

GOVERNMENTAL REGULATION OF LANGUAGE OF EDUCATION:
THE INTERNATIONAL HUMAN RIGHTS PERSPECTIVE

by

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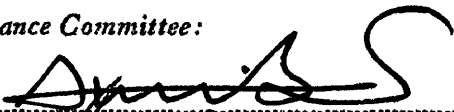
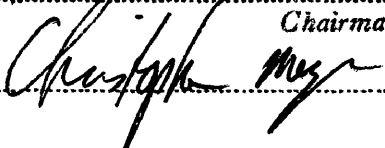
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Introduction

Quebec's Charter of the French Language,¹ adopted
by the National Assembly² of that Canadian province in
August 1977, is a comprehensive plan for the enhancement
of the status of the French language in Quebec. It
declares French to be the only official language of the
province³ and goes on to enumerate a number of specific
provisions designed to increase the use of French in
Quebec.⁴ The Charter supersedes the Official Language
Act⁵ which had been in effect from 1974 to 1977.⁶

This paper will evaluate the language of education
provisions of the Charter in the context of international
law. The language of education provisions permit English
public schools to continue to exist; however, access to
such schools is denied to most children whose parents
were not educated in English in Quebec. Thus, the issue
presented is whether access restrictions of this nature
can be implemented consistently with Canada's obligations
under international law. Opponents of Quebec language
policy have asserted that limitations on access to English
schools⁷ violate fundamental human rights.
Before any conclusion can be reached as to the validity

of those claims, it is necessary to ascertain the extent to which linguistic and educational rights are protected under international law. Once that has been done, it will be possible to assess the probability of success for a legal challenge to the educational provisions of the Charter of the French Language grounded in the international protection of human rights.

It is entirely possible that provisions of the Charter other than those dealing with education, such as the requirement that French be the sole working language of most private businesses⁸ and that only French appear on most signs and commercial advertising,⁹ might also be inconsistent with international human rights protections. The scope of this paper, however, will be limited to an examination of the Charter's educational provisions.

The first part of the paper will present an overview of the educational provisions of the Charter in order to develop a frame of reference for the application of the principles of international law. The pertinent sources of international law, and in particular the international human rights covenants which are binding on Canada, will then be surveyed to determine the specific linguistic and educational protections which international law recognizes. Finally, there will

be a discussion of the enforcement procedures pursuant to which a formal determination of the Charter's consistency (or inconsistency) with international human rights standards can be sought.

Considerable skepticism exists at present as to the value of international law--the question has been raised as to whether international law is really law at all.¹⁰ Traditionally, only states have had standing¹¹ to bring actions before international tribunals.

An action could only be brought against a state which¹² had given its consent to being sued. Once a decision had been rendered by an international tribunal, problems¹³ in the implementation of the judgment sometimes arose.

With regard to human rights, however, international law provides substantially more effective mechanisms for enforcement. For instance, the Optional Protocol to¹⁴ the International Covenant on Civil and Political Rights permits individuals to petition the Human Rights Committee established in Part IV of the Covenant regarding violations of rights guaranteed to them under the Covenant. A similar measure is contained in the European Convention on Human Rights, pursuant to which individuals may seek redress of violations of rights protected in that document by petitioning the European Commission of Human Rights, provided the state against

which the petition is directed has recognized the juris-
diction of the Commission to receive such petitions. ¹⁵

In fact, almost all parties to the Convention have
recognized the jurisdiction of the Commission, and a
considerable body of caselaw interpreting the Convention
has evolved since the Commission's inception in 1953. ¹⁶

One decision in particular, the Belgian Linguistic Case, ¹⁷
is especially relevant to the human rights analysis of
the issues presented by the educational provisions of the
Quebec Charter of the French Language. That case will be
discussed at length at a later point. ¹⁸

The experience
of the European Commission has established that inter-
national law has the potential for becoming an inval-
uable instrument for assuring the protection of human
rights, provided effective mechanisms are made available
for its enforcement.

Educational Provisions of the
Charter of the French Language

Until 1974, there were generally no restrictions on
access to the English and French language educational
systems in Quebec. There was recognition of an absolute
right of all parents--whether they spoke English, French,
or some other language--to determine in which of Canada's
two official languages their children were to be

instructed. This long-standing principle was challenged in the late 1960's by a suburban Montreal school commission which did not want to provide English language instruction for Italian immigrant children. ¹⁹

In response to the action of that school board, legislation was enacted by the National Assembly confirming that all parents had the right to decide whether their children were to be educated in English ²⁰ or in French.

The first statutory restrictions on access to English language education came into force in 1974, ²¹ when the Official Language Act was adopted. Access to English language schools, under that law, was afforded to children whose mother tongue was English, and children who could pass an English language proficiency test establishing that they were capable ²² of receiving instruction in English. All other children--i.e., those whose mother tongue was not English and who could not pass the language test--were ²³ required to attend French schools.

The Charter of the French Language, which came into force in 1977 and supersedes the Official Language Act, imposes even greater restrictions on access to English ²⁴ language schools. The Charter provides that in order for a child to enroll in an English school, at least one

of his parents must have been educated in English in
Quebec.²⁵ As a transitional measure, parents educated
in English outside Quebec may also send their children to
English schools, if the parents were domiciled in Quebec
on the date the Charter came into effect.²⁶ In addition,
children already legally enrolled in English schools may
continue to attend such schools, and their younger
brothers and sisters may also enroll in English schools.²⁷
The final exception to the general rule that all children
are to be instructed in French pertains to persons living
in Quebec for only a temporary period of time; such persons
may send their children to English schools in accordance
with regulations promulgated by the French Language Bureau
(Office de la Langue Française).²⁸

The Charter essentially confirms that a tax-supported
public school system offering instruction in the English
language will continue to exist. It imposes significant
restrictions, however, on access to that system. The
Charter accords different treatment to individuals based
on such factors as place and language of one's education,
place and language of one's parents' education, and date
of establishment of domicile in Quebec. For instance, a
person born in Quebec, who received his elementary
education in English in Quebec, may send his children to
either English or French schools. His neighbor, also

born in Quebec, but who was educated in the French language sector, may send his children only to French schools. Another neighbor, educated in English outside Quebec (for instance, in Ontario), and who moved to Quebec after August 1977, is also denied the right to send his children to English schools. Still another person who was educated in English in Ontario, but who moved to Quebec before August 1977, may send his children to either English or French schools. One of the most significant issues presented by the Charter, then, is whether such distinctions are permissible under international law. Also noteworthy is the fact that the Charter of the French Language does not attempt to abolish the minority educational system; it actually sanctions the continued operation of that system, within prescribed limits. Resolving the question of whether the Quebec Government might be entitled to abolish the tax-supported English language public school system would therefore contribute nothing toward determining the validity of the current language of education law.

Keeping in mind the analytical framework developed thus far, an examination of the language of education rights protected by international law will now be undertaken. The purpose of the following section is to determine whether international law places any limitations

on governmental regulations regarding who may and who may not have access to certain public schools, with particular reference to the types of classifications arising from the educational provisions of Quebec's Charter of the French Language.

Source and Extent of International Law Protection
of Language Rights in Education

International law is recognized as being derived from
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several different sources. Among the more common sources of international law are international conventions, international custom, and general principles of law in
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force in civilized nations. Of these various sources of international law, treaties are generally regarded as
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being the most important. A number of modern treaties
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serve as codifications of customary international law; in other instances, treaties reflect the resolution of controversies between nations as to what rights and
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obligations arise under international custom. In ratifying a treaty or voting in favor of adoption of an international convention, a state may signify that it recognizes the validity of the principles expressed in the document and is willing to be bound by those prin-
35
ciples. If an international convention is not ratified by a particular state but is ratified by a substantial

number of other states, the convention nonetheless serves as evidence of the prevailing view within the community of nations as to the status of the subject matter of the convention in international law.³⁶ Such a treaty is not binding on the non-ratifying state in the same way that it is with respect to ratifying states. However, to the extent that it sets forth widely accepted principles of international custom, the treaty is persuasive as to the rights and obligations of non-ratifying states under international law.³⁷

The order in which this paper will consider the various sources of international law is based on the relative contribution of the source to resolving the question of whether the educational provisions of Quebec's Charter of the French Language comport with international law. Accordingly, the first instruments that will be considered are the two international human rights covenants,³⁸ which deal with educational rights and the rights of members of minority groups, and which are binding on Canada.³⁹ The Universal Declaration of Human Rights will be examined after the Covenants: although the Covenants serve to amplify the principles set forth in the Declaration, which chronologically was drafted first,⁴⁰ the Declaration is only indirectly binding on Canada (through the Helsinki Accords)⁴¹ and its treatment

of the issues raised by the educational provisions of Quebec's Charter is less extensive than that contained in the Covenants. The last two documents that will be analyzed are not binding on Canada, but are nonetheless helpful in determining the scope of international protection of educational language choice rights. The Convention Against Discrimination in Education, a UNESCO document,⁴² has now been ratified by at least fifty-three states. Although the Convention is perhaps the most comprehensive codification of international law's educational anti-discrimination protections, its applicability to the analysis of Quebec's Charter of the French Language is somewhat limited by the fact that Canada has not ratified the Convention. Apparently, the Federal Government has elected not to ratify the Convention because under Canada's constitution, the British North America Act of 1867,⁴³ education is a matter within the exclusive jurisdiction of the provinces.⁴⁴ Neither the Federal Government nor the provincial governments, however, have expressed any opposition to or disapproval of the principles set forth in the UNESCO Convention. Accordingly, the Convention serves as persuasive authority as to the standards that Canada and other civilized nations are expected to live up to in the administration of their educational systems. The United Nations Declaration of

the Rights of the Child also recognizes rights which are closely related to the issue of choice of language of education. This Declaration is not binding on any state, but inasmuch as it was adopted unanimously by the U.N. General Assembly, a body in which Canada is a voting member, it serves as a highly persuasive restatement of the protection afforded children under international law.

The International Covenant on Economic,
Social, and Cultural Rights

This covenant was adopted by the U.N. General Assembly on December 16, 1966 and entered into force on January 3, 1976, three months after the deposit with the Secretary General of the United Nations of the thirty-fifth instrument of ratification. Canada ratified the Covenant on May 18, 1976 and has been bound by the Covenant since August 19, 1976. The three articles of the Covenant which are particularly relevant to analysis of the educational provisions of the Charter of the French Language are set forth below. Article 2, section 2, of the Covenant reads:

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

Article 13 of the Covenant deals with education. Specifically, that article provides:

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

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

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

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

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

Article 28 states that: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." Thus, with respect to Canada, the standards set forth in the Covenant apply to laws enacted by both the Federal and Provincial Governments.

Article 13 establishes that everyone has the right to education. The Charter of the French Language does not purport to deny anyone their right to education. In fact, it expressly states that everyone does have the right to an education in the French language.⁵⁰ Before concluding, however, that the Charter is not violative of Article 13 of the Covenant, it is necessary to take the analysis one step further--to determine the content of the term "right to education" as it is used in Article 13. Moreover, that

article cannot be read in isolation; it must, instead, be interpreted in conjunction with the other provisions of the Covenant, such as Article 2, section 2, the equal protection provision.

Article 13 states that everyone has a right to education, but it does not specify the language in which that education must be given. It might, for instance, have required that education be provided in the official language of the state. The Charter of the French Language would probably be in conformity with such a provision: section 1 of the Charter establishes French as Quebec's only official language, and section 6 confirms the right of every Quebecer to be educated in French.⁵¹ But the Covenant does not make any reference to a state's official language as the appropriate language of instruction. The Covenant's silence on the point was probably not intended to give rise to any inference that provision for education in a state's official language is impermissible; on the other hand, that silence does serve to undermine any assertion that provision of education in the official language is all that the Covenant requires of a state. And suppose a state adopted an obscure local dialect as its official language. If Article 13 does not require anything more than the provision of education in a state's official language, that state could conceivably

offer education to everyone in the obscure local dialect, thereby fully satisfying its obligations under the Covenant, while simultaneously operating a separate educational system offering instruction in a major world language, but open only to members of a privileged elite. The right of everyone to an education in the state's official language would be respected. But the intent of the Covenant surely was not to sanction such a discriminatory and inequitable educational system. Accordingly, the interpretation that Article 13 requires nothing more than the provision of education in a state's official language seems rather inconsistent with the purposes which underlie the International Covenant.

Another interpretation might be that the Covenant's silence regarding the appropriate language of education is indicative of a recognition that the prerogative of the state to determine the language of instruction in the schools which it operates is not something with which international law desires to interfere. However, this interpretation must also be rejected because it would operate to effectively nullify the guarantee contained in Article 13 of the Covenant. Under this "absolute prerogative of the state" interpretation, no limitations at all would be placed on a state's language of education policies. The scenario suggested above, of the provision

of education in an obscure local dialect for the masses and in a major world language for the elite, could be duplicated under the "absolute prerogative" interpretation, except that it would not even be necessary for the state to go through the formality of adopting the local dialect as its official language. This interpretation might be acceptable if states could be trusted to always act in fairness and good faith; but if states always did act in fairness and good faith there would be no need to have an International Covenant.

At the other extreme, it might be advanced that the Covenant obliges states to provide education in whatever language a child's parents request, or in the child's mother tongue. Some support for such an interpretation was expressed in the parliamentary debate on the Canadian Human Rights Act.⁵² That Act contains an equal protection provision which is very similar to the one contained in the International Covenant, except that it does not enumerate language as one of the impermissible grounds for discrimination. As a justification for the omission of language from the list of prohibited criteria, the Minister of Justice explained that the inclusion of language in the list would have given rise to a requirement that services, employment and accommodation be provided in all the languages which are spoken in Canada, not merely in

English and French.⁵³ Pursuant to that line of reasoning, the inclusion of language in the International Covenant's equal protection provision signifies that the various substantive rights recognized in the Covenant, including the Article 13 right to education, must be provided in all the languages spoken within the state, not just in the official language or languages. That interpretation may also be justifiable on psychological, sociological, and pedagogical grounds, inasmuch as provision of education in a child's native language has been shown to have a positive impact on the child's mental development.⁵⁴ This interpretation is not by any means universally accepted,⁵⁵ however. One problem with the interpretation is that it does contain the potential for absurd and unintended consequences. In a society composed of numerous linguistic groups, it is conceivable that requests might be submitted for instruction in a hundred or more different languages. Complying with all the requests would raise considerable administrative and financial problems for the state concerned. It seems doubtful that the true intent of the International Covenant was to impose such an enormous obligation on the ratifying states.

The decision of the European Court of Human Rights in the Belgian Linguistic Case⁵⁶ provides some guidance in determining whether any linguistic constraints are implicit

in the Article 13 right to education. In the Belgian Case, the Court was called upon to interpret Article 14 of the European Convention on Human Rights⁵⁷ and Article 2 of the First Protocol to that Convention.⁵⁸ Those provisions are very similar in substance to Articles 2 and 13 of the International Covenant on Economic, Social, and Cultural Rights: one article confirmed that everyone has the right to an education, while the other article required the signatory-states to protect the various rights recognized in the document without discrimination based on various criteria, including language. Essentially, one article dealt with the substantive right to education, and another article guaranteed the right to equal protection. The European Court of Human Rights rejected the idea that the Convention required states to provide instruction in the language of the parents' choice, but went on to hold that:

The object of these two Articles, read in conjunction, is more limited: it is to ensure that the right to education shall be secured by each Contracting Party to everyone within its jurisdiction without discrimination on the ground, for instance, of language. This is the natural and ordinary meaning of Article 14 read in conjunction with Article 2.⁵⁹

The Court determined that a number of the allegations of the petitioners did not amount to a violation of the Convention, when interpreted in that manner. In one instance, however, the Court found that the right to

education of certain children had not been secured without
discrimination on account of language.⁶⁰ The provision of
Belgian law that gave rise to that finding was accordingly
held to be inconsistent with the European Convention on
Human Rights.⁶¹

The particular Belgian law established Dutch as the
general language of instruction in six suburbs of Brussels.
The law also permitted French language primary schools to
be established in the communities, if requested by sixteen
families.⁶² The Dutch language school system was open to
everyone--all residents of the particular community, and
all other Belgian residents, regardless of whether their
mother tongue was Dutch or French. The French language
schools, in contrast, were open only to French-speaking
residents of the community where the schools were located.⁶³
Access to those schools was denied to French-speaking
persons residing anywhere other than in the community
where the school was located, and to all Dutch-speaking
persons, regardless of residence.

In essence, the Court held that once the Government of
Belgium had undertaken to operate both French and Dutch
language schools in these particular towns, it could not
limit access to one system while permitting unlimited access
to the other system, for the purpose of favoring one
language group over the other. Quebec's Charter of the

French Language creates a closely analogous situation. Public schools offer instruction in two languages, French and English. Instruction in one of the languages, French, is made available to everyone; instruction in the other language, English, is made available to only a limited group of students.

In the Belgian Case, the Court noted that administrative and financial considerations may justify restrictions on access to particular schools, but stated that restrictions arising from a policy of favoring one language over another were impermissible in view of the Convention's equal protection provision. The Court found that with respect to the French schools in the six Brussels suburbs, the access restrictions were imposed "solely . . . from
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considerations relating to language," and that the restrictions were therefore inconsistent with Belgium's obligations under the European Convention. Similarly, restrictions on access to English language schools in Quebec are motivated exclusively by the Government's language policies; they are set forth in a law the whole purpose of which is to enhance the status of the French
65
language. The Government's own explanation for the access restriction concedes an underlying linguistic purpose: "the English school, which forms a special system granted to the present minority in Quebec, must

cease being an assimilating force and must then be reserved
to those for whom it was created."⁶⁶ There is no mention
of financial or administrative considerations at all--the
purpose of the access restriction is to assist in the
assimilation of immigrants into the French-speaking
community, and to prevent their assimilation into the
English-speaking community.⁶⁷ In fact, significant
financial and administrative problems might be expected
to arise for those school boards which had never before
been called upon to offer anything but English language
education, in view of the requirement that they now begin
providing education in French to all students not
qualifying for English language instruction under the
Charter's criteria.

Based upon the interpretation by the European Court
of the educational and equal protection provisions of
the European Convention, it can be analogized that the
corresponding articles in the International Covenant dic-
tate that the public schools provided by a state must be
made accessible to all without regard to such criteria as
language or national origin. It should be re-emphasized
that the Belgian Linguistic Case is not by any means a
controlling precedent with respect to any international
legal challenge to the Quebec Charter. The Belgian Case
involved the interpretation of the European Convention on

Human Rights by the European Court of Human Rights. With regard to Quebec, the European Convention is inapplicable and the European Court lacks jurisdiction. Bearing in mind this caveat, the Belgian Linguistic Case serves as an illustration of the approach followed by one international tribunal in applying a human rights convention that is very similar in content to the International Covenant on Economic, Social, and Cultural Rights in order to resolve a choice of language of education controversy. The Belgian Case at least suggests that in the event an international tribunal is called upon to resolve a challenge to Quebec's Charter of the French Language based upon Articles 2 and 13 of the International Covenant, there is a very real possibility of a finding that the language of education section of Quebec's Charter is inconsistent with the interpretation which the tribunal gives to those Articles of the Covenant.

The International Covenant on Civil
and Political Rights

The procedural history of this Covenant closely parallels that of the International Covenant on Economic,
68
Social, and Cultural Rights, discussed previously.

Both Covenants were adopted at the same time by the United
69
Nations General Assembly, and both were ratified by Canada

on the same date.⁷⁰ The International Covenant on Civil and Political Rights has been binding on Canada since August 19, 1976.⁷¹

The first provision of the Covenant that is of particular relevance to an analysis of Quebec's Charter of the French Language is Article 2, the equal protection provision. Article 2, section 1, requires that all rights recognized in the Covenant be secured "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 50 of the Covenant is identical to Article 28 of the Economic, Social, and Cultural Rights Covenant, in establishing the applicability of the document to "all parts of federal states without any limitations or exceptions." The right to education is not specifically mentioned in this Covenant, having been dealt with at length in the Covenant on Economic, Social, and Cultural Rights. However, Article 27 of the Covenant on Civil and Political Rights provides that members of linguistic minorities are guaranteed "the right, in community with the other members of their group, to enjoy their own culture, . . . [and] to use their own language."

Article 27 is rather vague as to the specific obligations it imposes on states in order to protect the rights

of members of linguistic minorities. It does not, for instance, state that linguistic minorities have the right to tax-supported public schools offering instruction in their own language. Rather, it establishes the principle that linguistic minorities are entitled to protection from complete assimilation into the majority group.⁷² The particular means for assuring that protection are not specified; it is left up to the individual states to fashion such protective measures as are appropriate to the circumstances of their minority groups.

Article 27 cannot be read in isolation. It must be read in conjunction with Article 2, the equal protection provision, which relates to all the substantive rights guaranteed in the other articles of the Covenant, such as the cultural and linguistic protections contained in Article 27. Article 2 requires that the substantive rights conferred by the other articles of the Covenant be secured without discrimination on such grounds as language, national origin, and birth. Thus, whatever may be the specific mechanisms which a state adopts in order to assure recognition of the rights conferred under Article 27, those mechanisms must be made available to all who qualify for the protection of the article--i.e., all members of the minority group--without distinction based on the various criteria enumerated in Article 2.⁷³

Under the Charter of the French Language, the English public school system, one of the facets by which the Article 27 rights of the English minority are protected, is not made available to all members of the minority group without distinction based upon an impermissible criterion. Access to the minority school system is limited to persons whose parents were educated in English in Quebec. Members of the Quebec English-speaking minority who do not qualify under this requirement--i.e., because their parents were educated in English outside Quebec--are denied their Article 27 rights. They are discriminated against because of national origin⁷⁴ and/or birth,⁷⁵ two criteria which are prohibited by Article 2.

The Government of Quebec has endorsed the policy of permitting the English minority to have public schools⁷⁶ offering instruction in the minority language. There is no need to determine, at least for the time being, whether Quebec is bound to do so under the International⁷⁷ Covenant. The fact is that at the present time, Quebec purports to "guarantee the English minority in Quebec⁷⁸ access to English school," a policy that is undoubtedly consistent with Article 27 of the Covenant. Having embarked on that course of action, the International Covenant on Civil and Political Rights requires that that protection be made available to all members of the

linguistic minority without regard to national origin or birth. The provisions of the Charter of the French Language regulating access to English language public schools based upon place of education of a child's parents⁷⁹ seem to be violative of this command.

The stated purpose of the access restriction, according to the Quebec Government, is:

to open the English schools to all those who now live in Quebec and whose parents, because of their education, form part of the English-speaking community, as well as to their descendants; and to direct all other children to the French school, whether they already form part of the French-speaking community or whether they settle here in the future.

. . . .

As for those who come to settle in Quebec after the adoption of the Charter, wherever they come from and whatever their native tongue they will have to send their children to French schools.⁸⁰

In essence, the intention is to classify residents of Quebec whose mother tongue is English into two groups based on parentage: one group consisting of English-speaking persons whose ancestors were Quebecers, which is afforded access to English schools, and another group consisting of English-speaking persons of non-Quebec ancestry, which is denied access to the English schools. Clearly, this distinction is impermissible under Article 2 of the Covenant.

Article 27 does not recognize the right of everyone within a state to have access to a minority language educational system; it protects the rights of members of minority groups only. Accordingly, Article 27 does not prevent the Quebec Government from implementing procedures designed to deny access to English language schools to persons who are not members of the English minority.

Hence, the Covenant cannot be invoked on behalf of French-speaking persons, or in fact anyone who is not a member of the English-speaking minority, in support of any claim that such persons may wish to make regarding their right to attend English language schools.

The Quebec Government has expressed the view that the criteria contained in the Charter are the most workable administrative procedures for differentiating between members of the English-speaking minority (who are entitled to Article 27 protection), and persons who are not members of the English minority group (and who have no right to attend English schools under Article 27). The Govern-

ment has noted that language tests, such as those used between 1974 and 1977 pursuant to the Official Language Act, are a less than ideal classification method.

The Government acknowledges that the optimal way of determining a child's native language is through a sworn statement of the parents. That classification method

was rejected, however, because the Government believes it might be subject to deceit and abuse. ⁸⁶ Implicit in the Government's rejection of the sworn statement method is the notion that fundamental human rights may be compromised whenever permitting their full exercise would result in administrative complexity. If that contention is to be accepted, human rights throughout the world will indeed be relegated to an extremely precarious status.

Quebec has a legitimate interest, consistent with its obligations under the Covenant, in preventing persons who are not members of the English-speaking minority from having access to English language schools. The Government also has an interest in the implementation of the simplest administrative procedures for determining who is and who is not a member of that minority group. But Quebec cannot, under the guise of this latter interest, deny rights protected under Article 27 to persons who are bona fide members of the English minority.

The classification procedures set forth in the Charter of the French Language may indeed offer the advantage of administrative simplicity. But they are defective inasmuch as they do not serve the permissible purpose of accurately distinguishing between members of the English minority and other persons. ⁸⁷ Consider, for instance, a family that has moved from Ontario to Quebec after the enactment of

the Charter. The parents were educated in English in Ontario, and the children have always attended English schools in that province. English is the only language spoken by members of this family. Under Quebec's Charter, the family would not be classified as part of Quebec's English-speaking minority and would not be afforded the Article 27 rights which the Province is obliged to

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recognize with respect to all members of that minority.

Because the parents were not educated in English in Quebec, their children would not be permitted to enroll in English schools. Clearly, upon moving to Quebec, that family became a part of the province's English-speaking minority.

The failure of the minority school access regulations to classify this family as part of the minority group illustrates the ineffectiveness of those procedures at accomplishing the permissible purpose of differentiating between members of the English minority and other persons.

And the classification accorded this particular family is not by any means an anomaly arising from some legislative oversight: the Government's White Paper states that the intention of the law is to prevent all newcomers to Quebec, even though their language may be English, from having

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access to the English school system. Thus, it is clear that the Government never intended to fulfill its obligation to respect the Article 27 rights of all members of the

English minority without distinction on account of national origin and birth. The English school access regulations contained in the Charter attempt to differentiate according to ancestry, not according to membership in the English linguistic minority. A differentiation based on ancestry may be easier for the Government to administer, but such a differentiation fails to comport with the requirements of the International Covenant.

In sum, the International Covenant on Civil and Political Rights, a document that is binding on Canada in international law, requires that states permit members of linguistic minorities to enjoy their own culture and use their own language in community with other members of their linguistic minority group. This protection must be secured to all members of the linguistic minority, without distinction of any kind such as that based on national origin or birth. Quebec law divides the English minority into two groups, according to ancestry--i.e., national origin and birth. Quebec has partially fulfilled its obligations under the Covenant inasmuch as it permits one of the two groups--those English-speaking persons of Quebec ancestry--to enjoy their own culture and use their own language in the English public schools. Quebec law denies those rights to the remainder of the English minority--i.e., those English-speaking persons who are not of Quebec

ancestry. The Charter of the French Language thus does not respect the Article 27 rights of all members of the English minority without distinction based upon criteria classified as impermissible under Article 2. Accordingly, the prospects are highly encouraging for a successful challenge to the Charter under the International Covenant on Civil and Political Rights by members of the English-speaking minority who are currently denied access to English language schools.

The United Nations Universal Declaration
of Human Rights

The Universal Declaration of Human Rights is a statement of fundamental principles that was unanimously adopted by the U.N. General Assembly on December 10, 1948.⁹⁰ The Declaration was not intended to give rise to any binding obligations, and it does not contain any specific enforcement provisions.⁹¹ However, pursuant to the Helsinki Accords, all states which are parties to that document, including Canada, are bound to adhere to the dictates of⁹² the Universal Declaration.

The Declaration contains an equal protection provision, Article 2, which requires that all the rights recognized in the Declaration be secured "without distinction of any kind, such as race, colour, sex, language, religion, political

or other opinion, national or social origin, property, birth or other status." Article 26 of the Declaration establishes the right of every human being to receive an education. Section 1 of Article 26 obliges states to provide free and compulsory elementary education. Higher education must also be provided, and it must be made available to all on the basis of merit. Section 3 of the Article states: "Parents have a prior right to choose the kind of education that shall be given to their children."

At the very least, the Charter of the French Language cannot be said to promote the educational policies set forth in the Declaration. Until a few years ago, all Quebec parents had been afforded the right to determine, without governmental interference, whether their children would be educated in English or in French.⁹³ Since the enactment of the Charter in 1977, parents who were themselves educated in English in Quebec have been permitted to continue to exercise the right to choose whether their children will be instructed in French or in English, but all other parents have been denied that right of choice.⁹⁴

The phrase "[p]arents have a prior right to choose the kind of education that shall be given to their children" probably should not be interpreted as recognizing an unqualified right of parents to determine the language

in which their children are to be educated. As discussed previously,⁹⁵ recognition of any such right could lead to absurd consequences, and probably was not intended by those who drafted the Declaration. On the other hand, if Article 26, section 3, is not to be rendered meaningless, it is essential that state educational systems provide some mechanism for parental input into the determination of the kind of education their children shall be given. The Article may not confer any absolute linguistic choice rights on parents, but neither does it sanction the implementation of educational policies which totally fail to reflect parental wishes.

The proper interpretation of Article 26 may depend on the circumstances existing in particular states. In a state where education has always been offered in only one language, and where no significant linguistic minority exists, the Article probably does not oblige the state to begin offering instruction in additional languages. But in a state where publicly-financed education in two languages has always been made generally available, and where parents have always enjoyed an unrestricted right to choose in which of the two languages their children are to be educated, legislation which takes away that parental right of choice surely is not in furtherance of the principles which underlie the Declaration.

It must not be forgotten, however, that whatever meaning may be ascribed to Article 26, that provision is subject to the qualification of the Declaration's equal protection clause, Article 2. In other words, however limited the Article 26, section 1 right to education and Article 26, section 3 parental choice rights may be, those rights must be made available to all "without distinction of any kind, such as . . . language, . . . national or social origin, . . . birth or other status."⁹⁶

In Quebec, parents who were themselves educated in the province's English language school system enjoy a "prior right to choose" whether their children will be educated in English or in French. Denial of that right to parents who were educated in French in Quebec seems to constitute a distinction based on language, in contravention of Article 2 and section 3 of Article 26 of the Declaration. Denial of the right of English-speaking parents educated somewhere other than Quebec to choose the language of instruction for their children constitutes a distinction based on national origin, which is similarly proscribed by Article 2. Article 26, section 1 is violated in that one segment of the school population, delineated according to language, national origin, and birth, enjoys the right to education in either French or English, while the remainder of the school population is given access only

to French language schools. Analogizing once again to the Belgian Linguistic Case, when a state chooses to offer publicly-financed education in more than one language, the state cannot restrict access to one linguistic system according to impermissible criteria, while affording unlimited access to the other system.⁹⁷

Thus, any challenge to the Charter of the French Language based on the Universal Declaration of Human Rights will rely on both the equal protection provision, Article 2, and the provision conferring the right to education, Article 26. There is certainly an argument to be made that Article 26, section 3, standing alone, requires Quebec to permit all parents to decide whether their children are to attend the French or English public schools. But when Article 26 is read in conjunction with Article 2, the conclusion becomes almost inescapable that Quebec's language of education policies are repugnant to the Universal Declaration.

The Convention Against Discrimination in Education

Another international document which is helpful in assessing the validity of the Charter's educational provisions is the 1960 UNESCO Convention Against Discrimination in Education. This document is persuasive authority as to the current status of educational anti-discrimination

protections contained in international law, inasmuch as it
has been ratified by at least fifty-three states. ⁹⁸ The
Canadian Government has chosen not to ratify this Conven-
tion because under Canadian law, education is a matter
within the exclusive jurisdiction of the provincial
governments. ⁹⁹ Canada's failure to ratify the Convention
has not, however, been accompanied by any statement of
disapproval of the principles which it expresses.

Article 1, section 1, of the Convention sets forth
the definition of discrimination as:

any distinction, exclusion, limitation or
preference which, being based on race, colour,
sex, language, religion, political or other
opinion, national or social origin, economic
condition or birth, has the purpose or effect
of nullifying or impairing equality of treat-
ment in education

The definition goes on to list several specific situations
which constitute discrimination, including:

- (a) Of depriving any person or group of persons
of access to education of any type or at
any level;
- (b) Of limiting any person or group of persons
to education of an inferior standard;
- (c) Subject to the provisions of article 2 of
this convention, of establishing or main-
taining separate educational systems or
institutions for persons or groups of persons;
or
- (d) Of inflicting on any person or group of per-
sons conditions which are incompatible with
the dignity of man.

Finally, Article 1 clarifies that:

For the purpose of this convention, the term "education" refers to all types and levels of education and includes access to education, the standard and quality of education, and the conditions under which it is given. [emphasis added].

Article 2 provides that separate educational systems may be established for linguistic reasons, provided such education is "in keeping with the wishes of the pupil's parents, [and] . . . participation in such systems or attendance at such institutions is optional" As might be inferred from its title, this Convention is concerned with eliminating discrimination in education; the focus is upon protecting certain groups and individuals from being treated in an inferior manner. The Convention does not attempt to impose affirmative obligations on states, other than the obligation to provide equal treatment. Thus, as long as certain conditions are fulfilled, the Convention permits but does not require the operation of separate linguistic educational systems. Article 2 thus does not require that an English language school system be maintained in Quebec; it simply affirms that establishment of a separate linguistic educational system does not necessarily constitute a violation of the Convention. The English school system that is permitted to exist under the Charter of the French Language is probably in conformity

with most of the conditions enumerated in Article 2, subparagraph (b)--i.e., that attendance at such schools be optional, and that pedagogical standards for the minority sector be at least as high as those applicable to majority language schools. One question of interpretation arises in connection with the Article 2 requirement that when separate linguistic educational systems exist, attendance must be optional, and the education offered must be consistent with the wishes of the pupil's parents. Enrollment in the separate English educational system is "optional" with respect to children whose parents were educated in English in Quebec, but not with respect to other children. Perhaps the term "optional" should be interpreted narrowly, so as to merely require that those children who are determined by the state to be eligible for enrollment in the minority system may not be required to attend minority schools but must also be afforded the option of enrolling in the majority system. Under this interpretation, the state remains free to determine the class of children who may, if they or their parents wish, attend the minority schools. Alternately, the term "optional" might be construed as requiring that all members of the linguistic minority be afforded the option of sending their children to either the minority or the majority schools. In other words, a minority school

system might not be deemed to be in compliance with the Convention's "optional" requirement unless the option to enroll in the system was extended to all members of the linguistic group. A "plain meaning" analysis probably suggests that the first interpretation is correct--i.e., that the Convention does not attempt to define who must be afforded access to minority schools, but merely seeks to guarantee that those who do have access to the minority system also have access to the majority system. The second interpretation, however, seems more consistent with Article 2 read as a whole. Of particular significance in this regard is the phrase: "The establishment or maintenance, for . . . linguistic reasons, of separate educational systems . . . [shall not be deemed to constitute discrimination]." If a minority school system is really operated for linguistic reasons, as it must be in order to come within the terms of Article 2, it seems strange that only those members of the minority linguistic group whose parents were educated in a particular locale are permitted to have access to it. Such a restriction on access might be appropriate if the real reason for maintaining the separate school system was, for instance, to confer a special privilege on children of a certain ancestry.¹⁰¹ Basing access to the separate school system on descent rather than on language casts serious doubt on

whether linguistic reasons are the real justification for the existence of the minority "linguistic" educational system. And if the real reason for the system's existence is not linguistic, the establishment and operation of the system is impermissible under Article 2.

Article 3 of the Convention lists certain specific measures that the states which have ratified the Convention are obliged to undertake in order to eliminate discrimination in education. The educational provisions of the Charter of the French Language are inconsistent with at least two of the measures set forth in Article 3. Subparagraph (d) of that Article prohibits "restrictions or preferences based solely on the ground that pupils belong to a particular group." The Quebec Charter divides the school population into two groups, essentially according to parentage. It permits one group to have access to English and French language schools, and restricts the other group to the French system only. In so doing, it grants a preference to the former group and imposes a restriction on the latter group, in clear contravention of this provision of the Convention. Article 3, subparagraph (e) requires states "to give foreign nationals resident within their territory the same access to education as that given to their own nationals." It might be contended that the Charter provisions restricting

access to English language schools are not violative of this section inasmuch as they do not make any express differentiation between Quebec (or Canadian) citizens and foreign nationals.¹⁰² Most Quebecers are denied the right to English education; therefore, it cannot be said that the Charter provisions discriminate against foreign nationals by subjecting them to the same denial. But a closer examination of the practical operation of the Charter raises serious questions as to the validity of that argument. Under the law, no foreign nationals who come to Quebec after the enactment of the Charter may have access to the English educational system.¹⁰³ At least some Quebec citizens are permitted to send their children to English schools; all foreign nationals and their descendants, regardless of their linguistic or educational backgrounds,¹⁰⁴ are forever enjoined from sending their children to English schools. According to the Quebec Government, the English school system is the inheritance of the province's English-speaking community;¹⁰⁵ the Charter, however, restricts the benefits of that system not merely to members of the English-speaking community, but to English-speaking people living in Quebec on the date of the Charter's enactment, and their descendants. By extinguishing any possibility that newcomers to Quebec may ever be permitted to qualify for education in English,

the Charter is inconsistent with Article 3, subparagraph (e) of the Convention. Not all restrictions on access to the English language educational system are by any means inconsistent with subparagraph (e) of the Article. An access restriction which actually serves to distinguish between members of the English-speaking minority and others might be permissible under subparagraph (e).¹⁰⁶ The problem with the access restrictions contained in Quebec's Charter is that they result in different rights being extended to persons who are similarly situated in all respects except nationality. The English-speaking person whose parents were educated in English in Quebec is given access to both linguistic educational systems, while the English-speaking person who emigrated to Quebec from abroad after August 1977 is only afforded access to the French system. It is that distinction, based on nationality, which subparagraph (e) enjoins.

The right of national minorities to operate their own schools is recognized in Article 5, paragraph 1 (c) of the Convention. Consistent with this provision, the Quebec Government permits the operation of English language schools within its jurisdiction. These schools are probably in conformity with the specific criteria prescribed by Article 5, such as affording students the opportunity to gain an understanding of the language and culture of

the majority,¹⁰⁷ adhering to the same pedagogical standards as schools in the majority system, and optional attendance.¹⁰⁸

The minority educational system established in accordance with Article 5, paragraph 1 (c) is not, however, in conformity with the Convention's requirement that such education be made available in a non-discriminatory manner. Article 1, paragraph 1 (a) prohibits a state from "depriving any person or group of persons of access to education of any type or at any level." When a state's educational policy provides for the public funding and operation of minority language schools, it seems inconsistent with this section of the Convention to deny anyone access to that educational system. In light of Article 5, paragraph 1 (c), the denial to certain members of the minority group of access to that educational system is even more inconsistent with the principles expressed in the Convention. Quebec may be commended for adhering to Article 5, paragraph 1 (c) to the extent that it permits many of its approximately one million English-speaking citizens to operate an educational system offering instruction in the minority language;¹⁰⁹ but Quebec is subject to criticism for failing to respect the Article 5 rights of many other members of its English-speaking community, and for imposing access restrictions on the minority school system which are clearly in contravention of Article 1, paragraph 1 (a).

Because Quebec's Charter of the French Language creates a number of distinctions regarding educational rights based on language, national origin, and birth, it is violative of several provisions of the Convention Against Discrimination in Education. Although the Convention is not binding on Canada, the inconsistencies which can be demonstrated between Quebec's educational policies and the international standards set forth in the Convention would certainly lend support for any claims asserted under those Covenants which are binding on Canada in international law.

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The Declaration of the Rights of the Child

Another international document which bears on the validity of the educational provisions of the Charter of the French Language is the United Nations Declaration of the Rights of the Child. This Declaration was unanimously adopted by the United Nations General Assembly on November 20, 1959. Three sections of the Declaration seem especially pertinent to the analysis of Quebec's Charter: Principles 1, 2, and 7. Principle 1, the equal protection provision, states:

The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion,

political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.

Principle 2 provides:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount considerations. [emphasis added].

The impact of the language of education on a child's development has been considered extensively elsewhere. ¹¹²

To summarize the conclusions reached in those studies, education should generally be made available in the child's mother tongue, unless that would be impossible due to limited financial resources of the state. ¹¹³ In light of this conclusion, one cannot help but question the extent to which the educational provisions of Quebec's Charter have adopted "the best interests of the child [as] the paramount considerations." The White Paper makes clear that the primary motivating force behind the Charter is the Government's desire to enhance the status of the French language. ¹¹⁴ To the extent that the educational provisions of the law allow that interest to predominate over the best interests of the child, the provisions are inconsistent with Principle 2 of the Declaration.

Principle 7 of the Declaration confirms the right of children to receive education. In particular, it requires that the education provided to the child "promote his general culture, and enable him, on a basis of equal opportunity . . . to become a useful member of society." The Declaration requires that education promote the child's general culture, not the culture of the majority group within the society. Perhaps the cultural opportunities made available in the Quebec French language educational system would be deemed adequate to conform to the "general culture" requirement of Principle 7, even with respect to non-French-speaking children. But when a state undertakes to provide public instruction in a child's native language as well as in a non-native language, it can certainly be argued that the child's general culture would be promoted to a greater degree by his attendance at one of the schools offering instruction in his own language.

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Also significant is Principle 7's requirement that education enable the child, on a basis of equal opportunity, to become a useful member of society. Undoubtedly, the education offered in the Quebec French language sector is intended to help children become useful members of society. The real question is whether the education made available in the English language sector accomplishes that objective to an even greater degree,

inasmuch as its graduates must be proficient in both of Canada's two official languages, whereas graduates of the French system need be proficient in only one official language.¹¹⁶ However marginal the value of bilingualism may be in Quebec society, permitting members of one group to receive an education which results in their becoming bilingual while confining members of another group to a unilingual education contravenes the Declaration's command that education enable the child "on a basis of equal opportunity . . . to become a useful member of society."¹¹⁷ This conclusion is further reinforced by the fact that the distinction between the two groups is made on the basis of language, national origin, and birth, criteria which are prohibited under Principle 1.

Principle 7 goes on to state that: "The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents." Under the Charter of the French Language, some parents are permitted to decide whether a French or English language education would better advance the interests of their child.¹¹⁸ Other parents are denied the right to make that choice.¹¹⁹ The distinction between the two groups is based essentially on language, national origin, and parentage (birth)¹²⁰ --grounds that are impermissible

under Principle 1. Principle 7, like Article 26 of the U.N. Universal Declaration of Human Rights, suggests that Quebec should afford parents substantial latitude in determining the kind of education their children will receive. Whether this encompasses an obligation to permit parents to choose between the two languages in which public instruction is offered remains to be resolved;¹²¹ but once Quebec has undertaken to permit some parents to exercise that right of choice, it cannot prohibit other parents from doing so on grounds of language, national origin, or ancestry. Once again, international law may not require Quebec to operate any minority educational system; but once the province has undertaken to permit English public schools to exist, it cannot restrict access to them in a discriminatory manner.

The Declaration of the Rights of the Child is a statement of principle that does not contain specific enforcement procedures.¹²² However, the Declaration was adopted by the General Assembly,¹²³ an international body in which Canada is a member; therefore, the Declaration could be cited as a highly persuasive source of international law in any challenge to the validity of Quebec's Charter of the French Language brought before an international tribunal. The unanimity with which the General Assembly adopted the Declaration serves as further evidence

of the validity and broad acceptance of the standards set forth in the document on the part of members of the international community.

Procedures for Enforcing Human Rights
Recognized Under International Law

As stated by Mr. Justice Holmes, in a United States Supreme Court opinion, "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp."¹²⁴ The protections contained in the various sources of international law discussed in the preceding section of this paper will be no more valuable to the victims of human rights violations than the ghosts to which Justice Holmes alluded, unless meaningful procedures exist for their enforcement.

One of the most novel human rights enforcement mechanisms is contained in the Optional Protocol to the International Covenant on Civil and Political Rights, a protocol that has been ratified by Canada.¹²⁵ Pursuant to that document, an individual may petition the Human Rights Committee established under Part IV of the Covenant to consider allegations of violations of the Covenant by a state that is a party to the Protocol.¹²⁶ The individual¹²⁷ must himself be a victim of the human rights violation, and he must have exhausted all available domestic remedies.¹²⁸ The Committee gives notice of the complaint to

the state which is alleged to have violated the Covenant,
and the state is required to submit a response to the
Committee within six months explaining its conduct and
describing any remedial action that it intends to pursue. ¹²⁹
Thereupon, the Committee meets in closed session to consider
the matter, and upon reaching a decision, forwards its views
to the petitioner and to the state concerned. ¹³⁰ The
Committee also reports annually to the General Assembly
on its activities under the Protocol. ¹³¹ Thus, a member
of the Quebec English-speaking minority who is currently
denied access to English language schools, and therefore
claims a violation of his rights under Articles 2 and 27
of the Covenant, ¹³² may petition the Human Rights Committee
to consider his grievance once his domestic remedies have
been exhausted.

Another procedure by which individuals may seek to
have human rights violations redressed is by petitioning
the United Nations Subcommission on Prevention of Discrimi-
nation and Protection of Minorities. In 1970, the U.N.
Economic and Social Council authorized that Subcommission
and the Human Rights Commission to study complaints
received from individuals that "appear to reveal a consis-
tent pattern of gross and reliably attested-to violations
of human rights and fundamental freedoms." ¹³³ With the
consent of the state involved, the Commission on Human

Rights may establish an ad hoc committee to investigate the allegations, and may submit a report on the situation, containing recommendations, to the Economic and Social Council.¹³⁴ This procedure has the disadvantage that without the consent of the state alleged to be committing the human rights violations, the Commission may only study and may not investigate complaints. It has the advantage, however, of subjecting governmental practices to review in light of the full range of international human rights protections, not just those set forth in one particular document.

Thus far, no government has consented to the establishment of an ad hoc committee to investigate allegations that it has violated human rights.¹³⁵ Only the Government of Canada can enlighten us as to whether or not it would consent to the establishment of such a committee, in the event a petition is submitted to the Subcommittee alleging that Quebec's Charter of the French Language violates fundamental human rights. However, the Federal Government's current policy regarding the Quebec language law suggests that consent to the creation of such a committee may be somewhat likely. At the time the Charter of the French Language was enacted by the Quebec National Assembly, the Federal Government chose not to exercise any of the powers available to it in order to summarily

invalidate the law.¹³⁶ It did make a commitment, however, to intervene on behalf of any private parties bringing suits in the lower courts to challenge the validity of the language law.¹³⁷ Thus, while the Federal Government respects the autonomy of the Provincial Government to legislate as it sees fit in regard to education and other matters, it does not by any means endorse the specific policies and procedures contained in the Charter. Canada might, therefore, welcome the opportunity to have the validity of the language law tested in an international investigation. Canada presumably does not want to contravene the standards set forth in international law, and the decision of an international organization as to the validity of the language charter in light of those standards would greatly assist it in that regard.

Moreover, one of the reasons for the Federal Government's failure to exercise its power to disallow the Charter¹³⁸ was that it wanted to avoid giving the impression that Quebec could become free to implement whatever language policies it desired by simply opting out of confederation.¹³⁹ Invalidation of the Charter on the ground of incompatibility with human rights protections contained in international law, as opposed to invalidation by fiat of the Federal Government, would be an ideal way of accommodating the somewhat conflicting concerns of the

Canadian Government. It could not be said, by those Quebecers who support the province's restrictive language policies, that invalidation of the Charter is attributable to Quebec's membership in the Canadian confederation; it would be attributable, rather, to Quebec's membership in the world community, and the attainment of independence from the rest of Canada would not in any way serve to change that.

Another means whereby human rights may be enforced in international law is through diplomatic protection.¹⁴⁰ Under this doctrine, a state may bring a cause of action before an international tribunal alleging that another state has failed to treat nationals of the plaintiff-state in accordance with "minimum international standards." The various sources of international law discussed previously serve as evidence of the appropriate minimum international standard. Once all domestic remedies have been exhausted, the first step undertaken by a state which chooses to exercise its right of diplomatic protection is to assert a claim against the other state through diplomatic channels.¹⁴¹ If the matter cannot thereby be resolved to the satisfaction of the plaintiff-state, the claim may be submitted to an international tribunal for further action, depending on the policies of the states concerned regarding the jurisdiction of such tribunals.¹⁴²

There are two significant limitations on diplomatic protection as a means for redressing human rights violations. One is that diplomatic protection pertains only to violations of the rights of aliens within a state. It would permit, for instance, the United States to assert a claim against Canada based on the denial of access to English language schools to U.S. citizens currently living in Quebec. But it would be unavailing, at least in a direct sense, to Canadian citizens who believe that their human rights have been violated by Quebec's language policies. The second limitation is that no state is obliged to exercise its right of diplomatic protection. Thus, the United States could assert a claim against Canada on behalf of its nationals living in Quebec, if it chooses to do so; but nothing in the doctrine of diplomatic protection would require the U.S. to exercise its right to protect its nationals by asserting such a claim.

In practice, these limitations may not be as critical as might appear at first glance. Technically, a diplomatic protection claim can only be asserted on behalf of an alien. But many "test cases," particularly within the field of constitutional law, are brought by individual plaintiffs and not as class actions. Once a decision is rendered in such a case, it is no less pervasive vis-à-vis

the rights of similarly situated individuals who were not parties to the particular litigation. For example, assume that France brings a successful diplomatic protection claim against Canada establishing the right of French nationals living in Quebec to decide whether their children will attend French or English schools.¹⁴³ How tenable would it be for Quebec to recognize that right of French nationals permanently living within its jurisdiction, while denying that right to its own French-speaking citizens? And once it has been established that minimum international standards require that parents be afforded the right to choose between the English and French educational systems, pressure might be exerted on Quebec through the vehicle of world public opinion to totally abrogate those practices that had been determined to constitute human rights violations under international law.¹⁴⁴ As a practical matter, therefore, a successful diplomatic protection challenge to Quebec's Charter of the French Language might very well precipitate a complete revision of the language policies so as to comport with the "minimum international standard" established by the resolution of the diplomatic protection claim.

The second limitation on the diplomatic protection doctrine, the absence of any obligation upon states to assert claims on behalf of their nationals, is also somewhat

illusory. Whether any state would in fact choose to assert a claim against Canada pursuant to its right of diplomatic protection is difficult to ascertain at this point in

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time. Perhaps the determinative factors would be the state's evaluation of the gravity of the alleged human rights violations on the part of the Quebec Government, and the state's general policies regarding the appropriateness of invocation of diplomatic protection. Also important would be the amenability of the Canadian Federal Government to having such a claim asserted against it. The earlier discussion of the possible attitude of the Canadian Government toward an investigation by the U.N. Human

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Rights Committee might extend to a diplomatic protection challenge to the language law brought by another state: the Government might welcome the opportunity to have questions concerning the Charter's validity resolved by an international tribunal, regardless of whether the tribunal's jurisdiction is premised upon U.N. rules for the investigation of petitions from individuals, or international law procedures for the resolution of diplomatic protection claims.

International law inherently lacks the sanctions that exist in most municipal legal systems. International law has survived for as many centuries as it has because states recognize its long-term value in maintaining peace and

world order; states are generally willing to comply with principles established in international law even though the threat of sanctions may not exist. ¹⁴⁷ Accordingly, what is most important is the substantive content of international law--in this case, the extent of the human rights protections that international law recognizes. Some procedures for determination of that content must, and do, exist. The procedures available for "enforcement" of international law's substantive content may appear to be inadequate; but ultimately, enforcement is dependent upon the will of the state. Pressure from other members of the community of nations and recognition by the offending state that world peace is dependent upon its continued respect for international law serve as substitutes for the more visible enforcement procedures that those accustomed to dealing with municipal legal systems may believe to be essential.

Conclusion

Ideally, opponents of Quebec's Charter of the French Language might like to see recognition accorded to an unqualified right of all parents to determine the language in which their children are to be educated. Several of the documents which have been considered in this paper may lend some measure of support to that claim. But the most promising grounds for invalidation of Quebec's Charter

concentrate their attack on the discriminatory aspects of
the language law. ¹⁴⁸ In order to prevail on this "discrimination theory," it is unnecessary to resolve whether Quebec is under any obligation to provide tax-supported English language education in the first place. The theory maintains that if the Province elects to provide for such an educational system, it is prevented, under international law, from restricting access to that system in a discriminatory manner. Whether international law requires Quebec to operate an English language school system at all is completely outside the scope of the requisite analysis.

In response to a challenge under international law premised upon this "discrimination theory," Quebec might simply claim that it is not required to permit English language schools to exist in the first place. If the English language school system were totally abolished, and if all children were required to attend French schools, the discrimination problem would be eliminated. Why should the generosity which Quebec has seen fit to extend to some of its English-speaking citizens compel the abrogation of
¹⁴⁹
one of the Government's highest priorities, the enhancement of the status of the French language?

This response is not really a defense to the discrimination allegation at all. It might be restated as follows: conceding that access to the English language school system

is currently restricted in a discriminatory manner, would those who challenge the existing law prefer to see the complete abolition of English language schools, or the continued existence of the schools coupled with the discriminatory access regulations? The argument admits that present regulations may not comport with international anti-discrimination standards, but points out that if those measures are invalidated, an alternative course of action will be pursued that is even more detrimental to the interests of those who oppose the existing law.

In the Belgian Linguistic Case, the Government of Belgium included a similar argument in its presentation to the European Commission of Human Rights. The petitioners in the Belgian Case contended that the educational system existing in six suburbs of Brussels was violative of the educational and anti-discrimination provisions of the European Convention on Human Rights because it permitted unrestricted access to instruction in the Dutch language, while severely limiting access to French language instruction. Belgium claimed that it was under no obligation to provide any French language instruction in the six suburbs and that accordingly it should be free to impose whatever access restrictions it deemed appropriate with respect to those French language schools that it voluntarily chose to operate:

Why should the legislature permit the "concessions" made to French-speaking persons . . . in the communes on the outskirts of Brussels to become "the starting point for francisation of the Flemish populations in these and neighbouring communes", when its "avowable" and "legitimate" purpose consists precisely in ensuring in Flanders the formation of Dutch-speaking élites? . . . [T]he violation . . . "would disappear if the Belgian State simply withdrew the concessions"¹⁵¹

The Commission responded to that line of reasoning in the following manner:

Would the simple abolition of French language classes at Drogenbos, Kraainem, Linkebeek, Rhode-St. Genèse, Wemmel and Wezembeek-Oppem remove the discrimination in question? The Commission does not think it need consider this possibility, one of the effects of which would be to deprive the locality of Kraainem of a French school, a locality "which has a French-speaking majority": "what may happen as the result of a change in legislation in the near or distant future" does not concern the Commission. In any case it seems to the Commission "rather unlikely that the Belgian Government would consider adopting such a radical solution", which would probably be "difficult" to adopt in practice.¹⁵²

The decision of the European Court of Human Rights, holding the provision of Belgian law restricting access to French language schools in the six towns to be inconsistent with the European Convention on Human Rights, did not discuss the possibility that the discrimination problem might be "solved" by complete abolition of the French

¹⁵³
schools. And history has confirmed the wisdom of the manner in which the Commission and the Court dealt with the Belgian Government's "threat": the Court's decision in

the case did not bring about any action whatsoever on the part of the Government of Belgium to abolish the French language schools.

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Whether Quebec would actually respond to a finding by an international tribunal that its French Language Charter is inconsistent with international law by abolishing the English language educational system is a highly speculative question. From a political perspective, any such action would probably not enhance the chances for acceptance of the Quebec Government's "Sovereignty-Association" proposal by the nine other Canadian provinces, which are pre-

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dominantly English-speaking. Moreover, the Quebec Government's current policy regarding the continued operation of English language schools, as expressed in the White Paper, is as follows: "English schools have a large staff and considerable resources. There can be no question of abolishing English education nor of rejecting the cultural tradition which has inspired it until this day."

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[emphasis added]. Perhaps the Quebec Government would not enthusiastically reiterate that statement if the day ever comes that its Language Charter is found to be inconsistent with international law; but at least the statement suggests that legislation designed to abolish the English school system will not by any means be the inevitable response of the Government to such a decision by an international

tribunal. Analysis of the validity of legislation to abolish the English school system can be undertaken in a more satisfactory manner if and when such a bill is introduced in the National Assembly--i.e., at the time the specific provisions of the legislation are made known. ¹⁵⁷

As stated by the European Commission of Human Rights, "'what may happen as the result of a change in legislation in the near or distant future' does not concern [us]." ¹⁵⁸

The objective of this paper has been to develop a framework for the evaluation of the educational provisions of Quebec's Charter of the French Language in light of the protection accorded human rights under international law. Analysis of the language law with respect to several of the international human rights documents which are binding on Canada indicates that the Language Charter may very well give rise to a number of colorable claims of human rights violations.

A decade ago, a group of Belgian citizens were successful in their challenge to comparable provisions of their nation's educational language law based upon the contravention of international human rights protections. Those who oppose the educational provisions of Quebec's Charter of the French Language are now afforded a similar opportunity. In view of the sparse protections of individual and minority rights recognized in Canadian

municipal law,¹⁵⁹ and the reticence of the Canadian Federal Government in dealing with violations of individual rights by Quebec's Provincial Government,¹⁶⁰ international law may be the greatest source of encouragement for those whose fundamental human rights have been infringed by Quebec's Charter of the French Language. The potential for vindication of those rights is already in existence; it is now up to the aggrieved individuals to set in motion the procedures which international law has made available for the purpose of redressing precisely such violations of human rights.

Footnotes

¹Que. Stat. 1977, c.5.

²The "National Assembly" is the provincial legislature of the Province of Quebec.

³Charter of the French Language, Que. Stat. 1977, c.5 [hereinafter cited as Charter] at §1. Actually, French had been the only official language of Quebec since the enactment of the Official Language Act (Bill 22), Que. Stat. 1974, c.6 (repealed by Charter §212).

⁴For background on the content of the Charter and the public reaction which it provoked, see Note, "Language Rights and Quebec Bill 101," 10 Case W. Res. J. Int'l L. 543 (1978).

⁵Que. Stat. 1974, c.6.

⁶Charter §212.

⁷See, e.g., Brierley, Cayne, Cotler, Humphrey, Scott, Slayton & Vlasic, "Undermines two-culture concept: Seven McGill law professors raise objections to Bill 22," The Montreal Star, July 19, 1974, at D-2. See also Statement on Bill 1 of the Protestant School Board of Greater Montreal, at 8 (1977); Brief on Bill 1 of the Quebec Association of School Administrators, at 4-5 (1977).

⁸Charter §§130, 134.

⁹Charter §54.

¹⁰See M. Akehurst, A Modern Introduction to International Law 9-18 (3d ed. 1977).

¹¹See, e.g., Statute of the International Court of Justice, Art. 34.

¹²See, e.g., Id., Art. 36.

¹³M. Akehurst, note 9 supra at 13-15.

¹⁴For a more complete discussion of this Protocol, see notes 125 to 132 and accompanying text, infra.

¹⁵European Convention on Human Rights, 1950, Art. 25.

¹⁶Decisions of the European Court of Human Rights and the European Commission of Human Rights are reported in the Yearbooks of the European Convention on Human Rights.

¹⁷11 Y.B. Eur. Conv. on Human Rights 832 (Eur. Ct. of Human Rights 1968) (merits).

¹⁸See notes 56 to 67 and accompanying text, infra.

¹⁹See "'Il faut créer dix, vingt, cinquante St. Léonard': Jean-Marc Léger," [1968] Canadian Ann. Rev. 86-89 (J. Saywell, ed. 1969).

²⁰Bill 63, Que. Stat. 1969, c.9. Bill 63 provided that instruction was generally to be given in French, but that by simply submitting a request to the local school board, any parent had the right to have his children educated in English. It thus effectively conferred on parents an unrestricted right to choose between the two linguistic educational systems.

²¹Que. Stat. 1974, c.6.

²²Id. §§ 41,43.

²³Id. §41.

²⁴Charter §§ 68-83.

²⁵Section 68 of the Charter states:

Instruction in the kindergarten classes and in the elementary and secondary schools shall be in French, except where this chapter allows otherwise.

This rule obtains in school bodies within the meaning of the Schedule and also applies to subsidized instruction provided by institutions declared to be of public interest or recognized for purposes of grants in virtue of the Private Education Act (1968, chapter 67).

Section 69 provides:

In derogation of section 68, the following children, at the request of their father and mother, may receive their instruction in English:

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

²⁶Id. §69(b).

²⁷Id. §69(c), (d).

²⁸Id. §81.

²⁹See notes 148 to 158 and accompanying text, infra.

³⁰M. Akehurst, A Modern Introduction to International Law 30-47 (3d ed. 1977).

³¹Id. See also Statute of the International Court of Justice, Art. 38(1).

³²M. Akehurst, note 30 supra at 30-31.

³³Id. at 32.

³⁴Id. at 32-33.

³⁵Id. at 122-26.

³⁶Id. at 33.

³⁷Id.

³⁸The International Covenant on Economic, Social, and Cultural Rights, and the International Covenant on Civil and Political Rights.

³⁹Order in Council P.C. 1976-1156 (May 18, 1976). The Covenants have been binding on Canada since August 19, 1976.

⁴⁰The Declaration was adopted by the U.N. General Assembly in 1948; the Covenants were adopted by the General Assembly in 1966, and entered into force in 1976.

⁴¹Conference on Security and Cooperation in Europe, Final Act at 81 (Helsinki 1975). See also Fischer, "The Human Rights Covenants and Canadian Law," 15 Can. Y.B. Int'l L. 42, 45-46 (1977).

⁴²See Basic Documents on Human Rights 329 (I. Brownlie, ed. 1971).

⁴³30 & 31 Vict., c.3.

⁴⁴Id. §93. See generally, Lebel, "Le Choix de la Langue d'Enseignement et le Droit International," 9 Révue Juridique Thémis 221 (1974):

Le Canada n'a pas ratifié la Convention et s'est abstenu de voter lors de son adoption, parce que l'éducation relève constitutionnellement de la compétence des provinces.

Id. at 234.

⁴⁵G.A. Res. 1386, 14 U.N. GAOR 592, U.N. Doc. A/4249 and Corr.2 (1959).

⁴⁶Id.

⁴⁷Regarding adoption of the Covenant by the U.N. General Assembly, see G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966). Regarding the date of entry into force of the Covenant pursuant to Article 27, see 32 U.N. GAOR (Provisional Agenda Item 76), U.N. Doc. A/32/150 (1977).

⁴⁸Order in Council P.C. 1976-1156 (May 18, 1976).

⁴⁹International Covenant on Economic, Social, and Cultural Rights, Art. 2, paragraph 2.

⁵⁰Charter §6.

⁵¹The conclusion that Quebec's Charter affords everyone the right to education in the state's official language is valid only if the "state" is defined as the Province of Quebec rather than the Dominion of Canada. (See the Official Languages Act, Can. Stat. 1969, c.54, establishing that both English and French are official languages of Canada.) Although Quebec may be a nation, it is clearly

not a state. See "Nations Are Not States," 9 Canada Today/d'Aujourd'hui no.4 at 2 (Canadian Embassy (Washington) Public Affairs Division 1978). However, in this particular context the relevant official language may be that of the Province of Quebec because under Canadian law, education is a matter within the exclusive jurisdiction of the provinces. British North America Act of 1867, 30 & 31 Vict., c.3, §93.

⁵²Can. Stat. 1976-77, c.33.

⁵³H.C. Deb., No. 136 at 6199 (June 2, 1977, remarks of the Hon. Ron Basford, Min. of Justice).

⁵⁴McDougal, Lasswell & Chen, "Freedom from Discrimination in Choice Of Language and International Human Rights," 1976 S. Ill. U. L. J. 151 (1976); UNESCO, The Use of Vernacular Language in Education at 11 (1953):

It is axiomatic that the best medium for teaching a child is his mother tongue. Psychologically, it is the system of meaningful signs that in his mind works automatically for expression and understanding. Sociologically, it is a means of identification among the members of the community to which he belongs. Educationally, he learns more quickly through it than through an unfamiliar linguistic medium.

⁵⁵See, e.g., Lebel, "Le Choix de la Langue d'Enseignement et le Droit International," 9 Revue Juridique Thémis 221 (1974); see also Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium," [hereinafter Belgian Linguistic Case] 11 Y.B. Eur. Conv. on Human Rights 832, 866 (Eur. Ct. of Human Rights 1968) (merits).

⁵⁶11 Y.B. Eur. Conv. on Human Rights 832 (Eur. Ct. of Human Rights 1968) (merits).

⁵⁷Article 14 of the Convention states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁵⁸Article 2 of the First Protocol states:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

⁵⁹Belgian Linguistic Case, 11 Y.B. Eur. Conv. on Human Rights 832, 866 (Eur. Ct. of Human Rights 1968) (merits).

⁶⁰Id. at 942.

⁶¹Id.

⁶²Act of 2nd August 1963, art. 7, paragraph 3(b) (Belgium).

⁶³See McDougal et al. note 54 supra at 169-70.

⁶⁴Belgian Linguistic Case, 11 Y.B. Eur. Conv. on Human Rights 832, 942 (Eur. Ct. of Human Rights 1968) (merits).

⁶⁵This is rather apparent from the title of the law, the "Charter of the French Language." See also Quebec's Policy on the French Language (English version, prepared by the Service de Traduction, Ministère des Communications) (l'Editeur Officiel du Québec, March 1977) [hereinafter cited as White Paper].

⁶⁶White Paper at 71.

⁶⁷Id.

⁶⁸See notes 47 to 49, supra.

⁶⁹The Covenants were adopted on December 16, 1966. G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

⁷⁰Order in Council P.C. 1976-1156 (May 18, 1976).

⁷¹As provided in Article 49, the Covenant entered into force with respect to Canada three months after the date of ratification.

⁷²Dinstein, "Collective Human Rights of Peoples and Minorities," 25 Int'l & Comp. L. Q. 102, 118 (1976):

Article 27 of the 1966 International Covenant on Civil and Political Rights . . . is declaratory in nature and reflects a minimum of rights recognised by customary international law. The fundamental concept, once more, is that of prevention of forced assimilation (a "melting-pot") and preservation of the separate identity of the minority.

⁷³Actually, Article 2 requires states to secure the substantive rights protected by the Covenant without any distinctions--the list of impermissible criteria set forth in Article 2 is not exclusive; "Each State Party . . . undertakes to respect and ensure . . . the rights recognized in the present Covenant, without distinction of any kind, such as . . . language, . . . national or social origin, . . . birth or other status." The types of distinctions utilized in the educational provisions of the Charter are relatively novel: place and language of education, and date of establishment of domicile within the Province of Quebec. In reality, these criteria seem to be variants of three of the distinctions specifically prohibited by Article 2: language, national origin, and birth. See notes 74 and 75, infra. But even if the Charter's criteria were found not to give rise to distinctions based on language, national origin, and birth, they would not be permissible under Article 2 because that Article forbids all distinctions--not only those contained in the list of examples.

⁷⁴English-speaking persons who were educated in English outside Quebec--i.e., persons whose "nation of origin" is other than Quebec--are denied the right to enroll their children in the English school system. From this perspective, the ultimate factor which is determinative of whether access will be afforded to the English school system is national origin. See Brief on Bill No. 1, Provincial Association of Protestant Teachers, at 8 (May 1977): "This organization is opposed to any discrimination against people on grounds of their national origin, which is why we support total freedom of choice [as to language of education]."

⁷⁵Under the Charter, access to English schools depends essentially on whether a child's parents were educated in

English in Quebec. Two children who are similarly situated in all respects (age, aptitude, mother tongue, place of residence, etc.) except that one child's parents were educated in English in Quebec and the other child's parents were educated in English outside Quebec are treated differently under the Charter's school access regulations. The first child would be permitted to attend English school, while the second child would not. Birth to parents of a particular educational background thus determines whether or not a child will have access to English language schools.

⁷⁶White Paper at 71.

⁷⁷See notes 148 to 158 and accompanying text, infra.

⁷⁸White Paper at 71.

⁷⁹Charter §69.

⁸⁰White Paper at 71-75.

⁸¹Of course, sources of international law other than the Covenant on Civil and Political Rights--such as the Covenant on Economic, Social, and Cultural Rights, and the U.N. Universal Declaration of Human Rights--may protect the right of non-English-speaking persons to attend English schools.

⁸²See White Paper at 73.

⁸³Que. Stat. 1974, c.6, §43 (repealed by Charter §212).

⁸⁴White Paper at 73.

⁸⁵Id. at 73-74.

⁸⁶Id.

⁸⁷See White Paper at 73; "The problem is to find a criterion that is valid and quite easily applied to designate those who, if they expressly wish it, may enrol their children in the English schools." The White Paper then goes on to justify the Charter's access criteria almost exclusively in terms of being "easily applied"; there is no attempt made to establish that the Charter's criteria are the most "valid" of those that might have been adopted.

88 "English-speaking Quebecers must preserve their language, their culture and their way of life. The government not only does not object to this but acknowledges the fact as part of our common history." White Paper at 39. See generally A Brief on Bill 1 by the Metropolitan Quebec Language Rights Committee (on behalf of the Quebec City English-speaking Community, May 25, 1977):

The White Paper--Quebec's Policy on the French Language--announced happy days for the English-speaking community. . . . Then, Bill 1 [The Charter of the French Language] was tabled. And we learned that we were no longer part of the Quebec people, and indeed, we were considered public enemy number one.

Id. at 1.

89 White Paper at 75.

90 G.A. Res. 217, U.N. Doc. A/810 (1948).

91 Id.

92 Conference on Security and Cooperation in Europe, Final Act at 81 (Helsinki 1975).

93 See notes 19 to 20 and accompanying text, supra.

94 Charter §§68-69.

95 See note 55 and accompanying text, supra.

96 U.N. Universal Declaration of Human Rights, Art. 2.

97 Belgian Linguistic Case, 11 Y.B. Eur. Conv. on Human Rights 832, 942 (Eur. Ct. of Human Rights 1968) (merits).

98 See Basic Documents on Human Rights 329 (I. Brownlie, ed. 1971).

99 See Lebel, "Le Choix de la Langue d'Enseignement et le Droit International," 9 Révue Juridique Thémis 221, 234 (1974).

100 The conditions specified in the Convention--optional attendance, and pedagogical standards equivalent to those applicable to majority language schools--serve to assure

that the separate educational systems function in a manner consistent with the Convention's ultimate purpose, the elimination of discrimination in education.

¹⁰¹See text following note 51, supra.

¹⁰²That is, the access restrictions are expressed in terms of the parents' place of education rather than their nation of origin.

¹⁰³It should be noted that foreign nationals who intend to reside in Quebec for only a limited period of time may under some circumstances be afforded access to the English school system, pursuant to §81 of the Charter. See text accompanying note 28, supra. Those coming to Quebec to reside permanently, however, are denied access to that system.

¹⁰⁴I.e., including persons educated in the English language outside Quebec.

¹⁰⁵White Paper at 71.

¹⁰⁶Of course, alternative access restriction criteria might be vulnerable to a challenge under other provisions of the Convention, or other sources of international human rights protections.

¹⁰⁷Section 80 of the Charter provides:

No secondary school leaving certificate may be issued to a student who does not have the speaking and writing knowledge of French required by the curricula of the Department of Education.

¹⁰⁸Whether the English schools are in conformity with the Article 5 "optional" requirement, like the one contained in Article 2(b), depends upon the interpretation accorded to that term. See text accompanying notes 100 to 101, supra.

¹⁰⁹If, indeed, it is necessary or appropriate to commend a government for complying with international law.

¹¹⁰I.e., the two human rights covenants and the Universal Declaration.

¹¹¹G.A. Res. 1386, 14 U.N. GAOR 592, U.N. Doc. A/4249 and Corr.2 (1959).

112 See sources cited in note 54, supra. See also C. Amoun, Study of Discrimination in Education 143-77, U.N. Doc. E/CN.4/Sub.2/181 (1957).

113 McDougal et al., supra note 54 at 160:

The only rational limits which a community should be able to place upon its deference to a minority language is the community's ability to finance a multi-lingual system within available resources.

114 White Paper at 50: "The first of [the general principles which inspired the government] is a vigorous assertion of the primacy of the French language in Quebec."

115 See sources cited in notes 54 and 112, supra.

116 Article 80 of the Charter requires that students enrolled in English schools become proficient in French prior to their graduation from high school. Although the White Paper, at 42, states that "it is important to learn languages other than French," there is no requirement that graduates of French schools become proficient in English.

117 Declaration of the Rights of the Child, 1959, Principle 7.

118 I.e., parents educated in English in Quebec.

119 I.e., all parents educated outside of Quebec, and parents educated in French in Quebec.

120 See notes 74 and 75, supra.

121 See notes 148 to 158 and accompanying text, infra.

122 G.A. Res. 1386, 14 U.N. GAOR 592, U.N. Doc. A/4249 and Corr.2 (1959).

123 Id.

124 The Western Maid, 257 U.S. 419, 433 (1922).

125 Order in Council P.C. 1976-1156 (May 18, 1976).

126 Of course, the Protocol is only open to ratification by states which have ratified the Covenant. See Art. 8 of the Protocol.

127 Optional Protocol to the International Covenant on Civil and Political Rights, 1966, Art. 1.

128 Id. Art. 2.

129 Id. Art. 4.

130 Id. Art. 5.

131 Id. Art. 6.

132 See notes 68 to 89 and accompanying text, supra.

133 E.S.C. Res. 1503, 48 U.N. ESCOR Supp. (No. 1A) 8, U.N. Doc. E/4832/Add.1 (1970).

134 Id.

135 Saario & Cass, "The United Nations and the International Protection of Human Rights: A Legal Analysis and Interpretation," 7 Cal. W. Int'l L. J. 591, 604 (1977).

136 Note, "Language Rights and Quebec Bill 101," 10 Case W. Res. J. Int'l L. 543, 560 (1978).

137 "Will back challenge to Quebec bill: Lalonde," (Toronto) Globe & Mail, Oct. 10, 1977 at 10.

138 Section 90 of the British North America Act of 1867, 30 & 31 Vict., c.3 authorizes the Governor-General of Canada (who acts upon advice of the Prime Minister) to disallow any provincial law, for any reason or for no reason at all. It has been advanced that three types of provincial legislation in particular justify the exercise by the Federal Government of its power of disallowance--specifically, laws that (1) interfere with national legislation or policy, (2) infringe the rights of Canadian citizens living in other provinces, and (3) impair fundamental rights of Canadian citizens other than those protected in the British North America Act. R.M. Dawson, The Government of Canada 213-17 (5th ed. 1970). A cogent argument can be made that the Charter of the French Language comes within not only one, but all three, of Dawson's criteria. Exercise of the power of disallowance "interferes with the democratic process" inasmuch as it results in the invalidation of a law enacted by a duly elected provincial legislature. But the power of disallowance would never have been conferred on the Federal Government by the B.N.A. Act if there had been

a desire to foreclose such "interference." The constitutional plan is thus defeated not by the exercise of the power of disallowance, but by the failure of the Federal Government to exercise it, under appropriate circumstances.

139 If the Federal Government's policy is to abandon minority language rights in Quebec--i.e., to allow the province for all intents and purposes to function as an independent state, and to be a part of Canada in name only--members of the minority might well question whether it is to their advantage to continue to support federalism. They might be better off if Quebec separated from the rest of Canada, and the English-speaking community, concentrated in the West End of Montreal, in turn sought independence from the rest of Quebec.

140 See M. Akehurst, A Modern Introduction to International Law 88-102 (3d ed. 1977).

141 Id. at 88.

142 Id. at 227-31.

143 This might be premised, for instance, on the argument that the Charter's access regulations violate the International Covenant on Economic, Social, and Cultural Rights, and the U.N. Universal Declaration of Human Rights. See notes 47 to 67 and 90 to 97 and accompanying text, supra.

144 Consider, for instance, the role of world public opinion in securing more humane treatment for some dissidents in the Soviet Union, and in improving conditions for blacks in Southern Africa.

145 The question will not actually arise until all available domestic remedies have been exhausted--i.e., until a determination has been made by the Canadian court of last resort that Quebec's language charter is in fact valid under Canadian law.

146 See notes 135 to 139 and accompanying text, supra.

147 See M. Akehurst, A Modern Introduction to International Law 13-18 (3d ed. 1977).

148 In the Belgian Linguistic Case, the petitioners were unsuccessful in their attempt to establish that all

parents had the right to choose the official language in which their children were to be educated. The petitioners prevailed, however, on the theory that by affording linguistic choice rights to some parents while denying such rights to others, the Belgian educational language law discriminated against the latter group, giving rise to an inconsistency between the law and Belgium's obligations under the European Convention on Human Rights.

¹⁴⁹White Paper at 1, 4.

¹⁵⁰See notes 56 to 64 and accompanying text, supra.

¹⁵¹Belgian Linguistic Case, 11 Y.B. Eur. Conv. on Human Rights 832, 932-34 (Eur. Ct. of Human Rights 1968) (merits).

¹⁵²Id. at 936-38.

¹⁵³Id. at 938-42.

¹⁵⁴R. Senelle, Structures Politiques, Economiques et Sociales de la Belgique (Belgian Ministry of Foreign Affairs 1970).

¹⁵⁵See generally "Reflections on the Aspirations of Quebec and Other Factors in the Changing Concepts of the Canadian Confederation," 9 Canada Today/d'Aujourd'hui no. 4 (Canadian Embassy (Washington) Public Affairs Division, 1978).

¹⁵⁶White Paper at 71.

¹⁵⁷Depending on the content and the political factors existing at the time, it is possible that such legislation might be disallowed by the Federal Government. See notes 138 to 139 and accompanying text, supra.

¹⁵⁸Belgian Linguistic Case, 11 Y.B. Eur. Conv. on Human Rights 832, 938 (Eur. Ct. of Human Rights 1968) (merits).

¹⁵⁹See White Paper at 37-38: "[A] study of the texts reveals that there is no constitutional guarantee for the English language in Quebec." See also Bureau Métropolitain des Ecoles Protestantes de Montréal c. Ministre de l'Education du Québec, [1976] C.S. 430, wherein the Quebec Superior Court rejected a constitutional challenge to the

validity of the English school access restrictions contained in the Official Language Act, Que. Stat. 1974, c.6 (repealed by Charter §212).

¹⁶⁰See note 136 and accompanying text, supra.

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