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## Losing Relevance: Quebec and the Constitutional Politics of Language

Emmanuelle Richez

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## Losing Relevance: Quebec and the Constitutional Politics of Language

### Abstract

This article asks whether Quebec has lost relevance in the constitutional politics of language. It proposes a doctrinal analysis of the Supreme Court's Charter jurisprudence, with an emphasis on the most recent body of case law, and an assessment of its political consequences in the area of language policy in Quebec. The article argues that constitutional review has increasingly protected individual rights over Quebec's collective right to maintain its language and culture. This can be explained by the move towards an implacable parallel constitutionalism and a redefinition of official minority linguistic rights in the jurisprudence, as well as by the exhaustion of Quebec's legislative counterattacks to court rulings. The article concludes that Quebec is no longer driving concepts of Canadian citizenship. Undifferentiated rather than multinational citizenship appears to be the direction in which Charter language jurisprudence is taking Canada.

### Keywords

Linguistic rights; Linguistic minorities--Legal status, laws, etc.; Language policy; Canada. Canadian Charter of Rights and Freedoms; Canada; Québec (Province)

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## Losing Relevance: Quebec and the Constitutional Politics of Language

EMMANUELLE RICHEZ\*

This article asks whether Quebec has lost relevance in the constitutional politics of language. It proposes a doctrinal analysis of the Supreme Court's Charter jurisprudence, with an emphasis on the most recent body of case law, and an assessment of its political consequences in the area of language policy in Quebec. The article argues that constitutional review has increasingly protected individual rights over Quebec's collective right to maintain its language and culture. This can be explained by the move towards an implacable parallel constitutionalism and a redefinition of official minority linguistic rights in the jurisprudence, as well as by the exhaustion of Quebec's legislative counterattacks to court rulings. The article concludes that Quebec is no longer driving concepts of Canadian citizenship. Undifferentiated rather than multinational citizenship appears to be the direction in which Charter language jurisprudence is taking Canada.

Cet article soulève la question de savoir si le Québec a perdu sa pertinence dans la politique constitutionnelle de la langue. Il propose une analyse doctrinale de la jurisprudence de la Cour suprême relative à la Charte, en mettant l'accent sur le corpus le plus récent de droit jurisprudentiel, de même qu'une évaluation de ses conséquences politiques dans le domaine de la politique linguistique du Québec. L'article prétend que la révision constitutionnelle favorise de plus en plus les droits individuels au détriment du droit collectif du Québec de conserver sa langue et sa culture. Cela peut s'expliquer par un glissement vers un implacable constitutionnalisme parallèle et une redéfinition des droits linguistiques de la minorité officielle dans la jurisprudence, ainsi que par l'épuisement de la contre-attaque législative du Québec aux décisions des tribunaux. L'article conclut que le Québec n'est plus le moteur des concepts de la citoyenneté canadienne. La jurisprudence de la Charte sur la langue semble désormais conduire le Canada vers un concept de citoyenneté indifférencié plutôt que multinational.

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\* Assistant Professor, Department of Political Science, University of Windsor. The author would like to thank Christopher Manfredi, Francesca Taddeo, and Benoît Pelletier, as well as anonymous reviewers for their comments on previous drafts of this article.

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WHEN THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*<sup>1</sup> (*Charter*) was first adopted, its potential impact on the balance between individual and collective rights in Canada was much debated. Although some authors contended that the *Charter* was mostly a vehicle for liberal individualism,<sup>2</sup> others thought that it retained elements of communitarianism.<sup>3</sup> Quebec had refused to ratify the *Charter* precisely because it not only failed to recognize the province's distinct or national character, but also because it severely reduced Quebec's power to legislate in the area of language policy—a power that would help the province to preserve its Francophone culture.<sup>4</sup> Whether Quebec has been the biggest loser under the *Charter* is a matter of debate. On the one hand, only a decade after the adoption of the *Charter*, many authors pointed out that the judiciary had nullified more laws in Quebec than in any other province, and that those laws touched on language, a crucial policy area for the maintenance of Quebec's unique Francophone identity

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1. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
  2. See e.g. Allan C Cairns, "Constitutional Change and the Three Equalities" in Ronald L Watts & Douglas M Brown, eds, *Options for a New Canada* (Toronto: University of Toronto Press, 1991) 77; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational, 1994).
  3. See e.g. Patrick Monahan, *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada* (Toronto: Carswell, 1987) [Monahan, *Politics*]; David J Elkins, "Facing Our Destiny: Rights and Canadian Distinctiveness" (1989) 22:4 Can J Pol Sci 699.
  4. See e.g. Mandel, *supra* note 2; Guy Laforest, *Pour la liberté d'une société distincte. Parcours d'un intellectuel engagé* (Sainte-Foy, Que: Presses de l'Université Laval, 2004).

in North America.<sup>5</sup> On the other hand, some authors contended that the negative impact of the *Charter* on Quebec's Francophone identity was overstated, notably because Quebec retained the power under the new constitutional linguistic regime to limit immigrants' access to English schools by channelling them into the French education system.<sup>6</sup> However, the Supreme Court of Canada has recently questioned this power in *Gosselin (Tutor of) v Quebec (Attorney General)*<sup>7</sup> and limited it in *Solski (Tutor of) v Quebec (Attorney General)*<sup>8</sup> and *Nguyen v Quebec (Education, Recreation and Sports)*.<sup>9</sup>

This trilogy of cases shows that the debate on the nature of the rights embodied in the *Charter* remains salient. This article therefore seeks to evaluate whether Quebec has lost relevance in the constitutional politics of language. More specifically, it proposes a doctrinal analysis of the Court's *Charter* jurisprudence (with an emphasis on the most recent case law) and an assessment of its political consequences in the area of language policy in Quebec. The article argues that constitutional review has increasingly protected individual rights over Quebec's collective right to maintain its language and culture. This development can be explained by the move towards an implacable parallel constitutionalism and a redefinition of official minority linguistic rights in the jurisprudence, as well as by the exhaustion of Quebec's legislative counterattacks to court rulings. The article concludes that Quebec is no longer driving concepts of Canadian citizenship. *Charter* language jurisprudence appears to be taking Canada in the direction of undifferentiated rather than multinational citizenship. Before tackling these

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5. See Guy Laforest, *Trudeau and the End of a Canadian Dream*, translated by Paul Leduc Browne & Michelle Weinroth (Montreal: McGill-Queen's University Press, 1995); Yves de Montigny, "The Impact (Real or Apprehended) of the Canadian Charter of Rights and Freedoms on the Legislative Authority of Quebec" in David Schneiderman & Kate Sutherland, eds, *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 3; FL Morton, "Judicial Politics Canadian-Style: The Supreme Court's Contribution to the Constitutional Crisis of 1992" in Curtis Cook, ed, *Constitutional Predicament: Canada after the Referendum of 1992* (Montreal: McGill-Queen's University Press, 1994) 132.
  6. See especially James B Kelly, "Reconciling Rights and Federalism during Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982 to 1999" (2001) 34:2 Can J Pol Sci 321; Peter H Russell, "The Political Purposes of the Charter: Have They Been Fulfilled? An Agnostic's Report Card" in Philip Bryden, Steven Davis & John Russell, eds, *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life* (Toronto: University of Toronto Press, 1994) 33 [Russell, "Political"].
  7. 2005 SCC 15, [2005] 1 SCR 238 [*Gosselin*].
  8. 2005 SCC 14, [2005] 1 SCR 201 [*Solski*].
  9. 2009 SCC 47, [2009] 3 SCR 208 [*Nguyen*].

issues, this article shows how the content and scope of language rights have evolved in Quebec since Confederation as well as how they have influenced conceptions of Canadian citizenship.

## I. LANGUAGE RIGHTS IN QUEBEC AND CANADIAN CITIZENSHIP

Citizenship is a multifaceted concept that gives rise to many definitional and theoretical challenges.<sup>10</sup> A recurring theme in the literature is the primordial link between citizenship and access to rights in liberal democracies. In his famous essay *Citizenship and Social Class*, T.H. Marshall argued that citizenship consists of political, civil, and social rights brought about by the modern capitalist order.<sup>11</sup> This rights-based vision of citizenship has since been enlarged to include cultural rights, such as linguistic rights.<sup>12</sup> The nature of the cultural rights granted in any polity informs its type of citizenship. At one end of the spectrum lies the “universal” or “undifferentiated” conception of citizenship, which recognizes the right-bearing equality of individuals and is blind to cultural group differences. At the other end is the “pluralist” or “differentiated” conception of citizenship, which posits that substantive equality requires a differential treatment of certain cultural groups.<sup>13</sup>

Differentiated citizenship can take many forms depending on the level of diversity that it promotes and how it translates into rights and policies. Will Kymlicka distinguishes “polyethnic” citizenship from “multinational” citizenship.<sup>14</sup> Polyethnic citizenship is associated with group-differentiated rights for immigrants, which promote cultural retention by, for example, funding ethno-cultural activities and conferring exemption rights. Polyethnic citizenship also insists, however, on the necessity of facilitating integration into mainstream

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10. See Linda Bosniak, “Citizenship Denationalized” (2000) 7:2 *Ind J Global Legal Stud* 447; Will Kymlicka & Wayne Norman, “Return of the Citizen: A Survey of Recent Work on Citizenship Theory” (1994) 104:2 *Ethics* 352; Peter H Schuck, “Citizenship in Federal Systems” (2000) 48:2 *Am J Comp L* 195; Jane Jenson, “Introduction: Thinking about Citizenship and Law in an Era of Change” in Law Commission of Canada, ed, *Law and Citizenship* (Vancouver: UBC Press, 2006) 3.

11. *Citizenship and Social Class: and other essays* (Cambridge, UK: Cambridge University Press, 1950).

12. See especially Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1995).

13. Iris Marion Young, “Polity and Group Difference: A Critique of the Ideal of Universal Citizenship” (1989) 99:2 *Ethics* 250.

14. *Supra* note 12.

society by providing official language training. Because it often recognizes all cultural differences equally, polyethnic citizenship is close to the undifferentiated model on the citizenship spectrum. In contrast, multinational citizenship provides self-government rights to national minorities such as French Quebecers, to help them counter cultural assimilation into the dominant society and maintain a distinct collective identity.<sup>15</sup>

Alan Patten and Will Kymlicka argue that the recognition of language rights is inextricably linked to the establishment of multinationalism.<sup>16</sup> They categorize language rights and policies according to four distinctions: “(1) tolerance- vs promotion-oriented rights; (2) norm-and-accommodation vs official-languages rights regimes; (3) personality vs territoriality rights regimes; and (4) individual vs collective rights.”<sup>17</sup> National minorities expect not only tolerance rights, which prevent state intervention in an individual’s private language choices, but also promotion-oriented rights, which require the use of the minorities’ languages within state institutions.<sup>18</sup> They also prefer the establishment of an official-language rights regime, as opposed to simple accommodations for members who lack proficiency in the language of the majority.<sup>19</sup>

The distinctions between personality- and territoriality-based linguistic rights regimes and between individual and collective linguistic rights are important to the establishment of a multinational citizenship. Linguistic rights regimes can be organized on the territoriality principle, according to which “languages rights should vary from region to region according to local conditions,” or on the personality principle, according to which “citizens should enjoy the same set of (official) language rights no matter where they are in the country.”<sup>20</sup> The self-government rights associated with the multinational model imply the capacity to impose a linguistic regime on a delimited territory. As for the collective aspect of language rights, it manifests itself when enforcement of the rights is dependent on a certain threshold level of demand (and therefore on the existence

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15. *Ibid.* It should be noted that Kymlicka’s protection of collective identities finds its justification in individual autonomy. For a different view, see Dwight Newman, “Putting Kymlicka in Perspective: Canadian Diversity and Collective Rights” in Stephen Tierney, ed, *Accommodating Cultural Diversity* (Hampshire, UK: Ashgate, 2007) 59.

16. “Introduction” in Will Kymlicka & Alan Patten, eds, *Language Rights and Political Theory* (New York: Oxford University Press, 2003) 1 at 5.

17. *Ibid.* at 26.

18. *Ibid.* at 27. See also Heinz Kloss, “Language Rights of Immigrant Groups” (1971) 5:2 *Int’l Migr Rev* 250.

19. Patten & Kymlicka, *supra* note 16 at 27-29.

20. *Ibid.* at 29.

of a community) or when the primary intended beneficiary of the rights is a collectivity as opposed to individuals.<sup>21</sup> The collective goals pursued by national minorities are either linguistic security or linguistic survival.<sup>22</sup> Significant here are “external protections,” which refer to the national minority’s ability to “protect its distinct existence and identity by limiting the impact of the decisions of the larger society.”<sup>23</sup> External protection measures have been implemented by the government of Quebec to limit access to public English schools.<sup>24</sup>

Quebec’s use of external protections has conflicted with the recognition of the linguistic rights of members of its Anglophone minority.<sup>25</sup> For Patten and Kymlicka, these rights fall into the collective rights category by virtue of being group-differentiated.<sup>26</sup> As Denise G. Réaume explains, the group-differentiated rights of English and French minorities, though granted to individuals, aim at protecting language communities.<sup>27</sup> Anglophones in Quebec have traditionally favoured an undifferentiated citizenship, however. More specifically, they would prefer no state intervention by Quebec in linguistic matters, along with the promotion of individuals’ equal right to choose their preferred language in the public sphere. Nonetheless, the very existence of the rights of Anglophones in Quebec depends upon, or is at least intimately related to, the notion of multinational citizenship. That is, if Quebec did not have important self-government rights regarding language, minority language rights for Anglophones in Quebec would be unnecessary. Just as the minority language rights given to Francophones outside Quebec are extensions of the national minority rights of Francophone Quebecers,<sup>28</sup> minority language rights given to Anglophone Quebecers can be seen as an extension of the rights of the Anglophone-Canadian majority.

It is interesting to examine how the different conceptions of citizenship have conflicted and prevailed in Canada over time. Of particular relevance is Quebec’s

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21. *Ibid* at 30.

22. *Ibid* at 31.

23. Kymlicka, *supra* note 12 at 36.

24. These external restrictions can also be seen as internal restrictions, as they restrict the linguistic rights of Francophone Quebecers, who are themselves internal members of the collectivity being protected. See Newman, *supra* note 15.

25. Denise G Réaume, “Beyond *Personality*: The Territorial and Personal Principles of Language Policy Reconsidered” in Kymlicka & Patten, *supra* note 16, 271; FL Morton, “Group Rights Versus Individual Rights in the Charter: The Special Cases of Natives and the Quebecois” in Neil Nevitte & Allan Kornberg, eds, *Minorities and the Canadian State* (Oakville, Ont: Mosaic Press, 1985) 71 [Morton, “Charter”].

26. *Supra* note 16 at 30.

27. *Supra* note 25 at 288. *Contra* Morton, “Charter,” *supra* note 25 at 71-72.

28. Kymlicka, *supra* note 12 at 45-46.

linguistic rights system and its impact on the character of Canadian citizenship on the whole. The following paragraphs explore three key legal texts that have redefined Quebec's linguistic regime and have inevitably influenced the direction in which Canadian citizenship has gone: the *Constitution Act, 1867*,<sup>29</sup> the *Charter of the French language*<sup>30</sup> (*Bill 101*), and the *Charter*.<sup>31</sup>

First, the *Constitution Act, 1867* established both French and English as the languages of the legislatures and the courts under section 133.<sup>32</sup> It also, via section 93, guaranteed rights to denominational schools,<sup>33</sup> which at the time of enactment were divided along linguistic lines. By doing so, the *Constitution Act, 1867* recognized group-differentiated rights of French Catholics and English Protestants. Most importantly, the *Constitution Act, 1867* created Canadian federalism via sections 91–95, which relate to the division of powers between the federal and provincial governments.<sup>34</sup> Many argue that a federal system was chosen to grant the province of Quebec the powers necessary for the cultural survival of its Francophone majority within a larger union, in exchange for Quebec's adherence to the Confederation project.<sup>35</sup> Thus, the powers given to the Province of Quebec, notably including exclusive jurisdiction over education and civil rights, have amounted to self-government rights for the French-Quebecker majority, since it controlled the provincial state apparatus.<sup>36</sup> Moreover, the territorially based collective rights given to French Quebecers signified that Canadian citizenship was to some extent binational.<sup>37</sup>

Second, the Province of Quebec furthered the differentiation of Canadian citizenship by taking its linguistic destiny into its own hands. After the Quiet Revolution, multiple Quebec governments enacted several pieces of legislation intended to safeguard the vitality of the French language in the province,

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29. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

30. CQLR c C-11 [*Bill 101*].

31. *Supra* note 1.

32. *Supra* note 29, s 133. The use of both French and English is permitted in the Parliament of Canada and the National Assembly of Quebec (*ibid*).

33. *Ibid*, s 93.

34. *Ibid*, ss 91-95.

35. See e.g. Samuel V LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal: McGill-Queen's University Press, 1996); Gil Rémillard, *Le fédéralisme canadien: éléments constitutionnels de formation et d'évolution* (Montréal: Québec/Amérique, 1980).

36. Because of this development, the terms "government of Quebec" and "French Quebecers" are used interchangeably in this article.

37. See especially Joseph Eliot Magnet, "Collective Rights, Cultural Autonomy and the Canadian State" (1986) 32:1 McGill LJ 170.

culminating in the adoption of *Bill 101* by the Parti Québécois in 1977. This law, which has quasi-constitutional status in Quebec, notably advanced the francization of the workplace by requiring that all firms of fifty or more employees operate in French<sup>38</sup> and that all public and commercial signs use only French.<sup>39</sup> *Bill 101* also reduced the accessibility of English-language instruction by restricting it to children whose parents had received primary school instruction in English in the province of Quebec.<sup>40</sup> While this “Quebec clause,” as it is known, was written in individualistic terms, it had a collective purpose. This external protection was put in place to ensure that immigrant groups, whether from other Canadian provinces or other countries, would integrate into the French majority culture. Concurrently, the Quebec government tried to gain more power over immigration, a federal area of jurisdiction, in order to favour the establishment of French-speaking migrants in its territory. To this effect, Quebec signed several bilateral agreements with the federal government in the 1970s.<sup>41</sup> Still, due to the socioeconomic appeal of the English language as compared to French, the high rate of newcomers’ linguistic transfers to English dampened the hope of survival of the French fact in North America. By making French the common and sole language of public life, *Bill 101* consolidated the concept of a distinctive Quebec citizenship within Canada.<sup>42</sup>

Finally, the *Charter* broke with the spirit of the *Constitution Act, 1867* by imposing limits on the powers of the Quebec government, and thus the territorial collective rights of French Quebecers (notably in the area of language), to the benefit of individual citizens.<sup>43</sup> By promoting an individualized bilingualism as opposed to a territorialized one, the *Charter* also clashed with the purpose of *Bill*

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38. *Bill 101*, *supra* note 30, s 136, as amended by *An Act to harmonize public statutes with the Civil Code*, SQ 1999, c 40, s 45.

39. *Bill 101*, *supra* note 30, s 58.

40. *Ibid*, s 73(a), as repealed by *An Act to amend the Charter of the French language*, SQ 1993, c 40, s 15 [*Bill 86*].

41. Such agreements include the Lang-Cloutier Agreement (1971), the Andras-Bienvenue Agreement (1975), and the Cullen-Couture Agreement (1979). For a brief discussion of these agreements, see Stella Burch Elias, “Comprehensive Immigration Reform(s): Immigration Regulation Beyond Our Borders” (2014) 39:1 *Yale J Int’l L* 37 at 73-74.

42. Alain-G Gagnon & Raffaele Iacovino, “Interculturalism: Expanding the Boundaries of Citizenship” in Alain-G Gagnon, ed, *Québec: State and Society*, 3d ed (Peterborough, Ont: Broadview Press, 2004) 369.

43. Eugénie Brouillet, “La charte de la langue française et la Charte canadienne des droits et libertés: la difficile conciliation des logiques majoritaires et minoritaire” in Marcel Martel & Martin Pâquet, eds, *Légiférer en matière linguistique* (Quebec: Presses de l’Université Laval, 2008) 359 at 368-73.

101. First, the *Charter* guarantees civil rights, such as the individual freedom of expression (section 2(b)) and the right to equality (section 15), which prohibits discrimination based on ascriptive traits.<sup>44</sup> Second, it confers group-differentiated rights to members of official language minorities (sections 16–23).<sup>45</sup> Sections 16–22 of the *Charter* make French and English the official languages in the operations of the federal government and the government of New Brunswick. These sections extend the rights found in section 133 of the *Constitution Act, 1867* and constitutionalize the principles of the *Official Languages Act*<sup>46</sup> of 1969. The addition of education rights for members of linguistic minorities (section 23) to the constitutional edifice of Canada was a novelty.<sup>47</sup> Although denominational education rights have been protected since Confederation, the courts had ruled that they did not include education rights for linguistic minorities.<sup>48</sup>

While Quebec language policy has been challenged under sections 2(b) and 15 of the *Charter*, it has mostly been challenged under section 23 of the *Charter*. At first glance, the detailed nature of Anglophones' education rights interferes directly with Quebec's constitutional power to legislate in the field of education.<sup>49</sup> For example, section 23(1)(b) of the *Charter*, known as the "Canada clause," was included specifically to invalidate the Quebec clause in *Bill 101*. The Canada clause provides that all children whose parents received primary school instruction in English anywhere in Canada, not just in the province of Quebec, have the right to minority language education in Quebec.<sup>50</sup> Section 23 rights were thus modelled on the personality principle, whereby rights are available to individuals irrespective of their geographical location. Although these rights are exercised individually, they are conditional on the existence of a linguistic community and thus maintain a territorial element.<sup>51</sup> Section 23(3)(a) notably provides that these rights can only be granted where a sufficient number of rights-

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44. *Charter*, *supra* note 1, ss 2(b), 15.

45. *Ibid*, ss 16–23.

46. RSC 1985, c 31 (4th Supp).

47. *Charter*, *supra* note 1, s 23.

48. See *Ottawa Separate Schools Trustees v Mackell*, [1916] UKPC 92, [1917] AC 62; *Protestant School Board of Greater Montreal v Quebec (Minister of Education)*, [1976] CS 430, 83 DLR (3d) 645.

49. *Mandel*, *supra* note 2 at 142.

50. *Supra* note 1, s 23(1)(b).

51. Monahan, *Politics*, *supra* note 3 at 112; Vanessa Gruben, "Language Rights in Canada: A Theoretical Approach" (2008) 39 Sup Ct L Rev (2d) 91 at 115–16.

holders exist in a particular area to warrant the public funding of the requisite educational facilities.<sup>52</sup>

These limitations notwithstanding, the *Constitution Act, 1982* provides remedial mechanisms for Quebec to protect its self-government rights concerning language policy. First, section 59 exempts Quebec from having to comply with section 23(1)(a) of the *Charter*.<sup>53</sup> Known as the “mother tongue clause,” section 59 guarantees a minority language education right to Canadian citizens whose “first language learned and still understood is that of the ... linguistic minority population of the province.”<sup>54</sup> Quebec had attempted a mother tongue regime with the adoption of *Bill 22*<sup>55</sup> in 1974 and was of the view that it had failed.<sup>56</sup> Not only was it difficult to apply in practice, it prompted the integration of a majority of Allophones<sup>57</sup> into the English-language education system.<sup>58</sup> The exemption found in section 59 was thus intended to assuage Quebec’s concerns.<sup>59</sup>

Second, the limitation clause found in section 1 of the *Charter* provides that rights and freedoms are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>60</sup> In the context of judicial review, the onus is on the government to demonstrate that its

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52. *Charter*, *supra* note 1, s 23(3). Section 23(3) reads as follows:

The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction ... .

53. *Constitution Act, 1982*, s 59, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

54. *Charter*, *supra* note 1, s 23(1)(a).

55. *Official Language Act*, SQ 1974, c 6, ss 40-41.

56. Jean-Pierre Proulx, “Le choc des Chartes: histoire des régimes juridiques québécois et canadien en matière de langue d’enseignement” (1989) 23:1 RJT 67 at 110-13.

57. An Allophone is an individual whose mother tongue is not the official language of the territory where he or she resides. In Quebec, an individual whose mother tongue is neither French nor English is considered an Allophone.

58. Proulx, *supra* note 56.

59. *Ibid* at 163-67.

60. *Supra* note 1.

impugned legislation withstands a section 1 analysis according to the *Oakes* test.<sup>61</sup> As Janet L. Hiebert explains:

An expansive interpretation of section 1 would allow Parliament and the provincial legislatures to promote, where justified, values other than those specifically enumerated in the Charter. This would enrich the Charter by embracing collective values that, like individual rights, are relevant to Canadian conceptions of a just and democratic society yet are not adequately captured by the Charter's highly individualist language.<sup>62</sup>

Indeed, section 1 gives Quebec the opportunity to justify limits on individuals' language rights on the basis that such limits are necessary to allow the province's collective French language culture to flourish.

Third, section 33 of the *Charter*, better known as the "derogatory clause" or the "notwithstanding clause," can be used by the federal or provincial governments to immunize their legislative acts from past or future judicial review under the *Charter*. This section stipulates that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."<sup>63</sup> This clause imposes a five-year limitation period after which the concerned government must comply with *Charter* requirements or re-enact the overriding provision. The official language and education rights in the *Charter* are not subject to the notwithstanding clause, however. This fact significantly limits Quebec's capacity to affirm its parliamentary authority in language policy matters.

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61. The Court developed a test for the application of the limitation clause in *R v Oakes*. See *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719. The *Oakes* test was later clarified in *Egan v Canada*. See *Egan v Canada*, [1995] 2 SCR 513 at para 182, 124 DLR (4th) 609. In *Egan v Canada*, Iacobucci J states that:

First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

62. *Limiting Rights: The Dilemma of Judicial Review* (Montreal: McGill-Queen's University Press, 1996) at 138.

63. *Charter*, *supra* note 1, s 33.

Overall, the adoption of the *Charter* signalled an important step towards an undifferentiated Canadian citizenship in which primacy is given to the rights-bearing equality of individuals as opposed to the self-government rights of collectivities.<sup>64</sup> Quebec was not able to prevent this ideological turn and subsequently faced its consequences through *Charter*-based judicial review. While the *Charter* provides an inherent logic to guide judicial review, judicial discretion remains wide. Judges can interpret the *Charter* in a restrictive or non-restrictive fashion. Furthermore, Quebec can influence the outcome of *Charter*-based judicial review through its legislative responses to court decisions. According to constitutional dialogue theory, elected officials can “revers[e], modif[y], or avoi[d]”<sup>65</sup> unfavourable judgments. Nevertheless, as will be seen in the following sections, *Charter*-based judicial review in the area of language policy has been unfavourable towards Quebec.

## II. EARLY LANGUAGE RIGHTS JURISPRUDENCE: THE PATH TOWARDS LINGUISTIC PEACE

All Supreme Court of Canada *Charter* cases originating from Quebec in the area of minority language rights have challenged important provisions of *Bill 101*. Immediately after the enactment of the *Charter*, the National Assembly retrospectively invoked the notwithstanding clause to protect all of its legislation in *An Act respecting the Constitution Act, 1982*<sup>66</sup> (*Bill 62*). The concrete effect of *Bill 62* was to re-enact all Quebec statutes that had been enacted before the

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64. See especially Jane Jenson, “Citizenship and Equity: Variations across Time and in Space” in Janet Hiebert, ed, *Political Ethics: A Canadian Perspective*, vol 12 (Ottawa, Toronto: Royal Commission on Electoral Reform and Party Financing, Dundurn Press, 1991) 195 [Jenson, “Citizenship and Equity”]; Pierre Elliott Trudeau, “The Values of a Just Society” in Thomas S Axworthy & Pierre Elliott Trudeau, eds, *Towards a Just Society: The Trudeau Years* (Markham, Ont: Viking, 1990) 357.

65. Peter W Hogg & Allison A Bushell, “The *Charter* Dialogue between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn’t Such A Bad Thing After All” (1997) 35:1 Osgoode Hall LJ 75 at 80. For further discussions on constitutional dialogue theory, see Christopher P Manfredi & James B Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell” (1999) 37:3 Osgoode Hall LJ 513; Matthew A Hennigar, “Expanding the ‘Dialogue’ Debate: Canadian Federal Government Responses to Lower Court Charter Decisions” (2004) 37:1 Can J Pol Sci 3; James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent* (Vancouver: UBC Press, 2005); Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “*Charter* Dialogue Revisited—Or ‘Much Ado about Metaphors’” (2007) 45:1 Osgoode Hall LJ 1.

66. RSQ c L-4.2 [*Bill 62*].

*Charter* came into force, with the addition of an override clause providing that the statutes would operate notwithstanding a provision included in section 2 or sections 7–15 of the *Charter*. However, this blanket override strategy did not prevent *Bill 101* from being challenged under section 23 of the *Charter*. The period that followed the passage of *Bill 62* took on the appearance of a language war that was played out in the courts between the Quebec government and the Anglo-Quebecker community.

#### A. *AG (QUE) V QUEBEC PROTESTANT SCHOOL BOARDS (1984)*

The first case challenging *Bill 101* under section 23 of the *Charter* to reach the Court was *AG (Que) v Quebec Protestant School Boards*.<sup>67</sup> The unanimous decision declared that the provisions regarding instruction in English found in sections 72–73 of *Bill 101*, which comprise the Quebec clause, were inconsistent with the Canada clause of section 23(1)(b) of the *Charter*. It also stated that the impugned provisions could not be saved under section 1 of the *Charter*. The Court established that the minority language education rights found in the *Charter* had been adopted precisely to “remedy the perceived defects” of Quebec’s language policy.<sup>68</sup> The remedial nature of section 23 was made clear by the use of terminology and criteria similar to those used in *Bill 101*. Consequently, the Court reasoned that the *Charter*’s framers could not possibly have believed that the defects in Quebec’s language policy could be justifiable within the ambit of section 1. Furthermore, the Court noted that the *Charter*’s framers had Quebec’s immigration concerns in mind when they exempted the Province from having to comply with the mother tongue clause of section 23(1)(a).

Enrolment in publicly funded English schools in Quebec did not increase significantly following the decision in *Quebec Protestant School Boards*. A year before the Court’s decision, the Quebec National Assembly had already amended *Bill 101* in response to the lower courts’ unfavourable rulings in the case. The purpose of the amending legislation, *An Act to amend the Charter of the French language*<sup>69</sup> (*Bill 57*), was to consolidate the special status and rights of the Quebec Anglophone community. *Bill 57* widened the admission criteria for English instruction with the introduction of what is known as the “major part” requirement.<sup>70</sup> The new law provided that children whose parents had received the “major part” of their primary education in English in Quebec would have access

67. [1984] 2 SCR 66, 10 DLR (4th) 321 [*Quebec Protestant School Boards* cited to SCR].

68. *Ibid* at 79.

69. SQ 1983, c 56, amending *Bill 101*, *supra* note 30 [*Bill 57*].

70. *Bill 57*, *supra* note 69, ss 15, 20, amending *Bill 101*, *supra* note 30, ss 73(a)-(b), 86.1(a).

to public English instruction.<sup>71</sup> Prior to this amendment, the governmental admissibility bureau had interpreted the Quebec clause as guaranteeing access to English schools only for children whose parents had received the “totality” of their primary instruction in English in Quebec, whereas the appeal commission had applied the “major part” requirement.<sup>72</sup> The Quebec government decided to resolve the conflict in favour of the Anglophone community, which wished to increase eligibility for English schooling.<sup>73</sup>

Furthermore, *Bill 57* accepted the Canada clause but imposed two limitations on it.<sup>74</sup> Since the enactment of *Bill 101*, the Quebec government had consistently issued certificates of exemption allowing Canadians who had received their education in English outside of Quebec to send their children to publicly funded English schools, thereby informally enforcing the Canada clause.<sup>75</sup> *Bill 57* legalized this practice, but kept it discretionary as opposed to a guaranteed objective right.<sup>76</sup> *Bill 57* also added the requirement that to qualify for exemption, parents must have received their English instruction in a province that offered instruction to Francophones that was similar to the minority-language instruction offered to Anglophones in Quebec.<sup>77</sup> At the time, most Canadian provinces had underdeveloped educational systems for Francophone minorities<sup>78</sup> and only New Brunswick was deemed to provide adequate minority language education.<sup>79</sup> Although in theory *Bill 57* allowed the Quebec government to refuse public English instruction to the children of out-of-province Anglophone Canadians, more importantly, it allowed the Quebec government to pressure

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71. *Bill 57*, *supra* note 69, s 15, amending *Bill 101*, *supra* note 30, s 73(a).

72. Quebec, National Assembly, *Journal des débats*, 32nd Leg, 4th Sess, vol 27, No 199 (13 December 1983) at B-10876 (Camille Laurin).

73. *Ibid.*

74. *Supra* note 69, s 20, amending *Bill 101*, *supra* note 30, s 86.1.

75. See Edward McWhinney, *Canada and the Constitution 1979-1982: Patriation and the Charter of Rights* (Toronto: University of Toronto Press, 1982) at 96.

76. *Supra* note 69, s 20, amending *Bill 101*, *supra* note 30, s 86.1.

77. *Ibid.*

78. Michael D Behiels, *Canada's Francophone Minority Communities: Constitutional Renewal and the Winning of School Governance* (Montreal: McGill-Queen's University Press, 2004).

79. *Order in Council respecting the application of section 86.1 of the Charter of the French language to English-speaking persons from New Brunswick*, CQLR c C-11, r 2.

other Canadian provinces to develop better services for Francophones outside Quebec.<sup>80</sup>

Finally, *Bill 57* attempted to immunize *Bill 101* from future legal challenges by amending it to include a standard override provision.<sup>81</sup> However, the notwithstanding clause could not be invoked by the Quebec government in *Quebec Protestant School Boards* since section 23 of the *Charter* is shielded from its prerogative. The clause would later be used, however, in response to cases pertaining to freedom of expression.

#### A. *FORD V QUEBEC (ATTORNEY GENERAL) (1988) AND DEVINE V QUEBEC (ATTORNEY GENERAL) (1988)*

*Bill 101*'s legislative scheme pertaining to the language of commerce and business was challenged before the Court in *Ford v Quebec (Attorney General)*<sup>82</sup> and *Devine v Quebec (Attorney General)*.<sup>83</sup> In *Ford*, the Court found that sections 58 and 69 of *Bill 101* violated the freedom of expression guaranteed by section 2(b) of the *Charter*.<sup>84</sup> Section 58 required all public signs and posters, along with commercial advertising, to be solely in French.<sup>85</sup> Section 69 required firms in the province to use only the French versions of their names.<sup>86</sup> In *Devine*, the Court ruled that sections 59–61 of *Bill 101*,<sup>87</sup> which created exceptions to section 58, were of

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80. In 1977, at the Annual Premiers' Conference in St. Andrews, New Brunswick, Quebec Premier René Lévesque claimed that he was willing to implement the Canada clause formally if the English-speaking provinces would reciprocate by guaranteeing to Francophone minorities access to French schooling. See McWhinney, *supra* note 75 at 51; Proulx, *supra* note 56 at 124.

81. *Supra* note 30, s 52.

82. [1988] 2 SCR 712, 54 DLR (4th) 577 [*Ford* cited to SCR].

83. [1988] 2 SCR 790, 55 DLR (4th) 641 [*Devine*].

84. *Supra* note 82.

85. *Supra* note 30, s 58.

86. *Ibid*, s 69.

87. *Ibid*, ss 59-61. Sections 60 and 61 of the *Charter of the French language* were repealed in 1988 and 1993, respectively. See *An Act to amend the Charter of the French language*, SQ 1988, c 54, ss 3-4, amending *Bill 101*, *supra* note 30, ss 60-61 [*Bill 178*]; *Bill 86*, *supra* note 40, ss 59-61 read:

59. Section 58 does not apply to advertising carried in news media that publish in a language other than French, or to messages of a religious, political, ideological or humanitarian nature if not for a profit motive.

60. Firms employing not over four persons including the employer may erect signs and posters in both French and another language in their establishments. However, the inscriptions in French must be given at least as prominent display as those in the other language.

no force or effect since they were connected to the general rule found in section 58.<sup>88</sup> The only provisions of *Bill 101* to have escaped judicial invalidation under the *Charter* were sections 52<sup>89</sup> and 57,<sup>90</sup> which survived because they permitted the use of French together with another language when read with section 89.<sup>91</sup> In addition, the Court declared that the standard override provision that had been adopted previously only partially protected *Bill 101* from the application of section 2(b) of the *Charter*.<sup>92</sup>

In *Ford*, the Court found that the constitutional freedom of expression included “the freedom to express oneself in the language of one’s choice”.<sup>93</sup>

Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one’s choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality.<sup>94</sup>

Freedom of expression was also extended to commercial expression. In *RWDSU v Dolphin Delivery Ltd.*,<sup>95</sup> the Court had already established that freedom of expression extends beyond political expression. Adopting a purposive approach in *Ford*, the Court held that commercial expression plays a key role in a free and democratic society, “enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy.”<sup>96</sup> So, although freedom of expression can generally be justified according to the benefits it confers on the speaker, its extension to commercial expression was justified by the benefits it confers on listeners.

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61. Signs and posters respecting the cultural activities of a particular ethnic group in any way may be in both French and the language of that ethnic group.

88. *Supra* note 83.

89. *Supra* note 30, s 53. Section 53 reads: “Catalogues, brochures, folders and similar publications must be drawn up in French.”

90. *Ibid*, s 57. Section 57 reads: “Application forms for employment, order forms, invoices, receipts and quittances shall be drawn up in French.”

91. *Ibid*, s 89. Section 89 reads: “Where this Act does not require the use of the official language exclusively, the official language and another language may be used together.”

92. *Devine*, *supra* note 83.

93. *Supra* note 82 at 748-49.

94. *Ibid*.

95. [1986] 2 SCR 573, 9 BCLR (2d) 273.

96. *Supra* note 82 at 767.

The Attorney General of Quebec saw the extension of freedom of expression to include commercial expression as problematic for multiple reasons.<sup>97</sup> First, he argued that since freedom of expression was listed under “fundamental” freedoms in the *Charter*, it only protected fundamental forms of expression, but commercial expression was not considered fundamental. He also criticized the Court’s interpretation of freedom of expression for recognizing a de facto economic right that the framers of the *Charter* did not intend. Furthermore, the Attorney General of Quebec contended that there were no grounds to extend constitutional protection to commercial advertising in particular, since its main goal is to condition economic choices rather than to inform them. Finally, he argued that the American experience has shown that even a limited recognition of the right to commercial expression requires policy evaluation, which is a prerogative of the parliament, not of the courts.

In *Ford*, the real test was in deciding whether *Bill 101*’s violation of section 2(b) of the *Charter* constituted a reasonable limit in accordance with section 1. Following the *Oakes* test, the Court agreed that *Bill 101*’s stated objective to protect the quality and influence of the French language was serious and legitimate due to the language’s endangered status in the province:

The causal factors for the threatened position of the French language that have generally been identified are: (a) the declining birth rate of Quebec francophones resulting in a decline in the Quebec francophone proportion of the Canadian population as a whole; (b) the decline of the francophone population outside Quebec as a result of assimilation; (c) the greater rate of assimilation of immigrants to Quebec by the anglophone community of Quebec; and (d) the continuing dominance of English at the higher levels of the economic sector. These factors have favoured the use of the English language despite the predominance in Quebec of a francophone population. Thus, in the period prior to the enactment of the legislation at issue, the “*visage linguistique*” of Quebec often gave the impression that English had become as significant as French. This “*visage linguistique*” reinforced the concern among francophones that English was gaining in importance, that the French language was threatened and that it would ultimately disappear. It strongly suggested to young and ambitious francophones that the language of success was almost exclusively English. It confirmed to anglophones that there was no great need to learn the majority language. And it suggested to immigrants that the prudent course lay in joining the anglophone community.<sup>98</sup>

The Court also recognized that taking measures such as signage regulations to protect Quebec’s *visage linguistique* (linguistic face) were necessary to ensure the

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97. *Ibid* at 762-63.

98. *Ford*, *supra* note 82 at 778 [emphasis in original].

predominance of the French language in the province. However, it determined that the exclusive use of French in commercial advertising was neither a necessary nor a proportionate means to achieve the law's objective. The Court explained that the Quebec government could have made the use of other languages conditional on the presence of French or required that French be accorded greater visibility than other languages.

While the blanket override provision in *Bill 62* had already expired when the *Ford* and *Devine* cases reached the Court,<sup>99</sup> the one contained in *Bill 57* had not. After ruling on the validity of the standard override provision in *Bill 57*, the Court held that sections 52 and 58 of *Bill 101* were saved but not sections 57, 59-61 and 69, to which the override did not apply. But the Court nevertheless invalidated all these provisions because it found that they infringed the freedom of expression guaranteed by section 3 of Quebec's *Charter of human rights and freedoms*<sup>100</sup> (*Quebec Charter*). *Ford* and *Devine* thus suggest that the *Quebec Charter*, without having a formal constitutional status, could prevent Quebec from protecting its common language and collective culture due to the individualistic nature of some of its rights provisions.

While *Ford* and *Devine* signified an advancement of the individual freedom of expression for all Quebecers, in reality they mostly benefitted the Anglophone minority, whose members brought the cases before the Court.<sup>101</sup> Although the judgments reduced the strength of *Bill 101*, they cannot be said to have shown a total disregard for its cultural objective.<sup>102</sup> In a fine act of rights-balancing, the Court was able simultaneously to uphold Quebec's self-government right to protect its *visage linguistique* and the Anglo-Quebecker community's group-differentiated right to function in its own language in its everyday life. However, the rights compromise reached by the Court did not fare well among nationalist French-Quebeckers, and even outraged many of them.<sup>103</sup>

99. Even though the blanket override contained in *Bill 62* was expired, the Court in *Ford* pronounced on the validity of its application in conformity with s 33 of the *Charter*. It was decided that, in general, s 33 allows only for prospective derogation and not for retrospective derogation of rights protected by the *Charter*. See *Ford*, *supra* note 82 at 744-45.

100. CQLR c C12, s 3 [*Quebec Charter*].

101. See *e.g.* Claude Jean Galipeau, "National Minorities, Rights and Signs: The Supreme Court and Language Legislation in Quebec" in Alain G Gagnon & A Brian Tanguay, eds, *Democracy with Justice: Essays in Honour of Khayyam Zev Paltiel* (Ottawa: Carleton University Press, 1992) 66.

102. David R Cameron & D Krikorian Jacqueline, "Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process" (2008) 58:4 UTLJ 389.

103. Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3d ed (Toronto: University of Toronto Press, 2004) at 145 [Russell, *Constitutional Odyssey*].

In response to *Ford* and *Devine*, Robert Bourassa, then Premier of Quebec, passed *Bill 178*.<sup>104</sup> This piece of legislation, referred to as the “inside-outside” law, allowed for bilingual advertisement inside commercial establishments, with the French language preserving a marked predominance, but required the exclusive use of French on all exterior commercial signs. Because the new law contradicted the verdicts given in *Ford* and *Devine*, the government of Quebec made use of the notwithstanding clause found in both the federal and provincial *Charters*. By enacting *Bill 178*, the Quebec government affirmed its self-government right in language policy matters. Although the Anglophone minority had made minor gains under *Bill 178*, the minority saw the law as a setback in terms of the rights the Court had granted to it. Ironically, the use of the legislative override backfired and created an uproar in the rest of Canada. It also led to the demise of the Meech Lake Accord, which would have recognized Quebec as a “distinct society,” and eventually put an end to the weakening of its language policy through constitutional litigation.<sup>105</sup>

Before the five-year derogation period expired, the Quebec National Assembly passed *Bill 86*,<sup>106</sup> which conformed to the *Ford* and *Devine* decisions by allowing bilingual interior and exterior commercial signs with a marked predominance of French.<sup>107</sup> *Bill 86* also amended *Bill 101* to recognize the Canada clause officially, irrespective of the quality of francophone minority instruction services in other Canadian provinces.<sup>108</sup> The amendment also extended the “major part” requirement to rights-holders under section 23(2) of the *Charter* by providing that “a child whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers and sisters of that child,” are eligible for publicly funded English schooling, “provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada.”<sup>109</sup> By not requiring that the “totality” of the education be received in the minority language, Quebec’s articulation of the “continuity of education” clause in the *Charter* widened the criteria of eligibility for public English instruction. Although aware of the risk of subterfuge, the government thought it unlikely that this modification would lead wealthy Francophone or Allophone Quebecers to send

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104. *Supra* note 87.

105. See e.g. Patrick J Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991).

106. *Supra* note 40.

107. *Ibid.*, s 18, amending *Bill 101*, *supra* note 30, s 58.

108. *Bill 86*, *supra* note 40, s 24, amending *Bill 101*, *supra* note 30, s 73(1).

109. *Bill 86*, *supra* note 40, s 24, amending *Bill 101*, *supra* note 30, s 73(2).

their children to an English school in nearby Ontario for the first year of their primary school in order to acquire an automatic right to publicly funded English instruction in Quebec.<sup>110</sup>

These policy amendments to *Bill 101* showed that Quebecers' mindset was changing and that a certain linguistic peace in the province was possible through compromise.<sup>111</sup> Even though the Quebec government had to make concessions to members of the Anglophone community, it retained the power to integrate immigrants into the public French culture, thereby ensuring the culture's preservation in the long term. In this sense, Quebec was able to continue to pursue its ideal of a multinational Canadian citizenship, albeit with reduced means.

### III. RECENT LANGUAGE RIGHTS JURISPRUDENCE: THE LEGAL ARMISTICE CHALLENGED

After more than a decade of legal armistice on Quebec's language front, *Bill 101* was once again challenged under the *Charter*. This time, however, it was not challenged by Quebec's historical Anglophone community but by individual members of the Francophone<sup>112</sup> and Allophone communities.<sup>113</sup> As will be discussed, these challenges have undermined Quebec's self-government rights and resulted in a more undifferentiated Canadian citizenship.

#### A. *GOSSELIN V QUEBEC* (2005)

In *Gosselin*, section 73 of *Bill 101* once again came under attack. This time, Francophone parents<sup>114</sup> who did not qualify as rights-holders under section 23 of the *Charter* claimed that section 73 discriminated against the majority of French-speaking children by refusing them access to publicly funded English instruction and by denying a general freedom of choice with regard to language of instruction in Quebec. The appellants contended that *Bill 101* violated the equality rights protected in the *Quebec Charter*. Although the Court dismissed the appeal under the *Quebec Charter*, it deemed it necessary to assess whether such a challenge

110. Quebec, National Assembly, *Journal des débats*, 34th Leg, 2nd Sess, No 26 (20 May 1993) at 957-80 (Claude Ryan).

111. José Woehrling, "La Charte de la langue française: les ajustements juridiques" in Michel Plourde & Pierre Georgeault, eds, *Le français au Québec: 400 ans d'histoire et de vie* (Saint-Laurent, Que: Fides, 2008) 354.

112. *Gosselin*, *supra* note 7; *Solski*, *supra* note 8.

113. *Solski*, *supra* note 8; *Nguyen*, *supra* note 9.

114. Out of the sixteen appellants in *Gosselin*, only two were not born in Quebec and did not receive their primary education in French. See *Gosselin*, *supra* note 7 at para 3.

should also be dismissed under the federal *Charter*. In a unanimous decision, the Court held that *Bill 101* did not infringe the equality rights protected in section 15 of the *Charter*.

Even though “maternal language” had been recognized as an analogous ground for discrimination under section 15 of the *Charter* by the Quebec Superior Court in *R c Entreprises WFH Ltée*,<sup>115</sup> the Court considered that what was at stake in *Gosselin* was not the content of section 15 but rather its relationship with the positive language guarantees given to minorities in section 23 of the *Charter* and section 73 of *Bill 101*. Similar to its decision in *Mahe v Alberta*,<sup>116</sup> the Court found that universal individual rights such as those found in section 15 of the *Charter* could not be invoked to nullify the special status given to the English and French groups protected by sections such as section 23. Furthermore, as in *Arsenault-Cameron v Prince Edward Island*,<sup>117</sup> the Court found that special treatment given to linguistic minorities pursuant to section 23 was not an exception to section 15, as it was not a violation of equality, but rather the application of substantive equality. The Court thus established that there is no hierarchy among constitutional rights and that the text of the *Charter* must be understood comprehensively.

The Court also held that the *Charter*’s framers did not intend the principle of freedom of choice with regard to language of instruction to be recognized within the ambit of section 23. The framers were concerned that giving members of the linguistic majority access to minority language schooling, especially outside Quebec, would transform minority language schools into “centres of assimilation,” where members of the majority would outnumber members of the minority.<sup>118</sup> In the Quebec context, the framers were additionally worried that such a policy would “operate to undermine the desire of the majority to protect and enhance French as the majority language in Quebec, knowing that it will remain the minority language in the broader context of Canada as a whole.”<sup>119</sup> Since section 73 of *Bill 101*, as amended in 1993, was the legislative articulation of the constitutional right found in section 23 of the *Charter*, the Court argued that it could not conflict with section 15 of the *Charter*.

*Gosselin* resulted in the preservation of the legislative status quo. Graham Fraser believes that the case demonstrates that the *Charter* is sensitive both to

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115. [2001] RJQ 2557 (available on CanLII).

116. [1990] 1 SCR 342, 68 DLR (4th) 69 [*Mahe* cited to SCR].

117. 2000 SCC 1, [2000] 1 SCR 3 [*Arsenault-Cameron*].

118. *Gosselin*, *supra* note 7 at para 31.

119. *Ibid.*

Quebec's desire to retain control over its education policy and to the right of linguistic minorities to thrive.<sup>120</sup> However, the Court justified its decision mainly on the basis that the impugned provision of *Bill 101* directly protected the group-differentiated rights of the members of the Anglophone community in Quebec and indirectly protected the group-differentiated rights of the members of Francophone communities outside Quebec, rather than the National Assembly's self-government right. While the *Gosselin* ruling went in favour of Quebec, one may ask whether the parallel jurisprudential treatment of Francophone and Anglophone linguistic minorities in Canada can undermine the vitality of French in Quebec in other instances.

#### B. *SOLSKI V QUEBEC* (2005)

Members of the linguistic French majority and of the Allophone community were more successful in challenging *Bill 101* under the *Charter* in *Solski*. At issue was the constitutionality of section 73(2) of *Bill 101*, which specifies that only children who have completed the "major part" of their education in English should have access to publicly funded education in English.<sup>121</sup> In the appellants' view, this provision violated section 23(2) of the *Charter*, which provides that "[c]itizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language."<sup>122</sup> In a unanimous decision, the Court concluded that section 73(2) of *Bill 101*, when properly interpreted, did not infringe the rights protected in section 23(2) of the *Charter* and determined that the appellants qualified for instruction in a publicly funded English school.

To determine whether a child had completed the "major part" of his or her education in English, the Quebec government simply calculated whether the child had spent more time in the English school system than in the French one. The authorities also applied the "major part" criterion disjunctively, considering the time spent at the elementary level separately from the time spent at the secondary level. In the Court's view, this strictly mathematical interpretation of the "major part" requirement was incompatible with the purpose of section 23(2) of the *Charter*. The Court stated that the framers of the *Charter* intended

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120. "Canadian Language Rights: Liberties, Claims, and the National Conversation" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 169.

121. *Supra* note 30, s 73(2).

122. *Supra* note 1, s 23(2).

this guarantee to “provide continuity of minority language education rights, to accommodate mobility and to ensure family unity.”<sup>123</sup> Indeed, section 23(2) does not specify the time that a child must spend in a minority language school system in order to benefit from the constitutional guarantee.

The Court found that section 23(2) requires that a child has a sufficient connection with the language of the minority—in other words, the child needs to have spent a “significant part” of his educational pathway in the language of the minority.<sup>124</sup> Furthermore, this connection must be assessed both subjectively and objectively. The Quebec government would need to ask: “Subjectively, do the circumstances show an intention to adopt the minority language as the language of instruction? Objectively, do the educational experiences and choices to date support such a connection?”<sup>125</sup> The Court thus preferred a qualitative evaluation of a student’s genuine commitment to minority language instruction that takes into account “the time spent in each program, at what stage of education the choice of language of instruction was made, what programs are or were available, and whether learning disabilities or other difficulties exist.”<sup>126</sup> Only by adopting such an approach would section 73(2) of *Bill 101* be considered constitutional.<sup>127</sup> The Quebec government’s compliance with the “significant part” approach was subsequently made official by regulation in 2010.<sup>128</sup>

*Solski* also tackled the question of whether immersion programs could be equated with minority language education for the purpose of section 23(2) of the *Charter*. The Quebec government had refused to give one of the appellants, Shanning Casimir, access to publicly funded English schooling in Quebec because she had attended a French immersion program in Ontario and was deemed not to have received the majority of her education in English. The Court reversed this decision, declaring that French immersion programs do not qualify as Francophone minority education. Casimir was thus found to be more connected to the Anglophone culture than to the Francophone culture:

Outside Quebec, immersion programs are designed to provide second language training to children attending schools designed for those adopting the language of

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123. *Solski*, *supra* note 8 at para 30.

124. *Ibid* at para 46.

125. *Ibid* at para 40.

126. *Ibid* at para 33.

127. *Contra* Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 56-30.

128. *Regulation respecting the criteria and weighting used to consider instruction in English received in a private educational institution not accredited for the purposes of subsidies*, CQLR c C-11, r 2.1 [*English Instruction Regulation*].

the majority. Immersion programs occur in a majority setting where the majority language is spoken in the corridors and during extra-curricular activities. Immersion programs are run in majority schools that are a part of the majority school system.<sup>129</sup>

The justices in *Solski* further specified that “[s]ection 23(2) in particular facilitates mobility and continuity of education in the minority language, though change of residence is not a condition for the exercise of the right.”<sup>130</sup> Two of the three appellant families whose children were deemed to qualify for publicly funded English instruction had not moved from a Canadian province to Quebec. The *Solski* family had moved from Poland to Quebec and had been granted permission to send its children to publicly funded English schools on the basis that the family’s stay in Quebec was to be temporary. The family later decided to settle permanently in Quebec and sought permanent eligibility to send its children to English public schools. In the case of the Lacroix family, one daughter had completed her first two years of primary education in a private French school but had opted to continue her education in an English private school.<sup>131</sup>

By adopting a broad and purposive approach to interpreting section 23(2), the Court determined that this constitutional guarantee was not only for members of the official linguistic minority as conventionally defined, but also for members of the Allophone community and the linguistic majority. Thus, the *Solski* Court was more concerned with the individual rights of all children to have continuous education than with protecting Quebec’s self-government right to promote French culture. Even before the decision in *Solski* was delivered, however, the Quebec government had adopted *An Act to amend the Charter of the French language*<sup>132</sup> (*Bill 104*), under which the children of the *Solski* and Lacroix families did not qualify for public English instruction. The constitutionality of these amendments would later be assessed by the Court in *Nguyen*.

### C. *NGUYEN V QUEBEC* (2009)

*Nguyen* is the final case in a series of legal challenges aimed at vindicating minority language education rights against Quebec’s legislative power. At issue in *Nguyen* was the constitutionality of paragraphs 2 and 3 of section 73 of *Bill 101*, which concern eligibility to attend publicly subsidized English schools in

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129. *Solski*, *supra* note 8 at para 50.

130. *Ibid* at para 33.

131. *Ibid* at paras 14, 16.

132. SQ 2002, c 28, amending *Bill 101*, *supra* note 30 [*Bill 104*].

Quebec. *Bill 104* added these provisions to *Bill 101* to counter the effects of so-called bridging schools: Parents whose children were not entitled to receive publicly funded education in English under section 23(1) of the *Charter* would enroll their children in unsubsidized English schools for a few weeks or months for the purpose of acquiring an automatic right to publicly funded English-language education pursuant to section 23(2). This trend was increasing at the turn of the present century, especially among members of the Allophone community. Paragraph 2 of section 73 establishes that time spent in an unsubsidized English school shall not be taken into account when determining whether a child, his siblings, or his descendants may have access to a publicly subsidized English school.<sup>133</sup> Paragraph 3 of section 73 applies the same rule to special cases where the province has authorized the child to receive schooling in English due to a serious learning disability, temporary residence in Quebec, or an exceptional family or humanitarian situation.<sup>134</sup> Due to the circumstantial character of these exemptions, the Quebec government did not want the siblings and descendants of children benefitting from them to have the constitutional right to attend public English school.<sup>135</sup>

In a unanimous judgment, the Court decided that paragraphs 2 and 3 of section 73 of *Bill 101* infringed section 23(2) of the *Charter*. The Court pointed out that this constitutional right does not specify whether the education received has to be private or public nor does it mention the type of authorization by which it must have been granted. On the contrary, the Court held that section 23(2) alludes to the fact that a child has received instruction in one of Canada's two official languages. As Justice Lebel wrote for the Court: "The inability to assess a child's educational pathway in its entirety in determining the extent of his or her educational language rights has the effect of truncating the child's reality by creating a fictitious educational pathway that cannot serve as a basis for a proper application of the constitutional guarantees."<sup>136</sup>

*Solski* had determined that eligibility for instruction in the language of the minority was conditional on the child's educational pathway being "genuine."<sup>137</sup> For the *Nguyen* Court, this meant that the evaluation of a child's pathway must be comprehensive but must also recognize cases in which attendance at a school

133. *Bill 101*, *supra* note 30, s 73(2).

134. *Ibid*, s 73(3), as repealed by *An Act to amend the Charter of the French language and other legislative provisions*, SQ 2010, c 23, s 1.

135. Quebec, National Assembly, *Journal des débats*, 36th Leg, 2nd Sess, vol 37, No 42 (31 May 2002) (Diane Lemieux).

136. *Nguyen*, *supra* note 9 at para 33.

137. *Supra* note 8 at para 28.

is used solely and artificially to acquire an educational minority language right. The judges acknowledged that a literal interpretation of section 23(2) might lead to a return to the principle of freedom of choice of the language of instruction in Quebec, which they did not consider to be the intent of the *Charter's* drafters.

Furthermore, the Court found that the impugned provisions of *Bill 101* did not withstand a section 1 analysis. While the objective of the law was found to be pressing and substantial, the means chosen were found to be excessive under the proportionality requirement of the *Oakes* test. In *Ford*, the Court had already recognized the importance for Quebec of protecting the French language and realized that bridging schools were compromising this objective. In *Nguyen*, however, the Court determined that paragraphs 2 and 3 of section 73 of *Bill 101* did not minimally impair the constitutional rights of the appellants. While the number of children who became eligible for publicly funded English education after having attended a privately funded English school was increasing, the overall number remained low in proportion to the number of children enrolled in the educational system. For that reason, Justice Lebel stated that “the absolute prohibition on considering an educational pathway in [an unsubsidized private school] seems overly drastic.”<sup>138</sup> The Court concluded that, in reality, its decision would not imply a return to freedom of choice, and that other solutions, such as the contextual approach referred to in *Solski*, were available to Quebec’s National Assembly to deal with the problem of bridging schools.

In addition, the Court found paragraph 3 to be incompatible with the principle of preserving family unity provided for in section 23(2) of the *Charter*. In the case at hand, one of the appellants was not able to secure eligibility for instruction in English for his son even though his daughter was attending a school in the publicly funded English system pursuant to a special authorization. The Court recognized that by granting certain children special authorizations to attend publicly funded English schools, the government was exceeding its constitutional obligations, but held that once it did so, it could not then limit the constitutional rights derived from such authorizations.

Just as in *Solski*, the right of eligibility for publicly funded English instruction for certain categories of individuals was promoted in *Nguyen* to the detriment of the self-government right of Quebec to protect the vitality of the French language. While the Court was careful to recognize that a child’s educational pathway must be genuine rather than artificial when determining eligibility for instruction in the minority language, in reality, the invalidation of paragraph 2 of section 73 granted individuals the economic right to buy their children and

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138. *Nguyen*, *supra* note 9 at para 42.

subsequent generations a legal status as a member of one of Canada's official linguistic minority communities. *Nguyen* therefore undeniably increased the possibility of language substitution to the benefit of the English language and took from the Quebec government a policy tool that would have been helpful in integrating newcomers into the French public culture.

Although some people, including the Leader of the Official Opposition, Pauline Marois, urged the government to invoke the notwithstanding clause in response to *Nguyen*, the government could not do so since the clause does not apply to section 23 of the *Charter*. Having no other option, Quebec was constrained to comply with the Court's judgment. In 2010, the Quebec government of Jean Charest consequently adopted *An Act following upon the court decisions on the language of instruction*<sup>139</sup> (*Bill 115*), which essentially complied with the *Solski* and *Nguyen* decisions by allowing the government to determine, by way of regulation, the analytic framework to be used in assessing eligibility for publicly funded English schools. The implementing regulations require consideration of time spent in an unsubsidized English school when assessing students' educational pathways.<sup>140</sup> Although *Bill 115* deems illegal the creation or operation of an educational establishment for the purpose of circumventing the principle of French instruction, the regulations provide that three years spent in an unsubsidized English school are sufficient to guarantee access to publicly funded English schools. In 2012, Parti Québécois leader Pauline Marois ran her successful election campaign on the promise to put an end to the bridging schools, but her government failed to propose legislation on the matter. This begs the question of whether or not Quebec has exhausted its legislative counterattacks to unfavourable judicial decisions in the area of language rights.

#### IV. ANALYSIS OF THE COURT'S CHARTER-BASED REVIEW OF *BILL 101*

An analysis of the Court's *Charter*-based review of *Bill 101* reveals that Quebec is increasingly losing relevance in the constitutional politics of language. In all its judgments, the Court unanimously secured the group-differentiated rights of the Anglophone minority and, increasingly, the rights of individual Allophones and Francophones, against the democratic will of the Quebec majority. Even in *Gosselin*, the outcome of which favoured the Quebec government, the main justification for the decision was the need to protect linguistic minorities rather

139. SQ 2010, c 23 [*Bill 115*].

140. *English Instruction Regulation*, *supra* note 128.

than French-Quebeckers' collective interest. This state of affairs can be attributed to three factors: the move towards an implacable parallel constitutionalism, a redefinition of official linguistic minority rights, and the exhaustion of legislative counterattacks.

#### A. THE MOVE TOWARDS AN IMPLACABLE PARALLEL CONSTITUTIONALISM

The Court's preference for the group-differentiated rights of the Anglo-Quebeckers can be explained by the constitutional parallelism approach that it has adopted with regard to the interpretation of minority language rights.<sup>141</sup> This approach consists of treating linguistic minorities equally regardless of their official spoken language. Section 23 of the *Charter* specifically refers to the protection of provincial linguistic minorities—namely Francophones outside Quebec and Anglophones in Quebec—not to the protection of French, which is a minority language in Canada as a whole. The latter would warrant an asymmetrical treatment of linguistic minorities that, in practice, would entail protecting the rights of Francophones outside Quebec and protecting the use of French in Quebec, even at the expense of limiting the rights of other linguistic minorities within that province. Although the legitimacy of constitutional parallelism can be justified by the wording and structure of the linguistic rights provisions of the *Charter*, the Court's reliance on this principle as a method of interpretation has become increasingly important. In interpreting minority language educational rights, the Court appears to have been concerned mainly with the situation of Francophones outside Quebec and how it might be affected by the jurisprudence on *Bill 101*, rather than with the fate of French in Quebec. To better understand the Court's approach, it is necessary to read recent jurisprudence in conjunction with other minority-language case law from outside Quebec, notably *Abbey v Essex County Board of Education*<sup>142</sup> and *Whittington v Saanich Sch Dist 63*.<sup>143</sup>

*Abbey* dealt with children living in Ontario who did not qualify for minority language education under section 23(1) of the *Charter*. Their mother, Susan Abbey, spoke English as her first language and had received her primary school education in English. Her eldest son, Nicholas, had nonetheless attended a

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141. See especially, Carolyn J Tuohy, *Policy and Politics in Canada: Institutionalized Ambivalence* (Philadelphia: Temple University Press, 1992); Claude Ryan, "L'impact de la *Charte canadienne des droits et libertés* sur les droits linguistiques au Québec" (2003) 63 R du B 543.

142. (1999), 42 OR (3d) 481; 169 DLR (4th) 451 [*Abbey* cited to OR].

143. (1987), 16 BCLR (2d) 255, 44 DLR (4th) 128 [*Whittington* cited to BCLR].

French minority school pursuant to the decision of an admissions committee.<sup>144</sup> Thanks to section 23(2) of the *Charter*, his siblings were also able to attend a French minority school. When the family moved from London, Ontario to Essex County, the local school board denied the children access to minority language instruction on the basis that they did not originally qualify for it under section 23(1) of the *Charter*. The Ontario Court of Appeal found in favour of the Abbey family, declaring that section 23(2) extends to parents who are not connected linguistically or culturally to the linguistic minority group of their province of residence. It also decided that the exercise of section 23(2) rights is not conditional on interprovincial migration. As Justice Abella explained:

For purposes of s. 23(2), it does not matter whether this prior language instruction originated in another province, another part of a province, or through the kind of admissions committee contemplated by the *Education Act*. However it originated, it is the fact of it having occurred which attracts the protection of s. 23(2).<sup>145</sup>

Justice Abella sympathized with Francophone minorities' desire to grow their ranks with individuals who may not initially have a cultural and linguistic connection to them.<sup>146</sup> She recognized that “[t]he more fluency there is in Canada’s official languages, the more opportunity there is for minority language groups to flourish in the community.”<sup>147</sup> By confirming the *Abbey* approach in *Solski* and *Nguyen*, albeit without explicitly referencing the decision, the Court showed its preference for the well-being of provincial minorities over provincial majorities. If it had ruled in favour of Quebec, it would have endangered the future vitality of Francophone minorities outside Quebec.

Increasing enrolment in minority language schools can be highly beneficial for Francophone minorities. It can help attain the numbers needed to extend the right to minority language instruction to new areas pursuant to section 23(3) of the *Charter*, and it can help to justify increased funding for existing educational facilities.<sup>148</sup> However, opening the doors of minority language schools to members of the linguistic majority can turn these schools into assimilation centres. The Court was therefore careful to strike a balance between increasing enrolment

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144. Ontarian minority language schools may admit students that do not qualify under s 23 of the *Charter*. See *Education Act*, RSO 1990, c E.2, s 289.

145. *Abbey*, *supra* note 142 at 488.

146. José Woehrling, “La contestation judiciaire de la politique linguistique du Québec en matière de langue d’enseignement” (2005) 44 *Revista de Llengua i Dret* 101 at 122 [Woehrling, “Contestation Judiciaire”].

147. *Abbey*, *supra* note 142 at 489.

148. Woehrling, “Contestation Judiciaire,” *supra* note 146 at 123.

and preventing assimilation. In *Gosselin*, the main justification for disallowing freedom of choice with regard to language of instruction in Quebec was the need to protect linguistic minorities. The idea that members of the Quebec Anglophone community would assimilate into the French majority if freedom of choice were sanctioned is, however, questionable considering the assimilating force of the English language in North America. Indeed, before *Bill 22*, when freedom of choice prevailed in Quebec, Anglophones were certainly not assimilated. The Court's concern for assimilation only makes sense in the context of Francophones outside Quebec. In fact, its decision in *Gosselin* refers directly to *Abbey* to support the argument that freedom of choice does not fall within the ambit of section 23 of the *Charter*.<sup>149</sup>

Although the Court's desire to prevent the assimilation of Francophone minorities did not work to Quebec's detriment in *Gosselin*, it did so in *Solski*. In that case, the justices specified that French immersion programs do not qualify as minority language education under section 23(2) of the *Charter*. By doing so, they implicitly confirmed the decision in *Whittington*.<sup>150</sup> In *Whittington*, parents whose children had received education in a French immersion program claimed the right to have all their children instructed in French-language minority schools. In its decision, the Supreme Court of British Columbia stated that a French immersion program cannot qualify as minority language education because "[i]n that programme French is taught as a second language, recognizing English as the primary or first language."<sup>151</sup> In *Solski* the Court corroborated this idea and added that an important "cultural element"<sup>152</sup> is involved in minority language education, as it had affirmed in *Mabe* when it declared that "minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where [members of] the minority community can meet and facilities which they can use to express their culture."<sup>153</sup> To recognize attendance in a French immersion program as a ticket to French minority language education would jeopardize the future cultural unity of Francophone minority schools. This reasoning resulted in the widening of the eligibility criteria for Anglophone minority schools in cases like that of Shanning Casimir, who had attended a French immersion school in Ontario prior to moving to Quebec.

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149. *Supra* note 7 at para 30.

150. *Supra* note 143.

151. *Ibid* at 266.

152. *Solski*, *supra* note 8 at para 50.

153. *Supra* note 116 at 363.

The use of the limitation clause in section 1 of the *Charter* has been identified as a way to transcend the symmetry associated with language rights by simultaneously supporting Francophone minorities outside of Quebec and promoting the French language within Quebec;<sup>154</sup> yet, constitutional parallelism has increasingly guided the Court's section 1 analysis. In earlier jurisprudence, the necessity of preserving Quebec's French culture was recognized under the limitation clause. In *Ford*, the requirement of unilingual French public signs could not be saved under section 1, but the justices allowed for the predominance of French in public signage due to Quebec's particular linguistic situation.<sup>155</sup> It is unlikely that such a decision would have been rendered outside Quebec, as there is simply no substantial and pressing need to mandate the use of English in public signage in other provinces.

In its more recent jurisprudence, the Court has recognized the need for a certain asymmetrical treatment of language rights, but to no avail. The Court established in *Solski* that, despite its uniform approach to linguistic rights, the socio-historical context of each province had to be taken into account when implementing those rights under section 1.<sup>156</sup> However, since the Court upheld the constitutionality of *Bill 101* by reading down section 73(2), it avoided subjecting Quebec's mathematical approach to the "major part" requirement to a section 1 analysis. This prevented Quebec from using the opportunity to justify a limitation of rights guaranteed by section 23(2) of the *Charter*. Finally, in *Nguyen*, the Court could have shown more concern for Quebec's unique context under section 1. The worrisome phenomenon of "bridging schools" has not been witnessed in the rest of Canada. Ultimately, the justices did not save the impugned provisions of *Bill 104* under section 1, even though there was interpretative space for such a constitutional reading; the proportionality requirement of the *Oakes* test seems to have been fatal to Quebec's claim of reasonably limiting language rights in this case.

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154. Michel Bastarache, "Asymmetrical Federalism and Official Languages" (Paper delivered at the McLachlin Court's First Decade: Reflections on the Past and Projections for the Future, Canadian Bar Association Conference, 19 June 2009), online: <[http://www.cba.org/cba/cle/PDF/Constit09\\_Bastarache\\_paper.pdf](http://www.cba.org/cba/cle/PDF/Constit09_Bastarache_paper.pdf)>; Woehrling, "Contestation Judiciaire," *supra* note 146.

155. *Supra* note 82 at 777-80.

156. *Supra* note 8 at para 21.

## B. A REDEFINITION OF OFFICIAL LINGUISTIC MINORITY RIGHTS

Official minority linguistic rights have been significantly redefined since the enactment of the *Charter*, to the detriment of Quebec. More specifically, the Court's jurisprudence has made way for the individualization of the education rights found in section 23 of the *Charter*. Originally, minority-language education rights were constitutionally enshrined to protect Canada's historic linguistic minorities.<sup>157</sup> Although former Prime Minister Pierre Elliott Trudeau had a clear preference for the adoption of the individual freedom of choice in education, he soon realized that it would not rally support in Quebec. Quebec was worried, for economic reasons, that such a principle would encourage members of the Francophone majority and Allophone minority to choose to have their children educated in English. Trudeau consequently opted for the protection of official language minority group rights, which was supported by the Liberal Party of Quebec. Trudeau's intention was made clear in a governmental statement explaining the nature of minority-language education rights in the 1980 constitutional package:

This constitutional right to choose would not apply to non-citizens, or to citizens who belong to the official language majority population of the province. Thus a province would remain free to place the children of immigrants in the majority language school system of the province and to require children who are members of the language majority of that province to receive their education in that language.<sup>158</sup>

As previously mentioned, Quebec was exempted from the application of the mother tongue clause in section 23(1)(a) of the *Charter* in order to protect its capacity to channel students into the French education system. The application of section 23 of the *Charter* in Quebec therefore principally targeted the historic Quebec Anglophone community. Most of the children who had a guaranteed right to publicly funded English instruction were those whose parents had received English instruction in Quebec and thus had strong roots in the historic Quebec Anglophone community. Section 23(1)(b) also gave access to publicly funded English schools to those children whose parents had received English instruction in the rest of Canada. Although the latter group would have weaker roots in the historic Anglophone community, it would have strong roots in the Canadian Anglophone community. Its integration in Quebec's historic Anglophone community would be organic given the natural tie that binds the English-

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157. Proulx, *supra* note 56 at 146.

158. *The Canadian Constitution 1980: Explanation of a proposed Resolution respecting the Constitution of Canada* (Ottawa: Publications Canada, 1980) at 15.

speaking community outside Quebec to Anglophone Quebecers. Children without strong roots in the Quebec or Canadian Anglophone community could exceptionally gain access to publicly funded English instruction via section 23(2). This provision's initial draft, however, made continuity of education for linguistic minorities conditional on interprovincial migration.<sup>159</sup> It provided that Allophone or Francophone students who had attended English schools outside Quebec could subsequently attend publicly funded English schools in Quebec; but this provision did not apply to children who had spent time in Quebec's private English education system. Therefore, the integration of children into Quebec's historic Anglophone community pursuant to section 23(2) would also be organic, rather than deliberate and artificial.

The condition of interprovincial migration in section 23(2) was, however, removed from the final constitutional package of 1982, at the request of Liberal Senator Pietro Rizzuto and the National Congress of Italian-Canadians.<sup>160</sup> As enacted, the provision states that “[c]itizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.”<sup>161</sup> In demanding this change, the Italian community was pursuing two objectives.<sup>162</sup> First, it wanted to constitutionalize the acquired rights of Allophones in Quebec.<sup>163</sup> Paragraphs *c* and *d* of section 73 of *Bill 101* allowed Allophones who were enrolled in an English school at the time of the passage of *Bill 101* to maintain their enrolment, regardless of whether their parents had received English instruction in Quebec.<sup>164</sup> Second, the Italian community wanted to normalize the situation of approximately 1,500

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159. *The Canadian Constitution 1980: Proposed Resolution respecting the Constitution of Canada* (Ottawa: Publications Canada, 1980) at 22. Section 23(2) of the *Proposed Resolution respecting the Constitution of Canada* reads as follows:

Where a citizen of Canada changes residence from one province to another and, prior to the change, any child of that citizen has been receiving his or her primary or secondary school instruction in either English or French, that citizen has the right to have any or all of his or her children receive their primary and secondary school instruction in that same language if the number of children of citizens resident in the area of the province to which the citizen has moved, who have a right recognized by this section, is sufficient to warrant the provision out of public funds of minority language educational facilities in that area. Redefinition of Official Linguistic Minority Rights

160. Proulx, *supra* note 56 at 155.

161. *Charter*, *supra* note 1, s 23(2).

162. Proulx, *supra* note 56 at 155-57.

163. *Ibid* at 155.

164. *Supra* note 30, ss 73(c)-(d), as re-enacted by *Bill 86*, *supra* note 40, s 24.

students, mostly of Italian origin, who were receiving public English instruction in Quebec illegally since the enactment of *Bill 101*.<sup>165</sup> Ironically, the modification of section 23(2) demanded by the Italian community was never able to solve the problem of illegal instruction in Quebec.<sup>166</sup> This problem was addressed separately in 1986 with the adoption of *An Act respecting the eligibility of certain children for instruction in English*<sup>167</sup> (*Bill 58*).

As rewritten, section 23(2) opened the door for children to acquire a constitutional right to attend public minority language schools after having spent a certain period of time in an unsubsidized private minority language school, thereby legalizing the concept of “bridging schools.”<sup>168</sup> No available documentation, however, shows that the *Charter* drafters and the Italian community considered this legal stratagem at the time.<sup>169</sup> While the goal of the change was to ensure the constitutional protection of the acquired rights of Allophones in Quebec,<sup>170</sup> the seeds of the present individualization of minority-language education rights had been planted.

Although the rights conferred by section 23 of the *Charter* are couched in individualist terms,<sup>171</sup> they were initially given a collective meaning in the jurisprudence. In *Mabe*, the Court determined that section 23 had two general underlying goals: first, the preservation and development of the cultures of official language minorities, and second, the correction of past injustices endured by official language minorities.<sup>172</sup> As Chief Justice Dickson wrote, “Section 23 confers upon a *group* a right which places positive obligations on government to alter or develop major institutional structures.”<sup>173</sup> The constitutional objective pursued by minority-language education rights informed both subsequent Supreme Court of Canada decisions beyond Quebec’s section 23(1) jurisprudence<sup>174</sup> and

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165. Proulx, *supra* note 56 at 156.

166. *Ibid.*

167. SQ 1986, c 46 [*Bill 58*].

168. Proulx, *supra* note 56 at 156.

169. *Ibid.*

170. *Ibid* at 156-57.

171. See Monahan, *Politics*, *supra* note 3 at 112. The exception to this assessment is s 23(3)(b), which posits that the rights contained in ss 23(1)-(2) apply only “where the number[s] ... so warrants,” meaning that minority language education services will only be provided where there exists a significant minority language community. See *Charter*, *supra* note 1, s 23(3)(b).

172. *Supra* note 116.

173. *Ibid* at 365 [emphasis added].

174. *Reference Re Public Schools Act* (Man), s 79(3), (4) and (7), [1993] 1 SCR 839, 100 DLR (4th) 723 [*Public Schools Act (Man)* cited to SCR]; *Arsenault-Cameron*, *supra* note 117.

the decisions of lower courts beyond Quebec's section 23(2) jurisprudence.<sup>175</sup> Quebec had no problem guaranteeing its historic Anglophone community collective group rights. Section 23 extended to Francophones outside Quebec rights somewhat similar to those Anglo-Quebeckers already enjoyed under *Bill 101*. However, the recognition in *Solski* and *Nguyen* of purely individual rights under section 23 was seen by Quebec as more problematic.

In *Solski*, the Court changed its interpretation of section 23 rights by asserting that they were primarily individualistic in nature:

Section 23 is clearly meant to protect and preserve both official languages and the cultures they embrace throughout Canada; its application will of necessity affect the future of minority language communities. Section 23 rights are in that sense collective rights. The conditions for their application reflect this (*Doucet-Boudreau*, at para. 28): implementation depends on numbers of qualified pupils (*Mabe*, at pp. 366-67; *Reference re Public Schools Act (Man.)*, at p. 850; *Arsenault-Cameron*, at para. 32). Nevertheless, these rights are not primarily described as collective rights, even though they presuppose that a language community is present to benefit from their exercise. A close attention to the formulation of s. 23 reveals individual rights in favour of persons belonging to specific categories of rights holders.<sup>176</sup>

In this passage, the Court limited the collective aspect of section 23 to subsection (3), which deals with the number of minority language students needed to warrant the establishment of minority language education infrastructure. The characterization of subsections 23(1) and (2) as strictly individualistic is a new phenomenon.<sup>177</sup> The reasons given in *Solski* and *Nguyen* in favour of the right of Allophone and Francophone Quebeckers to instruction in the language of the minority differed greatly, in some circumstances, from those given earlier to defend the same right for Francophones outside Quebec. In *Solski*, the Court asserted that the reason for the "continuity of language instruction" clause found in section 23(2) was to reward an individual's "genuine commitment to a minority language education,"<sup>178</sup> rather than to protect the Anglo-Quebecker

175. *Abbey*, *supra* note 142.

176. *Supra* note 8 at para 23 [emphasis added].

177. *Contra* Gruben, *supra* note 51 at 117-19. Nicolas M Rouleau believes that *Solski* depicts ss 23(1)-(2) as simultaneously individual and collective: "The right [in s 23] is 'individual' because it allows individual members of the minority to fulfil their personal aspirations within the context of their own language. The right is 'collective' because it intends to promote the development of minority-language communities throughout Canada ... ." See Nicolas M Rouleau, "Section 23 of the Charter: Minority-Language Education Rights" in Joseph Eliot Magnet, *Official Languages of Canada: New Essays* (Markham, Ont: LexisNexis Canada, 2008) 261 at 292-93 [footnotes omitted].

178. *Supra* note 8 at para 28.

community.<sup>179</sup> Furthermore, granting eligibility for publicly funded English instruction to children of Allophones and Francophones in Quebec does not counter the assimilation of the Anglo-Quebecker community nor does it redress past linguistic injustices, except for not being able to recruit new members. Rather, it precludes Quebec from using a powerful policy tool for the survival of its French public culture.

### C. THE EXHAUSTION OF LEGISLATIVE COUNTERATTACKS

Since the enactment of the *Charter*, Quebec's National Assembly has been increasingly unsuccessful at counteracting the effects of the Court's jurisprudence on *Bill 101* in order to protect and promote the French language in Quebec. To start, Quebec has not been able to rely on the notwithstanding clause. Because the provincial language policy was predominantly challenged under section 23, the establishment of a rights violation by the judiciary could not be overturned constitutionally via the notwithstanding clause. In *Ford*, the only case in which the notwithstanding clause was available, its use was found to be politically unviable in the long run. The unavailability of the notwithstanding clause has forced the Quebec government to show legislative ingenuity in its pursuit of linguistic goals, especially in the area of education.

As soon as the Canada clause was adopted in 1982, the Quebec government understood that the Quebec clause would not withstand a constitutional challenge. Even before the Quebec clause was struck down in *Quebec Protestant School Boards*, the government of René Lévesque made the application of the Canada clause conditional on the implementation of minority language education infrastructure in other provinces.<sup>180</sup> If the government was not able to safeguard the Quebec clause, it wished to promote the vitality of French in other parts of the country. Eventually, the Court invalidated this controversial *Bill 101* provision, which in any event lacked cross-party consensus in the National Assembly. This legal defeat was somewhat easy for the Parti Québécois to swallow, as Quebec maintained the capacity to successfully integrate Allophones into French public culture.

The successive addition of the "major part" requirement to sections 73(1)<sup>181</sup> and 73(2)<sup>182</sup> of *Bill 101* also helped Quebec in its quest to francize Allophones.

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179. Henri Brun, "La Cour suprême du Canada et le droit à l'école publique anglaise au Québec" (2006) 1 Bull québécois de droit constitutionnel 18 at 21; *Brouillet*, *supra* note 43 at 378.

180. *Bill 101*, *supra* note 30, s 86.1.

181. *Ibid*, s 73(1).

182. *Ibid*, s 73(2).

Although it was initially adopted with a view to widening the eligibility criteria for publicly funded English schools for Anglophones, it also had the effect of guaranteeing that those eligible for publicly funded English schools would have a sufficient connection to the English minority, whether through their own education or that of their siblings or parents. Although this legal measure was read down in *Solski* with the imposition of the “significant part” requirement, Quebec’s goal of preventing members of the Francophone majority and Allophone minority from artificially gaining access to publicly funded English schools was maintained. Thanks to the earlier introduction of *Bill 104*, time spent in an unsubsidized English school would not be taken into account when determining eligibility for publicly funded English schools. *Bill 104* also provided that both the time spent at the elementary level and the secondary level would be considered when applying the “major part” requirement.

When the Court in *Nguyen* invalidated the new measures introduced by *Bill 104*, it removed an important policy tool for the Quebec government to ensure the integration of newcomers into French public culture. Quebec’s Ministry of Education, Recreation and Sport revealed that the number of children eligible for publicly funded English education on the basis of their attendance at an unsubsidized English school increased from 628 in 1998 to 1379 in 2002.<sup>183</sup> According to demographer Robert Maheu’s conservative estimate, this number would have reached 11,000 in 2009, which amounts to 10 per cent of the total population of public English schools in Quebec.<sup>184</sup> These figures are more worrisome than those to which the Court referred in *Nguyen*.<sup>185</sup> Although *Bill 115* prohibits bridging schools, it nevertheless allows members of the Francophone majority and Allophone minority to buy their children and their descendants a right to

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183. Robert Maheu, Address (Lecture delivered at Table ronde 2009: Le jugement de la Cour suprême sur la loi 104, 11 November 2009), online: The Institute for Research on French in America <[http://irfa.ca/table2009\\_1.html](http://irfa.ca/table2009_1.html)>.

184. *Ibid.*

185. *Supra* note 9 at para 42. In *Nguyen*, LeBel J stated that:

For example, in the 20012 school year, according to statistics provided by the Ministère de l’Éducation for the entire province of Quebec, just over 2,100 students enrolled in English-language UPSs at the preschool, elementary and secondary levels throughout Quebec did not have certificates of eligibility for instruction in English (A.R., at p. 1605). Thus, before *Bill 104* came into force, the time they spent in these institutions could have qualified them for a transfer to the publicly-funded Englishlanguage system. This represents just over 1.5 percent of the total number of students eligible for instruction in English that year (*Rapport sur l’évolution de la situation linguistique au Québec, 20022007*, at p. 82). This number has since increased. The number of students attending Englishlanguage UPSs who did not have certificates of eligibility exceeded 4,000 in the 20078 school year (A.R., at p. 1605).

publicly funded English schooling. This constitutional loophole will undeniably increase language substitution to the benefit of the English language in Quebec, especially among members of the Allophone minority, who run the risk of cutting all significant contact with the French language.<sup>186</sup> For most Allophones living in the Montreal metropolitan area, where English continues to be a greater assimilating force than French,<sup>187</sup> integration into the majority public culture is inextricably linked to their (or their children's) enrolment in French institutions.<sup>188</sup>

The analytical framework introduced in 2010 to determine eligibility to attend publicly funded English schools is likely to be legally challenged in the future.<sup>189</sup> The requirement of at least three years' attendance at an unsubsidized English school in order to gain access to a publicly funded English school

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186. For a different view, see James B Kelly, "Les limites de la mobilisation judiciaire: Alliance Québec, la *Charte de la langue française* et la *Charte canadienne des droits et libertés*" in François Rocher & Benoît Pelletier, eds, *Le nouvel ordre constitutionnel canadien: du rapatriement de 1982 à nos jours* (Quebec: Presses de l'Université du Québec, 2013) 205 at 227-30. Kelly argues that the 2010 regulations have made eligibility for public English instruction, after a stay in the English private system, more restrictive because of the extensive costs associated with attending private English school for three years and the discretionary nature of the eligibility granting process.
187. Groupe de travail ministériel pour un plan d'action en vue de promouvoir et de maintenir le caractère français de Montréal et d'assurer la vitalité et la qualité de la langue française au Québec, "Les défis de la langue française à Montréal et au Québec au XXI<sup>e</sup> siècle: constats et enjeux" (2000), online: Secrétariat à la politique linguistique <<http://www.spl.gouv.qc.ca/documentation/rapportsondagesstatistiques/lesdefisdelalangue/>>.
188. See e.g. Marie Mc Andrew, "La loi 101 en milieu scolaire: impacts et résultats" in Pierre Bouchard & Richard Y Bourhis, eds, *L'aménagement linguistique au Québec: 25 ans d'application de la Charte de la langue française, Revue d'aménagement linguistique* (Quebec: Publications du Québec, 2002) 69; Isabelle Beaulieu, "Le premier portrait des enfants de la loi 101" in Michel Venne, ed, *L'annuaire du Québec 2004* (Anjou, Que: Fides, 2003) 260; Alain Carpentier, "Tout est-il joué avant l'arrivée? Étude de facteurs associés à un usage prédominant du français ou de l'anglais chez les immigrants allophones arrivés au Québec adultes" (2004) at 42, online: Conseil supérieur de la langue française <<http://www.cslf.gouv.qc.ca/publications/pubf204/f204.pdf>>.
189. See Dean Ardron, "Amendments to the Quebec Charter of the French Language Constitutionally Invalid," Case Comment on *Nguyen v Quebec (Education, Recreation and Sport)*, (2010) 19:3 Educ & LJ 247; Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution* (Markham, Ont: LexisNexis Canada, 2013) at 709-10.

may be judicially reduced to a shorter period.<sup>190</sup> Under these circumstances, what legislative remedies are still available to Quebec to stop the expected turn towards an indirect freedom of choice in education? Two main solutions have been put forward to overcome this legal deadlock. First, some have argued that the application of *Bill 101* should be extended to unsubsidized schools.<sup>191</sup> In practice, this would mean that only those who qualify for minority language education under section 23 of the *Charter* would have the right to attend unsubsidized English schools in Quebec. Such a measure could easily be challenged in court on the basis that it violates the spirit of the minority-language education rights provision. The courts could rule that section 23 applies only to publicly funded schools. If *Bill 101* is to be a legislative articulation of this constitutional provision, however, it may not limit access to privately funded schools.

The second proposed solution is to amend the *Constitution Act, 1982*, through the bilateral amendment procedure in section 43,<sup>192</sup> either to recognize explicitly that time spent in an unsubsidized English school in Quebec will not

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190. The minimum would likely not fall under one year. In *Nguyen*, LeBel J declared that:

[I]t might be thought that an educational pathway of six months or one year spent at the start of elementary school in an institution established to serve as a bridge to the public education system would not be consistent with the purposes of s. 23(2) of the *Canadian Charter* and the interpretation given to that provision in *Solski*.

See *supra* note 9 at para 44.

191. Woehrling, "Contestation Judiciaire," *supra* note 121; Maheu, *supra* note 157; Daniel Proulx & Jean-Pierre Proulx, "Jugement sur la loi 104 - Imposer la loi 101 aux écoles privées non subventionnées," *Le Devoir* (11 November 2009) online: <<http://www.ledevoir.com/societe/education/274476/jugement-sur-la-loi-104-imposer-la-loi-101-aux-ecoles-privées-non-subventionnées>>; "Avis sur l'accès à l'école anglaise à la suite du jugement de la Cour suprême du 22 octobre 2009" *Conseil supérieur de la langue française* (2010) at 40-42, online: <<http://www.cslf.gouv.qc.ca/publications/avis204/a204.pdf>>.

192. *Supra* note 53, s 43. Section 43 reads as follows:

An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

(a) any alteration to boundaries between provinces, and

(b) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

open the door to public English schools,<sup>193</sup> or to enshrine an interpretative clause that recognizes Quebec's distinctiveness,<sup>194</sup> similar to the clauses proposed in the Meech Lake and Charlottetown Accords. Such a clause could protect *Bill 101* from future attacks. It is unlikely, however, that the federal government would support such an amendment, considering the history of constitutional negotiations in Canada. In that sense, Quebec appears to have exhausted its available legislative responses to effectively counteract the Court's *Charter* jurisprudence.

By repeatedly being forced to comply with the Court's judgments, Quebec has had to accept the protection of group-differentiated rights and, in some cases, purely individual rights, to the detriment of its self-government rights. Put simply, since the coming into force of the *Charter*, Quebec has not been able to stop the move towards an undifferentiated Canadian citizenship.

## V. CONCLUSION

By determining the content of linguistic rights, the courts, rather than governments, have become central in defining Canadian citizenship. By repeatedly ruling against Quebec in matters of language policy, the Court has denied the province its historical role in defining Canadian cultural citizenship. Quebec's political claims contributed to making Canada a federal state in 1867, and later to making it officially bilingual in 1969. Canada's new constitutional order has, however, made it more difficult for Quebec to further the multinational character of Canadian citizenship. Instead, Canada appears to be headed towards a more undifferentiated citizenship in which individual rights are favoured.

This phenomenon is not new. What is novel is the extent to which this individualization of Canadian citizenship is occurring. Pierre Elliott Trudeau's vision of an undifferentiated citizenship clearly had an impact on Canada, with the entrenchment of the *Charter* in 1982.<sup>195</sup> Early jurisprudence in the area of linguistic rights in Quebec constituted a first step in applying this new vision, in which Anglophones' group-differentiated rights, which are exercised individually, were promoted to the detriment of Quebec's self-government rights. Quebec

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193. See Charles-Emmanuel Côté & Guy Tremblay, "Un remède durable," *La Presse* (24 November 2009) A21; Guy Tremblay, "La portée élargie de la procédure bilatérale de modification de la Constitution du Canada" (2011) 41:2 RGD 417.

194. See Cameron & Jacqueline, *supra* note 102.

195. See Jenson, "Citizenship and Equity," *supra* note 64; Russell, "Political," *supra* note 6; Daniel M Weinstock, "The Moral Psychology of Federalism" in Jean-François Gaudreault-DesBiens & Fabien Gélinas, eds, *The States and Moods of Federalism: Governance, Identity and Methodology* (Cowansville, Que: Yvon Blais, 2005) 209.

nonetheless retained some policy tools with which to preserve its cultural distinctiveness by integrating immigrants into the French education system. Recent *Charter* jurisprudence has challenged these tools, however, by recognizing the purely individual right of Allophones and Francophones to access publicly funded English schools in Quebec in some circumstances, thereby increasing language substitution to the benefit of the English language. This change has marked an even bolder step towards an undifferentiated Canadian citizenship.

From a constitutional, jurisprudential, and normative perspective, however, Quebec has a justifiable claim to differential treatment.<sup>196</sup> To begin, Canada's constitutional edifice contains asymmetrical arrangements that give Quebec a de facto special status. Following the British Conquest, the *Quebec Act, 1774* restored the use of the *Civil Code* in private matters in Quebec,<sup>197</sup> making modern Quebec the only Canadian province with a civilian legal tradition. By establishing Canada's federal structure, the *Constitution Act, 1867* ensured that Quebec would be the only province with a Francophone majority. The *Constitution Act, 1867* also made Quebec the only province (for the time being) in which the use of French and English in the legislature and the courts is constitutionally protected.<sup>198</sup> Furthermore, Quebec is the only province to be exempted from the mother tongue clause in section 23 of the *Charter*.<sup>199</sup>

The recognition of differential treatment for Quebec also has a jurisprudential basis in the case of minority language education. Justice Giroux's minority opinion at the Quebec Court of Appeal in *Nguyen* made a compelling argument for why parts of *Bill 104* did not contravene section 23(2) of the *Charter*.<sup>200</sup> Justice Giroux refused to apply section 23(2) literally to grant a child the right to public minority language education after a short or significant stay in a private minority language school. Adopting a contextual approach, he argued that past judgments of the Court have established that the interpretation of section 23

196. See e.g. Benoît Pelletier, *Une certaine idée du Québec: Parcours d'un fédéraliste. De la réflexion à l'action* (Quebec: Presses de l'Université Laval, 2010) at 15-28; Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed (Cowansville, Que: Yvon Blais, 2008) at 890-91.

197. (UK), 14 Geo III, c 83.

198. The *Manitoba Act, 1870* later protected the use of the French and English languages in the province's legislature and courts. See *Manitoba Act, 1870* (UK) 33 Vict, c 3, reprinted in RSC 1985, App II, No 8. In 1982, ss 16-22 of the *Charter* gave French and English the status of official languages in the operations of the government of New Brunswick. See *Charter*, *supra* note 1, ss 16-22.

199. *Constitution Act, 1982*, *supra* note 53, s 59.

200. *HN c Québec (Ministre de l'Éducation)*, [2007] RJQ 2097 at paras 235-99 (available on CanLII), Giroux JA, dissenting.

should take into account the specific linguistic dynamic of each province<sup>201</sup> and accordingly allow for different solutions.<sup>202</sup> Furthermore, the Court has specifically noted that the linguistic concerns of the French majority in Quebec have a role to play in the interpretation of linguistic rights:

[R]ules to govern language rights ... also inevitably have an impact on how Quebec's French-speaking community perceives its future in Canada, ... and even more so in North America as a whole. To this picture must be added the serious difficulties resulting from the rate of assimilation of French-speaking minority groups outside Quebec, whose current language rights were acquired only recently, at considerable expense and with great difficulty. Thus in interpreting these rights, the courts have a responsibility to reconcile sometimes divergent interests and priorities, and to be sensitive to the future of each language community.<sup>203</sup>

Considering that Quebec was concerned with both the integration of newcomers and the growing phenomenon of “bridging schools,” Justice Giroux argued that section 23 of the *Charter* gave Quebec the necessary latitude to restrict access to English schools.

From a normative perspective, the substantive equality of French and English is better achieved through recognition of a special status for Quebec, rather than through the application of constitutional parallelism in matters of minority language education. According to Carolyn J. Tuohy, the legal parallel treatment of English and French in the jurisprudence on minority-language education rights originates from the myth of two founding nations.<sup>204</sup> However, constitutional parallelism does not reflect reality: the two “founding nations,” namely French Canadians and English Canadians, cannot be said to be on equal footing

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201. In *Public Schools Act* (Man), Lamer CJ noted that “different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province.” See *Public Schools Act* (Man), *supra* note 174 at 851; In *Solski*, the Court noted that “[t]he application of s. 23 is contextual. It must take into account the very real differences between the situations of the minority language community in Quebec and the minority language communities of the territories and the other provinces.” See *Solski*, *supra* note 8 at para 34.

202. In *Gosselin*, the Court noted that “[i]f the problems are different, the solutions will not necessarily be the same.” See *Gosselin*, *supra* note 7 at para 31.

203. *Solski*, *supra* note 8 at para 5.

204. *Supra* note 141.

in a demographic sense.<sup>205</sup> Furthermore, the precarious status of Francophone minorities outside Quebec does not compare to the special status that has been established for the Anglophone minority in Quebec. The latter can be qualified as a “dominant minority” due to its direct tie to the English majority in Canada.<sup>206</sup>

Interestingly, all the rights demanded by Francophones outside Quebec had already been granted to Anglo-Quebeckers before the enactment of the *Charter*. Quebec guaranteed its historical Anglophone minority access to publicly funded English instruction,<sup>207</sup> as well as management and control of its schools,<sup>208</sup> irrespective of whether the number of students warranted these rights in particular geographical areas. Furthermore, the rights claims to which the Court responded favourably in Quebec, to the dismay of the Francophone majority, would not have been issues in the rest of Canada, where Anglophones do not feel that the English language is threatened by language substitution to the benefit of French. Thus, only by promoting French inside and outside Quebec will the language have a chance to thrive in Canada.

In the end, Quebec’s prospects of finding a solution to its lack of special status are grim, should it decide to stay within the Canadian constitutional bosom. The reality of Canadian politics limits the possibility of amending the Constitution.<sup>209</sup> Today, constitutional modification is achieved mostly through rights-based judicial review, and to a lesser extent by the establishment of new conventions. Thus, as it stands, Quebec must accept that it has lost some relevance in the constitutional politics of language.

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205. Statistics Canada has reported that 56.9 per cent of Canadians have English as a mother tongue, while only 21.3 per cent of Canadians have French as a mother tongue. See Statistics Canada, *Population by mother tongue and age groups (total), percentage distribution (2011), for Canada, provinces and territories*, online: <<http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/lang/Pages/highlight.cfm?TabID=1&Lang=E&Asc=0&PRCode=01&OrderBy=1&View=2&tableID=401&queryID=1&Age=1>>.

206. José Woehrling, “Minority Cultural and Linguistic Rights and Equality Rights in the *Canadian Charter of Rights and Freedoms*” (1985) 31:1 McGill LJ 50.

207. *Bill 101*, *supra* note 30, s 73. Although *Bill 101* required protestant school boards to use French in their internal and external communications, this problem was remedied with the adoption of *Bill 58*. See *Bill 58*, *supra* note 167.

208. The Quebec Anglophone community has enjoyed control over its own education system since Confederation in 1867. See Garth Stevenson, *Community Besieged: The Anglophone Minority and the Politics of Quebec* (Montreal: McGill-Queen’s University Press, 1999) at 26.

209. See especially Allan C Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill-Queen’s University Press, 1992); Christopher P Manfredi & Michael Lusztig, “Why do Formal Amendments Fail? An Institutional Design Analysis” (1998) 50:3 World Pol 377; Russell, *Constitutional Odyssey*, *supra* note 102.

