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Education and Linguistic Security in the *Charter*

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The authors provide an interpretive framework for minority language education rights as guaranteed in section 23 of the *Canadian Charter of Rights and Freedoms*. They argue that the purpose of such rights is to protect linguistic security. Attending to that value and to the text of the *Charter*, they seek to explain the nature and ground of the limitation which confines application of the right to circumstances in which numbers warrant. In doing so, they critically discuss a number of judgments bearing on the content of the right, the relevance of cost in securing the right, and the appropriate judicial remedies for enforcing it.

Les auteurs tentent d'établir un cadre d'interprétation du droit à l'éducation dans la langue de la minorité garanti par l'article 23 de la *Charte canadienne des droits et libertés*. Selon eux, ces droits ont pour but la sûreté linguistique de la minorité. Considérant tant le but que le texte de ces dispositions de la *Charte* les auteurs tentent d'expliquer la nature et le fondement de la restriction qui stipule qu'on ne peut exercer ce droit que là où le nombre le justifie. Ils étudient et critiquent la jurisprudence en particulier en ce qui a trait au contenu de ce droit, à la pertinence de tenir compte des coûts et aux recours appropriés pour faire respecter ce droit.

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The Canadian constitution protects the use of minority languages in two distinct ways. General guarantees of freedom of expression, freedom of association, non-discrimination and natural justice create a regime of linguistic tolerance in which no language is a ground of social liability. Beyond these consequential protections, two language groups are protected directly. French and English-speaking citizens enjoy further rights, even where they are in the minority, to use their languages in some courts and legislatures, to have legislation enacted in their languages, to receive federal government services in those languages, and to have their children educated in their mother tongue. The educational rights in s. 23 of the Canadian *Charter of Rights and Freedoms*<sup>1</sup> are the concern of this article. They are perhaps the most important aspect of the Canadian regime of official languages, but have not yet been provided with a clear analytical and normative framework. Through a purposive analysis of the language rights provisions we seek to sketch the main elements of such an approach.

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<sup>1</sup>Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

In particular, we shall pay special attention to a feature of the education rights which is at once intuitively plausible and conceptually puzzling. They are subject to certain limitations with respect to numbers: the right of parents to have their children educated in the minority language applies only where numbers warrant. The numbers proviso is a plausible feature of such rights because no one thinks that the constitution does — or should — oblige provinces to set up a school system for the sake of a single child. It is puzzling, however, because most familiar human rights are not subject to a numbers constraint. It would be a very odd right to freedom of expression, for example, that applied only to large bodies of opinion. It is secured even for a single person. Why then are language rights, or at least some of them, different? We hope to illuminate this issue by appeal to the value of *linguistic security*, which we take to provide the best justification for language rights. It is uncontroversial<sup>2</sup> that the minority language education provisions of the *Charter* are remedial in character. It is our argument that those remedies should be understood to have the aim of promoting the linguistic security of official language minorities, and that some aspects of linguistic security involve collective goods whose benefits are only available in groups.

### I. The Value of Linguistic Security

Two mischievous notions about language rights have some currency in Canada. The first is that language rights are a mere product of political compromise and have no foundation in principle. The second contradicts the first. According to it, language rights are founded on the principle of survival: governments have a duty to ensure that minority languages continue into the future. These are not politically innocent notions, for each has implications for the way in which language rights should be interpreted and the weight they should be given. But they are both founded on mistakes.

The first confuses the *genesis* of constitutional rights with their *justification*. All rights entrenched in positive law have a particular form that attempts to make concrete certain abstract values which the law prizes. Every constitutional right thus marks a kind of compromise between competing interpretations of the values it protects; every one strikes some balance between legislative sovereignty and minority protections; every one can be protected only by a combination of non-interference and positive action on the part of government. Because these are features of all constitutional rights, they do not distinguish language rights from the rest and therefore provide no ground for interpreting them differently. That is why the Supreme Court of Canada, to whom this first mistake is due, has not been able to draw the proposed distinction between “compromise- and prin-

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<sup>2</sup>A.G. *Québec v. Québec Association of Protestant School Boards*, [1984] 2 S.C.R. 66.

ciple-based" rights in a consistent and persuasive way.<sup>3</sup> Such truth as there is in the idea amounts to this: the courts must give effect to the terms of a constitutional agreement without, under the guise of interpretation, amending them. That claim is as harmless as it is sound. It does nothing to show what those terms are, nor how courts should proceed when they are equivocal.<sup>4</sup> Thus, the claim that they originate in a compromise does not in fact justify the Court's recent policy of reading some language rights restrictively.

The second view, according to which minority language rights are rooted in the principle of survival,<sup>5</sup> makes a different error. It confuses the *justification* of a right with the likely *by-product* of its exercise. Minority languages are under threat from a variety of sources, but they die out for a common reason: they are abandoned by their speakers. Language rights aim to protect speakers from certain pressures to abandon their languages. When linguistic choices are made in a secure environment, roughly, one without unfair pressure to conform to majority practices, they will in fact typically lead to a higher rate of survival. Does it follow, then, that the aim of language rights is to protect the endangered species of the linguistic world?

We can test that hypothesis by considering some policies aimed at ensuring language survival. Suppose, for example, that one of the majority English provinces required all French speakers to send their children to French schools and denied them access to English instruction. Or suppose that by residential zoning it attempted to reduce exogamy among declining minorities. Set aside the question of whether these measures would violate other rights, and let us ask simply whether *as far as language goes*, they are aimed in the right direction. Could they be said to take at least one step towards justice? On reflection that seems dubious. The problem is not simply

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<sup>3</sup>Compare: *MacDonald v. Montreal (City of)*, [1986] 1 S.C.R. 460, 27 D.L.R. (4th) 321, 67 N.R. 1, 25 C.C.C. (3d) 481; *Société des Acadiens du Nouveau Brunswick Inc. v. Minority Language School Board No. 50*, [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406, 66 N.R. 173 [hereinafter *Société des Acadiens* cited to S.C.R.]; *Ford v. A.G. Quebec*, [1988] 2 S.C.R. 712 at 751, 54 D.L.R. (4th) 577 [hereinafter *Ford* cited to S.C.R.]. In *Ford*, the Supreme Court reinterprets *Société des Acadiens* as holding that the distinctive basis of language rights is that they impose positive duties on government. It is unclear whether this is meant to supplant or supplement the distinction drawn in the earlier cases between rights based on 'compromise' and those based on 'principle'.

<sup>4</sup>This argument is more fully made in our paper "Second-Class Rights?: Principle and Compromise in the Charter", forthcoming. For a brief statement of the position see L. Green, "Are Language Rights Fundamental?" (1987) 25 Osgoode Hall L.J. 639.

<sup>5</sup>This is, explicitly or implicitly, the view of most of the commentators on language rights in Canada. See for example, J.E. Magnet, "Collective Rights, Cultural Autonomy and the Canadian State" (1986) 32 McGill L.J. 170 at 184; André Braën, "Language Rights", at 21, Pierre Foucher, "Language Rights and Education", at 257, and Emmanuel Didier, "The Private Law of Language", at 327, all in Michel Bastarache, ed., *Language Rights in Canada*, (Montreal: Y. Blais, 1987).

that language rights and other liberties are here in conflict, but that moral rights to language use are *themselves* violated by the policies in question. Prohibiting the minorities from learning the majority language and banning minority-language instruction offend common principles: they attack linguistic security by creating unfair pressures to conform. These pressures do not become acceptable when they are inflicted on a minority within the minority community itself. Draconian measures to promote minority languages may evince a kind of concern for the health of the languages, but they do not give appropriate concern for the interests of their speakers.

That security and not survival is the root value is suggested by considering the importance of language. Apart from its instrumental value in communication, language is also an important marker of identity. Those who wish to use minority languages do so partly as an expression of belonging to and identifying with a community. But language use has this valuable expressive dimension only if rooted in a free and fair context. Those who are forced to use a particular language cannot be thought thereby to express their identity. That does not mean that language must be consciously chosen. Language is only partially a realm of free choice. Children have a mother tongue long before they develop the capacity for reflective and informed choice about ethnic identification, and parents typically transmit their mother tongues as a matter of course. But these normal processes of social development contribute value to their outcomes only in circumstances which are fair and unbiased. Thus, while facilitating minority language education and requiring it both promote the survival of minority languages, this equivalence in consequences does not establish an equivalence in aim. The point of language rights is to give speakers a secure environment in which to make choices about language use, and in which ethnic identification can have positive value.

The confusion of survival and security is easily made, for the conditions threatening security also make survival less likely. Evidence of assimilation and decline among the francophone minorities<sup>6</sup> made it clear that the lack of adequate protection in the 1867 constitution<sup>7</sup> had exacerbated their de-

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<sup>6</sup>This was first recognized by the francophone communities themselves when various provincial governments revoked the freedom that officially or *de facto* denominational schools had previously had to use French as the language of instruction. See Pierre Foucher, *Constitutional Language Rights of Official-Language Minorities in Canada* (Ottawa: Ministry of Supply and Services, 1985), for a survey of the history. See *Les héritiers de Lord Durham* (Ottawa: Fédération des francophones hors Québec, 1977), translated as *The Heirs of Lord Durham* (Ottawa: Burns and MacEachern, Ltd., 1978) for the views of La Fédération des Francophones hors Québec. See the *Report of the Royal Commission on Bilingualism and Biculturalism*, (Ottawa: Queen's Printer, 1968), especially Vol. 2, for the beginning of serious efforts at constitutional reform in this regard.

<sup>7</sup>*Constitution Act, 1867* (U.K.) 30 & 31 Vict., c. 3.

mographic fragility, and the desire to remedy this was a driving force of the language rights provisions. Nonetheless, the decline of the minorities is a symptom and not itself a disease. It is presumptive evidence that there is strong and potentially unfair social pressure to abandon their language. But this evidence is rebuttable. It is possible (though not probable under normal circumstances) that even in a completely secure environment, some members of minority language groups would still make free and informed decisions to integrate with a majority community. The need to identify with a community may be deeply rooted in human nature, but we know that there is nonetheless much flexibility regarding the community with which one identifies.

These considerations suggest that it is not the survival of languages but the security of their speakers that justifies language rights. To have linguistic security in the fullest sense is to have the opportunity, without serious impediments, to live a full life in a community of people who share one's language. This opportunity is taken for granted by those in linguistically homogeneous societies and by those who speak the majority language in multilingual societies. Through sheer numbers they enjoy *de facto* linguistic security without need for special legal protections. No doors are closed, and no aspects of human fulfillment are unavailable on account of language. Abandoning one's mother tongue (oneself or on behalf of one's children) is of course a conceivable option for them, but not one to which they are driven by force of social circumstance and not one which will even be considered in the normal course of life. It is otherwise for members of linguistic minorities.<sup>8</sup> Without special protections, minority language speakers are inevitably placed under strong pressures to abandon their mother tongue. Because of its central role in every aspect of human co-operation, people share a common interest in communicating with others. To be excluded from this is to be denied most of what is valued in life. The more restricted the existence available in one's mother tongue the more rational it becomes to take up the language that offers greater opportunities. This does not mean that the minority language speakers do not value their language or communities, any more than the decision of hold-up victims to part with their wallets means that they do not value their money. It means

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<sup>8</sup>Linguistic security is, of course, a universal good. This raises the question of why only *two* such communities should now enjoy the special protections of the official language regime. The point cannot be argued here, but it seems to us that the defense lies in the fact that the French and English are the nation's largest and most deeply established communities. If a sound argument can be made that other language groups also deserve special protections beyond what they now enjoy under the regime of linguistic tolerance, this would not weaken the claims of the French and English minorities. Moreover, one might have regional as well as national official languages. For convenience, however, our discussion is limited to the present official languages.

simply that there are some burdens that outweigh it, and some costs that it is unjust to expect them to bear.

Part of the environment that ensures linguistic security must be provided by the members of a particular language community themselves. Activities that require the participation of many people depend upon their choices converging. To the extent that linguistic security requires a social environment that includes such activities, the community is dependent upon its own efforts. The larger the community, the greater the range of options its members will have simply because it is more likely that there will be sufficient numbers with common interests. If a community is very small, much of this will not be feasible and could not be promoted without grave risk to other values. For example, it would be illegitimate for government to require minority language speakers to have more children to increase the size of their community, or to force non-native speakers of that language to participate in certain cultural activities to make their provision feasible. But provided there is at least a small core of willing native speakers, the government can act in ways that support and facilitate their ambitions.

This support takes two forms. First, a secure environment is partly established by those general rights which establish a regime of linguistic tolerance: freedom of expression, association, non-discrimination, *etc.* These ensure that one's language is not made a ground of liability. In the case of very small linguistic communities, there may be little more that can be done. But when groups have a standing and vitality of the French and English communities in Canada, governments have the capacity and duty to do more. They may provide for services, counteract unfair bias, and generally facilitate their activities in ways that will have tangible and beneficial consequences. These facilitative actions may intervene quite vigorously in the customary linguistic order, without threatening security in the way the compulsory measures discussed above would. The role of government in protecting linguistic security is thus easily explained. The familiar official language rights serve the interests of linguistic security by facilitating participation in activities under government control. Participation in political life involves communication with officials. A community that could not participate in the political life of its country would be severely handicapped, and, if participation must be on the majority's terms, then the incentive to assimilate is obvious. Similarly, the denial of government services, whether the court system or the kind of everyday help and advice that many government departments provide, turns the use of one's mother tongue into a handicap and sometimes even a source of shame. But, unlike ethnic groups, government has no mother tongue of its own. The choice of its working languages is a matter over which the government has complete control. Participation can therefore be guaranteed in one's own language

without sacrificing the legitimate interests of others. How does education fit into the emerging picture?

The system of education, particularly at the primary and secondary levels, makes major contributions to the security of one's linguistic environment. Provision for minority language education is a complex good with many different facets. For convenience, we distinguish two main aspects. There are powerful *individual benefits* of children being able to learn in their mother-tongue: it is easier to master other subjects when one knows the language and feels socially at ease in the class-room. It also opens doors to participation in one's community and fosters a positive attitude towards it. The absence of minority language education is quite obviously a powerful assimilative force. Children grow up with a grasp of their mother tongue which is inadequate for the kind of adult pursuits which require strong communication skills. In such circumstances it is hardly surprising that people abandon their first language and do not teach it to their children. Before long, such a community ceases to be viable and its language, if it persists at all, has merely folkloric status.

Education cannot however be fully understood as an individual good.<sup>9</sup> Minority language instruction benefits the linguistic group as well. It has *collective benefits* which flow from the language being a vehicle of instruction. For example, it provides and renews cultural capital. This is true at the level of both "high" and "popular" culture: the productive and appreciative capacities must be nurtured and trained through a comprehensive education. Musicians, writers, artists obviously depend on and draw on common cultural capital in representing and contesting the life of the community. But even folk and oral traditions, sporting culture, *etc.*, all draw on a stock of common forms and images. In modern societies this capital is largely controlled by the educational system.

Other direct collective benefits are more instrumental: the education system provides jobs for members of the minority community. There are also indirect collective benefits which flow from the existence and administration of minority-language instruction.<sup>10</sup> For one thing, a community

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<sup>9</sup>P. Foucher, *supra*, note 5, emphasizes the individual benefits to highlight the individual's standing to enforce the right. There is however no good reason to tie the nature of a right to the issue of who may sue for its protection. The primary beneficiaries of minority language education rights are children, but control over the right is normally exercised by their parents.

<sup>10</sup>See *Rapport de la Commission ministérielle sur l'Éducation secondaire en langue française/Report of the Ministerial Commission on French Language Secondary Education* (Toronto: Queen's Printer, 1972) at 13 (The Symons Report): "The school occupies a central role in the cultural life of the community. . . . The French language schools must truly be community schools and easily accessible to the general population of the linguistic group they exist to serve. . . ."

with public institutions will have greater visibility and status. More importantly, an educational facility such as a neighbourhood school is an important focus of social and cultural activities for the community, especially in smaller towns. And managing a school system by electing trustees, hiring teachers, setting policy, *etc.* are all important parts of the political life of such communities and contribute to their richness and vitality.

These are only some of the ways in which minority-language education enters the collective life of the community. Many of them exhibit interesting structural features. Some collective benefits are *public goods* in the economists' sense: none can be excluded from their benefits and they do not diminish with consumption. This is clearly the case with respect to the diffuse effects of a minority language education system on the security, status, and vitality of the community. And, where publicly funded education is the norm, it is true of educational options themselves: they become available to any parents who wish to take advantage of them.<sup>11</sup> Moreover, the existence of these schools makes the entire community more vital in diffuse ways which generate benefits even for those who do not directly participate in its activities. For example, the increased use of minority languages obviously increases the instrumental value of being able to speak them, and this benefit accrues to all.

But minority-language instruction has further collective benefits which, though excludable, are social and non-rival.<sup>12</sup> Where these flow from the inherent value of participating with others in some social activity, we call them *participatory goods*. A school plays a significant role in fostering human relationships, teaching co-operation, and imparting other social skills in a way that could not be achieved under a system of private individual tuition. Public education is the central means by which children are introduced to and can participate in the cultural traditions of their community. Management and control of an education system, similarly, provides a forum in which parents can exercise and develop skills of self-government. In all these ways, minority language education has a significant social role. Let us now see to what extent these abstract notions can illuminate one of the darker corners of the *Charter*.

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<sup>11</sup>We set aside the presence of some rivalness in consumption due to 'crowding' which in any case usually affects majority schools more than minority ones. For the general analytic framework see M. Peston, *Public Goods and the Public Sector* (London: Macmillan, 1972). On norm-dependent public goods see note 12, *infra*.

<sup>12</sup>See D. Réaume, "Individuals, Groups, and Rights to Public Goods" (1988) 38 U.T.L.J. 1.

## II. Rongh Equality of Instruction

The language rights provisions are quite complex. Section 23 does not simply announce that official language minorities have the right to education in their own language, in the way, for example, that s. 2 succinctly declares a right to freedom of expression. Rather, it provides to parents falling in certain precisely drawn categories,<sup>13</sup> a right to have their children receive "primary and secondary school instruction" in the minority language of the province, and limits the application of that right to areas where numbers warrant. But what does such "instruction" amount to? How should it be understood in light of its remedial purpose?

Generally speaking, the courts have endorsed the view that the right to minority language instruction means the right to minority first-language instruction that is of *roughly equal* quality to that of the majority,<sup>14</sup> thus interpreting "instruction" to mean education in which the minority language is the vehicle and not just the object of study. This is obviously the correct approach from the point of view of fostering linguistic security. The pressures to abandon one's language take the form of *comparative* incentives: the greater benefits of speaking one language rather than another. For that reason, the relative standing of the majority and minority educational systems bears on the success of the latter in fostering linguistic security. A

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<sup>13</sup>S. 23. (1): Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

<sup>14</sup>*Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 at 43, 10 D.L.R. (4th) 491 (Ont. C.A.) [hereinafter *Ontario Reference* cited to O.R.]; "The quality of education to be provided to the minority is to be on a basis of equality with the majority." See also: *Marchand v. Simcoe County Board of Education* (1986), 55 O.R. (2d) 638 at 660, 29 D.L.R. (4th) 596 (Ont. H.C.) [hereinafter *Marchand* cited to D.L.R.]; *Mahé v. The Queen in Right of Alberta* (1987), 80 A.R. 161 at 176, 180, 42 D.L.R. (4th) 514 (Alta C.A.) [hereinafter *Mahé* cited to D.L.R.] (leave to appeal granted by the Supreme Court of Canada, December 7, 1987); *Commission des Écoles Fransaskoises Inc. v. Saskatchewan*, [1988] 3 W.W.R. 354 at 360, 48 D.L.R. (4th) 315, 64 Sask. R. 123 (Sask. Q.B.) [hereinafter *Commission des École Fransaskoises* cited to W.W.R.]; *Reference Re Minority Language Educational Rights (P.E.I.)* (1988), 69 Nfld. & P.E.I.R. 236 at 256, 211 A.P.R. 236 (S.C.A.D.) [hereinafter *P.E.I. Reference* cited to Nfld. & P.E.I.R.]; *Lavoie v. Attorney General of Nova Scotia* (March 29, 1989) S.C.N.S.A.D., unreported, at 31.

substantially inferior system would do nothing to advance, and might even impair, the security of the group. First, for instrumental reasons, minority language parents will rarely sacrifice the quality of their children's education to its linguistic character. They may accept certain trade-offs in the range or nature of resources, but not a fundamental difference in quality. Second, an inferior system may express profound disregard for the status of minority-language citizens and would therefore be discriminatory. Education rights can improve the situation of the minority only if they offer a reasonably attractive option. For a variety of reasons, including especially the fact that the minority is always smaller than the majority, the options cannot be identical ones. Since nothing can change the general social matrix of a region so that all diffuse benefits are equalized as between minority and majority, the standard of equality is necessarily a rough one.<sup>15</sup> But to the extent that education can improve matters in such a situation, it should aim to do so by making the options as nearly equal as feasible with respect to both the quality and range of benefits that the education system provides.

Despite the apparent judicial acceptance of the idea of rough equality,<sup>16</sup> the courts have given little consideration to its nature. Apart from the obvious point that it does not require *identical* facilities to those enjoyed by the majority,<sup>17</sup> their comments have been confined to refusing to consider the equality provisions of s. 15 of the *Charter* as applicable to these cases.<sup>18</sup> The courts are perfectly correct to say that a requirement of equality flows from s. 23 itself, without need to resort to s. 15. For the reason given above, it is impossible to suppose that the *Charter* leaves the provinces free to provide an inferior education system for the minority community. But that there is no need to resort to s. 15 does not mean that one cannot resort to it, nor that its concept of equality is not already instinct in s. 23. There is

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<sup>15</sup>And it is easier to apply to some dimensions, *e.g.*, funding, than to others. In view of the historical underfunding of minority denominational schools in some provinces, careful scrutiny of the level of provision for linguistic minorities would be a prudent policy. See J.E. Magnet, "Minority-Language Educational Rights" (1982), 4 Sup. Ct. L. Rev. 195 at 213-14.

<sup>16</sup>The most concrete determination of what equality requires has been in *Marchand, supra*, note 14, in which Sirois, J. held that the school board's failure to provide adequate shop facilities, for the local French high school was unacceptable. Lawyers for the Attorney General of Ontario argued that the minority community deserved a high school, but not one with its own shop facilities. These arguments could not withstand evidence presented to the Court detailing the disadvantages suffered by minority students who wished to take a course common in majority language schools. See note 38, *infra*.

<sup>17</sup>*Mahé, supra*, note 14 at 546; *Commission des Écoles Fransaskoises, supra*, note 14 at 368; *P.E.I. Reference, supra*, note 14 at 256.

<sup>18</sup>One exception is the Appeal Division of the Nova Scotia Supreme Court in *Lavoie, supra*, note 14. However, despite accepting the relevance of s. 15, the Court held that there was no denial of equality in the fact that the province operated several anglophone schools with less than 68 pupils but refused to establish a school for 50 francophone students. No argument was offered in support of this conclusion.

no more need to suppose that s. 23 equality and s. 15 equality are different concepts than there is to suppose that two different conceptions of equality are invoked in s. 15 and s. 28, or two different concepts of fairness in s. 7 and s. 11(d). Without a fuller specification of the putative distinction between s. 23 equality and s. 15 equality little more can be said.

The principle of rough equality bears on the acceptability of immersion programmes as a way of meeting a province's s.23 obligations. Immersion programmes progressively introduce children to a second language by teaching them various subjects in that language. The objection to such programmes as facilities for the minority community is thus not based on the claim that they are not a form of instruction, for unlike some second-language programmes they do not treat the minority language merely as a subject of study. Rather, the objection is that integration of first and second-language speakers provides an unattractive option. Immersion schooling can be a stimulating method of second language training but it is stultifying when used as the medium of instruction for native speakers.<sup>19</sup>

The limits of immersion training were recognized in the *P.E.I. Reference*,<sup>20</sup> although the Court also held that the province is free to offer such instruction to groups too small to qualify under s. 23. However, in the *Commission des Écoles Fransaskoises* case, Wimmer, J. seemed to hold that if there are insufficient students to justify the provision of a separate "facility", francophone students can be combined with others, even if those others are less fluent in French.<sup>21</sup> Since his main point was to reject a claim that s. 23 schools should be limited to francophone children, this may not have been an endorsement of immersion schooling. It is clear that a child's ability to speak the minority language is not a condition for eligibility under s. 23 and thus cannot be used as a ground of exclusion. However, having to admit *eligible* non-minority language speakers is very different from combining eligible children with large numbers of *ineligible*, immersion students. Some kind of remedial programme may have to be devised for eligible

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<sup>19</sup>The trial judge in *Société des Acadiens du Nouveau Brunswick Inc. v. Minority Language School Board No. 50* (1983), 48 N.B.R. (2d) 361, 126 A.P.R. 361 (N.B.Q.B.), [hereinafter *Société des Acadiens*] heard and accepted evidence of the detrimental impact of this form of education on native francophones. Even among those who recognize that s. 23 provides rights to minority-language as a vehicle and not merely subject of instruction, the second-language model dies hard. In *Mahé, supra*, note 14 at 535, for example, Kerans, J.A. said: "The right to receive, out of public funds, 'minority language instruction' can only mean . . . the right to become sufficiently fluent in that language. . . ." It is somewhat odd to think that native speakers of, e.g., English in Montreal have the right only in order to *become* fluent in English.

<sup>20</sup>*Supra*, note 14. Without referring to immersion instruction, Kerans, J.A. in *Mahé, supra*, note 14 at 535, also seems to have acknowledged that what he called "effective" instruction should be directed at making the children full participants in the minority language community.

<sup>21</sup>*Supra*, note 14 at 367-68.

children who are not already fluent, but their numbers are likely to be small enough that their presence will not have an adverse impact on the linguistic environment. However, to admit any child merely at the request of the parents risks altering the balance to favour an immersion atmosphere. Since that would make the option of minority language instruction substantially less attractive, it would not adequately promote linguistic security. The contest between majority demands for second-language instruction and minority rights to first-language instruction is settled in that only the latter are entrenched by the *Charter*.

Further reasons for rejecting immersion can be gleaned from *Whitington v. Saanich Sch. Dist.* 63<sup>22</sup> in which it was held that having begun education in an immersion programme does not entitle a child to so continue. The decision establishes that members of the majority who wish to be educated in the minority language were not the intended beneficiaries of s. 23. However, the reasoning in the case can be generalized. The notion of "instruction in English or French" is used both to define the right and to designate two grounds of entitlement: para. 23 (1)(b) and subsection (2). There is no reason to think that it bears a different meaning in these closely adjacent contexts. Thus, the reasons supporting the view that immersion schooling cannot ground entitlement also support the view that provision of immersion schooling is not sufficient to fulfill the provinces' obligation to provide minority language instruction to those so entitled.

### III. Why Numbers Warrant

We turn now from the nature of instruction to the limits on that right. The most puzzling feature of s. 23 is surely the numbers proviso. This is indeed an unusual provision to find in a human rights law, but its role becomes intelligible if we consider the unusual features of the interest which it protects. Minority language rights have a collective dimension; they are group rights, secured for individuals but for the sake of interests which are partly indivisible from those of others. Numbers are relevant to minority language instruction rights at two levels. First, the diffuse cultural benefits which find their source in education constitute a public good for the entire community and require the participation of many to sustain it. Second, the more immediate benefits of minority language education constitute a shared good for the children who participate. Given the requirements of effective pedagogy, the participation of many is necessary to achieve the shared goods of education. Since neither of these goods can be enjoyed as an individual, neither can be understood as a matter of individual right in the classical sense. This is not to say that an individual may not *sue* under s. 23. Rather,

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<sup>22</sup>(1987), 16 B.C.L.R. (2d) 255, 44 D.L.R. (4th) 128 (B.C.S.C.).

it means that the *justification* for protecting minority language rights does not rest solely in the interests of a single child taken individually, but in his or her interests as a member of a linguistic community.

To have a right is to have an interest sufficiently urgent to warrant holding others duty-bound. In view of the social dimension of education, some of those interests give rise to duties only when shared by a group. There is obviously nothing that can be done for a single family, since all their linguistic contacts will be with majority language speakers. Life in their own linguistic milieu is already impossible for them and no institution could provide for them the indirect collective benefits that schools normally contribute to their communities. Thus, with respect to the collective dimension of linguistic security, there is a background notion of a minimally viable language group. The size of that group will vary with activity and context. It cannot be captured by some fixed proportion of the whole community, since the significance and possibilities of group life in five percent of a metropolitan area obviously differ from those in five percent of a rural one.<sup>23</sup> The numbers to which the proviso refers are therefore unavoidably context-dependent.

In respect of the immediate benefits of education, the numbers question is largely one of determining what is pedagogically effective. As argued above, education has a social dimension. The acquisition of social skills and a culture *itself* mandates that children be taught in groups sufficiently large to reap these benefits. Consideration of the nature and purpose of minority language education itself establishes that schools are not to be provided for one or two children, and that with larger groups richer and more diverse forms of educational experience become possible. The minimum size of group for a given kind of minority instructional facility is primarily a pedagogical question, and one in principle open to evidence. Indeed, the considerations here are in fact no different from those which bear on majority language instruction: a school is never provided for a handful of children, nor a science laboratory for two students. We must also bear in mind the remedial nature of s. 23, however. The minority communities outside Québec are weaker than they would have been had an educational system not been largely denied them for most of the last century. To insist on a full and vibrant community before qualifying for a school would only compound inherited injustice. To redress these inherited biases, the thresholds should be set at the lowest level, *i.e.*, not at optimal class sizes, but at minimal ones.

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<sup>23</sup>This need not exclude a small set of reasonably uniform standards, perhaps varying as between rural and urban areas, provided they are sensitive to activity and context.

This explains why some sort of numerical threshold is relevant in arguing for the provision of minority language education. Further exploration requires consideration of the impact of rising numbers on entitlement to different kinds of facilities. To this we now turn.

#### IV. Numbers and the Sliding Scale

We shall argue that an appropriate understanding of the social character of education supports a “sliding scale” interpretation of s. 23 according to which the nature of the facilities to which one is entitled depends upon the size of the group that may potentially benefit. We must reject the idea of a single numerical threshold, both because no single number is appropriate for the entire range of possible educational services and because any single number likely to be chosen would be so high as to prevent education from advancing linguistic security. However, the notion of a sliding scale is ambiguous between two quite different approaches. We shall distinguish between a scale which consists of a series of *ordered thresholds* and one which *slides continuously*, and argue that the former better serves the purpose of fostering linguistic security. But first, we must remove an obstacle in the path of either version.

In *Mahé*, the Alberta Court of Appeal argued that the sliding scale approach cannot give a satisfactory account of the relationship between paras (3)(a) and (b) of s. 23. Subsection (3) states:

The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

After describing the sliding scale approach as the idea that “...a new right arriv[es] at each new increase in the numbers of students”, Kerans, J.A. argued that this “...renders s. 23(3)(a) superfluous, because, if all possible situations fall within the scope of the second paragraph, it protects also the right expressed in the first.”<sup>24</sup> This led the Court to interpret paras (a) and (b) as encompassing, respectively, two distinct dimensions of education: teaching and governance.<sup>25</sup> However, that it renders para. (3)(a) superfluous is an objection to the sliding scale approach only if paras (a) and (b) are

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<sup>24</sup>*Mahé*, *supra*, note 14 at 537.

<sup>25</sup>*Ibid.* at 537.

correctly construed as two watertight compartments defining independent rights.

This "two rights" analysis (originally attributable to the Ontario Court of Appeal in the *Ontario Reference*<sup>26</sup>) is rapidly becoming the standard analysis of the structure of s. 23. On this view, para. 23(3)(a) grants a right to "instruction", whereas para. 23(3)(b) grants a distinct right, subject to distinct qualifications, to "minority language [educational] facilities".<sup>27</sup> This suggests that whatever is included in facilities must be excluded from instruction and that the task of the court is to decide into which category each concrete claim fits before applying the appropriate numbers test. If the content of para. (b) must be different from that of para. (a), any interpretation of "educational facilities" which also covers some of the content of "instruction" is unacceptable. Kerans, J.A. understood the sliding scale approach as an interpretation of the concept of "educational facilities". Since the scale includes the full range of educational services available in different circumstances, from the most modest to the most ambitious, para. (3)(a) becomes superfluous: "instruction" is simply the lowest end of the "facilities" scale.

This interpretation fails because it reads the parts of the section in isolation from one another rather than as parts of a coherent whole. It also overlooks the fact that the right granted by the section is already stated in subsections (1) and (2), and not initially defined by subsection (3). Subsections (1) and (2) not only define the eligibility criteria, they also create the right, which is *to have one's children "receive primary and secondary school instruction" in the minority language of the province*. This is emphasized by the opening line of subsection (3) which refers to the right *under* subsections (1) and (2). Subsection (3) is thus not an independent source of any rights; it merely performs a clarificatory or scope-limiting role by specifying 1) *what* the right to receive instruction *includes*, *i.e.*, the right to minority language educational facilities provided out of public funds, and

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<sup>26</sup>*Supra*, note 14.

<sup>27</sup>*Ontario Reference*, *supra*, note 14 at 29. This has been followed by the Court of Appeal of Alberta in *Mahé*, *supra*, note 14 at 536, which was in turn quoted approvingly by the Saskatchewan Court of Queen's Bench in *Commission des Écoles Fransaskoises*, *supra*, note 14 at 366. *Lavoie*, *supra*, note 14, is also consistent with this approach. Most commentators have also adopted a similar analysis. See P. Foucher, "Les droits scolaires des acadiens et la charte" (1984) 33 U.N.B.L.J. 97, J.E. Magnet, "Minority-Language Educational Rights", *supra*, note 15, and D. Proulx, "La précarité des droits linguistiques scolaires ou les singulières difficultés de mise en oeuvre de l'article 23 de la Charte canadienne des droits et libertés" (1983) 14 R.G.D. 335.

2) *where* in the province the right applies.<sup>28</sup> Shorn of the eligibility criteria, the substance of the right therefore amounts to this:

Eligible citizens have the right to have their children receive minority language primary or secondary school instruction, which includes, where the number of children warrants, the provision of minority language educational facilities out of public funds, and which applies wherever in the province the number of children is sufficient to warrant its provision out of public funds.

On this analysis there is only *one* right provided by the section: the right to minority language instruction.<sup>29</sup> Like any right,<sup>30</sup> it may require different things in different circumstances, some of which are determined by the specificatory clauses of s. 23.

It is therefore clear that the “two rights” theory suggests a misleading view of the relationship between paras (a) and (b). It has generally been assumed that the “right” to educational facilities allegedly contained in para. (b) guarantees something more than the “right” to instruction attributed to para. (a). “Instruction” and “educational facilities” are both general concepts, but the fact that s. 23 says that the former *includes* the latter means that the *Charter* regards “instruction” as of at least equal breadth to “educational facilities”. Rather than supporting a sharp distinction between the two concepts, a natural reading of s. 23 shows that they must be connected. Indeed, the courts have recognized this to a certain extent in noting that instruction can be provided only if there are some facilities in and through which to do so.<sup>31</sup> No instruction is possible without at least an instructor, teaching materials, and a room in which to teach. But how can that manifest truth be reconciled with the view that locates all rights to facilities in para. (3)(b) and subjects them to a separate numbers test? The “two rights” theory must be abandoned.

If anything, one might stand the *Mahé* argument on its head and say that para. (a) subsumes para. (b). But, of course, the fact that “instruction” includes “facilities” does not make the express mention of facilities redundant. As noted by Kerans, J.A. in *Mahé*, “instruction” is not a legal term of art with a precise meaning.<sup>32</sup> The right to “instruction” has no constitutional tradition either in Canada or in most other western nations. Un-

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<sup>28</sup>Here, we are mainly concerned with the relationship between the concepts of “instruction” and “educational facilities”. Below we return to the issue of the geographical dimension to the applicability of the right.

<sup>29</sup>More accurately, the right to have one’s children receive such instruction, but the abbreviated formulation is more convenient.

<sup>30</sup>See J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 171.

<sup>31</sup>See *Ontario Reference*, *supra*, note 14 at 37; *P.E.I. Reference*, *supra*, note 14 at 260-61; *Lavoie*, *supra*, note 14 at 18.

<sup>32</sup>*Supra*, note 14 at 533.

specified, it could have been taken to mean anything from a weekly class in the minority language to everything normally included in a comprehensive educational system. It was therefore sensible to draft the section so as to signal clearly that the more generous end of the spectrum was meant to be included. For example, para. (b) indicates that in some circumstances separate schools for the minority are warranted and thus pushes the courts toward a broad rather than a narrow interpretation of the right to instruction. Since the numbers proviso suffices to ensure that more comprehensive facilities are guaranteed only when appropriate, there is no need and no ground for a conceptual barrier between paras (a) and (b).

Once it is understood that s. 23 contains only one right, the supposed textual obstacle to the sliding scale crumbles and it becomes clear that the sliding scale makes sense of the section read as a whole. The social character of education dictates that what is required by instruction varies with the number of children available, and the inclusion of minority language educational facilities simply expands the potential scope of interpretation. "Instruction" covers a wide variety of arrangements, but its social dimension and certain obvious requirements of sound pedagogy mean that some facilities cluster together in natural ways. Instruction is a lumpy good, not a continuous one. There is no point in providing a class-room to students who have no teacher. But on the best understanding of a successful education, at least a small group is required to achieve the social benefits of education.

Many educational projects are organized around group participation, and quite generally the presence of other children is a stimulus to learning. Similarly, we unite in a single school a number of classes and teachers, enabling children to interact with others of various ages in a common setting which deepens the social dimension of the educational process. Greater numbers make possible many curricular and extra-curricular activities important to a well-rounded education. Specialized subjects, optional courses, group activities such as drama societies and team sports, and even the availability of a range of options all require enough students that those interested will be able to find like-minded colleagues. Greater numbers also make feasible the provision of specialized facilities which enrich education, but which may be warranted only if they are in sufficient use throughout the day. The more sophisticated these activities become and the more important the role they play in education (which typically increases in the transition from elementary to secondary school), the higher the numerical threshold. These considerations indicate roughly the numerical threshold for a homogeneous minority language school. Of course, the value to the community of homogeneous schools should not be underestimated. Their impact on the self-respect of both students and other members of the com-

munity is also an important contribution to a linguistically secure environment. But the net value of homogeneity decreases as educational opportunities become narrowly confined. It may be better to give minority language children access to a fuller range of activities in a mixed school, even if not in their own language, than to deprive them of the opportunity altogether. At some point, a homogeneous school may even become self-defeating.<sup>33</sup>

Thus, the concept of instruction encompasses various kinds of services suitable to different numbers of children. No single numerical level could be appropriate to all of these. What would be the likely result of choosing a single threshold? Because the level appropriate to the creation of a class would not justify the provision of the more ambitious facilities, the choice of a single threshold would probably be set higher, say, at the level appropriate for a school. But this in turn would exclude many children from the protection of the provision even though they and their community would greatly benefit from something less. Far from fostering linguistic security, this would be a retrograde step. Most provinces already allow the creation of individual minority language classes within majority language schools. Section 23 cannot be understood to permit the provinces to *reduce* their level of services.<sup>34</sup> Moreover, the choice of that threshold would also incline the courts against interpreting s. 23 to include facilities like educational television<sup>35</sup> because, while a single threshold would entail that a group reaching it is entitled to all the benefits of s. 23, the numbers sufficient for a school would not justify the provision of mass media. In any event, a single threshold is inconsistent with the view espoused in many cases that the satisfaction of para. 23(3)(b) requires greater numbers than para. 23(3)(a).

What is needed, therefore, is something like a sliding-scale with the type and level of services related to the number of children involved. Because education is a lumpy good, however, this should not be interpreted as a continuous, increasing function of numbers. There are limits on the extent to which the scale may slide. This seems to have been recognized by Sirois, J. in *Marchand*.<sup>36</sup> He rejected the government's argument that there were enough minority language students in Penetanguishene to justify the

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<sup>33</sup>For this reason, the appellants' concession in *Lavoie*, *supra*, note 14 at 25, that sometimes less than "ideal" arrangements must be accepted is misguided. The quality of arrangements can only be assessed by also taking into account the range of experience available to the pupils, not only their isolation from majority language students.

<sup>34</sup>*A.G. Québec v. Québec Association of Protestant School Boards*, *supra*, note 2.

<sup>35</sup>The possibility that such services may be included in s. 23 is suggested by J. Magnet, "Minority Language Educational Rights", *supra*, note 15.

<sup>36</sup>*Supra*, note 14.

provision of a high school, but not enough for one with shop facilities.<sup>37</sup> The Ontario government defended its position by relying on an argument which would permit a very finely graduated scale on which every type of educational equipment and facility could be related to numbers. On this logic there would be endless thresholds for the minority to cross: one for a class, a higher one for a school, a still higher one for a school with a shop, yet another for a shop with a drill-press, and why not another for a drill-press with drill-bits, and so forth?<sup>38</sup> The vision of a right to educational resources as an indefinitely articulated, numbers-related scale is fundamentally flawed. It ignores the need for rough equality of resources between majority and minority schools if linguistic security is to be protected at all. Within this constraint the instruction atom may be split, but not indefinitely. Pedagogical considerations determine which groups of facilities are indivisible (*e.g.*, no shop without a lathe), considerations of rough equality and adequate use determine which facilities are essential in which schools (*e.g.*, no school without a shop).<sup>39</sup> Because instructional facilities have only limited divisibility, the sliding scale is not continuous, but is a series of ordered thresholds.

## V. Numbers and Cost

The above arguments about why and how numbers are relevant contrast with a view according to which they are a measure of the *cost* of providing minority language facilities. In *Mahé*, Kerans, J.A. said: "Numbers, in my view, are relevant only as the criterion for reasonable cost."<sup>40</sup> Although some

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<sup>37</sup>*Ibid.* at 613. On the other hand, the Court of Queen's Bench implicitly accepted this notion in *Commission des Écoles Fransaskoises*, *supra*, note 14 at 368.

<sup>38</sup>Lest this be thought sheer fantasy, the reader would do well to consider the facts in *Marchand*. The French students allowed access to the shop facilities in the English school, "were permitted to use one room in which they could not touch anything, in which they had to bring their own defective equipment. This applies to both the technical shops and the home economics training." *Ibid.* at 604.

<sup>39</sup>We noted above that this issue is connected to the concern for ensuring that minority language education is of roughly equal quality to that provided for the majority. In *Marchand*, *supra*, note 14, the minority students were severely disadvantaged in being required to use the shop facilities at another school. Of course shared facilities may sometimes be acceptable, especially as a temporary expedient or when the combined numbers of minority and majority students are still very small. Nonetheless, a sharing system must always ensure that the minority is not unfairly treated. See note 38, *supra*.

<sup>40</sup>*Mahé*, *supra*, note 14 at 541-42.

courts have mentioned cost as a relevant factor,<sup>41</sup> no one else has suggested that it is the only way to understand the numbers limitation,<sup>42</sup> nor even that it is the most important element in it. So far, the courts have had few serious opportunities to explore the concrete implications of taking cost into account. A closer look suggests that it is both unwise and unnecessary to do so.

The idea that the numbers requirement amounts mainly to a cost constraint is based on two things: on the plausible intuition that it would be too expensive to provide schools or classes for very small numbers of pupils, and on the reference to "public funds". On these foundations some have sought to erect the thesis that minority language education rights are subject to general considerations of economy. Kerans, J.A., again, stated that "the reason for the limit is not to burden a province with substantial extra cost."<sup>43</sup> Thus, educational rights are guaranteed only where it is not too expensive to do so. And, since this is no guarantee at all unless the courts can test the constitutionality of the provinces' criteria of expense, it must be conjoined with fairly robust review powers, reaching even to details of the provincial budget.

The twin foundations mentioned above are, in our view, too slight to bear the weight of such a conclusion. First, there is in fact no reference anywhere in s. 23 to the concept of cost at all. The only restriction is defined in terms of *number of children*. The mention of "public funds" merely secures the entitlement at public expense, provided that the numbers test is met. Second, even if cost were involved, it could not be, *pace* Kerans, J.A., as a measure of burden on the public purse. As the number of eligible children increases, the total cost of providing instruction will in fact increase. But whatever the numbers test means, it is certain that it provides more entitlements, not fewer, as the size of minority groups increases. Its guarantees therefore expand as the burden on the public purse grows. In other words, only those measures of cost which vary *inversely* with numbers are

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<sup>41</sup>*E.g.*, *P.E.I. Reference*, *supra*, note 14 at 256; *Commission des Écoles Fransaskoises*, *supra*, note 14 at 368; *Lavoie*, *supra*, note 14 at 24. In the latter case, however, the Appeal Division gave no consideration to cost in determining whether a right to some form of instruction existed, while rejecting the claim for a separate school wholly on the ground of cost. This may indicate that the Court did not view cost as relevant to the interpretation of the numbers proviso since the right to instruction is also subject to a numbers constraint. However, it is difficult to see what other textual basis there is for using cost as a factor.

<sup>42</sup>In the trial judgment in *Mahé*, (1985) 22 D.L.R. (4th) 24 at 47, 39 Alta. L.R. (2d) 215 at 240, Purvis, J. suggested without argument that apart from cost, whether numbers warrant could also depend on: the difficulties of transport, the age of the children, the possibility of providing residential accommodation for students, and the impact such arrangements would have on the social and other development of the children.

<sup>43</sup>*Supra*, note 14 at 541-42.

admissible as interpretations of the numbers proviso. This excludes all costs which vary directly with numbers. For example, books in the minority language will frequently be more expensive than majority language ones. But since the books needed will increase with the number of students, that expense rises with numbers. It would make no sense to deny such a claim on the ground that it requires an expense which the numbers are insufficient to justify. Cost can therefore be relevant only as an average or proportionate index. This in turn admits of two interpretations.

#### A. *Equivalent Cost*

The strongest view would be that minority language instruction is warranted provided it costs no more than would majority language instruction for those same children, taking the average majority-language expenditure as the appropriate baseline. Under what circumstances would this permit, for example, a minority language school? If, within a certain area, there is a homogeneous minority-language neighbourhood, its local school would already be filled with minority-language children. Suppose also that they are taught by minority-language teachers but, until now, the majority language has been used. If a claim were made on behalf of these students for minority language instruction, the only change that would be necessary would be in the language of instruction. From the point of view of cost, it would make no difference which language is used. However, without even considering the *Charter* guarantee, the only reasons for not allowing these schools to be conducted in the minority language are intolerance or misguided views about what is best for the minority community. Groups like this would succeed under the *Charter*, but they would have just as valid a claim on the public purse as speakers of the majority language even without it (although this claim would not be guaranteed recognition by the province). Section 23 would thus be interpreted as a bare anti-discrimination provision protecting against intolerance and misguided paternalism. This is important, but it is not all the *Charter* was meant to do.

Cases like this are, of course, vanishingly rare. Neighbourhoods are not homogeneous, and an educational system is already in place, distributing students, teachers, and resources in a particular way. Thus, some additional costs are inevitable. First, there are the costs of transition from a system which is not designed with minority language rights in mind to one which is. These include new capital costs, costs of planning and reorganization, redistributing students and resources among schools, hiring new teachers, *etc.* Second, there are the continuing costs of running the new system. The very division of schools will itself have costs as some economies of scale become unavailable. This applies also to the minority language schools and

classes themselves: being smaller they are less likely to be used to optimal capacity. In addition, there are certain to be new costs in transportation and perhaps accommodation where the minority language population is unevenly spread. Children who were previously able to walk to the local majority language school may have to be bused if enough children are to be gathered to create a minority language school.

These are all additional costs which, in per capita terms, decrease as the number of students using the facility rises. However, if services can be denied on the ground that it costs more to educate students in the minority language than it would in the majority language, few groups would be large enough to succeed. A class would be created only where there are enough minority students, without busing, to fill an average size class and where a minority language teacher is available for reassignment. In other words, this interpretation would allow anglophone provincial governments to reduce their existing level of service. Since it has been accepted that s. 23 is remedial,<sup>44</sup> this interpretation must be rejected.

### ***B. Reasonable Cost***

It might be argued that precisely because certain expenses are inevitable they should be regarded as foreseen by the *Charter* and thus deemed reasonable. On this view, the cost criterion limits rights only when the expenditure exceeds reasonable transition and continuing costs. The burden of establishing reasonableness would fall on the plaintiff.<sup>45</sup> Is this an improvement over the "equivalent cost" interpretation?

What is the threshold of reasonability and how are the courts to determine it? Is it to be defined as additional per capita cost? Or as some proportion of the provincial education budget? The latter would require a consideration of the entire education system and all potential claims for minority language instruction across the province, making it difficult if not impossible for plaintiffs to prove that a school is warranted in *their* neighbourhood. A test of per capita expenditure can be applied at the local level and allows cost to be tied to numbers in the right way. This would require the courts to determine how much it costs to educate a student in the existing system, compare this with the expense under the plaintiff's proposal, and

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<sup>44</sup>*A.G. Québec v. Québec Association of Protestant School Boards*, *supra*, note 2.

<sup>45</sup>*Mahé*, *supra*, note 14 at 543.

decide what level of additional expenditure is reasonable.<sup>46</sup> If this is not to be a wholly *ad hoc* assessment, however, the courts will need some criteria for deciding how much additional expense is too much. What tests are appropriate in judging this?

Whether something is unreasonably expensive can be assessed only by considering its costs and benefits in light of the alternative uses to which that money might be put. But that general direction settles almost nothing. Should the courts, for example, consider only how the money might otherwise be spent within the local education system, or should their calculations range province-wide? Is it legitimate for them to consider alternative expenditures outside education on, say, health care or swimming pools? Perhaps twice as many people might benefit from the same expenditure on swimming pools for those schools which do not yet have one, or a new community skating rink, as would benefit from a minority school. Must the courts develop standards for weighing and comparing these benefits? Should they take into account the diffuse benefits of either project to those who do not directly participate?

There are two obvious objections to pursuing this line. First, to require plaintiffs to prove that their claim represents as good a use of public money as any other possible use would impose an impossible burden.<sup>47</sup> It is implausible to assume that a provision which was meant to improve the situation of minorities can bring such burdens. Second, even if evidence could be garnered, the courts would effectively be writing the provincial budget in deciding the issue. Nor could this problem be avoided by confining the comparisons more narrowly within the provincial or local education system, for the court would first have to decide whether the existing budget for education, at either level, was adequate.

Could courts avoid these budgetary decisions — and the questions of institutional role and political responsibility that they raise — by narrowing their scrutiny? Perhaps they would say that the provinces have full discretion

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<sup>46</sup>This is bound to be a very complicated matter. For example, the courts would have to decide how to weigh the additional expense of building new schools where necessary. It would be unfair to divide this by the existing number of eligible students as part of the per capita additional expense, for this does not take account of the future use of the school. Should these start-up costs therefore be discounted or amortized in some way? At what rate? For an example of some of the problems one might expect in the application of this approach, see the third trial judgment in *Lavoie* (1988), 90 N.S.R. (2d) 16. Although Hallett, J. held that the government was wrong to include the capital cost of renovation in its assessment of the additional per capita cost of providing a minority language school, he nevertheless found that this capital expenditure was not warranted for the sake of fifty children.

<sup>47</sup>In *Lavoie*, *supra*, note 14 at 23-24, the Court held that although the plaintiff has the initial burden of adducing evidence to support his or her claim, evidence of cost should be presented by the province to whom it is more readily available.

to decide how much extra expense is unreasonable, subject only to a test of rationality and good faith. That argument was rightly rejected in *Lavoie*.<sup>48</sup> It would, again, turn s. 23 into a bare anti-discrimination provision. Since there are always many good uses to which the government can put public funds, the province will almost always be able to make a plausible argument that money which minority parents want devoted to the minority language school system would be better spent elsewhere.

Fortunately, these difficulties need not be faced. To begin with, the text in fact gives little support to the view that cost is the engine of the numbers limitation. The cost of providing some facility depends in part on the level of demand for it. The proviso, however, specifies that the *number of children of eligible parents* is the criterion, not the *number demanding access*. If the courts were meant to compare the benefits of spending on minority education to other possible uses, the value of the former would vary according to the number who will actually attend the school. But s. 23 expressly refers to a potentially larger group for the purposes of measuring numbers. This seems to have been misunderstood in the *P.E.I. Reference* and in *Lavoie*. In the former, the interveners wanted the government to plan services according to statistical data about the prevalence of francophone families.<sup>49</sup> The Court responded that it is reasonable to require evidence of *actual demand* before committing resources:

It would be illogical to provide minority language instructions without some evidence of demand. It would be illogical and imprudent to provide a teacher, a classroom, equipment or a school facility without knowing if there existed a demand for the services offered. The cost of education is very high and it is never funded to the extent demanded by teachers or parents. To waste money on an insufficient demand would do an injustice to the whole school system.<sup>50</sup>

In *Lavoie*, the Court refused to order the establishment of a separate school because only fifty pupils had registered, even though there was evidence of as many as four hundred and twenty-nine eligible students in the area.<sup>51</sup>

Both these judgments wrongly read the numbers proviso of s. 23 as if it were the limitation in s. 20 which requires that minority language government services be provided whenever there is "significant demand". If a demand constraint were intended in s. 23, we would expect to find the same

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<sup>48</sup>*Supra*, note 14 at 17. It is of interest, however, that the trial judge in *Lavoie*, *supra*, note 46 at 22-23, thought that alternative uses of the money were relevant, and largely for this reason decided that the legislature was better placed to decide. Surprisingly, Hallett, J. rather quickly dismissed the argument that the courts had the advantage of "not being concerned about political pressure."

<sup>49</sup>*P.E.I. Reference*, *supra*, note 14 at 250-51.

<sup>50</sup>*Ibid.* at 251.

<sup>51</sup>*Lavoie*, *supra*, note 14 at 24.

language here. The clear difference of language between the two limitations has a plausible justification. For various reasons, minority parents might well be reluctant to exercise their right, especially in the early years of the system.<sup>52</sup> There may be uncertainty about the nature and quality of the facilities offered, and families may be reluctant to change their practices, particularly if it involves dividing their children among different schools. By using only the number of children of parents who *have* the right as its test, s. 23 requires the provinces to create classes and schools even though they may for a time be under-attended, in order to make the facilities available for use by the minorities if they choose. The education provisions promote linguistic security by facilitating parental choice of language of education; the extent to which the option is taken up is conditioned in large part by the character and quality of the education offered. But no effect can precede its cause, so there is no reason to expect or require that vigorous exercise of s. 23 rights must precede the availability of institutions within which those rights can in fact be exercised.

### C. *Efficacy and Cost*

The above considerations strongly suggest that the numbers criterion is not primarily a measure of cost. The contrary argument seems mainly to be based on the desire to avoid the repugnant conclusion that very small groups might be entitled to all the accoutrements of a normal school system, which would, of course, be excessively expensive. However, the repugnant conclusion does not follow at all, quite apart from any consideration of cost. As we have argued above, the nature of minority education *itself* dictates that certain facilities have a built-in numerical threshold. Below that threshold minority language children would not get the kind of education that the principle of rough equality requires. These pedagogical criteria are themselves sufficient to ensure against wasteful expenditure on minority facilities, and to give cost further weight, in the form of an independent constraint on rights, would involve the courts in budgetary issues and undermine the purposes of the provisions.

Minority language education will often, perhaps always, be more expensive than a unilingual education system. But to regard this as an objection is to treat the educational systems already in place before 1982 as setting a normatively relevant baseline. Minority language instruction is then to be "added" to this system only if it is not unreasonably expensive.<sup>53</sup> But

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<sup>52</sup>This will be especially so if, as so often, the school board or province has demonstrated its resistance to providing facilities.

<sup>53</sup>This attitude was amply demonstrated in *Lavoie* by the school board's argument that the facilities suggested by the minority parents could not be made available because the board had already promised them to various constituencies within the anglophone school system.

why should a system, recognized as deficient and for which constitutional remedies were provided, now be taken as a baseline? This is simply to reason as though the *Charter* never happened. In fact, it establishes a new baseline and requires us to assess the overall provision of education in that light. Necessary redistribution of educational resources is therefore wrongly described as “extra” spending on the minority community; it is their due under the constitutional obligations entrenched by the regime of official languages. The sufficiency of numbers should be determined according to the requirements of establishing effective learning environments which promote linguistic security. That will remain a complex and, at the margins, controversial matter. Unlike cost constraints, however, it will be one fully within the purposes of the education rights provisions.

## VI. Where Numbers Warrant

So far we have considered how *many* pupils are necessary for the application of s. 23. We now turn to the geographical dimension of the test. Paragraph (3)(a) provides that the right “applies wherever in the province the number of children ... is sufficient to warrant the provision to them out of public funds of minority language instruction”. This introduces further complexity. Although a linguistic community is often thought of as having territorial boundaries, in a modern and mobile society these boundaries are quite porous. Some families may temporarily have to move to an area in which their language group is very small. The cost of doing so should not include permanently cutting off their children from the community to which they hope to return. Other more stable groups are diffuse. For example, there is a fairly large minority language community in Toronto, but there is no “French Quarter”. Schools, however, usually have territorially defined catchment areas. The difficulty is that these areas generally antedate the constitutional guarantee of minority language education rights. Thus, “wherever in the province” cannot mean “wherever within the jurisdiction of existing school boards” since a community may overlap those boards.<sup>54</sup> Moreover, just as school jurisdictions are flexible, children are mobile, so transportation facilities must also fall under the scrutiny of the constitutional requirements. An assessment of numbers in a small town may conclude that a school or even a class is not justified, but if we expand the area and consider the number of children within busing distance, there may well be enough. Provinces must therefore take into account available means of

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<sup>54</sup>*Ontario Reference, supra*, note 14 at 32-33; *Commission des Écoles Fransaskoises, supra*, note 14 at 370-71; *P.E.I. Reference, supra*, note 14 at 250.

transportation when designing districts in which minority language instruction is to be provided.<sup>55</sup>

Let us provisionally say that instruction must be provided wherever sufficient children can be gathered through reasonable means. Reasonable means would clearly include busing. What then of those parents who live too far from a required area for their children even to be bused? Are they simply out of luck with respect to the application of their rights? The assumption is unnecessary. Provided there is at least one centre of minority language population large enough to support a school, it may be possible to accommodate all eligible minority language students in the province in that (or in one of those) school(s). On this view, para. 23(3)(a) does not mean that instruction need only be offered *to those children* who live in an area where there are enough others to warrant its provision, but that instruction need only be offered *in those locations* and made available to all children who qualify under s. 23. This could be done by transportation, or even by subsidizing lodging, for those students who qualify but live too far away.<sup>56</sup>

We can now see why the eligibility criteria for the right are themselves defined individualistically and not by reference to numbers. *Every* parent covered by subsections (1) and (2) has the right to have his or her children receive minority language instruction. This right, however, can be exercised only in those locations where sufficient children can be gathered through reasonable means. In principle, then, the right is inert only when a province has no location in which provision of instruction is warranted.<sup>57</sup> Thus, no eligible child is automatically excluded from the minority educational system, although only some of those children are guaranteed local instruction.

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<sup>55</sup>This was taken for granted in *Lavoie*, *supra*, note 14, the only case so far to address the issue of whether the provision of a minority language school was warranted in a given area. However, for a possible endorsement of the view that the province is under no obligation to fund transportation, see *Chaddock v. School District of Mystery Lake No. 2355 and Manitoba* (1986), 31 D.L.R. (4th) 82, [1986] 5 W.W.R. 673, 43 Man. R. (2d) 81 (C.A.), leave to appeal to the Supreme Court of Canada refused, January 15, 1987. Although s. 23 was not raised in this case, O'Sullivan, J.A., for the Court, opined that neither the framers of the *Charter*, nor the *Public Schools Act* intended that French and English instruction must be made available to every child on exactly the same basis, and thus denied the plaintiffs' claim that they were entitled to have their children bused at public expense to the only French elementary school in Thompson, Manitoba.

<sup>56</sup>This has also been suggested by Magnet in "Minority-Language Educational Rights", *supra*, note 15 at 213, "Language Rights: Myth and Reality" (1981) 12 R.G.D. 261 at 269, and in "Les écoles et la Constitution" (1983) 24 C. de D. 145 at 154, and would seem to be required by Foucher's emphasis on accommodating each child of eligible parents: "Language Rights and Education", *supra*, note 5 at 272-74.

<sup>57</sup>That is not presently the case anywhere. See Foucher, *Constitutional Language Rights of Official-Language Minorities in Canada*, *supra*, note 6, for recent data.

Naturally, exercise of the right will be more burdensome, and thus less valuable, where numbers do not warrant local provision. In such cases, parents must decide whether the benefits are worth the burdens they impose on their children.

Is this a desirable situation? The trial judge in *Mahé* did not think so. He stated: "Children are not by s. 23 the pawns of their parents in some form of cultural or linguistic conflict. Section 23 rights are limited by the children's rights to a reasonably normal childhood without the intervention of unusual compulsory transportation obligations."<sup>58</sup> Setting aside the offensive supposition about the motivation of French parents, three points are relevant. First, s. 23 rights do not impose "compulsory transportation obligations". No parent is obligated to send any child to a minority language school. Second, s. 23 rights are not limited by children's rights to a reasonably normal childhood. Like all *Charter* rights, they are subject *only* to such limits as meet the test set out in s. 1, including the requirement that the limits be established by law. That is not now the case with respect to the putative right to a reasonably "normal" childhood. Finally, it is not, in any case, obvious that having to ride a bus to school is more offensive to the ideal of a normal childhood than is being educated in a foreign language. The objection is thus without merit.

The decision whether to exercise these rights must rest with parents for an evident reason: they are best placed and most reliably motivated to take that decision in the interests of their children. The duty of the provinces is not to usurp the decision, but to facilitate it by providing services on fair terms and easing the costs of using them. This may be done in various ways. Local concentrations may warrant schools, dispersed groups only classes, transportation or accommodation. Given the importance of education in making it possible for a child to participate fully in the minority language community, one should not lightly disregard a parent's desire to keep this door open. Boundaries are thus controlled by the notion of linguistic security. Long absences from home may promote linguistic security in one way, by giving schooling, but harm it in others, by decreasing the time spent with family. Time spent on buses is time away from ancillary and sometimes even primary aspects of education. Once again, as in the case of cost, it is not competing considerations which define the substance of the right, but the protection of linguistic security itself.

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<sup>58</sup>*Mahé, supra*, note 42 at 240 (Alta L.R.).

## VII. Control of Facilities

Following the *Ontario Reference*,<sup>59</sup> it has been accepted in Alberta, Saskatchewan, Nova Scotia, and more cautiously in Prince Edward Island,<sup>60</sup> that s. 23 includes some sort of managerial control by the parents of eligible children. (It should be noted that even before the *Charter*, New Brunswick and Québec already had in place educational systems giving the minority extensive managerial control.<sup>61</sup>) The Ontario Court of Appeal held that, overall, the wording of the text was more consistent with the requirement of parental management. The Court held, first, that the deliberate distinction drawn between facilities and instruction must mean that more is involved in the former. Second, it relied on the fact that the French text of s. 23 refers to “établissements d’enseignement de la minorité linguistique” which seems to contemplate that these facilities must “appertain to or be those of the linguistic minority”.<sup>62</sup> Only if that community controls its schools can they be the schools of the minority. In *Mahé*, the Court of Appeal of Alberta held that para. (3)(b) must be regarded as a cogent extension of para. (3)(a), and that only governance is sufficiently important in this regard to justify constitutional protection.<sup>63</sup>

This may be the most serious misunderstanding arising out of the “two rights” view. The Ontario Court of Appeal treated all control rights as having their source in para. (3)(b), as distinct from para. (3)(a), and as being subject to a potentially higher numbers threshold. This implies that there may be minority parents who have instruction rights but who have no control rights at all. Similarly, in *Lavoie*, once it was decided that the appellants were not entitled to a separate school, the Court gave no further consideration to their right to some form of managerial control of the programme of instruction to which it held they were entitled. The Alberta Court of Appeal reasoned in *Mahé* that since paras (a) and (b) must be different, and since assigning instruction to para. (a) and control to para. (b) would constitute a difference between them, then that is what the difference in fact is. The argument is fallacious because there are other ways of marking the difference which better accord with the text.

In our view, para. (3)(b) sets a threshold only for mandatory *separate* facilities. Shared or common facilities are permissible below that threshold,

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<sup>59</sup>*Supra*, note 14.

<sup>60</sup>*Mahé*, *supra*, note 14; *Commission des Écoles Fransaskoises*, *supra*, note 14; *Lavoie*, *supra*, note 14; *P.E.I. Reference*, *supra*, note 14.

<sup>61</sup>See Foucher, *Constitutional Language Rights of Official-Language Minorities in Canada*, *supra*, note 6, for details.

<sup>62</sup>*Ontario Reference*, *supra*, note 14 at 37-38.

<sup>63</sup>*Supra*, note 14 at 536.

though pedagogical considerations set the limit at the basic instructional unit, *i.e.*, the class-room. Supposing the Ontario Court to be correct in its argument for management rights under para. (3)(b), does it follow then that there are no management rights apart from para. (3)(b)? Is the minority entitled to a share in the direction of instruction only if it is large enough to warrant separate facilities? Once the "two rights" view is rejected, that conclusion does not follow.

The argument for control rights is not in our view mainly established by the wording of the section (though it is consistent with it), but by its purpose in fostering linguistic security, as much of the Ontario Court's argument implicitly recognizes. From this perspective, control is as important to small groups as it is to large ones. First, the history of minority language education in Canada strongly supports the view that the minorities cannot rely on majority language school boards for fair consideration of their special rights, and the *Charter* was drafted with the history of arbitrary and unfair policies in mind.

Second, as we suggested above, an educational system is a participatory good for a community, and self-government has intrinsic value. Linguistic security requires that the minority education system provide, to the extent possible, the same kind of collective benefits that the majority system provides. Parents' sense of participation in the future of their children and, through them, their society, is an important by-product of an educational system incorporating parental control. It is important that the minority be able to share in this contribution to the future.

Third, there are good strategic reasons for preferring minority control to a situation in which the courts have continually to supervise the decisions of majority boards as they effect the minorities. Consider the lessons of *Marchand*,<sup>64</sup> decided before Ontario had enacted a system of minority control. The Court was asked to decide whether the majority-controlled board's refusal to provide industrial arts facilities for the French high school violated s. 23. Even after the Court decided that it did violate s. 23, the board continued its obstruction and, rather than implement a proposal put forward by the French Language Education Council ("FLEC"), (created in the meantime under the *Education Amendment Act, 1986*, (No. 2)<sup>65</sup>) the board presented a motion to the Court asking for clarification of the type and extent of the facilities necessary to satisfy the Court's first decision.<sup>66</sup> It was only because the new Ontario structure had been implemented in the meantime and gave exclusive jurisdiction over such matters to the FLEC that the Court

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<sup>64</sup>*Supra*, note 14.

<sup>65</sup>S.O. 1986, c. 29.

<sup>66</sup>*Marchand v. Simcoe County Board of Education (No.2)* (1987), 61 O.R. (2d) 651 (H.C.).

was able simply to decide that the FLEC's proposal was consistent with s. 23 and should therefore be implemented.

Without some form of managerial control by the minority themselves, each unfavourable decision of a school board — whether to provide a class, or a school, how to organize busing, or the extent of the facilities to be provided — could become the subject of litigation. In order to avoid obstructionist tactics by the boards, the courts would then have to make very detailed orders defining the required facilities. (Such obstruction is, sadly, already well documented.<sup>67</sup>) In short, the courts would have to decide, in minute detail, the shape of minority language education for each province. Quite apart from the obvious burden this would impose on the courts, it would reduce the effectiveness of s. 23 in fostering linguistic security because it would bleed the minority community of time, energy, and resources required by constant litigation. That is a recipe for frustrating rather than promoting the remedial intent of the *Charter*.

Interestingly, the P.E.I. and Alberta courts have both held that even parents who have no entitlement under para. (3)(b) nonetheless have some right of participation, though it falls short of exclusive control. In *Mahé*, the Court held that the concept of "instruction" itself might require "close ties to parents and local francophone institutions; perhaps some involvement in the affairs of the school by local s. 23 persons".<sup>68</sup> And in the *P.E.I. Reference*, the courts found that the right of parents to participate in programme development and delivery is already implicit in para. (3)(a). This will require that the minority community be associated with both the school boards, as trustees, and with the Ministry of Education, as staff.<sup>69</sup> This seems correct, but it is quite inconsistent with the procrustean "two rights" view which assigns different aspects of education to the two subsections.

The right to control is properly based on the remedial purpose of s. 23 in promoting linguistic security. It inheres in the notion of instruction itself and arises before the entitlement to separate facilities, though in that case necessarily in a truncated form. If this is so does it follow that the second reference to the numbers proviso in para. (3)(b) is redundant after all? The Ontario Court of Appeal reasoned thus:

[B]oth paras. (3)(a) and 3(b) refer to the "numbers warrant" test. The repetition in para. (3)(b), even though in slightly different terms, would not be necessary unless the facilities there referred to are different from those included in the providing of instruction. It would appear, further, that a different numbers test

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<sup>67</sup>See the history recounted in the *Ontario Reference*, *supra*, note 14 at 40-41.

<sup>68</sup>*Supra*, note 14 at 535.

<sup>69</sup>*Supra*, note 14 at 259.

might apply. Logically a larger number would be required for para. (3)(b) than for para. (3)(a).<sup>70</sup>

But what can this mean? That a certain number of children are needed for a class but a *higher* number of children are needed before those parents are entitled to any share in the management of *that* class? If there were a higher number of children, the facilities to which they were entitled would be greater and thus different rights of control would be appropriate. Why should the numerical threshold for rights to control of one kind of facility be greater than the threshold needed for the provision of *that* facility?

The Ontario Court's objection confuses redundancy with specification. The numbers test is repeated simply for the reason the Court gives: in some circumstances parents are entitled to have their children receive education in the minority language; in other circumstances that includes the right to receive that education in separate facilities. The threshold for separate facilities may be higher than the threshold for instruction; but that does not show that the threshold for management rights is higher still nor that those in shared facilities are not entitled to some share of control. Given that the clarifying point about educational facilities was placed in a separate paragraph, the reinclusion of the numbers proviso makes it absolutely clear that similar considerations are relevant here also. To think that the repetition of "numbers" must either be redundant or else refer to different numbers is like thinking that the second occurrence of "public funds" is either redundant or refers to different funds.

In our view, management rights are instinct in the general notion of "instruction" understood in light of the remedial purpose of protecting the linguistic security of the minorities. But since the sort of facilities provided depends on numbers of eligible children, the sort of management structures will necessarily vary. One should not have a school board if there are no schools for it to govern. One should not have exclusive control over shared facilities. But that leaves open many important alternatives. Which of these possible management structures are required under the *Charter*?

This should not be answered entirely according to the criteria used for majority language schools. We are not confined to asking whether there are enough students within an area of the size of a typical school board to justify a management structure. It may be the case, for example, that a city has been divided into several school districts, but that only if the city is considered as a whole are there enough schools to justify creating an autonomous or semi-autonomous managerial body. A holistic interpretation of s. 23, integrating the right and its conditions, makes the guarantee of parental control subject to the same geographical dimension as the guarantee of

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<sup>70</sup>*Supra*, note 14 at 38.

instruction. In other words, the right to manage applies in those locations in the province where numbers warrant. Just as the provision of instruction may require transporting students across pre-existing school districts, the provision of management rights may require bringing together their parents through the legal definition of an appropriate management area. Indeed, in some cases, *e.g.*, in Prince Edward Island, it might even be appropriate to have province-wide management structures for minority language facilities. It is useful to bear in mind that the difficulties in assembling parents from a wider area than is now standard are fewer than in assembling their children daily for school. Thus, the geographical limitations are no more stringent when applied to management than they are when applied to instruction.

It is therefore possible to create new types of facilities appropriate to the conditions that exist in the minority language sector. The government of Ontario, for example, attempts this in *The Education Amendment Act (No.2), 1986*<sup>71</sup> which constitutes trustees representing the minority language group as French Language Educational Councils responsible for the management of minority language schools within a given district. Of course, the management structures available to the minority must not violate any other constitutional right, including the right to equality. But there is no reason why one kind of managerial structure will be appropriate to all provinces, or throughout a single province. This kind of flexibility seems preferable to assuming on the rigid "two rights" theory<sup>72</sup> that there is a gulf between the guarantee of instruction and that of facilities and that the latter refers roughly to existing school boards and is subject to a high numbers threshold. On that view, parents who live in cities with a relatively large minority language community are entitled to something like a school board, while parents who live in rural areas or small towns where the best that can be done is to provide one or two classes in the local school are entitled to nothing beyond whatever influence they can muster on a local board on which they will always be outnumbered.

### VIII. Remedial Problems

The last issue — and we can only briefly touch on it here — is the appropriate remedial posture of the courts with respect to education rights. While rights cannot be reduced to or defined in terms of the remedies they bring, the character of those remedies is clearly of the greatest moment in

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<sup>71</sup>*Supra*, note 65.

<sup>72</sup>*Mahé, supra*, note 14; *Commission des Écoles Fransaskoises, supra*, note 14. The same tendency is evident in the *Ontario Reference, supra*, note 14, despite the fact that its own endorsement of the government White Paper proposals implicitly recognizes the possibility of alternative structures.

assessing the value of such rights. Without effective enforcement the most generous of constitutional regimes is idle.

The special remedial problems involving s. 23 flow from the fact that it creates rights to government services and does so by giving the provinces a duty to use their legislative powers over education in a particular way. Minority-language education rights may thus be infringed, not only by government action, but also by inaction. One might put this by saying that these are positive rights and not merely negative ones. But that contrast should not be overdrawn: most human rights require positive government action to some extent. Mere restraint is sometimes enough to ensure that a government does not *interfere* with rights, but the government's duties are not discharged in this way. They must not only refrain from interfering with rights; they must also *protect* them from interference.<sup>73</sup>

A more helpful distinction turns on the technique by which these rights are protected. Section 23 is an example of a duty-imposing constitutional rule rather than a power-conferring or validity-establishing rule.<sup>74</sup> It does not limit provincial jurisdiction to legislate with respect to education in the same way that, for example, the division of powers limits the provinces' capacity to legislate with respect to banking. In the latter case, the constitution deprives the provinces of a power and any attempt by them to exercise it is *ultra vires* and the purported legislation null and void. In contrast, s. 23 does not deprive the provinces of legislative powers, but rather directs them to use their existing powers over education in a certain way: it gives them a constitutional duty to provide minority language instruction. Where a province is in breach of this duty, individuals are entitled to apply to the courts who must do what they can to rectify the situation.<sup>75</sup> But what should the courts do?

The traditional remedy of invalidating legislation will have little scope here. One can, after all, only invalidate legislative action, not inaction. The

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<sup>73</sup>Consider, for example, the right to security of the person. The government has a duty not only not to interfere with this itself, but also to protect citizens from such interference on the part of others. And the government can violate the right to vote not only by prohibiting some citizens from voting, but by failing to create institutions which give citizens the power to vote. The notion that all constitutional rights are merely rights to non-interference results from an inappropriate extension of the distinction between not harming and helping from the realm of private to the realm of public morality. See H. Shue, *Basic Rights* (Princeton: Princeton University Press, 1980) at 35-40.

<sup>74</sup>For a more general discussion of the difference between these two kinds of constitutional provisions, see, D. Réaume, "Language Rights, Remedies, and the Rule of Law" (1988) 1 Can. J. of L. and Jurisprudence 35.

<sup>75</sup>*Reference re Manitoba Language Rights* [1985] 1 S.C.R. 721, 59 N.R. 321, 19 D.L.R. (4th) 1.

cases thus far litigated<sup>76</sup> suggest that neither the courts nor counsel have fully grasped the implications of this. Many existing statutes give school boards or officials a discretion wide enough to encompass decisions which would violate the *Charter*. Should these be invalidated? That would leave the relevant official without the power even to make *permissible* decisions. For example, the plaintiffs in *Mahé* asked the Court to invalidate the provision of the *School Act*<sup>77</sup> which gave the Minister discretion to create school districts but did not require the establishment of francophone districts in appropriate circumstances. But what purpose would invalidation of the Act serve? No doubt it would put a diffuse sort of political pressure on the government, but that may backfire and it is in any case purchased at the cost of serious disruption of the entire school system. Further, invalidation prevents the Minister from acceding to the plaintiffs' request for a new district until new legislation is passed, and that is counter-productive. Similarly, the request of the plaintiffs in *Lavoie* that the *Acadian Schools Amendment*<sup>78</sup> be invalidated because the criteria for the designation of the area served by an Acadian school did not match the s. 23 eligibility criteria was self-defeating. It would have prevented the establishment of any Acadian schools, except through court order, until new legislation was passed. There is no more logic in invalidating an official's power in these circumstances than there is in invalidating a power to create hospitals because it does not include the power to create minority language schools.

Though they have instinctively realized that invalidation is inappropriate in these cases, the courts have not yet developed adequate alternatives. The judgements in *Lavoie* illustrate some of the problems. Before passage of the *Charter*, Nova Scotia amended its *Education Act*<sup>79</sup> to permit the Minister to designate French-language "Acadian schools" and areas served by them, based on the number of children of French mother-tongue in the district. The *Charter*, however, grants rights on the basis of mother-tongue of the parents (which, in view of continuing assimilation, typically designates a larger group). The trial judge held, mysteriously, that the legislation was both "inconsistent" with and yet also "complementary" to the *Charter*.<sup>80</sup> The Appeal Division ruled the legislation consistent with the *Charter* because, unlike Bill 101,<sup>81</sup> it did not "directly collide" with s. 23 and could

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<sup>76</sup>See especially the legislation which was challenged in *Mahé*, *supra*, note 14 and in the *P.E.I. Reference*, *supra*, note 14.

<sup>77</sup>R.S.A. 1980, c. S-3, as am.

<sup>78</sup>*An Act to Amend Chapter 81 of the Revised Statutes, 1967, the Education Act*, S.N.S. 1981, c. 20.

<sup>79</sup>R.S.N.S. 1967, c. 81, as am.

<sup>80</sup>*Lavoie*, *supra*, note 46 at 27.

<sup>81</sup>*Charter of the French Language*, R.S.Q. 1977, c. C-11, as am.

therefore coexist with it.<sup>82</sup> Yet these words were used by the Supreme Court to signify that Bill 101 was such a great violation of *Charter* rights that it could not be saved under s. 1 and need not therefore even be tested against it. The Supreme Court did not say that any violation short of such direct collision could coexist with the *Charter*, but only that these would have to be tested against s. 1 in the usual way. Misunderstanding this, the Appeal Court opined that so far from detracting from the rights under the *Charter*, the *Acadian Schools Amendment* had the effect of "magnifying" them.<sup>83</sup> No doubt this came as a surprise to the Acadians. It seems odd that a government can magnify one's rights by a combination of inaction and inadequate provision. After all, the *Acadian Schools Amendment* is not what Nova Scotia has *in addition to* a regime implementing the *Charter*, it is what it has *instead of* a regime implementing the *Charter*.

It is clear that to provide for the creation of francophone schools from which some children eligible under s. 23 would be excluded does not fulfil the constitutional duty to provide instruction for the class defined by s. 23. What then will the courts say when a parent whose child is excluded under the statute but is eligible under the *Charter* sues to have the child admitted to an Acadian school? To order the child to be admitted is to recognize that the legislation is defective even if not invalid. So we need a more subtle vocabulary to describe the kind of unconstitutionality involved here: there has been a breach of constitutional duty even though there has been no invalid exercise of powers.

Some flexibility can be introduced, perhaps, by avoiding the all-or-nothing character of invalidation and allowing instead that a statute or decision can be declared ineffective to the extent that it conflicts with the requirements of s. 23. For example, one of the issues in the *Commission des Écoles Fransaskoises* case<sup>84</sup> concerned a regulation allowing the Minister to refuse to recommend the designation of a school as francophone if the programme could not be sustained for more than three consecutive years or if adequate provision could not be made for anglophone students. The regulation is inconsistent with s. 23 to the extent that it permits the Minister to refuse to designate a school when s. 23 would require it. The Court, rather than using the language of invalidity, declared the provision of no force and effect to the extent of the inconsistency, thus preventing the Minister from

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<sup>82</sup>*Supra*, note 14 at 28. The Court of Appeal in *Mahé*, *supra*, note 14 followed a similar approach arguing that the legislation which failed to recognize all the rights granted by s. 23 was supplementary to the *Charter*, not contradictory. The point is that contradicting s. 23 is not the only way to violate it. Ignoring its requirements is also a violation of duty.

<sup>83</sup>*Lavoie*, *supra*, note 14 at 27.

<sup>84</sup>*Supra*, note 14.

basing decisions on unconstitutional grounds while not excluding valid uses of his powers.

However, introducing remedial flexibility in this way or by the interpretative technique of "reading down" over-wide discretion is powerless against inaction. In the *Commission des Écoles Fransaskoises* case the Court declared that certain provisions of the *Education Act*<sup>85</sup> are of no force and effect to the extent that they fail to recognize the managerial rights of the minority. What consequence could this declaration have? It makes known the Court's view that the legislation is deficient, but does nothing to fill the gap. It has no immediate effect, since no particular decision or act is rendered ineffective by it. The most this can accomplish is to allow the courts to deny effect to any later decision made by officials which actively interferes with the ability of the minority to manage their own schools. This shows that in the face of legislative inactivity, mandatory orders may ultimately be the only effective remedy.<sup>86</sup> Merely to refuse to give effect to improper decisions will not itself ensure that the correct decisions will be made. Such remedies are certainly available under the *Charter*, provided only that they are "appropriate and just in the circumstances".<sup>87</sup> The failure of invalidation suggests that they are appropriate, at least in the sense of efficacious and proportionate to the violation of rights. Are they, in these circumstances, also just remedies? Or would their use raise some other general concern, such as the appropriate division of labour between courts and legislatures?

An educational system is a complex and expensive regime of physical resources, human skills, and organization. There is no doubt that legislatures and administrators are in the best position to create such a complex structure, and that courts have a lively awareness of their own limitations in this respect. They rightly hesitate to draft comprehensive blueprints for implementing s. 23, not only because of their limited competence, but also because there is no single scheme which is required by the *Charter*.<sup>88</sup> There is room for legitimate variation among the provinces in accordance with local needs and circumstances. In some cases, these variations will reflect the different responsibilities to religious minorities which must be accommodated by the minority language system, in others matters of convenience or efficacy. This will inevitably lead to differences among the structures ultimately adopted across Canada.

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<sup>85</sup>R.S.S. 1978, c. E-0.1 (Supp.) as am.

<sup>86</sup>For a similar argument, see Proulx, *supra*, note 27.

<sup>87</sup>S. 24(1): Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

<sup>88</sup>*Ontario Reference*, *supra*, note 14 at 43; *Mahé*, *supra*, note 14 at 533-35, 544; *Commission des Écoles Fransaskoises*, *supra*, note 14 at 361; *P.E.I. Reference*, *supra*, note 14 at 261.

There are, however, at least two remedial options between declarations of ineffectiveness and comprehensive educational planning by the courts. With respect to small-scale issues, the courts can provide for some immediate needs of litigants rather than leaving them subject to the vagaries of the legislative timetable. For example, assuming adequate evidence were presented, a situation like that giving rise to the *P.E.I. Reference* could be met with an order requiring the establishment of a school for all eligible children. This would ensure that at least these children get the education to which they are entitled. To make them wait until the government designs a minority language educational system is bound to have an adverse impact on their education. Provided that the court is presented with a reasonable and constitutional interim proposal, it should be implemented through mandatory orders. The courts need not be satisfied that the proposal is the best available one; they need only be confident that it will fulfill the essential needs of the litigants without closing any option which the government might legitimately wish to pursue. This does not irrevocably commit the legislature to a particular approach to the organization of the system. Indeed, the court could make it explicit in the order that it is effective only until the government makes provision for the relevant situation. In this way the ultimate power to determine the contours of the province's system would rest with the government, but parents and their children would not be required to wait for the benefits to which they are immediately entitled under s. 23.

Further, there may remain cases of complete and continued government inaction. It is impossible for the courts to refuse to intervene in such situations without completely nullifying the aims of s. 23. There are two alternatives. The courts could do their best to implement s. 23 on a piecemeal basis in response to claims raised by parents. But this would be a lengthy process and would tax the minority community with the need to litigate every complaint. Further, as more and more claims are adjudicated, the courts will inevitably face the necessity for more systematic planning and will therefore have to make the kind of judgments about which they now seem so hesitant. A better option may be to issue mandatory orders requiring the Minister of Education to design and establish a system for the implementation of s. 23. This would leave it to political officials to determine the shape of the system, subject, of course, to judicial review to ensure that whatever is adopted does in fact conform to the *Charter*. An appropriate time limit should be included in the order. This would put an end to governmental inactivity and ultimately establish a mechanism that should not require constant judicial supervision.

A final consideration suggests that mandatory orders are not merely permitted but required by justice. Time is running out for many minority

groups. The courts may well prefer to assume — at least at the outset — that no province wishes to deny minority rights, and that the courts need only declare the inadequacies of the existing legislation to induce the province to amend it. This may be the correct attitude in the first instance. But Canada is already seven years into the *Charter* era: that is long enough for a whole cohort of minority language children to have passed through the elementary school system. A recent study shows that, outside Quebec, facilities are still unavailable for *half* of the minority language students who are constitutionally entitled to them.<sup>89</sup> This should be understood in light of the fact that, unlike s. 15, s. 23 had no time-delay fuse; it was expected and intended to have immediate effect.<sup>90</sup> This seems to have been ignored by the courts in *Mahê* and *Lavoie* who said that the inadequate statutes, having been passed before the *Charter* came into force, could not have been intended to implement s. 23 and therefore cannot now be faulted for failing to do so.<sup>91</sup> They may be correct in holding that those statutes are not, for that reason, invalid. But that leaves many other remedial options. Does justice permit a government to evade its constitutional duties by the expedient of not trying to fulfil them? Is it not significant that the provinces have already had years to exercise their powers and, where necessary, amend or supplement their legislation as required by the *Charter*? To the extent that provincial regimes remain inadequate there has already been a deprivation of rights for a considerable period: another generation has been lost. The intended beneficiaries cannot fairly be expected to wait any longer. Not only their own education, but the linguistic security of their whole communities is at stake.

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<sup>89</sup>Angéline Martel, *Les droits scolaires des minorités de langues officielles au Canada ; de l'instruction à la gestion* (Ottawa : Commission des langues officielles, 1989) : Forthcoming.

<sup>90</sup>As Sirois, J. noticed in *Marchand*, *supra*, note 14.

<sup>91</sup>*Mahê*, *supra*, note 14, at 544; *Lavoie*, trial judgement, *supra*, note 46.