

Defining Language Groups: A Case Study of Eligibility for Minority Language Schooling in Canada

Denise Réaume

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Abstract

Political, economic, and social tension between language groups is a feature of life in many states as well as transnational bodies such as the EU. If not addressed, such tensions can lead to division, violence, and the ultimate breakup of political units. The need to accommodate the aspirations of the French- and English-language communities has been recognised in the Canadian Constitution since its inception in 1867. For much of Canada's history, its federal system of governance has been the main tool in the service of horizontal equality – since Quebec is the home of most French Canadians, the allocation to provincial jurisdiction of many of the spheres of regulation that affect everyday life has enabled the government of Quebec to protect the linguistic life of French Canadians to a large extent. But changes to Canadian society and to the Canadian constitution (in 1982) have complicated this simple federal solution to achieving horizontal equity. An important area of recent contest concerns access to minority language education – English schooling in Quebec; French schooling in other provinces. The 1982 Constitution enshrined a right to minority language education, setting out eligibility criteria and prescribing managerial control for the minority. The provisions constitute an unusual mixture of what look like very individual rights and provisions that indicate more group-based objectives. Judicial interpretation of these provisions brings out a pervasive tension between the collective ambitions of the provision and some of its individualistic attributes. Since courts in many legal systems are traditionally more adept at protecting individual rights and seeing and attending to forms of vertical discrimination, the individualistic elements of the Canadian provisions are in danger of undermining the central point of the provision – to use access to education as a key means of sustaining the French- and English-language communities on an equal basis.

The Author

Denise Réaume, Faculty of Law, University of Toronto; Visiting Professor, University of Oxford

Email: d.reaume@utoronto.ca

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Defining Language Groups: A Case Study of Eligibility for Minority Language Schooling in Canada

By Denise Réaume

1. Introduction

Two legal/policy approaches dominate language regulation (Dunton and Laurendeau 1967: Ch IV; McRae 1975). The territoriality approach assigns a particular language to be used within a particular geographical territory. With this approach, each territory should have a language it can call its own, and each language should have a territory it can call *its* own (Laponce 1987). By contrast, the personality approach treats language use as an individual right exercisable wherever an individual speaker of a particular language happens to reside. Both can be seen to be grounded in a concern about equality, but they differ in respect of whose equality is their focus. The territorial model concentrates on groups, whereas the personality principle is concerned with the equal treatment of individuals. The Canadian language rights scheme fits neither of these models in its pure form; rather it straddles the two. This creates a danger of confusion between a focus on individuals and one concerned with language groups. Provisions setting out individual eligibility criteria for access to minority language schools, the availability of which is designed to foster group equality, are a prime setting for this kind of confusion to appear, and, indeed, I will argue that this is currently happening in the interpretation of section 23 of the Canadian *Charter of Rights and Freedoms*.

This should perhaps not be surprising – courts are more used to working with individual rights than group rights, and the foundation of official language rights in the interests of groups is comparatively under-theorised. A better appreciation is needed of the nature of these rights, since allowing an individualistic bias to infiltrate the analysis will ultimately undermine the objective of fostering equality between groups. I hope to make a contribution to that project by demonstrating how the Canadian courts have given the section 23 eligibility criteria an individualistic cast, and arguing for an alternative interpretation that places the two official language communities at the centre of the analysis.

2. Groups or Individuals as the Focus of Language Policy: Competing Conceptions of Equality

Where there is a single dominant language in a state, it is natural that it be used in all official contexts; legal regulation is often unnecessary. The failure to provide for the use of any other languages compels their users to adapt to the majority language. When those who do not speak the dominant language are divided into several groups, are small in number, or are recent newcomers, the requirement to conform linguistically may be accepted. If this push for unilingualism raises equality concerns, they are not conceived of as issues of equality between groups, but rather as a matter of equal access for individuals to fluency in the dominant language, that is, help in assimilating.

However, in states with longstanding, sizeable communities using different languages, linguistic uniformity is not politically feasible. In this context, it is common to find a federal system of government with territorialist underpinnings. Semi-autonomous regions roughly map onto linguistic concentrations. Once provincial boundaries are established, the territoriality principle applies to language use in

official contexts within the province, and non-speakers of the regional majority language are expected to adapt, or move. This form of government can be seen as a way of fostering equality between language groups – each language community has its ‘own’ province within which that language can thrive, ensuring the equal opportunity of each to flourish. Note, though, that a territorialist policy undertaken in the service of inter-group equality protects groups at the expense of individuals’ ability to move freely across linguistic boundaries.

By contrast, a personality-based approach is said to protect individual freedom of choice with respect to language use without geographical conditions. However, unless interpreted as a positive right imposing on others obligations to accommodate and facilitate one’s choice of a particular language, this approach is unlikely to be conducive to inter-group equality. Recognising a mere negative liberty to use one’s language makes it easy to ensure vertical equality, but in the face of socio-economic inequality between language groups, it is typically only a matter of time before linguistic inequality emerges as well. When one linguistic group enjoys greater status, income, and position than another, speakers of the disadvantaged group come under constant pressure to abandon their own language and assimilate to the language of power and prestige. As better placed individuals make the decision to defect to the more advantaged group, it becomes ever harder for those left behind to maintain a vibrant linguistic community, and the socio-economic fortunes of the group decline. This self-reinforcing cycle is likely to result in the ultimate assimilation of minority language speakers into the majority. Yet it is difficult to see how the right to use one’s own language can be recognised as a positive *and* individual right, how each individual’s right can be equally respected – when speakers of different languages interact, one person’s putative right that another cooperate in speaking her language stands to conflict directly and pervasively with the other’s right that his use of his language be facilitated.

It appears, then, that the territoriality principle attends to language group equality, aiming to ensure a full social, economic, and political life for each of two or more language communities, but is blind to individual interests, while a personality-based approach, interpreted negatively, can protect individuals equally from interference in their choice of language, but leaves in operation forces that are likely to result in group inequality. In other words, the two policy strategies appeal to conflicting conceptions of equality.

Canada’s constitutional language policies include a territorial component, but also provide for certain language rights that are portable across the country. The former fits with the idea of pursuing horizontal equality while the latter seem more personality-based and might therefore be thought to aim at vertical equality. However, the language rights guaranteed are positive rights, not mere negative liberties, and they pertain only to the two official languages and operate within certain key contexts and institutions. Thus, we might ask whether the Canadian scheme is designed to promote equality between language groups or equality between individuals, and if the latter, what kind of equality.

A brief sketch of the Canadian system is in order. Since a federal system of government was adopted in no small part in order to take account of the cultural differences between predominantly French and Catholic Québec and the other original provinces which were predominantly English and Protestant, the federal underpinnings of the system reflect the territorial influence (Cook 1969; Leslie 1986). The province of Quebec, as the home of most French-speaking Canadians, has been

the guarantor of the health and vitality of the French language and culture; the other provinces, being predominantly Anglophone, conduct public life in English.¹

But this federal structure is overlaid with various special protections for French and English that are difficult to reconcile with the territorial principle. Both French and English may be used before the federal legislature and courts and those of Quebec (*Constitution Act, 1867*: section 133), Manitoba (*Manitoba Act, 1870*: section 23; retroactively confirmed in *Constitution Act, 1871*: section 5), and New Brunswick (*Charter of Rights and Freedoms* 1982: sections 16(2) & 17(2)). The federal and New Brunswick governments also have a constitutional obligation to provide government services in both official languages (*Charter of Rights and Freedoms* 1982: section 20(1)-(2)).² Finally, the most important change to language policy in the 1982 *Charter* – section 23 – encroaches on provincial jurisdiction over education to accord the linguistic minority in every province a right to have their children educated in their language, subject to a requirement of sufficient numbers. In these various respects, the ability to pursue a unilingual agenda as countenanced by a territorial model is constrained; official minority language use must be guaranteed in at least some public contexts.³ Of particular importance for the purposes of the case study below, every province has an obligation to provide education in the minority official language. French Canadians carry with them across the country their right to educate their children in the own language; likewise, English-speaking Canadians have a right to English-language education even in Quebec.

The Canadian scheme of language protections is explicitly aimed at fostering, reinforcing, and maintaining equality between the country's French- and English-speaking populations. The *Charter of Rights and Freedoms*, section 16, declares 'English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada'. The model uses territorialist policies and positive language rights together in the service of fostering horizontal equality between official language groups. In particular, the language rights included are best seen not as individual rights in the traditional sense, but as group rights. Thus the Canadian scheme seeks to foster group equality and remedy group inequality by recognising certain language rights for the benefit of minority language communities. This approach challenges the traditional alignment of the territorial approach with a concern for groups and the personality approach with a focus on individual rights. If our concern is whether and how law can be used to foster horizontal equality, the Canadian experience shows that language rights exercisable anywhere in the country are amongst the legal tools available.

The distinctive feature of the Canadian regime is that it accords to individuals rights in respect of language use that are justified by reference to the needs and interests of minority language groups. It cannot be claimed, however, that this foundation is clearly understood by the Canadian courts. This is not surprising given the relentlessly individualistic interpretation of human rights in western philosophy and

¹ Institutions of the federal government were meant to operate equally in both languages in order to maintain the balance.

² This obligation is categorical with respect to services from head offices, and is qualified by a combination of level of demand and importance of the service in respect of local offices.

³ There is an obvious asymmetry in the extent to which the use of one's own language is available to Francophones across the country by comparison with the availability of English in Quebec. The historical and political explanations for these asymmetries testify to the imperfections in the Canadian regime as an instantiation of a model of language rights.

law. This individualistic framework is so much part of legal culture that it is a matter of instinct. Thus, although the courts have recognised that the official language rights regime is, in general, designed to protect minority language communities, they also have a tendency occasionally to slip into an individualistic interpretation of some provisions. When this happens, it threatens to undermine the larger horizontal equality aim.

Canadian language rights are grounded in the interest in what I call linguistic security, and this interest is meant to be protected equally for French and English speakers. Linguistic security requires that use of a protected language not be subjected to attack, but also that it be positively supported through the maintenance of a substantial array of contexts for its use in freedom and dignity. Linguistic security cannot be individually enjoyed – the existence of a thriving language community is a complex set of practices requiring the participation of many not only for its production, but its enjoyment (Réaume 1988). The individual's interests in the use of a particular language are at least partly fused with those of the group as a whole. The group nature of the existence of a language community must therefore flavour the content of the specific rights recognised in pursuit of linguistic security.

This treatment of language rights as minority group rights does not mean that whole communities are the only possible *claimants* of the concrete legal rights that make up a language rights regime. Unless language communities are defined territorially as in a federal state, or are otherwise given legal shape, they lack clearly identifiable representative bodies. Enforcement of rights would therefore be impossible if only group claims were allowed. The participatory nature of a language community has more to do with establishing preconditions of the existence of the right, and with determining the appropriate substance of those protections, than with the question of who has standing to put such claims. Provided a language community is viable – has sufficient numbers to sustain a meaningful communal life – it meets the threshold conditions for protection.

With respect to the right to education, the local nature of the service makes it conditional upon the local existence of a community large enough to warrant it. Once this is established, there is no reason why an individual member of this community may not enforce the right. Thus, the good protected by these rights requires a community, and the right exists ultimately for the sake of the community as a whole, yet it is possible, for enforcement purposes, legally to define the right-holder in individualistic terms. Note, however, that it is individual *members of the community* who are entitled to exercise a given right. We must first specify the boundaries of the community before individual claims can be admitted.

However, when rights are conferred individually the underlying group-based justification for language rights is in danger of being forgotten. When the issue is language use in the courts or the provision of government services, there should be no objection to making these services available at will in either language.⁴ If the

⁴ Even in this context, however, judges have managed to go astray by interpreting language rights on a traditional individual rights model. For example, in *MacDonald v. City of Montréal* 1986, Beetz J. thought it necessary to interpret the right to use English or French before the courts as a negative liberty to avoid conflict with the language use rights of others that would arise on a positive rights interpretation. A's right to speak her official language would conflict with the official to whom she wanted to speak if the latter's choice of language were different. Therefore, according to Beetz J., the only way to avoid the problem is if A has the right to speak whichever language she wishes, but no right that the official understand her. For a critique of this argument see Réaume 2000.

institutions are in place to provide the service in both languages, it seems simply churlish to interrogate more closely the linguistic membership of a particular applicant to decide in which language she is entitled to be served. As we shall see, however, the provision of educational services is more complex. Here, the criteria for conferring the right also define the groups meant to benefit; they set out who is, and is not, a member of the relevant language communities. However, the individualistic cast of the eligibility criteria can obscure the task of defining the groups protected. An example of this phenomenon has arisen recently in Canada in a series of cases interpreting the eligibility criteria for access to minority language education. To this example, I now turn.

3. Eligibility for Minority Language Education: a Case Study

The Anglophone provinces have a long history of denying or restricting French language educational services, a fact that section 23 was manifestly designed to remedy (Magnet 1995; Martel 1991; Wardhaugh 1983). In other words, most Anglophone provinces traditionally have pursued a *de facto* territorialist policy, providing education only in the majority language. In response to a wave of litigation having to do with the type, extent, and quality of school system guaranteed by the minority language education provision, the Supreme Court ultimately interpreted section 23 generously, declaring that minority language communities are entitled to an education system that is roughly equal in quality to that of the majority, that immersion schools do not qualify as French-language schools, and that the right includes the right to governance of the schools meant for the section 23 community (*Mahe v. Alberta* 1990). In this context, the Supreme Court has shown a keen awareness of the group-focused purpose of section 23. In *Mahe* the section 23 right is said to be conferred upon a group (*Mahe* 1990: 365), and the Court remarks that 'A notion of equality between Canada's official language groups is obviously present in section 23' (*Mahe* 1990: 369). In *Arsenault-Cameron v. Prince Edward Island* the Court referred to the official language minority as 'itself a true beneficiary under section 23' (*Arsenault-Cameron* 2000: para. 29).

Meanwhile, in Quebec, the minority language education issues were entirely different. Quebec has long operated a comprehensive system of English schools parallel to the majority French school system. Indeed, for a period, parents were free to send their children to either system, provided only that the child's competence in the chosen language was adequate. In other words, Quebec operated a system based *de facto* on something very close to the personality principle. With rising immigration levels, however, a pattern developed of immigrant families in Quebec, Montreal in particular, choosing to send their children to the English schools. The government began to worry that the balance between the French majority and English minority in Quebec was in danger of tipping in the opposite direction and that the future of the French language was in danger. Given the history of English economic and social dominance in Quebec – a legacy of the conquest of New France by Britain against which the Quiet Revolution of the 1960s was directed – these trends were ominous. The future of the French language seemed threatened in its traditional (North American) homeland (Levine 1990: Ch 4-5).

In response to this threat, Quebec enacted the *Charte de la langue française (CLF)* in 1977.⁵ The *CLF* removed freedom of choice in the language of schooling, and enacted a set of eligibility criteria for access to English schools. When the Canadian *Charter of Rights and Freedoms* was enacted in 1982, the eligibility criteria for

⁵ This legislation is often referred to as Bill 101.

minority language education were roughly borrowed from the Quebec legislation – with one important exception. The *CLF* had confined access to English schools in Quebec to those whose parents were educated in English *in Quebec*, thus confining the right to the indigenous Anglophone minority. The Canadian *Charter* views the issue in more pan-Canadian terms, seeking to protect Francophones and Anglophones throughout the country whenever they find themselves in the minority within any province. In 1984, in *A.G. Quebec v. Quebec Association of Protestant School Boards*, the restriction in the *CFL* was struck down. In response, Quebec amended it in 1983 to allow access to the children of those educated elsewhere in Canada, but also to specify that the parent must have received the ‘major part’ of her instruction in English to qualify (*An Act to Amend the Charter of the French Language* 1983: section 15). In 1993, this ‘major part’ qualification was inserted throughout the eligibility criteria (*An Act to Amend the Charter of the French Language* 1993: section 24). In *Solski v. Quebec*, the Supreme Court declared this qualification on access to English state schools to be consistent with section 23 provided it is interpreted in a “qualitative” and not mechanically quantitative way (*Solski* 2005).

Section 23 issues have continued to play out differently in Quebec and the rest of the country – parents in the latter continue to struggle to secure high-quality schooling and full control over the governance of their school system, whereas the issues in Quebec continue to revolve around the criteria for access to section 23 schools. This fact, in itself, tells us a great deal about language issues and politics across the country. Quebec discovered that an individual free choice model can threaten to undermine even a majority language community. Judged by the scheme of the 1982 Constitution, Quebec went too far in confining English education to those who could be counted Anglophone *Quebecers* based on parental education in Quebec. But the fact that section 23 otherwise mirrors the eligibility criteria in the *CFL* suggests that the drafters understood the need to protect against the likely effects of individual free choice in a context of overarching inequality between language groups.

In summary, then, guaranteeing access to education for members of the French and English communities across the country was a response to the long-standing territorialist bent in Anglophone provinces as well as the relatively mild territorialist turn in Quebec in the 1970s. However, the response was not to enshrine individual freedom of choice in respect of the language of education. Rather, section 23 protects minority language *groups* within each province or territory. It controls the power of regional majorities for the sake of members of the other official language group present in the jurisdiction. However, there is potential for confusion because minority groups are protected through the grant of rights to individual parents in certain categories. The latest debates about eligibility criteria illustrate how easy it is for equality between groups to be forgotten when the legal language in which rights are expressed has an individualistic ring.

3.1 Eligibility: Identifying Individual Beneficiaries or Defining Groups?

The section 23 eligibility criteria are complex:

s23 (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.

The criteria consist of three elements: parental mother tongue, parental education in Canada, and child's educational history in Canada. Canadian citizenship is a background precondition. That there are eligibility requirements at all indicates the rejection of a model of individual free choice of language of instruction.⁶ The drafters of the Constitution therefore had to define the class of those covered by section 23. Each of the three elements plays a distinct role in shaping the class of section 23 claimants in any given jurisdiction. The question is whether these criteria are to be read in individual terms or seen as a means of describing two language *communities* in order to foster their linguistic security through schooling.

A few comments are necessary to provide context for these criteria before examining the courts' analysis of them. Above, I noted that an individualistic approach to language rights ignores and exacerbates inequalities between groups because it militates in favour of a negative liberty conceptualization. To ensure that a minority language community *is provided with* education in its own language, a negative liberty is obviously insufficient. Minorities need more than just freedom from interference in schooling their children in their language; they need state schools provided, operating in that language. The situation in Quebec involves a new twist – given that a school system exists, an individualistic approach to eligibility fails to take into account inter-group dynamics and can exacerbate inequality in a new way.

An English school system already exists in Quebec – the government has lived up to its positive obligation to provide English-language schooling. It is easy to take this infrastructure for granted when determining who is entitled to be admitted. If the system is not yet in place and entitlement to its creation depends on whether a group exists, it is natural for governments to scrutinise individual eligibility carefully to determine whether the threshold is met. However, one might argue, if the community is large enough to warrant the provision of schools, why not admit anyone who wants to attend? Surely this would guarantee the continued viability of the minority school system. But such an individualistic approach to eligibility would ignore the minority status of French in the country as a whole and the vulnerability that flows from it.

An individual right to access to English education creates the conditions for a Prisoner's Dilemma to unfold in Quebec. Given that there is only one Francophone province in Canada, that the rest of the continent is English-speaking, and that Canada has a history of denying full equality of opportunity to Francophones in government at the federal level and in business everywhere, there is inevitable pressure for parents seeking to maximise their children's options to educate them in English. Left to their own devices, ambitious parents will – one family at a time - choose English. As more parents do so, others will feel compelled to follow. This is likely gradually to undermine the existence of the French-language community in

⁶ The Supreme Court in *Solski* comments that the framers rejected a free choice model *in Quebec*, but the point can surely be generalised (*Solski* 2005: para. 8).

Quebec and ultimately throughout the country. The result could be that everyone will end up having lost their language without that being anyone's preference. In other words, the same dynamic that calls for the protection of Francophone minorities outside Quebec also affects the Québécois, considered as a disadvantaged minority in the country as a whole. In a nutshell, both the vulnerability of the Anglophone minority within Quebec and of the Francophone minority nationally must be taken into account in interpreting section 23 in order to foster horizontal equality. Though the individual free choice model for eligibility may look on the surface to be the easiest and best way to protect one group, it would likely be disastrous for the other.

Against this backdrop let us examine the key features of section 23's eligibility criteria. By virtue of section 59 of the *Charter*, subsection (1)(a) of section 23 does not come into force in Quebec until a proclamation to that effect is issued by the Governor General which has been authorised by the legislative assembly or government of Quebec. No such proclamation has yet been made. This means that the eligibility criteria are slightly more generous in English Canada than in Quebec. For example, a Francophone immigrant who becomes a citizen and settles in Ontario has a right to send her children to French schools, whereas an Anglophone immigrant who settles in Quebec does not enjoy a comparable right. This asymmetry was clearly designed to protect Quebec from the effects of future immigration in a way that was considered unnecessary in English Canada.

But section 23(1)(a) was not primarily intended to benefit immigrants who happen to be native speakers of French or English. Rather, it has a remedial purpose as a supplement to section 23(1)(b), which makes the language of the parent's primary education a basis for entitlement. These two subsections are very carefully crafted with a view to the conditions on the ground in the Anglophone provinces prior to the enactment of the *Charter*. For example, most provinces did not provide any secondary schooling in French, and so it is only primary-level education that is needed to satisfy (1)(b). Further, in many parts of most Anglophone provinces, even primary school instruction in French would have been unavailable to the generation of people with children in or about to enter school as the *Charter* came into force. Subsection (1)(a) was designed to ensure that, provided French was one's mother tongue and is still understood, a Francophone parent would be able to rely on section 23 schooling for her children even if she herself had been denied French-language education. The provision enables Francophone parents to undo the effects of past efforts at assimilation if they so desire.

Both parts of section 23(1) focus on parents; by contrast, section 23(2) grounds entitlement to access to section 23 schooling in a child's educational history. Subsection 2 focuses on the educational history of a specific child, and grounds a right in the parents of that child to continue the child's education in a particular official language as well as to have siblings educated in the same language. The provision is generally understood to be based on a desire not to disrupt a child's education by forcing her to change from one language to another. As we shall see, the courts have tended to treat continuity of educational experience as a freestanding value in the scheme rather than tying it to the effort to determine membership in language communities. This has ended up introducing something very close to freedom of choice by the back door.

Each of the parts of the eligibility criteria is independently needed – each contributes something distinctive to the total class of eligible persons. Although there is a great deal of overlap between the class of native speakers of a particular official language and those educated in that language, there are some native speakers who do not meet the primary education condition. Likewise, there will be some, mostly the

Canadian children of immigrants, who were educated in an official language which is not their native tongue and who would therefore qualify under section 23(1)(b), but not (a). Finally, section 23(2) is designed to enlarge the class by including some children who cannot qualify under (1). The central question is whether these criteria add up to the definition of a meaningful group, or a collection of individuals who make up a class of beneficiaries.

If section 23 is a kind of group right, meant to protect language communities and to recognise and foster the equality of the French and English communities, the groups so protected must be defined. This is the challenge raised by the eligibility cases and it is a tough nut to crack for legislative and constitutional drafters. They might have simply afforded protection to the English and French “communities” as such, but this would require identifying who speaks for these communities in order to have standing to enforce the rights claims. The standing problem would be avoided by according rights to members of these two language communities, but that is rather vague and suggests that anyone who speaks either language is a member. Such a wide definition seems to treat the languages themselves as important rather than the communities of people for whom they are the traditional means of expression and basis for identification. Yet to define the group narrowly in terms of ancestral history and rootedness in Canada gives rise to its own problems. Canada has always been and remains a country of immigrants. The protection of only two official languages indicates an expectation that each successive wave of immigrants will integrate into one or both of these language communities, even if they maintain a connection to their mother tongue. But when does a family of new Canadians become connected enough to an official language to become part of that group? The crafting of the boundaries of the protected communities has to reflect the experience of recent immigrants as well as ‘old stock’ Canadians.

Thus, defining the contours of the group for purposes of access to a group benefit is fraught with difficulty. Nor is it a task with which legislative and constitutional drafters have had a great deal of experience. One might say the same thing about courts, which are much more adept at working with individual than group rights. This creates a pull in the direction of individualising the interpretation of rights, even ones acknowledged to be designed for groups. This has been especially true of the interpretation of section 23(2). Instead of reading it as integrated into a set of eligibility criteria designed to define the group meant to enjoy language protection, the courts have treated it as a freestanding basis upon which individuals qualify for access to section 23 schools.

The issue has come to a head in the 2007 case of *H.N. v. Quebec*. The Quebec legislation explicitly makes French-language education the default in the state school system, requiring those seeking to attend English state schools to apply for an exemption. Its criteria for granting an exemption mirror those in section 23,⁷ but go further in some respects: those who are resident only temporarily in the province, parents who are not Canadian citizens but were themselves educated in English in *Quebec*, and those who can make a compelling humanitarian case may be exempted from the French-language schooling requirement.

Two sorts of hard cases have resulted in litigation. First is the situation of temporary residents who have taken advantage of the greater generosity shown by the Quebec legislation than required by the *Charter* and gotten temporary permission to send their children to English schools, but who then decide to remain in Quebec and take up Canadian citizenship. Having received English education under a temporary

⁷ Subject to the ‘major part’ qualification upheld in *Solski*.

permit, is such a child entitled under section 23(2) to carry on in the English school system, conferring a like right on all her siblings, and ultimately on her and their children?

A second scenario involves parents who do not qualify for permission under either section 23 or the more generous criteria of the *CFL* to send their children to English state schools, and who enrol their child in private English school. Does section 23(2) grant an entitlement to a child who has 'received instruction' in English in a private school to access to the English state school system for the rest of her education, along with the same right for her siblings and future generations? Note that the *CFL* does not apply to the private school system; there is no prohibition on operating private English schools in Quebec and no control exercised over who may attend such schools. These litigants include both immigrants who have become citizens and native born Quebec Francophone parents. If spending some time in a private school grants eligibility for section 23 schooling, it will be relatively easy for many new Canadians and Francophone Quebecers to evade the default rule in favour of French instruction. That this is not a hypothetical concern is revealed by the emergence of English private schools in Montreal advertising themselves as the gateway to section 23 schools.⁸ In other words, an increasingly popular parental strategy is to send one's first child to English private school for one year and then claim the right to switch to section 23 schools for the whole family.

Although Quebec used to treat time spent in English school through either of these paths as relevant to section 23(2) eligibility, concern about the rise in applications for exemption on these bases led to an amendment in 2002 stipulating that time spent in English schooling under a special exemption or in private school is to be disregarded in assessing whether the 'major part' qualification introduced in 1993 is met (*An Act to Amend the Charter of the French Language* 2002). The constitutionality of this injunction to disregard certain forms of English-language education for purposes of section 23 (2) is the issue in *H.N.*

A tendency to read section 23(2) in a profoundly individualistic way can be seen at work in both the Supreme Court decision in *Solski* and in the Quebec Court of Appeal in *H.N.* This individualistic slant pulls the interpretation toward the individual free choice end of the spectrum and away from considering the health and flourishing of communities. *Solski* sets the backdrop for the issue in *H.N.* I have mentioned that the Supreme Court consistently referred to the collective nature of the section 23 right in the earlier case of *Mahe*, but once the issue turned to the eligibility criteria in *Solski* the Court's language changed subtly, but significantly. Here, the Court describes section 23 as follows:

'Section 23 is clearly meant to protect and preserve both official languages and the cultures they embrace throughout Canada; its application will of necessity affect the future of minority language communities. Section 23 rights are in that sense collective rights....Nevertheless, these rights are not primarily described as collective rights, even though they presuppose that a language community is present to benefit from their exercise. A close attention to the formulation of s. 23 reveals individual rights in favour of persons belonging to specific categories of rights holders'.

(*Solski* 2005: para. 23, emphasis added)

⁸ See the discussion of this phenomenon in *H.N.* (*H.N.* 2007: para. 260-261, *per* Giroux J.A. dissenting).

The purpose of the section is then described as follows: ‘to protect, preserve and reinforce the minority language community by granting individual rights to a specific category of beneficiaries’ (*Solski* 2005: para. 28). So, although the purpose remains the protection of communities, the right is an *individual* right, or rather mysteriously, ‘both a social and collective right, and an individual and civil right’ (*Solski* 2005: para. 33).

There is no doubt that section 23 rights have an individual form – each citizen of Canada who fulfils the eligibility criteria has the right. But surely that is because it is individual parents who make decisions about schooling for individual children and we want *each* parent and child *who qualifies* to be able to avail herself of the right. The Court’s focus on the individual dimension of the right, however, ultimately goes beyond merely allowing individuals to claim enforcement of the right to fundamentally influence the interpretation of who qualifies, that is, of who is included in the group.

The Court begins by dismissing a conception of membership in either language community based on some sort of ancestral connection because of the various ways in which the section 23 criteria do not map neatly onto such a conception. For example, a particular child need not be able to speak the language of the school to which she seeks admission, as long as her parent meets the relevant criteria. Similarly, a Francophone from outside Quebec who has started her children in the majority English language schools in an Anglophone province has the right to have them carry on in English if she moves to Quebec.⁹ Finally, new Canadians, who may not be native English or French speakers, have the right under section 23(2) that their children continue to receive instruction in whichever language they have started, even if they move to a province in which that language is the minority language. For these reasons, the Court correctly concludes that section 23 rights are not defined in terms of ancestral participation in the English or French community in Canada.

Searching for an alternative ‘sufficient link’ (*Solski* 2005: para. 37)¹⁰ between claimants and a particular language community to inform the section 23 criteria, the Court latches onto whether the family has shown an ‘intention to adopt’ a particular language, treating such intention as a ‘marker of an existing affiliation’ with that language community (*Solski* 2005: para. 39). Later the link is expressed as a ‘commitment’ to that community (*Solski* 2005: para. 42). Provided commitment is evident, the Court holds that the purpose of section 23(2) in protecting educational continuity is served by allowing the child into section 23 schools. Notice that ‘continuity of educational experience’ is an individual interest that is disconnected from the underlying purpose of fostering the health and viability of minority language communities. If a child has begun school in one language, continuity is important simply because of the disruption for the individual child caused by the change to a new language. If not a fully universal interest (some children may enjoy change), it is surely something about which parents are best placed to judge and make the choice.

To protect this interest the Court invents a conception of membership in a language community that is itself closely tied to parental choice. Having discounted a thick conception of membership for purposes of deciding who is eligible, the Court perceives there to be nothing left to rely on than ‘commitment’. In the context, this amounts to the parent’s choice of one language over the other. If choice is sufficient

⁹ The same is true for an Anglo-Quebecer who sends her child to French school in Quebec and then moves to Ontario.

¹⁰ The Court is apparently adopting language advocated by the Quebec Attorney General – see *Solski* (2005: para. 26).

to ground membership, the only thing left of the collective nature of the right is the requirement that there already be a language community in existence in the jurisdiction to trigger section 23. In other words, given that an Anglophone minority exists in Quebec, evidence of commitment to the English community allows one to cement that commitment through one's children's schooling. The desire to protect continuity ends up protecting freedom of choice.

Only the explicit wording of section 23(2), which requires that the child must already have received or be receiving instruction, prevents eligibility turning solely on choice. Protecting *continuity* requires that a child has already gotten her foot in the door, so to speak. The Court begins by denying that access to section 23 schools is simply a matter of parental choice, yet choice plus the possibly modest effort it takes to get one's child's foot in the door suffices to establish the appropriate link – 'intention to affiliate', or 'commitment' – to the minority language community. Granted that ancestral connection rooted in the mists of time is too restrictive a conception of membership in a country of immigrants, it does not follow that the only alternative is choice-plus-a-foot-in-the-door. The Supreme Court's approach seems terribly thin as a conception of membership. The group of section 23 beneficiaries looks like the class of those who choose to shop at Wal-Mart and take the trouble to drive to big box land to do so.

Adopting this approach, the Quebec Court of Appeal let the other shoe drop in *H.N.* Remember that the issue in *H.N.* is whether Quebec must count as relevant to satisfying section 23(2) time spent in English instruction in a private school or under an exemption granted outside section 23. I will focus on the private schooling issue, since this is the greatest threat to the viability of the French majority in Quebec. If parents can send a child to a private school for as little as a year and then claim access to section 23 schools thereafter, the idea that Quebec is entitled to make French the default language of education is in jeopardy.¹¹ While not every recent immigrant or Quebecois parent who wants to educate her children in English will be able to afford even one year of private schooling, many more will be able to secure full English schooling for their children than if they had to do so through the private system for the whole of their children's education. Although the Court of Appeal denied that its decision in favour of section 23 access amounted to the imposition of an individual free choice model on Quebec, the result is so close to it as to make the differences cosmetic.

Again, the Court of Appeal got caught up in an individualistic conception of the purpose of section 23(2). Evidence of this lies in the pervasive references to the vertical inequalities that would arise on any other interpretation. These arguments ignore the fact that the boundaries of the relevant groups must be settled before we can know which individuals can properly be compared to ensure equal treatment.

For example, the majority argues that failure to treat all minority language educational experience, however received, as sufficient would be to treat new citizens like non-citizens (*H.N.*2007: paras. 116-120 & 201). This concern with the welfare of new citizens is laudable, but it begs the question of how 'membership' for the purposes of access to section 23 schools is defined by the *Charter*. Some inequalities between citizens are built into section 23 by its very nature. A new citizen is very unlikely to be able to claim access to section 23 schools for her children through section 23(1), which requires the parent to either be a native speaker of the relevant language (if applicable) or to have been educated in that

¹¹ In *Solski*, the Supreme Court ominously pointed out that there is no minimum period of instruction in the desired minority language prescribed by s. 23(2) (*Solski* 2005: para. 41).

language *in Canada*. Therefore new Canadians can usually only claim section 23 rights, if at all, through subsection (2). To the extent that section 23(2) is read narrowly, new Canadians are given limited access and therefore more of them are indeed treated the same as non-citizens. Faced with this, the court seems to have resolved to reduce the vertical inequality as much as possible within the constraints of section 23. However, the comparison with non-citizens begs the question. A narrower reading of section 23(2) would catch not only new Canadians but also many old stock Canadians – if using private school as a springboard into state English schools is unavailable to new citizens, it is equally unavailable to francophone Québécois parents who were not themselves educated in English. This is, of course, the majority of the Quebec population. New citizens denied access would be treated not only like non-citizens, but like Québécois, who do not have the automatic right to choose English as the language of their children’s education.¹²

The argument that it is wrong to treat new citizens like non-citizens reveals an assumption that all citizens should have equal access to section 23 schools. But that would be true only if the *Charter* had instituted an individual free choice regime. Indeed, by starting with the comparison between new citizens and non-citizens in order to declare like treatment insulting to new citizens, the logic of the analysis takes the court to the wholesale inclusion of Francophone Québécois. If it is wrong to treat new citizens like non-citizens by denying access, *a fortiori* it must be wrong to treat old stock Québécois like non-citizens. In two easy steps we have produced a thinned out conception of membership that turns nth generation Québécois into members of the *Anglophone* community provided they display an intention to so affiliate.

The majority also found it objectionable that a child educated in private school in English elsewhere in Canada should be entitled to section 23 schooling in Quebec, but a child sent to private English school in Quebec would not be. According to Dalfond J.A. it would be ‘absurd’ to premise section 23(2) rights on a move from one province to another (*H.N.* 2007: para. 210). If one can move from province to province and preserve one’s right to English state schooling, he argues, one should be equally entitled to move from one school system to another within Quebec. The child’s interest in stability is just as important in either case, he claims. The child’s putative right to continuity in education is driving the argument. Because continuity is equally important to every individual child the section 23 criteria for access to minority language schools should be read to make access to linguistic continuity as equally available to all children as it can be.¹³ This motivates the desire to level up wherever possible to ensure that children who seem like, in some respect, children who are undoubtedly eligible are treated alike. Again, educational continuity becomes

¹² The Supreme Court in the earlier decision in *Gosselin v. Quebec* 2005 rejected the argument presented by a group of Quebec francophone parents that the equality provision of the *Charter*, s. 15, gives them the equal right with Anglophone Quebecers to educate their children in English. There should therefore be no shame for new citizens in being treated the same as native born Québécois.

¹³ Similarly, focusing on the fact that some dominantly Anglophone provinces have more generous eligibility to minority French schools than Quebec does to English schools, Hinton J.A. complained that a narrow interpretation of s. 23(2) would mean different levels of access in different parts of the country. Again the argument is specious. Section 23 presupposes provincial control over education. It prescribes a floor, but not a ceiling with respect to access to s. 23 schools. The Constitution requires that its floor be respected. If, beyond that, some provinces are more generous than others, residents of the latter have no more basis for complaint than with any other aspect of education policy. We need an independent argument that the putatively more generous provinces have accurately captured the meaning of the s. 23 criteria before levelling up to that standard is require.

linguistic continuity and what provides the section 23 toehold is the parent's choice to start the child's education in English, by hook or by crook.

3.2 A New Start: Eligibility as Group Membership

These decisions go awry in failing to look at the section 23 eligibility criteria holistically and in line with the overarching objective of fostering the equality of the two official language communities based on a meaningful conception of them as established communities. The various aspects of the eligibility criteria are placed in watertight compartments and then independent objectives are attached to each; in particular the independent objective of protecting continuity of educational experience is attached to section 23(2). Given the individual focus of this objective, it pulls the interpretation of subsection (2) in a universalistic direction that ultimately produces a thin conception of membership based on a notion of 'commitment' that seems little different from choice. The mistake has been to disconnect the continuity objective from the mobility-protecting objective embedded in the criteria. Although the Supreme Court recognises mobility as one of the interests section 23 protects (*Solski* 2005: para. 30), these recent cases have subordinated it to educational continuity, so much so that it gets twisted into mobility between the private and state school systems. In fact, continuity is protected in order to protect mobility and the objective of protecting mobility can be fitted in with a meaningful conception of linguistic membership.

Let's go back to the beginning. Seeing the right to education in a particular language not as an individual right to choose, but as a group right requires us to define the groups through eligibility criteria for section 23 schools. Using deep ancestral connection as a necessary condition is too restrictive for a nation of immigrants. Using mere competence seems too loose a definition of the relevant groups, mere choice even more so. Against this backdrop, section 23(1)(b) – the parental education criterion – deserves a closer look. Parental education makes some degree of historical family connectedness to French or English the foundation for eligibility – not connectedness from time immemorial, but for at least a generation; long enough for a parent of a child seeking access to a particular school system to have been educated in Canada in that language herself. This is far more robust as a criterion for membership in a language community than mere choice, or than ability to speak the language, but not so robust that it screens out all but those who can trace their lineage in Canada back to initial European settlement. Families more recently arrived are included from the point at which the second generation is educated in Canada. In other words the grandchildren of immigrants from Poland or Haiti or India are full members of the English or French communities, as the case may be, provided the citizenship condition is met, and their parents have full rights to minority language education for them under section 23(1)(b). Not everyone will find this definition of linguistic community attractive or fully satisfactory, but it does provide a meaningful definition of membership in one of the two official language communities for a nation of immigrants and is thus consistent with the group focus of section 23.

This analysis makes the other elements of section 23 ancillary to the parental education criterion. As we have already seen, section 23(1)(a) has a remedial purpose. It is meant to counteract the history of denying minority language education in English Canada, a problem never experienced in Quebec. Without it, thousands who have an ancestral tie to the French community would lose their opportunity to reestablish that tie through their children. Ancestral connection may not be necessary to establish membership, but it should be sufficient, at least when its threatened loss has itself been a result of mistreatment and injustice. Looked at in this way, the inapplicability of section 23(1)(a) in Quebec is not, contrary to Supreme

Court dicta (*Solski* 2005: para. 8), a compromise of *Charter* principles but a recognition of asymmetrical realities. It has consequences, though, that may be discomfiting to judicial minds used to adjudicating universal principles. It means, for example, that a handful of native Francophones who immigrate to English Canada get more generous treatment than native Anglophones who immigrate to Quebec; the former get the benefit of the mother tongue criterion even though it is not designed with them in mind. But this is a mere side effect of the remedial purpose of section 23(1)(a). It would have been permissible to level down to treat Francophone immigrants the same as Anglophone immigrants, but the decision not to do so cannot ground a claim to level up.

What about section 23(2)? Before the section 23(1)(b) right vests, most first-generation Canadians must rely on subsection (2), *if they can*. An immigrant family that settles and stays in a particular province is in a comparable position to the linguistic majority in that province. Section 23 treats provincial entitlement to dictate that the majority language will be the default language of education, as all provinces do, as given. Anglophones in Ontario or Alberta have no more right to have their children educated in French than Francophones in Quebec have to educate their children in English.¹⁴ Similarly, the children of immigrants can expect to go to school in the language of the majority in their province of residence.

However, an important feature of the section 23 regime is the idea that Canadians from both official language groups ought to be able to feel at home in the whole country and able to make any part of the country their home. A Francophone Quebecer, or Ontarian, ought to be able to take a job in Alberta without having to sacrifice her family's linguistic culture. The same goes for an Anglophone Nova Scotian moving to Quebec. Those who are already part of one of the two language communities should be able to carry on that heritage by passing it to their children. Fear of losing one's linguistic heritage should not be a consequence of moving from one province to another; retaining one's heritage should not require confinement to a particular territory. It is easy to connect this concern with mobility to the welfare and vitality of the two official language communities, rather than as concerned only with the individual benefits of being able to move freely. The ability of individuals to move makes both language groups more secure throughout the country. The kind of equality envisaged transcends the two solitudes model in favour of a vision of both language communities sharing the whole country.

But here there is an important difference between those established long enough to have been educated in Canada and more recent immigrants. Old stock Canadians have *their* mobility protected automatically by section 23(1). Provided the parental education criterion is met, a Franco-Ontarian parent can go anywhere in the country secure in the ability to continue her child's education in French. From the perspective of section 23(1)(b), however, a newly minted Canadian citizen is not yet a card-carrying member of an official language community for purposes of these rights. Having no choice in the matter, except through private schooling, she will enrol her children in the majority language system of her province of residence. However, should she move to a province where the majority language is different, section 23(1)(b) gives *her* no right to keep her children in the same language of education.

¹⁴ Immersion schools may be available to provide second language training to the majority, but this is up to the province or territory. These are to be distinguished from s. 23 schools. Such opportunities would be equally available to immigrant children.

Had nothing been done to deal with this scenario, recent Canadians would have to choose between their mobility and their child's educational continuity. Moving could mean forcing the child to switch to another language of instruction. And, of course, if the family has reason to move again, the child could have to switch again. *This* is the evil that section 23(2) is specifically designed to protect against. It ensures, not that all children's educational continuity is equally protected, but that their parents' mobility is protected without having to sacrifice the child's education prospects. This section puts recent immigrants on a par with old stock Canadians in respect of their ability to move from one province to another. Educational continuity is protected because and to the extent that it is necessary in order to protect mobility between provinces.

Thus, far from it being absurd to require that parents move from one province to another in order to trigger section 23(2) rights, it makes perfect sense to think that national mobility is important enough to require some tweaking of the section 23 eligibility criteria, to enlarge the group beyond the core group of members of a linguistic community in the sense specified by section 23(1)(b). This is required to give new Canadians the same mobility rights that 'old stock' Canadians enjoy courtesy of section 23(1)(b). In other words, vertical equality amongst all Canadians *with respect to national mobility* is the point of section 23(2).

It is hard to see why those who wish to move from private schooling to public schooling in a particular language within a single province should be similarly protected. Notice that it takes two to disrupt a child's educational experience. Once a child has started school, educational continuity can be protected either by not moving the child, or by providing the same type of schooling someplace else. Each province is responsible for the type of schooling it makes available in its jurisdiction; *parents* are responsible for where to place the child initially and whether to move her. It is clear that section 23 means to free parents who have reason to move from one province to another from worrying about the effects on their child's education, linguistically speaking. The right to move in this sense is protected by implication, and rightly so. In order to protect that implicit right, provinces must accommodate the child linguistically, ensuring simultaneously mobility and educational continuity.

What reason is there to think that the constitution means to protect the right to the linguistic benefits of private school without bearing the costs? The child's educational continuity can be protected either by the parent not moving her from the private school setting or by the province admitting her to the minority language state school system. Requiring the province to do the latter does not so much protect the child as the parent from the costs of private schooling. Linguistic accommodation does not ensure that new Canadians are free to move about the country as old stock Canadians are; it ensures that parents can secure the language of choice for their children's education without incurring the cost of private schooling. Unless free choice of language has the same kind of constitutional weight that mobility has, it is hard to see why parents should be protected against the cost of securing it. Yet if choice had that weight, there would be no need for any eligibility criteria and we would have to trust that communities can avoid the Prisoner's Dilemma described above without legal help. But there are eligibility criteria because the need to protect vulnerable language communities from erosion is a central objective of section 23.

If section 23(2) is interpreted to mean that whenever a parent cannot or does not want to afford private schooling she effectively has the right to access to publicly funded minority language education, the scheme has shifted from a foundation in the protection of established, though constantly changing, groups to one based on individual choice of language of instruction. Every Canadian jurisdiction protects

freedom of choice as a negative right – there is no prohibition on private schooling in any language. The Court of Appeal argument in *H.N.* creates, in effect, a positive right to education in English for almost everyone. The only thing preventing universal access is the explicit requirement of section 23(2) that the child have a foot in the door. The court has not indicated what length of time in English instruction is necessary to trigger the right, but the lower the threshold the closer to universal access we get. This near universal positive right treats almost all who *want* English language education for their children the same, substituting a conception of vertical equality for the vision of equality between language communities that I think is the true meaning of section 23.

4. Conclusion

Working through the analysis in these key cases of the eligibility criteria for a benefit meant for groups shows how easy it is for judges who are more used to handling universal principles to slip into an individualistic mode. They think they see discrimination here and there, and when they detect it, they want to fix it. But the discrimination they see is inequality measured by reference to some characteristic outside those that define the groups, and this form of inequality is inevitable in a scheme that is designed to foster equality between groups. If we abstract from or ignore the defining criteria of the respective groups, we can always find individuals who otherwise look like the individuals who are protected by the right. But if we abstract from the definition of the group we are undermining the form of equality that the provision was designed to protect. From the perspective of equality between the groups, equal treatment between those recognised as part of the Francophone community and those who are recognised as part of the Anglophone community is mandated. How those who are not part of either community are treated is not relevant to equality between these groups. We must properly understand the criteria that define the groups before we can tell whether a kind of discrimination that is relevant to the scheme is present. It puts the cart before the horse to say A and B are alike in *some* respect, therefore B must be a member of the same group that A is and therefore entitled to the same benefits members of that group get.

Unfortunately, in a context of group *inequality*, this tendency to focus on vertical equality does not merely generously include some people who do not properly belong. Rather, it can undermine the ability of the disadvantaged group to maintain linguistic security. The majority status of Francophones in Quebec has, however, created the illusion of power. By force of numbers the Québécois are treated as the advantaged group and the Anglo-Quebecers as disadvantaged. But power and its effects are more complex than this. Anglo-Quebecers are vulnerable, and require protection; but the French culture is under threat across Canada. The desire to protect one vulnerable group should not come at the expense of another and talk of valuing continuity of educational experience equally for all children should not be allowed to obscure the group consequences of the free choice model.

ADDENDUM

Since this paper was written the Supreme Court of Canada has handed down its decision on appeal from the Québec Court of Appeal decision, *H.N.* In *Nguyen v. Québec*, [2009] 3 S.C.R. 208, the Supreme Court upheld the Court of Appeal declaration that the blanket refusal to consider time spent in a private English-language school or in an English-language school pursuant to a special exemption is a violation of s. 23 of the *Charter*. Although the Supreme Court did not explicitly rely

on the sort of vertical equality arguments that were prevalent at the Court of Appeal level, it treated s. 23(2) as primarily aimed at ensuring continuity of educational experience and as a freestanding basis for entitlement rather than reading the eligibility requirements together as criteria defining minority language groups as I have suggested. Conscious of the potential consequences of the decision, however, the Court was at pains to specify that it is only a 'genuine' educational pathway of a child that attracts the protection of s. 23(2), so that a short period of time in a private English school or at a school whose purpose is to evade the default rule in Québec of French-language schooling would not be a genuine basis for a s. 23 claim. The Court suspended its declaration of unconstitutionality for one year to give the government of Québec time to amend its legislation.

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