# The Impact of Legal Mobilization and Judicial Decisions: The Case of Official Minority-Language Education Policy in Canada for Francophones Outside Quebec

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The article investigates the impact of legal mobilization and judicial decisions on official minority-language education (OMLE) policy in the Canadian provinces outside Quebec, using the "factor-oriented" and "dispute-centered" theories of judicial impact developed by U.S. scholars. The Canadian Supreme Court's decision in *Mahé v. Alberta* (1990), which broadly interpreted Section 23 of the Charter of Rights to include management and control of OMLE programs and schools, along with federal funding to the provinces to implement OMLE policy, are important to explaining OMLE policy change as predicted by the factor-oriented approach. The dispute-centered approach, on the other hand, helps us understand how the Charter of Rights and judicial decisions shaped the goals and discourse of Francophone groups in the policy process and, more instrumentally, provided opportunity structures that Francophone groups exploited effectively. The article concludes that both approaches to explaining judicial impact could be accommodated within an institutional model of judicial impact that construes institutions as state actors, as sets of rules, and as frameworks of meaning and interpretation. Such an approach would allow for the development of a more comparative model of judicial impact.

This article investigates the impact of legal mobilization and judicial decisions on official minority-language education (OMLE) policy in Canada (outside Quebec). This policy area is bound up with broader questions of constitutional accommodation between French- and English-speakers in Canada and "has produced some of the most emotional and politically charged conflicts in Canadian history" (Apps 1985:45).[1] A 1991 study of Canadian interest group

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[1] The article does not examine OMLE policy in Quebec because the province's English-language education system for its English-speaking minority was relatively generous and set the standard against which OMLE policies in other provinces were (unfavorably) compared. More generally, the unique political situation in Quebec, bound up with questions

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activists and academics in the education policy field revealed that *Mahé v. Alberta* (1990)—a Canadian Supreme Court decision that granted management and control rights over education to official minority-language groups—was considered the most important Canadian Charter of Rights judgment delivered by the court since the Charter of Rights was added to Canada's constitution in 1982 (Dolmage 1991). However, a 1992 report by the Official Languages Commissioner complained about the slow and contested implementation of OMLE rights enshrined in Section 23 of the Charter after the Supreme Court's *Mahé* ruling (Commissioner of Official Languages 1993:18). Does the slow acceptance of the *Mahé* decision affirm Rosenberg's (1991) assertion that pursuing social change through the courts represents a "hollow hope" for politically disadvantaged groups? Or do we need a different model to understand judicial impact?

Surprisingly, given the extensive literature that has developed on the Charter since its entrenchment in Canada's constitution in 1982, there have been only limited and sporadic attempts to describe or explain the effects of legal mobilization and judicial decisions under the Charter. There is certainly no judicial impact literature in Canada equivalent to that in the United States. This article, therefore, draws upon the two dominant approaches to understanding judicial impact that have been developed in the U.S. literature to help explain the impact of judicial decisions on OMLE outside Quebec: the "bottom-up," "dispute-centered" approach and the "top-down," "factor-oriented" approach.

The first part of the article presents an overview of these two approaches to predict and explain judicial impact, approaches that have been used to understand school desegregation policy in the United States. School desegregation policy, like OMLE policy in Canada, has involved questions of where and how minorities are educated and implicated broader questions of constitutional accommodation (Apps 1985; Manfredi 1993; Magnet 1995). The Canadian case is simply the mirror image of the American one, where Francophone proponents of policy change are arguing for "separate but equal" educational facilities and administrative structures rather than integrated ones. The second part of the article describes the evolution of OMLE policy in the provinces outside Quebec. The third part of the article analyzes how the effects of legal mobilization and judicial decisions on OMLE policy can be explained using elements from each approach. The

of nationalism and separatism, makes it difficult to compare with other provinces. For a description of Quebec's system, which was characterized as "by far the best minority language education system in Canada . . . " (Mandel 1989:106–07).

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article concludes with some suggestions for the development of a model of judicial impact that would encourage its comparative use.

## U.S. Judicial Impact Theories and Models

Although a variety of approaches have been developed to explain judicial impact, two of the most prevalent approaches in the U.S. literature are the "top-down" approach, which hypothesizes that structural factors affect whether judicial decisions will eventually benefit rights claimants, and the "dispute-centered" approach, which centers on the explanatory power of the specific features of concrete disputes.[2]

Illustrating the "top-down" approach, Levine (1970) argues that U.S. Supreme Court efficacy is dependent on the *attributes of decisions* (clarity of announced policy, consensus on the Court, etc.), *external governmental conditions* (accurate communications to elites, low fiscal costs of compliance, etc.), and *environmental conditions* (low intensity of opposition opinion, sympathetic media treatment, favorable commentary by opinion leaders, etc.). Using similar factors, Wasby (1970) developed more than one hundred hypotheses concerning judicial impact.

A somewhat more parsimonious model was developed by Rosenberg in *The Hollow Hope* (1991). Rosenberg concluded that because courts are "constrained" by a variety of institutional limitations, particularly their lack of enforcement tools, courts can only produce social change when (1) there is ample legal precedent for change, (2) there is support for change from Congress and the executive branch, and (3) there is support or low opposition from the public and costs/benefits are offered to induce compliance (or administrators are willing to hide behind decisions to implement reforms). Therefore, Rosenberg was relatively pessimistic about the ability of the courts to promote policy change directly or indirectly (through altering public opinion, generating media attention, etc.). Using evidence of slow rates of change in Southern school desegregation after *Brown v. Board of Education* (1954, 1955), Rosenberg argued that legal mobilization and judicial decisions had a relatively negligible impact until Congress passed the Civil Rights Act and threatened to withhold millions of dollars from noncompliant school boards (1991:42–51, Ch. 3). He further argued that *Brown*

[2] While the "variable-oriented" and "dispute-centered" approaches are dominant, there have also been other attempts at explaining impact. See, for example, Johnson and Canon (1984).

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did not produce either increased media attention to the problem[3] or public support for school desegregation (1991:127, Ch. 4). Instead, he argued that desegregation proceeded only where political support and cultural approval allowed it to move forward, not because court decisions had ordered it done.

An alternative approach to evaluating judicial impact is more "bottom-up" and "dispute-centered" than Rosenberg's. In this view, courts participate in a complex policy milieu that includes interest groups, executives and legislatures, state and local governments, bureaucrats, media, and the public. The effects of legal mobilization and judicial decisions in the dispute-centered approach are considered to be "inherently indeterminate, variable, dynamic and interactive" (McCann 1992:733). The approach seeks to analyze how legal claims and judicial decisions are interpreted, utilized, and/or circumvented by differently situated actors (interest group leaders and litigators, government officials, judges) within legal, social, and political communities and institutions (see Scheingold 1974; Galanter 1983; McCann 1992, 1994; Mertz 1994). A bottom-up approach recognizes that constitutions, judicial decisions, and institutions more generally are constitutive in nature and provide frameworks for interpretation and action (Gillman 1999; McCann 1996, 1999). Legal mobilization and judicial decisions *may* bestow legitimacy on a group's demands, raise the political and social profile of an issue, alter the perceptions of adversaries and/or the public, and, more instrumentally, provide bargaining leverage (Scheingold 1974; Galanter 1983; McCann 1992, 1994; Simon 1992).

Some who use this approach argue that Rosenberg's theory and methodology lead him to underestimate the impact of school desegregation decisions on policy development, even if this influence was partial and contingent. Among other things, Rosenberg is said to ignore evidence that supports the contention that *Brown* had some transformative effects on African American attitudes and goals (Garrow 1994:155; also see Scheingold 1974:137). Others argue either that Rosenberg has an overly linear conception of cause and effect that impairs his ability to discern indirect effects (Simon 1992:932) or that he fails to see how *Brown* and subsequent decisions created a legal framework for federal government action and local political action (Cole-Frieman 1996:36). Rosenberg (1996), however, counters that a bottom-up approach is not as testable or generalizable as more "positivist" approaches, such as

[3] Rosenberg's conclusion that *Brown* did not generate increased media attention to school desegregation and civil rights has been challenged by Flemming, Bothe, and Wood (1997), who showed that Rosenberg systematically undercounted articles on *Brown* by his method of collecting the empirical data.

his own. Both the top-down and bottom-up approaches will be assessed in explaining the impact of legal mobilization on OMLE policy in Canada following a review of OMLE policy development.

## OMLE Policy Development in Canada (Outside Quebec)

Just as race relations have been a central concern of American politics and constitutionalism since the country's founding, the relationship between English-speakers and French-speakers (predominately Francophone) has been a central concern of Canadian politics and constitutionalism. In both countries, questions surrounding where and how minority students are to be educated have been and remain prominent aspects of constitutional politics. There were no language rights included in the British North America (BNA) Act, 1867 (now called the Constitution Act, 1867), which created Canada as a federal state. However, it was believed that such rights would be protected by the provision that denominational (Protestant or Catholic) school rights not be prejudicially affected by the provinces: Francophone children would be taught in French in Catholic schools outside Quebec, and Anglophone children would be taught in English in Protestant schools inside Quebec (Foucher 1985:2). As English speakers significantly began to outnumber French speakers in provinces outside Quebec, though, Catholic schools and the teaching of French came under political attack, particularly in Manitoba and Ontario (see Cook, Brown, & Berger 1969). Political protection was not forthcoming from the federal government, and the courts offered no more protection. The Judicial Committee of the Privy Council, in its *Ottawa RC School Trustees v. Mackell* (1917) decision, ruled that Ontario's ban on the teaching of French after the second grade did not violate Section 93 of the BNA Act, because that section protected only the religious, not the linguistic, aspect of education.

By the mid-1960s, however, a number of provinces allowed French to be used as a language of instruction for certain amounts of time in particular grades (Martel 1991:56). Around this same time, the federal government became interested in advancing the concept of pan-Canadian bilingualism largely in response to growing French-Canadian nationalism in Quebec (Julien 1991:117). This strategy aimed to cultivate national unity by promoting the use and visibility of both official languages in all regions of the country. Part of the federal strategy involved trying to entrench OMLE rights in the constitution.

While only Premier Davis of Ontario supported constitutional entrenchment, all ten premiers agreed at their 1978 conference in Montreal that each child of the French-speaking or English-speaking

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minority should have access to education in his or her language wherever numbers warranted (Council of Ministers of Education, Canada 1983:1–3). The premiers made it clear that this principle would be implemented and defined by each province, since education was a matter of exclusive jurisdiction of the provinces and there were wide cultural and demographic differences between the provinces.[4] As a result, the premiers' Montreal Declaration formed a basis for the inclusion of OMLE rights in the Charter of Rights, which was entrenched in Canada's constitution in 1982 after a complex series of negotiations between the federal government and the provinces.[5] According to Magnet, the previous failure of the architects of Confederation to find an appropriate constitutional formula to regulate OMLE "weakened the capacity of Canada to endure united" (1995:144). Section 23 of the Charter grants the right to instruction in the minority language, which includes the right to facilities for such instruction where the numbers warrant, with such instruction and facilities to be paid out of public funds. The rights are attached to parents who must meet two qualifications: (1) the parent must be a Canadian citizen, and (2) (a) the parent must have learned French first and still understand it (this goes for English in Quebec), or (b) the parent's primary school instruction must have been in the relevant minority language in Canada, or (c) the parent must have (or had) children in the relevant minority-language primary or secondary schools in Canada (see Magnet 1995:147). Section 23 was (and remains) central to the larger issue of cultural accommodation and national unity in Canada as it symbolically underscored the importance of linguistic duality and, more practically, provided an institutional mechanism to support the viability of official minority-language communities, especially Francophones outside Quebec (Knopff & Morton 1992; Martel 2001).

In a number of provinces, legal mobilization under Section 23 quickly followed introduction of the Charter. To help evaluate whether this influenced OMLE policy outside Quebec, the policy is analyzed over time to see changes in:

1. *Instruction*. Are French first language (FFL) programs provided (by contrast with French immersion or French as a second

[4] Francophones make up less than 2% of the population in British Columbia (BC) and Newfoundland; 2–3% in Alberta and Saskatchewan; 4–5% in Manitoba, Ontario, Nova Scotia, and Prince Edward Island (PEI); and around 33% in New Brunswick (Council of Ministers of Education 1983:1–2).

[5] The major concession given to the provinces was the inclusion of the Section 33 "override" clause of the Charter which allowed the federal or provincial governments to pass a piece of legislation declaring that an Act would operate "notwithstanding" the Charter for up to five years. However, the Section 33 clause did not apply to the official language rights contained in Sections 16 to 23, which underscored their importance in the federal government's larger national unity strategy.

language [FSL])? What are the rules surrounding both the provision of such programs and access to them?
2. *Facilities*. Are schools "homogeneous" (schools that cater only to minority-language enrollments and where the administration of the school is in French), "mixed" (schools wherein the enrollment is not made up exclusively of minority-language students, though FFL programs are provided in separate classrooms), or "bilingual" (schools in which instruction is defined in terms of teaching time spent on the language of the minority (usually, around half of the time is spent learning in French) (see Martel 1991:69)?
3. *Management and control*. How much control do minority-language parents have over the provision of programs, staff selection, facilities, and budgets?

The historical overview is divided into three time periods: OMLE policy prior to the Charter, OMLE policy from the entrenchment of the Charter in 1982 until the Supreme Court's first operationalization of Section 23 in *Mahé v. Alberta* (1990), and from *Mahé* onward. The historical overview outlines policy trends in all the provinces outside Quebec, though the province of Alberta serves as a particular focus because the *Mahé* case originated there. Data for the historical overview and subsequent analysis section come from interviews, archival documents, surveys, and secondary literature.

## Pre-Charter OMLE Policy

Prior to the introduction of the Charter, a majority of provinces outside Quebec had some form of legislation or regulation that provided for French-language schooling, usually depending on student demand (see Table A1). Enrollment in FFL programs also varied, and figures are difficult to determine for a number of provinces because FFL programs were not distinct from other French-language programs aimed at teaching students French as a second language (such as French immersion programs). Only New Brunswick and Ontario—the provinces with the largest number of Francophone children—had significant numbers of schools that offered FFL programs. Table A1 shows that half of the provinces outside Quebec recognized the concept of the French school prior to the Charter, but four provinces, including Alberta, had no schools that were homogeneous French schools. As for the management and control of FFL programs and French schools, only New Brunswick had a system of Francophone school boards.

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### Post-Charter Until 1990 OMLE Policy

Following the entrenchment of the Charter in 1982, many Francophone groups pressed for FFL programs, French schools, and Francophone school governance, using Section 23 of the Charter as the foundation for these claims. For the most part, however, the response of provincial governments and local school boards was not positive, so litigation was launched by Francophones in a number of provinces. The federal government funded much Section 23 litigation and interventions through the Court Challenges Program—a program designed to help individuals and groups pursue court action under Section 23 or Section 15 (the equality rights section of the Charter).[6] In Edmonton, Alberta, the provincial government and local school boards rejected requests for a French school and school governance by a small group of Francophone parents who dubbed themselves the Bugnet group. The Bugnet group reacted by initiating a Section 23 Charter case (*Mahé v. Alberta*) using funding from the Court Challenges Program.[7] The established Francophone group in Alberta, the Association of Francophone-Canadians of Alberta (ACFA), later joined the case as an intervenor in support of the Bugnet group. Unlike the Bugnet group, however, the ACFA argued that the right to school governance envisioned by Section 23 could take many forms and did not require necessarily distinct Francophone school boards. The federal government intervened in support of the Bugnet group at the appeal court level, agreeing largely with the ACFA's approach.

Judge Purvis, the trial judge, ruled in favor of the Francophone groups, ordering that French-language instruction was mandatory where numbers warranted. He also argued that Section 23 grants a certain degree of management and control to Section 23 parents, but he did not make any formal order requiring the government or the school board to provide for such management and control (*Mahé v. Alberta* 1985). On appeal, the Alberta Court of Appeal indicated that distinct Francophone school boards might be required under Section 23(3)(b), but not in Edmonton because the numbers did not warrant it (*Mahé v. Alberta* 1987). The court ruled that Alberta's legislative scheme did not contravene Section 23 even if it did not necessarily implement Section 23 either.

[6] The Court Challenges Program was established in the late 1970s to fund language rights cases but was expanded in 1985 to include equality rights cases. The program was canceled in 1993 but quickly reinstated in 1994. Official minority-language groups and equality-seeking groups play a considerable role in managing the program (see Brodie 2001). The program provided nearly $2.5 million for Section 23 litigation and interventions from 1985 to 1999 (see Martel 2001:14).

[7] Interview, Paul Dubé, cofounder of the Bugnet group, May 16, 2001; Interview with Angéline Martel, member of the Bugnet group and OMLE researcher, June 2, 1998.

Before the Supreme Court's decision in *Mahé*, the Alberta government did little despite continued lobbying from the Francophone community. In November 1988, the Alberta government introduced a new "Language Education Policy for Alberta," providing some financial and curricular support for French-language schooling but not addressing the governance issues (Alberta 1988). The reaction of local school boards to Francophone demands varied considerably (Julien 1991; Riddell 2002:Ch. 6; Slevinksy 1997). Despite substantial mobilization and positive court decisions for Francophones in Alberta, actual policy change was somewhat modest prior to 1990, when the Supreme Court decided *Mahé*.

Table A1 shows that this was the case more generally. Only two provinces introduced Francophone school management systems during this time. The province of PEI did establish a Francophone school board for the province following a Court of Appeal reference decision (*Reference Re Minority Language Education Rights* 1988) in which the court indicated that Section 23 afforded eligible parents the right to "participate" in the management of French-language programs and facilities. The Ontario government established Francophone school boards in both Ottawa-Carleton and Toronto. It also introduced a system of proportional representation for Francophones on existing school boards following a 1984 Court of Appeal decision that stipulated that Section 23 included a right to management and control (*Reference Re Education Act of Ontario and Minority Language Education Rights* 1984). However, the government had proposed these policies in a white paper prior to the appeal court decision.

As for facilities, Table A1 shows that a few more provinces did recognize the concept of the French school in legislation, regulation, or policy papers. Judicial decisions consistently held that Section 23 included the right to homogeneous French schools, but that shared facilities could also be appropriate depending on such factors as the number of Section 23 students, costs, and so forth (see Martel 1991:41–42). Moreover, a trial court judge in Ontario ruled that Section 23 required that minority facilities be equivalent to those of the majority and ordered the government and the local school board to improve the industrial arts facilities at the Francophone high school in Penetanguishene (*Marchand v. Simcoe County Board of Education* 1986). There were some increases in the number of Francophone schools in the prairie provinces and Nova Scotia during this time. For example, by 1989, Alberta had twenty schools that offered FFL programs, three of which were homogeneous French schools.

Two provinces made access to FFL instruction easier during this time. Ontario, for example, gave any eligible Section 23 student the right to receive FFL instruction regardless of whether the

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numbers warranted it. This policy was proposed in a 1983 white paper and approved by the Ontario Court of Appeal, which had ruled that the government's previous legislation violated the right to instruction in Section 23. And a community in Nova Scotia provided FFL instruction after the province's appellate court ruled that fifty students was enough for the provision of FFL instruction, though not enough for that instruction to have to be in a homogeneous French school (*Lavoie v. Nova Scotia* 1989). Most provinces, however, did nothing.

### Supreme Court's *Mahé* (1990) Decision to the Present

Given the general lack of policy movement following the introduction of the Charter of Rights, it is not surprising that governments such as Saskatchewan and Manitoba joined Alberta in arguing before the Supreme Court in *Mahé* that education was a provincial responsibility and that finding a right to management and control in Section 23 would infringe upon that responsibility and violate the framers' intent of Section 23. The Bugnet group, by contrast, asked the Supreme Court to enjoin the government to establish Francophone school boards. Various official minority-language groups, the federal government, and the government of Ontario supported the contention that Section 23 included the right to management and control, though they did not call for a mandatory injunction. Others, including the federal government, argued that provinces should have some latitude in implementing Section 23 rights.

In a unanimous decision (*Mahé v. Alberta* 1990), the Supreme Court ruled that Section 23 was remedial in nature and was designed to preserve and promote minority language and culture throughout Canada. According to Chief Justice Dickson, Section 23 rights should be viewed on a "sliding scale," with the right to instruction at one end and the right to management and control at the other. Determining the provision of rights along this scale depended on "where the numbers warrant," which in turn was analyzed in light of the actual and potential demand for services, pedagogical considerations, cost, and other factors, such as differences between rural and urban areas. The Court found that there were sufficient numbers to warrant a Francophone school in Edmonton but not a Francophone school board. However, Francophone parents were entitled to proportional representation on the school board. Denying the injunction, the court nonetheless held that Alberta had to create a legislative framework to implement Section 23.

The decision made national front-page news (Freeman & Cernetig 1990:A1) and, following the decision, Francophone

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groups at the provincial and national level accelerated efforts to develop Francophone school management models and to pursue their implementation through political and legal means (Commissioner of Official Languages 1990:214). Alberta and a number of governments began the process of responding to the decision by establishing committees on Francophone school governance that included representation of Francophone groups.

The Alberta government passed legislation late in 1993 that created a series of Francophone school boards that covered certain parts of the province and vested exclusive control over French schools and FFL programs with those boards. Saskatchewan and Manitoba also passed legislation establishing Francophone school governance in 1993, though Manitoba's legislation did not give exclusive authority to the Francophone board over French schools and FFL programs. The Supreme Court decided not to rule directly on whether exclusive authority was necessary when it issued its *Reference Re Manitoba Public Schools Act* (1993) decision, which largely reiterated its position in *Mahé*, but the Court did note that the legislative scheme would not be permitted to impair the Section 23 rights of those interested in making use of them.

In 1994, Francophone groups in BC reactivated a Section 23 case that it had held in abeyance since 1989 to force the provincial government to change its policy. The government introduced a limited scheme of Francophone school governance in 1995 based on regulations, but a trial judge in 1996 ordered the government to create a statutory framework for school governance by the end of the legislative session. In Ontario, the provincial government created a Francophone school board in the Prescott-Russell region in the face of a Section 23 lawsuit, but did not create any more boards. A number of advisory committees and the Royal Commission on Learning (1994) recommended the creation of a network of Francophone school boards, and parents in Cornwall launched a Section 23 suit in 1992 in an effort to force the government to move. In 1996, Ontario introduced a series of Francophone school boards as part of a larger reform of the education system.

By 1997, all provinces had a system of Francophone school governance in place. Moreover, when provinces adopted these systems they normally made access to FFL instruction easier and recognized the concept of the Francophone school in legislation or regulation (see Table A1). More equitable funding schemes for OMLE were also introduced. The number of schools providing FFL instruction increased in six provinces after 1990, and French schools and enrollment in them continued to increase in a number of provinces (Alberta, Saskatchewan, Manitoba, Newfoundland) even though both the number of eligible children and the Fran-

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cophone population as a whole declined during this period (see Martel 2001).

The influence of Francophone school boards outside Quebec was bolstered by the Supreme Court's *Arsenault-Cameron v. Prince Edward Island* (2000) decision. The Court ordered the provincial government of PEI to abide by the recommendation of the provincial Francophone school board to provide for FFL instruction in a facility in Summerside with very few students over a government objection that the students could attend an appropriate school 29 kilometers away. Most recently, in *Doucet-Boudreau v. Nova Scotia (Minister of Education)* (2003), the Supreme Court upheld a trial court judge's decision to issue an injunction ordering the government and Francophone school board of Nova Scotia to build more homogeneous Francophone schools and to retain jurisdiction in the case. The Supreme Court decision could portend a more active role for the courts in supervising OMLE policy, akin to the role played by U.S. courts in ordering school integration from the later 1960s onward.

## Explaining the Influence of Legal Mobilization and Judicial Decisions

An analysis of OMLE policy development suggests that both a top-down approach and a bottom-up approach have some promise in explaining the impact of legal mobilization and judicial decisions in the Canadian context. I first evaluate both and conclude by offering some suggestions for a model of judicial impact that recognizes the contributions of each approach.

### Top-Down, Factor-Oriented Approach

Rosenberg (1991) sets out to test the efficacy of U.S. Supreme Court decisions that are "wins" for groups wanting to pursue social change. A win is more likely, according to Rosenberg, if the Supreme Court has the support of the federal government (1991:31–32)—a contention supported in the Canadian case as the federal government intervened to support Francophone groups in *Mahé*. Others have emphasized that the clarity and forcefulness of a decision may contribute to its impact, though Rosenberg does not take this into account (McCann 1992:726). Clarity and forcefulness are not easy to operationalize, but U.S. scholars have considered whether there are easily understood expectations of what is required by the law, in terms of both doctrines and remedies; whether a decision is made by the court at the top of the judicial hierarchy and whether the decision was unanimous (Wasby 1970:247–50; Johnson & Canon 1984:206–07).

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The Supreme Court's (unanimous) *Mahé* decision did find a right to management and control in Section 23, emphasized the remedial nature of Section 23, and declared that the Alberta government should "delay no longer" in implementing Section 23 rights. However, the decision did not grant a mandatory injunction, left the provinces with some flexibility in implementing Section 23, and did not specifically define the "where the numbers warrant" clause. The decision was aptly characterized as "generous" but "imprecise" by one Francophone group (Commission Nationale des Parents Francophones 1990).

This review of OMLE policy development, however, supports the contention that a relatively clear victory at the Supreme Court level, especially on a key doctrinal question such as whether Section 23 includes the right to management and control, had an important impact on policy development. There were some OMLE policy improvements prior to the Supreme Court's *Mahé* decision; yet despite delays of varying length, neither the Alberta government nor five other provinces outside of Quebec implemented a legislative scheme giving Francophones management and control over French-language instruction and facilities until after the Supreme Court's *Mahé* decision. Prior to the Court's decision, there was uncertainty about what was required by Section 23 because lower courts were divided over whether the section included the right to management and control (see Martel 1991:19–43). Saskatchewan's Minister of Justice in 1984 argued that Saskatchewan's school legislation was consistent with the Charter of Rights when the government rejected a proposal for Francophone school management (Commissioner of Official Languages 1985:195–96). Similarly, the Alberta government continued to disagree with Francophone groups about what was required by Section 23, especially with regards to governance, until the Supreme Court's decision.[8] Jim Dinning, Alberta's Minister of Education at the time, said that the *Mahé* decision was "a catalyst" for the Alberta government to act and that Francopohone school governance "*might*" have been introduced without the decision, though the process would have taken "a lot" longer.[9] A survey of Alberta school boards by the ACFA early in 1985 found that uncertainty about the requirements of Section 23 slowed policy formulation at the local level as well (Morin 1985:24).

[8] Interview with Georges Arés, former executive-director of ACFA and former president of la Commission nationale des parents francophones (CNPF), May 26, 2001; interview with Adrien Bussiérre, former Director of French-Language Services Branch, Alberta Education, December 16, 1998. Reno Bossetti, former Deputy Minister of Alberta Education, gave the same assessment in an interview with Richard Julien (1991:430).

[9] Interview with Jim Dinning, former Alberta Minister of Education, June 15, 2001.

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OMLE policy change also illustrates the importance of incentives for the implementation of constitutional rights and judicial decisions operationalizing those rights. From the 1983–84 school year onward, the federal government, through the Official Languages in Education (OLE) program, provided hundreds of millions of dollars to provinces outside Quebec to pay for a portion of the additional costs incurred in providing FFL education programs through the OLE program (see Riddell 2002:380, Table B.6). Following the *Mahé* decision, the federal government offered to pay for half of the cost of implementing Francophone school governance.[10] Notably, with the exception of New Brunswick and PEI, no provincial government had established a comprehensive system of Francophone school boards prior to the Supreme Court's *Mahé* decision or without significant federal funding for the establishment of Francophone school governance. At the local level, Francophone schools were not built in some districts that supported the concept until after external funding was provided (see Julien 1993).

There is also support for Rosenberg's hypothesis that the state of public opinion (or at least decision makers' perceptions about public opinion) matters to the implementation of judicial decisions. Public opinion polls specifically geared toward OMLE (rather than more general questions about bilingualism) have been limited, but two survey results from the later 1980s (1987 and 1988) showed moderate support for French language instruction rights across Canada: support ranged from 44 to 54% in BC, averaged around 45% in the prairies, averaged around 55% in Ontario, and ranged from the mid-50 to the upper 60% range in the Atlantic provinces (with the highest rates of support, not surprisingly, in New Brunswick, with its large Francophone population).[11] Except for New Brunswick's early and robust system of OMLE, there does not seem to be an obvious regional pattern to OMLE policy development (see Table A1).

Although Alberta has a reputation for being politically conservative, the province is not an outlier on the question of French-

[10] For example, the 1993 Alberta-Canada Agreement provided that each level of government would contribute CA$5.385 million for the establishment of Francophone school authorities, CA$6.35 million for the development of FFL programs, and CA$4.5 million for the construction of Francophone school/ community centers in Fort McMurray and Calgary.

[11] Data were analyzed by the author from the 1987 Charter Values Survey and the 1988 Canada Election Survey. The 1987 Charter Values Survey asked, "Should French Canadians who move out of Quebec to another province have a basic right to have their children taught in French?" while the 1988 Canada Election Survey asked, "French Canadians Outside Quebec: 1) Have a right to educate their children in French wherever numbers warrant it; 2) Should accept the fact that outside Quebec, their children should be schooled in English, the language of daily life; 3) Neither; 4) Undecided."

language instruction rights (with support around the mid-40% range in both surveys mentioned before). A statistical analysis of the 1987 Charter Values Survey revealed that differences in levels of support for French-language instruction rights among partisan elites or among the public were not statistically significant between regions (Vengroff & Morton 2000:374–76).

Perhaps the visibility of opposition and the perceptions of public opinion on the part of decision makers are more important than actual public opinion itself. BC took more years to institute Francophone school governance than did Alberta and did so only after renewed litigation in the wake of the *Mahé* decision, even though BC was governed by the left-of-center NDP Party, whose leader had expressed support for the concept of Francophone school governance on the eve of his 1991 election victory (Commissioner of Official Languages 1993:125). BC's trepidation about increasing Francophone education rights might be explained by Robert Matas's observation in the *Globe and Mail* that NDP governments had been "tiptoeing through a political minefield" by trying "to avoid riling Anglophone communities across the province, especially those . . . mainly rural communities [that] have been openly hostile to policies promoting bilingualism and French-language rights" (Matas 1997:A8). Likewise, Ontario's Minister of Education at the time of the *Mahé* decision, Marion Boyd, stated that the "NDP caucus was ambivalent, to say the least. Members were aware of the policy position but were leery of how following that policy might affect them in their particular ridings."[12]

The school desegregation struggle in the United States illustrates that the opinions of members of the minority community are also relevant to implementation (Johnson & Canon 1984:118; Rosenberg 1991:131–33). In Canada, a 1981 survey of Francophones outside Quebec showed that respondents in Newfoundland and BC—two provinces that took a relatively long time to enshrine access to instruction and governance in legislation—were most in favor of French immersion schools, rather than FFL schools (Corbeil & Delude 1982). Disagreements within Francophone communities made it difficult for local school boards and provincial governments to proceed with changes to French-language education policy (see Julien 1991; Riddell 2002; Slevinsky 1997).

But can legal mobilization and judicial decisions influence majority or minority public opinion? Rosenberg thinks not, but the evidence from the study of OMLE policy is mixed. As for majority opinions, a 1993 poll commissioned by the CNPF found high levels of support for the proposition that provincial governments should

[12] Interview with Marion Boyd, former Ontario Minister of Education, June 10, 2001 (e-mailed response).

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respect Supreme Court decisions on minority-language rights (respondents in Alberta, for example, were least supportive, but still, 67% agreed with the proposition). However, a 1998 survey conducted in Alberta found that only 38% of respondents had heard of the *Mahé* decision, which suggests that it did not have a major impact on the state of public opinion (Riddell 2002:262–63). As for minority opinions, Martel (1988), relying on survey data from the early and latter 1980s on the Francophone population in Edmonton, concluded that the Charter, judicial decisions, and lobbying that accompanied the litigation process helped increase support for homogeneous French schools and school governance within the Francophone community.

Finally, examples in the Alberta case study can be found that support Rosenberg's suggestion that decision makers might hide behind judicial decisions. A former trustee and chairman of the Edmonton Catholic School Board told opponents of a Francophone high school that they "were really advocating that the School Board break the law [the Charter of Rights] if it refused to establish a Francophone high school" (quoted in Julien 1991:558). A number of Conservative members of the legislature maintained that they would support legislation establishing Francophone school governance, despite their misgivings, because of the Supreme Court decision (Alberta Legislature 1993).

The foregoing analysis suggests that a number of variables identified by top-down theorists such as Rosenberg did matter to OMLE policy development, though the lack of variation on some variables (i.e., federal funding for OMLE was given to all provinces since the mid-1970s, so there is no real variance), issues of multicollinearity (i.e., the Supreme Court victory was positive as was the federal government's decision to fund school governance), and the lack of precision of some of the data (notably public opinion data on OMLE) impair the ability to identify the relative contributions of each variable or to make strong causal claims.

### Bottom-Up, Dispute-Centered Influences

Bottom-up theorists would argue that even attempting to impute "causality" to "factors" is an overly mechanistic approach that does not capture the relational, interactive, and contingent dynamics at work when groups try to use legal mobilization for policy change. Bottom-up theorists, such as McCann (1994, 1999), posit two related roles that constitutional rights and judicial decisions can play in the policy process: (1) the opportunity structures presented by constitutional rights and judicial decisions can be used instrumentally by disadvantaged groups to further their policy goals, and (2) the law can have constitutive influences that work to

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motivate groups to undertake political and legal action, shape the goals that groups seek to achieve, and legitimate certain policy ideas over others in the policy process.

The U.S. school desegregation example suggests that constitutional rights and judicial decisions can inspire political and legal activity and shape the goals of minority groups. The same influences were at work in the OMLE case. Leaders within the Francophone community in Alberta pointed out that the Charter and legal mobilization by the Bugnet group either created or hastened the demand for Francophone schools and school governance (Julien 1991; Riddell 2002). For example, a former leader of a local Francophone parents' organization in Edmonton, Frank McMahon, stated that "The Charter changed peoples' perceptions of what was possible" (see Julien 1991:256–57, 534). Angéline Martel of the Bugnet group highlighted the importance of the Charter and legal mobilization for sparking the Francophone establishment in Alberta to demand Francophone schools and school governance and for conferring legitimacy upon these policy ideas within the Francophone community.[13]

More instrumentally, Francophone groups outside Quebec that were interested in Francophone school governance worked to leverage Section 23 and judicial decisions to achieve policy change. A focus on "factors" misses how the constitution, legal mobilization, and judicial decisions are utilized by minority groups within the policy process to shape policy, though outcomes are often partial and contingent depending upon interactions with other actors within the policy process.

Following the introduction of the Charter, Francophone groups made use of rights discourse to press their claims—such discourse has important currency in liberal democracies such as Canada and the United States. A systematic study of documentation produced by the national Federation des Communautes Francophones et Acadians (FCFA) and provincial Francophone associations revealed that in "the political arena, it is clear that the approaches for action favoured by the Francophone minority associations are always strongly marked by legal rhetoric [since the early 1980s] . . . [the legal tool] is seen as a means of safeguarding rights which will generate resources" and "the language of the associations . . . has mainly stressed the linguistic education rights recognized by Section 23" (Cardinal et al. 1994:53, 72). Alberta's Director of French Language Education remarked that Section 23 and judicial decisions were central to the arguments made by

[13] Interview with Angéline Martel, member of the Bugnet group and OMLE researcher, June 2, 1998; interview with Paul Dubé, cofounder of the Bugnet group, May 16, 2001.

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Francophone groups to Department of Education personnel as well as to the Minister of Education and the Premier.[14] The Royal Commission on Learning in Ontario noted that "Francophones often felt compelled to refer in great detail to historic judgments confirming the educational rights of Francophones outside Quebec . . . They referred especially to the Supreme Court's two unanimous decisions [the *Mahé* and *Manitoba Reference* decisions]" (1994:66).

Francophone activists have used legal mobilization and rights discourse within a broader political strategy that has included generating media attention, lobbying government decision makers, and educating the Francophone community (Commissioner of Official Languages 1990:214–15).[15] Even before the Supreme Court's *Mahé* decision, these interrelated activities contributed to OMLE policy change. For example, Ontario and PEI introduced systems of Francophone school governance. And the Alberta government's 1988 policy paper recognized the uniqueness of FFL instruction for Francophones and the importance of French schools where numbers warranted. Some school boards in Alberta established Francophone schools or FFL programs. Members of the Edmonton Catholic School Board (ECSB) claimed that Charter considerations were critical to their decisionmaking process, which resulted in the establishment of French schools and an offer to allow Francophone parents some administrative input (see Julien 1991: Ch. 4).

The Supreme Court's *Mahé* decision, then, proved particularly useful in providing a definitive statement that Section 23 should be read broadly and included the right to management and control, which put OMLE policy on the agenda and allowed Francophone groups greater access to the policy process. As discussed above, a number of provinces established task forces with Francophone representation in the wake of *Mahé*. Yet even after the Supreme Court decision, which was not an absolute victory for Francophone groups, how the policy process played itself out was not predetermined. For example, a bottom-up approach would draw attention to the fact that talks between the federal government and the provinces about funding for Francophone school governance were a dynamic very much associated with the *Mahé* decision. Within months after the *Mahé* decision, for example, the Alberta government approached the federal government to inquire whether the federal government would help finance the cost of establishing

[14] Interview with Gérard Bissonnette, director of French Language Services Branch, Alberta Education, December 16, 1998.

[15] Interview with Paul Dubé, co-founder of the Bugnet group, May 16, 2001; interview with France Levasseur-Ouimet, former president of ACFA, December 16, 1998.

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Francophone school governance.[16] "Funding" cannot be considered simply another variable in the equation, as the *Mahé* decision laid the groundwork for the federal government to provide monies for Francophone school governance, just as *Brown v. Board of Education* (1954) provided a framework for the U.S. government to tie federal educational funding to desegregation.

The Alberta case study further illustrates the contingent and interactive processes that followed *Mahé*. Although there was some suspicion that the French-Language Working Group—a committee established by the government after the *Mahé* decision to make recommendations about Francophone school governance that consisted of various stakeholder representatives—might have been created with the hopes that it would be divided and result in implementation delays,[17] the committee came back with a report, unanimously agreed to by all members, that supported Francophone school governance. Even the Alberta School Trustee's Association, which had intervened against Section 23 claimants in *Mahé* and had membership on the French-Language Working Group, had come to support the Francophone position.[18] The committee's report highlighted the Supreme Court's emphasis on the remedial nature of Section 23 and recommended a system of Francophone school boards rather than proportional representation on existing school boards (Alberta 1991). The report largely reflected a report prepared for the ACFA and the Francophone parents association in anticipation of the *Mahé* decision that was designed both to inform and consult the Francophone community about French-language rights (Lamoureux & Tardif 1990). In turn, Alberta's legislation in 1993 reflected the Report of the French Language Working Group by creating Francophone school boards in most parts of the province (and boards were created for southern Alberta later in 2000). Importantly, Alberta's policy went beyond the requirements stipulated by the Supreme Court in *Mahé*, which indicated that the number of Francophones in Edmonton required only proportional representation on the ECSB.

Alberta's policy toward OMLE policy over time shifted both practically and philosophically. Before the Charter, French-language education was not privileged over other minority languages, and access to French-language programs was not restricted to French speakers (Aunger 1989:218). After the Charter and

[16] Interview with Gérard Bissonnette, director of French Language Services Branch, Alberta Education, December 16, 1998; interview with Adrien Bussiére, former director of French Language Services Branch, Alberta Education, May 22, 2001.

[17] Interview with Georges Arés, former executive-director of ACFA and former president of CNPF, May 26, 2001.

[18] Interview with France Levasseur-Ouimet, former president of ACFA, December 16, 1998.

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Section 23 court decisions, the unique nature of Section 23 rights, including the right to FFL programs and French schools, was recognized within a multicultural context, but decisions about French-language education were left in the hands of local (majority-controlled) school boards (as set out in the 1988 "Language Education Policy for Alberta" discussed previously). Following the Supreme Court's *Mahé* decision, distinct Francophone school boards were created to exclusively administer FFL programs and facilities designed for Section 23–eligible students. The number of homogeneous French schools in Alberta went from three (of twenty schools providing FFL instruction) in 1988–89 to seventeen French schools (of twenty-four providing FFL instruction) in 1997–98. Enrollment in homogeneous French schools went from 943 to 2,246 over that time. Proponents of French schools and school governance in Alberta were therefore able to leverage legal mobilization and rights discourse into their preferred policy options, despite not achieving a total victory in *Mahé*.

Francophones in other provinces have achieved systems of Francophone governance as well. In some provinces, however, the process has proceeded along different paths and at a different pace than in Alberta (see Riddell 2002:Chs. 5–7 for more details). In BC, there was also progressive adoption of Francophone-friendly policies, though the sequence started later and resulted from a combination of post-*Mahé* litigation and political lobbying. In Ontario, litigation also helped spur movement on the part of the provincial government, especially after it realized that Section 23 litigation could derail large parts of the larger education reform program it had planned.[19]

OMLE policy outside of Quebec is now moving into more of a consolidation phase where Francophones are taking legal and political action to achieve such things as equality in funding, and the creation of programs that will allow Section 23–eligible children to acquire French-language skills. In terms of school governance, as noted above, Francophones in PEI have succeeded in having the decision of the Francophone school board override the decision of the Minister of Education. This suggests that there has been a cumulative effect of legal and political mobilization as posited by bottom-up scholars.

In their quest to achieve their policy goals, Francophone proponents have used legal mobilization and rights discourse to overcome opposition to such policy change within the Francophone community itself in various provinces and local communities (see Riddell 2002:Ch. 8). For example, the question of homogeneous

[19] Confidential interview with an Ontario Francophone activist and government consultant, June 26, 2001.

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Francophone schools had long divided Francophones in various areas of Nova Scotia,[20] but the recent Supreme Court decision in *Doucet-Boudreau* (2003) has provided support for the Francophone proponents who desire separate Francophone schools. Analogies can be drawn to how certain African American groups used legal mobilization and rights discourse promote integration in the face of some opposition within the community (Bell 1978).

## Conclusion

This examination of OMLE policy change across Canada (outside Quebec) supports the contention of the bottom-up approach that constitutional rights and judicial decisions can have constitutive influences and can be used instrumentally to further policy change, but that the process is dynamic and interactive. A dispute-centered approach is required to understand the nature of the policy demands made by Francophone groups and how the content and timing of OMLE policy was shaped in partial and contingent ways by actors utilizing, interpreting, and/or avoiding the constitution and judicial decisions within larger political strategies. However, as predicted by the top-down model, certain factors, particularly the positive Supreme Court decision in *Mahé*, combined with incentives for implementation by the federal government, are shown to be important contributors to OMLE policy change.

These conclusions suggest that one way of framing future judicial impact work is to expand the approach taken by McCann of offering modest, "possibilistic" prospective claims (1996:475). Rather than concentrate on the understandings of citizens or social movements as McCann does, however, the focus of the analysis should shift to how factors encourage or discourage policy change more generally.[21] The analysis would emphasize how the presence or absence of certain "factors" (a Supreme Court victory on doctrine, incentives for implementation, the political environment, interest group mobilization and funding, and so on) can mold outcomes by providing more or less opportunity for policy change, while recognizing the relational and dynamic interactions that take place within the policy process.

[20] For instance, when some schools in Nova Scotia moved to prevent the interaction of English-speaking and French-speaking students, a number of French-speaking and English-speaking students and parents complained that the policy was "segregationist" (Gillis 2000:A5).

[21] In fairness to McCann, his work on pay equity was "supplemented" by attention to broader political and economic relations, including institutional contexts (1994:287). The author would like to thank one of the anonymous reviewers for suggesting this way of framing the discussion.

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It would be particularly useful to situate the analysis in an institutional framework where institutions can be characterized as a "set of rules or structures," as "state actors" with relative autonomy to pursue their goals, or as "ideas" that are constitutive in nature (Gillman 1999; Immergut 1998; Pal 1993). The Charter, for example, provided another avenue by which Francophone groups could pursue policy change in addition to the ones they were already using; moreover, the Charter served to mold the goals and identities of Francophone groups who came to see themselves as "Charter Canadians" asserting their right to linguistic duality recognized in the Charter (Cardinal et al. 1994:53, 73). The federal government in Canada was a crucial player in the OMLE story. The government tried to achieve its policy preferences for national unity by enhancing the provision of OMLE in the provinces, while overcoming the structural hurdle of education being a provincial jurisdiction, through introducing OMLE rights in Section 23 of the Charter, funding Francophone legal mobilization through the Court Challenges Program, and providing monies to the provinces to implement OMLE policies.

It deserves mention that the political and social environment that exists outside of institutions also needs to be considered, such as whether public opinion appears supportive of policy change. However, institutional factors can shape how inputs from the political environment are transmitted into the political system. For example, the electoral systems in the Southern states of the United States led to the overrepresentation of rural areas hostile to desegregation in the legislatures, which was reflected in the reactions of state legislatures to judicial decisions on desegregation (Klarman 1994). Conversely, institutional factors may be relevant in shaping the political environment. Flemming, Bothe, and Wood (1997), for example, contend that the *Brown* decision did increase print media attention given to the civil rights struggle. The OMLE case shows how Francophone groups used the Charter and judicial decisions in their efforts to change the attitudes of the Francophone community.

An approach that takes the institutional context seriously could also help move judicial impact studies from being U.S.-centric to being more comparative in nature. How might the impact of legal mobilization be mediated differently in Canada and the United States because of their different forms of government, judicial structures, constitutional rules, and federalism? In the Canadian setting, for example, the federal government did not have the option of mandating guidelines to local school boards by linking funding to school boards' compliance with Section 23 decisions, as occurred in the United States, when the Department of Health, Education, and Welfare linked school funding to compliance with its guidelines that implemented Supreme Court decisions (Rosenberg 1991:97–100).

An institutionally grounded model of judicial impact that tries to combine the importance of factors in structuring possibilities with the recognition that policy change is dynamic, interactive, and contingent, using both quantitative and qualitative methodologies, may not satisfy adherents of either approach. Nevertheless, this study of the impact of legal mobilization and judicial decisions on OMLE policy outside Quebec reveals that policy change was not as fluid as suggested by the bottom-up approach nor as mechanistically tied to the presence or absence of factors as the top-down model suggests.

## References


Alberta (1988) Language Education Policy for Alberta, Department of Education, November.

Alberta Legislature (1993) Legislative Assembly debates, *Alberta Hansard,* 27 September, 495, 497, 499, 502.

Apps, Eric (1985) "Minority Language Education Rights," 43 *University of Toronto Faculty of Law Rev.* 45–71.

Aunger, Edmund A. (1989) "Language and Law in the Province of Alberta," in P. Pupier & J. Woehrling, eds., *Language and Law.* Montreal: Wilson and Lafleur.

Bell, Derrick A., Jr. (1978) "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," in H. I. Kalonder & J. J. Fishman, eds., *Limits of Justice*. Cambridge, MA: Ballinger Publishing Co.

Brodie, Ian (2001) "Interest Group Litigation and the Embedded State," 24 *Canadian J. of Political Science* 356–76.

Cook, Ramsay, Craig Brown, & Carl Berger, eds. (1969) *Minorities, Schools and Politics*. Toronto: Univ. of Toronto Press.

Cardinal, Linda, Lise Kimpton, Jean Lapointe, Uli Locher, & J. Yvon Thériault (1994) *Development of Official Language Communities*. Ottawa: Minister of Supply and Services Canada.

Cole-Frieman, Karl A. (1996) "The Ghosts of Segregation Still Haunt Topeka, Kansas: A Case Study on the Role of the Federal Courts in School Desegregation," 7 *Kansas J. of Law and Public Policy* 23–48.

Commission nationale des parents francophones (1990) Newsletter, September 27

Commissioner of Official Languages (1985) *Annual Report 1984*. Ottawa: Minister Supply and Services Canada.

Commissioner of Official Languages (1990) *Annual Report 1989*. Ottawa: Minister Supply and Services Canada.

Commissioner of Official Languages (1993) *Annual Report 1992*. Ottawa: Minister of Supply and Services Canada.

Corbeil, Yvan, & Camille Delude (1982) *Survey of Francophone Communities outside Quebec, Anglophone communities in Quebec, Francophones in Quebec, and Anglophones outside Quebec*. Montreal: CROP.

Council of Ministers of Education, Canada. (1983) *The State of Minority Language Education in Canada*. Toronto: Council of Ministers of Education, Canada.

Dolmage, Rod W. (1991) "Interest Groups, the Courts and Educational Policy: A Comparison of Perspectives of Academics and Legal Practitioners," 3 *Education and Law J.* 1–23.

Flemming, Roy B., John Bothe, & B. Dan Wood (1997) "One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947–1992," 41 *American J. of Political Science* 1224–50.

Foucher, Pierre (1985) *Constitutional Language Rights of Official-Language Minorities in Canada*. Ottawa: Minister of Supply and Services Canada.
Freeman, Alan, & Miro Cernetig (1990) "French Education Rights Guaranteed," *Globe and Mail,* 16 March, A1, A4.
French Language Working Group (1991) Report of the French Language Working Group to the Minister of Education the Honourable Jim Dinning, May. Commissioned by the Alberta Government.
Galanter, Marc (1983) "The Radiating Effects of Courts," in K. D. Brown & L. Mather, eds., *Empirical Theories of Courts*. New York: Longman.
Garrow, David J. (1994) "Hopelessly Hollow History: Revisionist Devaluing of *Brown v. Board of Education*," 8 *Virginia Law Rev.* 151–60.
Gillis, Charlie (2000) "Today's Lesson: Segregation," *National Post*, 5 Oct., A3.
Gillman, Howard (1999) "The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making," in C. Clayton & H. Gillman, eds., *Supreme Court Decision-Making: New Institutionalist Approaches*. Lawrence: Univ. of Kansas Press.
Immergut, Ellen M. (1998) "The Theoretical Core of the New Institutionalism," 26 *Politics and Society* 5–34.
Johnson, Charles A., & Bradley C. Canon (1984) *Judicial Policies: Implementation and Impact*. Washington, D.C.: Congressional Quarterly.
Julien, Richard (1991) *The French School in Alberta.* Doctoral dissertation. University of Alberta, Edmonton.
——— (1993) "The Quest for All-French Schools in Alberta," 25 *Canadian Ethnic Studies* 25–49.
Klarman, Michael (1994) "*Brown*, Racial Change, and the Civil Rights Movement," 80 *Virginia Law Rev.* 7–150.
Knopff, Rainer, & F. L. Morton (1992) *Charter Politics*. Scarborough, ON: Nelson.
Lamoureux, Phil A., & Denis Tardif (1990) An Educational System for Franco-Albertans. Prepared for l'Association canadienne-française de l'Alberta and la Fédération des parents francophones de l'Alberta.
Levine, James P. (1970) "Methodological Concerns in Studying Supreme Court Efficacy," 4 *Law & Society Rev.* 583–611.
Magnet, Joseph E. (1995) *Official Languages of Canada*. Cowansville, Quebec: Les Éditions Yvon Blais Inc.
Mandel, Micheal (1989) *The Charter of Rights and the Legalization of Politics in Canada*. Toronto: Thomsen Educational Publishing.
Manfredi, Christopher P. (1993) "Constitutional Rights and Interest Advocacy: Litigating Educational Reform in Canada and the United States," in F. L. Seidle, ed., *Equity and Community.* Montreal: Institute for Research on Public Policy.
Martel, Angéline (1988) *Profil de la Francophonie d'Edmonton et Opinions des Francophones sur l'Éducation Française*. Edmonton: Bugnet Group.
——— (1991) *Official Language Minority Education Rights in Canada*. Ottawa: Minister of Supply and Services Canada.
——— (2001) *Rights, Schools, and Communities in Minority Contexts: 1986-2002*. Ottawa: Minister of Supply and Services Canada.
Matas, Robert (1997) "B.C. bows to Francophone-school order," *Globe and Mail,* 20 June, A8.
McCann, Michael W. (1992) "Reform Litigation on Trial," 17 *Law and Social Inquiry* 715–43.
——— (1994) *Rights at Work*. Chicago: Univ. of Chicago Press.
——— (1996) "Causal versus Constitutive Explanations," 21 *Law and Social Inquiry* 457–82.
——— (1999) "How the Supreme Court Matters: New Institutionalist Perspectives," in H. Gillman & C. Clayton, eds., *The Supreme Court in American Politics*. Lawrence: Univ. of Kansas Press.

Mertz, Elizabeth (1994) "A New Social Constructionism for Sociolegal Studies," 28 *Law & Society Rev.* 1243–65.
Morin, Daniel (1985) "Alberta School Boards and Section 23 of the Canadian Charter of Rights and Freedoms." L'Association canadienne-française de l'Alberta.
Royal Commission on Learning (1994) "For the Love of Learning." Report of the Royal Commission on Learning. Ontario: Queen's Printer.
Pal, Leslie (1993) *Interests of State*. Montreal: McGill-Queen's Univ. Press.
Riddell, Troy (2002) *Legal Mobilization and Policy Change: The Impact of Legal Mobilization on Official Minority-Language Education Policy outside Quebec*. Doctoral dissertation. Montreal: McGill University.
Rosenberg, Gerald N. (1991) *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: Univ. of Chicago Press.
——— (1996) "Positivism, Interpretivism, and the Study of Law," 21 *Law and Social Inquiry* 435–55.
Scheingold, Stuart (1974) *The Politics of Rights: Lawyers, Public Policy and Political Change*. New Haven: Yale Univ. Press.
Simon, Jonathon (1992) "The Long Walk Home' to Politics," 26 *Law & Society Rev.* 923–41.
Slevinsky, Richard (1997) *Current Issues in Alberta's Francophone School Jurisdictions*. Doctoral dissertation. University of Alberta, Edmonton.
Vengroff, Richard, & F. L. Morton (2000) "Regional Perspectives on Canada's Charter of Rights and Freedoms: A Re-Examination of Democratic Elitism," 33 *Canadian J. of Political Science* 359–82.
Wasby, Stephen L. (1970) *The Impact of the United States Supreme Court*. Homewood, IL: Dorsey Press.

## Cases Cited

*Arsenault-Cameron v. Prince Edward Island*, 2000 1 S.C.R. 3. (S.C.C.).
*Brown v. Board of Education*, 1954 347 U.S. 483.
*Brown v. Board of Education* II, 1955 349 U.S. 294.
*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003, 3 S.C.R. 3.
*Lavoie v. Nova Scotia (Attorney-General)*, 1989 58 D.L.R. (4th) 293 (Nova Scotia Supreme Court, Appeal Div.).
*Mahé v. Alberta*, 1985 22 D.L.R. (4th) 24 (Alberta Court of Queen's Bench); 1987 42 D.L.R. (4th) 514 (Alberta Court of Appeal); 1990 1 S.C.R. 342 (S.C.C).
*Marchand v. Simcoe County Board of Education et al*., 1986 55 O.R. (2d) 638.
*Ottawa RC School Trustees v. Mackell*, 1917 AC, 62.
*Reference Re Education Act of Ontario and Minority Language Education Rights*, 1984, 10 D.L.R. (4th) 491.
*Reference Re Manitoba Public Schools Act*, 1993 1 S.C.R. 839 (S.C.C).
*Reference Re Minority Language Education Rights*, 1988, Nfld. and P.E.I. R. 236.

## Appendix

Guide for interpreting Table 1:

**Instruction**—Were FFL programs provided (as opposed to French immersion programs)?

"Mandatory"—FFL programs were provided to Section 23–eligible students regardless of the number of such students.

"Qualified Mandatory"—FFL programs were provided to Section 23–eligible students if a certain number of students (or parents of students) requested such a program.

"Discretionary"—FFL programs were provided completely at the discretion of local school authorities.

**Homogeneous Facilities**—Were schools provided that catered only to Section 23–eligible children and where the administration of the school was in French?

"No"—there were no homogenous French schools.

"Qualified No"—homogeneous French schools existed de facto because of demographic realities in certain areas, but there was no provincial policy that recognized or encouraged such schools.

"Qualified Yes"—there was recognition of the concept of homogenous French schools, but the creation of such schools was not mandated.

"Yes"—the creation of French schools was required where numbers warrant.

**Management and Control**—Were Francophone parents able to exercise control over matters related to French-language instruction and schools, including budgets, programs, and policies, either through their own school boards or by proportional representation on existing school boards?

"No"—Francophone parents did not have management and control powers.

"Qualified No"—certain school boards in the province, because of the concentration of Francophones in the geographical area, were de facto Francophone school boards.

"Qualified Yes"—Francophone school boards were created, but they were not given exclusive authority over French schools and French-language programs.

"Yes"—Francophone parents were granted proportional representation on existing school boards with exclusive authority over FFL programs and schools, or Francophone parents were provided with their own school boards.

Policy changes from a previous time period are shown in italics with the year that the change was made in parentheses. An asterisk (*) beside a year indicates that the change retained some limitations, usually in terms of geographic scope.

For a detailed overview of the policy changes in the provinces over time, see Riddell (2002: Table B.3, Appendix B).

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**Table A1.** OMLE Policy Change Outside Quebec

| | Instruction | | | Homogenous Facilities | | | Management and Control | | |
|---|---|---|---|---|---|---|---|---|---|
| | Pre-Charter (1982) | Pre-*Mahé* (1990) | Post-*Mahé* | Pre-Charter (1982) | Pre-*Mahé* (1990) | Post-*Mahé* | Pre-Charter (1982) | Pre-*Mahé* (1990) | Post-*Mahé* |
| **BC** | Qualified Mandatory | Qualified Mandatory | *Mandatory (1996)* | No | *Qualified Yes (1987)* | *Yes (1996)* | No | No | *Yes (1995*, 1996*, 1998*, 1999)* |
| **AB** | Discretionary | Discretionary | *Mandatory (1993*, 2000)* | No | *Qualified Yes (1988)* | *Yes (1993)* | No | No | *Yes (1993*, 2000)* |
| **SK** | Qualified Mandatory | Qualified Mandatory | *Mandatory (1993*, 2000)* | Qualified Yes | Qualified Yes | *Yes (1993)* | No | No | *Yes (1993*, 1999)* |
| **MB** | Qualified Mandatory | Qualified Mandatory | *Qualified Mandatory (improved 1993)* | Qualified No | *Qualified Yes (1984)* | *Qualified Yes (improved 1993)* | Qualified No | Qualified No | *Qualified Yes (1993)* |
| **ON** | Qualified Mandatory | *Mandatory (1984)* | Mandatory | Yes | Yes | Yes | Qualified No | *Yes (1986)* | *Yes (improved 1997)* |
| **NB** | Qualified Mandatory | Qualified Mandatory | *Mandatory (1997)* | Yes | Yes | Yes | Yes | Yes | Yes |
| **NS** | Discretionary | *Qualified Mandatory (1989)* | *Qualified Mandatory (improved 1991)* | Qualified Yes | *Yes (1984*, 1989)* | Yes | No | *Qualified No (1984)* | *Yes (1995)* |
| **PE** | Qualified Mandatory | *Qualified Mandatory (improved 1989)* | Qualified Mandatory | Qualified No | *Yes (1989)* | Yes | Qualified No | *Yes (1989)* | Yes |
| **NF** | Discretionary | Discretionary | *Qualified Mandatory (1996)* | No | *Qualified No (1986)* | *Yes (1996)* | No | No | *Yes (1996)* |

*Sources*: Commissioner of Official Languages (1998) School Governance: The Implementation of Section 23 of the Charter. Ottawa: Minister of Public Works and Government Services Canada; Council of Ministers of Education, Canada (1983) *The State of Minority Language Education in Canada*. Toronto: Council of Ministers of Education, Canada; Martel, Angéline (1991) *Official Language Minority Education Rights in Canada*. Ottawa: Minister of Supply and Services Canada; ——— (2001) *Rights, Schools, and Communities in Minority Contexts: 1986–2002*. Ottawa: Minister of Supply and Services Canada.

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