Dialogue as Non-compliance: Quebec and the
*Charter of the French Language*

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The legislative response to an activist judicial decision is perhaps the most important aspect of the parliamentary reaction to the Canadian Charter of Rights and Freedoms. Although judicial invalidation of a statute is significant, it does not necessarily determine the legislative architecture of the policy response introduced by the competent parliamentary body (Kelly and Murphy 2005, 218). Indeed, invalidation may result in legislative disagreement with a judicial ruling and the re-establishment of the policy status quo recent declared unconstitutional (Kelly and Hennigar 2012, 38-39). In a recent publication with Matthew Hennigar, we explored the ability of the Parliament of Canada to reverse judicial invalidation of sections of the Criminal Code without invoking the notwithstanding clause (Kelly and Hennigar, 35-36). Referring to this practice as ‘notwithstanding by stealth’ to differentiate it from the formal use of section 33 (Kelly and Hennigar, 38-39) – a transparent process whereby the competent parliamentary body introduces a resolution overriding a judicial decision in which a majority of its voting members support this course of action – we argued that Parliament had reversed key judicial decisions and re-established the policy status quo through simple legislative amendment of the Criminal Code. In effect, Parliament legislated notwithstanding the Charter without invoking the notwithstanding clause. This parliamentary practice, in our view, demonstrates the endurance of ‘weak-form’ review in Canada despite the notwithstanding clause falling into disuse. It also challenges Tushnet’s position that Canada has transitioned into strong-form judicial review, as it exists in the United States (Tushnet 2008). Further, legislative reversal through simple statutory amendment demonstrates the limited utility of judicial activism as a paradigm to understand the sovereignty of parliamentary bodies in Canada since the entrenchment of the Charter of Rights in 1982.

In this paper, the re-establishment of the policy status quo is considered in light of judicial invalidation of Quebec statutes as inconsistent with the Charter of Rights and Freedoms. Focusing on legislative amendments to Bill 101 introduced in response to the invalidation of the Sign Law (Ford v. Quebec), and access to public English education (Quebec v. Protestant School Boards, Solski v. Quebec, Nguyen v. Quebec), this paper argues that the Quebec National Assembly effectively re-established the policy status quo that existed before judicial invalidation of key provisions of Bill 101. This demonstrates the ‘hollow hope’ of legal mobilization for policy resolution through judicial victories (Rosenberg 2008), as well as the significant policy discretion available to parliamentary actors despite the characteristics of ‘strong-form’ judicial review in Canada with its constitutional Charter of Rights (Kelly and Hennigar 2012).

A number of factors explain legislative reversal through statutory amendment, as well as the limited potential of legal mobilization in Canada for long-term policy change in highly politicized policy areas such as the Charter of the French Language. First, the political context of minority language education rights (MLER) in Section 23 of the Charter, and the Supreme Court of Canada’s (SCC) growing reluctance to decide overtly political issues. This is best illustrated by the recent decisions of Solski (Tutor of) v. Quebec (Attorney General) and Nguyen v. Quebec, where the SCC deflected the issue back to the political arena for policy resolution, thus denying the full benefit of legal mobilization for groups engaged in MLER litigation. Indeed, the Court has refrained from remedying constitutional violations under section 23 and, instead, has placed the onus on the Quebec National Assembly for constitutional resolution. This has created a paradoxical situation for groups engaged in legal mobilization as they seek judicial remedy and not, as the SCC has preferred, political resolution (Solberg and Waltenburg 2006, 561-562; Hilson 2002, 250; Vanhala 2009, 739-742). Thus, the use of suspended declarations of unconstitutionality in highly charged policy areas can
result in strong legislative responses that offset and reverse judicial policy established in the short to medium term.

Secondly, the use of the notwithstanding clause functions as a deterrent for subsequent challenges against the legislative response introduced by Bill 86. In the case of the Sign Law and its invalidation in Ford v. Quebec, the Bourassa government pursued two legislative responses. First, the inside/outside rule of Bill 178 that amended section 58 to allow French only signs (outside) and languages in addition to French (inside), provided that French was ‘marked predominantly’ (Charter of the French Language 1988). Bill 178 protected the 1988 amendments to the Charter of the French Language from constitutional challenge by invoking section 33, the notwithstanding clause in the Canadian Charter, and an equivalent provisions within the Quebec Charter of Human Rights and Freedoms. Secondly, when the notwithstanding clause expired in 1993, the Bourassa government introduced Bill 86, which further amended sections 58 and 68 of the Charter of the French Language. Although Bill 86 has been considered as legislative compliance with Ford v. Quebec (Silver 2000; 719) this is not an accurate characterization. While the legislative response partially incorporates the Court’s requirement that languages other than French are allowed, so long as French is ‘predominant,’ the Charter of the French Language 1988 and 1993 ultimately retains for the Government, through regulation, the discretion to decide when public signs, posters, and advertising must be in French only. This is clearly in violation of the constitutional parameters established by a unanimous (and anonymous) Court ruling in Ford v. Quebec. This represents a common legislative response to judicial invalidation in regard to Bill 101 – amendments to the CFL that incorporate the Court’s decision (legislative compliance) coupled with new provisions that ultimately re-establish the policy status quo (legislative defiance). A legislative strategy that negates compliance with new provisions suggests that successful legal mobilization may only endure in the period before a legislature decides how to respond to judicial invalidation through statutory amendment.

Although Bill 101 was first enacted in 1977, it has been amended on several occasions by the National Assembly in response to judicial invalidation by the Supreme Court of Canada: Charter of the French Language 1988 (Bill 178), Charter of the French Language 1993 (Bill 86), Charter of the French Language 2002 (Bill 104) and most recently, Charter of the French Language 2010 (Bill 115). As this paper argues, the net effect of this legislative strategy is the re-establishment of the policy status quo and the continued sovereignty of the National Assembly of Quebec in language and education policy despite judicial invalidation of key provisions of Bill 101, the Charter of the French Language (Kelly and Murphy 2005, 220).

The first section of this paper provides an overview of provisions of Quebec statutes declared unconstitutional by the Supreme Court of Canada, as well as the legislative response introduced by the Quebec National Assembly. Section two focuses on Ford v. Quebec and the two-part legislative response by the National Assembly: amendment of the Charter of the French Language and the use of section 33 of the Charter of Rights (Bill 178) and legislative compliance but ultimate reversal through Bill 86. The third section considers the political and constitutional context that structured the introduction of the Charter of Rights and MLER in section 23. This is significant, as the Canadian manifestation of legal mobilization, particularly in the area of MLER, is embedded within the national unity conflicts in the period immediately after the election of the Parti Québécois in 1976, and the Trudeau government’s realization that it lacked sufficient constitutional instruments to challenge the Charter of the French Language. Section 23 of the Charter of Rights, therefore, was a
constitutional response by the Trudeau government to rectify the challenge that it believed Bill 101 posed for national unity. In this sense, the Canadian case is an example of ‘embedded’ legal mobilization, largely because the federal government, through the Court Challenges Program, financially supported the most significant constitutional challenges launched against Bill 101 by Alliance Quebec (Morton 1995, 181), and since its demise as an organization, Anglophone and Allophone groups that litigate against Bill 101 in Quebec.

The fourth section considers the major cases decided by the SCC that have considered the constitutionality of Bill 101 in light of section 23 of the Charter: Protestant School Boards (1984), Gosselin v. Quebec (2005), Solski v. Quebec (2005), and finally, Nguyen v. Quebec (2009). These cases will demonstrate several of the structural limitations to the benefits of successful legal mobilization involving section 23: the diffuse policy impact despite judicial review identifying constitutional limitations with Bill 101; qualified judicial decisions that undermine legal mobilization as a successful policy strategy; and finally, judicial remedies that ultimately re-establish the policy status quo in public education. The final section considers the legislative response to Nguyen v. Quebec, which was passed by the Quebec National Assembly in October 2010 – Bill 115 An Act following upon the court decisions on the language of instruction. This legislative response is significant as it demonstrates the limited value of legal mobilization in a highly politicized policy area. Bill 115 saw the Quebec government introduce a more restrictive approach to the use of unsubsidized private schools (UPS) to satisfy the requirements of Bill 101 that existed before Nguyen, despite the SCC finding the pre-Nguyen restrictions as unconstitutional. This paradoxical situation – a judicial victory for minority language groups followed by a more restrictive legislative response – highlights the limitations of legal mobilization for minority language education in Quebec, as well as the limited constraints that judicial decisions can place on sovereign legislatures in highly politicized policy contexts.

Judicial Invalidation of Quebec Statutes on Charter Grounds

As summarized in Table 1, the Supreme Court of Canada has declared six provisions of three Quebec statutes unconstitutional under section 52 of the Constitution Act 1982: the Charter of the French Language (4 provisions), the Summary Convictions Act (1 provision), and the Referendum Act (1 provision). Initially, the major concern with the Canadian Charter was the potential for centralization of provincial areas of jurisdiction, as judicial review involving a national Charter of Rights was suggested to lead to a standardization of public policies at the provincial level, and most importantly, in the province of Quebec (Morton 1995; Gagnon and Iacovino 2007, 36; Gagnon and Laforest 1993; Laforest 1995, 2009). Indeed, the only policy area directly targeted by the Charter of Rights is education policy, which is an exclusive area of jurisdiction, save a federal remedial power under section 93(3) that has fallen into constitutional disuse. In this regard, the political purposes of the Charter and its entrenchment of minority language education rights in section 23 was to constitutionally challenge Quebec’s legislative approach to public education in the Charter of the French Language (Magnet 2007, 150-153).

Although the centralizing potential of judicial review by the Supreme Court of Canada is a possibility, there are a number of factors that have resulted in the reconciliation between rights and federalism (Kelly 1999; Kelly and Murphy 2005; Kelly 2005). On the parliamentary side, the role of the Department of Justice at the national level and its provincial counterparts has been instrumental in protecting policy
discretion through institutionalized vetting of legislative proposals for their relationship to the Charter of Rights (Kelly 2005, 222-257). This reduces the potential for judicial invalidation and the centralization of the federation through rights-based vetting by sovereign parliamentary bodies of new legislation (Kelly 2005). As well, the Supreme Court of Canada has read federalism into section 1 of the Charter, the reasonable limits clause, as it accepts limitations that are demonstrably justified in a free and democratic federal society. In this respect, the Court’s Charter’ jurisprudence has already incorporated conceptions of distinct society and provincial differences into its section 1 – a development that Guy Laforest suggested would help to end Quebec’s ‘internal exile’ within the constitutional order created by the 1982 patriation of the Constitution (Laforest 2009, 256).

A major limitation with such approaches to the Charter of Rights is the judicial-centred focus of the analysis – the assumption that judicial decisions structure the policy response. Hogg and Bushell and ‘dialogue theorists’ defend legislative responses as evidence of an institutional relationship between courts and legislatures within the paradigm of constitutional supremacy (Hogg, Bushell-Thorton, and Wright 2007, 7-10). Dialogue theorists suggest that the growing use of suspended declarations of unconstitutionality is illustrative of the Court’s respect of legislatures:

Although the unconstitutional law is maintained in force for a short time, the Charter is still respected, because if no new law is enacted by the time the period of suspension ends, the declaration of invalidity takes effect. If a new law is enacted in response to the holding of invalidity, that law must comply with the Charter (Hogg, Bushell-Thorton, and Wright 2007, 18).
In contrast, critics of dialogue theory such as Grant Huscroft contend that this framework advances judicial supremacy, as the legislative response is ‘constitutionalism from the top-down’ because legislatures respond within a policy framework defined by the Supreme Court of Canada (Huscroft 2007, 97; Manfredi 2007, 114; Petter 2007, 166-167).

While there is disagreement as to the precise constitutional implications of judicial review involving the Charter, both sides in the dialogue debate share a common assumption – that the legislative response complies with the constitutional parameters established through invalidation (Hogg, Bushell-Thorton, Wright 2007, 18; Huscroft 2009, 57-58). As Table 1 indicates, the invalidation of Quebec statues by the Supreme Court of Canada has seen the National Assembly fully comply with the Court’s rulings in only 2 out of 6 invalidations (Libman, thibault). In Libman the Court ruled that the $600 spending restriction on third parties by the Referendum Act under section 404 – individuals not affiliated with either the ‘NON’ or ‘OUI’ committees, as required by the Act – was a violation of freedom of expression, and not a reasonable limit. In its judgment, the Court suggested that increasing the spending limit to $1,000 for third parties, as recommended by the Lortie Commission, would constitute a reasonable limit of freedom of expression under section 1 of the Charter of Rights (Libman v. Quebec, paras. 80-82). Bill 450, passed by the National Assembly in 1998, complies with the Court’s decision, as the spending restriction was increased to $1000 for third parties in election and referendum campaigns. Similarly, the National Assembly complied with the Court’s decision in thibault, when it rescinded the Summary Convictions Act that allowed an acquittal to be appealed through a new trial and replaced it with the Code of Civil Procedure that did not include such a procedure.

It is significant, therefore, that the legislative response to judicial invalidation of the Charter of the French Language has largely been statutory amendment. This complex legislative strategy of compliance and defiance when the Charter of the French Language has been amended has re-established the policy status quo of the National Assembly in a highly politicized policy area. This challenges both the defenders and critics of dialogue theory that assume that a legislative response will comply with, and respect, the constitutional parameters of a judicial ruling. Indeed, the policy discretion that a parliamentary body retains despite a negative judicial ruling reinforces the conclusion that Canada has ‘weak-form’ judicial review (Kelly and Hennigar 2012) and not judicial supremacy through legislative compliance with ‘constitutionalism from the top down’ (Huscroft 2007).

The Sign Law and the Supreme Court of Canada

The regulation of language on signs, posters, and advertising by the Charter of the French Language 1977 came to be known as the ‘Sign Law’ provisions of Bill 101. Two important provisions were challenged as a violation of freedom of expression in Ford v. Quebec, protected under section 2(b) of the Charter of Rights: sections 58 and 69. Section 58 of the Charter of the French Language required that “public signs and posters and commercial advertising shall be solely in the official language” (Charter of the French Language 1977), though it did provide the Office de la langue française with the discretion to allow bilingual signs, or the sole use of languages other than French. Under section 1, French was declared as the official language of Quebec, and section 69 required that only the French name of a firm could be used in Quebec. Individuals or firms violating the sign law provisions of Bill 101 were subject to fines.
under sections 205 and 206.

Several individuals found in violation of the Act and fined by Office de la langue française under sections 205 and 206 launched constitutional challenges to sections 59 and 69 of the Charter of the French Language in February 1984. The five claimants were successful at the Superior Court (Ford v. Quebec, para. 18) and the Court of Appeal (Ford v. Quebec, para. 19). On December 15, 1988, the Supreme Court of Canada dismissed the appeal of the Attorney General of Quebec, and declared sections 58 and 69 unconstitutional as an unreasonable limitation on freedom of expression protected under section 2(b) of the Charter of Rights, and thus, of ‘no force or effect’ under section 52 of the Constitution Act, 1982.

In a unanimous decision authored by ‘The Court’ – a practice that is rare in constitutional decisions by the Supreme Court of Canada but one that has been used in 4 out of 6 cases where Quebec statutes were invalidated – sections 58 and 69 were found to be an unreasonable violation of freedom of expression because of the close relationship between language, expression, and identity: “Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice” (Ford v. Quebec, para. 40). Further, the Court reasoned that language “as the preamble of the Charter of the French Language itself indicates, a means by which a people may express its cultural identity (Ford v. Quebec, para. 40). In the companion case Devine v. Quebec, decided the same day as Ford, the Court argued that the section 2(d) violation was compounded by the compelled use of French in Bill 101: “That freedom is infringed not only by a prohibition of the use of one's language of choice but also by a legal requirement compelling one to use a particular language” (Devine v. Quebec, para. 23). Commenting on Quebec’s position that commercial expression should not be protected by section 2(b) (Ford v. Quebec, para. 45), the Court rejected this, arguing, “there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the Charter. (Ford v. Quebec, para. 59).

While the Court was supportive of the policy rationale of the Charter of the French Language – promoting and maintaining the visage linguistique of Quebec – it did not consider that the section 2(d) violation constituted a reasonable limitation under section 1 of the Charter of Rights. Finding that sections 58 and 69 advanced pressing and substantial legislative objectives, the Court determined that the provisions failed the minimal impairment requirement of the Oakes test (Cameron 2009, 246). In its section 1 analysis, the Court took issue with the compelled and exclusive use of French: “Thus, whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "visage linguistique" in Quebec and therefore justified under the Quebec Charter and the Canadian Charter, requiring the exclusive use of French has not been so justified (Ford v. Quebec, para. 73). Indeed, the Court did not accept that the compelled use of French was essential to the maintenance and promotion of the French language in Quebec, whereas the marked predominance of French, alongside other languages, would advance this objective and be consistent with the demographic reality of Quebec: “Such measures would ensure that the "visage linguistique" reflected the demography of Quebec: the predominant language is French….But exclusivity for the French language has not survived the scrutiny of a proportionality test and does not reflect the reality of Quebec society (Ford v. Quebec, para. 73)

The constitutional basis on which the Court invalidated sections 58 and 69 of the Charter of the French Language, as well as the suggested policy response, closely mirror the position adopted by the Quebec Liberal Party in 1985. During the 1985 Quebec election, Robert Bourassa committed his government to easing Bill 101 to allow bilingual signs, as long as French was given greater visibility (MacDonald 2002, 294). This position was adopted during the June 1986 General Council of the Quebec Liberal Party, where, as the Government of Quebec, the Liberal Party reiterated its
commitment to protecting the French image of Quebec, but also supported the use of bilingual signs, as long as French was given greater prominence (Stevenson 1999, 188). In determining that the challenged provisions of the Charter of the French Language were an unreasonable limitation on freedom of expression, the Court generally adopted the stated position of the Quebec Liberal Party as an acceptable legislative response to the invalidation of sections 58 and 69.

The Quebec National Assembly introduced two legislative responses to Ford v. Quebec: Bill 178, which had the force of law between 1988 and 1993, and Bill 86 which replaced Bill 178 when the notwithstanding clause expired after 5 years and the Bourassa government decided against re-invoking section 33 of the Charter of Rights. The first legislative response, Bill 178 complied with and departed from Ford v. Quebec. Tabled in the National Assembly on December 19 and assented to on December 22, 1988, Bill 178 amended section 58 to create the inside/outside rule for public signs, posters and advertising (Appendix 1). Section 68 was amended to reiterate that the name of firms operating in Quebec could only be in French (Charter of the French Language 1988, section 68). Section 58, the outside rule, established that “public signs and posters and commercial advertising, outside or intended for the public outside, shall be solely in French” (Charter of the French Language 1988, section 58). Bill 178, therefore, disregarded the Court’s ruling in Ford that the exclusive use of French was inconsistent with section 2(d) of the Canadian Charter of Rights, as well as freedom of expression protected in the Quebec Charter of Human Rights and Freedoms. Section 58.1, the inside rule, provided that “inside establishments, public signs and posters and commercial advertising shall be in French” (Charter of the French Language 1988, section 58.1) but allowed for the use languages in addition to French “provided they are intended only for the public inside the establishment and that French is marked predominant” (Charter of the French Language 1988, section 58.1).

The inside/outside rule compelled the exclusive use of French on public signs, posters and advertisement but did allow for limited use of languages in addition to French, so long as the signs were located inside and French was ‘marked predominant.’ Recognizing that Bill 178 was mostly inconsistent with the Court’s ruling in Ford, the Bourassa government invoked section 33 of the Charter to protect the 1988 amendments to the Charter of the French Language against judicial invalidation for a period of 5 years (Bill 178, section 10). In addition, section 10 of Bill 178 allowed the amendments to the Charter of the French Language to proceed despite their inconsistency with the Quebec Charter of Human Rights and Freedoms. In justifying Bill 178, its departure from Ford, and the use of the legislative override (section 33) to protect against potential judicial challenges, the Premier of Quebec, Robert Bourassa argued that his government had to choose between collective and individual rights, and this necessitated invoking the notwithstanding clause to protect Bill 178. More importantly, Bourassa reasoned that he alone possessed the moral authority to invoke section 33: “I repeat that I am the only head of government in North America who has the moral justification to act in this manner because I am the only leader of a people that is very much a minority on this continent. Who can best and better defend, protect and promote French culture than the Prime Minister of Quebec?” (Bourassa, Debates in the National Assembly, December 20, 1988).

Bill 178 was introduced and passed in a politically charged atmosphere. Three Anglophone members of the Bourassa cabinet resigned in light of Bill 178 (Macdonald 2002, 295; Stevenson 1999, 190-191), and the 1989 Quebec election saw the Equality Party – an English rights political party that directly benefitted from Anglophone anger against Bill 178 – elect 4 members to the National Assembly (Stevenson 1999, 194-
Outside Quebec, Bourassa’s use of the notwithstanding clause is considered a decisive event that ultimately derailed the Meech Lake Accord and its recognition of Quebec as a distinct society (MacDonald 2002, 295-296; Morton 1994, 143; Riddell and Morton 1998, 485-489).

Bill 86 and the Charter of the French Language 1993

Shortly before the 5 year time limit on the notwithstanding clause expired in December 1993, the Bourassa government introduced its second legislative response to Ford. Bill 86 was introduced by Claude Ryan, the Minister responsible for the administration of the Charter of the French Language on May 6, 1993, and assented to on June 18, 1993. Because the Bourassa government decided against re-invoking the Canadian Charter’s notwithstanding clause, and instead, introduced new amendments to the Charter of the French Language, Bill 86 has been considered as legislative compliance with the Court’s earlier ruling requiring bilingual signs, as long as French was given ‘marked predominance’ (Stevenson 1999, 214-216).

The Court’s decision in Ford established a constitutional standard that freedom of expression was unreasonably infringed if, through legislation, governments compelled the exclusive use of any language on public signs, posters, or commercial advertising. Further, the Court endorsed bilingual signs with French given ‘marked predominance’ as a policy solution that would be considered a reasonable limit under section 1 of the Charter of Rights and Freedoms. The 1993 amendments to the Charter of the French Language (Appendix 1) do not fully comply with the Ford decision but re-establish the sovereignty of the Government of Quebec, through regulation, to decide the circumstances in which Ford may be complied with. For instance, the 1993 amendment to section 58 reads as follows: “58. Public signs and posters and commercial advertising must be in French” (Charter of the French Language 1993). The 1977 provision invalidated by the Court in Ford v. Quebec is nearly identical: “58. Public signs and posters and commercial advertising shall be solely in the official language” (Charter of the French Language 1977). In regard to the 1977 version of section 58, the official language is specified as French by section 1 of the Charter of the French Language.

While Bill 86 does incorporate the language of Ford v. Quebec, as section 58 does not compel the exclusive use of French and allows for the possibility of bilingual signs as “They may also be in French and in another language provided that French is marked predominant” the 1993 amendments retain for the Quebec government the discretion to decide when, and if, to comply with Ford v. Quebec:

However, the Government may determine, by regulation, the places, cases, conditions or circumstances where public signs and posters and commercial advertising must be in French only, where French need not be predominant or where such signs, posters and advertising may be in another language only (Charter of the French Language 1993, section 58).

Similarly, section 68 appears to comply with Ford as “A firm name may be accompanied with a version in a language other than French provided that, when it is used, the French version of the firm name appears at least as prominently” (Charter of the French Language 1993, section 68). However, this is qualified by section 58 of the Charter of the French Language that authorizes the Quebec Government, through regulation, to compel the exclusive use of French:
However, in public signs and posters and commercial advertising, the use of a version of firm name in a language other than French is permitted to the extent that the other language may be used in such posters or in such advertising pursuant to section 58 and the regulations enacted under that section (Charter of the French Language 1993, section 68).

Therefore, Bill 86’s compliance with Ford v. Quebec is at the discretion of the Government of Quebec and through regulation without parliamentary oversight.

Whereas legislative changes are passed by the National Assembly, regulations are orders-in-council passed by the Cabinet and do not require the consent of the National Assembly. Division III of the regulation is entitled “Public Signs and Posters and Commercial Advertising” and specifies the conditions when French must be used exclusively and not simply given marked predominance. For instance, section 15 specifies “a firm’s commercial advertising, displayed on billboards, on signs or posters or on any other medium having an area of 16 m² or more and visible from any public highway within the meaning of section 4 of the Highway Safety Code...must be exclusively in French unless the advertising is displayed on the very premises of an established firm (Regulation respecting the language of commerce and business 1993, section 15). Similarly, public signs and commercial advertising on public means of transportation and bus shelters must be exclusively in French (Regulation respecting the language of commerce and business, section 16).

Section 58 of the Charter of the French Language 1993 was challenged in 1999 when an antique store owned by Simpson and Hoffman in the Eastern Townships used commercial advertising that displayed English and French versions of the firm name, “La Lionne et le Morse – The Lyon and the Walrus” where English and French were equal in size. Clearly in violation of section 58 of the Charter of the French Language and the accompanying regulations, where ‘marked predominance’ for French is defined as “at least twice as large as the space allotted to the text in the other language” (Regulation defining the scope of the expression “marked predominant” for the purposes of the Charter of the French Language, section 2(1)), Simpson and Hoffman were fined $500 under section 205 of the Charter of the French Language (Les Enterprises W.F.H. Ltee v. Attorney General of Quebec, para. 4). Initially successful at the Court of Quebec, where Simpson and Hoffman challenged that section 58’s requirement of ‘marked predominance’ continued to be an unreasonable violation of freedom of expression, the finding of unconstitutionality was reversed at the Superior Court. Finally, the Court of Appeal upheld the constitutionality of section 58, arguing that the appellants had failed to demonstrate that the restrictions on languages other than French were no longer necessary in 1999 (Les Enterprises W.F.H. Ltee v. Attorney General of Quebec, para. 61).

An application for leave to appeal was filed with the Supreme Court of Canada (December 21, 2001), and the Court dismissed the leave to appeal without reasons on October 11, 2002 (Supreme Court of Canada, Bulletin of Proceedings, October 11, 2002). The Supreme Court of Canada, as well as the Quebec Court of Appeal, reached the correct decision, as Simpson and Wallace were clearly in violation of section 58. More importantly, section 58 is consistent with the constitutional standard established by the Court in Ford requiring French to be given ‘marked predominance’ on bilingual signs. Unfortunately, Simpson and Wallace challenged the 1993 amendments to the Charter of the French Language that fully complied with Ford v. Quebec. What has yet to be determined as constitutional is the ability, through regulation, to compel the exclusive use of French on public signs, posters and advertisement as mandated by Bill 86. Thus, by partially complying with Ford, the Government of Quebec has largely preserved the policy status quo that existed before 1988. In the end, it is the Charter of the French Language, as interpreted by the Government of Quebec, and not the Charter
of Rights, as interpreted by the Supreme Court of Canada, that determines the constitutional parameters of the Sign Law.

Access to Public Education in Quebec: Bill 101 and the Charter of Rights

The entrenchment of Minority Language Educational Rights (MLER) in the Canadian Charter of Rights and Freedoms in 1982 was directly related to two significant dimensions of the political agenda of former Prime Minister Pierre Elliot Trudeau: pan-Canadian nationalism derived from shared values between citizens, as well as common government services for Canada’s two official language communities irrespective of residency, particularly in the area of minority language education (Behiels 2004, 80-81); and secondly, challenging the policies of the separatist Parti Québécois that Trudeau considered counterproductive to his goal of Canadian unity (Laforest 2005, 125-126). For Trudeau, national unity was threatened by the rise of centrifugal pressures in the Canadian federation – provincialism outside Quebec and separatism within Quebec. In particular, the Trudeau government considered the first piece of legislation introduced by the Parti Québécois as a government in 1977, Bill 101, the Charter of the French Language (CFL) as inconsistent with pan-Canadian nationalism and contrary to his view of Canada as a bilingual country with equal status for the two official languages, English and French.

Yet, problematically for Trudeau, Bill 101 was clearly constitutional, as the British North American Act, 1867 – Canada’s constitution until 1982, when it was repatriated from Westminster and renamed the Constitution Act, 1982 – provided provincial governments with full constitutional authority for education, save for a federal remedial power under section 93(3) to protect denominational school rights for religious minorities. Although the BNA Act did contain language rights protections under section 133, they were limited to the use of French and English in court, as well as the proceedings of the Parliament of Canada and the Quebec National Assembly. Thus, the BNA Act did not contain linguistic protections in the area of educational instruction. In this context – the limited constitutional protections accorded to linguistic rights and their importance to the political agenda of the chief architect of the Charter of Rights and Freedoms (Kelly 2005, 86-87) – legal mobilization in the area of minority language educational policy has a decidedly political orientation in Canada, as it is intertwined with the politics of national unity, the place of national values in a federal system, and the national question in Quebec advanced by the goal of defending and protecting the French language through limiting choice in the area of public education.

Education Reform in Quebec: Bills 63, 22, and 101

The issue of Quebec and its place within Canada was the core political question that motivated both Pierre Trudeau as Prime Minister of Canada (1968-79, 1980-84), and Rene Levesque, first as a cabinet minister in the government of Quebec Premier Jean Lesage (1960-1966), and after his departure from the Quebec Liberal Party in 1968, during his tenure as Parti Québécois Premier (1976-85). For instance, Trudeau introduced the Official Languages Act in 1969 that established Canada as an officially bilingual country where citizens were guaranteed federal government services in either French or English. This statutory policy would be constitutionalized in 1982 when official bilingualism was entrenched as sections 16-22 of the Canadian Charter of Rights and Freedoms.
In contrast, Levesque introduced the *Charter of the French Language* in 1977 which built upon Bill 22 (*Loi sur la langue officielle*) introduced by the previous Liberal government of Robert Bourassa in 1974: Bills 22 and 101 declared French as the only official language of Quebec in government and business (McRoberts 1993, 276-279). However, on the issue of language of instruction in public schools, Bill 101 was a significant departure from previous legislative attempts to navigate this sensitive issue in Quebec. In 1969, the Union Nationale government of Premier Jean-Jacques Bertrand introduced Bill 63, which allowed parents to choose the language of instruction in public education for their children (*An Act to promote the French language in Quebec*, section 2). As well, Bill 63 required the Minister of Education to “ensure a working knowledge of the French language to children to whom instruction is given in the English language (*An Act to promote the French language in Quebec*, section 1). In relation to new immigrants to Quebec, Bill 63 provided French classes for greater integration into Quebec society, but did not require that new immigrants school their children in French (*An Act to promote the French language in Quebec*, section 3). Because Bill 63 ultimately confirmed freedom of choice in language of instruction in public education, it saw the integration of new immigrants, the Allophone community, into the Anglophone community as new immigrants generally chose instruction for their children in English.²

The defeat of the Union Nationale in 1970 is partially attributed to the backlash against Bill 63 by the Francophone and Anglophone communities (Stevenson 1999, 106-107). Having isolated the Francophone community, who viewed Bill 63 as an attempt to appease the English community (Stevenson 1999, 106), the nationalist vote in Quebec began to coalesce around the Parti Québécois, which elected it first members to the National Assembly in 1970. Conscious of the threat that language of instruction posed to his government, Liberal Premier Robert Bourassa (1970-76) introduced Bill 22 (*Official Language Act*) in 1974 that attempted to appease both the Francophone demand for limited choice of instruction, and Anglophones demand for unlimited choice in public education. Although Bill 22 did not remove the choice regarding language of instruction, it did establish under section 41 that “pupils must have a sufficient knowledge of the language of instruction to receive their instruction in that language” and further, “pupils who do not have a sufficient knowledge of any of the languages of instruction must receive their instruction in French” (*Official Language Act*, Chapter V).

The intention of section 41 was to limit access to English education to the existing Anglophone community and to direct the growing Allophone community to French instruction. Indeed, under section 43 the Minister of Education was required to establish, by regulation, the standards to evaluate whether students possessed sufficient knowledge of the language of instruction under section 41. While Bill 22 preserved English instruction in Quebec, these students were obligated to “acquire a knowledge of spoken and written French” whereas francophone students were simply required to received instruction in English as a second language (*Official Language Act*, Chapter V, section 44). The defeat of the Bourassa government in 1976 followed the pattern of the Union Nationale defeated in 1970: the introduction of legislation regulating language of instruction that antagonized both linguistic communities, leading to a spectacular defeat of an incumbent government (MacDonald, 8). In the case of the Quebec Liberal Party, its vote fractured, with Francophone strongly supporting the Parti Québécois and Anglophones voting for the Union National, as Bill 63 was viewed as more acceptable than Bill 22 (Stevenson 1999, 131-134).

The election of the Parti Québécois in November 1976 saw the abandonment of incrementalism in education policy and the restriction of English language
instruction as a historical right of Quebec’s Anglophone community (Charter of the French Language, R.S.Q. 1977, section 73). Under section 73, request for instruction in English was restricted to the children, or siblings, of those educated in English in Quebec on or before Bill 101 came into force in 1977 (Appendix 1). As such, Bill 101 had two objectives: prevent the integration of the Allophone community into the Anglophone community through parental choice in public education; and secondly, narrow accessibility to English education to simply Quebec Anglophones, as Anglophones emigrating from other provinces would be ineligible for English education under the Charter of the French Language. While Bill 101 faced stiff opposition from the Anglophone community in Quebec, it was constitutional, as the only protection for education rights under section 93(3) of the BNA Act involved denominational schools for religious – but not linguistic – minorities. Thus, Quebec possessed jurisdictional autonomy in restricting language of instruction in public education.

**Trudeau and the Charter of the French Language**

Legal mobilization as a strategy to challenge Bill 101 became an important dimension of the Trudeau government’s response to the Charter of the French Language. Under the Supreme Court Act, the federal cabinet can refer constitutional questions to the SCC, and the Trudeau cabinet considered a reference involving Bill 101. However, a direct confrontation with the Parti Québécois was decided against, given the larger context of national unity and the impending referendum on Quebec’s constitutional future that would occur during the PQ’s first mandate (Morton 1995, 180-82). Instead, the Trudeau government introduced the Court Challenges Program in 1978 and provided funding to Anglophone groups to challenge the constitutionality of Bill 101 (Pal 1993, 132). This did not, however, have any implications for the language of instruction under Bill 101, as it was beyond constitutional challenge, as it did not affect denominational school rights protected under section 93(3) of the BNA Act. The importance of the Court Challenges Program would be fully realized once the constitutional response to Bill 101 was entrenched by the Trudeau government in 1982. Recognizing that it lacked the ability to challenge Bill 101, the Trudeau government accelerated its efforts to patriate the BNA Act and rename it the Constitution Act, 1982. Although the documents are nearly identical, the inclusion of the Charter of Rights transformed the possibility of legal mobilization against Bill 101 and the language of instruction. Specifically, the Charter of Rights contains section 23, minority language educational rights, which were explicitly designed to reverse section 73 of the Charter of the French Language. Although the Parti Québécois could not agree in principle to the patriation of the constitution in 1982, as its political program was Quebec independence, it was opposed to the Charter of Rights on substantive grounds, recognizing the danger it posed to Bill 101 and the language of instruction. Whereas Bill 101 established in statutory form English instruction as an historic right of Anglo-Quebecers, section 23 of the Charter of Rights constitutionalized the right to minority language instruction for the children and siblings of Canadian citizens educated in English in Canada (Appendix 2).

In his analysis of judicial review and bills of rights, Epp discusses the central importance of the legal mobilization support structure – the institutional mechanism that facilitates litigation and the success of a rights revolution (Epp 1998, 17-20). According to Epp, a successful rights revolution is not the product of activist courts but sustained litigation by rights advocacy organizations with sufficient financial – and constitutional – resources to challenge public policy. Indeed, judicial activism is
simply a reaction to successful legal mobilization strategies by rights advocacy organizations. In the case of Canada, a number of qualifications need to be attached to Epp’s theory in relation to section 23 of the Charter. First, there has not been sustained litigation against Bill 101, with only a total of 6 challenges to its constitutionality heard by the SCC since 1984. As well, 4 challenges have occurred since 2005, suggesting that legal mobilization against Bill 101 has not been dramatically affected by the introduction of section 23 in 1982. Secondly, legal mobilization in Canada is best characterized as ‘embedded’ mobilization, as the Court Challenges Program – the federal government program that provided financial support to organizations seeking to challenge the constitutionality of Bill 101 – has been the principal source of funding for groups seeking to challenge the Charter of French Language. Thus, the financial basis of legal mobilization in Canada is fundamentally different than in the United States, where rights advocacy organizations are self-financed either through fund raising, or through pro-bono legal work donated by private firms (Epp 1998, 58-62).

Thus, legal mobilization rests on precarious grounds in Canada because of its state-connectedness, best illustrated by the insecure status of the Court Challenges Program. Established by the Trudeau government in 1978, the program was cancelled by the Mulroney government in 1992, re-established by the Chretien government in 1994, and cancelled by the Harper government in 2006 (Fraser 2009, 183). The recent cancellation of the Court Challenges Program was challenged as a violation of the federal government’s obligation under Part VII of the Official Languages Act to advance linguistic minorities, a position the Harper government rejected. However, after the Federal Court of Canada began hearings on this issue, the Government of Canada reached an out of court settlement re-establishing funding for linguistic challenges, but only after mediation efforts have failed and a test case has been launched (Fraser 2009, 184).

**Language of Instruction in Public Education: Section 73 of the CFL**

The first constitutional challenge to language of instruction governed by section 73 of the Charter of French Language was delivered by the Supreme Court of Canada in Attorney General (Quebec) v. Protestant School Boards. The Supreme Court determined sections of the Charter of the French Language (CFL), or Bill 101, which restricted English education to the Children of Anglophones educated in Quebec, infringed the Charter’s minority language education rights, section 23. The Government of Quebec readily admitted that aspects of the CFL violated section 23 of the Canadian Charter, but contended that the limitations were reasonable because of the important legislative objectives pursued. Those objectives included the continued survival of the French language by streaming emigrants to the French language education system. In making this argument, the Attorney General of Quebec relied upon more restrictive language policies in multi-linguistic societies, such as Belgium and Switzerland. As these nations had adopted stricter language polices subsequently upheld by the Swiss and European Courts, Quebec reasoned that this policy would be upheld through section 1 of the Charter (Protestant School Boards, 79). While the Supreme Court was sensitive to the policy objectives underlying Bill 101, the Court determined that denying educational instruction to the children of Canadian citizens educated in English outside of Quebec was not a reasonable, but rather a total, limitation of section 23(1)(b). As a result, the SCC declared section 73 of the Charter of the French Language unconstitutional, and eligibility for instruction in English in Quebec, based on section 23 of the Charter, would be available to the children or siblings of Canadian citizens educated in English in Canada.
In reaching this decision, the SCC considered the political nature of section 23, noting that this Charter provision had been drafted with the explicit intention of reversing section 73 of the Charter of the French Language:

This set of constitutional provisions was not enacted by the framers in a vacuum. When it was adopted, the framers knew, and clearly had in mind the regimes governing the Anglophone and Francophone linguistic minorities in various provinces in Canada so far as the language of instruction was concerned. They also had in mind the history of these regimes, both earlier ones such as Regulation 17, which for a time limited instruction in French in the separate school of Ontario - Ottawa Separate Schools Trustees v. Mackell, [1917] A.C. 62 - as well as more recent ones such as Bill 101 and the legislation which preceded it in Quebec. Rightly or wrongly, and it is not for the courts to decide, the framers of the Constitution manifestly regarded as inadequate some and perhaps all of the regimes in force at the time the Charter was enacted, and their intention was to remedy the perceived defects of these regimes by uniform corrective measures, namely those contained in s.23 of the Charter, which were at the same time given the status of a constitutional guarantee (Protestant School Boards, 79).

An important critic of the Charter of Rights is Guy Laforest who contends that, with its emphasis on individual rights, is incompatible with the collective political project of the Québécois and the desire to preserve its distinct language and culture. According to Laforest, the “Charter directly challenged Quebec legislation by imposing national language standards.” (Laforest 1995, 134). This position is also advanced by Fernand Dumont who views the nation-building objective of the Canadian Charter as a project in “anglo-conformité” that undermines the distinctiveness of Quebec and likely to erode the civil law tradition that exists in this province (Dumont 1993, 45). Similarly, Jean-François Gaudreault-DesBiens argues that the recognition of minority language education rights in the Canadian Charter is a direct challenge to Quebec’s French character (Gaudreault-DesBiens, 2003, 278-280).

In some respects, Protestant School Boards is an example of successful legal mobilization as it resulted in the invalidation of section 73 of the Charter of the French Language and expanded access to public instruction in Quebec to Canadian citizens educated in English in Canada and not simply, as specified by section 73, to Quebec’s Anglophone community. There are, however, two dimensions of this decision – accessibility to the policy victory, and the legislative response to Protestant School Boards by the National Assembly – that question whether successful legal mobilization has compromised the underlying policy objectives of Bill 101 regarding language of instruction. While Bill 101 restricted access to English instruction, its principle goal was to ensure that the growing Allophone community was streamlined into the French public school system, and prevented from choosing English instruction – a policy goal similar to Bill 22 introduced by the Bourassa government in 1974. In this respect, section 23 and Protestant School Boards has not undermined this public policy goal of Bill 101, as section 23 is restricted to Canadian citizens educated in English in Canada. Thus, this policy victory is limited to the Canadian Anglophone community, which does not emigrate in large numbers to Quebec, and cannot be accessed by the Allophone community, which are, for the most part, exempt from section 23 of the Charter because it is a right based on Canadian citizenship and
residency of educational instruction: two important qualifications on section 23 that reduce its accessibility as a right.

This example of successful legal mobilization has been offset by demographic shifts in Quebec’s population that question the negative assessments of Protestant School Boards. In the period between 1981 and 2006, the Anglophone community has declined from 13.3% to 7.8% of the Quebec population, whereas the Allophone community has increased from 8% to 12.1%. Indeed, there has been a negative net migration of 284,000 Anglophones from Quebec since the introduction of language legislation (Bills 63, 22, and 101), in the period 1971-2006, and a net outflow of 83,900 Anglophones since Protestant School Boards. Thus, the Supreme Court’s decision has not interfered with the substantive policy objective of preserving the French language by limiting choice in educational instruction because it only privileges Canadian citizens educated outside Quebec who move to Quebec. As there is a net outflow of Anglophones from Quebec and this is the only group to benefit from the decision, the children of new immigrants to Quebec cannot access English education because their parents (or siblings) are neither Canadian citizens nor educated in English in Canada. As the demographic strength of Francophones is not threatened by interprovincial immigration but bolstered by French-speaking emigrants to Quebec, the partial invalidation of the Charter of the French Language has no practical impact beyond providing a strong rhetorical tool for the critics of the 1982 constitutional settlement (Laforest 1995, 125-149). Thus, beyond the requirement to provide educational services to a restricted part of the Anglophone community in Quebec, which is declining in population, the Quebec National Assembly retains nearly complete autonomy over education policy, as 92 per cent of the population does not benefit from Protestant School Boards.4

Constitutional Challenges to the Charter of the French Language 1993

An important aspect of legal mobilization not considered in relation to Protestant School Boards is the legislative response to this decision by the National Assembly in 1993. Bill 86 was introduced by the Liberal government of Robert Bourassa (1985-1994) and represents Quebec’s attempt to legislatively offset the constitutional implications of Protestant School Boards for Bill 101 (Appendix 1). The 1993 amendments to the Charter of the French Language further reduced accessibility to English instruction by specifying that eligibility was only available to those children whose parents or siblings are Canadian citizens educated in English in Canada “provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada (Charter of the French Language 2010, section 73). In this respect, Bill 86 is a qualification on the Canadian Charter of Rights, which only requires that ‘sufficient numbers’ of an official language minority are necessary to warrant the provision of public education under section 23.

Two important constitutional challenges were launched against the Charter of the French Language in 2005, Gosselin v. Quebec and Solski v. Quebec, the first challenges against language of instruction since Protestant School Boards in 1984. Unlike previous challenges to provisions of Bill 101, which originated within the Anglophone community, Gosselin was from Francophone parents who argued the inability to send their children to English schools under section 73 of the Charter of the French Language was a violation of the equality provisions in the Canadian and the Quebec Charters. The Court did not accept this, arguing that section 23 of the Canadian Charter only provides specific rights to minority language educational communities. Further, the Supreme Court ruled that there cannot be a hierarchy of
constituent rights, and the equality rights provisions of the Canadian Charter cannot be used to expand section 23 to provide equal access to English education in the province of Quebec (Gosselin 2005). Thus, federalism came to the aid of the Charter of the French Language, as the Court ruled that the “appellants are members of the French Language majority in Quebec, and, as such, their objective in having their children educated in English simply does not fall within the purpose of section 23.” (Gosselin 2005: para. 30). In reaching this conclusion, the Court was sensitive to the loss of control over education policy that free access to minority language education would pose to Quebec as “the problem has the added dimension that what are intended as schools for the minority language community should not operate to undermine the desire of the majority to protect and enhance French as the majority language in Quebec, knowing that it will remain the minority language in the broader context of Canada as a whole.” (Gosselin 2005: para. 31).

The ‘Major Part’ Requirement and Section 23 of the Charter

At issue in Solski was the 1993 amendment to the Charter of the French Language introduced by Bill 86 and whether the ‘major part’ requirement was consistent with section 23 of the Charter. This case was launched by Allophones from Poland (Solski), Anglophones from Ontario (Casimir) and Francophones from Quebec (Lacroix) whose children were denied certificates of eligibility by the Administrative Tribunal Quebec (ATQ). Under the Charter of the French Language, parents seeking to have their children educated in English must complete a ‘certificate of eligibility’ establishing their claim under section 73. This certificate is reviewed by a person ‘designated’ by the Ministry of Education, Recreation and Sports (section 75), which evaluates all applications under the analytical framework established by regulation (Charter of the French Language, section 73.1). Finally, all decisions regarding eligibility may be contested before the ATQ within 60 days of notification (Charter of the French Language, section 83.4).

By regulation, the ‘major part’ requirement established was purely quantitatively: “the Minister will determine eligibility solely on the basis of the number of months spend in each language. Other factors, including the availability of linguistic programs and the presence of learning disabilities or other difficulties...are not considered” (Solski, para. 25). In Solski, the Supreme Court upheld section 73(2) of the CFL which limited English education in Quebec to children who have received “the major part of the elementary or secondary instruction received by the child in Canada.” (Solski 2005: para. 25). However, the Court ruled that the interpretation of the ‘major part’ requirement by the Minister of Education and used by the Administrative Tribunal of Quebec was inconsistent with purpose section 23 of the Charter. In effect, the SCC upheld the constitutionality of the Charter of the French Language but found that its administrative application – as established by regulation – was unconstitutional.

The Court ruled that a purely quantitative approach to section 73(2) violated the purpose of section 23, as only a significant part and not the majority of a child’s education would have to be in English to qualify for minority language education in Quebec (Solski 2005). While the Supreme Court recognized that provinces retain the discretion to determine eligibility for minority language education, the criteria established must be consistent with section 23. In the Court’s view, a qualitative approach to the ‘major part’ requirement would ensure the constitutionality of section 73(2) of the CFL and must consider the following criteria: how much time was spent in either language in an educational setting, the stage of education when the language of
instruction was chosen, the availability of minority language education instruction, and finally, whether the child experienced any disabilities or difficulties (Solski 2005). In reaching this conclusion, the Supreme Court recognized that the provision of minority language education rights varies between provinces and that, in the case of Quebec the “latitude given to the provincial government in drafting legislation regarding education must be broad enough to ensure the protection of the French language while satisfying the purposes of section 23.”(Solski 2005: para. 34). The significance of this decision is that the very narrow basis of the Court’s decision did not affect provincial control over education policy. While the Court did uphold the constitutionality of section 72(3) of the CFL, the decision simply required the province of Quebec to adopt a test that was contextual and less rigid when determining whether a child qualified for English education.

As well, the remedy adopted by the SCC in Solski offsets the impact of legal mobilization, as does the process for establishing eligibility for English instruction in Quebec. While the ‘major part’ requirement is a general requirement under the Charter of the French Language, it is individually assessed under section 75. Though the Court cautioned against a quantitative approach to section 73 of the Charter of the French Language, it did establish the requirement that parents demonstrate a commitment to the educational pathway: “It cannot be enough, in light of the objectives of s.23, for a child to be registered for a few weeks or a few months in a given program to conclude that he or she qualifies for admission, with his or her siblings, in the minority language programs of Quebec” (Solski, para. 39). Thus, the SCC would not accept ‘artificial educational pathways’ used to circumvent the Charter of the French Language – a judicial position that would become significant when Quebec fashioned its response to Nguyen v. Quebec in 2010.

In the case at hand, the SCC declared that the children of Casimir and Lacroix were eligible for English instruction once section 73(2) was read constitutional through a qualitative application, whereas the children of Solski were not, having abandoned the appeal after the trial court (Solski, paras. 58-61). While the SCC established a qualitative approach, it is still the responsibility of the person designated under section 75 to apply and assess the certificates of eligibility for English instruction. Thus, the SCC has constitutionalized Quebec’s legislative amendment of section 23 of the Charter via the 1993 statutory changes to the Charter of the French Language. This represents a movement away from Protestant School Boards which simply required previous English instruction in Canada, as mandated by section 23 of the Charter. While the outcome of Solski saw 2 families eligible for English instruction in Quebec, the broader significance is judicial acceptance of a further qualification on the Canadian Charter of Rights by the Quebec National Assembly.

Écoles Passerelles and the Charter of the French Language 2002

The Charter of the French Language further restricted access to English instruction in Quebec when it was subsequently amended in 2002 with the passage of Bill 104 by the Parti Québécois government of Premier Bernard Landry. Under Bill 104, section 73 of the Charter of the French Language was amended to specify the type of educational institution necessary to satisfy the ‘major part’ requirement introduced in 1993 (Appendix 1). This change was motivated by Quebec’s growing concern of the use of écoles passerelles (‘bridging’ schools) by the Allophone community to satisfy the eligibility criteria under section 73 of the Charter of the French Language. In particular, a practice developed whereby children of Allophone parents were sent to unsubsidized private schools (UPS) for short periods of time to establish eligibility
under section 73. Quebec took exception to Allophone parents enrolling their children in unsubsidized private schools for “no more than a few weeks or months in most cases” (Nguyen, para.9) as a way to circumvent the Charter of the French Language for children ineligible for public instruction.

Under this circumvention, once one child was briefly educated in English at a private institution, Allophones would apply for a ‘certificate of eligibility’ arguing that the ‘major part’ requirement had been met, thus allowing all family members access to English instruction in Quebec. For instance, if a child had only attended an UPS, even for a few weeks, it would have constituted their total educational experience, thus satisfying the ‘major part’ requirement demanded by section 73 of the Charter of the French Language. In response, Quebec introduced Bill 104 in 2002 to close the loophole created by the use of bridging schools that were used to circumvent the restrictions on language of instruction under the Charter of the French Language.

Under the 2002 amendment “instruction received in English in Quebec in a private educational institution not accredited for the purposes of subsidies by the child for whom the request is made, or by a brother or sister of the child, shall be disregarded” (Charter of the French Language 2002, section 73).

The case of Nguyen v. Quebec was launched by 131 families that had been denied ‘certificates of eligibility’ by the Administrative Tribunal of Quebec after briefly enrolling their children in unsubsidized private schools as a way to satisfy section 73 of the Charter of the French Language (Nguyen, para. 13). In Nguyen, the families challenged the prohibition against private institutions as a violation of section 23 of the Charter of Rights, which did not specify the educational setting necessary to qualify for public instruction in either official language. In a unanimous decision by Justice Lebel, the Court supported the constitutional challenge against Bill 104 because “[s]uch periods of instruction, are, in a manner of speaking, struck from the child’s educational pathway as if they had never occurred” (Nguyen, para. 31). In the opinion of the Court, the Charter of Rights did not specify institutional setting necessary to qualify for section 23, and thus, Bill 104 was unconstitutional because “it is therefore the fact that a child has received instruction in a language that makes is possible to exercise the constitutional right” (Nguyen para. 32).

For the Court, the prohibition against private instruction created a ‘fictitious educational pathway that cannot serve as a basis for a proper application of the constitutional guarantees” and the ‘major part’ requirement established in Solski (Nguyen, para. 33). As a result, the Supreme Court of Canada declared Bill 104 unconstitutional, and in this respect, it can be viewed as a successful example of legal mobilization for the Allophone community against Bill 104. However, there are two aspects of the unanimous judgement that undermined this victory: the remedy imposed by the SCC, and the requirement of parents demonstrating a ‘genuine commitment’ to the educational pathway chosen for their children to satisfy the ‘major part’ requirement established in Solski.

In regard to the use of ‘bridging’ schools, the Court recognized the problematic nature of particular UPS for the Charter of the French Language and thus, did not establish a general Charter principle that all English language instruction facilities would satisfy section 23 of the Charter. Perhaps more importantly, the Court accepted the underlying premise of Bill 104 and the need to regulate écoles passerelles:

The “bridging” schools appear in some instances to be institutions created for the sole purpose of artificially qualifying children for admission to the publicly funded English-language school system. When schools are established primarily to bring about the transfer of ineligible students to the publicly
The legislative response to *Nguyen* adopted by the Quebec National Assembly – Bill 115 (An Act following upon the court decisions on the language of instruction) – would be heavily influenced by the Court’s caution against artificial educational pathways as insufficient to establish access to English instruction under section 23 of the Canadian Charter of Rights.

In *Nguyen*, the Court imposed two remedies: the constitutional remedy involving the *Charter of the French Language*, and secondly, the remedy for the 131 parents seeking ‘certificates of eligibility’ allowing their children English instruction in Quebec that were denied by the ATQ. Although Bill 104 was declared unconstitutional, this decision was suspended for 1 year. The use of suspended declarations of unconstitutionality has become a common judicial remedy in Charter cases (Kelly 2005), and provided the National Assembly with the opportunity to fashion a legislative response to ensure the continued application of section 73 of the *Charter of the French Language*, which it did with the passage of Bill 115 in October 2010. The request for ‘certificates of eligibility’ was not granted by the Court. Instead, the files were returned to the Ministry of Education for re-evaluation, based on the principle established in *Solski* (the qualitative approach to the ‘major part’ requirement) and the ‘genuine commitment’ principle to the educational pathway established in *Nguyen*. However, given that most of the 131 families had attended UPS for very short periods of time, it is unlikely that upon re-evaluation, any would qualify for English instruction under section 73, despite judicial victories in *Solski* and *Nguyen*.

**The National Assembly’s Response to *Nguyen v. Quebec***

Unlike Protestant School Boards where the Court immediately declared section 73 of the *Charter of the French language* ‘of no force or effect’ under section 52 of the *Constitution Act*, 1982, a more restrained remedy was adopted in light of *Nguyen*. The suspended declaration of unconstitutionality in *Nguyen* was set to expire on October 22, 2010, and the Liberal government of Premier Jean Charest set about diffusing the language conflict by introducing amendments, first in the form of Bill 103, which was subsequently jettisoned in favour of Bill 115, passed into law on October 22, 2010. Indeed, the Charest government had to invoke closure, ending a raucous debate on Bill 115 that threatened its passage, and ultimate declaration that section 73 was unconstitutional by failing to pass a legislative response within the one-year period established by the Supreme Court of Canada.

Despite the Court’s ruling that Bill 104 was unconstitutional, the legislative response passed in the guise of Bill 115 introduced a more restrictive approach to English language eligibility in Quebec than previously existed. In effect, a successful example of legal mobilization, *Nguyen*, was followed by a policy setback through amendments to two acts: the *Charter of the French Language*, and secondly, the *Act respecting private education*. The *Charter of the French Language* was amended by
section 73.1 to remove the prohibition against private English instruction as a way to qualify for public education, and thus, brought Bill 101 into line with Nguyen (Appendix 1). However, the legislative response seized on the Court’s cautioning in Nguyen that a ‘genuine commitment’ to the educational pathway must be demonstrated for those individuals seeking ‘certificates of eligibility’ via private instruction:

Some of the evidence on the use of bridging schools raises doubts regarding the genuineness of many educational pathways, and regarding the objectives underlying the establishment of certain institutions. In their advertising, some institutions suggested that after a brief period there, their students would be eligible for admission to publicly funded English-language schools (A.R., at pp. 1200-1202). An approach to reviewing files closer to the one established in Solski would make it possible to conduct a concrete review of each student’s case and of the institutions in question. This review would relate to the duration of the relevant pathway, the nature and history of the institution and the type of instruction given there. For example, it might be thought that an educational pathway of six months or one year spent at the start of elementary school in an institution established to serve as a bridge to the public education system would not be consistent with the purposes of s. 23(2) of the Canadian Charter and the interpretation given to that provision in Solski. Moreover, as I mentioned above, this Court expressed reservations in Solski about attempts to create language rights for expanded categories of rights holders by means of short periods of attendance at minority language schools (Nguyen, at para. 39).

Under Bill 104, attendance at an accredited private institution for a period of a year was sufficient for those seeking a ‘certificate of instruction’ for public instruction in Quebec. In Nguyen, the Court argued that Quebec had a legitimate concern over (1) the nature of private institutions attempting to circumvent the Charter of the French Language, (2) the time frame of those attending such institutions to satisfy section 23 of the Canadian Charter, and (3) the importance of only allowing those students into English public instruction that demonstrated a genuine commitment to minority language education. Both Bill 103 and Bill 115 authorized the Minister of Education, through regulation, to establish an analytical framework for evaluating the commitment to English instruction: “The analytical framework may, among other things, establish rules, assessment criteria, a weighting system, a cutoff or passing score and interpretive principles” (Charter of the French Language 2010, section 73.1)

The period of residency in private English instruction was increased from 1 year (Bill 104) to 3 years under Bills 103 and 115. Further, the province would only recognize attendance at nine private institutions, with a total enrolment of 3500 students and a yearly tuition cost of $10,000 (Leavitt 2010). Clearly, these measures were intended to offset successful legal mobilization in Nguyen, as there was no guarantee that after 3 years residency and a $30,000 investment that a ‘certificate of eligibility’ would be issued. In particular, the 3 year residency is one requirement established by regulation under section 73.1 of the Charter of the French Language. At the end of the residency, applicants and their parents are interviewed by the Ministry of Education to assess their commitment to the educational pathway. Commenting on this aspect of the eligibility process, the Minister of Education Michelle Courchesne acknowledged “I won’t deny that the objective is to have a few as possible (approved)” (Macpherson 2010).

Bill 115 was criticized by the Parti Québécois for selling access to English instruction, likening the use of closure to pass the bill as the equivalent of its use
during the *War Measures Act* debate during the October Crisis in 1970 (Dougherty 2010). While the ‘rights for dollars’ argument is correct, it is unclear whether it will be accessed because of the cost impediment and the discretionary nature of the interview process at the Ministry of Education. In this regard, the legislative response required because of successful legal mobilization has resulted in a more restrictive policy in regard to language of instruction. For instance, section 78.2 of the *Charter of the French Language* 2010 prohibited the establishment of ‘bridging’ schools “No person may set up or operate a private educational institution or change how instruction is organized, priced or dispensed in order to circumvent section 72 or other provisions of this chapter governing eligibility to receive instruction in English” (Appendix 1). This is a more restrictive approach than Bill 104, which simply disregarded private English instruction when the Ministry of Education evaluated applications for ‘certificates of eligibility.’ Finally, the *Act respecting private education* was amended to allow the Minister of Education to refuse to issue a permit to a new private institution “if, in the Minister’s opinion, doing so could allow the circumvention of section 72 of the Charter of the French Language or of other provisions of that Act governing eligibility for instruction in English” (*Act respecting private education*, section 12(2)).

**Conclusion**

In *The Hollow Hope*, Rosenberg argues that legal mobilization may not result in social change, largely because it requires legislative responses that bring the decisions to life (Rosenberg 2008). In many ways, the issue of language instruction in Quebec demonstrates and languages on public signs confirms Rosenberg’s thesis, as many examples of successful legal mobilization were legislatively reversed through subsequent amendment to the *Charter of the French Language*. Commenting on Bill 103 and 115, Debbie Horrock, President of Quebec English School Boards Association concluded “We really don’t anticipate seeing one single student come to the English schools because of this [new law]” (CBC News, October 18, 2010). After nearly 30 years of legal mobilization, it is difficult to conclude that challenges against Bill 101 have fundamentally altered the policy status quo in Quebec.
References


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“Raucous debate on Quebec language law drags on” *CBC News* (October 18, 2010)


Quebec. Regulation defining the scope of the expression “marked predominant” for the purposes of the Charter of the French Language. Quebec Official Publisher 2012.

Quebec. Regulation respecting the language of commerce and business. Quebec Official Publisher 2012.


By 1971, 89.2% of Allophone children were enrolled in English instruction in Quebec. Taddeo and Tarras (2007) cited in Pierre Antcil, “The End of the Language Crisis in Quebec: Comparative Implications” at 348.

Of the 6 challenges, one has involved the restrictions on signs under the Charter of the French Language – the ‘Sign Law’ – that was successfully challenged in Ford v. Quebec, and the remaining four have involved challenges to language of instruction under Bill 101: Protestant School Boards (1984); Solski v. Quebec (2005), Gosselin v. Quebec (2005), Okwuobi v. Lester B. Pearson Board (2005) and Nguyen v. Quebec (2009).

Appendix 1

I Legislative Reversal of Judicial Invalidation


Challenged Provision

*Charter of the French Language (1977)*

58. Public signs and posters and commercial advertising shall be solely in the official language.

Legislative Response (1988-1993)

*Charter of the French Language 1988 (Bill 178)*

58. Public signs and posters and commercial advertising, outside or intended for the public outside, shall be solely in French.

Similarly, public signs and posters and commercial advertising shall be solely in French
1. Inside commercial centres and their access ways, except inside the establishments located there;
2. Inside any public means of transport and its access ways;
3. Inside the establishments of business firms contemplated in section 136;
4. Inside the establishments of business firms employing fewer than fifty but more than 5 persons, where such firms share, with two or more business firms, the use of a trademark, a firm name or an appellation by which they are known to the public.

The government may, however, by regulation, prescribe the terms and conditions according to which public signs and posters and public advertising may be both in French and in another language under the conditions set forth in the second paragraph of section 58.1, inside the establishments of business firms contemplated in subparagraphs 3 and 4 of the second paragraph.

The government may, in such regulation, establish categories of business firms, prescribe terms and conditions which vary according to the category and reinforce the conditions set forth in the second paragraph of section 58.1

58.1 Inside establishments, public signs and posters and commercial advertising shall be in French.

They may also be both in French and in another language, provided they are intended only for the public inside the establishments and that French is markedly predominant.

10. The provisions of section 58 and those of the first paragraph of section 68, enact by sections 1 and 6, respectively, of this Act, shall operate notwithstanding the provisions of paragraph b of section 2 or section 14 of the Constitution Act 1982...and apply despite sections 3 and 10 of the Charter of human rights and freedoms.

**Challenged Provision**

*Charter of the French Language (1977)*

58. Public signs and posters and commercial advertising shall be solely in the official language.

Notwithstanding the foregoing, in the cases and under the conditions or circumstances prescribed by regulation of the Office de la langue française, public signs and posters and commercial advertising may be both in French and in another language or solely in another language.

69. Subject to section 68, only the French version of a firm name may be used in Québec.

**Legislative Response (1993-present)**

*Charter of the French Language 1993 (Bill 86)*

58. Public signs and posters and commercial advertising must be in French.

They may also be both in French and in another language provided that French is marked predominant.

However, the Government may determine, by regulation, the places, cases, conditions or circumstances where public signs and posters and commercial advertising must be in French only, where French need not be predominant or where such signs, posters and advertising may be in another language only.

68. A firm name may be accompanied with a version in a language other than French provided that, when it is used, the French version of the firm name appears at least as prominently.

However, in public signs and posters and commercial advertising, the use of a version of a firm name in a language other than French is permitted to the extent that the other language may be used in such posters or in such advertising pursuant to section 58 and the regulations enacted under that section.

In addition, in texts or documents drafted only in a language other than French, a firm name may appear in the other language only.

**Challenged Provision**

*Charter of the French Language 1977 (Bill 101)*

Section 73 [Request for instruction in English]. – In derogation of section 72, the following children, at the request of their father and mother, may receive their instruction in English:

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

(b) a child whose father or mother, domiciled in Québec on the date of the coming into force of this act, received his or her elementary instruction in English outside Québec;

(c) a child who, in his last year of school in Québec before the coming into force of this act, was lawfully receiving his instruction in English, in a public kindergarten class or in an elementary or secondary school;

(d) the younger brothers and sisters of a child described in paragraph (c).

**Legislative Response**

*Charter of the French Language 1993 (Bill 86)*

Section 73 – The following children, at the request of one of their parents, may receive their instruction in English:

(1) a child whose father or mother is a Canadian citizen, and received elementary instruction in English in Canada, provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada;

(2) a child whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers or sisters of that child, provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada;

(3) a child whose father and mother are not Canadian citizens, but whose father or mother received elementary instruction in English in Quebec, provided that that instruction constitutes the major part of the elementary instruction he or she received in Quebec;

(4) a child who, in his last year in school in Quebec before 26 August 1977, was receiving instruction in English in a public kindergarten class or in an elementary or secondary school, and the brothers and sisters of that child;

(5) a child whose father or mother was residing in Quebec on 26 August 1977 and has received elementary instruction in English outside Quebec, provided that that instruction constitutes the major part of the elementary instruction he or she received in Quebec.

**Challenged Provision**

*Charter of the French Language 1993 (Bill 86)*

Section 73 – The following children, at the request of one of their parents, may receive their instruction in English:

"major part requirement" for public eligibility.

**Legislative Response**

*Charter of the French Language 2010 (Bill 115)*

2. The Charter is amended by inserting the following section after section 73:

"73.1. The Government may determine by regulation the analytical framework that a person designated under section 75 must use in assessing the major part of the instruction received, invoked in support of an eligibility request under section 73. The analytical framework may, among other things, establish rules, assessment criteria, a weighting system, a cutoff or a passing score and interpretive principles. The regulation may specify the cases and conditions in which a child is presumed or deemed to have satisfied the requirement of having received the major part of his instruction in English within the meaning of section 73.

The regulation is adopted by the Government on the joint recommendation of the Minister of Education, Recreation and Sports and the Minister responsible for the administration of this Act."

**Challenged Provision**

*Charter of the French Language 2002 (Bill 104)*

Section 73 of the said Charter is amended by adding the following paragraphs at the end:

"However, instruction in English received in Quebec in a private educational institution not accredited for the purposes of subsidies by the child for whom the request is made, or by a brother or sister of the child, shall be disregarded. The same applies to instruction in English received in Quebec in such an institution after (insert here the date of coming into force of this section) by the father or mother of the child.

**Legislative Response**

*Charter of the French Language 2010 (Bill 115)*

5. The Charter is amended by inserting the following sections after section 78.1:

"78.2. No person may set up or operate a private educational institution or change how instruction is organized, priced or dispensed in order to circumvent section 72 or other provisions of this chapter governing eligibility to receive instruction in English.

It is prohibited, in particular, to operate a private educational institution principally for the purpose of making children eligible for instruction in English who would otherwise not be admitted to a school of an English school board or to a private English-language educational institution accredited for the purposes of subsidies under the Act respecting private education (chapter E-9.1)."

*Act Respecting Private Education (Bill 115)*

12. Section 12 of the Act respecting private education (R.S.Q., chapter E-.1) is amended (1) by inserting "or section 78.1 or 78.3 of the Charter of the French language (c-11) after "under this act" in subparagraph 3 of the first paragraph;

(2) by adding the following paragraphs at the end:

"Moreover, the Minister may refuse to issue a permit if, in the Minister's opinion, doing so could allow the circumvention of section 72 of the Charter of the French language or of other provisions governing eligibility for instruction in English.

The Minister may also, with a view to preventing such a result, subject a permit to any condition the Minister judges necessary."
II Legislative Acceptance of Judicial Invalidation


**Challenged Provision**

*Referendum Act 1992*

ss. 402, 403, 404, 406 para. 3, 413, 414, 416, 417 of Appendix 2.

spending restrictions that limit third parties to maximum contributions of $600

**Legislative Response**

*An Act to amend the Election Act, the Referendum Act, and other Legislative provisions 1998 (Bill 450)*

ss. 402, 403, 404, 406 para. 3, 413, 414, 416, 417 of Appendix 2.

amended to increase maximum third party spending to $1,000
Appendix 2

Minority Language Educational Rights

Language of instruction

23. (1) Citizens of Canada

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

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

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

Continuity of language instruction

(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.

Application where numbers warrant

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

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

(b) includes, where the number of those children so warrants, the right to have them
receive that instruction in minority language educational facilities provided out of
public funds.
## Appendix 3

**Quebec: Interprovincial Migration of Anglophones, 1971-2006**

<table>
<thead>
<tr>
<th>Year</th>
<th>Net Anglophone Migration</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971-76</td>
<td>-52200</td>
</tr>
<tr>
<td>1976-81</td>
<td>-106300</td>
</tr>
<tr>
<td>1981-86</td>
<td>-41600</td>
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<tr>
<td>1986-91</td>
<td>-22200</td>
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<tr>
<td>1991-96</td>
<td>-24500</td>
</tr>
<tr>
<td>1996-01</td>
<td>-29200</td>
</tr>
<tr>
<td>2001-06</td>
<td>-8000</td>
</tr>
</tbody>
</table>

Total (1971-2006)  -284000  
Total (1986-2006)  -83900  

Source: Statistics Canada, censuses of population, 1971-2006