Legal Mobilization and Policy Change:
The Impact of Legal Mobilization on Official Minority-Language Education Policy outside Quebec

by

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A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the degree of Doctor of Philosophy.

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ISBN: 0-612-85737-9

ABSTRACT

The doctoral thesis investigates the impact of legal mobilization and judicial decisions on official minority-language education (OMLE) policy outside Quebec using a model of judicial impact derived from New Institutionalism theory. The New Institutionalism (NI) model of judicial impact synthesizes the dominant approaches to judicial impact found in the US literature, which are reviewed in Chapter Two, and transcends them by placing them within a framework based on the New Institutionalism.

The model, as developed in Chapter Three, proposes that certain factors will increase the probability of judicial decisions having a positive influence on policy, such as whether incentives are provided for implementation. The model argues that institutions—as structures and state actors—have important influences on these factors. Furthermore, the NI model recognizes that institutions play a partial and contingent role in the construction of policy preferences and discourse and in mediating the political process more generally over time.

Chapter Four demonstrates that the NI model can be applied usefully to reinterpret existing accounts of how legal mobilization and judicial decisions impacted the struggle over school desegregation in the US—a case that provides a heuristic comparison to OMLE policy as it concerns the question of how and where minorities are educated.

Chapters Five through Seven describe OMLE policy development in Canada from the latter 1970s until 2000, with case studies of Alberta and, to a lesser extent, Ontario and Saskatchewan. Chapter Eight reveals that legal mobilization by Francophone groups cannot be understood without reference to institutional factors, particularly the Charter of Rights and funding from the federal government. The policy impact of legal mobilization was influenced strongly by the Supreme Court's 1990 *Mahé* decision and by federal government funding to the provinces for OMLE policy development, while public opinion appeared to be a least a moderately constraining force on policy change. Chapter Eight further reveals that legal mobilization and judicial decisions helped Francophone groups gain access to the policy process and shaped the policy goals and discourse of actors within the process over time.

Chapter Nine bolsters confidence in the conclusions generated in Chapter Eight by demonstrating how the explanations provided by the NI model, which emphasize the

direct or mediating influence of institutional factors, are superior to explanations generated by a Critical Legal Studies (CLS) approach, a "systems" approach, a "dispute-centered" approach, and by Gerald Rosenberg's model. The thesis concludes by suggesting avenues for future research on judicial impact, particularly research that is focused on comparative institutionalism.

ABSTRACT (version française)

Cette thèse de doctorat enquète sur l'impact des actions judiciares et des décisions judiciaires sur l'éducation de la langue officielle minoritaire (official minority-language éducation: OMLE) en dehors du Québec en utilisant un modèle d'impact judiciaire dérivé de la théorie "New Institutionalism"(NI). Le modèle NI d'impact judiciaire synthétise les approches dominantes de l'impact judiciaire retrouvées dans la littérature Américaine, vue dans le chapitre 2, et les surpasse en les plaçant dans un cadre basé sur le NI.

Le modèle, développé dans le chapitre 3, propose que certains facteurs augmenteront la probabilité des décisions judiciaires en ayant une influence positive sur une politique, telle que si des moyens d'encouragement sont fournis. Le modèle argumente que les institutions, en tant que structures et acteurs, ont des influences importantes sur ces facteurs. De plus, le modèle NI reconnait que les institutions jouent un rôle partiel et contingent dans la construction des préférences et discours de politique et dans la projection de procès politique dans le temps.

Le chapitre 4 démontre que le modèle NI peut être appliqué utilement pour réinterpréter les comptes existants sur comment les actions judiciares et les décisions judiciaires ont impactées la lutte sur la déségrégation des écoles aux Etats-Unis, un cas qui fourni une comparaison heuristique de la politique OMLE en ce qui concerne la question de comment et où les minorités sont éduquées.

Du chapitre 5 au chapitre 7, est la description de développement de la politique OMLE au Canada des années 1970 jusqu'à l'an 2000, avec des études d'Alberta, et avec un peu moins d'importance, l'Ontario et la Saskatchewan. Le chapitre 8 révèle que les actions judiciares par des groupes francophones ne peuvent être compris sans la référence aux facteurs institutionels,surtout dans la Chartre des Droits et des fonds du gouvernement fédéral. L'impact de cette politique de mobilisation a été très influencé

par la décision *Mahé* en 1990 à la Cours Suprème et par les fonds fédéraux gouvernementaux aux provinces, pour le développement de la politique OMLE, pendant quel'opinion publique paraît être une contrainte moyenne sur les changements politiques. De plus, le chapitre 8 révele que les actions judiciares et les décisions judiciaire ont aidé les groupes francophones à avoir un gain au procédé politique et ont façonné les buts de politique et les discours dans le procès dans le temps.

Le chapitre 9 soutient la confiance dans les conclusions générées aux chapitre 8 en démontrant les explications fournies par le modèle NI, qui a une emphase directe ou par la médiatrice de l'influence des facteurs institutionels, sont supérieurs aux explications générées par une approche d'Etudes Critiques Légales (Critical Legal Studies: CLS), une approche systémique, une approche "Axée sur la confrontation", et par un modèle Gerald Rosenberg. La thèse se termine en suggérant des façons pour des recherches futures sur l'impact judiciaire, particuliairement la recherche qui est centré sur l'institutionalisme comparatif.

ACKNOWLEDGEMENTS

I want to begin by thanking my supervisor, Christopher Manfredi, for his support and guidance throughout the course of this project. He has made me a better scholar in a number of ways, from helping me to think more clearly about the big questions, such as the nature of the research question, to helping me address the smaller, but important, details of the writing process. Professor Manfredi also supplied funding assistance for the project. More generally, although we did have some disagreements about hockey, it was a pleasure to work with him.

Also, I would like to thank the other members of my thesis committee, Professors Elisabeth Gidengil and Hudson Meadwell for their advice along the way. Professor Gidengil was particularly helpful both in offering insights about methodology and in asking interesting questions from the perspective of someone whose primary field is not judicial politics. Professor Richard Schultz, while not on the committee, warrants thanks for his willingness to discuss New Institutionalism theory with me.

The research and writing process would not have been possible without financial support. I want to thank the Department of Political Science at McGill University for its financial support through scholarships. I want to thank also the Research Grants Office of the Faculty of Graduate Studies and Research for supplying me with a research grant. The Social Sciences and Humanities Research Council (SSHRC) also deserves much thanks for granting me a Doctoral Fellowship (752-96-1115), which was vital to my continued progress.

The research process was assisted by the willingness of a number of current and former government decision-makers and Francophone interest group activists to be interviewed—a list of interview participants can be found in Appendix D. Various officials in both the federal and provincial governments courteously supplied documents and information when requested. Richard Slevinsky of Alberta Learning merits special thanks for generously providing some documentation that he used for his own doctoral research.

To complete a project like this one needs the support of friends and I want to thank them. Some I met at McGill, such as Scott Lemieux and Brian Greene, and others I knew before heading to Montreal—Peter Zablocki, Dave and Karen Krause, Ron and Michelle

Pisoni, Stan and Rosi Wingenbach, Murray Trollope, Lori Hausegger, Matt Hennigar, Ian Brodie, John von Heyking, Ted Morton, Tim Carr, Howard Yuan and Rick Barber.

During the final year of this project I was working as a faculty member in the Department of Political Science at the University of Guelph. I want to thank the members of the Department for having confidence that I would finish the thesis and for their support along the way. In particular, I want to thank Judith McKenzie who suffered through thousands of my questions as I learned the ropes at Guelph and who supplied me with barbequed beef on occasion, which is important to a southern Albertan. The administrative staff of the Department also deserve thanks, especially Gerie McCauley who, aside from being very good and friendly at her job, makes great cookies.

Finally, it is essential that I acknowledge the help of family members who made completion of this project possible. While I was in Calgary doing research and teaching part-time, my cousin and her husband, Sarina and Dave Kehoe, generously allowed me to stay at their home for very reasonable rates. My uncle and aunt in Calgary, Gordon and Lorraine Jacksteit, also helped to sustain me with Sunday dinners. My grandmother, Louise Riddell, and my brother, Trevor Riddell, were supportive of my efforts and I thank them for it. I want to especially thank my parents, Guy and Lynda Riddell, who were instrumental in a number of ways in helping me to get the dissertation completed.

DEDICATION

For Mom and Dad

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LIST of ABBREVIATIONS

ACFA	-l' Association canadienne-française de l'Alberta
ACFO	-l' Association canadienne-française de l'Ontario
AEFO	-l' Association des enseignant(e)s franco-ontariens
AFCSO	-l' Association française des conseils scolaires de l'Ontario
ASTA	-Alberta School Trustees' Association
ATA	-Alberta Teachers' Association
CLS	-Critical Legal Studies
CNPF	-La Commission nationale des parents francophones
COL	-Commissioner of Official Languages
CORE	-Congress of Racial Equality
FCFAC	-la Fédération des communautés francophones et acadien du Canada
FFHQ	-la Fédération des francophones hors Québec
FPFA	-la Fédération des parents francophones de l'Alberta
HEW	-Department of Health, Education, and Welfare
NAACP	-National Association for the Advancement of Colored People
NI	-New Institutionalism
OCR	-Office of Civil Rights
OMLE	-Official minority-language education
OMLG	-Official minority-language group
SFM	-la Société franco-manitobaine

Chapter One- Introduction

In a 1991 study of Canadian interest group activists and academics in the education policy field, Dolmage found that respondents "strongly agreed" that section 23 of the Charter would have a "significant impact" on minority language education policy (21). Moreover, these same activists and academics considered *Mahé v. Alberta* (1990)- a case concerning minority language education- to be the most important Charter judgment delivered by the Supreme Court (ibid.: 23). However, the 1992 Annual Report of the Official Languages Commissioner cast doubt on the political efficacy of legal mobilization as a vehicle for pursuing official minority-language education (OMLE) policy change. The report complained about the slow implementation of minority language education rights after the Supreme Court's *Mahé* ruling, and it cited examples of infighting amongst members of official minority language communities over the implementation of section 23 (18). Does this experience affirm Rosenberg's (1991) assertion that pursuing social change through the courts represents a "hollow hope" for minority groups? This dissertation addresses this question, and the larger theoretical issues surrounding it, by examining the development and impact of legal mobilization by official minority- language groups (OMLGs) in Canada (outside Quebec) and comparing it to the impact of legal mobilization in the struggle for school desegregation in the United States.

A central empirical question, therefore, will be the degree to which legal mobilization and judicial decisions have enhanced the provision of minority-language education and the degree of control over such education by francophone parents across Canada (outside Quebec). There are a number of reasons why trying to answer this and related questions is an important undertaking. First, as discussed in Chapter Two, there is a paucity of this kind of judicial impact analysis in Canada, despite persistent claims that courts, especially the Supreme Court, have become important policy players in the post-Charter era (Mandel 1989; Knopff and Morton 1992; McCormick 1994). This means that there is both a lack of data and theoretical guidance for connecting judicial politics and public policy outcomes in Canada. Canon's call for more judicial impact research in the US applies even more forcefully in Canada: "All our knowledge about interest group judicial lobbying tactics, judges' social backgrounds, collegial court behaviour, case

meaning and the like serves little to real world avail if we do not know or cannot explain what happens to individuals and to society as a result" (1991: 459).

Undertaking such an empirical study requires theoretical guidance for the collection and analysis of the data. Chapter Two reveals that a number of theoretical and methodological challenges confront those wanting to research the policy impact of legal mobilization and judicial decisions. In particular, differences over whether to gauge such impact using aggregate data or through qualitative, "bottom-up" case studies are bound up with divergent theoretical explanations and predictions as to how legal mobilization works towards policy change. Another important reason for undertaking this study, therefore, is to contribute to the improvement of theoretical models for explaining the impact of legal mobilization and judicial decisions.

In Chapter Three I argue that this is best accomplished by using a "new institutionalist" framework for explaining legal mobilization and judicial impact that is presented at the conclusion of the chapter, following a discussion of the theoretical and methodological benefits and drawbacks of the new institutionalism in political science and judicial politics generally. Such a framework allows for a reconciliation of more-positivist and less-positivist approaches by recognizing that institutional configurations and "rules" can influence legal and political outcomes in more or less predictable ways, while acknowledging that institutions and rules themselves can shape the goals and identities of actors within the legal and political process in subtle ways. Moreover, a new institutionalist approach allows for a comparison of how different institutional arrangements in Canada and the US (constitutions, system of government, judicial systems, federalism, local school structures, etc.) influence the development and impact of legal mobilization and judicial decisions. As a result, a model of judicial impact can begin to be created that is not so heavily oriented towards the United States. More generally, the use of a new institutionalist approach could forge closer links between judicial politics and other sub-disciplines of political science, particularly public policy and comparative politics (see Smith 1988, 1999; Gates 1991, American Political Science Association (APSA) "Law and Courts" Section Newsletter 1999).

Since a number of commentators (Apps 1985; Manfredi 1993a; Magnet 1995; Coyne 1991) have indicated that litigation surrounding minority language education rights has

analogies to litigation for desegregated schools in the US, this suggests that there is an avenue for a comparative analysis of judicial impact. Indeed, a recent national newspaper story (*National Post*, Oct. 2000: a6) that compared the unrest which followed a Canadian judge's suggestion, based on section 23 of the Charter, that a school in Nova Scotia segregate its anglophone and francophone students to the unrest surrounding school desegregation in the US lends credence to such a proposition. Although there are different rationales and social contexts surrounding school desegregation in the US and minority language education in Canada, in both instances courts have been asked to make (often controversial) constitutional decisions concerning how and where minority students are educated. Chapter Four examines the school desegregation saga in the US and argues that a new institutionalist framework provides a better account of how legal mobilization and judicial decisions impacted this policy area than existing explanations.

Chapter Five describes OMLE policy in Canada, primarily from the mid-1970s until the year 2000 in the provinces outside Quebec. The case of Quebec is not included in the study for a number of reasons: first, Quebec's English-language education system for the English-speaking minority in the province was relatively generous and set the standard against which OMLE policies in other provinces were (unfavourably) compared (Mandel 1989); second, since the early 1980s, most section 23 litigation in Quebec has featured members of the French-speaking majority trying to gain access to English-language schools (Commissioner of Official Languages, School Governance Report 1998: 69-70); and, three, the unique influence that questions of nationalism and independence play in Quebec would make comparisons to other provinces difficult.

The more general overview in Chapter Five is supplemented by an in-depth case study of Alberta in Chapter Six and a closer look at events in Ontario and, to a lesser degree, Saskatchewan in Chapter Seven. Alberta was selected for in-depth study because it generated the most high profile section 23 decision by the Supreme Court and it is a province that is generally viewed as having less enthusiasm (and perhaps even hostility) for French-language rights or Charter rights generally (Urqhart 1997; Tardif quoted in Julien 1991: 599). Saskatchewan has similar demographic characteristics as Alberta, especially in its percentage of francophones, and, like Alberta, opposed the entrenchment of the Charter and official minority language education rights, which makes it useful as a

"control" device when trying to explain what factors influence judicial impact. The Ontario case study not only adds another more detailed set of observations, but also will aid in trying to explain the impact of legal mobilization because Ontario differs from both Alberta and Saskatchewan in supporting the Charter and, specifically, the inclusion of official minority-language education rights. Ontario also has a higher percentage of Francophones (and many more real numbers of Francophones). The inclusion of both a case that is similar to Alberta (Saskatchewan) and a case that is different from Alberta (Ontario) will help facilitate the process of making (at least tentative) inferences about what caused or shaped the impact of legal mobilization and judicial decisions on OMLE policy over time.

For all provinces outside Quebec aggregate data will be presented showing the number of schools offering French first-language (FFL) programs, enrolment in FFL programs, the number of Francophone schools, and enrollment in Francophone schools over time. Also, public opinion towards minority language education issues will be presented for provinces and/or regions over time. Such quantitative data will be supplemented by interviews with members of the minority language education policy community (from both government and OMLGs), by primary documents produced both by government (including school board) officials and from OMLGs, and by newspaper accounts and secondary studies. This qualitative data will be generated from all the provinces outside Quebec, but will be drawn heavily from Alberta, to a lesser extent from Ontario and Saskatchewan. As detailed in the dissertation, both the quantitative and qualitative data will be a combination of first-hand research and reference to research conducted by others. Given that "the issue of minority language education rights has produced some of the most emotional and politically charged conflicts in Canadian history" (Apps 1985: 45; also see Magnet 1995), such a project is important in its own right.

Studying the impact that legal mobilization and judicial decisions have had in this policy area is even more relevant given that language rights were largely the raison d'être for the entrenchment of the Charter in 1982 (Knopff and Morton 1992; Russell 1993; Mandel 1992) and, as discussed above, many in this policy area believed that section 23 and the courts would have a "significant impact" on official minority-language education

policy (Dolmage 1991). Drawing on the data from the previous chapters, in Chapter Eight I employ the new institutionalist model of legal mobilization and judicial impact developed in Chapter Three to explain how legal mobilization and judicial decisions influenced OMLE policy. Chapter Nine compares the explanation offered by the new institutionalist model to competing explanations and argues that the comparison enhances confidence in the new institutionalist model. Both Chapter Eight and Chapter Nine feature some heuristic comparisons between the case of school desegregation in the US and the case of OMLE policy in Canada to support the conclusions generated by the new institutional model. The dissertation concludes with Chapter Ten, which summarizes the research findings and suggests directions for future reseach to build on the theoretical and empirical insights offered in the dissertation.

Chapter Two- The State of Existing Judicial Impact Research in Canada and the US

In 1954 US Supreme Court justice Felix Frankfurter asked: "Does anybody know...where we can go to find light on what the practical consequences of these decisions have been?" (in Becker ed. 1969: 11). Ironically, soon thereafter judicial impact studies were conducted to gauge the consequences of a variety of US Supreme Court decisions involving controversial issues like school prayer, law enforcement and school desegregation (ibid.). Interest in conducting such studies in the US began to wane in the latter 1970s and the 1980s, but rebounded in the 1990s. This chapter reviews previous efforts devoted to describing and explaining the impact of judicial decisions and legal mobilization. It begins by outlining the rather sparse Canadian literature on impact, which suffers significant empirical and theoretical shortcomings. The chapter then turns for guidance to the more well-developed US literature on the subject. General theoretical and methodological issues are examined and the key fault lines in the literature are revealed. Examples of the actual application of these theories and methods are mostly left until Chapter Four when they are reviewed in the context of the struggle for school desegregation in the US.

Canadian Literature

Surprisingly, given the amount of attention directed to courts by political scientists and legal academics since the entrenchment of the Charter in 1982, there are few studies devoted to studying the impact of legal mobilization and judicial decisions surrounding the Charter.[1] There are, of course, various references to policy impact in the many books and articles concerned with interest group litigation and judicial decision-making in the

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[1] Some judicial impact studies do exist that do not involve Charter cases. In typically Canadian fashion the earliest examples of what might be loosely labeled judicial impact studies concerned the role of judicial decisions in shaping the nature of Canadian federalism. While early works in this area were highly normative and lacked empirical depth, later studies (Cairns 1971; Russell 1985;Vaughan 1986; Monahan 1987) offered insights that could be useful for this study as official minority-language education policy is bound up with concerns about federalism. In particular, Russell's institutionally grounded claim that the Supreme Court seemed to deliberately make decisions that did not provide either the federal or provincial governments with overwhelming doctrinal victories might be useful in illuminating the Supreme Court's section 23 Charter jurisprudence. Russell's argument that the decisions had little direct impact on federalism but were instead used as "political resources" by governments (and their societal-based supporters) engaged in complex policy and constitutional struggles is instructive. However, Russell does not systematically investigate how the indirect use of judicial decisions influenced outcomes, which limits the study's utility. Besides studies of judicial impact on federalism there exist studies on the effects of tort and administrative litigation (for a review see Bogart 1994) that offer some interesting insights but are too narrow in focus to be much help in this study.

post-Charter era. Any commentary beyond whether a law or policy was upheld or struck down by the courts is largely impressionistic, however (Morton 1987; Knopff and Morton 1992; Mandel 1992; Manfredi 1993b; Sigurdson 1993; Russell 1994). Even studies that explicitly promote impact analysis often fail to live up to expectations. In his chapter, "The Impact of Judicial Decisions," McCormick summarizes some of the American literature—mainly the Johnson and Canon model outlined below—then uses the model to evaluate the impact of three Charter decisions in the space of eight pages (1994, 180-187). His closing disclaimer that these "three anecdotes do not pretend to be a complete analysis of judicial impact in Canada" is understandable but also understated (ibid., 187). Likewise, while the sub-title of Black-Branch's (1993) book length study promises readers that it is about the "Legal, De Facto, and Symbolic Influences of the Canadian Charter of Rights and Freedoms on the Administration of Education in Canada," its strength lies in tracing changes to case law. Policy change (in four different aspects of education policy, including minority language rights) is described solely through interviews with fifteen legal or academic practitioners and twenty-five secondary school principals from across Canada.

There are some exceptions to this trend, although they are also limited in scope. A small, but growing body of literature examines how the internal policy-making processes of governments and related bodies have changed in reaction to the Charter and judicial decisions under the Charter. Monahan and Finkelstein (1993) have begun to trace how governments react to Charter decisions and how they try to anticipate Charter challenges in the policy-making process. Hiebert (1996, 1999) and Kelly (1999) have done similar work concentrating on the federal level. Moore (1993) analyzed the reaction of two local police departments in Ontario to Supreme Court Charter decisions involving criminal law procedures. In turn, their reaction depended on often slow and unclear directions from a host of provincial agencies and departments. While this body of literature tends to be atheoretical and does not address broader policy influences like interest groups and public opinion, it highlights the increasing importance of justice departments in the policy process and the tension this causes in government. Moore's study demonstrates how complex bureaucratic structures can slow reaction to a judicial decision and shape what the decision means to those "on the ground."

More theoretically oriented work, including that of the new institutional variety, is mostly concerned with the influence of litigation and the Charter on women's issues. For instance, Flanagan (1997) uses rational-choice institutionalism theory to explain why there was no successful legislative response by the federal government to the Supreme Court's 1988 *Morgentaler* decision, which struck down Canada's abortion law. According to Flanagan, the Court removed the status-quo policy option that normally prevents outcomes from "cycling," which is what happened when a free vote was allowed in Parliament following *Morgentaler*. Meanwhile, Urquhart (1989) has examined the Alberta government's response to *Morgentaler* and his analysis reveals how institutional arrangements can mediate the ultimate effects of judicial decisions. He argues that, contrary to Monahan's (1987) prediction about how governments might react to Charter decisions, the Alberta government's response was directed to satisfy the general ideological dispositions of its supporters- not the marginal voter (1989: 168). In turn, Urquhart notes that the Progressive Conservatives' increasing reliance on rural voters meant that government supporters tended to have more socially conservative policy preferences than the average voter (ibid. 165). The fact that Alberta (and other provinces) were able to limit access to abortion by virtue of their control over health policy links the importance of constitutional structures to the impact of judicial decisions (ibid.: 163-164).

Other studies have focussed more on how judicial decisions are communicated and whether Supreme Court decisions and their portrayal by the media may in some way influence public opinion and subsequent government action. Content analysis of the newspaper coverage devoted to three Charter decisions was undertaken by Amar who finds, among other things, that bias and inaccuracies surrounding coverage of *Morgentaler* tended to favour pro-choice policy positions (1997: 46). In their paper, "The Courts and the Media: Providing a Climate for Social Change," Miljan and Cooper begin by noting a correlation between increasing abortion rates and public support for abortion after *Morgentaler* (1997: 3). After reviewing how the national CTV and CBC news covered 1995 Supreme Court decisions, Miljan and Cooper link the mostly negative (television) media reaction to the *Thibaudeau* decision- where a majority of the Court refused to allow custodial parents to write off support payments for income tax

payments- to the subsequent decision by the federal government to amend the Income Tax Act to permit such write-offs. They note that the *Globe and Mail* had already explicitly connected the legislative changes to Ms. Thibaudeau's "long court struggle" (ibid.: 16).

The aforementioned Canadian studies contain insights that can be applied to studying the effects of litigation and judicial decisions concerning minority language education. Indeed, Urquhart has recently (and briefly) suggested that the Alberta government's slow reaction to *Mahé* also reflects the conservative preferences of the government in a policy area controlled by the provinces (1997: 39-42). Yet these studies are limited because they either describe mostly bureaucratic responses to a decision; focus on one particular aspect of judicial impact, such as media responses to a decision; concentrate on the response of one institution to a decision; or, when exploring the relationship between several variables, limit the examination to one province. Clearly, from both an empirical and a theoretical perspective, there is a need for a major study of judicial impact in Canada.

US Literature

Despite Canon's lament about the state of judicial impact studies in the US noted in the previous chapter, the judicial impact literature is much more developed in the US than it is in Canada. As detailed below, though not without controversy and failure, there have been serious and sustained efforts to define, measure, explain and predict the "impact" of judicial decisions and legal mobilization (developing legal resources through means other than litigation, such as having the constitution amended, writing legal commentary, hosting judicial education seminars, threatening litigation, and more generally using "rights" discourse). This review of the US literature begins by exploring how the term "impact" should be conceptualized. The interrelated problems of measuring impact and explaining and predicting impact theoretically are then discussed.

a) What is "impact"?

Notwithstanding some differences in specific conceptualization and some lingering confusion, a general consensus has emerged in the literature concerning the nature and scope of impact. This has been accomplished by viewing "impact" as a concept in the

middle of a continuum that runs from "compliance" to "aftermath". As Becker and Feeley explain:

> We are left with the third and last candidate, "impact." In many respects it is a compromise... Impact refers to "*all policy related consequences of a decision.*" Thus it refers not only to compliant behavior, but to other types of behavior as well, e.g. the response of Congress, etc.. It also provides a rough guide to determine the scope and nature of relevant consequences (1973: 212-213, emphasis in text).

Discussing "compliance," "impact" and "aftermath" in turn will reveal why "impact" is the best available concept with which to gauge the "scope and nature" of the relevant policy consequences of legal mobilization and judicial decisions. Research on compliance seeks to determine whether an actor (individual, company, government body, etc.) intentionally obeys the legal obligations and rules articulated by a court. Did the 46 states affected by the *Roe v. Wade* (1973) decision allow greater access to abortion services as demanded by the Supreme Court? Did school administrators and teachers stop the recitation of the Lord's Prayer after the Supreme Court declared the practice to be a violation of the First Amendment? Did police officers begin to read suspects their rights after being ordered to by the Supreme Court in *Miranda v. Arizona*? Such research is also concerned with whether lower courts follow the precedents set by the higher courts, particularly the Supreme Court. Most of the initial research on the effects of judicial decisions was concerned with compliance, but critics soon charged that, while research into compliance was important, the concept of compliance unduly limited the scope of inquiry. Some critics argued that those interested in compliance were influenced by the "upper-court myth" and thereby focused too much on the decisions of the Supreme Court. Instead, scholars suggested a more "bottom-up" approach whereby legal mobilization and judicial decisions by various levels of courts were some factors among many that contributed to policy change, often at a more local level. Others maintained that analyzing "compliance" ignored the reality that the judiciary, especially the Supreme Court, was an important part of the larger political process and, as such, judicial decisions might have indirect influences on various actors within the political process (see Wasby 1970a: 42-43).

In other words, legal mobilization or a judicial decision may indirectly influence policy by having interrelated effects on public opinion, interest group mobilization, and the actions of other actors in the political process not directly implicated by a judicial decision or legal mobilization. Furthermore, the policy-related activities spawned (to some degree) directly or indirectly by a judicial decision may have feedback effects that influence both the political and judicial processes (Wasby 1970a,b; Levine 1970: 584-587; Becker and Feeley 1973: 212-213; Simon 1992). The concept of "impact," therefore, includes an analysis of these potential indirect policy effects of legal mobilization and judicial decisions in addition to studying whether a specific judicial decision is being complied with or not. Hence, an analysis of the "impact" of the Supreme Court's 1973 *Roe v. Wade* decision that struck down abortion laws in 46 US states would not only include such factors as the behaviour of state legislatures and public hospitals following the decision, but would also include such factors related to policy-making as: the behaviour of Congress (which limited federal funding for abortions shortly after the decision), the behaviour of interest groups (pro-life groups became much more vocal and active following the decision and pro-choice groups made counter-efforts) and the attitudes of the public (opinion polls show a hardening of opinion on the abortion question following the decision). The decision also had effects on the judicial process as pro-life and pro-choice groups went back to court to pursue policy change and the opinions of potential Supreme Court justices on the abortion issue became a principal concern of the Senate (see Johnson and Canon 1984: 4-14).

The broader ambit of "impact" compared with "compliance" better captures what Feeley and Becker describe as the "policy related consequences" of legal mobilization and judicial decisions. An analysis of the effects of *Roe v. Wade* without looking at the indirect policy effects of the decision would paint a very incomplete picture of the ramifications of the decision. The same will be shown to be true of the Supreme Court's school desegregation decisions. Notice, however, that investigating the "impact" of *Roe v. Wade* does not include an inquiry into the second-order effects ("aftermath") of the policy and political changes that can be directly or indirectly attributed to the judicial decision. For example, an impact study would not be concerned with whether abortion policies and politics following *Roe v. Wade* have contributed to greater political and

economic equality for women though this may be the "aftermath" (a second-order consequence). This view, though, is not universally shared. "Broad impact," according to Canon, involves the second-order consequences of a decision. The example he provides asks not whether the school system is desegregated after the Supreme Court's *Brown v. Board of Education II* (1955) decision, which declared that schools must end de jure segregation, but whether desegregation is enhancing minority learning (1991: 439)?[2]

This use of the term "impact" to describe second-order consequences is not preferable, however. Including second-order consequences or "aftermath" would overburden the concept of "impact." It might be shown, for example, that, desegregation is not enhancing minority learning. Would this mean that the legal mobilization and judicial decisions concerning school desegregation had no "impact" even if researchers could clearly demonstrate that education policies concerning segregation were changed (to some degree) directly or indirectly because of legal mobilization and/or judicial decisions? More practically, undertaking a study that seeks to trace both the direct and indirect policy consequences that flowed from legal mobilization and judicial decisions *and* the consequences of those consequences would require enormous resources and time.

Canon's unfortunate definition of "broad impact" is part of a larger and somewhat confusing conceptual scheme. For example, he further distinguishes between compliance- "carrying out the letter of the decision"- and the implementation process, which is described as "foster its [the decision's] spirit." The latter definition is certainly not without ambiguity and seems to preclude effects that are not intended by the courts. Moreover, Canon's overall approach appears to ignore the possibility of non-linear, feedback effects flowing from judicial decisions. While Levine's (1970) typology of outcomes from Supreme Court decisions has the virtue of including a provision for feedback effects, the unorthodox conceptual schema also reveals the drawbacks of moving away from the general definition of "impact" offered above. Levine distinguishes between "specific implementation" (compliance), "political impact"

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[2] In terms of conceptualization, Wasby (1970 a,b) could be clearer. For example, he does not completely rule out examining, under the heading of "impact," such things as how well black children perform in desegregated schools. However, the thrust of his review is directed to more first-order policy consequences.

(government officials obeying the legal standards established by courts, especially the Supreme Court) and "social consequences," which he subdivides into "regulation of behaviour," "allocation of costs and benefits," "symbolic effects," "second-order consequences," and "feedback." An example of a second-order social consequence, according to Levine, is the possibility that the crime rate may have increased because the Supreme Court made numerous decisions that extended the rights of the accused in the criminal process (1970: 587). However, under the sub-heading of "allocation," Levine describes what also appears to be a second-order consequence- the possibility that small businesses have benefited economically from the Supreme Court's support of antitrust legislation (ibid: 586). Arguably, Levine would be better off to include "political impact" and first-order social consequences all under the general rubric of "impact," while leaving "specific implementation" (compliance) as a sub-category of impact and "second-order consequences" as a distinct conceptual category.

In sum, the concept of "compliance" is underinclusive and should be considered a subset of "impact," while the concept of "aftermath" (second-order consequences) is overly broad and would lead to conceptual confusion. It is instructive to note that in Gerald Rosenberg's 1991 book, the subtitle of which asks *Can Courts Bring About Social Change?*, Rosenberg defines "social change" as "*policy change with nationwide impact*" (1991: 4, emphasis in text). Therefore, Rosenberg studies whether the Supreme Court contributed directly (through compliant behaviour by those under legal obligation to follow rules issued by the Court) or indirectly (by changing public opinion, generating media attention, mobilizing organized interests, spurring actions by state actors like the President, etc.) to *policy change* in areas such as school desegregation, voting rights, abortion rights, etc., but he does not attempt to analyze systematically the second-order social consequences of policy changes that he may have found. In other words, while Rosenberg occasionally remarks on the larger social context, his research design is not intended to ascertain how policy changes (or the lack thereof) more broadly influenced the social, political, or economic conditions of African-Americans or women in American society.

This is not to claim that using the concept of "impact" is unproblematic. Most notably, it is not always easy to define a cut-off as to what is an indirect policy-related

effect. For example, it has been argued that political and legal reactions to the initial response of government officials to court decisions can themselves significantly influence the direction of public policy. Hence both Simon (1992) and Klarman (1994) argue that the extreme resistance engaged in by various Southern political forces to the Supreme Court's *Brown v. Board of Education* decisions (1954 and 1955) ended up creating a backlash against such policies in parts of the public, the media, the political elite and the federal judiciary. Similarly, if legal mobilization and judicial decisions influence the attitudes and behaviour of interest groups in the policy process (and how these groups are perceived by other actors in the policy process) and this translates into policy change then policy-related consequences occur because of how legal mobilization and judicial decisions affected interest group behavior. An "impact" study is, therefore, distinguished from some studies that primarily focus on how legal mobilization affects groups (see O'Connor 1980) by virtue of the fact that a researcher interested in "impact" is not concerned about the effects of legal mobilization on groups *per se*, but on how such effects influence policy processes and, particularly, policy outcomes. While such relational, feedback and non-linear effects discussed above should be included in the definition of "impact," the parameters of "indirect" policy consequences are difficult to define *a priori*.

Explaining and Predicting Impact

Despite the existence of a rather general consensus over the parameters of judicial "impact", there is no common understanding about how to explain or predict the impact of legal mobilization and judicial decisions. An early overview of the judicial impact literature by Wasby (1970b) contained over a hundred hypotheses about the relationship between courts and policy change, some of which Wasby acknowledged were mutually contradictory (ch. 8). The general factors that Wasby (ibid.: ch. 8) identified as determining judicial impact are: *the characteristics of cases* (a decision clearly based on the Constitution will produce greater compliance, a line of cases will have greater impact than a single case, etc.); *communication* (reporting of immediate negative reaction tends to increase non-compliance, etc.); *political environment* (the greater the number of levels of government or the number of people affected, the greater the non-compliance; compliance is more a function of norms in affected organizations than it is of Supreme

Court rulings; a decision will be more likely to bring action if it disturbs the balance between interests than if it affects an interest without affecting others; control of actions of the executive branch by the Court is far more difficult than is control of Congress, etc.); *follow-up* (impact will be greater when efforts are made to follow up a decision than when such efforts are not made); *those responding* (the greater the power and the higher the status of those responding to a Court decision, the greater the impact of the decision; though, it is also speculated that units of government are less likely to comply with court rulings than are individuals); and *beliefs and values* (compliance will be higher in the absence of personal preferences and behaviour supporting an invalidated practice).

Writing around the same time, Levine (1970) put forward a somewhat similar list of explanatory factors. According to Levine, Supreme Court efficacy is dependent on the *attributes of decisions* (clarity of announced policy, consensus on the Court, periodic reiteration of rules and craftsmanship of opinions), *external governmental conditions* (accurate communications to elites, positive reaction by public attorneys, official lawfulness, low fiscal costs of compliance, political vulnerability of elites, and structural coordination of affected individuals), and *environment conditions* (strong public support of decisions, low intensity of opposition opinion, sympathetic treatment of decisions by media, favorable commentary by opinion leaders, substantial ensuing litigation relating to decision, high ratio between resources of beneficiaries and resources of victims of decision and legitimacy of Supreme Court as rule-maker).

Levine's call for more parsimonious and coherent theoretical frameworks centered around such models as communications theory, organization theory and utility theory began to be heeded some years later. A 1976 study by Rodgers and Bullock found that utility theory best explained why government officials complied with the law. Compliance with the legal standards handed down by courts increased as it was clear that officials and/or their organizations would be rewarded for following a court decision or punished for not following a court decision. Rodgers and Bullock, however, recognized that judicial decisions might also have a broader impact, because, among other things, a decision might infer legitimacy on a particular political cause and raise its profile on the political agenda (ch. 8). Moreover, as discussed in Chapter Three, there was at least some recognition by Rodgers and Bullock that institutional arrangements influenced the

amount of coercion that could be applied to induce compliance. Although utility theory produced important results, it is not an adequate explanatory or predictive model, especially if a researcher is concerned with impact rather than the narrower concept of compliance.

Utility theory was one of the mid-range theories identified by Canon in his 1991 review as being employed- either singularly or in combination- to explain judicial impact in the US. The others were legitimacy theory, communication theory and organizational theory. As suggested above, utility theory hypothesizes that an individual will comply with a judicial order (or any legal command) when the benefits of compliance outweigh the costs (440-41). Legitimacy theory posits that an individual's response to a judicial decision will somehow depend on whether he or she believes the decision was legitimate and/or the court had the legitimacy to make such a decision. A related aspect of legitimacy theory is concerned with whether judicial decisions can in some way legitimate a particular issue or cause (441-442). How clearly written a judicial decision is or not and how quickly, broadly and accurately the contents of the decision are made known is the concern of communications theory. Some scholars have also pointed out that a decision's impact perhaps is linked more to how the decision was communicated than to how it was interpreted (442-443). Organizational theory, according to Canon, suggests that organizations will tend to evade or delay implementing judicial decisions to the degree that the decision disturbs organization goals. Organizational inertia might also be responsible for non-implementation or slow implementation (443-444).

Some factors found by Wasby and Rodgers and Bullock in the literature on impact are not, however, readily classified under the theories outlined by Canon. Wasby's hypotheses concerning interest group behaviour in the process are not captured by any of the aforementioned theories. Which theory, for example, encompasses the suggestion that "Internal dissension in interest groups will reduce their effect on the aftermath of Court rulings" (1970, 256)? Also, factors that emphasize the connection between impact and institutional actors and configurations within the political process do not fit easily into any of the mid-range theories suggested by Canon (i.e. "Lack of unity between branches of government at either [the] national or state level produces more non compliance than does unity"; "When Supreme Court decisions are followed by executive

branch agencies, lower federal judges are more likely to follow the decisions than when the executive branches agencies do not do so" (Wasby 1970: 256, 260); and "is there an agency with viable enforcement powers to enforce the laws?" (Rodgers and Bullock 1976: 6-7).

Yet Johnson and Canon (1984) developed a heuristic model for studying judicial impact that recognizes that other players in the policy milieu, besides courts and the implementing organization, can be critical in shaping policy outcomes. Johnson and Canon's model rests on analyzing the interrelated actions of five "populations": decision-maker population (appellate court or Supreme Court), interpreting population (primarily lower court judges), implementing population (usually public bureaucracies (e.g. school boards, etc.)), consumer population (affected individuals (e.g. black and white parents affected by desegregation orders) and the secondary population (executive and legislative branches of government, media, local elites, public opinion).

Using illustrations from past judicial impact studies in a variety of policy areas, Johnson and Canon suggest how communications theory, utility theory, legitimacy theory and organizational theory might be applied to explain the psychological reaction and the behavioral responses of each "population" to judicial decisions, although Johnson and Canon readily acknowledge that there is often overlap between the populations. For instance, members of the NAACP would be part of the consumer population of a school desegregation decision, the NAACP itself would be an interest group member of the secondary population, and the NAACP could be viewed as part of the implementing population when it launched future lawsuits to secure compliance with the original decision.

Using a "population" typology that does not create mutually exclusive categories weakens its explanatory and predictive power and makes it less of a theoretical advance over previous research. In other words, how different is the model from the numerous hypotheses suggested by Wasby, which cover a variety of actors? Nevertheless the model is valuable for its comprehensiveness and recognition of the importance of feedback influences over time. Also, the model's attention to the psychological/cognitive reactions of populations and their behavioural responses to decisions offers a compromise between those analyzing the influence of legal

mobilization and decisions from a "positivist," behaviouralist perspective and those taking a more "constitutive" approach- a debate more fully examined below. Finally, the inclusion of the "secondary population" in particular potentially situates the study of judicial impact more within a general study of the policy process. In his 1991 review Canon notes that "theories from other subfields of political science or the social sciences dealing with legislative behaviour, the executive branch, media behaviour and the formation and influence of public opinion" could be usefully applied to analyzing the role of the secondary population (457). He concludes this discussion by saying that "[s]uch theories have not been much used in the judicial impact context" (ibid.).

Ironically, just as Canon was decrying the lack of judicial impact studies and noting a lack of theorizing about the policy environment (secondary population), Gerald Rosenberg (1991) published his landmark study *The Hollow Hope*. The book contains major impact studies of two broad policy areas- civil rights and women's rights- and pays attention to such secondary population factors as public opinion, the role of Congress and the President and the agenda-setting potential of institutions.

Rosenberg begins by sketching two competing views about whether the courts are capable of creating progressive social (policy) change. The "Constrained Court" view offers three reasons for being skeptical about pursuing social change through courts. First, rights are limited in nature by a dominant legal culture and by a cautious and incremental judicial process that often limits access and prevents remedies that address underlying issues. Moreover, framing issues in a legal rights fashion might rob them of broader appeal and enervate the ability and will of groups to undertake popular mobilization. Secondly, the independence of the Court is constrained by the nature of the appointment process, the tendency of the Court to be in tune with public opinion and the deference of the Court to the federal solicitor general. Finally, the Court "has no influence over either the purse or the sword" to bring about compliance with its decisions. Other structural roadblocks to successfully implementing an effective remedy include the discretion often invested in the lower courts and the inability of judges to be fully cognizant of the many issues and problems associated with complex social phenomenon.

The "Dynamic Court" view, on the other hand, maintains that courts "can be effective producers of significant social reform" (ibid.: 22). Supporters of the Dynamic Court view argue that courts are uniquely situated to help disadvantaged groups lacking the economic and political resources that are necessary to be heard in democratic institutions and the bureaucracy. Judges are insulated from public opinion, must hear cases that fall within prescribed guidelines, and are required to base their decisions on legal arguments rather than personal opinion. Furthermore, courts have been developing methods of enforcing their decisions. Besides retaining jurisdiction in certain cases, judges have made use of "special masters" and monitoring commissions to oversee implementation. In addition to "directly" promoting social change via the enforcement of decisions, courts can "indirectly" promote social change by drawing media and public attention to various issues while educating citizenry and needling their consciences.

Rosenberg concludes that because courts are "constrained" by a variety of institutional limitations, particularly their lack of enforcement tools, courts can only produce social change when the following conditions are met: 1) there is ample legal precedent for change; 2) there is support for change from Congress and the executive branch; and 3) there is support or low opposition in the public and costs/benefits are offered to induce compliance (or administrators are willing to hide behind decisions to implement reforms or the decisions can be implemented in the market). Scrutinizing this model reveals that Rosenberg may have arrived at his conclusions in a novel fashion by comparing opposing views on the efficacy of policy change through the courts, but much of his framework rests on assumptions that were previously established in the literature. These include recognizing that the impact of judicial decisions rests on cost/benefit calculations of implementors, organizational theory, the ideology of implementors and the responses of other actors within the political environment (Wasby 1970 a,b; Levine 1970; Rodgers and Bullock 1976; Johnson and Canon 1984). To his credit, however, Rosenberg ignores some factors that have been shown in a number of studies to have little influence, such as a decision-makers perception of whether a court had the authority and legitimacy to make a decision. On the other hand, though, Rosenberg omits certain factors that previous studies have shown to be significant, such as the clarity and forcefulness of a judicial decision (for an overview see Johnson and Canon 1984: 222).

Rosenberg's model also fails to take into account how structural factors, such as federalism, mediate the impact of judicial decisions even though his own account indicates that such factors played a role in the policy processes surrounding issues like school desegregation or abortion.

A more fundamental critique of Rosenberg's theoretical model comes from those scholars, particularly Michael McCann (1992, 1994, 1996), who argue that the model assumes a top-down perspective whereby the Supreme Court makes decisions and those decisions are complied with under certain conditions. An alternative approach to evaluating judicial impact is one that is more bottom-up and dispute centered. Such an approach views courts as only one set of actors in a complex policy milieu that includes interest groups, executives and legislatures, state and local governments, bureaucrats, media and the public. Furthermore, this approach also considers legal mobilization, which could include such activities as filing legal charges or voicing legal claims in various forums, as potentially as important as judicial decisions. The effects of legal mobilization and judicial decision in the dispute-centered approach are considered to be "inherently indeterminate, variable, dynamic and interactive" (McCann 1992, 733). The approach is more concerned with *impact* than *compliance* (or simply the lack thereof) and seeks to analyze how legal claims and judicial decisions are received, interpreted, utilized and/or circumvented by differently situated actors within legal, social and political communities and institutions (See Wasby 1970; Scheingold 1974; Galanter 1983; McCann 1992, 1994; Mertz 1994).[3] This approach has the benefit of recognizing that those who are supposed to comply with judicial decisions react to those decisions as do others in the political environment and that these reactions, even if hostile or evasive, can potentially open up opportunities for policy change by placing an issue on the political agenda and so forth.[4]

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[3] McCann (1994, 291 ftn. 11) argues that the Johnson and Canon model was a move in this direction but still "retained a relatively mechanical stimulus-response view of causality and impact."

[4] Surveying studies of judicial impact (in areas such as criminal law procedure, school prayer, abortion, etc.) reveals that it is highly unusual for there to be no reaction to a judicial decision by those who are supposed to comply with the decision or by others in the political environment (Wasby 1970b, Becker and Feeley eds. 1973; Canon and Johnson 1984). Chapters 4 and 5 will demonstrate how hostile and evasive responses to *Brown* I and II helped create certain political dynamics that resulted in positive policy change.

This theoretical stance leads to a degree of ambivalence about the role of legal mobilization and judicial decisions. While law and the legal process are viewed as helping to maintain the dominance of the social, political and economic elite, many of these authors simultaneously argue that legal mobilization and courts can, nevertheless, be used by disadvantaged groups to further their cause at least incrementally. Such tactics may have such interrelated benefits as bestowing legitimacy on a group's demands; moving a group's struggle to the public arena; raising the political and social profile of an issue; altering the perceptions of adversaries and/or the public; and, more instrumentally, providing bargaining leverage (Scheingold 1974; Galanter 1983; McCann 1992, 1994; Simon 1992). These authors therefore do not share the pessimism of some who argue that legal mobilization precludes grassroots political action by groups because it is divisive, overly resource intensive and dominated by lawyers. Legal mobilization is instead viewed as simply one potentially important tactic in an overall political struggle wherein events and outcomes are difficult to predict. McCann, however, does offer a typology of four general stages in which legal mobilization may contribute in different ways with differing impacts: 1) the movement building process of raising citizens expectations, activating potential constituents, building group alliances and organizing resources for tactical action; 2) the struggle to compel formal changes in official policy; 3) the struggle for control over actual reform policy development and implementation that evolves among the various interested parties; and 4) the transformative legacy of legal action for subsequent movement development, articulation of new rights claims, alliances with other groups, policy reform advances, and social struggle generally (1994: 11).

The theoretical divide between scholars such as McCann and Rosenberg, is closely related to methodological differences between those who have a more interpretivist orientation and those who have a more positivist orientation in trying to measure impact. Issues surrounding the measurement of impact and the generation of causal inferences are discussed in the following section.

Measuring Impact

As Galanter (1983) puts it, the law has "radiating effects" that are rather diffuse and not readily susceptible to being measured as discrete variables. Indeed, McCann

acknowledges that this perspective "assumes a rather skeptical position regarding traditional scientific goals of defining clear causal relations and developing strong predictive capacities" (1994: 15). Similarly, Simon points out that various literatures in this "interpretivist" vein have "explored the role of law and legal discourse in structuring the self interpretations of social agents engaged in power struggles in many social settings, but with important exceptions they have largely eschewed empirical exploration" (Simon 1992: 940). According to Rosenberg, however, "the mechanisms or links of influence must be clearly specified. One needs to be told, for example, that Court decision A influenced President B to win legislation C...Once the hypothesized links are specified, then, second, the kind of evidence that would substantiate them must be presented...[and] other possible explanations for change must be explored and evaluated" (1991: 108-109).

To this end the *Hollow Hope* contains major case studies that analyze the role that judicial decisions played in the struggle for civil rights, particularly school desegregation, and in promoting gender equality. Gauging the influence of judicial decisions is primarily accomplished by comparing relevant aggregate statistical data before and after important Supreme Court decisions. For example, Rosenberg traces the percentage of African-American children attending school with white children before and after *Brown* to get a sense of the decision's direct impact.

In addition to "direct" effects, Rosenberg tests whether judicial decisions might have "indirect" effects, which include, among other things, placing an issue on the policy agenda or influencing public opinion. To test the indirect effect of *Brown*, for example, Rosenberg compares aggregate statistical data before and after the decision which tracks: the number of newsmagazine articles about school desegregation, public opinion concerning desegregation and civil rights and the number of black demonstrations. The number of references to *Brown* by Congressmen in the passage of the 1964 Civil Rights Act is also provided as evidence for *Brown's* influence or lack thereof. This quantitative material is supplemented by references to various sources that illustrate the attitudes of participants within the struggles that he analyzes. In the case study on civil rights Rosenberg relies on a variety of memoirs and documentary evidence to assess whether black leaders were motivated or somehow influenced by *Brown*.

In trying to assess the causal significance of a decision, Rosenberg argues that the longer the amount of time between a decision and a response- whether direct "compliance" or "indirect" changes in media coverage, public opinion, etc.- the less likely there is to be a causal relationship. By showing significant time lags between judicial decisions and direct or indirect change (or little change at all), Rosenberg concludes that pursuing social change through the courts is a "hollow hope." This provocative and pessimistic conclusion is tempered, however, by Rosenberg's proposition that the probability of success increases when the conditions he specifies are operating to facilitate the impact of a judicial decision.

From a positivist perspective, Rosenberg's methodology has a number of commendable features. By providing statistics from both before and after Supreme Court decisions at various time intervals, Rosenberg strengthens the validity of his conclusions. This methodology helps reduce the possibility of being misled by an anomalous statistical reading and allows one to better assess whether a judicial decision altered a statistical trend or not. Moreover, the statistics are provided from various states in the US. This allows for certain variables to be controlled and allows for variance on his explanatory variables. For example, in showing that the percentage of African-American students attending schools with whites increased rather significantly in the border states but not in the South in the ten years after *Brown*, Rosenberg is able to demonstrate that comparatively intense public and elite opposition to a Supreme Court decision negatively influences the policy impact of the decision- assuming all other things are relatively equal. Finally, Rosenberg supplements his use of aggregate statistics with reference to in-depth case studies conducted in these policy areas by other researchers.

Nevertheless, a number of methodological critiques could be leveled against Rosenberg's research from both positivist and constructivist perspectives. Critiques from each of these camps will be explored in turn using examples from Rosenberg's analysis of the impact of judicial decisions on school desegregation. First, specific questions surrounding the selection, quality and analysis of Rosenberg's measures have been raised. Flemming, Bohte and Wood point out that Rosenberg likely underestimated the number of magazine articles on *Brown* by failing to look under the "Public Schools-Desegregation" heading in *The Reader's Guide to Periodical Literature* (1997: 1229-

1230, ftn. 6). More importantly, Rosenberg's use of aggregate statistics did not allow him to disentangle *Brown's* influence on the media from competing events like the Montgomery bus boycott (ibid.: 1230). Using more sophisticated Box-Tiao methodology, Flemming et al. found that *Brown* created "substantial and prolonged" media attention that lent system-wide attention to desegregation (ibid: 1238-1240). Simon (1992: 926) and others (Feeley 1992; McCann 1992: 726) have also questioned how appropriate it is to rely on the number of African-American children attending school with white children as a measure of the "direct" impact of *Brown* considering that the Court did not order integration and seemed deliberately vague in announcing that desegregation should take place "with all deliberate speed."

In addition to reservations about the reliability and validity of Rosenberg's indicators, questions could be raised about how Rosenberg tested his theory. For example, his model implies that support of the executive branch and Congress is a necessary condition for a judicial decision producing policy change, but the example of school enrollment in the border states suggests otherwise. The question then becomes how many more African-American children would have enrolled in school with whites in the border states if the support of Congress and/or the executive were added to low public opposition and administrators willing to hide behind the *Brown* decision? Controls are also necessary to answer such a question. Does Rosenberg adequately take into account how state-level judges may have enforced *Brown* differently in the South and in the border states by offering differing degrees of costs/benefits for compliance? In sum, Rosenberg does a good job of showing that Court decisions by themselves are insufficient to cause policy change, but his study is less successful in pointing out the necessary and sufficient conditions under which judicial decisions can influence relative degrees of policy change.

This shortcoming is due in large part to the nature of the study itself. There are many variables to consider and arguably Rosenberg could have included more of them. Moreover, tracing the actions of a variety of policy players, including institutionalized state and societal actors and relating them to change in judicial doctrines and public policy over time on a national scale is not amenable to more sophisticated quantitative modeling. This does not, though, absolve Rosenberg from not recognizing and

discussing the inherent limitations of the research design and, when tracing the policy process over time, failing to assess better the causal connections between judicial decisions, the conditions for impact that he proposes and impact itself. Simon points out that Rosenberg has an overly linear conception of cause and effect (1992: 932). This impairs, for example, his ability to see that the confrontation over desegregation in Little Rock was not a competing source of attention with *Brown* but an indirect result of *Brown* and that Little Rock and other such confrontations likely had a major impact on the passage of the Civil Rights Act of 1964 (ibid.).

This latter critique dovetails with a more fundamental critique of Rosenberg's work that comes from scholars who are skeptical of using positivist social science techniques in explaining the influence of legal mobilization and judicial decisions. McCann, for instance, provides three reasons for rejecting a positivist methodology in his study of legal mobilization in the context of pay equity struggles. Firstly, he argues that a study in the more positivist tradition like Rosenberg's "tends to be either reductionist or evasive about the 'causes' (reasons, goals, motives) that figure into political action" (1996: 460-461). Secondly, positivists tend to analyze contextual factors by turning them into "discrete," "insular," and "commensurable" variables whereas McCann views context as an "ongoing," "dialectical," and "dynamic" process of human interaction not reducable to "isolated causal conditions" (ibid.: 462) Lastly, and most importantly according to McCann, in the interpretivist view, "institutional contexts of action are not wholly exogenous to research subjects, as is typically imagined in most positivist models. Rather, institutional forces are manifest in, and to a great degree 'work' through, the culturally defined intersubjective knowledge, conventions and norms that people carry around in their heads and act on in everyday practice" (ibid: 463).

Conducting judicial impact studies by comparing pre- and post-decision aggregate data (such as comparing the number of black students attending schools with whites before and after *Brown*), interpretivists charge, is a top-down approach too focussed on courts, particularly the Supreme Court, and offers an oversimplified and rigid view of causality and impact. While McCann (1994: 291 ftn 12) concedes that Rosenberg's consideration of the "indirect" effects of judicial decisions (such as examining the number of newsprint articles or public opinion before and after a decision) is a step

forward, McCann argues that the model and use of aggregate data still focuses primarily on judicial capacity to initiate behavioral changes rather than on relational dynamics generated over time by legal mobilization and judicial decisions. When cognition is taken into account its specification is "highly mechanical and reactive" (1996: 461, ftn. 11). Rosenberg's heavy reliance on aggregate statistical data to determine the efficacy of legal mobilization is the cause and/or the effect of using a theoretical framework that has a tendency, in McCann's words, "to isolate and compare tactics in zero-sum terms rather than to consider their dialectical and potentially cumulative relationships in political struggles" (1994: 292-293). McCann's methodological disagreements with Rosenberg lead him to attack Rosenberg's conclusions regarding the effects of judicial decisions on civil rights policy:

> Rosenberg thus may be accurate in arguing that court decisions did not unilaterally "cause," by moral inspiration, defiant black grass-roots action or, by coercion, federal support for the civil rights agenda. But these narrow claims hardly refute that the legal tactics pioneered by the NAACP figured prominently in defining (around civil "rights") and intensifying the initial terms of racial conflict in the South...Legal action was just one of many factors that played a role, but this hardly means that litigation and major court victories were an inconsequential dimension of the struggle (1992: 737).

Methodologically, attempting to reveal the complex and subtle dynamics surrounding legal mobilization and judicial decisions from a more "interpretivist" vantage point requires techniques more commonly associated with case studies, such as conducting interviews; participant observation; and reviewing the content, not just the frequency, of media articles and pertinent documents.

Yet trying to isolate, in order to explain let alone predict, the subtle impact that legal mobilization and judicial decisions have in a complex, changing policy environment using more interpretivist methods also has a number of related limitations. Questions could be raised about how much the results are shaped by the particular interpretations and experiences of the researcher. Put differently, the research is difficult to replicate and the results difficult to verify. Nor are the results generalizable. By emphasizing context and contingency, interpretivist studies are limited in developing explanations or predictions that might be put to use in other settings. Rosenberg, for example, criticizes McCann for not generating and testing hypotheses surrounding questions like "how

important was the law in various phases of the pay equity movement" and "what factors made the law more or less influential" which greatly limits the applicability of McCann's findings (1994: 446-447). For example, although McCann relates the importance of certain institutional features to the results of the pay equity struggle, such as Reagan-appointed judges exhibiting hostility to pay equity claims (1994: 285-287), his model does not offer predictions as to what might make legal mobilization more or less successful in generating policy change. Finally, and perhaps most importantly, positivists point out that interpretivists have little way of assessing the validity of their conclusions. McCann's study of the pay equity struggle, Rosenberg argues, seems to point more to the importance of union organization and mobilization than legal mobilization in contributing to policy change and the self-understandings of working women. Yet, because McCann's study for the most part lacked cases where there was no union organization and/or legal mobilization did not occur, there is no way to separate out the influence of legal mobilization (ibid.: 450-51).

To their credit, neither Rosenberg nor McCann are completely opposed to adopting some of the other's techniques. Rosenberg relies on documentary studies of the civil rights movement and published material written by participants in the struggle to provide context (Ch. 4) while McCann used aggregate data analysis in his study of pay equity and tried to offer modest "possibilistic" prospective claims (1996: 475). Others have also tried or advocated mixed approaches. As noted above, in their study of judicial impact, Johnson and Canon (1984) looked at both the behavioural response and the cognitive reaction of various "populations" to judicial decisions using both qualitative and quantitative data. Mertz recently called for an "empirically grounded" social constructionist approach for sociolegal research. "Particularly in large-scale societies," Mertz argues, it is seems crucial to combine the insights of multiple methods (with due considerations of the limits of each)" (1994: 1259, ftn. 13). Nevertheless, finding a combination of methods and approaches that satisfies scholars in each camp is not an easy task. McCann, for instance, has called Johnson and Canon's work an "interesting study that takes a subtle, complex view of impacts," but one that still "retained a relatively mechanical stimulus-response view of causality and impact" (1996: 469, ftn. 33; 1994, 291 ftn. 11). Rosenberg meanwhile notes that "While McCann (and others)

find my approach too much on the positivist side, I find his approach too much on the interpretivist side" (1996: 455, ftn. 15).[5]

Conclusion

To recapitulate, a study of the "impact" of legal mobilization and judicial decisions should be concerned with the policy related consequences that flow from legal mobilization and/or judicial decisions whether such consequences be direct (compliance) or indirect (changing the attitudes or behavior of other actors in the political process). A number of positivist theoretical frameworks of judicial impact have been developed in the US, but they feature a large number of variables ranging from the language of a decision to the attitudes of those required to implement a decision to intervening factors like media attention, public opinion and the responses of other political actors in the policy process (though some researchers suggest that some of these variables are more important than others) which makes it difficult to draw causal inferences. This task is made even more challenging when trying to assess the influence of judicial decisions over time in a complex policy area on a national scale. A more fundamental drawback, according to some researchers, is that, although such frameworks are elaborate in the sense that they have an abundance of potential variables, they have an overly simplistic view of cause and effect. A suggested alternative is to try and discover how legal mobilization and judicial decisions alter, perhaps subtly and over time, political, social and legal relationships and discourse between and amongst various policy actors. Either way, however, analyzing the impact of legal mobilization and judicial decisions is a daunting theoretical and methodological challenge. In the next chapter I argue that the new institutionalism approach provides a base that can be used to build a mid-range theory of impact that combines both positivist and interpretive assumptions and methods.

[5] Such debates are also ongoing in the public policy field and in the political and social sciences more generally (see Howlett and Ramesh 1998, Smith 1992).

Chapter Three- Developing a New Institutionalism Model of Judicial Impact

The "new institutionalism" approach, which has had a significant impact in political science generally (March and Olsen 1984; Steinmo et al. 1992; Peters 1999) and more recently has received attention by some judicial politics scholars (Gates 1991; Gillman and Clayton, eds. 1999; Flemming 1999), offers a potentially helpful framework for addressing the impact of legal mobilization and judicial decisions. This chapter first discusses the new institutionalism (NI) generally and, in doing so, highlights how the NI differs from competing approaches in explaining the political process and policy outcomes. The chapter proceeds to examine how the NI theory has already been applied fruitfully to certain aspects of judicial politics. Finally, the chapter concludes by outlining a NI model to explain and predict the impact of legal mobilization and judicial decisions.

New Institutionalism (NI) in Political Science

NI Theory

As its name implies, the NI gives centrality to institutions in explaining political processes and outcomes. The NI is a mid-range theory that not only recognizes that "state" actors like politicians, bureaucrats and judges have a certain amount of power independent of "societal" actors, but, just as importantly, the "new institutionalism" posits that rules influence political and legal outcomes in a number of ways. The NI points out that rules influence the behaviour of actors within organizations, sometimes resulting in "dysfunctional" outcomes, but builds upon organizational theory by also considering how various rules, including constitutional ones, influence relations between various institutions; how rules privilege certain actors and/or possible policy outcomes over others in the political process; how rules influence the behaviour of state and societal actors within the political process; and how institutions can influence policy ideas, discourse, attitudes and preferences of actors in the process (March and Olsen 1989; Smith 1992; Steinmo et. al. eds. 1992; Hall and Taylor 1996; Immergut 1998; Peters 1999). This last assumption, however, is a point of contention between "rational choice" and the "historical" institutionalists that will be explored more fully below.

The NI distinguishes itself from the "old" institutionalism in three important ways. First, although there are differences among NI scholars about what an institution "is"

precisely, generally NI scholars are relatively more interested in both the informal as well as formal attributes of institutions and more likely to see institutions as "unstable constants" (to use Riker's phrase) rather than stable embodiments of a particular normative order (Skowronek 1995: 92). In other words, NI scholars see institutions as somewhat more dynamic and amorphous than did their "old" institutionalist predecessors. Secondly, as Skocpol points out, NI scholars often look at the interconnections between a variety of institutions and their interaction with societal groups rather than look at institutions in isolation as traditional institutional analyses tended to do (1985: 103-104). Lastly, NI analyses often try to be more sophisticated methodologically than "old" institutionalist analyses that tended to describe the formal laws and institutions of one country and perhaps added a comparative element by describing the formal laws and institutions of other countries. Various methodological techniques employed by NI scholars are discussed below.

While NI scholars recognize the limitations of the "old" institutionalism, they argue that the behaviouralist and pluralist response to formal institutionalism went too far in a number of ways. NI scholars argue that behaviouralist and pluralist accounts of the political process treat institutions as empty vessels wherein political outcomes reflect an efficient aggregation of preferences and are determined by specifying the "parallelogram of forces" held by societal actors (March and Olsen 1984; Thelen and Steinmo 1992; Immergut 1988). The NI, on the other hand, treats the aggregation of preferences as problematic and claims that institutions can influence outcomes by embodying rules that aggregate preferences in certain ways (perhaps inefficiently) which, in turn, often shapes the strategies and choices of individuals and groups within the political process (Peters 1999; Immergut 1998; March and Olsen 1984: 737). Beyond shaping strategic choices, institutional structures can also affect the relative political resources of both societal and state actors within the process (Skocpol 1985; Smith 1988: 95; Pal 1993). Moreover, NI scholars treat state actors (cabinet ministers, bureaucrats, judges, etc.) as at least quasi-independent players (sometimes depending on the policy field at issue) that often try to influence various sectors of society by using their capabilities to try to alter public opinion and/or the political and legal resources of societal groups for their advantage (Nordlinger 1981; Skocpol 1985; Pal 1993). The NI's emphasis on state-interest group

relations within policy communities and networks means that the NI has clear affinities with the policy communities and network literature (Immergut 1998: 18). However, the NI approach is more comprehensive than such theories, because policy community scholars are only now beginning to link more micro-level actors and processes within the policy community to meta- and macro-level institutional variables (Atkinson and Coleman 1996: 203-206).

One variant of NI- the historical institutionalism- also argues that institutions help shape the demands, preferences and role orientations of actors within the political process- elements that are considered to be exogenous in behaviouralist theories and by rational choice institutionalist theory. As Thelen and Steinmo point out: [the] claim is more than just "institutions matter too." By shaping not just actors' strategies (as in rational choice), but their goals as well, and by mediating their relations of cooperation and conflict, institutions structure political situations and leave their imprint on political outcomes (1992: 9; also see March and Olsen 1984: 738-742; Smith 1988: 95). Immergut notes that this does not mean that institutions "radically resocialize" individuals but instead play a role in favouring particular interpretations of the goals toward which actors strive as well as what means are legitimate and effective in achieving those goals (1998: 20). To some degree, therefore, institutions are considered to be constitutive of motives and actions. As Skowronek puts it "Different institutions may give more or less play to individual interests, but ...institutions do not simply constrain or channel the actions of self-interested individuals, they prescribe actions, construct motives and assert legitimacy" (1995: 96). A corollary emphasis of a number of new historical institutionalist scholars is that ideas are important components of the policy process and that the development and life-cycle of policy ideas are influenced by institutions (see Peters 1999: ch. 4).

Although some rational choice institutional scholars have acknowledged that it would be useful to integrate preference formation into their theories, most rational choice analyses treat preferences as exogenous. In other words, rational choice institutionalists maintain that institutions influence (endogenously) the distribution of political resources and strategies of both state and societal actors, as do historical institutionalists, but the latter further argue that institutions to some degree form and mold preferences (Smith

1988, 1992). Pursuing such preferences is done rationally, according to many rational choice institutionalists, while other institutionalist scholars are more likely to emphasize the "bounded rationality" of participants.[1] The new historical institutionalists tend to further highlight the role that historical contexts and contingency play in shaping political processes and outcomes (Immergut 1998: 22-24).

The interaction of institutions and history still requires more theorizing (Abbot 1992; Flemming 1999) but it is generally understood that institutions, to a lesser or greater degree, shape history by constraining future choices and that institutions are themselves subject to change (Orren and Skowronek 1996). This change can be generated endogenously because institutions are rarely in equilibrium (Shepsle 1989; Levi 1990; Immergut 1998: 26) and/or change can be the result of some exogenous forces. There is still some disagreement about whether change is incremental or more dramatic, but there does seem to be some consensus, among new historical institutionalist scholars and a number of more rational choice oriented scholars that institutions are formed and changed by actors with "bounded rationality" operating in particular historical, economic, political and social settings. This means that changes to an institution are often desynchronized from other institutions within the system (Orren and Skowronek 1996) and can have unintended and perhaps negative consequences for the individuals and groups responsible for the change (Shepsle 1989; Cook and Levi., eds. 1990; Thelen and Steinmo 1992; Immergut 1998).

Given these assumptions of NI theory, particularly its new historical institutionalist variant, it is not surprising that NI scholars reject systems theories for their emphasis on efficiency and functionalism and their treatment of history and the political environment as exogenous (Orren and Skowronek 1996; Immergut 1998; Levi 1990; Shepsle 1989:

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[1] Even Tsebelis, who uses formal modeling for his rational choice institutionalism, admits that bounded rationality is frequent in real life and, following Williamson, recognizes that "institutions are required precisely because of the limited capacities of the human mind and the fact that human behavior is 'intendedly rational' but only limitedly so" (1990: 101). Tsebelis does not have much to say about institutional formation but he does study how political leaders can change use the power granted by certain rules (constitutions) to change lower-order rules (electoral systems). He provides a good example of this by analyzing changes to France's electoral laws by Chirac and Mitterand. The changes often had a less favourable impact than each leader hoped. Furthermore, it is evident that "strong" and even many "weak" versions of rational choice require unrealistic assumptions about human psychology. Preferences are rarely invariant, people do not maintain transitivity of preferences, and people have beliefs that do not correlate with the real world (which also makes it difficult for people to make rational assumptions about others in "game" situations) (see Cook and Levi eds. 1990).

145). Marxist grand theory, which explains political outcomes as the result of a historically dominant mode of economic production, is similarly rejected by NI theorists who view institutions as shaping and being shaped by politics and who see political outcomes as contingent (Hall 1986; Smith 1988).

Generally, NI theory, more so than other theories, treats politics, power and interests as elements that matter to processes and outcomes. Institutions shape and are shaped by these forces and, as such, are considered central to explaining and predicting political processes and results. The methodology used to build and test these theoretical models is discussed below.

NI Methodology

Investigating the effects of institutions requires some working definition of this key concept. March and Olsen define institutions as collections of interconnected norms, rules, understandings and routines that "define appropriate actions in terms of relations between roles and situations" (1989: 21-26). Viewing institutions as sets of rules is characteristic of rational choice institutionalism (Peters 1999, ch. 3). Others prefer to define institutions as the formal elements of governing structures (constitution; executive, legislative, judicial and bureaucratic branches), while others prefer more expansive definitions that encompass anything that "structures" political, social, legal and economic relationships from the nature of capital markets, to kinship networks, religious organizations, the organization of labour, etc. (Hall 1986: 7; Levi 1990: 405, Smith 1992: 30; Thelen and Steinmo 1992: 2-3). However, overly broad definitions can lead to research designs whereby institutions are so ubiquitous that they explain everything and, therefore, actually explain nothing.

NI scholars have attempted to demonstrate empirically that institutions matter in a number of ways. One prominent method has been to treat institutional structures as variables and, with the proper use of controls, infer that institutions played a role in causing changes to the dependent variable. Immergut (1992), for instance, revealed that the number of institutional veto points in the policy process explained different health care policies in France, Switzerland and Sweden by pointing out that other potential factors, such as the strength of opposition from medical groups, were rather consistent across the countries. Opponents of health care policy reform were able to dilute policy

proposals in Switzerland by taking advantage of the referendum procedures, while opponents to reform in France could not penetrate the rather closed, executive dominated policy process under the Fifth Republic. The concept of "veto points" has been given a more formal representation by Tsebelis (1999) who created a rational choice framework to explain policy differences in various countries with reference to the number of "veto players" within systems and their ideological distance from one another. Institutional differences between countries also has been used to explain divergent welfare policies between Britain and the United States, differences in tax policy between the US, Britain and Sweden and revolutionary outcomes in France, China and Russia (for an overview see Skocpol and Somers 1980; Immergut 1998). Work has also been done exploring the differences in performance and outputs between presidential and parliamentary governments (see Peters 1999: 80-82; Weaver and Rockman 1993).

Methodologically, these studies benefit from being rather standard, variable oriented studies that allow for the generation of causal inferences. They are immune to charges that are levelled against some NI research, which are discussed below, of being unscientific, indeterminate, and so on. On the other hand, these kinds of research designs have certain theoretical and methodological limitations. Methodologically, such studies tend to have small numbers of cases, which makes it more difficult to make causal inferences and assess the relative impact of variables (Lieberson 1991).[2] Theoretically, such studies emphasize the role of predictable structural forces while downplaying the importance of human deliberation and agency, context and contingency. In contrast, Weaver and Rockman conclude from a series of case studies involving various countries and policy areas that "although institutions affect governmental capabilities, their effects are contingent" and "the effects of specific institutional arrangements on government capabilities and policy outcomes are rarely unidirectional" (1993: 426-427). Electoral coalitions, interest groups, resource endowments and other factors interact with institutional arrangements and government actors in complex ways that vary across time and with different policy areas (Weaver and Rockman 1993).

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[2] An exception is Tsebelis (1999) who uses regression analysis is used to test the efficacy of the theory.

Other NI scholarship highlights these contextual and contingent effects of institutions and also emphasizes the effects that institutions can have on the strategies and goals of groups in society. Hattam (1992), for example, sought to explain why "business unionism" defined the goals and strategy of the US labor movement while the British labor movement sought to promote its interests through work-related legislation. Over the latter half of the nineteenth century both the US and British labor movements adopted similar goals and strategies, but a series of court decisions in the US that struck down laws protecting worker's rights led the US labor movement to largely eschew political reform and instead turn to collective bargaining and industrial action on the shop floor (1992: 178). The argument is somewhat structural (the US had judicial review and Britain did not), though it also involves judges in the US using their power to strike down labour laws and US labour re-evaluating their goals and strategies in light of legal failures. Other examples abound (see Steinmo et al., eds. 1992, Immergut 1998), but one more should suffice. Katzmann illustrated that after the passage in the US of section 504 of the Rehabilitation Act, which was a civil rights provision that required agencies receiving federal aid to operate without discrimination against the handicapped, many disability groups in the US came to redefine their interests in terms of "mainstreaming and civil rights" as opposed to "effective mobility." Hence, disability groups argued for changes to existing buses and subways rather than for special shuttles for the disabled. In his discussion of Katzmann's work, Smith notes that disability groups engaged in the kind of "structural politics" described by Moe's rational choice institutionalist study of this policy area: efforts were made to place transportation policies under some congressional committees and not others; legislative histories were written of vague legislation that could be used favourably by allied bureaucracies; and there were attempts to build group representation into bureaucratic decision-making processes, often by appealing or threatening to appeal to the courts (1992: 22-24). Smith favours Katzmann's approach, however, for illuminating how many disability groups came to unexpectedly change their preferences after passage of section 504 of the Rehabilitation Act. The "mainstreaming" approach was not always successful but it did play a substantive role in the process and outcomes of disability policy in the US from the 1970s onward.

Smith does suggest, however, that Katzmann's work might be read more as "contemporary history" than "political science." Indeed, NI approaches, especially of the new historical variety, have been criticized for employing research designs that make it difficult to build falsifiable theory and test for causal inferences because they feature numerous, interconnected variables; contextuality; contingency; and thick descriptions of preference formation. Adding to the difficulty is the fact that institutions, especially in the new historical institutionalism, can be considered as independent, dependent, and/or mediating variables because, though they are the artifacts of human agency and susceptible to change, they often take on a rather entrenched "life of their own" (Schepsle 1989). This makes institutions "unstable constants" to use Riker's phrase (quoted in Shepsle 1989). As such, institutions help maintain political order while simultaneously opening up and shaping historical trajectories through activities that are desynchronized with other institutions and the political environment more generally (Orren and Skowronek 1996). According to Immergut, the new historical institutionalists tend "to see complex configurations of factors as being casually [sic] significant...and it may be extremely difficult, if not impossible to break such models down into casually [sic] independent variables" (1998: 19).

There are some suggestions that new historical institutionalist scholars have turned against theory building and testing in general (Kiser and Hechter 1991; but cf. Pierson and Skocpol 2000). Before investigating this accusation, however, it is worthwhile to review briefly the concepts of theory and causality. The building of theory, developing hypotheses about the relationship between reasonably defined concepts to arrive at probabilistic statements about the structure, behaviour and interaction of phenomena, interacts with data collection and depends on prior knowledge. (Eckstein 1975; King et al. 1994). As King et al. (1994) point out, even the thickest description still simplifies reality and good description and the development and testing of a more general theory that contains causal hypotheses should be viewed as complementary rather than competing processes. Put differently, one should not fall prey to accepting a false dichotomy between induction and deduction in the development and testing of theory (Quadango and Knapp 1992: 493-94) nor should one fall prey to an exaggerated need for

parsimony. Theories should be as complex as the available evidence suggests that they need to be (King et al. 1994: 20).

However, the more complex the theory is the more difficult it is to test because it usually contains more causal inferences than observable cases (King et al. 1994: 20; Eckstein 1975: 88-89). A "causal effect" according to King et al., "is the difference between the systematic component of observations made when the explanatory variable takes one value and the systematic component of the comparable observations when the explanatory variable takes on another variable" (1994: 81-82). This definition relies on a counterfactual proposition and, as such, only causal *inferences* can be made about the relationship between the explanatory and dependent variables because the researcher cannot change the value of the explanatory variable and rerun history. Abbott is therefore correct to note that a theory which hypothesizes "'x causes y' [education causes occupational achievement]" is "a quick way of summarizing many narratives in which education accounts for occupational achievement" and not a statement about education causing occupational achievement in some transcendent fashion (Abbott 1992: 431), but the causal effect of the independent variable can be better inferred by a variety of techniques including controlling for other potential explanatory variables and observing as many "narratives" as possible (see King et al. 1994). As Quadango and Knapp argue, the "use of narrative does not preclude causal analysis, for one can construct temporal sequences of action to impute causal connections" (1992: 489). King et al., though, also acknowledge that generally causal inferences will be weak because more than one causal mechanism may be at work and within each mechanism it might be difficult to assess the relative influence of explanatory variables (1994: 227-228). Yet even the development of keen and careful narratives can help us to adjudicate between competing causal theories and aid in theory building (Quadango and Knapp 1992: 489; King et al: 227-228).

Hence, in Hattam's study of US and British labour movements, she develops a causal inference developed by unpacking the history of the two labour movements and grounding the investigation in theoretical considerations about how institutional arrangements- courts with or without the power of judicial review- and human reflection on political experience can influence the goals and strategies of actors within the political

process. Similarly, rational choice institutionalist Terry Moe, in a self-consciously "positivist" analysis, demonstrated how historical context, institutional practices and the balance of power among social and political actors interacted in his study of the National Labor Relations Board. During the 1950s the Democrats and Republicans were evenly matched in Congress, which led to a series of failed nominations to the Board. Both parties then agreed to abstain from blocking pro-business or pro-labor candidates and adopted a norm of parity representation. Interestingly, these rules were maintained even after the potential power of labor (measured by union membership and links between the Democrats and the AFL-CIO) significantly declined, thereby outlasting the fit between power and institutions that had been established in a previous historical context. Moe infers that, in contrast to the predictions of "capture" or other behaviouralist theories, established institutional practices allowed for a mismatch with societal interests- until radicals in the Carter and Reagan administrations repoliticized the nominating process (for an overview see Immergut 1998: 22-23).

The methodological hurdles faced by the NI are high, especially its historical institutionalist variant, but there are some grounds for optimism. First, even thick description allows for the evaluation of existing theories and for theory development. Second, NI research designs do allow for the creation of causal inferences. Such causal inferences, albeit limited ones, can be drawn from examinations of the historical trajectories of policy processes and outcomes that feature contextuality and contingency. New historical institutionalists have contributed to the accumulation of knowledge by demonstrating how meso- and macro-level institutional configurations can be used to explain various substantive political and policy puzzles ranging from why revolutions occur to social policy developments in various countries (Pierson and Sckocpol 2000). Yet the predictive capabilities of such theory remain somewhat limited, since they can only suggest that institutional structures will likely make a difference depending on the particular context being investigated. Somewhat more predictive capacity is gained from the "veto points" literature, which posits that, the likely passage and implementation of policy increases as the number of veto points in the political process decreases. Moreover, NI research primarily concerned with institutions as structures, such as the "veto points" studies, are standard variable-oriented projects that attempt to generate

causal inferences. Some scholars have even suggested that it could be possible to develop hypotheses about how preferences are structured in different institutional environments (Smith 1992: 30-36), although others doubt that an integration of positivist and interpretivist methodologies is achievable (Ethington and McDonagh 1995: 90).[3] It seems possible, however, that a synergy might be able to be created by combining various methods (Clayton 1999: 9).

The New Institutionalism in Public Law and Judicial Process and Politics

Given the achievements of the NI in increasing our understanding of political processes and outcomes described above, it is not surprising that the NI has attracted scholars in the fields of public law and judicial politics (Smith 1988; Gates 1991; Cairns 1992; Brodie 1997; Manfredi 1997; Gillman and Clayton, eds. 1999; APSA "Law and Courts" Newsletter 1999). Broadly speaking, the literature on public law and judicial process and politics can be divided into three interrelated topics: judicial decision-making; constitutional politics; and the role of courts in the political process, which includes judicial impact studies. I look at how the NI has been applied to each of these questions in turn. I do not look exclusively at judicial impact studies and the NI because to some extent they depend on micro- and macro-level assumptions. The review also highlights the strengths of the theoretical core of the NI described above as well as the theoretical and methodological tensions that were identified. These insights will be applied to the development of a model of judicial impact that will be set forth at the end of the chapter.

Judicial Decision-Making

The behaviouralist revolution discussed above had a significant impact on the study of judicial decision-making. Behaviouralists theorized that judicial decision-making, especially in appellate courts, was not simply reflective of the laws and legal precedents as was purportedly claimed by the formal legal analysis of the old institutionalists. More sophisticated methodology was also desired by behaviouralist scholars. Beginning in the 1950s and 1960s, scholars began investigating how the personal characteristics and

[3]However, if causality is "temporally heterogeneous and not uniform over samples of time" (Flemming 1999: 19), than interpretivists may have it right but be unable to adequately demonstrate it using falsifiable theories. In particular, one of the greatest difficulties facing those who treat history seriously is how to deal with conjunctures of events that are moving at different speeds (Abbott 1992).

beliefs of (appellate) judges influenced their voting behaviour. To date, the most popular explanation among behaviouralists for judicial decision-making in the US is the attitudinal model, which posits that judges (on appellate courts) respond to the stimulus of a case according to well-formed attitudinal positions (Segal and Spaeth 1993). Hence, a judge's views on such matters as equality, economic freedom, free speech, etc. largely determines his or her vote in cases that feature such issues. The attitudinal model and the personal characteristics of judges have also had some success in explaining judicial voting patterns on Canada's Supreme Court (Tate and Sittiwong 1989).

While not denying that the personal characteristics and attitudes of judges, particularly at the appellate level, are factors in judicial decision-making, NI scholars argue that behaviouralist accounts are reductionist and incomplete. Rational choice institutionalists have illustrated how judges act strategically during the decision-making process. New historical institutionalists go even further and argue that the "rules of the game" are influenced by institutional norms. Gillman argues, for example, that the focus of rational choice scholars on the strategic aims surrounding concurrences or dissents (and the threats thereof) ignore the fact that it was not until relatively recently (1930s) that the norm of consensus on the US Supreme Court broke down (1999: 75).

New historical institutionalists are particularly concerned with how institutional norms surrounding the importance of applying and developing the law influence judicial decisions. Qualitative case studies and quantitative analyses have shown that the law has a constraining effect on judicial outcomes. Justice Stewart, for example, dissented in *Griswold v. Connecticut* (1965) because, although he considered the anti-contraception law to be "uncommonly silly," he did not find it to be in violation of the Constitution. Following this precedent, Justice Stewart did not dissent in *Eisenstadt v. Baird* (1972), which declared a state law unconstitutional that prohibited the distribution of contraceptives to unmarried persons (Kahn 1999a: 180). A regression analysis by George and Epstein (1992) of the US Supreme Court's capital punishment decisions revealed that precedents and the facts of the cases were major factors in explaining case outcomes even when individual judicial preferences were included in the model. The law is taken (more or less) seriously by judges, according to new historical institutionalist scholars, because courts embody institutional norms that create some sense of duty to

decide cases in accordance with the law and established judicial procedures (Gillman 1999: 83). This does not mean, Kahn explains, that the policy preferences of judges are absent from the decision-making process but they are tempered by a judge's vision of the law and his or her duties in applying the law.

Rather than endorsing the outmoded formal "legal model," however, new historical institutionalists view the law itself as "a process for constructing political values" and argue that legal interpretation is "influenced by deep political forces that shaped judicial attitudes at the affective and cognitive level" (Clayton 1999). Judicial decisions may therefore at least in part be traced back to the judges' genuine view of the proper mode of interpreting the law and the particular values it does and/or should promote which are, in turn, influenced by political and historical contexts (Orren and Skowronek 1996). This is particularly salient in constitutional decisions. The influence of deeper normative and political factors on judicial decision-making could help explain why Justice Dickson voted to uphold Canada's abortion law when challenged under the 1960 Bill of Rights- a non-entrenched document- but struck down the same law over ten years later under the entrenched Charter of Rights. In both cases, neither the federal government nor the public seemed receptive to change to the abortion laws. Assuming Justice Dickson's preferences on abortion stayed constant between 1975 and 1988 his decision might best be explained by what he perceived as the normative requirements of adjudicating disputes under the Charter.

The law and normative positions about what values the law embodies and how it should be interpreted are endogenous institutional influences on judicial decision-making. Not surprisingly, given the NI's emphasis on situating institutions within particular economic, social and political contexts, NI scholars have also considered how judicial decisions are influenced by exogenous factors. NI scholarship differs in its conclusions, however, from two well-known theories that attribute judicial decisions to political and socio-economic contexts. One such theory was popularized by Robert Dahl (1957) who argued, using a political systems approach, that the US Supreme Court rarely made decisions that ran counter to the interests of the majority governing coalition, mostly owing to the political nature of the appointment process. Other scholars have also investigated how the Court is influenced by changing electoral coalitions or the alignment

of groups within society (see George and Epstein 1992 and Clayton 1999 for reviews). Similarly, though with less emphasis on electoral alignments, critical legal scholars argue that judicial decisions tend to reflect and support the dominant socio-economic interests of society. Such results occur because judges themselves are often chosen from dominant social classes, dominant groups in society (such as corporations) have the money and legal expertise to beat opponents in court, and the law itself is a reflection of underlying patterns of socio-economic power (Galanter 1974; Mandel 1989).

In most NI accounts external political and socio-economic influences are more subtle, multifaceted and mediated by institutional factors. NI scholars point out there are times when courts seem to be distinctly at odds with powerful electoral and social forces. Kahn provides as an example the *Casey* decision by the U.S. Supreme Court wherein Republican appointed justices decided to uphold, albeit in restricted form, the *Roe v. Wade* (1973) precedent (1999: 185). Other examples include *Dred Scott* (Gillman 1999: 81). Although the content of some of these decisions suggest that courts may circumscribe the forcefulness of decisions that seem out of step with other forces in the political system, new institutionalists argue that the outcomes of cases cannot be explained solely, or even predominately, simply with reference to dominant electoral coalitions or interest group politics. As a corollary of this argument, NI scholars further point out that systems should not be assumed to be in equilibrium. According to Orren and Skowronek, for example, the US Supreme Court may have removed the last obstacle to the consolidation of the capitalist economy in its 1911 Standard Oil decision which fits with the "1896" party system, but the fact that the Court took so long to do so reveals that the Court was not moving in step with the party system and, moreover, its earlier reluctance to make such a decision actually had political consequences that led to the disintegration of the 1896 party system. Orren and Skowronek argue that the reluctance of the Court to act can be traced to distinctive institutional characteristics, independent of the 1896 election such as an adherence by a rule-bound judiciary to the rule that clear

legislative deliberations overrode common law standards, and the relative imperviousness of life-time appointees to electoral realignments (1996: 118-120).[4]

Nor is it accurate to suggest, as do most critical legal scholars that "haves" always come out ahead (Galanter 1974; Mandel 1989). Epp, for example, notes that even when US business interests tended to monopolize interest based litigation in the late 1800s and early 1900s, many businesses lost their challenges (1999: 264-265). In Canada, although labour groups have had mixed success with the Charter before the Supreme Court, "new left" groups, such as feminists, have enjoyed a considerable degree of success (Morton and Knopff 2000). These results can be partly attributed to the actions of state actors. The federal government in Canada, for example, supplies "disadvantaged" groups with funding for constitutional challenges (Brodie 2001). In the US, following World War II the US Department of Justice often supported civil rights initiatives by participating as amicus curiae or by initiating lawsuits (Epp 1999: 274).

This means that, while to some degree Supreme Court decisions can be referenced to its relative power relationships with other state and societal forces, these factors are not as determinative as suggested by other theories (Clayton 1999: 35). Moreover, courts might proactively try to alter their relative power and influence within the system. NI scholars, such as Gillman, maintain that we should expect those affiliated with the Supreme Court, as those affiliated with other institutions, to try to maintain legitimacy and influence in dynamic social and political settings (1999: 81). For instance, the US Supreme Court's "united front" in particularly sensitive cases, such as *U.S. v. Nixon* (1974), cannot be explained by other overly deterministic theories. Russell (1985) acknowledges that the Canadian Supreme Court, whose judges are appointed by the federal government, may rule somewhat more often for the federal government in federalism disputes but he argues that the jurisprudence is relatively even-balanced to avoid upsetting the provinces unduly. This helps minimize provincial calls for changes to the Supreme Court, particularly its appointment process.

The Canadian Supreme Court, as Knopff and Morton (1992) point out, has made a number of rule changes in an attempt to accommodate its new policy-making role under

[4] Orren and Skowronek argue that the Republicans spent so much time trying to fix and clarify the Sherman Act prior to 1911 in response to Supreme Court decisions that they were "spent" as a governing force.

the Charter including increased use of intervenors (amicus curiae) and social fact evidence. Intervenors' views of the law and social fact evidence have both been shown to influence judicial outcomes (Kahn 1999; Hausegger 1999). In the US, the influence of the Solicitor General, a presidential appointee, is considered to be strong enough to warrant describing the Solicitor General as the "tenth justice" (Epstein, Walker and Dixon 1989: 829-830). Some commentators, however, have questioned the institutional capacity of appellate courts to deal with the complexities of amicus curiae and social facts in cases involving complex policy issues, such as those often raised in rights-based litigation (Horowitz 1977; Knopff and Morton 1992; Manfredi 1993).

These NI insights, however, suffer from some of the problems identified in the general discussion of NI theory and methodology. For example, the influence that law and courts can have on constructing norms that guide judges in their decision-making is somewhat difficult to predict and measure. The rather secretive process that surrounds judicial deliberations accentuates this problem. Attempting more "positivist," rather than "interpretive" research, is also difficult because many NI accounts, especially the new historical ones, feature a multiplicity of variables that are interdependent. Bracketing out norms as a part of the explanation still leaves NI researchers arguing that judicial decisions can be influenced by and can influence their own preferences, the law, intervenors, social facts, legal commentary, and power relationships with various actors in the political process.

Nevertheless, the NI has provided useful insights into the process of judicial decision-making. The NI has also proved useful in illuminating various dimensions of more macro-constitutional politics. The NI's contribution to constitutional politics is briefly discussed below.

Constitutional Politics

The process of constitutional amendment has benefited from attention from NI scholars. Manfredi (1997), for example, has demonstrated that the rules for amending the constitutions in Canada and the US, which sets out what actors are involved in the process and how much support is needed for change, profoundly influences the chances of successful constitutional amendment. Since both the US and Canadian constitutions require the approval of both the federal government and a relatively large number of the

states/provinces, the chances of successful constitutional amendment are limited by this institutional design.[5] Hence, even if powerful social and political forces are behind proposed constitutional amendments, as was the case with the Equal Rights Amendment in the US and the Meech Lake agreement in Canada, the US and Canadian constitutions have rules for change that privilege the status-quo.

NI scholars have also been interested in questions surrounding the influence of constitutions and laws on political culture, group identity and political participation (and vice-versa). Rogers Smith (1992) illustrated that citizenship laws with the explicit or implicit imprimatur of the Constitution helped to exclude certain groups (such as the Chinese) from identifying themselves as Americans and enjoying the full rights of political participation. A corollary effect of such laws was to help reinforce beliefs that America was a "white man's nation." Conversely, various groups like the Chinese could also use constitutional guarantees such as the "equal protection" clause and liberal ideology to argue for changes to citizenship laws. This kind of reasoning parallels Scheingold's (1974) argument that the law, particularly the Constitution, can be used to promote the interest of dominant social and political forces while simultaneously being used by politically and socially disadvantaged groups in their struggle for change. This somewhat paradoxical conclusion can only be reached by suggesting that the law has some degree of relative autonomy that helps to shape the identities and purposes of actors and gives them a practical rhetorical and institutional foothold to use in political struggles. This claim will be examined somewhat further in the context of African Americans and the quest for school desegregation.

These questions have been the subject of considerable academic commentary in Canada. Alan Cairns (1977), acknowledged to be at the forefront of the NI (see Nordlinger 1981), argued that the federal division of powers provided an institutional context within which provincial governments could actively increase their power and influence while building local allegiances among their populations. It is virtually impossible to discuss the role of the province of Quebec within the federation without reference to the constitution and the division of powers. This is not the only explanation

[5] In a comparative study, Lutz (1994) has demonstrated that amendment rates vary according to the difficulty of the amendment process and the length of constitutional documents.

of course. Quebec society went through a well-documented social change in the 1960s- the Quiet Revolution- that affected Quebec's political posture but federalism was and remains an important mediating structure for Quebec's political, economic and social development. Quebec's rather insulated and traditional social and political outlook before the 1960s was able to be sustained by provincial governments wary of social and political intrusions, especially from the federal government; likewise, the activist governments of Quebec since the Quiet Revolution effectively exploited the fact that many important areas of jurisdiction, notably health and education, are given to the provinces by the Constitution. Meadwell (1997) argues that Quebec nationalists have come much closer to achieving secession than any other nationalist group in the industrialized West because of the institutional resources available to nationalist leaders. The argument emphasizes path dependency. The way the Canadian state was put together, using federalism as a tool to achieve ethnic accommodation, differs from the state formation of most other countries in the industrialized West and therefore explains differences in nationalist political development.

The rise of nationalism in Quebec and increased provincial power in the 1970s led to renewed efforts by the federal government to generate pan-Canadian loyalties and reinforce notions that Canada was a bilingual and bi- or multicultural society rather than a state that housed one French-speaking nation in Quebec and another English-speaking nation in the rest of Canada. The introduction of the Charter of Rights, which entrenched the concepts of bilingualism and multiculturalism, was a key component of the federal government' efforts (Knopff and Morton 1992: 75).

Cairns (1991) argues that the Charter, particularly outside Quebec, indeed has had a powerful impact on Canadian political culture and politics more generally by generating a sense of constitutional proprietorship among citizens (also see Russell 1994). This is particularly true of groups specifically mentioned in the Charter, such as women and official minority language groups which "came to feel that particular constitutional clauses or phrases belonged to them, that they had hard-earned niches in the constitution and possessed constitutional stakes, indeed had constitutional identities" (1991: 21). The defeat of the Meech Lake Accord, which had been crafted by the federal government and the provinces, including Quebec, has been attributed to the work of Charter groups who

argued that their rights were threatened by a constitutional package put together behind closed doors by white, male provincial leaders (Cairns 1992; Russell 1994). Cairns notes that the Charter spawned a participatory ethic and sense of identification around the constitution for many groups, which was at odds with the amending formula that included only government actors. In the stylized language of Orren and Skowronek, this was a demonstration of how institutional intercurrence- the desynchronized movement of institutions through time- can significantly alter the course of political outcomes. There remains a tension to this day surrounding the politics of "rights" grounded in the Charter and the politics of "governments" grounded in federalism.

The Charter, as Russell notes, is a potent "political symbol in constitutional combat" (1994: 347) and groups are eager to maintain or increase their constitutional status which can be deployed to gain advantage over legal and political competitors (Knopff and Morton 1992: 82). Beyond constitutional status, however, both societal and state actors fear constitutional changes that may negatively affect their chances during Charter litigation. Conversely, societal and state actors faring poorly in Charter litigation may seek formal constitutional changes (Riddell and Morton 1998; Manfredi 1997).

An NI approach has greatly improved our understanding of more constitutional and political developments and processes in Canada. Nevertheless, there have been challenges to such explanations. Most notably, Brodie and Nevitte (1993) have argued that the participatory ethic revolving around equality and rights issues that Cairns stresses in his Citizens' Constitution Theory could be explained with a more generalizable and parsimonious theory based on postindustrial value change- Inglehart's postmaterialist thesis. In Brodie and Nevitte's argument, the Charter represents only a political opportunity structure through which groups and individuals engage in postmaterialist politics, which is common to many developed countries and is explained by postindustrial value change. The Charter thus becomes more effect than cause in this explanation. A similar argument, though one using a social movements perspectives, is made by Jane Jenson who highlights the role that women's groups and other groups played in trying to achieve political change during the 1970s and in framing the Charter in the early 1980s. Moreover, Jenson argues that such groups have continued to engage in political activity outside the realm of the Charter, which leads her to conclude that the

Charter is more a means of achieving political goals rather than a creator or generator of identities (1994: 63). More generally, Rogers Smith acknowledges that is difficult to ascertain whether underlying preferences and identities have changed or whether the expression of those preferences have changed (1999: 7).

It would appear, however, that even if institutions "do not radically resocialize" individuals and groups, as Immegut reminds us, it still matters politically if individuals and groups change their patterns of participation, their discourse and the goals that they try to achieve to satisfy their underlying preferences because of constitutions and their judicial interpretation. As Cairns put it in his defence of the Citizens' Constitution Theory:

> The Citizens' Constitution, with its Charter, gives the citizenry constitutional interests of a highly visible nature. They are given constitutional connections, constitutional niches, constitutional identities, constitutional clauses they can identify with, and the powerful language of rights to remind them that Trudeau's purpose was to vest sovereignty with the people. Would the New Politics Theory in a Charterless Canada, whose constitutional pillars were still parliamentary government and federalism, predict an equal degree of constitutional involvement? Without the Charter, the New Politics of the postmaterialists would have limited incentives to focus its participatory drives on the constitution, compared to the incentives the Citizens' Constitution offers to Charter Canadians. Whilst a postmaterialist ethic doubtless contributed to the positive reception of the Charter, it was the emergence of the Charter issue and the Charter's subsequent entrenchment that catalyzed so many Canadians into constitutional politics (1993: 266).

One could also add that in a Charterless Canada it would be difficult to imagine the judiciary becoming a prominent forum in which "disadvantaged" groups, including feminists, pursued policy change. Cairns supports his assertion with quotes from leading feminists contained in a monograph entitled "Changing Feminist Perceptions of Justice in English Canada," which indicated that "women were quite disinterested in [sic] the whole idea of the constitution" before the Charter (1993: 267 quoting from Burt 1991). Therefore, while Jenson is correct in pointing out that feminists played a significant role in molding the Charter in 1980-81, it would appear incorrect to assert that women were very interested in pursuing political change through constitutional and judicial means prior to the Charter. The dissertation will provide another opportunity to gather empirical

data concerning whether the Charter and legal mobilization under the Charter have influenced identity formation, discourse and patterns of political participation.

Besides influencing political culture and participation in formal constitutional change, Russell points out that the other two dimensions of Charter politics involve Charter litigation and its application by the courts and, lastly, how Charter activity is taken "into account by government policy-makers in the design of public policies and the provision of government services" (1994: 344). According to Russell, the latter dimension is the "least observed plane of Charter influence." This assessment was confirmed in the literature review in Chapter Two. In the penultimate segment of this chapter I examine how NI theory has been applied to judicial impact and, in the conclusion to this chapter, I develop an NI model for explaining judicial impact.

Judicial Impact

There is no NI model of judicial impact, but, as suggested by the literature review in Chapter 2, a number of assumptions held by NI theorists have appeared in various models and hypotheses about judicial impact. The institutionally limited enforcement power of the courts is recognized by a number of scholars as is the difficulty of a judicial decision altering the established practices, goals and norms of organizations. The odds of non-compliance also increase, according to a hypothesis forwarded by Wasby that has affinities with the institutional "veto point" literature described above, as the number of levels of government or the number of people affected increases (1970b: 253). Wasby also has a number of US specific institutional hypotheses such as the "President's ability to oppose the Court by himself is far less great than if he and the Congress are acting in concert" (1970b: 256). There are also suggestions that courts may alter their political environments by influencing public opinion and/or the agendas of other actors in the process. More interpretivist scholars, such as McCann, argue that legal mobilization and judicial decisions influence dynamic relationships in policy communities that feature state and non-state actors operating in multiple institutional orders (1999: 15).

Nevertheless, there is no coherent institutionally based judicial impact model. Moreover, other impact models tend to downplay the importance of institutions in favour of behaviouralist or systems approaches. Rosenberg's claim, for example, that the US Supreme Court needs the support of the president and Congress to make a favourable

ruling and his subsequent emphasis on public opinion towards the decision harkens towards a systems-type approach where judicial decisions and their enforcement need to be functionally synchronized with the political environment. NI theories, emphasizing as they do the complex interaction between state and society, do not discount the importance of public opinion, interest groups or the views of elites and so on, but NI theory does maintain that these factors are mediated by institutional structures, that state actors have some degree of autonomy from society, and that institutions can be desynchronized from other institutions and their political environments.

Besides the theoretical upside, the desirability of a NI model of judicial impact is enhanced by the potential for it to be comparative in nature and by its potential to more fully combine "positivist" and "interpretivist" theoretical and methodological insights than has yet been done. I next outline a model of judicial impact. The model draws on previous studies of legal mobilization and judicial impact, particularly those of McCann and Rosenberg, but synthesizes them and attempts to transcend them by formulating a model using a NI approach (for an overview see Table 3.1 below).

An NI-based Model of Judicial Impact

McCann's stages of legal mobilization described in Chapter Two (movement building process, the struggle to compel formal changes in official policy, the struggle for control over actual reform policy development and implementation and the transformative legacy of legal action) is a useful starting place and has the advantage of emphasizing agency, contextuality and contingency when discussing policy struggle among actors in various institutional arenas. However, the model unduly downplays the structural features that other scholars have found regularly increase or decrease the odds of legal mobilization resulting in policy change. The model I propose conceptualizes legal mobilization struggles for policy change as a series of stages similar to McCann's, with modifications noted below, but adds insights from the NI as to how institutional contexts influence, sometimes in rather predictable ways, the outcomes of policy struggles.

Since the judicial impact research is primarily concerned about policy change, more so than is McCann, who is equally if not more concerned with the effects of legal mobilization on social movement and interest groups, the stage at which to begin is: 1)

the struggle to compel formal changes in official policy with the help of legal mobilization. The next stage to consider is: 2) *the struggle for policy development and implementation.* Finally, it is useful to analyze: 3) *the transformative legacy of legal mobilization* on the policy process. The model is outlined in Table 3.1 and then described more fully below.

TABLE 3.1- New Institutionalist (NI) Model of the Impact of Legal Mobilization

Hypothesis (1)- *Compelling Formal Policy Change*

(a) POLITICALLY DISADVANTAGED GROUPS ARE MORE LIKELY TO LITIGATE IF THEY HAVE AN ADEQUATE SUPPLY OF LEGAL RESOURCES. THE SUPPLY OF LEGAL RESOURCES IS HEAVILY DEPENDENT ON INSTITUTIONS (LEGAL RULES and STATE ACTORS)

(b) THE PROBABILITY OF GETTING A FAVOURABLE JUDICIAL DECISION DEPENDS ON whether individual judicial attitudes, the appointment process, legal factors (constitutional and statutory language and precedent), support of state actors and the Court's institutional considerations are configured in such a way as to be supportive of the rights claimant.

HYPOTHESIS (2)- *Policy Development and Implementation* **THE PROBABILITY OF POLICY CHANGE RESULTING FROM LEGAL MOBILIZATION and JUDICIAL DECISIONS DEPENDS ON THE FOLLOWING FACTORS (based on a continuum)** **Positive (+)----------Negative(-)**		
Yes	**a) NATURE of LEGAL RULES** -favourable, clear and forceful, decisions made by highest court?	No
Supportive of judicial decision	**b) The ATTITUDES and PRACTICES of IMPLEMENTORS**	Opposed or contradictory to judicial decision
Yes	**c) Are INCENTIVES OFFERED for COMPLIANCE**	No
Public and media supportive of the decision(s)	**d) The POLITICAL ENVIRONMENT (mediated by institutions)**	Public and media opposed to the decision(s)
Lower	**e) The NUMBER of ORGANIZATIONAL VETO POINTS**	Higher
Alliances formed, constituents mobilized, access to policy process gained, etc.	**f) DO GROUPS EFFECTIVELY EXPLOIT the POLITICAL OPPORTUNITY STRUCTURE OPENED by LEGAL MOBILIZATION**	Alliances not formed, constituents not mobilized, access not gained to the policy process, etc.

HYPOTHESIS (3)- Transformative Legacy of Legal Mobilization

Success or failure during the previous stages to change law and policy will generate shifts in strategy, policy ideas, goals and relationships of actors within the process as actors operate in multiple institutional forums.

As the discussion below emphasizes, institutions play an important role in each of the hypotheses listed in the model. For the purposes of this study, institutions are considered to be the formal rules and norms that make-up governing structures from the constitution to systems of government (parliamentary or presidential; federal or unitary, judicial structure, etc.) to bureaucratic structures. State actors (executive, judges, bureaucrats, etc.) are considered to be "institutional" actors and their outputs (laws, regulations, judicial decisions) are rules of an institutional character as well. The definition does not encompass the organization of "private" groups within society, notwithstanding the fact that they might be funded or structured in some way by the state.

In keeping with NI theory, the model puts institutions at the centre of the analysis, but does not ignore how institutions interact with other factors, such as interest group activity or the political environment, to influence processes and outcomes. Sometimes the effects of institutions are rather predictable (i.e. the more veto points in a system the less probability of successful policy change), but more often the effects of institutions depend on the policy area, the historical context, environmental factors, etc. (see Weaver and Rockman 1993). More generally, the model attempts to balance theoretically the role of politics (agency), contextuality and structure in contributing to policy processes and outcomes.

Hypothesis 1 is concerned with the conditions under which legal mobilization will be commenced and, if a case proceeds to a decision (especially in appellate court), whether the decision will result in a victory. As non-majoritarian institutions courts may be attractive forums for "politically disadvantaged" groups, but such groups require significant resources to commence legal mobilization (Olson 1990). *Hypothesis 1(a)* draws attention to the connection between institutions and the provision of legal resources that are necessary for undertaking legal mobilization and litigation. Legal

resources consist of useful formal constitutional and statutory language, favourable precedents, legal expertise, legal support from allies (as amicus, as producers of legal commentary, etc.) and financial resources to undertake legal mobilization. Scholars such as Brodie (1997) and Epp (1999) have drawn attention to how the constitution can be an important source from which to draw legal arguments; how state actors can be helpful as intervenors, providers of funds, and/or as initiators of litigation and how rules of the judicial process have aided in the provision of legal resources. The dissertation offers an opportunity to further test and expand upon these theoretical insights. Although simply initiating a legal case (or making a credible threat to do so) is an example of legal mobilization, *Hypothesis 1(b)* considers the likelihood of achieving a favourable judicial decision if the case advances to that point. *Hypothesis 1(b)* indicates that a favourable judicial decision is more likely if: individual judicial attitudes are predisposed to a group's position, which, in turn, is more likely if the government appointing judges is supportive of the group's position; legal factors, such as constitutional language and precedents (and the normative values surrounding those rules) sustain a group's position; if a group is supported by intervenors, particularly state actors; and if a court believes that ruling for a group will not overly damage its institutional reputation or legitimacy within the broader political environment. However, owing to the number of variables involved and relatively low number of cases being examined, this study will not address *Hypothesis 1(b)* in depth- it will only comment on what factors might have contributed to particular outcomes.

Hypothesis 2 focuses on the likelihood of achieving policy change (policy change "on the ground" in addition to legal doctrine) in the desired direction following legal mobilization and judicial decisions. *Hypothesis 2(a)* stipulates that the odds of successfully achieving policy change are enhanced when legal rules favour a group's policy position and do so in a forceful and clear manner. Thus, favourably worded constitutional text is a useful legal resource but, given the inherent elasticity of constitutional language, it is unlikely that decision-makers unwilling to make policy concessions will do so solely based on constitutional wording. Judicial decisions, therefore, are often required to clarify legal language. As the founders of Women's Legal Education and Action Fund (LEAF) put it, "rights on paper mean nothing unless the

courts correctly interpret their scope and application" (Razack 1991: 36). As for judicial decisions themselves, vague decisions may prove more useful than specific ones in particular disputes, especially if groups do not get all they want from a decision (McCann 1994: 292, ftn 13.), but impact scholars tend to concur that vague decisions allow for more evasive behaviour by those responsible for implementing the decision (Levine 1970: 590; Wasby 1970: 250; Johnson and Canon 1984: 207-207). Hence, the more broadly a court interprets a right, the easier the court makes it to demonstrate a rights violation and the more forceful and clear the remedy is for breaches of that right, the more likely that positive policy change will result. Policy change is more probable yet if a forceful decision is made by the highest court in the judicial hierarchy, because a lower court ruling might be overturned by a higher court, thereby making the legal rules less than certain.

If the individuals and organizations responsible for designing and implementing policy are not predisposed to a group's legal arguments for policy change or to a judicial decision calling for policy change, *Hypothesis 2(b)* maintains that the probabilities of policy change are reduced. Organizational theory- one of the components of the New Institutionalism (see Immergut 1998: 18)- holds that organizations develop certain practices, outlooks and commitments that are often not amenable to change even in the face of a judicial decision (Johnson and Canon 1984: 81). Shapiro demonstrated this by showing that the US Patent Office did not change its patent granting practices even after a number of the Office's decisions were overturned by the US Supreme Court, which called for tougher standards in the granting of patents (see Johnson and Canon 1984: 210-214). Furthermore, organizational theory argues that the norms and attitudes of individuals working within organizations are shaped by the organization's goals, practices and norms (March and Olsen 1984: 738-742; Immergut 1998: 20). Studies of police behaviour in the US have shown, for example, that officers tend to evade judicial decisions that favour the rights of the accused because of organizational norms in the police department that emphasize "crime control" over "due process" (Skolnick 1967: 219).

Hypothesis 2(c) maintains that if incentives are offered to comply with legal rules then the chances of policy change being implemented in the desired direction are

increased. This is standard utility theory, but institutional factors play an important role that is not often articulated by utility theorists. First, *Hypothesis 2(c)* is made particularly relevant in this context because the courts have neither "the purse nor the sword" with which to implement their own decisions. Second, it is state actors who, by virtue of constitutional and other legal rules, possess the most powerful tools of coercion- from spending to taxation to the legitimate use of force- that are necessary to promote compliance. Third, the institutional relationship between various state actors will play a role in determining patterns and modes of coercion. Constitutional rules concerning the division of powers between the national and sub-national governments, for example, will influence the options available to the federal government to induce coercion.

Hypothesis 2(d) states that if the political environment is neutral or supportive of a judicial decision then it is more likely to result in policy change. Conversely, hostile reactions to a judicial decision in the public and the media will lessen the chances of policy change. Institutional arrangements, such as electoral systems or modes of selection for decision-makers (appointed versus elected) can mitigate or exacerbate the pressure that decision-makers face from the political environment.

Hypothesis 2(e) borrows from various policy studies which indicate that the more veto points there are in implementing a policy at the political or administrative level the lower will be the chances of successful implementation (see Kernaghan and Seigel 1999: 170-171). Such a hypothesis, for example, has been advanced to explain why it is easier for the executive to pass legislation in parliamentary systems, which feature fused executive and legislative branches, than it is in presidential systems, where there is a separation of powers (Peters 1999: 81).

Hypothesis 2(f) emphasizes the agency of groups working within the policy community. The hypothesis theorizes that groups which are better able to convert legal resources into political ones by mobilizing constituents, acquiring political allies and gaining greater access to the policy process will have a greater chance at achieving policy change.

Hypotheses 2(a)-(f) outline the conditions under which legal mobilization and judicial decisions will lead to more or less policy change. The question remains, how much can we expect legal mobilization and judicial decisions to alter (directly or

indirectly) those conditions to make them conducive to policy change? This question is briefly addressed for each of the *Hypotheses- 2(a)-(f)*.

As for *Hypothesis 2(a)*- the clarity of legal rules- if individuals and groups continue to make claims in a certain policy area over time, then jurisprudence is likely to evolve and encapsulate more specific rules. There are also suggestions that courts respond to the effects that previous judicial decisions produced, which might lead them to create new rules and clarify previous ones. As Wasby notes:

> Thus Supreme Court cases lay the groundwork for later cases, in at least two senses: one a case will spawn additional cases aimed at clarification and extension; and, two, the impact of a case on the environment perhaps changes the environment in such a way that conflicts resulting in cases are produced. The Supreme Court receives feedback from its decisions, ...which may affect what the Court subsequently does. Thus the impact *of* the Court has an impact *on* the Court (1970a: 57).

Two caveats deserve mention, however. First, given that the courts are relatively institutionally limited in obtaining feedback, the feedback process might be slower and less rigorous than for other institutions. Second, sometimes the efforts of courts to clarify legal rules actually result in more overall confusion as illustrated by the US Supreme Court's jurisprudence involving search and seizure and public aid for religious education.

The above discussion of *Hypothesis 2(b)* suggests that judicial decisions on their own are unlikely to fundamentally alter the attitudes or practices of decision-makers, especially if those attitudes and practices run in ways highly contrary to a judicial decision (Johnson and Canon 1984: ch. 3). Previous research has also shown that even when decision-makers consider a court decision to be legitimate in the general sense, most often attitudes and practices toward the specific policy in the decision remain relatively unchanged (Rodgers and Bullock 1976: 62-63, 69). This likely results from the fact that decision-making elites are not seduced by the myth that courts simply interpret and apply the law without making policy (Johnson and Canon 1984: 196).

Yet, judicial decisions may play a role in promoting change in two ways. First, individuals within organizations who prefer change, especially those in leadership positions, can use judicial decisions (preferably strongly worded ones) as a justification for promoting policy change (Johnson and Canon 1984: 97-99). In certain US police departments, for example, senior administrators used judicial decisions as a way to

promote professionalism in their departments (Rosenberg 1991: 323). Second, the desire to appear to be in conformity with the law might lead to policy changes, but ones that are more procedural than substantive in nature. Following the US Supreme Court's decision to limit prayer in schools, for example, some school administrators allowed teachers to decide whether prayer would be allowed in the classroom, knowing that it would be in many instances (Birkby 1973: 114). Such responses to judicial decisions might have unintended consequences that can be utilized in the quest for policy change, but this would be an indirect and contingent effect of judicial decisions.

Whether or not legal mobilization and judicial decisions lead to the provision of incentives for decisions to be implemented- *Hypothesis 2(c)*- is a difficult issue from both a theoretical and methodological vantage point. As noted in Chapter 2, Rosenberg found little connection between judicial decisions and the provision of incentives, while others argue that a more "bottom-up" approach and a more nuanced and complex view of "causality" leads to the conclusion that legal mobilization and judicial decisions can play a role in persuading other actors in the process to develop incentives for the implementation of judicial decisions. This can be done in a number of interrelated ways: by building a constitutional/ legal premise for incentives, by raising awareness of an issue among policy-makers, by providing legal resources to groups that can potentially convert them to political resources in the policy process, and by influencing the political environment. How this actually plays out depends on the contextual and contingent nature of politics. Institutions will play an important role by structuring the politics through various rules and state actors will be key players in the process.

The effects of legal mobilization and judicial decisions on the political environment (*Hypothesis 2(d)*) are also complex. The suggestion that a judicial decision can legitimate a policy position in the broader public has been shown to be exaggerated, often because many members of the general public are not aware of judicial decisions- even the ones considered to be seminal by academics and the media (see Johnson and Canon 1984: 195). Franklin and Kosaki (1989) offer a more sophisticated theory by arguing that reactions to judicial decisions are shaped by the interpretations given to decisions by an individual's social and political networks. Various actors in the policy process, including state actors, could therefore try to use judicial decisions (i.e. *Roe v. Wade*) as a tool to

mould public opinion (i.e. towards pro-life or pro-choice positions), despite the fact that the independent and direct effect of a decision on public opinion will likely not be strong. Legal mobilization and judicial decisions might have a more direct effect on the political environment by generating media attention, however temporarily, which would help put the policy issue on the agenda (Flemming et al. 1997). This does not mean, though, that media coverage necessarily would support policy change in the wake of a judicial decision.

Legal mobilization and judicial decisions may help reduce the number of veto points (*Hypothesis 2(e)*) over time by legally mandating an actor near the top of the institutional hierarchy to create policy change that would apply to subordinate organizations or by legally prohibiting a particular actor in the process from inhibiting policy change by other organizations.

Hypothesis 2(f) is predicated on the assumption that legal mobilization and judicial decisions may be helpful for groups in mobilizing support, cultivating allies and gaining greater access to the policy process. Judicial decisions conferring rights on a group can provide much political currency as rights-based claims have a particularly potent appeal at least at a general level. Public opinion research reveals that the general public and elites in Canada and the US are more supportive of the courts having the final say in constitutional questions than elected branches (Fletcher and Howe 2000). Actual success, though, in turning legal resources into political resources will be determined partly by the skill of a group's leadership and also by the reactions of the media, the public and the more proximate actors in the political community.

Hypothesis 3 speculates about how legal mobilization and judicial decisions may have a transformative influence on the policy community by altering a group's strategy and goals, altering policy ideas and discourse, and changing patterns of interaction amongst members of the policy community. Although such changes are somewhat difficult to predict, NI theory does offer some useful theoretical insights. For example, NI theory suggests that individuals can learn from past events and that institutions influence strategy and behaviour and possibly policy discourse and goal-orientation as well. Victoria Hattam (1992), for instance, showed how labour in the US switched to "business unionism" after US courts struck down labour legislation, whereas British

labour made no such switch because labour legislation was not struck down by the courts and could not be struck down because the British constitution did not give British courts the power of judicial review. Mary Ann Glendon (1987) pointed out that the discourse surrounding abortion policy is much more "rights" oriented and prone to polarization in countries where judicial decisions based on constitutional rights are part of the policy process than in countries where they are not. Morton (1992) found that litigation to change abortion policy in Canada was more prominent and successful following the introduction of the Charter and, similar to Glendon, he found an increased use of "rights" discourse and a tendency for the goal of compromise to be downplayed. Hence, changes in legal structures may not only affect strategic interaction amongst actors in the policy community but may also provide an institutional foothold for the development of new goals and discourse. This was also demonstrated by Katzmann's study of how many disabled groups changed their goals and discourse to reflect "mainstreaming and civil rights" rather than "effective mobility" after a civil rights provision was added to the US Rehabilitation Act.

Conclusion

The New Institutionalism has become one of the most popular theoretical frameworks within political science. The central tenets of the NI theory include: institutions mediate, but do not determine, political outcomes; there is an interdependent relationship between societal and state actors with state actors enjoying a certain degree of autonomy to pursue their own political goals; institutions can influence the practices and preference of actors; and, finally, although institutions are placed at the centre of the analysis, there is room for agency, contingency, and, more generally, "politics." While NI approaches have been recently applied to various aspects of constitutional and judicial politics, no one has yet developed a model of judicial impact based on NI theory. The impact model developed above is an attempt to fill this theoretical void. By synthesizing the best features of existing impact models within an explicitly NI framework, the model generally offers a theoretical advancement over existing impact models. Moreover, grounding the model in NI theory allows it to be used comparatively more so than existing models, which reflect American experiences.

The next chapter explains the impact of legal mobilization on school desegregation policy in the US through the lens of the NI-model of impact and reveals how the model improves on existing accounts. Subsequent chapters describe changes to official minority-language education policy in Canada from the mid-1970s until 2000 and analyze the predictive and explanatory power of the NI impact model. As part of the process, the case of school desegregation in the US is used as a heuristic comparison with the case of official minority language education policy in Canada. In other words, do similarities or differences between and within Canada and the US on the factors identified in the NI model help to explain how legal mobilization impacted policies concerning where and how minorities are educated in the two countries?

Chapter Four- Explaining the Impact of Legal Mobilization and Judicial Decisions on School Desegregation Policy using the NI Model

This chapter analyzes the struggle for school desegregation in the US described through the lens of the new institutional (NI) model of judicial impact developed at the conclusion of Chapter Three. In doing so, the chapter reinterprets existing accounts of the school desegregation policy struggle and reveals where the model offers superior explanations for the impact of legal mobilization and judicial decisions over competing approaches and where the limitations of the model might lie. Finally, by showing that the model has utility for explaining where and how African-American children are educated in the US, the chapter provides a comparative backdrop for assessing how legal mobilization and judicial decisions impact where and how francophone children are educated in Canada and how different institutional arrangements between the US and Canada might account for different policy processes and outcomes.

At the most basic level, the goal of the school desegregation struggle in the US was to have the legally sanctioned separation of black and white school children (*de jure* segregation) in the Southern and border states declared unconstitutional. However, the issues would soon become more complex and involve such questions as: how to integrate children from both races and to what degree (from "freedom of choice" plans to changing attendance zones and school building plans to mandatory busing to the creation of high-quality magnet schools); whether faculty should be racially balanced; who would pay for desegregation or integration plans; and what kind of school programs were required as part of the integration process. Adding to the complexity was the question of whether northern states and local school boards would be required to change practices that resulted in the separation of black and white school children (*de facto* segregation). The chapter looks at each of the stages of legal mobilization found in the NI model of judicial impact - efforts to compel formal change in policy, struggle over policy change and implementation, and the transformative legacy of legal mobilization- and the factors that predict greater or lesser probabilities of success during these stages (see Table 3.1) to explain how legal mobilization and judicial decisions influenced events and outcomes during the school desegregation struggle.

To make the analysis more manageable, the school desegregation controversy is divided into the following stages identified by Wilkinson (1979): *Brown v. Board of Education I* (1954) and *II* (1955) and Massive Resistance (1955-1959), Token Compliance (1960-1964), Modest Integration (1964-1968), Massive Integration (1969-mid-1970s) and Northern and Western Integration (early 1970s- present). Table A.1 in Appendix A shows the number of school districts that were desegregated in each of the border and Southern states up until the Modest Integration phase. Table A.2 in Appendix A shows the number and percentage of African-American students attending school with white students from 1954-55 until 1972-73 in the southern and border state regions. Of course, historical reality always defies categorization to some degree. As suggested by Table A.2, during the "massive resistance" stage in the South, for example, North Carolina, Tennessee, Texas and Florida practiced token compliance, while during the "token compliance" stage Mississippi, Alabama and South Carolina remained engaged in complete resistance to desegregation (Wilkinson 1979: 68). Nevertheless, these time periods provide a useful typology for describing the central legal, political and social events during the long and complicated struggle for school desegregation in the US.

***Brown v. Board of Education I, II* (1954-1955) and Massive Resistance (1955-1959)**

Hypothesis (1) Efforts to Compel Formal Policy change

The socio-economic and international environments were generally improving conditions for African-Americans by the mid-1950s. During this time, economic pressures on the South to integrate into the national economy, and the decline of the plantation system of agriculture and urbanization were slowly changing Southern race relations after World War II (Taylor 1986: 24; Klarman 1994: 37-64). Political pressure for change was also being generated by the international embarrassment that America's segregationist practices caused (Muse 1964: 10). More specifically, African-Americans were becoming more politically sophisticated and organized (Taylor 1986: 24). African-Americans benefiting from improved (though still substandard) educational opportunities, were able to use the ballot in competitive northern (and some southern) states to effectuate some political concessions, including President Truman's executive order desegregating the U.S. military in 1948 and the passage of a (weak) civil rights bill in 1957 (Klarman 1994: 33-37; also see Muse 1964: 3). The National Association for the

Advancement of Colored People (NAACP), established in 1909, quickly developed into "the most important civil-rights organization in the country" (Kluger 1976: 98). Locally, black parents and teachers organized petitions and strikes in an effort to force local school boards to improve conditions for black schools and to end segregation (Muse 1964: 8; Tushnet 1987, 138-140).

Despite these political resources, however, blacks had little relative political power. Official segregation was still "tenaciously defended" in the South (Muse 1964: 3) and, in the North, more subtle policies resulted in neighbourhoods and schools being highly segregated. Segregated elementary and secondary school facilities and programs were rarely equal, especially in the South. In Panola County, Mississippi, for example, the average per pupil expenditure of white schools ranged from $140 to $230 while the expenditures of black schools ranged from $70 to $86 per pupil (Wirt 1970: 197). When blacks used political means to demand greater equality or desegregated schools, local school boards provided little or no policy change in response. This was the case in Clarendon county, South Carolina and Prince Edward county, Virginia- counties that would produce lawsuits in association with the national NAACP office which would be consolidated with the *Brown* litigation (Muse 1964: 1-9). There was little public support for integrated schools as only half of whites in the North favoured integrated schools and opposition was greater than this in the South (Rossell 1995). The nomination of relatively conservative presidential candidates on the race issue by the Democratic and Republican parties in the 1950s and the weak 1957 Civil Rights Act, which included no provisions to deal with segregated schooling and revealed low Congressional support for major civil rights initiatives, boded negatively for racial change (Klarman 1994: 138). This lack of political influence was recognized by a leading member of the NAACP: "It was unreasonable and unjust, they maintained, to expect Negro children to wait twenty, thirty, or forty years for the Jim Crow [segregated] schooling to wither away" (quoted in Muse 1964: 7).

Indeed, in the face of white political opposition and misgivings about litigation from some elements in the black community, the NAACP chose to advance its policy aims in the federal courts- a non-majoritarian arena (Kluger 1976: ch. 6; Tushnet 1987: 150-151; Wilson and DiIulio 1998: 575). The federal courts were chosen over the state courts for

institutional reasons: only one set of rules had to be learned for the federal courts (Tushnet 1987; 51).[1] Yet the NAACP was not simply a "disadvantaged" group going to court without a number of legal and organizational resources. The NAACP benefited from having a number of legal experts on staff, including Special Counsel Thurgood Marshall and full-time attorney Charles H. Houston, and from having an organized source of funding from the Garland Fund (Kluger 1976, ch. 6). In 1939, the NAACP created the Legal Defense Fund to institutionalize a full-time litigation staff and to provide a way for the NAACP to receive tax deductible contributions (Wasby 1985: 342).

The NAACP benefited to some degree from institutions in the form of legal structures and state actors. In its more or less systematic attack on school desegregation the NAACP was able to rely on the Fourteenth Amendment (1868) to the US Constitution, which, among other things, forbade states to deny any person "the equal protection of the laws".[2] In the 1930s and 1940s the NAACP was successful in getting the US Supreme Court to order equalization of salaries and expenditures between black and white teachers and schools and to facilitate the admissions of blacks into professional and graduate schools (Wilkinson 1979: 23; Tushnet 1987: 89-90).[3] The decisions with the most direct implications for school desegregation were *Sweatt v. Painter* (1950) and *McLaurin v. Oklahoma State Regents for Higher Education* (1950) wherein the Court argued that segregated facilities for professional and graduate education had to be *qualitatively* equal to those available to white students. This made meeting the "separate but equal" doctrine "extremely difficult" (Manfredi 1993a: 99). As noted below, the federal government brief in *Brown* came down on the side of the NAACP. There is some support for *Hypothesis 1(a)* of the NI model in this stage, though the need for greater institutional sources of support become clear in subsequent stages.

School desegregation suits were pursued in Topeka, Kansas; Prince Edward County, Virginia; Clarendon County, South Carolina; Wilmington, Delaware; and the District of

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[1] Tushnet argues that this was more of a determining factor than as to how insulated the judges would be from societal pressures compared to state court judges, but see the comments of Martin Luther King Jr. below.

[2] The phrase "more or less systematic" is used because, although the school desegregation litigation scheme was planned, there was also much improvisation and reaction involved in the process (see Tushnet 1987; Wasby 1985: 341).

[3] The Court also outlawed the white primary and voided racially restrictive covenants in the sale of housing during this time.

Columbia.[4] The federal courts in South Carolina and Virginia upheld segregation but ordered school authorities to equalize school facilities. Since facilities were relatively equal in Kansas, the option of arguing equalization was not really a fallback position available to the NAACP so only the issue of segregation was raised at trial. While segregation was upheld in Kansas, the three judge federal district court made the important observation that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children" by inflicting on them a sense of inferiority (quoted in Muse 1964: 10). The Delaware Supreme Court ordered integration but only for such time as it took to bring black school facilities up to par.

On consolidated appeal to the Supreme Court in 1952 South Carolina's brief to the US Supreme Court pointed out that of the thirty-seven states in the Union at the time of the adoption of the Fourteenth Amendment, "23 continued, or adopted soon after the [Fourteenth] Amendment statutory or constitutional provisions calling for racial segregation in the public schools" to buttress the argument that the history of the Fourteenth Amendment "compels the conclusion that it has no such scope as is claimed by the appellants" (Kluger 1976: 544). The state respondents also emphasized to the Court that a long line of precedents affirmed the right of states to classify its public school children by race and that the cases relied upon by the NAACP (*Sweatt* and *McLaurin*) did not dilute the "separate but equal" doctrine of *Plessy* (Kluger 1976: 544, 549). Finally, the social-psychological evidence relied upon by the NAACP to demonstrate that segregated schooling causes inherent feelings of inferiority among black children were purported to be methodologically flawed and inapplicable to the legal issues at hand.

The NAACP took a middle ground approach. *Sweatt* and *McLaurin*, according to the NAACP, had replaced *Plessy* and *Gong Lum* as the governing precedents but the *Plessy* doctrine was not directly attacked.[5] After much debate, it was decided that a summary of the existing social scientific evidence concerning the effects of segregation,

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[4] In Kansas, the national NAACP office originally wanted to generate a case from Wichita but the local chapter of the NAACP was not supportive of the litigation effort (see Kluger 1976).

[5] Elsewhere, the NAACP argued that *Plessy* and *Gong Lum* were inapplicable. For example, the NAACP argued that *Gong Lum* was about whether the state of Mississippi could classify a man's daughter as 'colored' and did not deal with the state's right to make racial distinctions in public education per se (Kluger 1976: 554).

signed by a number of prominent social scientists, would be added as an appendix to the *Briggs* brief (Kluger 1976: 554-557).

The federal government was not planning on filing a brief in the case. However, after the replacement of the Attorney-General and the Solicitor-General owing to unrelated matters, the government did file a brief that was described as a "mixed bag" for both sides though it came down on the side of the NAACP. While the federal brief indicated that the Court need not directly face *Plessy*, it did indicate that the "separate but equal" doctrine was a contradiction in terms and that its underlying premise, that segregation constituted a "badge of inferiority" only in the minds of blacks, had been challenged by recent precedents and "the facts of everyday life." As for remedies, the federal brief suggested a gradual process of desegregation monitored by the federal district courts (Kluger 1976: 559-560).

The Court's decision was delayed by the death of Chief Justice Vinson; the appointment of a new Chief Justice, Earl Warren; and the Court's difficulty arriving at a decision. Finally, on May 17, 1954 the Court announced its unanimous decision in *Brown v. Board of Education* (1954), which struck down segregated schooling as unconstitutional. In the decision, the Court noted that *Sweatt* and *McLaurin* had decided that intangible factors made segregated professional and graduate schools inherently unequal. The Court argued that the underlying principles of those cases applied to grade schools and high schools and buttressed this assessment by quoting from the District Court decision in *Brown* that segregated schooling negatively affects the educational opportunities of black children. The psychological underpinnings of the "separate but equal" doctrine of *Plessy* were dismissed as being rejected by "modern authority." In a footnote (number eleven) the Court made reference to several works from the social sciences that had been summarized in the NAACP appendix to its brief. The Court then declared: "We conclude that in the field of public education the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

However, the Court also decided that in light of the complexity and widespread applicability of the decision, it would postpone the granting of a remedy and request that the immediate parties, the federal government and states requiring or permitting segregation in public schools to file briefs on the remedy question by October 1954.

During the process of developing a remedy, Kansas, Delaware and the District of Columbia all reported that they had slowly begun to undertake desegregation, but a number of southern states warned the Court that the public was very hostile to the notion of desegregated schools (Kluger 1976: 725, 732-33). Florida's proposed desegregation plan created a labyrinth of legal and administrative hurdles for blacks and left officials with wide discretion to deny such requests (Kluger 1976: 724-5). North Carolina's legal representative further argued that "The federal constitution does not confer upon the federal government, as a whole, authority to impose upon state officials affirmative duties in the administration of the states' schools, and it certainly does not give that power to the federal courts" (Kluger 1976: 734).

In contrast, the NAACP told the Court that rights guaranteed under the Fourteenth Amendment were not dependent on what area of the country one lived in or how much opposition there was to those rights. Marshall therefore argued that the Court move to end segregation forthwith and reminded the Court that state authorities had respected other orders by the Court providing rights for blacks which resulted in obedience on the part of the public.

Mediating between these two positions was the brief of the federal government. Though the government was clear that "popular hostility" could not justify the continuation of school desegregation, the government cautioned that segregation was socially ingrained in many places. The solution offered by the government was for the Court to pronounce that desegregation must begin in earnest everywhere and then allow the lower district courts to supervise the details of the process. This would allow for flexibility in meeting the various challenges faced by local conditions. As for the defendant school boards, the government suggested that they submit a detailed desegregation plan to the district court within ninety days (Kluger 1976: 726-727).

On May 15, 1955 a unanimous Supreme Court released its *Brown II* decision. The opinion began by noting that all federal, state and local laws must yield to the principle

that "racial discrimination in public education is unconstitutional." However, the Court acknowledged that "a practical flexibility" was allowed to enter into the shaping of remedies. As such, the defendants were required to "make a prompt and reasonable start towards compliance with our May 17, 1954 ruling," but in assessing their progress the courts below were allowed to take into consideration administrative hurdles relating to the necessity of changing attendance zones, the nature of the school transportation system, the quality of existing school facilities and the revision of local laws and regulations. The Court concluded by ordering this to be done with "all deliberate speed."

As discussed in Chapter 3, this study will not attempt a comprehensive analysis of judicial decision-making. However, it is worth noting that the *Brown I* and *II* decisions cannot be understood without reference to institutional factors. First, Chief Justice Warren used his institutionalized leadership position to craft unanimous opinions supporting school desegregation after it appeared that the Court would be split in its decision (Kluger 1976: 713). Second, the law influenced the decision-making process. Justice Frankfurter in particular, although seemingly personally disposed to ending segregation, wrestled with the conviction that the Fourteenth Amendment and ensuing precedents did not require desegregation. The decision to declare segregation unconstitutional on the grounds that it generated feelings of inferiority according to social science evidence was at least partly based on the fact that a number of justices were not convinced that the Fourteenth Amendment required desegregation (Wilson and DiIulio 1998: 576). Third, the ambiguous decision to allow the South to proceed only with "all deliberate speed" in desegregating schools is viewed by a number of commentators as an attempt by the Court to avoid a political backlash, particularly by Southern politicians (Peltason 1961, 17-18; Kluger 1976, 711-714; Simon 1992, 926). Fourth, the federal brief did support, though in a tentative way, the NAACP's position. Finally, notwithstanding the federal brief, it appears that the Court was out of step with the political environment when making the *Brown* decisions. Evidence for this includes the tepid Civil Rights bill that would be passed by the Congress in 1957, which did not include provisions for desegregating schools; the lack of endorsement of the decision by the President; and the public and political opposition that the decision faced, particularly in the South.

In the case of *Brown*, therefore, Rosenberg's study is mistaken in two ways. First, contrary to Rosenberg's model, it is clear that the Court acted without the support of political elites in the executive branch and Congress, apart from the Justice Department's belated and "mixed" brief that came down on the side of the NAACP. Put differently, while *Brown* can be seen as responding to changing socio-economic and political conditions (Peltason 1961, 249; Klarman 1994, 13-14; Rosenberg 1991, 169), it does not follow that the Supreme Court had to decide in favour of the NAACP when it did. For a long time, regardless of socio-economic and political changes, the Supreme Court was the only national institution to support the principle of desegregation (Peltason 1961: 134; Tushnet 1994: 177).[6] Secondly, because the Court was worried about being too out of step with other actors in the political environment, it provided the NAACP with a rather weak remedy. As McCann points out, Rosenberg has the habit of suggesting that the Court will not make decisions in favour of politically weak groups seeking social change, but then discusses a number of cases where the court did so, while ignoring the substantive limitations of the decision in order to bolster his claim that the Court has trouble implementing its decisions (1992, 724-726).

Hypothesis (2): Struggle over policy change and implementation

The NI model of judicial impact would predict that policy change and implementation of *Brown* would be limited, at least initially. The *Brown* decision was *not forceful (Hypothesis 2(a))*; the notion of desegregation, particularly in the South, went *against the practices and attitudes of school and state officials (Hypothesis 2(b))*; *no incentives were made available for desegregation (Hypothesis 2(c))*; the *political environment, particularly in the South, was not conducive to desegregation (Hypothesis 2(d))*; there were *a number of veto points available to opponents* of desegregation *(Hypothesis 2(e))* and *the NAACP had difficulty translating the legal resources provided by Brown into policy gains (Hypothesis 2(f))*. Furthermore, the *Brown* decisions had little direct impact on changing these factors, though the decisions contributed to change in

[6] Dahl, who was instrumental in arguing that the Court rarely strays from the preferences of the dominant national coalition, notes that the Brown decision seemed to be an exception (1957, 294). He tries to explain exceptions by arguing that the Court- at great risk- sometimes establishes policy when the coalition is unstable vis-à-vis a particular policy and the decision conforms to "explicit or implicit norms" held by political leadership. However, judging from subsequent events, it appears that the Court went against the norms of the national political leadership; though this would help explain problems with implementation.

contingent ways in different communities. The following discussion expands upon these themes. In doing so, the discussion highlights the interdependency of these factors, describes how institutional actors and structures shaped these factors, and notes where the model differs from alternative models and explanations.

The *Brown II* decision itself, as discussed above, ambiguously called for school desegregation with "all deliberate speed." As such, *the decision was not forceful and gave no clear guidelines as to what would constitute an acceptable remedy* (also see Johnson and Canon 1984: 51, 87; Law and Society Review 1967: 103; Wilkinson 1979: 29). This, in turn, affected the decisions delivered by lower courts. Transparently unconstitutional laws passed by state legislatures in response to *Brown*, including some pupil placement laws, were indeed declared as such by the district courts. However, when legislation promised even the slightest progress courts tended to approve such plans. Justice Parker of the Fourth Circuit Court of Appeals approved North Carolina's plan in 1956 and the Supreme Court decided not to review the ruling. Although the plan was quite restrictive, it did allow for local option and three cities began token integration in 1957 when a dozen blacks attended schools with whites (Wilkinson 1979: 84-85; Muse 1964: 113). Part of the problem rested with the fact that the Supreme Court left the lower courts with an enormous degree of discretion to implement desegregation (Johnson and Canon 1984: 51; Peltason 1961: 18-23). Justice Parker's justification of his *Briggs v. Elliot* (1955) decision that *Brown* only called for desegregation and not integration was a credible one (Wilkinson 1979: 116). Moreover, Justice Parker and the Fourth and Fifth Circuit Court of Appeals tended to be relatively stricter on school desegregation than many federal district court judges and state court judges. Five years after a desegregation suit was launched in Dallas federal district court, for instance, Judge Davison declared, "We will not name any date or issue any order [for school desegregation]" (quoted in Peltason 1961: 119). Although in September 1958 the Supreme Court rejected Little Rock's request for a postponement of a desegregation order by stating that the constitutional process could not be made to bow to force, the Court generally refused to hear school desegregation appeals, thereby providing no further guidance or impetus to the courts below (Wilkinson 1979: 86-92; Kluger 1976: 753-754).

Moreover, regardless of how specific court orders were, even the general proposition of desegregation *went against the practices of school boards and the attitudes of school board members*, particularly in the south. No school-board member or superintendent openly advocated compliance with *Brown* in the deep five Southern states (Rosenberg 1991: 84). Even in what was considered to be a moderate Southern state- Texas- one board member in Houston said, "she would go to jail rather than to have desegregation" (quoted in Peltason 1961: 110). In the border states, where there was a more sympathetic bureaucracy, much desegregation took place voluntarily after *Brown* (see tables 4.2 and 3.4) (Rosenberg 1991: 50-53; Simon 1992: 936).

There were, however, a small number of southern school boards that initiated desegregation plans. However, these plans were quickly quashed by state governments, which after an initial period of calm led the massive resistance effort against *Brown*. The legislature in Virginia, for instance, revoked Arlington County's right to an elected school board after the board proposed a desegregation plan for the 1956-57 school year (Klarman 1994: 107). Governor Faubus of Arkansas used state troops to prevent a handful of black students from entering Central High School in Little Rock in 1957. State governments also passed legislation threatening to cut-off funding or even close schools in districts that undertook desegregation. Meanwhile, the federal government, with the exception of sending troops to Little Rock, offered no financial incentives or other means of support for school desegregation. These events help to illustrate that the existence of *potential veto points in the policy implementation process, the lack of incentives* and a *hostile political environment* all combined to work against the implementation of desegregation in the South. This point deserves further elaboration.

In the border states, with certain exceptions such as the cotton-growing "boot heel" section of Missouri, desegregation proceeded at a much greater pace than in the South, much of it voluntarily. For the most part, state authorities in the border states encouraged or did not discourage school desegregation. Maryland's Governor, Theodore McKeldin, stated "I am sure our citizens and officials will accept readily the Supreme Court's interpretation of the fundamental law" (Muse 1964: 20). When local boards in the border states did not desegregate, judges in the region tended to be relatively strict in ordering

desegregation (Peltason 1961: 115). State politicians, local school officials and judges in the border states also did not face significant public opposition to *Brown*.

These factors were different in the South. After a brief period of initial calm, previously moderate governors on the race issue, such as Faubus of Arkansas, turned conservative to fend off challenges from pro-segregationist opponents (Klarman 1994: 98-100). Officials in Georgia, for example, complained that the decision was an "illegal" infringement on states rights and Marvin Griffin was elected Governor of Georgia in 1954 on the platform that "Come hell or high water, races will not be mixed in Georgia schools" (Rodgers and Bullock 1976: 13). As suggested above, a number of pieces of legislation were passed by Southern states that obviously tried to block the process of school desegregation, including school closing laws (see Rosenberg 1991: 350). More subtly, a number of state legislatures passed pupil placement laws that created enormous administrative hurdles for blacks wanting to enter white schools and provided for vague standards that were intended to disguise that admission denials were being made according to racial criteria (Wilkinson 1979: 84). State political leaders were aware that most of their laws designed to hamper school desegregation would be found unconstitutional but they bragged, "as long as they could legislate, they could segregate" (Rodgers and Bullock 1976: 13).

Southern school officials, politicians and judges were operating in a social milieu where segregation was a way of life and most members of the public supported segregation at least to some degree (Peltason 1951: 33; Klarman 1994: 106). A poll conducted in July 1954 found that, while 76 per cent of those in the Northeast approved of *Brown*, only 24 per cent of Southerners approved of the decision (Rosenberg 1991: 127; Muse 1964: 75). The general hostility to *Brown* among Southern whites manifested itself in a number of ways- from the brutal tactics of the Klu Klux Klan to the growth of "Citizen's Councils" composed of "respectable" whites opposed to desegregation. Regardless of the personal attitudes of school officials, politicians or judges, public opposition meant that making a decision that favoured school desegregation was a political and social risk.

Much of the preceding discussion could be read as suggesting that differences in rates of desegregation between the border states (where there was at least moderate

desegregation) and the southern states (where there was very little desegregation) can be attributed to different levels of opposition to school desegregation amongst decision makers and the public in the border states and the South, which perhaps could be traced back to how deeply entrenched segregation was in the social fabric of the two regions. Though social forces are certainly an important part of the explanation, institutional actors and structures mediated outcomes in a number of ways.

First, although there was some limited school desegregation in the border states before *Brown*, the decision accelerated desegregation (see Tables 4.1 and 4.2) in part by giving favourably disposed school officials a justification for policy change in the face of less than supportive public opinion. The members of the Topeka, Kansas school board who favoured desegregation, for example, welcomed the NAACP's lawsuit as a way of achieving that goal without the weight of the decision being squarely on their shoulders (Kluger 1976: 410). As noted above, some school boards in the South also began desegregating after *Brown* and there is speculation that more would have tried to implement such plans had judicial decisions given them more of a shield to "take the heat" (Peltason 1961: 96).

Second, although Southern judges were often lenient in their decisions (to greater or lesser degrees) and research has shown that such decisions correlated with social background factors, attitudes and political environment (Vines 1973; Peltason 1961), other research has demonstrated that federal district court judges voted more liberally on segregation questions after *Brown* in statistically significant ways (Sanders 1995: 744). Moreover, judges on the Circuit Court of Appeals- those closer to the Supreme Court in the judicial hierarchy- were generally more aggressive in their desegregation orders than district court judges (Johnson and Canon 1984: 63; Peltason 1961: 20). Evidence also suggests that, as a whole, when state courts were involved in school desegregation questions they were less supportive than federal courts. Southern state judges criticized *Brown* on and off the bench, led a movement at the 1958 Conference of State Chief Justices to reprimand the Supreme Court for its *Brown* decision, and upheld state efforts to evade compliance (Wasby 1970b: 172). Institutional characteristics have been used to account for the differences between state court decisions and federal district court decisions on school desegregation and race relations generally. According to Peltason,

> Though he [the federal district court judge] may be a white southerner living in the South, he is also a judicial officer of the national government. His position gives him some protection from local demands [more than elected state court judges], at the same time it exposes him to the claims of a national constituency. The Supreme Court and courts of appeals have no formal disciplinary power over the district judge and supervise his work only sporadically, but the living traditions of the law oblige the district judge, whatever his own views and however strong local pressures, to follow the rulings of his judicial superiors (1961: 10-12).

Third, institutional forces mediated the transmission of public opinion into the political process. Commentators have noted that, although there were a number of governors who staunchly advocated segregation, governors as a whole tended to be more moderate than the state legislatures in their response to *Brown* (Peltason 1961: 44; Muse 1964: 59). Take Tennessee, for example. In Nashville and, after a crisis, in Clinton desegregation began in 1958 under federal court orders after Tennessee's "School Preference Law," which allowed blacks and whites to choose segregated or integrated schools, was struck down by a federal district court. The law had been reluctantly signed by the Governor who after *Brown* noted "We must not overlook the fact that the Negro is equal to the white in the eyes of the law and in the sight of God." He also told the chairman of a local school district that, "no gubernatorial or legislative action can overturn a decision of the United States Supreme Court" (Muse 1964: 117). The hard line taken by state legislatures can largely be attributed to the fact that electoral systems highly exaggerated rural voting power and those in rural areas were much more strongly segregationist than their urban counterparts (Muse 1964: 66; Klarman 1994: 101, 107-108). This also meant that segregationists controlled leadership positions in the legislature (Peltason 1961: 44). State legislatures, as noted above, would then force school boards, particularly those in urban areas, from desisting in school desegregation efforts.

Muse speculates that governors on the whole had a more "constructive spirit" than did state legislatures because as chief executives they bore "a unique responsibility for the maintenance of public order and the general equilibrium of [their] state[s]" (Muse 1964: 59). Put differently, the institutional duties of a governor can moderate the effects of personal attitudes and public opinion by accenting the importance of respect for law

and order. Governor LeRoy Collins of Florida provides another example of this phenomenon. Though Collins was cautious about implementing school desegregation in the face of public opinion following *Brown*, he spared Florida "some of the legislative excesses which afflicted other Southern states" by stressing the need for "Christian tolerance and respect for the law" (Muse 1964: 60).

In addition to mediating elements of the political environment, did *Brown* and subsequent legal mobilization and related political activity contribute to changing elements in the political environment? As for public opinion, *Brown* did not have an immediate impact. While the overall approval rate for *Brown* increased by 5 percent (to 59 percent in 1959) the approval rate for *Brown* amongst Southerners actually dipped slightly (to 16 per cent in 1956) as did support for the concept of integrated schools in the South (to slightly below 10 per cent in 1959) (Rosenberg 1991: 127; Klarman 1994: 78). Moreover, the northern public did not place segregation high on the list of priorities in 1955 compared with crime, nuclear weapons and taxes (Klarman 1994: 78).

Nevertheless, *Brown* did influence the political environment in ways that would ultimately help spur on school desegregation. Flemming et al. found that the decision generated "substantial and prolonged" media attention that lent system-wide attention to desegregation (1997: 1238-1240). And, as discussed below, there are links between the *Brown* decision and the Montgomery bus boycott (1955-1957), which drew significant attention to the desegregation issue generally. Moreover, the attention that Rosenberg notes was given to the Little Rock school crisis in 1957 was not a competing source of attention with *Brown* but was an indirect result of *Brown* and subsequent political and legal activity by local and state officials, local African-Americans and the NAACP (see Simon 1992).

In other words, *Brown* and subsequent legal and political activity put school desegregation high on the political agenda, for better or worse in the short term, because the decision was evaded, disparaged or obeyed, but it was not ignored. In the border states much voluntary desegregation occurred with the backing of state politicians, but in the South, state officials, especially state legislatures, shifted rightward in their racial policies after *Brown* and African-American legal and political activity linked to *Brown*. After a period of calm following *Brown*, massive resistance started following Autherine

Lucy's challenge to segregation at the University of Alabama—a challenge that relied significantly on *Brown*—and the Montgomery bus boycotts which drew some inspiration and legal backing from *Brown* (see below) (Garrow 1994: 158-159). In 1958, Martin Luther King Jr. began an article on what he called the "crisis in race relations" by arguing that, "This crisis has been precipitated...[in part] by the determined resistance of reactionary elements in the South to the Supreme Court's momentous decision against segregation in public schools (quoted in Simon 1992: 931). According to Klarman (1994), this violent reaction by the southern states during the massive resistance phase was crucial to creating an environment in which black protests, like the ones in Birmingham in the early 1960s, would be put down with ruthless force, thereby triggering a reaction in northern opinion and in federal political leaders.

In addition to the hostile political environment, the restricted nature of any policy changes also reflects *the limited ability of the NAACP to translate the victory in Brown into significant legal and political gains in the short term by mobilizing constituents, gaining allies, increasing access to the policy process, etc.* in the South. Importantly, neither the President nor Congress joined the effort for school desegregation. While President Eisenhower sent troops to Little Rock to facilitate desegregation, he never publicly supported the *Brown* decision. "I think it makes no difference whether or not I endorse it," the President said in 1956. He also emphasized that, "It is difficult through law and through force to change a man's heart" (quoted in Kluger 1976: 753). Privately, the President strongly criticized the *Brown* decision (Klarman 1994: 134). Not surprisingly, the President did nothing to counter the Southern Manifesto issued by 101 Congressman from the eleven Southern states in 1956. The Manifesto deemed the *Brown* decision a "clear abuse of judicial power" that was based on the Judges' "personal, political and social ideas for the established law of the land." In conclusion, the Congressman promised, "to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution" (Kluger 1953: 752). Some support for *Brown*, however, did exist in Congress. Senator Paul Douglas of Illinois introduced a bill that endorsed the decision as expressing the "moral ideals of the nation" and the "supreme law of the nation." It would have provided for positive action to be taken by the Department of Health, Education and Welfare (HEW) to desegregate education and

would have empowered the Department of Justice to initiate desegregation suits (Muse 1964: 78). Nevertheless, political calculations in Congress and the executive branch dictated that neither proposal was included in the 1957 or 1960 Civil Rights Acts (Rosenberg 1991: 46-47; Klarman 1994: 130-134).

In spite of the federal government's stance, in the border states African-Americans were able to rely on sympathetic white allies at the local and state level to voluntarily implement the *Brown* decision, as discussed above. In the South, not only did the NAACP face government opposition at the state and local level, large numbers of whites joined groups opposed to desegregation from the Klu Klux Klan to the more "respectable" Citizens Councils. The fact that state officials often encouraged the creation of these Citizens Councils demonstrates the complex dynamic between state and society highlighted by NI theory. The number of whites who organized to oppose desegregation greatly outnumbered organized whites who supported desegregation from the Southern Regional Council to various religious groups. The latter offered support in some communities particularly when massive resistance to desegregation threatened the socio-economic fabric of the community (Muse 1964: 117, 193).

The effect of *Brown* on the African-American community is complex. On the one hand, *Brown* may not have strengthened the NAACP and seemed to have a limited impact in directly or indirectly mobilizing the African-American community to pursue desegregation. A number of people in the African-American community did not join efforts for school desegregation for a number of reasons. A 1955 Gallup poll suggested that only 53% of southern African-Americans approved of *Brown*; other African-Americans did not hear about the decision; others were reluctant to send their children to previously white schools because they were concerned about how their children would be treated; some African-Americans, particularly those with little education, saw segregation as a way of life; and/or African-American parents were threatened in some way to deter them from enrolling their children in white schools. Many African-American teachers were hesitant to join the fight for school desegregation because they would lose their jobs, as white school officials would not hire them to teach in integrated schools. And a number of African-American papers in some communities came out against the decision

(Muse 1964: 202-203; Wilkinson 1979: 73; Johnson and Canon 1984: 118; Rosenberg 1991: 131-133).

Some commentators also argue that *Brown* did not act as a catalyst for other direct forms of political action that furthered the cause desegregation, notably the Montgomery bus boycott (see Rosenberg 1991: 134-145; Klarman 1994: 81-82). They point out that: bus boycotts, including the one in Montgomery, were being planned prior to the *Brown* decision; the initial demand of the Montgomery boycotters was not for desegregation but for better conditions; the Montgomery boycotters tended to give little credit to *Brown*; and that the number of civil rights protests did not increase until well after *Brown.*

It is also arguable that the NAACP's organizational strength was not greatly enhanced by *Brown*. Rosenberg argues that the funding increases the NAACP received after 1954 were not as proportionally large as increases in the 1940s and that they are more likely attributed to events like the murder of Emmett Till in 1955 than *Brown.* Rosenberg and others also note that in the latter 1950s the NAACP began to face challenges to its leadership of the African-American community by those preferring more direct political action, such as Dr. Martin Luther King Jr. Moreover, having to press lawsuits in numerous school districts across the South and some in the border states placed enormous burdens on the NAACP's organizational resources. This task was made even more difficult when state governments tried to thwart the NAACP by various means, including demands that membership lists be revealed, which again demonstrates the interaction of state and society postulated by NI theory. As Simon points out, the campaign against the NAACP by Southern states following *Brown*, which suppressed membership growth in the NAACP and created a vacuum that was filled by local activists willing to break away from the NAACPs bureaucratic structure and legalistic methods, represents a "contingent" aftermath that can result from the complex interplay of social forces and institutions (1992: 933, 939).

On the other hand, however, there are reasons to believe that *Brown* did have some positive effects, if sometimes indirectly, on the mobilization of the African-American community and the NAACP. Notwithstanding the difficulties of litigation and the fears of some in the African-American community, by 1960 over 200 school desegregation lawsuits had been launched, many of which had NAACP involvement (Peltason 1961:

132). The increased funding available to the NAACP and other civil rights groups, which doubled between 1954 and 1957, has plausible causal links with *Brown* as well as other events, such as the murder of Emmett Till (McCann 1992: 723).

Brown may have also influenced other direct forms of political action more than critics allow. The lack of political protests immediately following *Brown* that Rosenberg seizes upon as evidence of the decision's ineffectiveness might be a result of Rosenberg's linear conception of causality. It could be that a couple of years of mounting frustration over the lack of policy change following the constitutional victory in *Brown* played a role in spurring direct political action (Simon 1992: 932). There is evidence of an even more direct connection between *Brown* and direct political action during this time. The success of the Montgomery bus boycott, for example, was greatly aided by the protester's Supreme Court victory in *Gayle v. Browder*, which relied on the desegregation principle established in *Brown* (Tushnet 1994: 179). There are also links between *Brown* and the initiation or escalation of the bus boycott. Rosa Parks, one of the leaders of the Montgomery bus boycott, emphasized that after *Brown* "African Americans believed that at last there was a real chance to change the segregation laws" (quoted in Garrow 1994: 155). Long-time Congress of Racial Equality (CORE) leader Bayard Rustin recollected, "Once that [the *Brown* decision] happened, it was very easy for that militance, which had been building up, to express itself in the Montgomery busy boycott of '55-56" (quoted in McCann 1992: 722).

Hypothesis (3): The transformative legacy of legal mobilization

The comments by Parks and Rustin suggest that *Brown* may have had a transformative effect on the African-American community's expectations and sense of identity, though the precise nature and magnitude of this effect is difficult to measure. In downplaying such effects, Rosenberg draws on various sources to claim that: the response to *Brown* in the African-American community was "muted;" events like the murder of Emmett Till moved African-Americans more than *Brown*; African-Americans had won legal victories in the Supreme Court before but were disappointed with the differences between the "law in books and the law in action;" and that civil rights leaders, particularly Martin Luther King Jr., warned against relying on the courts and legalism to pursue justice (1991: 132).

Rosenberg, however, ignores some evidence that supports the contention that *Brown* had some transformative effect on African-American attitudes and goals. King did warn against leaving the struggle to lawyers and courts, but in 1958 he emphasized that *Brown* "marked a joyous end to the long night of enforced segregation" and "brought hope to millions of disinherited Negroes who had formerly dared only to dream of freedom." King added that the Supreme Court decision "further enhanced the Negro's sense of dignity and gave him even greater determination to achieve justice." He also observed that "the law itself is a form of education," and "the words of the Supreme Court, of Congress and the Constitution are eloquent instructors" (quoted in Garrow 1994: 155). *Brown* was a particularly powerful Supreme Court victory because it endorsed the general principle of desegregation, which delegitimized the "Jim Crow" social system in the South (Simon 1992: 933). "What made '54 so unusual was that the Supreme Court in the *Brown* decision established African-American people as being citizens with all the rights of all other citizens," noted Bayard Rustin in an oral history collection of the civil rights movement (quoted in McCann 1992: 722). "We all agreed that Brown versus Board of Education had altered forever the conditions on which the continuing struggle would be predicated," said Reverend Ralph D. Abernathy of a meeting that included King, "It now appeared as if the law was on our side, that the federal government might eventually be pressed into service" (quoted in Garrow 1994: 156).

Such reflections on *Brown* by African-American political leaders give credence to Scheingold's contention that *Brown*, by being one of the earliest and most noteworthy official declarations of the injustice of segregation, gave rise to anticipation on the part of African-Americans and influenced the outcome of future political struggles (1974: 137). This conclusion is supported by McCann's claim that two-well known authorities on the civil rights struggle- Douglas McAdam and Aldon Morris- "accord the NAACP and *Brown* victory much greater- partial and contingent, to be sure, but nonetheless much greater- significance than does Rosenberg" (1992: 724).

Brown and subsequent interrelated events transformed the policy community in other ways as well. Massive resistance against school desegregation mostly collapsed prior to the early 1960s (Wilkinson 1979). The federal courts struck down blatantly unconstitutional laws and defiance of the sort seen in Little Rock sparked executive

action; therefore, "the truth came quietly home to many Southern politicians that 'you can't win' against the Supreme Court and the government of the United States" (Wasby 1970b: 179). The trickle of African-Americans into white schools had a number of subtle social-psychological by-products: the caste system of race relations in the South began to break down as African-Americans began to be recognized as citizens of the United States, white parents began to see school integration as "inevitable" and people started to realize that school integration was not as cataclysmic as many had feared (Muse 1964: 38, 210; Rose 1967: 126). These changes helped pave the way for greater, but still modest, integration from 1960 until 1964.

Token Integration (1960-1964)

Like the previous section, this section describes the struggle to compel formal policy change, the struggle over policy development and implementation and the transformative legacy of legal mobilization, but does so for the 1960-1964 time period- the period when massive resistance policies mostly collapsed, yet policy change remained minimal in the South before the introduction of the federal Civil Rights Act in 1964. Since this section builds on the previous one and many factors remained somewhat similar over this period, this section is briefer than the previous one.

Hypothesis (1): Struggle to compel formal policy change

As of 1960, the relative political power of African-Americans to engender policy change through traditional political means such as voting and lobbying remained minimal. Only one-third of voting age African-Americans in the South were registered to vote and Mathews and Protho established that the percentage of African-Americans registered to vote explained almost none of the variance in school desegregation amongst a number of southern counties. Mathews and Protho also found that the presence or absence of an African-American political organization explained only a fraction of the variance (1964: 150-152). This finding is consistent with Crain's assessment that civil rights organizations had very little influence over school board behaviour (1968: 358). Therefore, litigation in pursuit of school desegregation remained the best option for the NAACP, particularly since the *Brown* decision bolstered their legal resources (*Hypothesis 1 (b)*).

Furthermore, as discussed below, the federal courts were becoming stricter in their desegregation orders, largely owing to a feedback process that indicated a very slow pace of desegregation.

Hypothesis (2): Struggle over policy change and implementation

Muse argues that, "the year 1960 should be taken as the point at which the South began to move" (1964: 210). During this time period more African-Americans did begin to attend school with whites. Table A.2 reveals that the number of African-American children attending schools with whites in the South jumped from 4,216 during the 1959-1960 school year to 34,105 in the 1963-1964 school year. In the border states the numbers went from 191, 114 to 281,731. Table A.1 also shows increases in the percentages of school districts being desegregated during this time. In 1963, as many as 126 southern school systems desegregated without even waiting for court orders (Crain 1968: 231). However, Table A.1 also shows that in a number of Southern states the percentages of school districts desegregating remained low. Table A.2, moreover, shows that in the 1963-1964 school year only 1.2 per cent of African-American children in the South were attending school with whites- a low figure even if one takes residential segregation into account. The degree of integration, however, tended to vary between and within states. As briefly discussed below, these slightly improved and varied results in the South can be attributed to the *more forceful language of judicial decisions (Hypothesis 2(a)); a modest improvement in the political environment (Hypothesis 2(d)); contingent events, such as the ability of the NAACP to gain allies for desegregation in certain communities (Hypothesis 2(f)); and the removal of some disincentives to school desegregation formerly placed on local school officials by state politicians (Hypotheses 2(c)- incentives- and 2(e)- reduction in organizational veto points*).

By the early 1960s the NAACP had succeeded not only in having most patently unconstitutional state laws designed to thwart desegregation found unconstitutional or repealed, but had convinced the federal courts to produce stricter desegregation orders (*Hypothesis 2(a)*). Such was the case in Georgia, for instance. Some of the state's laws were declared unconstitutional and, as a suit aimed at desegregating schools in Atlanta moved closer to a decision, the legislature repealed a law that would have closed all

schools rather than desegregate one (Rodgers and Bullock 1976: 14). Soon thereafter a federal district court ordered Atlanta to desegregate its public schools.

Litigation therefore tended to be more successful during this phase of the policy struggle as the federal courts began to make it clear that desegregation would have to begin and that plans which blatantly promoted tokenism would be struck down (Crain 1968: 232; Wilkinson 1979: 95). Indeed, in 1963 the Supreme Court struck down a desegregation plan proposed by Knoxville, Tennessee that was relatively moderate and had received tentative approval from the district court and the Sixth Circuit Court of Appeals. The plan went beyond the pupil-placement stage but allowed a pupil to transfer from a school where his race was a minority to one in which it was a majority. Since the plan used race as a specific criteria and would encourage resegregation the Court struck it down in *Goss v. Board of Education* (1963) (Wilkinson 1979: 95). The Court's impatience with the pace of policy change became more evident in its 1964 decision against the intransigent Prince Edward County in Virginia (*Griffin v. County School Board*). Justice Black, one of the judges who decided *Brown*, emphasized that "[T]he issues here imperatively call for decision now. The case has been delayed since 1951 by resistance at the state and county level, by legislation and by lawsuits. The original plaintiffs have doubtless all passed high school age. The time for mere 'deliberate speed' has run out" (quoted in Wilkinson 1979: 101). The stance of the federal courts, including the Supreme Court, seems to be an example of an institution responding to feedback even though the response was a belated one.

In the southern public a feeling of inevitably about the process began to appear after the collapse of massive resistance in the South. Whereas in 1958 only 53 per cent of white respondents in the South answered in the affirmative to the question "Do you think the day will ever come in the South when whites and Negroes will be going to the same schools, eating in the same restaurants, and generally sharing the same public accommodations?" in 1961 over 75 per cent of Southern whites answered in the affirmative (Muse 1964: 211). Opinion polls also showed that support for desegregated schools was up to 62 per cent nationally in 1963 and support for the concept had risen to

between 30 and 50 per cent in the South (Wirt 1970: 181-182; Rosell 1995: 632-634).[7] The print media, according to Muse's rough survey of a number of southern newspapers, also began to moderate their resistance to school desegregation (1964: 180). There was some modest improvement, therefore, in the political environment (*Hypothesis 2(d)*).

Within this more relaxed, though not supportive, political environment the NAACP concentrated its resources on desegregating urban centres in the South, because they had more students and it was thought that school boards and the community would be more receptive to desegregation than rural areas. In many cases this strategy worked smoothly and without incident- even if the degree of desegregation was not dramatic- owing to an interrelated set of factors: the activities of the NAACP and local African-Americans helped spur government officials and civic elites to support desegregation (*Hypothesis 2(f)*), state threats against desegregating school boards were removed (*Hypotheses 2(c) and (e)*), and judges were less tolerant of activities to halt desegregation (*Hypothesis 2(a)*). In Miami, for example, the local board, which had a number of members that did not conceal their willingness to accept desegregation, with the support of Governor LeRoy Collins voted to desegregate before a judgment was made in a desegregation suit against the board (Crain 1968: 234). The school board in Atlanta did face opposition to desegregation from the governor and the state legislature, but a federal judge warned that any attempt to close schools in Atlanta would require all schools in the state to be closed and the school closing legislation was subsequently repealed. With the support of the mayor and the aid of the local business community, the Atlanta school board responded to a court order to desegregate by allowing a small numbers of African-American children into white schools in 1961 (Rodgers and Bullock 1976: 14; Klarman 1994: 107).

Desegregation did not always happen this smoothly, however, even in such a large, cosmopolitan centre as New Orleans as a case study by Crain illustrates (1968: 237-292). The case study reveals the contingent and relational aspects of legal mobilization highlighted by scholars favouring a "bottom-up" approach, but it also confirms that these events are structured by institutional factors. The NAACP had initiated a suit against the New Orleans school district as early as 1952, but it remained dormant until the Supreme

[7] For 1963 Rossell has approximately 50 per cent of Southern whites approving of "Schools with a Few Blacks," while Wirt reports general support for desegregated school in the South at 30 per cent at this time.

Court's *Brown II* decision. In July 1959, three years after he ordered the school board to admit students "on a racially non-discriminatory basis with all deliberate speed," Judge J. Skelly Wright finally ordered the board, which had stalled instituting the original order and had tied the case up on appeal, to file a desegregation plan by March 1, 1960. The board, however, faced stiff opposition from the state, which had authorized a variety of means to prevent integration, including the closing of desegregated schools. Though the members of the board did not favour integration, they were more concerned about having to close schools. Yet, since the board received little or no support for desegregating from the city's elites, the media, or the public, the board delayed filing a plan. The support the board had been receiving from Archbishop Rummel of the large Catholic diocese collapsed after his successors bowed to pressure from rank and file Catholics to oppose desegregation. As organized whites and state officials, including Governor Davis, continued their opposition to desegregation, a small group of white professionals formed the Committee for Public Education (CPE) and filed a suit against the state to keep schools open, partly because they believed that the NAACP might be trying to purposely lose their lawsuit in order to dramatize the desegregation issue.[8] According to Crain, there is strong evidence that the CPE lawsuit was secretly supported by the four moderates on the school board and that Judge Wright may have been consulted in the drafting of the CPE brief.

What followed was a running battle between state officials, whose legislation was supported by the state courts, and the federal court. By the end of the summer of 1960, Judge Wright had invalidated all state attempts to maintain segregated schools and two schools were selected for desegregation starting in November 1960. The city's mayor gave tepid support for keeping schools open by desegregating and some Protestant denominations also supported desegregation, but opposition remained strong. After a handful of African-American students were allowed into two schools with the aid of federal marshals a series of often violent protests by whites occurred, a school boycott was organized and threats were directed towards white parents who tried to defy the boycott. The state attempted to starve the school district financially- a move that was

[8] Although some individual blacks did comment on how the closing of the schools might force the issue, Crain seems to believe that the NAACP strategy was to win the case. The lacklustre legal performance in the suit was misread by leaders of the CPE (1968: 256-257).

supported by the state court- but Judge Wright struck the measures down. The unrest in New Orleans was given prominent attention by the mass media and tourism suffered accordingly. Early in 1961 prominent businessmen began calling for calm and peaceful desegregation and the mayor become more supportive of the project as well. Although the boycott remained relatively effective for some time after that, the worst of the crisis was over.

As suggested by the presence of federal marshals in New Orleans, the desegregation effort also began to find slightly more support from the federal government under the Kennedy administration.[9] However, support for civil rights remained tepid until late in 1963. The Freedom Riders in Mississippi were not supported by the administration, for example, and early in 1963 President Kennedy proposed only a very modest civil rights legislative package, primarily designed to enhance voting guarantees (Klarman 1994: 139 147).

It was a stronger civil rights package of 1964 that would prove to be particularly important for school desegregation in the South. For even though Muse points out that the South "began to move" by 1960, he concludes that until 1964 the South's response to *Brown* had been a "dilatory and feeble" one (1964: 210-211).

Hypothesis (3): Transformative legacy of legal mobilization

The influence of *Brown* on the passage of the 1964 Civil Rights Act is discussed in greater detail below, but it is worth noting here that legal mobilization and judicial decisions appear to have influenced actions and attitudes in this policy area to some degree. Muse argues that *Brown* was a "mighty precursor" rather than a direct "causal factor" in promoting direct political action by telling African-Americans that "their resentment of segregation was supported by the Constitution of the United States, [which] made their aspirations a part of what we like to call the 'American dream'" (1964: 208). The chaos that occurred in places like New Orleans and, especially Birmingham, shocked the northern public and helped prompt federal politicians to act (Klarman 1994). To the extent that these scenes are linked to *Brown* by leading to court

[9] Columbus, Georgia was quietly ordered to desegregate or lose students from Fort Benning and the federal funds they brought (Crain 1968: 235). In 1963 the Kennedy administration moved to negotiate a settlement in Birmingham and facilitated the desegregation of the University of Alabama by forcing Governor Wallace to back down after the state's National Guard was federalized (Kluger 1976: 756-758; Wirt 1970: 180-181).

desegregation orders, providing moral resources to the civil rights movement, shifting politics to the right in the South and so forth, legal mobilization helped alert the northern public to the dangers of folkways that they had considered quaint (Simon 1992: 933). Tushnet further asks whether northern revulsion would have been quite as strong and politically significant had *Brown* not established a constitutional principle of desegregation (1994: 181). An affirmative answer to that question seems plausible in light of Senator Paul Douglas' comments during the debates on the Civil Rights Act of 1964. Senator Douglas, one of the foremost supporters of the Civil Rights Act of 1964, argued that through *Brown* "the conscience of the country was touched, the national conscience came to believe in the equal protection of the laws, and that a state should carry out the 14th amendment" (quoted in Simon 1992: 935). The passage of the Civil Rights Act of 1964 signals the beginning of modest integration in the South.

Modest Integration (1964-1968)

Among other things, the 1964 Civil Rights Act authorized the Attorney General to sue segregated school districts on behalf of African-American complainants if the case was likely to advance the cause of school desegregation materially. The Justice Department was also authorized to join private litigants pursuing equal rights. Finally, Title VI of the Act prohibited discrimination in programs funded (in whole or part) by the federal government and established administrative procedures for cutting off funds to schools and other programs that discriminated against African-Americans. Leverage under Title VI was increased by the passage of the Elementary and Secondary Education Act (ESEA) in 1965, which increased the role of federal government in financing public schools. Title I of ESEA distributed funds for the education of low income families which, because of the correlation between race and income, provided states with high African-American populations sizable amounts of funds (Radin 1977: 7). Federal appropriations for Title I averaged approximately $1 billion from 1966 to 1976 (in 1965 dollars) (see Orfield 1978: 271).

Hypothesis (1): Struggles to compel formal policy change

The introduction of the 1964 Civil Rights Act greatly enhanced both the rate of litigation and the chances of success during this stage of the struggle *(Hypothesis 1(b))*. The Act provided enormous legal resources to the cause of school desegregation by

allowing the Justice Department to initiate and participate in desegregation litigation and by linking federal funding to compliance with court decisions. By the end of 1966 the Justice Department had filed or joined in 93 desegregation suits under the Civil Rights Act (Wirt 1970: 185).

The Justice Department would of course utilize the federal courts for desegregation suits but African-Americans continued to prefer this institutional forum as well. As King eloquently stated: "No one can understand the feeling that comes to a Southern Negro on entering a federal court unless he sees with his own eyes and feels with his own soul the tragic sabotage of justice in the city and state courts of the South...But the Southern Negro goes into federal court with the feeling that he has an honest chance before the law" (quoted in Cole-Frieman 1996: 23). The federal courts became even more aggressive in their decisions during this time, likely owing to a variety of factors- some of them institutional in nature (*Hypothesis 1(b)*). First, judges specifically and derisively noted the slow pace of desegregation in the South. Second, the federal government was a more active participant in desegregation. Third, judicial attitudes likely played a role. Judges appointed after 1963, for example, were more supportive of desegregation than judges appointed before 1963 (Johnson and Canon 1984: 69). Fourth, changes in desegregation doctrine likely also contributed to change, since even judges appointed before 1963 shifted slightly in favour of desegregation (Johnson and Canon 1984: 69-70). Finally, the courts may have perceived that the political environment was becoming less hostile towards desegregation.

Hypothesis (2): Struggle over policy development and implementation

By the 1966-67 school year, 71.4 per cent of African-Americans in the border states were attending schools with whites and 16.9 per cent of southern African-Americans were attending schools with whites- the latter figure would increase to 32 per cent by the 1968-69 school year (see Table A.2). There was clearly significant policy movement during this time. The explanation for this policy implementation lies in interrelated changes to a number of factors in the model: judicial decisions became even more forceful during this time (*Hypothesis 2(a)*); financial penalties were imposed on school districts that did not desegregate (*Hypothesis 2(c)*); state governments largely stopped interfering with the desegregation process, thereby eliminating a veto point from the

process (*Hypothesis 2(e)*); and the NAACP had HEW and the Justice Department as allies after the passage of the 1964 Civil Rights Act, which helped attract other allies by making it easier for moderates to advance their position (*Hypothesis 2(f)*). Less proximately, the political environment continued to slowly improve as support for integrated schools increased in both the north and south (*Hypothesis 2(d)*) (Rossell 1995).

In the mid-1960s there were indications that the federal courts were becoming increasingly impatient with the pace of desegregation. Not only were the decisions laced with urgency- "the clock has ticked the last tick for tokenism and delay in the name of 'deliberate speed'," but they also argued that school boards had a positive duty to integrate, rather than merely to stop segregating (*Hypothesis 2(a)*). In the remedial decree in *United States v. Jefferson County Board of Education* (1966), Judge Wisdom relied largely on HEW guidelines to tell school officials: when the periods of choice must be and how they would be advertised, how transportation must be routed, where new schools should be constructed, how faculty to were to be hired and assigned and how entering African-American students were to be treated (Wilkinson 1979: 113-114). Another noteworthy feature of Judge Wisdom's decision was that it was directed towards the school board. During this time period, the NAACP was able to greatly reduce the amount of resources needed to stop state politicians from impeding the school desegregation effort. As Wilkinson notes, "[t]his time, local school officials led the assault on the guidelines, as opposed to statewide officeholders of earlier years" (1979: 104).

This reduced a central veto point (*Hypothesis 2(e)*), but it also meant that there was even greater variation in the pace of desegregation between and within states. In their study of thirty-one Georgia school districts Rodgers and Bullock found a range of responses to desegregation initiatives ranging from voluntary compliance to negotiations with HEW to defiance (1976: chapter 2). The level of coercion necessary to compel desegregation, according to Rodgers and Bullock, was most affected by four factors: the degree to which school decision-makers disagreed with the decision, the percentage of African-Americans in the community, whether the superintendent was elected or appointed and the mean income of the community. The decision-makers' assessment of the attitudes of the community was not statistically significant because almost all the

decision-makers perceived there to be little support for desegregation, hence there was no heterogeneity in the sample (1976: 59, 65-67). Some districts, therefore, complied voluntarily; other districts complied after (often lengthy) negotiations with HEW; more districts desegregated after federal funds were threatened by Justice Department enforcement of Title VI of the Civil Rights Act; a small number of districts desegregated in the wake of private litigation and a number of others did not desegregate even after federal funds were cut off (1976: 48-51). HEW's threat to cut-off federal funds was insufficient in some Georgia counties for two reasons: the money tended to help African-Americans more than whites and federal funds accounted for only 12.5 per cent of education funding in Georgia. Similar rationales were given as to why a number of other districts in the South did not desegregate after losing federal funding (Wilkinson 1979: 107; Wirt 1970: 199-214).

Rodgers and Bullock's careful study is important for a number of reasons. First, it revealed that a number of factors, including a decision-maker's perception of the legitimacy of the desegregation order, showed very little correlation to the level of desegregation, but attitudes toward the policy position advanced in the decision were important (*Hypothesis 2(b)*) (1976: 59-63). Second, by showing that there was variation within the state of Georgia in the degree and timing of desegregation the study shows that public opinion (which seemed to be negative across the state) or political culture (say between the border states and the South) are not determinative of policy outcomes. Rodgers and Bullock, for example, point out that some school districts voluntarily desegregated (Table A.1 reveals that a small number did so even before passage of the 1964 Civil Rights Act), while in others moderate school board members welcomed HEW guidelines and court orders so that they could hide behind them when instituting desegregation (1976: 25-27). Third, an important corollary of the preceding point is that the study emphasizes that appointed superintendents were more likely to lead their districts to desegregate than elected superintendents, because they felt freer to buck public opposition (1976: 66). This highlights the importance of how certain institutional configurations can reduce the influence of public opinion on public officials. Finally, the study shows that financial incentives to desegregate by the federal government, though

not as uniformly effective as Rosenberg's study seems to suggest (1992: 97-100), was important to the desegregation effort (*Hypothesis 2(c)*).

Clearly, attracting the federal government as an ally able to exert financial pressure and carry out litigation was crucial to the NAACP and the quest for desegregation, even though the process started somewhat tentatively and came under attack by Congress. In 1965 HEW informed school boards that qualification for federal money depended on voluntarily following HEW guidelines for what constituted a unitary school system or abiding by a court order to desegregate. Although HEW somewhat strengthened its guidelines in 1966, especially by the requirement that quantitative standards be used to show that desegregation was proceeding, until March 1968 the guidelines allowed for "freedom of choice" desegregation plans.[10] By 1967 HEW had cut off funds in 34 school districts and had proceedings under way in 157 more. During this time HEW's ability to defer funds was attacked by members of Congress, but liberals holding key committee positions defeated such attacks (Orfield 1978: 236-240). The work of the Justice Department was noted above. According to Orfield, efforts by the federal government under the 1964 Civil Rights Act "broke the logjam" and pushed forward the process of desegregation, particularly in the rural South (1978: 362).

Given the importance of the 1964 Civil Rights Act in this process, the influence of *Brown* on passage of the Act deserves further investigation. Since a number of commentators link the 1964 Civil Rights Act to direct African-American political action in the early 1960s and the violence that followed it (Rosenberg 1991; Klarman 1994), are there links between these political actions and *Brown*? Rosenberg argues against such a link by noting that African-American activists did not often mention *Brown* as an inspiration. Instead, those who participated in events like the sit-ins, tended to point to the independence achieved by African countries, the Montgomery bus boycott and the words and actions of Martin Luther King (1992: 145). Furthermore, Rosenberg argues that direct political action was not called for by traditional African-American leaders of the NAACP in response to *Brown*. The NAACP had an ambivalent if not hostile relationship with other African-American groups that did promote direct political action,

[10] The 1966 guidelines required: quantitative proof that progress in desegregation was being made, prohibition of the publication of the names of black families who had decided to send their children to white schools and limits on the scope of choice of schools (Rodgers and Bullock 1978: 18).

such as CORE, whose members often saw the NAACP as an overly moderate organization dominated by the bourgeois (1992: 146-148).

This appraisal, however, ignores the links between *Brown* and the Montgomery boycott and King noted above. In fact in the early 1960s King was still making references to the importance of *Brown* and "urge[d] men to obey the 1954 decision of the Supreme Court for it is morally right..." in his "Letter from a Birmingham Jail" (Simon 1992: 932; McCann 1992: 933). Direct forms of political action led by King and others may have resulted partly over frustration of officials not obeying the courts (Simon 1992: 932-933). The well-publicized intimidation and jailing of individuals like King during direct political action in Alabama are closely tied, according to Klarman, to extremist racial political conditions formed in the wake of *Brown* (1994:85).

In his effort to show that there was no real link between *Brown* and the Act, Rosenberg also shows that amendments to prevent federal funding of segregated school activities, such as lunch programs, predated *Brown* as did the inspiration for Representative Powell's amendment to civil rights legislation that would prohibit federal funding to programs that segregated on the basis of race. The NAACP went on record in 1950 and 1951 as supporting the prohibition of federal money to racially segregated schools and lobbied Congress for legislative enactments that would implement such a prohibition (1992: 122-123). Rosenberg also points to the failure of stronger civil rights legislation in 1957 and 1960; the Kennedy administrations initial criticism of changes that would strengthen what became the 1964 Civil Rights Act, including the provision that federal money would not fund segregated programs; and the fact that few references were made to *Brown* in Congress during the debates over the 1964 Civil Rights Act to support his claim (1992: 117-121). Rosenberg argues that the strong Civil Rights Act of 1964 was driven primarily by fears of the escalating violence surrounding direct African-American political action and the response of the northern public to the treatment of those protestors.

As noted above, however, direct political action by African-Americans had some tangible and symbolic links to *Brown* and many northerners were aware that African-Americans were fighting for a constitutional principle established in *Brown* (Tushnet 1994). Klarman (1994) argues that *Brown* was key to shifting racial politics in the South

and that King brilliantly exploited this situation to highlight racial injustice to northern audiences and federal politicians. More proximately, Rosenberg himself notes that Representative Powell did not start making concentrated efforts, backed by the NAACP, to introduce amendments that would prohibit federal funding to segregated schools until 1955. In arguing that the NAACP called for such amendments prior to *Brown*, Rosenberg does not appreciate that lobbying and litigation are often mutually related-litigation may be used in the wake of legislative failure and lobbying may be used to press for legislative enactments to enforce judicial victories and so forth (Wasby 1996: 5). Middleton argues that that it would have been less likely for Congress to pass a piece of legislation like the 1964 Civil Rights Act had the "separate but equal" doctrine not been dismissed in *Brown* (1996: 9). Cole-Frieman makes a similar argument:

> ...the federal courts provided a legal framework for federal government intervention and local political action. According to Charles V. Hamilton, "...the legal legitimacy of segregation had to confronted." Thus, only after the federal courts dismantled the legal basis for segregation in Brown, could federal, state and local political institutions be forced to dismantle desegregation (1996: 36).

In Congress, those that mentioned *Brown* during debate on the bill gave the decision particular prominence. Senator Humphrey of Minnesota argued that the purpose of the bill was to aid the desegregation "ordered by the Supreme Court of the United States, whose decision is the law of the land." Senator Robertson of Virginia, who opposed the bill, criticized *Brown* and claimed that it led to the kind of strife that Rosenberg believes is most responsible for the bill: "There can be little doubt that the Supreme Court decision of 1954 has engendered more strife and discontent in all parts of the nation than any other decision of the Court for 100 years..." (quoted in Simon 1992: 930). In the end, McCann's balanced conclusion on this subject is worth repeating from Chapter Two:

> Rosenberg thus may be accurate in arguing that court decisions did not unilaterally "cause," by moral inspiration, defiant black grass-roots action or, by coercion, federal support for the civil rights agenda. But these narrow claims hardly refute that the legal tactics pioneered by the NAACP figured prominently in defining (around civil "rights") and intensifying the initial terms of racial conflict in the South...Legal action was just one of many factors that played a role, but this hardly means that litigation and major court victories were an inconsequential dimension of the struggle (1992: 737).

Not only did legal mobilization and its interplay with lobbying and direct political action help bring aboard the federal government as an ally in the school desegregation effort, but having the federal government on side gave added cover to moderate school officials and induced business leaders in a number of communities to support desegregation for fear of losing funding for education (Rodgers and Bullock 1976: 25-27; Rosenberg 1991: 100-103). The Southern Regional Council reported, for example, "at least half of the Mississippi school superintendents revealed in private conversations that their jobs were less difficult when the government was firm in demanding complete desegregation" (quoted in Rosenberg 1991: 103).

Ironically, however, as the NAACP gained more important allies, the pace of desegregation was reduced somewhat by members of the African-American community. Wirt's case studies of the school districts in Panola County, Mississippi reveals that, besides stalling on the part of local school officials to fully comply with HEW instructions, desegregation in Panola County was slowed by the reluctance of African-American parents to enroll their children in white schools (1970: 199-214). This resulted from worries that their children were not adequately prepared for more rigorous schooling, fear of reprisals in the community and in the schools, and the limitations of "freedom of choice" plans. In fact the SNCC, shortly before it turned to African-American separatism, decried the "fear of retaliation" that surrounded most "freedom of choice" plans. Other more subtle forms of delay built-in to many "freedom of choice" plans included: school bus routes that did not go through African-American neighbourhoods, infrequent periods of choice, "overcrowding" in white schools and suggestions that African-Americans would not be allowed to participate in various school activities (Wilkinson 1979: 110).

Hypothesis (3) Transformative legacy of legal mobilization

While the specifics of desegregation came to be more contested, after 1964 the principle of desegregation became more accepted. By 1968 the number of whites objecting to schools "With a Few Blacks" had dropped to below 30 per cent (Rossell 1995: 634). On a practical level, Rodgers and Bullock found a pattern in Georgia whereby a school district was more likely to desegregate if school districts around it had desegregated (1976: 62). This "social-psychological" effect has been noted by others as

well (Muse 1964: 210). Not surprisingly, as desegregation began to become more widespread, African-Americans became more concerned with how the actual process of desegregation was being carried out.

Whites were also concerned with more affirmative integration techniques, particularly mandatory busing being considered in some lower courts. Such fears, driven in considerable part by legal mobilization by civil rights groups, helped create a political climate that Richard Nixon exploited to win the presidency in 1968 with his "southern strategy," which opposed more radical integration orders, particularly busing (Orfield 1978: 234). Nixon's election would affect federal support of desegregation as will be made evident in the next section concerning 1968 onward.

Massive Integration 1968-onward

Hypothesis (1) Struggle to compel formal policy change

As the quest for policy change became somewhat more focussed on how desegregation was to be achieved and as African-American political power began to grow in the later 1960s (by 1971 over half of southern African-Americans were registered to vote and 1500 African-Americans held political office nationwide) the relationship between legal mobilization and political activity became more interactive and complex. At the federal level in the mid to late 1960s, a synergy developed between NAACP lobbying HEW for desegregation guidelines, judicial decisions that relied on HEW guidelines and HEW changing guidelines in response to judicial decisions, which resulted in desegregation requirements being ratcheted up (Wasby 1996: 5). Later, however, in 1973 civil rights groups had to go to court to order a then reluctant HEW to enforce the law. They won a victory in court and HEW responded affirmatively though often more in the way of procedure than substance (Orfield 1978: 292-294).

The relationship between legal and political resources was also apparent at the local level. In Atlanta, for example, the local NAACP in the early 1970s negotiated a deal with the local school board (against the wishes of the national NAACP) whereby the NAACP promised to suspend further legal action in exchange for more administrative power within school system (Rodgers and Bullock 1976: 22). The agreement was supported by Governor Jimmy Carter and Judge Griffin Bell (Orfield 1978: 25). In Topeka, Kansas, unsuccessful political action by African-Americans in the late 1960s for

greater levels of desegregation and more equitable desegregation plans (concerning the placement of schools, quality of schools, African-American faculty, etc.) resulted in a lawsuit that was settled out of court but attracted the attention of HEW in mid-1970s. The board filed a new desegregation plan but tried to avoid HEW by arguing that it was still technically under the jurisdiction of the federal courts from *Brown II*. The case was re-opened and remained in the federal courts into the late 1990s (Cole-Frieman 1996).

Legal mobilization, therefore, remained an important, if more interactive, component of the desegregation struggle and, until the early 1970s, the NAACP enjoyed legal support from the federal government (*Hypothesis 1(b)*). Not all African-Americans, though, were supportive of the goals of litigation during this time period. Derrick Bell, a African-American law professor, argued that the national NAACP and LDF, in pursuing remedies such as mandatory pupil reassignment, often ignored the preferences of local African-American parents for a variety reasons, including the fact that the organizations tended to be comprised of middle class African-Americans and were supported by liberal, middle class whites (Bell 1978).

Ironically, as some African-Americans were questioning the utility of more stringent judicial orders concerning desegregation, the federal courts, including the Supreme Court, became even more demanding in their desegregation decrees. Between 1968 and 1971 school desegregation developed more dramatically than in the preceding fourteen years (Orfield 1978: 14). In 1968, the Supreme Court would invalidate a "freedom of choice" plan and suggest affirmative remedies such as zoning and school pairing. A year later the Court would uphold a federal district court order that required greater faculty integration and quantitative standards to measure plans. In 1971, in *Swann v. Charlotte-Mecklenburg Board of Education*, the Court would approve of school busing plans to achieve greater integration in urban areas.

In doing so, the Court moved in the face of executive opposition. Indeed, Richard Nixon won the presidency in 1968 running on a "southern strategy" that included opposition to busing and stringent desegregation requirements. In *Swann*, the US Solicitor General called for minimal busing and emphasized maximum use of neighbourhood schools (Woodward and Armstrong 1979: 112). Interestingly, Chief Justice Burger, who was appointed by Nixon, participated in these unanimous decisions

after 1969. The new Chief Justice believed that he had to show his independence from Nixon and felt enormous pressure to maintain the norm of unanimity on desegregation cases (Woodward and Armstrong 1979). In *Swann*, there was also considerable strategic maneuvering amongst the judges and the voting switched a number of times. During the deliberations some judges raised concerns about a public backlash to busing (Wilkinson 1979: 147; Woodward and Armstrong 1979: 104: 128). What would be a muddled but unanimous outcome in *Swann* demonstrated the numerous variables that can enter into the judicial decision-making process and further revealed that courts do move, perhaps hesitantly, without the support of the executive branch or the public (*Hypothesis 1(b)*). It was not until the 1980s that the Supreme Court and the federal courts began to back away from mandatory reassignment remedies in favour of voluntary or controlled choice schemes (Rossell 1995).

Hypothesis (2): Policy Development and Implementation

By 1972-1973, the South had the most desegregated schools of any region in the county (Kluger 1976: 768; Rodgers and Bullock 1978; Rossell 1995). Table A.2 shows that over 90 per cent of African-American children were attending school with whites. Moreover, racial imbalance in Southern school districts had dropped from 0.73 in 1968 to approximately 0.37 in 1972 (1.0 represents complete segregation and 0.0 represents complete racial balance) (Rossell 1995: 620-621). During that same time, the proportion of whites in the average African-American child's school rose from 23 per cent to approximately 55 per cent (Rossell 1995: 618).

These findings are to be expected according to the NI model of judicial impact. Judicial decisions ordered more affirmative desegregation remedies (*Hypothesis 2(a)*); the public became more accepting of integration, though balked at remedies such as busing (*Hypothesis 2(d)*); the level of coercion exerted by the federal government on school districts to desegregate remained relatively strong, at least initially, despite Nixon's election (*Hypothesis 2(c)*); and in some communities the NAACP received support from city officials, the media and the business community (*Hypothesis 2(f)*). However, support from some parts of the African-American community for affirmative desegregation remedies was tepid. Each of these points will be briefly elaborated upon below, beginning with the forcefulness and clarity of judicial decisions (*Hypothesis 2(a)*).

In mid-1968 the Supreme Court in *Green v. New Kent County School Board* invalidated New Kent County's freedom of choice plan since 85 per cent of African-American students were still attending an all African-American school and, following the suggestion of the federal amicus brief that the Supreme Court require the dismantling of the segregation system (see Orfield 1978: 320), remarked that the "burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." In addition to using statistical indicators and requiring integration, the decision was novel for suggesting possible solutions, including pairing the two schools in the county or having each school serve a particular neighborhood (Wilkinson 1979: 120-121). A year later the Court upheld a federal district court order that Montgomery, Alabama achieve racial ratios of faculty at each school that reflected the racial ratio of the school district and that quantitative indicators be used to measure progress in desegregation. In the fall of 1969 the Supreme Court- now under the stewardship of Nixon-appointee Chief Justice Warren Burger- summarily reversed a decision by the Fifth Circuit Court of Appeal that granted Mississippi school districts a three month delay in submitting desegregation plans in order to avoid "chaos, confusion, and catastrophic educational set back" *(Alexander v. Holmes County Board of Education).* Despite the shock of the reversal, the Fifth Circuit proceeded to issue at least 166 opinion orders on desegregation from December 1969 until September 1970 (Wilkinson 1979: 118-121).

After the Supreme Court's *Green* decision, Federal District Judge McMillan announced that "the rules of the game" had changed and that the desegregation methods under which the Charlotte-Mecklenburg school board had operated under in good faith were no longer adequate. As part of his new remedial decree, Judge McMillan ordered mandatory busing of students to achieve more balanced ratios of African-Americans in schools at an initial start-up cost of over one million dollars. In upholding McMillan's decision, the Court encouraged the use of re-drawing attendance zones, faculty assignments, careful school building practices and majority to minority transfers as ways to achieve unitary status, but busing was the decision's most controversial feature. The Court indicated that overly long bus rides should not be countenanced and that busing

need not be used to insure that each school in the district reflect the exact ratio of minority students, but upheld the use of busing.

While *Swann* was more specific in its remedial decree than *Brown II*, the decision still left a reasonable amount of discretion in the hands of district court judges and contained a fair amount of ambiguity.[11] Not surprisingly, the federal courts began to increasingly sanction the use of bus transportation as a desegregation tool, but did so in inconsistent ways. The Fifth Circuit Court of Appeal ordered the elimination of 16 nearly one-race schools in Fort Worth, Texas with a busing plan that school board members argued would involve a daily round-trip of over two hours. In Memphis, however, the Sixth Circuit rejected such a long bus ride for elementary students and upheld a federal district court desegregation plan that left about one-third of Memphis' African-American children in all-African-American schools owing to "practical considerations" (Orfield 1978: 26).

Compared to earlier desegregation orders, however, the federal courts required more affirmative integration techniques than in previous eras. To pay for expensive remedial plans, especially those that involved busing, the federal courts also began ordering state and local governments to contribute financially. Some courts were also willing to interfere with state and local taxation schemes as well, though considerations like federalism and the scope of the remedial power of federal courts made some courts more hesitant than others in this area (Wolohojian 1989; Ryan 1999). The impoundment of state funds was also used as a device to compel desegregation. For example, the decision in *U.S. v. Georgia* (1970) threatened to cut-off state funds to school districts in Georgia that did not prepare desegregation plans by the fall of 1970.

Rodgers and Bullock argue that *U.S. v. Georgia*, which was initiated by the Justice Department, was crucial to getting the most recalcitrant school districts in Georgia to desegregate and prompted the Justice Department to initiate similar suits in a number of other states (1976: 20-21). These cases illustrate that the application of coercion on school districts to desegregate by the federal government was significant, if decelerated, even after Nixon's election in 1968. Federal funding available to school districts

[11] A judge of the Fifth Circuit Court of Appeals commented on the conflicting language in the decision by suggesting that, "It's almost as if there were two sets of views, laid side by side" (Woodward and Armstrong 1979: 127).

increased by two or three times in the late 1960's and into the early 1970s (Rosenberg 1991: 98). In March 1968, following on the heels of higher standards for desegregation articulated by the Fifth Circuit Court of Appeal, HEW issued new guidelines for obtaining federal funding that moved beyond freedom of choice: "Compliance with the law requires integration of faculties, and activities as well as students, so that there are no Negro or other minority group schools and no white schools- just schools" (quoted in Rodgers and Bullock 1976: 19). During this time, school integration continued at a steady and mostly peaceful pace, particularly in the rural South (Wilkinson 1979: 122), which highlights the importance of incentives in the implementation process (*Hypothesis 2(c)*).

Federal coercion remained strong until 1970 despite legislative and executive opposition because of bureaucratic politics. For example, after the Justice Department filed a motion supporting a southern school board's request for delaying the implementation of a desegregation plan, a number of lawyers within the Department resigned or covertly helped the LDF in desegregation cases. Leon Panetta, director of the Office of Civil Rights (OCR) within HEW tried to keep his program alive by ignoring parts of Nixon's announcement that the responsibility for desegregation was being shifted to the Justice Department. The "bureaucratic guerrilla warfare," as Orfield described it, went on for over half a year until Panetta was fired early in 1970- a move that prompted 1800 career employees of HEW to sign a petition asking the secretary to explain the department's civil rights policies (Orfield 1978: 286-289). Institutional dynamics also mitigated increasing Congressional hostility to desegregations plans, particularly in the House of Representatives. Amendments coming from the House to reduce support for integration schemes and/or interfere with the jurisdiction of the federal courts were defeated in the Senate or in conference committees (Orfield 1978: ch. 8). The complexity and difficulty of amending the Constitution insured that proposed amendments to prohibit mandatory busing were never passed.

Wariness of more intrusive integration schemes on the part of the President and members of Congress did have some influence on desegregation policy. On the legislative side, an *Emergency School Aid Act* was passed in 1970 and 1971-1972 that provided federal money to help districts desegregate though no monies were to be used

for busing (Orfield 1978: 247-258). On the administrative side, HEW began to vacillate late in 1968 and in the next few years proceeded to go through the following processes: testing alternative enforcement procedures, polarization and assertion of political control, relatively futile efforts by civil rights groups to reassert original goals through the courts and de facto new missions (Orfield 1978: 281). The shift of responsibility away from HEW did reward those districts that had stalled in developing plans and encouraged further delay. Moreover, because organizational norms within Justice discouraged the department from interfering with districts under court supervision through private litigation, a number of districts were not held to new, higher desegregation standards because of the inability of some groups to re-open litigation (Rodgers and Bullock 1976: 21). Thus the number of organizational veto points in the implementation process (the large number of individual school boards) created unevenness in the pace of desegregation (*Hypothesis 2(e)*).

Generally, however, as noted earlier, from the late 1960s until the early 1970s, desegregation proponents could rely on stricter judicial pronouncements and greater federal government coercion than in previous time periods. And, the public became increasingly amenable to the general concept of integration. By 1969 only 20 per cent of southern whites objected to a school "With a Few Blacks" (and those objecting to a school that "That is Half Black" dropped below 40 per cent by 1970), but only 10 per cent of whites (nationally) supported busing to achieve school integration (*Hypothesis 2(d)*) (Rossell 1995: 632-640). Overall, this led to the South becoming more desegregated than the North by the early 1970s. How the desegregation process played out in specific communities though, especially in urban areas, differed according to whether desegregation proponents were able to attract community allies (*Hypothesis 2(f)*).

For example, the Charlotte-Mecklenburg school board, the subject of the *Swann* case, tried to delay the implementation of busing, while being wary of contempt of court citations, citing a variety of factors as justification: costs; the difficulty in balancing desegregation with other educational needs; the lack of a constitutional mandate for busing, at least prior to the Supreme Court decision; and the need to maintain public support of the school system, particularly in light of the formation of parent groups to

oppose busing or at least to insure that the burdens of busing also fell on areas where affluent whites lived. An anti-busing rally in Charlotte drew 10 000 people and a civil rights attorney in the *Swann* case had his office firebombed. Yet, the Charlotte *Observer* had supported the busing order from the beginning. People in Charlotte began to acquiesce to or support the busing plan. One parent in 1972 said that "I wouldn't care if they bused my children to South Carolina, I'm so tired of it all," while another claimed that "though I'm surprised to hear myself say this, I think in years to come we'll see that it [integration] is something that had to be done" (quoted in Wilkinson 1979: 157). In 1973 civic leaders in Charlotte met to draft new desegregation plans and a more moderate school board was elected at the same time. Two years later the local district judge, in an order subtitled *Swann Song*, closed the file with a thank-you to school board members, school administration, community leaders, teachers and parents for making it possible to terminate the litigation.

Other communities had less fortunate outcomes. In Richmond, Virginia, a city that had a 65 per cent African-American population, whites in the affluent west end reacted to court ordered busing by voting for anti-busing candidates and forming parents associations. The editor of a local newspaper delivered over 29 000 letters that protested the abolition of freedom of choice to the Supreme Court and demonstrations were organized. In the face of public opposition, Virginia's Governor, Linwood Holton, personally escorted his child to a predominately African-American school. Though there was praise for such action in some quarters, the media and the voters reacted negatively. Subsequently, many whites in Richmond moved to the suburbs or sent their children to private schools, since two largely white suburban school districts just outside Richmond were left out of the desegregation plans when the Supreme Court narrowly voted to uphold a Fourth Circuit Court of Appeal decision that prohibited court orders from forcing the restructuring of internal governments to achieve racial balance in schools. By 1976, the percentage of white children in schools was less than 20 per cent (Wilkinson 1979: 151-154).

Although African-Americans were more supportive of busing to achieve integration, they were also divided on the issue. A national survey revealed that less than 50 per cent of African-Americans supported busing to achieve integration (Rossell 1995: 642). A

number of African-American leaders began to argue that African-American community schools would benefit African-American students more than schools that were developed to serve the needs of white, middle-class children (Wilkinson 1979: 146). One African-American principal remarked that, "it's just not true that you need whites to have a good school" (quoted in Kluger 1976: 77). Of course many African-Americans and African-American leaders supported busing to achieve greater integration and there were also charges that white opposition to busing was somewhat hypocritical, since the busing of African-American students had long been countenanced by whites when it was used to achieve segregation (Kluger 1976: 765); yet, it appears that litigation by a certain segment of African-Americans was used as a tool for changing policy that not only clashed with the preferences of many whites but of other African-Americans as well (Bell 1978; Watts 1993).

It is difficult, however, to determine whether this division within the African-American community affected the implementation of desegregation policies, but in certain communities there is evidence that certain African-Americans began to shift their priorities. As noted above, the Atlanta chapter of the NAACP disassociated itself from the efforts of the national NAACP to attain racial balance throughout the Atlanta school system and instead negotiated with the local board for improvements to African-American schools and greater administrative power in exchange for not pursuing racial balance throughout the system (Rodgers and Bullock 1976: 22). This event further revealed the competing policy conceptions within the African-American community when a number of civil rights groups opposed to the agreement complained that "constitutionally mandated desegregation is the most important issue to be resolved" after the Court of Appeal upheld the deal (quoted in Orfield 1978: 25).

Hypothesis (3): Transformative Legacy of Legal Mobilization

The shift in political priorities by some African-Americans towards greater community autonomy can be seen partly as a result of the outcomes of litigation efforts for desegregation (disappointment in the actual implementation of desegregation plans through the courts), though larger social trends also contributed to a greater sense of African-American power and independence (see Kluger 1976: 761-778).

Another legacy of this time period was that the Supreme Court laid the groundwork to confront northern segregation in *Swann* by approving busing for urban areas and by looking at how decisions by school officials affected patterns of segregation in school. The struggle for northern and western desegregation will be briefly discussed below to illustrate that the theoretical model of legal mobilization and judicial impact holds in this setting as well.

Western and Northern Desegregation

Hypothesis (1) Struggle to compel formal policy change

Case studies of desegregation in eight northern cities (San Francisco, Bay City, Pittsburgh, Lawndale, Newark, Buffalo, Baltimore, St. Louis) from the late 1950s to the mid-1960s by Crain revealed that six desegregation suits were launched in five cities and that two suits were settled out of court, while the other four never came to a hearing (1968: 133). A similar study by the Law and Society Review also found that lawsuits were initiated in five of the eight cities studied (Albany, San Francisco, Chicago, Evanston, Berkeley, New Haven, Pasadena, St. Louis). Legal mobilization was not an exclusive tactic in any of the cities and the sequence or combination of tactics varied from location to location. In some cities, such as Newark, legal mobilization was used to first demand policy change while in several other cities it was the preparation of a report on segregation to lobby the school board or the threat of a school boycott (Crain 1968: 139). That legal mobilization was not as prevalent as in the South is explained by the fact that African-Americans in the North had more political resources than their southern counterparts and arguably fewer legal resources, therefore legal mobilization was not an obvious tactic in the North.

However, in terms of legal resources, African-Americans were missing an indication by the Supreme Court that so-called *de facto* segregation was a constitutional violation. Furthermore, African-Americans did not have legal assistance from the federal government on the school desegregation issue until the late 1960s- HEW, the Justice Department and the courts were all waiting for one another to take some leadership on the issue (*Hypothesis 1(b)*) (Orfield 1978).

While northern African-Americans did not possess overwhelming political resources, they were able to exert some influence. For example, in response to African-American

political pressure from CORE, the NAACP, and the Urban League in the early to mid-1960s, the Denver School Board would commission a report on racial segregation in schools and subsequently alter policy to alleviate identified problems to some degree (Pearson and Pearson 1978: 181-182). At around the same time, the NAACP in Massachusetts joined forces with the Republican Lt.-governor, the Democratic House Speaker and state education officials to help pass the state's Racial Imbalance Act (Smith 1978: 38-39). In a study of eight northern cities there was a correlation, albeit a small one, between the size of the African-American voting bloc and school board acquiescence on the desegregation issue (Crain 1968: 155).

Legal mobilization became a more prominent tool to compel formal policy change after African-Americans became dissatisfied with the limited results of earlier political efforts and the courts and the federal government began to scrutinize northern desegregation more carefully near the end of the 1960s. Put differently, legal mobilization was more frequently used as African-Americans became aware of the limits of their political resources and their legal resources increased. This trend would accelerate when in 1973 the Supreme Court, would order desegregation in Denver in *Keyes v. School District No. 1.*

However, as will be discussed below, the actual policy change resulting from federal court desegregation orders would often be limited by a number of factors, including the lack of forcefulness in the northern and western desegregation decisions by the Supreme Court. To what degree this hesitation resulted from interrelated influences such as the increasingly ideological split between liberals and conservatives on the Court, or from the influence of Nixon appointees, or a genuine commitment to 'judicial self-restraint' by some members of the Court, or the willingness of the Court to bow to white opposition or a number of other factors is difficult to surmise (*Hypothesis 1(b)*) (see Wilkinson 1979: ch. 9).

Hypothesis (2): Policy Development and Implementation

According to a number of commentators, the primary reason for the general ineffectiveness of legal mobilization in the early 1960s was that the courts had not taken a clear position that de facto segregation was a constitutional violation (Crain 1968: 133-134; Law and Society Review 1967: 101). At the local level, the ambiguity of the law

reduced the leverage of legal mobilization by proponents and allowed opponents to use it as an issue confounding device (Law and Society Review 1967: 101-103), while at the national level such ambiguity limited the involvement of the federal government as an ally. Not only were agencies like HEW and Justice hesitant to move without the backing of the courts, but de facto segregation had been omitted from the 1964 Civil Rights Act largely because legislators interpreted the Supreme Court's refusal to hear a case from Gary, Indiana, which found that de facto desegregation was constitutional, as an indication of the Court's stance on the issue (Orfield 1978: 237). The lack of clear judicial guidelines, as predicted by *Hypothesis 2(a)*, was a drag on policy change.

The threat of litigation or the filing of a court suit did, however, help civil rights groups in some communities to gain some access or influence over the policy process. In Chicago, it helped lead to the Hauser Report; in San Francisco the judge encouraged the parties to negotiate, which helped lead to some policy change; and the suit in Newark led to a new open enrolment plan. On the one hand, therefore, the ability of groups to utilize legal resources- even if indefinite- in the larger political process should not be dismissed; on the other hand, the results of these legal activities were limited. Crain, for example, speculates that other forms of political action besides litigation by civil rights groups probably would have achieved the same result in Newark perhaps in a faster time frame (1968: 133).

Both Crain and the Law and Society Review emphasize that the school boards operated with some degree of independence from political activity (by African-Americans or whites) and from public opinion, though Crain argues that appointed boards had somewhat more leeway (1968: 161-162). These arguments fit with NI theory, as does Crain's argument that boards could even sway the public to some degree either for or against segregation. Crain parts company with NI theory, however, when he tries to trace the board's behaviour back to forces such as the economic structure of the city and the type and style of city elites. Yet he admits, as NI theorists have pointed out, that such a model is one of equilibrium and does not allow for actors to be influenced by past events (1968: 154). Moreover, the model seems to contradict his earlier suggestions that school boards can change (to some degree) the political environment. Nevertheless, policy change was generally only incremental, thereby suggesting that public opinion set

broad parameters for the freedom of the board. Coercion by state officials also had an effect on school boards, but this coercion often resulted more from political factors than lawsuits. In Buffalo, an NAACP petition to the state's Education Commissioner brought quick results (Crain 1968: 134).

Legal mobilization and courts would become more important in the desegregation struggle when the logic of southern school cases, especially with their busing decrees, began to be applied in the north and African-Americans became discouraged with the pace of policy change. In Denver, for example, new school board elections resulted in a rolling back of the desegregation policy fought for by civil rights groups in the late 1960s. A lawsuit was launched that resulted in a partial victory at the district court level and a subsequent victory in the Supreme Court in 1974 (see Pearson and Pearson 1978).

A number of factors, however, would limit the policy results, though the amount of policy change varied from community to community depending on how political actors operated within structural constraints. The first constraint had to do with the nature of the decisions by the Supreme Court (*Hypothesis 2(a)*). By requiring that litigants prove that there was some intention on the part of school officials to increase or maintain segregation in western and northern schools, the Court made the process of litigation very time consuming and resource intensive. Moreover, the rules for proving intentional segregation set out in *Keyes* and what the appropriate remedies should be were quite ambiguous. Decisions on these issues tended to vary from one northern court of appeal circuit to the next (Combs 1982). Decisions could also vary within the same circuit. For example, a judge ruled that optional attendance zones, construction of schools in segregated neighbourhoods and assignment of African-American teachers to African-American schools in Grand Rapids, Michigan all had permissible explanations. A different judge in nearby Kalamazoo deemed similar practices unconstitutional. Both judgements were affirmed by the Sixth Circuit Court of Appeal (Wilkinson 1979-199-200). A year after *Keyes*, in *Milliken v. Bradley* (1974), the Supreme Court made it very difficult for lower courts to order interdistrict desegregation plans. As the city school districts were becoming increasingly African-American this made meaningful desegregation difficult- a point made by Thurgood Marshall, now a Supreme Court justice, in his dissent (Wilkinson 1979: 227).

Another factor that worked towards limiting desegregation in the North was that desegregation orders, particularly those involving busing, were quite unpopular with the white public and only had the support of about half of the African-American public (*Hypothesis 2(d)*) (Rossell 1995; Taylor 1986). Not only did this have some influence on local decision-makers, but this popular sentiment was also felt in Congress and the executive branch. The withdrawal of legal and financial incentives to desegregate by the federal government was another barrier to policy change (*Hypothesis 2(c)*). Many of the legislative attacks on mandatory busing were deflected by liberals in committees or by filibusters in the Senate, but administrative agencies were affected by the President's policies. Hence, despite internal grumbling, the Justice Department would promote rather conservative views about how northern desegregation had to be proved and what remedies were appropriate. Orfield concludes that the Justice Department failed to take steps to see that the Keyes [1974] decision was carried out, unlike its action after the Green [1968] decision (1978: 343). Similarly, even despite a court order instructing it to enforce the 1964 Civil Rights Act, HEW was reluctant to energetically attack northern segregation. Indeed, in the face of executive pressure, when Congress passed a complex amendment directed towards executive agencies that limited busing in 1974, instead of ignoring it or studying it for several months to determine legislative intent- both normal practices- HEW quickly used it as a justification to limit the types of remedies that it would order (Orfield 1978: 294-314).

The timing and level of desegregation in northern cities became functions of the processes and substantive orders employed by federal district court judges (subject to review by Courts of Appeal) (*Hypothesis 2(a)*), the attitudes of school officials and organizations (*Hypothesis 2(b)*), and the coalitions of political actors (at the local and state level) and civic elites that supported or opposed desegregation and to what degree and whether they were willing to offer incentives for desegregation (*Hypothesis 2(c)- incentives, 2(e)- veto points, and 2(f)- exploitation of the political opportunity structure*). These points can be illustrated by looking at desegregation in Boston and Buffalo in the 1970s and 1980s. Scales-Trent argues that desegregation proceeded more smoothly in Buffalo than in Boston- two cities with comparable socio-demographics- largely because of the skill of Judge Curtin in planning the desegregation process, setting the pace of

desegregation and monitoring the process of reform (1990: 132-133). He effectively overcame the structural limitations of the court by meeting frequently with the parties and holding community meetings to generate support or at least understanding in the broader public (Scales-Trent 1990: 162). Judge Curtin was helped in this effort by the support of the superintendent of the Buffalo School Board- partly because it allowed him to undertake other changes to the school system in the face of bureaucratic inertia- and the support of Buffalo's religious community (Scales-Trent 1990).

Judge Garrity in Boston did not have such support. As Smith points out,

> In the months that followed his decision, Judge Garrity learned that desegregation was much more easily ordered than implemented... He had not anticipated the variety and complexity of devices that public officials and bureaucrats would employ in their all-attempt to undermine and frustrate the desegregation order. Moreover, he seemed unprepared for the degree of public opposition and polarization (1978: 52)

Among other things, the School Committee claimed that it did not have the necessary funds to implement the decree. Boston's Mayor requested some funds (though fewer than what the School Committee had asked for) from the City Council, though this money was not immediately forthcoming because an ardent opponent of busing chaired the Council's Ways and Means Committee (Smith 1978: 52-57). When money did come from various sources, it took a court order to force the School Committee to reallocate parts of its budget to implement the desegregation program.[12] Generally school committee members promised not to go any farther than the judge ordered them and they promised to appeal every order (Wilkinson 1979: 209). After an unsuccessful appeal of Judge Garrity's order, three members of the School Committee rejected submitting a plan for Phase II, which led Judge Garrity to reluctantly charge them with civil contempt. A plan was subsequently submitted to the court but it did not include provisions for busing. Three other plans were submitted, including one by the NAACP, which would be used as a basis for the development of a desegregation plan by four special court masters appointed by Judge Garrity.

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[12] Some aid came from the state and the federal government. The court order was obtained from the Massachusetts Supreme Judicial Court (because earlier litigation concerning desegregation had taken place in this court) (Smith 1978: 52-57).

There was significant public opposition to Judge Garrity's July order as whites organized groups to protest the order and begin a school boycott. Considerable violence ensued in some parts of the city (Wilkinson 1979: 207). Politicians at all levels of government were at best ambivalent about the judge's order (Taylor 1986: 133-135, 178; Smith 1978: 60-61; Wilkinson 1979: 209). In May 1975 Judge Garrity issued his Phase II order which was largely based on the recommendations of the court appointed masters but included busing a greater number of students- over 20 000- to achieve greater racial integration. In addition to busing the plan called for changing school districts, creating high-quality "magnet" schools to attract students, programs for disadvantaged children, more racial balance in faculty assignment, and pairing schools with post-secondary institutions to improve the overall quality of education in Boston. Judge Garrity's attempt to overcome the structural constraints of the court were less successful than Judge Curtin's in Buffalo- a Citywide Coordinating Council (CCC) was created by Judge Garrity to help facilitate the implementation of the plan had to be restructured after internal bickering reduced its effectiveness- but, nevertheless, some support for desegregation began to appear from politicians, such as Governor Dukakis, and the religious community (Smith 1978: 98-90). While public opinion was beginning to acquiesce to the implementation of the plan, public opposition remained strong (Taylor 1986: 178-179). The Boston School Committee also remained committed to stalling the implementation of the court's plans. Appointing a new school superintendent was just one of many tactics used for avoiding the decision, although this particular move backfired when the superintendent said, "...I call on everybody in the city to understand we are under a court order and we have to abide by it" (Smith 1978: 98).

Despite local official recalcitrance and public opposition, Judge Garrity's Phase II order had the effect of creating greater racial balance in schools and, according to some commentators, generally improved the rather dismal quality of education that existed in Boston (Taylor 1986: 198-199). Following the decision, however, a white exodus began from the school system. In 1974 the enrollment in Boston public schools included 53 593 whites, 31 963 African-Americans, and 8 091 others; ten years later there were 15 257 whites, 27 400 African-Americans and 14 743 students from other backgrounds (Taylor 1986: 196). In 1977, these demographic shifts coupled with subtle shifts in public

opinion resulted in a African-American being elected to the Boston School Committee for the first time in seventy-six years while three anti-busing leaders were not re-elected. The Boston school system remained under court supervision until the mid-1980s.

The desegregation experience in Boston may not have been as smooth as in Buffalo, but arguably it proceeded more quickly. In 1981, five years after the desegregation process began, the plaintiffs succeeded in getting the Second Circuit Court of Appeal to express concern that the process of desegregation had "dragged on too long." Judge Curtin subsequently ordered the School Board to make fixed assignments and to achieve those results through limited busing. Judge Curtin also ordered the city of Buffalo to provide extra monies to the School Board for the purposes of carrying out desegregation upon the recommendations of a special master appointed to investigate the impasse. In addition to financing questions, Judge Curtin became involved in questions ranging from how handicapped children were to be dealt with to training mentally challenged children to the hiring of faculty.

By 1988 the school district was still under the court's jurisdiction though only four schools out of seventy-seven had greater than a 65 per cent minority enrollment- the upper threshold set by Judge Curtin for a school to be considered integrated. The federal district court order, therefore, generated more integration in the Buffalo school district than orders from the state Commissioner of Education in the mid-1960s. In response to the Commissioner's order, the Buffalo School Board enacted a voluntary integration program in 1966 and bused some African-American junior-high school students to predominately white peripheral schools. However, since the Board also allowed white students to transfer out of integrated schools, very little desegregation occurred in Buffalo prior to the federal court order (Scales-Trent 1990: 123-124).

The case studies of Buffalo and Boston illustrate the complex and somewhat contingent nature of northern school desegregation and attempts by the courts- some more successful than others- to adapt to these new roles (see Kalonder 1978). They also reveal displeasure within the African-American community over the implementation of desegregation, which also created friction within the African-American community in certain instances. The NAACP in Buffalo, for instance, refused to defend the district court order against the city before the appeal court for more funding, because it believed

that many school districts used such monies not for desegregation purposes but to finance other measures, especially those not completely supported by local communities. The Second Circuit noted that this position probably reflected the institutional concern of the national NAACP, rather than the concerns of the local plaintiffs led by the Citizen's Council on Human Relations (CCHR)- a local interracial group that had been formed in the early 1960s. Some African-American parents in Buffalo complained about schools being closed primarily in minority neighbourhoods, while others were concerned that the magnet schools would create a two-tiered educational system in Buffalo that disproportionately limited educational opportunities for African-Americans, especially lower income African-Americans (Scales-Trent 1990). In Boston there was a sense that African-Americans and poor whites were sharing a disproportionate share of the desegregation burden (Wilkinson 1979: 210-213).

Hypothesis (3): Transformative Legacy of Legal Mobilization

The Boston and Buffalo examples demonstrate how much more complex and less traditional litigation in this area has become. Indeed, the lawsuit that demanded more money from the City of Buffalo saw many plaintiffs on the same side as the School Board (Scales-Trent 1990: 163)- not an unusual occurrence in the complex, multipolar litigation of northern school desegregation cases (Ryan 1999). More recent litigation is explicitly concentrating on providing a child with a quality education using state constitutional provisions rather than the US Constitution (Hansen 1993: 873).

This shift occurred after the Supreme Court in the 1990s further concluded that the standards established by some of the circuit Courts of Appeal for dissolving desegregation decrees were too stringent and that more respect should be given to the autonomy of school boards (Carter 1993). It is difficult to assess, however, whether the shift occurred because of: opposition from the Republican controlled executive branch; increases in the number of Republican appointed judges, the unpopularity of busing remedies with whites and near majority of African-Americans, or the perceived failure of the courts to "solve" the problem of desegregation and its associated educational and social questions (Carter 1993; Linseth 1993; Hansen 1993; Cole-Frieman 1996; Rossell 1995).

The above discussion suggests that changes in the rules altered the tactics of rights claimants and school boards (i.e. school boards supporting claimants in litigation, claimants looking to state constitutions in the wake of losses using the federal constitution in the Supreme Court). However, it is arguable that legal mobilization and judicial decisions have also contributed to reassessments of the goals and attitudes underlying desegregation. The division of opinion within the African-American community in Buffalo over the remedies designed or allowed by the courts was not unusual (Wilkinson 1979; Cole-Frieman 1996). On average, approximately 50 per cent of African-Americans supported mandatory busing to achieve racial integration in surveys conducted in the 1970s and early 1980s (Rossell 1995: 642). Moreover, only 33 per cent of African-Americans were definitely willing to send their children to a magnet school in an opposite race neighborhood (Rossell 1995: 650). The 1972 National Black Political Convention held in Gary, Indiana came out opposed to busing on the encouragement of CORE's executive director. As Wilkinson points out, in individual communities African-American parents were not willing to have their children bused to inferior schools or schools where they would be considered "slow learners" or "troublemakers" but were supportive of well-crafted desegregation plans that promised enhanced educational opportunities (1979: 333). Now debates are going on within the African-American community whether or not African-American immersion schools, which would also emphasize African-American culture, would be preferable and whether or not they would be allowed by courts under the Fourteenth Amendment (Brown 1993). In some respects, this policy debate has come full circle and legal mobilization and judicial decisions were, and remain, important components of this policy struggle.

Conclusion

In 1970, Levine called for the development of more parsimonious and general impact models built on theories such as communications theory, learning theory, organizational theory or utility theory. This desire was not surprising given that Wasby's book published in the same year contained over a hundred hypotheses about judicial impact. However, this review of school desegregation makes it clear that no one general theoretical model will suffice to explain the effects of legal mobilization and judicial decisions on a complex policy area. Rodgers and Bullock's 1976 study, for example,

touts the advantages of utility theory in explaining school desegregation in Georgia. While the theory does have predictive and explanatory power, Rodgers and Bullock's research reveal that the attitudes of school officials- a component of organizational theory- were also important and they also acknowledge that *Brown* was a symbolic victory that grounded African-American rights in the Constitution, served as one of the catalysts of the civil rights movement and created political controversy (1976: 123-124). Moreover, their study illustrates how important state actors were in providing incentives for desegregation and how institutional features (federalism, the relationship between the state and local school boards over education policy, etc.) structured the policy struggle.

On the other hand, Johnson and Canon's 1984 book on judicial impact made a number of interesting observations about the impact of *Brown* and subsequent judicial decisions on school desegregation policy (a number of which were noted above), but used a model that was described as "heuristic" (describing the reaction of various "populations" to judicial decisions- interpreting, implementing, consumer and secondary). The discussion of how the various populations reacted to judicial decisions drew on various theories- communications, organizational, environmental, etc.- but in the absence of a coherent framework the theoretical explanatory and predictive power of the discussion was limited.

Between these two theoretical poles- a general theory and a heuristic model- Rosenberg offered his model in 1991 that emphasized incentives, the state of public opinion, whether administrators wanted to hide behind decisions and the support of Congress and the executive for the Supreme Court to make a positive decision. It is evident that a number of these factors were important, such as the role of incentives and public opinion, which suggests that those who maintain that the effects of legal mobilization and judicial decisions are completely "indeterminate" overstate the case. However, it is also clear that Rosenberg's model and methodology miss the mark in a number of interrelated ways: first, institutions were important to the provision of incentives and in mediating the environment; second, the Court did not make decisions in concert with the executive and Congress in the area of school desegregation; third, the content of judicial decisions made a difference in policy change; fourth, *Brown* did play some role in spurring subsequent legal and political action by African-Americans; fifth,

there were complex interdependencies between judicial decisions, federal funding guidelines, and political and legal activity by African-Americans; and, finally and more generally, Rosenberg's restricted view of causality leads him to underestimate the influence of legal mobilization and judicial decisions on putting school desegregation and civil rights on the agenda (polarizing Southern public opinion and politics, attracting the attention of northern public opinion, generating media attention, etc.) and to incorrectly conclude that the flow of social, economic and political history would have led to school desegregation (at least as quickly) without judicial intervention.

The NI model of predicting and explaining the impact of legal mobilization improves on these previous efforts. Unlike other models, for example, the NI model attempts to better explain the initiation of litigation and how long it is sustained effectively. The need for institutions- the constitution, judicial decisions, state actors undertaking litigation and intervening, etc. to supply legal resources (*Hypothesis 1(a)*) was shown to be important. Indeed, Orfield's (1978) book on school desegregation highlighted the importance of state actors contributing to the litigation effort in a chapter entitled "The Limits of Private Enforcement." The overview did not take an in-depth analysis of judicial decision-making, but it did reveal that decisions were not simply the product of individual attitudes or the Court's environment- the law and other institutional factors also played a role in judicial outputs (*Hypothesis 1(b)*).

The factors listed in *Hypothesis 2- (a)* the nature of legal rules, *(b)* the attitudes of individual and organizations implementing the decision, *(c)* the presence or absence of incentives, *(d)* the political environment, *(e)* the number of veto points, and *(f)* the agency of rights claimants- were all shown to be relevant to how school desegregation policy developed in the wake of legal mobilization and judicial decisions. Moreover, as the NI model predicted, institutions were an important component of each of these factors as these selected examples suggest: the federal government was critical to the provision of incentives and the fragmented nature of the US presidential system influenced the timing and nature of incentives provided by the federal government, desegregation ran against the organizational practices of many school boards, appointed superintendents were more willing to undertake desegregation than elected superintendents; electoral systems exacerbated opposition to desegregation in a number of state legislatures; and, early in

the process Southern states used laws to interfere with the activities of the NAACP to follow-up on legal victories; and so forth.

It is, however, difficult to assess the relative importance of each of the factors in *Hypothesis 2* and make strong arguments about causality. There are a number of reasons for this in addition to the limitations inherent in a reinterpretation of existing studies. First, there are a number of variables, which requires a high number of observations to clarify the role of each variable. In fairness, however, the NI model does not include a number of other factors suggested in previous studies of judicial impact, such as the perceived legitimacy of the court and, happily, these did not seem to be relevant in the struggle over school desegregation (see Rodgers and Bullock 1976). Second, there was interdependency between the factors and they tended to change in the same direction over time. Judicial decisions were becoming stronger at the same time public opinion was becoming more favourable and the federal government was offering incentives for desegregation and so on. Third, in an effort to be more sensitive to complex causality than Rosenberg, the overview of the school desegregation struggle relied on a number of studies that are case study oriented.

Hypothesis 3, concerning the transformative legacy of legal mobilization was not designed to be testable in a rigorous sense, but the thrust of the hypothesis- that changes to legal rules might cause instrumental changes in strategy and deeper changes to goals and attitudes- was shown to have some validity. Recall, for example, Martin Luther King, Jr.'s statement that the Supreme Court's *Brown* decision "further enhanced the Negro's sense of dignity and gave him even greater determination to achieve justice." Also, more recent multipolar litigation that sometimes features school boards and African-American groups on the same side and divisions between African-Americans over the practical and philosophical ramifications of using the courts to achieve integration further reveals how strategies and goals can come to be altered in the wake of past efforts to achieve policy change through legal mobilization.

It is therefore hoped that the NI model will be helpful in explaining and predicting the impact of legal mobilization and judicial decisions on official minority language education policy in Canada, though it is not expected that the model will generate strong causal inferences. The next chapter describes the evolution of official minority language

education policy in Canada from the mid-1970s until 2000. The following chapters more closely examines policy change in selected provinces, primarily Alberta and Ontario. This is followed by an application of the NI model to explain the policy outcomes—explanations that are bolstered by heuristic comparisons with the US school desegregation struggle.

Chapter 5- Official Minority Language Education Policy: National Description

Questions surrounding where and how official minority language students should be educated have been contentious ones in Canada since Confederation. Magnet describes education as "the most explosive issue dividing French and English Canadians" (1995: 139). This chapter describes the evolution of official minority-language education (OMLE) policy in the nine provinces outside Quebec. The review concentrates on the time period from the mid-1970s until the year 2000. The review is broken down into the following time periods: **historical context and pre-1978 OLME policy, 1978-1982** (from the Premiers' commitment to minority language education in the 1978 St. Andrews declaration to the 1982 entrenchment of OLME rights in section 23 of the Charter of Rights), **1982-1984** (from the introduction of the Charter to the Ontario Court of Appeal's major decision on section 23), **1984-1990** (from the Ontario Court of Appeal decision to the Supreme Court's *Mahé* decision), and **1990-2000** (from *Mahé* to following the Supreme Court's section 23 decision in the *Arsenault-Cameron v. P.E.I.* case).

The overview includes aggregate data about the number of schools offering French first-language (FFL) programs, enrolment in FFL programs, the number of Francophone schools, and enrollment in Francophone schools over time. Also, public opinion towards minority language education issues will be presented for provinces and/or regions over time. Qualitative data taken from primary documents produced by both state actors and Francophone parents and OMLGs, from newspaper accounts, from secondary studies and from interviews with participants (politicians, bureaucrats, OMLG leaders, and parents) in the OMLE policy process also will be featured.

Each interview lasted approximately one half-hour. Initially, interview participants were not told that the study investigated the impact of legal mobilization and judicial decisions on policy so as not to bias their responses when I asked them near the start of the interview about what factors they identified as most important in driving OMLE policy development over time. As each interview progressed, the questioning became more fluid as I asked participants to elaborate on previous responses or asked them questions about issues that would be unique to their role in the process.[1] While some of

[1] One interview, with Marion Boyd, was conducted through email correspondence. See Appendix D.

the information from interviews is presented in this chapter, the next chapter—the Alberta case study chapter—features the bulk of the interview material.

Tables are provided in this chapter to summarize aggregate data and to summarize policy changes over time, but a number of tables are provided in Appendix B to help facilitate the overview in this and subsequent chapters and the analysis in Chapters Eight and Nine: Table B.1 summarizes demographic data; Table B.2 provides data on the total number of schools offering French first-language (FFL) programs in each province outside Quebec, enrolment in those schools, the number of homogeneous French schools, and enrolment in homogeneous schools for selected time periods; Table B.3 details OMLE policy in each of the nine provinces outside Quebec for the time periods described above; Table B.4(a) shows when minority language education cases, particularly section 23 cases, were initiated and Table B.4(b) shows when judicial decisions were made and describes these decisions. Table B.5 outlines the position of the appellants, respondents and interveners in the *Mahé* case before the Supreme Court. Appendix C details the results of opinion polls on official minority-language education policy. Appendix D lists the individuals interviewed for the study.

Following this chapter, Chapters Six and Seven will present a more detailed review of OMLE policy during the same time period for the provinces of Alberta and Ontario (and, to a lesser extent, Saskatchewan), respectively. Chapters Eight and Nine then analyze these developments in light of the NI model of judicial impact presented in Chapter Three.

HISTORICAL CONTEXT and PRE 1977/78 OLME POLICY

Education was made an exclusive area of provincial jurisdiction at Confederation by virtue of section 93 of the *British North America (BNA) Act, 1867* (now *Constitution Act, 1867*), subject to the provision that denominational school rights not be prejudicially affected and that religious minorities (Catholic or Protestant) could appeal to the federal cabinet for relief if their education rights were violated. No minority language education rights were included in the *BNA Act*, though it was believed that such rights would be protected by denominational school rights: Francophone children were taught in Catholic schools outside Quebec and Anglophone children were taught in Protestant schools inside Quebec (Foucher 1985: 2). However, as English-speakers began to significantly

outnumber French-speakers in provinces outside Quebec, Catholic schools and the teaching of French came under political attack, particularly in Manitoba and Ontario (see Brown, ed. 1969). The Manitoba Schools Crisis (1896) demonstrated the limits of an appeal to the federal government for remedial legislation- the introduction of a remedial bill led to the fall of the government and immediately thereafter the clause became a "constitutional dead letter" (Magnet 1995: 141). Appealing to the courts offered no more protection. The Judicial Committee of the Privy Council in 1917 ruled that Ontario's ban on the teaching of French after the second grade did not violate section 93 of the BNA Act, because that section protected only the religious, not the linguistic, aspect of education (*Mackell*, 1917).

By the 1930s, however, lobbying by Francophone groups and altered attitudes towards Francophone communities resulted in legislation in many provinces which allowed instruction in French (and often other minority languages) for portions of the school day in specific grades (see Martel 1991: ch. 2). In reality, the use of French as a language of instruction was often greater than allowed by the law owing to private French schools or small publicly-funded districts that Francophones effectively controlled, though provincial consolidation of school districts and the declining viability of private institutions would limit these de facto opportunities for French instruction and Francophone control of schools and programs (Aunger 1989: 216-217; Martel 1991: 56; Wiseman 1992: 714-715).

By roughly the mid-1960s a number of provinces expanded by legislation or regulation the time and number of grades that French could be used as a language of instruction (Martel 1991: 56). Around this same time, the federal government became interested in promoting the concept of pan-Canadian bilingualism largely in response to growing French-Canadian nationalism in Quebec manifesting itself in the Quiet Revolution (Julien 1991: 117). The Royal Commission on Bilingualism and Biculturalism highlighted the need for French to be used as a language of instruction for Francophones and recommended that bilingual and unilingual French schools be established in the provinces, though the Commission stopped short of advocating all-French schools for all Francophones outside Quebec (Julien 1991: 119). Resulting from the Commission's Report was the passage of the federal Official Languages Act (1969),

the creation of the Office of the Commissioner of Official Languages (COL) and the creation of the federal Bilingualism in Education policy (later known as the Official Languages in Education (OLE) program) in 1970. The program would be used to transfer funds for the provision of official minority-language education instruction and immersion programs across Canada (Commissioner of Official Languages (COL) Report 1987: 181). The federal government's 1969 constitutional white paper also proposed entrenching minority language education rights in the constitution:

> The right of the individual to have English or French as his main language of instruction in publicly supported schools in areas where the language of instruction of his choice is the language of instruction of choice of a sufficient number of persons to justify the provision of the necessary facilities.

Minority language education rights were absent from the proposed 1971 Victoria Charter, but were recommended for inclusion by the 1972 (Molgat-MacGuigan) report of the Joint Committee of the Senate and House of Commons on the Constitution of Canada (Foucher 1985: 3).

Rather than entrenching minority language education rights in the Constitution, Quebec Premier Rene Lévesque in July 1977 proposed bilateral reciprocal agreements with the other provinces. Lévesque promised to suspend provisions of Bill 101 that limited access to English-language education to the children of parents who were educated in English in Quebec (and children who had already started their education in English) if another province agreed to allow Quebec émigrés access to an agreed upon level of educational services (Mandel 1989: 106-107). The other premiers, however, rejected this offer and, instead, issued a pledge at the 1977 St. Andrews Conference to improve access to minority language education. This pledge was reaffirmed at the 1978 Premier's Conference in Montreal with all ten premiers agreeing to the following statement:

i) Each child of the French-speaking or English-speaking minority is entitled to an education in his or her language in the primary and secondary schools in each province wherever numbers warrant; and

ii) It is understood, due to exclusive jurisdiction of provincial governments in the field of education, and due also to wide cultural and demographic differences, that the implementation of the foregoing principle would be as defined by each province... (Council Ministers of Education (CMEC) Report 1983: 1-2)

The demographic differences that the statement refers to can be summarized as follows: those claiming French as a mother-tongue in 1976 ranged from under 2 percent of the population (B.C., Newfoundland), from 2.5 to 3 percent (Alberta and Saskatchewan), to around 5 percent (Manitoba, Ontario, Nova Scotia, P.E.I), and up to 33 percent for New Brunswick (see Table B.1).

Conservative Premier Bill Davis of Ontario also called for official minority-language education rights to be constitutionally entrenched, but the suggestion received little support from the other premiers (Johnson, *Globe and Mail (G&M)*, Feb. 24, 1978: 2). Trudeau's suggestion of entrenching the right to attend English or French schools received strong support in a 1977 Gallup Poll with 85 per cent approval (see Table B.6-Appendix B), though this belies the strong opposition to FFL programs and French schools from English-speakers that occasionally manifested itself in various local disputes (Ruest 1985: 63; COL Report 1979: 31).[2] Later in June 1978, the federal government as part of Bill C-60, the Constitutional Amendment Bill, proposed that provinces could opt-in to providing official minority-language instruction in the facilities required for such instruction in areas of the province where numbers warranted. For a variety of reasons, however, Bill C-60 failed, which meant that official minority-language education rights would not be constitutionally enshrined until the introduction of the Charter of Rights in 1982.

Did the provision of and access to OLME programs and schools begin to improve prior to the introduction of the Charter in 1982, owing to the political promises made by the Premiers in 1977 and 1978? In order to answer this question the situation in the provinces prior to 1978 must be compared to the 1978 to 1982 time period. Policy evaluations for all the time periods are made on three interrelated dimensions:

> i) *instruction*- are French first-language (FFL) programs provided (as opposed to French immersion which is designed to teach French as a second-language (FSL)) and what are the rules surrounding their provision and access to them;

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[2] Part of the discrepancy between the 1977 poll and local opposition might stem from the fact that poll did not distinguish between French schools designed for Francophones and French immersion schools. As will be explained further in the analysis chapter, local opposition partly resulted from the fact that calls for a Francophone school seemed to smack of "separatism" or "segregation."

ii) *facilities*- facilities are generally of three different types (see Martel 1991: 69): "homogeneous" French schools that cater only to minority language enrolments and where the administration of the school is in French; "mixed" schools wherein the enrolment is not made up exclusively of minority language students, though FFL programs are provided in separate classrooms; and "bilingual" schools in which instruction to the minority is defined in terms of teaching time spent on the language of the minority (usually around half of the time is spent learning in French); and

iii)*management and control*- how much control do minority language parents have over the provision of programs, staff selection, facilities, budgets, etc.?

The number and type of schools providing FFL programs and enrolment in those schools are other important policy indicators. Table 5.1 outlines OLME policy in each province outside Quebec prior to the 1977 school year (for details see Table B.3 Appendix B).

Table 5.1- OLME Policy Pre 1977/1978

	Instruction	**Homogeneous Facilities**	**Management**
BC	Discretionary (no law or regulation)	No	No
AB	Discretionary	No	No
SK	Discretionary	No	No
MB	Qualified Mandatory	Qualified No (de facto)	Qualified No (de facto in one area)
ON	Qualified Mandatory	Qualified Yes	Qualified No (de facto in certain areas, also advisory committees)
NB	Qualified Mandatory	Qualified Yes	Qualified No (de facto in certain areas)
NS	Discretionary (no law or regulations)	No	No
PE	Discretionary (no law or regulation)	Qualified No (de facto)	Qualified No (de facto in one area)
NF	Discretionary (no law or regulation)	No	No

Four provinces had no law or regulation concerning French language instruction; nevertheless FFL programs were offered in the Atlantic provinces that had no official language policies. Nova Scotia, for example, had close to 30 schools (none homogeneous) that offered some form of FFL instruction to close to 5,600 students.

Subject to approval by the Minister of Education, school boards in Saskatchewan and Alberta could offer French-language programs (Discretionary), while in Manitoba and Ontario school boards had to offer French-language programs if a certain number of children could be assembled (Qualified Mandatory). The distinction between FSL and FFL programs was often blurred, especially in the Western provinces, and the percentage of time in French as a language of instruction tended to decline significantly at the secondary level in most provinces (see CMEC Report 1978). Only New Brunswick and Ontario had policies that officially encouraged the existence of homogeneous facilities for FFL programs, while de facto French schools existed in Manitoba and P.E.I. As for management and control, the demographic make-up of New Brunswick meant that Francophones effectively controlled their own schools. Francophones in a few other provinces had de facto control over one or more school boards owing to their geographic concentration. Ontario also had a policy whereby a French-language advisory committee had to be established if a FFL program was offered by a school board. Few provinces had administrative structures in their Departments of Education to supervise or promote the development of French-language programs or facilities (see CMEC Report 1978; *Heirs of Lord Durham* 1978: 49).

1978/79 (pre-Charter) to 1981/82 (introduction of the Charter)

Francophone groups outside Quebec were not convinced that OLME policies were going to change after the political promises made by the Premiers in 1977 and 1978. After the 1978 Premier's Conference, the executive director of the Fédération des francophones hors Quebec (FFHQ) was "bitterly disappointed" that the Premiers made only general a statement on minority language education rights, as they had in 1977, while announcing no concrete measures to improve French education outside Quebec (Johnson, *G&M*, February 24, 1978: a2). The FFHQ was formed in 1975, with the help of the federal Secretary of State, as the national federation for provincial and other francophone associations (Pal 1993: 179-181). According to the Commissioner of Official Languages, by 1978 Francophone groups were "learning modern lessons of politicization," which included the use of publicity campaigns, pressure tactics and political intervention (COL Report 1978: 25). In fact, by 1978 FFHQ had produced two reports (*The Heirs of Lord Durham* and *Two Communities, Two Standards*) that

highlighted the imbalance between rights and services enjoyed by the Anglophone minority in Quebec compared to the Francophone minority outside Quebec. Education was a major area of concern in both reports. The FFHQ was also critical of the federal government's policies, particularly its funding formula for the Official Languages in Education program that gave disproportionate amounts of money to English-language teaching in Quebec, even as the federal government was increasing its financial support for the FFHQ and other official minority language groups (OMLGs) (Pal 1993: 183-184). National and certain provincial Francophone groups also were calling on provincial governments to allow Francophone parents to administer French language schools and programs and there were local struggles for French schools, particularly in Saskatchewan, Manitoba and Ontario, that sometimes came to involve provincial authorities (COL Report 1978: 35; COL Report 1979: 31; COL Report 1980: 32-33; COL Report 1981: 40-42; Lancashire, *G&M*, Feb. 25, 1978: 10).

Political action by OMLGs began to increase during this time period, but there was only infrequent resort to the courts, and what litigation there was focussed on administrative issues (see Table B.4(a) and B.4(b), Appendix B). In Saskatchewan, for example, a Court of Queen's Bench judge ruled against a Francophone parent's request for a writ of mandamus to force the Minister of Education to designate a French program for grades 10-12 in Vonda, because, according to the judge, the statute gave complete discretion to the Minister to decide whether the program would be viable (Foucher 1985: 241-244). However, a court ordered the local school board in Prince Albert, Saskatchewan to provide a Type-A Francophone school after the board had refused a request from local Francophone parents (Julien 1995: 122). In 1982 in New Brunswick, two Acadian groups, the Société des Acadiens du N.B. and the Association des conseillers scolaires francophones du N.B., sought an injunction against the Grand Falls school board (an English-language minority board) to prohibit the board from allowing Francophone students into its English-language or French immersion classes. In his 1983 judgement, Justice Richard of the New Brunswick Court of Queen's Bench ruled that New Brunswick's legislation did not abolish freedom of choice in education, but he did introduce a few caveats to this conclusion: one, a child must have sufficient knowledge of the language of instruction to be admitted into programs; two, immersion must only be

provided for the learning of a second language and not as a means of instruction in the mother tongue; and, three, in his obiter dicta Justice Richard argued that section 23 of the newly introduced Charter of Rights conferred rights only for minority first-language education. In making his ruling Justice Richard accepted expert testimony that bilingual schools were a major source of assimilation for Francophones (Foucher 1985: 63-68).

However, Francophones across Canada had conflicting views on a number of issues and were very divided in their preferences for immersion programs or FFL programs. (COL Report 1981: 41; Corbeil and Delude 1982). Indeed, the parents in Vonda, Saskatchewan discussed above had wanted a French immersion program. Freedom of choice in education, notwithstanding the opposition of some Francophones, was in place across the provinces. B.C.'s new FFL program, for example, was open to English-speaking students if no immersion program was available and Francophones were still allowed to enroll in French immersion courses. Likewise, a 1977 policy in Manitoba specified that the French-language program was open to non-Francophones.

While freedom of choice was still the norm, by this time a majority of provinces (with the exception of Alberta and Newfoundland) changed their policies to distinguish between French immersion and FFL programs. This was often done in the context of making the provision of an FFL program mandatory if certain numbers requested. Table 5.2 below describes OLME policies between 1977-78 and 1981-82. Descriptions in italics indicate where changes have been made since the last time period and the year that the change was made is indicated in parentheses. Table 5.2 indicates that four provinces changed their access to French-language instruction from either "no law or policy" or "discretionary" to "qualified mandatory." B.C., for example, announced a policy in 1978 whereby a school board had to offer an FFL program if requested by 10 Francophone elementary students. Also in 1978 and 1979 Saskatchewan changed its legislation and regulations to state that the Minister must designate a school as providing a French language program if requested by a local school division or board or local parent's council representing at least 15 pupils and if the Minister thought the program would be viable. The designation could be a Type A program, wherein French was the language of instruction and administration and was geared towards Francophones, or a Type B program, which was a bilingual or immersion program aimed at English-speakers.

Following the litigation in Vonda, regulations were changed in 1981 to make the Minister designate a program if he or she thought that it would be offered for three consecutive years, to designate the grades for which the program would be offered and to specify the proportion of time that would be spent in French. Access to French-language instruction also became a "qualified mandatory" process in P.E.I when the province changed its School Act in 1980 to require that school boards offer minority language instruction according to regulations. The regulations stipulated that an FFL program would be provided if at least 25 pupils would be enrolled over three consecutive grades (1 to 9), or if "sufficient numbers" could be assembled for grades 10 to 12. Nova Scotia is treated as "Discretionary" for access to instruction because 1981 amendments to the Education Act allowed the Minister, upon request from a *school board* (not a group of Francophone parents), to designate a school an Acadian school "where there are sufficient number of pupils whose first language learned and still understood is French."

Table 5.2- OLME Policy 1977/78- 1981/82

	Instruction	**Homogeneous Facilities**	**Management**
BC	*Qualified Mandatory* (1978)	No	No
AB	Discretionary	No	No
SK	*Qualified Mandatory* (1978)	*Qualified Yes* (1978)	No
MB	Qualified Mandatory	Qualified No	Qualified No
ON	Qualified Mandatory	*Yes* (1979)	Qualified No
NB	Qualified Mandatory	*Yes* (1981)	*Yes* (1981)
NS	*Discretionary* (recognized in law 1981)	*Qualified Yes* (1981)	No
PE	*Qualified Mandatory* (1980)	*Qualified No* (1980)	*Qualified No* (1980)
NF	Discretionary (no law or regulation)	No	No

Despite the official policy distinction between FSL and FFL programs in most provinces, Martel notes that between 1970 and 1982 the explosive popularity of French immersion actually inhibited the development of FFL programs because in most

provinces the two activities "were partly or completely amalgamated, from program design and management by the ministry of education" (1990: 56-57). Not surprisingly, even in provinces that officially distinguished between FSL and FFL programs and allowed for the creation of homogeneous French schools, FFL programs were often provided in schools that also contained FSL or even English-language instruction. According to a study published by the FFHQ in 1978, only three provinces had homogeneous French schools (Manitoba, Ontario and New Brunswick), though other research includes P.E.I. (see FFHQ 1978; CMEC Report 1983). Saskatchewan created two schools for the 1981-82 year where the language of instruction and administration was French. Table B.3 reveals that only Ontario and New Brunswick had a significant proportion of Francophone schools (approximately 90 percent) out of all schools providing a FFL program. Although Nova Scotia's legislation was changed in 1981 to allow the Minister to designate a school an "Acadian" school, no such designations were made until 1984. Manitoba had 10 homogeneous French schools out of a total of 29 schools that provided FFL programs. In Manitoba there was even some mixing of FFL and French immersion classes.

Table 5.2, which shows a number of provinces moving towards accepting the concept of homogeneous facilities during this time frame (see italics), may thus overstate the degree of support for homogeneous French schools "on the ground." Even the government of Ontario, which had a policy of actively supporting financially the creation of homogeneous French facilities, refused to support the creation of French schools in certain situations and became embroiled in lengthy controversies (see Chapter 7).

As for the management and control of FFL programs and French schools, Table 5.2 reveals little policy change. Only New Brunswick created Francophone school boards- a change introduced in 1981. School boards were organized along linguistic lines and the Minister was required to establish official minority-language boards if requested by the minority-language speaking parents of at least 30 elementary school children. P.E.I allowed one Francophone board to be created by default when, in 1980, the School Act was amended to stipulate that a regional school board would offer instruction in the language of the mother tongue (English or French) of the majority of the students within the district. The school board in Evangeline was a French school board. In 1979, the

Ontario government rejected a 1976 commission's proposal for a French-language Catholic School Board for the Ottawa-Carleton region, but a government Green Paper did float the idea of creating French-language sections within existing school boards (Martel 1991: 124). Calls for official Francophone school boards in Saskatchewan, Manitoba, Nova Scotia and P.E.I. were ignored by governments (COL Report 1979: 31; COL Report 1980: 33; COL Report 1981: 43; COL Report 1982: 37).

To recap, access to French-language programs was mandatory, usually depending on the number of students, in 6 of 9 provinces outside Quebec before the Charter was introduced in 1982, though both English-speaking and French-speaking parents were generally free to choose what kinds of programs in which to enroll their children. There were de facto French schools in 2 provinces and there was some official policy recognition of French schools in 4 others. Despite these policies, with the exception of New Brunswick and, to a lesser extent, Ontario, the provision of FFL programs and schools was often the source of conflict involving the Francophone community (including conflict within the community), local school boards and Departments of Education. Moreover, as noted above, immersion programs and FFL programs were often fused in their implementation, and if schools provided FFL programming it was often in conjunction with immersion programs, with some children even sharing the same classes. This blurring of immersion and FFL programs makes looking for statistical trends difficult in a number of provinces until approximately the mid-1980s (Magnet 1995: 177). Indeed, Table B.2 (Appendix B) contains numerous footnotes explaining the difficulty of accurately counting Francophone enrolment and French schools prior to 1986. Best estimates, however, suggest that there was a reasonably significant increase in the number of schools providing an FFL program in B.C. by 1981-82 (none homogeneous) and, to a lesser degree, Manitoba (though figures for that province are particularly tricky), with small increases in Saskatchewan and Ontario and small decreases or no change in the Atlantic provinces. Enrolment figures are particularly difficult to calculate because of the tendency for immersion students to be counted (see Table B.2).

Only one province, New Brunswick, officially recognized Francophone school boards, though P.E.I. also allowed for boards that reflected the majority official-language

of the area. One school board in Manitoba (Red River) and a small number in Ontario were effectively controlled by Francophones. Advisory committees were established at schools offering FFL programs in Saskatchewan and Ontario. However, at the time of the introduction of the Charter in April 1982, no government besides New Brunswick was willing to legislate distinct francophone school boards into existence.

1982/83 (Charter) to 1983/84 (Ontario Court of Appeal decision)

When the parliamentary Joint Committee on the Constitution was examining the content of the proposed Charter of Rights in 1980-81, a number of actors urged the Trudeau government to include the right to administer schools and programs as part of the official minority-language education guarantees. The Association culturelle franco-canadienne de la Saskatchewan, for example, called for the "recognition of the principle of control over, and management of, Francophone schools by Francophones" (Minutes of the Special Joint Committee on the Committee at 12:11; also see l' Association canadienne-française de l'Ontario (AFCO) at 8: 33; la Société franco-manitobaine at 10: 27; FFHQ at 13:30, Positive Action Committee, Quebec at 7: 57). Mr. Yalden, the federal Commissioner of Official Languages, commented critically, "Section 23 offers no guarantee to the minorities regarding the administrative control of their own educational institutions" (SJC Minutes at 6:13). The government did not accede to such requests. Mr. Lapierre, a Liberal MP, responded to them by saying: "Here again, I find this intention quite praiseworthy, but I ask myself, is the management of institutions as fundamental right [sic] as access to education? We have not gone that far yet..." (SJC Minutes at 8:47). Justice Minister Chretien concurred in response to a question from Senator Murray: "We did not go that far in the sense that education remains the responsibility of the province and the setting up of school boards should not be the responsibility of the national government" (SJC Minutes at 38:108).

The Canadian Charter of Rights and Freedoms was officially added to Canada's constitution on April 17, 1982 and the final version of section 23 provided:

23. (1) Citizens of Canada

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

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

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

(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 so warrants, the right to have them receive that instruction in minority language education facilities provided out of public funds.

Section 23 grants, where numbers warrant, the right to instruction in the minority language, which includes the right to facilities for such instruction where the numbers warrant, with such instruction and facilities to be paid out of public funds. The rights are attached to parents who must meet two qualifications: (1) the parent must be a Canadian citizen and (2) (a) the parent must have learned French first and still understood it (English in Quebec); or (b) the parent's primary school instruction must have been in English or French in Canada; or (c) the parent must have or must have had children in English or French primary or secondary schools in Canada (see Magnet 1995: 147).[3] In addition to not getting an explicit right to manage and control minority facilities, MLGs and the Commissioner of Official Languages were also unsuccessful in getting the requirements of citizenship and the "where the numbers warrant" clause removed to qualify for minority language rights (see SJC Minutes at 6:13; 8: 33; 12: 11; and 13:29; *G & M* March 17, 1982; 1; Magnet, *G&M,* April 13, 1982: 7). However, during the

[3] Parents in Quebec cannot qualify under the maternal language stipulation until that province assents. *Constitution Act, 1982*, s.59.

drafting of section 23, certain eligibility standards were loosened, including the dropping of a reference to the "area" of the province "where numbers warrant."

Importantly, section 23 was exempted from the section 33 "override" clause- the concession to the eight premiers outside of Ontario and New Brunswick who were opposed to the Charter, which allows federal or provincial legislation to operate "notwithstanding" section 2 or sections 7-15 for a five-year period upon a legislative declaration of the override. The fact that language rights were spared from the override provision reveals Trudeau's intention that the Charter would serve as a vehicle to promote his pan-Canadian vision with bilingualism at its core (Knopff and Morton 1992: 74-75).

Ironically, however, around the time that the Charter was being formulated federal funding for the Official Languages in Education program was being reduced. Bilateral agreements between the federal government and the provinces had expired in 1979 and were renewed on an interim basis, though funding was reduced by 20 percent and frozen at $140 million, because the federal government was concerned that it did not get enough credit for the funding and that it did not know how the money was spent (COL Report 1980; 28-30; COL Report 1982: 31; Beaty 1987: 23). After occasionally contentious negotiations (Matas, *G&M*, October 1, 1983: 5), a new protocol agreement for the program was reached in December 1983 that was to last over three years. Under terms of the agreement, the federal government would transfer $172,102,000 in 1983-84 for both minority language education and second-language instruction and this would increase to $173,571,000 by 1985-86 (CMEC Report 1985-86: 1-2). Transfers to individual provinces ranged from approximately $1 to 2 million (P.E.I., Newfoundland, Saskatchewan) to over $44 million for Ontario and over $85 million for Quebec. The new agreement offered a small corrective to the imbalance under the previous agreement whereby a substantial part of the monies went towards established programs, particularly in Quebec (COL Report 1987: 182). The new protocol also called for a distinction between FFL and immersion programs and greater accountability for how funds were being spent (COL Report 1983: 24-25).

The federal government also was continuing its funding of OMLGs. By 1981, however, the FFHQ was looking to free itself somewhat from the paternalism of the

federal Secretary of State and to develop a global, proactive strategy on the language issue in close concert with provincial OMLGs. In practice this meant demands for tripartite meetings between OMLG representatives, politicians and senior officials in the development of policy. The FFHQ was particularly interested in seeking control over education and the adoption of French as an official language in the provinces. More generally, the FFHQ was demanding that government services, such as education, be defined around the fundamental rights that were going to be enshrined in the constitution (Pal 1993: 133). The level of actual political activity by OMLG groups varied across provinces, however. For example, Chapter Six will show that the Association canadienne-francophone de l'Alberta (ACFA) was rather slow to demand distinct French schools and management and control of schools, while Chapter Seven will show that various Francophone groups in Ontario were busy demanding schools and management and control and started litigation under section 23 to press their claims. Although the level of activity seems somewhat linked with demographics, Francophone associations in Saskatchewan- a province with a similar ratio of Francophones as Alberta- were actively seeking schools and management and control. Early in 1984, the Commission des écoles fransaskoises presented a detailed proposal for a province-wide French language school board with parent committees at each school, but the government rejected the proposal and argued that its legislation was consistent with the Charter (COL Report 1984: 195-196).

Perhaps this was a dominant assumption across provincial governments. Table 5.3 indicates that between 1982 and 1984 there was only one change in policy, and this was rather minor. A French school opened in Vancouver (l'École Anne Hebert), but B.C. still had no official policy of promoting homogeneous facilities for FFL programs (Qualified No). In 1983, Nova Scotia introduced regulations that set out criteria for the designation of a school as an Acadian school and prescribed the ratio of French-language instruction in such schools. However, because these regulations were made pursuant to legislative changes made in 1981, Nova Scotia was counted as having changed its policy during the previous time period.

Table 5.3 OLME Policy 1982/83 to 1983/84

	Instruction	**Homogeneous Facilities**	**Management**
BC	Qualified Mandatory	*Qualified No* (1983)	No
AB	Discretionary	No	No
SK	Qualified Mandatory	Qualified Yes	No
MB	Qualified Mandatory	Qualified No	Qualified No
ON	Qualified Mandatory	Yes	Qualified No
NB	Qualified Mandatory	Yes	Yes
NS	Discretionary	Qualified Yes	Qualified No
PE	Qualified Mandatory	Qualified No	Qualified No
NF	Discretionary (no law or policy)	No	No

As Chapter Seven will detail, Ontario proposed in a 1983 White Paper to drop the numbers requirement for access to FFL instruction and to adopt guaranteed proportional representation of Francophones on existing school boards if such boards had a certain level of FFL enrolments. Legislation was delayed, however, until a decision on the constitutionality of the existing and the proposed legislative scheme was made by the Ontario Court of Appeal in June 1984. In 1982, the government of Newfoundland made a policy statement that claimed to support and recognize the right of Francophones to instruction in their mother tongue where numbers warrant. However, no legislative or regulative changes were made. Alberta began to officially distinguish between immersion and FFL programs following the December 1983 federal funding protocol, but the Deputy Minister of Education called the change a matter of semantics (Aunger 1989: 219).

If there were little or no formal policy changes during this time, were there changes to the number of schools offering FFL programs, and did enrolments change? Table B.2

suggests that both enrolment and schools offering FFL programs rose by nearly 50 percent in B.C. during this period. Figures for Alberta, as with other provinces are hard to determine again owing to the lack of distinguishing between FSL and FFL programs until at least the 1984-85 school year, but it appears that a couple of schools providing FFL programs may have been added during this time period. In Saskatchewan, the number of schools offering FFL programs jumped from 5 to 9, 2 of which were homogeneous schools. In March 1982 a group of Francophones in Debden, Saskatchewan succeeded with the help of the Department of Education, though against the wishes of the local board, to have a school established within the public system. However, the parents complained that they were given no input into the teachers that were hired and were not given adequate resources (Byfield, *Alberta Report*, October 6, 1986). Parents in Domremy were not granted their request for a French school, but were granted what the Commissioner of Official Languages called "modest gains" in French instruction. This led the Commissioner to complain that access to minority-language instruction, as opposed to French immersion, in Sasktachewan "remains too often the subject of exhaustive local struggles" and that there was a need for a more systematic approach as the current process left too much discretion in the hands of the Minister and school boards (COL Report 1983: 29).

The Manitoba figures show that after growth from 1976 to 1981 in enrolment and the number of schools providing FFL, there were some declines in both from 1982 to 1984. In February 1983 controversy persisted over the construction of a French secondary at Ile des Chenes. The Conservative government of Premier Sterling Lyon had approved the construction, though the Public Schools Finance Board had raised objections and suggested the use of existing facilities. However, when the Conservatives moved to opposition, MLA Gary Filmon, on behalf of the caucus, came out against construction of the school. In an editorial, the *Winnipeg Free Press* chastised this switch and argued that currently there was very little opportunity for FFL instruction in secondary schools outside of Winnipeg (February 14, 1983: 6).

Table B.2 also shows modest declines in schools and enrolment in Ontario; slight decreases in enrolment in P.E.I. and Newfoundland, though the number of schools remained small; while, in New Brunswick, the numbers remained rather static. In Nova

Scotia, the aggregate number of schools and students in FFL programs fell, but the number of homogeneous French schools jumped considerably as the Province began the process of designating Acadian schools- a move promised back in 1981.

While parents in P.E.I were considering litigation to challenge the province's numbers requirement for the provision of FFL instruction in 1983 owing to the refusal of a local school board and the provincial government to provide a FFL program in the Summerside area, a group of Francophone parents (the Bugnet group) in Edmonton, Alberta launched a section 23 challenge for the provision of a French school in Edmonton and management and control over French facilities. This action would come to be known as the *Mahé* case. Also in 1983, a number of Francophone groups initiated a section 23 case against Ontario's policies concerning access to FFL instruction and management and control of facilities. This action was dropped when the Ontario government indicated it was willing to refer the constitutional questions to the Ontario Court of Appeal, which would announce its decision in June 1984. Shortly thereafter, in early 1984, Jacques Marchand went to court using section 23 to argue that the Francophone secondary school had inferior facilities compared to the other secondary schools operated by the Simcoe Board of Education (see Table B.4). The Bugnet group received monies from the federal Court Challenges Program to press its case in Alberta. This program had been expanded in 1982 to encompass court cases under sections 16 to 23 of the Charter (Brodie 1997: 97).

1984/85 (after Ontario Court of Appeal decision) to 1989/90 (prior to *Mahé*)

This section begins by describing the Ontario Court of Appeal decision in *Reference Re Education Act of Ontario and Minority Language Education* in June 1984. The importance of the decision is twofold: one, it was the first section 23 decision outside of Quebec; and two, the Ontario Court of Appeal is highly regarded and closely watched. It is the appeal court that is most cited by other courts of appeal and it is the court of appeal that is least likely to be reversed by the Supreme Court (McCormick 1994: 90, 143). The section then describes events up to the 1989-90 school year, just before the Supreme Court released its *Mahé* decision in March 1990.

In a unanimous "judgment of the Court," the Ontario Court of Appeal argued that section 23 was designed to preserve the language and culture of the minority and should

be given a broad and liberal interpretation. As such, the Court ruled that Ontario's current legislation was unconstitutional insofar as it: made eligibility for instruction dependent on the language of the child and not the parent as called for in section 23; created a standard number of students required for the provision of an FFL program that applied in each district across the province, which struck the Court as arbitrary; gave too much discretion to school boards to determine whether those numbers could be collected; potentially diluted the numerical power of Francophones by existing school board boundaries; and did not provide for the management and control of programs and facilities by Francophones. In making this last point the Court relied on the French wording of section 23(3)(b) which suggested that facilities were to be "of the minority" and social fact evidence that linked the lack of management and control over educational facilities by Francophones to unequal treatment and assimilation (at 531). According to the Court, Ontario's anticipated legislation, which proposed dropping the numbers requirement for instruction and providing for proportional representation by Francophones on existing school boards, did not violate section 23.

The Ontario Court of Appeal decision was relied upon by Francophone groups in their presentation before the Alberta Court of Queen's Bench in *Mahé* and, following the Ontario judgment, section 23 cases were launched by provincial Francophone associations in Saskatchewan (1985), Manitoba (1986) and P.E.I. (1985) to demand, among other things, management and control of homogeneous French facilities. For example, Francophone parents in Saskatchewan presented the following complaints to the trial judge about the operation of "designated schools":

> facilities and services shared with anglophone students with the result that the French language is essentially confined to the classroom; English-only signs in common areas of the building; school announcements made in English...unequal treatment as compared to anglophone schools- lack of sports equipment and facilities being cited as an example; school boards that function in English only; parent councils are not consulted before decisions affecting francophone students are made; advice of parent councils is rarely followed; little or no input by parents into staff hiring, and a general lack of French ambiance in the schools (*Commission des Écoles Fransaskoises Inc.* at 325).

By 1988, the Association francophone scolaires de l'Ontario (AFCSO) would launch a section 23 case arguing that the scheme of proportional representation for Francophones on existing school boards instituted by the Ontario government did not provide adequate

management and control capabilities for Francophone parents. Also in 1988, francophone parents in St. John, Newfoundland initiated a section 23 case against the local school board and the Minister of Education after their requests for French-language instruction in a homogeneous facility with management and control were rejected. A year later a francophone association in B.C. began a legal action to acquire management and control of homogeneous French facilities. Other litigation initiated during this time concentrated on the provision of FFL programs in acceptable facilities and on the inequality between Francophone facilities and programs compared to majority programs and institutions (see Table B.4(a)).

In some instances litigation was suspended in exchange for a study of the problem (as in B.C.) or the provision of FFL instruction in a homogeneous facility but with no management and control (Newfoundland). When the litigation did result in a decision or series of decisions such decisions often offered section 23 claimants at least partial victories (see a description of each decision following Table B.4(b) Appendix B). This can be observed in the following description of section 23 decisions made before the Supreme Court's *Mahé* decision in March 1990. The description briefly discusses the following key aspects of the decisions: the right to instruction, the right to facilities, the right to management and control, the "where the numbers warrant" clause, the right to equal education, and the nature of the remedies offered in the decisions.

The right to instruction was found to mean more than just a French immersion course. The Alberta Court of Appeal (1987), for example, argued that s.23(3)(a), subject to the "where numbers warrant" clause, encompassed a complete set of programs in French, special rules for the selection of qualified staff, the administrative language be French, and a certain measure of isolation of FFL students (535-536). However, Judge Wimmer of the Saskatchewan Court of Queen's Bench (1988) also remarked that FFL programs need not be limited to students fluent in French, since section 23 did not have this as a criterion. The Ontario Court of Appeal in fact maintained that Ontario legislation, which made access to FFL instruction dependent on the language, violated section 23, though Nova Scotia courts in the *Lavoie* case (discussed below) argued that Nova Scotia's legislation, which provided access to FFL education based only upon the

mother tongue (or first language understood) of the child rather than the parent, did not detract or impair section 23 rights necessarily.

The right to a physically distinct, homogeneous Francophone school where numbers warranted was acknowledged in a number of decisions (*Reference Re Education Act,* 1984 (Ontario Court of Appeal); *Mahé*, 1985 (Alberta Court of Queen's Bench); *Mahé*, 1987 (Alberta Court of Appeal); *Lavoie,* 1988 (Nova Scotia Supreme Court); *Commission des Écoles Fransaskoises Inc.*, 1988 (Saskatchewan Court of Queen's Bench); *Reference Re Minority Language Education Rights*, 1988 (P.E.I. Supreme Court, Appeal Division); *Lavoie,* 1989 (Nova Scotia Supreme Court, Appeal Division); *Reference Re Manitoba Public Schools Act,* 1990 (Manitoba Court of Appeal), though Judge Wimmer further clarified that s.23(3)(a) rights do not preclude FFL instruction from being provided in facilities shared with majority language speakers in Saskatchewan- the right to a physically distinct, "separate but equal" school is triggered only upon a certain threshold of numbers under s.23(3)(b) (*Commission des Écoles Fransaskoises Inc.* at 330).

The right to distinct facilities was linked with some degree and form of management and control over those schools in a number of decisions (*Reference Re Education Act,* 1984 (Ontario C.A.), *Commission des Écoles Fransaskoises Inc.*, 1988 (Sask. Q.B.) *Mahé*, 1985 (Alberta Q.B.), 1987 (Alberta C.A.). The precise implementation of management and control was left to the provincial governments by these decisions owing to provincial jurisdiction over education and the fact that section 23 did not specify how this should be achieved, but factors such as the allocation of funds, the appointment of administrators, the development of programs of instruction, recruitment of teaching staff and agreements concerning programs and services were suggested by the Ontario Court of Appeal (1984) and Justice Purvis (1985) in Alberta. The Alberta Court of Appeal (1987) agreed that section 23(3)(b) confers extensive management powers where numbers warrant, but concluded that the numbers in Edmonton did not justify management and control powers.

While most judgements endorsed the right to management and control when the issue was raised, the P.E.I. appeal court (1988) stated that section 23 provides the right to participate in the development and delivery of FFL programs but not the right to

management and control per se. In February 1990, one month before the Supreme Court would deliver the *Mahé* decision, none of the judges of the Manitoba Court of Appeal would find the right to management and control in section 23.[4]

Since the rights provided by section 23 depend on "where the numbers warrant," the questions surrounding what level of numbers was necessary and how those numbers were to be determined were important. A number of decisions, in addition to the 1984 Ontario Court of Appeal, ruled that legislation that made numbers dependent on existing school boundaries and gave too much discretion to school boards and/or the minister were in violation of section 23 (*Mahé,* 1985; *Commission des Écoles Fransaskoises Inc.*, 1988; *Reference Re Minority Language Education Rights (PEI)*, 1988; *Reference Re Manitoba Public Schools Act,* 1990). Whether legislation could enshrine a set number to trigger section 23 rights was accepted in some decisions (*Commission des Écoles Fransaskoises Inc.*, 1988; *Reference Re Minority Language Education Rights (PEI)*, 1988), but rejected in others (*Reference Re Education Act*, 1984; *Reference Re Manitoba Public Schools Act,* 1990). There was also some division over whether all eligible students in a given area should be counted for the triggering of section 23 rights or whether the numbers should be based upon current or clearly demonstrated future enrolment.

This issue was central to the *Lavoie v. Nova Scotia* case, decided by the trial division of the Nova Scotia Supreme Court in 1988 and reviewed by the appellate division in 1989. A group of Francophone parents in Cape Breton sought the provision of a FFL program and a homogeneous facility in which to operate the program, presenting evidence that were approximately 300-400 eligible students to take advantage of the program and facility. The trial judge, however, questioned how many students might actually enroll, since it was unclear where the facility would be located and what type of French-language program would be provide. In particular, the trial judge was concerned that 60 percent of those who responded to a questionnaire prepared by the plaintiffs indicated a preference for French immersion- "not minority language instruction as provided for in the Charter" (at 588). Rather than deny the claim, the court instead ordered the school board to design a FFL program and suggest a suitable and reasonably

[4] One judge, however, found the right to management and control under the section 15 equality rights provision of the Charter.

accessible facility for the program and then conduct a registration to determine the number of students that would actually enroll. When the registration showed that only 50 students would enroll, the court argued that the number did not justify overruling the decision of the school board or the Minister of Education. The appellate court, however, argued that the remedial aspect of section 23 calls for a "large and liberal interpretation" of the rights therein. As such, the court found that 50 students justified the provision of a FFL program in a structured environment that did not lend itself to assimilation, but did not justify the provision of a physically distinct structure that might also entail a degree of management and control. The court also noted that this could change if enrolments increased in the future. While the result was more generous to the plaintiffs than the trial court result, and demonstrated the willingness of the appellate court to overrule the judgment of the Minister, the determination of numbers still revolved more around actual enrolment rather than the number of eligible section 23 students, which seemed to be the criterion favoured by the Ontario Court of Appeal.

A number of other considerations were offered by the courts concerning the "where the numbers warrant" clause, particularly those involving costs and transportation. In a discussion of the latter issue, Justice Purvis of the Alberta Court of Queen's Bench quoted a lengthy passage from the US Supreme Court's decision in *Swann* (1971) that discussed transportation as a technique of desegregation (*Mahé*, 1985 at 44-45).

While costs could be factored into the decision to provide section 23 rights under the "where the numbers warrant" clause, judicial pronouncements also made it clear that when the numbers justified a particular response under section 23 those programs or facilities should be equal to those of the majority. The P.E.I. appellate court (1988), for example, stated that where there exists a comparable equivalency in numbers: "Those opportunities available to the majority linguistic group are the criteria by which must be judged equivalent opportunities available to the minority linguistic group" (at 525). In *Marchand v. Simcoe Board of Education* (1986), Justice Sirois of the Ontario High Court of Justice ordered the board to build shop facilities for Le Caron secondary school in Penetanguishene and generally to make the provision of instruction and facilities at Le Caron equivalent to the English language secondary schools operated by the board.

The mandatory order issued by Justice Sirois was unusual in these decisions. All other section 23 decisions involved declaratory orders at most or were reference cases, which are not legally binding. Justice Purvis (1985) declined to declare any sections of Alberta's School Act inoperative, though he stated that section 159 should be altered to make access to instruction mandatory and that some management powers should be given to section 23 parents. The Alberta Court of Appeal did not declare any parts of Alberta's legislation to be invalid, instead stating: "Now that the law is explained, Alberta can act" (at 552). Judge Wimmer in Saskatchewan (1988) declared parts of Saskatchewan's Education Act and related regulations to be in violation of section 23 insofar as they denied the right to management and control and impeded access to instruction. In the *Lavoie* case discussed above, the Nova Scotia appellate court did not find the legislation underpinning the decision not to offer a FFL program and facility to violate the Charter. However, it was the opinion of appellate courts in the Manitoba, Ontario and P.E.I. reference cases that various aspects of education legislation and regulations in those provinces violated section 23.

The content and timing of the litigation and judicial decisions described above suggests that section 23 litigation was not as systematic as the NAACP's quest to dismantle segregated schools. In other words, there was no prior coordinated plan to build gradually a series of favourable section 23 precedents, though plaintiffs in the *Mahé* case said that there was consultation with Alberta's francophone association and other OLME groups that intervened in the case as well as the Commissioner of Official Languages in an effort to present a common front to the court (Martel interview, Dubé interview, Levasseur-Ouimet interview, Confidential interview). By 1987, however, there was recognition that more co-ordination might be desirable. The FFHQ distributed an interpretive guide to section 23 written by Michel Bastarache (1986) that included strategies for effectively preparing a section 23 case. Among other recommendations, parents or groups were told to obtain statistical information on the number of eligible children in an area and to compare the financing of minority programs and facilities to financing for the majority (also see *Le Franco*, March 20, 1987- translation). In 1987, the chairman of the Commission national des parents francophones (CNPF) felt that his organization should be able "to provide better support and co-ordination for the legal

battles of the parents' groups" (*Language and Society*, Winter 1987: 24), but it would not be until the late 1980s and early 1990s that the CNPF would provide better coordination (Martel interview; Arès interview).

In addition to planning or initiating litigation, Francophone groups between 1987 and 1990 tried to make sure that proposed constitutional changes in the Meech Lake Accord would not diminish the legal resources available to Francophone communities outside Quebec. Francophone groups believed that because the province of Quebec was being offered the power to "promote and preserve" the French-language and culture in Quebec, while other provincial governments and the federal Parliament were charged only with "preserving" French-speaking communities outside Quebec, this could diminish the legal and symbolic status of French-speaking communities outside Quebec (Coyne 1991; Confidential Interview).

Litigation and litigation-related activities, however, were only one group of methods that Francophone parents or groups used in their efforts to achieve policy change and/or the provision of FFL program/ schools. Conducting studies; lobbying local, provincial, and federal politicians and bureaucrats; and building support within the Francophone community were also some of the other methods employed, though section 23 of the Charter played a prominent role in each of these strategies as well (Cardinal et al. 1994). In 1985, law professor Pierre Foucher published a lengthy study of the implementation of section 23 in each province and concluded that in most provinces there was still considerable progress to be made. Two years later the CNPF reached a similar conclusion when it profiled the education system for francophones outside Quebec and called the results a "scandale national." The study provided the basis for an action plan that involved provincial parent organizations lobbying provincial officials and the CNPF lobbying the federal government for more money and to host a conference on the implementation of section 23 (*Language and Society*, Winter 1987: 24). In 1983 the Société Franco-manitobaine (SFM) and the Federation provinciale des comite de parents undertook a study of minority language education problems in order to present proposals to the Manitoba government. The Comite des parents also worked to build support in the community and the SFM published the views of school board candidates in its paper *La Liberté* (COL Report 1983: 28; COL Report 1984: 192; MacKenzie, *Winnipeg Free*

Press (WFP), May 20, 1982: 3). The Federation des francophone parents in Newfoundland conducted a study on francophone school governance in 1987, while the St. Thomas Aquinas society in Nova Scotia asked the federal Secretary of State and the provincial government for a francophone school in Charlottetown (COL Report 1987: 174-175). Efforts in Alberta and Ontario during this time will be discussed in Chapters Six and Seven respectively and some local efforts are discussed at the end of this section.

The federal government, under the control of the Mulroney Conservatives since 1984, continued to be supportive of these efforts. The Commissioner of Official Languages was highly supportive- intervening in court cases and advocating a broad interpretation of section 23, meeting with provincial and local officials and, in his reports, often criticizing both federal and provincial politicians for not doing more to implement section 23. The Secretary of State continued to fund OMLGs. For example, approximately $18 million was spent on OMLG operating costs and special projects outside Quebec in 1987-88 (Pal 1993: 162-165) and increased funding was given to the CNPF and its provincial affiliates in 1989 by the Secretary of State as those groups prepared to step up their fight for Francophone school management (COL Report 1989: 175). Late in 1988 a new funding protocol covering 1988 to 1993 was announced for the OLE program whereby federal funding by the Secretary of State would increase by 3.8 per cent with larger percentages being directed towards minority language programs outside Quebec (COL Report 1989: 175; CMEC Report 1988-89: 1-3). Total federal contributions for minority language programs in the nine provinces outside Quebec in 1988-89 came to approximately $24.5 million. Extra monies were promised to Saskatchewan in a supplementary agreement for the implementation of Francophone management and control of schools. The federal Department of Justice also intervened in support of section 23 claimants in a number of cases, but disappointed Francophone groups when in the Ontario Court of Appeal Reference case the Department argued that the Court should set a flexible standard for providing management and control powers to Francophones, rather than granting a blanket right to distinct Francophone school boards (*G & M*, January 21, 1984: 5).

Was there policy change at the local and provincial levels that corresponded with the legal and political activity discussed above? Table 5.4 reveals little change in policy at

the provincial level from 1984-85 to 1989-90 involving access to instruction and school governance. However, Table 5.4 does show increased recognition of the concept of homogeneous French schools. A brief description of some of these changes will be provided, but for details see Table B.3 (Appendix B).

There were changes to policies involving access to instruction in only two provinces-Ontario and P.E.I. Ontario made access to instruction available to any student eligible under section 23, while P.E.I.'s changes were less dramatic. Legislation in 1989 promised a French language program, specifically defined as not including French immersion, where the number of eligible section 23 students warranted pursuant to regulations. Regulations introduced in 1990 specified that the "where the numbers warrant" clause means at least 15 children over two consecutive grade levels. P.E.I's changes to legislation and regulations also stated that the Minister may designate a school a French school (a building or part of a building) "where numbers warrant." In 1989, changes to Nova Scotia's Education Act specified that the Minister shall recommend the establishment of Acadian schools "where numbers warrant" subject to regulations. In B.C., Alberta and Manitoba, the provision of French schools was recognized in policy documents. Newfoundland remained classified as "Qualified No" because homogeneous schools were established during this time period, but there was no provincial policy, regulations or legislation recognizing or encouraging such schools.

Table 5.4 OLME Policy 1984-85 to 1989-90

	Instruction	**Homogeneous Facilities**	**Management**
BC	Qualified Mandatory	*Qualified Yes (1987)*	No
AB	Discretionary	*Qualified Yes* (1988)	No
SK	Qualified Mandatory	Qualified Yes	No
MB	Qualified Mandatory	*Qualified Yes* (1984)	Qualified No
ON	*Mandatory* (1984)	Yes	*Yes* (1986)
NB	Qualified Mandatory	Yes	Yes
NS	*Qualified Mandatory* (1989)	*Yes* (1984, 1989)	Qualified No

	Instruction	Homogeneous Facilities	Management
PE	*Qualified Mandatory* (improved 1989)	*Qualified Yes* (1989)	*Yes* (1989-90)
NF	Discretionary (no law or regulation)	*Qualified No* (1986)	No

Only two provinces altered their policies to provide powers of management and control to section 23 parents during this time period- Ontario and P.E.I. In 1986, Ontario provided for French-language sections on existing school boards to administer various aspects of French language education and in 1988-89 a French language school board was granted for Metropolitan Toronto and a French language board was established for the Ottawa-Carleton region (with a Catholic and a public section). P.E.I. established a Francophone school board for the entire province in 1990.

Table 5.5 reveals an increase in the number of schools providing FFL programs ("FFL Schools Total"), FFL enrolment ("FFL Enrolment Total"), the number of homogeneous French schools ("French Schools"- a subset of FFL schools)- physically distinct schools administered in French and geared towards Francophones- and enrolment in those schools ("French School Enrollment") in B.C., Alberta, Saskatchewan and Newfoundland during this time period.[5] For example, the number of schools providing FFL instruction in Saskatchewan increased from 9 to 12, FFL enrolment went from 832 to 1 254 and one more homogeneous French school was in place by 1988-89. The numbers remained relatively static in Manitoba, Ontario, P.E.I and New Brunswick. In Nova Scotia overall enrolment declined by roughly 1 000 students, but there was a significant increase in the number of homogeneous French (Acadian) schools (to 12) and enrolment in those schools (to 1 990).

Table 5.5 – OLME Statistics- Selected Years 1976-1989

	1976-77	*1981-82*	*1984-85*	*1986-87*	*1988-89*
BC - FFL Enrollment Total	**0**	**785**	**1,362**	**1,803**	**1,916**

[5] See Table B.2 (Appendix B) for details about the data collection and for specific notes involving particular numbers.

	1976-77	*1981-82*	*1984-85*	*1986-87*	*1988-89*
BC FFL Schools Total	0	20	30	35	36
BC French Schools	0	0	1	2	3
BC – French School Enrollment	0	0	160	357	478
AB – FFL Enrollment Total	n/a	n/a	1,154	1,595	2,036
AB FFL Schools Total	n/a	n/a	10	17	20
AB French Schools	0	0	2	2	3
AB - French School Enrollment	0	0	367	526	943
SK – FFL Enrollment Total	n/a	n/a	832	1,164	1,254
SK FFL Schools Total	n/a	5	14	14	12
SK French Schools	n/a	2	2	3	3
SK – French School Enrollment	n/a	n/a	n/a	166	266
MB - FFL Enrollment Total	n/a	6,411	5,547	5,364	5,355
MB FFL Schools Total	n/a	41	30	30	31
MB French Schools	10	13	14	15	15
MB – French School Enrollment	n/a	n/a	n/a	3,230	3,170
ON - FFL Enrollment	106,099	94,557	90,854	91,728	93,515
ON FFL Schools Total	360	374	354	360	360

	1976-77	*1981-82*	*1984-85*	*1986-87*	*1988-89*
ON French Schools	324	314	313	313	331
ON – French School Enrollment	n/a	n/a	n/a	72,555	76,186
NB - FFL Enrollment	56,399	48,614	47,077	46,086	45,308
NB FFL Schools Total	187	157	157	153	152
NB French Schools	166	152	151	150	152
NB – French School Enrollment	n/a	n/a	n/a	43,737	45,396
NS - FFL Enrollment	5,587	5,308	4,273	3,840	3,236
NS FFL Schools Total	28	31	23	20	18
NS French Schools	0	0	10	12	12
NS – French School Enrollment	0	0	n/a	1,959	1,990
PE - FFL Enrollment Total	664	529	511	497	514
PE FFL Schools Total	2	3	3	2	2
PE French Schools	n/a	n/a	n/a	2	2
PE – French School Enrollment	n/a	n/a	n/a	497	507
NF - FFL Enrollment Total	200	127	84	74	230
NF FFL Schools Total	3	2	2	2	4

	1976-77	*1981-82*	*1984-85*	*1986-87*	*1988-89*
NF French Schools	**0**	**0**	**0**	**0**	**1**
NF – French School Enrollment	**0**	**0**	**0**	**0**	**47**
Total - FFL Enrollment Total	**n/a**	**n/a**	**n/a**	**152,151**	**153,364**
Total FFL Schools Total	**n/a**	**n/a**	**n/a**	**632**	**635**
Total French Schools	**n/a**	**n/a**	**n/a**	**499**	**522**
Total French School Enrollment	**n/a**	**n/a**	**n/a**	**123,027**	**128,983**

Between 1986-87 and 1990-91 the proportion of the number of children enrolled in FFL programs compared to those eligible under section 23(1)(a) increased from 56 to 60 per cent.[6] By 1990-91 these figures ranged from 10 to 15 per cent for B.C., Alberta and Saskatchewan; to 22 per cent for Newfoundland; to between 29 and 34 per cent for Manitoba, Nova Scotia and P.E.I.; to 75 per cent for Ontario and 82 per cent for New Brunswick. The percentages are higher if one only includes children qualified under s.23(1)(a) who have French as a mother-tongue, because less than half of those children eligible under s.23 have French as a mother-tongue (see Table B.1).

These numbers also should be considered within the larger demographic context described in Table B.1. The number of those claiming to have French as a mother-tongue outside Quebec increased to 943 820 in 1986 from 856 350 in 1976, though about one-third of those individuals do not speak French in the home (Martel 2001: 53). However, while their was an overall increase in those claiming to have French as a mother-tongue, there were declines in real numbers in Saskatchewan, Manitoba, P.E.I

[6] These percentages might be slightly inflated because the total enrolment figures used include kindergarten aged children, while Martel's calculation of eligible children under s.23(1)(a) is for 6-17 years olds inclusive. Also, the total enrolment figures for FFL programs likely include some children that are not technically eligible under s.23 (children of non-citizens, etc.). Calculations are made on the basis only of s.23(1)(a) because Martel (1990, 2001) argues that s.23(1)(b) eligible children are too difficult to calculate and, regardless, would likely be a very small group.

and Newfoundland and, in province where there were increases in real numbers, they did not keep pace with the general growth in the population. By 1986 the number of individuals with French as a mother tongue dropped slightly to 5.0 per cent of the population (excluding Quebec).

Underlying this general discussion of numbers and policy change were sometimes intense local struggles. In Cheticamp, Nova Scotia, for example, the Francophone community was badly split over whether the local school should be declared an "Acadian" school. A number of parents thought that too much instruction in French would impair their children's ability to learn English effectively and subsequently organized a school boycott to protest the fact that Nova Scotia's Board of Education made the Acadian designation after intense lobbying by the Fédération des francophone parents (Jones, *G&M*, August 1, 1983: 3; *Edmonton Journal*, September 5, 1985: D11). Similarly, in Manitoba a group of Francophone parents wanted the emphasis on French language instruction by the Red River board reduced (Tanszen, *G&M*, May 1, 1985: 1), while an investigation was launched by the Seine River board over whether FFL students were being segregated from other students in two schools (*Winnipeg Free Press*, January 25, 1984: 2). After the *Winnipeg Free Press* endorsed the general concept of homogeneous French schools, Brian Gudmundson, who described himself as an English track parent, current school trustee of the Fort Garry School Division and a former director of the Manitoba School Trustees Association wrote a strongly-worded letter to the editor opposing homogeneous French schools. As part of his argument he noted that: "The 'separate but equal' concept of segregation was struck down three decades ago by the U.S. Supreme Court because it was discriminatory and harmful against southern African-Americans. The editorial prescription would also be discriminatory and harmful to Manitobans" (*Winnipeg Free Press*, August 3, 1985: 7). Other local struggles are described in Chapters Six and Seven.

Local differences of opinion concerning French schooling were reflected in a survey conducted in 1987, which asked "Should French Canadians who move out of Quebec to another province have a basic right to have their children taught in French?" Anglophone respondents in the mass public were 53 percent in favour and 39 percent opposed, while legal elites were only 40 percent in favour and administrative elites were 50 percent in

favour (Sniderman et al 1996: 206). However, a 1985 survey, which asked if minority language residents of a province should be entitled to have their children instructed in their own language, drew 68 percent support amongst English-speakers in the public outside Quebec (Churchill and Smith 1987) (see Table C.4- Appendix C).

1990/91 (*Mahé*) to 1999/00 (*Arsenault-Cameron*)

It was within the social, political and legal environment described above that the Supreme Court delivered its unanimous *Mahé v. Alberta* decision in March 1990. Chief Justice Dickson, writing for the Court, first explained that the general purpose of s.23 "is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in the provinces where it is not spoken by the majority of the population" (at 362). Dickson went on to argue that section 23 was also "a remedial provision" and, in doing so, rejected suggestions that the section should be interpreted narrowly because language rights were the result of political compromises (at 363-365, emphasis in text). Rather than viewing section 23 as encompassing two distinct rights, one to instruction and the other to facilities, the decision recommended that section 23 be viewed as a "sliding scale" with the appropriate level of rights and services being provided in accordance with the number of students involved. The upper end of this scale includes the right to management and control, according to Chief Justice Dickson. This conclusion was reached by relying on the reasoning of the Ontario Court of Appeal decision (1984) and by arguing that including management and control rights comports with the purposes of section 23 described earlier.

As for the nature of the right to management and control, distinct Francophone school boards might be required if the numbers warrant, but most important is that minority language groups have control over the aspects of education which have an effect on their language and culture. These include decision-making authority over expenditures provided for such instruction and facilities, establishment of programs of instruction, recruitment and assignment of teachers and other personnel, and making of agreements for education and services for minority language pupils. Dickson stressed that it was not possible or appropriate to describe "specific modalities" for implementing the right to management and control, which should be left up to public authorities, though

he did suggest that, if minority representation on existing school boards was warranted by the number of students, then the number of minority representatives on the boards should, at a minimum, reflect the proportion of minority students within the school board system.

Dickson did not view the management and control rights granted under section 23 as interfering with section 93 denominational school rights, because it would be possible to constitute minority language boards along denominational lines. However, the Chief Justice acknowledged that denominational school guarantees could possibly break-up the group of eligible section 23 students in such a way as to preclude the creation of minority language schools.

Determining what level of rights and services, if any, are required by section 23 should be done by estimating a number based upon the currently known demand and the total number of students who potentially could take advantage of the rights and services. The numbers used for the calculation should not be restricted to existing school board boundaries. Costs can be considered in this calculation, but, owing to the remedial nature of section 23, pedagogical considerations would have more weight than financial ones. More generally, Dickson stressed that a number of subtle and complex factors could be involved in the "where the numbers warrant" clause, such as geographic and transportation issues, which militated against the development of detailed formulas, though the remedial nature of section 23 should always be considered.

Likewise, Dickson indicated that there is no specific formula for determining the degree of equality required between minority and majority services, though the funds allocated for the minority language schools should at least be on par with per student funding for majority schools. Also, the start-up of a minority language program might be an example of a special circumstance requiring a proportionately higher allocation of funds.

Turning to the specific situation in Edmonton, Dickson noted that there were approximately 3,750 eligible s.23 students in Edmonton, the vast majority of who were separate (Catholic) school supporters, and that the current enrolment in the French elementary school operated by the Edmonton Catholic School Board (ECSB) was 242. In the Court's opinion these numbers were sufficient to require a Francophone school and, since generally if there are sufficient numbers to justify a school there are sufficient

numbers to justify a degree of management and control, the Court argued that in this instance section 23 parents were entitled to proportional representation on the ECSB but not to a separate Francophone board.

In addition to declaring the concrete rights of section 23 parents in Edmonton, the Court stated that the Alberta government "must delay no longer in putting into place the appropriate minority language education scheme" (at 393). However, the Court did not specify any particular scheme for implementing section 23 rights, arguing that governments require flexibility to fashion responses that are suited to their particular circumstances. On the other hand, the Court did strike down Regulation 490/82, which mandated that a minimum of approximately 20 percent of instruction be spent on English language instruction, because the rule might impede instruction under section 23 and the Alberta government had not demonstrated adequately that such an interference with section 23 was a reasonable limit under section 1 of the Charter.

Predictably, actors such as the Commissioner of Official Languages, OMLGs and the A.G. of Canada- a number of whom intervened in the case (see Table B.5)- were generally pleased with the ruling. The Commissioner of Official Languages called *Mahé* an "historic decision" (COL Report 1990: 211), while the president of La Fédération des Franco-Colombiens called the decision a "victory" and expected the B.C. government to amend the province's Education Act to provide for Francophone school governance (*Vancouver Sun*, March 15, 1990: A1). The ACFA and the FFHQ, however, were concerned that further litigation would be required because the Court did not better define the "where the numbers warrant" clause (*G &M*, March 16, 1990: A4). Following the decision, OMLG groups at the provincial and national level accelerated efforts to develop Francophone school management models and to pursue their implementation through political and legal means (COL Report 1990: 214; Info-Parents, October 1991: 6; *Éducation et Francophonie*, April 1991). The federal government continued to support OMLGs financially during this time, though contribution levels dropped somewhat. For example, total funding for OMLGs dropped to $19.6 million in 1995-96 from $24.3 million in 1994-95 (COL Report 1995: 66). The federal Court Challenges Program was also cancelled by the Mulroney Conservatives in 1992, but was reinstated by the victorious Liberals in 1993.

A relatively common response on the part of provincial governments to the *Mahé* decision and subsequent lobbying and legal threats by OMLGs was to establish committees or task forces to study the issue. Shortly after *Mahé* the Social Credit government of Bill Vander Zalm established a seventeen-person task force with representatives from various interested parties to study implementation of section 23, including school management. Similarly, the Alberta government established a task force on francophone school management that included representatives from various groups interested in the question. The Manitoba government, under Conservative Premier Gary Filmon, established the Gallant Committee to propose measures that would allow for Francophones to manage minority language instruction and facilities. The Liberal government in Ontario agreed to establish a task force on the creation of French school boards- a similar pledge was made by the new NDP Education Minister, Marion Boyd, following the provincial election.

The responses of Nova Scotia and Newfoundland differed from this pattern, however. Francophone groups in Nova Scotia were disappointed that the government did not respond to *Mahé,* but in 1991 the government introduced a bill that would allow for Francophone management in certain districts and a governance system was established for Halifax in 1992. In 1993, the government held public consultations on Francophone school management in addition to the colloquium that was organized on that topic by the provincial Federations des parents francophone. Newfoundland's Minister of Education in Clyde Well's Liberal government welcomed the *Mahé* decision, but believed that there were not a sufficient number of students to justify a Francophone school board. However, a ministerial report prepared in the wake of a 1989 lawsuit (which was eventually dropped) had recommended a French school board, but the report was not released at the time. In 1992 the issue was again being studied, this time by a committee within the Department of Education (COL Report 1990: 168; COL Report 1992: 120; COL Report 1996: 74).

As for the other provinces, New Brunswick and P.E.I. had already established Francophone school boards. Saskatchewan had previously established a committee to study Francophone school governance in 1989, which recommended the creation of Francophone school boards. When the Conservative government of Grant Devine

delayed implementing the recommendations even after *Mahé* the Prime Minister and the Commissioner of Official Languages expressed regret and Francophone groups organized demonstrations in Regina and Prince Albert (COL Report 1990: 227).

It turns out that Saskatchewan would not be the only province to delay implementation (or improvement) of Francophone school governance even in the wake of recommendations for French school boards by provincial task forces or committees established to study the issue. For example, though NDP leader Mike Harcourt said on the eve of his 1991 election win in B.C. that he was in favour of Francophones establishing their own school system and the B.C. task force on the subject recommended management and control for Francophone parents, in 1992 B.C.'s Minister of Education announced that a plan to establish a single Francophone school board for the province would be delayed until 1995. In 1992 the Commissioner of Official Languages noted that "it remains a matter of serious concern that more than 10 years after the passage of the Canadian Charter of Rights and Freedoms several provinces have not yet fulfilled the spirit of the proclamation or the letter of the commitment to provide minority official language community governance of schools" (COL Report 1992: 18). The passage is followed by a quotation from the *Mahé* decision.

Frustrated by the lack of policy movement, in 1992 Paul Dubé of the Bugnet-Mahé group in Alberta threatened to return to the Supreme Court to force Alberta to abide by the judgment (Dubé interview). In 1991, francophone groups in Saskatchewan asked the province's Court of Appeal to issue a mandatory injunction forcing the government to comply with Judge Wimmer's 1988 decision. In 1992, a group of Francophone parents in Cornwall, Ontario launched a section 23 case demanding more equal funding of French education and a Francophone school board for the area. In December 1992, the Supreme Court heard arguments in the appeal of the Manitoba Court of Appeal's 1990 decision in the reference case on section 23 rights.

As part of that appeal, Francophone groups wanted the Supreme Court to comment on Manitoba's newly proposed Francophone school governance model. The proposal called for the creation of a province-wide Francophone school board. Parents in school divisions that ran existing FFL programs and schools would be allowed to vote to join the new school board- a process that would be facilitated by an "Implementation Support

Team" consisting of various stakeholders, including a number of Francophone representatives. School divisions that did not opt to join the new school board would continue to be allowed to run FFL programs and schools. Divisions that decided to join the Francophone school board would also be given the option of opting out of the new system after a number of years. Francophone groups argued that not giving the Francophone school board exclusive jurisdiction over FFL programs and schools and allowing divisions to opt out of the system violated section 23 and the Supreme Court's *Mahé* ruling (Mémoire de l' Appelante; Mémoire de la Société Franco-Manitobaine; Santin,*WFP*, March 27, 1992: B21). In response, the government of Manitoba claimed that the Supreme Court should not comment on proposed legislative changes that were not before the Manitoba Court of Appeal. Substantively, the government reminded the Court that the Gallant Report called for communities to vote to decide whether to join the Francophone board. Although the Gallant Report suggested that FFL programs and schools in school divisions that were not part of the board should be phased out, the government argued that a number of Francophones expressed a desire to retain the status-quo if a new Francophone school board was created. According to the government, a number of Francophone intervener groups, particularly the CNPF and the FCFA, favoured a "top-down" approach under section 23 that ignored parental choice and local autonomy and emphasized "linguistic survival" rather than "linguistic security." The government also accused the Société Franco-Manitobaine of overestimating the number of students who would participate in FFL schools operated by the Francophone school board by including section 23 eligible students who did not have French as a mother tongue- a group that the Gallant Report referred to as "secondary clientele" that, for the most part, would not likely join French schools (Factum of the Respondent; Reply of the Respondent).

The Supreme Court announced its unanimous decision in the *Manitoba Reference* in March 1993. The decision relied heavily on the interpretive principles announced in *Mahé*. The Court commented that the entitlement to facilities is a subsidiary matter that flows from the level of management and control warranted by the numbers, though some distinctiveness in the physical setting is often desirable. More specific criteria were not provided, however. Chief Justice Lamer wrote that "while I endorse a general right to

distinct physical settings as an integral aspect of the provision of educational services, it is not necessary to elaborate at this point what might satisfy this requirement in a given situation. Pedagogical and financial considerations would both play a role" (at 856). Likewise, the Court maintained that it would not directly take a stand on Manitoba's proposed legislative scheme and reiterated that it would not detail specific modalities of implementation. Nevertheless, Chief Justice Lamer noted that the rights provided by section 23 were granted to minority language parents individually and were not subject to the will of the minority group (at 862). On the other hand, the Court argued that "if the province chooses to allow minority language parents a choice of school for instruction in the minority language, this should not be at the expense of the services provided by a French-language school board or hamper this board in its ability to provide services on a basis of equality..." (at 863).

By the time of the decision, however, the Conservative governments of Alberta and Manitoba and the NDP government of Saskatchewan were in the process of developing and passing legislation that provided for Francophone school boards. In the case of Saskatchewan and Alberta, there were a number of French-school boards created though they did not cover the entire province, whereas in Manitoba one French-school board was created for the province. In Alberta and Saskatchewan, all FFL programs and schools within the jurisdiction of a French-school board were to be operated exclusively by that board, whereas that was not the case in Manitoba. Manitoba, though, altered its earlier proposals and did not provide for opting-out provisions once a community agreed to join the Francophone school board. There were also mechanisms provided for section 23 parents to join the Francophone school board, subject to various conditions, even if the majority in their community preferred to stay within the existing school division.

By 1994, therefore, only B.C. and Newfoundland did not provide at least some degree of Francophone school management. To facilitate the development of Francophone school governance the federal government pledged $112 million in 1993 for the development of governance structures (and the development of French-language post-secondary institutions) over six years. Meanwhile, in 1993 a new protocol agreement for OLE funding was concluded between the provinces and the federal government, which also covered funding that had been ongoing since 1993-94 (CMEC 1997: 1-3). For each

of the years 1993-94 and 1994-95, the federal government had committed approximately $70 million dollars to minority language education in the provinces outside Quebec.

Following the implementation of Francophone school management in Alberta, Saskatchewan and Manitoba in 1993-1994, the next wave of Francophone school management policies began in 1995-1996. B.C. created a Francophone School Authority in 1995 by means of regulation and limited its territorial scope to the lower Fraser Valley and southern Vancouver Island. In response, the Association des parents reactivated its 1989 court challenge and in August 1996 Justice David Vickers of the BC Supreme Court ruled that the Francophone School Authority did not meet the requirements of section 23 and that the government had until the end of the next legislative session to legislate an appropriate governance model. The following year the BC government legislated a system of Francophone school governance, but Francophone groups went back to court arguing that the model did not provide the appropriate authority and resources and that it did not cover the entire province. In March 1998, the geographical reach of the Francophone School Authority was extended and it covered the entire province by July 1999.

Nova Scotia passed legislation in 1995 that allowed for the creation of the Francophone school board for the province and Newfoundland passed legislation in 1996 that created a Francophone school board for the province. In 1997 the government of Ontario created four public Francophone boards and eight separate (Catholic) Francophone boards, which cover nearly all of Ontario. The federal government financially supported the creation of Francophone school governance in BC, Nova Scotia, Newfoundland and Ontario as it had earlier for Alberta, Saskatchewan and Manitoba.

The government of Saskatchewan announced that by 1999 there would be one Francophone school board that would cover the entire province and Alberta created a Francophone school board for southern Alberta, thereby making the network of Francophone boards complete across the province (see Chapter Six for details). Only in New Brunswick was there an apparent setback when the government changed the school management structure in 1997, creating one French- and one English- school board for the entire province, which would make decisions "in conjunction with the Minister." Advisory committees were established for schools and districts but the Department of

Education was given considerable administrative influence at all levels. Table 5.6 outlines OLME policies from 1990-91 to 1999-00.

Table 5.6- OLME Policy 1990/91 to 1999/00

	Instruction	**Homogeneous Facilities**	**Management**
BC	*Mandatory* (1996)	*Yes* (1996)	*Yes* (1995*, 96*, 98*, 99)
AB	*Mandatory* (1993*, 2000)	*Yes* (1993)	*Yes* (1993*, 2000)
SK	Qualified Mandatory (improved 1993, 2000)	*Yes* (1993)	*Yes* (1993*, 99)
MB	*Qualified Mandatory* (improved 1993)	*Qualified Yes* (improved 1993)	*Qualified Yes* (1994)
ON	Mandatory	Yes	*Yes* (improved 1997)
NB	*Mandatory* (1997)	Yes	Yes (changed 1997)
NS	*Qualified Mandatory* (1991)	Yes	*Yes* (1995)
PE	Qualified Mandatory	Yes	Yes
NF	*Qualified Mandatory* (1996)	*Yes* (1996)	*Yes* (1996)

Table 5.6 not only highlights the implementation of Francophone school governance discussed above, but also reveals that there were policy changes involving access to FFL instruction during this time period. B.C., for example, dropped the numbers requirement for access to FFL instruction- any eligible child under section 23 is entitled to enroll in a French-language program offered by the Francophone School Authority, which covered the entire province from July 1999 onward. Only P.E.I. retains a set number of students to trigger FFL instruction, though the province has qualifications to this number and employs more general factors, such as proximity of existing classes and facilities, transportation distances and the ages of children. Likewise, a number of other provincial policies provide criteria to guide the decisions of school boards and the Minister. Nova Scotia's regulations, for example, mandate that the Conseil Scolaire consider such things as the proximity of existing classes and facilities and the expected number of entitled children who would enroll when deliberating about offering FFL instruction. Such an offer requires the Minister's approval and the Minister is instructed to take into account

*These items were "qualified" until later changes to policy—see Table B.2.-Appendix B for details.

similar considerations, including transportation issues (see Table B.3 for details about all provinces).

Eligibility for FFL instruction is mostly based on section 23, though some provinces, such as Manitoba, also allow non-citizens to be eligible. Manitoba (and Saskatchewan) specifically disqualifies from eligibility the children of parents who learned French through French immersion or children who are taking French immersion. This kind of rule caused considerable controversy in Manitoba in 1991 when the St. Boniface school division did not allow a 15-year-old French immersion student to attend a local French high school because neither of his parents was of French lineage. Debates about cultural racism and administrative discrimination versus the importance of preserving the French culture filled the news (for example, see Hebert, *WFP*, Dec. 30, 1991: A7; Roberts, *G&M* Dec. 20, 1991: A5). Francophones outside Quebec, however, are not precluded from attending regular English-language courses and schools, though in New Brunswick pupils must demonstrate sufficient linguistic proficiency to be admitted to classes not in their mother-tongue (French or English).

In addition to less stringent requirements for the provision of FFL instruction, there was an increased emphasis on homogeneous French schools during this time period. Newfoundland, for example, defines a "French-first-language" school as one operated by the conseil scolaire. As is the case in other provinces, the definition of "school" in Newfoundland is ambiguous enough to include an FFL program separately administered in a shared building. Yet, Table 5.7 shows that, since 1990, the number of physically distinct French schools increased or held steady in every province except New Brunswick and, with the exception of Nova Scotia and B.C., the number of physically distinct French schools relative to the total number of schools providing FFL instruction also increased.

Table 5.7- OLME Statistics 1990-1998- Selected Years

	1990-91	*1992-93*	*1994-95*	*1996-97*	*1997-98*
BC - FFL Enrollment Total	**2,047**	**2,020**	**2,628**	**2,766**	**2,860**
BC FFL Schools Total	**44**	**42**	**51**	**56**	**54**

	1990-91	*1992-93*	*1994-95*	*1996-97*	*1997-98*
BC French Schools	4	4	4	4	4
BC – French School Enrollment	693	716	803	809	840
AB – FFL Enrollment Total	2,548	2,483	2,810	3,125	3,033
AB FFL Schools Total	22	25	29	26	24
AB French Schools	6	10	10	13	17
AB - French School Enrollment	1,474	1,775	1,811	1,527	2,246
SK – FFL Enrollment Total	1,076	1,190	1,100	1,044	1,416
SK FFL Schools Total	10	11	13	12	17
SK French Schools	9	10	10	12	12
SK – French School Enrollment	683	843	909	879	845
MB - FFL Enrollment Total	5,464	5,323	5,414	5,283	5,241
MB FFL Schools Total	31	28	28	29	29
MB French Schools	15	17	20	23	23
MB – French School Enrollment	3,285	3,672	3,897	4,477	4,456
ON - FFL Enrollment	96,340	95,965	97,173	98,495	95,026
ON FFL Schools Total	402	374	407	417	441
ON French Schools	350	356	361	363	364

	1990-91	*1992-93*	*1994-95*	*1996-97*	*1997-98*
ON – French School Enrollment	76,441	77,303	76,629	75,096	75,200
NB - FFL Enrollment	44,432	46,700	45,298	43,259	42,187
NB FFL Schools Total	148	143	132	115	109
NB French Schools	148	142	132	115	109
NB – French School Enrollment	44,432	43,686	42,248	40,144	39,164
NS - FFL Enrollment	3,487	3,381	3,752	3,927	4,095
NS FFL Schools Total	17	18	19	18	21
NS French Schools	10	12	11	11	11
NS – French School Enrollment	1,777	2,067	2,457	2,821	2,964
PE - FFL Enrollment Total	554	585	631	657	624
PE FFL Schools Total	2	2	2	2	2
PE French Schools	2	2	2	2	2
PE – French School Enrollment	554	608	631	652	623
NF - FFL Enrollment Total	257	258	256	275	267
NF FFL Schools Total	5	5	5	5	5
NF French Schools	1	1	2	2	2

	1990-91	*1992-93*	*1994-95*	*1996-97*	*1997-98*
NF – French School Enrollment	**61**	**62**	**137**	**143**	**136**
Total - FFL Enrollment Total	**156,205**	**157,905**	**159,062**	**158,831**	**154,749**
Total FFL Schools Total	**681**	**648**	**686**	**679**	**702**
Total French Schools	**545**	**554**	**552**	**545**	**544**
Total French School Enrollment	**129,400**	**130,732**	**129,522**	**126,548**	**126,474**

Comparing Table 5.5 and Table 5.7 (or looking at Table B.2- Appendix B) shows that the creation of French schools started to grow in the early to mid-1980s outside Ontario and New Brunswick, which already had a large number of such schools, but accelerated in the latter 1980s and early 1990s. Not surprisingly, as the number of French schools increased so did enrolment in those schools. The percentage of enrolment in French schools as a portion of total FFL enrolment rose significantly in most provinces between 1990 and 1997, except in Ontario, New Brunswick and P.E.I. where the proportion remained relatively stable over that time (see Table B.2). For example, in Manitoba enrolment in homogeneous French schools was 58.0 per cent of total FFL enrolment in 1988-89 and this figure increased to 85.0 per cent in 1997-98. Continuing a trend that began before 1990, overall total FFL enrolment was up in B.C., Alberta, Saskatchewan, Nova Scotia, P.E.I. and Newfoundland, but declined slightly in Manitoba, Ontario, and New Brunswick during this time period. Total FFL enrolment for the all the provinces outside Quebec declined by approximately 3,000 pupils between 1990 and 1997, but the number of eligible section 23 students with French as a mother tongue declined by more than 20, 000 between 1986 and 1996 (see Table B.1).

Despite the policy and statistical changes described above, or sometimes because of them, various political controversies and legal disputes arose during this time. As indicated above, Francophone parents in B.C. went to court twice: once to compel the government to enact school governance and the next time to argue that the method of

implementation was unsatisfactory (Matas, *G&M,* June 20, 1997; Crossely, *BC Report* March 30, 1998: 35). In both instances the section 23 claimants were successful. In his first decision Justice Vickers argued that the B.C. government's unwillingness to give statutory protection to section 23 rights, guarantee equal funding for French-language education, permit capital expenditures with funds other than those provided by the federal government (and only after approval of the Minister) and facilitate negotiations with majority school boards violated section 23. In his next decision Justice Vickers ordered the province to establish a conflict resolution process to address disputes that may arise over the transfer of assets, co-management of facilities and lease arrangements.

Like their counterparts in B.C., francophone groups in Manitoba complained that the francophone school board did not possess adequate financial resources and that mechanisms were not in place to aid in negotiations with majority school boards over existing facilities and resources. Controversy erupted in the town of Laurier when eligible parents voted to remain with the existing school division, which led to difficult and tense negotiations that eventually allowed students whose parents wanted to be part of the Francophone board to be accommodated in portable classrooms. Entitled parents in St. Claude were upset about having to bus their children to a school controlled by the Francophone school board and they were disappointed that the Minister did not force the local school division to share facilities (COL Report 1996: 83; COL Report 1997: 105). Francophone groups in Manitoba have launched litigation under section 23 to object to the method by which communities are allowed to decide to join the Francophone board and to argue that the Francophone school board does not possess adequate authority and resources.

Similar concerns over resources, authority and implementation were voiced by Francophones in other provinces (see COL Reports 1996-1998). As in Manitoba, sometimes these disputes triggered litigation. Parents in the Acadian peninsula of New Brunswick prevented the government from closing three schools in the area after protesting, sometimes violently, and obtaining a temporary court injunction against the closures (Morris, *G&M*, July 25, 1997: A10). A Francophone parents group in New Brunswick is currently before the courts trying to have the government's decision to

abolish local school boards struck down as an infringement of their management and control rights under section 23.

A court battle originated in P.E.I. when the Minister of Education refused to approve the construction of an elementary French school in Summerside proposed by the Francophone school board. According to the Minister, a school with under 100 students would not be able to offer the pedagogical advantages of a larger school and that FFL instruction was provided in a community 28 kilometres away. A number of Francophone parents objected that the trip was too long, especially for young children, and that busing precluded children from participating in extracurricular activities. At trial the Francophone plaintiffs also argued that, while only 34 children had pre-registered for the school, there were 140 more eligible section 23 children in the area and that 151 more children would be eligible within five years and registration would increase once the school commenced operation.

Accepting these numbers and citing the remedial nature of section 23, the trial judge declared that the section 23 claimants had the right to FFL instruction provided in a French elementary school at Summerside. The Appeal Court reversed the decision and, in doing so, argued that the trial decision should be read only as providing for a class or classes in the Summerside area and not a physically distinct school as the appellants interpreted it. The Appeal Court claimed that the trial judge should not have accepted the total number of eligible section 23 students because the evidence suggested that only 65 students would eventually take advantage of such a school over the next two years. The Appeal Court also noted that, while a purposive interpretation of section 23 was appropriate, such an interpretation should take into account different linguistic dynamics in each province and the fact that section 23 is founded on a political compromise. Finally, the Appeal Court argued that the Minister was correct to take pedagogical considerations into account when determining the level of service mandated by the "numbers warrant" test.

A number of actors intervened in the subsequent appeal to the Supreme Court, including the A.G. Canada, A.G. Ontario and A.G. Manitoba and various Francophone groups. In January 2000, the Supreme Court unanimously reversed the Appeal Court in a decision co-written by Justices Major and Bastarache. In making its decision the Court

reiterated its earlier reasoning that section 23 was remedial in nature and should be interpreted in light of the importance of minority-language instruction and schools in the development of official language communities (at 25). The Court noted that, while governments have a legitimate interest in the content and quality of educational programs and facilities and also possess discretion in the specific implementation of section 23, such discretion is subject to the requirements of the remedial nature of section 23 and the management powers granted to section 23 rights holders to control those aspects of education that affect language and culture. The Court argued that in this case the Minister did not adequately take into account the importance of a school in promoting the minority language community and culture and preventing assimilation. The Court also noted that other school jurisdictions in P.E.I. had schools with fewer than 100 students; and, besides, numbers should not be calculated on the basis of actual demand as the Appeal Court erroneously seemed to expect. The Court reinstated the declaratory order of the trial judge.

Another court battle over schools occurred in Nova Scotia, and in June 2000 Justice LeBlanc of the Nova Scotia Supreme Court ordered the province to hasten transforming mixed schools into homogeneous French environments, part of which involved establishing an English-language school in the Clare district so that the existing school could become a fully homogeneous Francophone school. Justice LeBlanc indicated that he had the authority to monitor the process of change and also encouraged the Acadian school board to take its own initiatives if the provincial government did not move quickly enough. When the province did not move quickly on this order, the Acadian school board took measures designed to physically prohibit the minority English-speaking students at Clare District High from mixing with the Francophone students. However, a large group of both English and French-speaking students walked out of the school to protest the board's decision. A number of Francophone parents were also concerned that the move went too far. One national newspaper covered the story under the headline "Today's lesson: segregation" (Gillis, *National Post*, October 5, 2000: A5).

CONCLUSION

This chapter began by noting that minority language education has been historically one of the most contentious political issues in Canada since Confederation. The chapter

documented that this has remained the case from the mid-1970s until 2000 by reviewing generally OMLE policy and legal decisions in each of the provinces outside Quebec and by briefly describing particular political, legal and social struggles in various local communities. Although OMLE policy remains contentious, the chapter reveals that there has been a large degree of policy change since the mid-1970s that favours those individuals and actors who prefer: FFL instruction as opposed to French immersion, FFL instruction being provided in homogeneous French facilities rather than in "mixed" or "bilingual" schools, and FFL programs and schools being managed and controlled by Francophones. An analysis of why these changes occurred and why they occurred when they did will be performed in Chapter Eight using the NI model of judicial impact.

Before proceeding with that analysis, however, the next two chapters will explore OMLE issues in more depth by providing case studies of OMLE struggles in Alberta (Chapter Six) and Ontario (and, to a lesser degree, Saskatchewan) (Chapter Seven).

Chapter Six- Alberta Case Study

Chapter Six more closely examines the evolution of OLME policy in Alberta from the late 1960s until 2000. As such, this case study features more use of information from interviews and primary documents than did Chapter Five. Following similar but less detailed case studies of Ontario and Saskatchewan in Chapter Seven, the dissertation turns to explaining the impact of legal mobilization and judicial decisions on the evolution of OLME policy.

In 1968, Alberta amended its School Act to allow for French language instruction in grades three through twelve for up to 50 per cent of daily school time. Further changes in 1970 and 1971 allowed a school board to authorize the use of French or any other language other than English as a language of instruction in addition to English in any or all of its schools subject to the regulations of the Minister. A local advisory board could also instruct a school board to offer a French-language program if the board deemed it feasible. Regulation 250 in 1976 extended the limit of French-language instruction to about 80 percent of school hours, though by Grade 12 the amount of instruction time in French was less than 50 percent (Aunger 1989: 217; Foucher 1985: 269). In 1976, 40 of the province's 1,499 public and separate schools were offering French-language instruction (CMEC Report 1978: 34), but this instruction was primarily provided by way of French immersion programs. Many Alberta Francophones supported these programs and enrolled their children in them (Slevinsky 1997: 8).

Following the commitment by provincial premier's to improving official minority-language education in 1977 discussed in the previous chapter, in March 1978, Alberta Premier Peter Lougheed and his Minister of Education, Julian Koziak, issued a joint statement on minority language education that expressed a commitment to accelerate the development of French language programs, to provide more monies for transportation and other expenses and to establish a Language Services Branch within the Department of Education to further support French-language instruction. However, the statement also made it clear that education was a provincial responsibility, that the government would continue to leave programs open to students whose mother-tongue was not French, that French language instruction would not be given special status over other minority language instruction, and that school boards would still retain autonomy over whether to

offer French-language programs (see Aunger 1989: 218). The Association Canadienne-Française de l'Alberta (ACFA) issued a press release that was positive in nature, calling the initiative a "major step forward," though it noted that existing school boundary regulations, the costs of transportation and the potential loss of resident pupils had to be addressed (ACFA, March 8, 1978). Internal ACFA documentation also revealed concerns about the government's reluctance to intervene in local school boards' decisions, the government's refusal to entrench French-language instruction guarantees into legislation and the disbursement of funding for French-language programs. There were also documented meetings between the ACFA and the Minister in which the ACFA offered to aid in the implementation of the policy initiative (June 17, 1978- author's translation). Notably absent from the ACFA's evaluation, however, were calls for homogeneous francophone schools and for management and control over such schools.

This was perhaps to be expected. Support for the concept of French-first language (FFL) programs being offered in homogeneous Francophone schools managed and controlled by Francophones had been developing amongst some Francophone leaders in the 1970s (see Munro 1991), but it was not until the early 1980s that it became the dominant option amongst Francophone leadership (Julien 1991: 3, 129).[1] Moreover, the established Francophone leadership was not willing to call for as much management and control of French education as proposed by a small group of Francophone parents (Interview- Angéline Martel). And, significantly, below the leadership level, most members of Alberta's francophone community were content with bilingual or French-immersion programs (Interview- Angéline Martel; Interview France-Levasseur Ouimet; also see Julien 1991: 3, 27).

Ironically, the popularity of French-immersion amongst English-speakers made the program highly popular and further discouraged the development of FFL programs (Slevinsky 1997: 8). As a matter of policy, Foucher noted that in Alberta "no distinction [was] made between French as a first language and immersion, either with respect to the pupil population or with respect to the program" (1985: 260). This makes tracking

[1] Munro states that the idea of the need for French schools came to dominate the Franco-Albertan community by the mid-1970s (1991: 261-262), but Julien's (1991) detailed case study of French schools in Alberta and the responses of interview participants for this research suggests that the concept of the French school and management and control of schools began to become predominate only in the early 1980s, especially after the entrenchment of the Charter (also see Chapter Nine for more support of this argument).

statistics rather difficult, though it is easy to claim that there were no homogeneous French schools during this time.

Not surprisingly, in 1980 Alberta's Minister of Intergovernmental Affairs told the ACFA that the province would oppose the entrenchment of official minority language education rights in the constitution, because education was a matter of provincial jurisdiction. The Minister also reiterated the government's position that the French-speaking minority in the province would treated the same as any other ethnic minority in the province (ACFA, News Release, May 6, 1980). However, as discussed in Chapter Five, a complex set of negotiations resulted in the entrenchment of the Charter, which contained official minority language education rights in section 23.

Following the introduction of section 23 of the Charter of Rights in 1982, Alberta, quickly passed Regulation 490-82, which required all school boards who wished to deliver instruction in French to submit a resolution to that effect to the Minister. The regulation also required that English be taught at least a certain number of minutes per week (Slevinsky 1997: 9), yet it did not place any positive obligations on the Alberta government or school boards to provide FFL programs or homogeneous French schools. A small group of Francophone parents in Edmonton, who dubbed themselves the "Bugnet group," approached the Minister of Education in the Conservative government about the possibility of establishing a homogeneous French school in Edmonton to be operated by a Francophone school board, citing section 23 of the Charter, problems with assimilation in mixed school environments, and the deficiencies of French immersion programs. At the same time, the group also sought the support of the Premier; the Commissioner of Official Languages; the Office of the Secretary of State; other local, provincial and federal politicians; the ACFA; and senior bureaucrats in the Department of Education. The group also held meetings with local francophone parents and teachers (Interview Angéline Martel; Julien 1991: 158-159). Dave King, the Minister of Education, "encouraged their endeavours," but denied the request saying that there was no money for such a proposal (Julien 1991: 158-159). The Minister further suggested that the group try to make an arrangement with one of the existing school boards in Edmonton.

In December of 1982 the Bugnet group made proposals to the Edmonton Catholic School Board (ECSB) and the Edmonton Public School Board requesting that an elementary Francophone school be established in September 1983. Information concerning the target population, the curriculum, and the degree of management and control by Francophone parents was included in these proposals. Both school boards rejected the proposals. The ECSB, which enrolled the majority of children of French-speaking parents in Edmonton, was concerned primarily that the Catholic dimension of education would not be adequately stressed by the proposed school and that the proposed school would siphon away children from the French immersion program, but in June 1983 the board began to study the possibility of creating a separate FFL program (Interview Paul Dubé; interview Angéline Martel; Julien 1991).

The Bugnet group established a private, secular elementary school, but lack of funding and adequate staffing led it to cease operations after its first year. The efforts of the Bugnet group had little support from the established Francophone community represented by the ACFA, partly because support for Francophone schools, especially of a non-denominational character, and complete management and control was not as strong in the ACFA and partly because of personal and organizational tensions and rivalries (Interview- Angéline Martel, Interview- Paul Dubé, Interview Levasseur-Ouimet; Julien 1993, 166-168).

Meanwhile, in October 1983 the Bugnet group launched a court action against the Alberta government under section 23. The Bugnet group was promised $100,000 through the federal Court Challenges Program by the Secretary of State to pursue the case through the court system. The ACFA was allowed to intervene in the case and also received money from the Court Challenges Program (Interview Georges Arès; Julien 1993). Paul Dubé and Angéline Martel, two of the leaders of the Bugnet group, maintain that Dave King told them that they would have to go to court, because the government was not going to change its policies or its interpretation of the scope of section 23 (Interviews).

Calls for greater management and control over Francophone programs and schools increased in Alberta during this time period as well. However, there would only be limited policy change. The Alberta government did officially recognize the distinction

between French immersion and FFL programs in the summer of 1984, but it appears that it took some time before the change to be reflected in programs (Aunger 1989). In its 1985 submission to the Court of Queen's Bench, the ACFA noted that the revised August 1984 Program Policy Manual of Alberta Education described a student in a French programme as one who receives 75 per cent of instruction in French at the elementary level or 60 per cent of instruction in French at the secondary level- no distinction was made between French immersion and FFL programs and no restrictions were placed on the linguistic backgrounds of students entering the French programme (ACFA Factum: 30).

A 1985 survey of school boards by the ACFA reported that 75 per cent of boards said that they understood the distinction between French immersion and FFL programs, but the ACFA researcher found little practical differences between the two programs in a number of cases (Morin 1985). The school boards also complained that the provincial government did not provide adequate guidelines concerning the provision of French-language services (Morin 1985). For example, no guidelines were forthcoming concerning the numbers of students needed to trigger section 23 rights. The provincial government, however, was not prepared to impose French-language policies on the boards nor was it willing to issue more specific guidelines.

Some school boards did initiate changes on their own, however. In September 1984 the Calgary Catholic Board of Education started operation of a French-language elementary school, while at the same time the ECSB began operating a French-language elementary school (Maurice Lavallée)- both were established in existing schools.[2] However, the ECSB was unwilling to assent to two other demands being made by a group of Francophone parents calling themselves la Société des parents francophones pour des écoles francophones d' Edmonton (la Société): the establishment of a Francophone high school and management and control over French-language facilities.

Not surprisingly, the provincial government was also unwilling to establish Francophone school boards or other management structures. During the hearings for the *Mahé* case at trial, Jack Major, who acted as the lawyer for Premier Lougheed's government in the case, argued that not only do Francophones not require special school

[2] This school also housed immersion classes until June 1985.

boards or special forms of control over education but that the Charter does not require them either. Major argued that the government was acting with "reasonable dispatch" in providing French schools and services and that "interference" from the courts was not required (Sheppard, *G&M*, April 20, 1985: 5).

Brent Gawne, the lawyer for the Bugnet group countered that the government's French-language education program is "an engine of assimilation" that only "pays lip service to autonomy." He urged the court to encourage a system of local Francophone school boards, claiming that the "rights of the Charter would be illusory if they could be ignored because of administrative convenience" (Sheppard, *G&M*, April 20, 1985: 5). The ACFA, in its factum prepared by Michel Bastarache, also highlighted the problem of assimilation and the need for distinct FFL programs schools as well as meaningful management and control over those programs. The ACFA acknowledged that the right to management and control may take various forms depending on the circumstances (Factum 1985: 41), which is perhaps why some members of the Bugnet group thought that the ACFA arguments concerning management and control at the trial level could have been stronger (Interview Paul Dubé, Interview Angéline Martel).

Justice Purvis of the Alberta Court of Queen's Bench delivered his judgment in the *Mahé* case in July 1985. Justice Purvis agreed with the Ontario Court of Appeal (1984) that section 23 grants exclusive management and control powers over French language instruction where the numbers warrant. He urged the government of Alberta to provide a method of providing management and control, though he noted that it was not up to the court to detail these methods and that they could vary depending on the numbers (at 40-41). Justice Purvis also discussed the right to instruction and facilities, claiming that French language instruction should "ideally" be provided in separate facilities, but noted that the "where the numbers warrant" test includes factors such as: costs (specifically rejecting the ACFA's argument that costs should not be a factor), transportation issues, etc. As for remedies, Justice Purvis argued that there are a sufficient number of children eligible under section 23 to warrant the provision of French language instruction in distinct facilities, but that reasonable progress towards this end had been made with the establishment of Maurice Lavallée by the ECSB. Furthermore, Justice Purvis declined to make the requested declarations that would have given the parents "extensive power and

authority that they seek" and did not declare Alberta's education legislation unconstitutional for not facilitating the creation of French language boards (at 48-49). However, Justice Purvis did declare that the sections of Alberta's *Education Act* that permitted, but did not mandate, the provision of French language instruction were in conflict with section 23.[3]

A number of activities took place between the production of the Purvis judgment and the Supreme Court's decision in the case in March 1990. To simplify the narrative, the provincial-level events, policies, etc. will be discussed first, followed by a selection of local-level on-goings. The provincial Francophone newspaper, *Le Franco,* hailed the judgment as a "décision historique," though an editorial in the paper by Lise Bissonnette was entitled "La Cour sans miracle" (July 31, 1985: 1-2, 4). Bissonnette applauded the judge's decision to recognize management and control in section 23 and to declare that certain sections of the law violated section 23, but was disappointed that Justice Purvis did not grant management and control powers to the parents in Edmonton. The decision, according to Bissonnette, was an important legal victory, but was only part of a series of political and legal struggles wherein Francophones were dependent upon the good will of the Anglophone majority (author's translation). The ACFA also welcomed the decision, calling it a "landmark development," but also had reservations, including: the question of "where numbers warrant" was still largely open, costs were a relevant factor in the offer of services, it was suggested that reasonable progress was being made, and section 15- the equality rights provision of the Charter was deemed to be irrelevant in the case (*Le Franco*, July 31, 1985 (author's translation); Strauss, *G&M*, July 27, 1985: 8; *The Bonnyville Nouvelle*, Aug. 5, 1985: a2). Members of the Bugnet group called it a "great step forward," though they acknowledged that the decision was not a total victory and they decided to file an appeal (Holubitsky, *Edmonton Journal*, July 25, 1985; Strauss, *G&M*, July 27, 1985: 8).

Dave King, the Education Minister, called the decision "supportive of the direction of the province's current initiatives in the area" and said that he was pleased that the

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[3] Section 159 provided that boards "may" authorize the use of French and other languages of instruction. Section 27 provided that a board "shall" off French language instruction if requested by a local advisory board, but Justice Purvis noted that the rights apply to eligible section 23 parents and not advisory boards. Regulation 490/82, which provided for a minimum amount of English language instruction, was found to be compatible with section 23.

judgment recognized that Alberta was "unique." At the same time he promised to introduce the necessary changes to the *School Act* in the next session of the legislature and negotiate with the ACFA and the Alberta School Trustees Association to work out a system of giving Francophones control over French-language education. King said that he would speak to, but not negotiate with, the Bugnet group because they had gone to court, though Paul Dubé of the Bugnet group stated that they had already had discussions with the Deputy Minister, who was described as being "open-minded and receptive" to what the group had to say (de Luna, *ATA News*, Sept. 18, 1985).

However, it soon became clear that the government would not move as far or as fast as many had hoped, even though the *Edmonton Journal* called on the government to accept and implement the Purvis judgment (July 26, 1985). King soon dismissed the idea that the government would contemplate creating French school boards after Edmonton school trustees expressed fear that there might be a backlash if taxpayers had to support a French school board (de Luna, *ATA News*, Sept. 18, 1985). Conservative MLA Ernie Isley, whose constituency included the community of Bonnyville, which has a sizeable French-speaking population, said that he could not see the caucus rushing to endorse the Purvis decision. He claimed that the government was "pushing the multicultural society" and that other minority groups might want whatever is given to the Francophone community. In the meantime an advisory group on a new school act that was being considered was studying the issue of "where numbers warrant," but the ACFA wanted action before the introduction of a new school act (*The Bonnyville Nouvelle*, Aug. 5, 1985: a2).

In 1986, a government commissioned study by Zudnich found that there were over 3,000 children aged 0-14 years with French as a first-language in Edmonton, nearly 2,000 in Calgary, and slightly over 1,000 in both the Northeast and Peace Country. According to Zudnich, section 23 eligible parents who responded to a survey were supportive of French-language education (cited in Desjarlais 1989: 38).[4] This study was kept quasi-confidential, though not quite as confidential as a 1985 Department of Education document that mentioned eight regions where the number of Francophones warranted the

[4] However, it is not clear if the survey specifically distinguished between French immersion and FFL programs.

establishment of French-language programs: Peace River region (Falher, Girouxville), Fort McMurray, St. Paul, Edmonton, Legal, Calgary and Bonnyville (Desjarlais 1989: 41). Given the government's reluctance to make such studies widely known, it is perhaps not surprising that the ACFA and the Bugnet group found that their lobbying efforts with the provincial government were not getting results (Interview- Georges Arès; Interview- Paul Dubé).

In September 1986, the lawyer for the Bugnet group told the Alberta Court of Appeal in the *Mahé* hearing that they wanted "total dualism" for Francophones, which could even include a distinct Dept. of Education. The ACFA and other interveners, such as the CNPF and the Commissioner of Official Languages, demanded equivalent educational services (including instruction and facilities), but would accept representation on existing school boards for the purposes of management and control- a position supported by the federal government (Lord, *Edmonton Journal*, Sept. 25, 1986: B16).[5] The Alberta School Trustees Association and the government of Alberta opposed these arguments.

In the spring of 1987 *Le Franco* published a guide to preparing section 23 legal claims prepared by Michel Bastarache. That summer Bastarache traveled to Alberta to discuss legal strategies with Francophone groups. Near the end of that summer the Alberta Court of Appeal unanimously dismissed the appeal in the *Mahé* case. Although the Court of Appeal generally agreed with Justice Purvis that section 23 incorporates management and control rights, the Court disagreed with the trial judge's specific reasoning and was confused by the dissonance between his general discussion supporting a degree of management and control and his subsequent quick dismissal of the Bugnet group's request for management and control powers in his order. The Court argued that the section 23 contains two distinct rights- one to instruction (ss. (3)(a)) and the other to facilities managed and controlled by the minority (ss.(3)(b))- each triggered by different numerical thresholds. The Court maintained that Francophones should be entitled to an equivalent educational system "(with all its complexity and cost)" that is run by them if the numbers required for section 23(3)(b) are met, though the precise implementation of

[5] In its decision, the Court of Appeal noted that the statement of claim and most intervenants did not call for an injunction or "other drastic relief" to remedy any breaches of section 23 (at 552).

this would be left to the province (at 537).[6] On the basis that there were currently 242 students enrolled in the Francophone school in Edmonton with a potential for perhaps 500 (though the Court quoted an expert who was uncertain about projected growth because of the fractured nature of the Francophone community), the Court concluded that the costs of setting up a Francophone school district would be unreasonable (at 543). Based on this argument and the fact that the Minister of Education (Nancy Betkowski) was not a party, the Court refused to find that she breached the Charter by not creating new Francophone school districts under the Act (at 547).

As for the right to instruction being violated by Section 159 of the *School Act*, which permitted boards to provide French-language instruction, the Court argued that because the section was passed before the Charter it should be viewed as complementing- not denying- section 23 rights and should not be struck down. The Court further argued that Alberta had neither implemented section 23 or delegated the authority to local boards and that the appellant's right to instruction was not being violated in Edmonton (and the Court understood that the appellants did not ask for such a finding) (at 552). As with the trial court decision, the ACFA had mixed reactions (ACFA News Release, Aug. 31, 1987).

Around the time that the Court of Appeal handed down its judgment, Nancy Betkowski proposed a new School Act (Bill 59). The bill, which would not be passed before the legislative session ended, proposed to recognize section 23 rights, but would leave it to the Minister to enact regulations for the purposes of implementing those rights. The ACFA responded by claiming that the bill did "not contain the minimum legislative elements essential to implement Section 23 of the Charter of Rights and Freedoms" (*Reactions of the ACFA to Bill 59*, Dec. 1987: 2). The ACFA pointed out that the bill did not formally distinguish between FFL and immersion programs; did not mention homogeneous facilities, though seemed to indicate that mixed schools were acceptable; and provided no right to Francophone school governance. Furthermore, there were no obligations placed on the government to implement section 23 rights. The Alberta

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[6] The Court noted that this could create conflicts with the management powers given to denominational groups by the application of s.93 of the *Constitution Act* (formerly *BNA Act*) via Section 17 of the *Alberta Act, 1905*. However, since the issues were not canvassed at trial and only mentioned in passing at the appeal hearing, the Court decided not to confront them (at 540-541).

government further raised the ire of Francophones when in December of 1987 the government suggested that NDP MLA Leo Piquette should apologize for challenging the Speaker's ruling that would not allow him to ask the Education Minister about French language education using French. Subsequently, more than 400 Francophones marched on the Alberta legislature in protest.[7] In 1988, Francophones would again be angered when, in response to a Supreme Court judgment, the Alberta government would repeal legislation that required the translation of statutes into French.

In 1988, a new School Act was passed with provisions like those found in Bill 59, despite the fact that the ACFA and the Fédération des parents francophone de l' Alberta (FPFA) had, in the interim, met with senior officials in the Education Department and outlined a comprehensive legislative scheme that addressed instruction, facilities and governance in accordance with section 23 (ACFA document, Feb. 1, 1988). In November 1988 the Alberta government introduced a new "Language Education Policy for Alberta." The document claimed that "[w]ithin the overall context of Alberta's multicultural society, it is important to recognize the bilingual nature of Canada and the unique rights of francophone parents under section 23 of the *Charter*" (Alberta, November 1988: 2). Two types of rights were recognized- the right to instruction and the right to facilities. Local school boards continued to be given the responsibility for decisions concerning French-language schooling, but the government promised to facilitate the process through the development of appropriate curriculum materials, helping boards to identify the number of section 23 eligible children in an area, providing financial support and having Education Ministry staff investigate appeals launched by section 23 parents at the request of the Minister (as allowed for in the revised School Act). The policy also identified certain areas of the province where the number of section 23 eligible students likely were sufficient to warrant French language programs, and possibly schools (Edmonton, St. Paul, Falher, Calgary and Bonnyville and their surrounding areas). General criteria were also offered to guide school boards in deciding whether to offer FFL programs or French schools, including: the number of section 23 eligible children in an area, the preferences of section 23 parents in an area, existing

[7] The government would eventually allow the "qualified" use of French or any other language if prior permission was obtained from the Speaker, etc. (see Julien 1993: 34-35).

schools and services in an area, costs and transportation issues. The policy reminded boards that "court decisions to date" have indicated that school boards could not restrict counts to only those students within their boundaries and encouraged cooperation amongst various boards (at 10). Management and control of French language education by section 23 parents was not addressed, though the policy said that if a French school was created parents must be given an opportunity to participate in a school council. A million dollars in funding was promised for the initiative, though the government later said that it would be unable to make good on this promise.

Although a columnist in the *Edmonton Journal* called the policy "entirely sensible, reasonable" (Elliot, Dec. 7, 1988: D1), the ACFA claimed that the policy document was a "small step" in the right direction but did not fulfill the requirements of section 23. The ACFA was pleased that the distinction between FFL and French immersion was recognized and that appeals were allowed to the Minister, but was frustrated that decision-making power was still left in the hands of school boards, that the definition of "school" did not preclude necessarily mixed school environments, and that the policy did not grant any real management and control powers to Francophones. The ACFA reaction concluded with a reference to the Ontario Court of Appeal (1984) judgment, which stressed that limits on minority language education rights could not be left to the discretion of school boards (*Reaction of l' ACFA to the Language Education Policy for Alberta*, April 1989; Geddes, *Calgary Herald*, Dec. 7, 1988: a14).

A report prepared by the former Dean of the Faculty of Education of the University of Ottawa, Lionel Desjarlais, and released by the ACFA and FPFA in the late 1980s echoed the view that section 23 as interpreted by the courts prohibited school boards from retaining vast discretionary powers in relation to French-language education outside Quebec. In addition to highlighting how Alberta's OMLE policies fell short of judicial interpretations of section 23, the Desjarlais Report advocated homogeneous Francophone schools and Francophone management and control of those programs. As a basis for further policy development, the Report outlined various potential management models and reviewed studies that tried to ascertain the number of section 23 eligible in various parts of the province. The Report concluded that there were sufficient numbers of section 23 eligible students to justify Francophone school and management and control, pointing

out that Alberta and other provinces established schools and even school districts for small numbers of English-speaking children (Desjarlais n.d.).[8]

In a press communiqué released along with the Report, which drew attention to Alberta's slow progress in implementing section 23 rights, the ACFA and FPFA promised to hold meetings with the Francophone community to determine which educational models would best serve their needs (ACFA Communique, n.d.). Thus, prior to the Supreme Court's *Mahé* decision, the ACFA; the FPFA (after its inception in 1985); and, to a lesser degree, the Bugnet group had lobbied the provincial government at both the bureaucratic and political levels, conducted studies of the OMLE issue, tried to gain media exposure in the French-speaking and English-speaking press, and made attempts to mobilize local Francophones to petition their local school boards for FFL programs and schools (Interview- France Levasseur-Ouimet; Interview Paul Dubé; Interview Georges Arès).

These provincial-level events intermingled with a variety of local battles over French language education that took place in a number of communities during this time, most prominently in Edmonton. Following the establishment of the Francophone elementary school in Edmonton, La Société requested that J.H. Picard school become a separate Francophone high school or, failing that, than the Anglophone French immersion students should be separated from the Francophone students at the school. However, the ECSB, which had earlier declared J.H. Picard to be a French language school according to section 23 of the Charter even though French immersion students shared the school and some classes with Francophone students, rejected this request. The ECSB and la Société had divergent views on admissions criteria. The Superintendent of the ECSB, John Brosseau, was concerned that the Alberta government would not fund a program that essentially excluded Anglophones, plus he argued that the Canadian constitution could be interpreted as supporting two official language schools in Canada and that any Canadian pupil had the right to attend either such school (Julien 1991: 180).[9] The ECSB also disagreed that Francophone parents should be given management and control

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[8] The Desjarlais Report does not have a specific publication date, but information gleaned from interviews and secondary source material suggests that it was released in 1988-89.

[9] The Bugnet group in their initial proposal for a school wanted an admissions policy based only on fluency in French, not mother tongue.

powers. From 1985 onward, la Société pressed its claims on the ECSB by holding meetings; creating petitions; writing letters; lobbying municipal, provincial and federal politicians; holding public demonstrations; sitting-in for two days at the ECSB building in the spring of 1988 (with the support of the ACFA and a Francophone youth group); and threatening court action (Julien 1991: ch. 4).[10]

In addition to the legal and philosophical disagreements that the ECSB had with la Société, the ECSB also cited practical difficulties in providing a French high school. Since the province refused to grant specific funding for such a project, monies would have to be found in the general building budget. The ECSB, including the two members of the board who were Francophone, argued that there were other more pressing projects that required funds. Furthermore, although la Société argued that there were enough section 23 eligible students in Edmonton to justify a school, the ECSB disagreed, partly because it felt that many Francophones were satisfied with the status quo (Julien 1991: ch. 4).

In 1987, after analyzing the Charter, court cases, and holding discussions with Department of Education officials, members of the Catholic community and Francophone leaders, the ECSB tabled a management model that would delegate responsibility to an elected council of Francophone parents to give them control over French language facilities and programs. Flowing from its legal obligations under the School Act, the ECSB said that it would retain overall control, including setting the Francophone budget. Francophone leaders rejected the proposal during public hearings (Julien 1991: 181-183; Elliot, *Edmonton Journal,* Sept. 1987).

As tensions began to rise in 1988, highlighted by the sit-in of the ECSB offices, the ECSB proposed separating the French immersion students and Francophones in FFL programs at J.H. Picard. The proposal offended many immersion parents. A number of media reports also questioned the proposal to segregate the students- some making references to the "Berlin Wall" and the apartheid regime in South Africa (Julien 1991:

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[10] La Société decided to wait until March 1989 before pursuing legal action (see Julien 1991: 185, ftn. 229). The sit-in ended after the group was promised that Education Minister Nancy Betkowski would meet them over the provincial government's refusal to financially support a Francophone high school in Edmonton (*Calgary Herald*, March 11, 1988: b9).

192).[11] Yet, continuing problems at J.H. Picard would lead the ECSB in 1989 to move the Francophone students in J.H. Picard to an expanded Maurice Lavallée, which would be a K-12 Francophone school.

Conflict over French schools occurred in other Alberta communities as well during this time. In 1985 some parents called for a distinct Francophone school in Bonnyville, but the Lakeland Catholic School Board responded by claiming that most French speaking parents did not support such a move and that its dual-track French programs reflected the "spirit and intent" of section 23 (*Edmonton Sun*, Nov. 26, 1985: c9). Following the identification of Bonnyville as one of the areas that could support FFL programs or a French school in the province's Language Policy in November 1988, some Francophone parents renewed their efforts to establish a school. The Public board in the area said it did not have enough numbers to justify an FFL program or French school, while the Catholic board said that it was open to discussions. However, the board stated that it believed that a majority of Francophones were satisfied with existing FFL programs and, in meetings with Alberta Education officials, the board expressed concern about provincial funding. The Director of French Language Services responded that it would be up to the politicians to decide funding questions (as noted above in 1989 the government indicated that it would not be able to inject another $1 million dollars into the system as promised in the November 1988 policy paper) (*Bonnyville Nouvelle* Dec. 13, 1988; *Bonnyville Nouvelle*, Jan. 17, 1989; *Edmonton Sun*, Jan. 17, 1989)

In St. Paul a group of Francophones formally formed a Society in 1985 to request a distinct Francophone school because the current French-language programs in a mixed setting did not meet the linguistic and cultural needs of their children. After a committee composed of Board members and the Society recommended the creation of a distinct Francophone school, the Board rejected the request stating that it was not convinced that there were would be enough students. The Board was also concerned about the effects that a Francophone school would have on its other French programs. More meetings followed, including some attended by Department of Education officials, and a section 23 lawsuit was initiated against the board in mid-1987 though it would be dropped as it

[11] Julien notes that the Edmonton Journal editorial did not support the "segregation" of the students, though it did not make comparisons to the Berlin Wall or apartheid in South Africa.

became clear that the Supreme Court would address the legal principles in the *Mahé* case (Interview- Georges Arès). In 1988 the ACFA published a report that identified the potential number of section 23 eligible students in the region and proposed how facilities and resources could be allocated to establish a FFL program in a Francophone school within a distinct Francophone school district (*The Establishment of a St. Paul French Language School District*, August 1988). A report prepared for Alberta Education in 1989, in accordance with the 1988 Language Policy directive that school boards assess the number of section 23 eligible parents who desire programs and facilities, found splits within the Francophone community about the desirability of a Francophone school in St. Paul. Based on a survey of 400 families, it was estimated that approximately 100 Francophone students would attend a distinct French school (Conway, June 1989). However, the report prepared by the AFCA concerning the St. Paul area concluded that the demand would be higher and that more students would be attracted in coming years. The St. Paul Diocese lent its support to a French school in 1989, but the dispute would not be settled until after the Supreme Court's *Mahé* decision.

In the Peace River area, the St. Isidore School Board established a Francophone school in 1988, but the school soon ran into some financial difficulties, in part because some nearby districts that sent students to the school would not transfer funds to the St. Isidore board. The Falher district, in particular, was adamant that it would not transfer dollars (Barron, *Alberta Report*, Jan. 14, 1991: 25-26). Controversy also erupted in Falher when in September 1988 the board decided to physically separate its French- and English- language programs within the same school. The board tried to justify the decision by arguing: 1) it would encourage students to use the language that they are learning; 2) the Board would receive extra funding from the provincial government; and 3) it would help to mitigate the threat of possible court cases, since the Board did not enter into tuition or transportation agreements with the St. Isidore Board. In a letter to the editor of the local paper, a member of the group called the "Committee of the Opposed" claimed that the decision "breeds intolerance and segregation" and disputed the claim that the board would be receiving extra funding from the province (*Smokey River Express*, Sept. 24, 1988: 4; Levesque, *Smokey River Express*, Sept. 28, 1988). A compromise solution was soon developed (*Smokey River Express*, Oct. 5, 1988: 4).

Other districts experienced some difficulties as well. For example, Paul Molgat of Lacombe (near Red Deer) launched a lawsuit in 1987 against the province and three school boards for violation of section 23 rights. This move surprised the Red Deer board, which had reached an agreement with Molgat in 1986 that he could send his children to immersion programs in Red Deer without paying non-resident fees. The ACFA did not support this action because its legal advisors suggested that it would not be a good test case because of the limited number of Francophones in the area (Interview- Georges Arès).

In contrast, the Roman Catholic school board in Fort McMurray voted in 1989 to provide FFL programs in a new set of portable units at a junior high school for a cost of half-a-million dollars. A local group of ratepayers collected signatures from over 500 people opposing such spending, including some Francophones, but the board and the local superintendent were undeterred, arguing that per pupil spending would only be $180 more per pupil on average and that the province had promised to pay for some of the costs. A spokesman for the local society for Francophone education argued that they had rights and wondered whether opposition stemmed more from bigotry than financial considerations (Hutchinson and Byfield, *Alberta Report*, July 10, 1987: 27).

By the end of the 1988-89 school year, there were a total of 20 schools providing FFL programs in Alberta, 3 of which were homogeneous francophone schools. Enrollment in FFL programs was slightly over 2,000, almost double than in 1984. The growth in both FFL and immersion programs led to increased federal funding under a new OLE funding protocol agreement signed in 1988-89. In 1989-90, for example, Alberta received $2.7 million for FFL education (and $7.5 million for French immersion), whereas in 1983-84 Alberta had received a little over $5 million total (for FFL and immersion). These new funding levels would remain relatively steady into the mid-1990s after the signing of a new protocol in 1993. (see CMEC Reports; Department of Canadian Heritage, Annual Report-Official Languages).

Public opinion was split towards these OMLE policy efforts. In the prairies 72 percent said yes to the question of whether Francophones should be entitled to have their children instructed in their own language, which was actually 4 points higher than in Ontario (Churchill 1985). However, in a 1987 survey that asked whether French

Canadians who moved out of Quebec to another province had a basic right to have their children taught in French, only 50 percent of respondents in Alberta chose "yes" or "qualified yes" as their response (total 92 respondents).[12]

Within the policy environment described above the *Mahé* case was argued before the Supreme Court (see Table B.5- Appendix B for an overview of the positions of the parties and interveners before the Court). Alberta's submission to the Court quoted heavily from the legislative history of section 23 to back its argument that the section does not provide the right to management and control (A.G. Alberta Factum: 19-27). Among other things, the Alberta government also argued that: section 23 could not be interpreted in such a way as to infringe on provincial jurisdiction over education, providing management and control to section 23 parents would conflict with the rights of separate school supporters to manage education, and stated demand for a particular level of service should be part of the "where the numbers warrant" test for instruction or facilities. Alberta's position was supported by Manitoba and Saskatchewan, while the Quebec government argued that section 23 parents should have input into creating a "proper linguistic environment" but not their own school boards (Factum A.G. Quebec, author's translation). This position drew criticism from Francophone groups involved in the case (Aubin, *G&M*, June 6, 1989: A11).

The federal government, as in the Ontario Reference case, supported reading section 23 as containing the right to management and control, but acknowledged that implementation of the right could be achieved by a variety of methods depending on local circumstances (A.G. Canada Factum: 12-15). The Ontario government now also endorsed this reasoning as well (A.G. Ontario Factum).

The Bugnet group again pressed its claim for a distinct Francophone school board, arguing that section 23 embodied a national objective that includes a imposing on provinces a positive duty to "formulate a regime which gives full effect to the exclusive management and control by the minority linguistic group of its educational programs in a homogeneous setting." The Bugnet group reminded the Court that it had found education to be a state function of the highest importance when it quoted from *Brown v. Board of Education* in an earlier Charter case (Appellant Factum, 24-26). A number of

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[12] The data come from the 1987 Charter Values Survey and were analyzed by the author.

Francophone groups, including the ACFA, intervened to support the Bugnet group, as did Alliance Quebec- an Anglophone rights group in Quebec. Not all of the OMLG intervenors went as far as the Bugnet group in calling for a mandatory injunction and almost complete administrative autonomy, but the CNPF did argue that section 23 imposes a set of national standards on provinces to implement school systems that are equal to the majority, which would include the right to school governance; and even the ACFA suggested that Francophone school boards were required (this differs from the ACFA's earlier position which stated that proportional representation on existing boards might be acceptable).

As discussed in Chapter Five, the Supreme Court handed down its unanimous decision in March 1990. To review briefly, the Court argued that section 23 was remedial in nature and deserved a large and liberal interpretation. The Court argued that section 23 encompassed a sliding scale with management and control at the upper end of the scale. The "where the numbers warrant" test, according to the Court, should take into account both existing and future demand- in Edmonton this would entitle section 23 parents to management and control of distinct facilities, but not a completely distinct school board. The Court suggested perhaps minority representation on the existing school board, but noted that it was up to provinces to implement schemes to satisfy section 23. As such, the Court did not declare the *School Act* unconstitutional, but called upon the government to provide a method by which those parents in Edmonton, and others so situated, could enjoy their section 23 rights as declared by the Court. The Alberta government, according to the Dickson judgment, "must delay no longer" in discharging its constitutional obligations. The Court did declare Regulation 490/82 unconstitutional for setting too high a minimum for the number of hours of English instruction required.

Francophone groups in Alberta were pleased with the ruling—the President of the ACFA was happy that the Court found a right to management and control in section 23 and that the ruling "indicated that the purpose of section 23 was the correction on a national scale of the progressive erosion of minority official language groups and to give effect to the concept of the equal partnership of the two official language groups in the context of education" (Interview Levasseur-Ouimet). However, Levasseur-Ouimet was

concerned that the decision did not really define the "where the numbers warrant" clause and that the government and school boards would continue to use the numbers clause as a "way of not granting rights." Moreover, the AFCA had "reasons to believe that the government would not be very generous nor that it would act quickly" (Interview-Levasseur-Ouimet). National Francophone groups, such as the CNPF and the FFHQ, also viewed the decision as a victory, but a "flawed" one (Interview- Levasseaur-Ouimet; Interview Georges Arès). The Bugnet group, on the other hand, was enthusiastic about the decision and thought that it was advantageous that the "where the numbers warrant clause" was not strictly defined (Interview Paul Dubé).

Although the Bugnet group proceeded to lobby the government after the decision was brought down, they would largely be shut out of the process and it would be the ACFA and the FPFA that would be the most influential Francophone groups in the process (Interview Paul Dubé). The ACFA called on the Alberta government to quickly and generously implement the ruling in a news release entitled, "A Step Forward But How Far? The Decision Mr. Getty is Yours" (see Julien 1991: 352). An Advisory Committee on the Management of French Language Instruction and Facilities established by the ACFA and FPFA in October 1989 instructed the two consultants it hired that during their second round of meetings with Alberta Francophones they not only verify information gathered during the first round of meetings, but to also bring information about the Supreme Court's decision to those meetings (Lamoureux and Tardif 1990: 3). The final report, "An Educational System for Franco-Albertans," released in June 1990 was to be used by the ACFA and FPFA for two purposes: one, to increase awareness and understanding among members of the Francophone minority and other interested educational groups regarding issues related to French language education; and, two, to be used in discussions with Alberta Education and other government officials, "which are intended to lead to a type of educational system which will respect the intent of Section 23 of the Charter as outlined in the recent Supreme Court judgment" (Lamoureux and Tardif 1990: 4). The Report covered a range of issues: school populations, facilities, financing, school districts, personnel issues, possible types of school management models, and so on.

As for the Alberta government, a number of members of the Conservative caucus wanted to know if the section 33 notwithstanding clause could override the Court's decision, but it could not (Interview- France Levasseur-Ouimet; Interview- Jim Dinning). Publicly, Education Minister Jim Dinning said that he would introduce legislation to comply with the Supreme Court ruling, though time would be needed to further study the decision and to consult the Alberta people. He also drew attention to the fact that the Court did not require a Francophone school board in Edmonton. Furthermore, Dinning indicated that the decision largely vindicated Alberta's policies, but the *Edmonton Journal* said the decision "does nothing of the sort" and urged the Minister to begin the process of meeting the requirements set down by the Court (*Edmonton Journal*, March 19, 1990: A14; also see Julien 1991: 353).

Initially, the government opted not to establish a commission to study the issue as some other provinces had done. Instead, in April 1990, the Education Department produced a confidential report designed to propose a legislative model that would meet the requirements of the Supreme Court decision and to do so in a way that reflected an "Alberta solution" that was also acceptable to the Francophone community. After carefully going through excerpts of the Supreme Court decision concerning management, where numbers warrant, etc., the report outlined three possible types of management models: 1) regular school councils, 2) school councils with legislated powers, and 3) regional school boards (French Education in Alberta: Discussion Paper, April 1990). These proposals were later expanded upon in a document released in November 1990. The document outlined section 23 of the Charter and the Supreme Court decision; reviewed Alberta's previous achievements in French language education, while acknowledging that improvements could be made (such as to curriculum material); and noted that management and control was a "sensitive and complex issue" that involves the "difficult issue of power" (Management and Control of French Education in Alberta, November 1990: 3). The document then outlined various management and control options for areas of the province with relatively large Francophone populations. Later Education officials then took these proposals to Francophone communities, but there were complaints that the meetings were hasty, poorly advertised and not consultative in nature (Interview Levasseur-Ouimet; Julien 1991: 356).

The ACFA, now with the support of the Alberta Teachers Association and the Alberta School Trustees Association (the latter group was an intervener opposed to the ACFA position during the *Mahe* case before the Supreme Court) asked for a committee to be established to study the issue (Interview Levasseur-Ouimet). In January 1991, the government announced that it was establishing a committee that would include members of various stakeholder groups to study and receive input on Francophone school governance. The ten members of the group represented Francophone groups (ACFA and FPFA), school superintendents, teachers, trustees, Alberta Education, the Alberta government and members of the public. The announcement was welcomed by Francophone groups, but there was also apprehension. Georges Arès, then vice-president of the ACFA, was worried that the government was hoping that no consensus would be possible and the committee would be deadlocked. A related concern was that Francophone groups believed that as the government delayed it was negotiating for section 23 of the Charter to be modified or eliminated during the Charlottetown constitutional negotiations (Interview- Georges Arès). The ACFA appeared before the Alberta Select Committee on Constitutional Reform in May 1991 to argue in favour of section 23 and even suggested ways to make section 23 stronger, such as dropping the "where the numbers warrant" clause (Transcript, May 31, 1991: 304-406).

Also in May 1991 the French Language Working Group finished its report on Francophone school governance. Although the deliberations were sometimes difficult (Confidential Interview), the group delivered a unanimous report. The Report rejected the notion of proportional representation on existing school boards. Instead, the Report called for the establishment of six Francophone education regions (Smoky River/Peace River, Northeast, Greater Edmonton, St. Paul / Bonnyville, Central and Bow Area South) and the creation of Francophone school boards (called Regional Authorities) for selected regions—the Smoky River/ Peace River and Edmonton regions (and perhaps the St. Paul/ Bonnyville region). In the other regions, consultative Coordinating Councils would be established with the possibility that they could be transformed into Authorities. Existing school boards would still be allowed to operate FFL programs, but section 23 parents would only be entitled to management and control powers if they chose to join a Francophone Regional Authority. The Authorities would be expected to accommodate

demands for religious instruction, though the Report foresaw a time when separate Authorities might have to be created for Catholic parents who enjoyed section 93 rights. The Authorities would have the same powers as other school boards, except for the power to tax. Funding for Authorities would come from existing boards which sent pupils to a school managed by the Authority, the same provincial grants as given to other school boards (building, transportation, special education, official and other languages grant, etc.) and special grants designed to help with start-up costs and programs that address linguistic assimilation in the community.[13]

The Report warned that this funding plan might affect existing local school boards, especially in rural areas, and that the province would have to be sensitive to the matter. The Report warned that "rights must be addressed but costs must also be contained," yet also indicated that "the remedial aspects of the Supreme Court decision clearly require a greater financial commitment on the part of the province" (18). The Report also used references to the remedial aspect of the *Mahé* decision and the Lamoureux-Tardif study to call for improvements to the French language curriculum (19).

Jim Dinning tabled the Report in the Alberta Legislature, but said that the public deserved a chance to comment on the Report's recommendations before legislation was formulated. This led to an angry response from leaders of Francophone groups, some of whom repeated the charge that the government was delaying in hopes that the constitution would be changed to reduce or eliminate French language education rights (Johnson, *Calgary Herald*, June 25, 1991: a7). Yolande Gagnon, the Liberal Education critic, issued a press release blasting the government for delay in the face of the unanimous Report; the Supreme Court decision, which called for the government to act without delay; and the endorsement of the Francophone position by a number of groups, including the Alberta School Boards Association and the Canadian Parents for French (French version quoted in Julien 1991: 358, translation by author). Paul Dubé, the last member of the Bugnet group remaining in Alberta, threatened to return to the Supreme Court to force the government to act and to seek monetary compensation for the delay (Interview Paul Dubé, also see Brault, *Le Franco*, June 28, 1991).

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[13] Coordinating Councils would receive administrative and operating grants to function.

It would take another year before the government introduced legislation to implement the Report of the Working Group on French Language and it would not be until late 1993 that such legislation was passed. While no formal changes were being made to legislation or regulations during this time, the government was selectively active in some disputes over French language schooling. Most notably, the Education Minister intervened in St. Paul and told the local school board that the numbers justified a homogeneous school, which was established in September 1990. The Department of Education also helped fund a Francophone school to be established by the 400-student Legal school division (Hatton, *Alberta Report*, June 15, 1992: 40). More generally, the Department established a policy that mandated sending students to other districts for French language instruction to compensate those districts (COL Report 1990: 229-230).

In some instances government intervention was not required. The Red Deer Roman Catholic school board, for example, established an FFL program for grades 1 to 6 in a mixed school after it found that 40 to 45 children would be interested (Hatton, *Alberta Report*, June 15, 1992: 40). In a number of other instances, however, government intervention was requested, but refused. For example, the Edmonton Public School Board refused a request that a nondenominational Francophone school be established in Edmonton until such time as the provincial government established guidelines on what constitutes "sufficient numbers." The Education Minister said that the board does not have to wait for guidelines to make its own decision (Julien 1993a: 37-38). The ECSB said that nothing would happen in the area of school management until the province enacted legislation and also called for provincial guidelines on the building of schools. Similarly, in response to demands for a Francophone school in Lethbridge, the public and Catholic boards maintained that they would not consider the request until there were clear provincial guidelines and guaranteed provincial funding. The Alberta government said that the dispute was a local matter (COL Report 1992: 105). In the face of opposition from the local MLA and a group of citizens, the Lac La Biche school division decided that it would build a Francophone school in the village of Plamondon if the government paid one hundred percent of the costs. In the meantime, French-language classes were being offered in temporary facilities in the district (Unland, *Edmonton Journal*, Aug. 30,

1992: E1). Nearby, the town of Medley on the Cold Lake military reserve was ordered by a Federal Court judge in 1991 to establish a Francophone school (Julien 1993a: 38).

A number of these situations were defused following the establishment of Francophone school governance by the passage of Bill 8 in November 1993. In the interim, a similar bill had been proposed in June 1992 (Bill 41) but was not passed before the end of the legislative session. However, a Francophone Governance Implementation Committee was established in July 1992 that consisted of the same stakeholders as the earlier (1991) French Language Working Group. This committee would review Bill 41 and later Bill 8 and identify problematic areas, advise on grant rates and develop a plan to communicate the contents of the legislation.

Bill 41 was not passed partly due to the resignation of Premier Don Getty in 1992, who had spoken out against official bilingualism earlier in the year (Panzeri, *Calgary Herald*, Jan, 18, 1992: A5). During the subsequent leadership race, former Education Minister Nancy Betkowski came out in favour of Bill 41, while Ralph Klein- the eventual winner- argued that the bill might have to be changed since it "fosters discrimination" and was not favoured by those he spoke to during the campaign (Crockatt, *Edmonton Journal*, Nov. 14, 1992).

Yet, a very similar bill would pass in 1993 despite Premier Klein's comments during the leadership race and the fact that a number of government members raised concerns about the Francophone school management provisions during debate. Conservative Ty Lund pointed out that his constituents were concerned about the Bill, that English was the official language of the province, that the system would be costly and that the legislation would be divisive (*Alberta Hansard,* Sept. 27, 1993: 497). This last concern was echoed by Conservative Steve West who suggested that the Bill would foster discrimination by giving Francophones special rights (*Alberta Hansard,* Sept. 27, 1993: 497). Lorne Taylor shared Lund's concern with costs, because he believed that the system would not be economically viable (*Alberta Hansard*, Sept. 27, 1993: 495). Each of these members, however, said that they would support the Bill because the province was obeying the law articulated by the Supreme Court (also see Jenkinson, *Alberta Report*, Oct. 18, 1993: 34-35).

The legislation provided that the Minister of Education "may establish any portion of Alberta as a Francophone Education Region" and the Minister may also establish a Francophone regional authority for the region (Section 223.1(1)), which would have the same powers as a school board, except for the power to tax. In other Francophone education regions, a Francophone Coordinating Council could be established. A Francophone governance handbook prepared by Alberta Education in March 1994 stipulated that seven regions were to be established. The Northwest region- the Peace River area with Jean Côté and Falher- contained 2,420 individuals between the ages of 5 and 17 who had at least one section 23 parent; the Northeast region with Fort McMurray (525 section 23 eligible students); the East Central Region, including Plamondon, Lac La Biche, Medley, St. Paul, and Bonnyville, with 2, 435 section 23 eligible students; the North Central region (Edmonton and Legal with 9,895 section 23 eligible students); the Central region (Red Deer and Lacombe with 925 section 23 eligible students); the South Central region consisting primarily of Calgary with 4,810 section 23 eligible students); and the Southern region (Lethbridge and Medicine Hat with 860 section 23 eligible students). Francophone School Authorities were established for the Northwest (Peace River) region, North Central (Edmonton and Legal) and the East Central Region. Coordinating Committees were established in all other regions accept the Southern region.

The Francophone Governance Implementation Handbook indicated that the Francophone schools currently in operation would be transferred to the Francophone Authorities. Alberta's legislation provides that Francophone Authorities have the exclusive right to provide FFL programs and French schools for eligible section 23 students. Any Section 23 eligible student would have the right to French language instruction if he or she lived within a region governed by a Francophone Authority- the Authority could establish eligibility criteria to admit other students.[14] Other school

[14] Section 6 of the current Alberta School Act states that the Francophone Authorities shall enroll a section 23 eligible student in a school if the school is within the distance prescribed by the Authority, otherwise the Authority may enroll the student. Section 10 states that section 23 rights holders have the right to instruction if they are enrolled in a school run by a Francophone regional authority. The combined reading of these two sections suggests that access to FFL instruction is technically not necessarily guaranteed by law for section 23 eligible students, but the Director of French Language Services for Alberta Learning stated that the expectation is that Francophone Authorities will enroll all eligible section 23 students wanting an FFL education (Personal Communication with Gerard Bissonnette).

boards can provide French-language programs, but not those geared towards section 23 rights holders (see section 21 of the School Act). According to the Handbook, this stipulation follows the Supreme Court's 1993 decision, which noted that the provision of French-language programs by majority-controlled boards could not come at the expense of the minority (see p. 20).[15] Alternatively, again relying on the 1993 Supreme Court decision, the Handbook indicated that section 23 eligible students were not obliged to remain in programs or facilities run by the Francophone authority.

According to the Handbook, a Francophone authority would base its decision on whether to provide a school based on such factors as transportation and the number of section 23 eligible students likely to enroll in the school over a period of time, as suggested by the Supreme Court in *Mahé* (p. 56). Provincial support for school construction projects would be determined by regular policies, but would also take into considerations the special needs that Francophone Authority's might have, such as facilities required to assist non-fluent children to participate successfully in a FFL program. This flows from the importance of promoting culture as part of the objective of a Francophone school recognized in the 1993 Supreme Court decision (p. 57). Federal funding, secured with agreements with the province, could also be used for the building of facilities. In the Special Agreement signed between the federal government and Alberta in October 1993, it was agreed that the federal government would contribute $4.5 million towards the construction of a hybrid Francophone school and community center in both Calgary and Fort McMurray (p. 49). The $4.5 million dollars was part of a larger federal contribution of $24 million dollars for six years to enhance French language education at the primary, secondary and postsecondary levels. The federal government provided $5.4 million dollars for the implementation and maintenance of Francophone school governance (p. 49). The Alberta and federal governments also arrived at an agreement in 1993 for continued federal funding under the OLE program after another OLE protocol was signed between the provinces and the federal government up to the 1997-98 year (CMEC 1993-94 Report).

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[15] There was some controversy about these provisions, especially in the Peace River Region and Falher in particular—questions revolved around the status of dual-track French-language programs offered by the existing board (Interview Bissonnette; Alberta Education—Information Package, 1993: 6).

By 1997-98, Alberta had 17 homogeneous Francophone schools, as opposed to 3 in 1988-89 and 6 in 1990-91. Total FFL enrollment nearly doubled from 1988-89 to 1997-98. While the Commissioner of Official Languages noted in his 1995 Report that "considerable progress" had been made in Francophone education in Alberta, trouble areas still remained. The Peace River area, particularly the community of Falher, continued to be split over the issue of Francophone schooling and whether tuition fees had to be paid to the district running the Francophone school (Interview Arès, Interview Bissonnette). Although parents in Lethbridge were finally offered a FFL program by the local Catholic school board in 1993, they were still demanding a Francophone school and suggested legal action. Over time, the Lethbridge situation was placed under the purview of the North Central Authority and, by 2000 there would be a Francophone school in Lethbridge operating under the newly established Greater Southern Alberta Francophone Regional Authority.

The creation of this board in January 2000 grew out of a dispute between Francophones in Calgary who wanted to remain with the public and Catholic school boards and those who wanted a Francophone Authority established to run Francophone schools in Calgary. Those parents wanting to stay within the existing boards argued that the existing boards had more resources owing to economies of scale, teachers would be reluctant to join the Francophone board because of limited opportunities for promotion and mobility, and that their children received quality French language instruction. A number of Catholic parents were concerned about how the religious dimension of education would be handled by a Francophone authority. Opponents of the plan to form a Francophone school board argued that it smacks of "separation" and that because section 23 rights existed did not meant that they had to be used. Petitions were sent to the Minister of Education, meetings were organized to oppose the plan, and some parents considered exploring whether the plan could be challenged as infringing denominational school rights in section 93 of the Constitution Act, 1867 (Marshall, *Calgary Herald*, June 15, 1998: B1; Confidential Interview).

Proponents of a new Francophone school board argued that Francophone school management was necessary to counter the threat of assimilation by promoting cultural identity through education. Suzanne Sawyer, head of the Coordinating Council for the

Calgary region argued that Francophones should not have to continue to rely on the goodwill and support of mainstream boards for French education and that management and control of Francophone education was a constitutional right affirmed by the Supreme Court of Canada in its March 1990 decision (*Calgary Herald*, Oct. 29, 1998). Hence, Sawyer had opposed the appointment of a mediator or suggestions that a vote be conducted amongst Francophones in Calgary, because "You do not vote on constitutional rights" (Marshall, *Calgary Herald*, July 17, 1998: B5).

A Francophone Authority was established early in 2000, but the question of whether existing schools in the area (a public elementary school in Lethbridge, a public elementary school in Calgary (Queen's Park) and a Catholic kindergarten to grade 12 school in Calgary (St. Marguerite Bourgeoys)) would be transferred to the new Authority was left open. The government's compromise solution generated further conflict. Suzanne Sawyer previously argued that this option would be "playing with the constitution" (Marshall, *Calgary Herald*, Dec. 29, 1998), while a trustee of the new Francophone board argued that the board was the only legal authority to provide French language education in the region as a means of ensuring a vital French community (Pilon, *Calgary Herald*, March 31, 2000). Georges Arès, a lawyer and executive director of the ACFA was retained to negotiate the transfer of schools. Although not without some rancor (Smith, *Calgary Herald*, Jan. 14, 2000: a8), two schools were transferred; but the Calgary Catholic Board of Education refused to transfer St. Marguerite Bourgeoys. The Board's position was championed by Bishop Henry in Calgary. After intense discussions and the threat of litigation by the Francophone authority, an agreement was reached whereby a distinct Catholic, Francophone regional authority would be created to administer St. Marguerite Bourgeoys (Interview Georges Arès; Derworiz, *Calgary Herald*, June 27, 2000: B1).

Thus, by 2000, there was a series of Francophone school boards that covered the entire province.[16] However, the Alberta government continues to explore options concerning the structure of Francophone school management in the province (Catholic

[16] In January 2000, the seven Francophone Education Regions were reduced to four (Northwest, Greater North Central, East Central and Greater Southern), each of which would have its own Francophone Educational Authority. The Greater Southern Region would also have a Catholic Francophone Authority. Earlier suggestions by the government in 1999 that one Francophone Authority be created for the entire province were opposed because it would detract too much from local control of education.

Francophone Governance Advisory Committee: Draft Report, February 2001). Any restructuring would likely cause controversy within the Francophone community, and the government would have to be careful about igniting unfavourable opinion in the larger population. In 1998, I included a series of questions about minority language education in a survey conducted in Alberta. Only 39 percent of respondents thought that English speaking parents in Quebec or French speaking parents outside Quebec should have the right to manage their own schools (56 percent supported the right to instruction only and nearly 5 percent supported no right to instruction or management). Moreover, support for the right to management dropped considerably if it "were to increase the cost of education in Alberta" (see Table C.9- Appendix C).

Chapter Seven – Ontario and Saskatchewan Case Studies

The previous chapter revealed that OMLE policy in Alberta changed significantly from the late 1960s up to 2000, though the pace of change was sporadic and there were many battles at the local level that intersected policy developments at the provincial level. Was the evolution of OMLE policy in Alberta unique or did it share similarities to the development of OMLE policy in other provinces outside Quebec? The overview of OMLE policy development in Chapter Five can begin to answer these questions, but somewhat more detailed comparisons are needed to help explain the changes, particularly the role of legal mobilization and judicial decisions. This chapter provides a brief case study of OMLE policy development in Saskatchewan and a slightly longer case study of Ontario. Ontario was selected for a somewhat closer examination because it differs from Alberta in a number of respects: it has a higher proportion of Francophones, many more Francophones in real numbers, and supported the entrenchment of the Charter and official minority language education rights. Saskatchewan, on the other hand, is similar to Alberta in two important respects—it has roughly the same proportion of Francophones and joined Alberta in opposing the entrenchment of the Charter and official minority language education rights. By including references to cases both "different" and "similar" to the Alberta one, the effects of legal mobilization and judicial decisions might be slightly easier to tease out in the following chapter.

Saskatchewan

Saskatchewan, like its prairie neighbour Alberta, liberalized its language policy in 1968 by allowing the Lieutenant Governor in Council to "designate schools in which French may be taught or used as the language of instruction in a designated program" (other languages other than English could also be used in specified schools) (Julien 1995: 121). Approximately 17 schools were designated until further reforms in 1973-74, though the process was gradual and French was only used 50 percent of the time by grades five and six. Legislative changes in 1973-74 allowed for individual school districts to use French (or other languages other than English) in schools without Cabinet designation, though districts still had to follow regulations set by the Minister (Foucher 1985: 223-24).

As noted in the previous chapter, Saskatchewan enacted a more progressive policy scheme than Alberta by distinguishing between FFL (Type A) and immersion (Type B) programs; reducing the discretion involved in designating schools to offer the programs, indicating that Type A programs be provided in distinct facilities (including parts of existing schools), and that parent advisory councils be established for designated programs. An office of Official Minority-Language Education was also established in the Department of Education. Policy results on the ground, however, were mixed. Parents in Vonda wanted a Type B program designated for grade 10, but were denied and lost in court, though subsequent changes to the regulations addressed such concerns. Parents in Prince Albert successfully went to court to get a French (Type-A) school, but the Catholic school board was uncooperative and removed the principal soon after the school was opened. The parents boycotted the school and established their own school, though without financial support from the province the school faltered (*G & M*, Jan. 9, 1982: 8). In the early 1980s Francophone groups called for administrative control over French-language education to address problems associated with Francophone schooling, including the difficulty in getting Type A schools and programs (COL Report 1980: 33; COL Report 1981: 43).

Early in 1984 the Commission des écoles fransaskoises presented to the Minister of Education a detailed proposal that called for a province-wide French-language school board with parent committees at each school. The Minister of Education rejected the proposal, arguing that too much power would be lost at the local level, while the Minister of Justice claimed that Saskatchewan's education legislation was consistent with section 23 of the Charter and that no changes were necessary (COL Report 1984: 195-196). The Commissioner of Official Languages noted that, although nine schools were now offering FFL [Type A] programs in Saskatchewan, "access to minority-language instruction, as opposed to French immersion, remains too often the subject of exhausting local struggles" and "ministerial and school board powers of discretion still leave too many Francophone children crying in the educational wilderness" (COL Report 1984: 29).

In 1984, Saskatchewan, with approximately half of the number of Francophones as Alberta (see Table B.1, Appendix B), had 12 schools providing a FFL (Type A) program, with 3 of those schools being homogeneous Francophone schools. Total enrollment in

the FFL programs was just over 1,200 students. A coalition of Francophone groups launched a court action under section 23 in 1985 to demand the right to manage and control the FFL programs and facilities. As noted in Chapter Five, the Francophone groups in the case raised issues concerning the perils of assimilation in mixed schools, the lack of French ambiance in the schools, unequal facilities and the lack of input by Francophone parents into hiring, admissions policy and other administrative decisions.

These groups won a partial victory in Judge Wimmer's 1988 decision. Judge Wimmer argued that section 23(3)(b) included the right to management and control of French-language facilities and declared Saskatchewan's *Education Act* to be in conflict with section 23 insofar as it did not grant such powers to section 23 parents. He did not specify or suggest a model of governance, stating that it was up to the legislature to design an appropriate model (at 321, 323, 331). Section 23 rights were further limited, according to Justice Wimmer, by the fact that existing school board jurisdictions might fragment the number of section 23 parents, making it more difficult for them to achieve the required threshold (parents of 15 pupils), and by regulations that made designating a French program dependent on the program being viable for three years and schools being able to accommodate students who did not want to be in the designated program.

However, Judge Wimmer did not find that school boards had too much discretion in the process, nor did he endorse the suggestion that there should be stricter admissibility requirements for designated programs. He also argued that if the number of students warranted only French language instruction, than compromises would become necessary, such as sharing facilities or making the instruction available to a broad range of students.

Soon after the decision was rendered, the Conservative government, in response to a Supreme Court decision that would have required the translation of existing government statutes, angered the province's Francophones by passing legislation that validated the use of English-only statutes, regulations and records (Julien 1995: 123). Despite this legislative action, the government reached an agreement with the federal government in June 1988 to strengthen the use of French in the legislature and courts. A subsidiary agreement provided millions of dollars in federal funding for the development of more French language facilities and the implementation of management and control of such facilities by the French language minority (Gallant Report 1989: 15; Ducharme 1996:

30). Shortly thereafter the Minister of Education appointed a committee to recommend a system of school management that would have members from the fransaskois community, the government, trustee and teacher associations and would be chaired by former federal civil servant, Edgar Gallant.

In June 1989, the Gallant Committee recommended that a series of local fransaskois school boards be established along with a central council (made up of representatives from the school boards) and secretariat to provide support to the boards. The boards would not be able to tax, but would receive funding from the province and federal grants. Following a transition period where parents would be allowed to decide whether to opt-in to the new system, all schools operating FFL programs would be under the control of fransaskois boards. Admission to fransaskois schools would be based on section 23 of the Charter, though the Committee recommended that the government encourage fransaskois boards to admit French speaking immigrants, families of French origin who no longer speak French and Anglophones who would prefer to remain in a fransaskois school (*A Fransaskois Component for the Saskatchewan School System* (Gallant Report), 1989).

The government promised to enact legislation to implement the Gallant Report's recommendations, which would create fransaskois boards that would initially control seven schools. However, in April 1990, the government postponed developing the legislation following the Supreme Court's *Mahé* decision in March 1990, stating that it wanted to study the legal and constitutional ramifications of the decision. Francophones demonstrated in Regina and Prince Albert against the move and some accused the government of being afraid to grant Francophone rights in an era of budget constraint with an election looming on the horizon (COL Report 1990: 227; Waite, *Montreal Gazette*, Apr. 24, 1990: B1). However, public attitudes toward official minority language education rights are difficult to determine—Saskatchewan is usually included with other "prairie provinces" and if there are separate data for Saskatchewan the sample sizes are very low. For example, a 1987 survey that asked whether French Canadians who moved out of Quebec to another province had a basic right to have their children taught in French, in Saskatchewan 15 of 36 people who were asked this question responded "yes"

or "qualified yes."[1] (In Alberta 46 of 92 respondents answered "yes" or "qualified yes," compared to Ontario where 234 of 306 respondents answered "yes" or "qualified yes").

The Prime Minister, Secretary of State and Commissioner of Official Languages expressed disappointment, and several million dollars of federal money promised in the 1988 agreement for implementing Francophone school management were withheld (COL Report 1990: 227; Ducharme 1996: 30). However, Saskatchewan was still receiving federal funding for FFL education by virtue of a bilateral agreement signed with federal government under a new funding protocol agreed upon in 1988 and in effect until 1993. In 1989-90, for example, Saskatchewan received $1.8 million for FFL education (and $4 million for French immersion).

Not surprisingly, the government of Saskatchewan in the *Mahé* case before the Supreme Court supported the Alberta government's contention that section 23 did not include the right to management and control of French-language facilities and urged the Court to adopt a restrained interpretation of section 23 (Factum A.G. Saskatchewan).

Despite the government's opposition to Francophone school governance, by the 1990-91 school year the number of homogeneous francophone schools in Saskatchewan had jumped dramatically to 9 (from 3 in the 1988-89 school year). However, in Gravelbourg, while a number of Francophone parents wanted to retain French immersion, another group of parents started a private French language school and were demanding public funding. Litigation was started to try and back this demand (COL Report 1990: 228). Many Francophone parents were also disappointed by the Conservative government's decision to delay the creation of French language school boards as recommended by the Gallant Report. Although on-going negotiations between Francophone groups and the government were resolving some issues, a number of items remained contentious, such as whether the government had to enshrine rules surrounding French schools, trustees and other administrative matters in legislation. Francophone groups asked the Saskatchewan Court of Appeal to issue a mandatory injunction forcing the government to act, but the Court declined to review the matter because it would have to exercise original jurisdiction if it did. The Supreme Court declined to hear an appeal in 1991 (COL Report 1991: 17-18; *Calgary Herald*, Aug. 18, 1991: B2).

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[1] 1987 Charter Values survey. Data analysis by author.

The Justice Minister argued that the matter was "complex" and that there were "legitimate differences of opinion." He predicted that it would take another court case to clarify some of the issues. As the government continued to justify the delay in creating Francophone school boards as a response to "technical" problems, Francophones argued that the government was stalling because of a "kneejerk reaction on the part of a vocal minority" in a pre-election period (*Calgary Herald*, Aug. 18, 1991: B2).

In October 1991, the Conservatives lost power to the NDP led by Roy Romanow. In opposition, Romanow had called the Gallant Report a "good starting point" and, following the election, the Education Minister promised to implement the recommendations as resources permitted. A bill establishing Francophone school boards was not tabled for third reading in 1992, which disappointed Francophone groups, but Francophone New Democrat Armand Roy claimed that the government was still supportive. Indeed, in 1993 the government passed legislation that created eight Francophone school boards with provisions for adding others as needed. The Saskatchewan Teacher's Federation supported the move, but the Saskatchewan School Trustee's Association had voted narrowly against the proposal in 1992, citing concerns over costs (COL Report 1992: 106-107). In 1997, a school board for Zenon Park was added and, in 1999, owing to efficiency concerns, one Francophone school board was created for the entire province. Any child of a parent eligible under section 23 has a right to attend a "fransaskois school" operated by the Francophone board. The board does not have taxing power, but equivalent basic grants are provided and extra monies are given because of the higher costs of providing FFL instructional services.

The transition process was a relatively smooth one, with the situation in Zenon Park being a notable exception. In 1997, the newly established Zenon Park Francophone board was prompted to take legal action because it was unable to come to an arrangement to share facilities with neighbouring boards and was forced to establish a school in a temporary facility. Moreover, the other local school in the area refused to allow the Francophone school to share facilities, such as the gymnasium (COL Report on Governance 1998: 108-109). An interlocutory, mandatory injunction was granted in June 1998 for the sharing of facilities with the local school (*Conseil Scolaire Fransaskois de Zenon Park*, 1998).

By 1999, tensions in the community were running very high. The fighting, however, was amongst Francophones. A number of the community's Francophones felt that the local school did not operate sufficiently in French and demanded a Francophone school, while other Francophones were happy with the level of French in the existing school and argued that the community did not have enough students to split between two schools. Opponents argued further that the one million dollars being spent to construct the new Francophone school was an inappropriate use of funds. Supporters of the school responded that the school was necessary to preserve the French culture and that the Charter gave them the right to the facility (W5 transcript, Jan. 26, 1999).

Ontario

Compared to Saskatchewan, Ontario moved somewhat earlier in improving its OMLE policies. In 1974 Ontario stipulated that French-language instruction had to be offered by a school board, if upon written request, it ascertained that 25 pupils per class at the elementary level or 20 students per class at the secondary level could be assembled. Moreover, when a French-language instructional unit (FLIU) was established a French language advisory committee had to be created as well. At the Departmental level there was a Languages of Instruction Commission and other structures to assist the provision of French-language instruction. The Department also offered grants to establish FLIUs and to provide transportation for students to FLIUs. Approximately 360 schools had FLIUs (see CMEC Report 1978: 87-95).

Despite Ontario's more progressive policies concerning French-language education policy relative to Alberta and Saskatchewan, policy disputes did arise. For example, as Lancashire noted, "Anglophone and Francophone trustees [in the Ottawa-Carleton region] have been bickering for years over facilities, the division of funds, the quality of French teaching, textbooks and transportation subsidies and the domination of the English language" (*G & M*, Feb. 25, 1978: 10). In 1976, the Mayo Commission had recommended a French-language Catholic school board for the Ottawa-Carleton region, but the provincial government did not move to implement this recommendation. There were also on-going disputes surrounding demands for a French-language high school in various areas such as Essex and Penetanguishene (COL Report 1978: 35).

Following the 1974 policy changes, Ontario made few changes to OMLE policy prior to the early 1980s. There were some administrative changes, such as the establishment of the Council for Franco-Ontarian Education and the designation of Assistant Deputy Minister of Education for Franco-Ontarian education, but the only policy change came in the form of a 1979 statement indicating the desirability for more FLIUs to be established as distinct "entities" and the provision of extra funds for that purpose. In the late 1970s, Churchill published a study that concluded English-dominated mixed high schools encouraged Anglicization and discouraged the use of French and controversy continued to swirl around OMLE policy, especially the building of Francophone schools (see Churchill et al. 1985). English-speaking parents in North York were upset that their children were being bused to a crowded school when the local school board was preparing to build a new French-language elementary school (*G & M*, June 20, 1978: 4). In Penetanguishene, the Simcoe Board of Education had long refused to build a Francophone secondary school and the government declined to overrule the decision, saying that it could only offer a special section within an existing school. In early 1980, attempts by a group of Francophone parents to start their own school was met by resistance from the town over zoning laws, a member of the Simcoe Board of Education and a member of a group opposed to the school claimed to have received death threats over the phone, a bilingual group claimed that not all Francophones supported a separate school, and the *Globe and Mail* weighed in with an editorial arguing that the government's refusal to fund a school contradicted its "professed support for French language rights" (February 8, 1980: 6). In May 1980 a group of approximately one hundred and fifty protestors marched in front of the Ontario legislature to protest when the government announced, following a closed door meeting involving Conservative Premier Bill Davis, his Education Minister and local school officials, that it would fund a Francophone high school in Penetanguishene (Mulgrew, *G & M*, May 26, 1980).

The question of Francophone management and control over French-language schools and programs remained controversial. The four existing school boards in the Ottawa-Carleton region supported the creation of a French-language school board as did Francophone associations, trustees and teachers. Francophone groups also were supported by the Archbishop of Ottawa and a petition with 8,000 signatures. Yet certain

Ottawa trustees complained that the proposal smacked of "separatism" and "apartheid" and that other ethnic groups would be demanding their own school boards if the proposal went through. On the one hand, the Davis government did not want to come out against the proposal and give more ammunition to Quebec Premier Rene Levesque; on the other hand, the government did not want to lose votes in areas such as Windsor by actively promoting Francophone education rights (Lancashire, *G&M*, Feb. 25, 1978: 10). Indeed, Premier Davis quashed a private member's bill in June 1978 that would have extended French-language services in Ontario without making French an official language after it received approval in principal from the Legislature, claiming that French was a "matter of sensitivity" for English Ontarians (Oziewicz, *G&M*, June 3, 1978: 8). Nevertheless, following the publication of a Green Paper in February 1979, the government officially proposed creating French-language sections within existing school boards (Martel 1991: 124).

Freedom of choice in education also generated some controversy. In December 1981, a group of French-speaking parents were considering taking the Toronto Board of Education to court after the Board decided to allow French-speaking students to take nearly all of their courses in English (Park, *Toronto Star*, December 17, 1981: a12).

The release of the government's White Paper in March 1983 indicated that Ontario was prepared to make significant policy changes. The White Paper was a response to the 1982 Report of the Joint Committee on the Governance of French-language elementary and secondary schools, which recommended easier access to French-language instruction and proportional and guaranteed representation of Francophones on existing school boards. In the White Paper, the government indicated that it was prepared to drop the numbers requirement for the provision of FFL instruction by either requiring boards to establish a FLIUs or to provide transportation to a board that has a FLIU. The government also proposed guaranteed and proportional representation for Francophones on existing public school boards that have at least 500 Francophone students or where Francophones make up at least 10 per cent of total enrolment. Minority language trustees would have exclusive jurisdiction over the administration of FFL programs and schools. It was estimated that relaxing the access requirements to FFL instruction would affect approximately 1,000 students who were not receiving instruction in their mother-tongue,

while the cost of implementing French-language sections on public school boards would be approximately 1 million dollars (Black, *Montreal Gazette*, Aug. 27, 1983: b4).[2]

The Ontario Public School Trustees Association and a number of individual English-speaking trustees complained that the government's proposals would be too costly, organizationally unfeasible, would sacrifice the principle of representation by population, and would unfairly advantage Francophone ratepayers by giving many a vote for Catholic trustees and another vote for Francophone trustees. Some English-speaking boards recommended that distinct Francophone boards be established instead. Francophone groups applauded the proposal to drop the numbers requirement for access to French-language instruction, but were unhappy that the government was unwilling to establish distinct Francophone school boards- a stance supported by the NDP's Education Critic. Francophone critics also pointed out that the proposal for French-language sections on school boards would have limited application to Catholic boards, which enrolled the majority of French-speaking students, and that the proposed financial formula would inadequately fund FFL programs and schools. In May 1983, the Association canadienne-française de l'Ontario (ACFO), and the Association des enseignantes et des enseignants franco-ontariens (AEFO), and a number of francophone parents challenged the government's education policies under section 23 of the Charter. The litigants agreed to drop this action when Attorney-General Roy McMurtry referred the constitutional questions raised by the legal challenge directly to the Ontario Court of Appeal. Monies were given to francophone groups for the case through the Court Challenges Program (see Matas, *G&M*, May 27, 1983: 4; Black, *Montreal Gazette*, Aug. 27, 1983: b4; Gadd, *G&M*, September 29, 1983: 1; Matas, *G&M*, Sept. 30, 1983: 4; *Toronto Star*, Oct. 13, 1983: a8; COL Report 1983: 28).

More local political and legal battles continued during this time as well. Francophones continued to press for a French high school in Wawa, but the local school board continued to deny the request while voting to prohibit Francophone students from being bused in from a nearby community. This was done to insure that Francophone numbers did not meet the threshold under the proposed plan for requiring Francophone

[2] In the few boards where English-speakers were the minority, English-speakers would have guaranteed and proportional representation on majority Francophone boards.

trustees on school boards (Churchill et al 1985: 383; *Toronto Star*, March 2, 1984: d13). In Penetanguishene, Francophone parents complained that the new Francophone secondary school (Le Caron) lacked adequate resources. In particular, Francophone parents objected to the fact that students of Le Caron were forced to be bused two miles to another school during the lunch hour to take industrial arts courses. The school board maintained that it thought of Le Caron as a provincial project and if the province was unwilling to provide funding then there would be no industrial arts facility at Le Caron. In January 1984, a Francophone business consultant, Jacques Marchand commenced legal action against the province of Ontario and the Simcoe Board of Education arguing that the lack of equal facilities at Le Caron violated section 23 of the Charter (COL Report 1983: 28; *Marchand,* 1986).

At approximately the same time as the *Marchand* case was being initiated, the Ontario Court of Appeal began hearing arguments in the reference case. Although the Ontario government was prepared to drop the numbers requirement in forthcoming legislation, it still defended the practice of establishing a minimum number of students for the mandatory provision of FLIUs within each school district as being consistent with section 23 of the Charter (A.G. Ontario Factum: 17-25). The Ontario government also submitted that section 23 did not give the French linguistic minority "the right to manage and control their own French language classes of instruction and French language educational facilities" (A.G. Ontario Factum: 26). Among other reasons, the government argued that the legislative history of section 23 revealed that the section was not meant to grant the right to management and control. For example, the Ontario factum details how the federal Minister of Justice at the time specifically denied any intent to provide for the establishment of distinct or separate minority-language school boards (31).[3] Similar arguments were made by the Ontario Public and Separate Trustees Associations, the Ontario Secondary School Teachers' Federation, and the Ontario English Catholic Teachers' Association. Catholic representatives were concerned that management and control rights given to Francophones would interfere with the denominational school rights of Catholics.

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[3] Interestingly, the Ontario government's vigorous defence in this case should give pause to those who argue that the government was quite willing to lose the case in order to justify granting further education rights to Francophones (see Knopff and Morton 1992: 31-32).

The federal government agreed that section 23 did not provide a blanket right for minority-language groups to have their own school boards, but the government did ask the Court to adopt a flexible standard which might include distinct school boards if the numbers warranted it (*G & M*, Jan. 21, 1984: 5). Ontario and national Francophone organizations, as well as the Commissioner of Official Languages, the Ottawa Board of Education and the Liberal and NDP parties of Ontario presented submissions that favoured an expansive definition of section 23, including the right to management and control.

In June 1984 the Ontario Court of Appeal ruled that Ontario's legislation violated section 23 by imposing a standard numerical requirement across the province; potentially limiting the number of section 23 eligible students through existing school board boundaries; granting too much discretion to school boards; and by not providing for some degree of management and control over French language programs and facilities, including those in the separate (Catholic) system. The Court did, however, note that the policies proposed in the White Paper would not violate section 23 (*Reference Re Ontario Education Act,* 1984).

Ontario francophone groups were pleased by the ruling, claiming that the government could no longer "seesaw" because the court has established rights to French-language education. Guy Matte, president of the AEFO, also was pleased that the discretion of school boards would be limited, which, among other things, might contribute to the building of more French high schools (Stephens and Matas, *G&M*, June 27, 1984: 1-2). Francophone groups claimed that they would meet with Premier Davis in August to discuss how the decision would be implemented and Mr. Matte warned the Premier not to proceed in a half-hearted way without consulting Francophone groups because, the "courts have told us, 'Come back to us and we'll judge the propriety of any proposals the Government will put in front of you'" (MacKenzie, *G&M*, June 28, 1984: m2). A few days after the decision was released the Ontario and federal governments announced that they had signed a deal, under the federal-provincial protocol agreed to in December 1983, whereby the federal government would contribute roughly $137 million over three years towards minority language education (FFL and immersion).

In December of 1984 the Conservative government of Ontario passed a law guaranteeing access to French-language instruction to any child eligible under section 23 of the Charter. The minority government took until July 1985 to introduce a bill that would provide for Francophone representation on public and Catholic boards with 500 Francophone students or 10 percent of enrolment is made up of Francophones. The Liberals and NDP refused to support the bill, arguing that there needed to be more flexibility, which could include distinct Francophone boards (Matas, *G&M*, July 13, 1985: 4). Very soon afterward the Conservative government was defeated on another matter and the new Liberal government introduced legislation that would provide Francophones management and control over French language education in December 1985. The bill proposed guaranteed and proportional representation for Francophones on any school board that offered French-language instruction (approximately 28 public and 30 separate boards) by 1988 with interim French-language education councils established by 1987.[4] Minority language representatives on boards would have exclusive authority over the operation of minority language programs and schools, but would not have complete control over budgetary and financial matters. The bill also established an implementation committee to facilitate the creation of a Francophone board for Ottawa-Carleton. The committee would be chaired by former Liberal MPP Albert Roy, who was a strong advocate for Francophone education. Although Education Minister Conway said that only Ottawa-Carleton would be considered for a new board, the bill that was passed included the creation of a Francophone board with public and Catholic sections for the Metro-Toronto region (a separate bill would be passed in 1988 establishing the Ottawa-Carleton Francophone board with public and Catholic sections).

The delay in introducing legislation giving management and control to Francophones by both the Conservative and Liberal governments can largely be attributed to two factors: one, stakeholders could not agree on a proposal; and, two, the complications that arose from the Conservative government's initiative to fund Catholic secondary schooling (Churchill 1985: 375-385; Confidential Interview). A study released by the

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[4] English-speakers would also enjoy guaranteed proportional representation in those few areas where Francophones were a majority. Also, there would also be guaranteed Francophone representation on boards that did not have an FLIU but purchased French-language services from another board for 300 or more students or 10 per cent of the board's enrolment.

Council for Franco-Ontarian Education shortly before the Liberal government's proposed legislation in December 1985 argued that the Conservative's original plan did not go far enough and, to reduce the rate of assimilation, called for the creation of independent Francophone governance structures not based on numbers and a reduction in the number of mixed high schools (Churchill et al. 1985: 387-389). In the 1986 school year in Ontario there were 33 homogeneous public high schools, 27 mixed public high schools, 11 homogeneous Catholic high schools and 4 mixed Catholic high schools (Martel 1991: 128). Le Caron in Penetanguishene, for example, had some Anglophone students who attended French-language programs.

In July 1986 Justice Sirois released his decision in the *Marchand* case, holding that the Simcoe Board of Education and the Ontario government violated section 23 of the Charter by not providing equal facilities at Le Caron. Justice Sirois declared that the Government of Ontario had a duty to ensure that the instruction and facilities provided to the children of the plaintiff and other section 23 students were equivalent to English-language instruction and facilities in the district and to provide adequate funding for this to be achieved. Against the Simcoe Board of Education, Justice Sirois issued a mandatory order for the Board generally to provide equal instruction and facilities to section 23 rights holders and specifically to establish facilities for industrial arts at Le Caron.

Following the decision, disagreement arose between the parties as to how to proceed. Instead of financing additions to Le Caron the Ministry of Education proposed giving Francophones the existing Penetanguishene Secondary School and have English-speaking students bused eight kilometers to Midland. The Simcoe Board, however, opposed the plan and the case went before Judge Sirois for clarification. In his October 1987 ruling, Justice Sirois ordered additions to be built to Le Caron and ordered the government to pay for 94.4 percent of the costs and the Simcoe Board to pay the remaining costs. Concerned that the broader effects of the judgment could result in approximately $150 million being spent to upgrade Francophone facilities across the province, the government decided to appeal the decision.[5] The decision to appeal was criticized by

[5] However, the purpose of the appeal seemed to create confusion in the government. While Education Minister Conway suggested the appeal was to test the decision's effects on the law providing for

Francophone groups and by the Conservative and NDP opposition parties (Downey and Bourrie, *G&M*, Oct. 14, 1987: a15; Sheppard, *G&M*, Oct. 27, 1987: 5; Sheppard, *G&M*, Oct. 28, 1987: 5). The appeal was eventually dropped and $5.7 million was provided by March 1988 for the project by the province (*G & M*, March 18, 1988: a14).

However, just when the Education Minister thought that problems had been solved in Penetanguishene, Jacques Marchand, with the backing of the ACFO, launched another lawsuit because Le Caron was operated by the public board so French-speaking Catholics would not be able to participate in selecting trustees. The introduction of full financing for Catholic high schools contributed to this problem, since Catholics were no longer going to enjoy having two special trustees sit on the public board. The situation created tensions within the community between Anglophones and Francophones. Anglopohone representatives accused Francophones of not wanting to share political power in Le Caron and of trying to "twist the kids by religion as well as by language," while Francophone representatives claimed that Anglophones only see French instruction as second language training as opposed to first language training and the maintenance of culture (Bourrie, *G&M*; April 15, 1988: a9). This latter view was echoed by a report released in June 1988 by the Council for Franco-Ontarian Education. The authors, Paul Calvé and Lionel Desjarlais, claimed that Anglophone parents, educators and students who were interviewed tended not to see a real distinction between French immersion and FFL programs. The report also suggested that many school board officials ignored the provisions of section 23, primarily by their willingness to accept students whose culture was non-French. The report largely blamed provincial funding formulas for tempting officials to allow non-Francophones into French-language programs and facilities. Finally, the report expressed disappointment that many Francophones seemed indifferent to the future of Francophone education and schools (Polyani, *G&M*, June 16, 1988: a20).

A group of Francophone parents were not indifferent, however, when the separate school board in Sault Ste. Marie liberalized its policy of only permitting children of French-speaking parents to join its FFL programs. In January 1989, the parents of fifty

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Francophone management and control on regional school boards, the government's legal documents concentrated on arguing that French instruction and facilities should mostly have to be "equivalent" with remote or low enrolment schools and not necessarily to English instruction and facilities within the same district.

children switched their support to the public school board and later took the public board to court in order to force it to provide an FLIU- an option that was favoured by the board's French-language advisory council and Director of Education, but was rejected by the trustees. At a meeting where 200 people from the Sault Ste. Marie Association for the Preservation of English-Language Rights protested outside, the board decided to enter into an agreement with the separate board to provide FFL instruction. The court issued an interlocutory injunction ordering the public board to establish an FLIU, though the board instead came to a new agreement with the separate board to supply the necessary French-language services (Green 1990-91: 101-103; *G & M*, May 6, 1989: a11).

It appears that the English-speaking protesters in Sault Ste. Marie did not represent the prevailing public opinion towards at least the abstract notion of OMLE rights for Francophones. In a 1985 survey, 68 percent of respondents in Ontario answered "yes" to the question of whether Francophones should be entitled to have their children instructed in their own language (Churchill 1985). Similarly, in the 1987 Charter Values survey that asked whether French Canadians who moved out of Quebec to another province had a basic right to have their children taught in French, 62 percent of Ontario respondents answered with a "yes" or "qualified yes."

In the meantime, the Ontario government's method of establishing the number of Francophone trustees to be selected in the upcoming municipal elections was challenged in court by the Association francais des conseils scolaires de l' Ontario (AFCSO) in October 1988. The AFCSO argued that in moving to a system whereby the number of trustees would be determined by enumeration rather than by property assessment, Francophones were systematically undercounted in the enumeration process. Justice Sirois agreed with the AFCSO and ruled that the elections should be based on the previous rules. The Court of Appeal quickly overturned the order, though it did rule that a handful of districts should have trustees chosen under the old rules (Confidential Interview; Downey and Polyani, *G&M*, Oct. 18, 1988, a1).

The AFSCO in 1989 called for more Francophone school boards and early in 1990 Francophone groups threatened court action to force the province to create Francophone school boards outside of Toronto and Ottawa-Carleton. Inadequacies and operational problems were cited for the need for Francophone boards. However, the Liberal

government indicated that no more Francophone boards were being considered (COL Report 1989: 195; COL Report 1990: 195).

Francophone groups in Ontario that had been dissatisfied with Francophone representation on existing school boards and threatening litigation, argued that the *Mahé* decision made their position "more solid." The chairwoman of the AFCO said that the Education Minister of Ontario does not have "any choice", but to come forward with proposals to meet the Francophone community's requirement for greater control over education. She did warn, however, that expansion of minority language education rights might meet with an unfavourable response in some areas of the province, since school disputes involving language contributed to the recent English-only resolutions passed by the cities of Sault Ste. Marie and Thunder Bay (Allen, *G&M*, March 16, 1990: a4; COL Report 1990: 239). The Liberal government, which for the first nine months of the year had refused to consider adding more French school boards, in June announced that it would review increasing Francophone representation on existing school boards and establish a task force to develop procedures for the creation of more Francophone school boards. When the NDP came to power in November, the new Education Minister, Marion Boyd, promised to establish an advisory board on Francophone school management and introduce amendments to the Education Act permitting the creation of other Francophone boards. Specific consultations would begin on creating such boards in the Simcoe and Prescott-Russell regions (COL Report 1990: 239), the latter had a particularly large Francophone (Catholic) contingent (1986 figures showed that 40 600 of the nearly 58 000 residents in the area had French as a mother tongue) and a well-prepared Charter case ready to be launched (Interview- Marion Boyd).

A Francophone, Catholic school board for Prescott-Russell was established in 1991 by the provincial government by way of regulation. A network of French language school boards for regions that would have at least 1,500 students was recommend by the *Report of the French Language Education Governance Advisory Group* (Cousineau Report) submitted to Education Minister Boyd in September 1991. Boyd asked all interested parties to comment on the report, and the Council for Franco-Ontarion Education was created in 1991 to provide ongoing advice and information on Francophone education. By 1992, however, some Francophones were becoming

impatient with consultations and were demanding more action. Adrien Cantin wrote in Le Droit: "Despite the Supreme Court of Canada's decision on school management, the Rae government continues to drag its feet. Despite the sympathy expressed by the New Democrats and the successive study commissions on the issue, Francophones still directly control only a fraction of their schools..." (quoted in COL Report 1992: 110).

The weak performance by Ontario's Francophones in science and math in the 1992 International Assessment of Educational Programs report led the president of the AEFO to argue that with more autonomy over education Francophones could better target resources to problem areas. However, in response to the Cousineau Report that recommended Francophone school boards, some organizations, such as the Muskoka Board of Education, questioned the costs associated with a new set of boards. This was the position generally taken by the public boards, while the Catholic school boards had divergent views, often depending on the numbers of Francophones within a board's jurisdiction (Interview- Marion Boyd). The president of the French teacher's association responded that "it's a question of rights, not money." This left the government to try to come up with a plan that satisfied conflicting views on the matter (Lewingston, *G&M*, Feb. 19, 1992: a3). The NDP caucus was "ambivalent" over the matter (Interview- Marion Boyd). As the government contemplated action, a group of Francophone parents in Cornwall launched court action under section 23 in 1992 demanding more equitable funding for Francophone education and a Francophone school board. The initiation of the case had been delayed as its proponents waited for the outcome of the Cousineau Report and its aftermath (Interview- Marion Boyd).

In 1993 the provincial auditor would support the contention that French programs and schools were, on average, not equivalent to English ones (COL Report 1993: 123), and in 1994 two Francophones lodged a complaint with the United Nations Human Rights Committee that Ontario's policies were contributing to cultural genocide. Among other things, the submission cited the lack of a system of Francophone school boards as contributing to the problem of assimilation (Rusk, *G&M*, May 25, 1994: A9). However, before this process was complete and by the time the Cornwall section 23 case came to trial, the government would announce that it was planning major changes to the funding

and organization of education in Ontario, which included the establishment of a network of Francophone school boards.

The groundwork for these changes started with Ontario's Royal Commission on Learning. By the time the Commission's hearings were concluded, 145 Francophone groups had made submissions, as did the Commissioner of Official Languages (COL Report 1994: 89). According to the Commission, briefs from Francophone groups called for the creation of a network of French language school boards and in their submissions they "referred especially to the Supreme Court's two unanimous decisions, in the case of *Mahé* (Alberta) in April 1990 [sic] and in the case of *Franco-Manitoban parents v. the Public Schools Act* [sic] in March 1993..." (Report of the Royal Commission On Learning, 1994 (vol. 4): 66). In addition to recommending Francophone school boards, the Commission called for the more equitable distribution of school tax revenues and for extra funding to be allocated to French-language instructional units because of their importance in promoting and preserving Francophone culture. The Commission also suggested that greater efforts should be made to integrate ethno-cultural Francophones into the school system and that a uniform criteria for the admission of "non-rightholders" be established (*Report of the Royal Commission on Learning*, 1994 (vol. 4): 65-72).

A follow-up task force appointed shortly before the Conservatives under Premier Harris were elected called for a network of fifteen French-language school boards (5 public and 10 Catholic) to replace the existing seventy-eight French-language governance structures, most of which were French-language sections on existing school boards, as part of an overall strategy to reduce the number of school boards in Ontario. The Sweeney Report also repeated calls for changes to the way education was funded and made recommendations on how to implement the various proposed changes (*Ontario School Board Reduction Task Force: Final Report*, 1996). An advisory committee chaired by David Crombie in 1996 also recommended that the Education Ministry create French-language boards and set a fixed property rate for funding (COL Report 1996: 80). The fact that a system of province-wide French language school boards had not yet been established led the federal Heritage Minister in 1996 to compare unfavourably Ontario's record in this regard with other provinces, particularly western provinces with small

Francophone populations. She said that the federal government was prepared to back litigation that would force the issue (*Montreal Gazette*, Oct. 19, 1996: a18).

However, in 1997 the provincial government passed legislation (Bill 104 and Bill 160) that, among other things, created seven French language, Catholic school boards and four French language, public school boards that covered almost the whole of Ontario. The government also introduced new funding arrangements and the act regulating grants specified that legislation and regulations governing education funding must operate so as to respect section 23 of the Charter (COL Report on School Governance 1998: 77). A survey of newsprint coverage on the legislative scheme suggests that the creation of Francophone boards did not generate much controversy, particularly when compared to the fact that teachers staged a wildcat strike in reaction to the increased powers given to the Ministry of Education and a number of Catholic boards argued that their section 93 prerogatives under the Constitution Act, 1867 were infringed by the legislation.

In fact, for a time it looked like some Catholic supporters were going to fight the establishment of Francophone school boards as part of their general attack on the legislation, but this challenge was dropped shortly into the process (Confidential Interview). Those involved with the transition to the new system of Francophone boards reported that the process was a relatively smooth one.[6]

When the legislative changes were announced in 1997, the president of the ACFO enthused: "We are being given everything we have been requesting for over a hundred years." The Commissioner of Official Languages also stated that Ontario's move was a positive one, but reminded the government of the need for proper funding arrangements and real decision-making power. Similar thoughts were expressed by the CNPF and the Ontario French Teachers Association. The parents in Cornwall went back to court to challenge inadequate funding of schools in their area (COL Report 1997: 100-103).

As part of its overall changes to education, the provincial government announced changes to its grant system in 1998. Included in the special purposes grant category were

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[6] There were only two significant conflicts (both in northern Ontario) which needed the intervention of the Education Improvement Committee- the body established to oversee changes to education in Ontario (Lewingston, *Globe and Mail*, July 10, 1998: S11). A section 23 case also was launched that argued that in those few areas that still featured representation of Francophones on existing boards, this representation was inadequate. The judge argued that the decision by the Educational Improvement Committee concerning representation was reasonable and did not violate section 23 (*Berthelot*).

funds for relatively small, geographically remote schools and language education, both of which would benefit Francophone schooling (COL Report- School Governance 1998: 77-78). Also in 1998, the federal government entered into an agreement to contribute $90 million dollars over the next five years to implement Francophone school governance (COL Report 1998). For 2001, the province established a separate table for the building of Francophone schools (Confidential Interview).

Previously, provincial policy that affected the building of schools was challenged on a local basis when in 1996 the Dufferin-Peel Catholic School Board took the government to court to force the building of a Francophone secondary school in Mississauga. Francophone students had been housed in a temporary facility since 1989 and funds had been allocated to build a new facility in 1995, but the government subsequently imposed an across-the-board moratorium on capital projects as part of a cost-savings policy. The board argued that the students' right to an equal education under section 23 of the Charter was violated by the decision. A trial judge agreed with the board and ordered that funds be released for the project. The Ontario Court of Appeal refused to issue a stay order while the province prepared an appeal. The Education Minister proceeded to approve the construction and provided an initial payment of $3 million to the board (Calleja, *Toronto Star*, July 11, 1996: MS1). The Department then lifted the funding moratorium for all school construction (Confidential Interview).

There were a couple of other rather localized controversies during this time period. In 1990, although other northern boards had agreed to establish schools, the Lakehead school board refused to establish an FLIU for 17 students, while in 1994 a dispute over a new school for Kingston was settled after the Minister of Education appointed a mediator (COL Report 1994: 89). The Halton Regional public school board came under criticism in 1997 when the board refused the advice of its French-language advisory council to establish an FLIU and instead purchased French-language education from the Catholic board. Some parents protested against being forced to accept Catholic religious teaching in order to receive FFL instruction and threatened litigation under the Charter (Gerard, *Toronto Star*, July 4, 1997: A8).[7]

[7]A somewhat unusual turn occurred in June 1997 when a panel of three judges of the Ontario Divisional Court refused the request of an English-speaking parent to force the Essex County school board

More generally, however, between the 1990-91 and the 1997-98 school year, the total number of schools offering FFL instruction in Ontario increased from 402 to 441, while the number of homogeneous Francophone schools rose from 350 to 364. Total enrollment dropped slightly, from 96, 340 to 95, 026 students.

The dissertation now turns to explaining the OMLE policy developments that have been reviewed in this and the previous two chapters.

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to pay for the tuition of her three children attending a French language school in Windsor (*Abbey*). Her lawyer argued that the school board paid for the oldest child to attend a French language school when they used to live in the county in 1989 and, because section 23 of the *Charter* grants rights to citizens whose children had received their primary schooling in English or French, they have rights guaranteed by section 23. However, the judges ruled that section 23 was "designed to secure the rights of linguistic minorities" and does not give rights to the Anglophone community in Ontario to have their children educated in French. The Court of Appeal overturned the decision in 1999, stating that section 23 gives Canadians the right to have all their children receive a French or English education if any of their children have received it (see Table B.4(b)- Appendix B).

Chapter Eight- New Institutionalist Analysis of Judicial Impact on OMLE Policy

The previous three chapters presented an overview Official Minority Language Education (OMLE) policy in the nine provinces outside Quebec from the late 1960s until 2000 (with a closer look at Alberta, Ontario and Saskatchewan) by describing relationships among key actors, events, and ideas within the OMLE policy community over time, which included discussing the timing and outcome of legal mobilization concerning OMLE; outlining the larger social and political environment in which the OMLE policy community found itself; and tracing policy change over time through qualitative and quantitative means. This chapter analyzes the information presented in the previous three chapters to assess the influence of legal mobilization and judicial decisions on OMLE policy using the New Institutional (NI) Model of Judicial Impact developed in Chapter Three. Where appropriate, references will be made to the impact of legal mobilization and judicial decisions on school desegregation policy in the US to bring the Canadian analysis into sharper relief. Chapter Nine will then compare how well the model performs compared to other potential explanations of judicial impact.

Before embarking on the analysis, a summary of policy change in the provinces is provided in Table 8.1 and Table 8.2 below. Table 8.1 summarizes OMLE policy prior to the Charter and judicial decisions outside Quebec on section 23 (mid-1970s-1984), before the Supreme Court's *Mahé* decision (1984-1990) and after the Supreme Court's *Mahé* decision along the three key dimensions of OMLE policy: instruction (some form of access to FFL instruction enshrined in policy, regulation or legislation), homogeneous facilities (does FFL instruction take place in a distinct physical setting (ideally a separate school)) and management and control (do Francophones have the power to manage and control FFL programs and schools).

Table 8.1 OMLE Policy Change

	mid-1970s- 1984	1984-1990	1990-2000
INSTRUCTION	-6 provinces	-7 provinces	-9 provinces
HOMOGENEOUS FACILITIES	-4 provinces	-8 provinces	-9 provinces
MANAGEMENT and CONTROL	-1 province	-3 provinces	-9 provinces

The summary in Table 8.1 should be treated with caution, however. For example, Chapters Five pointed out that access to French language instruction prior to the mid-1980s often was limited and, in many instances, such instruction was essentially French immersion. In other words, there are qualitative policy shifts and debates that the table does not capture. Nor does the table capture the number of schools providing FFL instruction or the number of homogeneous Francophone schools or enrolment in those schools. A summary of those figures is provided in Table 8.2.[1] (When looking at Table 8.2, one should bear in mind the demolinguistic data presented in Table B.1 (Appendix B), particularly the falling levels of eligible section 23 students between 1986 and 1996).

[1] Taken from Table B.3 (Appendix B). There are no figures for the 1982-83 and 1983-84 years due to the lack of available data. Until the federal government required the provinces to distinguish between French immersion and French first-language programs for statistical purposes under the 1983 OLE protocol agreement, statistical data was unreliable. The 1978 and 1982 CMEC Reports provided some useful pre-1982 data, however. After 1986, I followed the years selected by Martel (1991, 2001) because she provides reliable data on the number of homogeneous French schools and enrolments in those schools for selected years.

Table 8.2- OMLE Statistics

	1976-77 to 1981-82	1984-85 to 1988-89	1990-91 to 1997-98
BC – FFL Enrollment Total	0-785	1,362–1,916	2,047-2,860
BC FFL Schools Total	0-20	30-36	44-54
BC French Schools	0-0	1-3	4-4
BC – French School Enrollment	0-0	160 – 478	693-840
AB – FFL Enrollment Total	n/a	1,154-2,036	2,548-3,033
AB FFL Schools Total	n/a	10-20	22-24
AB French Schools	n/a	2-3	6-17
AB - French School Enrollment	n/a	367-943	1,474-2,246
SK – FFL Enrollment Total	n/a	832-1,254	1,076-1,416
SK FFL Schools Total	n/a-5	14-12	10-17
SK French Schools	n/a-2	2-3	9-12
SK – French School Enrollment	n/a	n/a-266	683-845
MB - FFL Enrollment Total	n/a-6,411	5,547-5,355	5,464-5,241

	1976-77 to 1981-82	1984-85 to 1988-89	1990-91 to 1997-98
MB FFL Schools Total	n/a-41	30-31	31-29
MB French Schools	10-13	14-15	15-23
MB – French School Enrollment	n/a	n/a-3,170	3,285-4,456
ON – FFL Enrollment	106,099-94,557	90,854-93-515	96,340-95,026
ON FFL Schools Total	360-374	354-360	402-441
ON French Schools	324-314	313-331	350-364
ON – French School Enrollment	n/a-n/a	n/a-76,186	76,441-75,200
NB – FFL Enrollment	56,399-48,614	47,077-45,038	44,432-42,187
NB FFL Schools Total	187-157	157-152	148-109
NB French Schools	166-152	157-152	148-109
NB – French School Enrollment	n/a	n/a-45,396	44,432-39,164
NS – FFL Enrollment	5,587-5,308	4,273-3,236	3,487-4,095
NS FFL Schools Total	28-31	23-18	17-21
NS French Schools	0-0	10-12	10-11

	1976-77 to 1981-82	1984-85 to 1988-89	1990-91 to 1997-98
NS – French School Enrollment	0-0	n/a-1,990	1,777-2,964
PE – FFL Enrollment Total	664-529	511-514	554-624
PE FFL Schools Total	2-3	3-2	2-2
PE French Schools	n/a	2-2	2-2
PE – French School Enrollment	n/a	n/a-507	554-623
NF – FFL Enrollment Total	200-127	84-230	257-267
NF FFL Schools Total	3-2	2-4	5-5
NF French Schools	0-0	0-1	1-2
NF – French School Enrollment	0-0	0-47	61-136

Comparing Tables 8.1 and 8.2 reveals some divergence between policy statements and policy implementation on the ground. For example, in both B.C. and Nova Scotia the concept of the homogeneous French school was recognized in policy by the mid-1980s, but the ratio of homogeneous French schools to all schools providing FFL programs is lower than most other provinces. Chapter Five discussed recent litigation in Nova Scotia for more homogeneous Francophone facilities.

What explains the use of litigation and legal mobilization as a tactic to achieve policy change and, more particularly, what explains the policy impact of legal mobilization and judicial decisions? To review briefly the NI model of judicial impact developed in Chapter Three, the model begins by proposing that institutional factors

(legal rules and state actors) will play an important role in supplying the legal resources necessary for legal mobilization and that institutional factors influence the judicial decision-making process. The model then hypothesizes that the results of legal mobilization and judicial decisions will depend on the nature of legal rules, the attitudes and practices of implementers, whether incentives are offered for compliance, the nature of the political environment, the number of organizational veto points and whether groups effectively exploit political opportunity structures. It is hypothesized further that political institutions will structure all these factors. Finally, the NI model suggests that as actors interact within legal and political institutions, institutional factors will shape policy strategies, ideas and goals.

Hypothesis (1) (a)- Legal Mobilization is more likely to be undertaken by "politically disadvantaged" groups if there is an adequate supply of legal resources. The Supply of Legal Resources is Heavily Dependent on Institutions (Legal Rules and State Actors)

Francophone groups outside Quebec could be considered to be "politically disadvantaged groups." Most importantly, except in the province of New Brunswick, francophones do not make up a significant portion of voters (see the demographic data in Table B.1). Litigation through the courts- non-majoritarian institutions- would be an attractive (though not cost or risk-free) option for francophone groups. Based on his meetings with representatives of OMLGs, Professor Pierre Foucher stated that "[m]inority groups do not have the political clout to attain their objectives by negotiation alone, and so they believe it is important to take the education rights question in their provinces to the courts" (1985: 400). Paul Dubé of the Bugnet group said that they "realized its [litigation's] inevitably very quickly" after their requests for a distinct francophone school and school management were denied by the Alberta government and the Edmonton Catholic School Board (Interview). Similarly, France Levasseur-Ouimet of the ACFA maintained that litigation was a crucial component in their effort to change French-language education policy in Alberta because the government would not otherwise act (Interview).

Even in Ontario, where there are large pockets of francophone voters in a few areas that can impact individual ridings (such as Ottawa-Carleton), Francophones had very little political influence and governments were wary of generating a public backlash by

offering too much to francophones (Interview- Marion Boyd; Confidential Interview). The Ontario Court of Appeal, in its influential 1984 Reference decision gave credence to the notion that Francophones in Ontario were a disadvantaged group by quoting from researcher Stacy Churchill: "The Franco-Ontarians are an underprivileged group whose needs are not adequately met by any public service...[the reason for this inequality in education is because] implementation of (Franco-Ontarian) rights is left in large measure to the discretion of local School Boards" (at 531).

Yet, legal mobilization requires legal resources. Hypothesis (1)(a) draws attention to the importance of institutions (legal rules, institutional rules, and the activities of state actors) in providing the legal foundations (legal bases for claims, access to court, etc.) and organizational resources, particularly funding, necessary to engage in legal mobilization. Tables B.4(a) (Appendix B) show that only a handful of legal cases were launched prior to the introduction of the Charter of Rights in 1982, but from 1982 until 2000 over twenty-five individual cases were initiated.[2] As suggested by the "political disadvantage" theory, Table B.4(a) shows comparatively less litigation in activity in New Brunswick- the province where Francophones enjoy some political clout. The increase in legal mobilization following 1982, particularly outside New Brunswick, cannot be understood without reference to a number of institutional considerations, such as the introduction of the Charter, funding from the federal government, the assistance of the Commissioner of Official Languages, and rules surrounding access to court set down by the Supreme Court.

The Charter resulted from an attempt by the federal government, led by Pierre Trudeau, to alter Canada's constitutional structure to promote a pan-Canadian vision of Canada (Knopff and Morton 1992: ch. 4; Cairns 1992; Russell 1993: ch. 8). Section 23 of the Charter was an important component of this plan and, beyond its symbolic value, provided OMLGs with specific constitutional guarantees for minority language education. Prior to the Charter there were no constitutional guarantees protecting

[2] It is difficult to get a precise figure for the number of cases initiated. These estimates come from reported cases in the Quicklaw database, various reports from the Commissioner of Official Languages, and detailed secondary studies, particularly Foucher (1985) for the pre-Charter cases. Also, the figures do not include the number of credible threats to litigate that were made—these appear to have been particularly important in the post-Charter era. For example, as discussed below, the former Min. of Education for Ontario said that a Francophone school board was created for the Prescott-Russell region because Francophone groups in the area had a very strong Charter case prepared (Interview).

Francophone education as the JCPC made it clear that the denominational school rights in the Constitution Act, 1867 did not protect the linguistic aspect of education. Before 1982, therefore, administrative law provided the only legal basis for minority language education claims. Francophone parents and groups did launch a handful of legal cases in the latter 1970s and early 1980s under liberalized legislative and regulatory provisions regarding French-language education enacted by a number of provinces (see Table B.4). However, besides being limited in number, these cases aimed to achieve limited policy goals, such as the provision of a French-language class or school, funding for transportation to French-language programs, or prohibiting a school board from allowing freedom of choice in the language of instruction policy goals.

While a number of section 23 Charter cases also aimed for such specific goals, compared to administrative law provisions, section 23 provided a much broader legal basis for claims and allowed for legal attacks to be directed at the substance of provincial French-language education policies. More generally, sections 24(1) and 52 of the Charter provide Canadian courts with a broad range of power to provide remedies for violations of constitutional guarantees from declaring legislation unconstitutional to providing for mandatory injunctions requiring a government to undertake a particular action directed by the court.

However, as Epp (1998) has pointed out, constitutional bills of rights like the Charter are not self-enforcing and need support structures for legal mobilization, including organized group support and financing. The federal government has been critical in both facilitating the creation of organizations to represent Francophones outside Quebec and in providing support for the operation of francophone OMLGs. Pal (1993) has documented how the federal government encouraged and facilitated the creation of the national FFHQ (now FCFAC) in the latter 1970s and subsequently provided core and project funding for the group. For instance, in 1986-87, eighty-three percent of the FFHQ's revenues of nearly $600,000 came from core funding by the federal Secretary of State. In the same year, provincial OMLGs also received significant core funding by the Secretary of State: the ACFO received $1,218,000, the Association Culturelle franco-canadienne de la Saskatchewan $461,533, and the ACFA $315,000 (Pal 1993: 165-179). The federal government has also funded the CNPF- a national organization with provincial affiliates

dedicated to promoting francophone minority language education by various means, including litigation. The Commissioner of Official Languages reported in 1989:

> ...the Commission nationale des parents francophones (CNPF) demanded that the federal government provide the financial support it needed to carry out its mission of ensuring that solid majority of young people eligible under Section 23 gain access to quality French-language instruction, provided in teaching facilities controlled by the minority, in every province and territory before the year 2000. We were pleased when the Secretary of State answered the call by granting the Commission and its provincial and territorial offices the financial resources to enable them to go about this major task more effectively in 1989 (175).

Subsequent to this funding the CNPF was able to develop "modules of expertise" for provincial and local parent groups, which included litigation strategies prepared by various legal experts, including Michel Bastarache- now a member of the Supreme Court- and Alfred Monnin- a former justice of the Manitoba Court of Appeal (CNPF Plan du Action 1991-92; Confidential Interview). The CNPF also was better able to provide coordination for section 23 litigation across Canada (outside Quebec) in the early 1990s (Interview- Angéline Martel). Federal funding of OMLGs continued throughout the 1990s. Total core funding for national organizations like the FCFAC and the CNPF from Canadian Heritage (formerly the Secretary of State) rose to $2,738,710 in 1995-1996 (Cardinal and Hudon 2001: Appendix 6. Also see this Appendix for core funding to various provincial groups, such as the ACFA).

Moreover, through the Court Challenges Program, the federal government provided funding for francophone groups to launch section 23 cases and to intervene in such cases. Up to March 1999, $2,418,336 was spent on funding section 23 cases and interventions through the Program (Martel 2001: 14, ftn. 26). The Bugnet group received a "substantial amount of money" ($100,000) to usher the *Mahé* case from the trial level up to the Supreme Court (Interview Paul Dubé; also see Julien 1991: 163, ftn. 125). Goreham's review of the Court Challenges Program up to 1992 noted that the Program was instrumental in funding section 23 cases that were launched when provincial and local authorities did not respond adequately to the constitutional recognition of language rights in 1982 (1992: 26). The announcement that the federal government was canceling

the Court Challenges Program led Goreham to conclude, after quoting from the Supreme Court's *Mahé* decision, that

> The adverse consequences of the disappearance of the Court Challenges Program are therefore clear. Henceforth, a heavy financial burden will be imposed on individuals and groups who wish to gain access to the courts as the ultimate means to enforce constitutional language guarantees. Unfortunately, many people may find such a deterrent too difficult to overcome in their struggle to see language rights implemented and respected (1992: 44).

These conclusions were borne out in the communities of Plamondon and Lethbridge, Alberta where francophone groups had threatened court action for homogeneous Francophone facilities in the early 1990s, but the threats seemed less likely to materialize after the cancellation of the Court Challenges Program (Julien 1993: 39). However, OMLGs (and equality rights groups) successfully lobbied for the Program to be reinstated in 1994 and achieved significant administrative control over the program (Brodie 2001: 370). Parents in Lethbridge then prepared a section 23 case in the autumn of 1995, but the legal action did not proceed after it was agreed that a French-language school facility in the city would be managed by the Francophone regional authority that operated French schools in Edmonton (COL Report on School Governance 1998: 118).

The effort to revive the Court Challenges Program was also aided by the federal Commissioner of Official Languages who commissioned the report by Goreham referred to above, which advocated continuation of the program for language rights cases (COL Report 1992; Goreham 1992).[3] Earlier, in late 1985, the Commissioner wrote to the Minister for the Secretary of State urging him to provide Court Challenges money for the Bugnet group to appeal the trial court decision in *Mahé* by noting that the group's "ability to proceed with this second phase is, I believe, contingent on receiving further help from your Department's Court Challenges Program" (Letter Aug. 26, 1985). The Commissioner of Official Languages generally proved to be helpful in providing legal resources to OMLGs and francophone parents. The Commissioner lobbied the parliamentary Joint Committee in 1980-81 for a strong version of section 23 (see Chapter Five) and subsequently intervened in a number of key section 23 cases, including all

[3] The Commissioner of Official Languages is appointed for a ten-year by the government and reports directly to Parliament.

three Supreme Court section 23 cases (outside Quebec) and the 1984 Ontario Court of Appeal case, to call for an expansive definition of section 23 and appropriate remedies. According to Angéline Martel of the Bugnet group, the Commissioner of Official Languages was "very supportive all the way" of section 23 litigation (Interview).

Martel indicates that the federal government was an ally, but not as straightforward or supportive as was the Commissioner of Official Languages owing to the federal government's concern about provincial jurisdiction over education (Interview). Indeed, the federal government intervened to support francophone groups and parents in key cases, including the three cases that went to the Supreme Court and the 1984 Ontario Court of Appeal case, although, as discussed below, the federal government's legal arguments were not as forceful as some OMLGs would have preferred.

Nevertheless, the acquisition of organizational resources, such as funding and legal expertise, necessary to mount a Charter case and allies willing to intervene in such cases would be diminished if appellate courts, particularly the Supreme Court, were unwilling to hear such cases or allow interventions. Thanks to rule changes in the 1970s the Supreme Court has much more control of its docket and Charter cases now compose a significant portion of the Court's workload (Flemming 1999; Morton, Russell and Riddell 1995). This does not mean that that the Court will hear every section 23 appeal, but it does enhance the chances that such cases will be heard. The Supreme Court has decided three of the four section 23 cases outside Quebec that it has been asked to hear (*Mahé*, *Ref. Re Manitoba Schools Act*, *Arsenault-Cameron*) only refusing to hear an appeal requested by the Commission des Ecoles Fransaskoises Inc. et al to challenge a 1991 decision of the Saskatchewan Court of Appeal.[4] In that case the Saskatchewan Court of Appeal chose not to consider an application for a mandatory order against the Saskatchewan government under section 24(1) of the Charter to provide francophone school management because it would have required the Court to exercise original jurisdiction.

Several interveners were present in each of the three section 23 cases that the Supreme Court has heard outside Quebec. After 1987, the Supreme Court became much

[4] This information was found using the Supreme Court of Canada Appeals database accessed through Quicklaw.

more receptive to interventions, including those by citizen or public interest groups; more specifically, up to 1993, 94 per cent of requests by language groups to intervene in Charter cases before the Supreme Court were accepted (Brodie 1997: ch. 2). In *Mahé* alone, there were 13 intervenor factums filed- 8 of them supported the Bugnet group and came from both OMLGs and government actors (see Table B.5). Brodie argues that the Supreme Court's increased willingness to accept intervenors gave hope to "politically disadvantaged" groups in Canada who wanted to emulate the success of the NAACP in the US (1997: 52).

While the NAACP did benefit from the US Supreme Court's allowing the group to intervene in desegregation cases, it was the direct litigation efforts by the US Justice Department that were crucial to the desegregation effort (see Chapter Four). In the Canadian case the federal government was critical to the litigation efforts of OMLGs, but the federal role was a comparatively indirect one. The federal government funded OMLGs, funded cases and interventions through the Court Challenges Program and intervened in support of OMLGs. In both Canada and the US, however, legal mobilization to challenge policies concerning where and how minorities are educated cannot be understood without reference to the institutional factors that supported such efforts.

Institutional factors help to explain the use of legal mobilization to change French first-language education policy outside Quebec- do they also help to explain how judges decided section 23 cases once they got to court? This question is addressed by Hypothesis 1(b).

Hypothesis (1)(b): THE PROBABILITY OF GETTING A FAVOURABLE JUDICIAL DECISION DEPENDS ON whether individual judicial attitudes, the appointment process, legal factors (constitutional and statutory language and precedent), support of state actors and the Court's institutional considerations are configured in such a way as to be supportive of the rights claimant.

As indicated in Chapter Three, this discussion will not be an in-depth analysis of judicial decision-making; rather, it will use section 23 cases to explore whether institutional considerations can help explain how judges make decisions.

It has been well established in the American literature that the orientations of individual judges, particularly their policy preferences, influence how judges make

decisions (Segal and Spaeth 1993). Studies of the Supreme Court of Canada offer similar conclusions (Tate and Sittiwong 1989; Morton, Russell and Riddell 1994). Recently, however, some scholars have argued that the behaviouralist approach fails to appreciate how judges might be influenced by institutional factors, such as the law, the arguments of intervenors (amicus), extrinsic evidence, the appointment process, and the political environment (George and Epstein 1992; Clayton and Gillman eds. 1999). While there are too few section 23 decisions to make concrete inferences, there are indications that such institutional factors influenced judicial decision-making, particularly at the Supreme Court level. One indication that institutional forces might be at work comes from the fact that the panels of Supreme Court judges that delivered the three section 23 decisions outside Quebec were quite different in terms of personnel, yet the outcomes of each case were quite similar—unanimous victories for the section 23 claimants and their legal allies. This is demonstrated in Table 8.3, which shows the judges in *Mahé*, the *Manitoba Reference*, and *Arsenault-Cameron* along with the Prime Minister who appointed them.

Table 8.3- Supreme Court Justices in section 23 cases outside Quebec (and government of appointment)

Mahé (1990)	*Ref. Re Manitoba School Act (1993)*	*Arsenault-Cameron (2000)*
Dickson (Trudeau- Liberal)	Lamer (Trudeau-Liberal)	Lamer (Trudeau- Liberal)
Wilson (Trudeau- Liberal)	La Forest (Mulroney-P.C.)	McLachlin (Mulroney- P.C.)
La Forest (Mulroney- P.C.)	Iacobucci (Mulroney- P.C.)	Iacobucci (Mulroney- P.C.)
L'Heureux-Dubé (Mulroney- P.C.)	L'Heureux-Dubé (Mulroney- P.C.)	L'Heureux-Dubé (Mulroney- P.C.)
Sopinka (Mulroney- P.C.)	McLachlin (Mulroney- P.C.)	Major (Mulroney- P.C.)
Gonthier (Mulroney- P.C.)	Gonthier (Mulroney- P.C.)	Gonthier (Mulroney- P.C.)
Cory (Mulroney- P.C.)	Cory (Mulroney- P.C.)	Bastarache (Chretien- Liberal)
		Binnie (Chretien- Liberal)
		Arbour (Chretien- Liberal)

The inference that more than individual attitudes were at work in these decisions is strengthened by noting that, although these judges voted similarly in section 23 cases, they had different patterns of voting behaviour in other kinds of Charter cases. For example, a statistical analysis of the voting behaviour of Supreme Court justices up to 1997 shows that Gonthier's rate of support for equality-seeking groups making Charter claims (which includes section 23 cases) was 35 per cent and his rate of support of claimants invoking legal rights under the Charter was 29 per cent, while Wilson's rate of support for equality-seeking groups was 81 per cent and her rate of support for criminal rights claimants was 61 per cent (Kelly 1999b: 680).

Legal Rules

NI theory posits that individual judicial attitudes might be shaped and constrained by legal considerations, such as constitutional and statutory law and precedent (Clayton and Gillman eds. 1999; George and Epstein 1992). Canadian Supreme Court judges in their judgments and public commentary have argued that the Charter generally provides Canadian courts with a new constitutional mandate that legitimates a purposive approach to interpretation and less deference towards the legislature than was exercised under the Bill of Rights, which was a non-entrenched document that applied only to the federal government (Knopff and Morton 1992: 129-133; Wilson 2001).[5] The Court has emphasized in its section 23 decisions that the provision should be read purposively and that it was designed to be remedial in nature. In doing so, the Court rejected the approach to section 23 adopted by some courts below, which suggested that because section 23 resulted from a political compromise it should be interpreted cautiously. Chief Justice Dickson in *Mahé* explicitly dismissed such an argument advanced by "several of the interveners" and instead remarked that "[i]n my view the appellants are fully justified in submitting that "history reveals that s.23 was designed to correct, on a national scale, the progressive erosion of minority official language groups..." (at 364).

Not only has the Court relied on the *Mahé* precedent to support section 23 claimants in its subsequent decisions, but also the success rate of section 23 claimants in the courts below has been higher since the Court's *Mahé* decision. In nine decisions prior to *Mahé*

[5] As evidence of this, it is instructive to recall Justice Dickson's more activist decision on abortion under the Charter compared to his highly deferential decision on the same abortion policy under the statutory Bill of Rights.

there were four "wins," three classified as "both" and two "losses." Since *Mahé*, there have been five "wins" and only one "loss." Moreover, three mandatory order remedies have been delivered following *Mahé*, whereas only one was used before *Mahé* (see Table 8.5 below for results).

However, the Chief Justice's comments in *Mahé* reveal that there were contested visions as to how section 23 should be interpreted. Interviews with OMLG activists and lawyers reveal that there was no systematic strategy to build favourable precedents in the same way that the NAACP did in the US with school desegregation (see Chapter Four). Only after the Supreme Court's *Mahé* decision and extra federal funding was the CNPF systematically able to provide information for potential claimants and to offer some general assistance in orchestrating cases (Interview Martel, CNPF Plan Juridique 1991-1992). Early cases did, however, feature consultation amongst various groups, though this did not always result in agreement about legal strategies (Martel- Interview; Arès Interview; Confidential Interview). Did the legal arguments advanced by certain parties have more influence than others, particularly in the *Mahé* case?

Interveners and Legal Arguments

The NI theory proposes that state allies will have an influence on judicial-decision making. According to the US literature, the US Solicitor-General has an important influence on Supreme Court decision-making (George and Epstein 1992). While similar statistical studies on the success or influence of the federal Attorney-General in interventions before the Supreme Court have not been conducted in Canada, more general studies of litigant success show that the federal government has had much success before the Supreme Court (McCormick 1993). The Attorney-General of Canada could plausibly be an influential intervener owing to the fact that the A.G. is a "repeat-player" with ample resources who represents the government that appointed the Supreme Court justices. Evidence from section 23 Supreme Court decision supports this conjecture. Following a line of argument that it made (successfully) before the Ontario Court of Appeal in the 1984 reference case, the federal government before the Supreme Court in *Mahé* claimed that section 23(3)(b) of the Charter should be read in a "liberal and remedial" fashion to include the right of section 23 parents to have "a certain degree of management and control over its instruction and educational facilities analogous to

those of the majority" (Factum A.G. Canada, 12). The federal government also argued that the Alberta government needed to enact legislation to guarantee section 23 rights, but that the province should have latitude as to how to implement management and control by the minority language group. Although no concrete submission was made concerning the situation in Edmonton, the federal factum suggested that section 23 rights had been violated if the number found by the trial judge to warrant the provision of the right was accepted.

The federal position, which was opposed by Alberta, Saskatchewan, Manitoba, the Edmonton Catholic School Board, No. 7 and the Alberta School Trustees Association, largely was mirrored by the established Francophone group in Alberta- the ACFA- but differed from the position of the appellants in the case- the Bugnet group. Although the Bugnet factum noted that the institutional means of establishing management and control would be up to the provinces (25), the factum argued that once the threshold for management and control had been met there had to be equality in this regard with the majority, conceding only that "some integration" at the Ministerial level could be envisioned (23). As such, the Bugnet group urged the Court to use section 24(1) to mandate that the Alberta government create a Francophone school district in metropolitan Edmonton. The Court also was asked to declare that the School Act temporarily remain valid while being amended to provide for French-language instruction, facilities, and management and control. The Commissioner of Official Languages supported this argument, which explains Martel's observation that the Commissioner was more forceful in its legal arguments than the federal government and the Bugnet group was more forceful in its legal arguments than the ACFA.

In *Mahé,* the Court adopted the moderately activist approach encouraged by the federal government by declaring that Alberta needed to pass legislation to conform to section 23, though without specifying the nature of such a regime, and by declaring that section 23 parents in Edmonton deserved proportional representation on the Catholic School Board. Likewise, the federal government's moderate position in *Reference Re Manitoba Public Schools Act* (between OMLG groups arguing that section 23(3)(b) presupposed homogeneous schools and that Manitoba's proposed policy violated section 23 for not allowing for the widest possible grouping of rights holders who would have

exclusive rights of management and control and the more limited and deferential approach urged by the Attorney-General of Manitoba) was adopted by the Court.[6] In *Arsenault-Cameron*, the federal government drew attention to the importance of local schools to the promotion and preservation of local minority language communities and argued that the Francophone school board in the province should have exclusive management and control powers subject only to objective pedagogical and financial considerations. As such, the federal position was that the decision of the Francophone school board of P.E.I. to offer French first-language instruction in Summerside should stand (Factum A.G. Canada). These arguments paralleled the Supreme Court's decision. The trilogy of non-Quebec section 23 cases decided by the Supreme Court suggests that the federal government may have helped OMLG groups achieve success, even if the nature of that success was not as strong as hoped for by some OMLG groups.

Extrinsic Evidence

The Supreme Court decisions discussed above also highlight the importance of extrinsic evidence in the judicial decision-making process. Section 23 invites the use of extrinsic evidence with its "where the numbers warrant clause," but section 23 claimants have gone beyond only trying to marshal data on the number of potential section 23 students in a given area to offering evidence that links French-language education facilities and control of those facilities to community and cultural survival. In *Arsenault-Cameron*, the Supreme Court referred to the expert evidence provided by the appellants, which showed that "the school is the single most important institution for the survival of the official language minority..." (27). Previously, in *Mahé* the Court quoted from the 1968 Royal Commission on Bilingualism and Biculturalism to underscore the linkage between minority language educational guarantees and the promotion of culture (362-363). By relying on extrinsic evidence in this way, the Court has embodied a certain normative vision about the Canadian political and social community in section 23- a legal development that was opposed by some provincial governments who argued that section 23 simply guaranteed access to French-language instruction and facilities for the children

[6] The A.G. of Manitoba argued that distinct physical structures are not presupposed by section 23(3)(b), that "some degree of management and control" was afforded by section 23 (where numbers warranted), and that the Court should not rule on the government's proposed policy in a Reference case (see Respondent's Factum).

of qualified parents, but not the protection and promotion of cultural communities (see Factum of the A.G. Saskatchewan, Supreme Court- *Mahé* , p. 23; Factum of A.G. Manitoba, Supreme Court- *Mahé*, p. 7).[7]

Extrinsic evidence has also played an important role in the courts below as well. In its influential 1984 decision, the Ontario Court of Appeal argued on the basis of extrinsic evidence that it is "apparent that the lack of effective control of French language education and facilities has led to the rapid assimilation of francophones in Ontario" (531). Most recently, Justice LeBlanc ordered the creation of more homogeneous Francophone facilities in Nova Scotia after agreeing with the inference drawn by expert witnesses that the relatively lower rates of assimilation in the Halifax-Dartmouth region compared to other areas was attributable to the existence of a French-language school in Halifax-Dartmouth that ran a full-range of courses at both the elementary and secondary levels (*Doucet-Boudreau*, 2000 at 273-274 and 290-291). Justice LeBlanc, relying on Supreme Court precedents, concluded that the government had failed to promote the remedial purposes of section 23 which was aimed at preserving and enhancing French language and culture.

Institutional Linkages and Environment

Beyond legal considerations, the presence and arguments of intervenors, and extrinsic evidence, can the Supreme Court's institutional linkages and environment help to explain its support of section 23 claimants? The success of section 23 claimants could be explained by the tendency of national high courts in federal systems to support the imposition of national values on state/provincial entities (Shapiro 1981; Bzdera 1993; Feeley and Rubin 2001). This explanation largely derives from institutional linkages between the federal government and the Court, notably the federal government's ability to appoint Supreme Court justices (Bzdera 1993: 27). The appointment of Michel Bastarache- an influential legal representative for OMLGs, including the ACFA in *Mahé*- by Prime Minister Jean Chretien supports such a contention. So does Thurgood Marshall's appointment to the US Supreme Court; in fact, Bastarache's appointment

[7] See Kahn 1999 for the links between extrinsic evidence and the development of legal doctrine based upon a particular social construction of reality. For example, Kahn argues that the "moral force of Brown does not come from the empirical facts alone- psychological experiments with dolls or the fact of measured differences in levels of self-esteem between black and white children- but from their relationship to a particular conception of equality that the justices think required by the equal protection clause" (48).

might be considered the Canadian equivalent to the Marshall appointment, since both men were important litigators in the movement for pursuing minority education policy change in the states/provinces through the courts before their appointments to the high courts by the federal government. Given that both the Progressive Conservative and Liberal governments that appointed the Supreme Court judges in the three cases under analysis largely shared a belief in encouraging the promotion of the French-language outside Quebec, the appointment process could be an important institutional factor in explaining the Court's support of section 23 claimants.

Nevertheless, such an explanation is incomplete. Marshall's appointment to the US Supreme Court does not capture the institutional dimensions of decision-making - why, for example, did conservative-oriented Chief Justice Burger support desegregation claimants in his first number of desegregation cases (see Chapter Four)? Similarly, the appointment process explanation, as useful as it is, does not explain why John Major, who was the chief legal officer for the Alberta Conservative Party and the Alberta government's lawyer throughout in *Mahé* would be appointed to the Supreme Court and then co-author the *Arsenault-Cameron* decision with his former legal adversary in *Mahé*—Michel Bastarache who represented the ACFA. At one point during the *Mahé* proceedings Major argued that the 1984 Ontario Court of Appeal section 23 decision was a tortured piece of legal reasoning and that section 23 was not designed to protect culture (Sheppard, *G&M*, Apr. 20, 1985: 5). In *Arsenault-Cameron*, Major co-authored an opinion that highlighted the importance of section 23 to protecting and promoting culture and provided Francophone groups with an important legal victory. The unanimous, co-authored opinion by Justices Bastarache and Major signals that Major adopted the Court's legal and normative orientation towards section 23, which generally endorsed national values, and also suggests that the Court was deliberately trying to enhance the legitimacy of its decision- just as the US Supreme Court did with its first several desegregation decisions.[8]

[8] It could be argued that Major's policy preferences did not change necessarily because his earlier arguments about section 23 simply may have reflected those of his client- the Alberta government. However, given that Major was also the lawyer for Alberta's Progressive Conservative party, this suggests that his personal policy preferences likely were similar to those of the government.

The Court's desire to maintain its status within the larger political environment might also explain the content of its section 23 decisions, which have been victories for section 23 claimants but victories that (ostensibly) leave a degree of latitude for implementation by provincial legislatures. In *Mahé*, for example, the Court indicated that, "As the Attorney General for Ontario submits, the government should have the widest possible discretion in selecting the institutional means by which its s.23 obligations are to be met" (at 393). This trend parallels the one observed by Russell (1985) in the Court's federalism jurisprudence whereby the federal or national position was the winner in a majority of cases but the legal reasoning did not overwhelmingly support the federal position or unduly restrict provincial political/ policy options. Russell argued that the Court's moderate federalism jurisprudence was designed to protect itself from attacks by the provinces- an argument that could be applied to the Court's section 23 jurisprudence. As noted above, in taking this approach, which is somewhat sensitive to provincial jurisdiction over education, the Court has followed cues from the legal arguments submitted by the federal government rather than some of the more vigorous arguments made by certain OMLGs and the Commissioner of Official Languages.

It will be interesting to see whether this trend continues. Despite quoting from the above passage in *Mahé* concerning the need for government discretion in implementing section 23 (at 37), the Court in *Arsenault-Cameron* overturned the government's decision to bus students to a nearby community in favour of the French-language school board's recommendation to have a French-language facility in Summerside. How will the Court respond to even more aggressive lower court section 23 decisions, such as the one made by Justice LeBlanc in Nova Scotia where a mandatory order was given to the province to build more homogeneous schools with the judge retaining jurisdiction in the case?

In certain respects, the Canadian Supreme Court's early section 23 jurisprudence is reminiscent of the US Supreme Court's early desegregation decisions. In *Brown I* and *II*, the Court unanimously supported the principle of school desegregation, partly by relying on social science evidence, but allowed the state governments latitude in the precise pace and nature of desegregation reforms. In doing so, the Court largely followed the US

Solicitor-General's legal arguments.[9] Gradually, the US Supreme Court put more specific and onerous burdens on state and local officials, as illustrated by the busing decisions.

As noted in Chapter Four, the US Supreme Court's decision-making in the early desegregation cases cannot be explained by reference to the preferences of individual judges. Likewise, the evidence suggests that the Canadian Supreme Court's support of section 23 claimants cannot be explained by referring to the judges who heard the cases. Rather, the decisions appear to have been directly or indirectly influenced by the introduction of the Charter, the legal arguments of the federal government, the nature of the appointment process, institutional norms on the Court, and the Court's desire to maintain its legitimacy within the political system.

Thus far, the analysis has focused on whether institutional consideration can help explain both legal mobilization by OMLGs and their success in court, particularly the Supreme Court. This next section investigates the impact of legal mobilizations and judicial decisions using the Hypotheses presented in Chapter Three, which are presented below in Table. 8.4.

Table 8.4- Hypothesis 2 of the NI Model of Judicial Impact

HYPOTHESIS (2)- *Policy Development and Implementation* **THE PROBABILITY OF POLICY CHANGE RESULTING FROM LEGAL MOBILIZATION and JUDICIAL DECISIONS DEPENDS ON THE FOLLOWING FACTORS (based on a continuum)** **Positive (+)----------Negative(-)**		
Yes	**a) NATURE of LEGAL RULES** -favourable, clear and forceful, decisions made by highest court?	No
Supportive of judicial decision	**b) The ATTITUDES and PRACTICES of IMPLEMENTORS**	Opposed or contradictory to judicial decision

[9] The arguments forwarded by the US Solicitor-General did not always appear to have the endorsement of the president and/or Congress- a situation that would be less likely to arise in Canada's executive-dominated parliamentary system.

Yes	**c) Are INCENTIVES OFFERED for COMPLIANCE**	No
Public and media supportive of the decision(s)	**d) The POLITICAL ENVIRONMENT (mediated by institutions)**	Public and media opposed to the decision(s)
Lower	**e) The NUMBER of ORGANIZATIONAL VETO POINTS**	Higher
Alliances formed, constituents mobilized, access to policy process gained, etc.	**f) DO GROUPS EFFECTIVELY EXPLOIT the POLITICAL OPPORTUNITY STRUCTURE OPENED by LEGAL MOBILIZATION**	Alliances not formed, constituents not mobilized, access not gained to the policy process, etc.

Hypothesis 2(a)

According to Hypothesis 2(a), judicial decisions that adopt the legal doctrine advocated by rights claimants, are won by the rights claimants based on the facts of the case, feature clear remedial standards and, more generally, minimize doubts as to what is required by those expected to comply with the decision will have a greater policy impact than decisions that do not have those characteristics or feature them to a lesser degree. Analyzing judicial decisions for whether doctrine favours rights claimants requires a comparison between the doctrine advocated by the rights claimants (which is often summarized in a judicial decision and can be obtained by looking at factums in the case) and the doctrine adopted in a judicial decision.[10]

While a judicial decision may adopt the doctrine favoured by rights claimants and their allies, it is possible for rights claimants to still lose the actual dispute at hand. Determining wins and losses is relatively straightforward and has been used in various statistical analyses of Supreme Court decision-making (Morton and Allen 2001; Kelly

[10] Recently, Morton and Allen (2001) completed such an analysis when investigating the success of feminist litigants before appellate courts in Canada. Morton and Allen, for example, argued that the Supreme Court's *Andrews vs. B.C. Law Society* decision was a victory for feminists because the Court narrowed the scope of eligibility under section 15 to include only "historically disadvantaged groups" but broadened the ambit of section 15 to include discriminatory effects as urged by the Women's Legal Education and Action Fund (LEAF) (2001: 65).

1999b; Morton, Russell and Riddell 1995). A "win" occurs when a court finds in favour of the rights claimant and provides some form of remedy for the claimant, even if the remedy might not be as forceful as the one desired by a claimant (i.e. the court may grant proportional representation on an existing school board to remedy a violation of the right to management and control, but not a distinct school board). A "loss" occurs when the decision does not find in favour of the rights claimant and no remedy is provided even if the decision adopts the general interpretive principles advocated by the claimant. Some decisions may be coded as "both" wherein the court may find in favour of the rights claimant and provide a remedy for one dimension of the case (i.e. the right to instruction), but not on another dimension of the case (i.e. the right to management and control).

When rights claimants do win, two broad kinds of remedies are common: a declaratory order or a mandatory order. As the name implies, a declaratory order affirms the rights entitled by the claimants and may include declarations that the legislation and/or decisions of public officials are invalid under the constitution and that appropriate actions should be taken to rectify the rights violation. A mandatory order is a legally enforceable injunction commanding a government and/or public official to undertake actions to provide remedies. More generally, remedies can outline that a new process be implemented to address the rights violation, or that certain performance standards be met to address the rights violation, or that specific actions be undertaken to address the rights violation (see Manfredi 1993a: 116, ftn. 69).

Whether a judicial decision is generally "clear" or not is more difficult to operationalize, but scholars in the US look to such factors as whether there are easily understood expectations of what is required by the law, both in terms of doctrine and remedies; whether a judicial decision is made by the court at the top of the judicial hierarchy, or is based on a decision made by a high court; and whether the decision is unanimous or contains conflicting opinions (see Wasby 1970: 247-250; Johnson and Canon 1984: 206-207).

Table 8.5 evaluates the results of section 23 cases according to wins/ losses and remedy. Out of eighteen cases brought by Francophone parents or OMLGs and that went to full trial or appeal, the section 23 claimant(s) won twelve cases and lost only three

(three are coded as "both").[11] Only three mandatory orders were issued in the twelve wins, but some of the declaratory orders were more forceful and precise than others.[12] A discussion of the more qualitative features of the decisions and their relationship to policy impacts are discussed below.

Table 8.5- Wins and losses in Section 23 cases

Prov.	*Case*	Year and level	Win/Loss/ Both	Remedy
BC	***L' Association des parents francophones de la Colombie-Britannique,***	1996- trial court	win	declaratory order
BC	***L' Association des parents francophones de la Colombie-Britannique***	1998- trial court	win	declaratory order
AB	***Mahé v. Alberta.***	1985- trial court	both	declaratory order
AB	***Mahé v. Alberta***	1987- appeal court	loss	none
Nat.	***Mahé v. Alberta***	1990- Supreme Court	win	declaratory order
SK	***Commission des Écoles Fransaskoises Inc.***	1988- trial court	win	declaratory order
MB	***Reference Re Manitoba Public Schools Act***	1990- appeal court	both	declaratory order

[11] *Piette v. Saulte Ste Marie* (1989), *Association francais des conseils scolaires de l' Ontario (1988- trial and appeal court levels), Conseil Scolaire Fransaskois de Zenon Park (1998)* were all victories for the rights claimants, but the cases did not go beyond the stage where temporary orders were issued. In the latter case, however, the trial judge stated that although his mandatory order was interlocutory, he maintained that the order was not in the nature of a temporary order and hoped that compliance would "obviate the necessity for further proceedings." *Abbey v. Essex County Board of Education* (1998- trial level and 1999 appeal level) involved an English-speaking claimant who tried to get her children into an FFL program. *Berthelot v. Ontario (Education Improvement Commission)* involved a dispute over the number of trustees allocated to a new Francophone, Catholic Board. These cases, which appear in Table B.4 Appendix B, are not counted herein.

[12] It is difficult to determine why declaratory orders were made more frequently than mandatory orders. In some instances, the rights claimants did not ask for a mandatory order—this was the case in Saskatchewan, for example, where Justice Wimmer issued a declaratory order in 1988—no mandatory order was sought. (Francophone groups went to the Saskatchewan Court of Appeal asking for a mandatory order after the government was not moving quickly to implement Justice Wimmer's 1988 decision, but the Court of Appeal did not hear the case because it said it would have to invoke original jurisdiction). However, in other instances mandatory orders were asked for but such orders were not granted (the Bugnet group, for example, asked for a mandatory order in Mahé, but was not granted one, even in their Supreme Court victory). Also, as indicated in footnote 11, in *Conseil Scolaire Fransaskois de Zenon Park (1998)* an interlocutory mandatory injunction was issued by the trial judge. The Saskatchewan Court of Appeal subsequently ruled that there was no error in law with such an order.

Nat.	***Reference Re Manitoba Public Schools Act***	1993- Supreme Court	win	declaratory order
ON	***Reference Re Education Act of Ontario***	1984- appeal court	win	declaratory order
ON	***Marchand v. Simcoe Board I and II***	1986- trial court	win	declaratory and mandatory orders
ON	***Conseil des écoles séparées catholiques romaines de Dufferin and Peel et al.***	1996- trial court (stay rejected by appellate court)	win	mandatory order
NS	***Lavoie v. Nova Scotia***	1987- trial court	loss	none
NS	***Lavoie v. Nova Scotia***	1989- appeal court	win	declaratory order
NS	***Doucet-Boudreau v. Nova Scotia***	2000- trial court	win	mandatory order
PE	***Reference Re Minority Language Education Rights***	1988- appeal court	both	declaratory order
PE	***Arsenault-Cameron v. Prince Edward Island***	1997- trial court	win	declaratory order
PE	***Arsenault-Cameron v. Prince Edward Island***	1998- appeal court	loss	none
Nat.	***Arsenault-Cameron v. Prince Edward Island***	2000- Supreme Court	win	declaratory order

Hypothesis 2(a) derives support from the Alberta case study. The Alberta government did not change its legislation and regulations surrounding official minority-language education to provide for Francophone school management and guaranteed access to instruction in French-language facilities until after the Supreme Court made a decision in 1990 that was more clear and favourable to the section 23 claimants than what was offered by the lower courts. Justice Purvis of the Court of Queen's Bench criticized a number of sections of the School Act, but did not declare any parts of the Act invalid; rather he declared that section 159 should be changed to make access to French-language instruction mandatory where numbers warrant. Justice Purvis also argued that section 23 grants a certain degree of management and control to section 23 parents but he did not make any formal order requiring the government or the school board to provide for such management and control- a dissonance noted by the Court of Appeal (at 525). Moreover, the Justice argued that the local school board in Edmonton had a "commendable record in attempting to satisfy the aspirations of the s.23 French linguistic minority" and that the

courts should not decree methods by which officials should meet the requirements of the Charter (at 50-51). In the end, Justice Purvis' decision gave the section 23 claimants and their allies some doctrinal support and a very partial "win" by only declaring that the School Act should be altered to make access to instruction mandatory where numbers warranted.

The Court of Appeal judgment in *Mahé* was more straightforward- in terms of doctrine it held out the possibility of distinct Francophone school boards under section 23(3)(b), but the decision was a complete "loss" for section 23 groups because the Court found that there were not sufficient numbers to warrant a Francophone school board in Edmonton and that Alberta's legislative scheme did not contravene section 23 even if it did not implement section 23 either. As such, the Court did not declare any part of Alberta's legislative scheme invalid and it explicitly refused to grant a mandatory injunction to facilitate the implementation of section 23 rights (at 552).

The Supreme Court, on the other hand, did not issue a mandatory order as requested by the Bugnet group (see above), but did declare that section 23 parents in Edmonton were entitled to proportional representation on the Edmonton Catholic School Board with certain exclusive powers. The Court also indicated that, while governments should have discretion about the precise implementation of section 23:

> Section 23 of the Charter imposes on provincial legislatures the positive obligation of enacting legislative schemes providing for minority language instruction and educational facilities where numbers warrant. To date, the legislature of Alberta has failed to discharge that obligation. It must delay no longer in putting into place the appropriate minority language education scheme (at 393).

As for doctrine, the Supreme Court endorsed the "sliding scale" approach to section 23 with the right to instruction at one end and the right to management and control at the other end. Determining the provision of rights along this scale depends on where the numbers warrant, which in turn is analyzed in light of the actual and potential demand for services (existing school boundaries should not impede this calculation); pedagogical considerations, bearing in mind the remedial nature of section 23; cost considerations; and other factors, such as differences between rural and urban areas.

The ACFA was concerned that the Court did not better specify the "where numbers warrant" formula and thought that it might lead to delays and more litigation; on the other hand, the Bugnet group representatives thought it was advantageous to have flexibility in the numbers requirement, especially for smaller Francophone communities (Interview Levasseur-Ouimet; Interview Dubé). In terms of remedy, however, the Bugnet group did not get the mandatory order it was seeking from the Court. Despite these misgivings, the Court's (unanimous) decision was more clear and forceful than either of the lower courts' decisions, particularly in its emphasis on the remedial aspect of section 23--even members of the ACFA enthusiastically acknowledged that the decision was important in establishing that section 23 included the right to management and control and that section 23 was remedial in nature (Interview Levasseur-Ouimet).

Both the ACFA and the Bugnet group were somewhat correct in their forecasts. Alberta and other provinces did establish Francophone school governance for areas with smaller Francophone populations than Edmonton- in a number of cases provinces established province-wide Francophone boards- but the process took a number of years (some longer than others – for details see Table B.3 in Appendix B) and involved litigation or threats of litigation (see Chapters Five through Seven). The director of Alberta's Language Services Branch attributes at least part of the delay in Alberta's response to the lack of "specific requirements" in the *Mahé* decision except as they applied to Edmonton (Interview Bissonnette).

Significantly, despite some delays, neither the Alberta government nor five other provinces outside of Quebec implemented a legislative scheme giving Francophones management and control over French-language instruction and facilities until after the Supreme Court's *Mahé* decision (the exceptions were P.E.I., New Brunswick and Ontario). Prior to the Court's decision, there was uncertainty about what was required by section 23. Saskatchewan's Minister of Justice in 1984, for example, argued that Saskatchewan's school legislation was consistent with the Charter when the government rejected a proposal for Francophone school management (COL Report 1984: 195-196). Similarly, according to an OMLG activist, a former director of the Language Services Branch, and a former Deputy Minister of Education, the Alberta government continued to disagree with Francophone groups about what was required by section 23, especially with

regards to governance, right up to the Supreme Court's decision (Arès Interview; Bussierre Interview; Bossetti quoted in Julien 1991: 430).

The Alberta case also reveals that the lack of clear judicial and/or provincial directives hindered the development of French-language instructional programs and schools at the local level. A survey of Alberta school boards by the ACFA early in 1985 found significant differences in interpretation of section 23 from board to board and that boards were "awaiting clarifications on Section 23 and that any provincial directive would have a definitive impact on the formulation of policies at the local level" (Morin 1985: 24).

This does not necessarily mean, however, that the introduction of the Charter and the lower court decisions had no impact at the local level in Alberta prior to the Supreme Court decision in *Mahé*. The ACFA survey, for example, indicated that a limited number of school boards were taking action to introduce French-language programs for Francophones that were distinct from French immersion programs (Morin 1985). In 1984, Francophone elementary schools were established in Calgary and Edmonton and the decision by the Edmonton Catholic School Board to establish a French-language high school in 1989 was influenced by the Bugnet group's legal action and threats of litigation by la Société of parents (Julien 1991: 170). And, although it was widely criticized by Francophone groups, the government of Alberta introduced its revised Language Policy for Alberta in 1988 that gave recognition to section 23 rights, including the right to FFL instruction in distinct facilities. Table 8.2 shows increases in the number of schools in Alberta offering French first-language instruction and enrollment in those schools prior to 1990.

However, Table 8.2 shows that French-language schools and enrollment in those schools rose significantly after 1990 in the prairie provinces—arguably, after a certain threshold each additional Francophone school is a more important addition to the number of schools than preceding additions, particularly in light of the falling number of Francophone students with French as a mother-tongue (see Table B.1- Appendix B). Chapter Six discussed a number of communities where local school boards refused throughout the 1980s and early 1990s to establish a Francophone school even when threatened with a lawsuit, such as in St. Paul. The situation in Alberta prior to *Mahé* and

the provincial government's subsequent policy changes has similarities to efforts by parents in northern states to desegregate schools before the US Supreme Court declared *de jure* desegregation unconstitutional and state governments responded with changes to education policy—some communities moved to desegregate to a greater or lesser degree while others did not and the results did not seem to vary according to whether legal mobilization or political pressure was the main instrument used to press the claim (see Chapter Four).

Other examples that support *Hypothesis (2)(a)* can be culled from the narratives presented in Chapters Five through Seven. In Nova Scotia, for instance, Francophone parents in the County of Cape Breton (which includes the City of Sydney) lobbied the local school board for an Acadian school in the area starting in 1981. No action was taken, however, until after the Appeal Division of the Nova Scotia Supreme Court (*Lavoie*, 1989) overturned a lower court decision and, emphasizing the remedial aspect of section 23, issued a declaratory order under section 24(1) of the Charter that French-language instruction be provided in an environment designed to preserve and enhance the French culture (see MacKay 1991).[13]

In B.C., it took the provincial government five years to engineer a response to the Supreme Court's *Mahé* decision—a length of time possibly explained to some degree because it was unclear how the doctrinal holding would apply to BC with its relatively limited Francophone population—yet it took the government only a year to introduce legislative changes demanded by Justice Vicker's 1996 ruling. In applying the Supreme Court's section 23 precedents, particularly *Mahé*, Justice Vickers declared that the government had until the end of the legislative session to enact legislation giving effect to section 23, which included "the highest measure of management and control of educations programs and facilities contemplated by s.23" (Justice Vickers also retained jurisdiction of the case to monitor progress) (at 380). Two years later in November 1998, Justice Vickers ordered the government to create a dispute resolution mechanism to mediate conflicts over the transfer and control of assets between the Francophone

[13] The court did not order the creation of a homogeneous Francophone school as requested by the appellants, but the court did invite the appellants to return to court if the province did not act in a satisfactory manner in fulfilling the court's order.

authority and majority school boards. A regulation to that effect was enacted in July 2000.

In Ontario, upgrades to the Francophone school in Penetanguishene were made reasonably quickly following Justice Sirois' decisions in *Marchand I* and *II*, which included mandatory orders about the nature of changes that needed to be made to the school as well as a distribution of the costs between the province and the school board. The Ontario government released money to the Dufferin and Peel Catholic School Board for the building of a school shortly after being ordered to by the Ontario Court of Appeal in 1996.[14] In 1990, the NDP government established a Francophone school board in the Prescott-Russell region largely because Francophones had prepared a "very strong" case following the *Mahé* decision. Prior to this, legislative changes easing access to French-language instruction and providing for a degree of Francophone management and control through Francophone representation on existing school boards were introduced shortly after the Ontario Court of Appeal's unanimous decision in 1984- a decision generally regarded as being clearly favourable towards section 23 claimants (Foucher 1985; Martel 1991; see discussion in Chapter Seven).

By way of contrast, the Manitoba Court of Appeal decision in 1990 contained three different opinions—none of which found the right to management and control under section 23. When the decision was appealed to the Supreme Court, the Court largely affirmed its holding in *Mahé* in a unanimous 1993 decision. Manitoba passed legislation to implement school governance in 1994.

In terms of major provincial legislative initiatives, only the PEI government's decision to introduce a Francophone school board following the PEI Court of Appeal's rather timid and vague assertion that section 23 requires some degree of "participation" in the development and delivery of FFL runs counter to Hypothesis 2(a). However, it might be argued that responses to judicial decisions are also a function of the attitudes of those responsible for interpreting and implementing the decisions.

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[14] An individual familiar with both cases indicated that the government responded quite promptly after both decisions (Confidential Interview).

Hypothesis 2(b)

Hypothesis 2(b) explores the relationship between the attitudes of those responsible for implementing constitutional guarantees/ judicial decisions and speculates that those more inclined to agree with a claim made by litigants or the results of a judicial decision will be more likely to change policy in a timely and generous manner. Ideally, one might like to conduct a survey of decision-makers to probe their policy preferences before legal mobilization is commenced, but such a situation is impractical in this situation, particularly because of the length of time that has elapsed since key judicial decisions. Nevertheless, the general policy orientation of decision-makers can be ascertained by analyzing policies in place prior to legal mobilization, reviewing public statements and documents, and interviewing selected individuals who were involved in the decision-making process.

Disaggregating the narrative in Chapters Five through Seven reveals that the evidence for *Hypothesis 2(b)* is mixed. A comparison of Alberta and Saskatchewan is instructive in this regard. The case study in Chapter Six shows that the Conservative government in Alberta was reluctant to treat Francophones as a group with "special rights," did not want to interfere with the autonomy of local school boards, and strongly argued before the courts that section 23 did not include a right to management and control. When the *Mahé* decision was announced, the Alberta government complained that a federal institution was infringing on the province's jurisdiction over education and there were calls within caucus to determine whether the Charter's section 33 override clause applied to section 23 (Interview Levasseur-Ouimet; Interview Dinning). Moreover, Premier Don Getty spoke out against enforced bilingualism shortly before his retirement and his successor, Ralph Klein, specifically said that proposed legislation to give Alberta francophones management and control of schools was "discriminatory." Several Conservative MLAs spoke out against the legislation. It took the Alberta government approximately three and a half years to pass legislation providing for school governance after the *Mahé* decision.

In Saskatchewan, the Conservative government initially expressed a willingness to implement Francophone school governance but reneged on this promise. Roy Romanow, Saskatchewan's NDP leader who became premier in October 1991, had spoken of the

Gallant Report's recommendation of Francophone school management as a "good starting point" while in opposition (COL Report 1991: 124). The Romanow government took two years to pass legislation providing for Francophone school governance and, unlike Alberta's legislation, Saskatchewan's legislation created Francophone school boards that covered the whole province and also had provisions for the creation of Francophone schools, but Francophone groups had still complained about the pace of implementation in Saskatchewan. Comparing the different responses to judicial decisions between the Conservative and NDP governments within Saskatchewan and between the NDP government in Saskatchewan and the Conservative government in Alberta shows some support for Hypothesis 2(b).

The Ontario case study also provides some evidence for how policy predispositions can influence the aftermath of judicial decisions—following the 1984 Court of Appeal decision, the Conservative government followed through on its promise to ease access to French-language instruction. The Conservatives also introduced a legislative proposal to grant proportional representation to Francophones on existing school boards with at least 500 Francophone students. Subsequently, the Liberals, who had supported strongly the notion of Francophone school management (even intervening in support of section 23 claimants during the 1994 Court of Appeal reference), introduced a proportional representation scheme that did not have a minimum numerical requirement of Francophone students and the Liberals also established Francophone school boards in Toronto and Ottawa-Carleton.

Yet, other comparisons are not as supportive of the hypothesis. The incoming NDP government in BC (1991), for example, had publicly expressed support for Francophone school governance (COL Report 1991: 125); however, BC enacted a limited regulatory scheme only in 1995 and was faced with (renewed) litigation shortly thereafter. In Ontario, despite the fact that Premier Rae expressed support for creating more Francophone school boards when being sworn-in in 1990 and the Minister of Education, Marion Boyd, was personally predisposed to the creation of more such boards (COL Report 1990: 242; Interview Boyd), only one additional board was created. The network of French-language boards sought by OMLGs in Ontario was not put into place until the

Conservative government under Mike Harris restructured the school system in the latter 1990s.

At the local level, the Alberta case study suggests that the policy orientations of implementers might have had some influence on policy outcomes in response to the Charter and/or legal mobilization. In 1988, the St. Isadore school district- under superintendent Jacques Moquin, who was described as a "passionate defender of French language and culture"- established an homogeneous Francophone school despite financial challenges.[15] The school district cited section 23 of the Charter to justify its decision to establish the school (Barron, *Alberta Report*, Jan. 24, 1991: 25-26). A year later the Catholic School Board in Fort McMurray decided to offer French-language classes in a series of portables attached to the local junior high school even though the provincial government only promised to pick up part of the costs and there was significant public opposition to the plan. Opponents said that the school board had been "determined from the start" to offer the classes (Hutchinson and Byfield, *Alberta Report*, July, 10, 1989: 27).

However, organizational theory- one of the sub-components of the New Institutionalism discussed in Chapter Three- suggests that personal policy preferences are often sublimated to some degree by organizational concerns (see Brooks 1998: 78). Hypothesis 2(b) predicts that school boards would hesitate to respond favourably to demands made during the course of legal mobilization if such demands were to run counter to the boards' organizational practices and objectives. This would be especially true if other factors hypothesized to enhance impact, such as financial incentives and clear legal guidelines, were lacking. There is support for this argument in Julien's (1991) case study of the controversy over Francophone schools and school management in Edmonton. The case study reveals a complex dynamic that existed between individual attitudes, organizational concerns and legal mobilization, which influenced the decision-making of the Edmonton Catholic School Board (ECSB) (as did other factors, such as lobbying by Francophone parents and groups).

Initially, the ECSB rejected the Bugnet group's request for a Francophone school in 1982 partly because it felt that the proposed school would not incorporate Catholic

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[15] The school ran a $250,000 deficit in its first year of operation.

teaching. However, although the demands for French schools- as opposed to French immersion programs- coupled with the Charter and its interpretation came as a "bit of a shock" to the ECSB, it did establish a Francophone elementary school in 1984 in an effort to conform to section 23 of the Charter. The ECSB, nevertheless, rejected calls by the Bugnet group and by another of Francophone parents (la Société) to delegate extensive management and control powers over such homogeneous schools because the Board maintained that it would be a violation of their legal duties. For a number of years the ECSB also refused to separate Francophone and French immersion high school students that occupied the same school (J.H. Picard) and, in certain instances, the same classes. The ECSB and Francophone parents disagreed over such issues as admissions criteria, funding, and the number of students that were necessary to have a viable program (see Julien 1991: Chapter Four, also Section Five- Interviews).

Simone Demers-Seker, a former Francophone trustee on the ECSB, voted to keep J.H. Picard high school as a mixed school (Francophone and French immersion programs) because of pedagogical concerns involving the number of students, but indicated that the Charter, threats of legal mobilization by Francophone parents, and a push by several trustees were instrumental in getting the Board to recognize the distinction between French immersion and French first-language programs and to provide French schools where appropriate- as was the case with the establishment of the Francophone elementary school (Maurice Lavallée). Legal mobilization under the Charter helped prompt those trustees without necessarily a "deep conviction of its [homogeneous French schools] necessity" (see interview in Julien 1991: 449-455).

Alice Gagné, a former ECSB trustee, similarly reflected:

> I look at it this way: through the Francophone members sitting on the Edmonton Catholic School Board (of which I was a member), a sensitization took place through the years very slowly, that 'yes it is a constitutional right to have children of Francophone parents educated in French'...But, being sympathetic and doing something about it are two different things. And the struggle was: we were a school system, and no matter whether you're from a French or English background, you have to have the numbers of students necessary for a viable education program (quoted in Julien 1991: 488).

Gagné went on to explain that the Board initially voted to keep J.H. Picard as a mixed school because it felt that there were an insufficient number of students to make it into an homogeneous French high school.

According to Paul Dubé of the Bugnet group, the ECSB was also concerned that physically separating the Francophone students and the French immersion students would adversely impact the immersion program by reducing both its numbers and French ambience (Interview Dubé). Similar concerns about numbers of students and the impact on French immersion programs led other school boards in Alberta to reject calls for homogeneous French schools even in the face of legal threats and challenges (Slevinsky 1997: 30-34; Julien 1991, 1993; Interview Bissonnette; Loyie, *Edmonton Journal*, Oct. 15, 1986: b16).

Hypothesis 2(c)

As predicted by *Hypothesis 2(c)*, which highlights the importance of incentives in explaining impact, financial concerns also were closely bound up with the decisions of many school boards in Alberta not to create homogeneous Francophone schools. First, there were concerns that the creation of Francophone schools would reduce the financial viability of French immersion schools because of the link between funding and enrollments (Slevinsky 1997: 30-34; Julien 1991, 1993a,b; Interview Bissonnette; Loyie, *Edmonton Journal*, Oct. 15, 1986: b16). Second, and more generally, building new schools or renovating existing schools requires funds. For example, following the *Mahé* decision and subsequent lobbying by francophone parents for a Francophone school, the chairman of the Lac La Biche school division stated: "We could have chosen not to be co-operative like some of the other school boards in the province, [but] we didn't want to be a school board breaking the law." However, the school superintendent maintained that the school would not be built without 100 per cent funding from the provincial government (Unland, *Edmonton Journal*, Aug. 30, 1992: E1). In 1992, the Fort McMurray Catholic Board, which had earlier established French-language classes in portables (see above), said that it was awaiting provincial funding commitments (and clear provincial guidelines) in response to requests for a homogeneous school. Previously, though, in a response to a request from the ECSB, the Alberta government had indicated that it would not create a special priority list for the construction of Francophone schools (Julien 1991).

During the transition to Francophone school governance some special funds were spent on Francophone school construction and renovation with the help of federal

funding (discussed below). The Francophone Governance Implementation Handbook also referred specifically to the province's responsibilities outlined in section 23 and the Supreme Court's *Mahé* and *Manitoba Reference* decisions to provide French-language facilities where numbers warranted (1994: 55-57).[16] Although the $1 million dollars promised by the Alberta government in 1988 for FFL programs was not provided, since the introduction of Francophone school management in 1993-94, more than $30 million has been provided for Francophone education, which includes funding for the construction of new schools and the renovation and modernization of schools that Francophone Authorities inherited from other school boards (Interview Bissonnette).[17]

Table 8.2 reveals that the number of Francophone schools in Alberta rose from 10 in 1992-93 to 17 by 1997-98. Although Table B.2 in Appendix B shows that there had been an upward trend in the number of French schools in Alberta since the early 1990s, the implementation of Francophone school governance along with additional funding for new schools resulted in schools being built in communities that had previously balked at the idea without funding, such as Fort McMurray and Plamondon. Thus, by 1997-98, 17 of the 24 schools in Alberta offering French-language instruction were homogeneous Francophone schools.

This can be contrasted with Nova Scotia where in 1997-98 only 11 of 21 schools offering French-language programs were homogeneous, or B.C. where 4 of 54 schools were homogeneous (see Table 8.2 above). Both of these provinces' policies on the funding of Francophone schools were (successfully) attacked in court. In B.C., Justice Vickers argued that the BC government's decision to restrict capital funding to the Francophone Authority to federal monies supplied for such purposes violated the Supreme Court's *Mahé* decision, which stipulated that funding for official minority language education had to be at least equal to that provided to the majority (*L'*

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[16] Alberta's funding formula was altered as well. Francophone school boards generally benefit from grants related to scarcity and distance, plant operation and maintenance, and central administration and specifically benefit from grants geared towards French first-language programs (Interview Bissonnette).

[17] The government recognized that funding was required for facilities; instructional funding (funding that reflected the sparsity of the student population); transportation costs, particularly for rural areas; operation and maintenance costs and funds for FFL programs to upgrade the French-language skills of section 23 eligible students (Interview Bissonnette). However, as noted above, the funding is provided in such a way that the formula is a general one—it does not apply specifically to Francophone Authorities, but it helps them disproportionately.

Association des parents francophone, 1996). In Nova Scotia, Justice Desroches ordered the provincial government to supply more funding to create homogeneous Francophone facilities. The province, according to Justice Desroches, violated section 23, as interpreted by the Supreme Court in *Mahé* and *Arsenault-Cameron*, by not taking section 23 into considerations in its policies concerning school capital construction (*Doucet-Boudreau*, 2000).

In the wake of the Supreme Court's *Arsenault-Cameron* decision, the Ontario government created a special list for funding the construction of Francophone schools (Confidential Interview). However, since 1979 the Ontario government had encouraged the creation of distinct facilities for French-language instructional units through additional grants, which helps explain why Ontario has long had a large proportion of homogeneous facilities providing French-language instruction (see Table 8.2 above).

While Ontario's support for homogeneous facilities was rather unique, since the late 1970s and early 1980s, most provincial governments provided grants on a per-pupil basis to school boards to help provide French-language instruction (see Table B.3; CMEC Report 1978; CMEC Report 1982). Federal funding through the Official Languages in Education (OLE) program has assisted the provinces to provide such funding to local boards and to generally develop and administer programs. From its establishment in 1970-71 until 1982-83 the OLE program provided nearly $433 million dollars to provinces outside Quebec for minority language education programs, but these funds did not distinguish between French first-language and French immersion programs and there were questions about how the provinces spent those monies (see Chapter Five) (Secretary of State 1987: Exhibit III-19). Starting in 1983-84, the OLE protocol agreements (1983-84 to 1987-88, from 1988-89 to 1992-93, from 1993-94 to 1997-98, and from 1998-99-) distinguished between French immersion and French-first language programs. Under the OLE protocols, the federal government pays for a portion of the additional costs incurred by the provinces in supplying official minority-language education programs in the areas of infrastructure support, program expansion and development, teacher training and development and student support. From 1983-84 until 1997-98, the OLE program has provided hundreds of millions of dollars to provinces outside Quebec for French first-language education programs (see Table B.6 for federal OLE funding for selected years).

The percentage of federal money that went into supporting the additional costs incurred by the provision of minority language programs varied by province, but the funding was particularly important outside of Ontario and New Brunswick. For example, in 1985-86, the Alberta government received $628,213 from the federal government for infrastructure support (which is the largest category of funding to provinces and covers delivery and maintenance of existing programs, transportation, etc.) for FFL programs, which represented 44 per cent of the additional infrastructure costs of providing such programs. The Alberta government also received 50 per cent ($577,000) of the additional costs associated with FFL program expansion and development. In the same year, the federal government provided 35 per cent of Ontario's additional infrastructure expenses for FFL programs (which totaled nearly $51 million) and 50 per cent of the additional costs associated with FFL program expansion and development. Newfoundland, in turn, received $1,024,922 from the federal government for infrastructure support (62 per cent of the total additional infrastructure costs) and $1,862,929 for program expansion and development (67 per cent of total additional program development costs) (no breakdowns are provided between FFL and FSL funding) (see CMEC Report 1985-86; Annex Canada-Alberta Agreement 1985-86).

By the 1988 protocol agreement more emphasis was being placed on developing new official minority-language programs, which helps explain why the percentage of federal money for the OLE program that was targeted to French minority-language education programs outside Quebec rose from 29 per cent in 1983-84 to 38 per cent in 1990-91 (Vezina 1992). Although the proportion of additional costs covered by the provinces has been increasing, it is clear that federal funding remains important for the provision of FFL programs and services outside Quebec. For instance, in 1997-98, the federal government contributed $521,763 towards Alberta's FFL additional infrastructure costs of $2,577,863 (20 per cent) and $1,131,000 towards additional costs associated with FFL program expansion and development of $4,683,912 (24 per cent) (see Appendix Alberta-Canada Agreement 1997-98).

Not surprisingly, a consultant who evaluated OLE program was "advised repeatedly [by OMLG and provincial government representatives] that without the assurance of continued federal support both for the maintenance of existing provincial programs (as

well as for the development of new ones), these activities would wither in most provinces" (Vezina 1992: xxii). The study was undertaken between July 1991 and January 1992- almost ten years after the Charter was introduced and more than a year after the Supreme Court's *Mahé* decision- which points to the importance of incentives on the impact of legal mobilization and judicial decisions.

This observation is reinforced by the fact that the federal government helped finance the implementation of Francophone school governance in most provinces with supplementary agreements to the regular OLE protocols. In 1993, the federal government announced that it would make $112 million dollars available for provinces to implement Francophone school governance (some of this money was also earmarked for French-language post-secondary needs). The money for school governance could include, depending on the individual agreements with the provinces, funds for the establishment of Francophone school boards, upgrading of FFL curriculum, constructing and renovating schools, and programmes d'accueil (programs designed to allow eligible section 23 students who do not have the necessary French-language skills to acquire such skills). In October 1993, the federal government agreed to provide Saskatchewan with $21.9 million over six years and Alberta with $24 million over six years. Manitoba was given $15 million over 5 years in November 1994 and Nova Scotia was given $9 million over five years in October 1995. Two years later the federal government agreed to provide $4.8 million over six years to Newfoundland and $10.5 million to BC, while in 1998 the federal government agreed to contribute $90 million to Ontario over five years for the implementation of school governance (see Ducharme 1996; COL Reports 1997, 1998).[18]

In each of these cases the federal contribution was 50 per cent of the implementation costs associated with school governance. For example, the Alberta-Canada Agreement provided that each level of government would contribute $5.385 million for the establishment of Francophone Regional Authorities and Coordinating Committees, $6.35 million for the development of FFL programs, and $4.5 million for the construction of

[18] New Brunswick and PEI already had francophone school boards prior to 1993 and, hence, did not receive monies for this purpose.

Francophone school/ community centers in Fort McMurray and Calgary (see Heritage Canada, Alberta Appendices 1997-98: 29-33; also see CMEC Report 1993-95).

The timing of these agreements corresponds closely to when each province introduced legislation for francophone school governance. The agreements are also related to section 23 and judicial decisions, particularly the Supreme Court's *Mahé* decision. Within months after the *Mahé* decision the Alberta government approached the federal government to inquire whether the federal government would help finance the cost of establishing Francophone school governance (Interview Bissonnette; Interview Bussiere). Moreover, the agreements themselves specifically refer to the fact that "the Supreme Court has ruled that section 23 confers upon minority-language parents a right of management and control over educational facilities" (see, for example, the Canada-Ontario Special Agreement: 1). Importantly, with the exception of New Brunswick and PEI, no provincial government established a comprehensive system of Francophone school boards prior to the Supreme Court's *Mahé* decision or without significant federal funding for the establishment of francophone school governance.

While the provision of incentives in response to legal mobilization and judicial decisions appears to be an important factor in explaining impact, it is in itself not a sufficient factor. In 1988, the Saskatchewan government was promised $12 million dollars in federal funding after the government indicated that it was prepared to establish Francophone school governance in response to Justice Wimmer's 1988 judgment. However, the Saskatchewan government did not proceed with the implementation of school governance and the federal money was withheld from Saskatchewan until a new agreement was reached in 1993 (Ducharme 1996: 30). Francophone supporters accused the government of delaying in the wake of a provincial election (*Calgary Herald*, Aug. 18, 1991: B2). Could the nature of the political environment help explain Saskatchewan's delay and the timing of responses to legal mobilization and judicial decisions more generally?

Hypothesis 2(d)

Hypothesis 2(d) suggests that the political environment will influence the impact of legal mobilization and judicial decisions. As discussed in Chapter Two, this factor primarily involves analyzing public opinion on an issue as expressed in opinion polls or

political demonstrations and investigating decision-makers' perceptions of public opinion.

Some scholars also include an analysis of the frequency and/or content of media reports on a particular issue. There are some questions about the utility of counting media articles (Simon 1992), particularly if this effort is not part of a sophisticated statistical analysis that compares media attention given to various issues (see Flemming et al. 1997). Given that the Canadian Periodical News Index is not as comprehensive or sophisticated as its American counterpart, includes no specific subject headings that would allow for easy identification of articles related to French first-language schooling, and altered the number and type of media sources that it covered over the time of this study, no statistical analysis of the number of print media articles related to French first-language schooling is provided here. However, the Commissioner of Official Languages in his 1985 Report did note that minority language education was "often in the headlines" in the wake of court cases or legal action (177) and Paul Dubé of the Bugnet group noted that the *Mahé* case "put us on the front pages of newspapers and in the media quite often..." (Interview).

A content analysis of such media coverage is beyond the scope of this research, though Dubé noted that the *Edmonton Journal* was more favourable in its coverage than the *Edmonton Sun* (see interview in Julien 1991: 477). Indeed, a week after the Supreme Court's *Mahé* ruling, an *Edmonton Journal* editorial rebuked Education Minister Dinning's claim that the decision vindicated Alberta's school system and called on the Minister to begin working towards implementing the Court decision (March 19, 1990: a14).

As noted in Chapter Six, however, positive guarantees of access to French first-language instruction and Francophone school governance were not passed until late 1993 in Alberta. Assessing whether there is a correlation between public opinion and policy responses to legal mobilization and judicial decisions is difficult for a number of reasons: first, most of the opinion surveys done on official-language education tap only the access to instruction dimension of the policy area (not schools or governance) and, as discussed below, the way in which the question is phrased could have an important influence on the results; second, surveys have not been done that have inquired about specific attitudes

towards particular decisions; and third, surveys have not been conducted of local areas within provinces, which limits the number of comparisons that can be made. What follows is an assessment of how the most relevant survey data might illuminate the influence of (majority) public opinion in the process, which is complemented by a discussion about the perceptions of decision-makers about public opinion. This part is followed by an examination of how opinions within the Francophone community might have impacted policy reactions to legal mobilization and judicial decisions. The section concludes with a discussion about the potential role of institutions and legal mobilization in altering or channeling public opinion.

In 1977, the Gallup organization asked respondents: "Prime Minister Trudeau recently proposed an amendment to the constitution which would guarantee the right of all Canadians to send their children to English or French schools according to their choice. Would you approve or disapprove of this?" There was a high level of approval in all regions of the country- 91 per cent in BC, 82 per cent in the prairies, 88 per cent in Ontario and 87 per cent in Atlantic Canada (*Vancouver Sun*, Nov. 16, 1977: c8).

However, as interpreted by the courts, section 23 of the Charter does not guarantee freedom of choice in education, rather it provides guarantees for minority-language speakers to have their children educated in minority first-language programs (possibly in distinct educational facilities) where numbers warrant. Surveys that ask questions that better capture the nature of section 23 have generated less enthusiastic responses. Results for individual provinces and/or regions are shown in Table 8.6:

Table 8.6 – Public Opinion and Official Minority Language Education

	BC (%)	AB (%)	SK (%)	MB (%)	ON (%)	NB (%)	NS (%)	PEI (%)	NF (%)
	BC	***Prairies***			***ON***	***Atlantic***			
"French-speaking Canadians outside Quebec should be able to find schooling for their children in French" (1978 survey)									
Support	**36**	**48**			**50**	**58**			
"Should (minority official-language) residents of (province of interview) be entitled to have their children instructed in their own language" (1985 Canadian Facts Survey)									
Yes	**57**	**73**			**68**	**76**			
"Should French Canadians who move out of Quebec to another province have a basic right to have their children taught in French?" (1987 Charter Values Survey)*									
Yes	**54.2**	**47.1**	**36.8**	**42.2**	**56.5**	**77.8**	**42.2**	**93.3**	**75.9**
		43.5 (Prairies)				**61.6 (Atlantic)**			
Qual. Yes	**3.5**	**6.9**	**5.3**	**11.1**	**5.9**	**8.9**	**9.6**	**0**	**0**
		7.6 (Prairies)				**7.0 (Atlantic)**			
No	**39.6**	**43.7**	**57.9**	**46.7**	**36.6**	**1.3**	**44.6**	**6.7**	**24.1**
		47.6 (Prairies)				**30.0 (Atlantic)**			
Qual. No	**2.8**	**2.3**	**0**	**0**	**1**	**0**	**3.6**		**0**
		1.1 (Prairies)				**1.7 (Atlantic)**			
N=	**144**	**87**	**38**	**45**	**306**	**45**	**83**	**15**	**29**
"French Canadians Outside Quebec: 1) Have a right to educate their children in French wherever the number warrant it; 2) Should accept the fact that outside Quebec, their children should be schooled in English, the language of daily life; 3) Neither; 4) Undecided" (1988 Canada Election Study)									
Educate in French	**43.8**	**43.2**	**45.4**	**52.6**	**53.0**	**66.2**	**55.2**	**62.7**	**55.6**
Schooled in English	**48.1**	**46.2**	**47.1**	**33.0**	**37.7**	**27.1**	**40.3**	**27.7**	**27.8**
Neither	**5.4**	**7.6**	**5.9**	**11.3**	**5.0**	**3.8**	**3.0**	**3.6**	**2.8**

(*missing cases=16, data analysis by Riddell)

Table 8.6 suggests that public support for FFL rights was relatively weak in 1978, but stronger in 1985. This might be partially a result of the Charter, but the 1987 Charter Values survey and the 1988 Canada Election Study survey showed less support; however, these results might be influenced by the controversy surrounding the Meech Lake Accord or the wording of the questions (see above). The data from the Charter Values survey reveal also that nearly half of the respondents (outside Quebec) who answered "Yes" or

"Qualified Yes" in support of French-language instruction would "feel differently" if "it substantially increases the amount of taxes people have to pay over and above what they are paying now" (the percentages were relatively consistent across provinces- see Table C.6, Appendix C). In a 2002 survey, however, 81 per cent of respondents outside Quebec agreed that French-speaking families living in their province should have the right to have their children educated in French—the level of support was 91 per cent for those respondents who were asked a version of the question which stipulated, "as long as the number of French-speaking children was large enough that this education could be provided at a reasonable cost" (CRIC 2002: 10).[19]

Unfortunately, none of the surveys discussed above ask respondents about Francophone school governance. To assess how Alberta residents would respond if given a choice as to what level of minority official-language education rights that they would support, in 1998 just over one thousand Albertans were asked the following question for this study as part of the Alberta Advantage survey: "In your opinion, where there are sufficient numbers of children, should English-speaking parents in Quebec and French-speaking parents outside Quebec:

> a) have the right to have their children instructed in their own language AND have the right to manage their own schools which could include their own school boards
> b) have the right to have their children instructed in their own language but NO right to manage their own schools, which could include their own school boards
> c) have no right to have their children instructed in their own language"

Approximately 38 per cent of the respondents chose the right to instruction and management, while 56 per cent chose only the right to instruction, and 5 per cent chose the last option of no right to even instruction.

Given the limitations of the survey data, deciphering trends can only be done with extreme caution. However, the survey results suggest that BC residents on average were less supportive of giving French-language speakers the right to instruction than residents of other regions. This might explain BC's trepidation in enshrining the right to

[19] A table of regional breakdowns was not provided in the CRIC study, but the report did note that "support for French-language education rights in western Canada (85%) is as high as it is in Ontario."

instruction in legislation, creating more Francophone schools and granting management and control rights to Francophones. It also tends to support Robert Matas' observation in the *Globe and Mail* (June 20, 1997) that NDP governments had been "tiptoeing through a political minefield" by trying "to avoid riling Anglophone communities across the province, especially those...mainly rural communities [that] have been openly hostile to policies promoting bilingualism and French-language rights." Therefore, it might have been relatively easy for Mr. Harcourt to support Francophone school governance on the eve of an easy NDP election victory over the Social Credit party in 1991, but a more difficult matter to implement in the face of public opposition. Moreover, editorials such as the one in the *Victoria Times Colonist* that claimed the province could not afford full-fledged Francophone school management would have added to the government's difficulties (Aug. 4, 1995: a4).

Respondents in the Atlantic region, on the other hand, tended to be the most supportive of French-language instruction rights, but the inclusion of New Brunswick in the region likely skews results. Interestingly, the prairie provinces and Ontario often have similar results with a fair degree of support for official-language instruction coming in the 1985 Canada Facts survey (73 and 68 per cent support respectively). The 1987 Charter Values survey suggests that support for instructional rights in the prairie provinces might be less stable than in Ontario if particular associations are made with the right to instruction (i.e. French-speaking individuals moving from Quebec), while levels of support in all provinces were susceptible to decline if the public thought that significant costs would result from the provision of minority language education rights. This comports with the Alberta government's decision not to entertain Francophone school governance in 1985 after suggestions that there would be serious opposition from taxpayers if they had to support another level of school board (see Chapter Six).

Moreover, an analysis of the 1987 data on the general question of granting the rights to instruction reveals that for the prairie provinces there is a modest, statistically significant association between levels of support and the size of the community in which the respondent lives with those in small towns, villages, and rural areas being less supportive of providing such rights than those living in cities (Cramer's V=0.198,

p=0.08).[20] This could help explain why Conservative governments across the prairies, which relied more heavily on rural support than other parties, were hesitant to extend Francophone education rights to include schools and governance.

The 1987 data show that Conservative party affiliates tended to be less supportive of granting the right to instruction, but that this relationship bordered on statistical significance only for Alberta (Cramer's V=0.286, p=0.10) and not for the prairie provinces as a whole.[21] The 1998 Alberta Advantage survey, in addition to showing that overall support for Francophone school management was more modest than support for the right to instruction, also revealed that respondents who intended to vote for the Conservatives in the next provincial election were less supportive of management rights (33.5 percent) than those who intended to vote for the Liberals (43.6 per cent) or the NDP (55.6 per cent). The relationship is statistically significant (Cramer's V=0.137, p=0.001).

How did those in the policy process perceive the nature and influence of public opinion? Most government and OMLG representatives interviewed for this study stated that public opinion, to some degree, made the Alberta government cautious about extending Francophone education rights. Paul Dubé suggested that government fears about a "backlash" operated in the background, while Angeline Martel claimed that public opinion was a more immediate influence- "the biggest question" for the government- because it would be difficult to give school governance powers to one group and not others. Likewise, the Director of the Language Services Branch of Alberta indicated that one of the concerns of the government was about appearing to give "special rights" to a particular ethnic/linguistic group if it supported Francophone schools and school governance (Interview Bissonnette, also see Interview Bussiere). Bissonnette also indicated that there was public disagreement about the best method of providing French-language education (Interview Bissonnette, also see Interview Levasseaur-Ouimet). Julien (1990: 150) found similar explanations based on his research and interviews concerning the situation in Edmonton and Alberta more generally. Conservative MLA

[20] Data analysis by author. Respondents who lived in small and large cities were grouped together into one variable and those who lived elsewhere in rural areas, towns and villages were grouped together into one variable.

[21] Data analysis by author. Following Urquhart's (1997) analysis of the Charter Values Survey for how partisan orientation might have influenced attitudes towards selected Charter rights, Conservative party affiliates were included in one variable and all other partisan affiliates (including independents) were included in another variable.

Ty Lund, when addressing Bill 8, claimed that, "my constituents are really concerned" and cited potential costs and social divisiveness as problems with the Bill (Alberta Hansard, Sept. 27, 1993: 497). Education Minister Dinning reflected that some members of the public were concerned about costs or providing special rights to a particular group, but Dinning did not think that the issue had a particularly high degree of salience (Interview Dinning).

Arguably public opinion was felt more acutely at the local level where personal relationships were involved and pedagogical and financial considerations would have an immediate impact on children's education (Interview Bissonnette). In a letter to the Minister of Education requesting funding for another Francophone facility in 1988 (a request that was denied), the Superintendent of the ECSB wrote that, "This request comes to you in an attempt to solve the problems of space and location in terms of the Francophone minority rights as defined in the Charter of Rights and Freedoms. This situation has been politically volatile with every indication that it will become increasingly so...." (quoted in Julien 1991: 194). However, it is difficult to sort out how much of a role public opinion might have played at the local level. As discussed elsewhere, for example, the situation in Edmonton also involved personal and organizational considerations, including financial implications, as well as splits within the francophone community.

Certain controversies at the local level in Ontario, such as the one in Penetanguishene, suggest that local opposition might have influenced reactions to legal mobilization- in that community two judicial decisions involving mandatory orders were required to resolve an issue that generated vocal local opposition (see Chapter Seven). Again, however, comparing the relative influence of (majority) public opinion at the local level is not possible. What about policy at the provincial level in Ontario? According to an individual who was instrumental in both OMLG litigation and in advising the provincial government, public opinion was a factor that influenced government policy (for example, when the government lifted its construction freeze for a Francophone school in Dufferin-Peel in response to a court order it lifted the construction freeze for English schools as well), but that public opinion was not any larger factor than the complications associated with introducing a new system or the potential costs involved

with such a system (Confidential Interview). Education Minister Marion Boyd concurred that the potential costs associated with extending French-language boards was an issue, but she also maintained that the "NDP caucus was ambivalent, to say the least. Members were aware of the policy position but were leery of how following that policy might affect them in their particular ridings" (Interview Boyd). Again, only one Francophone board was added during the NDP's time in government- in Prescott-Russell- even though legal challenges were being mounted in other communities (Cornwall and Sudbury, for example).

It would appear that majority public opinion at least played a moderately important role in explaining the hesitation to extend Francophone education rights outside of Quebec, though assessing its relative influence is difficult. A potentially more relevant aspect of the political environment that influenced the decision-making process was the fractured state of opinion in Francophone communities outside of Ontario and New Brunswick. A 1981 survey of Francophones outside Quebec showed that a plurality of respondents (45 per cent) favoured French immersion schools to French schools (26 per cent) and bilingual schools (16 per cent)- (the question was not asked in Ontario or New Brunswick) (Corbeil and Delude 1982). Respondents in Newfoundland and BC- two provinces that took a relatively long time to enshrine access to instruction and governance in legislation- were most in favour of immersion schools (each at approximately 67 per cent). Public opinion surveys of members of the ACFA in Edmonton in the early 1980s showed that less than 45 per cent of respondents favoured French schools (see Martel 1988: 16, 30 (translation by author)).

The narratives in Chapters Five through Seven highlighted various battles over the years within the francophone communities over a number of issues: what type of French-language instructional program was preferable, whether Francophone schools were desirable, whether Francophone children should be separated physically from other children if they shared a school, and whether Francophone school governance was appropriate or not. Most of the interview respondents from Alberta pointed out that disagreements within the francophone community made it difficult for local school boards and/or the provincial government to proceed with changes to French-language education policy (see Interviews Arès, Bissonnette, Levasseur-Ouimet, Martel, Dubé,

Bussiere, Confidential Interview). Other research concerning French-language education in Alberta reaches similar conclusions (Julien 1991; Slevinsky 1997).

However, Martel argues that Francophone opinion in Edmonton evolved considerably over time, as support for Francophone schools rose to over eighty per cent in a 1988 survey of ACFA members in and around Edmonton. Support for Francophone school governance stood at 65 per cent. Martel attributes the increase in support for French schools to a demystification of the policy options that resulted from litigation and the lobbying efforts that went along with that process (1988: 17 (translation by author)). More generally, Martel argues that the Charter and recourse to the courts to obtain French-language education rights freed latent attitudes that were being more readily expressed in the late 1980s (1988: 27 (translation by author)).

Do institutions, such as the Charter and the courts, have some influence over the political environment? Martel thinks so. During her interview, Martel commented that "I've maintained in all my writing that the courts and litigation and the constitution have a pedagogical power...it gives a certain credibility to requests and activism." This kind of argument is similar to one in the US that maintains that *Brown v. Board of Education* legitimated the claims of African-Americans for desegregated schooling, which helped generate support and activism in the African-American community (see Chapter Four). Just as that claim is reasonable but difficult to pin down empirically in the US, the same can be said of the Canadian case. Chapters Five through Seven documented several recent conflicts within Francophone communities over schools and governance, though this does not necessarily rule out the legitimation thesis. Perhaps conflict was generated when a group of Francophones that had never aspired to having more than French immersion programs available for their children began to press for French schools and governance as a result of the Charter and judicial decisions.

It is similarly difficult to gauge the influence of the Charter and judicial decisions on majority attitudes. A month before the Supreme Court released its decision in the Manitoba Reference in 1993, the CNPF conducted a study asking "Do you think that the provincial and territorial governments have a duty to respect the decisions of the Supreme Court of Canada which concern the rights of the French and English minorities in Canada?" In BC, 73 per cent answered in the affirmative; 67 per cent did so in Alberta

and Saskatchewan/ Manitoba; 75 per cent answered affirmatively in Ontario; and 84 per cent did so in the Atlantic provinces.

However, as noted in Chapter Two, US research indicates that many members of the public do not hear about Supreme Court decisions, which limits the impact that such decisions have on public opinion. To test public awareness in Alberta about the *Mahé* case the following question was asked of respondents in the 1998 Alberta Advantage survey discussed above:

> The Supreme Court of Canada, in a 1990 Charter of Rights decision—Mahé v. Alberta—ruled that French-speaking parents outside of Quebec and English-speaking parents inside Quebec had the right to have their children instructed in their own language if there were sufficient numbers. They also ruled that they had the right to manage their own schools, which could include their own school board. Were you aware of the Court's position concerning minority language education rights?

Respondents were given a choice of answering "yes" or "no"- only 38 per cent answered "yes."

To begin to get a sense of whether knowledge of the Supreme Court's position would influence public opinion, the respondents were randomly divided into two groups: the first group was asked about their opinions concerning minority language education rights and then given the question about the Court's decision, while the other half of the respondents were asked about the Court's decision and then asked about their opinions concerning minority language education rights. The group of respondents who received the question about the Court first had support-levels for the right to instruction and management that were 9 percentage points higher than the second group (43.4 to 34.4 per cent). While care should be taken not to read too much into these results, the fact that the sample sizes were relatively large and drawn randomly suggests that the Court's support of a certain position might influence public opinion if people are made aware of the decision.

More generally, according to the current president of the CNPF, members of the public generally come to accept OMLE policies enacted by governments in the wake of Supreme Court pronouncements (Interview Arès). The high level of support for French-language education rights outside Quebec expressed in the 2002 CRIC survey discussed above tends to support this proposition, though the timing of the survey (during a period

of relative constitutional calm) and the wording of the survey compared to other surveys means that the results should be interpreted cautiously.

In addition to influencing the distribution of public opinion, institutions may mediate the political influence of public opinion. Chapter Four illustrated how rural voters in southern US states, who were most opposed to desegregation, were over-represented in state legislatures which slowed the pace of desegregation. A similar process might have been at work in Alberta. As noted above, those in smaller communities in Alberta were less supportive of French-language rights in the 1987 Charter Values survey and, according to Urqhart, by the late 1980s the Conservatives became increasingly reliant on support from smaller communities (1997: 51), while the electoral system over-represented smaller, rural communities (Knopff and Morton 1992).

Hypothesis 2(e)

Yet, despite the fact that there were "many in caucus" who disagreed with the *Mahé* decision, according to Education Minister Dinning (Interview), and there was a relative lack of support for Francophone education rights among Conservative and rural voters (who were often the same), the government pressed ahead- albeit belatedly according to Francophone groups- with implementing Francophone school governance and the creation of more Francophone schools- a result that may be partially accounted for by Hypothesis 2(e), which predicts that fewer veto points in the implementation process will translate into an increased probability of policy impact flowing from legal mobilization and judicial decisions. Education Minister Dinning, and his successor, pressed ahead with the introduction of Francophone school management with support from the Premier's office (Interview Dinning).[22] Whereas the Alberta government, operating in an executive-dominated parliamentary system, was able to implement school governance legislation despite legislative opposition, governors in the US were often thwarted in their attempts to introduce desegregation policies in the face of legislative opposition (see Chapter Four). An inference about the efficacy of Hypothesis 2(e) can only be tentative at best, however, because of other factors that could come into play, such as the state of public opinion and the scope of legislative opposition. Moreover, the timidity of the

[22] It appears that after Ralph Klein became Premier he did not stand by his comments during the leadership campaign about wanting to revisit Francophone school governance legislation due to its potential divisiveness.

NDP government in Ontario to institute a province-wide system of Francophone school boards, despite the support of the Premier and Education Minister, illustrates that executive dominance has its limits.

Nevertheless, this study exhibits other examples to suggest that the veto points theory has application in looking at the impact of legal mobilization and judicial decisions. For instance, the battles that took place within and between the legislative and executive branches in the US federal government over funding and litigation surrounding school desegregation are missing from the Canadian case- the federal government has consistently promoted the importance of Francophone language rights outside Quebec through various funding mechanisms even though the Alliance Party (formerly the Reform Party), which has been critical of interest group funding, constitutional group rights, and federal bilingualism policy, has enjoyed reasonable representation in the House of Commons since the early 1990s. Conversely, when the executive branch (or parts thereof) in the US federal government was able to push forward with promoting school desegregation it was able to act directly against local school boards through a combination of the enforcement mechanisms of the 14th Amendment and the Civil Rights Act, while the Canadian federal government enjoyed no such institutional mechanisms- it had to promote minority official-language education indirectly.

The policy responses at the local level also offer some support for the "veto points" hypothesis. When individual school boards were left to their own devices, as in Alberta, they tended to be unwilling to act and waited upon clear guidelines and funding promises from the province. More generally, as discussed in Chapters Five through Seven, the discretion of local majority boards in implementing official minority-language education policy has been identified as a factor that limited the expansion of French-language educational programs outside Quebec. Not only has unfettered school board discretion been ruled a violation of section 23 in various decisions (see Table B.4(b)), more recent section 23 jurisprudence is geared toward reducing the possibility of a veto in the promotion of French-language education rights. The upshot of the Supreme Court's *Arsenault-Cameron* decision is that provincial governments will have a difficult time justifying not following recommendations by Francophone school boards for program or facility expansion. Justice LeBlanc's decision to enter a mandatory order against the

province of Nova Scotia and the Francophone School Board to hasten the development of homogeneous Francophone schools combined with his decision to retain jurisdiction in the case goes one step further than *Arsenault-Cameron* by effectively putting superior courts (staffed by federally-appointed judges) in charge of implementing the expansion of minority-language education rights at the local and provincial levels. If Justice LeBlanc's order is allowed to stand it could signal the beginning of a supervisory role for Canadian courts in official minority-language education policy similar to the one exercised by the federal courts in the US over desegregation policy. Although the US example shows that veto points are not wholly eliminated in such a scenario- public officials can use overt or covert ways of trying to frustrate implementation of the court order-, desegregation did proceed at a faster pace when closely monitored by the federal courts.

Hypothesis 2(f)

Hypothesis 2(f) is concerned more with a "bottom-up" perspective focusing on whether legal mobilization and judicial decisions contributed to political mobilization, gaining access to the policy process and the formation of alliances within the policy process. Evaluating Hypothesis 2(f) will be done primarily at the provincial-level; however, the experience of national Francophone organizations supports the hypothesis. In 1990, for example, the FFHQ produced a study (*The 90s Decade: Consolidation Period*) that reviewed section 23 jurisprudence and the state of education policy in each province. The activities of the CNPF, though, best illustrates Hypothesis 2(f). The Commissioner of Official Languages reports that the CNPF "accelerated efforts" to solidify a national network of parent groups and to develop Francophone school management proposals in the wake of the Supreme Court's *Mahé* decision (COL Report 1990: 214). Indeed, in September 1990, the CNPF began plans for developing "modules of expertise" (legal, pedagogical, political, demographic, administrative, etc.) that would be used to promote school governance in light of the "generous," but imprecise, Supreme Court *Mahé* decision (CNPF Letter Sept. 27, 1990). Another CNPF document outlines the various goals of the CNPF for 1991-92, which include proposing models of governance; encouraging meetings between CNPF provincial affiliates and their governments; making Francophone parents aware of the advantages of Francophone

school-community centers; lobbying the federal government for funding for the implementation of section 23 rights; collaborating with other minority language groups in promoting constitutional and policy position; and disseminating information through a newsletter called "Info-Parent," among other things (CNPF Plan d' Action 1991-92). Moreover, in 1991 the Council for Ministers of Education, Canada (CMEC) devoted a major portion of its 1991 meeting to discuss the implementation of section 23 based on a brief from the CNPF. This was the first time since the Charter came into effect that the Council held an exchange of views on minority language education and school governance models (COL Report 1990: 214-25).

At the provincial-level, the Alberta case study underscores the importance of Hypothesis 2(f). Section 23 of the Charter and the *Mahé* case launched by the Bugnet group proved to be a catalyst in motivating the ACFA to press for Francophone schools and school governance (Interview Levasseur-Ouimet; Interview Martel; Julien 1991: chapter four). Another Francophone interest group in Alberta, the FPFA, was established in 1986 as an organization composed of "committees and groups of Francophone parents of the province who work to have their rights respected under section 23 [of the Charter]" (FFPA, "Quoi, Pourquoi, Comment" n.d.- author's translation). In Edmonton, specifically, Claudette Roy, a former president of la Société (which grew out of an ad hoc committee of the ACFA), reflected that the Bugnet litigation was a catalyst for demands for Francophone schools and that, "Without the Charter, I doubt that parents would have bothered to seek to obtain a French first language school" (quoted in Julien 1991: 584). Another former president of la Société shared this perception (see Julien 1991: 571).

Chapter Six described how Francophone groups and parents in Alberta undertook a variety of activities to promote policy change from the early 1980s onward, including: lobbying, media awareness, community awareness projects, studying potential demand under section 23, and litigation. However, Francophone groups had little real influence in the policy process- meetings with bureaucrats or the Minister of Education could best be characterized as a "consultation" form of participation where information was exchanged (see Kernaghan and Siegel 1999: 504-509). After the Alberta government prepared a briefing document in the wake of the Supreme Court's *Mahé* decision (March 1990) to present to Francophone groups in various regions, it appeared that Francophone

input might again be limited to "consultation." At that point, however, the president of the ACFA, France Levasseur-Ouimet, asked the Alberta Teachers Association (ATA) and the Alberta School Trustees Association (ASTA) to help persuade the government to put together a working group to study the implementation of Francophone school governance (Interview- Levasseur-Ouimet). They were successful.

The ten-member working group consisted of various stakeholders, including Levasseur-Ouimet of the ACFA and Claudette Roy of the FPFA. The Lamoureux-Tardif study, which was commissioned by the FPFA and ACFA, was a significant document that the committee used as a basis for deliberations (though not all Francophones concurred with everything in the report) (Interview- Levasseur-Ouimet; Interview- Arès; Confidential Interview). While the committee deliberations were sometimes difficult, the committee delivered a unanimous report (Interview- Dinning; Interview Levasseur-Ouimet). The ACFA leadership believed that the unanimity exhibited by the committee was politically helpful and Levasseur-Ouimet argues that the support of the ASTA was particular helpful (Interview- Levasseur-Ouimet; Interview- Arès). The ASTA had intervened in *Mahé* at the trial, appeal and Supreme Court level to oppose the section 23 claimants, but in May of 1990 (two months after the Supreme Court decision) announced its support of the ACFA and FPFA position (the ATA passed resolutions supporting the ACFA-FPFA position in April 1990) (Interview Levasseur-Ouimet).

The French-Language Working Group Report then formed the basis of the legislation to implement Francophone school governance. There was also Francophone representation on the Francophone Governance Implementation Committee, including Denis Tardif, one of the co-authors of the Lamoureux-Tardif study. Importantly, according to the Minister of Education who appointed the French-Language Working Group, Jim Dinning, Francophone school governance *might* have been introduced in Alberta without the Supreme Court decision, but it would have "taken a hell of a lot longer" with Francophone proponents being forced to use traditional lobbying. The Supreme Court decision "catalyzed" the process (Interview Dinning).

Further evidence for the importance of the Charter and legal mobilization in contributing to political mobilization, the cultivation of allies, and influence in the policy process can be found by looking at other provinces and the national level as well. In

Saskatchewan, for example, the Gallant Committee, which included representation from Francophone education and cultural groups, was established pursuant to Justice Wimmer's 1988 decision (see Gallant Report, 1989). The Gallant Report formed the basis for the legislation introduced in 1993, which was supported by the Saskatchewan Teacher's Federation but opposed by a narrow majority of the Saskatchewan School Trustee's Association (COL Report 1991: 124; COL Report 1992: 107; COL Report 1993: 119).

Edgar Gallant also chaired a task force in Manitoba that was established to advise the government on issues surrounding "a school governance system for Franco-Manitobans, who have the right of management and control of schools according to a Supreme Court of Canada ruling in March 1990." The twelve-member committee included representation from the Franco-Manitoban Society, Franco-Manitoban School Trustees and the Franco-Manitoban component of the Manitoba Teacher's Society (Manitoba Government News Release, Nov. 6, 1990). The Gallant Report served as the model for the government's Francophone governance legislation passed in 1993 (see Supplementary Affidavit of Deputy Minister of Education, Province of Manitoba, Supreme Court file no. 21836, Feb. 1989).[23]

The examples of the prairie provinces can be usefully compared and contrasted with the situation in Ontario following the Supreme Court *Mahé* decision. Francophone groups in Ontario became increasingly vocal for school management following the decision and intensified threats of legal action (Interview Martel; Interview Boyd; COL Report 1990: 239). In response to these demands the NDP established a Francophone board in Prescott-Russell and formed an advisory group on Francophone school management, which received over one hundred submissions. Following the release of the Cousineau Report, which suggested possible types of Francophone school boards that could be created (if certain numerical thresholds were reached, otherwise French-language sections of boards would remain), the Ministry of Education received 173 submissions from various groups and organizations in response to the report. An analysis

[23] However, contrary to the recommendation of the Gallant Report, the government did allow existing school jurisdictions to continue to offer FFL programs to Francophones who did not want to join the Francophone school board. The government argued that a number of Francophones had indicated that they prefer the status-quo (see Supplementary Affidavit of Deputy Minister of Education, Province of Manitoba, Supreme Court file no. 21836, Feb. 1989).

of these submissions reveals that there was overwhelming support from Francophone organizations and strong support from Roman Catholic boards, even from many of those with a majority of English trustees; and public school boards were split on the issue, with opposition concentrated in the western and northeastern parts of the province (Haché and Churchill 1992: 12-20). This was the general sense of Education Minister Boyd, who noted also that the teacher groups tended to follow the lead of their particular school board associations on this policy question (Interview).[24] Subsequent government reports, including the Report of the Royal Commission on Learning, the Sweeney Report and the Crombie Report all recommended the creation of some system of French-language school boards. The aftermath of the *Mahé* decision in Ontario was that Francophone groups forced the issue of Francophone school governance on to the agenda and were provided significant opportunities to express their policy preferences, especially through the Cousineau advisory group. The recommendations in favour of Francophone school boards, which were eventually created in 1997, gave credence to Francophone demands, but opposition from key players in the policy community- notably public school boards- appears to have contributed to the delay in the creation of Francophone boards.

The connection between the content and timing of policy change and Hypothesis 2(f) is less clear in other jurisdictions, however. In BC, for example, litigation initiated in 1989 was "only one part of Operation loi scolaire conducted by the APPCF and Federation franco-colobienne," which also included sensitizing majority and minority-language parents to the educational issues, identifying current problems with the education system, and proposing reforms to the government (COL Report 1989: 191). Shortly after *Mahé*, the Social Credit government established a seventeen-person task force, which included Francophone representatives, to investigate the establishment of Francophone school governance—the section 23 case by Francophone groups was suspended in the meantime. In the ensuing years BC Francophone groups continued to negotiate with the government and mobilize the larger Francophone community, but it was not until the lawsuit was renewed in 1994 that significant policy change resulted (see COL Reports 1991-1995; Interview Martel).

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[24] Boyd, however, seemed to detect more resistance from the Roman Catholic Boards with smaller Francophone populations than is reflected in the statistical breakdown of responses to the Cousineau Report.

Thus, the results of Hypothesis 2(f) are partial (federal funding, for example, was an important incentive to provinces) and contingent (for example, the election of the NDP government in Saskatchewan likely pushed forward implementation of the Gallant Report), particularly in BC where the fruits of political mobilization and input were not as immediately realized, but they do suggest that legal mobilization and judicial decisions played a role in shaping the policy process and policy outcomes.

HYPOTHESIS (3)- Transformative Legacy of Legal Mobilization. **Success or failure during the previous stages to change law and policy will generate shifts in strategy, policy ideas, goals and relationships of actors within the process as actors operate in multiple institutional forums.**

As discussed in Chapter Three, Hypothesis Three is more heuristic in orientation than the other Hypotheses, but suggests that legal mobilization and judicial decisions could shape the policy landscape over time by influencing the strategies and goals of actors, policy ideas and discourse, and the relationship between actors in the process. To make a potentially malleable discussion more manageable, the following interrelated points will be elaborated upon briefly (often with references to earlier discussions) in support of Hypothesis Three:

a) Legal mobilization became an important strategy for Francophone groups after the introduction of the Charter, but it was complemented by other political activities.

b) The Charter, legal mobilization, and judicial decisions over time helped to increase the legitimacy of the policy goals of Francophone schools and school governance, especially amongst Francophone leadership in certain provinces; however, the use of litigation to achieve Francophone schools and school governance generated or exacerbated differences within Francophone communities in a number of provinces and also created some animosity between the English-speaking majority and Francophones pressing for schools and school governance.

c) Francophone proponents of Francophone schools and school governance largely have been successful in using legal mobilization and the discourse of rights to achieve policy goals over Francophone and majority opposition; as such, the minority-language education policy schemes are quite similar in

each province both practically and in the vision of the political community that they represent; and

d) Francophone proponents currently are using legal mobilization in conjunction with other tactics to solidify and expand their policy achievements of the last two decades.

The importance of legal mobilization as a strategy for Francophone proponents was discussed above under Hypothesis (1) and the complementary activities to legal mobilization (lobbying, media, community awareness, etc.) are discussed in various places, including the description in Chapters Five through Seven. What deserves reiteration is that section 23 of the Charter (and judicial decisions) became the focal point of all the various efforts. For example, Gerard Bissonnette, Director of the Language Services Branch for Alberta Education, pointed out that in meetings with Department officials as well as the Minister and Premier, the Francophone community and its various stakeholders relied primarily on section 23 and Supreme Court judgments and how section 23 rights had been implemented in other jurisdictions (Interview Bissonnette; also see ACFA Briefing Document 1988). During the undertaking of the Lamoureux-Tardif (1990) study, which was relied upon by Alberta's French Language Working Group, information about section 23 and selected court judgments were provided at meetings with members of the Francophone community and the opinions of members of the Francophone community were solicited about how to best implement section 23 (2). In a follow-up series of consultations, the researchers were asked to provide members of the Francophone community with information about the Supreme Court's *Mahé* decision (3). Numerous other examples of the use of section 23 and judicial decisions to educate the Francophone community, lobby decision-makers, and attract media attention in various provinces can be found in the Annual Reports of the Commissioner of Official Languages from 1983 onward (also see Chapters Five through Seven).

Given the centrality of section 23 to the efforts of Francophone groups to alter OMLE policy, it is not surprising that Chapters Five through Seven also noted that Francophone groups and their allies worked to protect section 23 during mega-constitutional rounds (Meech Lake and Charlottetown) and to advocate for changes to section 23, such as dropping the "where numbers warrant" requirement (Interview Arès;

Coyne 1991; Alberta Select Special Committee on Constitutional Reform, May 31, 1991: 304-305).

Not only did the introduction of section 23 and legal mobilization alter the strategies of Francophone groups and accelerated efforts for Francophone schools and school governance in provinces such as Ontario, the analysis surrounding Hypothesis 2(f) demonstrated that the Charter and legal mobilization had a role in altering the policy goals of Francophone organizations in provinces such as Alberta and BC where demands for Francophone schools and school management superceded a general satisfaction with the system of French immersion programs operated by majority school boards. (It is useful to compare pre-Charter ACFA documents (1978, 1980) with post-Charter ACFA documents (1987 (March), 1987 (Dec.), 1988, 1989) to get a sense of how both the policy objectives and the policy discourse of this organization changed (see Chapter Six for details)).

A combination of the Charter; legal mobilization; judicial decisions, such as the Supreme Court's *Mahé* decision; and associated activities, such as media exposure and community awareness campaigns, helped to legitimate these goals within the broader Francophone community- this is the belief of a number of Francophone observers (Interview Martel, Interview Dubé, Julien 1991), which is reinforced by noting the increased enrollments in Francophone schools (see Table 8.2) and the increase in support found for Francophone schools in Edmonton from the early 1980s to 1987 (Martel 1988).

Nevertheless, the narratives in Chapters Five through Seven reveal that demands for Francophone schools and school management made under section 23 caused considerable friction within a number of Francophone communities. Differences of opinion revolved around pedagogy; resources; the separation of French-speaking and English-speaking children; and, particularly in Alberta, the role of Catholicism in education. Demands for Francophone schools and school management made under section 23 also generated some opposition from English-speakers who were concerned about costs; the impact on French immersion programs; the granting of "special" rights to a particular cultural group; and the separation of students according to cultural background.

In these disputes, Francophone proponents used legal mobilization and "rights talk" more generally to press their claims. A few examples will suffice (also see Chapters Five

through Seven). In Sault Ste. Marie, Ontario a group of Francophone parents decided to switch school board allegiances to the public school board because they believed the Catholic board had become too liberal in admitting non-Francophones to the FFL program—the group then took the public board to court to demand an FFL program under section 23. This, in turn, generated a protest by approximately two hundred English-speaking residents. Francophones pressing for a FFL program in facilities attached to a school in Fort McMurray, Alberta claimed that "Our children have, under section 23 of the Charter of Rights, the right to French instruction." This comment came in response to a 500-signature petition signed by English-speakers opposed because of the costs of the program and some Francophones who preferred having their children interact with English-speaking children in immersion programs (Hutchinson and Byfield, *Alberta Report*, July 10, 1989: 27). In the wake of controversy generated by the segregation of Francophone and English-speaking students in certain Nova Scotia schools following Justice LeBlanc's ruling (pending the construction of homogeneous French-schools), the head of an Acadian parents group dismissed protestations by Francophones and English-speakers by pointing out that they had been fighting for homogeneous schools since the introduction of the Charter of Rights to fight cultural assimilation (Brown, *Halifax Daily News*, Oct. 24, 2000: 9). One of the leaders of the group who used litigation to fight successfully for a Francophone school in Zenon Park, Saskatchewan stated that, "It is our right. We have the right to have this schooling, so it's not like we are abusing people's money or anything." This comment came in response to Francophone critics who argued that the new Francophone school threatened the viability of the mostly French-school run by the English board and that the new school was not worth the money given the strong French-language content in the existing school (CTV, W5 transcript, Jan. 26, 1999).

As discussed in Chapters Five through Seven, Francophone groups also used legal mobilization and rights talk to press for Francophone school management. Again, some examples should suffice (also see Chapters Five through Seven). In its 1987 position paper the ACFA called on the Alberta government to revise the School Act to "implement Section 23 in Alberta." Among other things, this would include "the right of the French-language minority in Alberta to governance, that is, to manage and administer

their own homogeneous French schools and French-as-a-first-language programs" (ACFA, March 14, 1987). The ACFA intervened in the *Mahé* case at each level to press these claims in court. The Royal Commission on Learning in Ontario, which recommended that a network of Francophone school boards be created in the province, specifically noted that "francophones often felt compelled to refer in great detail to historic judgments confirming the educational rights of francophones outside Quebec...They referred especially to the Supreme Court's two unanimous decisions [the *Mahé* and *Manitoba Reference* decisions]" (1994: 66).

The controversy in Calgary over the creation of a Francophone school board for southern Alberta and that board's control over Francophone schools in Calgary represents a microcosm of the influence of legal mobilization and rights talk in relation to Francophone school management. A number of Francophones wanted to keep their schools with their respective school boards because of economies of scale; Catholic Francophones also believed that the religious dimension of education would best be preserved by staying with the Catholic board. Francophone proponents of a new board consistently made references to section 23 of the Charter and the Supreme Court's *Mahé* decision. In a piece written for the *Calgary Herald*, Suzanne Sawyer, the president of the South-Central Region Advisory Council, argued that, "As the Supreme Court of Canada ruled in 1990, francophones must have full control and management of the education of their children in their mother tongue" (Oct. 29, 1998: A23). A few months earlier Sawyer had opposed a government suggestion that a mediator be appointed to help resolve the issue, which might have involved a vote amongst Francophones, by saying that, "You do not vote on constitutional rights" (*Calgary Herald*, July 4, 1998: b1). When the Alberta government decided to establish a Francophone board for southern Alberta, but did not immediately allow the board to take control of Calgary's Francophone schools, the board's chairperson recognized that the issue was "highly charged" and that concerns about quality education, job security and continued Catholic education had to be addressed. Prior to this, however, the chairperson reminded readers of the *Calgary Herald* article that, "Canada's Constitution, as confirmed by the Supreme Court of Canada, recognizes that francophones have the right to manage and control their own schools" (Pilon, March 31, 2000). Shortly thereafter the Board then hired a lawyer-

Georges Arès (then president of the ACFA) to press its claim for control over Calgary's Francophone schools (Interview- Arès). It is little wonder that opponents of a distinct Francophone board controlling Francophone schools in Calgary observed that supporters of the plan kept couching their claims in the language of "rights" in an effort to trump their views (Confidential Interview).

The claim that Francophone groups have relied on legal mobilization and rights discourse as a central mechanism for promoting OMLE policy change is bolstered by the findings of a study that systematically analyzed the content of documents produced by Francophone groups, particularly the FCFA and its provincial affiliates. The study found that in "the political arena, it is clear that the approaches for action favoured by the Francophone minority associations are always strongly marked by legal rhetoric [since the early 1980s]...[the legal tool] is seen as a means of safeguarding rights which will generate resources" and "the language of the associations... has mainly stressed the linguistic education rights recognized by Section 23" (Cardinal et al. 1994: 53, 72). It should be noted that the study did not even take into consideration the documentation of the CNPF and its provincial affiliates, such as the FPFA, which are groups explicitly dedicated to the implementation of section 23 of the Charter (CNPF Pamphlet n.d.).

Francophone advocates of Francophone schools and school management outside Quebec have employed legal mobilization and rights talk to help achieve policy goals not originally favoured by governments, a number of English-speaking actors in the policy community, and opponents within the Francophone community. The conclusion to the situation in Calgary was to create both a public and a separate (Catholic) Francophone board. In Alberta, Francophone boards operate to cover the entire province and Alberta's Education Act stipulates that Francophone boards have exclusive power to operate and manage FFL programs and facilities. As Table B.3 (Appendix B) shows, in every province except Manitoba and New Brunswick, a single Francophone board or series of boards operate in almost every area of the province with the exclusive right to control FFL programs and facilities. In Manitoba litigation is under way to achieve exclusivity for the Francophone board and in New Brunswick litigation has begun to challenge the government's centralization of the administration of schools (even though there is an equal and distinct Francophone administrative structure). Table B.2 (Appendix B) also

shows that the number of Francophone schools and the proportion of Francophone schools to all schools providing FFL programs has increased in most provinces since the early 1980s and that enrolment in Francophone schools increased in seven provinces, declining marginally only in Ontario and New Brunswick. These increases have come in the wake of declining numbers of eligible section 23 children with French as a mother-tongue (see Table B.1).

Legal mobilization and rights talk has not only been a successful counter-majoritarian strategy, it has also been a useful strategy in promoting the policy preferences of certain elements within the Francophone community over others—just as litigation for school integration through techniques like school busing, rather than desegregation, allowed certain elements in the African-American community to promote their policy preferences over opposition not only from the majority but also from other elements in the African-American community. In both the Canadian and American cases, the policy tensions between the majority and minority communities and within the minority communities had two related dimensions: the first dimension involved practical considerations over financial resources, pedagogical issues, teacher allocation, transportation, etc.; and the second dimension involved questions about the nature of the political community. In the US, the liberal integrationist ideal competed against ideas that promoted, or were at least resigned to, the separation and distinctions between the African-American and white communities. Bound up in this debate were contested notions about the appropriate role of national institutions in imposing social values in the states. Broadly similar themes arose in Canada about the nature of federalism and the nature of the relationship between Francophones and English-speaking people.

In achieving the establishment of an educational policy regime across Canada that features Francophone schools and school management in an effort to promote French language, which in turn is seen as a vehicle in preserving and promoting Francophone cultural communities, Francophone supporters of the regime and their political and legal allies have used section 23 to effectively elevate a particular vision of Canada's political community above other possibilities. In 1978 the Premiers' declaration of support for OMLE at the Montreal Conference was based on freedom of choice in the official-language of instruction and federalism—the Premiers emphasized that minority language

education policies were matters of provincial jurisdiction and most provinces opposed the inclusion of minority official-language education rights in the constitution. In Alberta, this stance was wedded to an education policy that emphasized multiculturalism and did not distinguish between French immersion and FFL programs, though certain provinces had recognized the distinction between immersion and FFL programs as well as the need for some type of homogeneous facilities for FFL instruction. Most provinces, however, argued before the courts that the right to school management should not be found in section 23 as it would interfere with provincial control of education. Some provinces also argued that section 23 should not be operationalized as a vehicle to promote cultural communities. Similar arguments were also made at the local level by parents and officials. Immersion programs or schools that had multiple streams with English-speaking and Francophone children were seen by many parents, both English-speaking and Francophone, and those in the media as a way of generally promoting the French culture while also allowing Francophone children to interact with students from the majority culture (Julien 1991; *Edmonton Journal*, March 5, 1988). Chapters Five through Seven documented how moves to separate English-speaking and Francophone children led to charges of "segregation" in a number of communities. In response to the Dejarlais Report commissioned by the ACFA, ECSB superintendent John Brosseau noted that the report "maintains that the goal of a French school is linguistic and cultural purity," which would be "somewhat of a new goal in Alberta Education." Brosseau went on to argue that excluding Anglophones from a French school might violate a particular interpretation of the Constitution that would give Canadians the right to attend either type of official language school (Julien 1991: 180). This argument reflects the vision of pan-Canadian bilingualism that was part of the 1978 Montreal declaration.

These arguments were unsuccessful, however. Instead, the Supreme Court's inclusion of the right to management and control in section 23 and its reading of the purpose of section 23 as the preservation and enhancement of the French-language and culture found their way into important policy papers (for example, Alberta's Report of the French Language Working Group 1991: 4-5; Ontario's Royal Commission on Learning Report 1994: 70). Not surprisingly, these principles then became entrenched in public policy. In Alberta, this was over the objections of a number of Conservative

MLAs who called it costly and also divisive for promoting "special rights" for a particular cultural group. However, these MLAs maintained that they would support the Bill because of the Supreme Court decision. Before arguing against the Bill, for example, MLA Lorne-Taylor stated, "Let me preface my comments by saying I believe that because the Supreme Court has ruled, then I must support this Bill" (Alberta Hansard, Sept. 27, 1993: 495; also see Lund at p. 497; West at p. 499; Fischer at p. 502). Alberta's policy changed from one that emphasized multiculturalism, access to French-language education regardless of mother-tongue, and school board autonomy in 1978 to one that featured distinct Francophone school boards with the exclusive authority to provide and manage FFL programs and schools with enrollment in those programs or schools being dependent upon eligibility under section 23 or criteria created by the Francophone boards. These changes cannot be understood without reference to the Charter, legal mobilization and judicial decisions.

The latest section 23 decision by the Supreme Court (*Arsenault-Cameron,* 2000) acknowledged a community dimension to section 23 and further eroded provincial government authority in minority official-language education policy by supporting the decision of the Francophone school board. As such, the principles of freedom of choice in education and federalism found in the 1978 Montreal Declaration have been superceded: minority official-language education policy now reflects promoting the culture of official minority language communities rather than allowing for free choice of education in one of Canada's official languages and provincial jurisdiction over education policy has been significantly constrained by national institutions- the Charter and the Supreme Court.

Francophone proponents are now working to solidify and extend their policy gains. The litigation efforts in Manitoba and New Brunswick were noted above, and Francophone groups along with the Commissioner of Official Languages are urging the establishment of pre-school programs and greater funding for various programs. Part of this strategy is to argue that section 23 should be interpreted to include the right to preschool FFL programs and schools for children of eligible section 23 parents (COL Report 1997: 8; COL Report 1999-2000: 37-38). More generally, there is a new emphasis being placed on education "results" and a conviction that "action regarding

section 23 should focus on new language planning regarding its 'remedial' role" (COL Report 1997: 21,87; Martel 2001: 11).

Given that, since the introduction of the Charter and judicial decisions resulting from legal mobilization under the Charter, the strategies and goals of actors within the minority official-language policy community have been altered, the power relationships between actors within the community has changed and that policy discourse and philosophy have changed, there is evidence to support the heuristic claims about the transformative nature of legal mobilization contained in Hypothesis (3).

Conclusion

The New Institutionalism theory posits that institutions- as actors and structures- play an important role in shaping policy and the policy process. This chapter analyzed specific propositions about the role of institutions in the context of a judicial impact study. This study demonstrated that institutions were important in facilitating legal mobilization. The entrenchment of section 23 of the Charter of Rights and federal government funding of OMLGs and court challenges provided crucial resources to Francophone groups to undertake litigation (Hypothesis 1(a)). Francophone OMLGs have been quite successful in court, particularly the Supreme Court- a result that is difficult to explain simply with reference to the ideological predispositions of the individual judges. Institutional variables also factored in to the results (Hypothesis 1(b)). The evidence suggests that the law and its suggested interpretation by parties and interveners, particularly the federal government, are factors that explain OMLG success as are the federal government's appointment power, the institutional influence of the Court on individuals, and the Court's concerns about institutional legitimacy. This latter concern helps to explain the latitude that the Court ostensibly gave provincial governments, especially in its first two section 23 decisions outside Quebec.

Hypothesis Two proposed that multiple factors would influence the policy impact of legal mobilization and judicial decisions. The low number of observations that can be used to test the hypotheses; the imprecise nature of much of the data; and issues such as multicollinearity, where various variables are changing in the same direction simultaneously (i.e. favourable judicial decisions, federal funding and OMLG mobilization all adding positively to impact at the same time), pose methodological

hurdles that make evaluating the hypotheses difficult. Nevertheless, the chapter's use of observations between and within provinces showing policy developments over various time periods using both quantitative and qualitative data (discussed more fully in Chapters Five through Seven), and the use of heuristic comparisons with the school desegregation struggles in the US (discussed more fully in Chapter Four) allows for the factors in Hypothesis Two to be ranked generally as being of HIGH, MODERATE, or LOW IMPORTANCE based upon the preceding analysis. These rankings and brief reasons for the rankings are outlined in Table 8.7.

Table 8.7- Importance of Factors in Hypothesis (2)

HYPOTHESIS (2)- Policy Development and Implementation
a) Nature of Legal Rules- <u>HIGH</u> -The introduction of the Charter itself had little impact. Only two provinces enacted a system of province-wide Francophone school boards prior to the Supreme Court's *Mahé* decision. -The Alberta case study demonstrates the importance of clear rules for local decision-makers.
b) The ATTITUDES and PRACTICES of IMPLEMENTORS- <u>LOW to MODERATE</u> -Some influence could be inferred by certain comparisons—the NDP government in Saskatchewan, unlike its Conservative predecessor, introduced Francophone school governance. In doing so, the NDP government took less time to implement school governance than did the Conservative government in Alberta. However, the variability in implementation that exhibited amongst actors with similar attitudes (such as NDP governments in BC, Saskatchewan and Ontario) suggests that this was not a highly important variable. Also, the nature of the issue itself likely did not create the degree of extremely intense feelings among decision-makers as school desegregation did during its early stages in the US.
c) Are INCENTIVES OFFERED for COMPLIANCE- <u>HIGH</u> -Federal funding through the OLE program and special monies for the implementation of Francophone school governance were very important to provincial implementation. At the local level, the Alberta case study particularly shows the importance of funding to local school boards.

d) The POLITICAL ENVIRONMENT- MODERATE (mediated by institutions)

-Players within the policy process, including government officials, considered both majority public opinion and splits within the Francophone community to be a factor that influenced the policy process. However, at the provincial-level the issue was likely less salient to the public than at local levels.

-Supreme Court decisions might help to legitimate policy, but the public, at least in Alberta, was not very aware of the Court's position. Electoral system might have exacerbated the negative influence of public opinion in Alberta.

e) The NUMBER of ORGANIZATIONAL VETO POINTS- INDETERMINATE

-Difficult to evaluate because of a lack of variability in Canada, though heuristic comparison with the US case suggests that this might be important. Also, as courts become more directly involved in enforcing section 23 decisions, this may lead to greater impact as intervening veto points are reduced.

f) DO GROUPS EFFECTIVELY EXPLOIT the POLITICAL OPPORTUNITY STRUCTURE OPENED by LEGAL MOBILIZATION- MODERATE

-The Alberta case study demonstrates the importance of exploiting the political opportunity structure, and the Ontario case shows that having opponents within the policy community can slow impact. However, cases like BC show that other factors, such as public opinion, can still restrain government decision-makers even in the face of task forces, etc.

Table 8.7, however, does not indicate adequately the interaction between the variables. Yet, having a higher number of observations ("N") to control for interaction effects in a statistical equation would not resolve the problem. NI theory posits that over time variables can act as either dependent or independent variables or both and that there is a degree of contingency involved in the process. Furthermore, NI theory and the NI model of judicial impact posit that institutions are to some degree "constitutive" of the attitudes, goals, ideas and discourse of actors within the policy process. Separating out dependent and independent variables and assessing the relative contribution of the variables is difficult using a traditional positivist analysis as is determining the transformative effects of the Charter, legal mobilization and judicial decisions. Put

differently, the causal inferences presented in Table 8.7 are important and demonstrate that certain factors, such as the provision of incentives, have an important impact on the policy outcomes of legal mobilization and judicial decisions, but such an analysis is incomplete—the NI model suggests that institutions (as structures and state actors) will shape these factors in complex ways over time and, more generally, institutions help to shape the strategies, goals and discourse of actors within the policy process.

Examining the validity of these propositions is a difficult methodological task, but previous scholarship has indicated that carefully examining differences in policy processes, ideas and outcomes over time can reveal the explanatory role of different institutional actors and institutional configurations (see Chapter Three). For example, the narratives in Chapters Five through Seven reveal the connection between the Charter, the federal government's Court Challenges Program, legal mobilization and the Supreme Court's *Mahé* decision—the decision in turn led to accelerated legal and political mobilization by Francophone groups, and the signing of financial agreements between the federal and provincial governments for the implementation of Francophone management and the construction of Francophone facilities. Delving deeper into the historical narrative illuminates additional nuances. For example, when Francophone school governance policy was being shaped in Alberta, recognition that Ontario's system of proportional representation of Francophones on existing school boards was deemed unsatisfactory- a point made in the Lamoureux and Tardif study commissioned by ACFA and FPFA, which was relied on by the French Language Working Committee in the wake of *Mahé*- helped persuade the government to establish distinct Francophone boards. In the late 1990s, the Ontario government decided to create a series of Francophone boards, partly because of the recommendations of previous government reports, which resulted from Francophone legal mobilization, and partly to protect itself from a section 23 challenge to its reorganization of the education system. In Ontario, Alberta and other provinces, accommodating the rights of Catholic-school supporters guaranteed in section 93 of the Constitution Act, 1867 and section 23 of the Charter was a difficult and contested process that reveals the need to be sensitive to how intersecting institutional forums can shape policy activity in subtle and complex ways.

The narrative also reveals that litigation became a much more important strategy for Francophone OMLGs following the Charter; that the goals of Francophone groups in Alberta and other provinces were altered by the Charter and legal mobilization, while more developed and less conservative Francophone groups in other provinces, such as Ontario, accelerated their efforts to achieve their goals; that section 23 and the discourse of rights were pervasive in the policy struggle; judicial decisions raised the profile of French-language education issues and increased the relative policy influence of Francophone OMLGs and Francophone school boards, while diminishing the autonomy of the provincial governments; and that minority official-language policy outside Quebec emphasizes the importance of Francophone culture and communities—a philosophy that promotes the idea that French-language education systems outside Quebec should be "separate but equal" to the majority education system, which is different from the freedom of choice philosophy embedded in the 1978 Montreal Declaration.

This chapter has demonstrated the utility of the NI model by showing that certain factors, such as whether incentives are provided for implementation are important to policy outcomes and that institutions (structures and state actors) shaped those factors, while also showing that legal mobilization and judicial decisions were important in agenda setting, shaping policy ideas and discourse, which were important elements of the policy process and outcomes. However, the conclusions generated by the application of the NI model could be made with greater confidence if it can be shown that the model performs better than competing models or theories. How the NI model compares to other potential explanations is the subject of the next chapter.

Chapter Nine- The NI Model Versus Alternative Explanations

The preceding chapter argued that the significant policy changes that have occurred in official minority-language education (OMLE) policy in the provinces outside Quebec were closely linked to the role of institutions- as actors and structures- within the policy process. More specifically, the introduction of section 23 of the Charter of Rights in 1982; the liberal interpretation given to section 23 in a number of judicial decisions, particularly the Supreme Court's 1990 *Mahé* decision; and the role of the federal government in financing OMLGs and section 23 litigation, financing the provision of OMLE in the provinces, and acting as a legal ally of OMLGs were found to be particularly critical in explaining the timing and the nature of OMLE policy change. In subtle and complex ways institutional factors also structured the policy process by influencing the strategy, goals, discourse and relationships of actors within the OMLE policy community.

To further test the NI model, this chapter compares the utility of the NI model in explaining the impact of legal mobilization and judicial decisions on OMLE policy against potential alternative explanations. The NI model is compared to the predictions and/or explanations offered by Critical Legal Studies theory, which is pessimistic about the role of the law and legal institutions to affect social change; an "environmental-type" approach that emphasizes how political systems alter policy outputs in ways that reflect changes in the social, political, and economic environment; a "bottom-up" theory of impact that highlights the unpredictability of the influence of legal mobilization and judicial decisions; and, finally, Gerald Rosenberg's model of judicial impact. The chapter concludes by arguing that confidence in the conclusions offered by the NI model is bolstered by the comparisons with other models.

Critical Legal Studies

Although there are a number of variants within Critical Legal Studies (CLS) theory, proponents argue that the law and judicial process reflect power relationships within society that disadvantage labour, women, and various other marginalized groups. As such, CLS scholars are pessimistic about the possibilities of social change through litigation: "At best, I can tolerate, but have little faith in, the possibility of progressive intervention through rights litigation," remarks CLS scholar Allan Hutchinson (1995:

25).[1] This pessimism rests on two main theoretical planks that attempt to explain how existing unequal power relationships in society limit the capacity of the law and courts to be used for progressive social change. First, some CLS scholars highlight the unrepresentative nature of the judiciary. Since CLS scholars borrow from legal realists the assumption that the law itself is highly indeterminate, it is argued that judicial decisions will reflect the assumptions and values of the powerful class from which judges are predominately drawn. Petter argues that, "There are few public institutions in this country whose composition more poorly reflects, and whose members have less direct exposure to, the interests of the economically and socially disadvantaged" (1987: 857). Petter concludes that judges would not be inclined to promote the interests of such groups in their decisions.

A second, and more prevalent, argument made by CLS scholars is that, regardless of the composition of the legal profession and the judiciary, there are certain structural features of litigation that reduce the possibility of progressive social change. One structural hurdle is the cost and resource needs associated with litigation (Petter 1987). Another is the nature of constitutional rights litigation itself. The nature of legal arguments justifies and legitimates the existing social order. According to Mandel, "Arguments of principle are forced to derive their premises from *existing* arrangements...They must start from, take for granted, and indeed *justify* basic social arrangements. But in Canada, as well as in the US, existing social arrangements are also-whatever else they are—relations of unequal social power" (1992: 57, emphasis in original). Constitutional rights litigation legitimates the existing system because it is premised on liberalism, which limits the possibilities of social democracy. Hutchinson argues that, "Despite its recent communal trappings, [legal liberalism] depicts individuals as separate and egoistic, striving for a liberty that is self-regarding and a sociability that is hollow" (1995: 24-25). Thus, "the exclusive focus of much contemporary critical legal scholarship [is] on the alleged cooptive force of hegemonic legal forms" (McCann 1994: 12).

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[1] Some CLS scholars are open to the possibility that the Charter and legal mobilization could open up possibilities for social change, but the legal left, especially its more traditional variant, remains dismissive of such possibilities (see Dobrowlsky 1997: 322 and 341, ftn. 137).

Critics of rights litigation on the left argue that rights litigation by disadvantaged groups is self-defeating for a number of interrelated reasons: it is a costly strategy, it allows for the actions of the group to become dominated by lawyers, it tends to enervate political action by the group or community, it is couched in the language of rights, and it tends to provide symbolic rather substantive victories (Mandel 1992; Rosenberg 1990: 340-341; also see overviews in Scheingold 1974 and McCann 1994). Critics also point out that even if a group receives a favourable judicial interpretation, implementation of the decision will be hindered by the power relationships within society and that opponents may be mobilized by a judicial victory by a disadvantaged group (Scheingold 1974: 86; Rosenberg 1990: 341-342).

How does CLS theory translate into predictions or explanations of the effects of legal mobilization to change OMLE policy? While not a CLS theorist per se, Foucher in 1985 warned about some of the potential pitfalls of litigation to change OMLE policy that echoed CLS concerns. Foucher quoted from Proulx about the possible role of the courts: "...Canadian legal history, stamped as it is with reserve in its approach to rights and freedoms, tells us that we must avoid too eager enthusiasm here" (1985: 355). On the role of litigation, Foucher warned:

> It must be recalled that the removal of the education rights question to the courts has serious consequences for minority-language communities. Apart from the high costs of such proceedings, there may be significant backlash effects. Parents, who are the people entitled to the guaranteed rights, may hesitate to embark on these adventures, since litigation can drain much energy that could better be used for other purposes, often divide the community internally, give rise to hostile reactions in some quarters of the majority-language community and block dialogue with government authorities (1985: 399)

In 1994, Mandel offered a CLS analysis of the role of Charter litigation in OMLE policy. Mandel acknowledged that French minorities outside Quebec had achieved a number of policy changes since the late 1960s, but he remained "unconvinced that the courts or the Charter can take any of the credit for this..." (1994: 175). According to Mandel, most of the credit for policy change should go to federal funding through the OLE program (1994: 168). By way of contrast, the Supreme Court's *Mahé* decision was viewed as providing little or no help to OMLG groups outside Quebec. First, the Court did not grant the remedy sought by the Bugnet group, instead offering the possibility of

proportional representation on the ECSB, and the Court made only a declaratory order against the Alberta government while noting the importance of giving provincial governments flexibility in implementing section 23 (Mandel 1994: 167). After referring to a number of Commissioner of Official Languages Reports in the early 1990s where frustration was expressed with the pace of implementation since the decision, Mandel concluded that the remedies proposed by the Court demoted "constitutional rights to unenforceable platitudes to be bargained over by parties of unequal bargaining strength..." and "helped the politicians in dampening and containing the demands of the francophone communities themselves" (168).

Second, Mandel argued that the legal reasoning used by the Court also limited its impact. Mandel pointed to the Court's emphasis of a passage from the Royal Commission on Bilingualism and Biculturalism that warned that separate departments of education for minority schools would constitute a "grave danger" because the minority system would be "isolated" as a "prime example" of how the Court's reasoning capitulated to dominant political interests at the expense of the Francophone community:

> This strongly suggests that the Court had in mind the necessity of accommodating the constitutional rights of the francophone parents to the political purposes for which the Charter had been entrenched in the first place: a *bilingual* vision of Canada aimed primarily at thwarting the separation of the two communities, however much this might conflict with the French community's own idea of what was necessary for its survival, inside or outside of Quebec (1994: 167, emphasis in original).

More generally, Mandel concluded that, "the linguistic rights guaranteed to Franco-Manitobans, Franco-Ontarians, and the rest could not weaken the powerful forces of assimilation due to the economic and cultural dominance of English in the vast 'private' sphere" (1994: 176).

How do the predictions and explanations of CLS theory compare to those of the NI model? This question is examined along three interrelated dimensions: the effects of legal mobilization on the community, judicial decision-making, and the policy aftermath of legal mobilization and judicial decisions. As for the effects of legal mobilization on the community, concerns that rights-based demands might divide the Francophone community (or exacerbate underlying tensions) proved to be justified. However, the story is more complicated than this. Divisions within the Francophone community did

contribute to delays in policy implementation at the local and provincial levels, but it is arguable that policy change would have been slower or non-existent without legal mobilization. Moreover, while there were delays in implementation owing to divisions within the Francophone community, there is some evidence that legal mobilization legitimated or at least promoted Francophone school and school governance; and, regardless of divisions within the community, the results show that proponents of French schools and school governance were effectively able to use legal mobilization and rights discourse to overcome opposition within the Francophone community as well as the majority community. This complex result is not accounted for by CLS theory.

Likewise, contrary to CLS predictions, legal mobilization did not enervate broader political action within the Francophone community. This study reveals that section 23 of the Charter, legal mobilization and judicial decisions prompted some Francophone groups to begin calling for Francophone schools and school management (such as in Alberta and BC) and accelerated calls for these policies among groups that had already been calling for such measures (such as in Manitoba and Ontario). The CNPF and its provincial affiliates were created explicitly to promote the implementation of section 23 of the Charter. Legal mobilization by the CNPF and its provincial affiliates as well as provincial Francophone associations and other groups like the Bugnet group were explicitly tied to larger strategies to inform Francophones about the policy issues, lobby bureaucratic and political decision-makers, and generate media exposure. Lawyers were an important part of the process, but they did not dominate the process (Interview Martel, Interview Arès, Interview Dubé, Interview Levasseur-Ouimet). Unlike the NI model, the CLS theory does not consider the possibility—contingent though it is—that legal mobilization involving the courts and constitutional rights can spur political action, legitimate certain policy alternatives amongst members of a group or community and provide symbolic and concrete resources that can be translated into policy change in the political arena over time.

OMLGs were able to undertake legal mobilization largely because of the Charter and funding from the federal government's Court Challenges Program. The degree to which legal mobilization can be translated into policy victories depends to some degree on the nature of the judicial decisions achieved through legal mobilization. This study shows

that, contrary to the expectations of CLS scholars, the courts, particularly the Supreme Court, were supportive of section 23 rights claimants outside Quebec. The study also suggests that institutional factors contributed to both the success of section 23 claimants and the somewhat limited remedies offered by the Supreme Court, at least in its first couple of non-Quebec section 23 decisions. Hence, Mandel is correct to point out that the Supreme Court's remedy in *Mahé* was not as forceful as desired by some Francophone groups and legal allies, but this study suggests that this owed more to institutional considerations—the Court being wary of provincial governments who were jealous of their jurisdiction over education granted by the Constitution—rather than unequal social power relationships.

Mandel, however, incorrectly characterizes the nature of the legal reasoning used in *Mahé*. Rather than focus on individual bilingualism as suggested by Mandel, the Court in *Mahé* emphasized the importance of section 23 to the preservation and promotion of official minority-language cultures. Chief Justice Dickson stated in *Mahé* that, "My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it" (at 362). The Chief Justice then quoted from the Bilingualism and Biculturalism Commission on the role of official-minority language schools: "These schools are essential for the development of both official languages and cultures;... the aim must be to provide for members of the minority and education appropriate to their linguistic and cultural identity..." (at 363, emphasis added by Dickson). Section 23 was found to be remedial in nature (at 363) and that management and control was "essential" to "preserve and promote minority language and culture throughout Canada" (at 371).

Therefore, although the Court has indicated that section 23 rights are granted to individual parents (*Manitoba Reference,* [1993] at 862), the Court has continued to emphasize the importance of section 23 in promoting cultural communities. In supporting the decision of the Francophone school board of PEI over the Minister to provide FFL instruction in a French-language facility in Summerside, the Court remarked: "Insisting on the individual right to instruction, the Minister appeared to ignore

the linguistic and cultural assimilation of the Francophone community in Summerside, thereby restricting the collective right of the parents of school children" (*Arsenault-Cameron*, [2000] at 26). The Court also disagreed with the Minister that "a French language facility is unnecessary to the cultural development of the minority community. In our view this approach is inconsistent with that adopted in *Mahé*" (at 26-27). The fact that this decision was co-written by a former OMLG litigator also defies CLS theory, which, as noted above, emphasizes that the judiciary is dominated largely by representatives of socially powerful groups.

As noted previously, the Court's emphasis on the remedial nature of section 23 in preserving and promoting official minority language and culture made its way into important policy documents. Therefore, while the remedy in *Mahé* was not as forceful as it could have been, Francophone supporters of school management and French schools effectively exploited the logic of the decision. The historical narrative reveals an overall growth in French schools and the establishment of Francophone school boards in each province outside Quebec following the decision. Just as officials in the US who were opposed to desegregation found themselves "swimming against the tide" following the Supreme Court's desegregation decisions (Scheingold 1974: 126), provincial governments found themselves acquiescing over time to the policy demands of Francophone proponents of French schools and school management, particularly after *Mahé*. The provinces of Alberta, Saskatchewan and Manitoba all enacted systems of Francophone school governance in 1993-94 and the number of French schools in those provinces continued to grow afterwards. In BC, the provincial government created a Francophone school board for the entire province after delays and a court decision in 1996. In Ontario, the Conservative government instituted a system of Francophone school boards in the late 1990s as part of its educational reform plans at least in part to guard against section 23 litigation that might adversely affect the entire educational restructuring plan (see Chapter Five for other examples). This process was at times slow and difficult, but legal mobilization and judicial decisions in concert with lobbying, generating media attention, and raising community awareness played an important role in promoting these policy developments in a number of interrelated ways that demonstrate

how legal mobilization, judicial decisions and rights discourse can be leveraged in the policy process.

First, Francophone groups used rights discourse to legitimate their claims and prod provincial and local decision-makers to act. Rights claims in liberal democracies such as the US and Canada have important symbolic influences and can help to legitimate the policy choices being advocated by rights claimants (Scheingold 1974; McCann 1999; Smith 1999). Francophone groups invoked section 23 and judicial decisions to legitimate the notion of French schools and school governance within the Francophone community and the majority community and with government and local decision-makers (Interview Martel; COL Report 1987: 155; COL Report 1989: 176, 191; Julien 1991; CNPF Plan d' Action 1990-91; la Société des parents d'Edmonton, "Notre Droit" ("Our Right") 1988; ACFA 1988). While rights claims were often made in meetings with decision-makers or meetings within the minority community, Francophone groups also used the media to make their claims. As noted in Chapter Six, the ACFA not only used the Francophone media (*Le Franco* newspaper) to raise awareness of section 23 rights within the Francophone community, but the ACFA issued press releases to the mainstream English-speaking media outlining how proposed measures by the Alberta government did not conform to section 23 of the Charter and its judicial interpretation (see ACFA 1987, 1988). Following the Supreme Court's *Mahé* decision, a director of the FPFA told the *Globe and Mail* that the group was "hoping the [Alberta] government will respond generously and in the spirit of the Charter" (Allen, Mar. 16, 1990: a4). The ACFA issued a press release highlighting the need for the Premier to implement the *Mahé* decision (see Julien 1991: 352). Similarly, Rolande Soucie, the chairwoman of the ACFO told the *Globe and Mail* that in light of the *Mahé* decision, Ontario's Education Minister would "just have to come forth" with proposals that grant greater management and control to Francophones—Soucie stated that "I don't think he has any choice" (Allen, *G&M* Mar. 16, 1990: a4). The opinion poll conducted for the CNPF in 1993, which showed high levels of support across Canada for the suggestion that provincial governments should respect the Supreme Court's decisions on official minority language matters (see Table C.11- Appendix C), suggests that rights claims, particularly those based on Supreme Court decisions, could resonate with the public (or at least the informed public).

Second, rather than blocking dialogue with government decision-makers, legal mobilization, judicial decisions, and rights discourse were utilized by OMLGs to gain access to the policy process and to achieve substantive policy gains. Following the Supreme Court's *Mahé* decision most provincial governments that had not yet adopted Francophone school boards found it necessary to respond to the decision (suggesting that the leveraging of rights discourse discussed above was often successful), usually by establishing task forces or committees to study the issue that had Francophone representation on them (see Chapter Five). As discussed in Chapter Six, in Alberta, for example, policy was implemented after some delay but it largely reflected the views of the ACFA and FPFA who participated in both the French-language Working Group and the Francophone School Governance Implementation Committee—later, threats of litigation in Calgary resulted in the establishment of a Francophone school board for southern Alberta. In other provinces the consultative process took longer and featured additional legal mobilization, but the policy results ultimately largely reflected the wishes of Francophone groups. In Newfoundland, for example, the provincial Fédération des parents filed a lawsuit for Francophone school governance in the mid-1990s and also presented the Charbonneau Report to the province's Dept. of Education, which outlined a system of Francophone school governance—the Fédération was pleased when the government enacted a scheme of Francophone school governance that reflected almost all the points in the Report (COL Report 1996: 74; COL Report 1997: 90). (See Chapters Five through Seven for other examples).

Third, as Mandel admits, local decision-makers and provincial governments sometimes used the Charter and judicial decisions to justify potentially unpopular decisions that provided for Francophone education rights (1994: 168, 171). This comports with the narratives in Chapters Five through Seven. For example, the former chairman of the Edmonton Catholic School Board told opponents of French schools that they were "advocating that the school board break the law (the Charter of Rights) if it refused to establish a Francophone high school" (quoted in Julien 1991: 1989). As discussed in Chapter Six, a number of Conservative MLAs claimed that, though they had misgivings, they would support Alberta's school governance legislation because of the Supreme Court's *Mahé* decision. One may agree or disagree with Mandel's normative

assessment that this represents a deleterious trend toward the "legalization of politics," but it does support the argument that judicial decisions helped influence policy change.

Fourth, although demands for Francophone education rights may have generated opposition amongst majority-language speakers, such opposition was overcome owing to the aforementioned use of judicial decisions to justify policy change demanded by the courts. Moreover, data from the Alberta Advantage survey discussed in Chapter Eight suggest that Supreme Court decisions may legitimate demands for rights in the broader public (for those in the public who have heard of the decisions). George Arès, former executive director of the ACFA and now President of the CNPF, argues that opposition to French schools and Francophone school governance has been largely dissipated following judicial decisions and the enactment of policies providing for French schools and Francophone school governance (Interview).

Finally, Mandel's analysis does not appreciate the complex interaction between the federal funding to which he ascribes much of the explanation for the changes in Francophone education policy and the Charter and judicial decisions. For example, in the OLE protocol agreement agreed to late in 1983, the federal government forced provincial governments to distinguish between FFL and French immersion programs for funding purposes—the timing of this change suggests that it was linked to the introduction of the Charter in 1982. More concretely and more importantly, the hundreds of millions of dollars provided by the federal government to help the provinces establish Francophone school governance was tied to the Supreme Court's decision in *Mahé*, which found a right to management and control in section 23. Those who do not see the link between federal funding, the Charter, and judicial decisions make the same mistake as those in the US who fail to acknowledge how the US federal courts provided a legal framework for federal government intervention in the US desegregation struggle (see Cole-Frieman 1996: 36).

Mandel's final argument—that regardless of OMLE policy change and the causes of such change—the dominance of English in the global marketplace and cultural sphere will lead to the continued diminution of Francophone minority communities is beyond the scope of this study, which is concerned with policy change and not the second-order impact of policy change. Nevertheless, it deserves mention that research in Nova Scotia

indicates that assimilation rates are lower in areas with homogeneous French schools than in those areas without such schools (*Doucet-Boudreau*, 2000). Moreover, a "recovery plan" for Francophone minority communities based on the implementation of "the second phase of section 23" is "expected to have considerable results," according to a report prepared by Angéline Martel (2001: 38). Martel points out that Francophone communities now have tools to fight assimilation that they did not have previously, including Francophone school management and French schools (or more French schools) (2001: 38).

Perhaps, however, recognition of the need for French schools and Francophone school governance and other social and political influences would have led to policy change without the Charter and judicial decisions. Put differently, the Constitution might have had "questionable relevance" as Wiseman (1992) argued in his study of French language rights in Manitoba. The next section of this chapter looks at explanations for policy change that focus on external political, social and economic forces.

Environmental Forces

The argument that the constitution and judicial decisions might have little causal relationship to policy change compared to changes in the political, social and economic environment is best illustrated by the debate about the role of legal mobilization in the quest for school desegregation in the US. Chapter Four revealed a number of arguments that emphasized "environmental" factors over legal mobilization as causal factors in the scope and pace of school desegregation. At its most general level, this kind of argument proposed that school desegregation would have occurred at least as quickly regardless of judicial intervention because global and national economic forces were undermining the southern plantation economy; desegregation was becoming an international embarrassment to the US; African-Americans were starting to improve their socio-economic lot, particularly owing to education; and, most importantly, African-Americans were starting to mobilize politically, especially through increased participation at the ballot box. In an "environment"-type argument, the US Supreme Court's *Brown* decisions are viewed as responding to these environmental changes and reflecting the preferences of the dominant coalition of political elites within the federal government that held relatively liberal attitudes toward desegregation.

Another variant of the "environment" argument posits that judicial decisions like *Brown* had little policy impact—policy changed after passage of the 1964 Civil Rights Act and direct intervention by the federal government and it was direct political action by African-Americans, such as the Montgomery Bus Boycotts and the activities of leaders like Rev. Martin Luther King, rather than judicial decisions that most prompted passage of the Civil Rights Act. Furthermore, it is argued that the Supreme Court's decisions did not indirectly inspire direct political actions by African-Americans nor did they inspire federal legislators.

Finally, in examining the pattern of school desegregation, some scholars argue that the relative quickness of desegregation in the border states compared to the southern states is attributable to differences in public opinion between the two regions, which can be traced to how deeply entrenched segregation was in the social fabric of the regions. A similar argument points to faster rates of desegregation in areas with relatively fewer African-Americans.

Chapter Four marshaled a variety of arguments and evidence to indicate that legal mobilization and judicial decisions played an important, though partial and contingent, role in US school desegregation. In doing so, the chapter concluded that there are good reasons to infer that legal mobilization and judicial decisions structured and even altered the "environment" and the flow of history. Some of the highlights of the arguments and evidence include the following points. First, despite the (tepid) federal brief in *Brown*, which supported the NAACP, the US federal government was not supportive generally of school desegregation and for some time the US Supreme Court was the only national institution supportive of the principle of desegregation. Second, the reaction of the southern states to *Brown* and subsequent legal and political mobilization drew the attention and displeasure of northern public opinion. Third, public officials predisposed to the desegregation in the border states (and even some in the southern states) were able to use judicial decisions as a justification for school desegregation, thereby hastening the process. Fourth, there is evidence that the Supreme Court's interpretation of the constitution played some role in legitimating or inspiring important members of the civil rights movement with its desegregation decisions. Fifth, evidence shows that school desegregation in the southern states, while still limited, began to accelerate in response to

increasingly demanding federal court orders prior to the Civil Rights Act; and, around this time support for school desegregation began increasing, as was the public's sense that desegregation was inevitable. Sixth, funding guidelines and funding withdrawals by the Department of Health, Education and Welfare (HEW) and litigation by the federal Justice Department following the passage of the *Civil Rights Act* were intertwined with Supreme Court and federal court school desegregation decisions. Seventh, while there was a push for northern school desegregation prior to the Supreme Court's decision in 1973 that ruled de facto school desegregation unconstitutional, the Court's decision spawned northern school busing controversies and complex, multipolar litigation where school boards would sometimes side with African-American groups to acquire more resources. During this time, African-American communities increasingly became divided over desegregation schemes, particularly busing, that seemed to detract from the quality of local neighbourhood schools.

In comparison to the school desegregation struggle in the US, controlling for the possible effects of environmental factors on OMLE policy outside Quebec in the Canadian case is somewhat easier. While it has been noted herein that the question of minority language education has been one of the most sensitive and explosive in Canadian history, in the time period under study Canada did not witness the kind of massive social upheaval that occurred in the US over the issue of civil rights in the 1950s and 1960s. Francophone groups did lobby and sometimes conduct direct political action for education and other language rights, but not to the same extent as African Americans in the US. And, as will be briefly discussed below and as was shown in Chapters Five through Eight, political activity for changes to OMLE policy has been linked unambiguously to section 23 of the Charter and judicial decisions. Put differently, it is easier to show the connection between the Charter, legal mobilization and political activity in the quest for OMLE policy change in Canada than it is to show the connection between the Constitution, legal mobilization and political activity in the quest for school desegregation in the US. Moreover, declines in the proportion of Francophones outside Quebec in the general population (see Table B.1 Appendix B) would tend to militate against improvements to OMLE policy. Francophone influence through the ballot box would not be increasing and real (or proportional) declines in the numbers of French-

speaking children would not make OMLE policy a priority from a practical policy perspective. Finally, from an economic vantage-point, the increasing prevalence of English in the global economy would run counter to the need to improve Francophone education policy.

Nevertheless, the counter-factual proposition that OMLE policy for Francophones outside of Quebec would have improved regardless of the Charter and legal mobilization needs to be examined. So too does the related claim that the Charter and judicial decisions concerning section 23 reflect environmental change and therefore are not key explanatory factors. Wiseman, for example, points out that Francophones in Manitoba, unlike other groups such as Ukrainian-Canadians, succeeded in maintaining minority-language instruction even after the province officially abolished bilingual education in 1916 owing to the work of the Catholic Church, geographic concentration and other social factors (1992: 712-713, 720). By the early 1970s, French was recognized in legislation as one of the official languages of instruction in legislation, the Manitoba government had committed itself to extending the use and study of French, and there were a number of schools providing French first-language education (1992: 715).[2] While Wiseman acknowledges that the constitution has not been "totally irrelevant" or "purely 'symbolic'," he points out that French-language education persisted and prevailed before minority language education rights were enshrined in section 23 of the Charter (1992: 720, 716). He concludes by arguing that, despite improved legal protection over the years in Manitoba, the francophone fact in the province is actually eroding due to such factors as the decline in the importance of the Church, less residential segregation, economic development (which makes French less important in terms of kinship), lower birth rates, and so on (1992: 720).

The gist of this argument potentially applies more broadly. In Alberta, for example, French-language instruction occurred in French-speaking communities despite policies that restricted the use of French and in the late 1960s the Alberta government amended its

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[2] When discussing the number of schools, Wiseman uses data from 1988, which is somewhat surprising given that using data from before the Charter would have been more relevant to his argument. Moreover, when he maintains that there were 31 "Franco-Manitoban schools" by 1988 this is somewhat ambiguous, because Martel's data (used in this study) indicates that there were only 15 schools in Manitoba at this time that were "homogeneous" Francophone schools. The data in Table B.3 show that there were 10 homogeneous Francophone schools in Manitoba in 1976-1977.

School Act to permit the use of French as a language of instruction (Aunger 1989: 216-217). Table B.2 in Appendix B reveals that a number of provinces improved their OMLE policy, particularly access to instruction, prior to the introduction of the Charter.

These provincial policy changes also need to be placed into the broader context of Canadian politics. In response to growing discontent in Quebec, the federal government established the Royal Commission on Bilingualism and Biculturalism in 1963. The Commission's 1968 report drew attention to the invaluable role of education to the linguistic and cultural preservation of Francophones outside Quebec. While the Commission stopped short of recommending all-French schools for all Francophones, it did call for bilingual and unilingual French schools to be established in the provinces (outside Quebec). In response to the Commission's report the federal government enacted the Official Languages Act in 1969, established the Office of the Commissioner of Official Languages, started the Official Languages in Education (OLE) program and supplied funding through this program, and recognized and funded provincial OMLGs (Julien 1991: 117-119).

The electoral victory in Quebec of the separatist Parti Quebecois (PQ) in 1976 created a further impetus to address language issues in Canada, particularly on the education front. In 1977, the PQ government passed Bill 101, which restricted access to English education in Quebec—under Bill 101 even Canadian citizens who moved to Quebec from elsewhere in Canada could not send their children to English schools unless they [the parents] had received English elementary instruction in Quebec. Following the enactment of Bill 101, the provincial premiers declared their support for official minority language education at their 1977 and 1978 conferences. According to Magnet, "the Premiers recognized the need to maintain and develop minority language rights through the educational system. The Premiers' thinking flowed from a reawakened sense that Canada needed to control the hostilities sparked between the linguistic communities over schooling" (1995: 145). Although the Quebec government did not think that the declarations went far enough, the Montreal Declaration formed a basis for the entrenchment of official minority-language education rights in section 23 of the Charter (Magnet 1995: 145). From the federal government's perspective, section 23 of the

Charter was integral to the promotion of Canadian unity by guaranteeing minority linguistic rights in education.

As these activities were ongoing within the broad political context, research by Francophone educators was starting to highlight that bilingual education contributed to assimilation of Francophones outside Quebec (Churchill 1985). The FFHQ and Francophone groups in certain provinces were beginning to press for homogeneous Francophone schools and school governance in the 1970s (COL Report 1980: 7, 33). In 1976, the Mayo Commission in Ontario proposed that a French-language Catholic School Board be established for the Ottawa-Carelton region (Martel 1991: 124).

Therefore, it could be argued that, owing to factors in the social and political environment, actors in the policy community recognized the need for improvements to OMLE policy outside Quebec and policy change had begun to take place prior to the introduction of the Charter. In this argument section 23 of the Charter and legal mobilization and judicial decisions involving section 23 are not so much the causes of change as they are reflective of ongoing change in the OMLE policy field driven by political events. This minimizes the independent influence of the Charter, legal mobilization and judicial decisions on developments in OMLE policy outside Quebec following 1982.

New Institutionalism theory does not discount completely the effects of environmental factors; rather NI theory argues that more attention should be paid to how the "structures" of the political system can mould political inputs and influence the environment and less emphasis should be placed on how political systems "function" to produce outputs from environmental inputs (Hall 1986). Likewise, the NI model of judicial impact does not ignore environmental factors but argues that institutions—such as the constitution, the courts and judicial decisions, and government actors—can have an important independent influence on policy change over time. Although disputing a counter-factual proposition to infer causality is not easy in a complex policy field over time, there is evidence that strongly implies that OMLE policy would not have changed to the extent that it did and/or at the pace it did without the Charter, legal mobilization and judicial decisions.

First, statistical trends over time in each of the key policy dimensions—instruction, facilities, and management and control—suggest that the Charter, legal mobilization and judicial decisions had an independent impact. Starting with management and control, only one province (New Brunswick) featured Francophone school governance prior to 1982 and only one other province had even considered the possibility (Ontario considered proportional representation for Francophones on existing boards in a 1979 Green Paper). Following the introduction of the Charter a number of governments, such as those in the prairie provinces, rejected calls to establish Francophone school governance. Only three governments prior to the Supreme Court's 1990 *Mahé* decision established mechanisms for francophone school governance. By 2000, all nine provinces outside Quebec had established mechanisms giving Francophones management and control of French first-language programs and facilities that provided those programs.[3]

As for French-language facilities, Table B.2 in Appendix B shows that the number of provinces that recognized the concept of an homogeneous Francophone school in legislation went from four prior to 1982 (with Manitoba also recognizing French schools in a policy paper), to five between 1984 and 1990 (with three others recognizing French schools in policy papers) to nine provinces by 2000. Table B.3 in Appendix B shows that the number of French schools increased significantly in most provinces from 1981-82 to 1997-98 (BC- 0 to 4; AB 0 to 24; SK 5 to 17; MB 13 to 23; ON 314 to 364; NB 152 to 109; NS 0 to 11; PE 0 to 2; NF 0 to 2). Increases in the number of French schools in all provinces but New Brunswick came in the face of declines in the number of children eligible under section 23 in all provinces outside Quebec between 1986 and 1996 (see Table B.1, Appendix B).

Access to French-language instruction was generally improving in most provinces beginning in the late 1960s (see Table B.2, Appendix B). However, significant changes to access to French-language instruction often coincided with the introduction of Francophone school management. For example, changes to Alberta's, Saskatchewan's and BC's education legislation to provide for Francophone school governance contained

[3] In Manitoba, there is litigation on-going concerning the powers of the Francophone school board in the province and in New Brunswick there is litigation on-going concerning the provincial government's decision to eliminate school boards and allow parental input through a more centralized administrative scheme to control the schools (though there is a distinct French-language administrative structure).

provisions stipulating that eligible children under section 23 were entitled to French-language instruction if they resided in an area controlled by a French-language school board. Since each of those provinces eventually extended Francophone school governance to cover the entire province, eligible children under section 23 are now guaranteed access to instruction. In five provinces (BC, AB, SK, ON and NB) access to instruction for eligible section 23 students is guaranteed. In most other provinces, when deciding whether to offer instruction Francophone school boards are to consider such factors as the proximity of existing classes, number of eligible children expected to take advantage of instruction and other pertinent factors. Only PEI maintains that a minimum number of eligible children are required before French-language instruction will be provided.

Other related and important policy changes have occurred since 1982 that are not captured by the statistical trends discussed above. Provinces have improved their funding for French-language administration, facilities, and instruction often by making Francophone boards eligible for additional monies that are also available to majority-controlled boards that have low enrollments, are in remote areas, have transportation needs, and/or offer some type of language program (French first-language, French second-language, English second-language, etc.) (Interview Bissonnette; COL Report on School Governance 1998). There have also been pedagogical improvements. For example, the Alberta government distinguished between French immersion and French first-language programs for statistical purposes in 1984 and made the distinction in an official policy document in 1988. Provincial governments have recognized that some eligible children under section 23 will require special programs (programmes d'accueil) to improve their French-language skills (see Alberta Francophone School Governance Handbook 1994: 57; Manitoba School Act). Teacher training levels for French first-language instruction have improved dramatically (Churchill 1998: 31).

Although Francophone groups and researchers of Francophone education policy point out that the implementation of improvements to OMLE policy took a long time even after the introduction of the Charter and that there are still difficulties to be addressed in OLME policy, such as the availability of teaching materials, the need for extra funding, more programmes d'accueil, preschool programs and so forth (COL

Report 1997: 20; Churchill 1998), "the other side of the coin is the almost inconceivable transformation of minority education for Francophones in the same period [from 1982 when the Charter was introduced and 1984 when the Ontario Court of Appeal decision was handed down]" (Churchill 1998: 31).

Churchill's assessment supports the inference drawn from the policy trends discussed above that the Charter and judicial decisions were critical in promoting policy change. The assessment deserves to be taken seriously since Churchill is a foremost expert on French-language education policy in Canada. It is also an assessment that is shared by those who were involved in the policy process in Alberta. Julien notes that there "was unanimous agreement amongst [interview] participants that the Canadian Charter was instrumental in the movement for Francophone schools in Edmonton, and across Alberta" (1990: 256). The former Deputy Minister of Education for Alberta, Reno Bossetti, told Julien that he thought that the Alberta government eventually would have accorded Francophones the opportunity to attend all-French schools, but that "the Charter has become the driving force for Francophone schools—it becomes a must rather than a may" (quoted in Julien 1991: 431, emphasis in original). Bosetti also indicated in the January 1990 interview that the Alberta government did not think that section 23 of the Charter included the right to governance, but that the Supreme Court would likely rule otherwise. The Court did indeed rule that section 23 included management and control, which had a significant impact on Alberta's OMLE policy according to key players in the Alberta policy process. When asked a general question about what drove OMLE policy change in Alberta, both the current Director of French Language Services Branch of Alberta (Gérard Bissonnette) and a former Director (Adrien Bussiere) explained that public opinion and public policy were changing over time in ways that were favourable to improved OMLE policy, but that the Charter and judicial decisions were vital in getting the Alberta government to change its Francophone education policy (Interview Bissonnette; Interview Bussiere). Bussiere, for example, stated that it was the Charter and the *Mahé* decision that "forced the province to come up with a set of policies and legislative changes to allow Francophone school boards to be established." Bissonnette also remarked that section 23 of the Charter and judicial decisions were central to the arguments made by Francophone groups to department personnel as well as to the

Minister of Education and the Premier. Jim Dinning, who was Minister of Education at the time of the Supreme Court's *Mahé* decision, said that the decision was "a catalyst" for the Alberta government to act and that Francophone school governance "*might*" have been introduced without the decision though the process would have taken "a lot" longer (Interview). Legislation to establish Francophone school governance was introduced with reference to section 23 of the Charter and the *Mahé* decision and MLAs opposed to the legislation indicated that they would nevertheless support it because of the Supreme Court decision (see Chapter Five).

Members of the Edmonton Catholic School Board (ECSB) also highlighted the importance of the Charter and legal mobilization to policy developments. Ken Alyluia, a former trustee on the ECSB told Julien that, "Without a doubt, I think it [the Charter] is [a catalyst], they have now the law on their side. They are bargaining from a position of strength...I say this with a lot of conviction that the Francophone status is where it is now because of judicial decisions" (quoted in Julien 1991: 407). A former chair of the ECSB, Francis O'Hara, noted that, "The Charter came as a bit of a shock, as was [sic] the interpretation of the Charter of Rights, and the demands for Francophone schools...the Charter was made the platform on which to demand educational changes, and as a result of the Charter, it [Francophone school] has probably come sooner" (quoted in Julien 1991: 558, 565). Likewise, former trustee Simone Demers-Secker argued that, "most of the trustees accepted the idea that it [establishing Francophone schools] was the legal thing to do and they were going to do it. Without the power of the law, that is the Charter of Rights, events might not have moved so quickly" (quoted in Julien 1991: 456).

Leaders within the Francophone community also point out that the Charter and legal mobilization by the Bugnet group either created or hastened the demand for Francophone schools and school governance and that legal mobilization was a critical component in trying to achieve policy change. Viviane Beaudoin, president of the FPFA in 1989, stated that the movement for Francophone schools in Edmonton "started after the Charter in 1982, but specifically after the Bugnet Association initiated a court case" (quoted in Julien 1991: 257). Claudette Tardif, former leader of la Société in Edmonton, said that "the Charter gave a certain legitimacy to the creation of all-French schools. Even though some Francophones had embraced that notion before 1982, they didn't express this view

publicly" (quoted in Julien 1991: 256). Another former leader of la Société, Frank McMahon, stated that, "I think that the movement for all-French schools in Edmonton began with the adoption of the Canadian Charter. The Charter changed peoples' perceptions of what was possible" (quoted in Julien 1991: 534). McMahon also thought that it was "an excellent idea" to seek judicial interpretation of section 23 or else subsequent policy changes "could not have taken place" (quoted in Julien 1991: 538). Georges Arès, past president of the ACFA and current president of the CNPF, indicated that "changes to the constitution" [section 23 of the Charter] and litigation to enforce section 23 were the most important factors in explaining OMLE policy change in Alberta (Interview). He also argued that once the Alberta government indicated that Francophone schools and school governance were legitimate following judicial decisions, opposition to such policies in the broader public dissipated. France Levasseur-Ouimet, who was president of the ACFA in 1990, explained that recognition of the need for improvements to OMLE policy began with the Royal Commission on Bilingualism and Biculturalism but concluded that, "What contributed most to change in language education policy was the lobbying of the parents (who became aware of their rights as presented in the Charter) (and later community associations) which led to litigation which was made possible by the financial support from the federal government." According to Levasseur-Ouimet, "[litigation] was the only way to go since the Government, we all agreed, would not move unless they had to" (Interview). Paul Dubé of the Bugnet group argued that there was "no question" that the Charter was behind policy change, but that the Charter was only one aspect of a process that included interrelated activities of litigation, lobbying, media strategies, educating the Francophone community, etc. (Interview). Angéline Martel of the Bugnet group highlighted the importance of the Charter and favourable judicial decisions for conferring legitimacy upon the notions of Francophone schools and school governance, particularly in the Francophone community (Interview; also see Dubé interview).

Policy documents also reveal the influence of the Charter and judicial decisions. The 1988 Language Education Policy for Alberta recognized the distinction between French immersion and FFL programs and indicated that "French language programs are programs offered almost entirely in French and which are designed to meet the needs of

children and parents who qualify under section 23 of the Charter" (1988: 9). This represents a philosophical shift from the Alberta government's 1978 policy statement that maintained that non-Francophones would be allowed into French-language programs while emphasizing the multicultural aspects of language education in Alberta. Both the French-language Working Group Report (1991) and the Francophone School Governance Implementation Handbook (1994) emphasize the importance of section 23 of the Charter and the Supreme Court's *Mahé* decision. Likewise, submissions by the ACFA and FPFA also emphasized section 23 and judicial decisions (see *Reactions of L'Asssociation canadienne-française de l'Alberta to Bill 59 (Alberta School Act)*, December 1987; *Reactions of L'Asssociation canadienne-française de l'Alberta to the Language Education Policy for Alberta*, April 1989; *Now is the Time for Franco-Albertan Schools* (Desjarlais) n.d.; *An Educational System for Franco-Albertans*, (Lamoureux and Tardif, June 1990)).

The Alberta case study reveals that the Charter and judicial decisions stimulated and legitimated calls for Francophone schools and school governance within the Francophone community and played an important role in compelling the provincial government and local decision-makers to change their OMLE policies. The Charter and judicial decisions therefore altered the objectives and the tactics of leaders in the Francophone communities, put these policy ideas on the agendas of the provincial government and local decision-makers, and shaped policy changes at the provincial and local levels. Inputs and outputs in the OMLE policy process were structured by these institutional factors, which suggests that a purely environmental-type argument would be of limited utility in explaining policy change in Alberta (as would the pessimistic CLS model).

In other provinces calls for Francophone schools and school governance began prior to the Charter and there was more significant policy change prior to the Charter, which suggests that environmental-type arguments might have greater applicability in other provinces, such as Ontario. However, other evidence in addition to the trends discussed above indicates that environmental arguments would have limited explanatory power in other provinces. Marion Boyd, Minister of Education in the NDP government of Ontario, stated that the Charter and "the Charter challenges were very important to us in our

decision making" about French-language education policy. The particular issue of school governance was:

> primarily forced by the Prescott-Russell situation, where French Language Catholic ratepayers... had no local control over education. Their representation on the two English language Boards was simply not adequate and they had a very good court challenge prepared showing that support for the purchase of books and the hiring of teachers could not be equitably achieved under the current circumstances. Once we made the decision to permit French language governance in Prescott-Russell [in 1990, after *Mahé*], the other communities, like Cornwall and Sudbury became very vocal indeed. Cornwall had a very good Charter challenge already underway, which the proponents delayed, pending the outcome of the [Francophone School Governance] Committee (Interview).

While the Francophone School Governance Committee and other advisory bodies in Ontario did recommend Francophone school governance, implementation was delayed which led Francophones in Cornwall to renew their Charter challenge. However, the challenge was again dropped when the Conservative government created a network of Francophone schools in 1996 as part of a general restructuring of education. According to an individual who was involved with section 23 cases in Ontario and other provinces, and who served as a consultant on the creation of the Francophone school boards in Ontario, the addition of the French-language boards was influenced by the government's recognition that "court decisions can have complicated and unforeseen consequences"—the government did not want its education reforms sabotaged by a potential section 23 case (Confidential Interview). More generally, this individual pointed out that the expansion of French-language education rights began in the 1960s, but that the Charter was important because it contained constitutional obligations and the 1984 Ontario Court of Appeal decision was important because it "accelerated and reinforced" the expansion French-language education rights. Across Canada, litigation under section 23 was "critical" because of the limited response of provincial governments to the Charter (Confidential Interview).

As documented in Chapters Five through Seven and analyzed in Chapter Eight, section 23 of the Charter and litigation became the central mechanism in the quest for policy change by Francophones, which not only was supplemented by lobbying, media awareness, community education, etc. but helped to bolster those strategies (by

generating media attention, providing legal resources that could be converted to political resources, etc.). A systematic study of documentation produced by the FCFA and provincial Francophone associations revealed that in "the political arena, it is clear that the approaches for action favoured by the Francophone minority associations are always strongly marked by legal rhetoric [since the early 1980s]...[the legal tool] is seen as a means of safeguarding rights which will generate resources" and "the language of the associations... has mainly stressed the linguistic education rights recognized by Section 23" (Cardinal et al. 1994: 53, 72). Concomitant with shifts in strategy and rhetoric by Francophone groups has been a change in how these groups view themselves and their place in the Canadian community—the language of "victimization" has been replaced by rhetoric which emphasizes the rights of "entitled citizens" and the language of two founding peoples has been replaced by an emphasis on linguistic duality recognized by the Charter, "which enables the community to assert its rights and to promote a linguistic duality which is based, first and foremost, on the recognition of a Francophone space and of its tradition of community development" (Cardinal et al. 1994: 53,73). The study self-consciously borrows the terminology of political scientist Alan Cairns to point out that Francophone groups have become "children of the Charter" (1994: 53). It should be noted that the report did not even take into consideration the documentation of the CNPF and its provincial affiliates, which are groups explicitly dedicated to the implementation of section 23 of the Charter.

Cairns (1992) has pointed out, however, that there is a tension between the "Charter" with its constituency of non-territorial based groups and "federalism" with its constituency of territorial based governments—in other words, the political system was "dysfunctional" to some degree owing to institutions that shape their environments according to conflicting principles. This raises another difficulty with the environmental-type argument. Not only does it underestimate the independent influence of the Charter and judicial decisions, it does not account for the interrelated influence of other institutional variables on OMLE policy development, such as the constitutional division of powers (federalism), denominational school rights granted by section 93 of the Constitution Act, 1867, and the role of the federal government. Canada's federal structure gave the provinces control over education—a fact that Alberta and other

provinces highlighted in their *Mahé* factums, which argued that the provinces should be allowed to decide how to implement section 23 and that interpreting section 23 to include the right to management and control would unduly interfere with provincial administration of education. Alternatively, francophone groups such as the CNPF argued that section 23 imposed certain national standards for OMLE policy and maintained that section 23 included the right to management and control. The federal government supported OMLGs, though it did advocate that some policy implementation leeway be granted to the provinces. The Supreme Court rejected Alberta's (and other provinces') interpretation of section 23 and found a right to management and control in section 23, but the Court indicated that provincial governments had some flexibility in precisely how section 23 was implemented. A number of Progressive Conservative caucus members argued that the decision violated Alberta's jurisdiction and the government checked to see whether the Charter's notwithstanding clause applied to section 23 (it did not) (Interview Dinning; Interview Levasseur-Ouimet).

Section 23 of the Charter, ultimately interpreted by a national Supreme Court with federally appointed judges, and not subject to the section 33 override clause, can be viewed as a mechanism designed by the federal government to promote OMLE policy development by circumventing provincial jurisdiction over education. Indeed, as Magnet pointed out, a key distinction between section 23 and the premiers' 1978 declaration on OLME policy is the way the two provisions are enforced—the former by the Supreme Court and the latter by implementation at the discretion of provincial governments (1995: 146, ftn. 24). Funding of section 23 litigation and interventions through the Court Challenges Program and interventions by the federal government were other components of the federal strategy of promoting changes to OMLE policy. The federal government also contributed significant amounts of money to the provinces for OMLE programs and for the implementation of Francophone school governance—the latter monies were made available only after the courts found section 23 included a right to management and control. Hence, the environmental argument correctly points out that the federal government was promoting OMLE policy development prior to the Charter, but it does not properly account for how the federal government augmented its promotion of OMLE policy in ways that are associated with the Charter and litigation. In addition to the

constitutional division of powers, the role of the Supreme Court, and the role of the federal government, the analysis in Chapter Eight indicated that Canada's parliamentary system of government and Alberta's electoral system potentially structured the OMLE policy process.

It could be argued that even if one takes these institutional considerations into account, the NI model overlooks the influence of such factors as political culture and demographics on the pace of policy reform. It could be argued, for example, that even if judicial decisions sparked school desegregation in the US, the pace of desegregation was quicker in the border states than in the South because the border states had relatively fewer African-Americans and a more liberal attitude toward desegregation. There is some evidence for a similar, but mirror image, phenomenon in Canada with respect to demographics. In the Canadian case, New Brunswick with the largest proportion of Francophones (see Table B.1, Appendix B) had a fully developed educational system for Francophones prior to the introduction of the Charter, and, Ontario, with the largest real number of Francophones, was the first province after the introduction of the Charter to make access to French-language education mandatory and to introduce some form of Francophone school management and control. Both provinces were the only two provinces to support the Trudeau government's plan to entrench a charter in the constitution. Conversely, BC and Newfoundland, the provinces with the lowest proportion of Francophones (and Francophones who were most likely to favour French immersion—see Corbeil and Delude 1982) were two of the last provinces to introduce Francophone school governance. OMLE policy change was also slow in Alberta, a province with a low percentage of Francophones and a province with a record of political conservatism.

The response to this kind of argument is fourfold. First, new institutionalism theory in general and the NI model of judicial impact do not deny that factors like political culture and demographics will influence the policy process—institutions structure, but do not determine, political outcomes. Second, just as the relationship between numbers of African-Americans in a district or region was not always related to the timing or content of school desegregation policy change, the relationship between numbers of Francophones and the timing of OMLE policy reforms does not always fit. For example,

Alberta, Saskatchewan, and Manitoba all introduced significant policy reforms around the same time (1993 and 1994) even though Manitoba had more than twice the proportion of eligible section 23 students, while Saskatchewan had approximately half of the real numbers of eligible section 23 students compared to Alberta and Manitoba. PEI, with 1,813 eligible section 23 students in 1996, instituted a province-wide Francophone school board in 1989-90—seven years before Ontario, with 117,127 eligible section 23 students introduced a province-wide system of Francophone school boards. Third, while there are differences in support for the Charter across regions, the Charter generally enjoys high support across all regions of Canada and the specific question of support for minority language education rights did not generate statistically significant differences between regions in the 1987 Charter values survey for either masses or partisan elites (Vengroff and Morton 2000: 376). Fourth, the question remains as to whether provinces such as BC or Newfoundland would have ever instituted a system of Francophone school governance absent section 23 of the Charter and judicial decisions.

The final argument to be addressed as part of the environment-argument is the one raised by Wiseman who argued that, regardless of policy changes, Francophones outside Quebec are still facing serious challenges in maintaining their communities. The response to this argument is the same as the one used in the discussion of Critical Legal Studies above. It is beyond the scope of the study to research the potential second-order policy effects, but there is some cautious optimism that OMLE policy reforms will provide useful tools in the battle against assimilation.

Scholars such as Michael McCann (1992, 1994, 1996) would not be surprised that the Charter, legal mobilization and judicial decisions impacted OMLE policy. However, McCann and other scholars who use a "bottom-up" or "dispute-centered" approach argue that such results are intrinsically difficult to predict. The next section of this chapter examines the how the NI model compares against this approach.

"Bottom-up," "Dispute-centered" approach

As noted in Chapter Two, the effects of legal mobilization and judicial decision in the dispute-centered approach are considered to be "inherently indeterminate, variable, dynamic and interactive" (McCann 1992, 733). The approach seeks to analyze how legal claims and judicial decisions are received, interpreted, utilized and/or circumvented by

differently situated actors within legal, social and political communities and institutions (see Wasby 1970; Scheingold 1974; Galanter 1983; McCann 1992, 1994; Mertz 1994). A bottom-up, dispute-centered perspective emphasizes the constitutive nature of legal mobilization and its impact on policy discourse and rejects suggestions that legal victories are necessary conditions for policy change. According to Smith, "[r]ights claims function as claims to political legitimacy, as a means of politicizing grievances, and thus as mechanisms for the creation of a sense of political identity," regardless of whether such claims are successful; in fact, a loss in court might be more effective than a victory (1999: 41-42).

Although a dispute-centered approach has some merit in explaining the development of OMLE policy (see discussion below), the analysis indicates that the structural factors predicted by the NI model to influence the impact of legal mobilization and judicial decisions have explanatory power in the case of OMLE policy. The provision of legal resources to undertake legal mobilization cannot be understood without reference to institutional factors, especially the Charter and federal funding from the Court Challenges Program.[4] In turn, the impact of legal mobilization and judicial decisions was dependent to greater and lesser degrees on certain factors identified in Hypothesis Two of the NI model of judicial impact. In particular, the Supreme Court's interpretation of section 23 in the *Mahé* decision and federal funding for French-language education, including the establishment of Francophone school governance, and federal funding of OMLG legal mobilization were shown to be very important in the development of OMLE policy (see Chapter Eight). Put differently, the hypothesis that the results of legal mobilization and judicial decisions are "inherently indeterminate" is overstated. The probabilities of achieving policy change in the desired direction appear to increase if legal rules and judicial decisions are clear and forceful, incentives are provided for implementation, the attitudes of implementers are predisposed to the decision, the political environment is supportive, and groups effectively exploit the opportunity structures opened up by legal mobilization. Even McCann in his study of pay equity policy in the US concludes that unfavourable judicial decisions (as the courts became more conservative in the 1980s)

[4] Even Smith, in her study of gay and lesbian movements in Canada, concedes that the political opportunity structure prior to the Charter was not conducive to achieving policy change (1999: 42).

and the ability of pay equity reformers to generate financial and organizational resources constrained the effects of legal mobilization (1994: 285).

It might appear, therefore, that Rosenberg's model of judicial impact, since it highlights the importance of such things as incentives to the implementation of judicial decisions, would be sufficient to explain the impact of legal mobilization and judicial decisions on OMLE policy. The applicability of Rosenberg's model is compared to that of the NI model in the next section.

The Rosenberg Model

Rosenberg's model postulates that since courts are "constrained" by a variety of institutional limitations, particularly their lack of enforcement tools, they can only produce social change when the following conditions are met: 1) there is ample legal precedent for change; 2) there is support for change from Congress and the executive branch; and 3) there is support or low opposition in the public and costs/benefits are offered to induce compliance (or administrators are willing to hide behind decisions to implement reforms or the decisions can be implemented in the market).

Although elements of Rosenberg's model would help to explain the effects of legal mobilization and judicial decisions on OMLE policy, the NI model works better than Rosenberg's on three different levels. First, the NI model includes a structural feature that is not included in Rosenberg's model but one that had relevance to the impact of legal mobilization and judicial decisions—the clarity and forcefulness of legal rules.

Although the Supreme Court's *Mahé* decision did not grant a mandatory injunction and did not specifically define the "where the numbers warrant" clause, which concerned some Francophone groups, the decision did find a right to management and control in section 23, emphasized the remedial nature of section 23, and declared that the Alberta government should "delay no longer" in implementing section 23 rights (Interview Levasseur-Ouimet; *G & M*, March 16, 1990: A1,A4). Arguably, the decision was more forceful than the US Supreme Court's *Brown* decision, which has been criticized for relying too much on social science evidence relative to constitutional arguments, and the "all deliberate speed" standard for implementation was seen by many as an invitation for delay (Peltason 1961: 17-18; Kluger 1976: 711-714; Simon 1992: 926).

Significantly, despite some delays of varying length, neither the Alberta government nor five other provinces outside of Quebec implemented a legislative scheme giving Francophones management and control over French-language instruction and facilities until after the Supreme Court's *Mahé* decision (the exceptions were P.E.I., New Brunswick and Ontario). Prior to the Court's decision, there was uncertainty about what was required by section 23. Saskatchewan's Minister of Justice in 1984, for example, argued that Saskatchewan's school legislation was consistent with the Charter when the government rejected a proposal for Francophone school management (COL Report 1984: 195-196). Similarly, according to an OMLG activist, the former director of the Language Services Branch, and the former Deputy Minister of Education, the Alberta government continued to disagree with Francophone groups about what was required by section 23, especially with regards to governance, right up to the Supreme Court's decision (Arès Interview; Bussierre Interview; Bossetti quoted in Julien 1991: 430).

The Alberta case study shows the effects of uncertainty at the local levels. A survey of Alberta school boards by the ACFA early in 1985 found significant differences in interpretation of section 23 from board to board and that boards were "awaiting clarifications on Section 23 and that any provincial directive would have a definitive impact on the formulation of policies at the local level" (Morin 1985: 24; also see Julien 1991). The Supreme Court's interpretation of section 23, which emphasized the remedial function of the section and included the right to management and control, was a key stimulus in OMLE policy development, particularly concerning Francophone school governance.

Second, the NI model situates the courts within a broader institutional framework than does Rosenberg's model. The NI model considers the role of institutions in constraining or enabling legal mobilization (constitutional rules, state funding, etc.) and considers how the policy effects of judicial decisions might be shaped by state actors and institutional structures such as federalism, electoral systems, and "veto points," while simultaneously considering how judicial decisions might potentially influence the political environment. A corollary of this advantage of the NI model is that it allows for comparative application and is not US-centric as is Rosenberg's model.

Third, the NI model incorporates the insights of a "bottom-up" approach by highlighting how the constitution, legal mobilization and judicial decisions can influence both the strategies and preferences of actors within the policy community and raise the profile of a policy issue. Drawing from the "bottom-up" approach, the NI model also recognizes that rights claimants can use legal mobilization, judicial decisions and rights discourse in conjunction with other tactics to promote and legitimate certain policy claims, gain access to the policy process, and acquire allies. The Alberta case study, for example, reveals how the Francophone establishment began to press for Francophone schools and school management after the Bugnet group launched its section 23 case; how different local school boards reacted differently to demands made under section 23; how some local boards, such as the ECSB, and the Alberta government came to understand the distinction between French immersion and French first-language once these distinctions were attached to Charter demands and judicial decisions; how OMLGs gained access to the policy process and managed to convince former opponents, such as the Alberta School Trustees Association, of the desirability of Francophone school governance; and how the government adopted a policy based on the Report of the French Language Working Group, which was permeated with references to section 23 and the Supreme Court's *Mahé* decision—in turn this report reflected recommendations made in a report prepared by OMLGs in anticipation of the Supreme Court's *Mahé* decision. Importantly, the Alberta government over time moved away from its multicultural policy of viewing French-language instruction as on par with other language instruction and its policy of allowing open access to French-language programs to recognizing that Francophones had constitutional "rights" to FFL programs and French schools to be governed by Francophone school boards, which would limit admissions to eligible section 23 students or others as the Francophone board saw fit.

Legal mobilization, judicial decisions and rights discourse were prevalent outside of Alberta as well and shaped the policy process. Sometimes such influences took time to fully manifest themselves. In Ontario, for example, there was policy change after the 1984 Ontario Court of Appeal decision, which confirmed some of the government's policy intentions, but by the mid-1990s most other provinces had moved beyond Ontario's OMLE policy, especially in the area of Francophone school governance.

Francophone groups initiated legal action and made presentations before a number of advisory commissions that emphasized section 23 and judicial decisions, but it was not until 1996 that the provincial government created a network of Francophone school boards, in part to protect its larger education reforms against litigation.

Conclusion

The NI model offers advantages over Rosenberg's model because it incorporates additional relevant factors, allows for contingency, and recognizes the constitutive nature of the constitution, legal mobilization and judicial decisions. Conversely, although the NI model recognizes the contingent, "radiating effects" of legal mobilization and judicial decisions on preferences, policy ideas, discourse, etc., the model, unlike the "bottom-up" approach, predicts that certain factors, such as the nature of legal rules, incentives, public opinion, and so on, will affect the impact of legal mobilization and judicial decisions. Most of the factors identified in the NI model appeared to have "high" or "moderate" influence on the impact of legal mobilization and judicial decisions on OMLE policy based on an analysis of qualitative and quantitative data collected over various time periods in various political jurisdictions. The NI model tries to judiciously blend looking at how "variables" (clarity of legal rules, incentives, public opinion, etc.) influence outcomes within an institutional model that stresses how these variables operate and interact are shaped and constituted by institutional actors and configurations over time.

Judgments on whether this NI model would satisfy either the "positivist" camp (including whether the appropriate variables were included) or the "dispute-centered" camp or whether the model incorporates too much and therefore lacks appropriate parsimony should await future research, though the model appears robust in explaining OMLE policy development. While the model is not parsimonious, the complexity associated with tracing the impact of legal mobilization and judicial decisions seems to demand a complex model—a legitimate choice according to King et al. (1994). Certainly the outcomes predicted by rather deterministic approaches, such as the CLS and environmental approaches, are not borne out by the evidence, whereas the NI model fares much better in explaining the impact of legal mobilization and judicial decisions.

Chapter Ten- Conclusion

The dissertation began by noting a potential disjuncture between two phenomena. On the one hand, interest group activists and academics in the education policy field expressed optimism over the impact of section 23 and judicial decisions on official minority-language education (OMLE) policy. On the other hand, the Commissioner of Official Languages frequently complained about the pace and scope of OMLE policy change. There was a substantive puzzle to be addressed—what have been the effects of legal mobilization and judicial decisions on OMLE policy? Surprisingly, there was little in the existing Canadian judicial politics literature that provided theoretical or methodological guidance for investigating systematically how legal mobilization and judicial decisions contribute (or not) to policy development over time. By studying the impact of legal mobilization and judicial decisions on OMLE policy outside Quebec and developing a theoretical framework to structure the research, the dissertation at a minimum provides a basis for future research on judicial impact in Canada.

The theoretical framework—called here the New Institutional (NI) model of judicial impact—had three primary sets of hypotheses. The first argued that politically disadvantaged groups would be more likely to undertake legal mobilization (primarily litigation, threats of litigation, or interventions in cases) if they had adequate legal resources, and that institutions as actors and structures were key determinants in the supply of legal resources. It was hypothesized that achieving favourable judicial decisions if litigation was pursued was related to institutional considerations, such as the appointment process, the desire of courts to maintain institutional legitimacy, legal arguments and so on, rather than just the individual policy preferences of judges. The chances of generating a favourable judicial decision if litigation was pursued were hypothesized to be related to some degree to institutional factors such as the appointment process, institutional considerations, etc. The second set of hypotheses focused on the aftermath of legal mobilization and judicial decisions. Policy impact was hypothesized to be greater to the degree that legal rules were clear and forceful, the attitudes and practices of implementers were consistent with legal rules and judicial decisions, incentives were offered for compliance, the political environment was supportive of the judicial decisions, there were fewer veto points, and groups were able to exploit opportunity

structures effectively. The third hypothesis suggested that success or failure during previous stages of the policy process would generate changes in strategies, preferences and discourse.

The NI model is derived in part from two broad categories of judicial impact literature in the US. The first category is variable-oriented work that highlights the importance of various factors in directly or indirectly influencing impact. One review of this literature generated over a hundred hypotheses (Wasby 1970). The framework used by the dissertation has distilled this down to a more manageable number, emphasizing such things as the clarity of legal rules, the attitudes of implementers, the existence of incentives, and the state of the political environment (primarily public opinion). The NI model also incorporates elements from the "bottom-up" or "dispute-centered" literature that stresses the partial and contingent nature of legal mobilization on the policy process. These elements are reflected in parts of the model that highlight the exploitation (or not) of political opportunities and resources generated by legal mobilization and suggestions that success or failure during legal mobilization and interrelated activities will generate changes in policy ideas, discourse and preferences.

Beyond synthesizing various US models of judicial impact, the NI model, as the name suggests, transcends these models by placing the elements within an explicitly institutional framework. Institutions—as state actors or structures—are hypothesized to influence the nature of the key factors identified above. A few examples will suffice. The provision of legal resources is hypothesized to be largely dependent on institutions, as is the existence of incentives for implementation of judicial decisions. The attitudes of judges and of implementers of judicial decisions will be influenced by institutional norms, and institutions will structure the influence of the political environment. Institutions are also hypothesized to shape the strategies, discourse and preferences of actors within the policy community interacting within intersecting institutional arenas over time. By hypothesizing that institutions influence preferences and discourse as well as strategy, the NI model considers institutions to be "constitutive" in nature. Finally, reflecting the historical variant of new institutionalism, the NI model proposes that the historical evolution of a policy process needs to be considered. The NI model (and historical institutionalism more generally) recognizes that outcomes are likely to be

partially contingent, but also theorizes that institutions also shape the flow of history by making some options (such as litigation or implementation of a judicial decision) more attractive than others, by privileging certain actors or ideas over others, etc. The NI model therefore rejects more deterministic theories of impact, such as Critical Legal Studies or environmental-type arguments.

Nevertheless, being interested in "substantive outcomes or puzzles clearly relevant to more than just fellow academics" and taking seriously how macro- and meso-level institutional configurations influence the policy process over time as is characteristic of the new (historical) institutionalism involves some methodological challenges (Pierson and Skocpol 2000: 2). Researchers are usually forced to select on the dependent variable and there are often only a relatively low number of observations that can be made (Pierson and Skocpol 2000: 4). Moreover, new institutionalism posits that over time there is complex interaction between variables where the distinction between dependent and independent variables can become blurred (Immergut 1998).

The dissertation tried to mitigate these and other methodological concerns in a variety of ways. First, the dissertation relied on four different sets of data: archival documents from the political and legal spheres; interviews with various participants in the policy process; statistical data, such as the number of Francophone schools in each province, etc.; and detailed secondary research. Second, these data were analyzed at various points over time for comparisons before and after constitutional change and judicial decisions. Third, observations were not only collected at various points in time, but they were collected from all provinces. Fourth, case studies, particularly of Alberta but also of Ontario and Saskatchewan, allowed for an in-depth investigation of the policy process and allowed for some intra-provincial comparisons as well.

The evidence collected using these methodological techniques reveals that the NI model has significant explanatory power. First, legal mobilization by OMLGs depended heavily on institutional mechanisms—particularly section 23 of the Charter and the federal government's Court Challenges Program. OMLGs have also been successful in court, particularly the Supreme Court. There are indications that success in the Supreme Court was related to more than just individual judicial attitudes and that institutional considerations (such as the appointment process and institutional norms) were at work.

The impact of legal mobilization and judicial decisions were clearly linked to the Charter; the clarity of legal rules, particularly the Supreme Court's interpretation of section 23 in *Mahé* (1990); and federal funding to the provinces to implement policy change. These findings are particularly evident given that only one province had a system of Francophone school governance prior to the introduction of the Charter, three provinces had a system of Francophone school governance prior to the *Mahé* decision, and all nine provinces had a system of Francophone school governance by the latter 1990s. The attitudes of implementers and public opinion, both in the majority and minority communities, also had a moderate influence on impact—the latter factor potentially delaying implementation in some areas, particularly BC.

The research also reveals the importance of placing these factors within a broader historical framework where actors (state and non-state) work within various institutional configurations over time in ways that can shape strategies, preferences and discourse in somewhat contingent ways. The Alberta case study, for example, demonstrated how the Charter and legal mobilization by the Bugnet group spurred the Francophone establishment in its calls for Francophone schools and school governance. These demands, which relied heavily on the Charter but were supplemented by lobbying, media strategies, communication with the Francophone community, and so on, had an uneven impact at the local level and were largely resisted by the provincial government committed as it was to a policy of not privileging French-language education over other minority languages. The Alberta government adopted a system of Francophone school governance three years after the Supreme Court's *Mahé* decision—a system that was half funded by the federal government based on an agreement negotiated in the aftermath of the Supreme Court decision. The system implemented by the Alberta government was influenced by Francophone representation on various task forces. Reports produced by these task force reports emphasized the Supreme Court's determination that section 23 was remedial in nature and noted that Ontario's system of proportional representation of Francophones on existing school boards was not the most desirable option. Later, a Francophone school board was created for Calgary and southern Alberta after Francophone proponents of the board overcame opposition to the proposal in the

Francophone community by threatening litigation and claiming that "rights" are not negotiable.

Comparing the explanations generated by the NI model to alternative explanations further enhanced confidence in the utility of the NI model. The NI model improves on the Critical Legal Studies approach by hypothesizing and demonstrating that courts can make decisions that are not (fully) congruent with existing political and social power dynamics and that constitutional rights can be leveraged in at least partial and contingent ways to generate policy change by putting issues on the agenda, mobilizing constituents, generating the provision of incentives from other (state) actors, etc. The NI model improves on an environmental-type approach by hypothesizing and demonstrating that institutions can structure political outcomes such that outcomes differ from what would be expected if the political system functionally generated outcomes after receiving inputs from the socio-economic and political environments. Constitutions and judicial decisions and their employment by various actors in the policy community can structure outcomes in a variety of ways from altering the nature of demands, to putting issues on the agenda, to re-distributing institutional authority for making policy decisions (i.e. creating tensions between provincial governments and the courts over the path of OMLE policy), etc. While acknowledging the contingent nature of the effects of legal mobilization, the NI model identifies certain factors that make policy change more probable, such as the provision of incentives, and so forth—this is a theoretical improvement over the "dispute-centered" approach and one that proved useful in explaining OMLE policy development. Finally, the NI model improves on Rosenberg's model of judicial impact by including additional relevant factors in the model, such as the clarity of legal rules, recognizing the insights of the "dispute-centered" approach and placing the model within an institutional framework that is generalizable across countries.

Indeed, the effects of legal mobilization and judicial decisions on school desegregation in the US were analyzed through the lens of the NI model. This allowed for a heuristic comparison with the Canadian case since both cases involve issues surrounding how and where minorities are educated. The comparison further pointed to the promise of the NI model in a number of ways. The re-interpretation of the impact of legal mobilization and judicial decisions on school desegregation demonstrated the

advantages of the NI model over existing accounts in the US. The analysis also allowed for suggestions that differences on certain factors contributed to differences in the scope and pace of policy change in the two countries. For example, the greater public opposition to desegregation in the US (at least initially) compared to public opposition to French-language education in Canada and the lack of forcefulness in the US Supreme Court's *Brown* decisions compared to the Canadian Supreme Court's *Mahé* decision likely contributed to the slower pace of desegregation in the US compared to the pace of implementation of OMLE policy changes in Canada. More generally, the analysis also showed that similar factors contributed to policy change in the US and Canada, such as political action motivated by legal mobilization and judicial decisions and federal government intervention (linked to judicial decisions), but that different institutional configurations shaped the nature of these factors. For example, the combination of the Fourteenth Amendment and the *Civil Rights Act* allowed the federal government to intervene directly against local school boards in the US, but the fragmented nature of the US government often constrained federal action; whereas in Canada, the parliamentary system of government allowed the government to act, but the government had to act indirectly to shape OMLE policy, especially at the local levels, owing to the absence of institutional features found in the US system. The comparison also showed that constitutional rights had some influence in motivating political action by minority groups in both countries and that segments of the minority community in each country used legal mobilization to promote their particular policy visions over opposition within the community.

While the NI model shows promise, more research to test its efficacy is required in a variety of ways. As OMLE policy outside Quebec enters a consolidation phase, it would be worth monitoring how legal mobilization will be employed to protect and expand existing provisions as well as to make novel demands and how this will impact policy. For example, how will Justice LeBlanc's mandatory order against the province of Nova Scotia and the Francophone school board for the building of more Francophone schools play itself out? Will the results conform to the hypotheses generated by the NI model? The NI model also should be applied to other policy areas, such as abortion policy, policy surrounding same-sex couples, criminal justice policies, etc.

Further tests of the model in any policy area should attempt to generate more refined data than was possible for elements of this study of OMLE policy. Given appropriate resources, surveys could be conducted of decision-makers at various stages of the process and public opinion data could be generated at different points in the process using questions that more precisely address the policy options under consideration as well as specific judicial decisions. Ideally, one might be able to look ahead to an important Supreme Court decision in a particular policy area and collect data before and after the decision when attitudes and memories are most current.

Future research also needs to be undertaken where the comparative application of the NI model at the meso- and macro-levels is more than heuristic, and more research needs to be conducted at the micro-level. Although the dissertation discussed how the attitudes and decisions of local school board members might have been shaped by legal mobilization and judicial decisions and the organizational needs of the school board, a more precise research design and better data are needed to untangle how reactions to judicial decisions are influenced by the interaction of individual preferences and organizational goals and norms at the micro-level (this research would also include analyzing how judicial decisions might alter individual attitudes and organizational norms). Future research on OMLE policy could look at school boards, while in criminal justice policy it would be worthwhile to investigate how individual police officers react to judicial decisions and how the reactions of officers are influenced not only by judicial decisions but by the reaction of their police department to the judicial decisions. For example, would police officers be more inclined to follow the rules of investigation set out in a judicial decision if their department provided incentives for compliance, emphasized the importance of legal standards in training exercises, and gave clear guidelines for implementing the decision compared to officers in a department that promoted "crime control" over "due process"?

Undertaking the kind of research discussed above would help to address a number of theoretical questions. Do some of the factors in the NI model consistently prove to be more important than others? Do different institutional configurations lead to predictably different outcomes (as suggested by the veto points literature) or do institutions shape outcomes over time, but often in ways that cannot be predicted in advance (as suggested

by historical institutionalists)? Do the variable-oriented aspects of the model explain more than the "dispute-centered" aspects (or vice-versa) or are they interrelated to the point that any explanation would be incomplete without the other? More generally, are there other models of judicial impact that have similar explanatory power but offer greater parsimony, or is the nature of judicial impact so inherently complex that elegant models will not suffice?

Regardless of the outcomes of such future research, the dissertation has provided an empirical assessment of the impact of legal mobilization and judicial decisions in an important policy field and has developed a theoretical framework for analyzing judicial impact that has comparative application. This theoretical framework—the NI model—also has the potential to bring the judicial politics subfield closer to the concerns of mainstream political science by its emphasis on the analysis of substantive questions about the policy process and policy outcomes within the rubric of a general theoretical framework that has become popular in political science—the new institutionalism.

Appendix A- School Desegregation in the US

Table A.1: Per cent of School Districts Desegregated by Year (1954-1964) and State

Wilkinson description		Massive Resistance in South					Token Compliance				Modest Integ.
Crain description	Border State Voluntarism			Massive Resistance (Little Rock)			Post-Massive Resistance			Resistance Collapses (Compliance)	
	1954	**1955**	**1956**	**1957**	**1958**	**1959**	**1960**	**1961**	**1962**	**1963**	**1964**
W. Virginia (b)	68	80	95	100	100	100	100	100	100	100	100
Maryland (b)	4	48	87	91	100	100	100	100	100	100	100
Missouri (b)	47	47	79	86	86	93	93	95	95	95	95
Kentucky (b)	0	21	61	64	70	73	83	83	89	99	100
Oklahoma (b)	0	33	76	80	75	75	79	81	81	81	66[1]
Delaware (b)	17	19	21	29	33	37	47	100	100	100	100
Texas (s)	0	10	12	17	17	17	18	17	19	29	52
Virginia (s)	0	0	0	0	3	5	9	16	25	43	64
N. Carolina (s)	0	0	0	2	2	4	6	6	10	23	51
Tennessee (s)	0	1	1	2	2	3	5	13	19	32	45
Arkansas (s)	1	1	2	4	4	4	4	4	5	6	11
Florida (s)	0	0	0	0	0	2	2	7	15	24	33
Louisiana (s)	0	0	0	0	0	0	2	2	2	3	4
Georgia (s)	0	0	0	0	0	0	0	0.5	0.5	2	7
S. Carolina (s)	0	0	0	0	0	0	0	0	0	1	17
Alabama (s)	0	0	0	0	0	0	0	0	0	4	8
Mississippi (s)	0	0	0	0	0	0	0	0	0	0	3

(from Crain 1968: 233)

[1] Slight decreases in percentages the results of combining school districts. The number of school districts was generally decreasing during this period.

Table A.2: Numbers and Percentages of African-Americans Attending School with Whites

	South		South (without Texas and Tennessee)		Border		Border (without D.C.)	
	%	#	%	#	%	#	%	#
Year								
1954-55	.001	23	.001	20	NA	NA	NA	NA
1955-56	.12	2 782	.002	47	NA	NA	NA	NA
1956-57	.14	3 514	.002	34	39.6	106 878	18.1	35 378
1957-58	.15	3 829	.005	109	41.4	127 677	25.2	57 677
1958-59	.13	3 456	.006	124	44.4	142 352	31.1	73 345
1959-60	.16	4 216	.03	747	45.4	191 114	35.5	117 824
1960-61	.16	4 308	.02	432	49.0	212 895	38.7	131 503
1961-62	.24	6 725	.07	1 558	52.5	240 226	42.8	151 345
1962-63	.45	12 868	.17	4 058	51.8	251 797	43.7	164 048
1963-64	1.2	34 105	.48	11 619	54.8	281 731	46.2	182 918
1964-65	2.3	66 135	1.2	29 846	58.3	313 919	50.1	207 341
1965-66	6.1	184 308	3.8	95 507	68.9	384 992	64.1	275 722
1966-67	16.9	489 900			71.4	456 258		
1968-69	32.0	942 600			74.7	475 700		
1970-71	85.9	2 707 000			76.8	512 000		
1972-73	91.3	2 886 300			77.3	524 800		

(from Rosenberg 1991: 50)

Appendix B

Table B.1 Demolinguistic Data

Province	Year	French mother tongue (FMT)[a]	FMT/ Total Population (%)	s. 23 eligible students[b]	s.23 eligible students w FMT[c]	Total student pop., 1986 and 1996[d]
BC	1976	38 430	1.6			
	1986	45 845	1.6	14 815	2 602	483 253
	1996	56 755	1.5	14 075	2 778	616 891
AB	1976	44 400	2.4			
	1986	56 245	2.4	21 093	5 318	438 183
	1996	55 290	2.1	19 208	4 201	514 566
SK	1976	26 705	2.9			
	1986	23 720	2.3	10 722	1 762	196 291
	1996	19 900	2.0	7 449	1 265	196 405
MB	1976	54 745	5.4			
	1986	51 775	4.9	17 754	6 681	200 295
	1996	49 100	4.5	15 056	5 738	202 693
ON	1976	462 075	5.6			
	1986	484 265	5.3	135 612	70 462	1 674 553
	1996	499 690	4.7	117 127	58 111	1 854 651
NB	1976	223 785	33.0			
	1986	237 570	33.5	57 331	46 350	140 804
	1996	242 410	33.2	46 593	37 892	125 618
NS	1976	36 870	4.5			
	1986	35 810	4.1	10 516	3 791	161 478
	1996	36 310	4.0	9 701	3 591	154 594
PE	1976	6 545	5.5			
	1986	5 920	4.7	2 280	706	24 938
	1996	5 720	4.3	1 813	632	24 782
NF	1976	2 755	0.5			
	1986	2 670	0.5	1 117	267	130 466
	1996	2 440	0.4	898	230	99 627
Totals	1976	856 350	5.1			
	1986	943 820	5.0	271 240	137 939	3 450 261
	1996	967 615	4.5	231 991	114 438	3 789 827

[a] From Martel (1991, 2001). Beginning in 1986 Statistics Canada allowed for more than one response to mother tongue. For comparisons with previous years, Statistics Canada adds the total number of respondents who reported one mother tongue, to one half of those who reported two mother tongues (French and English), and to one third of those who reported three mother tongues (one of which was French). Approximately one-third of these individuals do not speak French in the home.
[b] From Martel (2001). These figures (for ages 6-17 inclusive) include only those students eligible under s.23(1)(a) of the Charter- parents who are citizens with French as a mother tongue (or one of the mother tongues). Martel argues that those who qualify under s.23(1)(b) and s.23(2) are hard to quantify and are likely to be a very small portion of those who generally qualify under s.23.
[c] From Martel (2001).
[d] Special tabulations by Statistics Canada of children aged 6-17 years used in Martel 2001.

Table B.2- OLME Statistics – Selected Years- 1976-1998[a]

	1976-77	*1981-82*	*1984-85*	*1986-87*	*1988-89*	*1990-91*	*1992-93*	*1994-95*	*1996-97*	*1997-98*
BC - FFL Enrollment Total	0	785	1,362	1,803	1,916	2,047	2,020	2,628	2,766	2,860
BC FFL Schools Total	0	20	30	35	36	44	42	51	56	54
BC French Schools	0	0	1	2	3	4	4	4	4	4
BC – French School Enrollment	0	0	160	357	478	693	716	803	809	840
AB – FFL Enrollment Total	n/a[b]	n/a	1,154	1,595	2,036	2,548	2,483	2,810	3,125	3,033
AB FFL Schools Total	n/a	n/a[c]	10	17	20	22	25	29	26	24
AB French Schools	0	0	2	2	3	6	10	10	13	17
AB - French School Enrollment	0	0	367	526	943	1,474	1,775	1,811	1,527	2,246
SK – FFL Enrollment Total	n/a	n/a[d]	832	1,164	1,254	1,076	1,190	1,100	1,044	1,416
SK FFL Schools Total	n/a	5[e]	14[f]	14	12	10	11	13	12[g]	17
SK French Schools	n/a	2[h]	2	3	3	9	10	10	12	12
SK – French School Enrollment	n/a	n/a	n/a	166	266	683	843	909	879	845
MB - FFL Enrollment Total	n/a[i]	6,411	5,547	5,364	5,355	5,464	5,323	5,414	5,283	5,241
MB FFL Schools Total	n/a[j]	41	30	30[k]	31	31	28	28	29	29

	1976-77	*1981-82*	*1984-85*	*1986-87*	*1988-89*	*1990-91*	*1992-93*	*1994-95*	*1996-97*	*1997-98*
MB French Schools	10	13	14	15	15	15	17	20	23	23
MB – French School Enrollment	n/a	n/a	n/a	3,230	3,170	3,285	3,672	3,897	4,477	4,456
ON - FFL Enrollment	106,099	94,557	90,854	91,728	93,515	96,340	95,965	97,173	98,495	95,026
ON FFL Schools Total	360	374	354	360	360	402	374	407	417	441
ON French Schools	324	314	313[l]	313	331	350	356	361	363	364
ON – French School Enrollment	n/a	n/a	n/a	72,555	76,186	76,441	77,303	76,629	75,096	75,200
NB - FFL Enrollment	56,399	48,614	47,077	46,086	45,308	44,432	46,700	45,298	43,259	42,187
NB FFL Schools Total	187	157	157	153	152	148	143	132[m]	115	109
NB French Schools	166	152	151	150	152	148	142	132	115	109
NB – French School Enrollment	n/a	n/a	n/a	43,737	45,396	44,432	43,686	42,248	40,144	39,164
NS - FFL Enrollment	5,587	5,308	4,273	3,840	3,236	3,487	3,381	3,752	3,927	4,095
NS FFL Schools Total	28	31	23	20	18	17	18	19	18	21
NS French Schools	0	0[n]	10°	12	12	10	12	11	11	11
NS – French School Enrollment	0	0	n/a	1,959	1,990	1,777	2,067	2,457	2,821	2,964

	1976-77	*1981-82*	*1984-85*	*1986-87*	*1988-89*	*1990-91*	*1992-93*	*1994-95*	*1996-97*	*1997-98*
PE - FFL Enrollment Total	**664**	**529**	**511**	**497**	**514**	**554**	**585**	**631**	**657**	**624**
PE FFL Schools Total	**2**	**3**	**3**	**2**	**2**	**2**	**2**	**2**	**2**	**2**
PE French Schools	**n/a**	**n/a**	**n/a**	**2**	**2**	**2**	**2**	**2**	**2**	**2**
PE – French School Enrollment	**n/a**	**n/a**	**n/a**	**497**	**507**	**554**	**608**	**631**	**652**	**623**
NF - FFL Enrollment Total	**200**	**127**	**84**	**74**	**230**	**257**	**258**	**256**	**275**	**267**
NF FFL Schools Total	**3**	**2**	**2**	**2**	**4**	**5**	**5**	**5**	**5**	**5**
NF French Schools	**0**	**0**	**0**	**0**	**1**	**1**	**1**	**2**	**2**	**2**
NF – French School Enrollment	**0**	**0**	**0**	**0**	**47**	**61**	**62**	**137**	**143**	**136**
Total - FFL Enrollment Total	**n/a**	**n/a**	**n/a**	**152,151**	**153,364**	**156,205**	**157,905**	**159,062**	**158,831**	**154,749**
Total FFL Schools Total	**n/a**	**n/a**	**n/a**	**632**	**635**	**681**	**648**	**686**	**679**	**702**
Total French Schools	**n/a**	**n/a**	**n/a**	**499**	**522**	**545**	**554**	**552**	**545**	**544**
Total French School Enrollment	**n/a**	**n/a**	**n/a**	**123,027**	**128,983**	**129,400**	**130,732**	**129,522**	**126,548**	**126,474**

[a]There are no figures for the 1982-83 and 1983-84 years due to the lack of available data. Until the federal government required the provinces to distinguish between French immersion and French first-language programs for statistical purposes under the 1983 OLE protocol agreement, statistical data was unreliable. (See the numerous notes below). The 1978 and 1982 CMEC Reports provided some useful pre-1982 data, however. After 1986, I followed the years selected by Martel (1991, 2001) because she provides reliable data on the number of homogeneous French schools and enrolments in those schools for selected years.

Hence, Martel (1991, 2001) is relied upon heavily for post-1986 data. Other sources of data were the CMEC Reports, particularly 1978 and 1982, and the Annual Reports of the Commissioner of Official Languages.

[b] Alberta did not officially distinguish between FFL and French immersion programs until 1983-84, thereby precluding accurate statistical data on FFL programs.

[c] According to the 1983 CMEC Report, there were approximately 6 schools that offered predominately French instruction. Although Alberta did not officially distinguish between FSL and FFL programs, it is likely that a number of these 6 schools offered some FFL instruction.

[d] The 1983 CMEC Report noted that 1 403 French-speaking students were enrolled, but "many" were in Type B French immersion programs (see p. 161). It was not until 1983-1984 that Saskatchewan began to separate out those figures.

[e] This figure comes from the 1983 CMEC Report (p. 60), where it reports that 5 schools offered the Type A French program. The 1978 FFHQ Report also had 5 non-homogeneous schools listed for Saskatchewan.

[f] However, Foucher (1985) reports only 9 "Type A" schools.

[g] The 1992 COL Report lists 11 schools, while Martel (2001) lists 12 schools, all homogeneous. In this instance, Martel's figures were used.

[h] This comes from a description of the situation in Saskatchewan by Julien (1995: 122-123).

[i] The 1978 CMEC Report stated that 9 833 students were enrolled in French language programs in Manitoba, approximately 30% were Anglophones (p. 74). Of the 9 833 total, 6 300 had 51% or more instruction in French.

[j] The 1978 FFHQ Report has 19 mixed schools plus 10 homogeneous French schools. The 1978 CMEC Report has 10 homogeneous French schools, but states that there are 49 mixed schools (p. 73-74).

[k] Martel (1991) reports a total of 34 FFL schools (p. 117)

[l] This is an approximate value.

[m] The 1995 COL Report records 131 schools, but Martel (2001) has 132. Martel's figure is used. The same discrepancy of 1 school happens in future years and Martel's figure is used.

[n] The CMEC reports that there were 16 elementary schools that offered mostly French-language instruction, but also provided instruction in English for small groups of Anglophones (p. 183).

[o] The 1984 COL Report states that the Minister designated 10 schools as "Acadian" schools for the 1984 school year (p. 199). However, Foucher (1985: 409) has 16 homogeneous schools listed for Nova Scotia.

Table B.3- OMLE POLICY DEVELOPMENT

Table B.3 was prepared using the following sources: Council of Ministers of Education, Canada, *The State of Minority Language Education in Canada* (1978 and 1983); Foucher, *Constitutional Language Rights of Official-Language Minorities in Canada* (1985); Martel, *Official Language Minority Education Rights in Canada* (1991); Ducharme, *Status Report: Minority-Language Education Rights* (1996); Commissioner of Official Languages, *School Governance: The Implementation of Section 23 of the Charter* (1998); Commissioner of Official Languages, *Annual Reports* (1978-2000); interviews (see Appendix D); judicial decisions (see Table B.4(b)); government documents (see bibliography); and provincial legislation and regulations (see bibliography).

Law, Regulations, Policy (Pre 1977/78)

Pre-1977/78	**Instruction**	**Homogeneous Facilities**	**Management**	**Other/ Comments**
B.C.	**Discretionary** -no mention in law or policy	**No** -immersion programs only	**No**	
Alta.	**Discretionary**[a] -a school board could initiate a French-language program subject to approval by the Minister.	**No** -No distinction between immersion and French as a first language	**No**	
Sask.	**Discretionary** -School board could start a French-language program subject to regulations of the Minister.	**No** -Schools could be designated by Minister to use French instruction for percentage of day (not restricted to francophones)	**No**	

Pre-1977/78	Instruction	Homogeneous Facilities	Management	Other/ Comments
Man.	**Qualified Mandatory** -in 1970 English and French are declared to be official languages of instruction -by 1970 law, if 28 pupils at elementary level or 23 at secondary level so request, otherwise Minister's discretion.	**Qualified No** (*de facto in limited areas*) -French-language program open to non-francophones and francophones are allowed into French immersion; however, some schools de facto French.	**Qualified No** (*de facto in certain area*) -Only one board effectively controlled by francophones	-French-language Advisory Committee in Dept. of Education
Ont.	**Qualified Mandatory** -1974 Act stipulates that, upon written request, French-language instruction be offered by a school board if it believes that 25 students per class (elementary) or 20 students per class (secondary) can be assembled. Otherwise French-language instruction is offered on a discretionary basis. or where numbers warrant.	**Qualified Yes** -French Language Instructional Unit (FLIU) is a class, group of classes or school that is accessible primarily to students whose first language is French. -some FLIUs were in separate facilities, but, especially at the secondary level most existed in mixed schools.	**Qualified No** (*de facto possible in limited number of areas,otherwise advisory committees*) -when a FLIU is established a French-language advisory committee must be created. -de facto control possible in a small number of districts	-supplemental grants available for establishing and maintaining FLIUs -transportation grants also available for boards to send students to an FLIU in another district. -Advisory committee in Dept. and Languages of Instruction Commission help to plan and solve problems involving French-language instruction.
N.B.	**Qualified Mandatory** -Official Languages Act stipulates that French will be language of instruction when francophones are a majority, mixed schools will exist where there is a mix of French and English, and the Minister may make it possible for a language to be taught when numbers do not warrant a homogeneous or mixed school.	**Qualified Yes** -most schools attended by francophones are homogeneous French, though some mixed-language schools and French programs not limited to francophones.	**Qualified No** (*de facto in areas*) -demographic make-up of N.B. made it such that francophones effectively controlled certain school boards.	

Pre-1977/78	Instruction	Homogeneous Facilities	Management	Other/ Comments
N.S.	**Discretionary** -no law or regulations govern French language education, but French-language program exists within Dept. of Education	**No** -some schools at elementary level mostly French schools but do teach some English-speaking children, other schools are mixed or only offer limited French instruction	**No**	
P.E.I	**Discretionary** -no reference to language of instruction in law or regulations	**Qualified No** (*de facto in some cases*) -two schools in the province provide instruction in French to French-speaking Acadians	**Qualified No** (*de facto in one area*) -one school board effectively controlled by French-speaking Acadians	
Nfld.	**Discretionary** -no law or regulations governs French-language instruction	**No** -one elementary school and one secondary school do offer French-language programs	**No**	

[a] According to Alberta's 1971 *School Act*, if a local advisory board requested that a school board establish a French program the board was obliged to establish one as soon as the board determined that it was practical (subject to Ministerial approval). Regulation 250/76 specified that a School Division could establish a program in French subject to the Minister's approval. The School Division had to demonstrate to the Minister that it had considered the interests of students who wished to continue receiving their instruction in English. English was required to be taught for one hour per day for grades 1 and 2, decreasing thereafter (Foucher 1985: 268-278)

Law, Regulations, Policy (1977/78 to 1981-82)

1977/78-1981/82	Instruction	Homogeneous Facilities	Management	Other/ Comments
B.C.	**Qualified Mandatory** -In 1978 B.C. announced a policy whereby school boards must offer a French language program (incorporating a core French curriculum developed by province) if requested by 10 francophone elementary school pupils -1981 Circular 146 better defines French language programs and states that the French-language core curriculum (PCDF) is primarily for, but not restricted to francophones.	**No** -the French-language core curriculum was offered in predominately English-speaking schools, in mixed English and French-immersion schools and, in limited instances, in predominately French-speaking schools. -English-speaking students could be admitted to program if no immersion classes are available -francophones could enroll in immersion programs	**No**	-School board must request Minister to consider implementing French program if fewer than 10 elementary students ask for the program. -Extra funding provided by the Province for Boards to establish French program. -No special policy on transportation.
Alta.	**Discretionary** -1978 policy indicating support for French language (and other minority language) instruction -1978 policy, put in legislation in 1980, stipulated that a school board had to offer a French language program if asked by a local advisory council and if the school board deemed it feasible (subject to Ministerial regulations and approval).	**No** -in 1978 government said that it would encourage a proper climate for education in French and/or other languages, but reaffirmed policy of making French-language programs accessible to students regardless of mother tongue. No distinction between French immersion and French as first language is made.	**No**	-extra funding available to districts who provide extended, bilingual or immersion French language programs -Language Services Branch established in 1978. Among other things, responsible for planning and developing French curricula.

1977/78-1981/82	Instruction	Homogeneous Facilities	Management	Other/ Comments
Sask.	**Qualified Mandatory** -1978 amendments authorize a school board, subject to regulations, to offer instruction in a language other than English in specified schools after passing a resolution; stipulates that, subject to conditions in regulations, the Lt.-Gov. in Council shall designate schools where French will be the principal language of instruction subject; and, at the request of parents, a child is entitled to receive instruction in a designated school. Regulation 118/79: Minister must designate a school if: a) requested by a school division or local board or local parent's council (representing 15 pupils) and b) there will be 15 pupils per class or the school will solely offer the designated program and the Min. considers the program to be viable. 1981 amendments required school boards to submit plans defining the implementation of a proposed designated program and required the Minister to specify grades of designation and the proportion of time in French. -transportation will be provided to a designated school in a different division if a student's division has no designated school.	**Qualified Yes** - Two types of designated schools that offer designated program: Type A: French is the language of instruction and most administration and activities emphasize French-Canadian culture; Type B: (bilingual/ immersion schools)- French is the language of instruction between 50 to 80% of the time. -Enrolment not restricted to francophones	**No** -School divisions effectively control administrative functions. Francophones *may* control local boards within divisions but they have limited power. Where no local boards exist, a parent advisory council will be established for designated schools.	-extra funding is available for designated programs. 1981 regulatory changes made school boards offering a designated program to recognize and plan for additional staff and resources and to provide an accounting of how money was spent on the designated program. -in 1980, the Official Min. Language Office was established in the Dept. of Education.

1977/78-1981/82	Instruction	Homogeneous Facilities	Management	Other/ Comments
Man.	**Qualified Mandatory** -according to 1980 amendments, if 23 pupils at elementary level or 23 at secondary level so request, otherwise Minister may instruct a board to provide French-language instruction. -some allowance for transportation provided to pupils if no French language program in the district.	**Qualified No** (*de facto in some cases*) -policy (1977) that French-language program open to non-francophones -in some cases French immersion classes are combined with French language classes or francophones forced to attend immersion classes; however, some schools de facto French. -1981 regulations allows Min. to allot the percentage of instruction time in French- high percentages require school to be administered in French.	**Qualified No** (*de facto in one area*) -see above	-extra funding available to boards providing French language instruction. -schools with over certain percentage of instruction in French must be administered in French
Ont.	**Qualified Mandatory** -see above	**Yes** -1979 policy statement reiterated call for more homogeneous FLIUs and provided extra funds to establish distinct "entities" for minority language education	**Qualified No** *(some de facto, also advisory councils)* -see above	-Since Sept. 1977 additional grants were made available to create more FLIUs and to improve conditions in mixed schools. More pedagogical resources also available. -Assistant Deputy Min. of Franco-Ontarian Education. In 1980 Council for Franco-Ontarian Education was established.

1977/78-1981/82	Instruction	Homogeneous Facilities	Management	Other/ Comments
N.B.	**Qualified Mandatory** -1981 amendments states that "School districts, schools and classes shall be organized on the basis of one or the other of the official languages of New Brunswick." -for francophones (anglophones) in school districts without a majority or minority francophone (anglophone) school board, an English (French) school board *may* offer classes in the minority language if so requested. Transportation is compulsory when no classes are available.	**Yes** -1981 amendments to the *Schools Act* states that "School districts, schools and classes shall be organized on the basis of one or the other of the official languages of New Brunswick." -A handful of mixed schools still exist but the classes themselves are homogeneous.	**Yes** -1981 amendments to the *Schools Act* organized school boards along linguistic lines. Also, the minister is required to establish a minority language school board if minority-language speaking parents of at least 30 elementary school children in a district request.	
N.S.	**Discretionary** -1981 amendments to the Education Act allowed the Minister, upon request from a *school board*, to designate a school an Acadian school "where there are sufficient number of pupils whose first language learned and still understood is French." -Min. could also prescribe ratio of French instruction	**Qualified Yes** -1981 amendments to the Education Act allowed the Minister, upon request from a school board, to designate a school an Acadian school "where there are sufficient number of pupils whose first language learned and still understood is French." -however, no designations took place until school boards and Minister agreed on guidelines in 1984.	**No**	-Advisory Committee established in Dept. of Education that included francophone representation

1977/78-1981/82	Instruction	Homogeneous Facilities	Management	Other/ Comments
P.E.I	**Qualified Mandatory** -1980 amendments to the School Act require school boards to offer minority language instruction according to regulations (where school boards believed that at least 25 pupils would be enrolled in three consecutive grades (1 to 9) and if "sufficient numbers" can be assembled grades 10-12). -If there are not sufficient numbers a board must provide transportation to a minority language program, offer an immersion program, or offer a minority language program.	**Qualified No** -no stipulation for homogeneous facilities but one French board operated a French school in accordance with 1980 amendments to the School Act.	**Qualified No** -1980 amendments to the School Act stipulate that a regional school board shall offer instruction in the language of the mother tongue (French or English) of majority of the students within the district. One board (Evangeline) was French. -However, Francophones in other districts have no management	
Nfld.	**Discretionary** -see above	**No** -see above	**No**	

Law, Regulations, Policy (1982/83 to 1983/84)

1982/83-1983/84	Instruction	Homogeneous Facilities	Management	Other/ Comments
B.C.	**Qualified Mandatory** -same as previous years (see above) except that French-language core curriculum (PCDF) extended to secondary level. However, there were difficulties in getting sufficient numbers to have the program offered at the secondary level.	**Qualified No** (*exist but no provincial policy*) -l' Ecole Anne Hebert first all-French school (Vancouver). (other schools mixed-anglophones could be admitted to program if no immersion classes are available and-francophones could enroll in immersion programs)	**No**	-Additional funding provided by the Province for the French-language program.[a] -parents unhappy with deficient transportation to French language instruction. -at department level a full time coordinator was appointed to look after French core program.
Alta.	**Discretionary** -see above -Regulation 490/82 reiterates that school boards wanting to deliver instruction in French submit a request to the Minister. Minimum requirements for English also set.	**No** -see above	**No** -see above	
Sask.	**Qualified Mandatory** -see above	**Qualified Yes** -see above	**No** -a contract between a Francophone parent committee of local school and Roman Catholic Board in Saskatoon delegates certain responsibilities to parent committee.	

1982/83-1983/84	Instruction	Homogeneous Facilities	Management	Other/ Comments
Man.	**Qualified Mandatory)** -see above	**Qualified No** (*de facto in certain areas*) -see above	**Qualified No** (*de facto in one area)* -see above	-French Education Bureau becomes division in Dept. of Education -new languages advisory committee (4 of 9 must be francophone)
Ont.	**Qualified Mandatory** -see above	**Yes** -see above	**Qualified No** *(de facto possible, also advisory councils)* -see above	-in response to Joint Committee Report, 1983 government white paper proposes amendments to eliminate "where numbers warrant" for instruction and to allow for minority language sections on majority boards. No action taken because of impending litigation.
N.B.	**Qualified Mandatory** -see above	**Yes** -see above	**Yes** -see above -regulations allow Min. to appoint minority-language advisory committees if there are not enough numbers for minority-language school boards	

1982/83-1983/84	Instruction	Homogeneous Facilities	Management	Other/ Comments
N.S.	**Discretionary** -see above	**Qualified Yes** -see above -guidelines put in place by Min. prescribing ratio of French instruction in Acadian schools	**Qualified No** *(de facto in one district)*	-in 1983 Min. of Education defined the role of the Acadian school as preserving and promoting the French-language and culture of Acadians in the province; and assisting the Acadians in benefiting from their language rights.
P.E.I.	**Qualified Mandatory** -see above	**Qualified No** -see above	**Qualified No** -see above	
Nfld.	**Discretionary** -see above -1982 policy statement claims that government supports and recognizes right of francophones to instruction in their mother tongue	**No** -see above	**No**	

[a] Foucher notes that some school boards in BC were taking advantage of this extra funding by eliminating immersion classes and then allowing English-speaking students who had been taking immersion classes into the French-language core program.

Law, Regulations, Policy (1984/85 to 1989/90)

1984/85-1989/90	Instruction	Homogeneous Facilities	Management	Other/ Comments
B.C.	**Qualified Mandatory** - *B.C. School Act* (1989) provides that children of entitled persons under section 23 of the Charter are entitled to receive their education in French and empowers regulations to be made concerning the exercise of that right. -*Circular 39* (1987) and later Regulation 265/89 requires the establishment of a French-language core program (PCDF) if requested by parents of 10 elementary school pupils or 15 secondary school pupils -Criteria for access to PCDF dependent on sec. 23 (1) (2) of the Charter of Rights -*Circular 39* also stated that transportation to French schools will be the same as transportation to English-language schools	**Qualified Yes** -*Circular 39* encourages "homogeneous facilities" where numbers warrant -in 1986 another French school opens (in Victoria) bringing total to 2 homogeneous schools.	**No** -*Circular 39* (1987) encourages school boards to help francophone parents to form Advisory Committees with responsibilities concerning PCDF. -1989 *School Act* calls for establishment of one parent advisory committee per school, hence minority-language committees are jeopardized.	-*Circular 39* emphasizes financial support for PCDF from both the federal government and the provinces. -Min. of Education, shortly after Mahe established a 17 person task force to study implementation of section 23

1984/85-1989/90	Instruction	Homogeneous Facilities	Management	Other/ Comments
Alta.	**Discretionary** -Nov. 1984 Min. of Education sends a letter to school boards indicating that the government is prepared to cooperate with boards to develop and implement French-language education programs. -1988 *School Act* recognizes the official language minority's right to instruction under s.23 of the Charter "wherever in the Province those rights apply" and that regulations could be made to give effect to those rights. However, no regulations developed and decision to offer instruction left to school boards.	**Qualified Yes** -1988 Language Education Policy discusses factors school boards should consider when deciding to establish a French-language school for section 23 parents. -homogeneous French elementary schools opened in Edmonton and Calgary (1984) and Peace River (1988).	**No** -see above	-1988 Language Education Policy for Alberta indicates certain areas of the province where the provision of French-language instruction likely warranted by the number of eligible section 23 children. Government promises to help with curriculum and help boards to decide whether to provide instruction and facilities, but decision is still left to the school boards.
Sask.	**Qualified Mandatory** -see above	**Qualified Yes** -see above	**No** -in 1984 Justice Min. declares current legislative framework does not violate Charter.	-in 1988 Sask. and federal government conclude agreement that includes funds for the development of francophone school management. -1989 Gallant committee recommends establishing Francophone boards, but government delays implementation.

1984/85-1989/90	Instruction	Homogeneous Facilities	Management	Other/ Comments
Man.	**Qualified Mandatory** -see above -Regulation 469/88 (Nov. 1988) specifies time allotments for French and essentially creates two types of French mother tongue programs- one with 75% or more of the school day in French and one where the school day is 50% in French.	**Qualified Yes** -in 1984 a policy paper prepared by the French Education Bureau recognizes the Franco-Manitoban school and its specific mission, but school boards still have discretion concerning whether a school will be homogeneous or not.	**Qualified No** *(de facto in one area)* -see above	
Ont.	**Mandatory** -Education Act amended (Dec. 1984) to guarantee that children eligible under section 23 of the Charter receive French-language instruction -If a board does not offer French-language instruction, instructional services must be purchased from another board (transportation must also be provided or funded)	**Yes** -see above	**Yes** -Bill 75 came into effect in 1986. -school boards with French-language instructional units (FLIUs) shall have proportional and guaranteed representation of francophones -School boards without FLIUs but who provide French-language instruction through agreements with other boards shall provide French-language advisory committees[a] -In 1988-89 a French-language School Board is created for Metropolitan Toronto and a French-language board is created for the Ottawa-Carleton area	-French-language sections of school boards called French-language education councils (FLEC) -In 1985 and 1986 questions are raised about the effects of school financing and changes to the system of financing for francophone schools.

1984/85-1989/90	Instruction	Homogeneous Facilities	Management	Other/ Comments
N.B.	**Qualified Mandatory** -see above -conflict over whether English-language boards could provide French immersion programs to francophones	**Yes** -see above	**Yes** -see above	-between 1984 and 1986 three Francophone minority school boards are changed to regular school boards.
N.S.	**Qualified Mandatory** -Education Act, 1989 specifies that where numbers warrant French-language instruction shall be provided to the children of entitled persons-eligibility determined according to language taken from section 23 (numbers to be determined by regulations, but no regulations)	**Yes** -number of Acadian schools designated by Minister beginning in 1984 -Education Act, 1989 specifies that Min. shall recommend the establishment of Acadian schools "where numbers warrant" subject to regulations (but no regulations at time) -while Acadian schools provide a French program designed for francophones, a number of Acadian schools are still mixed schools, particularly at the secondary level.	**Qualified No** -1986 Education Act allows Minister to designate an Acadian school district. Up to 1989 no districts designated though in practice Clare-Argyle district Francophone.	

1984/85-1989/90	Instruction	Homogeneous Facilities	Management	Other/ Comments
P.E.I	**Qualified Mandatory** -1989 amendments to the School Act (introduced in 1988) stipulate that where numbers warrant French language instruction will be provided to children of citizens who qualify under section 23 of the Charter. (new regulations to that effect introduced in 1990) -French language program specifically defined as not including French immersion	**Yes** -1989 amendments to the School Act stipulate that where numbers warrant French language instruction will be provided in French language educational facilities	**Yes** -1989 amendments to the School Act state that those who have rights to French instruction under section 23 have the right to participate in French language instruction program development and delivery. Regulations created to that effect in 1990.	
Nfld.	**Discretionary** -1984 position paper and 1986 Report of the Policy Advisory Committee on French Programs recommends French language instruction for francophones where numbers warrant -drafts (1990) of amendments to the School Act have provisions for guaranteeing French language instruction	**Qualified No** -1986 Report of the Policy Advisory Committee on French Programs recommends French instruction in homogeneous facilities -first fully homogeneous French school opened at Mainland in 1989.	**No** -1986 Report of the Policy Advisory Committee on French Programs recommends that French facilities be established within existing school boards.	

[a] Specifically, French-language advisory committees are to be established when a board does not operate a FLIU but has entered into an agreement to provide for French-language instruction with another board and the number of minority students is less than 300 (or 10 per cent of total enrolment of the board) and at least 10 French-speaking ratepayers call for the establishment of the committee.

Law, Regulations, Policy (1990/91 to 1992/93)

1990/91-1992/93	Instruction	Homogeneous Facilities	Management	Other/ Comments
B.C.	**Qualified Mandatory** -see above	**Qualified Yes** -see above	**No** -see above	-political leaders pledged support for francophone school management late in 1991 during the provincial election
Alta.	**Discretionary** -see above	**Qualified Yes** -see above (a few more homogeneous schools open, while in some communities requests for homogeneous schools are rejected)	**No** -June 1992 bill is tabled by Min. of Education that would provide for Francophone school boards in some parts of the province (not passed until late 1993)	-following Mahé government releases a discussion paper -a task force on school management calls for francophone school boards
Sask.	**Qualified Mandatory** -see above	**Qualified Yes** -see above	**No** -bill to allow for francophone school management introduced in 1992 but not given third reading until 1993	
Man.	**Qualified Mandatory** -see above	**Qualified Yes** -see above	**Qualified No** (*de facto in one area)* -see above	-Gallant Committee established in 1990, recommends in 1991 that francophones be granted school management

1990/91-1992/93	Instruction	Homogeneous Facilities	Management	Other/ Comments
Ont.	**Mandatory** -see above	**Yes** -see above	**Yes** -see above -francophone school board for Prescott-Russell region created by regulation in 1991	-operational difficulties arising from francophone school management led to the establishment of task forces by both Liberal and NDP governments in 1990
N.B.	**Qualified Mandatory** -see above -in addition to providing for minority language education boards, the Education Act, 1992 allowed for the designation of a community school to operate in an official language other than the language of the majority board (when no minority board existed for the area).	**Yes** -see above	**Yes** -see above (number of homogeneous francophone boards reduced to 6 in 1992 by regulation) -minority-language designated community schools would be administered by minority parents subject to general policies of the majority school board	
N.S.	**Qualified Mandatory** -see above	**Yes** -see above	**Qualified Yes** -1991 legislation provides for the creation of school councils to manage French schools with all the powers of a school board	

1990/91-1992/93	Instruction	Homogeneous Facilities	Management	Other/ Comments
P.E.I	**Qualified Mandatory** -1990 regulations pursuant to 1989 amendments that guaranteed minority language instruction where numbers warranted (see above) specify that "where numbers warrant" for instruction purposes means at least 15 children entitled under section 23 over 2 consecutive grade levels -regulations also discuss qualifying criteria such as proximity of existing classes and facilities, transportation concerns, potential for future admissions, etc.	**Yes** -1990 regulations pursuant to 1989 amendments that guaranteed educational facilities "where numbers warrant" state that the Minister may designate a school a French school (a building or part of a building) taking into consideration the number of students, number of grade levels and the reasonable assembly of students in one location.	**Yes** -1990 regulations pursuant to 1989 amendments creates a province-wide school board controlled by francophones to administer French language instruction	-conflict soon arose between Minister of Education and the French School Board over the Minster's refusal to approve the creation of a French school at Summerside
Nfld.	**Discretionary** -the Schools Act, 1991 provided that the children of entitled persons under section 23 may receive instruction in French wherever the right applies in the province and that regulations can be made to that effect (no regulations created)	**Qualified No** (*one exists but no policy*) -see above	**No** -see above	-Ministerial committee established on how to effectively implement rights under section 23.

Law, Regulations, Policy (1993/94 to 1999-00)

1993-94/ 1999-00	Instruction	Homogeneous Facilities	Management	Other/ Comments
B.C.	**Mandatory** -School Act, 1996 provides that an eligible child (under section 23) of school age who resides in a francophone educational authority is entitled to enroll in a French-language program offered by the authority (francophone authority only covered Vancouver/Lower Mainland and Victoria regions but that expanded in 1998 and was again expanded to cover the whole province in 1999)[a]	**Yes** -The School Act, 1996 defines a "francophone school" as a body of francophone students that is organized as a unit by a francophone education authority under the supervision of a francophone administrative officer. Although there is some ambiguity about whether the legislation specifically requires distinct physical facilities, the reality appears to be that the francophone schools operate in distinct physical settings. -Francophone Education Program restricted to those eligible under section 23 or to landed immigrants who would qualify under section 23 if approved by Francophone Education Authority	**Yes** - Regulations in 1995 established a Francophone Education Authority (FEA) for Vancouver/Lower Mainland and Victoria -1996 legislation specifically provided for the creation of FEA -regulations extended FSA in March 1998 and covered the entire province as of July 1, 1999	-government has consulting firm provide study on francophone school management in 1993

1993-94/ 1999-00	Instruction	Homogeneous Facilities	Management	Other/ Comments
Alta.	**Mandatory** -School Amendment Act 1993 provides that if a pupil eligible under section 23 resides in an area controlled by a Francophone Regional School Authority (school board) then that pupil is entitled to receive instruction in French -Extension of Francophone Authorities in 2000 makes access to instruction mandatory.[b]	**Yes** -Francophone school authorities responsible for ensuring that section23 rights are protected in a district—includes running schools (and designating whether the school will be public or separate (Catholic)).	**Yes** -1993 School Amendment Act allows the Min. to designate Francophone Education Regions and to create a Regional Authority (school board) for such regions or a Coordinating Council for such regions -2000 extension of Francophone Authorities	-Oct. 20, 1993 federal and Alberta government agree on funding for French-language education. The federal share is $24 million, $5.8 million of which is earmarked for implementing school management structures.
Sask.	**Qualified Mandatory** -Education Act 1993 recognizes the rights of children of parents entitled under section 23 to attend a "fransaskois school" in a "francophone education area" -if no Francophone instruction program is available in an area, parents of eligible children can apply to the Conseil général for the provision of a program which must consider such factors as the proximity of a fransaskois school, demand for the program and costs. The Conseil général can then pass an application to the Min. who has discretion as to whether a school or program will be designated according to regulations.	**Yes** -The Education Act defines a "fransaskois school" as a school in a Francophone Education Area wherein the French language is used and developed as a first language of instruction and in school activities and the language of communications with pupils and parents is predominately French. Although the general definition of a "school" in the Act would potentially allow for shared facilities that housed distinct French and English components, fransaskois schools seem to be homogeneous schools with a distinct physical setting.	**Yes** -under authority of the Education Act, the Min. of Education in 1994 ordered the creation of eight Francophone education areas each with a French school board (conseil scolaire)[c] -1997 it was announced that the rather complex scheme introduced in 1994 would be changed and that in 1999 there would be one French school board (Conseil scolaire fransaskois) for the entire province	- On Oct. 22, 1993 a special Canada-Saskatchewan agreement was signed providing $21.9 million over 6 years to implement school management ($12.3 million of which was the balance from the 1988 agreement that was withheld by the federal government because of lack of action by Saskatchewan).

1993-94/ 1999-00	Instruction	Homogeneous Facilities	Management	Other/ Comments
Man.	**Qualified Mandatory** -1993 amendments to the School Act defines entitled persons eligible for francophone instruction similarly to section 23 (though allows access to resident non-citizens and distinctly eliminates possibility of anglophones/ French immersion students qualifying). -Francophone School Board will provide a Francophone program (or a "programme d' accueil" designed to prepare eligible students for the Francophone program) "where numbers warrant based on the number of pupils expected to take advantage of the program." No further details concerning numbers are provided, though the Francophone School Board is also required to accept students who are not residents of the district if it is practical to do so. -Another school district may not discontinue a French program unless it is transferred to the Francophone Board or the Min. provides permission. Nothing in the Act or regulations stipulates that a majority board must establish a new French program or enter into agreement with the Francophone School Board.	**Yes** -1993 Amendments provide that the Francophone school board has a duty to provide instruction in "such minority language facilities as may be required." -after consultations with parents, all of the homogeneous French schools at the time were transferred to the French School. -The Act provides that eligible parents are allowed to request a French program be transferred to the Francophone School Board and that the school premises are also transferred or that a shared use arrangement be made. Requests are referred to a five-person Board of Reference which, among other things, determines the level of support amongst entitled persons for the Francophone program. The Min. is obliged to follow the recommendations of the board. -The legislation allows, based on the discretion of the Minister, for the shared use of facilities and for the Francophone School Board to enter into agreements to provide the Francophone program in schools operated by a majority school board.	**Qualified Yes** -Under the authority of the Act, a regulation created Francophone School Board in January 1994, but does not have exclusive authority over FFL instruction. -The Division does not cover the entire province though provisions were made to try to include pockets of territory where Francophones were present. The Division is divided into four regions with committees that elect trustees to the board. -initial consultations with eligible parents determined which schools would be controlled wholly or partially by the French School Board- all homogeneous schools were transferred but less than half of mixed schools were transferred. After a two year period parents could ask for a transfer to take place (see over). No opting out is allowed once a decision to opt-in has taken place.	-School Management implementation Task Force led by Alfred Monnin (former CJ of Man. Court of Appeal) who in late 1980s had chaired meetings about French instruction and management -split in town of Laurier after majority of entitled parents decided not to join Francophone board -entitled parents in St. Claude dissatisfied with having children bused to school under control of French board. Local school board refuses to enter into an agreement with the French board for providing instruction in their facilities and Min. would not force the board to do so. -Francophones parents concerned about the need for more funding for the Francophone board. -Nov. 5, 1994 Canadian Heritage and Manitoba agree to school management funding program worth $15 million

1993-94/ 1999-00	Instruction	Homogeneous Facilities	Management	Other/ Comments
Ont.	**Mandatory** -children of parents eligible under section 23 ((1) and (2) only) are entitled to receive instruction from a French-language school board (either Catholic or public). Other boards are required at the request of one eligible parent to establish a French-language Instructional Unit (FLIU) or to enter into agreement with another board to have such instruction provided	**Yes** -FLIUs are homogeneous though in limited cases are not provided for in distinct physical settings -Boards may allow students who are not "French-speaking persons" into FLIUs only after approval from an admissions committee	**Yes** -legislative changes in 1997 allowed for the creation of French-language school boards, which were created by regulation in 1997. 4 public boards and 8 separate (Catholic) boards were created -French boards cover nearly all of Ontario, but in districts without such boards ten "French-language rights holders" can petition the local board about a variety of issues. If a board refuses the proposal it goes to the Languages of Instruction Commission which may appoint a mediator to resolve the issue.	-Royal Commission on Learning recommended changes to school governance for francophones. Soon after Sweeney Report recommends network of French-language school boards.

1993-94/ 1999-00	Instruction	Homogeneous Facilities	Management	Other/ Comments
N.B.	**Mandatory** -Education Act, 1997 guarantees that a child of parents who have rights under section 23 is entitled to instruction in the French language. The Act also generally guarantees access to instruction in the official language of the student (proficiently bilingual students are allowed to receive instruction in either language).	**Yes** -see above	**Yes** -Education Act, 1997 changed management structure. Three levels- parent advisory committees for each school, parent advisory councils for each school district, and one English and one French- school board for the entire province who make wide-ranging decisions "in conjunction with the Minister." -The Education Act, 1997 provides for an administrative hierarchy that gives the Dept. of Education considerable influences at all administrative levels	

1993-94/ 1999-00	Instruction	Homogeneous Facilities	Management	Other/ Comments
N.S.	**Qualified Mandatory** -regulations under the Education Act state that when a Conseil scolaire is considering a new French program it "shall consider the proximity of existing classes or facilities, expected numbers of children of entitled persons and other pertinent factors" and it shall obtain agreement of the Min. as to the projected numbers and the Ministers approval that a class can be reasonably assembled. -According to the regulations, the Minister considers proximity of facilities, number of children of entitled parents in an area, transportation distances, etc.	**Yes** -see above -Act also gives Minister the power to determine the location of Acadian schools and the use of transportation to convey eligible students to French-first-language programs	**Yes** -Education Act 1995-96 gave the Minister the authority to create a "conseil scolaire acadien provincial" mandated to deliver and administer all French-first-language programs in the province (when created this body replaced all former administrative structures for French-first-language programs) -existing homogeneous schools were transferred to the Conseil scolaire, but shared facilities may remain shared with the costs being split between boards. -Act also allows for the creation of school advisory councils for all schools	-1995 White Paper on the Restructuring of the Education System proposed a French school board for the province -Oct. 1995 Nova Scotia and federal government ratify a special agreement for school management with a federal contribution of $3 million
P.E.I	**Qualified Mandatory** -see above	**Yes** -see above	**Yes** -see above	

1993-94/ 1999-00	Instruction	Homogeneous Facilities	Management	Other/ Comments
Nfld.	**Qualified Mandatory** -School Act, 1996 provides that "where an individual has rights under section 23 of the Charter to have his or her children receive instruction in French, the children of that individual shall receive that instruction in accordance with those rights wherever in the province those rights apply."	**Yes** -School Act, 1996 defines a French-first-language school as one established and maintained by the conseil scolaire. (However, the general term "school" in the Act is broad enough to include a French-first-language program in a shared building).	**Yes** -School Act, 1996 provides for a conseil scolaire with province wide jurisdiction and for conseils d'ecole to help administer each French school and to advise the conseil scolaire	-report of ministerial committee submitted in Sept. 1993 preceded introduction of changes to School Act in 1996.

[a] Prior to the extension of Francophone school authorities to cover the province, an eligible student who wanted to enroll in a French-language program offered by a Francophone school authority outside his/her area of residence had to receive approval from the school board in which he/she resided.

[b] Section 6 of the current Alberta School Act states that the Francophone Authorities shall enroll a section 23 eligible student in a school if the school is within the distance prescribed by the Authority, otherwise the Authority may enroll the student. Section 10 states that section 23 rights holders have the right to instruction if they are enrolled in a school run by a Francophone regional authority. The combined reading of these two sections suggests that access to FFL instruction is not necessarily guaranteed by law for section 23 eligible students, but the Director of French Language Services for Alberta Learning stated that the expectation is that Francophone Authorities will enroll all eligible section 23 students wanting an FFL education (Personal Communication with Gerard Bissonnette).

[c] Under the Act, new Francophone education areas and school boards could be created when two or more eligible parents apply to the Conseil général (the body that oversee the system of French-language education), the Conseil général makes an assessment based on such factors as the proximity of fransaskois schools or potential schools, demand and costs. If the Conseil général recommends the establishment of a Francophone education area and conseil scolaire then the Min. must create them. (A ninth conseil scolaire was created for Zenon Park). – This system was altered beginning in 1997

TABLE B.4(a)- Legal Mobilization by Province

	pre-1977	1977-1984	1984-1990	1991-2001
BC			-English-speaking parent tries to use section 23 to have French immersion programs provided (BC1) -(1989) litigation initiated by francophone group under section 23 in 1989 but was suspended after government promised a task force to review the French-language education, particularly management by francophones (BC2)	-(1994) francophone group resumes legal action (BC2) -(1997) the plaintiffs in the original action remain dissatisfied with government response, particular on issues surrounding funding, and file a new suit in Dec. 1997 (BC3).
AB			-(October 1983) group of francophone parents (Bugnet group) initiate court action (*Mahé*) involving the provision and management of French schools (AB 1) -(1986-87) case (*Molgat*) launched by parent against Alberta government and three school boards demanding French instruction (AB 2) -in 1986 a number of suits were filed to force certain Alberta school boards to pay for the cost of busing to either French immersion or French-first-language schools (AB 3) -(1987) French-speaking parents in St. Paul initiated a case (*Van Brabant* but the case was suspended while negotiations continued and *Mahé* proceeded (AB 4)	-(1992) Paul Dube, one of the parents involved in the *Mahé* case threatened to return to the Supreme Court to argue that Alberta was not abiding by the Court's decision. -(1992-1993) the Falher school board takes the government to court arguing that it should not have to pay registration fees for French-speaking pupils resident in the district who enroll in a school in another district- also questions about what programs needed to be provided. (*Falher Consolidated School District No. 69 v. Minister of Education of Alberta* (trial court)) - (1995) francophone parents in Lethbridge prepared to initiate litigation in 1995 but did not do so after the Alberta government placed Lethbridge under

	pre-1977	1977-1984	1984-1990	1991-2001
				the jurisdiction of the French School Board in Edmonton -(2000)- a group of Francophone parents and school administers threaten to take legal action to have French-school in Calgary under the jurisdiction of the Francophone authority
SK		-(1980) parents and school trustees in Vonda sought an order of mandamus to force the local school board to pass on a request to the Minister to extend the Type B French program to grades 10 – 12 (SK1) -(1980) parents in Prince Albert take school board to Court after request denied (SK 2)	-(1985) a number of francophone groups launched a court case under section 23, particularly to gain management and control over minority education and schools (SK 3) -(1990) group of francophone parents in Gravelbourg launch legal action for public funding of a francophone school that they established (SK 4)	-(1991) francophone groups ask the Court of Appeal to issue a mandatory order forcing government to enact provisions for francophone school governance, which was found to be a right in the 1988 Court of Queen's bench decision by Justice Wimmer. (Sask. Court of Appeal decided not to review the matter because it would be exercising original jurisdiction. Supreme Court declined to hear appeal (SK 3a). - (1998) Zenon Park conseil scolaire took legal action over lack of facilities (SK 5)
MB		-parents of a group of students displaced from a school go to court arguing that the St. Boniface school board cannot designate that an entire school would be used for French immersion (MB1). -parents went to court after their request for a French-language class of kindergarten and grade one levels was denied by the school board (MB2)	-In Sept. 1986 the Federation provinciale de parents filed suit to have government comply with section 23. Government decided to work with parents in formulating reference questions to be given to Court of Appeal. (MB 4)	-in the town of Laurier, the minority of French parents in the Turtle River School district who voted to join the Francophone School Board contemplated legal action to have their children come under the authority of the Francophone School Board, perhaps through a shared use agreement (MB 5) -(1997) Francophone parents in St. Claude went to court on a

	pre-1977	1977-1984	1984-1990	1991-2001
		-group of parents complained to court that the school board was charging transportation fees for students in the French- language program but not for students in the English-language program (non-Charter case) (MB3		number of issues, including: requesting the provision of a French program, the discretion of the Min. to force a school board into a joint use agreement and the ability of the school board for St. Claude to offer a partial French program (MB6) (*Maurice Hince, the Fédération provinciale des comités de parents et al. v. Government of Manitoba* (trial court-filed June 1997) -(1998) The Fédération provinciale des comités de parents challenged the constitutionality of the Public Schools Act, particularly regarding financial and administrative restrictions placed on the Francophone Board (MB7)
ON	- (early 1900s) French-speaking trustees landed in court after they had violated an injunction forbidding them to authorize the use of French in their school	-(1983) French Canadian Association of Ontario challenges school legislation in court, the suit is withdrawn after the government plans a comprehensive reference case (ON1) -(1984) parents in the Penetanguishene region seek Francophone facilities and programs that are equal to those of the majority (ON 2)	-(1988) AFCSO went to court to protest trustee elections (ON3) -(1989) a number of francophone parents were dissatisfied with the liberal admissions program to francophone instruction by their school board- the parents switched support to a different board and asked the court to force the board to supply a French-language instructional unit (ON 4) -(1990) Francophones in minority status on school boards believe they can win lawsuits in light of Mahé- this is particularly true in	-(Nov. 1992) Parents in Cornwall launch a lawsuit challenging the lack of equitable finances for French education and demanding an autonomous French school board for the area Although legislative changes were made as the case was pending, the plaintiffs argue that problems still exist (see over) (ON 5) -June 1994 two francophone parents filed a complaint to the UN Human Rights Commission about language education. -(1996) After the provincial government

	pre-1977	1977-1984	1984-1990	1991-2001
			Prescott-Russell	announced an across-the-board freeze on all capital expenditures, the Roman Catholic Separate Board of Dufferin and Peel asked the court to force the province to fund a previously approved construction of a new francophone facility (ON 6) -(1997) parents in Cornwall contend that new legislative and regulatory scheme does not provide equitable funding for French education (*J. Séguin et al v. The Queen in Right of Ontario*). (ON5a) -(1997) Non-francophone parent whose children began their education in the French-language argues that children have the right to French-language instruction (ON 7) -(1998) French, Catholic Board in northern Ontario goes to court arguing that it was not allocated enough trustee positions by the Education Improvement Commission (ON 8)
NB		-(1982) Francophone groups go to court to try to prevent the admission of francophones into French immersion programs (non-Charter, administrative law case) (NB1).		-(1997) francophone parents obtained an injunction preventing the Minister from closing certain French schools in a rural area of the province (NB2) -(1998) The Comités de parents du Nouveau-Brunswick was planning legal action

	pre-1977	1977-1984	1984-1990	1991-2001
				arguing that the new Education Act centralized management power in the hands of the government (NB3) *Jean Giroux-Gagné et al. v. Le Ministre de l' Éducation du Nouveau-Brunswick et al.* (trial court- filed- June 1997- NB2)
NS			-(1986) parents in Sydney go to court for French-language instruction and facilities (NS1)	-(1998) Francophone parents initiated litigation for a homogeneous school in Clare after the provincial francophone school board offered a compromise solution that would divide a school into homogeneous, bilingual and English sections (NS2)
PEI			-(1985) parents in Summerside initiate litigation to challenge provincial legislation regarding French-language education. The litigation is transformed into a reference question (PEI 1)	-(August 1996) Francophone parents in Summerside go to court demanding a separate francophone school in their community. (PEI 2)
NF			-(1988) Francophone parents in St. John's initiate legal action in 1988 against the school board and then also the Minister after their requests for French-language instruction in a homogeneous facility with management and control was rejected. The case was suspended after a French-language program was offered (though without management- NF1).	-(1993) a group of Francophone parents contemplated legal action to force compliance with s.23. -(1996) Francophone parents and two francophone groups commence legal action for French schools and management and control. The case was suspended after changes to the legislation were made in 1996 and 1997 (NF 2).

Table B.4(b)- Judicial Decisions by Province

Prov.	pre-1977	1977-1984	1984-1990	1991-
BC			***Whttington v. Board of School Trustees of School District No. 63*** (1987) (BC1)	***L' Association des parents francophones de la Colombie-Britannique, et al. v. A.G. British Columbia et al.*** (trial court- August 1996- BC2) ***L' Association des parents francophones de la Colombie-Britannique, et al. v. Queen in Right of the Province of British Columbia et al.*** (trial court- 1998- BC3)
AB			***Mahé v. Alberta.*** (trial court- 1985- AB1) ***Mahé v. Alberta*** (Court of Appeal- 1987- AB1) ***Mahé v. Alberta*** (Supreme Court of Canada, March 1990- AB1)	
SK		*R ex Rel LeBlanc & Board of Education of Saskatoon East SD No. 41* (1980- trial court- SK1) *R ex Rel LeBlanc & Board of Education of Saskatoon East SD No. 41* (1980- Court of Appeal- SK1) *R ex Rel. White et al. v. Board of Trustees of Prince Albert RC Sep. SD No. 6* (October 1980) (SK 2)	**Commission des Écoles Fransaskoises Inc. v. Government of Saskatchewan** (trial court- 1988 - SK 3)	***Conseil Scolaire Fransaskois de Zenon Park v. Government of Saskatchewan*** (trial court –1998- SK 4)
MB		*Damus v. Trustees of St. Boniface School Division* (trial court- 1980- MB1) *Pernisi v. Swan Valley ST* (Court of Appeal) (MB2)	*Bachman v. St James, Assiniboia SD No. 2* (Court of Appeal) (MB3) ***Reference Re Manitoba Public Schools Act*** (Court of Appeal – 1990- MB4)	***Reference Re Manitoba Public Schools Act*** (Supreme Court- 1993- MB 4)

Prov.	pre-1977	1977-1984	1984-1990	1991-
ON	*Ottawa RC School Trustees v. Mackell* (Judicial Committee of the Privy Council- 1917)	***Reference Re Education Act of Ontario and Minority Language Education Rights*** (Court of Appeal- June 1984- ON 1)	***Marchand v. Simcoe County Board of Education et al.*** (divisional court- 1986- ON 2) ***Marchand v. Simcoe County Board of Education et al. (No.2)*** (supreme court-trial division- 1986-ON 2a) ***Association français des conseils scolaires de l' Ontario v. Ontario*** (trial court –1988 – ON 3) ***Association français des conseils scolaires de l' Ontario v. Ontario*** (appeal court –1988- ON3) ***Piette v. Sault Ste. Marie (Board of Education)*** (trial court- 1989- ON 4)	***Conseil des écoles séparées catholiques romaines de Dufferin and Peel et al. v. Ontario (Ministre de l' Éducation et de la Formation)*** (trial court – 1996- ON 6) ***Conseil des écoles séparées catholiques romaines de Dufferin and Peel et al. v. Ontario (Ministre de l' Éducation et de la Formation)*** (Court of Appeal-1996- ON 6) ***Abbey v. Essex County Board of Education*** (trial court-1997- ON 7) ***Abbey v. Essex County Board of Education*** (Court of Appeal-1999- ON 7) ***Berthelot v. Ontario (Education Improvement Commission)*** (trial court-1998- ON 8)
NB		*Société des Acadiens du N.B. v. Minority Language School Board No. 50* (trial court- 1983-NB1)		
NS			***Lavoie v. Nova Scotia (Attorney-General)*** (trial court-1987- NS1) ***Lavoie v. Nova Scotia (Attorney-General)*** (appeal court-1989-NS1)	***Doucet-Boudreau v. Nova Scotia (Minister of Education)*** (trial court- 2000- NS 2)
PEI			***Reference Re Minority Language Education Rights*** (Court of Appeal- 1988- PEI 1)	***Arsenault-Cameron v. Prince Edward Island*** (trial court- Jan. 1997- PEI 2) ***Arsenault-Cameron v. Prince Edward Island*** (appeal court- 1998- PEI 2)

Prov.	pre-1977	1977-1984	1984-1990	1991-
				Arsenault-Cameron v. Prince Edward Island (Supreme Court- 2000-PEI 2)
NFL				

British Columbia

Whttington v. Board of School Trustees of School District No. 63 (1987) (BC1): The Supreme Court of BC in 1987 rules that section 23 does not guarantee French immersion instruction to English-speaking parents. **[1997] 44 D.L.R. (4th) 128.**

L' Association des parents francophones de la Colombie-Britannique, et al. v. A.G. British Columbia et al. (trial court- August 1996- BC2): Justice Vickers of the Supreme Court of British Columbia found that the Regulations that created the Francophone School Authority violated section 23 in a number of ways, including: not guaranteeing equal funding for francophone education, only permitting capital expenditures to be made using federal money and only after approval was given by the Minister, leaving the Francophone School Authority to negotiate for facilities with majority school boards without any resolution dispute mechanism and not providing a statutory guarantee to francophones. Justice Vickers ruled that the regulations would remain in effect until the provincial government enacted appropriate legislation no later than the last day of the next session of the Legislative Assembly. Justice Vickers retained jurisdiction in the case in the event that difficulties arose **[1996] 139 D.L.R. (4th) 356.**

L' Association des parents francophones de la Colombie-Britannique, et al. v. Queen in Right of the Province of British Columbia et al. (trial court- 1997- BC3): Francophone groups requested a declaration that would provide them with ownership of Francophone schools and proportionate ownership and co-management of shared schools along with a dispute resolution system to govern the process. Mr. Justice Vickers did not grant the ownership requests but ordered the province to establish, by legislation or regulation, a conflict resolution process to address disputes that may arise over the implementation and operation of the transfer of assets, co-management of facilities and lease arrangements. **[1998] 167 D.L.R. (4th) 534.**

Alberta

Mahé v. Alberta. (trial court- 1985- AB1):
Justice Purvis of the Alberta Court of Queen's Bench recognized a distinction between French immersion programs and French-first-language programs and that distinct physical facilities may be required where numbers warrant but that shared facilities with a distinct French program may satisfy section 23 if there are more limited numbers. Justice Purvis found that section 23 did provide a degree of management and instruction to francophone parents where numbers warranted and that the calculation of "where numbers warrant" should not be restricted to existing school districts. In the present case, he argued that francophone parents should have representation on the Separate School Board in Edmonton and have exclusive authority over the French-first-language program. Although the judge found that Alberta's legislative scheme violated section 23 by leaving the decision to provide instruction, facilities and/or management in the hands of majority school boards, he did not order a binding decision against the province. Instead he left it to the government to implement a legislative scheme that is consistent with section 23. **(1985) 22 D.L.R. (4th) 24**

Mahé v. Alberta (Court of Appeal- 1987- AB1): Justice Kerans for the Alberta Court of Appeal recognized that the right to instruction in section 23 confers upon Francophone parents, where numbers warrant, a right to educational programs equal to that of the majority and also recognized that section 23, where numbers warrant, conferred upon francophone parents the right to distinct educational facilities and education systems to be operated by the minority language group. In assessing where numbers warrant, the Court argued that such numbers must not only justify a distinct facility but also make it financially feasible to establish a distinct management structure. As such, the Court argued that in the present case there were insufficient numbers to justify a distinct facility and management thereof by the minority. As for Alberta's legislation, the Court argued that the legislation, enacted before the Charter, was only to be taken as supplementing section 23 rights and therefore was not per se unconstitutional. **(1987) 42 D.L.R. (4th) 514**

Mahé v. Alberta (Supreme Court of Canada, March 1990- AB1): The Supreme Court found that section 23 contains a right to management and control where numbers warrant. The Court established a "sliding

scale" approach to section 23 and rejected an approach that argued for two distinct rights (instruction and facilities/management) each with their own numerical thresholds. In *Mahé,* the Court found that the province of Alberta violated section 23 by leaving the provision of instruction, facilities and management up to majority school boards. Decisions about the provision of minority language education should be determined by reference to how many students might enroll in a program or facility; pedagogical concerns; and, to a lesser degree, financial concerns. The Court also found that, while provinces may require some limited instruction in English for francophone education, the Alberta government had not adequately justified the amount of time required for English instruction in Regulation /82. **[1990] 1 S.C.R. 342.**

Saskatchewan

R ex Rel LeBlanc & Board of Education of Saskatoon East SD No. 41 (1980- trial court- SK1): The trial judge dismissed the request for mandamus on a number of technical grounds including standing and an error in the order of mandamus sought (the request for mandamus was for grades 10-12 while the request to the school board for a French Type B program covered only grade 10). The trial judge did, however, remark on the merits of the case and stated that, under the legislation and regulations, the school board is obligated to forward a proper request on to the Minister who then had complete discretion as to whether a program would be implemented. Furthermore, the Minister owed a duty to the Crown and not to citizens. **[1980], Sask. D. 71-03.**

R ex Rel LeBlanc & Board of Education of Saskatoon East SD No. 41 (1980- Court of Appeal- SK1): In a very brief opinion the Court of Appeal agreed that the only duty of the school board was to pass along a valid request on to the Minister who then had complete discretion and owed a duty to the Crown. **[1980] Sask. D. 71-04.**

R ex Rel. White et al. v. Board of Trustees of Prince Albert RC Sep. SD No. 6 (October 1980- trial court- SK2). The court ordered the establishment of a designated school because the court found that local parents had satisfied the legislative requirements in requesting the designation. **(1980) 6 Sask. R. 109.**

Commission des Écoles Fransaskoises Inc. v. Government of Saskatchewan
(trial court- 1988 - SK 3): The trial judge found that Saskatchewan's legislation and regulations violated section 23 by potentially splitting the number of eligible rights holders amongst existing school districts and creating criteria (that a program be viable for at least three years and that adequate provisions are made for English-speaking students) that detracted from the provision of rights. The court also stated that section 23 envisions management and control over homogeneous and distinct Francophone facilities, but when number do not warrant a homogeneous school then francophone parents may be limited to exercising management and control through parent advisory councils attached to a school. **[1988] 3 W.W.R. 354, (1988) 48 D.L.R. (4th) 315.**

Commission des Écoles Fransaskoises Inc. v. Government of Saskatchewan
(appeal court- 1991 - SK 3a): The Saskatchewan Court of Appeal denied the appeal on the basis that in order to issue a mandatory order forcing the government to enact a system of Francophone school governance it would have to exercise original jurisdiction **[1991], 81 D.L.R. (4th) 88.**

Conseil Scolaire Fransaskois de Zenon Park v. Government of Saskatchewan (trial court –1998- SK 4): An injunction was granted ordering that the Francophone school be allowed to share facilities with the local school in the community. **[1998] S.J. No. 494.**

Manitoba

Damus v. Trustees of St. Boniface School Division (trial court-1980- MB1): The trial judge seemed to decide, at least implicitly, that French immersion instruction was included in the reference to "French…is used as the language of instruction" in the legislation, which concerned legal commentator Pierre Foucher because he believed that it unduly conflated French immersion and French-first-language instruction. The trial judge found it odd that, although homogeneous French schools existed in Manitoba, the legislation did

not specify that schools could be designated as solely providing instruction in French. However, the judge found that nothing prevented the actions of the school board, which had acted in good faith, and that the Minister could not be forced to make the school board alter its plans (see Foucher 1985: 203-204) **(1980), 108 D.L.R. (3d), 350**

Pernisie v. Swan Valley ST (Court of Appeal) (MB2) The Manitoba Court of Appeal ordered that the Swan Valley school board group kindergarten and grade 1 students together so that the threshold of 23 students could be met for the provision of French-language education, since the Act did not distinguish between grades and other school boards had grouped grades together (see Foucher 1985: 205) **(1982), 18 Man. R. (2d), 409.**

Bachman v. St James, Assiniboia SD No. 2 (Court of Appeal-1984-MB3): The Court ruled that the school board's decision to charge for transporting pupils in the French-language program while not charging for transporting pupils in the English-language program was discriminatory (non-Charter case). (see Foucher 1985: 205) (1984), **29 Man. R. (2d) 66.**

Reference Re Manitoba Public Schools Act (Court of Appeal – 1990- MB 4). The Court of Appeal issued three separate judgments. Importantly, none of the judgments found that section 23 contained a right to management and control, but Justice Monnin found that a right to management and control could be found in section 15 of the Charter. A majority found that having a rigid threshold of numbers for providing French instruction violated section 23 as did giving discretion to school board concerning the assembly of these numbers (Justice Monnin also pointed out that existing school districts could split francophone numbers across districts). **[1990] 2 W.W.R. 289.**

Reference Re Manitoba Public Schools Act (Supreme Court- 1993- MB 4). In a unanimous decision by Chief Justice Lamer, the Supreme Court reiterated the sliding scale approach, which included a right to some degree of management and control where numbers warranted. However, the case primarily revolved around the concept of "facilities". Although the Court argued that, given the importance of schools in fulfilling a cultural preservation function, it is reasonable to infer that some physical distinctiveness is required, the Court only maintained that the right to completely distinct physical settings might be appropriate given the number of students involved as well as geographic, pedagogical and financial considerations. In so far as the Manitoba legislation violated the Court's interpretation of section 23 (by providing a rigid threshold of numbers and not providing for management and control) it was unconstitutional. However, the Court stated that the nature of "facilities" was related to the degree of management and control required in any given circumstance and that the Court would not impose strict orders as to how the system should be changed to make it constitutional. **[1993] 1 S.C.R. 839.**

Ontario

Ottawa RC School Trustees v. Mackell (Judicial Committee of the Privy Council- 1917). The Judicial Committee of the Privy Council (JCPC) ruled that section 93 of the British North America Act offered legal guarantees only on the basis of religion (Protestant and Catholic) and those groups could not legally be subdivided into language groups. The JCPC argued that requiring schools to provide instruction in a particular language (English) did not infringe on the rights conferred by section 93 (see Foucher 1985: 128-129). **[1917] AC, 62**

Reference Re Education Act of Ontario and Minority Language Education Rights (Court of Appeal- June 1984- ON 1). The Ontario Court of Appeal ruled that section 23 was remedial in nature and that education was the cornerstone of preserving French culture. As such, the Court argued that "instruction" in section 23 should be read broadly and provided as a first-language program and that "facilities" should be homogeneous in character. Both "instruction" and "facilities" for the francophone minority should be equal to that of the majority. The Court ruled that legislation and regulations which existed at the time violated section 23 by imposing a rigid numbers requirement for instruction, allowing the school board too much discretion in determining whether those numbers could be met and split the potential numbers, and potentially unfairly dividing the number of eligible students by pre-existing school boundaries. Moreover, the Court argued that section 23 was violated insofar as the legislation and regulations did not provide for

adequate management and control by francophones of French education. The Court suggested that the government's White Paper proposal of guaranteed proportional representation of francophones on existing boards with responsibility for French education would likely meet the requirements of section 23. **[1984], 10 D.L.R. (4th) 491.**

Marchand v. Simcoe County Board of Education et al. (divisional court- 1986-ON 2). The case was part of a long standing dispute over access to, and quality of, French-language education instruction and facilities. This case revolved primarily around the refusal of the local school board to provide shop facilities and instruction at the local Francophone secondary school even though it had been recommended by the Frenh-language advisory committee and had some support from the provincial government. Justice Sirois, relying heavily on the interpretation given to section 23 by the Ontario Court of Appeal (1984), declared that the province should provide adequate funding for French-language instruction and facilities and further declared that the school board violated section 23 by not providing an equal education to Francophones. The trial judge also issued a mandatory order against the school board requiring the provision of French-language instruction and facilities equivalent to that of the majority and the establishment of an industrial arts and shop facility at Le Caron secondary school. **[1986] 55 O.R. (2d) 638** (July 1986)

Marchand v. Simcoe Board of Education et al. (No. 2) (supreme court trial division- 1987 – ON 2a) In a clarification of his previous ruling, Justice Sirois ordered that the province had a duty to pay 94.4% of the cost and the school board 5.6%. Justice Sirois said that there was no need for s.24(1) to be used in the case since the government had allowed for the creation of a French-language education council (FLEC) which had submitted a detailed spending proposal. **[1987] 44 D.L.R. (4th) 171.**

Association francais des conseils scolaires de l' Ontario v. Ontario (trial court –1988- ON 3). The AFCSO challenged the process of electing trustees to schools boards, arguing specifically that the calculation of the number of French and English trustees was based on a flawed enumeration process. Justice Sirois accepted this argument and claimed that the section 23 rights of francophones had been violated. In an interim order he declared that the portion of Bill 125 that changed the calculation of the number of trustees was of no force or effect. **[1988], O.J. No. 2028**

Association francais des conseils scolaires de l' Ontario v. Ontario (appeal court –1988- ON 3). The appeal court agreed that section 23 rights had been impaired by the enumeration process, particularly in six school districts. However, the Court substituted the trial judge's interim order with an interim order that would allow elections to proceed, but in the six districts significantly affected by the new process the Court ordered that all matters not coming within the exclusive authority of one or the other language section of the board required a double majority for decision-making purposes. **66 O.R. (2d) 599.**

Piette v. Sault Ste. Marie (Board of Education) (trial court- 1989- ON 4). The trial judge ruled that since the public school board had already indicated that it would not establish its own French-language instructional unit (FLIU) and it seemed hesitant to enter into an agreement with another board, the public board looked like it was going to be in violation of the provinces Education Act, which outlined the right to French instruction in a manner even more generous than section 23 of the Charter (because the Education Act did not require a certain number to engage the right to instruction). The trial judge therefore ordered the school board to establish an FLIU with an interlocutory injunction (see Green 1990-91 case comment). **(10 Nov. 1989), Algoma 2731/89 (Ont. H.C.).**

Conseil des écoles séparées catholiques romaines de Dufferin and Peel et al. v. Ontario (Ministre de l' Éducation et de la Formation) (trial court –1996- ON 6). The School Board operated the only French-language separate school between Toronto and Hamilton, which had been housed in temporary quarters since 1989. Funding was eventually allocated for the construction of new facilities but the provincial government announced an across-the-board freeze on all capital expenditures. The School Board took the province to court to secure the funding for the new facility. Justice Hawkings found that the current facilities were unequal to that of the majority in violation of section 23 and ordered the Dept. of Education to release the money allocated to the building of the new school. **(1996) 30 O.R. (3d) 681**

Conseil des écoles séparées catholiques romaines de Dufferin and Peel et al. v. Ontario (Ministre de l' Éducation et de la Formation) (appeal court –1996- ON 6). The Ontario Court of Appeal refused to stay the execution of the order made by the trial judge to release funds for the construction of a new francophone school. **(1996), 30 O.R. (3d) 686**.

Abbey v. Essex County Board of Education (trial court – 1997- ON 7). In 1989 a French-language admissions committee allowed Susan Abbey's child to be enrolled in a French-language program despite the fact that Susan Abbey did not possess a right under section 23 to have her child enrolled. When Ms. Abbey returned to Essex county in 1996 the local Protestant board took the position that she did not possess section 23 rights and hence would not pay her children's tuition fees at a local French-language school operated by the Catholic School Board. The trial court supported the Board's contention, since section 23(2) was designed to secure the linguistic rights of the minority. **[1997] O.J. No. 2379**

Abbey v. Essex County Board of Education (appeal court – 1999- ON 7). The Court of Appeal overturned the trial court decision stating that the plain meaning of section 23(2) confers rights when one child is receiving or has received his or her schooling in the minority official language of the province. The Court added that encouraging fluency in Canada's official languages would be helpful to the minority language community. **(1999) 42 O.R. (3d) 481.**

Berthelot v. Ontario (Education Improvement Commission) (trial court- 1998- ON 8). In 1998, the number of trustees allocated to a newly created northern, French-Catholic school district by the Ontario Education Improvement Commission was challenged under section 23 (and section 93 of the Constitution Act, 1867). The trial judge argued that section 23 rights holders can effectively exercise their right to management and control under the scheme adopted by the province and implemented by the Commission. **[1998], 168 D.L.R. (4th) 201.**

New Brunswick

Société des Acadiens du N.B. v. Minority Language School Board No. 50 **(trial court- 1983-NB1)**. In the Grand Falls region in New Brunswick two francophone groups, the Société des Acadiens du Nouveau-Brunswick and the Association des conseillers scolaires francophones du Nouveau-Brunswick, objected to the fact that the minority (English) school board accepted a number of francophones into its regular classes and into its French immersion program. Relying on legislative provisions and expert testimony that linked bilingual programs to linguistic assimilation, Justice Richard argued that bilingual programs and schools should not be allowed in New Brunswick. He disagreed though with the plaintiffs in finding that there was no prohibition against a francophone child attending an English school or vice-versa. However, Justice Richard found that the legislation implicitly required that a pupil have sufficient command of the language of instruction and that pupils should not be enrolled in immersion programs which provided instruction in the child's first-language. Finally, in his obiter dicta, Justice Richard maintained that section 23 of the Charter applies only to the right of the Francophone minority to an education in French and did not guarantee the right of the linguistic minority to an education in the language of the majority. **(1983) NBR (2d), 361**.

Nova Scotia

Lavoie v. Nova Scotia (Attorney-General) (trial court-1987- NS1). Francophone parents in Sydney were asking for French-language instruction and a francophone school. The trial judge refused to issue an injunction (July 1987) and then ruled on the merits of the case in 1988. Although the trial judge was not convinced that approximately 300-400 students would enroll in a francophone school, he believed that there would be enough enrolment to justify ordering the school board to: institute a French-language program, designate a suitable education facility that would be reasonably accessible for minority-language students and to conduct a registration to determine how many students might enroll in the facility. In

subsequent proceedings when it was revealed that only fifty students registered for the French-language program, the trial judge ruled that the school board's inaction was reasonable. **(1988), 47 D.L.R. (4th) 586**

Lavoie v. Nova Scotia (Attorney-General) (appeal court-1989-NS1). The Nova Scotia Court of Appeal argued that section 23 is "remedial in nature" and should not be read narrowly. Hence, the Court of Appeal determined that fifty students was enough to justify the provision of minority-language instruction. The Court suggested that a higher threshold was required to warrant a separate and free-standing educational facility and that management and control of minority-language education was dependent on having sufficient numbers to justify a separate facility. Moreover, the Court deemed that Nova Scotia's education legislation and policy did not contravene section 23 of the Charter. **(1989) 58 D.L.R. (4th) 293.**

Doucet-Boudreau v. Nova Scotia (Minister of Education) (trial court- 2000- NS 2). Francophone parents from a number of districts in Nova Scotia complained about the lack of homogeneous facilities available for Francophone instruction. Relying on expert testimony concerning assimilation rates and the effectiveness of French-language education in homogeneous environments, Justice LeBlanc ordered that the government provide the necessary resources to provide for homogeneous facilities. In his findings, Justice LeBlanc argued that the decisions of the French-language school board, which had adopted a gradualist approach to homogeneous facilities because of splits in the Francophone community, could be found to violate section 23. Moreover, the search for a consensus within the community should not delay the provision of section 23 rights, which are individually based. Justice LeBlanc set out a timetable for the provision of homogeneous facilities in the various regions and indicated that he would maintain jurisdiction over the case (this has prompted the provincial government to appeal the decision). **(2000) 185 N.S.R. (2d) 246.**

Prince Edward Island

Reference Re Minority Language Education Rights (appeal division- 1988- PEI 1). The Court of Appeal ruled that it was unconstitutional to give school boards unfettered discretion in determining whether the number of students required by statute could be reasonably assembled and that "where numbers warrant" should not be limited by existing geographic limits of school boards. However, the Court did not find that the statutory limit of 25 eligible students violated section 23 per se. As for eligibility, the Court ruled that determining eligibility by reference to the mother tongue of the student and his/her ability to understand it was contrary to the eligibility criteria established by section 23. As for management and control, the Court argued that section 23 provides a right for minority parents to "participate" in program development and delivery. **(1988), Nfld. And P.E.I. R. 236.**

Arsenault-Cameron v. Prince Edward Island (trial court- Jan. 1997- PEI 2). After consultation and a pre-registration that gathered 34 eligible children, the Francophone School Board asked the Minister for permission to establish a French-language program in a designated school in Summerside rather than having to bus the children to a school 28 kilometres away. The Minister rejected this request arguing that there was a well-established French program at Évangeline School and that having a school with a small enrollment was not practical from a pedagogical standpoint. Justice DesRoches emphasized the remedial nature of section 23 and the importance of education rights in preserving culture. After considering a variety of factors- from the history of the French-speaking communities in P.E.I. to expert testimony on rates of assimilation and the importance of schools- Justice DesRoches argued that there were sufficient numbers to warrant the provision of French-language instruction at a facility (though not necessarily a distinct one) in Summerside. In doing so, he did not find the Regulations unconstitutional but argued that the Minister did not properly exercise his discretion under the Regulations. An application was made to have Justice DesRoches enforce his order after the Minister appealed the decision and suggested it was only declaratory in nature, thereby not requiring the establishment of a French-language program in Summerside. This request was denied as the case was under appeal, though Justice DesRoches urged the government to cooperate with the French School Board. **(1997) 147 Nfld. & P.E.I.R. 308.**

Arsenault-Cameron v. Prince Edward Island (appeal division- 1998- PEI 2). The P.E.I. Supreme Court, Appeal Division noted that while a purposive approach to section 23 was warranted, prudence should be taken when interpreting section 23 because it was founded on a political compromise. The Court maintained that the trial court judge erred in his estimation of the number of section 23 students that might take advantage of a facility in Summerside (the Appeal Division concluded 65 was the relevant figure while the trial judge said it could be as high as 306 in ten years) and that the Minister was within his discretion to reject the demand for a separate facility based on pedagogical considerations and the fact that the bus journey to the neighbouring community would not be overly onerous. **(1988) 160 D.L.R. (4th) 89.**

Arsenault-Cameron v. Prince Edward Island (Supreme Court- 2000- PEI 2). In a unanimous judgment co-written by Justices Major and Bastarache, the Supreme Court rejected a narrow reading of section 23 because it was based on "political compromise" and reiterated that section 23 should be read broadly as a remedial provision that is connected to the development of minority language communities. Using a calculation that takes actual and potential demand for instruction and facilities into account, the Court found that 155 students might be expected to take advantage of a facility in Summerside. The notion of equality found in section 23 contemplates that official language minorities might need to be treated differently than the majority in order to achieve substantive equality. The Minister's discretion, according to the Court, was subject to section 23 and that the French School Board's judgment is important given the remedial nature of the powers of management and control. As such, the Minister's decision did not take into consideration the potential harm to the minority language community that might result from busing students to another community. More generally, while the Minister's role is important, discretion is subject to the "positive obligations on government to alter or develop 'major institutional structures' to effectively ensure the provision of minority language instruction and facilities" (at 37-38). **[2000], 1 S.C.R. 3.**

Newfoundland

Table B.5- *Mahé v. Alberta*, [1990]- Positions of Parties and Interveners

Participant	For App. (A) or Resp.(R)	Right to educational facilities in Edmonton infringed?	Right to Management and Control in s.23 (instruction and facilities)?	Does School Act violate s.23? (if so, saved by s.1)	Does s.93 of the Const. Act affect s.23 of the Charter?
Mahé et al. (app.)	A	Yes	Yes, yes	Yes, no	No
The ACFA (Alberta franco.)	A	Yes	Yes, yes		
ACFO, AFCSO, AEFO (franco-ontarion groups)	A	Yes	Yes, yes	Yes, no	No (s.23 and s.93 rights can co-exist)
Commissioner of Official Languages	A	Yes	Yes, yes (comparable to majority)	Yes, no	N/A
Attorney General of Canada	A	Yes	Yes, yes	Yes, no	No
Alliance Quebec, Alliance for Language Comm. in Quebec	A	Yes	Yes, yes	Yes, no	No
Quebec Assoc. of Protestant School Boards	A		Yes, yes		
Attorney General of New Brunswick	A	Yes	Yes, yes	Yes, No	N/A
Attorney General of Ontario	A	N/A	Yes, yes (though does not require separate min. language boards)	N/A	Yes (s.23 rights must be accommodated within s.93 rights)
Attorney General of Quebec	B	N/A	"proper linguistic environment," provinces determine modalities	N/A	No
Province of Alberta (respond.)	R	No	No	No, yes	Yes (s.93 precludes management)
Edmonton Roman Catholic School Board, No. 7	R	No	No, no	No, yes	Yes (s.93 management rights)
Alberta School Trustees Assoc.	R	No	No, No	No, yes	Yes (s.93 management rights)
Attorney General of Manitoba	R	N/A	No, no	Only if specifically denies right	N/A
Attorney General of Saskatchewan	R	N/A	No, no	N/A	N/A

Table B.6- Federal OLE Funding for OMLE- selected years
(in millions of dollars, rounded to nearest 10,000—figures for 1995-96 rounded to nearest 100,000)[a]

	1984-85[b]	1987-88[c]	1990-91[d]	1993-94[e]	1996-97[f]
BC	1.16	1.57	2.19	2.28	2.1
AB	1.93	2.41	2.36	2.65	1.8
SK	0.85	1.37	1.59	3.71	4.8
MB	2.30	3.74	4.89	4.17	3.0
ON	28.60	32.10	40.88	32.93	25.5
NB	18.68	20.80	19.89	19.48	14.8
NS	1.77	1.75	6.03	4.20	4.3
PEI	0.54	0.64	4.10	1.08	1.0
NFLD	0.17	0.45	1.20	1.04	0.90
Totals	56.00	64.83	83.13	70.46	58.2

[a] A certain percentage of funds for each province goes toward post-secondary minority-language education (see Secretary of State OLE Program Evaluation (1987) and Vézina (1992)). The percentages are usually less than 25 per cent for most provinces, except for New Brunswick where post-secondary funding is sometimes more than half of the total.
[b] From Secretary of State OLE Program Evaluation (1987), Exhibit III-19.
[c] From Vézina (1992), OLE Evaluation, Table 26(C).
[d] From Annual Report 1990-91: Official Languages (Secretary of State), p. 73 (Appendix K).
[e] From CMEC Report on French- and English-language Education in Minority Settings (1993-94 and 1994-95), p. 3. (Data taken from this Report because the figure for New Brunswick ($2.4 million) in the 1993-94 Annual Report- Official Languages from the Department of Canadian Heritage seems to be vastly out of line with data for New Brunswick in other years).
[f] From Annual Report 1996-97, 1997-98: Official Languages (Department of Heritage Canada). www.pch.gc.ca/offlangoff/publications/1996-98/english/index.html.

Appendix C: Public Opinion on Official Minority-Language Education Issues

Table C.1:

Gallup Poll (1977)

"Prime Minister Trudeau recently proposed an amendment to the constitution which would guarantee the right of all Canadians to send their children to English or French schools according to their choice. Would you approve or disapprove of this?"

	Approve (%)	Disapprove (%)	Don't Know (%)
National	85	12	3
Atlantic	87	8	5
Quebec	80	17	3
Ontario	88	9	3
Prairies	82	15	3
British Columbia	91	7	2

(source: *Vancouver Sun*, Nov. 16, 1977: C8).

Table C.2:

May-June 1977 Survey (see Michael D. Ornstein et al. 1978).

Percent saying "Agree or Strongly Agree"

		Non-French outside Quebec			
	French outside Quebec	BC	Prairies	Ont.	Mar.
"French-speaking Canadians outside Quebec should be able to find schooling for their children in French."	83	36	48	50	58
"English-speaking people who move to Quebec should be able to find schooling for their children in English"	92	80	89	80	86

Table C.3:

Gallup Poll (conducted Oct. 1985)

Prime Minister Trudeau recently proposed an amendment to the constitution which would guarantee the right of all Canadians to send their children to English or French schools according to their choice. Would you approve or disapprove of this?

	BC	AB	SK	MB	ON	PQ	NB	NS	PEI	NF	Canada Totals
											Yes
	BC	Prairies			ON	App. 80%	Atlantic Provinces				App. 85%
	App. 91%	Approve 82%			App. 88%		Approve 87%				

Table C.4:

Canadian Facts Survey (4, 000 Canadians, Sept. and October 1985)
Should (minority official-language) residents of (province of interview) be entitled to have their children instructed in their own language?"

	BC	AB	SK	MB	ON	PQ	NB	NS	PEI	NF	Canada Totals
											Yes
English	BC	Prairies			ON		Atlantic Provinces				68 %
	Yes 57%	Yes 72%			Yes 68%		Yes 76%				
French						88 %					87 %

Note: younger age categories had higher support (Canada) as did people who had more contact with people who spoke the minority language

Table C.5:

Charter Values Survey 1987- Sniderman et al.

Should French Canadians who move out of Quebec to another province have a basic right to have their children taught in French?

	BC (%)	AB (%)	SK (%)	MB (%)	ON (%)	NB (%)	NS (%)	PEI (%)	NF (%)	Total outside Que. (%)
Yes	54.2	47.1	36.8	42.2	56.5	77.8	42.2	93.3	75.9	42.3
Qual. Yes	3.5	6.9	5.3	11.1	5.9	8.9	9.6	0	0	4.7
No	39.6	43.7	57.9	46.7	36.6	1.3	44.6	6.7	24.1	29.5
Qual. No	2.8	2.3	0	0	1	0	3.6		0	1.2
N=	144	87	38	45	306	45	83	15	29	1020

(missing cases=16, data analysis by Riddell)

	Canada Totals			
	Yes	Qual. Yes	Qual. No	No
Anglo	53	6	2	39
Franco	79	4	0	17
PC	21	36	3	39
Lib	61	25	3	12
NDP	50	34	2	14
PQ	85	8	8	0
Legal Elite	42	15	3	40
Admin. Elite	50	9	3	38

Table C.6:

(Charter Values Survey 1987)

Those supporting the right of French Canadians who move out of Quebec to another province to have their children taught in French were asked "Would you feel that way even if it substantially increases the amount of taxes people have to pay over and above what they are paying now?"- Yes, feel same way or No, *feel differently.*

	BC (%)	AB (%)	SK (%)	MB (%)	ON (%)	NB (%)	NS (%)	PEI (%)	NF (%)	Total outside Que.
Yes, feel same	49.4	46.8	50	37.5	48.2	51.3	34.9	28.6	50	47.1
Qualified Yes	3.6	10.6	0	4.2	3.1	2.6	2.3	0	0	3.6
No, feel different	44.6	42.6	50	54.2	45.5	41.0	58.1	57.1	50	47.8
Qual. No	1.2	0	0	4.2	1.6	2.6	0	7.1	0	1.5
N=	83	47	16	24	191	43	43	14	22	471

(missing cases=8, data analysis by Riddell)

Table C.7:

(Charter Value Survey 1987)
Anglophones opposed to the right of French Canadians outside Quebec to have their children educated in French were randomly divided into two groups.
One group was asked "Would you feel that way even if, as a result, French Canadians feel less at home in Canada and separatism is strengthened?" Yes, feel same, No feel differently

	BC	AB	SK	MB	ON	PQ	NB	NS	PEI	NF	Canada Totals			
											Yes	Qual. Yes	Qual. No	No
Anglo											73	--	--	27
Franco											--	--	--	--

Another group was asked "Would you feel that way even if, as a result, parents don't have the right to educate their children in the language of their choice?" Yes, feel same, No feel differently

	BC	AB	SK	MB	ON	PQ	NB	NS	PEI	NF	Canada Totals			
											Yes	Qual. Yes	Qual. No	No
Anglo											79	--	--	21
Franco											--	--	--	--

Table C.8

1988 Canada Election Study

Respondents were asked to complete a self-administered questionnaire which asked: "French-Canadians outside Quebec: 1) Have a right to educate their children in French wherever the number warrants it; 2) Should accept the fact that outside Quebec, their children should be schooled in English, the language of daily life; 3) Neither; 4) Undecided."

	BC (%)	AB (%)	SK (%)	MB (%)	ON (%)	NB (%)	NS (%)	PEI (%)	NF (%)
Right to educate in French	43.8	43.2	45.4	52.6	53.0	66.2	55.2	62.7	55.6
Children schooled in English	48.1	46.2	47.1	33.0	37.7	27.1	40.3	27.7	27.8
Neither	5.4	7.6	5.9	11.3	5.0	3.8	3.0	3.6	2.8
Undecide	2.7	3.0	1.7	3.1	4.2	3	1.5	6.0	13.9

(Total Weighted N=2123)

Table C.9

Alberta Advantage Survey- Riddell Questions (Jan. 1998)

The respondents (n=1008) were randomly divided into two groups. One group was asked the following questions in this sequence, while the other group was asked the same questions but with the question about the Supreme Court coming last rather than first.
Group I- Supreme Court question first

The Supreme Court of Canada, in a 1990 Charter of Rights decision—Mahé v. Alberta—ruled that French-speaking parents outside of Quebec and English-speaking parents inside Quebec had the right to have their children instructed in their own language if there were sufficient numbers. They also ruled that they had the right to manage their own schools, which could include their own school board. Were you aware of the Court's position concerning minority language education rights?
Yes: 41.4% (n=209)
No: 58.6% (n=296)

In your opinion, where there are sufficient numbers of children, should English-speaking parents in Quebec and French-speaking parents outside Quebec:

a) have the right to have their children instructed in their own language AND have the right to manage their own schools which could include their own school boards
b) have the right to have their children instructed in their own language but NO right to manage their own schools, which could include their own school boards
c) have no right to have their children instructed in their own language

a) 43.4% (n=218)
b) 50.0% (n=251)
c) 6.6% (n=33)

Respondents who chose (a) were asked the following question with all options; those who chose (b) were asked the following questions but only options (b) and (c) were provided; and those who chose (c) were not asked the following question.

If it were to increase the cost of education in Alberta, should French-speaking parents in Alberta (where there are sufficient numbers of children):

a) have the right to have their children instructed in their own language AND have the right to manage their own schools which could include their own school boards
b) have the right to have their children instructed in their own language but NO right to manage their own schools, which could include their own school boards
c) have no right to have their children instructed in their own language

a) 37.5% (n=181)
b) 52.2% (n=252)
c) 10.4% (n=50)

Group II- Supreme Court question last
In your opinion, where there are sufficient numbers of children, should English-speaking parents in Quebec and French-speaking parents outside Quebec:

a) have the right to have their children instructed in their own language AND have the right to manage their own schools which could include their own school boards
b) have the right to have their children instructed in their own language but NO right to manage their own schools, which could include their own school boards
c) have no right to have their children instructed in their own language

a) 34.4% (n=167)
b) 62.7% (n=304)
c) 2.9% (n=14)

Respondents who chose (a) were asked the following question with all options; those who chose (b) were asked the following questions but only options (b) and (c) were provided; and those who chose (c) were not asked the following question.

If it were to increase the cost of education in Alberta, should French-speaking parents in Alberta (where there are sufficient numbers of children):

a) have the right to have their children instructed in their own language AND have the right to manage their own schools which could include their own school boards
b) have the right to have their children instructed in their own language but NO right to manage their own schools, which could include their own school boards
c) have no right to have their children instructed in their own language

a) 40.6% (n=193)
b) 51.6% (n=245)
c) 7.8% (n=37)

The Supreme Court of Canada, in a 1990 Charter of Rights decision—Mahé v. Alberta—ruled that French-speaking parents outside of Quebec and English-speaking parents inside Quebec had the right to have their children instructed in their own language if there were sufficient numbers. They also ruled that they had the right to manage their own schools, which could include their own school board. Were you aware of the Court's position concerning minority language education rights?
Yes: 39.2% (n=172)
No: 60.8% (n=267)

Table C.10:

Alberta Advantage (1998) Survey Results by current provincial voting orientation:

The Supreme Court of Canada, in a 1990 Charter of Rights decision—Mahé v. Alberta—ruled that French-speaking parents outside of Quebec and English-speaking parents inside Quebec had the right to have their children instructed in their own language if there were sufficient numbers. They also ruled that they had the right to manage their own schools, which could include their own school board. Were you aware of the Court's position concerning minority language education rights?

	PC (%)	Liberal (%)	NDP (%)
Yes	33.5	48	58.1
No	66.5	52	41.9
n=	478	244	62

In your opinion, where there are sufficient numbers of children, should English-speaking parents in Quebec and French-speaking parents outside Quebec:

a) have the right to have their children instructed in their own language AND have the right to manage their own schools which could include their own school boards
b) have the right to have their children instructed in their own language but NO right to manage their own schools, which could include their own school boards
c) have no right to have their children instructed in their own language

	PC (%)	Liberal (%)	NDP (%)
Instruction and management (a)	33.5 (n=169)	43.6 (n=109)	55.6 (n=35)
Instruction only (b)	61.9 (n=312)	54.4 (n=136)	38.1 (n=24)
No instruction or management ©	4.6 (n=23)	2.0 (n=5)	6.3 (n=4)
n=	504	250	63

Respondents who chose (a) were asked the following question with all options; those who chose (b) were asked the following questions but only options (b) and (c) were provided; and those who chose (c) were not asked the following question.

If it were to increase the cost of education in Alberta, should French-speaking parents in Alberta (where there are sufficient numbers of children):

a) have the right to have their children instructed in their own language AND have the right to manage their own schools which could include their own school boards
b) have the right to have their children instructed in their own language but NO right to manage their own schools, which could include their own school boards
c) have no right to have their children instructed in their own language

	PC (%)	Liberal (%)	NDP (%)
Instruction and management (a)	31.6 (n=155)	45.2 (n=112)	50.8 (n=32)
Instruction only (b)	57.6 (n=282)	44.4 (n=122)	44.4 (n=28)
No instruction or management ©	10.8 (n=53)	5.6 (n=14)	4.8 (n=3)
n=	490	248	63

Table C.11:

La Commission nationale des parents francophones (CNPF)
(conducted by Angus Reid- February 1993)

Question: Do you think that the provincial and territorial governments have a duty to respect the decisions of the Supreme Court of Canada which concern the right s of the French and English minorities in Canada? (translation)

	Number of Respondents	Yes (%)	No (%)	No Response
Canada	1501	77	12	11
B.C.	184	73	14	12
Alberta	134	67	12	22
Saskatchewan/ Manitoba	111	67	18	15
Ontario	561	75	13	12
Quebec	385	85	9	6
Atlantic Provinces	126	84	7	9

Note: Support is slightly higher amongst younger and more educated groups.

Appendix D- Interview Participants

Arès, Georges. Former executive-director of l'Association canadienne-française de l'Alberta and curreent president of la Commission nationale des parents francophone. (Interview- May 26, 2001 (phone interview)).

Bissonnette, Gérard. Current director of the French Language Services Branch, Alberta Education. (Interview- Dec. 16, 1998).

Boyd, Marion (Honourable). Former Ontario Minister of Education. (Emailed responses to Questions- June 2001).

Bussière, Adrien. Former Director of Language Services Branch, Alberta Education- currently works for Heritage Canada. (Interview May 22, 2001 (telephone interview)).

Confidential Interview. Calgary Francophone opposed to a distinct Francophone school board for Calgary (July 22, 1998).

Confidential Interview. Ontario OMLG activist. (Interview June 26, 2001).

Dinning, Jim (Honourable). Former Alberta Minister of Education (Interview- June 15, 2001).

Dubé, Paul. Co-founder of the Bugnet group. (Interview May 16, 2001).

Levasseur-Ouimet, France. Former president of l'Association canadienne-française de l'Alberta. (Interview- Dec. 16, 1998).

Martel, Angéline. Member of the Bugnet group and official minority-language education researcher. (Interview- June 2, 1998).

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