Judicial Impact and the Supreme Court of Canada: Legislative Responses to Judicial Invalidation of Contentious Policies by Quebec’s National Assembly

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Abstract: The Charter of the French Language presents an ideal case to test the transition to legal constitutionalism and strong-form judicial review in Canada. Introduced by the separatist Parti Québécois in 1977 as Bill 101, the Charte de la langue française denies freedom of choice in public instruction, and initially compelled the exclusive use of French on public signs. Both dimensions of Bill 101 directly conflict with the Canadian Charter of Rights and Freedoms that guarantees freedom of expression (section 2b) and minority language education rights (section 23). More importantly, the principal instrument of political constitutionalism in the Canadian Charter – the notwithstanding clause – does not apply to section 23. This article demonstrates the endurance of political constitutionalism in regard to Quebec’s Charter of the French Language despite the presence of strong-form judicial review under the Canadian Charter of Rights and Freedoms. Focusing on all cases involving Quebec statutes invalidated as inconsistent with the Canadian Charter of Rights and Freedoms, this article considers the legislative responses introduced by the Quebec National Assembly that serve to re-establish the policy status quo that existed before judicial review. The complexity of the legislative response, and not the notwithstanding clause, is the principle explanation for the endurance of political constitutionalism within a strong-form constitutional Charter of Rights.

Keywords: judicial review, Canadian Charter of Rights and Freedoms, legislative responses, Bill 101, the Charter of the French Language, Quebec National Assembly, Supreme Court of Canada.
Introduction

The debate on judicial review tends to focus on the relationship to normative democratic principles, and whether legal constitutionalism is preferable to political constitutionalism.\(^1\) Although legal and political constitutionalism are associated with the American and British models, with legal constitutionalism suggesting that democracy and rights are best protected by written constitutions and judicial review, and political constitutionalism believing that they are best protected by the political process (Bellamy 2008: 1-12), the introduction of bills of rights in Westminster democracies challenge this distinction.\(^2\) Referred to as ‘parliamentary bills of rights,’\(^3\) systems of ‘weak-form review,’\(^4\) or the ‘Commonwealth model of constitutionalism,’\(^5\) the approaches in Canada, New Zealand, and the United Kingdom temper the finality of judicial review through bills of rights that can preserve parliamentary interpretations of rights commitments.

The Canadian Charter of Right and Freedoms provides for political reversal through the notwithstanding clause, section 33, that allows a legislature to override a judicial declaration of unconstitutionality for a renewable five year period involving a limited set of rights and freedoms.\(^1\) Under section 4 of the United Kingdom’s Human Rights Act, judges are restricted to issuing non-binding declarations of incompatibility. According to Bellamy, political constitutionalism endures because section 19 of the Human Rights Act allows

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Parliament to define the political approach to rights that structures judicial review, and section 4 maintains parliamentary discretion whether, and how, to respond to judicial declarations of incompatibility.\(^6\) In New Zealand, the judicial role is even more circumscribed, as section 4 of the New Zealand Bill of Rights Act (NZBORA) is unequivocal that courts cannot remedy inconsistent legislation and are instructed ‘where possible’ under section 6 to view statutory construction as consistent with right commitments.\(^7\)

While all three parliamentary bills of rights are, to varying degrees, examples of political constitutionalism, only the Canadian Charter of Rights and Freedoms requires a formal response to reverse judicial invalidation of a statute. However, the notwithstanding clause has not featured prominently as the principle parliamentary response to judicial invalidation since the Charter’s enactment in 1982.\(^8\) As it has only been invoked twice and not since Quebec’s override of the Supreme Court of Canada’s (SCC) invalidation of provisions of the *Charter of the French Language* in 1988, a plausible conclusion is that Canada has transitioned to strong-form judicial review because of parliamentary reluctance to employ the mechanisms of political constitutionalism within the Charter of Rights.\(^9\)

This article considers the possibility of political constitutionalism enduring in Canada, despite the infrequent use of the notwithstanding clause and the significant


augmentation of judicial review since 1982. Presenting a case study of Quebec’s *Charter of the French Language* – an iconic statute passed by the separatist Parti Québécois in 1977 but defended as essential to the protection of the French language and culture by subsequent federalist and separatist governments in Quebec – this article demonstrates the ability to legislate notwithstanding judicial decisions without invoking the formal instruments of political constitutionalism such as section 33 of the Canadian Charter of Rights and Freedoms. While Quebec’s the *Charter of the French Language* (hereafter CFL) represents a highly charged policy area that has been at the centre of Canadian mega-constitutional politics since the 1960s, as the preservation of Quebec’s language and culture has dominated the national unity debate, there is growing evidence of political reversal without the notwithstanding clause in other policy areas. The Parliament of Canada has reversed key judicial invalidations of the *Criminal Code*, engaging in what Kelly and Hennigar refer to as ‘notwithstanding-by-stealth’ to distinguish this legislative strategy from the formal, and constitutionally mandated, reversal through section 33 of the Charter of Rights. In this respect, legal mobilization in a highly politicized policy area such as the CFL is consistent with the ‘hollow hope’ thesis advanced by Rosenberg in his study of constitutional review and policy change in the United States.

A number of factors explain the endurance of political constitutionalism in language and education policy despite the constitutional status of the Canadian Charter of Rights and

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12 James B. Kelly and Michael Murphy, *Shaping the Dialogue on Federalism: Canada’s Supreme Court as Meta-Political Act* 35 PUBLIUS J. FEDERALISM 218 (2005).
 Freedoms and the statutory nature of the *Charter of the French Language*. First, the political context of this policy area and the willingness of the Quebec National Assembly to assert its sovereignty by engaging in non-compliance with judicial decisions, either in part or wholly. Indeed, the National Assembly has never ratified the *Constitution Act*, 1982 and has been willing to function as a constitutional entrepreneur defining language and education policy, both in response to – and independent of – judicial interpretation of *la Charte de la langue française* by the Supreme Court of Canada. Second, the use of weak-form remedies and anonymous decisions where the SCC invites parliamentary resolution of constitutional violations. Although it is not a common practice, the SCC has delivered anonymous decisions in 5 out of 7 cases in which it has invalidated Quebec statutes, and employed remedies that require political resolution, such as suspended declarations of unconstitutionality. This has created a paradoxical situation for groups engaged in legal mobilization as they seek judicial remedy of rights violations and not, as the SCC has preferred, political resolution within a judicially mandated.

Third, political constitutionalism endures through complex legislative responses that have the appearance of parliamentary acceptance of judicial invalidation of the *CFL* but which have the substantive outcome of re-establishing the policy status quo. Indeed, a common approach by the Quebec National Assembly has been to amend the *CFL* to incorporate judicial principles (legislative compliance) but to couple them with new provisions that neutralize and ultimately negate these judicial principles (legislative defiance).

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This has the outcome of largely re-establishing the policy status quo, or, at a minimum, the substantive components of the CFL considered vital to the Quebec National Assembly.

Fourth, the lack of judicial oversight of legislative responses is an important (and largely neglected) explanatory variable. Legal constitutionalism is premised on political compliance with judicial review. However, the mechanisms available for judicial scrutiny of legislative compliance are limited, and overlook a central folly of legal mobilization – the willingness of governments to defend their interpretation of the constitution as a repeat litigator as well as a repeat legislator. Finally, the structure of the Canadian Charter of Rights, which attempts to balance legal and political constitutionalism through instruments such as section 33, but also the asymmetrical application of section 23 to the Quebec National Assembly. Unlike other jurisdictions in Canada, the minority language education provisions do not fully apply to Quebec, and will not unless ratified by the National Assembly, and this is an acknowledgment of the political importance of this policy area to the Quebecoise identity.

Judicial Invalidation and the Quebec National Assembly

As summarized in Table 1, the Supreme Court of Canada has, in 7 cases, invalidated provisions of Quebec statutes as unconstitutional under section 52 of the Constitution Act 1982: the CFL (5 cases), the Summary Convictions Act (1 case), and the Referendum Act (1 case). Initially, the major concern with a constitutional Charter was the potential for the centralization of provincial areas of jurisdiction, as judicial review involving a national Charter of Rights was suggested to lead to a standardization of public policies at the
provincial level, and most importantly, Quebec’s control over language and education policy.\textsuperscript{16}

Indeed, the only policy area directly targeted by the Charter of Rights is education policy, which is an exclusive area of provincial jurisdiction, save a federal remedial power under section 93(3) that has fallen into constitutional disuse. In this regard, the main political purpose of the entrenchment of minority language education rights was to constitutionally challenge Quebec’s legislative approach to public education in the CFL,\textsuperscript{17} and more generally, Quebec’s unilingual French language policy introduced in 1977 as Bill 101, \textit{la Charte de la langue française}.

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Although the centralizing potential of judicial review is a possibility, the major limitation with such a concern is the judicial-centred focus of the analysis – the assumption that judicial decisions structure policy responses. Hogg and Bushell and ‘dialogue theorists’ defend legislative responses as evidence of an institutional relationship between courts and legislatures within the paradigm of constitutional supremacy.\textsuperscript{18} For dialogue theorists, the use of suspended declarations of unconstitutionality is illustrative of the Court’s respect of parliamentary actors, who, in turn, accept the policy parameters established by judicial review:

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\item[17] JOSEPH ELLIOT MAGNET, OFFICIAL LANGUAGES OF CANADA: NEW ESSAYS 150-153 (2008)
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Although the unconstitutional law is maintained in force for a short time, the Charter is still respected, because if no new law is enacted by the time the period of suspension ends, the declaration of invalidity takes effect. If a new law is enacted in response to the holding of invalidity, that law must comply with the Charter.\(^{19}\)

In contrast, critics of dialogue theory such as Grant Huscroft contend that this framework advances judicial supremacy, as the legislative response is ‘constitutionalism from the top-down’ because legislatures respond within a policy framework defined by the Supreme Court of Canada.\(^{20}\)

While there is disagreement as to the precise constitutional implications of judicial review, both sides in the dialogue debate share a common assumption – that the legislative response complies with the constitutional parameters established through invalidation.\(^{21}\) As Table 1 indicates,\(^3\) the invalidation of Quebec statutes by the SCC has seen the National Assembly fully comply with the Court’s rulings in only 2 out of 10 legislative responses introduced to remedy constitutional violations identified by the SCC.\(^{22}\) In Libman the Court ruled that the $600 spending restriction on third parties by the Referendum Act under section 404 – individuals not affiliated with either the ‘NON’ or ‘OUI’ committees, as required by the Act – was a violation of freedom of expression, and not a reasonable limit. In its judgment, the Court suggested that increasing the spending limit to $1,000 for third parties, as recommended by the Lortie Commission, would constitute a reasonable limit of freedom

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\(^{20}\) Grant Huscroft, Constitutionalism From the Top Down 45 OSGOODE HALL L. J. 91, 97 (2007).


of expression under section 1 of the Charter of Rights. Bill 450, passed by the National Assembly in 1998, complies with the Court’s decision, as the spending restriction was increased to $1000 for third parties in election and referendum campaigns. Similarly, the National Assembly complied with the Court’s decision in *thibault*, when it rescinded the *Summary Convictions Act* that allowed an acquittal to be appealed through a new trial and replaced it with the *Code of Civil Procedure* that did not include such a procedure.

It is significant, therefore, that the legislative response to judicial invalidation of the *CFL* has largely been statutory amendment and not the use of the notwithstanding clause. Indeed, a complex strategy of legislative amendment that both complies with and defies the Court’s rulings has allowed the Quebec National Assembly to offset judicial invalidation by effectively re-establishing the policy status quo that existed before judicial review, or at a minimum, the substantive policy components considered essential to the National Assembly to retain control over language and education policy. This challenges both the defenders and critics of dialogue theory that assume that a legislative response will fully comply with, and respect, the constitutional parameters of a judicial ruling. Indeed, the policy discretion that a parliamentary body retains despite a negative judicial ruling reinforces the conclusion that Canada has ‘weak-form’ judicial review and not judicial supremacy through legislative compliance with ‘constitutionalism from the top down’.

**The Sign Law Provisions of Bill 101**

The regulation of language on signs, posters, and advertising by the *CFL* 1977 came to be known as the ‘Sign Law’ provisions of Bill 101. Two important provisions were challenged

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as a violation of freedom of expression in *Ford v. Quebec*, protected under section 2(b) of the Charter of Rights: sections 58 and 69. Section 58 of the CFL required that “public signs and posters and commercial advertising shall be solely in the official language”\(^{26}\), though it did provide the Office de la langue française with the discretion to allow bilingual signs, or the sole use of languages other than French. Under section 1, French was declared as the official language of Quebec, and section 69 required that only the French name of a firm could be used in Quebec. Individuals or firms violating the sign law provisions of Bill 101 were subject to fines under sections 205 and 206.

Several individuals found in violation of the Act and fined by Office de la langue française launched constitutional challenges to sections 59 and 69 of the CFL in February 1984. The five claimants were successful at the Superior Court\(^ {27}\) and the Court of Appeal.\(^ {28}\) On December 15, 1988, the SCC dismissed the appeal of the Attorney General of Quebec, and declared sections 58 and 69 unconstitutional as an unreasonable limitation on freedom of expression protected under section 2(b) of the Charter of Rights, and thus, of ‘no force or effect’ under section 52 of the *Constitution Act, 1982*.

In a unanimous decision authored by ‘The Court’ sections 58 and 69 were found to be an unreasonable violation of freedom of expression because of the close relationship between language, expression, and identity: “Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice.”\(^ {29}\) Further, the Court reasoned that language “as the preamble of the Charter of the French Language itself

\(^{26}\) *Charter of the French Language*, R.S.Q. 1977

\(^{27}\) *Ford v. Quebec* [1988] 2 S.C.R. 712, ¶ 18

\(^{28}\) *Ford v. Quebec* [1988] 2 S.C.R. 712, ¶ 19

\(^{29}\) *Ford v. Quebec* [1988] 2 S.C.R. 712, ¶ 40
indicates, a means by which a people may express its cultural identity. In the companion case *Devine v. Quebec*, decided the same day as *Ford*, the Court argued that the section 2(d) violation was compounded by the compelled use of French in Bill 101: “That freedom is infringed not only by a prohibition of the use of one's language of choice but also by a legal requirement compelling one to use a particular language.” Commenting on Quebec’s position that commercial expression should not be protected by section 2(b), the Court rejected this, arguing, “there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the Charter.”

While the Court was supportive of the policy rationale of the CFL – promoting and maintaining the *visage linguistique* of Quebec – it did not consider that the section 2(d) violation constituted a reasonable limitation under section 1 of the Charter of Rights. Finding that sections 58 and 69 advanced pressing and substantial legislative objectives, the Court determined that the provisions failed the minimal impairment requirement of section 1, the reasonable limits test. In its section 1 analysis, the Court took issue with the compelled and exclusive use of French: “Thus, whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "visage linguistique" in Quebec and therefore justified under the Quebec Charter and the Canadian Charter, requiring the exclusive use of French has not been so justified.” Indeed, the Court did not accept that the compelled use of French was essential to the maintenance and promotion of the French language in Quebec, whereas the marked predominance of French, alongside other languages, would advance this

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31 *Devine v. Quebec* [1988] 2 S.C.R. 790, ¶ 23
34 Jamie Cameron, *To the Rescue: Antonio Lamer and the Section 2(b) Cases from Quebec, in THE SACRED FIRE: THE LEGACY OF ANTONIO LAMER* 217, 246 (Adam Dodek and Daniel Jutras eds., 2009).
objective and be consistent with the demographic reality of Quebec: “Such measures would ensure that the "visage linguistique" reflected the demography of Quebec: the predominant language is French….But exclusivity for the French language has not survived the scrutiny of a proportionality test and does not reflect the reality of Quebec society.”

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

Bill 178: Legislative Defiance and the Notwithstanding Clause

The Quebec National Assembly introduced two legislative responses to Ford v. Quebec: Bill 178, which had the force of law between 1988 and 1993, and Bill 86 which replaced Bill 178 when the notwithstanding clause expired after 5 years and the Bourassa government decided against re-invoking section 33 of the Charter of Rights. The first legislative response, Bill 178 complied with and departed from Ford v. Quebec. Tabled in the National Assembly on December 19 and assented to on December 22, 1988, Bill 178 amended section 58 to create

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the inside/outside rule for public signs, posters and advertising (Appendix 1). Section 68 was amended to reiterate that the name of firms operating in Quebec could only be in French.39 Section 58, the outside rule, established that “public signs and posters and commercial advertising, outside or intended for the public outside, shall be solely in French.”40

Bill 178, therefore, disregarded the Court’s ruling in *Ford* that the exclusive use of French was inconsistent with section 2(d) of the Canadian Charter of Rights, as well as freedom of expression protected in the Quebec Charter of Human Rights and Freedoms. Section 58.1, the inside rule, provided that “inside establishments, public signs and posters and commercial advertising shall be in French”41 but allowed for the use languages in addition to French “provided they are intended only for the public inside the establishment and that French is marked predominant.”42

[TABLE 2 HERE]

The inside/outside rule compelled the exclusive use of French on public signs, posters and advertisement but did allow for limited use of languages in addition to French, so long as the signs were located inside and French was ‘marked predominant.’ Recognizing that Bill 178 was mostly inconsistent with the Court’s ruling in *Ford*, the Bourassa government invoked section 33 of the Charter to protect the 1988 amendments to the *CFL* against judicial invalidation for a period of 5 years (Table 2: Bill 178, s.10). In addition, section 10 of Bill 178 allowed the amendments to the *CFL* to proceed despite their

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39 *Charter of the French Language*, R.S.Q. 1988, s. 68
40 *Charter of the French Language*, R.S.Q. 1988, s. 58
41 *Charter of the French Language*, R.S.Q. 1988, s. 58.1
42 *Charter of the French Language*, R.S.Q. 1988, s. 58.1
inconsistency with the Quebec Charter of Human Rights and Freedoms. In justifying Bill 178, its departure from *Ford*, and the use of the legislative override (section 33) to protect against potential judicial challenges, the Premier of Quebec, Robert Bourassa argued that his government had to choose between collective and individual rights, and this necessitated invoking the notwithstanding clause to protect Bill 178. More importantly, Bourassa reasoned that he alone possessed the moral authority to invoke section 33: “I repeat that I am the only head of government in North America who has the moral justification to act in this manner because I am the only leader of a people that is very much a minority on this continent. Who can best and better defend, protect and promote French culture than the Prime Minister of Quebec?”

Bill 178 was introduced and passed in a politically charged atmosphere. Three Anglophone members of the Bourassa cabinet resigned in light of Bill 178, and the 1989 Quebec election saw the Equality Party – an English rights political party that directly benefitted from Anglophone anger against Bill 178 – elect 4 members to the National Assembly. Outside Quebec, Bourassa’s use of the notwithstanding clause is considered a decisive event that ultimately derailed the Meech Lake Accord and its recognition of Quebec as a distinct society.

43 ROBERT BOURASSA, DEBATES IN THE NATIONAL ASSEMBLY (1988).
44 IAN L. MACDONALD, FROM BOURASSA TO BOURASSA: WILDERNESS TO RESTORATION 295 (2002).
46 IAN L. MACDONALD, FROM BOURASSA TO BOURASSA: WILDERNESS TO RESTORATION 295-296 (2002).
Bill 86: Re-establishing the Policy Status Quo through Statutory Amendment

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


[TABLE 3 HERE]

The Court’s decision in *Ford* established a constitutional standard that freedom of expression was unreasonably infringed if, through legislation or regulation, governments compelled the exclusive use of any language on public signs, posters, or commercial advertising. Indeed, the Court was unequivocal regarding the constitutional parameters of commercial expression. Further, the Court endorsed bilingual signs with French given ‘marked predominance’ as a policy solution that would be considered a reasonable limit under section 1 of the Charter of Rights and Freedoms. The 1993 amendments to the *CFL* do not fully comply with the *Ford* decision but re-establish the sovereignty of the Government of Quebec, through regulation, to decide the circumstances in which *Ford* may be complied with. While Bill 86 does incorporate the language of *Ford v. Quebec*, as section 58 does not compel the exclusive use of French and allows for the possibility of bilingual signs so long as French is marked predominant (Table 3), the 1993 amendments retain for
the Quebec government the discretion to decide when, and if, to comply with the Court’s
decision as “the Government may determine, by regulation, the places, cases, conditions or
circumstances where public signs and posters and commercial advertising must be in French
only, where French need not be predominant or where such signs, posters and advertising
may be in another language only.”

Similarly, section 68 appears to comply with Ford as “A firm name may be
accompanied with a version in a language other than French provided that, when it is used,
the French version of the firm name appears at least as prominently.” However, this is
qualified by section 58 of the CFL that authorizes the Quebec Government, through
regulation, to compel the exclusive use of French. Therefore, Bill 86’s compliance with Ford
v. Quebec is at the discretion of the Government of Quebec and through regulation without
parliamentary oversight.

Whereas legislative changes are passed by the National Assembly, regulations are
orders-in-council passed by the Cabinet and do not require the consent of the National
Assembly. Division III of the regulation is entitled “Public Signs and Posters and
Commercial Advertising” and specifies the conditions when French must be used exclusively
and not simply given marked predominance. For instance, section 15 specifies:

…a firm’s commercial advertising, displayed on billboards, on signs or posters or on
any other medium having an area of 16 m² or more and visible from any public
highway within the meaning of section 4 of the Highway Safety Code…must be
exclusively in French unless the advertising is displayed on the very premises of an
established firm (Regulation respecting the language of commerce and business 1993: s.15).

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48 Charter of the French Language, R.S.Q. 1993, s.58
49 Charter of the French Language, R.S.Q. 1993, s.68
50 Charter of the French Language, R.S.Q. 1993, s.68
Similarly, public signs and commercial advertising on public means of transportation and bus shelters must be exclusively in French (Regulation respecting the language of commerce and business: s.16).

Section 58 of the CFL 1993 was challenged in 1999 when an antique store owned by Simpson and Hoffman in the Eastern Townships used commercial advertising that displayed English and French versions of the firm name, “La Lionne et le Morse – The Lyon and the Walrus” where English and French were equal in size. Clearly in violation of section 58 of the CFL and the accompanying regulations, where ‘marked predominance’ for French is defined as “at least twice as large as the space allotted to the text in the other language” (Regulation defining the scope of the expression “marked predominant” for the purposes of the Charter of the French Language: s. 2(1)), Simpson and Hoffman were fined $500 under section 205 of the CFL.51 Initially successful at the Court of Quebec, where Simpson and Hoffman challenged that section 58’s requirement of ‘marked predominance’ continued to be an unreasonable violation of freedom of expression, the finding of unconstitutionality was reversed at the Superior Court. Finally, the Court of Appeal upheld the constitutionality of section 58, arguing that the appellants had failed to demonstrate that the restrictions on languages other than French were no longer necessary in 1999.52

An application for leave to appeal was filed with the SCC (December 21, 2001), and the Court dismissed the leave to appeal without reasons on October 11, 2002.53 The Court, as well as the Quebec Court of Appeal, reached the correct decision, as Simpson and Wallace were clearly in violation of section 58. More importantly, section 58 is consistent with the constitutional standard established by the Court in Ford requiring French to be given ‘marked

51 Les Enterprises W.F.H. Ltee v. Attorney General of Quebec ¶ 4
52 Les Enterprises W.F.H. Ltee v. Attorney General of Quebec ¶ 61
53 SUPREME COURT OF CANADA, BULLETIN OF PROCEEDINGS (2002).
predominance’ on bilingual signs. Unfortunately, Simpson and Wallace challenged the 1993 amendments to the CFL that fully complied with *Ford v. Quebec*. What has yet to be determined as constitutional is the ability, through regulation, to compel the exclusive use of French on public signs, posters and advertisement as mandated by Bill 86. Thus, by partially complying with *Ford*, the Government of Quebec has largely preserved the policy status quo that existed before 1988. In the end, it is the CFL as interpreted by the Government of Quebec, and not the Charter of Rights, as interpreted by the SCC, which determines the constitutional parameters of the *Sign Law*.

**Bill 101 versus the Charter of Rights: Section 73 and Language of Instruction**

The issue of Quebec and its place within Canada was the core political question that motivated both Pierre Trudeau as Prime Minister of Canada (1968-79, 1980-84), and Rene Levesque, first as a cabinet minister in the government of Quebec Premier Jean Lesage (1960-1966), and after his departure from the Quebec Liberal Party in 1968, during his tenure as Parti Québécois Premier (1976-85). For instance, Trudeau introduced the *Official Languages Act* in 1969 that established Canada as an officially bilingual country where citizens were guaranteed federal government services in either French or English. This statutory policy would be constitutionalized in 1982 when official bilingualism was entrenched as sections 16-22 of the Canadian Charter of Rights and Freedoms.

In contrast, Levesque introduced the *Charter of the French Language* in 1977 which built upon Bill 22 (*Loi sur la language officielle*) introduced by the previous Liberal government of Robert Bourassa in 1974: Bills 22 and 101 declared French as the only official language of Quebec in government and business. However, on the issue of language of instruction in public schools, Bill 101 was a significant departure from previous legislative attempts to

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navigate this sensitive issue in Quebec. In 1969, the Union Nationale government of Premier Jean-Jacques Bertrand introduced Bill 63, which allowed parents to choose the language of instruction in public education for their children.\textsuperscript{55} As well, Bill 63 required the Minister of Education to “ensure a working knowledge of the French language to children to whom instruction is given in the English language.”\textsuperscript{56}

In relation to new immigrants to Quebec, Bill 63 provided French classes for greater integration into Quebec society, but did not require that new immigrants school their children in French.\textsuperscript{57} Because Bill 63 ultimately confirmed freedom of choice in language of instruction in public education, it saw the integration of new immigrants, the Allophone community, into the Anglophone community as new immigrants generally chose instruction for their children in English.\textsuperscript{4}

Conscious of the threat that language of instruction posed to his government, Liberal Premier Robert Bourassa (1970-76) introduced Bill 22 (\textit{Official Language Act}) in 1974 that attempted to appease both the Francophone demand for limited choice of instruction, and Anglophones demand for unlimited choice in public education. Although Bill 22 did not remove the choice regarding language of instruction, it did establish under section 41 that “pupils must have a sufficient knowledge of the language of instruction to receive their instruction in that language” and further, “pupils who do not have a sufficient knowledge of any of the languages of instruction must receive their instruction in French.”\textsuperscript{58}

The election of the Parti Québécois in November 1976 saw the abandonment of incrementalism in education policy and the restriction of English language instruction as a

\textsuperscript{55} \textit{An Act to promote the French language in Quebec}, S.Q. 1969, c.9, s.2
\textsuperscript{56} \textit{An Act to promote the French language in Quebec}, S.Q. 1969, c.9, s.1.
\textsuperscript{57} \textit{An Act to promote the French language in Quebec}, S.Q. 1969, c.9, s.3.
\textsuperscript{58} \textit{Official Language Act}, S.Q. 1974, c. 6, Chapter V.
historical right of Quebec’s Anglophone community. Under section 73, request for instruction in English was restricted to the children, or siblings, of those educated in English in Quebec on or before Bill 101 came into force in 1977. As such, Bill 101 had two objectives: prevent the integration of the Allophone community into the Anglophone community through parental choice in public education; and secondly, narrow accessibility to English education to simply Quebec Anglophones, as Anglophones emigrating from other provinces would be ineligible for English education under the CFL.

Recognizing that it lacked the ability to challenge Bill 101, the Trudeau government accelerated its efforts to patriate the BNA Act and rename it the Constitution Act, 1982. Although the documents are nearly identical, the inclusion of the Charter of Rights transformed the possibility of legal mobilization against Bill 101 and the language of instruction. Specifically, the Charter of Rights contains section 23, minority language educational rights, which were explicitly designed to reverse section 73 of the CFL. Although the Parti Québécois could not agree in principle to the patriation of the constitution in 1982, as its political program was Quebec independence, it was opposed to the Charter of Rights on substantive grounds, recognizing the danger it posed to Bill 101 and the language of instruction. Whereas Bill 101 established in statutory form English instruction as an historic right of Anglo-Quebecers, section 23 of the Charter of Rights constitutionalized the right to minority language instruction for the children and siblings of Canadian citizens educated in English in Canada.

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

The first constitutional challenge to language of instruction governed by section 73 of the Charter of French Language was delivered by the Supreme Court of Canada in Attorney General...
(*Quebec*) *v.* *Protestant School Boards.* The Supreme Court determined sections of the *CFL* which restricted English education to the Children of Anglophones educated in Quebec, infringed the Charter’s minority language education rights, section 23. The Government of Quebec readily admitted that aspects of the *CFL* violated section 23 of the Canadian Charter, but contended that the limitations were reasonable because of the important legislative objectives pursued. Those objectives included the continued survival of the French language by streaming the growing Allophone population to the French language education system. In making this argument, the Attorney General of Quebec relied upon more restrictive language policies in multi-linguistic societies, such as Belgium and Switzerland. As these nations had adopted stricter language polices subsequently upheld by the Swiss and European Courts, Quebec reasoned that this policy would be upheld through section 1 of the Charter.\(^{60}\) While the Supreme Court was sensitive to the policy objectives underlying Bill 101, the Court determined that denying educational instruction to the children of Canadian citizens educated in English outside of Quebec was not reasonable, but rather a total, limitation of section 23(1)(b). As a result, the SCC declared section 73 unconstitutional, and eligibility for instruction in English in Quebec, based on section 23 of the Charter, would be available to the children or siblings of Canadian citizens educated in English in Canada.

**[TABLE 4 HERE]**

In reaching this decision, the SCC considered the political nature of section 23, noting that this Charter provision had been drafted with the explicit intention of reversing section 73 of the *CFL*:

This set of constitutional provisions was not enacted by the framers in a vacuum. When it was adopted, the framers knew, and clearly had in mind the regimes governing the Anglophone and Francophone linguistic minorities in

\(^{60}\) *Quebec v. Protestant School Boards* [1984] 2 S.C.R. 66, ¶ 79.
various provinces in Canada so far as the language of instruction was concerned….as well as more recent once such as Bill 101 and the legislation which preceded it in Quebec. Rightly or wrongly, - and it is not for the courts to decide, - the framers of the Constitution manifestly regarded as inadequate some - and perhaps all - of the regimes in force at the time the Charter was enacted, and their intention was to remedy the perceived defects of these regimes by uniform corrective measures, namely those contained in s.23 of the Charter, which were at the same time given the status of a constitutional guarantee.61

In some respects, Protestant School Boards is an example of successful legal mobilization and constitutional engineering as it resulted in the invalidation of section 73 of the CFL and expanded access to public instruction in Quebec to Canadian citizens educated in English in Canada and not simply, as specified by section 73, to Quebec’s Anglophone community.

There are, however, two dimensions of this decision – accessibility to the policy victory, and the legislative response to Protestant School Boards by the National Assembly – that question whether successful legal mobilization has compromised the underlying policy objectives of Bill 101 regarding language of instruction. While Bill 101 restricted access to English instruction, its principle goal was to ensure that the growing Allophone community was streamlined into the French public school system, and prevented from choosing English instruction. In this respect, the Court’s decision in Protestant School Boards has not undermined this goal of Bill 101, as section 23 is restricted to Canadian citizens educated in English in Canada. Thus, this policy victory is limited to the Canadian Anglophone community, which does not immigrate in large numbers to Quebec, and cannot be accessed by the Allophone community. Specifically, the Allophone community is comprised of recent immigrants to Quebec principally from French-speaking nations, which has extreme difficulty in satisfying the constitutional requirements of section 23 for minority language instruction, as well as being ineligible for English instruction under Bill 101.

This example of successful legal mobilization has been offset by demographic shifts in Quebec’s population that question the negative assessments of Protestant School Boards. In the period between 1981 and 2006, the Anglophone community has declined from 13.3% to 7.8% of the Quebec population, whereas the Allophone community has increased from 8% to 12.1%. Indeed, there has been a negative net migration of 284,000 Anglophones from Quebec since the introduction of language legislation (Bills 63, 22, and 101), in the period 1971-2006, and a net outflow of 83,900 Anglophones since Protestant School Boards (Statistics Canada, censuses of population, 1971-2006). Thus, the SCC’s decision has not interfered with the substantive policy objective of preserving the French language by limiting choice in educational instruction because it only privileges Canadian citizens educated outside Quebec who move to Quebec.

As there is a net outflow of Anglophones from Quebec and this is the only group that can benefit from the decision, the children of new immigrants to Quebec cannot access English education because their parents (or siblings) are neither Canadian citizens nor educated in English in Canada. As the demographic strength of Francophones is not threatened by interprovincial immigration but bolstered by French-speaking emigrants to Quebec, the partial invalidation of the CFL has no practical impact beyond providing a strong rhetorical tool for the critics of the 1982 constitutional settlement. Thus, beyond the requirement to provide educational services to a restricted part of the Anglophone community in Quebec, which is declining in population, the Quebec National Assembly

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retains nearly complete autonomy over education policy, as 92 per cent of the population does not benefit from Protestant School Boards.⁵

An important aspect of legal mobilization not considered in relation to Protestant School Boards is the legislative response to this decision by the National Assembly in 1993. Bill 86 was introduced by the Liberal government of Robert Bourassa (1985-1994) and represents Quebec’s attempt to legislatively offset the constitutional implications of Protestant School Boards for Bill 101. The 1993 amendments to the CFL further reduced accessibility to English instruction by specifying that eligibility was only available to those children whose parents or siblings are Canadian citizens educated in English in Canada “provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada.”⁶⁴

Section 23 of the Charter establishes the following requirements for Canadian citizens who seek to have their children educated in English in Quebec: first, the parent must have received their primary or secondary school instruction in English in Canada, or alternatively, have one child who is receiving their education in English in Canada as the basis of qualification for all their children; secondly, the provision of services is not automatic but is only required ‘where numbers warrant.’⁶⁶ As a result, section 23 does not specify the length of residency in English instruction to qualify, or the type of educational institution providing English instruction to satisfy section 23.

In this respect, Bill 86 legislatively redefines section 23 of the Charter and the constitutional requirement of ‘received or receiving’ English instruction to a legislative standard that requires a rights holder to also demonstrate that the ‘major part’ of their education has been in English in Canada. The desired policy outcome of Bill 101 and

⁶⁴ Charter of the French Language R.S.C., 2010, s.73.
section 73 was to restrict access to English public instruction to those educated in English in Quebec, whereas the effect of Protestant School Boards was to expand access to those educated in English in Canada. Bill 86 and the ‘major part requirement’, combined with the negative outflow of Anglophones from Quebec, effectively re-establish the policy status quo of Bill 101 in regard to language of instruction in public institutions.

**Constitutional Challenges to Bill 86: the ‘Major Part’ Requirement**

A significant challenge was launched against the CFL in 2005, Solski (Tutor of) v. Quebec, the first case heard by the SCC against language of instruction since Protestant School Boards. At issue in Solski was the 1993 amendment to the CFL introduced by Bill 86 and whether the ‘major part’ requirement was consistent with section 23 of the Charter. Under the CFL, parents seeking to have their children educated in English must complete a ‘certificate of eligibility’ to establish their claim under section 73. This certificate is reviewed by a person ‘designated’ by the Ministry of Education, Recreation and Sports (section 75), which evaluates all applications under the analytical framework established by regulation.65 Finally, all decisions regarding eligibility may be contested before the Administrative Tribunal Quebec (ATQ) within 60 days of notification.66

By regulation, the ‘major part’ requirement established was purely a quantitative assessment: “the Minister will determine eligibility solely on the basis of the number of months spent in each language. Other factors, including the availability of linguistic programs and the presence of learning disabilities or other difficulties…are not considered.”67 In Solski, the SCC upheld section 73(2) of the CFL that limited English education in Quebec to children who have received “the major part of the elementary or

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65 Charter of the French Language, R.S.Q. 1993, s.73.1
66 Charter of the French Language, R.S.Q. 1993, s.83.4
67 Solski (Tutor of) v. Quebec (Attorney General) [2005] 1 S.C.R. 201 ¶ 25
secondary instruction received by the child in Canada.”68 However, the Court ruled that the interpretation of the ‘major part’ requirement by the Minister of Education and used by the ATQ of Quebec was inconsistent with the purpose of section 23 of the Charter. In effect, the SCC upheld the constitutionality of the CFL but found that its administrative application – as established by regulation – was unconstitutional.

The Court ruled that a purely quantitative approach to section 73(2) violated the purpose of section 23, as only a significant part and not the majority of a child’s education would have to be in English to qualify for minority language education in Quebec.69 While the SCC recognized that provinces retain the discretion to determine eligibility for minority language education, the criteria established must be consistent with section 23. In the Court’s view, a qualitative approach to the ‘major part’ requirement would ensure the constitutionality of section 73(2) of the CFL and must consider the following criteria: how much time was spent in either language in an educational setting, the stage of education when the language of instruction was chosen, the availability of minority language education instruction, and finally, whether the child experienced any disabilities or difficulties.70

In effect, the Court disregarded the ministerial directive on the ‘major part requirement’ and included the very criteria that were previously disregarded. In reaching this position, the Court recognized that the provision of minority language education rights varies between provinces and that, in the case of Quebec the “latitude given to the provincial government in drafting legislation regarding education must be broad enough to ensure the protection of the French language while satisfying the purposes of section 23.”71

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68  Solski (Tutor of) v. Quebec (Attorney General) [2005] 1 S.C.R. 201 ¶ 25
69  Solski (Tutor of) v. Quebec (Attorney General) [2005] 1 S.C.R. 201
70  Solski (Tutor of) v. Quebec (Attorney General) [2005] 1 S.C.R. 201
71  Solski (Tutor of) v. Quebec (Attorney General) [2005] 1 S.C.R. 201 ¶ 3
The impact of judicial activism was tempered by the remedy imposed by the Court, as well as the preservation of the assessment process under section 75 of the CFL. While the ‘major part’ requirement is a general requirement under the CFL, it is individually assessed under section 75. Though the Court cautioned against a quantitative approach to section 73 of the CFL, it did establish the requirement that parents demonstrate a commitment to the educational pathway: “It cannot be enough, in light of the objectives of s.23, for a child to be registered for a few weeks or a few months in a given program to conclude that he or she qualifies for admission, with his or her siblings, in the minority language programs of Quebec.”

Thus, the SCC would not accept ‘artificial educational pathways’ used to circumvent the CFL – a judicial position that would become significant when Quebec fashioned its response in the guise of Bill 115.

While the SCC established a qualitative approach, it is still the responsibility of the person designated under section 75 to apply and assess the certificates of eligibility for English instruction. Thus, the SCC has constitutionalized Quebec’s legislative amendment of section 23 of the Charter via the 1993 statutory changes to the CFL. This represents a movement away from Protestant School Boards, which simply required previous English instruction in Canada, as mandated by section 23 of the Charter. While the outcome of Solski saw 2 families eligible for English instruction in Quebec, the broader significance is judicial acceptance of a further qualification on the Canadian Charter of Rights by the Quebec National Assembly.

Bill 104 and ‘Bridging Schools’: Nguyen and the Charter of the French Language 2002

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72 Solski (Tutor of) v. Quebec (Attorney General) [2005] 1 S.C.R. 201 ¶ 39
The CFL further restricted access to English instruction in Quebec when it was subsequently amended in 2002 with the passage of Bill 104 by the Parti Québécois government of Premier Bernard Landry. Under Bill 104, section 73 of the CFL was amended to specify the type of educational institution necessary to satisfy the ‘major part’ requirement introduced in 1993. This represents an additional legislative amendment of section 23 of the Charter, which does not specify the type of educational institution to establish eligibility for minority language instruction in Canada. This change was motivated by Quebec’s growing concern of the use of ‘écoles passerelles’ (bridging schools) by the Allophone community to satisfy the eligibility criteria under section 73 of the CFL. In particular, a practice developed whereby children of Allophones were sent to unsubsidized private schools (UPS), or ‘bridging schools’, for short periods of time to establish eligibility under section 73. Allophones are members of Quebec’s growing immigrant population who are, under Bill 101, streamlined into the French-language education system, as they generally do not qualify for English public education under section 23 of the Charter. Quebec took exception to Allophone parents enrolling their children in unsubsidized private schools for “no more than a few weeks or months in most cases” as a way to circumvent the CFL for children ineligible for public instruction.  

Under this practice, once one child was briefly educated in English at a private institution, Allophones would apply for a ‘certificate of eligibility’ arguing that the ‘major part’ requirement had been met, thus allowing all family members access to English instruction in Quebec. For instance, if a child had only attended an UPS, even for a few weeks, it would have constituted their total educational experience, thus satisfying the ‘major part’ requirement demanded by section 73 of the CFL. In response, Quebec introduced Bill

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104 in 2002 to close the loophole created by the use of bridging schools that were used to circumvent the restrictions on language of instruction under the CFL. Under the 2002 amendment “instruction received in English in Quebec in a private educational institution not accredited for the purposes of subsidies by the child for whom the request is made, or by a brother or sister of the child, shall be disregarded” (Charter of the French Language 2002: s.73).

The case of Nguyen v. Quebec was launched by 131 families that had been denied ‘certificates of eligibility’ by the ATQ after briefly enrolling their children in unsubsidized private schools as a way to satisfy section 73 of the CFL.\(^{74}\) In Nguyen, the families challenged the prohibition against private institutions as a violation of section 23 of the Charter of Rights, which did not specify the educational setting necessary to qualify for public instruction in either official language. In a unanimous decision by Justice Lebel, the Court supported the constitutional challenge against Bill 104 because “[s]uch periods of instruction, are, in a manner of speaking, struck from the child’s educational pathway as if they had never occurred.”\(^{75}\) In the opinion of the Court, the Charter of Rights did not specify institutional setting necessary to qualify for section 23, and thus, Bill 104 was unconstitutional because “it is therefore the fact that a child has received instruction in a language that makes is possible to exercise the constitutional right.”\(^{76}\)

For the Court, the prohibition against private instruction created a “fictitious educational pathway that cannot serve as a basis for a proper application of the constitutional guarantees.”\(^{77}\) As a result, the SCC declared Bill 104 unconstitutional, and in this respect, it can be viewed as a successful example of legal mobilization for the Allophone

\(^{74}\) Nguyen v. Quebec (Education, Recreation and Sports), [2009] 3 S.C.R. 208 ¶ 13

\(^{75}\) Nguyen v. Quebec (Education, Recreation and Sports), [2009] 3 S.C.R. 208 ¶ 31

\(^{76}\) Nguyen v. Quebec (Education, Recreation and Sports), [2009] 3 S.C.R. 208 ¶ 32

\(^{77}\) Nguyen v. Quebec (Education, Recreation and Sports), [2009] 3 S.C.R. 208 ¶ 33
community against Bill 104. However, there are two aspects of the unanimous judgement that lessened this victory: the remedy imposed by the SCC, and the requirement of parents demonstrating a ‘genuine commitment’ to the educational pathway chosen for their children to satisfy the ‘major part’ requirement established in Solski.

In regard to the use of ‘bridging’ schools, the Court recognized the problematic nature of particular UPS for the CFL and thus, did not establish a general Charter principle that all English language instruction facilities would satisfy section 23 of the Charter. Perhaps more importantly, the Court accepted the underlying premise of Bill 104 and the need to regulate écoles passerelles: “When schools are established primarily to bring about the transfer of ineligible students to the publicly funded English-language system, and the instruction they give in fact serves that end, it cannot be said that the resulting educational pathway is genuine.”^78

In Nguyen, the Court imposed two remedies for the Charter violations: the constitutional remedy involving the CFL, and secondly, the remedy for the 131 parents seeking ‘certificates of eligibility’ allowing their children English instruction in Quebec that were denied by the ATQ. Although Bill 104 was declared unconstitutional, this decision was suspended for 1 year. The use of suspended declarations of unconstitutionality has become a common judicial remedy in Charter cases,^79 and provided the National Assembly with the opportunity to fashion a legislative response to ensure the continued application of section 73 of the CFL, which it did with the passage of Bill 115, An Act following upon the court decisions on the language of instruction, in October 2010.

However, the Court did not grant the requests for ‘certificates of eligibility’. Instead, the files were returned to the Ministry of Education for re-evaluation, based on the

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qualitative approach to the ‘major part’ requirement established in Solski, and the ‘genuine commitment’ principle to the educational pathway established in Nguyen. However, given that most of the 131 families had attended UPS for very short periods of time, it is unlikely that upon re-evaluation, any would qualify for English instruction under section 73, despite judicial victories in Solski and Nguyen.

**Bill 115: Quebec’s Legislative Responses to Solski and Nguyen**

The Quebec National Assembly, in the guise of Bill 115, amended two acts as its legislative responses to Solski and Nguyen: *Charter of the French Language* 2010, which offset the invalidations of Bill 86 (*Solski*) and Bill 104 (*Nguyen*), and changes to the *Act Respecting Private Education*, which also addressed the invalidation of Bill 104 in *Nguyen*. By passing Bill 115, the National Assembly satisfied the one-year suspended declaration of unconstitutionality as the remedy established by the Court in *Nguyen*, as well as fashioning a response to the qualitative analytical assessment for the ‘major part requirement’ fashioned by the Court in *Solski*.

**[TABLE 5 HERE]**

*A Weighted Approach to the ‘Major Part Requirement’*

Bill 115 amended section 73 of the CFL to include section 73.1 that authorized the government to create an analytical framework for determining whether the ‘major part requirement’ is satisfied for issuing certificates of eligibility for public English instruction:

“The analytical framework may, among other things, establish rules, assessment criteria, a weighting system, a cut-off or passing score and interpretive principles.”

During the debate on Bill 103, which was replaced by Bill 115, the Minister of Education noted that the

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80 *Charter of the French Language*, R.S.Q. 2010, s.73.1
The purpose of the analytical framework was to severely restrict the number of certificates of eligibility issued: “I won’t deny that the objective is to have a few as possible (approved).”

This assessment was shared by Debbie Horrock, President of Quebec English School Boards Association, who commented in regard to Bill 115: “We really don’t anticipate seeing one single student come to the English schools because of this [new law].”

Thus, the Liberal government of Jean Charest introduced a legislative response to Nguyen that complied with the Solski qualitative assessment but authorized an analytical framework with the purpose of marginalizing the policy change introduced by the Court. This occurred through a weighting system that prioritizes previous years spent in English education to the detriment of other factors identified by the Court as essential to the purpose of Section 23 of the Charter.

The regulations introduced in support of section 73.1 require a candidate to achieve a score of 15 “calculated according to the weighting set out in Schedule 1.”

Candidates are assessed based on three criteria: (1) ‘Schooling’ which considers “the different types of educational institutions attended and the characteristics of their enrolments that illustrate their relationship with the Quebec Anglophone minority” (section 3, Division 1); (2) ‘consistent, true commitment’ which evaluates “the family context and other elements of the child’s environment that may shed light on the authenticity of the commitment to an English-language education” (section 3, Division 2); and (3) ‘Specific situation and overall education’ which is to allow “a more in-depth assessment, with respect to the child’s personal and family situation, of the authenticity of the commitment made” (section 3,

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81 Don Macpherson, *Bill 103 is in the style of Bourassa – Language law; Charest government proposal reopens English-education loophole, but barely*, MONTREAL GAZETTE, June 3, 2010.
82 Raucous debate on Quebec language law drags on, CBC NEWS, October 18, 2010.
83 Regulation respecting the criteria and weighting used to consider instruction in English received in a private educational institution not accredited for the purposes of subsidies, RRQ, c C-11, r 2.1 (2012c), s. 5.
Division 3). Finally, the regulations emphasize that the point of the exercise is to determine an applicant and their family’s commitment to English education:

When interpreting and applying Schedule 1, in particular Division 3, it is important, among other things, to make a distinction between cases that demonstrate a genuine commitment to an English-language education, and cases where attendance at a private educational institution…could simply denote a desire to create an artificial educational pathway in order to circumvent the Charter of the French language (section 4).

The weighting system is largely based on length of residency, as each category assigns a value based on the number of years an applicant is enrolled in a Type A, B, or C private English institution. For instance, under Division 1 ‘Schooling’ 1 year of attendance in a Type A English language unsubsidized private school is assigned a score of 2, and 3 years results in an allocation of 15 points (Schedule 1). In an acknowledgment of the Court’s requirement that the ‘major part requirement’ consider the presence of disabilities or learning difficulties, children attending an unsubsidized private school with a special mission or purpose can receive an additional 5 points.

Under Division 2 “Consistent, true commitment” applicants are deducted points for every year spent in a French-language institution while awaiting a certificate of eligibility for English instruction. Specifically, a penalty of 3 points is assessed for each of the first two years in French-language elementary instruction, and 5 points for each additional year. Further, applicants receive points if their siblings have attended English language unsubsidized private institutions and loose points if their siblings attended French-language institutions. Finally, Division 3 “Specific situation and overall education” allows the minister’s designate under section 75 of the CFL to assess a weighted score of +8 to –8 based on a subjective assessment of the authenticity of the family commitment to English education. Indeed, the regulations do not provide any criteria in which to assess Division 3, which is judged by interviewing the applicant and their family.
The regulations comply with Solski as eligibility is based on a qualitative assessment of the ‘major part requirement’ established by the Court as necessary to reconcile section 73 of the CFL with section 23 of the Charter of Rights. However, the weighted system effectively reduces it to a quantitative assessment of years spent in English private education in unsubsidized institutions. In Solski, the Court cautioned “the strict mathematical approach lacks flexibility and may even exclude a child from education vital to maintaining his or her connection with the minority community in culture…In short, the strict approach mandated by the Minister of Education fails to deal fairly with may person who must be qualified under a purposive interpretation of section 23(2) of the Charter.”

Further, the Court concluded that the stage when English education was accessed was irrelevant, as an Anglophone that spent the first three years in French education would not qualify under section 73 of the CFL despite having a “sufficient link to the minority language community.”

A review of the regulations demonstrate that residency in an English private institution is the principle and dominant assessment criterion that marginalizes the qualitative assessment established by the Court in Solski. Further, the regulations attach a significant penalty if applicants (or their siblings) first attend French language institutions despite the Court indicating in Solski that this was not a relevant consideration as “the language learned in the last three years may provide a better marker than that learned in the first three years.”

Thus, the legislative response re-establishes the policy status quo through a weighted system that marginalizes all considerations except residency in English private institutions and a commitment to the educational pathway that is determined by family members not attending

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84 Solski (Tutor of) v. Quebec (Attorney General) [2005] 1 S.C.R. 201 ¶ 37
85 Solski (Tutor of) v. Quebec (Attorney General) [2005] 1 S.C.R. 201 ¶ 37
86 Solski (Tutor of) v. Quebec (Attorney General) [2005] 1 S.C.R. 201 ¶ 37
the French language system. This is a particularly difficult criterion for Allophones to satisfy, as their children generally do not qualify through a parent’s educational history, given that the parent tends to be educated outside Canada. Thus Allophone children have the possibility of attaining a certificate of eligibility only through attendance at private unsubsidized institutions, provided that no sibling has attended French-language instruction.

[TABLE 6]

Although the general prohibition on unsubsidized private schools for the purpose of establishing eligibility for English instruction under the CFL was declared unconstitutional in *Nguyen*, the Court recognized that Quebec had a legitimate concern with institutions established solely to circumvent the CFL. Bill 115 amended the CFL and included section 78.2 that targets ‘bridging schools’ and prevents their establishment (Table 6). In this respect, Bill 115 complies with *Nguyen* as the general prohibition is replaced by a case-by-case evaluation of educational institutions. However, the corresponding amendments to the *Act Respecting Private Education* in Bill 115 authorize unfettered ministerial discretion that effectively re-establishes the blanket approach to unsubsidized private schools. Under section 12(2) of the *Act Respecting Private Education* “the Minister may refuse to issue a permit if, in the Minister’s opinion, doing so could allow the circumvention of section 72 of the Charter of the French language or of other provisions governing eligibility for instruction in English” (Table 6: *Act Respecting Private Education*, Section 12). Further, the Minister has the discretion to prevent circumventions of the CFL by subjecting “a permit to any condition the Minister judges necessary” (Table 6: *Act Respecting Private Education*, Section 12).

Despite the Court’s ruling that Bill 104 was unconstitutional, the legislative response passed in the guise of Bill 115 introduced a more restrictive approach to English language eligibility in Quebec than previously existed. Under Bill 104, attendance at an accredited
private institution for a period of a year was sufficient for those seeking a ‘certificate of
instruction’ for public instruction in Quebec. With the passage of Bill 115 and the
regulations governing the analytical framework for assessing the ‘major part requirement’ a
minimum residency of 3 years is now required. Further, the Minister of Education only
recognizes attendance at 9 private institutions, with an average yearly tuition cost of
$10,000.\textsuperscript{87} Clearly, these measures are intended to offset successful legal mobilization in
Nguyen and Solski, as there is no guarantee that after 3 years residency (per child) and a
minimum $30,000 investment (per child) that a ‘certificate of eligibility’ will be issued.
Indeed, at the end of the residency, applicants and their parents are interviewed by the
Ministry of Education to assess their commitment to the educational pathway, which will
ultimately determine whether the certificate is issued. As more than half of the required
points of 15 are assessed at this time, members of the Allophone community must
demonstrate a ‘genuine commitment’ to English education while convincing the Ministry of
Education that it is not an attempt to circumvent for the CFL for a linguistic group that
does not normally qualify for English education. Bill 115 has the illusion of legislative
compliance with Solski and Nguyen. However, the practical implication is that fewer
certificates of eligibility will be issued as a result of judicial invalidation of Bill 104, as Bill 115
is a more restrictive legislative approach to language of instruction. This has consistently
been the approach of the Quebec National Assembly to judicial invalidation of the CFL:
complex legislative responses that have the illusion of compliance but have the outcome of
re-establishing the policy status quo.

Conclusion

\textsuperscript{87} Sarah Leavitt, \textit{Bill 103 stricter than Bill 104, West Island Chronicle}, June 8, 2010.
The *Charter of the French Language* presents an interesting example of the endurance of political constitutionalism despite the constitutional status of the Canadian Charter of Rights and Freedoms. This is most surprising in regard to section 23 of the Charter, as the Charter’s principle instrument of political constitutionalism – the notwithstanding clause – does not apply to minority language education rights. Further, the Supreme Court of Canada has spoken authoritatively when it has determined the constitutionality of Quebec statutes, releasing unanimous and anonymous decisions in 5 of the 7 cases considered. This suggests little ambiguity as to the constitutional standards that must be adhered to when the Quebec National Assembly fashions a legislative response to judicial invalidation of the *CFL*.

The endurance of political constitutionalism, however, is not dependent on formal mechanisms such as the legislative override, section 33. As this article demonstrates, the Quebec government has functioned as a repeat litigator defending its policy preferences but also as repeat legislator, motivated by the re-establishment of the policy status quo when the Court has declared these preferences unconstitutional. Thus, the Quebec National Assembly has maintained its prerogative as policy entrepreneur defining the parameters of the *Charter of the French Language* despite the Charter of Rights and Freedoms and the transition to legal constitutionalism in the area of minority language education rights.

**Notes**

1 The notwithstanding clause does not apply to all rights and freedoms in the Canadian Charter, but is limited to fundamental freedoms (section 2), legal rights (sections 7-14), and equality rights (section 15). The following are excluded from the notwithstanding clause: democratic rights (sections 3-5), mobility rights (section 6), official languages of Canada (section 16-22), and minority language education rights (section 23).

The total legislative responses is 10 as several invalidations were addressed through the introduction of several statutes to address the Court’s reasoning in the 7 cases where Quebec statutes were declared unconstitutional.

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

Section 23 of the Charter reads as follows:

23. (1) Citizens of Canada

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

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

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

Continuity of language instruction

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

Application where numbers warrant

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

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

   (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.
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<tr>
<th>Decision</th>
<th>Provision</th>
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<td>Challenged Provision</td>
<td>Legislative Response (1988-1993)</td>
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<td><strong>Charter of the French Language (1977)</strong></td>
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<td>58. Public signs and posters and commercial advertising shall be solely in the official language.</td>
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<td>Notwithstanding the foregoing, in the cases and under the conditions or circumstances prescribed by regulation of the Office de la langue française, public signs and posters and commercial advertising may be both in French and in another language or solely in another language.</td>
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<td><strong>Charter of the French Language 1988 (Bill 178)</strong></td>
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<td>58. Public signs and posters and commercial advertising, outside or intended for the public outside, shall be solely in French.</td>
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<td>Similarly, public signs and posters and commercial advertising shall be solely in French.</td>
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<td>1. Inside commercial centres and their access ways, except inside the establishments located there:</td>
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<td>2. Inside any public means of transport and its access ways;</td>
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<td>3. Inside the establishments of business firms contemplated in section 136;</td>
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<td>4. Inside the establishments of business firms employing fewer than fifty but more than 5 persons, where such firms share, with two or more business firms, the use of a trademark, a firm name or an appellation by which they are known to the public.</td>
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<td>The government may, however, by regulation, prescribe the terms and conditions according to which public signs and posters and public advertising may be both in French and in another language under the conditions set forth in the second paragraph of section 58.1, inside the establishments of business firms contemplated in subparagraphs 3 and 4 of the second paragraph.</td>
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<td>The government may, in such regulation, establish categories of business firms, prescribe terms and conditions which vary according to the category and reinforce the conditions set forth in the second paragraph of section 58.1.</td>
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<td>58.1 Inside establishments, public signs and posters and commercial advertising shall be in French.</td>
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<td>They may also be both in French and in another language, provided they are intended only for the public inside the establishments and that French is markedly predominant.</td>
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<tr>
<td>10. The provisions of section 58 and those of the first paragraph of section 68, enacted by sections 1 and 6, respectively, of this Act, shall operate notwithstanding the provisions of paragraph b of section 2 or section 14 of the Constitution Act, 1982 (Schedule B to the Canada Act, chapter 11 in the 1982 volume of the Acts of the parliament of the United Kingdom) and apply despite sections 3 and 10 of the Charter of human rights and freedoms (R. S. Q., chapter C-12).</td>
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</table>
### TABLE 3

<table>
<thead>
<tr>
<th>Challenged Provision</th>
<th>Legislative Response (1993-present)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Charter of the French Language (1977)</strong></td>
<td><strong>Charter of the French Language 1993 (Bill 86)</strong></td>
</tr>
<tr>
<td>58. Public signs and posters and commercial advertising shall be solely in the official language.</td>
<td>58. Public signs and posters and commercial advertising must be in French.</td>
</tr>
<tr>
<td>Notwithstanding the foregoing, in the cases and under the conditions or circumstances prescribed by regulation of the Office de la langue française, public signs and posters and commercial advertising may be both in French and in another language or solely in another language.</td>
<td>They may also be both in French and in another language provided that French is marked predominant.</td>
</tr>
<tr>
<td>69. Subject to section 68, only the French version of a firm name may be used in Québec</td>
<td>However, the Government may determine, by regulation, the places, cases, conditions or circumstances where public signs and posters and commercial advertising must be in French only, where French need not be predominant or where such signs, posters and advertising may be in another language only.</td>
</tr>
<tr>
<td></td>
<td>68. A firm name may be accompanied with a version in a language other than French provided that, when it is used, the French version appears at least as prominently.</td>
</tr>
<tr>
<td></td>
<td>However, in public signs and posters and commercial advertising, the use of a version of a firm name in a language other than French is permitted to the extent that the other language may be used in such posters or in such advertising pursuant to section 58 and the regulations enacted under that section.</td>
</tr>
<tr>
<td></td>
<td>In addition, in texts or documents drafted only in a language other than French, a firm name may appear in the other language only.</td>
</tr>
<tr>
<td>Challenged Provision</td>
<td>Legislative Response</td>
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<tr>
<td>-------------------------------------------------------------------------------------</td>
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</tr>
<tr>
<td><em>Charter of the French Language 1977 (Bill 101)</em></td>
<td><em>Charter of the French Language 1993 (Bill 86)</em></td>
</tr>
<tr>
<td>Section 73 [Request for instruction in English]. – In derogation of section 72, the following children, at the request of their father and mother, may receive their instruction in English:</td>
<td>Section 73 – The following children, at the request of one of their parents, may receive their instruction in English:</td>
</tr>
<tr>
<td>(a) a child whose father or mother received his or her elementary instruction in English, in Québec;</td>
<td>(1) a child whose father or mother is a Canadian citizen, and received elementary instruction in English in Canada, provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada;</td>
</tr>
<tr>
<td>(b) a child whose father or mother, domiciled in Québec on the date of the coming into force of this act, received his or her elementary instruction in English outside Québec;</td>
<td>(2) a child whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers or sisters of that child, provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada;</td>
</tr>
<tr>
<td>(c) a child who, in his last year of school in Québec before the coming into force of this act, was lawfully receiving his instruction in English, in a public kindergarten class or in an elementary or secondary school;</td>
<td>(3) a child whose father and mother are not Canadian citizens, but whose father or mother received elementary instruction in English in Quebec, provided that that instruction constitutes the major part of the elementary instruction he or she received in Quebec;</td>
</tr>
<tr>
<td>(d) the younger brothers and sisters of a child described in paragraph (c).</td>
<td>(4) a child who, in his last year in school in Quebec before 26 August 1977, was receiving instruction in English in a public kindergarten class or in an elementary or secondary school, and the brothers and sisters of that child;</td>
</tr>
<tr>
<td></td>
<td>(5) a child whose father or mother was residing in Québec on 26 August 1977 and has received elementary instruction in English outside Quebec, provided that that instruction constitutes the major part of the elementary instruction he or she received in Quebec.</td>
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</tbody>
</table>
## TABLE 5
Legislative Response (Bill 115) to *Solski (Tutor of) v. Quebec*, [2005] 1 S.C.R. 201.

<table>
<thead>
<tr>
<th>Challenged Provision</th>
<th>Legislative Response</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Charter of the French Language 1993 (Bill 86)</em></td>
<td><em>Charter of the French Language 2010 (Bill 115)</em></td>
</tr>
</tbody>
</table>

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

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

**Ministerial Directive – ‘Major Part Requirement’**

The Minister has interpreted the “major part” requirement in a disjunctive and strictly mathematical manner. The Minister will consider either the child’s primary school attendance or the child’s secondary school attendance, but will not consider them cumulatively. Further, the Minister will determine eligibility solely on the basis of the number of months spent in each language. Other factors, including the availability of linguistic programs and the presence of learning disabilities or other difficulties, which are developed below, are not considered.

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

The regulation is adopted by the Government on the joint recommendation of the Minister of Education, Recreation and Sports and the Minister responsible for the administration of this Act."
TABLE 6

<table>
<thead>
<tr>
<th>Challenged Provision</th>
<th>Legislative Responses</th>
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</thead>
<tbody>
<tr>
<td><strong>Charter of the French Language 2002</strong> (Bill 104)</td>
<td><strong>Charter of the French Language 2010</strong> (Bill 115)</td>
</tr>
<tr>
<td>Section 73 of the said Charter is amended by adding the following paragraphs at the end:</td>
<td>5. The Charter is amended by inserting the following sections after section 78.1:</td>
</tr>
</tbody>
</table>
| "However, instruction in English received in Quebec in a private educational institution not accredited for the purposes of subsidies by the child for whom the request is made, or by a brother or sister of the child, shall be disregarded. The same applies to instruction in English received in Quebec in such an institution after *(insert here the date of coming into force of this section)* by the father or mother of the child. | "78.2. No person may set up or operate a private educational institution or change how instruction is organized, priced or dispensed in order to circumvent section 72 or other provisions of this chapter governing eligibility to receive instruction in English. It is prohibited, in particular, to operate a private educational institution principally for the purpose of making children eligible for instruction in English who would otherwise not be admitted to a school of an English school board or to a private English-language educational institution accredited for the purposes of subsidies under the Act respecting private education (chapter E-9.1)."
| | |
| **Act Respecting Private Education** (Bill 115) | 12. Section 12 of the Act respecting private education (R.S.Q., chapter E-9.1) is amended |
| (2) by adding the following paragraphs at the end: | (2) by adding the following paragraphs at the end: |
| "Moreover, the Minister may refuse to issue a permit if, in the Minister's opinion, doing so could allow the circumvention of section 72 of the Charter of the French language or of other provisions governing eligibility for instruction in English. The Minister may also, with a view to preventing such a result, subject a permit to any condition the Minister judges necessary." | "Moreover, the Minister may refuse to issue a permit if, in the Minister's opinion, doing so could allow the circumvention of section 72 of the Charter of the French language or of other provisions governing eligibility for instruction in English. The Minister may also, with a view to preventing such a result, subject a permit to any condition the Minister judges necessary." |