Mahe v. *Alberta*: Management and Control of Minority Language Education

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Introduction

The Supreme Court of Canada recently offered its first detailed elaboration of the minority language educational rights guaranteed in section 23 of the *Canadian Charter of Rights and Freedoms*.[1] *Mahe* v. *Alberta*[2] defines those rights broadly and gives minority language communities the authority to manage and control minority language education. It is a major victory for language rights activists and will have a continuing impact on provincial and national affairs.

Mahe is a direct response to the representations of minority language groups that control of minority language education is a key to their continuing vitality and survival. They argue that the educational system is central to community life and is an essential vehicle for the transmission to younger generations of language skills and cultural values. Those contentions clearly found favour with the Court and inspired the substantive result in the appeal.

In general terms, *Mahe* obviously reflects the orthodox approach to bilingualism in Canada.[3] It advances and protects the minority language rights of individuals in all provinces at a time when those rights are under public and political pressure. Further, it attempts to help minority language communities counter the social forces which continue to undermine many of them. Measured against the accepted model of Canadian bilingualism, the decision represents sound language rights policy.

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[1]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].
[2]*Mahe* v. *Alberta*, [1990] 1 S.C.R. 342, 68 D.L.R. (4th) 69 [hereinafter *Mahe* cited to S.C.R.].
[3]For a general discussion of Canadian language policy see: K. McRoberts, "Making Canada Bilingual: Illusions and Delusions of Federal Language Policy" in D.P. Shugarman & R. Whitaker, eds, *Federalism and Political Community* (Peterborough, Ont.: Broadview Press, 1989).

However, *Mahe* must also be seen as a remarkable example of judicial activism. It clearly illustrates the willingness of the Supreme Court to tailor its legal reasoning in order to advance constitutional policy objectives. That aspect of the decision is the principal focus of this commentary.

I. Section 23 of the *Charter*

Section 23 imposes a positive obligation on governments to provide minority language instruction and facilities to the children of three specifically defined classes of parents. The section reads as follows:

> 23 (1) Citizens of Canada
> (a) whose first language learned and still understood is that of the English and 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 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 of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

II. The Litigation

The *Mahe* case arose because francophone parents in the City of Edmonton were not satisfied with the existing educational system in Alberta. They sought a series of declarations about the meaning of their rights under section 23 of the *Charter*. The key issue in the case concerned the "management and control" of minority language education. Mr. Mahe argued that section 23 conferred rights of that kind on parents entitled to educate their children pursuant to the section. He enjoyed significant success in the Court of Queen's Bench. Purvis J. held that section 23 involves "a degree of exclusive management and control over

provision and administration of minority language schools"[4] and that there were sufficient francophone children in Edmonton to attract such rights.

Kerans J.A., writing for the Court of Appeal, found that section 23(3)(b) guarantees, where numbers warrant, an educational system "run by the minority language group or its representatives."[5] However, he went on to hold that there were insufficient numbers of section 23 students in the Edmonton area to engage those rights.

III. The Supreme Court Decision

Dickson C.J. wrote the reasons for a unanimous Supreme Court. He concluded that section 23 encompassed rights of management and control. But, after examining the specific situation in Edmonton, he held that there were not enough students to warrant the establishment of a separate francophone school board. Nonetheless, he said that francophones must have guaranteed representation on existing school boards and have a substantial amount of exclusive authority in relation to minority language education.

Unlike most judges who had considered the issue,[6] the Chief Justice declined to read section 23 as involving two levels of rights — one relating to instruction and one relating to facilities — that would be triggered by different numerical thresholds. Rather, he endorsed a "sliding scale" approach,[7] with section 23(3)(a) and its reference to "instruction" representing the lower end of the scale and section 23(3)(b) representing the upper end of the range. The rationale for that approach was described as follows:

> In my view, it is more sensible, and consistent with the purpose of section 23, to interpret section 23 as requiring whatever minority language education proteetion the number of students in any particular case warrants. Section 23 simply mandates that governments do whatever is practical in the situation to preserve and promote minority language education.[8]

Turning to the central issue in the case, Dickson C.J. found that the words of section 23(3)(b) supported the notion that the section mandates management and control. He reasoned that the right to "instruction" in section 23(3)(a)

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[4](1985), 64 A.R. 35, 22 D.L.R. (4th) 24 at 50 (Alta. Q.B.).

[5](1987), 42 D.L.R. (4th) 514 at 537, 6 W.W.R. 331 (Alta. C.A.).

[6]See, for example: *Reference Re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1, 10 D.L.R. (4th) 491 (Ont. C.A.); *Commission des Écoles Fransaskoises* v. *Saskatchewan* (1988), 48 D.L.R. (4th) 315, 3 W.W.R. 354 (Sask. Q.B.); and *Reference Re Minority Language Education Rights (P.E.I.)* (1988), 69 Nfld. & P.E.I.R. 236 (P.E.I. C.A.).

[7]*Mahe, supra*, note 2 at 366. The "sliding scale" approach as such was not argued during the appeal. The concept appears to come from D. Réaume & L. Green, "Education & Linguistic Security in the Charter" (1989) 34 McGill L.J. 777, which was published after the appeal was argued. However, the Chief Justice does not cite that article.

[8]*Mahe, ibid.* at 367.

implicitly must include a right to facilities. Instruction must take place somewhere. Therefore, according to the Chief Justice, the term "minority language educational facilities" in section 23(3)(b) would be entirely superfluous unless it encompassed a degree of management and control. Thus, "facilities" was not to be read merely as a reference to physical structures.[9]

Dickson C.J. then went on to argue that the overall purpose of section 23 strongly supported his interpretation of the text. He said that purpose was "to preserve and promote the two official languages of Canada, and their respective cultures"[10] by ensuring that both French and English flourished in those jurisdictions where they were not spoken by the majority of the population.[11] Management and control of minority language educational facilities, said the Chief Justice, is essential to further the purpose of section 23. A variety of management issues in education can affect linguistic and cultural concerns and the health of minority language and culture can be affected by decisions relating to such issues. Moreover, history was said to establish that the minority language community cannot rely on the majority to reflect their concerns. Dickson C.J. concluded that a lack of francophone participation on school boards had opened the door for various historical setbacks experienced by francophones.[12]

The Chief Justice next defined the content of the right to management and control. He began by noting that an independent minority language school board would be required to satisfy the purpose of section 23 when there were substantial numbers of qualified students. However, where the number of students was smaller, other approaches involving exclusive authority within a majority language school board could be appropriate. In such circumstances, section 23 could be satisfied by guaranteeing that linguistic minorities were represented on existing school boards and that they had control over "those aspects of education which pertain to or have an effect on their language and culture."[13] The situation was described more specifically in the following terms:

> (1) The representation of the linguistic minority on school boards or other public authorities which administer minority language instruction or facilities should be guaranteed;
> (2) The number of minority language representatives on the board should be, at a minimum, proportional to the number of minority language students in the school district, *i.e.*, the number of minority language students for whom the board is responsible;
> (3) The minority language representatives should have exclusive authority to make decisions relating to the minority language instruction and facilities, including:

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[9] *Ibid.* at 369-370.
[10] *Ibid.* at 362.
[11] *Ibid.* at 362; see generally *ibid.* at 362-365, 371-373.
[12] *Ibid.* at 372.
[13] *Ibid.* at 375.

(a) expenditures of funds provided for such instruction and facilities;
(b) appointment and direction of those responsible for the administration of such instruction facilities;
(c) establishment of programs of instruction;
(d) recruitment and assignment of teachers and other personnel; and
(e) making of agreements for education and services for minority language pupils.[14]

Finally, although the judgment is not entirely clear on the point, it appears the Chief Justice was also of the view that it may not he necessary to afford minority language parents any rights of management and control when numbers of eligible students are very small.[15]

IV. Commentary

The reasoning in *Mahe* is marked by a number of weaknesses. Those weaknesses highlight the extent to which the Court shaped its analysis in order to reach a conclusion favouring management and control. In that regard, the most revealing aspects of the judgment concern two issues: (a) the purpose of section 23; and (b) the text of the section.

A. *Purpose of Section 23*

The Supreme Court has often endorsed the interpretational approach outlined in *R.* v. *Big M Drug Mart*[16] to the effect that, while *Charter* rights should be interpreted generously, it is important not to exceed the actual purpose of the provision in issue. Rights and freedoms are to be placed in their "proper linguistic, philosophic and historical context"[17] and understood "in light of the interests [they were] meant to protect."[18] Further, with respect to language rights in particular, the Court has adopted an especially restrained interpretational approach. As Beetz J. said in *Société des Acadiens du Nouveau-Brunswick Inc. et al.* v. *Association of Parents for Fairness in Education*:

> Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle ... [Language rights] although some have been enlarged and incorporated into the *Charter*, remain nonetheless founded on political compromise. This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial

[14]*Ibid.* at 377.
[15]*Ibid.* at 367.
[16][1985] 1 S.C.R. 295 at 344, 3 W.W.R. 481 [hereinafter *Big M Drug Mart* cited to S.C.R.].
[17]*Ibid.* at 344.
[18]*Ibid.*

> interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights.[19]

Not surprisingly, the Attorney General of Alberta commended *Société des Acadiens* to the Court as describing the appropriate interpretational technique to use in analyzing section 23.[20] The Chief Justice accepted the warning of Beetz J. that courts should be careful in interpreting language rights. He also said that courts were nonetheless under an obligation to breathe life into the "expressed purpose"[21] of section 23.

However, the Chief Justice then disregarded the interpretational principles he and the Court had endorsed. The history and background of minority language education in general, and of section 23 in particular, had been the subject of extensive analysis in both written and oral argument before the Court. That background was essential to establish the purpose of section 23. Chief Justice Dickson presented no consideration of it in his decision. Instead, he referred only to the legislative debates leading up to the introduction of section 23. He summarily concluded that those debates "contribute[d] little to the task of interpreting [the section]" and placed no weight on them.[22] However, that evidence was only a small part of the relevant history. The overall historical context that inspired section 23 was ignored by the Court.

As a result, the Chief Justice failed to canvass satisfactorily the background which would have informed the "express purpose" of section 23 to which he had referred earlier in his reasons. Equally, he failed to come to grips with the nature of the "political compromise" which was the centerpiece of the analytical approach described by Beetz J. in *Société des Acadiens*.[23] Indeed, he failed to properly establish the "historical context" of the right which he himself had said was crucial in *Big M Drug Mart*. These omissions took him well away from the basic interpretational techniques that had been endorsed by the Court.

Failure to employ established principles of interpretation enabled the Chief Justice to define the purpose of section 23 in the broadest terms possible. He said the section was intended to "preserve and promote minority language and culture throughout Canada"[24] and that minority language parents should have

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[19][1986] 1 S.C.R. 549 at 578, 27 D.L.R. (4th) 406 [hereinafter *Société des Acadiens* cited to S.C.R.].

[20]See *Mahe, supra*, note 2 at 364.

[21]*Ibid.* at 365.

[22]*Ibid.* at 369.

[23]The approach in *Société des Acadiens* has been subject to criticism. See, for instance, L. Green, "Are Language Rights Fundamental" (1987) 25 Osgoode Hall L.J. 539 at 644ff. An undercutting of it will be welcomed in many quarters. My point is simply that the Court failed to faithfully apply *any* settled interpretational technique.

[24]*Mahe, supra*, note 2 at 371.

rights of management and control because such rights would advance the overall objective of the section.

However, the Court's characterization of the purpose of section 23 does not reflect accurately the place of the section in the historical debate on minority language education. The key issue in that debate has been the simple *availability* of minority language education. This is clearly illustrated by an examination of the background against which section 23 was enacted.

The formal roots of the section extend back at least as far as the *Report of the Royal Commission on Bilingualism and Biculturalism.*[25] The Commission recognized the role of education in protecting minority language groups and stressed the importance of providing minority language education across the country. But it rejected the concept of separate school boards for majority and minority language instruction.[26] Later, in 1969, a federal constitutional paper entitled *The Constitution and the People of Canada* proposed granting individuals the right to choose English or French as a language of instruction in areas where there were sufficient numbers of persons to warrant the provision of facilities.[27] There was no reference to management and control.

The next significant step toward section 23 was the *St. Andrews Agreement* of 1977. All premiers undertook to "make their best efforts to provide instruction in English and French wherever numbers warrant."[28] In 1978, the premiers met in Montreal and agreed on a somewhat more detailed set of principles respecting "availability of, as well as accessibility to"[29] minority language education. The *Montreal Agreement* specifically recognized that the implementation of these principles would be defined by each province.[30] Guarantees of minority language educational rights were also contained in the 1978 federal *Constitutional Amendment Bill.*[31] Section 21 of the Bill contained detailed provisions for determining when parents would have the right to have their children educated in publicly financed facilities. Once again, there was no reference to management and control.

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[25]Canada, *Report of the Royal Commission on Bilingualism and Biculturalism*, Book I (Ottawa: Queen's Printer, 1967) (Co-chairs: A.D. Dunton and A. Laurendeau); Book II (Ottawa: Queen's Printer, 1968).

[26]See *ibid.*, Book I at 123 & 148; Book II at 141-59, 165-72 & 299-301.

[27]See Government of Canada, *The Constitution and the People of Canada* (Working Paper No. 5) Canadian Constitutional Conference (1969) at 22 & 54-57.

[28]*Statement on Language*, Premiers' Conference, August 18-19, 1977, St. Andrews.

[29]*Ibid.*

[30]*Statement on Language*, Premiers' Conference, February 22-23, 1978, Montreal [hereinafter *Montreal Agreement*]. Mr. Chrétien described section 23 as a direct reflection of the Montreal Agreement: See Canada, *Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Minutes of Proceedings [hereinafter *Special Joint Committee*], November 7, 1980 at 2:41 and Canada, House of Commons, *Debates* at 3286 (October 6, 1980).

[31]Bill C-60, *Constitutional Amendment Act*, 3d Sess., 30th Parl., 1978 [hereinafter "the Bill"].

In 1980, notwithstanding the *St. Andrews* and *Montreal* agreements, several anglophone provinces still offered no legislative entitlement whatsoever to French language instruction.[32] (Indeed, that appears to remain the case today in at least one province.[33]) Not surprisingly, francophone language rights activists focused on the need for instruction.

More importantly, Bill 101[34] in Quebec had denied anglophones the opportunity to send their children to school in English. The need to address that situation was the root motivation behind section 23. As the Supreme Court itself said in *A.G. Quebec* v. *Quebec Association of Protestant School Boards*:

> The framers of the Constitution unquestionably intended by section 23 to establish a general regime for the language of instruction, not a special regime for Quebec; but in view of the period when the *Charter* was enacted, and especially in light of the wording of section 23 of the *Charter* as compared to that of sections 72 and 73 of Bill 101, it is apparent that the combined effect of the latter two sections seemed to the framers like an archetype of the regimes needing reform, or which at least had to be affected, and the remedy prescribed for all of Canada by section 23 of the *Charter* was in large part a response to these sections.[35]

In *Mahe*, the Court offered no consideration of that general historical background. Rather, the Chief Justice simply began with the direct observation that "the general purpose of section 23 is clear"[36] and went on to describe that purpose in broad and abstract terms.

The Chief Justice also emphasized the "remedial purpose" of section 23 by noting that minority language groups cannot rely on the majority to accommodate their linguistic and cultural needs. He endorsed views expressed by the Courts of Appeal in Ontario and Prince Edward Island to the effect that setbacks experienced by minority language communities occurred because they did not participate in management and control of education. The situations which had been the focus of comment by the Ontario Court of Appeal concerned incidents where English-dominated Boards of Education had refused to establish French language schools. The Court apparently saw the connection between the lack of management and control and the denial of minority language education as a reason for finding management and control in section 23. Dickson C.J. observed that minority language groups must have a measure of management and control "if s. 23 is to remedy past injustices and ensure that they are not repeated in the future."[37]

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[32]Newfoundland, British Columbia and Prince Edward Island are examples. More generally, see *The State of Minority Language Education in the Ten Provinces of Canada*, A Report by the Council of Ministers of Education (Toronto: Council of Ministers of Education, 1978).

[33]As of August, 1990, there was no effective legislative entitlement to French language instruction in Newfoundland.

[34]*Charter of the French Language*, R.S.Q. 1977, c. C-11 [hereinafter Bill 101].

[35][1984] 2 S.C.R. 66 at 79-80.

[36]*Mahe, supra*, note 2 at 362.

[37]*Ibid.* at 372-73.

The Court chose to overlook a fundamental point when it said that management and control must be read into section 23 because the historical absence of these rights had led to a failure to provide minority language education. Section 23 *itself* guarantees minority language instruction and facilities. Minority language groups no longer need political influence or control of school boards to get instruction and facilities. They have a constitutional right to them which can be enforced in court if necessary. The very purpose of section 23 was to break the link between the availability of minority language education and political control of school boards or legislatures.

Thus, it seems clear that the purpose and focus of section 23 would have been more appropriately stated in more concrete and specific terms than those chosen by the Chief Justice. As the section itself says, it is aimed at guaranteeing rights to primary and secondary education in the official minority language of each province. The preservation of cultural and linguistic integrity is not the *direct* object of section 23. The availability of minority language education will have an impact on assimilation but that is the *effect* of the section rather than its immediate purpose. Section 23 can easily become over-inflated if it is seen as being aimed directly at guaranteeing linguistic and cultural vitality.

B. The Text

The Court's endorsement of a broad purpose for section 23 allowed it to place an extremely liberal interpretation on the specific text of the section. Section 23(3)(a) stipulates that the right to "instruction" applies wherever the number of students is sufficient to warrant that instruction be provided out of public funds. Section 23(3)(b) states that the right to instruction includes, where numbers warrant, the right to receive that instruction in "minority language educational facilities." The key to Chief Justice Dickson's conclusion on management and control involves a comparison of these two paragraphs. As noted, he reasoned that because "instruction" necessarily implies "facilities," then the reference to "facilities" must be read as encompassing a degree of management and control.

However, the reference in section 23(3) to "instruction" and in section 23(3)(b) to "facilities" offers no convincing basis for discovering management and control. On its face, there is nothing in the textual logic of section 23 to require a finding of such rights. The specific references to "instruction" and "facilities" appear to be nothing more than an effort to ensure that both matters are comprehended by the section. At the same time, one would expect that an entitlement as significant as "management and control" would be stated expressly. The result in *Mahe* diverges widely from that suggested by a straightforward reading of the text.[38]

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[38]The Chief Justice also placed some emphasis on the French version. However, that textual analysis is not particularly compelling either. See B. Schwartz, "The Other Section 23" (1986) 15

An examination of the legislative history of section 23 confirms that it was intended to bear its plain meaning. The original draft text of section 23 described a constitutional obligation to provide "minority language educational facilities" out of public funds.[39] That wording was criticized by the Commissioner of Official Languages on the basis that it was too restrictive. He pointed out that it did not impose any obligation to provide instruction when, by virtue of television or other new technologies, there would be situations where instruction would be feasible even if the construction of "facilities" was not.[40]

The Government responded to these criticisms by deleting all reference to "facilities" and amending section 23 so that it referred only to the provision of "minority language instruction" out of public funds.[41] However, those amendments were attacked on the basis that they did not solve the problem that the Commissioner had described.[42] There should be a specific obligation to provide both instruction and facilities. The authorities should not be allowed to use new technology as a way of avoiding the construction of traditional school buildings. As a result, more amendments were made. The final version of the section separated the entitlement to "instruction" from the entitlement to "facilities" in a final effort to meet the criticisms being expressed.[43] There was no suggestion that the modified language included rights of management and control.

Indeed, some witnesses who appeared before the Joint Committee specifically criticized the draft text of section 23 because it did not provide for management and control.[44] However, the Committee rejected demands that such guarantees be included. Several statements by Committee members are directly on point and are inconsistent with the notion that there was an intention to provide management and control.[45] It is rather clear that such control was to be excluded from the constitutional framework.

Man. L.J. 347 at 354; *Reference Re Public Schools Act of Manitoba* (1990), 2 W.W.R. 289 at 333 (Man. C.A.) per Monnin C.J.M.

[39]Canada, House of Commons, *Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada, Debates*, October 6, 1980, p. 3286 (the Hon. J. Chrétien, Minister of Justice).

[40]*Special Joint Committee, supra*, note 30, November 17, 1980, at 6:14; 6:20.

[41]Possible amendments to *Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada*, tabled before the *Special Joint Committee* on January 12, 1981 (the Hon. Jean Chrétien, Minister of Justice).

[42]See *Special Joint Committee, supra*, note 30, January 15, 1981 at 38:37-38; 38:107-109 and January 20, 1981 at 41:40.

[43]See *ibid.*, January 29, 1981 at 48:108-10.

[44]See *ibid.*, November 17, 1980 at 6:13, 23; November 18, 1980 at 8:47-52; November 21, 1980 at 8:10, 27; November 25, 1980 at 12:11 and 12:23-24; November 26, 1980 at 13:30.

[45]See, for example, *ibid.* per Mr. Chrétien, November 13, 1980 at 4:22, January 15, 1981 at 38:109; January 29, 1981 at 48:103 and 48:110-111; Mr. Lapierre, M.P., November 19, 1980 at 8:47.

Therefore, it is apparent that the wording of section 23(3)(b) was not inspired in any way by an attempt to guarantee management and control. The section was drafted, as its plain language suggests, to ensure that minority language students could receive "instruction" and "facilities" as numbers warranted. The underlying bases for those guarantees were simple. First, the *availability* of minority language education, not the lack of management and control, was the central problem facing minority language communities. Second, with the advance of technology, it was recognized that instruction would be feasible in situations where there were not enough students to warrant the construction or provision of a physical school plant. The Chief Justice's basic assumption in analyzing the text of section 23 was simply incorrect. It *is* possible to have instruction without educational facilities in the regular sense. That is precisely why the present wording of section 23 was chosen. The section was not drafted as a subtle invitation to find rights of management and control. Rather, it was intended to reflect technological reality. Neither legislative background nor linguistic logic effectively supports the reading of the text of section 23 that was endorsed by the Court.

Conclusion

There is no easy or obvious congruence between the substantive result in *Mahe* and either the text of section 23 or the history of minority language educational rights in Canada. The section speaks rather plainly of "instruction" and "facilities." Those two matters have been the central preoccupations of Canadian minority language groups. Yet, the Supreme Court invested section 23 with a generous and complicated entitlement for minority language communities to control those aspects of education which relate to minority language and culture.

Mahe is obviously not the first decision in which the Supreme Court has taken an activist approach to *Charter* interpretation.[46] Moreover, constitutional adjudication, by its nature, can never be a sterile exercise in logic. *Mahe* is nonetheless exceptional because of the extent to which the Court was prepared to adjust its analytical approach, its reasoning and its treatment of the historical facts in order to secure particular substantive results.

As noted, there is little doubt that the decision will work to the benefit of minority language communities and that it responds to their concerns.[47] It fits comfortably with the prevailing Canadian model of bilingualism. But, *Mahe*

[46]See *Reference Re Section 94(2) of the B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 504-509, [1986] 1 W.W.R. 481.

[47]There will no doubt be some concern in minority language communities that the number of students required to trigger the entitlement to an independent school board, as determined by the Court, is unacceptably high.

also demonstrates the extent to which the reasoning and conclusions of the Supreme Court can be driven directly by specific constitutional policy objectives.