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Denominational and Linguistic Guarantees in the Canadian Constitution:
Implications for Quebec Education

Abstract

This article is primarily concerned with an analysis of the constitutional protection provided under s. 93 of the ***Constitution Act of 1867*** *and of s. 23 of the relatively new* ***Charter of Rights and Freedoms****. The context is provided by three recent events: the Supreme Court decision on Mahé v. Alberta, the Quebec reference case on Bill 107, and the school board elections in Montreal. The author concludes that s. 23 of the Charter may add significantly to the protection afforded to minorities in s. 93.*

Résumé

Ce texte mise principalement sur l'analyse de la protection constitutionnelle accordée sous l'article s. 93 de la ***Loi sur la Constitution de 1867****, et l'article s. 23 de la relativement récente* ***Charte des droits et libertés****. Le contexte est fondé sur trois événements récents: la décision de la Cour suprême sur Mahé c. l'Alberta, le cas de référence du Québec sur le projet de loi 107, et les élections de la commission scolaire de Montréal. L'auteur conclut que s. 23 de la Charte pourrait augmenter de façon très significative le degré de protection accordé aux minorités sous l'article s. 93.*

Since the Quiet Revolution of the 1960s, successive Quebec governments have attempted to change the Province's denominational (or confessional) system of education and to replace it with a system of school boards based instead on some form of territorial or linguistic criteria. So far, these government initiatives have been unsuccessful, either because they have proved to be too controversial and subsequently have been withdrawn, or

because the legislation has been found unconstitutional by the courts.[1] Many have assumed, therefore, that the Protestant and Catholic school boards in Quebec have such strong constitutional protection that no provincial government can legislate their disappearance. Another widely held assumption is that the linguistic minority in Quebec is protected under the Protestant umbrella and that it would be unwise for the English-language community to give up this particular form of school-based constitutional protection. Several recent events, however, suggest that the status quo may be changing. The protection afforded to certain religious minorities under section 93 of the **British North America Act** may not be as far-reaching as previously thought; and a clause in the **Canadian Charter of Rights and Freedoms**, section 23, may offer a substantial constitutional guarantee to both French and English minority groups. Who or what, then, is actually protected under s. 93? What exactly are the minority education rights offered in the Charter? Does the Charter apply in Quebec? And do these rights carry any weight; or can they be abrogated by simply invoking the infamous 'notwithstanding' clause? Before attempting to comment further on these questions it might be useful to examine some recent events that not only provide context but also serve to illustrate the changing educational scene in Quebec and Canada.

Recent events changing the status quo

First, in March 1990, the Supreme Court of Canada delivered what has been called a landmark decision in the Mahé case concerning the French-language minority in Edmonton, Alberta. Never before had the highest court in the land ruled on the minority language education clause, section 23, of the **Canadian Charter of Rights and Freedoms**. As this relatively new section of the Charter is **not** subject to the "notwithstanding" clause, the linguistic minority in Quebec may well be interested in how the court interpreted minority language education rights for francophones in Alberta. Sauce for the goose, they say, is also sauce for the gander !

Second, in September 1990, the Quebec Court of Appeal issued its decision on the Bill 107 reference case. Bill 107, the new **Quebec Education Act**, was introduced by Education Minister Claude Ryan and passed into law in 1988 but the clauses concerning the implementation of linguistic school boards were delayed pending a ruling from the courts as to their constitutionality. It was the unanimous opinion of the highest court in Quebec, however, that the replacement of confessional boards with linguistic boards was, indeed, constitutional. Furthermore, the court provided a new and controversial interpretation of what it considered to be protected by section 93 of the **Canada Constitution Act of 1867**. As expected, this ruling has now been appealed to the Supreme Court of Canada by the Quebec Association of Protestant School Boards (QAPSB). A final ruling on the constitutionality of Law 107 and linguistic school boards in Quebec is anticipated from the Supreme Court in the spring of 1992.

Third, the school board elections held in November, 1990, resulted in some new alignments of power in both of Montreal's two largest school boards, suggesting perhaps that traditional policy positions may be changing. In the Montreal Catholic School Commission (MCSC), the *Regroupement Scolaire Confessionel*, which has held power for a number years and has strongly supported the retention of confessional school boards, only managed to maintain control by a slim one-seat margin over the rival *Mouvement pour une école moderne et ouverte* (MEMO). As MEMO is in favour of linguistic school boards, the traditional opposition of the MCSC in regard to linguistic school boards is now open to question. At the time of writing, and reflecting perhaps the new alignment of power, the final policy position on linguistic school boards has yet to be determined. Meanwhile, at the Protestant School Board of Greater Montreal (PSBGM), the election was not fought on party lines and, in fact, generated very little overall interest; but, for the first time, four newly elected commissioners were francophones. This is significant in that it reflects the new demographic situation at PSBGM. Whereas, the Board has been seen traditionally as a major supporter of English language rights in Quebec, the present reality is that 43% of the student body, or 11,660 students in no fewer than 26 of the PSBGM's 67 schools, are now enrolled in the French sector.[2] This rapidly expanding French enrollment, together with a significant number of French-language teachers and French-language parents, means that the PSBGM is no longer the bastion of English-language rights that it was once considered to be.

As a result of these changes and the increased possibility of the government of Quebec going ahead with its plans to abolish the confessional system of school boards, a number of concerned citizens are beginning to enquire more thoroughly as to the exact nature of the protection afforded to minorities in both the old **British North America Act** (now known as the **Canada Constitution Act of 1867**) and the relatively new **Canada Constitution Act of 1982** including specifically the **Canadian Charter of Rights and Freedoms.**

Section 93 of the Canada Constitution Act of 1867

In his article in this issue, *Denominationalism and Nondenominationalism: The different traditions of Canadian and American Education*, Magnuson explains the historical antecedents of s. 93. It is important to emphasize that s. 93 does not confer any rights for linguistic minorities nor for minorities in general. Indeed, the words "English" and "French" are not to be found anywhere in its text. Nor does s. 93 mention school boards as such. Although the full text of s. 93 is reproduced below, it should be noted that only the main clause and subsection (1) are of any practical application. The other subsections are now either virtually meaningless, as in the case of

subsection (2) dealing with the transfer of Ontario separate school rights to Quebec, or are politically unusable as in the case of subsections (3) and (4) dealing with appeals to the Federal cabinet and Federal remedial legislation.

Section 93, Canada Constitution Act, 1867

In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;
(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;
(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education;
(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

The part of s. 93 that, in practice, now applies to Quebec and the other three original provinces of Canada is the opening clause and subsection (1). The primary purpose of the opening clause, of course, is to confer legislative powers in the field of education to the provinces. Although this power is stated to be "exclusive" it is, in fact, limited by certain rights that are guaranteed to certain groups of people indicated in subsection (1) provided that these rights existed in law at the time of the Union, that is, in 1867. It is not, therefore, a blanket protection for minorities in Quebec, nor does it confer rights on all types of denominational schools *per se*, nor does it protect all groups of Protestants and Catholics.

According to Judge Chouinard in *Attorney General of Quebec v. Lavigne,* in order to claim the protection of s. 93, the following conditions must all be met: (a) there must be a right or privilege affecting a denominational school; (b) enjoyed by a particular class of persons; (c) by law; (d) in effect at the time of the Union; and (e)which is prejudicially affected (Dickinson & Mackay, 1989). Generally, in Quebec, the jurisprudence concerning

s. 93 has been concerned with defining the rights and privileges pertaining to confessional and dissentient school boards. It is important to recognize, however, that these school boards do not enjoy the right to operate completely independently of provincial regulations. Evidently, only those rights that are determined by reference to religious belief are guaranteed by s. 93. And even these may be regulated by provincial legislation provided that the regulation does not "prejudicially affect" their denominational character. Thus the Supreme Court of Canada ruled in favour of the provincially mandated curriculum (*régime pédagogique*) in spite of the fact that the confessional school boards claimed that this was a usurpation of their denominational rights to manage and control. Section 93 also draws a thin line between provincial legislation that "prejudicially affects" a right or privilege affecting a denominational aspect of schooling, and is therefore *ultra vires*, and provincial legislation which merely "affects" it (Dickinson & Mackay, 1989). In the case of Bill 3 (1984) which proposed the establishment of linguistic boards throughout the Province and the reduction of MCSC and PSBGM to the territories that they occupied in 1867, the Quebec Superior Court had no difficulty in striking down the whole Act as prejudicially affecting denominational rights.

As s. 93 protects rights and privileges belonging to Protestants and Catholics with respect to denominational schools which existed in law in 1867, it is important to know what exactly were these rights and privileges. To determine this it is necessary to study the *Consolidated Statutes of Lower Canada* as they existed in 1861.These consolidated statutes bring together the various laws concerning schooling in Lower Canada that were first enacted in 1841, 1845, and 1846. In practice, the statute law concerning education permitted the establishment of Catholic and Protestant school boards to manage their respective denominational schools in the city of Montreal and in the city of Quebec. These four school boards, known legally as confessional school boards, have been considered in the past as "protected" by s. 93 of the constitution. It is questionable, however, whether this protection extends beyond the official municipal boundaries. Today, all four confessional boards include a number of other municipalities within their territories which now extend considerably beyond the official municipal boundaries of the two cities.

Elsewhere in the Province, that is, in the so-called rural areas outside the two cities of Montreal and Quebec, and with one important proviso to be discussed below, the law permitted the establishment of what is known as common schools, meaning that they were open to all. These common schools were managed by school commissioners elected by local property owners. In law, these school boards were not denominational and, according to most jurists, are not protected by s. 93. These legally common school boards represent the vast majority of school boards in Quebec. The legal status of these school boards is often confusing to the lay person because, although the

board is legally of a non-denominational status, the schools that they operate have "assumed" a denominational character because of the majority population that they served. In other words, these legally common school boards have become denominational in practice. In Quebec, however, and unlike certain other provinces, s. 93 applies to what exists "in law" rather than what exists "in practice". This situation is further complicated by the fact that the actual schools that these common boards operate and manage have all been recognized as "Protestant" or as "Catholic'" by the Protestant or Catholic Committees of the Superior Council of Education. It is commonly assumed that these school boards, now known technically as school boards "for Catholics" or as school boards "for Protestants," can be replaced with linguistic boards by simple provincial statute.

In addition to the confessional school boards in the city of Montreal and in the city of Quebec and the common school boards found in the remainder of the Province, there is in law a third type of school board that is of particular importance to Catholic and Protestant minorities. This third type of school board, of which only five currently exist in Quebec, are known as dissentient boards. The right of a religious minority, Catholic or Protestant as the case may be, to dissent has been an important principle of Quebec school law since the inception of public schooling. As this principle appears to be well protected by s. 93, it is important to understand what it means. The original intent in the 1840s was to permit the members of a religious minority, Catholic or Protestant as the case may be, to withdraw their children from the common school if they were offended by the religious beliefs or practices of the majority, and to set up a separate dissentient and denominational school specifically for this religious minority. One result was to emphasize the religious nature both of the minority dissentient school which was *de jure* denominational and the common school which assumed the *de facto* denominational character of the majority. Thus, the dissentient schools were denominational in practice and in law and could restrict enrollment, if they wished, to those adherents of the same minority denomination. These schools were managed and controlled by tax-paying supporters of the denomination in question. In practice, as to be expected, the majority of dissentient schools in Quebec were Protestant, but today, after considerable school board consolidation, there exists only three dissentient boards for Protestants and two for Catholics.[3] However, it is not the number of dissentient school boards that is important, but the principle of dissent itself. Not only has this principle been honoured by all Quebec governments since before Confederation, but the current **Education Act** (Bill 107) states quite explicitly in clause 126:

> Any number of natural persons of full age who are resident in the territory of a school board, except the territory of a confessional school board, and who are of a religious denomination, Catholic or Protestant, different from that of the majority of persons entered on the school

> board's latest electoral list, may serve on the school board a notice in writing informing it of their intention to establish a dissentient school board.[4]

In other words, except in the territory of confessional school boards in the city of Montreal and the city of Quebec where there already exists both Catholic and Protestant schools, the right of dissent for a religious minority is protected in s. 93 and in Law 107.

Section 93 appears then to protect the four confessional boards in Quebec City and the city of Montreal and the five dissentient boards in rural areas, but the six other boards on the Island of Montreal and the 170 or so common boards off the Island appear to be not so protected. As s. 93 does not specifically mention school boards as such, it is perhaps more appropriate to think of the constitution protecting the right of both Catholics and Protestants to have access to denominational schooling controlled by the adherents of their respective denominations in the city of Montreal and the city of Quebec. Elsewhere in the Province, a Catholic or Protestant minority has the right to withdraw its children from the system of common schools in order to establish dissentient schooling again controlled by adherents of the respective denomination. It is therefore a moot point as to whether s. 93 protects denominational school boards as such or certain rights and privileges belonging to specific groups of Catholics and Protestants.

In considering the series of questions recently submitted to the Court of Appeal by the government of Quebec, the court gave particular attention to the principle of dissent.[5] What was important, said the court, was not so much the maintenance of current school board structures as such but the right of the religious minority to exercise freedom of conscience. In other words, it was the opinion of the court that school board structures in Quebec, including the confessional school boards, originally had been designed primarily to protect the right of a religious minority not to be proselytized and converted by a religious majority. Provided that this right was protected, said the court, the government could create or abolish school boards as it saw fit. It remains to be seen whether the Supreme Court of Canada will agree with this somewhat distinctive interpretation of s. 93.

Linguistic guarantees under the Canadian Charter of Rights and Freedoms

Before examining that section of the **Canadian Charter** that deals with minority language education rights, it would be well to point out that the **Canada Constitution Act of 1982**, including the **Charter of Rights and Freedoms**, does not replace the old **British North America Act** but supplements it and renames it. In fact, s. 29 of the Charter specifically states that "Nothing in this Charter abrogates or derogates from any rights or privileges

guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." It is also important to point out that s. 33, the so-called "notwithstanding clause," is limited in its application to section 2 and to sections 7 - 15 of the Charter. It does not apply therefore either to those sections dealing with the official languages of Canada or to s. 23 dealing with minority-language education rights. As the minority-language education clause has added to the rights and privileges contained in s. 93 it is important to know what these rights are.

Canada Constitution Act 1982
Charter of Rights and Freedoms
Section 23: Minority Language Educational Rights

Language of instruction
(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.

With one important exception, s. 23 applies throughout Canada and applies equally to the English-language minority in Quebec as it does to the French-language minorities in the other provinces. The one important exception concerns s. 23 (1) (a) regarding the "first language learned and still understood." This subsection does not apply as yet in Quebec, presumably because of the perilous state of the French language in Quebec.[6] However, all

the other subsections, including the so-called Canada clause, apply equally in Quebec. A common misconception is that because the government of Quebec did not sign the **Constitutional Accord of 1981** that somehow or other it is exempt from the application of the Charter. This is not so. So long as Quebec is part of Confederation, the constitution of Canada, including the new **Canada Constitution Act of 1982**, is also the constitution of Quebec and applies with equal force there as it does elsewhere in Canada.

The first part of s. 23 describes who is eligible for minority language rights. Part 1(a) applies to Canadian citizens whose first language, learned (mother tongue) and still understood, is French. These citizens have the right for their children to receive instruction in French, if they so wish, anywhere in Canada. This right would also apply to French-speaking immigrants once they have satisfied citizenship requirements. This clause is in large measure responsible for the recent expansion of French-language instruction in Canada. As explained above, similar rights for English-speaking immigrants to receive instruction in English do not yet apply in Quebec.

Part 1(b), the so-called Canada clause, was included in the Charter partly as a direct challenge to some the education clauses of the Quebec **Charter of the French Language** (Bill 101). According to Bill 101, s. 73(a), only those children whose parent(s) received primary instruction in English in Quebec would be eligible for English-language schooling. In effect, the Canada clause qualifies the children of those who have received their primary instruction in English anywhere in Canada. In an early test of this clause in the courts it was ruled that the Canadian Charter, a constitutional document, had precedence over Bill 101, a provincial statute.

Part 2 of s. 23 includes two major elements. One is really a mobility clause, in that it allows for the continuation of the original language of instruction. In other words, a child cannot be forced to change the language of instruction simply because the child moves from one province to another. The other element provides for what may be described as the linguistic continuity of the family. Once one child in a family has received instruction in English or in French, then all the children in the family are entitled to receive instruction in that same language. It has been suggested that this particular aspect of the law was influenced by the language tests once required under Quebec's **Official Language Law, Bill 22** (1974), in which some members of a given family may have been able to demonstrate "sufficient knowledge" of the language of instruction whereas others could not, thus leading to the splitting up of families on a linguistic basis.

Part 3 of s. 23 outlines the conditions that have to be met for the full exercise of these minority-language education rights. First, in subsection (3)(a), there is a limitation as to the number of children required for minority

language instruction. They must be of a number "sufficient to warrant the provision to them out of public funds of minority language instruction." And, in subsection (3)(b), again where the number of children so warrants, there is a requirement not only for the provision of minority-language instruction *per se* but also for the provision of this instruction "in minority language educational facilities provided out of public funds."

One of the problems with the conditions set out in part 3 is that the Charter does not specify what exactly is meant by "sufficient numbers" nor does it precisely state what is meant by minority-language educational "facilities." For that matter, neither does it explain what is meant by "public funds." It was assumed from the text of the subsection that the number of children must be determined on the basis of the province as a whole, rather than on the basis of a single school board or specific geographical area. But the minority language "facilities," not being defined, could be anything from a classroom to a school or perhaps even a school board. Another unanswered but important question was whether the minority would have the right to manage and control these facilities. As to public funds, these could be local school taxes, provincial education funds, or even perhaps federal funds specifically targeted to minority language education. As the law did not spell out the precise details, it has been left for the courts to approach these problems on a case by case basis.

Of particular interest, then, to both minority language groups in Canada is how s. 23 will apply in practice. To a considerable extent, this question was answered by the Supreme Court of Canada in its landmark decision of March 1990 in the Mahé case in Alberta.[7] The Commissioner of Official Languages for Canada, M. D'Iberville Fortier, has recently described the court's decision as having "established for the provinces a veritable code of ethics to govern minority language education rights."[8] Although this particular case involved the French-language minority in Edmonton, the principles apply equally as well to the English-language minority in Quebec. The Court was unanimous in explaining what it thought to be the overall intent of of s. 23:

> The general purpose of s. 23 of the Charter is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada. Section 23 is also designed to correct, on a national scale, the progressive erosion of minority official language groups and give effect to the concept of 'equal partnership' of the two official language groups in the context of education.[9]

The Court therefore saw s. 23 as a remedial provision, deliberately designed to correct some of the existing problems with the linguistic education situation in Canada, and hence to alter the status quo. Specifically, the Court saw s. 23 as a means to correct the perceived defects of certain provincial laws and regulations by means of uniform corrective measures which were at the same time given the status of a constitutional guarantee.

The Court decided that the best way to interpret the "where numbers warrant" provision was by means of a sliding scale: at one end would be the example of a solitary, isolated minority-language student where there is little that a government can be expected to do; whereas at the other end of the scale would be the example of a relatively large number of minority-language students enrolled in minority-language schools controlled by minority-language school boards. In the case of the French-language parents in Edmonton, with 242 eligible students, the Court recommended the establishment of guaranteed elementary and secondary schooling, controlled and managed by minority parents, but stopped short of ordering the establishment of an independent school board. Of particular importance, however, was the Court's insistence that minority language representatives should have a guaranteed number of seats on the school board and that these representatives "should have **exclusive authority** to make decisions relating to the the minority language instruction and facilities," including: (a) expenditure of funds provided for such instruction and facilities; (b) appointment and direction of those responsible for the administration of such instruction and 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.

The Court added that the funds allocated for the minority-language schools must be at least equivalent on a per student basis to the funds allocated to the majority schools and that special circumstances may warrant the allocation of additional funding.

Conclusion

The Supreme Court of Canada has thus addressed the matter of minority-language school rights in a broad and liberal manner. The protection afforded to Catholic and Protestant minorities in s. 93 is evidently now considerably enhanced by the protection afforded to the French and English linguistic minorities by s. 23 of the Charter. Both sections have the weight of constitutional guarantees and, according to the Supreme Court, there is no conflict between the denominational guarantees of s. 93 and the linguistic guarantees of s. 23. In fact, it could be argued that s. 23 guarantees appear to be stronger than s. 93 guarantees. This is so because s. 93 protects certain denominational aspects of schooling in only some of the provinces whereas s. 23 applies to all the provinces and territories and protects not just denomi-

national rights but all those aspects of schooling concerned with the preservation of a language and therefore of a culture.

As Chief Justice Brian Dickson indicated in his judgement on the Mahé case:

> . . . any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them. . . . It is, as the preamble of the **Charter of the French Language** itself indicates, a means by which a people may express its cultural identity.[10]

When the Supreme Court issued its unanimous ruling on the Mahé case, it was hailed by *The Gazette*, in Montreal, as a great victory for minority rights across Canada. The emphasis in the French press in Quebec, however, was that it cleared the way for the introduction of linguistic boards as proposed in Bill 107.[11] The only word of caution was that it might lead to an even greater multiplicity of boards than currently exist.This scenario could occur if the courts not only approved the establishment of English-language school boards in Quebec as intended by Bill 107 and as indirectly guaranteed by s. 23, but also permitted the continued existence of confessional and dissentient boards under s. 93. Conceivably in Montreal, for example, there could be a system of French and English linguistic boards, together with a system of Catholic and Protestant confessional boards, and perhaps with a separate system for the English-language minority in a confessional board as, for example, in the current Montreal Catholic School Commission, or even in a possible French-majority Protestant board. The possibility also exists for a Protestant or Catholic minority to dissent from a linguistic board in order to establish its own denominational board outside of the territories of PSBGM and MCSC. The mind simply boggles at such possibilities!

Much therefore is dependent on the Supreme Court's ruling on the Bill 107 reference case. First, the Quebec government wanted to know if it was constitutional to replace the system of school boards "for Protestants" and "for Catholics" with a network of English and French school boards. Second, the government asked if the arrangements made in the law for the exercise of dissidence were constitutional and if it could limit enrollment in dissident school boards solely to Protestants and Catholics. The third group of questions concerned the confessional school boards in the two cities of Montreal and Quebec. Would Bill 107 prejudicially affect the rights and privileges of these school boards? Could the government change the boundaries of these

school boards? Could enrollment be restricted solely to Protestants and Catholics?[12]

The Court handed down its decision in September, 1990, stating that Bill 107 did conform in the main to section 93 of the **Constitution Act of 1867** and that the National Assembly had the power to modify the system of school boards as proposed. The Minister of Education called the decision "a breath of fresh air" in that it would allow the government to implement the kind of school system needed in a modern society while at the same time respecting entrenched religious rights. He added, however, that the government did not intend to go ahead with these proposals until the Supreme Court had dealt with the matter on appeal. If the Supreme Court upholds the opinion of the Quebec Court of Appeal then the stage seems set for a major upheaval of school board structures in Quebec.

NOTES

1. The last two attempts were (a) Bill 40, *An Act Respecting Public Elementary and Secondary Education* tabled in the National Assembly in June 1983 but withdrawn after Committee hearings in 1984, and (b) Bill 3, *An Act Respecting Public Elementary and Secondary Education* which was enacted in December 1984, but declared *ultra vires* the constitution by the Quebec Superior Court in June 1985.
2. Commissioner of Official Languages, *Annual Report 1990* (Minister of Supply and Services Canada, April 1991), ISBN 0-662-58028-1, 250.
3. The five dissentient boards remaining in Quebec are: the Protestant dissentient school boards of Baie-Comeau, Rouyn, and Laurentienne; and the Catholic dissentient school boards of Portage-du-Fort and Greenfield Park.
4. National Assembly, *Education Act* (1988, Bill 107, chapter 84, Québec Official Publisher), s. 126.
5. Cour d'appel, *Communiqué de presse,* (2 mai 1989, Palais de justice, Montréal).
6. Section 59 of the Constitution Act, 1982, reads as follows:
   (1) Paragraph 23(1)(a) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.
   (2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec.
   (3) This section may be repealed on the day paragraph 23(1)(a) comes into force in respect of Quebec and this Act amended and renumbered, consequentially upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.
7. Supreme Court of Canada, *Mahé v. Alberta,* (March 15, 1990).
8. Commissioner of Official Languages, *Annual Report 1990* (Minister of Supply and Services Canada, April 1991), ISBN 0-662-58028-1, 66
9. Supreme Court of Canada, *Mahé v. Alberta,* (March 15, 1990), Headnotes, 3.
10. Supreme Court of Canada, *Mahé v. Alberta,* (March 15, 1990), 13. (The last sentence of this reference is quoted from *Ford v. Attorney General (Quebec),* [1988] 2 S.C.R. 712, at pp. 748-49).

11. *The Gazette*, "Court backs minority rights in schools," (Montreal, March 16,1990) A1. *Le Devoir*, "La Cour suprême trace la voie à la réforme scolaire au Québec: Le même jugement fait cependant naître un danger d'éclatement du système actuel." (Montréal, 19 mars, 1990) 14.
12. It is assumed that the government intends to restrict the boundaries of MCSC and PSBGM to the current municipal boundaries of the City of Montreal and then to restrict enrollment in these boards solely to those who are of the Catholic or Protestant faiths.

REFERENCE

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