THE LANGUAGE OF EDUCATION IN QUEBEC

A STUDY OF BILL 101 IN TERMS OF CONSTITUTIONAL AND NATURAL LAW

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QUEBEC LANGUAGE OF EDUCATION: BILL 101 & CONST. LAW

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RESUME

La Loi 101 stipule que la langue de l'enseignement au Québec doit être le français, excepté pour les personnes légalement reconnues comme ayant droit à l'enseignement en anglais.

Cette thèse examine la constitutionalité de cette Loi aux fins des provisions de l'article 93 de la Loi de l'Amérique Britannique du Nord qui définissent les droits minoritaires dans la loi qui existait au temps de la Confédération et tel qu'interprétée par la jurisprudence.

Cette thèse examine aussi la Loi en fonction des droits des parents de voir à l'éducation de leurs enfants en vertu de la Loi Naturelle et en fonction de droits stipulés dans des documents tels que la Charte des Droits et des Libertés de l'Homme au Québec.

Pour conclure la Loi semble en tout point être valide en tant que législation, quoique sujette à appel en vertu des subdivisions 3 et 4 de l'article 93 de la Loi de l'Amérique Britannique du Nord.

ABSTRACT

Bill 101 stipulates that the language of education in Quebec shall be French, except for persons legally defined as qualified for education in English.

This thesis examines the constitutionality of this law under the provisions of Section 93 of the British North America Act as they define minority rights existing in law at the time of Confederation and as interpreted by jurisprudence.

It also examines the Bill in terms of the rights of parents to oversee the education of their children under Natural Law and in terms of rights in such documents as Quebec's Charter of Human Rights and Freedoms.

The conclusion is that the Bill on all counts appears to be valid legislation, though subject possibly to appeal under subsections 3 and 4 of Section 93 of the British North America Act.

INTRODUCTION

Bill 101[1]

The preservation of Quebec's distinct culture, and hence of the French language, has always been a fundamental concern of the Province. It is only within the last twenty years, however, that the provincial legislature has moved to protect and promote that language through law. As will be seen, a series of bills relating to language have been presented during that period and several enacted into law. The culmination of this process occurred on August 26, 1977 when the Charter of the French Language, commonly known as Bill 101, came into effect.

Chapter VIII of the Charter deals with the language of instruction and provides that with the exception of some clearly defined groups of people, the education of children in Quebec public schools from kindergarten through secondary shall be in French (Section 72). This applies also to those private schools which, in virtue of the Private Education Act, are declared to be in the public interest or recognized for the purpose of receiving grants.

The exempted persons are, by Section 73, the following:

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

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

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

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

Children of primary school age receiving education in French but qualified for English instruction may be declared so eligible and, for the purposes of Section 73, are considered to be receiving their education in English (Section 76). This provision would allow them to switch to an English school and thus enable their own children to be eligible for English language instruction.

Children with severe learning disabilities must be exempted from the provisions of Chapter VIII (Section 81). Exemptions may also be obtained for temporary residents (Section 85) and the Chapter provides possible exemptions for persons coming from provinces with which Quebec has entered into reciprocity treaties concerning the language of education (Section 86). To date no such treaty has been negotiated.

Section 87 provides for the use of Amerindian languages in the education of such native people and Section 88 provides that in schools under the Cree School Board and the Kativik School Board

the languages of instruction shall be Cree and Inutituut respectively, but places upon these boards the duty to use French also as a language of instruction so that graduates may pursue higher studies in that language.

By Section 97 Indian reserves are not subject to the Act.

The Issue

Few laws in the history of the Province have aroused such controversy, and no part of the law is more controversial than that relating to the language of education. On one side it has been attacked as denying the freedom of a parent to choose English or French as the language of his child's instruction, a freedom long enjoyed in the Province; as a threat to the continued existence of English language and culture; and as a threat to Quebec's economic future in discouraging anglophone and other non-French immigration. On the other side, the law is seen as essential to preserve and enhance the use of French and the culture dependent upon it in a Quebec totally surrounded by English North America.

In addition to social, cultural and economic questions, the educational provisions of Bill 101 raise one of a constitutional nature. Briefly, the principal issue here is whether or not the law contravenes certain rights enacted in Section 93 of the British North America Act. The study of this quesiton is the main subject

of this thesis. Beyond that precise point of statutory and judicial interpretation is the broader issue of whether this law runs counter to principles of human rights such as those enunciated in Quebec's own Charter of Human Rights and Freedoms or as may be recognized by the jurisprudence in terms of parental authority to oversee a child's education. This issue will also be addressed in a preliminary way. It may, in the long run, prove to be the more important question since it relates not only to Bill 101 but to any subsequent legislation respecting education. Current proposals with respect to the right to French and English education across Canada as part of a human rights formula in a new constitution bring this to mind.

It might be suggested that a study of the constitutionality of Bill 101 is, for two reasons, redundant. In the first place, the educational rights protected by the British North America Act have been the subject of judicial interpretation which, in the eyes of many, has settled the issue: language rights are not protected. This jurisprudence arose, however, out of contestations originating in other provinces, with one principal exception. It also arose in social conditions very different from those now being experienced. Existing research needs also to be updated by the examination of jurisprudence which has arisen from language of education legislation enacted in Quebec during the last two decades.

It may well be concluded that Bill 101 does not raise any

issue which could lead to a ruling different from the one generally established by the courts, namely that rights protected in the B.N.A. Act are religious, not linguistic, ones. This point, however, should be examined rather than assumed. In this sense, the present study attempts to bring the issue up to date: to examine Bill 101 and, to some extent, its antecedents in the light of existing jurisprudence on Section 93 of the B.N.A. Act and of the opinions of earlier jurists.

The second reason this study might be said to be redundant is that it may soon be obsolete. At the time of writing new constitutional provisions are imminent.* When they, or variations on them, come into effect, however, they will have to be interpreted on the basis of their own historical and constitutional antecedents, including the B.N.A. Act and Bill 101.

The Study

The juridical relationship between Bill 101 and the British North America Act with respect to education must be studied by beginning with their own antecedents. Over the twenty years preceding it, Bill 101 has had a number of predecessors in both proposed and enacted legislation. Chapter 1 will summarize these in chronological order and trace the development from one to the other.

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*The writer is aware of the new constitutional provisions which came into effect in April under Section 23 of the Canadian Charter of Rights and Freedoms and of recent jurisprudence in Quebec Superior Court upholding this Section over Bill 101. Section 23 is reproduced as Appendix A to the thesis.

Chapter 2 will consider educational provisions existing in Lower Canada at Confederation in 1867. It will seek to discover what were the rights which Section 93 purports to guarantee.

Chapter 3 will examine the jurisprudence which subsequently arose from contestations centered on Section 93, the main thrusts of juridical opinion on the jurisprudence and ultimately the application of both sources to Bill 101.

In Chapter 4, the issue of parental and human rights as applied to Bill 101 will be studied.

Chapter 5 will summarize the findings of the previous chapters and present certain conclusions to which an analysis of them may lead.

Chapter 1

EDUCATION LEGISLATION AND LANGUAGE

Bill 60 to Bill 101

Introduction

It is significant to note that prior to Bill 63 which was enacted in 1969, language of education was not a subject of legislation either prior to or after Confederation. It is true, as will be noted later, that education law in both periods required that in selection of teachers and books due regard had to be given to the language of instruction, but it would appear that this was simply a recognition of a de facto situation: education in Quebec was given in both French and English. No law, however, stipulated who could or could not attend a French or English language school.

Parents sent their children to whichever language school they chose, and in general English-speaking children customarily went to English schools and French mainly to French schools.

The principal division, as reflected in and, in a sense, guaranteed by Section 93 of the B.N.A. Act was on confessional lines. This point will be studied in depth in ensuing chapters. The only reference to language guarantees in that Act is Section 133 which

stipulates specific rights to use French or English in the Canadian and Quebec legislatures and in the courts.

Bill 60

In the 1950s the emergence of Quebec as a modern, industrialized state created a demand for competent technological and industrial personnel for whom the traditional classical-religious orientation of Catholic education was inadequate. In the spring of 1961 the Government of Jean Lesage formed a Royal Commission of Inquiry into the organization and financing of education. As a result of the report of this body, commonly known as the Parent Commission, Bill 60 was introduced in mid-1963 to establish a Ministry of Education. The fact that there had been no such Ministry since 1875 had been due largely to a prevailing philosophy that the state should keep education out of politics.(1) It belonged, it was thought, to the realm of religion and morals and as such it was the primary concern of Church and home, not of the state. The existing system had, at least on the French side, been elitist in the sense that post-elementary education was largely the privilege of the professional class. It was also classical as opposed to technological.

Both a move toward democratization in Quebec at the close of the Duplessis era and a demand for technological competence to

control the Province's own industrial future were behind Bill 60. Education was now of prime concern to the government as the elected embodiment of the people's will and the expression of their new goals. The Ministry of Education was to direct this new process and to coordinate the heretofore hodge-podge organization of education. This government was therefore ready to institute a new era in pedagogical purpose, authority and structure.(2)

The voice and influence of tradition, however, were far from dead or mute. There was still a strong feeling amongst many that "l'éducation constitue une réalité trop noble pour être livrée aux caprices de la politique".(3) Nor would all accept the arguments that the Bill furthered democratization of education. Whereas its proponents meant by democratization the disposition of education for the benefit of all sectors of society, its opponents argued that by placing education in the hands of one authority and taking it from those who traditionally shared it, the Bill made it less rather than more democratic.

The greatest controversy concerned the issue of confessionality. The authors of the Bill recognized the traditional confessional nature of Quebec education and were prepared to protect it through the Superior Council of Education with its Catholic and Protestant Committees. These public bodies were to ensure the confessional character of the schools, to make regulations for

religious and moral instruction and to approve text-books from a religious and moral point of view.(4)

To opponents, however, the mere acknowledgement of confessionality did not signify that the whole philosophy of education was to be based upon traditional religious values as against secular ones. They saw the confessional provisions of the Bill as mere lip-service to the principle and feared that what it really engendered was the secular materialism of the anglo-saxon world.

> "Les auteurs, affirmaient les opposants, au lieu de s'appuyer sur des prémises philosophiques élevées, ont adhéré à un pragmatisme et à un matérialisme des plus étroits. Il en est résulté, déploraient-ils, que l'esprit qui imprègne ces documents est tout à fait anglo-saxon et par conséquent étranger et même hostile aux traditions religieuses et humanistes des Canadiens français."(5)

Thus, while the proponents of the Bill felt Quebec would be left behind if it did not keep up with the rest of the Western world, its opponents were equally concerned that it would be endangered if it failed to retain its traditional values.

Briefly, the result of this debate was the withdrawal of the original Bill, the invitation of the Prime Minister to individuals and associations to make representations to him, and the introduction of a new Bill 60 in the following year, 1964. The major change in the new Bill was the inclusion of a preamble, taken virtually verbatim from the submission of the Assembly of Bishops, which stated the right of a child to an education conducive to the full

development of his personality; the right of parents to choose such educational institutions for their children which would, in their judgement, ensure the greatest respect for the children's rights; the right of individuals and associations to establish private schools; and the recognition of confessionality through the collaboration of the Superior Council of Education and its Protestant and Catholic Committees with the Minister of Education.(6) In addition, more power was given to the Bishops in the appointment of members to the Catholic Committee. The duties of the confessional committees were also defined in more detail.

From the point of view of the present study it is significant to note that Bill 60 did not raise the issue of language. The major thrust concerned the control and the organization of educational direction. There was a single submission(7) to the Prime Minister which identified the protection afforded to Protestant confessionalism with a continuation of privileges for anglophones, a privilege which was considered to attract immigrants away from the francophone sector. This submission was, however, remarkable by its isolation.

Since language was not a major point in the debate of the era under discussion, the inclusion of Bill 60 in this study may be justified on the grounds that it was the watershed, as far as legislation is concerned, which separated the new thrust in Quebec educa-

tion from the old. As has been seen the law could not run roughshod over the traditions and values of old Quebec, but in a way its opponents were prophetic. The respect paid to confessional education appears to have become more theoretical than real in substance.

A new tack had been taken which placed education in the service of the state and its people. Through it they were to find their significant and rightful place in the modern world and to control their own destiny by taking education into their own hands through their elected representatives. Out of this major step came subsequent ones, the most important being to make the language of education meet the same ends.

The Language Issue

The language issue came to public attention largely through demographic studies, especially those of Jacques Henripin.(8) Henripin published the results of his first investigation in the year Bill 60 became law. He indicated that due to the declining birth-rate amongst Quebecers and to the fact that 85 percent of immigrant children attended English schools, the percentage of francophones in Montreal would decline significantly. Since Montreal is the economic heart of the Province, such a decline would affect the survival of the French language throughout Quebec.

There were also more positive influences reflected in a

new awareness of the French language. One of these was the accomplishment of a new breed of francophone technologists and businessmen whose successful projects indicated that major undertakings could be achieved in the French language. It was no longer necessary that English be the language of science, technology and commerce in the Province.

Another influence was the rebirth of pride in Quebec culture. In the period under discussion, all aspects of the arts and literature flourished, stressing the importance of maintaining the French language and enhancing its quality.

The St. Léonard Affair

In education this new awareness came to a head when the school commissioners in St. Léonard-de-Port-Maurice, a suburb of Montreal with a large Italian minority, adopted in June, 1968, a resolution which abolished English language education in the commission's schools, beginning with Grade One in September of that year.

Two of the five commissioners dissented and took legal action in the Superior Court for an interlocutory injunction to disallow the resolution.(9) Several arguments relating to alleged illegalities in the notice of meeting and the adoption of the resolution were raised by the petitioners and were dismissed by the court. That which concerns us is the allegation that the resolution which abolished English language education and rescinded previous resolu-

tions relating to bilingual education were discriminatory, illegal, unjust and oppressive. The petitioners submitted that the commissioners had the obligation to offer education in both official languages.

The trial judge dismissed this argument on the grounds that the Education Act provided for education divided along confessional lines, not linguistic ones. The power to offer education in both languages was deemed to be discretionary, not obligatory, on the part of commissions and boards.

Bill 85

This judgement and the subsequent one of the Court of Appeal will be further discussed in Chapter 3. For the moment our concern is the result of the Commission's action and of the judgement. The public outcry both in opposition and in favour led to the government's attempt to effect some compromise. Toward the end of 1968, Prime Minister Bertrand introduced Bill 85 which would have have added to the Superior Council of Education a third committee beyond the existing Catholic and Protestant ones. Under Section 2 of the Bill this was to be a linguistic committee. The duty of this committee would have been to make regulations under which the Minister would designate (Section 8a) which institutions were French language schools and which English. In addition, the Minister of

Education in cooperation with the Minister of Immigration was to take steps to see that immigrants should acquire on their arrival a working knowledge of French and have their children enrolled in French schools.

Before the parliamentary Committee on Education, anglophone groups were generally pleased that Bill 85 guaranteed English education, but argued that the unequivocal right of all citizens to choose the language of instructions should be stated. Francophones, on the other hand, objected that the Bill aggravated the precarious position of French by creating for the English a right out of what had been before only a privilege.(10)

The Bill was withdrawn and shortly afterwards a Commission of Inquiry into the use of the French language(11) was created and given the mandate to recommend measures which would assure the growth and spread of that language in all sectors of public activity: educational, cultural, social and economic.

Bill 63

Although the work of the Commission was not completed until 1972, the Quebec legislature enacted an Act to Promote the French Language in Quebec on November 28, 1969. It is commonly referred to as Bill 63.(12) Section 1 of the act confirmed the principle stated in Bill 85 that children being educated in English

should receive a working knowledge of French. Section 2 amended paragraph 3 of Section 203 of the Education Act. To the statement of that paragraph that commissions and boards had the duty to ensure that courses given were those approved for Catholic and Protestant education respectively, the section added:

> Such courses must be given in the French language. They shall be given in the English language to any child for whom his parents, or the persons acting in their stead, so request at his enrolment; the curricula and examinations must ensure a working knowledge of the French language to such children and the Minister shall take the measures necessary for such purpose.

Section 3 repeated the stipulation in Bill 85 that the Ministers of Education and of Immigration had the duty to ensure that immigrants receive a working knowledge of French on or before arrival and have their children educated in French schools.

This law, in effect, enacted for the first time the principle that primary and secondary education was to be in French. It also explicitly stated, however, the right of any parent to choose instruction in English for his child. The exceptional provision was therefore so broad as to make the general principle of French language education inoperative as a fact. The proponents of autonomy for the French language thus saw in this law more benefit for the anglophone cause than for their own.

Bill 22

In response to the pressure for a stronger law to ensure French as the language of Quebec, the Liberal government of Robert Bourassa introduced The Official Language Act,[13] commonly known as Bill 22. It became law on July 31, 1974, although Section 121 provided that its sections relating to the language of instruction did not apply to registrations for the school year 1974-75.

Bill 22 declared that French was to be the official language of instruction in the public schools, including kindergarten. Boards and commissions were to continue to provide instruction in English, but could not begin, cease, increase or reduce it without the authorization of the Minister of Education. This law differed fundamentally from Bill 63 which it replaced in providing that children "must have sufficient knowledge of the language of instruction to receive their instruction in that language," (Section 41). Since this section did not stipulate the language of instruction referred to as being English, it thus implied that anglophone children without a qualifying knowledge of French could not receive their education in that language despite the proclamation of French as the official language. Instruction in English schools had nevertheless to ensure a knowledge of spoken and written French. The law also required that English as a second language was to be taught in French schools, (Section 44).

Section 42 of the Act gave to the school commissions and boards the duty to assign pupils to the appropriate group or school, having regard to their aptitude in the language of instruction. By Section 43 the Minister was authorized to set tests to determine that aptitude and the boards and commissions could be required to re-assign pupils on the basis of the test results. An appeal might be made to the Minister, but his decision was final.

The decision as to who could attend English schools was taken from the parent by the law and put in the hands of government officials. The scene of immigrant children crowding church basements in makeshift kindergartens to be crammed in English was a familiar one in the Province, particularly during the winter of 1974-75. This picture and the agony of appeals to the Minister from negative official decisions, along with the prospect of brothers and sisters being separated in English and French schools, brought strong protests on humanitarian and pedagogical grounds from the minorities.

Bill 101

The stormy three-year history of Bill 22 came to an end with the enactment of the even more controversial Charter of the French Language or Bill 101.(14) The main provisions of this law have been set forth in the Introduction of this study. Its effect was to remove the question of eligibility to receive education in

English from the realm of language proficiency and tests to one of family history at the date of enactment. Should the present provisions of this law remain in force, it would appear that only those who have a family background of English education in Quebec will in general continue to be entitled to it.

Summary

We can trace four main stages in this historical development, from a juridical point of view, of the language of education in Quebec:

1. From the earliest days of public education in Quebec up to the abortive Bill 85 in 1968 and the enactment of Bill 63 in 1969 no law stipulated a policy with respect to language of instruction. By tradition French and English were educated side by side and parents were free to choose one or the other, although availability and religious persuasion limited the choice to some extent.

2. Bill 85, while attempting to make instruction in French the norm, implied but did not explicitly state the right to English education. Bill 63, in effect from 1969 to 1974, provided for the somewhat ambivalent position that public elementary and secondary education "must" be in French, but "could" be in English for parents who requested it. No limitation was placed on who had the right to request.

3. Bill 22 enacted French as the official language of instruction, but continued to allow for education in English. The principal difference from Bill 63 was that it was no longer a matter of parental choice. Those eligible for education in English had to have sufficient proficiency in that language as determined by ministerial norms and tests.

4. Bill 101, the law currently in effect since 1977, has placed eligibility for English language education on a standard of generally clear and objective restrictions. Apart from provisions for temporary residents and other limited cases, those restrictions are determined by the language, residence and place of education of the child's parents or siblings.

Chapter 2

CONFESSIONAL RIGHTS AND PRIVILEGES IN LOWER CANADA AT CONFEDERATION

BNA Act

Section 93 of the British North America Act deals with education and provides as follows:

> 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 made, or in case any Decision of the Governor General in Council on any Appeal under 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.

In affording jurisdiction in education to the provinces, the British Parliament gave statutory protection to certain rights and privileges acquired prior to Confederation by certain classes of persons. What those rights and privileges were, who the classes of persons were, and what kind of acts might prejudicially affect their rights or privileges, have been matters of legal contestation and judicial interpretation. These will be examined in the following chapter.

1800-1867

It is essential to examine first, however, what statutory provisions governed education in Lower Canada at the time of Confederation, particularly as they related to confessional rights and privileges.

It is anachronistic but true that from a legal point of view the law in the field of education prior to Confederation is more important to a study of the constitutionality of Bill 101 than the law between 1867 and 1977.

It is tortuous to trace educational law through the years prior to the Act of Union of 1840, through those of the Union itself, and finally as it existed at Confederation. In those days there were not the batteries of legal draftsmen in the civil service that exist today and legislators often amended previous legislation by simply stating that anything in it which was inconsistent with a new statute was repealed.(1)

The Royal Institution

From the constitutional point of view which is the subject of this study, the period prior to the Act of Union is not especially important. Briefly, the first system of public education was instituted in 1801 by an Act which established the Royal Institution for the Advancement of Learning.(2) Schools set up under this Act depended upon local initiative for their establishment. The government's responsibility was to provide the necessary funds for the establishment and to appoint the teachers.(3) No provisions were made with respect to divisions along religious or linguistic lines, but because the Royal Institution was the child of English and Pro-

testant initiative its schools were suspect to the French Catholics and actively opposed by their Church.

The Fabriques Act

As a result an act was passed in 1824 which authorized local parish councils, the fabriques, to establish their own schools. Attaching the school to the Church had, of course, strong episcopal support, but in actual fact very few fabrique schools were established. This was due principally to the lack of funds. The Fabriques Act did not provide for public assistance and parochial resources were limited. Added to this may have been the factor that amongst the populace in general, itself largely illiterate, there appeared to be little demand for education. Be that as it may, during the five years the Act was in force only forty-eight fabrique schools were established.(4)

The Syndics Act

More successful was the Syndics Act of 1829. This legislation provided for the establishment of local elementary schools. The government provided financial assistance while the responsibility for the establishment and maintenance of the schools was vested in elected trustees or "syndics". The legislature was given the ultimate authority in education, a fact which did not endear the Act

to the ecclesiastical hierarchy, even though a subsequent amendment made parish clergy eligible for election as trustees. Furthermore, no denominational distinctions were made, again a factor unacceptable to the Catholic Church in particular. A bill had, in fact, passed the Legislative Council which would have created Catholic and Protestant Committees, each to regulate its own schools. This bill, however, did not reach the Assembly and never became law.

Despite the opposition of the Church, there was a rapid expansion of schools to the extent that probably a third of Quebec children by 1832 were receiving some elementary schooling.(5) This might indicate that there was indeed more general interest in education than was apparent in the failure of the fabrique schools.

The 1830s were, however, troublesome years in terms of political and nationalistic unrest. The Legislative Council, representing the interests of the wealthy English merchants, and the Assembly, those of the "Canadiens", were at constant loggerheads. Measures voted by the Assembly could not become law without the approval of the Legislative Council. Similarly, the Governor, supported by his Executive Council, popularly known as the "Château Clique", possessed a veto and had the right at any time to dissolve the Assembly.

On its side, however, the Assembly held a significant power: that of voting credits necessary to finance the administra-

tion of government. Under the leadership of Louis-Joseph Papineau, the Assembly kept the Governor and Executive Council continually short of funds. In order to obtain them, the Governor dipped into the confiscated wealth of the Jesuits which had been designated for education.(7) Thus in 1836, government funding of the Syndic schools was withdrawn, forcing most of them to close.

The Durham Report

The continuous opposition between the Assembly and the two Councils, Legislative and Executive, led the British Government to send a royal commission under Lord Gosford to Lower Canada. His report, which was sympathetic to the Canadiens and proposed important reforms, was rejected by the British Parliament.

The result was an increasing cry in the colony for independence and republicanism similar to that achieved by the United States. While the clergy urged submission to authority and even Papineau himself did not advocate armed resistance, uprisings occurred at St. Denis on the Richelieu and at St. Eustache in which, after some brief moment of success, the "Patriotes" were defeated by British troops.(8)

It was at this point that Lord Durham was sent by the British government to restore law and order. He was given full power to act upon his own judgement. Suspending the constitutional

forms of government in Lower Canada, Durham governed the colony through a Special Council whose members were named by him and over which he presided.

His famous Report was concerned not only with fundamental constitutional issues. It applied itself also tc other issues relating to the life of the colony, including an extensive analysis of education in Lower Canada. Arthur Buller, Durham's secretary and the man behind the educational aspects of the Report, proposed a common school system for Catholics and Protestants in which a non-sectarian approach would be taken to the teaching of religion. His proposals were, of course, unacceptable to the Church.

Another view, that of Charles Mondelet, proposed a somewhat bilingual approach by suggesting that French and English schools should be housed in contiguous buildings or even in the same one. He suggested further that the clergy, the government and the people would share in policy-making for the schools, but that the legislature would have the final authority. None of these proposals was ever enacted because of the broad divergence of opinion and interest.

The Special Council

Prior to the Imperial Act of Union enacted on July 23, 1840 and promulgated on February 10, 1841, an Ordinance of the Special Council under Lord Sydenham provided for the division of Lower

Canada into twenty-two districts. Each district had a Warden, appointed by the Governor, and Councillors elected by the parishes and townships.(9) Priests and ministers were not qualified to be councillors. By Section 38 of the Ordinance, the district council was given power to enact, amongst other things, by-laws "providing for the establishment of, and a reasonable allowance for, the support of Parish and Township Schools." Tolls, rates and assessments on real and personal property were to provide the funds. The Governor, however, retained the right to disallow the by-laws of any district council.

The Common Schools Act

One of the first legislative actions of the Union legislature was to pass "An Act to repeal certain Acts therein mentioned, and to make further provisions for the establishment and maintenance of Common Schools throughout the Province."(10) This Act repealed prior legislation relating to education and provided for the establishment of a Common School Fund to be divided amongst the district councils. A Superintendent of Education was to be appointed by the Governor and he was to apportion the Fund amongst the districts on the basis of population between the ages of five and sixteen. The district councils were to raise an equal amount by levy. Each council was made into a Board of Education with powers to divide

the Townships and Parishes into school districts.

The Act provided for the election of Commissioners in each township and parish. They were to choose a site for the school, to appoint teachers and to regulate the course of study and approve books. Section 11 of the Act then went on to enact that any group professing a different religious faith from that of the majority had the right to establish its own schools with the same privileges and responsibilities.

This Act of 1841, common to both Canadas, proved impossible to administer for that very reason. In 1843 Upper Canada received its own distinct educational system which laid the basis for separate schools in that province. These separate schools might be either Catholic or Protestant, depending upon the religious affiliation of the teacher. That is, if the teacher in the common school were Protestant, then ten or more resident Roman Catholic Freeholders or Householders in the district were entitled to a separate school. The separate schools, however, were not under a separate jurisdictional system. They were common schools, but of a particular religious persuasion, and were subject to the same regulations and entitled to share the same public funds as the other schools. The Upper Canada law also provided that no child in any public school should have tc read any religious book or take part in any religious exercise to which his parents objected.(11)

Act of 1845

The Ordinance of the Special Council which had organized Lower Canada into districts was repealed in 1845,[12] effective July 1, 1846, and the parishes and townships were incorporated. The Common School Act of 1841 as applicable to Lower Canada was also repealed that year by "An Act to Make Better Provision for Elementary Instruction in Lower Canada".[13] This law, in effect briefly, provided for the election in each parish and township of School Commissioners by the landholders and householders. The commissioners were to divide the parish or township into school districts and to engage teachers. The cities of Quebec and Montreal were each to be considered one parish and each school in them one district. Each of these two "parishes" had six Protestant and six Roman Catholic Commissioners.

Section 26 of the Act stipulated the right of the religious minority in the parish or township to establish its own school, having Trustees with the same powers as Commissioners and entitled to a proportionate amount of public funds.

Act of 1846

The 1845 legislation was replaced the following year. The new Act[14] set out the basic educational structure Quebec was to have at the local level into modern times.

It provided for the organization of school municipalities

under commissioners elected, except in Quebec and Montreal, by the inhabitants of the municipality annually. The commissioners were to divide the municipality into school districts. Quebec and Montreal each formed a school municipality with commissioners appointed by the city's Municipal Corporation. In each city there were six Roman Catholic and six Protestant Commissioners, each group forming a distinct corporation. This was the basis of the denominational system which has characterized the educational organization of the two cities.

The powers of the commissioners given by the Act were very broad. They included the engagement and removal of teachers, the regulation of the courses of study, and the levy and collection of school taxes. In Montreal and Quebec, however, the school commissions were financed by the respective city corporations out of government grants. Textbooks were to be approved by the Board of Examiners set up under the Act or, in the case of courses in religion and morals, by the priest or minister "for the use of the Schools for children of his own religious faith."(15) Section 26 of the Act provided,

> "That when in any Municipality, the regulations and arrangements made by the School Commissioners for the conduct of any school, shall not be agreeable to any

> number whatever of the inhabitants professing a religious faith different from that of the majority of the inhabitants of such Municipality, the inhabitants so dissentient may collectively signify such dissent and give the names of three Trustees, chosen by them, for the purposes of this Act."

These trustees, who collectively were referred to as a Board rather than a Commission, had the same powers, responsibilities and rights as the school commissioners, except that they could not levy or collect their own taxes. They were simply entitled to their proportionate share of tax monies and of the Common School Fund. The Superintendent of Education had a general supervisory authority as, for example, to prepare and cause to be printed recommendations and advice on the management of schools.(16) In addition to approving texts, the Board of Examiners examined and certified teachers and, in the first reference of a linguistic nature in legislation, the certificate had to state whether the teacher "can teach English and French, and if not, which of these two languages".(17) There were two Boards of Examiners, one situated in Quebec and one in Montreal, and they were divided into Catholic and Protestant sections.

Opposition to this law in Lower Canada was not based on pedagogical, religious or linguistic lines. The chief objection was to compulsory taxation for education amongst francophones. Dislike of taxation, especially direct taxation, was, of course, not confined

to Lower Canada. Elsewhere measures which imposed taxes on property for the support of education were unprecedented and unpopular. The problem was compounded in Lower Canada, however, by the fact that there was no tradition of any kind of direct taxation. And why should people not having children of school age have themselves to pay to educate the children of others?

The opposition became violent in form and a number of schools were burned. Popularly it was known as the "guerre des éteignoirs", referring to the fact that the opponents of taxation for education were seen as snuffing out the light of knowledge..

The Church also objected that clergy, not being property owners, could not be commissioners. Protestants complained that there should be a Superintendent of Education for their own schools. Having the majority of dissentient schools, they also argued that they should be able to levy and collect their own taxes for these schools.

Some of these grievances were redressed by subsequent amendments. Still further legislation established Normal Schools and provided for the appointment of School Inspectors who reported to the Superintendent of Education.(18)

Act of 1856

In 1856 a second major legislative act instituted the

Council of Public Instruction for Lower Canada.[19] Amongst other duties the Council, which was appointed by the Governor and consisted of eleven Catholics and four Protestants, was given power to make regulations "for the organization, government and discipline of Common Schools, and classification of Schools and Teachers,"[20] and [21]

> "To select or cause to be published ... books, maps and globes, to be used to the exclusion of others, in the Academies, Model and Elementary Schools under the control of the Commissioners or Trustees, due regard being had in such selection to Schools wherein tuition is given in French, and to those wherein tuition is given in English..."[22]

This particular paragraph is quoted because of the argument, to be discussed later, that it recognized in law a right or privilege to English or French education. At the moment, however, the significant issue is that the law of 1856 marked a centralizing trend in education compared to that of 1846 which restricted the central authority in the person of the Superintendent to a largely advisory role. This centralization has been seen to be the influence of the Superintendent at the time, P.J.O. Chauveau, later Quebec's first Premier and Minister of Public Instruction.[23] It was a move opposed by Alexander Galt, the spokesman for Lower Canada's Protestant minority amongst the Fathers of Confederation, who wanted to broaden the power of school commissioners and repeal the

Act of 1851 which had established School Inspectors.[24]

The Consolidated Statutes

The provisions of the 1856 Act relating to the powers of the Council of Public Instruction were in force at the time of Confederation[25] as were those of the School Commissioners as established by the 1846 Act. They appear in the 1861 Consolidated Statutes for Lower Canada which indicated no intervening attempt to reconcile the localizing and centralizing essence of the two statutes.

By virtue of this consolidation we can list the following features of school law in Lower Canada at the time of Confederation:

The Superintendent of Education had the duty,

> "To prepare and cause to be printed recommendations and advice on the management of Schools, as well for the School Commissioners and Trustees as for the Secretary-Treasurers and Teachers."[26]

Further provisions enacted the election of Commissioners[27] and the establishment of dissentient schools under Trustees.[28] The Trustees had the right, when dissatisfied with the distribution of assessments, to receive directly the assessment on dissentient inhabitants of the school municipality[29] and might, where no assessment existed or where it was considered not to be 'proper', levy and collect their own.[30]

The provisions of the 1846 Act establishing the powers

of the Commissioners and Trustees respecting the management of the schools from an educational point of view are contained in Section 65 of the Consolidated Statutes. To repeat, these included the engagement and removal of teachers[31] and the duty[32]

> "To regulate the course of study to be followed in each School, ... to provide that no other books be used in the Schools under their jurisdiction than those approved and recommended by the Council of Public Instruction[33] ... and to establish general rules for the management of the Schools, and to communicate them in writing to the respective Teachers; ... to fix the time of the annual public examinations, and to attend the same,"

saving the right of the clergy to select books relating to religion and morals.

Consolidating further the provisions of the 1846 Act, the Commissioners and Trustees were given the duty to name two of their members to visit the public schools of their municipality "to report to the Corporation ... the state of the School and whether (the Commissioners') rules and regulations are strictly observed, also the progress of the scholars, the character and capacity of the Teachers, and every other matter relating to the management of the Schools."[34]

Provisions of the Act of 1851 which established School Inspectors who reported to the Superintendent of Education were also consolidated with the 1846 Act. The Inspectors were to visit the

School Municipalities and "to inspect the Schools, School Teachers and School Houses therein ... and generally to ascertain whether the provisions of the School Laws are there carried out and obeyed."(35) The Superintendent was himself ex officio Visitor-General and had the final decision in disputes between commissioners or trustees and teachers.(36)

Still another authoritative group was the Board of Examiners set up initially in Montreal and Quebec by the Act of 1846 to certify teachers. Later amendments had enabled the creation of boards in other districts. The provision that the certificate had to state whether the teacher could teach English and French or, if not which of the two languages, was retained.(37) Finally, the Consolidated Statute contained the provisions creating what has been called the denominational school structure of the cities of Quebec and Montreal which has already been outlined.

There were no significant amendments to Chapter 15 of the Consolidated Statutes of 1861(38) and the law that existed at the time of Confederation is that Chapter. The problem is that it consolidated two laws, those of 1846 and 1856 with their respective amendments, which had differing perspectives: one concerned with essentially local authority and the other with central. There was no clear definition of their respective weight vis-à-vis one another.

As Confederation approached, there was concern amongst

the Protestant minority in Lower Canada, for which A.T. Galt was the chief spokesman, that its rights in education were not properly defined or protected. Legislation was introduced in the summer of 1866 to clarify these rights, but a second bill was also presented which applied to Upper Canada and which would have given Catholics there a virtual autonomous educational system. It was bitterly opposed and both bills were withdrawn, leading to Galt's resignation. The result was that he pressed for a clause in the British North America Act which would extend to the minority in Quebec school municipalities the same powers and privileges which were enjoyed with respect to education by Roman Catholics in Upper Canada. This ultimately was enacted in subsection 2 of Section 93 of the Act.(39)

The School System at Confederation

In summary, the educational system in Lower Canada at Confederation gave rise to three kinds of schools. The first of these is usually referred to as common schools erected and managed in school municipalities by elected commissioners and financed jointly by the Common School Fund and by taxes on local property. A minority of different faith, Roman Catholic or Protestant, from that of the majority in the municipality had the right to set up its own schools, known as dissentient schools, under the management of elected trustees. There was no required minimum number to constitute a

minority. Section 55 of the Statute stated clearly that "any number whatever" of dissentients could set up their own Board. Children of the dissentient faith in one school district might, however, attend a dissentient school in another whenever, according to subsection 2 of Section 56, "such dissentients are not sufficiently numerous in any District to support a School alone."

The dissentient schools had the right to their proportionate share of money from the School Fund and the assessments.(40) In the cities of Quebec and Montreal two distinct corporations were created for each city, one Catholic and the other Protestant. The commissioners were appointed by the respective municipal corporations rather than elected. The commissions were financed by the municipal corporation from funds granted by the government. These are known as denominational school commissions or boards.

Education was in law controlled centrally by the Council of Public Instruction with the power to make regulations for the organization, government and discipline of the schools and to select text-books to be used in them, having regard to where tuition was given in French and where in English. Priests and ministers had the right to select books relating to moral and religious instruction. The Superintendent of Education, ex officio a member of the Council, had amongst other duties,

> "To prepare and cause to be printed recommendations and advice on the

> management of Schools, as well for the School Commissioners and Trustees as for the Secretary-Treasurers and Teachers."(41)

Boards of Examiners were set up in various sections of the Province, representative of the two main religious denominations, to examine and certify teachers.(42) They reported to the Superintendent of Education and through him to the Council.

School Inspectors were appointed to the various school municipalities to visit the schools, see that school laws were carried out and also to report to the Superintendent.(43)

All teachers in the public schools had to be certified except priests, ministers or members of religious teaching orders. The certificate had to declare the teacher's religious affiliation and whether he could teach in French, English or both languages.

The Commissions and Boards at the local level engaged and removed teachers and regulated the course of studies, using books approved by the Council of Public Instruction. It would appear that they paid the salaries of teachers, for while no specific stipulation to that effect can be found, Section 24 (1) provided that the Superintendent of Education received Common School funds and distributed them pro rata to the Commissions and Boards for school purposes.

The Commissions and Boards also established "general rules for the management of the Schools."(44) They appointed from amongst their membership inspectors to see to the implementation of

their regulations. Certain persons at the local level had the right to be school Visitors, entitled to information respecting each school and to interrogate teachers being examined for certification.(45) Among those who had this right were the resident clergy, but they could not visit a school not of their persuasion without the consent of the Commissioners or Trustees as the case might be.

All of the above stipulations applied to the three types of school: the common, the dissentient and the denominational.(46) In other words, the dissentient and denominational schools were subject to the same provisions of law as were the common schools.

The confessional rights and privileges of Catholics and Protestants at the time of Confederation were basically to have schools of their own religious persuasion, in the cities of Montreal and Quebec as denominational schools, and in municipalities where either was a minority as dissentient schools.(47)

Language Rights

The fundamental question is whether such rights and privileges included the legal right to determine the language of instruction in the schools. If this indeed was the case then Bill 101 might be considered to be unconstitutional in light of Section 93 of the B.N.A. Act. The answer to the question hinges not so much on the philosophical issue of whether language is a necessary adjunct

to religion in the context of Quebec's educational history as on the legal one of whether the powers vested in commissioners and trustees included that of determining the language of instruction in the schools under their jurisdiction.

As has been seen, the existing educational law did not legislate directly concerning the language of instruction. It did, however, recognize the fact that education in the Province was given both in French and in English. In giving the Council of Public Instruction authority to select text-books, it had to give regard to schools wherein education was giver. in French and where in English. The implication is that text-books of two kinds were to be approved: those for French schools and those for English. Secondly, a teacher's certificate had to state in which language he could teach or if he could teach in both. The rights of the local authorities, that is, commissioners and trustees, included the engagement of teachers for its schools and the regulation of the course of study provided that they used books approved by the Council of Public Instruction.

It would appear that while there was some confusion in the law at the time of Confederation between the two levels of school government, the Council of Public Instruction at the provincial level and the Boards and Commissions at the local, the determination of the language of instruction in the schools belonged to the latter. They could appoint the teachers and choose the approved textbooks. To do

this is essentially to be able to choose the language of instruction. The only power of the central authority was to certify teachers as teaching in one or other of the languages, or both, and of approving both French-language and English-language books. From this it has been persuasively argued[48] that the right to a denominational or dissentient school included the right of commissioners, in Quebec and Montreal, and trustees elsewhere to determine the language of instruction, and that this right was thereby protected by Section 93 of the B.N.A. Act.

It is admitted in the same argument, however, that a similar right of commissioners of common schools was not protected. While these schools might be denominational in fact, they were not so in law. Over the years, and especially since the establishment of the Ministry of Education in Quebec in 1964, the powers of the local authorities have been eroded and those of the central increased in education. The legislature has the right, the argument continues, to modify these powers with respect to the common schools since they have no rights guaranteed under the B.N.A. Act, not being in law denominational. It does not have the same right, it is argued, with respect to denominational and dissentient schools, nor to the denominational boards, commissions and regional boards subsequently set up by order-in-council which have replaced or amalgamated many of them. This would be so, it is contended, because the right to choose the language of instruction at that time was inherent in the right

of the local authority to choose teachers, texts and generally to manage the schools.

This argument, however, would appear to base the right to choose the language of instruction on faulty grounds. The power to so choose did not stem from the fact that it was given to a dissentient board or denominational commission. It stemmed from the fact that the power was given to the local authority whether the school was denominational, dissentient or common. The law of education at the time of Confederation gave rise, as we have seen, to three types of school: common, dissentient and denominational. With minor variations the law applied to all three as public schools. The power of the local authority to choose the language of education did not depend upon whether the school was denominational or not in law. It resulted from the fact that the power was within the jurisdiction of the local authority. In other words, the authority of the commissioners of a common school to choose French as the language of instruction was no less than the authority of the coterminous dissentient board to choose English. At the time of Confederation that power was vested in the local authority whether common or denominational. The legislature cannot take away the right to a denominational or dissentient school, but it can alter the balance of educational authority between the local and central jurisdictions.

What appears to have been protected in the main clause

of Section 93 of the B.N.A. Act was the right of a denominational "Class of Persons" to establish a dissentient school, but not a right to choose the language of instruction. That de facto power existing at Confederation is no more protected in the denominational or dissentient school, it would appear, than in the common. The study of the jurisprudence which follows will tend to support this view.

Chapter 3

JURISPRUDENCE

The jurisprudence which has arisen out of Section 93 of the British North America Act has been extensively studied. New laws raise new issues, however, or old ones in new ways. It is therefore important to consider the jurisprudence in the light of Bill 101, especially since the language of education provisions of this law have not yet been judicially reviewed.(1)

The questions which have had to be decided by the courts are:

1. What are the rights or privileges protected by Section 93?
2. What would it mean to "prejudicially affect" them?
3. What constitutes "any Class of Persons" within the meaning of the section?
4. What protection is afforded by sub-sections 3 and 4 beyond that enacted in subsection 1?

1. Protected Rights and Privileges

The Barrett case

The right or privilege protected by subsection 1 is essentially that of establishing a denominational school and that right or privilege must have existed in law at the time of Confederation.(2) This question was first raised in the City of Winnipeg v. Barrett.(3) By virtue of The Public Schools Act of 1890, the Province of Manitoba established a common school system as opposed to a denominational one. At the time of the Manitoba Act of 1870 by which that province joined the Confederation, there had been no legislation in the territory governing education. There was, however, a system of denominational schools which, in the case of Roman Catholic ones at least, were supported by parents' fees and Church funds.

In 1871 the denominational system was enacted into law and school assessments were imposed. By later amendments a Roman Catholic could not be obliged to pay assessments for a Protestant school and vice versa. The Act of 1890 completely reversed the system by establishing a common school fund. The litigation arose from the complaint of Roman Catholics, supported by some Anglicans, that they were being taxed for the support of schools to which in conscience they could not send their children, that is, public common schools. They claimed that a right or privilege they enjoyed at Confederation, that of denominational schools, was prejudicially affected.

While their argument was upheld in the Supreme Court of

Canada, the Privy Council was of a contrary mind. After an examination of the pre-Confederation status, the Privy Council found that the educational system had indeed been a denominational one. Had that system been enacted in law at that time, the right or privilege protected would have been the right to a denominational school. The fact that there was no such legislation accounted for the addition in Section 22(1) of the Manitoba Act of the words "or practice" after "by Law", words not included in the corresponding Section 93(1) of the B.N.A. Act.

The right of a Class of Persons to establish a denominational school was not prejudicially affected by the establishment of a common school system. The right still existed. It might be an inconvenience or annoyance to have to pay taxes for the support of the common schools, but that in itself did not prejudicially affect the right to establish the denominational school.

The Mackell case

The same line of reasoning was followed in the somewhat different circumstances of the case of the Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Mackell.(4) In this instance, the Ontario Department of Education, under Regulation 17, had made certain provisions concerning the language of instruction in schools which had been designated either as French or

French-English. Since these provisions were restrictive of the French language, the Trustees, all francophone, refused to enforce them and were brought to court by co-religionist Catholics of the English language (5) seeking a mandatory order to enforce the provisions. The Trustees' argument was that at the time of Confederation the power of trustees included the right to determine the language of instruction.

Noting that Regulation 17 applied equally to common as to separate schools, the Privy Council ruled that the right existing at Confederation was the right to a separate school, but not the right to have a free hand in all matters relating to that school system. The separate system was not an autonomous unit. It was subject to legislation and regulation of the Council for Public Instruction, later the Department of Education.

> "...(The) right or privilege reserved ... is a legal right or privilege, and does not include any practice, instruction, or privilege of a voluntary character which at the date of the passing of the Act might be in operation."(6)

The significance of the Mackell case is, therefore, that the right protected by Section 93 to establish a denominational or separate school system on a religious basis does not include the right to determine the language of education in that system. Nor did the right given to local trustees to manage the schools include

the right to select that language. The power to do this validly belonged to the provincial legislature and was properly exercised by its delegate, the Council for Public Instruction.

The Tiny Case

The case of the Roman Catholic Separate School Trustees for Tiny v. Rex (7) went even further in a restrictive interpretation of Section 93(1). In this instance the Trustees sought a proportionate share of educational grants for the development of secondary schools to that which high or collegiate schools received in the public system. Such level schools had not been part of either the common or separate systems at the time of Confederation, although Ontario law did provide for public education in both types of school up to the age of twenty-five. The Trustees also sought exemption for Roman Catholics from having to pay taxes for the support of the public or common high schools.

The Privy Council ruled that the legislature had the right to apportion public funds for education as it saw fit. To regulate what funds were given to the separate school system beyond those to which it was entitled under laws existing at Confederation might restrict the activity and development of that system, but it did not abolish its right to exist. The separate system could develop its own secondary schools, but it would have to do so at its own cost. It did not have the guaranteed right to develop such

schools at public expense under Section 93(1).

> "(The Trustees) are still left with separate schools which are none the less actual because the liberty of giving secondary and higher education in them may be abridged by regulation." (8)

The Privy Council may have detected an inequity in its decision, but maintained a strict or narrow interpretation of Section 93(1) because of the fact that other avenues of redress were open to the appellants under subsections 3 and 4.

The right or privilege, then, has been narrowly interpreted in judicial decision. The provincial legislatures' right to make laws in education has been given a broad definition, the limitation upon them being that they must not interfere with the right to establish denominational schools since such right existed in law at the time of Confederation (or in practice, in the case of Manitoba).

2. What would "prejudicially affect the Right or Privilege?

The Hirsch case

Following the previous discussion, to affect prejudicially the right or privilege would be to deprive those entitled to it of the right or privilege. This was the point at issue in Hirsch et al v. Protestant Board of School Commissioners of Montreal.(9)

In 1903 the Quebec legislature had enacted a law which,

in brief, provided that for the purposes of education Jews should be considered Protestants.(10) Certain questions relating to the validity and interpretation of this statute were referred to the courts. They, including the definitive judgement of the Privy Council, distinguished between the dissentient schools of the rural areas and the denominational schools of the cities of Quebec and Montreal. In the former case, these schools were ruled to be truly confessional and it would prejudicially affect the right of Protestants to force them to enroll students who did not profess the Protestant faith. The common schools might in fact be confessional due to local population factors, but were not so legally and were thereby open to persons of any faith.

The denominational schools of Quebec and Montreal were somewhat different. They were, in one sense, common in that children of any faith had the right to attend them. They were, in another sense, confessional in that they were under denominational control and hence neither the Catholic Commission nor the Protestant could be forced by law to accept commissioners or to appoint teachers not of the respective faith. Such a law would prejudicially affect the right of the denomination protected by Section 93(1). It was not, however, considered prejudicial to the rights of Protestants and Catholics if the legislature were to establish a separate school commission for persons of a third religious faith. It might affect them, but would not do so prejudicially.

The St. Léonard case

Although the case of Perussé et Papa v. Les Commissaires d'Ecoles de St. Léonard de Port-Maurice,(11) which was a petition for an interlocutory injunction, did not directly raise the issue of constitutional rights under Section 93, the comments of the judges both in the Superior Court and the Quebec Court of Appeal do have some bearing.

The basic issue of the case has already been referred to.(12) Was it discriminatory, illegal, unjust and oppressive for the School Commissioners of St. Léonard to cease English language education in Grade one of its schools, to bus anglo-saxon children to neighbouring commissions and to force neo-Canadians into French language education? The trial judge admitted that, as with most administrative decisions which affect the rights of citizens, there was an element of discrimination just as the Education Act itself could be said to discriminate against people who are neither Catholic nor Protestant. He found, however, in the Commissioners' majority action a valid exercise of discretionary power and refused to put himself in the position of the legislature by doing what that body had not done, namely enacting a legal obligation that school commissioners must provide education in both languages.

The appeal court judges took a different view. They did not pronounce on whether or not the legislature might lawfully confer

on school commissioners the power to determine language of instruction. Mr. Justice Brossard, who delivered the principal judgement, did state, however, that the action of the St. Léonard Commission deprived non-francophones of a right to which they had long been accustomed. His four colleagues were in essential agreement with him. Such an action could not be taken without the express authorization of thé legislature. To repeat, however, the crucial issue of whether the legislature might constitutionally so authorize was not raised.(13)

Notre-Dame-des-Neiges case

The right to a confessional education in schools under the jurisdiction of the Montreal Catholic School Commission was upheld in the instance of Clément-Séguin v. Le Procureur-Général de la Province de Québec et al., commonly known as the Notre-Dame-des-Neiges case.(14) The case arose because the Catholic Committee of the Superior Council of Education had revoked the recognition of the Notre-Dame-des-Neiges school as Catholic and made it into a neutral school.

In the court's judgement elementary schools under the Montreal Catholic School Commission and the Protestant School Board of Greater Montreal, as well as those under the few remaining dissentient boards in the Province, are denominational and protected under Section 93(1) of the B.N.A. Act. The action of the Catholic Committee in recognizing the school as Catholic by prior resolution was deemed

to be superfluous; its act of revoking such recognition and making it neutral was deemed to be unconstitutional. It prejudicially affected a right existing at Confederation. It was noted by the court that the need to provide non-confessional education in a pluralistic society was just, but could not be accomplished by abrogating rights protected constitutionally. It stated that the Hirsch decision opened the way to the creation of a neutral school system without contravening the rights of Catholics or Protestants.

To "prejudicially affect", then, means not just to affect in the sense of altering a de facto situation. It means to deprive those entitled to a right guaranteed by law at the time of Confederation of that right or of the means of exercising it.

3. What constitutes "any Class of Persons" within the meaning of the Act?

The jurisprudence in this instance is abundantly clear. The principle was established in the Barrett case[15] and reiterated in the Mackell case[16] that the Class of Persons means a group of persons determined by religious adherence.

> "... the class of persons to whom the right or privilege is reserved must, in their Lordships' opinion, be a class of persons determined according to religious belief, and not according to race or language."[17]

PSBGM case

The jurisprudence cited so far has arisen principally out of contestations by French-speaking Catholics in Ontario and Manitoba. Only in recent years, apart from the Hirsch case, have English-speaking Protestants in Quebec found themselves facing language legislation which, in the judgement of many of them, is considered to be discriminatory.

In 1975 the Protestant School Board of Greater Montreal took legal action against the Minister of Education to have certain clauses of the Official Language Act (Bill 22) declared unconstitutional under Section 93(1) of the British North America Act.

The arguments put forward by the Board were basically those of the report referred to in Chapter 2.(18) Amongst other things it was contended that the Manitoba and Ontario jurisprudence did not apply since the situation in law in Quebec at Confederation was substantially different. More authority, it was said, rested in the local boards in Quebec at Confederation than was the case in Ontario, including the authority to determine the language of instruction.

This argument was rejected by the Chief Justice of the Superior Court,(19) who found slight difference between Upper and Lower Canada legislation insofar as the division of powers between local and central educational authorities was concerned.

This judgement contains a weighty review of the history

of education in Quebec and of the jurisprudence on Section 93 of the B.N.A. Act. On grounds both of the relevant legislation and of the jurisprudence, the Chief Justice rejected the claim that language of education was protected to Protestants under Section 93(1).

> "A chacun (des) moments solennels de notre histoire, les Tribunaux ont distingué entre langue et foi, entre culture et religion: à la seule confessionalité des garanties constitutionelles et jamais n'ont-ils interprété l'Acte de l'Amérique du Nord britannique comme un instrument de protection de la langue ou de la culture d'un groupe particulier."(20)

The Chief Justice could not help but wonder why the court should find a special right to English for Protestants in Quebec where no such right to French for Catholics elsewhere had been upheld in previous judgements.

4. Protection of Rights Afforded by Subsections 3 and 4 of Section 93.

A somewhat different and broader protection of minority rights is afforded by subsections 3 and 4 of Section 93. Authorities are in general agreement that as a result of the constitutional crisis which resulted when these subsections were invoked on one occasion they are unlikely to be used again. At least some consideration, however, should be given to them and their applicability to Bill 101 should be discussed.

In essence, these two subsections provide for an appeal to the Governor-General-in Council where an act of a "Provincial Authority" affects a right or privilege of the Protestant or Roman Catholic minority in the province with respect to education. Under subsection 4 it would seem that if such appropriate action as may be deemed necessary by the Governor-General-in-Council is not taken at the provincial level, the Parliament of Canada may make remedial legislation.

We have seen in our study of the Barrett case that in 1890 the legislature of Manitoba passed an act which converted the confessional system of education in that province to a secular one. In the Barrett case it was pleaded that this law was unconstitutional in depriving Roman Catholics of a right guaranteed under subsection 1 of Section 22 of the Manitoba Act. This subsection corresponds more or less to Section 93(1) of the B.N.A. Act. It was ruled by the Privy Council that the act of the Manitoba legislature was not unconstitutional since the right to denominational schools remained to any denomination which wanted to opt out of the public system.

The Brophy case

Subsequent to the Barrett case, the Roman Catholic minority appealed to the Governor-General-in-Council under subsections 2 and 3 of Section 22 of the Manitoba Act, again corresponding to,

but not identical with, Section 93(3 and 4) of the B♀N.A. Act. The courts were asked to rule if this appeal could be allowed. This is the well-known case of Brophy and others v. The Attorney-General of Manitoba.(21)

One of the arguments raised on behalf of the Attorney-General was that subsections 2 and 3 of Section 22 merely reinforced subsection 1 and therefore the precedent of the Barrett case stood. The Privy Council rejected this argument, holding that the provisions of these subsections stood as substantive law on their own and covered different circumstances. The Privy Council went on to note their differences from subsection 1:

1. The right affected need not have existed at the time of Union but might have come into existence later.

2. The right need only be affected, not necessarily prejudicially as the qualifying adverb in subsection 1 was omitted from subsection 2.

3. The right was not confined to one enjoyed with regard only to denominational schools, but more broadly covered the rights of Catholic and Protestant minorities in relation to education.

On this interpretation the Privy Council ruled that the rights of Roman Catholics which had existed "in practice"(22) at the time Manitoba joined the Union and which had been confirmed in legislation of 1871 and 1881 were indeed affected by the 1890 law

and hence the appeal to the Governor-General-in-Council was well-founded.

The historical result of this decision is well-known. The Manitoba legislature refused to rectify the situation and remedial legislation was introduced in Parliament. It was dropped, however, when the House of Commons dissolved for an election. The issue was hotly debated in that election, but when the new Parliament assembled a compromise between Canada and Manitoba was worked out. Even today, however, the issue of French Catholic rights in Manitoba can hardly be said to be a settled one.

Further Consideration of Subsections 3 and 4

In the opinion of one authority(23) the appeal to the Governor-General-in-Council is unlikely ever to be invoked again because of the constitutional crisis which followed the Brophy case. However this may be, it remains a constitutional option and two issues relative to it deserve mention.

The first is that because of the Brophy decision subsections 3 and 4 of Section 93 have always been linked together and made distinct from subsection 1. A difference between subsection 2 of Section 22 of the Manitoba Act and its parent provision in the B.N.A. Act could have led to that separation. On a reading of Section 93 alone, however, another possibility is presented: that

subsection 4 provides for remedial action by the Parliament of Canada when, in the view of the Governor-General-in-Council, either subsection 1 or subsection 3 is contravened.

The first clause of subsection 4, referring to Provincial Law, could be seen as relating to subsection 1 and the second clause, referring to the Provincial Authority, could be seen as relating to subsection 3. It is to be noted that subsection 4 refers to laws and acts under this Section, not under, let us say, subsection 3 or the previous subsection. In other words, subsection 4 might be considered to have the whole of Section 93 in mind, not just subsection 3.

The reason why the Privy Council in the Brophy case may have interpreted otherwise is that in subsection 2 of Section 22 of the Manitoba Act, acts of the Provincial legislature as well as acts of a Provincial authority are included whereas they are not in the parent clause of the B.N.A. Act.

As indicated, the discussion is hardly pertinent anymore except for an historical question. Did the Fathers of Confederation, in view of the agitation over education at the time in both Lower and Upper Canada, wish to give to the Parliament of Canada a stronger legislative control or supervision over provincial law as well as administrative act in education than has been judicially interpreted from the wording of Section 93?

The second point to be briefly mentioned is that subsection

3, as indicated, has been interpreted to apply to legislation subsequent to Confederation. In Chapter 1 it was suggested that no law at Confederation or for a long time afterward guaranteed the use of a particular language in education in Quebec until Bill 63. This law, in making French the predominant language, guaranteed the right to education in English. At least one authority[24] has expressed the possibility that Bill 63 may have created a guaranteed right which would fall under subsections 3 and 4. In the remote event that this question should come before the courts, it is highly questionnable whether the language right given in Bill 63 would be interpreted as a right or privilege given to the Protestant minority. The weight of the jurisprudence would appear to separate the issue of language from that of confessionality.

Conclusion

As was the case with our review of the educational legislation existing at the time of Confederation, the jurisprudence studied seems to contain little from which to conclude that the language of education provisions of Bill 101 contravene a right existing in law at that time.

The courts have consistently interpreted Section 93 in a narrow way and have accorded to the provincial legislatures the authority to enact such laws as they deem necessary to suit the edu-

cational needs of the time. The only proviso has been that they do not abrogate the right to a confessional system. It would be difficult to argue that Bill 101 does that. It may affect the Protestant system in that it is forced to adapt from being a predominantly anglophone one to a predominantly francophone or bilingual one. This would not appear, however, to deprive it of its right to exist or to affect it prejudicially in the sense of making it impossible for it to function.

Chapter 4

HUMAN RIGHTS AND FREEDOMS

Natural Law

In times past the courts have on occasion recognized principles of natural law. Natural law appears to have its roots in certain theological concepts about the nature of man, namely that he possesses God-given rights and responsibilities of which he cannot be deprived by positive law.

The right of a parent to raise his child according to his own values and beliefs is one example. To take an extreme case, were the state to legislate that all children must follow a course which inculcates Quebec independence as the only valid option, a principle of natural law would be raised. For the parent to take this stance would be one thing; for the state to take that right as its own would be another.

It would appear that in modern times this parental right is not seen as unlimited. It is recognized that a parent has the right to correct his child, but if correction becomes abuse the state has not only the right but the duty to intervene. Yet even this can be based upon a principle of natural law: the right of the child himself

to life and physical and emotional well-being.

Parental right as a judicial issue is familiar to us in the question of blood transfusions for children of Witnesses of Jehovah. The Witnesses argued in the courts that forced transfusions contravened their right as parents to apply their beliefs to their children. These beliefs forbade blood transfusion. Their argument was not unsuccessful in early cases. Later litigation has emphasized the right to life of the child.

In Quebec the most outstanding case which raised the issue of parental right was that of Chabot v. School Commissioners of Lamorandière.(1) The Chabot children were forbidden by their father, a Witness of Jehovah, to take part in Roman Catholic religious exercises which were part of the curriculum of the school they attended. As a result they were expelled. In the Court of Appeal the judges based their decision primarily on the ground that the school involved was a common one and while in fact it might be Roman Catholic, in law it was not. It was open to any child of any denomination. Furthermore, even if a specific religious instruction were part of the curriculum no child could be forced to take it. To do so would be to contravene the natural law principle, namely the freedom of conscience of a parent to determine the religious education of his child. The point is clearly made by Mr. Justice Pratte:

> "... it appears useful to recall that the right to give one's children the religious

> education of one's choice, like freedom of conscience, is anterior to positive law."(2)

He went on to quote Lord O'Hagan of the Privy Council in an earlier judgement:

> "..'The authority of a father to guide and govern the education of his child is a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law.'"

The basis of natural law in theological conviction is evident in this quotation. In our more secular era principles of natural law have tended to become enshrined in various national and international declarations and charters of human rights and freedoms. These statements in general stipulate against discrimination on a number of grounds, including sex, religion and language.(3)

The Quebec Charter of Human Rights and Freedoms

Quebec has its own Charter of Human Rights and Freedoms.(4) The basic principle of the Charter is set out in Section 10:

> "Every person has a right to full and equal recognition and exercise of human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, sexual orientation, civil status, religion, political conviction, language, ethnic or national or social condition. Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right."

Other relevant sections are 40, which provides that everyone has the right to free public education; 42, that parents can choose private education provided that it complies with prescribed standards; 50, that the Charter does not suppress or limit the enjoyment of rights not enumerated in it; 52, that sections 9 through 38 prevail over any provision of any subsequent law unless that law specifically states that it applies despite the Charter; and 54, that the Charter binds the Crown.

It is important to note that the provisions of the Charter relating to education are not protected by Section 52 since they are subsequent to Section 38. In other words, a statute enacted after the Charter could derogate from it in, for example, taking away the right to private education without specifically stating that it suspends the Charter.

The Charter and Bill 101

The question arises as to whether Bill 101 is discriminatory in terms of Section 10 of the Charter.

It is true that the Charter does not enumerate the right to be educated in either French or English. Parents in Quebec, however, have long enjoyed that right and it might be argued that it is protected in terms of Section 50 of the Charter.

A legal case based on the Charter would appear, then, to

have two basic thrusts: that Bill 101 is discriminatory in light of Section 10 of the Charter and the right to education in English or French is a right of the kind protected by Section 50. To this might be added an argument drawn from the Chabot case that the parent has an inalienable right to guide and govern the education of his child.

This last argument would have to establish, however, that the freedom of a parent to choose the language of instruction is of equal weight to that of choosing a religion. As presented in this study it would appear that the legal precedents are based on the issue of religion and to establish an inseparable relationship between religion and language would seem to be a difficult task.

It may be true that to some extent both religion and language are cultural phenomena. It is open to argument, however, that religion is seen to transcend culture. Whether in fact this is so is not at issue. The point submitted here is that God is thought to transcend culture and since religion is what binds man to his God it lifts him beyond his culture and even beyond the law which is part of that culture. For this reason positive law has tended to respect freedom of religious conscience. As religion may be seen to extend beyond law, it may also be seen to transcend language. In view of the fact that, for example, there are Roman Catholics of almost every tongue imaginable, it is difficult to argue that being a Roman Catholic in Quebec is tied in a <u>sine qua non</u> relationship with

being French.

In comparison language does not appear to transcend culture. Rather, it is a part of it. They are related in the sense that language is both an expression of and a contributor to the life of a culture. Being tied to culture in this sense and not transcending it as religion may be seen to do, it is not above the reach of the laws of that culture.

It is unlikely, therefore, that the principle of parental right to raise one's child in the religion of one's choice may be extended to language. Indeed, were it to be so done, it would mean that a parent could choose any language, not just French or English, as he can choose any religion.

If an argument based on natural law that Bill 101 contravenes parental rights appears untenable, can it be maintained that this law discriminates on the grounds of language within the meaning of Section 10 of the Quebec Charter of Human Rights and Freedoms? Further, can it be argued that English and French language rights are historically protected within the sense of Section 50 of the Charter?

The Belgian Languages case

The question of discrimination and acquired rights was raised by the Protestant School Board of Greater Montreal in a case already referred to.[5] This case related to the language legislation

of Bill 22 to which the Charter did not apply, being chronologically subsequent to it. In rejecting the Board's arguments, the Chief Justice of the Superior Court of Quebec cited with approval a judgement of the European Court of Human Rights in 1968. This case is commonly referred to as the Belgian Languages case.(6) The judgement in this case involved interpretation of the European Convention on Human Rights and of Article 2 of its First Protocol. The provisions in question are similar to those of Quebec's Charter of Human Rights and Freedoms.

There are marked similarities between the issues of language of education in Belgium and those in Quebec. The judgement referred to therefore deserves careful consideration.

Belgian law provides for the division of education along linguistic lines. Basically there are three types of division depending upon the linguistic composition of a district. Districts in Flanders are classified as unilingual Flemish and education must be in that language. Similarly, the language of education in Wallonian districts must be in French. In the Greater Brussels area there are both French and Dutch language schools. A child in that area is not free, however, to attend whichever school the parent chooses. The head of the family must attest to the maternal language of the child and the attestation must be approved by the language inspectorate.

In six districts situated on the fringe of Greater

Brussels, the official language is Dutch but, at the request of sixteen French-speaking heads of family residing in the district, a French school must be established. This right applies up to and including primary education to which level education in Belgium is compulsory.(7)

Representations were made to the European Commission on Human Rights by the parents of some eight hundred French-speaking children who lived either in unilingual Flemish districts or in one of the six districts where French schools can only be established upon petition. The Commission investigated the issue and brought certain points to the Court for judicial interpretation.

The first and foremost argument of the petitioners was that under prior Belgian law they had had the right to education in French. The legislation creating unilingual Flemish districts deprived them, they argued, of this right and, in terms of Article 14 of the Convention, discriminated against them on the basis of language. They argued further that under Article 2 of the Protocol, reinforced by Articles 8 and 12 of the Convention, parents have the right to determine the language of education of their children.

The articles invoked read as follows:

Protocol:

> Article 2: No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to

teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Convention

Article 8: Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society with interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12: Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 14: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

The argument of the Walloon petitioners was that Article 2 of the Protocol, applied in the context of Belgian history, protected the right to an education in French at the choice of the parents.

They argued further that the language legislation in question constituted an interference in family life in contravention of Articles 8 and 12 of the Convention. They argued that if they wanted education in French for their children they had, as opposed to previous practice, to now send their children to expensive non-subsidized private schools or to transport them at great inconvenience to the Greater Brussels area. Finally, they submitted that the legislation was discriminatory in terms of Article 14 of the Convention.

The Court dismissed these arguments.(8) It held that Article 2 of the Protocol did not protect language rights. Religious and philosophical convictions could not be stretched to include language. Secondly, while hardships might indeed result from the cost of non-subsidized private education or from having to transport children to the Greater Brussels area, these did not constitute an interference in family life by the state. Parents who wanted French education for their children had those options and the selection of them was the parents' own choice.

It was, however, on the question of discrimination that the judgement was most pertinent. The Court established criteria for determining what constituted discrimination:

> "... the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles

> which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized."(9)

In applying these criteria the Court concluded that the language of education legislation of the Belgian Parliament had an objective and reasonable justification. This was the protection and enhancement of the Dutch language in Flemish regions. The creation of unilingual districts to achieve this aim was reasonably proportionate to it. Neither the pursuit of the aim nor the means taken to achieve it were deemed to be discriminatory.

> "Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the community and respect for the rights and freedoms safeguarded by the Convention."(10)

The legislation complained of was not considered to be arbitrary. It was based on an objective element: the language of the community and on public interest, namely that schools dependent upon the State and existing in a unilingual district, should teach in the language of that community. Indeed, it was thought to be a matter of public interest that all children living in a district

declared to be unilingual should learn that language.

Other issues were raised by the petitioners as constituting discrimination. These included the withdrawal of government subsidies from schools which contravened the legislation and denial of its homologation of certificates issued by them.

In each instance but one the Court held that the aim of the regulation or law was based on objective criteria and public interest. The means used were judged to be in reasonable proportion to the aim.

The one exception related to the six districts situated on the outskirts of Greater Brussels. In these districts the schools were officially Dutch, but French schools could be established on the petition of the requisite number of household heads. The law stipulated that children from outside such a district, even from one of the other five, could not attend these French schools. Dutch children, on the other hand, from outside one of these districts could attend the official Dutch schools within it.

By a mere majority of one the Court found that in this instance there was not a relationship of proportionality between the means employed and the aims sought. There was deemed to be an exclusion on the sole ground of language. The minority of judges argued that the lack of a reasonable relationship of proportionality was not clearly established. Dutch schools, these judges said,

were the official common schools in the six districts and as such open to anyone. The French schools were exceptional and it was legitimate on the principle of territoriality to restrict attendance.

Application of the Belgian Languages case to Quebec

There is enough similarity between the language situation in Belgium and Quebec to consider Bill 101 in terms of the judgement of the European Court of Human Rights.

In Belgium the language of education legislation aimed at protecting and enhancing the Flemish language which, even in Flanders, was in danger of dying out to French. As a result the entire Flemish culture in Belgium was seen to be imperilled.

The Charter of the French Language in Quebec arose from a similar problem: the fear that French language and culture would be swamped by the surrounding sea of English.

The European Court held that the aim of Belgian legislation to protect Flemish was legitimate and objective. It was objective in the sense that it sought not merely to discriminate, but was based on the public interest of the country. Furthermore, the means adopted to achieve the aim were in reasonable proportion to it.

It would not be improbable that the courts of the Province of Quebec would be of a similar mind with respect to Bill 101. Earlier in this Chapter it was noted that one of the arguments which

might be raised against Bill 101 is that it deprives parents of an acquired right to choose French or English education and therefore contravenes Section 50 of the Quebec Charter of Human Rights and Freedoms. The situation in Belgium was quite similar. Prior to the legislation in dispute children had been sent to French or Flemish schools as the parent chose. The Belgian parliament, however, in due democratic process determined that it was in the public interest to alter the system of education in order to protect a Flemish culture and language perceived to be in peril. The Court held this to be legitimate and was not deterred in its judgement by the petitioners' argument of acquired rights.

Would the courts here be of a similar mind? No dogmatic answer is, of course, possible. That they might not could be argued from opinions expressed in the Quebec Court of Appeal in the St. Léonard case.(11) Contrary to the finding of the judgement in the Superior Court, the judges on appeal felt that the resolutions of the St. Léonard School Commission which took a step toward the abolition of English-language education violated an acquired right which not only Anglophones but new citizens of Quebec had long enjoyed: the right to choose English or French as the language of education. In view of the many Francophones who in earlier days were schooled in English schools it could be said that the right pertained to all citizens of the Province.

The application of the case is, however, difficult to assess. In the first place, the judges' opinions, however weighty, did not play a part in their final disposition of the case.(12) More important, however, is the fact that a by-law of a school commission and not an act of the provincial legislature was in question. The powers of the latter are much broader than those of the former which has only a delegated authority. To say that a by-law of a municipal corporation cannot touch a right which is said to be acquired is not to say that it cannot be touched by the broader competence of the legislature.

It would appear, then, doubtful that a strong case against the language of education provisions of Bill 101 could be made on the ground that it contravenes natural law or the provisions of Quebec's own Charter of Human Rights and Freedoms.

In the first instance, the natural right of parents to oversee the education of their children is not absolute. It may be superseded by principles seen to have precedence within a given social context. Furthermore, while that right may continue to be recognized within the area of religious belief, language is not of necessity irrevocably bound to religion.

Secondly, if the Belgian Languages case is to be taken as a precedent, a legislative distinction based on language is not discriminatory against human rights if it is aimed toward an objec-

tive and valid social purpose and the means used are commensurate with that end.

Chapter 5

CONCLUSION

The aim of this study has been to examine the constitutional validity of Bill 101 as far as its language of education provisions are concerned.

The absence of legislation until 1969 relating to language of education was noted in the introduction to Chapter 1. While generally English-speaking children went to English schools and French-speaking to French, it would appear to have been a matter of parental choice and of social custom. In the mid-1960s the so-called Quiet Revolution brought with it a deep concern not only for a modern educational system but one which would preserve and promote the French language as the commercial, industrial and cultural language of modern Quebec.

Bill 63 (1969), in effect, enacted in principle that primary and secondary education must be in French, but then permitted it to be given in English where parents, without distinction, so opted. Bill 22 (1974) provided that to receive education in one or other language a child had to have sufficient knowledge of it, although it is not clear if this applied to anglophone children who wanted to attend French schools. Proficiency in English for children whose

parents wanted them to be educated in that language was determined by tests. Children who did not have proficiency in either of these two languages were to be educated in French. Essentially, the decision of the language of instruction was taken out of the hands of parents and given to government officials.

Bill 101 (1977) made education in French compulsory for all except for certain persons who, by reason principally of family historical background, are entitled to English language education. It was also seen that certain exceptional provisions were made for native people and for temporary residents.

Custom, long before Confederation, appears to have acknowledged the equal existence of French and English schools and the right of parents to choose either. The question therefore arose as to whether Bill 22 and then Bill 101, in depriving them of this right, were unconstitutional. Was there a right, existing at Confederation, to such a choice which could be said to be guaranteed, at least to persons of religious minorities if not to all, under Section 93 of the B.N.A. Act?

An historical analysis in Chapter 2 of pre-Confederation legislation relating to education in Lower Canada revealed very little which specifically concerned language. Teachers' certificates had to state whether they could teach in English or French or both.

The Council for Public Instruction had, in authorizing textbooks, to give due regard to where education was given in French and where in English.

While the legislation existing at Confederation may be said to be unclear as to the exact delineation of power between the central Council of Public Instruction and the local boards and commissions, it would appear that the choice of the language of instruction in schools under their jurisdiction belonged to the latter. According to the language chosen, they would hire, supervise and pay teachers who could teach in that language and select authorized books approved for that language.

The question was examined as to whether the local authority's right to choose the language of instruction was, as far as denominational and dissentient boards were concerned, a right protected under Section 93 of the B.N.A. Act. The argument of those who claimed that it was, admitted that the same protection was not afforded to common schools since they, not being denominational, were not covered by that Section.

If indeed it is true that at the time of Confederation the local boards and commissions had the authority to determine the language of education in their schools, it would appear that this was the result of the existing division of powers between the local and central authorities. In other words, it is highly ques-

tionable whether it could be considered a right inherently attaching to a denominational or dissentient board. If it were a right at all, it would appear to have been simply a local one rather than a denominational one. It could therefore be modified by the legislature in a restructuring of authority as much in the case of denominational schools as common ones.

The review of the jurisprudence on Section 93 of the B.N.A. Act in Chapter 3 tended to give little support to the argument that language rights are ancillary to the denominational ones it protects. On the contrary, the courts have consistently held that language rights are not protected under it. It is true that the precedents arose from litigation outside the Province of Quebec. It may even be true, though not readily apparent, that at the time of Confederation the local authorities in education in Quebec had more power vis-à-vis the central provincial one than was the case, let us say, in Ontario. It is to be noted, however, that in the PSBGM case cited in the chapter, the Chief Justice of the Superior Court of Quebec gave no credence to that argument.

The jurisprudence, then, would tend to confirm the view that what is protected under Section 93(1) is the right of a denominational minority to establish a separate school system, but that right does not include any guarantee of language.

It may, however, be argued that subsections 3 and 4

provide an avenue of appeal for federal intervention if, for example, it were to be argued that the right to English-language education were a privilege enjoyed both before and after Confederation by the Protestant minority, and even legislated for all citizens in Bill 63. It is true that the political ramifications of such an appeal might be such as to make it unthinkable. In a study of constitutional rights, however, it must be borne in mind.

In the broader context of Natural Law and of Human Rights and Freedoms, Chapter 4 presented the argument that while there is judicial precedent based upon natural law which supports parental right to oversee the education of one's child, it is not absolute. It may be superseded by overriding social considerations. Furthermore, the jurisprudence has dealt with this parental right in terms of religious freedom. Linguistic freedom may not be analogous.

As far as Quebec's Charter of Human Rights and Freedoms is concerned, within the last two decades the duly elected legislators of the Province of Quebec, responding to a need widely recognized in the society, namely that of protecting and promoting French language and culture, have enacted a series of laws designed to achieve that end. Bill 101 is the current culmination of these laws. In terms of the criteria laid down by the European Court of Human Rights to determine whether or not legislation may be discriminatory, Bill 101 would appear to pass the test of having an objective and

reasonable justification and of being in the public interest. In other words, it may be interpreted as enacting a legitimate aim as opposed to creating distinctions and exclusions based on the sole ground of language.

A further question based on the European judgement is whether the means which Bill 101 employs are in reasonable proportion to its aim. Under the Charter of the French language, kindergarten, primary and secondary education in Quebec must be in French except for certain clearly defined persons who are entitled to it in English. This exception means that the persons so defined have a choice of English or French whereas the remainder of the population does not have the same choice. Does this, in terms of Section 10 of the Charter of Human Rights and Freedoms, amount to a distinction, exclusion or preference having the effect of nullifying or impairing a human right?

Certainly, there would appear to be an element of distinction, exclusion or preference when one element of the population may choose the language of education for their children while others may not. It is open to question, however, that the right to choose the language of education is the kind of human right or freedom which the legislature had in mind when enacting Section 10. One might suppose that what was in mind were the more universally recognized rights in democratic societies, such as freedom of speech

in whatever language a citizen might choose to express it. It might be more appropriate to refer to the choice of language of education which the defined persons have under Bill 101 not as a right but as an exception arising out of legislative recognition of their historical place in the Province.

It would appear, then, that the language of education provisions of Bill 101 are in reasonable proportion to the aim of protecting and promoting French language and culture. Education cannot help but be a prime area of concern in this aim. If it is seen to be of public interest by the majority of citizens through their elected representatives that French is to be the language of Quebec, it follows that education should be in French. An exception is made for certain persons, native people as well as those of English descent, but that would not seem to constitute an untouchable right. It is difficult to see in this instance how legislation democratically determined to be in the public interest should be found to be discriminatory. Quebec is French and those who choose to live here must speak that language. This was the principle enunciated by the European Court for French-speaking Walloons living in Flemish districts. By general rule established by the Quebec legislature in Bill 101, it is in the public interest that the people of this Province are to be educated in French. Even those who by exception may be educated in English must know and speak French.

Section 84 of Bill 101 provides:

> "No secondary school leaving certificate may be issued to a student who does not have the speaking and writing knowledge of French required by the curricula of the Ministry of Education."

If legislation were enacted which placed some restriction, let us say, on persons who have attended English schools by which their basic right to employment by that very fact alone was impaired, it would not be difficult to detect a discrimination based on language alone. To enact that everyone, whether educated under the general rule of French education or the exceptional provision of English education, should graduate with a defined standard of French does not appear to constitute a discrimination based on language.

One further observation ought to be made with respect to the Quebec Charter of Human Rights and Freedoms. Unlike the British North America Act the Charter is simply an act of the provincial legislature. Even were Bill 101 to be found discriminatory in terms of that Charter, it would be within the competence of the legislature to amend or abrogate the Charter accordingly or to take steps to exempt Bill 101 from its provisions.

Similarly, it is worth noting that where they have recognized it necessary as a matter of public order to abridge even the more universally recognized rights, the courts have not hesitated to do so. This has happened with such universal rights as freedom

of religion and of speech. In the former instance, blood transfusions have been ordered for children of the Witnesses of Jehovah. In an example of the latter, the Supreme Court of Canada ruled in 1978 that a city by-law forbidding a public demonstration was not a restriction of freedom of speech.(1)

In this particular instance, Mr. Justice Beetz, considering what are generally thought to be fundamental freedoms as, for example, set forth in the American Constitution, stated:

> "None of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation."(2)

As the Canadian Constitution is brought from London to Canada containing a Charter of Human Rights for Canadians, including the right to choose English or French as the language of education, the above statement leads one to wonder if, even then, a definitive decision in terms of the law to the question of language of education in Quebec and the rest of Canada will have been made.

FOOTNOTES

Introduction

1. The continued reference in English to Law 101 as a "Bill" is seen by some as a refusal on the part of the anglophone community to accept that it is no longer projected but actual legislation. The reference is indeed incorrect but it is retained in this study because of common usage.

Chapter 1

1. Gérin-Lajoie, Paul. Pourquoi le Bill 60, Les Editions du Jour, Montreal, 1963, p. 19.

2. Ibid., p. 51. "L'objectif fondamental du gouvernement provincial en matière d'éducation est la démocratisation de l'enseignement en même temps que la coordination la plus parfaite possible au plan académique et administratif."

3. Dion, Léon. Le Bill 60 et la Société Québécoise, Editions HMH, Montreal, 1967, p. 39.

4. See especially Sections 2, 15, 16, 17, 18 and 20 of the proposed Chapter 58B, the Superior Council of Education Act, which would have been added to the Revised Statutes of Quebec, 1941 by Bill 60. These references are to the original Bill of June 16, 1963.

5. Dion, Léon, op. cit., p. 57.

6. See Revised Statutes of Quebec, Chapters 233 and 234.

7. This submission was made in a brief submitted by four francophone student groups. It argued that the Protestant confessional system permitted the assimilation of neo-Canadians into the anglophone minority. Dion, Léon, op. cit., pp. 77-78.

8. Henripin, J. and Martin, Y. La population du Québec et de ses régions, 1961-1981. Presses de l'Université Laval, Quebec, 1964.

9. Perussé et al v. Les Commissaires d'Ecoles pour la Municipalité de St. Léonard-de-Port-Maurice, 1970 C.S. p. 181. Judgement of September 28, 1968.

10. Garant, Patrice. Droit et Législation Scolaires, McGraw-Hill, Montreal, 1971, p. 34.

11. The Commission of Inquiry on the Position of the French Language and on Language Rights in Quebec, commonly known as the Gendron Commission, Editeur officiel du Québec, 1972.

12. 1969 Statutes of Quebec, Chapter 9.

13. 1974 Statutes of Quebec, Chapter 6.

14. 1977 Statutes of Quebec, Chapter 5.

Chapter 2

1. Modern teachers would appreciate the recognition of their trials and tribulations afforded to their predecessors by the legislators. 1856, 19 Vict. c. 14, sec. 7 sets up a fund "for the support of superannuated or worn out Common School Teachers in Lower Canada ..."

2. Boulianne, R.G. The Royal Institution for the Advancement of Learning: the correspondence 1820-29, Ph.D. Thesis, McGill University, Montreal, 1970.

3. Sissons, C.B. Church and State in Canadian Education, Ryerson, Toronto, 1959, p. 133.

4. Magnuson, R. A Brief History of Quebec Education, Harvest House, Montreal, 1980, p. 22.

5. Ibid., p. 23.

6. Viau, R. Lord Durham, Editions HMH, Montreal, 1962, p. 73.

7. Ibid., p. 74.

8. Ibid., pp. 75-80.

9. 1840 4 Vict. Chapter 4, enacted on December 9.

10. 1841 Statutes of Canada, 4 & 5 Vict., Chapter 18.

11. 1843 Statute cited by Sissons, C.B., op. cit., p. 17.

12. 8 Vict., Chapter 40.

13. 8 Vict., Chapter 41.

14. 9 Vict., Chapter 27.

15. Section 21, para. 5.

16. Section 35, para. 3.

17. Section 50, para. 5.

18. 1851 14 & 15 Vict., Chapter 97.

19. 1856 19 Vict., Chapter 14.

20. Section 18, para. 3.

21. Section 18, para. 4. The selection of books for moral and religious instruction remained with priests and ministers as provided in the 1846 Act.

22. By 1859 22 Vict., Chapter 52, Section 9, the Council of Public Instruction was given copyright of any publications published under its direction for use in the schools.

23. Labarrière-Paulé, André. P-J-O. Chauveau, Fidès, Montreal, 1962.

24. Mair, Nathan. Quest for Quality in the Protestant Schools of Quebec, Comité Protestant, Conseil Supérieur de l'Education, Quebec, 1980, p. 20 and footnote 35, p. 141.

25. The Consolidated Statutes for Lower Canada, 1861, Chapter 15, Section 21 and especially para. 3 and 4.

26. Section 24, para. 3.

27. Section 34, ff.

28. Section 55, ff.

29. Section 57, para. 1.

30. Section 57, para. 5 and Section 58. Section 73, however, appears to contain somewhat broader powers of assessment, and Sections 74 and 75 provide for extended powers of assessment and collection for Trustees as well as Commissioners.

31. Section 65, para. 1.

32. Section 65, para. 2

33. The 1846 Act had referred to the Board of Examiners here, but jurisdiction over them had been subsequently given to the Council of Public Instruction.

34. Section 72.

35. Section 114. Although this section refers to Inspectors of Common Schools, it is clear by further references that their jurisdiction applied to dissentient schools. In other words, "common" in this sense implies what today we would refer to as "public" and includes rather than excludes the dissentient and denominational schools.

36. Section 121.

37. Section 110, para. 9.

38. 1866 19 & 30 Vict. Chapter 31 amended Chapter 15 of the Consolidated Statutes by providing for a process of arbitration in cases where a lot was to be expropriated for erection of a school and the Corporation could not come to terms with the owner.

39. Sissons, C.B. op. cit., pp. 138-142.

40. Nathan Mair reports that in 1846 there were 48 Catholic and 134 Protestant dissentient schools in Lower Canada out of a total of 3, 604 schools altogether. Mair, op. cit., p. 141, note 33.

41. Consolidated Statutes for Lower Canada, 1861, Chapter 15, Section 24, para. 3.

42. Sections 103-110.

43. Sections 114-115.

44. Section 65.

45. Sections 120-122.

46. See note 27. The context clearly indicates that throughout the Act the phrase "Common School" includes dissentient and denominational schools.

47. The rights of other religious groups deserve discussion. At the time of Confederation, Catholics and Protestants were the only numerically significant groups.

48. T. Palmer Howard, Q.C., et al. Report of the Legal Committee on Constitutional Rights in the Field of Education in Quebec to the Protestant School Board of Greater Montreal. Unpublished, McGill University Law Library, 1969, 3 vols.

Chapter 3

1. Litigation contesting the validity of these provisions was introduced in Quebec Superior Court on December 7, 1978. (See The Gazette, December 8, 1978, page 1). According to information obtained from the plaintiff's legal counsel, it has yet to come up for hearing. He refused to comment on the reason for the delay.

2. In subsequent acts which brought other provinces into the Union, the phrasing is somewhat different. In Manitoba, for example, the right or privilege might have existed not only in law but in practice. This point is dealt with in the discussion of the Barrett case.

3. 1892 A.C. 445, Privy Council.

4. 1917 A.C. 62, Privy Council.

5. The Trustees were removed from office and replaced, as provided for in legislation. This led to other litigation which does not directly concern us here.

6. Mackell case, op. cit., p. 67.

7. 1928 3 D.L.R. 753.

8. Ibid., p. 772.

9. 1928 1 D.L.R. 1041.

10. 1903 3 Edw. VII Chapter 16.

11. 1970 C.S. 181; 1970 C.A. 324.

12. See the discussion of the St. Léonard case, Chapter 1, pp. 13-14.

13. While the Court of Appeal felt that the petition for the interlocutory injunction should have been granted, it did not order it since in the intervening year and a half between the Commission's action and the Appeal Court's hearing, a modus vivendi had been reached in St. Léonard which the Court did not choose to disturb.

14. 1980 C.S. 443.

15. Op. cit., note 3.

16. Op. cit., note 4.

17. Mackell case, op. cit., p. 69.

18. See Chapter 2, pp. 43 ff and note 48.

19. Bureau Métropolitain des Ecoles Protestantes de Montréal v. Ministre de l'Education du Québec et autres, 1976 C.S. 430 at p. 448.

20. Ibid., p. 450.

21. 1895 A.C. 202.

22. The addition of these words in the Manitoba Act, which were not in the B.N.A. Act, has already been noted. See note 2, supra.

23. Houle, Guy. Le Cadre de l'Administration Scolaire Locale au Québec, Annexe au Rapport de la Commission Royale d'Enquête sur l'Enseignement, Quebec, 1966, p. 105.

24. Garant, Patrice, op. cit., p. 38.

Chapter 4

1. 1958 12 D.L.R. Vol. 2, p. 796.

2. Ibid., p. 802.

3. See, for example, the United Nations Declaration of Human Rights:

> Article 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under other limitation of sovereignty."
>
> Article 26: (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory ...
>
> (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
>
> (3) Parents have a prior right to choose the kind of education that shall be given to their children."
>
> Quoted from The Impact of the Universal Declaration of Human Rights, Rev. Ed., United Nations, Department of Social Affairs, New York, 1953.

4. 1975 Laws of Quebec, Chapter 6.

5. Op. cit., Chapter 3, p. 56, note 19.

6. Case "Relating to Certain Aspects of the Laws on the Use of

Languages in Education in Belgium," Judgement of July 23rd, 1968, Publications of the European Court of Human Rights, Strasbourg, 1968.

7. Age fourteen. Similar provisions apply to certain districts where German is predominant, but this language was not at issue in the case.

8. The case is one of the most important ever brought before the Court. The memorials and other pleadings both on a preliminary jurisdictional dispute and on the merits fill two large volumes. The judgement alone on the merits takes almost one hundred pages.

9. Casé, op. cit., p. 34.

10. Ibid., p. 44.

11. Supra, p. 53 ff.

12. Chapter 3, footnote 13, p. 94.

Chapter 5

1. Dupond v. City of Montreal, 19 N.R. 478.

2. Ibid., p. 496.

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Lavigne v. Le Procureur-Général du Québec et al., 1980 C.S. 318; 1980 C.A. 25.

APPENDIX A

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

SECTION 23

Minority Language Educational Rights

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

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

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

number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.