CASE COMMENTS
CHRONIQUES DE JURISPRUDENCE

Linguistic School Boards in Quebec — A Reform Whose Time Has Come: *Reference Re Education Act of Québec* (Bill 107)

William J. Smith*

On June 17, 1993, in *Reference Re Education Act of Québec* (Bill 107), the Supreme Court of Canada handed down its decision on the constitutionality of the restructuring of school boards in Quebec, thereby ending years of speculation concerning the legal feasibility of school board reform. In brief, the Court ruled that the provisions of Bill 107 at issue in this case do not prejudicially affect the rights and privileges protected by subsections 93(1) and (2) of the *Constitution Act, 1867*.

The judgment of the Supreme Court is so straightforward and its tone so matter of fact that someone reading it, without any other context, should be forgiven for wondering why these questions were ever raised — the answers appear so obvious. The reason for this, the author argues in this comment, is that this case is the *culminating incident* in a series of cases stretching over eighteen years. By the time the Supreme Court of Canada came to consider it, most of the relevant constitutional questions had already been answered.

The author describes the battle over denominational rights as a quixotic crusade to preserve school board structures which were creatures of post-Confederation legislation and never protected by section 93. The only rights protected by section 93 are denominational rights and other rights necessary to give effect to these rights. The claim that section 93 shielded denominational boards from state control was a myth. Confessional and dissentient boards will continue but, except for certain denominational rights, they will only have those powers which the government chooses to delegate to them.

Le 17 juin 1993, dans le *Renvoi relatif à la Loi sur l'instruction publique* (Loi 107), la Cour suprême du Canada se prononçait sur la constitutionnalité de la réforme scolaire au Québec, mettant ainsi fin à l'incertitude qui régnait alors quant à la faisabilité d'une telle réforme. La Cour jugea que la Loi 107 en cause ne portait pas atteinte aux droits et privilèges protégés par les alinéas 93(1) et (2) de la *Loi constitutionnelle de 1867*.

Selon l'auteur, les motifs de cette décision semblent si évidents qu'on ne peut s'empêcher de se demander pourquoi ce problème avait fait l'objet, d'un si grand débat. Il soutient que cette situation s'explique par le fait que le présent arrêt constitue l'*aboutissement* de dix-huit années de jurisprudence sur le sujet. Ainsi, au moment où la Cour suprême a eu à se pencher sur la constitutionnalité de la Loi 107, les réponses à la majorité des questions constitutionnelles pertinentes avaient déjà été données.

L'auteur qualifie cette bataille juridique sur les droits confessionnels, de croisade *donquichottesque* menée afin de conserver intactes des structures scolaires créées après la Confédération, lesquelles n'étaient pas protégées par l'article 93. En fait, les seuls droits protégés par cet article sont les droits confessionnels proprement dits, de même que ceux nécessaires à leur application. La prétention selon laquelle l'article 93 prémunissait les commissions confessionnelles contre le contrôle de l'État n'était donc pas fondée. Les commissions confessionnelles et dissidentes pourront poursuivre leurs activités, mais, à l'exception de certains droits confessionnels particuliers, elles ne jouiront que des pouvoirs que l'État voudra bien leur déléguer.

* Ph.D. Senior research associate of the Office of Research on Educational Policy, McGill University, Montreal, Canada. The author wishes to thank Professor William F. Foster, of the Faculty of Law, McGill University, for his helpful comments on an earlier draft of this article.

Revue de droit de McGill
To be cited as: (1994) 39 McGill L.J. 200
Mode de référence: (1994) 39 R.D. McGill 200

Synopsis

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Introduction

Until the Quiet Revolution of the 1960s, public education in Quebec was provided in two parallel structures: one Catholic — tlie majority system, and one Protestant — the minority system. Until this time, no provincial government had proposed any major legislative reform of the education system, nor had it ever been the subject of any major judicial challenge. The creation of the Royal Commission of Inquiry on Education in the Province of Quebec,[1] popularly known by the name of its chairperson as the Parent Commission, changed the tranquil *status quo* forever. Among the many recommendations included in the *Parent Report* was the proposal to replace the denominational school system by a unified one.[2] Thirty years later, the legacy of this recommendation is still the subject of debate and conflict, of legislative action and litigation.[3]

The most recent event in this saga of school board reform and contestation is the decision of the Supreme Court of Canada in *Reference Re Education Act*

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[1]*Report of the Royal Commission of Inquiry on Education in the Province of Quebec*, parts 1, 2, 3 (Quebec: Government of Quebec, 1963-66) [hereinafter *Parent Report*].

[2]A unified board system is one which erects school municipalities according to geographic territory, without any distinctions based on denomination or language.

[3]See G. Pépin, "L'article 93 de la Constitution et les droits relatifs à la confessionnalité des écoles du Québec" (1988) 48 R. du B. 427.

of Québec,[4] concerning the Quebec *Education Act* adopted in 1988, still referred to by its pre-passage name, Bill 107.[5] It is the last of a series of cases testing the reach of constitutional protection of "denominational schools", as provided for in section 93 of the *Constitution Act, 1867*,[6] versus the authority of the provincial government to make laws in relation to education, as also provided for in section 93.

The judgment of the Supreme Court of Canada in *Reference Re Bill 107* is straightforward, providing a clear summary of the background to the case, an explanation of the issues and a disposition of the specific constitutional questions posed. In fact, the tone of the judgment is so matter of fact that someone reading it, without any other context, should be forgiven for wondering why these questions were ever raised — the answers appear so obvious. Such a situation begs the question, were the answers that obvious? If they were, was it because they had already been answered by previous decisions? What are the implications of this judgment?

The purpose of this case comment is to begin to answer these questions by analyzing *Reference Re Bill 107*. In order to provide some context for the analysis, the first section of this comment provides a brief overview of section 93 and the evolution of the Quebec school system in relation to this constitutional framework. Thereafter, an analysis of the reference case will be presented, focusing on school board structures and denominational rights. The final section will present a brief discussion of the implications of this case for major educational policy issues.

I. Backgronnd to the Reference Case

The image of public education in Quebec has been one of a dual system of denominational boards, Roman Catholic and Protestant, which pre-date Confederation and cannot be disturbed because of the denominational guarantees provided for in section 93. As the decisions I will discuss demonstrate, this image is misleading as it is based on an erroneous assumption.

A. *Section 93*

Prior to Confederation, public education was provided in a combination of "common" and "denominational" schools, operated by local school commissioners or trustees under the authority of the Council of Public Instruction, as provided for by law.[7] In brief, except in Montreal and Quebec City, common schools were operated by non-denominational school municipalities and were open to all children. Denominational schools existed in two forms. First, there were two "confessional" school commissions in both Montreal and Quebec

[4][1993] 2 S.C.R. 511, 105 D.L.R. (4th) 266, aff'g [1990] R.J.Q. 2498 (C.A.) [hereinafter *Reference Re Bill 107* cited to S.C.R.].

[5]*Education Act*, R.S.Q. c. I-13.3.

[6]*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

[7]*An Act Respecting Provincial Aid for Superior Education, — and Normal and Common Schools*, C.S.L.C. 1861, c. 15 [hereinafter *1861 Act*].

City, one for Roman Catholics, the other for Protestants. Second, outside these cities, minority Catholic and Protestant groups could form a "dissentient" school board. As Confederation approached, both Catholic and Protestant groups sought constitutional guarantees to protect the denominational character of public education,[8] while, at the same time, the State sought to affirm its control over education. The constitutional compromise which resulted from these tensions over the management and control of schools was set forth in section 93 of the *British North America Act, 1867*[9] (as it was then known):

> **93.** 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.

Inasmuch as the meaning of these brief subsections has preoccupied policy makers, educational leaders, jurists and scholars for 125 years, a brief explanation of them is in order.

The main purposes of section 93 are, first, to establish "exclusive" provincial control over education in the division of powers between the federal and provincial governments, and second, to temper this legislative authority by prohibiting legislative action with respect to *certain* provisions respecting *certain* persons. Subsection 93(1) defines the restriction of provincial legislative autonomy in relation to two sets of elements. The first set is *relatively* clear; the only provisions which the provincial government cannot infringe upon are "rights and privileges" which were provided for "at the Union by Law" (*i.e* upon Confederation in 1867). Thus, any advantage or authority enjoyed in practice but not provided for by law at Confederation is not protected, and any legal rights

[8]It should be noted that although the vast majority of schools were common schools, hence *de jure* neutral, they were, in the vast majority of cases, *de facto* denominational, in that they served, were staffed and were managed by Roman Catholics.

[9]*Supra* note 6.

provided *after* 1867 can be withdrawn by the government at will. The second set, which is more difficult to define, limits protected rights to those which existed for a "Class of Persons" "with respect to Denominational Schools" and which would be "prejudicially affect[ed]" by provincial legislative action. The class of persons envisaged, like the rights themselves, is defined by religious belief. Only provincial legislation which is prejudicial to these denominational rights is prohibited.

Subsection 93(2) is designed to extend the legal rights and obligations respecting separate schools and their trustees in Upper Canada to dissentient schools in Quebec. Thus, the scope of the rights protected by section 93 is determined by the relevant statutory provisions of Upper and Lower Canada as they existed in 1867.

Subsection 93(3) contemplates the right of appeal of Protestant or Roman Catholic minorities to the Governor General in Council (effectively, the federal Cabinet) regarding any provincial act which affects any of their rights or privileges in education. This provision is much broader than the preceding subsections because it covers pre- and post-Confederation legislative action. Whereas *legal* redress is confined, by subsection 93(1), to rights existing in 1867, subsection 93(3) provides *political* recourse for Protestant and Catholic minorities whenever their rights in education are adversely affected. The qualification of "minority" would, however, eliminate the use of this subsection in relation to post-Confederation legislative action which prejudicially affected, for example, the Roman Catholic majority in Quebec.

Subsection 93(4) gives the federal government remedial authority to enact laws to redress prejudice caused by provincial legislative action. Such remedial action may be taken pursuant to an appeal made under section 93 or on the initiative of the federal government itself. This remedial authority has never been exercised, and was contemplated only once, with respect to the Manitoba school question in 1896.[10] Some authors contend that these powers are, for all practical purposes, *désuets*.[11]

Even this superficial reading of section 93 reveals that it could be interpreted differently by those who see it as an unwanted restriction on state authority than by those who see it as a buffer against such authority. For example, one can construe section 93 narrowly to protect only the right of the religious minority to have separate schools, subject to complete state regulation. Alternatively, one can interpret the section more broadly and argue that the right to have separate schools implies the right to manage them without interference from the government. As is often the case with compromise provisions, the drafting permits opposing factions to see their respective visions in the same text. Sometimes in such cases, neither party wishes to test the validity of its interpretation and a satisfactory *modus vivendi* is worked out by mutual consent. However,

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[10]See G. Bale, "Law, Politics and the Manitoba School Question: Supreme Court and Privy Council" (1985) 63 Can. Bar Rev. 461.

[11]See F. Chevrette & H. Marx, *Droit constitutionnel: Notes et jurisprudence* (Montreal: Presses de l'Université de Montréal, 1982) at 1617.

when one party wants to effect major changes or becomes convinced that its interpretation will prevail in court, political compromise may give way to legislative action and legal conflict.

B. Legislative Changes

It is not possible in the scope of this brief comment to trace even the major events in the evolution of Quebec school law from Confederation to the present. However, it is important to understand that the denominational school board system which Bill 107 was designed to replace was a post-Confederation creation, beginning in 1869.[12] More significantly, this 1869 legislation was meant to replace a bill which had been introduced in the joint Parliament of Upper and Lower Canada in 1866 by Solicitor General Langevin. This bill would have provided for the creation of denominational school boards, as was subsequently provided for in the *1869 Act*. Had this bill become law, Protestant school boards would have existed "by Law at the Union" and would have been protected under subsection 93(1).[13] However, the network of Protestant school boards was created by a post-Confederation statute and was therefore not covered. The only constitutional recourse available to the Protestant minority was the appeal to the federal Cabinet pursuant to subsection 93(3).

The *1869 Act* also reorganized the Council of Public Instruction, which had been created in 1856 to direct the province's school system; specifically, it was given authority to regulate normal schools, the certification of teachers and the organization and governance of common schools. In brief, the *1869 Act* divided the Council into two denominational committees, one Roman Catholic, the other Protestant.[14] They generally met separately but could meet for joint consideration and action. At the beginning there were sporadic joint meetings, but none occurred after 1908. As Sissons remarks, "It appears that there have been since 1908 no joint interests."[15] For approximately one hundred years, the State left education to the management and control of the Catholic and Protestant churches, so much so that during this period "one can scarcely speak of one school system, but rather of two systems that were more or less independent of each other."[16] This sharp denominational division combined with minimal state intervention meant that Catholic and Protestant school boards became responsible in fact and in law for the management and control of education. It was this *status quo ante* that school boards began to assume was protected by section 93.

When the Parent Commission considered the question of school board structures in the 1960s, it was confronted with a school system comprising more

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[12]*An Act to Amend the Law Respecting Education in this Province*, S.Q. 1869, c. 16 [hereinafter *1869 Act*].

[13]See C.B. Sissons, *Church and State in Canadian Education* (Toronto: Ryerson Press, 1959) at 137ff.

[14]*Supra* note 12, ss. 1-2.

[15]*Supra* note 13 at 146.

[16]L.-P. Audet, "Educational Development in French-Canada after 1875" in J.D. Wilson, R.M. Stamp & L.-P. Audet, eds., *Canadian Education: A History* (Scarborough, Ont.: Prentice-Hall, 1970) 337 at 339.

than 1600 school boards bifurcated along denominational lines.[17] The commissioners concluded that "the juridical basis of school commissions favoured fragmentation rather than amalgamation or cooperation."[18] Their solution was the creation of *unified* school boards, that is, boards responsible for all education in a given region — Catholic, Protestant and non-confessional, French and English, elementary and secondary. The massive structural reform envisaged by the *Parent Report* did not take place. The first real reform began several years later with the reorganization of school boards off the Island of Montreal,[19] followed by a restructuring of boards on the Island.[20]

The dual denominational character of the Quebec school system was maintained in this reorganization. Off the Island, the new boards were divided between those "for Catholics" and those "for Protestants". On the Island, the division was between six Catholic and two Protestant boards, including the Commission des écoles catholiques de Montréal ("CECM") and the Protestant School Board of Greater Montreal ("PSBGM"). However, this was merely another post-Confederation expression of denominational structures which were not protected under subsection 93(1). Meanwhile, the conflict over school board structures and autonomy was becoming intertwined with a virulent debate over language, thereby setting the stage for the beginning of a series of court cases.

C. *Court Challenges*

As alluded to in the introduction, *Reference Re Bill 107* is the last in a series of cases contesting various aspects of educational reform. The first began almost twenty years ago when the government adopted the *Official Language Act* of 1974 ("Bill 22"), which restricted access to English instruction on the basis of language proficiency tests.[21] The Quebec Association of Protestant School Boards ("QAPSB") alleged that Bill 22 was unconstitutional because it infringed upon the denominational rights protected by subsection 93(1). In brief, the QAPSB argued that, although section 93 explicitly protects denominational, not language, rights, it indirectly protects the latter because the determination of the language of instruction was a legally enshrined prerogative of Protestant school commissioners at the time of Confederation.

The case contesting Bill 22, *Protestant School Board of Greater Montreal* v. *Quebec (Minister of Education)*,[22] did not bring about the results sought by the QAPSB. The following statement by Deschênes, C.J. set the tone for the findings which followed:

> [T]he constitutional guarantee given in the first sub-section of s. 93 is attached to the denominational aspect of the system of education, and to this aspect only since

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[17]*Parent Report*, part 3, vol. A, *supra* note 1 at 136-45.

[18]*Ibid.* at 139.

[19]*An Act Respecting the Regrouping and Management of School Boards*, S.Q. 1971, c. 67.

[20]*An Act to Promote School Development on the Island of Montreal*, S.Q. 1972, c. 60.

[21]S.Q. 1974, c. 6.

[22][1976] C.S. 430, 83 D.L.R. (3d) 645 (leave to appeal refused) [hereinafter *Bill 22* case cited to D.L.R.]. The statute had by then been repealed and replaced by the *Charter of the French Language*, R.S.Q. c. C-11.

> it is a derogation of the general principle of competence of the provincial Legislature. As to the remainder — the choice of the language of instruction included — the provincial Legislature is supreme.[23]

The Chief Justice dismissed the action, stating that after scrutinizing jurisprudence "which stretches over a century, one looks vainly for judgments which would allow the plaintiffs to establish their claims."[24]

The next case arose from provincial legislation which limited the right of school boards to raise local property taxes to a predetermined ceiling, unless local rate-payers gave permission for a higher rate through a referendum, and also made other changes to the provincial grants system.[25] Alleging infringement of section 93 rights, the Fédération des commissions scolaires catholiques du Québec ("FCSCQ"), the QAPSB and others launched a court challenge which eventually was heard by the Supreme Court of Canada in *Quebec (A.G.)* v. *Greater Hull School Board.*[26] The Supreme Court accepted some of the arguments advanced by the school boards but not the core argument concerning the referendum.

Chouinard J., speaking for a unanimous court, ruled that school boards did have a right to receive grants on a pro-rated basis and that Bill 57 was deficient to the extent that it infringed upon that right.[27] He further held that the rights of the Catholic and Protestant adherents of the CECM and the PSBGM were prejudicially affected by Bill 57 because all electors on the Island of Montreal, regardless of their affiliation, would be entitled to vote in a referendum concerning property taxes.[28] Although the impugned legislation was declared to be unconstitutional in its present form, the requirement to hold a referendum was not declared *per force* to be an infringement of section 93 rights. Following the decision of the Supreme Court, the government amended the *Education Act* to provide for proportionality of grants and to correct the provisions governing voting rights in a referendum.[29] On the face of the court record, the school boards had won their case, but it was an illusory victory — the referendum was maintained, following the legislative amendments.

In the third case, the QAPSB alleged that the new education regulations adopted in 1981,[30] known popularly by their French name, the *Régimes pédago-*

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[23]*Ibid.* at 656.

[24]*Ibid.* at 667.

[25]*An Act Respecting Municipal Taxation and Providing Amendments to Certain Legislation*, S.Q. 1979, c. 72 [hereinafter Bill 57]. Bill 57 amended, *inter alia*, the *Education Act*, R.S.Q. 1977, c. I-14.

[26][1984] 2 S.C.R. 575, 15 D.L.R. (4th) 651, aff'g (*sub nom. Lavigne* v. *Greater Hull School Board*) [1983] C.A. 370, 6 D.L.R. (4th) 651, rev'g (*sub nom. Lavigne* v. *Quebec (A.G.)*) [1981] C.S. 337, 133 D.L.R. (3d) 666 [hereinafter *Greater Hull* cited to S.C.R.].

[27]*Ibid.* at 590-91.

[28]This occurs because school taxation is managed by the Conseil scolaire de l'Île de Montréal for all boards.

[29]*An Act to Amend the Education Act and Various Legislation*, S.Q. 1985, c. 8.

[30]*Regulation respecting the basis of elementary school and preschool organization*, R.R.Q. 1981, c. C-60, r. 11; *Regulation respecting the basis of secondary organization*, R.R.Q. 1981, c. C-60, r. 12 [hereinafter *Régimes pédagogiques*].

giques, infringed the rights guaranteed by subsection 93(1). Specifically, the QAPSB claimed that the government's authority to make regulations "for the establishment of the pedagogical system in the schools placed under the control of school commissioners or trustees,"[31] as well as the actual regulations themselves,[32] were *ultra vires* the power of the government. Accordingly, the QAPSB sought to have the impugned provisions declared null and void. This case, *Protestant School Board of Greater Montreal* v. *Quebec (A.G.)*,[33] also eventually reached the Supreme Court of Canada.

The Supreme Court rejected the claims of the QAPSB that the regulations "undermine the constitutional protection of Protestant schools because they are contrary to Protestant educational philosophy."[34] Citing an early Manitoba case,[35] the Supreme Court stated that the regulatory power sought by the appellants "is completely incompatible with the exercise of a general regulatory power of the province over matters of curriculum which fall outside religious and moral education."[36] Accepting the argument advanced by the Attorney General of Quebec, Beetz J. concluded that the impugned regulations "allow the school boards to exercise their 1861 power over the non-denominational aspects of denominational schools which are necessary to give effect to denominational guarantees."[37]

This judgment, except for very specific points, might have eliminated any further constitutional objection to school board reform if Beetz J. had not added the following *obiter dictum*. Stating that all school boards represented by the QAPSB comprised dissentient schools, he wrote, "This may not be entirely free from doubt but I am prepared to assume without deciding that the postulate is well founded."[38] This tantalizing remark left the door open for further argument that boards might be able to claim section 93 protection after all. The disposition of this issue had to await the decision of the Supreme Court in *Reference Re Bill 107*.

II. *Reference Re Bill 107*: The Supreme Court Decision

Reference Re Bill 107 involved two main issues and some related matters. The first issue was the authority of the government to create a network of linguistic, but denominationally neutral, school boards. The second was whether the legislation provided sufficient protection to the denominational rights guaranteed by section 93. The related matters concerned the roles of the Conseil scolaire de l'Île de Montréal ("Island Council") and the Conseil supérieur de l'édu-

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[31]Former *Education Act*, *supra* note 25, s. 16(7).

[32]*Supra* note 30.

[33][1989] 1 S.C.R. 377, 57 D.L.R. (4th) 521, aff'g [1987] R.J.Q. 1028, 41 D.L.R. (4th) 229 (C.A.), aff'g [1986] R.J.Q. 48 (Sup. Ct.) [hereinafter *Greater Montreal* cited to S.C.R.].

[34]*Ibid.* at 412.

[35]*Winnipeg (City of)* v. *Barrett*, [1892] A.C. 445 (P.C.), rev'g (1891), 19 S.C.R. 374, rev'g (1891), 7 Man. R. 273 (Q.B.); *Logan* v. *Winnipeg (City of)* (1891), 8 Man. R. 3 (Q.B.).

[36]*Supra* note 33 at 414.

[37]*Ibid.* at 416.

[38]*Ibid.* at 418.

cation ("Superior Council"). Each of these issues will be presented and discussed in turn.

A. Creating Linguistic Boards

The creation of linguistic school boards in Bill 107 is the latest in a series of attempts to reform the denominational structure of school boards in Quebec. More specifically, this new act replaced an enactment of the previous government. In the early 1980s, the government embarked upon a major revision of school board structures which culminated in 1984 in *An Act Respecting Public Elementary and Secondary Education* ("Bill 3").[39] In brief, Bill 3 envisaged the replacement of all existing boards by linguistic boards, except for existing dissentient and confessional boards. Bill 3 was subsequently declared *ultra vires* the power of the provincial government in *Quebec Association of Protestant School Boards* v. *Quebec (A.G.)*.[40] Essentially, Bill 3 was declared invalid because it went too far in reducing the territories of the confessional boards in Montreal and Quebec City to their 1867 limits and, more importantly, by transforming denominational boards throughout the province into linguistic ones. Brossard J. recognized that present school boards were common, in that they were open to all, but held that they enjoyed successor rights to the dissentient boards which they had replaced.[41]

In 1986, the newly elected provincial government decided not to appeal the court decision but began to develop a completely new *Education Act*, which was adopted in 1988 ("Bill 107").[42] The explanatory notes accompanying Bill 107 set forth the following aims of the new Act:

> The object of this bill is to replace the present Education Act with a new, up-to-date Act organized in accordance with more coherent principles and providing more rational structures.The bill is designed to make the school legally more independent of the school board, while preserving its organizational links with the board and the other schools connected with the board. It gives both the school and persons acting for the school a larger say in the decisions of the school board.[43]

It was the aim of structural school board reform which created the most controversy. Like Bill 3, Bill 107 was intended to replace all existing boards "for Catholics" and those "for Protestants" by linguistic boards. This reorganization would result in the dissolution of all of the former boards, whose assets and personnel would then be transferred to the new linguistic boards. Unlike Bill 3, however, it did not go as far in reducing denominational rights.[44]

Pre-empting another court challenge regarding the constitutionality of the new bill, the government decided to refer a number of constitutional questions

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[39]S.Q. 1984, c. 39.

[40][1985] C.S. 872, 21 D.L.R. (4th) 36 [hereinafter *Bill 3* case cited to C.S.].

[41]*Ibid.* at 882-83. See also P. Garant, J. Gosselin & B. Tremblay, "Les soubresauts de la réforme scolaire: La constitutionnalité de la Loi 3" (1985) 16 R.D.U.S. 205.

[42]*Supra* note 5.

[43]G.O.Q. 1989.II.696.

[44]See discussion below in Part II.*B*.

directly to the Quebec Court of Appeal.[45] The questions had been formulated after extensive consultation with school board representatives.[46] Subject to certain specific requirements, which will be discussed below in relation to the Supreme Court decision, the Court of Appeal gave negative answers to the constitutional questions posed. The government subsequently amended certain provisions of the *Education Act* to respond to the decision of the Court of Appeal.[47]

The FCSCQ, the QAPSB and others were not satisfied with these amendments and appealed the decision of the Court of Appeal. The Supreme Court granted leave to appeal and agreed to rule on the amended act. The five constitutional questions and several sub-questions submitted in the original reference were all examined by the Supreme Court.[48] The unanimous judgment of the Supreme Court was delivered by Gonthier J.

Prior to answering the specific questions posed, Gonthier J. provided some background to the key constitutional issues. Of particular interest are his comments regarding the status of existing boards in "rural areas", which include all school municipalities outside of Montreal and Quebec City. Citing LeBel J.A. with approval, Gonthier J. stated that "[w]hat s. 93 of the Constitution guarantees 'rural' inhabitants of Quebec is the right to dissent itself, not the form of the institutions which have made it possible to exercise that right since 1867."[49] Thus, according to Gonthier J., when dissentient electors agreed to merge their schools in newly created school boards (*e.g.* regionalization of school boards in 1971), "to some extent [they] abandoned their dissent but *not their right or the option to exercise it.*"[50] Stating that section 93 rights "are not in any way patrimonial rights,"[51] Gonthier J. rejected Brossard J.'s finding in the *Bill 3* case that the transfer of property from the old dissentient boards to the newly created boards violated section 93. These remarks foreshadowed the treatment of the five constitutional questions posed.

The first question dealt with the replacement of all existing school boards, except confessional and dissentient boards, by linguistic ones:

> *Question 1.*
> Does the *Education Act* (S.Q. 1988, c. 84), in particular ss. 111, 354, 519, 521, 522 and 527, prejudicially affect the rights and privileges protected by s. 93(1) and (2) of the *Constitution Act, 1867* by providing for the establishment of French lan-

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[45]O.C. 610-89, 26 April 1989, G.O.Q. 1989.II.2885.

[46]The final enumeration of questions was not unanimously supported by the various parties, as evidenced by the objections raised about the questions before the Court of Appeal. See *supra* note 4 (C.A.) at 2513-17.

[47]*An Act to Amend the Education Act and the Act Respecting Private Education*, S.Q. 1990, c. 78.

[48]In each of the five questions which follow, a general question is posed, with *particular* reference to various sections of the Act. Thus, the Court was not asked to rule on the validity of the entire Act, neither was it confined to particular sections. In the words of LeBel J.A.: "Elle [la Cour] examine complètement les questions soumises, mais en prenant en considération toutes dispositions qu'elle estimerait pertinentes" (*supra* note 4 (C.A.) at 2509).

[49]*Supra* note 4 at 541.

[50]*Ibid.* at 542.

[51]*Ibid.*

> guage and English language school boards which will succeed to the rights and obligations of school boards for Catholics and Protestants?[52]

The particular sections of the Act stipulated in the question refer to the enabling provisions to establish linguistic boards (sections 111 and 354), assignment of rights to the provisional councils of the new boards (sections 519, 521 and 522) and the dissolution of the previous boards (section 527).

Subject to the answers to the more specific questions which follow, Gonthier J. stated that the government had every right to replace existing boards with linguistic ones, inasmuch as the former were not the result of dissent and not, therefore, protected under section 93. Although arguably the most important question posed, the answer of the Supreme Court occupied only five pages in a ninety page judgment, less space than was devoted to the role of the Island Council.[53]

It is submitted that, in part, this curt treatment of what the Supreme Court recognized was the "fundamental purpose of *Bill 107*,"[54] was due to previous case law, including the treatment of this issue by the Court of Appeal. In a dispute concerning the admission of Jewish students to the PSBGM, *Hirsch* v. *Protestant Board of School Commissioners of Montreal*,[55] the Privy Council recognized the authority of the government to establish separate schools for non-Catholic or non-Protestant students in Montreal and Quebec City. The Court of Appeal in *Reference Re Bill 107* held that like authority existed to establish such boards throughout the province, and this despite preliminary objections based on the Bill 3 decision.[56]

It appears that the Supreme Court only felt obliged to state the obvious and affirm the lower court ruling. Gonthier J. cited with approval the holding of LeBel J.A. that "the creation of a denominationally neutral system of school boards, organized on the basis of language, is a valid exercise of provincial powers."[57] He then stated, "As the dismantling of the existing system does not affect the right to dissent or the denominational rights themselves, it is not an infringement of s. 93 of the Constitution."[58] He then concluded:

> It is natural and normal for the linguistic boards to be the successors of the boards for Catholics and the boards for Protestants. Like the latter, they are boards which are not the result of the exercise of a right to dissent and are therefore not protected by s. 93.
>
> The abolition of the existing boards is also not *in itself* an infringement of the rights guaranteed by the Constitution. Furthermore, if the province has the power

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[52]*Ibid.* at 523.

[53]See discussion below in Part **II.C.**

[54]*Supra* note 4 at 549.

[55][1928] A.C. 200, [1928] 1 D.L.R. 1041 (P.C.), aff'g [1926] S.C.R. 246, [1926] 2 D.L.R. 8, rev'g (in part) (1925), 31 R. de J. 440 (K.B.) [hereinafter *Hirsch*].

[56]Relying on the pronouncements of Brossard J. in the *Bill 3* case, *supra* note 40, the QAPSB argued that: "The legal issues now referred to this Court included those litigated and determined by the said final judgment, and this Reference is a disguised appeal from that judgment. Such issues cannot be re-litigated or attacked collaterally by the Attorney General of Quebec by way of a reference or otherwise" (*supra* note 4 (C.A.) at 2514).

[57]*Supra* note 4 at 550.

[58]*Ibid.*

> to create linguistic boards, it is proper that it should also have the power to determine their territories.[59]

Having rejected the argument that the creation of linguistic boards infringed constitutionally protected denominational rights, the Court then turned to the questions which purported to delimit just what those rights were.

B. Preserving Denominational Rights

Like Bill 3, Bill 107 maintained the five dissentient boards still in existence, as well as the four confessional boards of Montreal and Quebec City. Unlike Bill 3, Bill 107 left the territories of the confessional boards in Montreal and Quebec City intact, subject to explicit government authority to change them. The Act also provided for the right to dissent in the future, although the provisions in the Act, as originally adopted, were somewhat cumbersome and caused delays in the actual exercise of this right.[60] The second and third questions posed dealt with the right to dissent and the rights of the four confessional boards.

The question on the right to dissent comprised three sub-questions dealing with the ways and means to exercise this right, the administrative authority of the government over dissentient board structures and the limitation of dissentient adherents to members of the denomination represented by the dissentient board:

> *Question 2.*
> Does the *Education Act*, in particular ss. 126 to 139 and 206, prejudicially affect the rights and privileges protected by s. 93(1) and (2) of the *Constitution Act, 1867* in its provisions:
> (a) which stipulate the manner in which the right to dissent is to be exercised and the manner in which dissentient school boards are to be established;
> (b) which give the government the power to change the legal structures of the dissentient school boards and to terminate the existence of those which do not perform any of the functions contemplated in the Act;
> (c) which restrict access to these school boards to persons who belong to the same religious denomination as that of these school boards?[61]

Sections 126-39 of the Act, to which this question refers, provide for the procedures for exercising the right to dissent, while section 206 seeks to limit adherence to confessional and dissentient boards to persons who belong to the same denomination as that of the board in question. Special attention was also paid to sections 515.1-515.4 which were added in response to the decision of the Court of Appeal. These latter sections deal with the exercise of the right to dissent during the transitional period to linguistic school boards.

Before answering the sub-sections of question 2, Gonthier J. stated the objections of the QAPSB in the following terms:

> Since the school boards in question are linguistic, Anglophone Protestants will be unable to exercise their right to dissent unless they form a minority within the

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[59] *Ibid.* at 552.

[60] See analysis of LeBel and Beauregard JJ.A., *supra* note 4 (C.A.) at 2541ff and 2580ff, respectively.

[61] *Supra* note 4 at 524.

> English-language board, which would not be likely. The effect of *Bill 107* is that only Francophone Protestants and Anglophone Catholics could exercise their right to dissent.[62]

Sub-question 2(a) dealt largely with procedural matters. To determine if the new Act had any *prejudicial effect* on dissentient rights, Gonthier J. compared the requirements of the new Act regarding dissent with those contained in pre-Confederation statutes. He concluded that the new provisions were less stringent, in that the right to dissent was no longer contingent upon a disagreement with the regulations made by the religious majority. The right to dissent is still, however, reserved for the religious minority. If that deprives the religious majority in a linguistic board of rights, as suggested by the argument of the QAPSB cited above, then this is no less than that which was provided for in section 93. He further held that the other conditions governing this right did not prejudicially affect it, noting that the amendments made by the government remedied the defects which the Court of Appeal had found with respect to the time restraints for exercising this right.

The right of the Minister to settle disputes over the transfer of assets was also dealt with within the scope of this sub-question. Gonthier J. first noted that this was more properly a matter of how the Act was implemented and that the provision did provide for an *objective* test of necessity based on the services which the dissentient board would have to provide:

> [T]he means for exercising the right to dissent must be made available without discrimination, with no prejudicial effects, and the dissentient boards must be on the same footing in this respect as the linguistic boards from which they separate. This includes equality of access to public funds, to means of taxation and, in the event of a reorganization, to the distribution of immovable property ... [63]

Gonthier J., citing Chouinard J. in *Greater Hull* with approval, added that the "equality" to which he was referring above "must be understood in the sense of equivalence and not of strict quantitative identity."[64]

Sub-question 2(b) concerned the right of the government to dissolve inactive dissentient boards and was summarily affirmed. Referring to his earlier statements about structures not being protected,[65] and citing Beauregard J.A. from the Court of Appeal decision, Gonthier J. declared that such a power was "purely a matter of administration which does not fundamentally affect the right to dissent. It is normal for the government ... to have such power."[66]

Finally, sub-question 2(c) examined the restriction of access to dissentient schools to persons of that faith. It was held that restricting access thus may affect a right or privilege existing by law at the Union, but even if this were so, there is no prejudice to denominational rights and therefore no infringement of section 93. One can deduce from the comments made that even if dissentient schools were allowed to admit children of other faiths "by favour", not being

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[62]*Ibid.* at 559.
[63]*Ibid.* at 566.
[64]*Ibid.* at 567.
[65]See *supra* note 50 and accompanying text.
[66]*Supra* note 4 at 568.

able to do so did not prejudice any protected denominational rights. It is possible that such a restriction might deprive them of students, and therefore a higher level of grants, but such a situation is better characterized as a fiscal disadvantage than a constitutional prejudice.

The third question dealt with the four confessional boards in Montreal and Quebec.[67] It involved four sub-questions respecting the continuance of such boards, their territories, transfer of assets and the same restriction regarding adherents referred to above in question 2:

> *Question 3.*
> Does the *Education Act*, in particular ss. 122, 123, 124, 206, 519, 521 and 522, prejudicially affect the rights and privileges protected by s. 93(1) and (2) of the *Constitution Act, 1867*:
> (a) by continuing the existence of the confessional school boards in their territories;
> (b) by allowing the government to change these territories;
> (c) by providing for a means of transferring part of their rights and obligations to French language and English language school boards;
> (d) by restricting access to these school boards to persons who belong to the same religious denomination as that of these school boards?[68]

The sections of the Act referred to therein deal with boundaries and electors (sections 122, 123 and 124), limiting adherence to persons who belong to the same denomination as that of the board in question (section 206) and the transfer of rights and personnel (sections 519, 521 and 522). In addition, section 123.1, a provision regarding boundaries of confessional boards added to the Act following the Court of Appeal decision, was examined. Having stated that the continuance of confessional boards was not only permissible, it was actually required by section 93 (answering sub-question 3(a)), the discussion focused on the other sub-questions.

Sub-question 3(b) was the most contentious issue respecting confessional boards and one which has been the subject of contradictory judicial opinion over the years. In brief, given that confessional boards in Montreal and Quebec City have a right to exist, the issue was what territory was constitutionally protected. At first blush, there seem to be at least four possibilities: no specific territory; city limits as they existed in 1867; city limits as they evolve; present school board territory. The question had been raised but not decided in *Hirsch*.[69] In the *Bill 3* case, Brossard J. found that reduction to 1867 boundaries was invalid.[70] The Court of Appeal was divided. The majority held that no territory was protected but that any territory severed had to be serviced by a confessional board; the minority held that the territory outside the present city limits could be severed, provided that it were serviced by another confessional board but that in no case could it be reduced below the present city limits.

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[67]The four confessional boards are the CECM and the PSBGM in Montreal and the Commission des écoles catholiques de Québec ("CECQ") and the [Protestant] School Board of Greater Quebec ("SBGQ") in Quebec City.

[68]*Supra* note 4 at 524.

[69]*Supra* note 55.

[70]*Supra* note 40.

Once again, in response to the Court of Appeal decision, the government had amended the Act to provide for the right of dissent in any territory removed from a confessional board.[71] However, the Act as amended still permitted the government to reduce the size of the territories without any other restriction. Gonthier J., citing with approval the minority opinion of LeBel J.A., concluded that the amended Act was valid, provided that any reductions in territory "*do not reduce the limits to be less than those of the municipal corporations of Québec and Montréal.*"[72] Gonthier J. did state, however, that such a reduction could take place, if "the territory thus separated is served by a confessional school board offering the same rights and privileges."[73]

This conclusion is based on two principal reasons. First, the right to confessional boards stipulated in section 93 was linked to the municipal corporations of Montreal and Quebec City. As the cities evolve, it makes sense that the territory of a confessional board should evolve in a like manner. Second, in keeping with the thesis that section 93 protects denominational rights, not school board structures, the Court held that it would be possible to replace existing confessional boards by other confessional boards. Thus, for example, if the government wished to make all boards on the Island of Montreal a similar size, it could reduce the CECM (a very large board) to half its size and create a second confessional board to serve the severed territory.

Questions 3(c) and 3(d) were quickly disposed of. In keeping with the disposition of the conditions governing dissentient boards, the partial transfer of rights and obligations to linguistic boards was approved with little discussion, as was the right to limit attendance to persons of the same faith.

C. Two Councils to Preserve

Having disposed of all the major issues, there remained two minor questions concerning the Montreal Island Council and the Superior Council. Neither the FCSCQ nor the QAPSB made any representation on either question:

> *Question 4.*
> Does the *Education Act*, in particular ss. 423, 424, 425, 428 and 439, prejudicially affect the rights and privileges protected by s. 93(1) and (2) of the *Constitution Act, 1867* in that:
> (a) it gives the Conseil scolaire de L'île de Montréal the power to borrow money on behalf of all school boards on the island of Montréal;
> (b) it authorizes the Conseil scolaire to establish rules for apportioning the proceeds of the tax it collects on behalf of these school boards?[74]

The particular sections of the Act refer to the powers of the Island Council respecting its borrowing authority and the apportionment of tax proceeds.

The first issue, sub-question 4(a), concerned the exclusive right of the Island Council to borrow money on behalf of boards. The unanimous decision

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[71] *Supra* note 47.
[72] *Supra* note 4 at 579.
[73] *Ibid.*
[74] *Ibid.* at 524.

of the Court of Appeal approving this right was affirmed in one short paragraph. The second issue, sub-question 4(b), concerned the apportionment of the proceeds of taxes collected. On this point, the Court of Appeal had been divided; the majority found that the impugned provisions were valid, while the minority held that they were deficient. The minority opinion was based on the finding that the key provision (section 439) contained no guarantee that the confessional boards on the Island (CECM, PSBGM) would receive "their fair share"[75] of tax proceeds.

The relevant provisions of the *Education Act* had been amended since the Court of Appeal decision.[76] The new provision stated that tax proceeds "must be apportioned in a fair and equitable manner" and further provided for disputes to be referred to the Minister for a ruling.[77] Holding that the amended provisions were valid, Gonthier J. concurred with opinions expressed by Professor Hurtubise,[78] that taxing powers are a means, not an end, to having adequate financial resources. Changes in taxing powers are not prejudicial, as long as other means are provided in their stead.

The fifth question concerned the powers of establishing rules respecting the confessional nature of schools and approving programs and instruction for personnel for religious teaching:

> *Question 5*
> Does the *Education Act*, in particular ss. 49, 223, 227, 230, 261 and 568, prejudicially affect the rights and privileges protected by s. 93(1) and (2) of the *Constitution Act, 1867*, in that it gives the Catholic committee and the Protestant committee of the Conseil supérieur de l'éducation the authority:
> (a) to establish rules respecting the confessional nature of the schools of the confessional and dissentient school boards;
> (b) to approve the programs of studies for religious instruction offered in such schools and to determine the qualification of persons providing that instruction and those assigned to pastoral or religious care and guidance in such schools?[79]

The sections of the Act at issue in this question deal with the role of the Superior Council regarding Catholic and Protestant moral and religious instruction, with respect to staffing (sections 49 and 261), locally developed programs (section 223) and Council regulations (sections 230 and 568).

In brief, the issues raised in this question concern the regulatory power of the Comité catholique and the Comité protestant ("denominational committees") of the Superior Council.[80] First, the *Education Act* provides for the possibility that a school be recognized as either Catholic or Protestant by the appro-

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[75]"[L]a répartition des impôts doit être faite de façon que chacune des diverses commissions reçoivent [*sic*] sa juste part, compte pris des clientèles" (*supra* note 4 (C.A.) at 2590).

[76]*Supra* note 47.

[77]*Education Act*, *supra* note 5, s. 439.

[78]R. Hurtubise, "La confessionnalité de notre système scolaire et les garanties constitutionnelles" (1962) 65 R. du N. 171.

[79]*Supra* note 4 at 525.

[80]*An Act Respecting the Conseil supérieur de l'éducation*, R.S.Q. c. C-60, s. 22, amending *Education Act*, S.Q. 1988, c. 84, s. 568.

priate denominational committee of the Superior Council.[81] Prior to its amendment, this provision applied to *all* school boards. The amendment exempted schools in confessional and dissentient boards from this process, recognizing that such schools were *de jure* Catholic or Protestant, as the case may be. It seems ironic that the provision now applies strictly to schools in denominationally neutral linguistic boards, suggesting a lingering attachment in some quarters to denominational schools, despite the secular nature of the school board reform.

The *Education Act* also includes various provisions relating to Catholic and Protestant moral and religious instruction. Here again, the denominational committees of the Superior Council play a regulatory role. The regulations cover a broad range of related domains, including teacher qualifications, curriculum content, books and teaching materials. The issue before the Supreme Court was whether the assignment of such duties to these committees infringed section 93 rights by *usurping* the exercise of these denominational responsibilities.

Little argument was made regarding question 5. The relevant provisions were simply viewed as providing for the exercise of denominational responsibilities by bodies representing, respectively, the Catholic and Protestant faiths. They were therefore held to be a valid exercise of such power under section 93. The final constitutional impediment regarding school board reform had been examined and dismissed.

III. Implications of the Reference Case

Reference Re Bill 107 can be viewed as the *culminating incident* in a series of legal battles over the reform of education in Quebec, beginning with the Parent Commission during the Quiet Revolution. Many key issues were dealt with in this final case, while others, already decided in earlier decisions, were not. However, the significance of the reference case can only be understood in light of these earlier decisions. Taken together, they have far-reaching implications for a broad range of policy issues concerning funding, instruction and governance. Taken together, they tell us what rights section 93 provides concerning the management and control of education by school boards in this province.

A. The Funding of Public School Boards

The Supreme Court of Canada decision in *Greater Hull*,[82] regarding denominational rights in relation to the changes in the Quebec funding system, was one of only two cases in the series leading to *Reference Re Bill 107* in which the school boards were "declared the winner" (the other being the *Bill 3* case). However, as stated above, it was an illusory victory, as the requirement to hold a referendum was maintained. This was the first section 93 case in

[81] *Education Act*, *ibid.*, s. 218. This is the key section which the government amended to comply with the ruling of the Court of Appeal. For some reason, it is not included in the sections enumerated in question 5.

[82] *Supra* note 26.

recent times to be decided by the Supreme Court of Canada and was a harbinger of the ruling in *Reference Re Bill 107*.

In both *Greater Hull* and *Reference Re Bill 107*, the Supreme Court took a narrow view of the rights protected under section 93 and a more expansive view of government authority to legislate in the field of education. This approach reflects the views of most scholars in the field.[83] The more liberal approach advocated by the QAPSB was rejected.[84] The underlying rationale was that section 93 was intended to protect *denominational* rights and those rights which were necessary to give effect to these rights.

Funding is the cornerstone of any school system; without adequate funds, other rights can quickly become illusory. LeDain J. understood this, as his dissenting opinion in *Greater Hull* attests:

> I would agree that school commissioners or trustees are not themselves a class of persons contemplated by s. 93(1) ... but they are the representatives of such a class for purposes of the management of denominational schools. ... [T]he requirement of approval by referendum ... , because of its cost and uncertainty of outcome ... is prejudicial to the effective management of denominational schools in the interests of the class as a whole. ... I agree with the conclusion that the requirement of approval by referendum renders the power to tax beyond the limit prescribed quite illusory. What is in issue here is not the theoretical scope of the democratie rights of a class of persons, viewed in the abstract, but the effective power of school commissioners and trustees to provide for and manage denominational schools in the interests of the class.[85]

Unfortunately for the school boards, the majority of the Court did not agree. The implications of the restrictive approach adopted by the majority are that the denominational rights are not a shield against government regulation, *but* that government authority in education is the general rule and denominational rights the exception. The further implication is that only those enactments which clearly infringed these rights would be held to be invalid; in other cases, the general authority of the government would prevail. The remainder of the cases leading to *Reference Re Bill 107* bear out this conclusion.

B. The Language and Content of Instruction

Neither language of instruction nor curriculum — the content of instruction — were issues before the courts in the reference case. The first was decided in the *Bill 22* case in 1976.[86] The plaintiff school boards argued that prior to Confederation they had decided the language of instruction and, consequently, that right or privilege was protected. The Chief Justice of the Quebec Superior Court

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[83]See *e.g.* G. Houle, *Le cadre juridique de l'administration scolaire locale au Québec* (appendix to the *Parent Report*, *supra* note 1); F. Chevrette, H. Marx & A. Tremblay, *Les problèmes constitutionnels posés par la restructuration scolaire de l'île de Montréal* (Quebec: Ministère de l'Éducation, 1972); P. Garant, *Droit scolaire* (Cowansville, Que.: Yvon Blais, 1992).

[84]T.P. Howard, *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* (Protestant School Board of Greater Montreal, 1969) [unpublished].

[85]*Supra* note 26 at 599-600.

[86]*Supra* note 22.

disagreed. Denominationally protected rights were one thing, language quite another. In reaching this conclusion, Deschênes C.J. relied on the judgment of the Privy Council in *Ottawa Separate School Trustees* v. *MacKell*:

> The right to manage does not involve the right of determining the language to be used in the schools. Indeed, the right to manage must be subject to the regulations under which all the schools must be carried on; and there is nothing in the Act to negative the view that those regulations might include the provisions [regarding language of instruction] to which the appellants object.[87]

Given this early decision and the *Bill 22* case, there seems little reason to suppose that the school boards would have the right to control curriculum, as alleged in *Greater Montreal*.[88] However, when the QAPSB appealed to the Supreme Court of Canada, they did have reason to believe that this time things would be different.

The reason lay in a decision of the Supreme Court of Canada which was handed down between the Quebec Court of Appeal decision in *Greater Montreal* and the hearing of *Greater Montreal* before the Supreme Court. The decision in question was *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*,[89] which extended "full funding" to separate schools in Ontario.[90] In the Ontario case, the Supreme Court found that the failure to provide for full funding infringed denominationally protected rights, which included the right of separate school supporters to have their children receive an "appropriate education".[91] Unfortunately for the appellant school boards in Quebec, the Supreme Court distinguished the Ontario case, albeit unconvincingly,[92] and held that the denominational rights protected under section 93 did not include the right to control the content of instruction, unfettered by government regulation.

The combined effects of these cases add to the above implications regarding school board funding and the interpretative lens used to examine alleged constitutional violations. The government has the right to determine what will be taught and, subject to the provisions of the *Canadian Charter*,[93] in what language instruction will be given. The denominational rights guaranteed by section 93 cover only those aspects of curriculum which affect religious instruction. Another implication flows from a statement made by Beetz J. in *Greater*

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[87](1916), [1917] A.C. 62 at 74, 32 D.L.R. 1 (P.C.), aff'g (1915), 34 O.L.R. 335, 24 D.L.R. 475 (C.A.), aff'g (1914), 32 O.L.R. 245 (H.C.J.).

[88]*Supra* note 33.

[89][1987] 1 S.C.R. 1149, 40 D.L.R. (4th) 18, aff'g (1986), 56 O.R. (2d) 513, 25 D.L.R. (4th) 1 (C.A.) [hereinafter *Reference Re Bill 30* cited to S.C.R.].

[90]"Full funding" refers to the provision of government grants to the end of secondary schooling (grade 13), whereas separate school funding had been hitherto limited to the end of grade 10. For a discussion of this important case, see G. Bale, "Reference Re Funding for Roman Catholic High Schools — Tiny Convincingly Overruled but Equality Rights Needlessly Compromised" (1989) 11 Supreme Court L.R. 399; P. Carignan, *Les garanties confessionnelles à la lumière du renvoi relatif aux écoles séparées de l'Ontario: Un cas de primauté d'un droit collectif sur le droit individuel à l'égalité* (Montréal: Thémis, 1992).

[91]*Supra* note 89 at 1195.

[92]See Carignan, *supra* note 90 at 147.

[93]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Canadian Charter*].

Montreal: "Whatever the merits of the approaches to education espoused by the appellant school boards and the Minister respectively, s. 93(1) ... is not the appropriate device to settle their differences."[94]

C. *School Governance*

The foregoing issues of funding and instruction are core constructs in the broader issue of school governance. The heart of *Reference Re Bill 107*, and the *Bill 3* case which preceded it, is the locus of authority for the management and control of schools. With the exception of religious curriculum, the overarching implication of the reference case is that this authority resides in the government, except to the extent to which it chooses to delegate it. This means that the image of the "local authority" in education as an independent source of power is no longer valid, if indeed it ever was. In some ways, the image of the local *authority* can be associated with the doctrine of *in loco parentis*, whereby school officials are viewed to be acting on behalf of parents. The contemporary view is that school officials act as "state agents". According to this view, education is a major public undertaking governed by statutory law. Those engaged in this mass enterprise act on behalf of the State, not parents.[95]

Reference Re Bill 107 has put to rest forever the belief that section 93 was intended to protect school boards as the structural expression of denominational rights. The closest the school boards came to such recognition was in the above quoted statement by LeDain J. in *Greater Hull*.[96] However, his eloquent defence of school boards remains a dissenting opinion in support of a wider meaning of the right to dissent. The majority view, and by far the prevailing view among scholars, is that school boards are "creatures of statute" and what the government has created, it may modify or eliminate. Section 93 rights are not vested in the institutions which have been denominationally based in this province for more than one hundred years. The denominational system of school boards in Quebec is a post-Confederation creature and enjoys no constitutional protection.

Another implication of this case is found in the vestiges of denominational boards which the government is bound to respect. The reference case has confirmed prevailing views that the government cannot completely eliminate the denominational aspects of the school system. That would require a constitutional amendment; needless to say, it is highly unlikely that any such constitutional amendment will be considered at the present time. As we have seen, this means the continuation of the four confessional boards in Montreal and Quebec City and the perpetuation of the right of Catholics and Protestants, where they are in a minority, to dissent and form separate school boards.

In several school districts, a plurality of religious denominations will exist. It is thus possible that in a given territory there will be a French language board and an English language board, as well as dissentient or confessional boards for

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[94]*Supra* note 33 at 416.

[95]See A.W. MacKay & L.I. Sutherland, *Teachers and the Law: A Practical Guide for Educators* (Toronto: Emond Montgomery, 1992).

[96]*Supra* note 85 and accompanying text.

Catholics and for Protestants. The government retains the right to effect the amalgamation of dissentient boards in a common territory. However, it cannot do so in a manner which would *de facto* frustrate the right to dissent. It remains to be seen how many people will exercise the right to dissent, and what the practical consequences thereof will be.

In Montreal and Quebec City, in addition to language boards, confessional boards will be maintained. The latter will presumably be reduced to territories contiguous with the city limits, now that the Supreme Court has approved such a change. In Montreal, this will mean a considerable reduction in territory and student population for each of the two confessional boards, especially for the PSBGM. One can also expect the student population to be further eroded by the exodus of students to one of the two language boards. Furthermore, one can anticipate that any English speaking minorities will demand, "where numbers warrant", management and control of their own schools, in accordance with section 23 of the *Canadian Charter*.

Whether these vestiges create major problems or minor annoyances for the advocates of school board reform will depend ultimately on the number of people who opt to send their children to a confessional board in Montreal or Quebec City, or who choose to dissent in other school districts. If a significant number of people choose the denominational route, the province could become a patchwork of linguistic and denominational school boards. If the opposite occurs, then one can anticipate an entirely new system replacing the old. There is, however, one caveat which must be kept in mind, even if confessional and dissentient boards all but disappear.

As discussed above in relation to the fifth reference question, school boards can request that an individual school be recognized as either Catholic or Protestant, in accordance with the regulations of the denominational committees of the Superior Council. Thus, one can envisage neutral, Catholic and Protestant schools existing inside a *denominationally neutral* language-based board. At first blush, one could argue that the only preferential treatment which should be granted to Catholic and Protestant groups is that which is provided for in relation to confessional and dissentient boards. However, the *Education Act* includes two provisions which are designed to shield *any* such preferential treatment from attack, either on the basis of the *Canadian Charter* or the Quebec *Charter of Human Rights and Freedoms*:[97]

> **726.** The provisions of this Act which grant rights and privileges to a religious affiliation shall apply despite sections 3 and 10 of the [Quebec] Charter. ...
>
> **727.** The provisions of this Act which grant rights and privileges to a religious affiliation shall operate notwithstanding the provisions of paragraph *a* of section 2 of the [*Canadian Charter*] ... and section 15 of that Act.

These provisions, which are also used to protect programs of Catholic and Protestant religious instruction, would be unnecessary if the government merely wished to respect the denominational rights protected by section 93 — section

[97]R.S.Q. c. C-12.

29 of the *Canadian Charter*[98] would be sufficient for that purpose.[99] This suggests that current government policy is to maintain a preferred status for the Catholic and Protestant religions. The use of these *notwithstanding* provisions is difficult to justify in an increasingly pluralistic society. It will be even more difficult to maintain such provisions in linguistic school boards which are denominationally neutral.

Conclusion

As we have seen, *Reference Re Bill 107* is the *culminating incident* in a series of cases. It has been shown that by the time the Supreme Court of Canada came to consider it, most of the relevant constitutional questions had already been answered. In the *Bill 22* case, the first case leading to the reference case, the Attorney General for Quebec asserted that subsection 93(1) protected the right to dissent, namely (a) the right to establish Protestant schools, (b) managed by Protestants, (c) teaching only Protestant religion, (d) the right to hire teachers and admit Protestant pupils and (e) the right to a traditional share of the profit of taxation.[100] This view, even if not in every detail, was to prevail in that case and in succeeding cases for the next eighteen years respecting the issues examined in this comment: funding, language and content of instruction, and school governance. The right to dissent was unequivocally maintained; however, it was held that this right did not include the right to raise taxes without the restrictions of a referendum, the right to choose the language of instruction, the right to control the course of study, or, as reflected in the final case, the right to the management and control of education as sought by the FCSCQ, the QAPSB and other litigants. The maintenance of constitutionally protected boards had proved to be a quixotic crusade. Confessional and dissentient boards have been preserved, but without any of the powers which had been assumed to be included in their right to exist.

At the time of Confederation, Protestants sought guarantees that would protect them in the years to come. Pre-Confederation legislation which might have afforded such protection, depending on the scope of the rights granted, was never adopted. It is an ironic footnote to history that the draft bill to protect the predominantly English Protestants was proposed by a French Catholic (Langevin) and withdrawn by an English Protestant (MacDonald).[101] Legislation providing for separate Catholic and Protestant school boards was a post-Confederation innovation and so was not protected by subsection 93(1). This dual denominational system continued and the division of the "two solitudes"

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[98]Section 29 states that "[n]othing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools."

[99]It has been generally assumed that denominational rights shielded from *Charter* scrutiny were limited to pre-Confederation rights, as provided for in s. 93(1). However, the judgment of the Supreme Court of Canada in *Reference Re Bill 30* (*supra* note 89) indicates that any government legislation regarding Catholic and Protestant denominational rights in education is immune to challenge under the *Canadian Charter*. See also Bale, *supra* note 90.

[100]*Bill 22* case, *supra* note 22 at 653.

[101]Sissons, *supra* note 13 at 140-42.

increased with the years, leaving many to conclude that the denominational division of school boards was immutable, protected forever by section 93.

For those seeking greater local autonomy in the management and control of public schools, the results of this long juridical battle are bitterly disappointing. They serve to demonstrate that the courts will accord governments a great deal of latitude in exercising their legitimate legislative powers. Many people now look to the *Canadian Charter* as the shield to protect minority language rights in education. The leading case, *Mahe* v. *Alberta*,[102] and more recently, the Manitoba reference case,[103] indicate that these rights will be supported by the courts but that governments will be given a large measure of discretion in implementing appropriate legislative schemes.[104]

In 1930, Professor F.R. Scott wrote, "[T]he belief in the Privy Council appeal as a safeguard of minority rights is a popular myth, devoid of any foundation in fact."[105] I wonder what he might say today about section 93, or about section 23? Perhaps the lessons learned from *Reference Re Bill 107* will help determine the nature of constitutional protection for minorities in Canada and the role of the courts versus the role of politics in this continuing policy dialogue — but that is the subject of another comment.

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[102][1990] 1 S.C.R. 342, 68 D.L.R. (4th) 69.

[103]*Reference Re Public Schools Act (Man.)*, [1993] 1 S.C.R. 839, 100 D.L.R. (4th) 723.

[104]See *e.g.* Y. LeBouthillier, "L'affaire Mahé et les droits scolaires: Difficulté de mise en œuvre d'un droit proportionnel aux effets d'une minorité" (1990) 22 Ottawa L. Rev. 77; R.G. Richards, "*Mahe* v. *Alberta*: Management and Control of Minority Language Education" (1991) 36 McGill L.J. 216.

[105]"The Privy Council and Minority Rights" (1930) 37 Queen's Q. 668 at 678.