

BRIEF

SUBMITTED BY

THE ASSOCIATION DES JURISTES D'EXPRESSION FRANCAISE DE L'ONTARIO

TO

THE SPECIAL JOINT COMMITTEE
(OF THE SENATE AND HOUSE OF COMMONS)
ON THE CONSTITUTION OF CANADA

November 25, 1980

Ottawa

The Association des juristes d'expression française de l'Ontario was founded on November 15, 1980. It is composed of practitioners and experts in common law, such as judges, lawyers, law professors and so on, who are concerned with expressing and administering this law in French in Ontario, and eventually having it included in its French form in Canada's cultural heritage.

As soon as the Association was formed, its members determined to draft a resolution expressing all of their objectives, charging their board of directors, as their first mandate, with sending a copy to the Attorney General of Ontario, the Minister of Justice of Canada and the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada. The resolution reads as follows:

TRANS

WHEREAS the governments of Canada are now studying changes to the Constitution;

WHEREAS the language rights of the French-speaking people of Ontario are at stake and opinion is divided as to enshrinement of those rights in the country's Constitution;

WHEREAS it is imperative that the Association des juristes d'expression française de l'Ontario make a strong representation on this question;

WHEREAS the right to use French is an integral part of legal services which the members of this Association propose to provide to the people of Ontario;

BE IT THEREFORE RESOLVED that the board of directors of the Association des juristes d'expression française de l'Ontario, at the time of its founding on November 15, 1980, shall perform its first public act as represented by the resolution which follows, sending a copy to the Attorney General of Ontario, the Minister of Justice of Canada and the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, to wit:

"THAT THE CANADIAN CONSTITUTION RECOGNIZE A STATUS FOR THE FRENCH LANGUAGE IN ONTARIO EQUAL TO THAT OF THE ENGLISH LANGUAGE, SUCH THAT THE FRENCH-SPEAKING PEOPLE OF THAT PROVINCE MAY REQUIRE THE USE OF AND RESPECT FOR THE FRENCH LANGUAGE IN JUSTICE AND IN LAW".

This resolution was adopted almost unanimously. It is based on historical, political and legal considerations, as described below.

The French-speaking community of Ontario senses that it is excluded from both Quebec and Ontario. It is forced to recognize that, because of its insufficient numbers and resources at the time the *British North America Act* was drafted, its "problem" was simply avoided by the Fathers of Confederation, as well as by its adopting parents, Quebec and Ontario.

To the French-speaking population of Ontario, the 1867 Constitution stands as an agreement for separation rather than an act of union, a union from which they are excluded. For them, Confederation means being placed under permanent guardianship. The great charter of its language rights is confined to section 93(1) of the *British North America Act*, which reads as follows:

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:

This concerns a privilege granted before Confederation to parents of the Roman Catholic faith, permitting them to educate their children in denominational (known as "separate") Roman Catholic schools administered by members of the same religion. It is therefore fair to say that the French-speaking community of Ontario enjoys no language rights as such unless they are corroborated by membership in the Catholic church. Catholic means French. Under section 93, the government can always establish rights in the area of education, but has been careful not to, at least until quite recently (1968).

An analysis of the judicial precedents in Ontario concerning the use of languages compels us to conclude that the 1867 Act not only does not protect rights acquired before Confederation, but allows them to be repealed, as was the case when it was a question of extending denominational (in other words, French) education beyond grade ten. Such a right existed before Confederation, but the courts decided that the government could restrict it by virtue of its regulatory powers. In other words, from Confederation until quite recently, even very recently, the Francophones of Ontario, being Catholic, were entitled to be educated in French from kindergarten to grade ten only.

There are three sources of law:

the statutes,
court precedents, and
orders or regulations.

Let us examine briefly how these sources have been used.

Statutes

Statutory law is practically non-existent in the area of language rights, since the government has deemed it appropriate to keep to a rigid interpretation of section 93 and therefore of the agreement made in 1867. It has refused to use the provisions of section 93 except in a negative sense, that is, for the specific purpose of repealing the rights and privileges existing before Confederation and guaranteed by the Constitution. The well-known Regulation XVII is an example. There has been a certain improvement in recent years due to the tendency to secularize institutions in Quebec since the Quiet Revolution, the effect of which has been to deprive the French-speaking population of Ontario of its teaching clergy. The secularization of the University of Ottawa and Laurentian University and the establishment of the French secondary school system occurred in this period. According to the interpretation by the courts of section 93 of the 1867 Act, secondary school education in French was not provided by the government but by religious organizations. When the Catholic church found itself compelled by events to withdraw from the area of primary school, secondary school and university education, the government in turn felt obliged to take over the Catholic clergy's responsibilities and provide the French-speaking people of Ontario with a French education system. This has given rise to timid references to the French language in a few Ontario provincial statutes, including the 1974 *Education Act*, which recognizes at the outset, and for the first time since 1867, the use of the French language in education. The major advance in the administration of justice in Ontario came in 1978 with the establishment of courts competent to use French. This change is the result of surreptitious amendments to the *Judicature Act* (1978), the *Criminal Code* (1979) and the *Evidence Act* (1979). Incidentally, the Government of Ontario has done more in these last few years in the area of language rights than in a hundred years of history.

The precedents

Precedent is for all intents and purposes an untouched area, and this is intentional. The ~~cases~~ of *Mackell and Tiny Roman Catholic School Board*, and especially the case of *Maher v Town of Portland* (1874), not a trace of which can be found except in a very old text, Wheeler's *Confederation Law of Canada* (1896), (338), establish that only pre-Confederation statutory law could grant language rights and privileges. One might as well say that precedent, or the common law, was depriving itself of the resources of the common law, like the popular image of the snake swallowing itself by the tail. Certainly, common law prior to Confederation included vested rights which the 1867 Act cut off abruptly. Moreover, precedent has not acted in the slightest as an innovative, standardizing agent, but as a destructive agent, adopting as it has a rigid interpretation of the spirit and the letter of the *BNA Act*, considered as a covenant or agreement between two equal "old régime" partners that were perfectly aware of their rights and obligations. *Dura lex sed lex*. It is therefore not surprising that "equity", the indispensable corollary of the common law, has not intervened. Equity, with its rules of good conscience, could not civilize the common law; nor could it prompt the legislator to pass laws that the majority, his electoral clientele, did not want. It therefore took the form of the Order and in this way avoided proclamation by the parliamentary process.

Orders

The Order allowed the government to overcome the resistance of the silent majority, so as to implement without too much visibility the whole range of French language services we now have, and to set up the administrative machinery comprising the co-ordinators of French language services in all government departments and agencies and the consulting committees attached to the agencies or permanent boards. These

co-ordinators and consultants in turn politically represent the French-speaking community to the authorities in power, except that they are most often appointed by these authorities. They are responsible for applying the government's "policies" on the provision of French language services.

One often has the impression that the government subscribes to the principle that "not only must justice be done but it must not appear to be done". Practice obviously varies according to the sense of conscience of the government and of its representative. It may depend, as equity once did, on the mood of the Lord Chancellor.

It would seem that the government is being carried along by public opinion, a majority of which rebels at recognizing the rights of the French-speaking minority in Ontario. As the quip goes, "I have to follow them, I'm their leader." We must face the fact that the government, any government in Ontario, whatever its sense of justice, does not have complete freedom of manoeuvre, and must in its decisions take into account the old Loyalist base that even today constitutes the backbone and forms the pure, tough nucleus of the electorate. The Ontario government is thus compelled to restrict its improvements to one small step at a time, as illustrated so well by the agreement made with the federal government to establish language rights for the French-speaking minority of the province. Only the right to education in French would be recognized, and then only if the number of users (one might just as well say the circumstances) warrants it.

The French-speaking people of Ontario feel that their small population alone justifies the enshrinement of their language rights in the Constitution, rights which should not be subject to the condition of sufficient demand. They have the distinct impression that, because of the negligence of their governments at all levels of the Confederation

structure, their survival has been compromised and they are doomed to extinction in a relatively short time. French-speaking Ontarians merit the protection given rare or even unique species, precisely because of their numbers. They no longer want to be the object of such statutes as the *Essex County French Language Secondary School Act* of 1977, *An Act to require The Essex County Board of Education to provide a French-language Secondary School*. These may be contrasted with section 73 of the *Ontario Game and Fish Act*, which reads as follows:

No person shall take or attempt to take frogs by any means from waters set apart for the conservation or propagation of frogs, but the Minister may, in writing, authorize frogs to be taken from such waters for scientific purposes.

Cynicism and solicitude carry the day!

Last November 14, the Honourable R McMurtry made the following statement at the founding of the Association des juristes d'expression française de l'Ontario:

Most Ontario Francophones are bilingual. Yet they wish to live as much as possible in their mother tongue. Ontario and Canada are the better for it. Let there be no more apologizing and no more fear of "rocking the boat". A Franco-Ontarian should never believe that he must leave his language at the door before entering the courtrooms of Ontario.

The Association des juristes d'expression française de l'Ontario wants this commitment by the Ontario government to cover all language rights of the French-speaking population of Ontario and wants the basis for these rights to be enshrined in the Constitution. The Francophones of Ontario want Canada to make this commitment, for its own survival as a nation is at stake. This brings new understanding to an old image, one from the New Testament: "Let the dead bury their dead." The dead to be buried might well be the French-speaking minority of Ontario, while

those doing the burying would be the hypothetical fathers of the new Confederation. Canada's existence as a nation will exact a high price.

They say that happy nations have no history. The Franco-Ontarian "nation" does have a history, an unhappy one, like that of its rights. If only its rights could be recognized, at least in principle, in a new union Act! If only the habit of just paying lip service would cease, once and for all!

[TRANS]

"Your majesty has his trousers on inside out."
"Indeed I do," said the king,
"I'll put them right."

(King Dagobert)

[TRANS]

"I'm French, I'm sorry to say."

(François Villon, c 1460)

(sgd)

ROBERT PARIS

President

L'ASSOCIATION DES JURISTES D'EXPRESSION
FRANCAISE DE L'ONTARIO