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GOVERNMENT OF QUEBEC
CONSEIL DE LA LANGUE FRANCAISE

Position of the Conseil de la langue française
on language rights and the Constitution
(federal proposal of 2 October 1980)
sent to the Minister of State for Cultural and Scientific Development

The Conseil de la langue française, a consultative body set up under Bill 101, has as its mandate to keep a watch on language development and study Québec's language policy in order to advise the minister in question and inform the public.

At the beginning of September, the Conseil entered the debate over the enshrinement of language rights in the Constitution of Canada, thinking it its duty to inform the people of Québec as to the stakes involved.

Since that time, there has been a First Ministers' meeting in Ottawa and three weeks afterwards the Constitution Act was tabled. This bill was not the same as that of 22 August, which the Conseil had analysed, but it has been abundantly commented on by all the media. There are however things that have not yet been discussed, and others that need to be restated or clarified. The Conseil, therefore, decided to examine the federal proposal and assess its scope in view of the importance of the situation, since if this proposal, insofar as it touches on language rights, remains unchanged and is accepted by London, there is a risk that it will freeze the language situation in Québec for a long time to come.

The French-speaking majority in Québec poorly protected by the federal proposal

The purpose of adopting Bill 101 was to protect the language of the French-speaking majority in Québec in all sectors of public and social life where demographic and sociological studies had shown that it was seriously compromised. In education, the intention of Bill 101 was not solely to make French-speaking Québécois study in French, but also to make those speaking neither English nor French, as well as immigrants, attend French schools. This is of great importance if the aim is to protect and develop French, as it is a mere island in an ocean of English.

Both paragraphs of section 23 of the federal proposal run directly counter to this objective of Bill 101.

According to section 23(1), all immigrants whose mother tongue is English, whether they come from the United States, Australia, England or elsewhere, may send their children to English schools in Québec once they have become Canadian citizens. According to section 23(2), all Canadian citizens coming from another province, regardless of their mother tongue (be it English, French, German, Italian, etc) may send all their children to English schools in Québec provided that any one of their children has attended English school for however short a time in the province of their previous residence.

The arrangement under sections 72 and 73 of the Charter of the French Language, which form part of the chapter entitled The Language of Instruction, is also upset by the federal proposal, which forces Québec to retreat towards free choice and the now defunct Bill 63, and reopens the door to a disproportionate expansion of English schools in Québec, thus clearly showing that its aim is not to protect the French-speaking majority in Québec.

Part of the English-speaking minority poorly protected by the federal proposal

There is more. The federal proposal would offer protection to all minorities. Let us examine this claim more closely by giving two examples of how English speakers may be poorly protected by the bill.

A German immigrant arrives in Québec in 1948, attends English schools in Québec and speaks only English, although as a child he first learned German and still understands it today. His children, aged 4 and 5, speak only English. Under section 23(1) of the federal proposal, this man could not send his children to English school, but could do so under section 73(a) of Bill 101 - which, however, is described as restrictive.

There has been frequent mention made of the historical rights of the English-speaking minority in Québec. But what does the federal proposal do for them? Let us take an example. A Canadian citizen, born in Québec, whose mother tongue is English, attends English school in Québec. He marries a Francophone and they have a son whom they decide to bring up in French and send to French school. In turn, this son marries and despite the fact that his mother tongue is French, he wants to send his daughter to English school. Based only upon section 23 of the federal proposal, he would be unable to do so; yet section 76, paragraph 2 of Bill 101, which guarantees the perpetuation of the rights of his grandfather, would permit him to.

Care should be taken when claiming that the federal proposal fully protects the English-speaking minority in Québec.

French-speaking minorities outside Québec poorly protected by the federal proposal

As we have said before, the fate of the French-speaking minorities outside Québec is intimately related to the status and development of French within the province; and the Conseil cannot remain disinterested, since the fate imposed on the minorities has automatic repercussions on the status of French in Québec.

Like the 22 August proposal, the current federal bill - which should, however, transcend both federal and provincial jurisdictions - does not distribute justice evenly across Canada. Thus, one might have been entitled to expect a Constitutional Charter to take into consideration the threatened rights of French, the minority language of Canada, and grant it particularly vigorous protection and guarantees in comparison with the majority language, which has solid support in the entire Canadian and North American context. But this is not the case. The federal proposal conceives of distributive justice as mathematical equality; this does not exist in the reality of Canada. In principle, it calls for identical treatment of all minorities, whether threatened or not. In reality, it grants more to the English-speaking minority in Québec, which is already better treated - as the Prime Minister and the provincial ministers recently recognized, on 10 October - than all other minorities in Canada; and affords less to the French-speaking minorities outside Québec, which are much less protected.

The 22 August proposal was prepared to extend to Ontario and New Brunswick the current requirements in Québec and Manitoba in respect of bilingualism in the legislature and courts and in legislation. It also provided that in the other six provinces, such bilingualism ought to be introduced as far as possible. The present Charter (sections 16 to 19) is retrogressive, and removes the protection from the French-speaking minorities outside Québec which it might have given them in respect of parliamentary institutions and provincial courts. Only Québec and Manitoba are required to provide such protection to their minorities, under constitutional acts that are not being repealed by the federal proposal (see section 52).

The same applies to communication between French-speaking minorities and governmental administrations and services in their provinces. The 22 August proposal gave them the right of using French in their

communications with such public services. The present proposal has withdrawn this protection. And Francophones outside Québec do not have a Bill 101 to guarantee this right, as Section 15 of the Charter of the French language does for English-speaking Québécois.

Finally, in the context of the language of instruction, it has been said that section 23(1) of the federal proposal was replacing the "clause Québec" in Bill 101 with a "clause Canada" and simultaneously establishing the reciprocity agreements which the Government of Quebec had wished for. This is untrue; for there is no "clause Canada", no agreement, no reciprocity. In point of fact, both a "clause Québec" and a "clause Canada" conformed to the spirit and criteria of Bill 101; but when the federal proposal changes these criteria completely, this possibility flies out of the window*. And besides, there is no need for lengthy proof to show that there has been no agreement! Finally, as far as reciprocity under the federal proposal is concerned, assuming that the provisions of section 23 apply to English-speaking Québécois, they most surely do not apply to the Francophones outside Québec, given the requirement that there must be sufficient numbers to warrant their implementation.

The federal proposal, in effect, adopts the expression "where the number of children is sufficient to warrant", which was already present in the 22 August proposal, and about which much has already been written. But how can the French-speaking minorities outside Québec really feel protected by such vague provisions and so flagrant a lack of concrete possibilities of recourse, when the federal proposal, which is described as assuring equality of treatment for minorities, could very easily, instead of that, have tried to guarantee the French-speaking minorities outside Québec the same rights as those Québec gives its English-speaking minority?

Linguistic justice and peace poorly protected by the federal proposal

The distributive justice the federal proposal is claimed to be based on should spontaneously come to the assistance of Canada's minority language, French, either by encouraging measures taken in Québec respecting minority rights, or by establishing special guarantees outside Québec that have been long awaited; but in fact its concern is not to upset the demands of a strong English-speaking majority while trying to undermine the Charter of the French language in Québec.

Now Québec has a great lead over all the other provinces as well as the federal government as regards knowledge and experience of linguistic matters and linguistic adaptation, and has enshrined them in legislation that protects the rights of the majority and the minority simultaneously. Quite apart from everything else, this experience, which Quebec has acquired and turned to advantage, ought to have occupied the minds of those who drew up the constitutional proposal.

Instead of this, the inner workings of Bill 101 are being changed, despite that fact that it is admitted that the consequences of this position have not been weighed: no account is taken of the collective rights of the French-speaking majority in Québec; a special category of immigrants - those who speak English - is favoured; all interprovincial migrants become eligible to send their children to English school on condition that any one of them has attended English school for however short a time; and to cap it all, the criteria for eligibility for English school for residents of Québec are completely changed, by replacing the criterion of which school the father or mother attended by that of mother tongue - the first language learnt and still understood - which is very hard to apply and which will tend to return Québec to the Bill 22 era, with all the friction, injustice and bitterness known to us from that time. It must therefore be recognized that linguistic justice and peace are poorly protected by the federal proposal. It would have been wise to recognize and enshrine Québec's experience and jurisdiction in language matters; this, indeed, was recommended by the Pépin-Robarts Commission.

Collective rights poorly protected by the federal proposal

Such wisdom is lacking in the language provisions of the federal proposal, since this bill is entirely oriented towards individual rights. At no point is there any question of minorities as groups, of the means and institutions they should have to develop, of the collective rights that should be guaranteed them by a charter incorporated into the constitution. And since the federal government is not at all concerned about this, it also neglects the law which Québec adopted to protect the collective rights of its French-speaking majority, which is the official minority in Canada and should therefore receive special protection.

Through a series of compromises and various laws, Québec succeeded in ensuring some social peace and a delicate balance through Bill 101. This law achieved two things: the protection of the language rights of the French-speaking majority and those of the English-speaking minority, together with their respective institutions. The implementation of this law rests on objective, operational and satisfactory criteria - which took time to develop. One wonders why the federal proposal, which stands to create disparities and difficulties, should, in the name of certain individual rights which, as we have just seen, it does not even manage to protect, barge into the creation of a collective, provincial project, and why this federal proposal, which demands so much of the French-speaking majority of Québec, demands much less of the English-speaking majority of Ontario - for example - insofar as strengthening the protection of its French-speaking minority is concerned.

This lack of consideration for collective rights in the federal proposal leads us to raise certain questions and examine its possible consequences.

Firstly: how many times will Québec have to go back and assemble the bricks to make a language policy out of without running the risk that the federal government will change the rules of the game yet again? Was the federal government aware that Québec had only just achieved a certain stability in this field?

Secondly: in view of the insistence on individual, and the scant attention paid collective, rights, would it not be possible for someone coming to work in Québec from another province to invoke sections 6 and 15 of the federal proposal to claim that the language tests of the Office de la langue française constitute discrimination? That they inhibit free movement across Canada? And would not that set off a process that called into question the status of French as the language of work in Québec?

Thirdly: how is section 25 of the federal proposal, which reads "any law that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect to be interpreted? Does not this all-embracing provision constitute serious negligence under law and open the door to all sorts of interpretations that could threaten the collective rights we have in mind?

Now for the consequences.

Firstly: in demographic terms, there is still a risk that immigration and interprovincial migration will upset the delicate linguistic balance in a given region or province. Since section 23(2) of the federal proposal makes it easier for the children of Canadian citizens coming from other provinces to attend English school, Québec will probably get more of these English-speaking migrants, especially in regions, like Hull, which are more exposed to interprovincial migration. The school distribution based on Québec's language policy will be more effectual in forestalling the consequences of such migration on language composition and balance.

Another possible consequence of the federal proposal, but one hard to forecast, would, like the first, result in more children attending

English school. Supposing that English-speaking Québécois insist on maintaining the hereditary right of their descendants to attend English school, the several thousand of them who currently send their children to French schools may change their minds and henceforth send them to English ones.

A third consequence, which touches on English-speaking immigrants coming to Québec: as the federal proposal is not interested in these people until they become citizens, they are left under Bill 101 for their first three years' residence in Québec. They will therefore be able to choose English school after having been obliged to send their children to French school for three years. Paradoxically, at that time the Charter of the French language will seem ridiculous to them, not the federal proposal. Hence the federal proposal which ministers to individual rights, neglects the collective rights of a society which adopted long ago its Charter of human rights and freedoms:

Temporal powers in Québec poorly protected by the federal proposal

Here we touch on the most important point, the one that explains everything else; and it is here that the federal proposal is in fundamental error. Since 1867, Quebec, like the other provinces, has had exclusive jurisdiction, under Section 93 of the British North America Act, over all matters related to education and teaching in the province. Moreover, setting aside Section 133 of the BNA Act in respect of parliamentary and legal institutions, Québec has hitherto exercised jurisdiction over language matters in complete legitimacy. Yet the federal proposal breaks into historical provincial jurisdiction over education and language.

Without the consent of the provinces, it attacks the very bases of the current federative pact which the provinces concluded among themselves in the last century. By making this proposal unilaterally, the central power sets itself above the provincial powers; this runs counter to the spirit, letter and balance of the present federative pact.

Until now, the provisions of the federal Official Languages Act enjoyed the same footing as those of Bill 101; by being incorporated into the Constitution Act, they take precedence over Bill 101, and still further compromise section 1 of that act, which makes French the official language of Québec. Until now, Québec had been able to adopt language laws adapted to its needs and growth, and able to ensure social peace. If the language provisions of the federal proposal have the force of constitutional law, how, and to what extent, will the Québec legislature be able to continue to exercise a right in this field already seriously cut into by section 23? Until now, the provinces were rarely worried about their exclusive jurisdiction over education; section 23 of the federal proposal steps squarely into provincial jurisdiction, transforms educational provisions into constitutional articles without the consent of the provinces, refers the matter of the implementation of these "hard to apply" provisions to the courts, and no longer even guarantees the provinces - as did the 22 August proposal - that the decision whether "the number of children warrants the provision of educational facilities" in a given region will remain in the hands of the provinces. In short, the federal proposal will start a new historical trend, one very different in spirit and orientation from that which allowed Québec, until this time, to fully ensure its linguistic and cultural future.

We cannot support this way of doing things! Education, like labour, is a key sector in language policy, for in school are the tools fashioned that enable culture and language to survive. It has always been exclusively under provincial jurisdiction, and must continue to remain a provincial matter - for the provinces are closest to the growth of the people. For years now, every government in Québec has concurred unanimously in this. But the federal proposal arrogates to itself the right to override Québec's temporal powers.

Conclusions

This has been an analysis of the effects of the federal proposal on Québec's language policy and legislation; As will have been noticed in the kind of comments we have made, a language policy far outreaches laws and legal provisions as such: it sees the changing tide and takes root in society's attitudes, values, choices. It also reflects social progress and behaviour, and can thereby motivate people of differing political beliefs. In this way, it may be said that with Bill 101 Québec succeeded in moulding the broad lines of a language policy into law.

By contrast, the language provisions of the federal proposal are not a coherent whole. They have neither the accuracy nor the objectivity required to implement them. They run counter to the linguistic development of the people of Quebec and do not espouse their consciousness. They stand in direct opposition to the spirit and letter of the Charter of the French language, bearing discord and dissension with them that recall those that struck Québec when Bill 22 was in force. They substitute the power of the courts for provincial jurisdiction. They afford the French-speaking majority and part of the English-speaking minority of Quebec poor protection. They give only theoretical guarantees to French-speaking minorities outside Québec. They take no account of collective linguistic rights. They give absolutely no recognition to Québec as the heart-land of French language and culture in Canada. They directly attack the very basis of the present federative pact by encroaching on provincial powers over education and language. They set themselves up, unilaterally, over the provinces - whose agreement they do not seek.

For all these reasons, the Conseil de la langue française concludes that the language provisions in the federal proposal are not intended to protect and develop Québec's language policy and should therefore be rejected. By virtue of its obligation under section 188(b) of the Charter of the French language, the Conseil is communicating the findings and conclusions of this document to the appropriate minister.

"Adopted by a majority of votes (nine for and two against)
on 1 November 1980."

Translator's note

The terms "clause Québec" and "clause Canada" refer to the educational provisions of the Charter of the French language. In its current form, the Act refers to Quebec: this is called the "clause Québec". It might equally refer, by substitution, to Canada: this alternative is known as the "clause Canada".