

ASSOCIATION DES COMMISSIONS
SCOLAIRES ANGLOPHONES DU QUÉBEC

ACSAOESBA

QUEBEC ENGLISH SCHOOL
BOARDS ASSOCIATION

Brief presented by

the Quebec English School Boards Association

**to the National Assembly Committee
on Culture and Education**

on Bill 23

**An Act to amend mainly the Education Act and to enact
the Act respecting the Institut national d'excellence en éducation**

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Introduction

The Quebec English School Boards Association (QESBA) is and has always been guided by the imperative that all legislation concerning education in Québec must firstly contribute to student success and secondly be effective and efficient in setting out the framework by which our public education system ensures that success. QESBA's analysis of Bill 23 considers the additional imperative, for the English-language minority in Québec, that the positive obligations imposed on the government of Québec by Section 23 of The Canadian Charter of Rights and Freedoms (The Charter), as interpreted by various judgments of the courts of Canada, be respected. Notably, in this regard, QESBA's analysis of Bill 23 considers the legislation's impact on the English-language minority's right to the management and control of its community's institutions, rights repeatedly expressed in the legal decisions up to and including the Supreme Court of Canada, and constitutionalized in The Charter for the protection of both the English-language minority in Québec and the French-language minority in the rest of Canada. It is demonstrable that the current Government of Québec, either through a lack of understanding or deliberately, does not appreciate the scope and breadth of the constitutional rights of the English-speaking community of Québec to manage and control our educational system (the importance of Section 23 of The Charter will be expanded upon later).

We affirm this based on court judgements on the Government of Québec's Bill 21 and Bill 40 and on the fact that Bill 23, currently before the National Assembly, contains provisions

which are manifestly unconstitutional and violate the spirit of the stay of Bill 40 issued in August 2020 and in force until a judgement on the merits.

It bears reminding Members of the National Assembly that the application of Bill 21, *An Act respecting the laicity of the State*, to English school boards was struck down on April 20, 2021 by the Quebec Superior Court, based on the management and control rights of our community. This decision was appealed by the Attorney General of Québec.

Additionally, Bill 40, *An Act to amend mainly the Education Act with regard to school organization and governance*, which was forced through the National Assembly with closure in February 2020, is subject to a stay issued by the Québec Superior Court and confirmed by the Quebec Court of Appeal, pending a judgement on the merits of a constitutional challenge undertaken by the QESBA and all nine English school boards.

Furthermore, the current Government of Québec also proposed Bill 96, *An Act Respecting French, the Official and Common Language of Québec*, which was adopted by the National Assembly in May 2022. Bill 96 is being contested by the English Montreal School Board on the grounds that it violates Section 23 of The Charter and Section 133 of the Constitution Act 1867 regarding access to the courts in English and French. Regarding the Section 133 violation, the Superior Court issued a stay in August 2022. A second stay was issued by the Superior Court regarding the non-bilingual requirement for judges (a stay which has recently been upheld by the Quebec Court of Appeal).

In the three court cases relating to legislation proposed by this Government cited above, Ministers loudly proclaimed that the rights of the English-speaking community of Québec were being respected. The courts have since struck down the application of Bill 21 to English school boards and have issued three stays on Bill 40 and 96. Thus far the Government is zero for three in terms of the respect of the rights of our community in the courts. With Bill 23, we are convinced they will be zero for four.

We urge the government to re-examine its interpretation of the constitutional rights of the English-speaking community in light of the case law and to listen to our community, in order to avoid unnecessary legal debates and focus on measures that will really contribute to the educational success of our students.

The English Education Network

Since 1929, the Quebec English School Boards Association (QESBA) and its predecessors have served as a vehicle through which school boards, elected commissioners, and parents have shared ideas and worked together to achieve our community's common goal of ensuring quality educational services. There are English-language schools in every administrative region of Québec with the exception of the Grand Nord. The nine member school boards of QESBA serve roughly 100,000 students in 340 elementary schools, high schools, and adult education and vocational training centres across Québec. Each Board has its unique demographics, orientations, and history. All of them share a "made-in-English-Québec" sensibility to delivering public education services, with equal regard for the needs and wants of all students, parents, staff and communities. Our member boards have

successively proven themselves, always placing student success as the primary focus of what they do.

QESBA points to at least five elements to describe this “made-in-English-Québec” sensibility:

- a) *An educational approach based on “teaching the student, not the subject”,* that is to say, in the spirit of Québec’s curriculum, to focus on the acquisition of competencies as well as knowledge and to encourage critical thinking, citizenship, enquiry and teamwork;
- b) *Parent and community involvement:* As our school boards answer to our community, our schools have always been accessible to and transparent towards all members of the community, of which parents are a crucial element. Our boards place high value on input from parents and their local communities. Community Learning Centres (CLCs) in English schools are a unique model of service to local communities;
- c) *A commitment to preparing our students for a future in Québec:* This commitment starts with the extensive concentration on French second-language acquisition. It is one of the prime missions of each of our school boards to provide every student with the opportunity to master French. Our commitment contributes to ensuring that every student graduating from the English school system has the capacity to live and work in Québec. This commitment extends to a general approach to teaching the arts, literature and history and includes extracurricular activities –

an approach that is cognizant and respectful of Québec's rich and unique character;

d) *A recognition of our particular status as English-speaking institutions:* Québec's English-speaking community, in all its diversity, continues to contribute to the rich culture of Québec life. English public school boards, representing the sole level of elected government answerable directly to our community, assume as part of their mission, the job of teaching and strengthening that fundamental contribution;

e) *The recognition of Section 23 of The Canadian Charter of Rights and Freedoms:* Québec English-language public school boards are the manifestation of the constitutional rights of Québec's English-speaking community to obtain and maintain public education instruction in English through the management and control of English-language educational institutions. Our school boards and the schools they operate reflect the commitment to the English language and culture within the context of providing our students with the tools to live, thrive and contribute to Québec.

Elected school board commissioners are made up of a wide spectrum from the community. They are parents, grandparents, former educators and interested community members who are on the front lines of all decisions that will affect and ultimately benefit students.

Student Success in the English Network¹

The English education network is very proud of the fact that at 86.8%, our student success rate, as measured by the 7-year graduation rate from high school used by the MEQ, surpasses by a full 5 percentage points the overall Québec average of 81.8%.

Looking only at the public education system, the Québec average 7-year high school graduation rate is 78.6%. Six of the nine English school boards (two-thirds) surpass this average.

Regionally, six of the nine English school boards surpass all the school service centres located in their regions in terms of the 7-year high school graduation rate.

Five English school boards are among the top ten school service centres and school boards combined in terms of the 7-year high school graduation rate. This is quite remarkable considering there are only nine English school boards and 61 school service centres in Québec. Finally, three English school boards have a 7-year high school graduation rate above 90%, a success rate unrivalled by any school service centre.

Public policy initiatives, such as Bill 23, are supposed to address or correct a problem. Looking at educational policy through the lens of student success, or perhaps more broadly

¹ All statistics on student success rates are taken from : *Diplomation et qualification au secondaire*, Édition 2021, Direction des indicateurs et des statistiques, Ministère de l'Éducation.

in terms of excellence in education, these statistics would appear to indicate that there is no significant governance problem in the English public education network in Québec.

Management and Control Rights as per Section 23 of the Canadian Charter of Rights and Freedoms

As was mentioned earlier, it is our contention that the current Government of Québec, and indeed the National Assembly of Québec, do not understand and do not respect the scope and breadth of the management and control rights of the English-speaking community of Québec guaranteed by Section 23 of the Canadian Charter of Rights and Freedoms (The Charter).

According to jurisprudence (up to and including the Supreme Court of Canada) Section 23 is understood to:

- Encompass both individual and collective rights of the minority official language
- Be remedial in nature; it is designed to correct, on a national scale, the erosion of minority language groups²
- Be interpreted purposively; it provides official language minority groups with equal access to high quality education in their own language in circumstances where community development will be enhanced

² This is significant because enrollment in the English language education system has gone from 250,000 in the mid 1970s to under 100,000 today, a decline of 60%

Regarding the constitutional challenge of Bill 40, the Quebec Court of Appeal reaffirmed, on September 17, 2020, the importance of the management and control rights of the linguistic minority contained in section 23 of The Charter:

In *Mahe*, the Supreme Court of Canada recognized that s. 23(3) of the Canadian Charter includes the right for linguistic minorities to exercise a measure of management and control over the schools that provide education in their language. Such management and control “is vital to ensure that their language and culture flourish”: *Mahe*, p. 372 [...]

But even where the number of children does not warrant the creation of school boards for the linguistic minority, in most cases in which the number justifies at least one separate educational institution, the “measure of management and control” of schools guaranteed by s. 23 must **at a minimum** ensure “exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns”: *Mahe*, pp. 375-376 (emphasis added), which includes, **at a minimum, exclusive control** over expenditures of funds relating to instruction in its language and the facilities for doing so, the appointment and direction of those responsible for the administration of such instruction and facilities, the establishment of programs of instruction, the recruitment and assignment of personnel, including teachers, and the making of agreements for education and services for minority language pupils, as Dickson, C.J. indicated in *Mahe*, p. 377 [...]³

Furthermore, the deliberate exclusion of Section 23 from the application of the notwithstanding clause in the Canadian Charter of Rights and Freedoms highlights its significance as a constitutional protection and makes any infringement of Section 23 particularly difficult to justify, as explained by the Supreme Court of Canada in *Conseil scolaire francophone de la Colombie-Britannique* (2020 SCC 13).

By excluding s. 23 from the scope of the notwithstanding clause, the framers of the [Charter](#) sought to prevent the majority from being able to shirk its constitutional obligations and thus avert a return to the time when the minority was unable to develop in its own language and culture.

³ Arrêt 500-09-029030-202 PGQ c. QESBA et al.

The following Bills have been the subject of constitutional challenges based on the management and control rights of the English-speaking community:

- Certain provisions of Bill 40 - stay pronounced in August 2020 by the Quebec Superior Court and upheld by the Court of Appeal in September 2020. A decision on the merits is pending.
- Bill 21 on the laicity of the state, the application of which to the English school boards was struck down in April of 2021 by the Quebec Superior Court. This judgement has been appealed by the Attorney General of Québec. A decision is pending.
- Certain provisions of Bill 96. This case is before the Quebec Superior Court.

In all these cases, English school boards have felt compelled to contest legislation because such legislation violated the management and control rights of Section 23. The courts have thus far sided with the English school boards in two cases, namely Bill 21 and Bill 40.

Additionally, certain provisions of Bill 23, which is the object of these Parliamentary consultations, are manifestly unconstitutional.

Bill 23 – General Observations

Before we examine in greater detail the specific content of Bill 23, the QESBA would like to make a couple of general observations.

Firstly, the QESBA deplores the fact that the original list of witnesses to be heard at this Parliamentary consultation on Bill 23 contained only one group from the English-speaking community of Québec despite a number having asked to appear.

Secondly, the introduction of Bill 23 in the National Assembly in advance of a Quebec Superior Court decision having been rendered on the merits of the QESBA et al v. the Attorney General of Québec case on the constitutionality of Bill 40 is, to say the least, unfortunate and some would say provocative. This action on the part of the Government of Québec certainly violates the spirit of the stay of Bill 40 in the English education network issued by the Superior Court in August of 2020 and upheld by the Quebec Court of Appeal in September of 2020.

Thirdly, it is significant that Bill 23 as drafted would not apply to the Cree School Board or Kativik Ilisarniliriniq (the school board of Nunavik). These two school boards are exempted from Bill 21 on the laicity of the state and they are exempted from Bill 23. During the Parliamentary Committee hearings on Bill 21, the QESBA was told that Bill 21 would not apply to the Cree School Board or to Kativik Ilisarniliriniq because of the James Bay and Northern Québec Agreement (JBNQA). This demonstrates that the Government of Québec and the legislature recognizes that these indigenous communities have a significant level of autonomous management and control of their education system by virtue of the JBNQA, a position that the QESBA fully supports.

Why then, does the Government of Québec and the National Assembly recognize the significance of respecting the JBNQA but not Section 23 of the Canadian Charter of Rights and Freedoms, which is part of the Constitution of Canada? Are the constitutional rights of Québec's English-speaking minority less important than the rights of the Cree and Inuit of Québec?

Fourthly, the QESBA maintains, like a number of other educational organizations and observers, that Bill 23 is part of the tendency on the part of the current government of Québec to centralize decision-making in the hands of the government and of the minister of Education. This tendency began with Bill 40 which, despite protestations to the contrary by the former Minister of Education, clearly concentrated greater authority in the Minister and Department of Education, to the detriment of local decision-making.

All informed observers understand that regarding governance, Bill 23 is an unambiguous power grab by the Government of Québec. Councils of commissioners in the English network and board of directors of school service centres in the French network lose authority over an array of administrative appointments and may have their decisions annulled by the Minister of Education.

Finally, even in Bill 40, the National Assembly recognized that a separate governance regime was necessary in the English education network by virtue of the management and control rights under Section 23 of The Charter. Québec's English school boards, which are public bodies, challenged the constitutionality of various provisions of Bill 40 alleging that they did not fully respect these constitutional rights.

However, Bill 23 treats English school boards in the exact same way as French school service centres. There is absolutely no recognition of any elements of a separate governance regime (as established in Bill 40) for the minority language community. This is a significant

departure from government policy since the creation of linguistic school boards more than 25 years ago.

Bill 23 – Specific Provisions

The following section of the brief is divided into two parts: infringements of the constitutional management and control rights of the English-speaking community under Section 23 of the Canadian Charter of Rights and Freedoms and; more general observations on other provisions of the Bill.

Constitutional infringements

The following are a non-exhaustive enumeration of the violations of Section 23 of The Charter contained in Bill 23:

1. Appointment and removal of directors general by the Government of Québec (s. 18)⁴
 - In all nine English school boards, the director general is named by the Council of Commissioners
 - Transferring this authority to the Government of Québec is manifestly unconstitutional. The Supreme Court of Canada in *Mahe v Alberta* wrote:

“the minority language representatives should have exclusive authority

to make decisions relating to minority language instruction and facilities

⁴ s. refers to the pertinent section of Bill 23

including: (b) **appointment and direction of those responsible for the administration of such instruction and facilities**” (p 377). This exclusive authority was recently reaffirmed by the Quebec Court of Appeal in QESBA et al v. the Attorney General of Québec.

- The Minister of Education’s statement that Bill 23 respects this right because the Government of Québec will name directors general of school boards from the English-speaking community completely misses the constitutional point. It is not *who* is named that is the right, it is *who has the authority to name*.

2. Directors general must carry out any mandate entrusted to them by the Minister (s. 20)

- This clearly establishes that directors general report to the Minister of Education and not to the Council of Commissioners which are the representatives of the community (see Mahe cited above)
- Directors general become the “executants” of the Minister and are accountable to the Minister, not to the Council of Commissioners

3. Directors general appoint assistant directors general (s. 18), principals and vice-principals (s. 4-6, 10-12)

- Currently the Council of Commissioners in eight school boards appoint their assistant directors general. The ninth is named by the director general on the delegated authority of the Council of Commissioners

- Regarding principals and vice-principals, in five school boards they are appointed by the Council of Commissioners. In the other four the Council of Commissioners has delegated this authority to the director general
 - This new authority attributed solely to the directors general is indirect ministerial control over the appointment of school administrators and is manifestly unconstitutional (see Mahe above)
4. Councils of commissioners will no longer be able to remove directors general (s. 19)
- See Mahe cited above
5. The Minister is given the authority to designate interim directors general (until the Government appoints a new director general) in the event of a vacancy (s. 23)
- See Mahe cited above
6. Ministerial power to annul a decision made by a school board or make a decision for the school board at the Minister's initiative (s. 40)
- The Minister can annul decisions "not consistent with targets, objectives, policy directions and directives **the Minister has established.**"
 - This power would enable the Minister of Education to annul a decision by a school board simply on the grounds that he disagrees with the priorities established by the community's elected officials, whether it be a decision to keep a small school open in order to maintain the vitality of an English-speaking community in small communities, the decision to install air purifiers

in classrooms without mechanical ventilation (as was done during the COVID-19 pandemic)

- This is excessive interference in the management and control rights of the English-speaking community and is an impermissible infringement on those rights

7. Obligation to conclude an annual “management and accountability agreement” with the Minister which enables the Minister to set objectives and priorities of the school board (s. 25)

- The right to determine the objectives and priorities for minority language education is at the heart of the right to management and control

8. Ministerial power to determine “policy directions that must be taken into account in organizing educational services” (s. 36)

- This is excessive interference in the management and control rights of the English-speaking community and is an impermissible infringement
- Is the Minister not satisfied with the student success rates in the English education network which exceed the Québec average?

9. Role of human resources committee of the school board in determining the evaluation criteria of the director general removed (s. 17)

- See Mahe cited above

These examples are not necessarily exhaustive and there may be other sections of Bill 23 which are intertwined with the ones highlighted above.

Other comments

Institut national d'excellence en éducation (INEE)

Regarding the creation, mandate and role of the INEE, the QESBA questions its impact on the initial training, continuing education and the professional autonomy of teachers in the area of pedagogy. Bill 40 was supposed to give greater authority and autonomy to those who were closest to students; teachers and parents. The creation of the INEE appears to be a step in the other direction, namely a further centralization of authority.

We are also concerned that the INEE appears to not have the same level of independence to advise the Minister of Education that the Conseil supérieure de l'éducation currently has.

Distance Educational Services

Bill 23 also introduces amendments to the Education Act regarding distance instructional services. Section 33 of the Bill gives the Government regulatory authority in determining under what "exceptional or unforeseen circumstances" such services can be provided. The regulations may "empower the Minister to grant, following a request giving reasons,

authorization for a student or a group of students to receive educational services from a distance...”.

The English education network has successfully delivered distance instructional services for many years. Amongst other things, distance instructional services allow students in small English schools throughout Québec access to specialized, higher-level courses where the numbers of such students do not allow for a class to be given in their school. Without this option, certain educational pathways would be closed off to them.

Furthermore, the COVID-19 pandemic appears to have demonstrated the benefits of distance educational services for some students with special needs in learning.

While the QESBA agrees that distance instructional services should be regulated by a broad legislative and/or regulatory framework, we are concerned that such a future regulatory framework could be too restrictive and narrow and not be adapted to the particular situation of students in English schools. By virtue of the principle of subsidiarity and to best respond to the needs of students in our network, the details of who is eligible for such services and under what conditions should be left to the student (in conjunction with their parents), and the school board/school service centre based on the pedagogical needs of the student.

Information in education

Bill 23 establishes a sweeping information filing and communications system which will house a vast amount of data, including nominal information. The QESBA does not specialize in information technology, we simply want to be reassured that all the necessary safeguards have been considered in the establishment of this system. The Government of Québec's recent track record on the management of information technology has not necessarily been stellar.

Conclusion

Bill 23 further centralizes decision-making to the Government of Québec at the expenses of local communities. A number of provisions related to governance are impermissible infringements on the constitutional rights of the English-speaking community of Québec to manage and control our education system, a system which is often cited as an example to be followed rather than compromised by unnecessary Government interference.

Public policy is supposed to address or correct problems. What are the problems the Government of Québec wants to address in Bill 23? If it is a deficient information gathering system, then modify the Info-collecte system the Department of Education currently uses.

If it is a search for excellence in education, it is up to the Government to demonstrate how the Bill will improve on the better-than-Québec-average success in the high school

graduation rates in the English public education network. There is always room for improvement and no-one is resting on their laurels, but in addition to being unconstitutional, the governance changes proposed in Bill 23 will cause what we believe to be unnecessary and unjustified disruption in Québec's education system, a mere three years after the major governance reform brought in by Bill 40.

The one-size-fits-all approach in Bill 23 regarding English school board is also at odds with decades of recognition of a distinct governance regime for the English education network, recognized in the current Government's own Bill 40, which produces enviable results – a student graduation rate 5% higher than the overall Québec average. The phrase "if it isn't broken, don't fix it" comes to mind.

Finally, a number of provisions of Bill 23 are a further infringement on the constitutional rights of the English-speaking community of Québec to manage and control our education system as per the jurisprudence around Section 23 of the Canadian Charter of Rights and Freedoms, this while the courts are still adjudicating the QESBA et al's constitutional challenge to Bill 40 and while a stay is still in place.

With Bill 23 as drafted, the QESBA and its nine member school boards would have no other option than to initiate yet another constitutional challenge. It is our fervent hope that given the time before us, we will, with a number of other organizations, be able to convince Members of the National Assembly to modify Bill 23 by exempting English school boards

from those provisions which infringe on our constitutional rights, as Bill 23 appropriately does (and Bill 21 did) with the Cree and Inuit of Québec.

The respect of Section 23 of the Canadian Charter of Rights and Freedoms is no less necessary.