

Brief to the Election System Study Panel

Minority Language Educational Rights and
Canada's English Linguistic Minority Communities:
Looking Forward

Presented by the Quebec Community Groups Network

August 2015

Introduction

For a number of years, a political discussion has been underway in Quebec regarding the management and control of the Province's primary and secondary school systems. This discussion has been taking place within a wider governance trend of retrenching decentralized governance of public institutions; health and social services, post-secondary institutions, and economic development to name a few. The locus of civil society's involvement in the Province's public life has therefore been shifted from regional power bases to the central government.

Fiscal pressures and efficiency have been used to explain these evolutionary shifts. It is argued that reducing the number of intermediary management frameworks reduces costs and streamlines the targeted system, resulting in government that is lean and flexible. Whether or not centralization realizes these promises remains to be proven.

The Government of Quebec's traditional function of promoting and protecting the Province's distinct society is also an unspoken principle that affects the centralization of public power. There is popular understanding of Quebec's language and culture being under constant threat - an island of French in a North American sea of English. This perception is shared not only by the majority in Quebec, but also by the courts, other levels of government, and outside observers and commentators.ⁱ In the face of this threat, there has been a historical role for strong central government; seen as necessary for effective collective defence. And residual powers left extraneous to central government control (i.e. post-secondary, health and social services institutional governance), have been brought into to fold of Ministerial authority. There seems to be little tolerance in the culture of Quebec's governing systems for decentralizing management and control of public institutions.ⁱⁱ

Two powerful forces that have very broad internal and external support therefore stand squarely behind the logic of school system reform: the immediate policy aim of saving money; and, the continuing evolution of power centralization, serving the Provincial Government's need to protect and promote Quebec's language and culture.

Situation

Ministers of Education of the current government have discussed school system reform. These discussions are not taking place around a defining instrument; there is no draft legislation, or written proposal against which to offer opinion. It is not clear whether the Ministers' thoughts are the Government's position. We should therefore assume that the Ministers' remarks at this point are intended to stimulate discussion and generate feedback from affected communities (English and French). The focus of the ESCQ in this process has been centred on two propositions: replacing the current school boards with another governance mechanism; and, the amalgamation of governance school governance structures.

Leaders within the ESCQ have signalled a willingness to discuss school system reform, and have established the constitutionally protected minority language educational rights as vital ground. A legal

impact study, commissioned by the QCGN, funded by the Language Rights Support Program (LRSP) and written by constitutional law expert Me. Michael Bergman surveys these rights. The study is being widely circulated amongst community leaders, and has been reviewed by government policy and political leaders including the Minister of Education. Reaction to the study has focussed on the current method of management and control of the English school system, a school board elected by universal community suffrage.

The Right

Section 23 of the Charter of Rights and Freedoms defines Canadian's minority language education rights. In Quebec, a citizen of Canada who has received their primary school instruction in Canada in English has a right to send their child to an English school. There is also a right for Canadians to send children to English school in Quebec if the child's sibling(s) are receiving or received their primary and secondary school instruction in English. The interpretation of these rights will be discussed, however at this point, it is worth noting that the 'black letter' right holders are eligible parents. From first principles, citizens without school-aged children are not included in the section, and it is a legal fiction to read in extending these rights to non-eligible citizens.

Constitutional rights and freedoms are not absolute. They are bounded by section 1 of the Charter to, "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Any discussion of constitutional rights and freedoms involving Quebec, must be informed by the generally accepted principle by the courts that the protection and promotion of French is a sufficiently important and legitimate justification to limit these guaranteed rights. This does not give Quebec carte blanche, but it is worth considering.¹

The purpose of section 23 rights is well covered in the Bergman study. The key Supreme Court decision that defines these rights is *Mahe v Alberta*, and discussion within the ESCQ to this point has centred on this decision's finding that the section's general purpose is, "preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population (*Mahe v Alberta*)." Perhaps more attention could be paid to the next two sentences in the decision:

"The section aims at achieving this goal by granting minority language educational rights to **minority language parents** throughout Canada. Section 23 is also **designed to correct**, on a national scale, the **progressive erosion of minority official language groups** and to give effect to the concept of the 'equal partnership' of the two official language groups in the context of education." (Emphasis added)

The Bergman study comments on the remedial nature of section 23 rights; they were designed to correct a historic injustice, the denial of educational rights to French communities outside of Quebec. However, Quebec related section 23 decisions have been positive, and it is worth noting that the wording of section 23 is almost identical to the wording that existed in Bill 101 in 1982 (minus the Québec clause).

¹ [See here for a fuller explanation of section 1 of the Charter](#). Again, the judicial recognition of the legitimate objective or legislative purpose of protecting the French language, while satisfying the first step of the Oakes test under section 1, has never justified a violation of or limit on constitutionally protected language rights. It's only the first step of the test.

And so it can also be concluded that section 23 was designed – and has been interpreted - to deal with the more modern reality of the English-speaking linguistic minority community. This contextual approach is evident in *Solski*, rational given the unique challenges faced by English-speaking Quebec.

We will set aside the question of whether school boards are constitutionally protected, since this does not seem to have been settled, and is still a matter of opinion. *Mahe* refers to independent linguistic minority school boards as a possible mechanism for parental management and control, but states outright that independent school boards are “not necessarily the best means of fulfilling the purpose of section 23.”

Whatever mechanism is chosen it must provide what *Mahe* defines as minimum parental management and control:

- Where the numbers warrant minority language parents have a right to management and control over the educational facilities in which their children are taught. Such management and control is vital to ensure that their **language and culture flourish**. (emphasis added)
- Management and control includes exclusive authority to decide:
 - expenditures of funds provided for such instruction and facilities;
 - appointment and direction of those responsible for the administration of such instruction and facilities;
 - establishment of programs of instruction;
 - recruitment and assignment of teachers and other personnel; and,
 - the making of agreements for education and services for minority language pupils.

Current Practice

The degree to which English school boards currently exercise management and control of the system is unknown. It is also unclear the degree to which in practice, school boards ensure the flourishing of ESCQ language and culture. Indeed, the educational community seems focused on its educational mission; formal recognition of its role within the ESCQ is not apparent. English schools promote core French programs, and all emphasise their ability to produce bi-literate children who can integrate into French-speaking Quebec. This is a completely rational approach, consistent with a minority community pursuing integration with the majority

Moreover the English school system has a significant Francophone population, particularly off the island of Montreal. Demographic realities, coupled with section 23 (a) not being in force in respect of Quebec point to this trend continuing and accelerating. The only cohort of growth within the English school system since 1971 is French mother tongue children. In the regions outside Montreal, these children now represent nearly 20% of the population. Anecdotally, some individual schools contain less than ten mother tongue English students.

There does not seem to be a previous case in which the courts have been required to respond to this reality; but they could if Quebec is challenged in court on school board reform. The risks of a ruling establishing asymmetrical language rights (beyond a section 1 interpretation) should be understood.

Offsetting these factors however, is the community role our schools play beyond their educational function. Schools are a centre of community activity, a meeting place where our culture is presented and enjoyed. The community learning centres (CLC) for example, turn schools into community hubs where English-speaking Quebecers engage in communal activities and interests irrespective of their individual

eligibility regarding section 23 rights. In this sense, community stakeholders in the management and control of English schools extend beyond right holders.

Universal suffrage

There is no constitutional right for universal suffrage (within the official language minority community) of an independent linguistic minority school board. Only three Canadian jurisdictions extend this privilege: Prince Edward Island, New Brunswick, and the Yukon. The majority of provinces limit management and control of the linguistic minority school systems to parental right holders. Provincial and territorial duties are to providing mechanisms that permit right holders to effectively manage and control their schools (see above).

Recent and Future Jurisprudence

Further attention should be paid towards the Supreme Court's decision in *Association des parents de l'école Rose-des-vents v. British Columbia (Education)* rendered on 24 April, 2015 for two reasons: the ESCQ tends to accept the Government of Quebec's position and practice of a single public policy approach; and, it is unclear if the English school system has benefited from the concept of 'substantive equivalency'. A detailed analysis of *Rose-des-vents* will not be offered here, however the following points from the decision are noted:

- "[A government's] focus in giving effect to s. 23 rights should be on substantive equivalence, not on per capita costs and other markers of formal equivalence. What is paramount is that the educational experience of the children ... be of meaningfully similar quality to the educational experience of majority language students."
- "The question to be examined [in determining substantive equivalence] is whether reasonable rights holder parents would be deterred from sending their children to a minority language school because it is meaningfully inferior to an available majority language school? If so, the remedial purpose of s. 23 is threatened. If the educational experience, viewed globally, is sufficiently superior in the majority language schools, that fact could undermine the parents' desire to have their children educated in the minority language, and thus could lead to assimilation."

Practically, this could mean that Quebec is not providing a substantively equivalent education for English students if:

- If a child has to travel by bus for 40 minutes to attend an English school, while her peers walk 5 minutes to a French school;
- Parents send their child to a French school because they are unhappy with the level of French taught at the English school; or
- The local French school offers recreation facilities, programmes, and specialised resources not available to English school.

Recommended Position

Community action

Current English school boards should unequivocally and formally express their role as institutions of the English-speaking Community of Quebec, emphasising their responsibility to preserve and promote the unique culture of this community. Adjunct to providing high quality education to their students is the school's mission to provide the community's young people with a strong sense of identity and attachment to the ESCQ.

The community sector should unequivocally and formally express their support of English schools as vital institutions of the English-speaking Community of Quebec. These expressions should highlight the responsibility of schools to preserve and promote the unique culture of the ESCQ, and provide English-speaking youth with a strong sense of identity and attachment to the ESCQ.

Government of Quebec

That the Government of Quebec make its position on school board reform known to the public in writing, and that it thereafter embark on an inclusive consultation process.

English-speaking Community Demands (proposed)

That management and control of our schools be the exclusive right of eligible parents, who must be permitted the ability to freely and independently, as a minimum:

- Decide how to expend funds provided to English schools;
- Appoint and direct those responsible for the administration of English schools;
- Establish programs of instruction;
- Recruit and assign teachers and other personnel; and,
- Make and enter into agreements for education and services for minority language pupils.

Because of the special responsibility of English schools to preserve and promote the unique culture of English-speaking Quebec, and the role our schools play as centre of community, all Quebecers who identify with the ESCQ should be afforded a voice in the management and control of English schools.

Quebecers who pay taxes to support the English school system must be provided a voice in the management and control of English schools. Failing to provide this opportunity creates taxation without representation, which is intolerable in our democratic system.ⁱⁱⁱ

ⁱ This is from the Ford case and has been cited in Solski and Nguyen: “The material amply establishes the importance of the legislative purpose reflected in the Charter of the French Language and that it is a response to a substantial and pressing need. . . . The vulnerable position of the French language in Quebec and Canada was described in a series of reports by commissions of inquiry beginning with the Report of the Royal Commission on Bilingualism and Biculturalism in 1969 and continuing with the Parent Commission and the Gendron Commission. . . . Thus, in the period prior to the enactment of the legislation at issue, the “visage linguistique” of Quebec often gave the impression that English had become as significant as French. This “visage linguistique” reinforced the concern among francophones that English was gaining in importance, that the French language was threatened and that it would ultimately disappear. It strongly suggested to young and ambitious francophones that the language of success was almost exclusively English. It confirmed to anglophones that there was no great need to learn the majority language. And it suggested to immigrants that the prudent course lay in joining the anglophone community. . . .”

Charter rights and freedoms are subject to reasonable limits prescribed by law. The courts may find these limits justified if they pass the “Oakes test” (from *R v Oakes*, 1986). First, the limits must be designed to achieve objectives, “related to concerns which are pressing and substantial to a free and democratic society.” If this condition is satisfied, then a proportionality test is applied. The legislative objective of protecting the French language has only been found to satisfy the first step of the Oakes test under section 1 of the Charter. We are not aware of a case where a violation of a constitutional language right, such as section 23, has ever been saved by section 1. In other words, although the courts have recognized Quebec’s protection of French as a legitimate concern, that objective has never trumped a constitutional right.

ⁱⁱ For the majority, this might pose less of a problem, since in theory, the Government of Quebec not only represents their interests, but is representative of the majority. But for the English-speaking minority, which is largely absent from the political system, and not present in the bureaucracy, centralization poses a significant threat to community vitality.

ⁱⁱⁱ Note the political, not legal nature of this particular demand.