

# Quebec Community Groups Network

brief to

## Committee on Culture and Education

Special Consultations on Bill 40: An Act to  
amend mainly the Education Act with regard to  
school organization and governance

November 2019

## Summary

The Quebec Community Groups Network (“QCGN”) has not been invited to appear before the Committee in the course of its special consultations on Bill 40. Nonetheless, the QCGN submits this brief to the Committee.

In addition to providing an excellent education to students, Quebec’s English public schools exist to preserve and promote the language and unique culture of English-speaking Quebec. Schools are key and central institutions of the English-speaking community of Quebec. The Government of Quebec must recognize and support the linguistic and cultural rights of Quebec’s English-speaking community. Management and control of our educational institutions cannot be unilaterally restricted.

At the same time, the English-speaking community of Quebec recognizes the need for reforms to the governance of its educational institutions.

In 2015, the community conducted a wide-ranging consultation, and prepared recommendations to the Minister of Education and Higher Education on the matter (the “*Election Systems Study Panel*”, see **Appendix A**). Bill 40 largely ignores those recommendations, particularly the recommendations for improving the electoral system. It does not reflect a model of education governance by and for the English-speaking community. It is wholly foreign to the model of school governance that the community has been asking for.

In summary, the QCGN has serious concerns related to:

- the constitutionality of the legislation, particularly its compliance with s. 23 of the *Charter of Rights and Freedoms*;
- the failure of the Government of Quebec to demonstrate that the reforms are necessary, i.e. that they will improve the efficiency and effectiveness of school governance and improve student achievement; and
- the introduction of a major education governance reform without broad-based public consultations.

Although it purports to set up a system of elected representation, this Bill does not provide a vehicle by which the community can exercise any meaningful level of management and control over education. Taken as a whole, Bill 40 creates an empty shell for community representation in which true management and control is likely to be exercised by staff and Ministry officials rather than rights-holders and the wider community. As such, it violates the right to management and control guaranteed by s. 23 of the *Canadian Charter of Rights and Freedoms* (“the *Charter*”).

The Bill falls short of the constitutional standard for two reasons:

- i. Composition and Selection of School Service Centre (“SSC”) Boards: Rights-holders’ exercise of management and control through representatives on SSC Boards is stifled by restrictions on who can serve on these Boards and the lack of resources provided to these representatives.
- ii. Power of School Service Centre Boards: The decrease in the decision-making powers of SSC Boards paired with greater control by the Minister means that the SSC Boards will likely not exercise much meaningful decision-making power over education.

Our minority constitutional rights are shared by Francophone minority communities outside Quebec. This Bill erodes those constitutional rights for the English-speaking community of Quebec, and by extension, those of the Francophone minority communities outside Quebec.

Why is this reform necessary, and what problem is it meant to solve? The purpose of Bill 40 seems to be mainly administrative. It makes no claim either to directly improve the scholastic performance of Quebec’s students or improve or maintain existing educational services. At the same time, the Bill imposes a major change on education governance without the benefit of input from the affected stakeholders: students, parents, and communities.

This Bill cannot be passed in its current form. The QCGN requests that this Committee:

- Amend the Bill so that the English system is exempt from the reform, pending a full consultation with the community to design a governance system by and for the community; and/or
- Request a reference on the constitutionality of Bill 40 to the Quebec Court of Appeal.

## **1) Introduction to the QCGN**

Founded in 1995, the QCGN is a not-for-profit organization linking English-language community organizations across Quebec. As a centre of evidence-based expertise and collective action, the QCGN identifies, explores and addresses strategic issues affecting the development and vitality of the English-speaking community of Quebec. The QCGN's vision for English-speaking Quebec is a diverse, confident, recognized and respected national linguistic minority that actively participates in and contributes to the social, economic, cultural and political life of Quebec and Canadian society.

The QCGN carries out a range of actions geared at the vitality and development of Quebec's English-speaking community. The QCGN is active in many policy areas of interest to the English-speaking community, including access to justice, access to health and social services, education, the integration of newcomers, youth retention, and seniors.

The QCGN is a strong supporter of the right to minority language education guaranteed under s. 23 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), including the right to minority language education facilities and the right to management and control of education by the minority community. The QCGN works cooperatively with community partners to protect and defend community rights and interests in the area of education. For example, the QCGN was a leading partner in English-speaking Quebec's opposition to Bill 86, Quebec's proposed reforms to the education system in 2016, which would have seriously undermined the right to manage and control educational facilities guaranteed under s. 23 of the *Charter*.

The QCGN is also a founding member of the Alliance for the Promotion of Public English-language Education in Quebec (APPELE-Quebec), launched in April 2019. In this respect, the QCGN is working with Alliance members to protect the community's constitutional rights under s. 23 of the *Charter*.

## **2) Bill 40 infringes s. 23 of the *Charter of Rights and Freedoms***

### **a. Section 23 of the *Charter***

The model for English education governance proposed in Bill 40 is a novel one in Canada. With Bill 40's model, Quebec will enter uncharted territory in terms of the province's compliance with s. 23 of the *Charter*. Therefore, we must look again at first principles of s. 23 to understand whether the model in Bill 40 complies with the *Charter*.

We do not assume that the current system and practice complies with s. 23 of the *Charter*. We compare Bill 40 not to the status quo, but to the standard set by s. 23 of the *Charter*.

The purpose of s. 23 of the *Charter* is “to 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”.<sup>1</sup>

Section 23 of the *Charter* sets out certain rights in respect of minority language education. In Quebec, it confers on certain citizens (“rights-holders”) the right to have their children receive primary and secondary school instruction in English provided out of public funds, where numbers warrant. It also confers the right to exercise “a measure of management and control over the educational facilities in which their children are taught”.<sup>2</sup> Essentially, rights-holders should have control “over those aspects of education which pertain to or have an effect upon their language and culture.”<sup>3</sup> This right is exercised by rights-holders as a group; generally through representatives.<sup>4</sup>

The Supreme Court has set out the scope of the right as follows:

The minority language representatives should have exclusive authority to make decisions relating to the minority language instruction and facilities, including:

- (a) expenditures of funds provided for such instruction and facilities;
- (b) appointment and direction of those responsible for the administration of such instruction and facilities;
- (c) establishment of programs of instruction;
- (d) recruitment and assignment of teachers and other personnel; and
- (e) making of agreements for education and services for minority language pupils.<sup>5</sup>

The province has the “positive obligation[.]” to “develop major institutional structures” to satisfy its obligations under s. 23.<sup>6</sup> It is the province’s responsibility to design an education governance structure that protects and enables the English-speaking community’s management and control over its constitutionally-guaranteed minority language education.

## **b. Education and Community**

The purpose of all schools is to provide the best educational experience possible for its students. English schools – institutions of our linguistic minority community – have the added responsibility of preserving and promoting the unique culture of English-speaking Quebec.

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<sup>1</sup> *Mahe v Alberta*, [1990] 1 SCR 342 at 362 [*Mahe*].

<sup>2</sup> *Mahe* at 371-72.

<sup>3</sup> *Mahe* at 375.

<sup>4</sup> *Mahe* at 377.

<sup>5</sup> *Mahe* at 377.

<sup>6</sup> *Mahe* at 365.

These are not merely institutions that provide services in English; they are institutions of English-speaking Quebec. Thus, caring for these institutions, ensuring our children receive an excellent education, and reinforcing the school's role as the centre of community life are responsibilities shared between the English-speaking community of Quebec and the Minister.

The Supreme Court has repeatedly recognized that the purpose of s. 23 is to protect minority language and culture.<sup>7</sup> Minority language education plays a “vital role” in “encouraging linguistic and cultural vitality” of minority communities.<sup>8</sup> Minority language schools are the “primary instrument”<sup>9</sup> and the “single most important institution”<sup>10</sup> for the survival of the community and the transmission of language and culture. Minority education rights provide, “...the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced.”<sup>11</sup> In addition to transmitting language and culture, minority language schools provide community centres where members of the minority community can “express their culture”.<sup>12</sup> Thus, the s. 23 right is not merely a right to receive instruction in the minority language; it is the right to participate in a linguistic community and in the transmission of that community's language and culture to future generations.

At the heart of every community is a school. Schools do far more than instruct our children, they define, protect and communicate who we are and what we value. They are places where we meet and celebrate significant events and milestones in the lives of our children and our families. Schools reflect their communities; and so with good reason, schools are and have been locally governed and managed, within the bounds of broad societal policy objectives for generations in Quebec. In many communities, they are the last remaining self-governed institution.

Our schools play a community role beyond their educational function. Schools are a centre of community activity, a meeting place where our culture is expressed and enjoyed. They are the cornerstone of communities—particularly in the minority context. Centralizing the power to manage and control these institutions – thereby separating them from their communities – reduces, and will eventually remove schools as community institutions.

**c. Bill 40 does not provide a meaningful vehicle for community management and control of education as required by s. 23 of the *Charter***

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<sup>7</sup> See *Mahe* at 362; *R v Beaulac*, [1999] 1 SCR 768 at para 25, and *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 at para 28.

<sup>8</sup> *Mahe* at 350.

<sup>9</sup> *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21 at para 27.

<sup>10</sup> *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1 at para 29 [*Arsenault-Cameron*].

<sup>11</sup> *Arsenault-Cameron* at para 27.

<sup>12</sup> *Mahe* at 363.

Put simply, Bill 40 seeks to increase the executive authority of the Minister in the Quebec's public school system and decrease input by the community and its representatives. It chokes community management and control by all communities—French and English-speaking. It adapts its model to the English school system by creating a system of elected representation. On paper, Bill 40 provides a system of representation for s. 23 rights-holders on School Service Centre ("SSC") Boards of Directors by way of universal suffrage. However, this system of representation is not designed to provide meaningful management and control by the community.

Taken as a whole, the Bill fails to provide a means for rights-holders to have any meaningful degree of management and control through their representatives. Bill 40 creates an empty shell for community representation in which true management and control is likely to be exercised by staff and Ministry officials rather than the community.

The Bill falls short of the constitutional standard for two reasons:

- i. **Composition and Selection of SSC Boards:** Rights-holders' exercise of management and control through representatives on SSC Boards is stifled by restrictions on who can serve on these Boards and the lack of resources provided to these representatives.
- ii. **Power of SSC Boards:** The decrease in the decision-making powers of SSC Boards paired with greater control by the Minister means that the SSC Boards will likely not exercise much meaningful decision-making power over education.

#### **i. Composition and Selection of SSC Boards**

Rights-holders' exercise of management and control through representatives on the SSC Boards is stifled by restrictions on who can serve on these Boards and the lack of resources provided to these elected representatives.

- a) The Bill restricts who can serve as a representative on the SSC Boards: For example, only parents who are currently serving on school Governance Boards are eligible to run as a parent representative. Community representatives must fit specific profiles. Given this combination of restrictions, only a small proportion of community members is eligible to serve on an SSC Board. To take the problem to its extreme, surely a system of representation in which only one rights-holder could run for office would not satisfy a constitutional standard for management and control.
- b) The Bill's electoral system for SSC Boards does not fix any of the problems with the current system and does not define who is eligible to vote in SSC elections: This Bill does not address any of the problems identified with the current electoral system for school board elections in the *Election Systems Study Panel*, nor any of recommendations to

improve voter turn-out. Rather, it makes the electoral system more complicated, holding elections every two years, and requiring voters to vote for different categories of community representatives. At the same time, this system leaves the English system vulnerable to influence by the majority because it does not define who is eligible to vote in SSC elections. This Bill opens the franchise to any voter, whether or not they have any link to the English-speaking community. Having lost its right to vote in French SSC elections, theoretically, electors from the majority could overwhelm the minority community's voting power in the selection of the English SSC Boards. The franchise is ill-defined, and at the same time, the system does not address the existing problems. Overall, the electoral system is unacceptable.

- c) The presence of staff as voting members on the SSC Boards reduces the voting power of rights-holders: Staff members are not necessarily rights-holders, they are not selected by rights-holders, and not directly accountable to rights-holders. The presence of voting staff on the SSC Board dilutes the voting power of the parent and community representatives, and therefore indirectly dilutes the voting power of the rights-holders.
- d) The resources provided to SSC Board members are insufficient: The Bill provides for training, but not for remuneration.<sup>13</sup> Thus, the community and parent representatives serve on SSC Boards as volunteers. The time demands on these volunteers (particularly parent volunteers) will further limit the pool of candidates willing to serve on these Boards.

Overall, the Bill restricts who can represent the community on SSC Boards and places huge unremunerated demands on representatives, particularly on the parent representatives. The Bill will discourage people from standing for election. As such, it curtails not only the voting power of rights-holders, but also the range of choices that will be available to them in elections. It sets up a system of representation that is weak *at best*, and dysfunctional and illusory at worst.

## ii. Power of SSC Boards

More fundamentally, the Bill's governance structure centralizes power with staff and the Ministry. It takes away power from SSC Boards. This means that the SSC Boards—and the rights-holders' representatives on these Boards—will likely not exercise much meaningful decision-making power over education.

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<sup>13</sup> The Bill provides for reimbursement of reasonable expenses and attendance allowances set by the government: Bill, s 65.

- a) The Director General’s role is enhanced: Under Bill 40, the Director General takes on an enhanced role with respect to the SSC Board: the Director General becomes the official spokesperson of the SSC Board.<sup>14</sup> As such, the role and power of the Director General in SSC governance is enhanced.
- b) The role of staff in SSC Board governance diminishes the Board’s overall power: The increased role of staff dilutes the governance function of SSC Board itself. The Board of Directors will include 4 staff voting members. The presence of staff on a Board of Directors breaches the separation between the Board and staff, and will likely lead to a decreased ability for the Board itself to deliberate on and decide issues involving staff management. For example, SSC staff will now be involved in selecting (and potentially removing) the Director General. SSC staff will be placed in the bizarre position of having voting power over decisions affecting their own supervisor.

Further, three important SSC Board committees are also composed entirely of staff: the resource allocation committee, the commitment-to-student-success committee, and the advisory committee on management. Again, this indicates that staff will have a major influence in Board deliberations on important topics. The Election Systems Study Panel specifically recommended against adding staff on school board Council of Commissioners.<sup>15</sup>

- c) Devolution of some decision-making to the school level further decreases the role of the SSC Board: Some functions are devolved from the school board level to the school level. For example, school Governing Boards are now responsible for the promotion of public education<sup>16</sup>—a function currently exercised at the school board level.<sup>17</sup> Devolution to the school level is problematic because it takes away that decision-making from a body controlled by rights-holder representatives (i.e. the SSC Boards) and puts it into the hands of a decision-making body not controlled by rights-holder representatives (i.e. school Governing Boards).
- d) The strategic planning process creates lines of accountability to the Minister rather than the SSC Board: The Minister currently has a role in supervising the “commitment-to-success” planning process.<sup>18</sup> Under Bill 40, the role of staff and the Minister is enhanced,

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<sup>14</sup> Bill, s 90.

<sup>15</sup> See *Election Systems Study Panel*, p 27, Recommendation 9, **Appendix A** to this brief.

<sup>16</sup> Bill, s 30

<sup>17</sup> *Education Act*, s 207.1, amended by Bill, s 93.

<sup>18</sup> For example, *Education Act*, s 209.1: the plan must be consistent with the strategic directions of the department and must meet department expectations; and s. 459.2: the Minister may determine the policy directions, objectives or targets that school boards must take into account in preparing their commitment-to-success plan.

and the role of the SSC Board is further diminished. The all-staff “commitment-to-student-success” committee is responsible for creating the plan. If the SSC Board does not accept the committee’s plan, it must give reasons.<sup>19</sup> Thus, the SSC’s strategic plan comes to the SSC Board as a *fait accompli*, and the members of the SSC Board may have little substantive input into the plan. Many decisions otherwise in the purview of SSC Board will be dictated by these plans rather than by the community.

- e) The Ministerial powers can be exercised to override SSC Board decisions: If unchecked, the Bill’s new Ministerial power—and many of the existing powers—can be used to violate s. 23. It falls to the rights-holders, either individually or collectively, to challenge the use of these powers. However, the new structure weakens the ability of SSC Boards to resist and challenge Ministerial intervention, and leaves rights-holders with fewer recourses. This will have a chilling effect on the deliberations of SSC Boards.

The Minister’s own comments about the role of SSC Boards indicate his view that SSC Boards will not exercise much real power. In response to a concern about the lack of remuneration for SSC Board members, Minister Roberge answered as follows:

Et si on demandait avec les changements qui s’en viennent exactement la même chose aux gens qui sont sur le c.a. versus les commissaires ça [la non-remuneration] poserait un problème [...]

Il ne faut pas transposer exactement que font les commissaires par rapport à ce que qui feront les gens sur un conseil d’administration. C’est un changement de paradigme. On inverse la pyramide des pouvoirs. Et les gens qui siègerons sur les c.a. n’aurons pas la même mission, la même charge de travail. Et il y aura justement une formation pour qu’on comprenne le rôle, devoirs, et responsabilités [...]

La mission sera différente. On leur demandera de venir siéger sur un c.a., d’être en quelque sorte le gardien de l’équité, le gardien que les décisions sont prises selon les règles et on leur demandera pas de gouverner une instance de gouvernement comme le sont en ce moment les commissions scolaires. Et c’est là où il y a un changement de paradigme.<sup>20</sup>

Overall, the SSC Board may find itself simply “rubber-stamping” many staff decisions, or its decisions overridden or pre-empted by Ministerial decisions. The rights-holder representatives

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<sup>19</sup> Bill s 88, adding s 193.9.

<sup>20</sup> Transcription of response of Jean-Francois Roberge, Committee on Culture and Education, 6 November 2019, during testimony of APPELE-Quebec.

on the SSC Board are left with a system that provides them little influence in important decisions.

**3) The Government of Quebec has not demonstrated that this model will either improve education governance or student success**

The purpose of Bill 40 seems to be mainly administrative. It makes no claim to either improve the scholastic performance of Quebec's students or to improve or maintain existing educational services. At the same time, the Bill imposes a major change on education governance without the benefit of input from the affected stakeholders.

Other stakeholders before this Committee have spoken to the high student success rate within English school boards. The Government of Quebec has not demonstrated why this reform is necessary to improve student success, or even to improve governance within the English system. What problem does this Bill solve? What policy objective is so pressing and substantial that it can justify the withdrawal of community management and control? The QCGN invites the Minister to answer these questions.

**4) No reform to governance of the English education system should take place without proper consultation with the English-speaking community**

Constitutional issues aside, there has been insufficient public consultation on this proposed reform, particularly considering its scope.

By all accounts, this Bill is the most important reform in school governance since the change from confessional to linguistic school boards in the 1990's. Such a major reform warrants major reflection and consultation. This has not been done here.

Why the proposed reforms contained in Bill 40 are required remains unclear. The Government of Quebec chose neither to conduct public consultations nor to produce a white paper prior to introducing this legislation. Moreover, the Government has chosen the more restrictive special consultation (consultations particulières) process to gather feedback on this Bill, rather than the more open general consultation process, which addresses the population as a whole. This seems extraordinary, given not only the scope of the proposed reforms, but their nature. It is unacceptable for any level of government to capriciously effect constitutional and democratic rights.

Our mature democracy demands the voice of all Quebec citizens be constantly sought out, heard and reflected in government policy and legislation, and not just during election campaigns. Developing policy remotely without input from interested and invested citizens and then foisting these ideas on these same communities is contrary to the finest of Quebec's political traditions.

Community leaders believe that reforms to the public school system – its governance included – are necessary. In the summer of 2015, four leading English-speaking civil society groups sponsored the *Election Systems Study Panel*, an independent ad hoc body led by the Honourable Marlene Jennings.<sup>21</sup> The Panel was mandated to review the current practice of school board governance and propose options for improving the elections system. Following a broad community consultation, the Panel made 13 recommendations, which included specific, evidence-based suggestions on how to improve voter turnout and increase community participation in the management and control of English public schools. These recommendations have been mostly ignored and, in some instances, contradicted.

The QCGN is disappointed that this Bill does not reflect the recommendations of this study. Nor does this Bill represent the outcome of any consultation process with the English-speaking community.

Rather, the provisions of this Bill for English SSC Boards seem to be simply a modified version of the reform directed at the French system. This is fundamentally the wrong approach. To set up a system where the community's right to manage and control education is respected requires a system designed with the minority community in mind: a governance system *by and for* the community.

## **5) Conclusion: The Way Forward**

This Bill cannot be passed in its current form. The QCGN requests that this Committee:

- Amend the Bill so that the English system is exempt from the reform, pending a full consultation with the community to design a governance system by and for the community; and/or
- Request a reference on the constitutionality of Bill 40 to the Quebec Court of Appeal.

It is time for the Government of Quebec to engage the English-speaking community of Quebec constructively and substantively in policy development on issues that affect all Quebec citizens. The QCGN invites the government to embark on an inclusive consultation process with stakeholders in English-speaking Quebec to improve the exercise of minority language education rights, and fully realize the purpose of s.23 of the *Charter of Rights and Freedoms*.

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<sup>21</sup> See **Appendix A** to this brief.