



Ontario Catholic School Trustees' Association

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MEMORANDUM

TO: OCSTA Board of Directors

FROM: Stephen Andrews, Director of Legislative and Political Affairs

SUBJECT: **Bill 40 in Quebec: General Background Information**

On Monday February 10, 2020, several Canadian media outlets covered stories about the recent passage of Bill 40 in Quebec or “*An Act to amend mainly the Education Act with regard to school organization and governance*” (“Bill 40”). Bill 40 contains the following key provisions:

- Transforms English and French school boards into School Service Centres.
- Eliminates the role of elected school trustee or commissioner in the 9 English boards and 60 French boards.
- Creates an elected board of directors for the School Service Centres. In the English system, these School Service Centres will have 8-17 parent representatives, 4 community representatives who reside in the centres jurisdiction and have expertise in one of the following areas:
 - risk management;
 - ethics, governance;
 - finance or human resources.
- Additional representatives will be elected who are 18-25 years old and all elected representatives on the Service Centre board will serve a three-year term.
- The Chair and Vice Chair of the Service Centre board will be parents of students who sit as parent representatives on the board.
- The Director General (Director of Education) will sit on the board but not have voting rights but will serve as the official spokesperson for the board.
- Governing boards previously fell under the authority of the school board but now come under the jurisdiction of the Service Centre and the Ministry of Education. They will have 12 members including four parents from the school, four school staff, two of which are teachers elected by their peers, one support staff, one student, one community representative. The Chair and Vice Chair are appointed by the governing board. This governing board approves and adopts the anti-bullying and anti-violence plans of the Service Centre and oversees other operational matters.

- The Minister of Education will have enhanced powers. He or She has the regulatory authority to determine the terms, conditions, and standards for the election of members of School Service Centres' board of directors. The Minister will also control the objectives and targets relating to the administration and operation of the Service Centres.

Concerns of the Quebec English School Board Association

In November 2019, the Quebec English School Boards Association (“QESBA”) submitted its analysis of Bill 40 to the National Assembly Committee on Culture and Education (attached). They are critical of the proposed reforms to the governance structure of School Service Centres and the elimination of school board trustees or commissioners. QESBA argues that the reforms undermine their constitutional rights under section 23 of the *Charter of Rights and Freedoms* to secure and maintain public education instruction in English through the control and management of English-Language school boards. QESBA also argues that the government produced no “evidence-based comparative analysis that the governance model proposed in Bill 40 will improve student success” (p.7).

In light of these concerns, QESBA recommended that the government withdraw Bill 40 or provide a blanket exemption from the legislation similar to one granted the Cree School Board and the Kativik Ilisarnilriniq School board of Nunavik. They also made a number of recommendations related to the governance structure of the School Service Centres such as removing the age and expertise conditions for board members and limiting the new powers of the Minister of Education to retroactively change decisions of School Service Centres.

Next Steps

According to media reports, the QESBA is considering a legal challenge to the legislation in order to protect their constitutional minority language rights.

Potential Impact on Catholic School Boards in Ontario

Under the Canadian Constitution, section 93 states that the provinces have exclusive jurisdiction over education. However, there is no formal definition of a school board within the constitution. Section 93 states:

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen’s Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen’s Protestant and Roman Catholic Subjects in Quebec;

(3) Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education;

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section. (50)

This generally means that provinces have the constitutional jurisdiction to determine how they structure and deliver education, subject to the limitations on that power by guaranteeing the rights and privileges of denominational schools. These limitations include matters impacting curriculum, the hiring of Catholic teachers, managing/controlling schools and those non-denominational aspects necessary to deliver the denominational elements of education.¹

Generally speaking, and for illustrative purposes only, the government of Ontario could change the governance structure of Catholic school boards and limit the role of trustees under its powers re: 93 (3). For example, the government could introduce a requirement to appoint persons to a school board. And, as is the case currently, change the compensation structure of trustees and require the adoption of a trustee code of conduct. In other words, the constitutional protections in 93.1 do not protect school boards from governance changes imposed by the province that are not connected to the denominational rights and those non-denominational aspects necessary to deliver the denominational elements of Catholic education.

Further, as is well known, the governments of Quebec and Newfoundland have ceased to fund Catholic education through a constitutional amendment process contained in section 43 of the Constitution. It requires a resolution passed at the provincial level and by the federal government.

If you have any questions or concerns please do not hesitate to contact me at 416-932-9460 or sandrews@ocsta.on.ca

¹ See Ontario English Catholic Teachers' Association v. Ontario (Attorney General), 2001, SCC 15 at para 30. Also see the judgement in Reference re: bill 30 per Justice Wilson, 1986, para 63.



Association des commissions scolaires anglophones du Québec
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 40
An Act to amend mainly the Education Act with regard to school organization
and governance

November 2019

Under Strict Embargo until QESBA's Appearance
Before the Parliamentary Committee
Scheduled for November 4, 2019 at 3:00 pm

Introduction

The Quebec English School Boards Association (QESBA) 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 40 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 Supreme Court of Canada, be respected. Notably, in this regard, QESBA's analysis of Bill 40 considers the legislation's impact on the English-language minority's right to the control and management of its community's institutions, rights repeatedly expressed in the decisions of the Supreme Court of Canada, 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.

Bill 40 represents the most significant school governance change since the creation of linguistic school boards more than twenty years ago. It will necessarily impose disruptive structural changes on a Québec public school system that is currently the envy of many OECD countries. This legislation needs to be very deliberately studied and its impacts carefully evaluated from the perspective of student success.

The conclusions listed in this brief are made with a detailed analysis based on this imperative to contribute to student success and on our community's right to control and manage our educational institutions. We conclude that:

- a) The burden is on the Government of Québec to demonstrate, through evidence-based public policy analysis, how Bill 40 will contribute to student success. In our estimation it has not adequately done so;
- b) While we recognize that the Government of Québec has made an effort to respond to the particular situation of the English-speaking community of Québec, Bill 40, in its present form, places unreasonable limits on our community's Constitutional rights to control and manage our educational institutions;
- c) Bill 40 accrues to the Minister of Education the power to intervene, direct, and exercise a significant degree of control over school service centres (hereafter referred to as "service centres"). Modifications contained in Bill 40 threaten the independence and autonomy of service centres as legal persons in the service of local communities, and in the case of English-language service centres, are elected by the population-at-large;
- d) Bill 40 creates a governance structure for English-language service centres that is convoluted, confusing, complicated and difficult to implement.

In coming to these conclusions, we must note that, considering the extent of the changes brought about by Bill 40 to the public education system of Québec, it is most

disturbing that the new structural and organizational model proposed in the Bill, has not been preceded by extensive public consultations and discussions throughout Québec. A meaningful dialogue between government and all interested parties in civil society, such as an “estates general” or green paper process would, in our estimation, have had a better chance at producing the broad public consensus necessary when changing institutions dedicated to the education of the most precious resource we have as a society, the youth of Québec.

Our Association, and the nine English school boards and one special status board it represents, very much regret the lack of such prior public consultation and input which has resulted in a proposal to remove a tier of democracy by eliminating elections by universal suffrage for French-language school boards in Québec. Universal suffrage elections are the most legitimate democratic process. They ensure citizens' input and accountability regarding the management of public money. They guarantee inclusion, identity and responsiveness at a local, community level. They also solidify the critical link between our education system and local communities. The elimination of elected school boards in the French network is a serious blow to local democracy, and any possible benefits of the Government's proposed model are not at all clear.

Historical Background

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. The member school boards of QESBA serve roughly 100,000 students in over 340 elementary and high schools, as well as 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 proved 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 reform, 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;
- 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 remain, 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 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’s English 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 control and management 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 drawn from 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. Our school boards have much to be proud of, attaining an 85% student success rate¹.

School Governance Reform

We have not seen any evidence-based comparative analysis demonstrating that the governance model proposed in Bill 40 will improve student success. In an era of evidence-based public policy, this is a significant shortcoming in the Government's reform, one that calls into question the underlying rationale of Bill 40.

One of the benefits of the existing universal suffrage elected school commissioners is that the commissioners represent the public's concern for the importance of education in society at large. Existing commissioners answer to their electorate, which currently consists of the population at large.

Regarding the more specific situation of the English-speaking community, section 23 of The Charter requires that English-language school boards be under the direct control and management of the English-language minority in Québec which it serves. In decision after decision of the Supreme Court of Canada, Francophones outside

¹ Taux de diplomation et qualification par commission scolaire au Québec, Édition 2018, Ministère de l'Éducation et de l'Enseignement supérieur. Cohorte de 2010 suivi jusqu'en 2016-2017, page 14

Québec have successfully litigated their rights under Section 23 to have unique and autonomous schools and school boards serving the French language and culture outside Québec. These decisions apply with equal force to the English public schools of Québec and their parents, students and communities.

The landmark Supreme Court case of *MAHE vs. ALBERTA (MAHE)*, [1990] 1 SCR 342 instructively says, “that purpose, [Section 23]... is to preserve and promote minority language and culture throughout Canada...it is essential, ...that...minority language...possess a measure of management and control over the educational facilities in which their children are taught...it is necessary because a variety of management issues in education, e.g., curricula, hiring, expenditures, can affect linguistic and cultural concerns...minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns....Section 23 clearly encompasses a right to management and control...in some circumstances an independent school board is necessary to meet the purpose of Section 23.”

The *MAHE* Supreme Court case notes that even where official language minority numbers do not warrant an independent school board, (and in Québec, English-language independent school boards are manifestly warranted), minimally, “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 arrangements for education and services for minority language students.”

It is interesting to cite the Chief Justice, writing for the Supreme Court almost thirty years ago, regarding the above enumeration: “I do not doubt that in future cases courts will have occasion to expand upon or refine these words. It is impossible at this stage in the development of s. 23 to foresee all of the circumstances relevant to its implementation”. [« Je ne doute pas que, dans d’autres affaires, les tribunaux auront l’occasion de développer ou de préciser ces principes. Il est impossible, à ce stade de l’évolution de l’art 23 de prévoir toutes les circonstances entourant son application ».]

The Chief Justice was prescient in his remarks. Jurisprudence regarding minority - language control and management rights has indeed evolved since the Mahé decision in 1990. This case law cannot be ignored by the government of Québec and legislation which complies with the English-speaking community’s now well-established Constitutional rights is not a compromise, it is a legal necessity.

RECOMMENDATIONS

Withdraw the Bill

1. Given that neither the need for wholesale changes to school governance nor how the proposed model would improve student success has been convincingly demonstrated, Bill 40 should be withdrawn pending an “estates general” style process on our education system including governance reform.

Exemption for English School Boards

2. Should the Government and the National Assembly decide to proceed with Bill 40, and given in its current form it imposes limitations on the English-speaking community’s Constitutional rights, as a official linguistic minority community, to control and manage our school system, the English school boards be granted the same blanket exemption from the legislation as the Cree School Board and Kativik Ilisarniliriniq, the school board of Nunavik.

If the James Bay and Northern Quebec Agreement is, quite rightly, sufficient cause to exempt the Cree and Inuit educational networks from Bill 40, then the Constitutional rights of the English-speaking community to control and manage our educational system merits similar treatment. Furthermore, this exemption was the approach adopted by the provinces of Nova Scotia, Prince Edward Island

and the Yukon Territory for minority French-language school boards when those jurisdictions undertook governance reform.

Necessary Modifications

3. Should the Government and the National Assembly reject the exemption of English school boards from Bill 40, we are convinced that the following modifications are necessary in order to, at a minimum, lessen the prejudice caused our community by the governance model proposed in Bill 40 and so that the legislation is workable.

School Service Centres Boards of Directors

As proposed, we have a number of serious reservations regarding the composition of the boards of directors of service centres, reservations which go to their representativity, effectiveness, and the method of election - all of which limit the exercise of our control and management rights.

Firstly, with only four (4) community members there is an imbalance in the representation of the general population on the boards. Therefore:

- 3.1. Boards of directors of English-language school service centres be composed of a minimum of eight (8) parent representatives and an equal

number of community representatives, one of each elected in the same electoral division.

Secondly, restricting parent representatives, who are to be elected by universal suffrage in our network, to membership on a school governing board at the time of their election eliminates the vast majority of parents from being candidates for the service centre board. Additionally, this double requirement to sit on a governing board and the service centre board will place a significant volunteer burden on the already busy daily lives of parents. It also runs the risk that parent representatives may feel that their primary allegiance is to their local school.

Therefore:

- 3.2. The requirement that parent representatives on the board of directors of English-language school service centres be a member of a school governing board at the time of their election should be removed.

Thirdly, the age and “expertise” requirements for community representatives on the boards of service centres are difficult to implement in practice and represent an unreasonable limit on who can run for these positions. Democracy, and for that matter the exercise of control and management rights, are not only about who can vote, but it is also about who can run. Therefore:

- 3.3. The age and “expertise” requirements for community representatives on the boards of directors of English-language school service centres should be removed.

Fourthly, we have serious reservations about the presence of service centre staff as voting members of the board of directors. This introduces a strongly corporatist element on these boards. The potential for institutionalized conflicts of interests (for example in the adoption of local collective agreements, the assignment of personnel, the resolution of grievances) are real. Furthermore, the presence of a significant block of board members who may not be minority-language rights holders clearly contravenes the Constitutional rights of the official language minority community to control and manage our school system. Therefore:

- 3.4. The positions of school service centre staff be removed from the composition of the board of directors.
 - 3.4.1. If the staff positions are maintained on the board of directors of English-language school service centres, the staff must be rights holders in the sense of those provisions of Québec’s Charter of the French Language.

Fifthly, we do not understand the shift to three-year mandates, with the attendant responsibility of organizing and financing general elections for the

boards of English-language service centres every three years rather than the current four. Therefore:

- 3.5. The mandate of members of the boards of directors of English-language school service centres should be four years.

Finally, we believe that restricting the chair and vice-chair to parent representatives is too limiting and may deprive the service centre board of the best qualified candidate for these positions. Additionally, since the chair and vice-chair of service centre boards are to be elected by universal suffrage the chair has the legitimacy to be the official spokesperson of the service centre.

Therefore:

- 3.6. The chair and vice-chair of the boards of directors of English-language school service centres be elected by the board from among the parent or community representatives.

- 3.7. The chair of the board or the person he/she delegates be the official spokesperson of the board of directors.

Elections for School Service Centres:

QESBA has long held that school board elections should be held on the same day as municipal elections to both significantly reduce cost and to encourage larger voter participation.

Additionally, Bill 40 specifies that there be eight to seventeen parent representatives on the boards of English-language service centres, elected in electoral divisions (commonly referred to as “wards” in English). We understand that this broad range is meant to reflect the current number of wards in English school boards, which vary from a minimum of nine to a maximum of twelve. Given our recommendation that there be an equal number of parent and community representatives, one each elected per ward and given that this could produce service centre boards with as many as 28 members (if the government retains the four staff representatives), we suggest that there is need to reduce the number of wards through redistribution. Therefore:

3.8. In order to meet the legal deadlines for the redistribution of school service centre electoral divisions as necessary, the elections currently scheduled for November 1, 2020 should be held in November 2021 to coincide with municipal elections or, in June 2021 if the Government rejects twinning school service centre elections with municipal elections.

Bill 40 affords us the opportunity to re-examine the eligibility requirements for electors in a language-based school system. Therefore:

3.8.1. Electors of English-language school service centres be rights holders as defined by Québec's Charter of the French Language.

In 2015, the English-speaking community, through the English School Boards Election Systems Study Panel, commonly referred to as the Jennings Report after its Chair, former MP the Hon. Marlene Jennings, made a series of recommendations regarding school board elections. In addition to finding that "the overwhelming majority of the organizations, stakeholders, experts and individuals who made submissions to [the Panel] were in agreement that the current system of universal suffrage of Québec's English school boards is the model which best respects the English Minority Communities' Constitutional Rights on Section 23 of the Charter ..." ², the Panel examined ways to make school board elections more accessible. Therefore:

3.8.2. In order to ensure the broadest accessibility possible, the Government mandate the DGEQ to work with English-language school service centres to implement alternate voting methods and measures that facilitate voter registration on the electoral list.

² Report of the [English School Boards Election Systems Study Panel](#), September 16, 2015, page 20.

Centralisation of Powers:

Bill 40 clearly expands the powers of the Minister of Education, some of which are enumerated below. Taken individually these additional powers may not appear that significant, but taken as a whole a pattern emerges which compromises the independence and autonomy of service centres as legal persons in the service of local communities. This is particularly relevant for English-language service centres which are to be governed by elected bodies. Therefore:

- 3.9. The power of the Government to modify the territories of English-language school service centres, by order, on its own initiative (section 46 of the Bill), is very broad and could be exercised in a manner inconsistent with section 23 of the Charter. This power should be circumscribed in order to respect the control and management rights of the linguistic minority community.
- 3.10. Section 308 of the Bill, which empowers the Minister of Education to retroactively annul certain decisions of school boards, is excessive given the powers already conferred upon the Minister in the Education Act. This section be removed.

3.11. The power conferred on the Minister of Education to unilaterally determine objectives or targets relating to the administration, organization or operation of school service centres is a significant restriction of the autonomy and independence of these elected institutions. Section 137 of the Bill be removed.

3.12. The new regulatory power conferred on the Minister of Education to prescribe the information that a school service centre's annual report must contain, and the format of the report, is another unnecessary interference into the autonomy and independence of these elected institutions. Section 134 of the Bill be removed.

Conclusion

The Québec English School Boards Association is firmly convinced that the Government of Québec is on the wrong track with Bill 40. We have seen no convincing evidence that the Bill will improve student success. It has not been met with broad support from educational stakeholders. According to a recent poll Quebecers do not view structural reform as an educational priority. It will plunge Québec's school system into years of structural changes, thereby acting as a distraction to our primary mission of better educating our students.

On the other side of the coin, two polls done by Leger have confirmed that English-speaking Quebecers are strongly attached to their school boards, and trust them to defend the interests of our community. English school boards have a student success rate that surpasses that of the Québec average. The old adage “if it isn’t broken, don’t fix it” comes to mind.

We also believe that as drafted, and despite the Government’s efforts to hear our concerns, Bill 40 represents a limitation on our community’s Constitutional control and management rights. For all of the above reasons, the Bill should be withdrawn and the Government should go back to the drawing board.

In the event that the Government and the National Assembly decide to push ahead with Bill 40, and since, in its current form, the Bill imposes limits on our community’s Constitutional rights, as an official language minority community to manage and control our school system, English School Boards should receive a blanket exemption from the provisions of the legislation.

Judged by student results, English school boards are a success story. We should be focussing on how to make school boards better; not on what replacement model should be imposed on our community. The government should work consensually with school boards and other stakeholders to strengthen the current system for the benefit of our students. We are willing to be a part of this process. We hope that the Government is as well.