**English translation of the judgment of the Court**

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| Procureur général du Québec c. Quebec English School Boards Association | 2025 QCCA 383 |
| COURT OF APPEAL |
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| CANADA |
| PROVINCE OF QUEBEC |
| MONTREAL  | SEAT |
| No.: | 500-09-030704-233 |
| (500-17-112190-205) |
|  |
| DATE: | April 3, 2025 |
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| CORAM: | THE HONOURABLE | ROBERT M. MAINVILLE, J.A.CHRISTINE BAUDOUIN, J.A.JUDITH HARVIE, J.A. |
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| ATTORNEY GENERAL OF QUEBEC |
| APPELLANT – Defendant |
| v. |
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| QUEBEC ENGLISH SCHOOL BOARDS ASSOCIATION |
| LESTER B. PEARSON SCHOOL BOARD |
| ADAM GORDON |
| RESPONDENTS – Plaintiffs |
| and |
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| NEW FRONTIERS SCHOOL BOARD |
| SHANNON KEYES |
| ENGLISH MONTREAL SCHOOL BOARD |
| WESTERN QUEBEC SCHOOL BOARD |
| RIVERSIDE SCHOOL BOARD |
| EASTERN TOWNSHIPS SCHOOL BOARD |
| SIR WILFRID LAURIER SCHOOL BOARD |
| EASTERN SHORES SCHOOL BOARD |
| CENTRAL QUEBEC SCHOOL BOARD |
| CHRIS EUSTACE |
| IMPLEADED PARTIES – Interveners |
| and |
|  |
| QUEBEC COMMUNITY GROUPS NETWORK |
| INTERVENER |
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| JUDGMENT |
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1. The Attorney General of Quebec (the “AGQ”) appeals against the judgment dated August 2, 2023, rendered by the Honourable Sylvain Lussier of the Superior Court, district of Montreal,[[1]](#footnote-1) which declared that certain provisions of the *Act to amend mainly the Education Act with regard to school organization and governance* (“*Bill 40*”)[[2]](#footnote-2) and certain provisions of the *Education Act* (the “*EA*”)[[3]](#footnote-3) are of no force or effect with respect to Quebec’s English‑language school boards because they unjustifiably infringe the rights guaranteed to Quebec’s minority language group by s. 23 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).
2. The conclusions of the impugned judgment are worded as follows:

[translation]

[438] **GRANTS** in part the applicants’ application for judicial review;

[439] **DECLARES** **THAT** sections 50, 52 in respect of the addition of section 155 to the *EA*, 66, 91, 93, 196, 208, 212, and 216 of the *Act to amend mainly the Education Act with regard to school organization and governance* and 155 and 473.1 of the *Education Act* infringe the rights guaranteed under section 23 of the *Canadian Charter of Rights and Freedoms*;

[440] **DECLARES** that these infringements cannot be justified under section 1 of the *Canadian Charter of Rights and Freedoms*;

[441] **DECLARES THAT** these provisions are inoperative with regard to the English‑language school boards of Quebec;

[442] **DISMISSES** the application concerning sections 105, 142, 329, and 330 of the *Act to amend mainly the Education Act with regard to school organization and governance*;

[443] **SUSPENDS** the declaration of inoperability of section 15 of the *Act respecting school elections to elect certain members of the boards of directors of English‑language school service centres* for a period of 18 months from the date of this judgment;

[444] **EXTENDS** the suspension of the application of the *Act* and other statutory provisions ordered on August 10, 2020, until the time limit to appeal this judgment has expired;

[445] **SUSPENDS** for a period of six months from the date of this judgment the application of the statutory provisions listed in the Schedule to this judgment[[[4]](#footnote-4)] to the English‑language school boards or school service centres;

[446] **RETAINS** jurisdiction over this file to resolve any issues that may arise in this respect;

[447] **THE WHOLE**, with legal costs, including experts’ fees, in favour of the applicants.

1. The respondents did not lodge an incidental appeal. The interveners before the Superior Court are parties to the appeal as impleaded parties. Additionally, the Quebec Community Groups Network was authorized intervene on appeal.[[5]](#footnote-5) The appeal was heard over three days, from January 27 to 29, 2025.
2. After setting out the general context for *Bill 40*, describing the proceedings in first instance and summarizing the trial judgment, the Court will address the general scope of the linguistic minority’s rights of management and control over its educational facilities and will identify the holders of those rights. It will then deal with the analysis of the provisions of *Bill 40* that were found to infringe s. 23 of the *Charter* and the justification submitted for these provisions under s. 1 of *Charter*. The Court will then turn to the question of the state’s duty to consult the linguistic minority as part of the law-making process. Lastly, the Court will address the matter of remedies.

**CONTEXT**

1. **General context**
2. Section 93 of the *Constitution Act, 1867* gives the provinces the exclusive power to legislate in relation to education. Within certain provinces, however, including Quebec until 1997, this power is subject to protections for the Catholic or Protestant religious minorities, as the case may be: [[6]](#footnote-6)

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| **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 Dissentient Schools of the Queen’s Protestant and Roman Catholic Subjects in Quebec;**3.** Where in any Province a System of Separate or Dissentient 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.  | **93.** Dans chaque province, la législature pourra exclusivement décréter des lois relatives à l’éducation, sujettes et conformes aux dispositions suivantes :**1.** Rien dans ces lois ne devra préjudicier à aucun droit ou privilège conféré, lors de l’union, par la loi à aucune classe particulière de personnes dans la province, relativement aux écoles séparées (*denominational*);**2.** Tous les pouvoirs, privilèges et devoirs conférés et imposés par la loi dans le Haut-Canada, lors de l’union, aux écoles séparées et aux syndics d’écoles des sujets catholiques romains de Sa Majesté, seront et sont par la présente étendus aux écoles dissidentes des sujets protestants et catholiques romains de la Reine dans la province de Québec;**3.** Dans toute province où un système d’écoles séparées ou dissidentes existera par la loi, lors de l’union, ou sera subséquemment établi par la législature de la province — il pourra être interjeté appel au gouverneur-général en conseil de toute loi ou décision d’aucune autorité provinciale affectant aucun des droits ou privilèges de la minorité protestante ou catholique romaine des sujets de Sa Majesté relativement à l’éducation;**4.** Dans le cas où il ne serait pas décrété telle loi provinciale que, de temps à autre, le gouverneur-général en conseil jugera nécessaire pour donner suite et exécution aux dispositions du présent article, — ou dans le cas où quelque décision du gouverneur-général en conseil, sur appel interjeté en vertu du présent article, ne serait pas mise à exécution par l’autorité provinciale compétente — alors et en tout tel cas, et en tant seulement que les circonstances de chaque cas l’exigeront, le parlement du Canada pourra décréter des lois propres à y remédier pour donner suite et exécution aux dispositions du présent article, ainsi qu’à toute décision rendue par le gouverneur-général en conseil sous l’autorité de ce même article.  |

1. Although there is some overlap in Canada between the Catholic and Protestant religions and the French and English languages,[[7]](#footnote-7) the constitutional protections conferred by paragraphs (1) to (4) of s. 93 apply only to religious education and not to the language of instruction, as the Privy Council decided over a century ago in *Mackell*.[[8]](#footnote-8) Thus, until the *Charter* came into force in 1982, the Canadian Constitution offered no constitutional protection to members of the English and French linguistic minorities as regards the language of instruction of their children.
2. That said, in Quebec, unfettered choice of the language of instruction was the norm for the first century after Confederation, and indeed, instruction in Quebec’s Protestant school boards was largely (though not exclusively) in English. A large English‑language teaching sector also developed within Quebec’s Catholic school boards, mainly in the Montreal area.
3. For purposes of this appeal, it is not necessary to undertake a detailed historical analysis of minority language instruction, nor to deal with the abundant and complex case law regarding s. 93 of the *Constitution Act, 1867*.[[9]](#footnote-9) Suffice it to say that in Quebec, English‑language instruction at the primary and secondary levels was not prohibited for any student whose parents requested it. Moreover, in Quebec, such instruction was provided by local educational institutions whose management and control were generally entrusted to local elected officials or to representatives appointed by these officials. In short, the constitutional protections conferred by s. 93 on Quebec’s Protestant minority, combined with government policies on the choice of the language of instruction, enabled a vigorous English‑language educational sector to flourish in Quebec. It can thus be stated, as the Court recently did in *Organisation mondiale sikhe du Canada*, that section 93 of the *Constitution Act, 1867* [TRANSLATION] “is the precursor to s. 23 of the *Canadian Charter*”.[[10]](#footnote-10)
4. Access to primary and secondary education in English, however, has been restricted in Quebec since the 1970s. In *Quebec Association of Protestant School Boards*,[[11]](#footnote-11) the Supreme Court provided a comprehensive overview of the various measures taken in that regard, from Bill 63 in 1969[[12]](#footnote-12) to the *Charter of the French Language*,[[13]](#footnote-13) which came into force in 1977.
5. It was these restrictions on access to instruction in the language of Quebec’s English linguistic minority, combined with the lack of eagerness – if not a wait-and-see attitude or even a refusal in some cases – on the part of other Canadian provinces to provide instruction in the language of the French linguistic minority outside Quebec, that led to the enactment of s. 23 of the *Charter*.[[14]](#footnote-14)This provision reads as follows:

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| **23** **(1)** Citizens of Canada**(a)** whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or**(b)** who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,have the right to have their children receive primary and secondary school instruction in that language in that province. **(2)** Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.**(3)** The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province**(a)** applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and**(b)** includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds. | **23** **(1)** Les citoyens canadiens :**a)** dont la première langue apprise et encore comprise est celle de la minorité francophone ou anglophone de la province où ils résident,**b)** qui ont reçu leur instruction, au niveau primaire, en français ou en anglais au Canada et qui résident dans une province où la langue dans laquelle ils ont reçu cette instruction est celle de la minorité francophone ou anglophone de la province,ont, dans l’un ou l’autre cas, le droit d’y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue. **(2)** Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.**(3)** Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d’une province :**a)** s’exerce partout dans la province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l’instruction dans la langue de la minorité;**b)** comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d’enseignement de la minorité linguistique financés sur les fonds publics. |

1. It should be noted that s. 23(1)(*a*) does not apply in Quebec. Indeed, s. 59 of the *Constitution Act, 1982* provides as follows:

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| **59** **(1)** Paragraph 23(1)(a) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.**(2)** A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec.**(3)** This section may be repealed on the day paragraph 23(1)(a) comes into force in respect of Quebec and this Act amended and renumbered, consequentially upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada. | **59** **(1)** L’alinéa 23(1)a) entre en vigueur pour le Québec à la date fixée par proclamation de la Reine ou du gouverneur général sous le grand sceau du Canada.**(2)** La proclamation visée au paragraphe (1) ne peut être prise qu’après autorisation de l’assemblée législative ou du gouvernement du Québec.**(3)** Le présent article peut être abrogé à la date d’entrée en vigueur de l’alinéa 23(1)a) pour le Québec, et la présente loi faire l’objet, dès cette abrogation, des modifications et changements de numérotation qui en découlent, par proclamation de la Reine ou du gouverneur général sous le grand sceau du Canada. |

To date, however, neither the Quebec National Assembly nor the government of Quebec has authorized the coming into force in Quebec of s. 23(1)(*a*) of the *Charter*.

1. Section 23 of the *Charter* introduced minority language education rights into the Canadian Constitution for the first time. Its general purpose 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 inhabitants. Section 23 aims to achieve this goal by granting to minority language parents who are Canadian citizens minority language educational rights throughout Canada for their children.[[15]](#footnote-15)
2. Section 23(3)(*b)* establishes that the right of citizens of Canada to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province also includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.
3. In its early decisions interpreting s. 23(3)(*b*), the Supreme Court concluded that, when the number of children warrants it, the provision also allows for the establishment of an independent minority language school board.[[16]](#footnote-16)
4. If the number of children does not permit the establishment of such a school board, s. 23(3)(*b*) nonetheless guarantees linguistic minority representation, in proportion to the number of students involved, on local boards or other public authorities which administer minority language instruction or facilities.[[17]](#footnote-17)
5. The minority language representatives have exclusive authority to make decisions relating to the minority language instruction and facilities, including with respect to: (a) expenditures of funds provided for such instruction and facilities; (b) the appointment and direction of those responsible for the administration of such instruction and facilities; (c) the establishment of programs of instruction; (d) the recruitment and assignment of personnel (including teachers); and (e) the making of agreements for education and services for minority language pupils.[[18]](#footnote-18)
6. These linguistic educational rights, which include powers of management and control over minority facilities, are in addition to and overlap with the rights conferred on Protestant and Catholic minorities by s. 93 of the *Constitution Act, 1867*. That said, the growing secularization of Quebec society as a whole since the Quiet Revolution, which was greatly accelerated in the decades following the enactment of the *Charter*, led to a reconsideration of Quebec’s educational structures, which until then had been largely built on the basis of denominational school boards. Over time, the idea of replacing this model with a network of linguistic school boards arose in Quebec, leading to a number of bills to this effect.
7. Although such a reform could have been achieved without a constitutional amendment,[[19]](#footnote-19) the practical and operational challenges of reconciling the new linguistic school boards with the denominational education rights conferred by s. 93 of the *Constitution Act, 1867* proved highly complex to resolve. As a result, the idea of a constitutional amendment to exempt Quebec from the application of paragraphs (1) to (4) of s. 93 took shape.
8. One of the main political obstacles to such an amendment was the fear, within the English‑speaking community, that the community’s powers of management and control over the new linguistic school boards would not be protected, whereas s. 93 at least guaranteed Quebec Protestants the management and control of an educational network that *de facto* comprised a large segment of the linguistic minority. However, in light of the scope given to s. 23 of the *Charter* by the Supreme Court of Canada with regard to the management and control of minority language educational facilities by the minority, notably in *Mahe*, both the Quebec and Canadian governments reassured Quebec’s English linguistic minority that these fears were ill founded.
9. Thus, during the debates in the National Assembly regarding the constitutional amendment introducing s. 93A into the *Constitution Act, 1867* for the purpose of making paragraphs (1) to (4) of s. 93 inapplicable to Quebec, the then Minister of Education expressed the government of Quebec’s policy of allowing Quebec’s English community to manage its educational institutions, as, in fact, the *Charter* recognizes:[[20]](#footnote-20)

[translation]

The second basis for this policy, is to allow the English‑speaking community to manage its institutions, to be responsible for its entire school system, which is recognized by the Charter, which we are willing to grant, using the quickest method, that is, this [constitutional] amendment, this motion proposed by my colleague, the Minister responsible for Canadian Intergovernmental Affairs. So in that way, that is the basis for our desire to amend s. 93.

[Underlining added]

1. The National Assembly’s resolution to amend s. 93 recognizes the established rights of the English‑speaking community of Quebec, including the right to have those of its children who are eligible receive their instruction in English‑language educational facilities that are “under the management and control of this community”.[[21]](#footnote-21)
2. During the debates on the enactment of this constitutional amendment, the federal government, via its Minister of Intergovernmental Affairs, who was in charge of the file, informed the Canadian Parliament that the amendment would not have a negative impact on the English‑speaking minority in Quebec, given the constitutional rights guaranteed under s. 23 of the *Charter*, in particular the right of that linguistic minority to have separate school boards managed and controlled by it:[[22]](#footnote-22)

[…]

In that connection I reiterate that Quebec’s anglophone minority, which has traditionally controlled and managed its own school system, thanks to protections granted to Protestants under section 93, can support amending that provision in all confidence. That is because its rights have been better protected since the coming into force of the Constitution Act, 1982, specifically section 23 of the Canadian charter.

Unlike section 93, section 23 of the Canadian charter has the specific objective of providing francophone and anglophone minorities with linguistic guarantees with respect to education. It has been interpreted progressively and generously by the courts. In effect, section 23 guarantees official language minorities the right to manage and control their own schools and even their own school boards. A number of groups and experts confirmed that during their testimony to the committee.

In that respect the establishment of linguistic school board[s] will enable the anglophone community to consolidate its school population of [*sic*] and gain the maximum benefit from the guarantees under section 23.

[Underlining added]

1. The constitutional amendment was finally approved and came into force in 1997.[[23]](#footnote-23) It introduced s. 93A into the *Constitution Act, 1867*, which provision reads as follows:

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| **93A** Paragraphs (1) to (4) of section 93 do not apply to Quebec. | **93A** Les paragraphes (1) à (4) de l’article 93 ne s’appliquent pas au Québec. |

1. As a result, Quebec’s denominational school boards were reorganized into linguistic school boards governed by councils of elected commissioners, including English‑language school boards controlled and managed by Quebec’s English‑speaking minority. Obviously, s. 93 of the *Constitution Act, 1867*, which confers full jurisdiction over education to the provincial legislatures, remains in force, but it must nonetheless be interpreted and applied with regard to the rights and guarantees set out in s. 23 of the *Charter*.[[24]](#footnote-24)
2. Over time, a number of factors, including low voter turnout in school elections, particularly in the French‑speaking sector,[[25]](#footnote-25) led some political players to question the legitimacy of the school governance model based on elected representatives. Indeed, the election platform of the provincial political party Coalition Avenir Québec (the “CAQ”) included the abolition of school boards, with the aim of transforming them into school service centres:[[26]](#footnote-26) [translation] “The school service centres, which will be less costly and eventually fewer in number, will be integrated into the Ministère de l’Éducation. Their mission will be to provide administrative services and make school management as easy as possible.”
3. Following the provincial election on October 1, 2018, the CAQ was called upon to form a majority government in the National Assembly. The reform of primary and secondary education management structures envisaged in its electoral platform was implemented through *Bill 40*.
4. ***Bill 40***
5. *Bill 40* was introduced in the National Assembly on October 1, 2019, passed in final form on February 8, 2020, and assented to the same day. It contains 335 sections and two schedules that mainly amend the *EA*, but also over 80 other statutes, including the *Act respecting school elections*,[[27]](#footnote-27) which it renames the *Act respecting school elections to elect certain members of the boards of directors of English‑language school service centres* (the “*New Act respecting school elections*”).[[28]](#footnote-28)
6. For the French sector, the provisions of *Bill 40* gradually came into force and are now fully in effect in this sector.[[29]](#footnote-29) Such is not the case, however, for the English sector, as the Superior Court ordered a stay of application of *Bill 40* for this sector,[[30]](#footnote-30) a stay that was confirmed by the Court.[[31]](#footnote-31) Following this stay and in light of the pending court challenge, the government, by order in council (*O.C. 1077-2021*), adopted a regulation delaying its coming into force for this sector.[[32]](#footnote-32)
7. As the Minister of Education (the “Minister”), who was in charge of shepherding *Bill 40* through the adoption process during the parliamentary debates, pointed out, the bill introduced [translation] “a paradigm shift” in the education system by [translation] “inverting the pyramid of powers”:[[33]](#footnote-33)

[translation]

[…] But this is where one cannot exactly transpose what commissioners do versus what people on a board of directors will do. It’s a paradigm shift, the pyramid of powers is inverted, the people who will sit on the boards will not have the same mission, the same workload, and, in fact, there will be training so they can understand their roles, duties and responsibilities. But in that respect, I can understand that for someone who is looking at the bill and thinks that we are simply going to ask the board members to do what the commissioners do, but to a lesser degree, that is a problem. That said, that’s not it. The mission will be different. They will be asked to come and sit on a board, to be a kind of guardian of fairness, a guardian ... that decisions are made according to the rules, and they will not be asked to govern a governing body, as school boards are at present. And that’s where there’s a paradigm shift, and that’s where it requires a little more effort, but I understand that concern.

[Underlining added]

1. A careful reading of *Bill 40* leads one to conclude, as the trial judge did, that it (a) effects a significant transfer of the power of management and control over the English‑language minority’s educational system to the Minister and to staff of the school service centres; and (b) places major restrictions on the candidacy of a significant segment of the English‑speaking community for election as members of the boards of directors of the new school service centres.
2. *Bill 40* institutes a profound transformation in the governance of primary and secondary education. There is no need to describe each of its many provisions, nor all of the numerous changes it makes. A general overview of the main features that are relevant to this appeal will suffice.
3. First and foremost, *Bill 40* transforms school boards governed by elected councils of commissioners into school service centres,[[34]](#footnote-34) which are now run by a board of directors. It also radically alters the mission of these school service centres in relation to that of school boards.
4. Whereas, prior to the adoption of *Bill 40*, s. 207.1 of the *EA* provided that the mission of a school board was “to organize educational services for the benefit of the persons who come under its jurisdiction and ensure the quality of those services [and] to see to the success of students”, the new mission of a school service centre, set out in s. 207.1 as amended by *Bill 40*, is now “to establish educational institutions in its territory, to support those institutions and to accompany them by procuring access to the goods and services and offering the optimal conditions enabling them to provide students with quality educational services and see to their educational success”.
5. Thus, the role of the school boards has been restricted, as that role has been transformed – from one that entails organizing educational services and controlling their quality – to the more secondary role now conferred on school service centers – that of providing support as well as goods and services so that optimal conditions to dispense educational services are offered. As its new name suggests, a “service centre” is now responsible for providing services in accordance with policies set by the government and objectives defined by a committee of employees. It is no longer a body responsible for organizing educational services and ensuring their quality. This represents a major paradigm shift.
6. The role of a school service centre’s board of directors is now one of oversight rather than direction, as decisions are made at other levels and must comply with numerous ministerial directives that address not only pedagogy, but administration and budgets as well. It is worth recalling that during *Bill 40* debates in the National Assembly, the Minister acknowledged that the new board of directors would become [translation] “a kind of guardian of fairness, a guardian ... that decisions are made according to the rules” because “they will not be asked to govern [...]”.[[35]](#footnote-35)
7. These role and mission changes are reflected in the composition of the board of directors, the abolition of remuneration for its members, the transfer of responsibilities to the director general (who now acts as spokesperson) and to employee committees (notably the commitment-to-student-success committee), and the increased powers of the Minister.
8. In the French‑speaking sector, the elected council of commissioners is replaced by a board of directors made up of fifteen members who are appointed rather than elected, namely:[[36]](#footnote-36)
9. five members who are parents of students attending an institution under the school service centre’s jurisdiction, who are members of the parents’ committee, who are not members of the school service centre’s staff[[37]](#footnote-37) and who sit on the governing board of a school;[[38]](#footnote-38) each of these parent members represents a district[[39]](#footnote-39) and is designated by the parents’ committee in accordance with the terms determined by that committee and in accordance with the territorial division established by the director general of the school service centre;[[40]](#footnote-40)
10. five members designated by and from various categories of employees of the[[41]](#footnote-41) school service centre, in accordance with the terms determined by the centre’s director general;[[42]](#footnote-42) and
11. five community representatives who must satisfy certain specific expertise profiles[[43]](#footnote-43) and who are designated by co-optation by the other two categories of board members.[[44]](#footnote-44)
12. In the English‑speaking sector, *Bill 40* preserves school elections for most board of director positions but establishes eligibility criteria for running in these elections that *de facto* disqualify a very large segment of the linguistic minority.
13. The composition of the board of directors in the English‑speaking sector can fluctuate from 16 to 34 members,[[45]](#footnote-45) namely:

(a) 8 to 17 parent representatives who are parents of students attending an institution under the school service centre’s jurisdiction, who are not members of the centre’s staff and who sit as parent representatives on the governing board of a school;[[46]](#footnote-46) each parent representative is elected by universal suffrage of the electors in the territory of the electoral division concerned, which is established for this purpose on the territory of the school service centre;[[47]](#footnote-47)

(b) 4 to 13[[48]](#footnote-48) community representatives who are domiciled in the school service centre’s territory, who are not members of the school service centre’s staff, and who satisfy certain specific expertise profiles, namely: “*(a)* at least one person with expertise in governance, in ethics, in risk management or in human resources management; *(b*) at least one person with expertise in finance or accounting or in financial or physical resources management; *(c*) at least one person from the community, municipal, sport, cultural, health, social services or business sector; and *(d*) at least one person aged 18 to 35”;[[49]](#footnote-49) these members are elected by universal suffrage of the electors in the entire territory of the school service centre;[[50]](#footnote-50) and

(c) four members of the school service centre’s staff designated by and from various categories of employees of the centre, in accordance with the terms determined by the centre’s director general.[[51]](#footnote-51)

1. It should be noted that the executive committee of the council of commissioners is abolished, correspondingly reducing the involvement of board of directors members in the management of the school service centre, and also reducing the number of meetings involving members of the board of directors.[[52]](#footnote-52) In addition, the positions of chair and vice-chair of the board of directors are now reserved for members who are parents of students enrolled at an educational institution of the school service centre.[[53]](#footnote-53)
2. The members of the board of directors are not entitled to remuneration, as was previously the case for elected commissioners. They now receive an attendance allowance for taking part in a board of directors meeting.[[54]](#footnote-54) The value of the latter results in a significant reduction in compensation compared with the previous remuneration.
3. The function of spokesperson, which used to be entrusted to the school board chair, now belongs to the director general of the school service centre.[[55]](#footnote-55) In addition, a new employee committee, referred to as the commitment-to-student-success committee, has been created, with the primary mission of establishing and proposing the school service centre’s policy directions, objectives and targets, which were previously the sole responsibility of the council of commissioners.[[56]](#footnote-56)
4. The new role and mission of school service centres contrasts with the Minister’s increased powers. These powers accumulated over the years that followed the replacement of denominational school boards with linguistic school boards. *Bill 40* continues in this vein by further expanding these ministerial powers with regard to the new school service centres – powers that, in fact, increased considerably once again through legislation passed since *Bill 40*. Here are but a few examples, among several:
5. since 2009, the Minister may determine, for all school boards or based on the situation of one or certain school boards, policy directions, objectives or targets they must take into account in preparing their commitment-to-success plans: s. 459.2 of the *EA*;
6. since 2016, the Minister may issue directives to a school board concerning its administration, organization, operation and actions: s. 459.6 of the *EA*;
7. since 2018, the Minister may, for any school board, prescribe terms governing the coordination of the strategic planning process between the educational institutions, the school board and the department; he may also order a school board to defer publication of its commitment-to-success plan or amend it so as, on the one hand, to harmonize the period covered by the plan with that covered by the department’s strategic plan in accordance with any terms prescribed and, on the other hand, to ensure that the plan is consistent with the strategic directions and objectives of the department’s strategic plan: s. 459.3 of the *EA*;
8. since 2020 (i.e., with the enactment of *Bill 40*), the Minister may determine, for all the school service centres or even for one of them, objectives or targets relating to their administration, organization or operation: s. 459.5.4 of the *EA*;
9. since 2020 as well (i.e., with the enactment of *Bill 40*), the Minister may require that a service centre share its resources or services, especially administrative resources and services, with another school service centre, or even with another public body, including a municipality: s. 215.2 of the *EA*;
10. since 2023 (i.e., after *Bill 40* was enacted), the Minister may annul any decision by a school service centre that he considers not to be consistent with the targets, objectives, policy directions or directives he has established; he may then make the decision that, in his opinion, ought to have been made in the first place. The same principle applies where the Minister is of the opinion that the centre should make a decision to ensure that it complies with the targets, objectives, policy directions and directives he has established: s. 459.7 of the *EA*;[[57]](#footnote-57)
11. still since 2023 (i.e., after *Bill 40* was enacted), the Minister may, after consulting with the school service centres concerned, determine policy directions that must be taken into account in organizing educational services for all school service centres or based on the situation of one or certain school service centres: s. 459.0.0.1 of the *EA*;[[58]](#footnote-58) and
12. in addition, the Minister establishes budgetary rules for the school boards (now school service centres): s. 472 of the *EA*; since 2016,[[59]](#footnote-59) these rules enable the Minister to stipulate that certain budgetary measures are intended for a transfer to educational institutions to be used exclusively for specific purposes determined by him: s. 473.1 of the *EA*.
13. There are many more such examples. Suffice it for our purposes, however, to note that the primary and secondary school system is increasingly under the Minister’s control, and that the school boards’ leeway in managing and controlling education has diminished considerably over time, to the benefit of ministerial powers. This leeway has truly been put to the test under the aegis of *Bill 40* as regards the new school service centres. There is a strong trend towards direct ministerial control of the entire school system.
14. **The proceedings undertaken**
15. As soon as *Bill 40* was introduced in the National Assembly, many members of the English‑speaking minority voiced strong opposition to it, notably on the ground that it would be incompatible with the rights guaranteed by s. 23 of the *Charter*.
16. On May 15, 2020, the Quebec English School Boards Association (which encompasses all of the province’s English‑language school boards), the Lester B. Pearson School Board and Adam Gordon, a rights holder under s. 23 of the *Charter*, filed an application with the Superior Court to have certain provisions of *Bill 40* and the *EA* declared inapplicable on the ground that they are inconsistent with s. 23. The proceedings also asked the Superior Court to order a stay of the application of *Bill 40* to Quebec’s English‑language school boards while the judicial proceedings were pending. Quebec’s other English‑language school boards intervened in the proceedings in support of the applicants (now the respondents on appeal): the New Frontiers, English Montreal, Western Québec, Riverside, Eastern Townships, Sir Wilfrid Laurier, Eastern Shores and Central Québec school boards.
17. The respondents do not challenge *Bill 40* in its entirety. For example, they do not challenge the new mission and role of school service centres, nor do they seek a declaration of unconstitutionality of all the many powers devolved to the Minister over time, targeting, instead, only some of them. They limit their challenge to certain specific aspects of *Bill 40*, arguing that they are contrary to the management and control rights flowing from s. 23(3)(*b*) of the *Charter.*
18. Thus, although *Bill 40* establishes a new and complex integrated structure, the respondents’ application for a declaration of constitutional invalidity targets only 13 of the 335 sections of this statute, namely:
19. section 50, which deals with the composition of the board of directors of a school service centre;
20. section 52, which provides that only members of the board of directors sitting as parent representatives are eligible for the positions of chair and vice-chair;
21. section 66, which deals with the new compensation scheme for board of director members;
22. section 91, which establishes the commitment-to-student-success committee and its mandate;
23. section 93, which transfers the role of spokesperson from the chair to the director general;
24. section 105, which allows the Minister to require that a service centre share its resources or services, especially administrative resources and services, with any other school service centre, or even with another public body, including a municipality;
25. section 142, which allows the Minister to determine, for all the school service centres, or even for one of them, objectives or targets relating to their administration, organization or operation;
26. section 196, which deals with the method of electing members sitting as parent or community representatives on the board of directors of an English‑language school service centre;
27. section 208, which imposes certain professional requirements for purposes of electing community representatives to the board of directors of an English‑language school service centre;
28. section 212, which amends s. 15 of the *New* *Act respecting school elections*, the latter section being one that governs the right to vote in elections in the English‑language school system;
29. section 216, which deals with the qualification requirements for members of the board of directors of an English‑language school service centre, in particular, the requirement that parent representatives must sit on the governing board of a school under the centre’s jurisdiction; and
30. sections 329 and 330, which allow the Minister to annul any decision made by an English‑language school board between October 1, 2019 and November 5, 2020.
31. The respondents also seek a declaration of constitutional invalidity of s. 473.1 of the *EA*, which, since 2016, has allowed the Minister to prescribe the transfer of certain subsidies to local bodies so they can be used for specific purposes determined by the Minister.
32. Although the respondents target only a few sections of *Bill 40* in their application for a declaration of constitutional invalidity, they identify several other provisions of *Bill 40* that they say are inextricably linked to these sections.[[60]](#footnote-60) They therefore request that the application to the English‑language school system of *Bill 40* in its entirety or, subsidiarily, of the provisions inextricably linked to its infringing provisions, be suspended until the National Assembly adopts remedial legislation.
33. Moreover, in addition to seeking a declaration invalidating s. 212 of *Bill 40* which amends s. 15 of the *New* *Act respecting school elections*, the respondents also seek a declaration of constitutional invalidity of said s. 15 which governs the right to vote to elect members of the board of directors of English‑language school service centres.

**TRIAL JUDGMENT**

1. The evidence in first instance largely consisted of affidavits and expert reports. Some affiants also testified during the proof and hearing held on April 14, 15, 16 and 19, 2021. Counsel presented oral arguments on April 21, 22, 23, 26 and 27, 2021. On the last day of the oral arguments, the applicants (now the respondents on appeal) were authorized to submit an amended originating application, which they did on June 25, 2021.
2. The trial judgment comprises 129 pages, consisting of 447 paragraphs and a schedule. The judge divided his analysis into three parts, dealing, respectively, with the infringement of s. 23 of the *Charter*, the justification for the infringement, and the remedies. The following is a summary.
3. **Infringement of s. 23 of the *Charter***
4. The first part, regarding the issue of infringement, takes up nearly 100 of the 129 pages of the judgment. It is subdivided into 10 sections, each of which is briefly summarized below.
5. The first section deals with the purpose and interpretation of s. 23 of the *Charter*. The judge reviews the case law and concludes that one [translation] “of the purposes of adopting s. 23 was to protect the minority from decisions of the majority made without regard to minority rights”.[[61]](#footnote-61) In this regard, he cites Major and Bastarache, JJ. in *Arsenault‑Cameron*, where they stated that “s. 23 was intended in part to protect the minority against the effect of measures adopted to suit the needs of the majority”.[[62]](#footnote-62) He refers to the remarks of Wagner, C.J. in *Conseil scolaire francophone de la Colombie‑Britannique*, in which the Chief Justice mentioned that what this constitutional provision does is to “protect an official language minority from the effects of decisions of the majority in the area of education by granting the minority a certain autonomy in relation to its education system”.[[63]](#footnote-63)
6. Based on his reading of the Supreme Court’s rulings, the judge also concludes that s. 23 of the *Charter* must be given a broad and liberal interpretation to achieve its purpose,[[64]](#footnote-64) which leads him to examine the impugned sections of *Bill 40* [translation] “from a global perspective and in context to determine whether, taken as a whole, they infringe the rights guaranteed”[[65]](#footnote-65) by this constitutional provision.
7. The second section deals with identifying the rights holders under s. 23 and, more specifically, s. 23(3)(*b*). The judge rejects the AGQ’s approach that only parents of students attending a minority language school enjoy the rights of management and control that flow from this constitutional provision. In the judge’s view, this is a restrictive interpretation of s. 23 that fails to achieve its objectives, particularly because it does not consider the collective dimension of the right to minority language education.[[66]](#footnote-66)
8. It is this collective dimension that the judge addresses in greater detail in the third section. After an exhaustive review of the case law and doctrine, he concludes that s. 23 of the *Charter* protects both individual rights – notably the right of the individuals concerned to have their children educated in the language of the linguistic minority (ss. 23(1) and (2)) – and collective rights – notably the right of the linguistic minority to manage and control educational facilities (s. 23(3)*b*)). He does not specifically define the groups of individuals forming part of the linguistic minority referred to in s. 23(3)(*b*), but intimates that this group includes those described in ss. 23(1)(*b*) and 23(2) of the *Charter*:

[translation]

[72] The collective aspect of the rights conferred by s. 23 must therefore condition and inform its interpretation.

[73] The English‑speaking community of Quebec is not limited to parents of students enrolled in school. Section 23 extends its protection to all citizens of Canada who received their primary school instruction in Canada in English or whose child received or is receiving primary or secondary instruction in English. Section 23 does not create two categories of rights holders, those who have children at school and those who do not.

[74] The designation of community representatives goes beyond simply the group of parents of children enrolled in school. The law must aim to promote the participation of community members in school management, with a view to the community’s development.

1. That said, further on in his reasons, the judge states that it is the entire linguistic minority that is covered by s. 23(3)(*b*), but he does not precisely define that minority:

[translation]

[211] The linguistic minority transcends the smaller group of individuals whose children are enrolled in school. It is the transmission of culture that is at stake. The entire community is involved in the school project, which is not limited to the classrooms. The community must recognize itself in its representatives. It has a say in their appointment. These representatives are eminent members of the community, regardless of their status as parents or members of the governing board. The community must be able to participate in defining the programs and identify the issues that are specific to it. It must be able to express itself through the representatives it has chosen.

1. In the fourth section, the judge examines the historical context in which s. 23 was enacted. He conducts a lengthy review of the expert reports on file that dealt with the history of primary and secondary education in Quebec and the role of the English‑speaking community in the governance of educational structures. He notes that, at the time of Confederation, the educational rights of Quebec’s English‑speaking minority were largely based on the constitutional guarantees conferred on Quebec Protestants under s. 93 of the *Constitution Act, 1867*. The judge then examines the evolution of Quebec’s educational structures from Confederation to the enactment of *Bill 40*. He notes the circumstances that led to the *Constitution Amendment, 1997 (Quebec)*, which rendered the denominational education guarantees of ss. 93(1) to (4) of the *Constitution Act, 1867* inapplicable to Quebec and facilitated the replacement of denominational school boards with linguistic school boards.
2. He also notes the commitment made by the representatives of Quebec and Canada to Quebec’s English‑speaking minority, at the time of this constitutional amendment, with regard to the management and control of their school boards. He states that [translation] “[t]his commitment to keeping the management and control of institutions in the hands of the minority must necessarily guide the interpretation of s. 23 in this situation”.[[67]](#footnote-67) Based on his overview of the historical context, he concludes that the guarantees under s. 23 of the *Charter* must be interpreted in such a way as to protect the management and control rights of Quebec’s English‑speaking minority over its primary and secondary educational institutions:

[TRANSLATION]

[148] In *Reference re Public Schools Act (Man.)*, the majority wrote:

In passing, one should note, as this Court held in Ford v. Quebec (Attorney General), 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at pp. 777-78, that the focus on the historical context of language and culture indicates that different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province.

(Emphasis added by the trial judge)

[149] Concurrently with the purpose of s. 23 to [translation] “remedy” the injustices done to Francophones living outside Quebec, in Quebec it must also be to prevent the erosion of the rights acquired over the centuries by English‑speaking Quebeckers to the management and control of their educational institutions.

[150] As professors Guillaume Rousseau and Éric Poirier wrote on s. 23 and its application in Quebec:

“Rather than causing changes as it did in the other provinces, (s. 23) protected existing institutions in Quebec.”

(References omitted)

1. The judge addresses the geographical context in the fifth section of his infringement analysis. Based on the evidence presented, he finds that the lived realities of Quebec’s English‑language school boards differ greatly from one to the other. Two of these boards serve a relatively small territory, in what are essentially urban areas, while the others cover vast territories that include densely urbanized areas, suburbs, and rural or geographically isolated zones. He cites as an example the expert report of Professor Diane Gérin-Lajoie, who concludes that Quebec’s English‑speaking communities are diverse, and that those located far from Montreal face particular issues of vitality:[[68]](#footnote-68)

12. […] Anglophones living in regions are isolated. Lamarre (2012) explains that, contrary to the situation in Montreal where Anglophones have better institutional support, Anglophones outside of Montreal who are dispersed on large territories face the same problems as Francophones do outside Quebec: little access to services in English, a lack of resources, such as bookstores, community centres, theater, etc. and the absence of institutional support. […]

The judge concluded that the [translation] “issues of dispersion and lack of vitality of the English‑speaking community outside of Montreal are not without consequence on *Bill*[*40*]’s infringement of the rights guaranteed by s. 23”.[[69]](#footnote-69)

1. In the sixth section, the judge deals with the infringement of the English‑speaking minority’s right to manage and control its educational institutions. He finds that the replacement of English school boards by English‑language school service centres forms part of what constitutes (a) significant transfer of the powers of management and control over the English‑language minority’s educational system to the Minister and to the employees of the school service centres, and (b) the imposition of major restrictions on the candidacy of a significant segment of the English‑speaking community for election as members of the boards of directors of the new school service centres.[[70]](#footnote-70) This general conclusion is divided into nine specific points, each of which is hereinafter discussed.
2. *Requirements for board membership (ss. 50, 196, 208 and 216 of Bill 40)*
3. The judge’s analysis of *Bill 40* and the evidence in the record lead him to conclude that several provisions restrict the pool of members of the English‑speaking community eligible to run for election as directors of a school service centre, or impose requirements or election procedures that are likely to discourage members of the minority language community from running for these positions.
4. For example, the eligibility requirements for positions reserved for parent representatives – i.e., to be both a parent of a student enrolled in a school of the school service centre and a parent member of the governing board of that school – mean that 99% of voters registered on the electoral lists in the English‑language school sector are disqualified from the outset as candidates for these positions.[[71]](#footnote-71) The new professional qualification requirements (expertise profiles) also effectively prevent half of all voters from running for the positions reserved for community representatives.[[72]](#footnote-72) The judge refers to the expert report of Professor Peter Loewen, in which the latter establishes that the current English‑speaking commissioners are, for the most part, less likely to run under the new formula.[[73]](#footnote-73)
5. The judge concludestherefrom that the impugned provisions of *Bill 40* do not allow Quebec’s English‑speaking minority to fully exercise its rights guaranteed by s. 23.[[74]](#footnote-74) He adds:

[translation]

[215] Although these provisions appear harmless when examined individually, their cumulative effect is undeniable and leads to an erosion of the control exercised by the minority through its traditional representatives.

[216] This reading inevitably leads to the conclusion that the effect of the provisions is to deprive the minority of the contribution of most of its members to the democratic life of the minority.

[…]

[230] Directly or indirectly limiting the right of representatives to run in school elections, as *Bill* [*40*] does, restricts the minority’s right to manage and control its educational institutions.

[231] The minority has had the majority’s vision of who can represent it imposed on it, whereas all members of the community have been eligible to take charge of school management for more than 200 years, taking into account, of course, the historical evolution of the eligibility criteria. The imposition of the majority view is one of the evils that the adoption of s. 23 was intended to correct.

(ii) *Lack of remuneration for members of boards of directors* *(s. 66 of Bill 40)*

1. The judge also notes that *Bill 40* eliminates the remuneration of members of the new boards of directors of school service centres, a remuneration to which elected commissioners were previously entitled. He concludes, based on the evidence, including Professor Loewen’s report, that the elimination of this remuneration and its replacement by attendance allowances markedly discourages members of the linguistic minority from participating in school management.[[75]](#footnote-75) He further adds that [translation] “[t]his measure impairs the minority’s right to elect the members it chooses”[[76]](#footnote-76) and that it [translation] “impairs the right to control the ‘expenditures of funds provided for such instruction and facilities’, guaranteed by *Mahe*”.[[77]](#footnote-77)

(iii) *Ineligibility to sit as chair or vice-chair of the board of directors (s. 52 of Bill 40)*

1. Section 52 of *Bill 40* provides that, henceforth, the chair and vice-chair of the board of directors of a school service centre must be selected from among the members sitting as parent representatives. The judge concluded that this restriction contravenes the minority language community’s exclusive management and control rights flowing from s. 23 of the *Charter*.[[78]](#footnote-78)

(iv) *Presence of school staff as unelected representatives (s. 50 of Bill 40)*

1. Section 50 of *Bill 40* also provides that four members of the school service centre’s staff, designated by the centre’s employees, must sit on the board of directors. Since staff members are not necessarily themselves s. 23 rights holders and are not designated by the linguistic minority, the judge concludes that this, too, is a measure that contravenes the minority’s exclusive management and control rights.[[79]](#footnote-79)

(v) *Transfer of the role of spokesperson to the director general of the school service centre (ss. 52 and 93 of Bill 40, s. 155 of the EA)*

1. *Bill 40* (s. 93) also provides that the director general of a school service centre becomes its spokesperson, whereas previously this role was vested in the elected chair of the school board (s. 155 of the *EA* before its replacement by s. 52 of *Bill 40*). The judge analyses the evidence and concludes that this measure severely limits the freedom to act of representatives of the English‑speaking minority. Therefore, this measure is a direct violation of the linguistic minority’s rights of management and control.[[80]](#footnote-80)

(vi) *Loss of control over the commitment-to-student-success committee (s. 91 of Bill 40)*

1. Section 91 of *Bill 40* provides for the creation, in each school service centre, of a commitment-to-student-success committee composed of members of the centre’s staff and one individual from the education research sector. The committee’s mission is to develop the commitment-to-student-success plan, which essentially comprises all the school service centre’s policy directions, which must also be consistent with the Minister’s strategic directions and objectives. Not only are there no elected representatives or parents on this committee, but there is no legal requirement that the members of the committee be from the linguistic minority. In the judge’s view, it [translation] “is inconceivable for a plan as fundamental as the commitment-to-success plan not to be the responsibility of the minority’s elected representatives”.[[81]](#footnote-81) He adds:

[translation]

[271] It is clear that entrusting the commitment-to-student-success plan to a committee on which not a single elected member of the minority sits is a direct violation of s. 23. This committee’s obligation under the *EA* to consult parent representatives does not meet the requirement that the management and control of educational success be under the purview of community representatives who alone and exclusively may decide.

 (vii) *Loss of control over resources and services (s. 105 of Bill 40)*

1. Section 105 of *Bill 40* henceforth allows the Minister to require the sharing of resources and services between school service centres or with other public bodies, including municipalities. Although the judge acknowledges that the [translation] “sharing of schools” between the French‑speaking majority and the English‑speaking minority would violate s. 23 of the *Charter*,[[82]](#footnote-82) he finds that [translation] “[t]here was no evidence that the Minister was attempting or that he would attempt to impose this measure on an English‑language school”.[[83]](#footnote-83) He thus considers the issue to be theoretical at present, since no concrete infringement of the *Charter* had been established. The judge therefore refuses to rule on the constitutional validity or applicability of this new measure.[[84]](#footnote-84)

(viii) *Transfer of powers from the school service centres to educational institutions through budgetary rules (s. 473.1 of the EA)*

1. The judge concludes that s. 473.1 of the *EA* violates s. 23 of the *Charter* and is therefore inoperative with regard to English school boards. Following an amendment introduced in 2016,[[85]](#footnote-85) this section has allowed the Minister to prescribe that certain funds provided for in the budgetary rules of school boards are intended for a transfer to the budgets of the educational institutions to be used for the sole purposes determined by him.
2. After reviewing the evidence in the record regarding the school boards’ funding mechanisms, the judge concludes that the [translation] “result of these imposed budgetary constraints is that substantial amounts remain unspent because they are dedicated and cannot be used for purposes other than those determined by the Minister”.[[86]](#footnote-86) These constraints thus run directly counter to the minority language community’s exclusive power to make decisions concerning the expenditure of funds earmarked for minority language education and for the facilities where that education is provided.[[87]](#footnote-87)

(ix) *Minister’s power to determine objectives and targets (s. 142 of Bill 40)*

1. Section 142 of *Bill 40* also allows the Minister to determine objectives or targets relating to the administration, organization or operation of a school service centre. The judge refuses to invalidate this new provision in the absence of evidence establishing that the Minister was exercising or would exercise his discretion without taking into account the needs of the English‑speaking community.[[88]](#footnote-88) Nonetheless, the judge specifies that, if the Minister were to set objectives or targets that are incompatible with the needs or requests of the English‑speaking community, this measure could be challenged in court based on s. 23 of the *Charter*.[[89]](#footnote-89)
2. In the seventh section of his reasons on infringement, the judge deals with the Minister’s power to annul any decision of an English‑language school board made between October 1, 2019 and November 5, 2020 (s. 329 of *Bill 40*). As the evidence does not indicate that this power has been used, the judge is of the opinion that the question of the constitutional validity of the legislative provision in question is moot. He therefore refuses to rule on this subject.[[90]](#footnote-90)
3. In the eighth section of his reasons on infringement, the judge deals with s. 15 of the *New* *Act respecting school elections*.This section allows a Canadian citizen aged 18 or more, who does not have a child who is admitted to the educational services of an English or French language school board or school service centre having jurisdiction over the territory in which the elector is domiciled, to choose to vote in the election of the members of the English‑language school service centre’s board of directors. Consequently, under said s. 15, an individual who is not part of the English‑speaking minority – a Francophone, for example – can vote in a school election to elect the board of directors of an English‑language school service centre.
4. The judge concludes that this possibility is inconsistent with s. 23 of the *Charter.* In his view, it [translation] “seems logical that protection of the minority and its right to control its educational facilities requires that only those who are part of this minority may have a voice in the matter”.[[91]](#footnote-91) Despite this conclusion, the judge omits to declare that s. 15 of the *New Act respecting school elections* infringes s. 23 of the *Charter*, but he does come to this conclusion as regards s. 212 of *Bill 40* (which amends s. 15). In any event, as the parties’ counsel agreed at the appeal hearing, this is clearly an omission, since the judge suspends the [translation] “declaration of inoperability”[[92]](#footnote-92) of said s. 15 in his conclusions.
5. In the ninth section of his reasons on infringement, the judge concludes that provincial governments, including the legislatures – in this case the National Assembly – must take into account the concerns of the linguistic minority when enacting legislation and imposing decisions in matters of education.[[93]](#footnote-93) He draws this conclusion from his reading of certain Supreme Court decisions[[94]](#footnote-94) and determines that the obligation is not merely one to consult, but an obligation of result:

[translation]

[326] The government’s obligation goes beyond the duty to consult, which we will examine. The obligation to consult does not produce a veto right for the consulted party. In the case of s. 23 rights, the measures must respond to the needs of the minority. Consultation is not necessarily how those needs must be identified, but it is undoubtedly an effective way of doing so.

[Reference omitted; underlining in the original]

1. In this case, the judge criticizes the legislature for not taking sufficient account of the concerns and needs of Quebec’s English‑speaking minority when enacting *Bill 40*. Indeed, he conducts a lengthy review of the interventions made by representatives of the English‑speaking minority to members of the government and the National Assembly, and concludes from this that the legislature did not respect the rules of a “meaningful” consultation during the process leading to the enactment of *Bill 40*.[[95]](#footnote-95)
2. **Justification for the infringement**
3. The second part of the trial judgment concerns the justification for the infringement of s. 23 under s. 1 of the *Charter*. The judge refers to the principles set out in *Oakes*,[[96]](#footnote-96) but notes that in *Conseil scolaire francophone de la Colombie-Britannique*, Wagner, C.J. states that any intrusions on s. 23 of the *Charter* are especially difficult to justify and must therefore be analysed on the basis of a stringent standard.[[97]](#footnote-97)
4. The judge rejects the justification submitted by the AGQ at the first stage of the analysis – that of a pressing and substantial objective.
5. At trial, the AGQ argued that the main purpose of *Bill 40* was to bring decision‑making closer to students and that the ancillary purpose was to give parents a greater role in decision‑making.[[98]](#footnote-98) While the judge acknowledges that these are legitimate objectives, he also notes that they are [translation] “very general and could apply to any objective in educational matters”.[[99]](#footnote-99) As such, they cannot justify the significant infringements of the management and control rights guaranteed to Quebec’s English‑speaking minority by s. 23 of the *Charter*.[[100]](#footnote-100) He also points out that these objectives do not relate to the specific needs and concerns of the linguistic minority and adds that it [translation] “is not sufficient to rely on a legislative objective that is legitimate in relation to the majority to justify the measure[;] [i]t must be justified in relation to the minority”.[[101]](#footnote-101)
6. Although it was not necessary to address the other requirements of the *Oakes* test in order to rule on the matter, the judge determines that these, too, have not been satisfied.[[102]](#footnote-102)
7. **Remedies**
8. As regards the impugned sections of *Bill 40* and the *EA* that the judge finds to infringe the rights protected by s. 23 of the *Charter*, he declares them inoperative with respect to Quebec’s English‑language school boards.[[103]](#footnote-103) The provisions in question are ss. 50, 52 (in respect of the addition of s. 155 to the *EA*), 66, 91, 93, 196, 208, 212, and 216 of *Bill 40*, as well as ss. 155[[104]](#footnote-104) and 473.1 of the *EA*. The judge’s declaration takes immediate effect.
9. Although the respondents had asked the judge to maintain the stay of application of *Bill 40* with regard to English‑language school boards until the National Assembly adopts legislation correcting the infringements of the rights guaranteed by s. 23 of the *Charter*, the judge instead grants the respondent’s subsidiary request to suspend the application to the English‑language school network of the numerous provisions of *Bill 40* that are inextricably linked to the provisions declared contrary to s. 23 of the *Charter*.[[105]](#footnote-105)
10. The judge identified these provisions in a schedule to his judgment.[[106]](#footnote-106)This stay of application is granted for an [translation] “initial” period of six months, to allow for a [translation] “dialogue” aimed at correcting the infringements.[[107]](#footnote-107) The judge decides to retain jurisdiction over the case during this period in order to resolve any issues that might arise [translation] “in this respect”, including, presumably, the extension, if necessary, of the stay of application or the possible resolution of any difficulties that might arise during the [translation] “dialogue”, or even in order to be in a position to respond to any difficulties that might arise following the stay of application of certain provisions of *Bill 40*.[[108]](#footnote-108)
11. As the AGQ had asked the judge for an 18-month suspension of any declaration that would render inoperative the legislative provision granting certain individuals who are not part of the English‑speaking minority the choice of voting in school elections in the English‑language sector, the judge suspends the declaration of inoperability of section 15 of the *New Act respecting school elections* for a period of 18 months from the date of his judgment.[[109]](#footnote-109) As mentioned above, the judge does not formally declare this section inoperative, but only the amendments thereto introduced by s. 212 of *Bill 40.*
12. Lastly, the judge extends the stay of application of *Bill 40* until the expiry of the time limit for appealing his judgment.[[110]](#footnote-110) He awards legal costs to the applicants.[[111]](#footnote-111)

**GROUNDS OF APPEAL**

1. The AGQ raises the following three grounds of appeal:[[112]](#footnote-112)
2. Did the trial judge err in concluding that ss. 50, 52 in respect of the addition of s. 155 to the *EA*, 66, 91, 93, 196, 208, 212 and 216 of *Bill 40*, as well as ss. 155and 473.1 of the *EA*, unjustifiably infringe s. 23 of the *Charter*?[[113]](#footnote-113)
3. Did he err in concluding that s. 23 of the *Charter* imposes a duty to consult on the state that applies as part of the law-making process and requires the National Assembly to respond to the concerns of Quebec’s English‑speaking community?
4. Did he err in his choice of remedies?
5. In short, the AGQ argues that the trial judge gave s. 23 of the *Charter* a scope that is not supported by the text of the provision, by the historical context in which it was enacted, or by the case law. He argues that the judge also erred in concluding that s. 23 requires the state to consult members of the linguistic minority as part of the law-making process. Finally, in the AGQ’s view, the judge erred in ordering a suspension of constitutionally valid legislative provisions and in deciding to retain jurisdiction over the case.
6. Two preliminary issues underlying the entire dispute must also be addressed. The parties dealt with them extensively in their briefs and at the hearing before the Court, but never identified them as independent issues. They are as follows: (1) what is the scope of the management and control rights of the linguistic minority over their educational facilities; and (2) who exercises these rights?
7. In our view, these are fundamental issues raised by the present appeal. Indeed, they have an impact on most of the parties’ other grounds. As the AGQ notes in his brief, [translation] “[t]he resolution of this case rests largely on determining the nature and scope of the rights conferred by s. 23”.[[114]](#footnote-114) In the present matter, this is mainly a matter of defining the rights conferred by or arising under s. 23(3)(*b*).

**ANALYSIS**

**The preliminary underlying issues: What is the scope of the management and control rights over minority language educational facilities and who exercises these management and control rights?**

1. *The parties’ positions*

The AGQ

1. Generally speaking, the AGQ argues that the judge erred in focusing his analysis on school democracy and its structures, a consideration that is foreign to s. 23 of the *Charter*, and in failing to consider the overall characteristics of the system put in place, which favours not only the direct participation of parents in the management and control of minority educational facilities, but also the [translation] “ability for the English‑speaking minority to make decisions concerning school administration, and to do so without the influence of actors likely not to be attentive to [its] linguistic and cultural concerns”.[[115]](#footnote-115)
2. In presenting his argument, the AGQ maintains that s. 23 of the *Charter* does not grant a linguistic community rights of a political nature, including the right to elections.[[116]](#footnote-116) Rather, s. 23 enshrines an individual right for Canadian citizens identified in ss. 23(1) and (2)to have their children receive school instruction in the language of the linguistic minority population of a province.[[117]](#footnote-117) As for s. 23(3), it merely clarifies the rights conferred by ss. 23(1) and (2) by stipulating that the individual right of parents to benefit from the guarantees set out therein is conditioned by a collective factor – namely, that the number of children concerned warrants it.[[118]](#footnote-118) Thus, s. 23 does not require the creation of representative political systems for each minority language community in Canada.[[119]](#footnote-119)
3. The AGQ submits that the rights conferred by s. 23(3)(*b*) are therefore essentially individual rights granted to parents and not collective rights granted to the linguistic minority as a whole.[[120]](#footnote-120) After providing a historical analysis of the inclusion of s. 23 in the *Charter*, the AGQ argues that the purpose was to protect Canada’s official linguistic minorities, particularly Francophones outside Quebec, while preserving the provinces’ exclusive powers over education by leaving them [translation] “free to determine the means for satisfying their constitutional obligations”.[[121]](#footnote-121)
4. The AGQ argues that while it is true that the Supreme Court of Canada has recognized the existence of a certain measure of management and control in favour of the linguistic minority through s. 23(3)(*b*) of the *Charter*, such management and control are connected and limited to aspects of education affecting language and culture.[[122]](#footnote-122) Moreover, such management and control fall within the purview of the parents of pupils receiving minority language education, and are not exercised according to established and guaranteed procedures.[[123]](#footnote-123) The judge was therefore mistaken in concluding that the purpose of s. 23 is to protect linguistic minorities from the decisions of the majority and prevent the erosion of the rights acquired over the centuries by English‑speaking Quebeckers to the management and control of their educational institutions on the basis of a specific model.[[124]](#footnote-124)
5. As for s. 93 of the *Constitution Act, 1867*, the AGQ is of the view that it is not relevant to the debate because the rights conferred therein are aimed at religious minorities, not linguistic minorities, and in any event, these rights do not protect a particular structure of school governance, including school elections. Moreover, according to the AGQ, the government of Quebec made no commitment to Quebec’s English‑speaking community at the time of the *Constitution Amendment, 1997 (Quebec)*, which renders paragraphs (1) to (4) of s. 93 of the *Constitution Act, 1867* inapplicable to Quebec.[[125]](#footnote-125) In any case, the events of 1997 cannot have an impact on the interpretation to be given to s. 23 of the *Charter*, which was enacted in 1982.

The respondents

1. According to the respondents, the rights of management and control that flow from s. 23(3)(*b*) of the *Charter* are those defined by the Supreme Court in *Mahe* and therefore include, if the number of children concerned warrants it, the establishment of an independent minority language school board.[[126]](#footnote-126) Regardless of the number of students involved, minority language representatives must, at a minimum, have exclusive authority to make decisions relating to minority language instruction and the facilities in which such instruction is provided, including the expenditures of funds, the appointment and direction of administrative staff, the establishment of programs of instruction, the recruitment and assignment of staff, and the making of agreements for education and services for students.[[127]](#footnote-127)
2. These powers of management and control are exercised through representatives chosen by the linguistic minority as a whole, whether or not the members of that minority have children enrolled in a minority language educational facility.[[128]](#footnote-128) The respondents therefore object to the AGQ’s position that only the parents of children enrolled in a minority language educational facility enjoy the rights of management and control stemming from s. 23(3)(*b*), whether directly or through representatives. In their opinion, both a textual and contextual reading of s. 23 leads to the conclusion that all individuals identified in ss. 23(1) or (2), whether or not they have children enrolled in school, are covered by s. 23(3)(*b*).[[129]](#footnote-129)
3. That being so, given that s. 23(1)(*a*) of the *Charter* does not apply to Quebec, the respondents first stated in their brief that the individuals who have the rights of management and control that flow from s. 23(3)(*b*) are restricted, in Quebec, to those covered by ss. 23(1)(*b*) and 23(2) – namely, Canadian citizens who have received their primary school instruction in Canada in English or whose child has received or is receiving primary or secondary school instruction in English in Canada.[[130]](#footnote-130) It should be noted, however, that at the appeal hearing, in response to questions from the Court, counsel for the respondents qualified their position on this issue and instead now support the interpretation put forward by the intervener, Quebec Community Groups Network, to the effect that all members of Quebec’s linguistic minority, including Canadian citizens whose first language learned and understood is English and who are contemplated by s. 23(1)(*a*), participate in the control and management of minority language educational institutions through the representatives they choose.
4. The respondents further submit that, given Quebec’s specific historical context, which includes the rights conferred on the Protestant minority by s. 93 of the *Constitution Act, 1867*, the right of the English‑speaking linguistic minority to independent school boards managed and controlled by representatives chosen by it is guaranteed.[[131]](#footnote-131) Moreover, in their view, at the time of the 1997 constitutional amendment, the governments of Quebec and Canada made a commitment to them that their exclusive management and control rights would not be affected.

The intervener, Quebec Community Groups Network

1. The Quebec Community Groups Network, the intervener on appeal, has existed since 1995 as a non-profit organization linking some forty English‑language associations in Quebec. It is recognized by the Canadian government as a representative of Quebec’s English‑speaking community.[[132]](#footnote-132) Its activities include interventions in constitutional disputes before all levels of court in Canada.
2. It submits that s. 23 of the *Charter* has both an individual dimension and a collective dimension, but that its ultimate purpose is to ensure the vitality of the minority language community in each province and territory of Canada. This collective dimension is reflected in s. 23(3)(*b*), from which rights of management and control over educational institutions arise for the linguistic minority as a whole. This collective dimension is an integral part of s. 23 and must be taken into account if its ultimate objective is to be achieved.
3. It follows that the management and control rights over minority language educational facilities belong to that community as a whole. In practice, these rights are exercised through representatives from the linguistic minority, who are chosen by the members of that minority. To this end, there is no need to distinguish between the various categories of rights holders, as all members of the minority language community are concerned by this collective dimension of s. 23, whether they are covered by s. 23(1)(*a*) or (*b*) or by s. 23(2) of the *Charter*.
4. *Analysis*
5. The proper way to interpret the rights and freedoms enshrined in the *Charter* is well established: they must be given a broad, liberal and purposive interpretation, “by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the [...] right or freedom [in question], to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*”.[[133]](#footnote-133)
6. Despite what a previous line of jurisprudence might have suggested,[[134]](#footnote-134) the fact that language rights – whether stemming from the *Constitution Act, 1867*,[[135]](#footnote-135) the *Charter* or a statute– are the result of a political compromise does not affect this rule of interpretation.[[136]](#footnote-136) Indeed, it is now clear that language rights, including those set out in s. 23 of the *Charter*, “must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada”.[[137]](#footnote-137) In *Conseil scolaire francophone de la Colombie‑Britannique*, Wagner, C.J., writing for the majority, pointed out that the cases that date back to when the Supreme Court favoured a restrictive approach to the interpretation of language rights, which include *Mahe*, must therefore be interpreted in light of the subsequent cases favouring a broad and liberal interpretation of these rights.[[138]](#footnote-138)
7. Nonetheless, these principles cannot prevail over the text of the *Charter* provision. The interpretation must remain rooted in the text, which is the starting point for the interpretative exercise.[[139]](#footnote-139) Therefore, the interpretation must not overshoot – or undershoot – the actual purpose of the right or freedom in question.[[140]](#footnote-140) Thus, in its recent judgement in *Organisation mondiale sikhe du Canada*, the Court concluded that s. 23 of the *Charter* could not be raised to invalidate the provisions of the *Act respecting the laicity of the State*[[141]](#footnote-141) since there was little connection between this constitutional provision and the provisions of that act.[[142]](#footnote-142)
8. Section 23 of the *Charter* is both preventive and remedial in that it is meant to ensure, in each of the provinces and territories, the protection and development of the two official languages and the cultures they embrace.[[143]](#footnote-143) Indeed, it “is intended not only to prevent the erosion of official language communities, but also to redress past injustices and promote the development of those communities”.[[144]](#footnote-144) In other words, it seeks to change the status quo[[145]](#footnote-145) and “ensure the sustainability of the country’s linguistic communities” while also making it possible for them “to develop in their own language and culture”.[[146]](#footnote-146)
9. Protection of the right to instruction in the minority official language is the means chosen to realize this objective. A well-established line of Supreme Court cases recognizes the fundamental role of education in preserving and encouraging linguistic and cultural vitality in the minority language community,[[147]](#footnote-147) as schools are “a setting for socialization where students can converse with one another and develop their potential in their own language and, in using it, familiarize themselves with their culture”.[[148]](#footnote-148) Minority language schools also play a vital role in fulfilling the promise contained in s. 23 – namely, to “give effect to the equal partnership of the two official language groups in the context of education”.[[149]](#footnote-149)
10. Moreover, s. 23 has a unifying purpose “in that it accommodates mobility by enabling citizens to move anywhere in the country without fearing that they will have to abandon their language and culture”.[[150]](#footnote-150)
11. Section 23, which is an essential component in Canada’s constitutional protection of the official languages, has been described as the “linchpin in [Canada]’s commitment to the values of bilingualism and biculturalism”.[[151]](#footnote-151) Indeed, the Supreme Court has repeatedly stated that s. 23 is a unique provision, peculiar to Canada,[[152]](#footnote-152) which “is unlike those generally found in charters and declarations of fundamental rights”.[[153]](#footnote-153) A particular feature of s. 23 is that, unlike other constitutional provisions that impose only negative obligations, it imposes positive obligations on the state.[[154]](#footnote-154) It enshrines the constitutional duty of the provinces and territories to provide minority language education to children of s. 23 rights holders where numbers warrant.[[155]](#footnote-155) It places on provincial and territorial governments “positive obligations [...] to mobilize resources and enact legislation for the development of major institutional structures”.[[156]](#footnote-156) Nonetheless, the state must “have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met”.[[157]](#footnote-157)
12. From the earliest decisions on the interpretation of s. 23(3)(*b*) of the *Charter*, Canadian appellate courts recognized that this provision confers on the linguistic minority the exclusive rights to manage and control its educational facilities where the number of children concerned so warrants. In 1987, in *Mahe*, the Alberta Court of Appeal expressed itself as follows:[[158]](#footnote-158)

[96] In my view, s. 23(3)(b) guarantees to s. 23 students, where numbers warrant, an educational system (with all its complexity and cost) that not only offers the same quality of education as other systems but is run by the minority language group or its representatives. To that extent, I disagree with the learned trial judge.

[…]

[104] I therefore conclude that s. 23(3)(b) offers the minority-language group the right, where numbers warrant, to establish and control an independent school system, but that a province shall select the institutional means by which that right will be implemented.

(Underlining added)

1. As Dickson, C.J. noted in *Mahe*, courts in Ontario, Saskatchewan, Nova Scotia and Prince Edward Island had reached similar conclusions.[[159]](#footnote-159) In taking into account this judicial consensus, he concluded, for a unanimous Supreme Court, that, where the number of children is significant enough to warrant it, s. 23(3)(*b*) sets out an upper level of management and control by the linguistic minority:[[160]](#footnote-160)

In my view, the words of s. 23(3)(b) are consistent with and supportive of the conclusion that s. 23 mandates, where the numbers warrant, a measure of management and control. Consider, first, the words of subs. (3)(b) in the context of the entire section. Instruction must take place somewhere and accordingly the right to “instruction” includes an implicit right to be instructed in facilities. If the term “minority language educational facilities” is not viewed as encompassing a degree of management and control, then there would not appear to be any purpose in including it in s. 23. This common sense conclusion militates against interpreting “facilities” as a reference to physical structures. Indeed, once the sliding scale approach is accepted it becomes unnecessary to focus too intently upon the word “facilities”. Rather, the text of s. 23 supports viewing the entire term “minority language educational facilities” as setting out an **upper** level of management and control.

(Underlining and boldface added)

1. Although certain passages in *Mahe* may suggest that only the parents of children attending a minority language school or their representatives exercise the management and control rights arising from s. 23(3)(*b*),[[161]](#footnote-161) Dickson, C.J.’s reasons also specify that it is the “minority language” representatives who exercise these rights.[[162]](#footnote-162)
2. The Court is of the view that the management and control rights stemming from s. 23(3)(*b*) are intended to protect the linguistic minority as a whole – not just parents whose children attend schools. These management and control rights are therefore exercised by representatives chosen by the linguistic minority as a whole. The following reasons explain this conclusion.
3. As Major and Bastarache, JJ. noted in *Arsenault‑Cameron*, “[i]n *Mahe*, the Court decided that, where numbers warrant the creation of facilities, the representatives of the official language community have the right to a degree of governance of these facilities”.[[163]](#footnote-163) Indeed, this is effectively what Dickson, C.J. stated in *Mahe* when he explained the scope of these rights:[[164]](#footnote-164)

In my view, the measure of management and control required by s. 23 of the *Charter* may, depending on the number of students to be served, warrant an independent school board. Where numbers do not warrant granting this maximum level of management and control, however, they may nonetheless be sufficient to require linguistic minority representation on an existing school board. In this latter case:

(1) The representation of the linguistic minority on local boards or other public authorities which administer minority language instruction or facilities should be guaranteed;

(2) The number of minority language representatives on the board should be, at a minimum, proportional to the number of minority language students in the school district, i.e., the number of minority language students for whom the board is responsible;

(3) 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) the appointment and direction of those responsible for the administration of such instruction and facilities;

(c) the 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.

(Underlining added)

1. This is also what Wagner, C.J. made quite clear in *Conseil scolaire francophone de la Colombie‑Britannique*:[[165]](#footnote-165)

[23] In *Mahe*, this Court rejected what was called the “separate rights” approach, according to which s. 23 provides for only two rights: a right to educational facilities where there are a specific number of students and a right only to instruction where the number of students is smaller. The Court held that s. 23 must instead be understood “as encompassing a ‘sliding scale’ of requirement” (p. 366).

[24] By virtue of this “sliding scale” concept, s. 23 provides a basis for a range of educational services. The low end of the scale corresponds to the right only to instruction that is provided for in s. 23(3)(*a*), while the high end corresponds to the “upper level of management and control” provided for in s. 23(3)(*b*) (*Mahe*, at p. 370). In other words, at the low end, s. 23 rights holders are entitled to have their children receive instruction in the language of the official language minority, but the extent to which the minority exercises control over the provision of instruction rises with the number of children of rights holders. At the low end of the scale, the minority is entitled only to instruction in its language. In the middle, it might have control over one or more classrooms in a school of the majority or over one part of a school it shares with the majority. It might also have control over the hiring of teaching staff and over certain expenditures. At the high end, the minority has control over separate educational facilities, that is, over a homogeneous school. The number of children of rights holders might also entitle the minority to the management and control of a separate school board. In short, once the minimum threshold of s. 23(3)(*a*) is crossed, the sliding scale applies to determine the level of services that corresponds to the extent to which the minority will have control over the provision of educational services.

(Underlining added)

1. This is so because of “the collective scope of the individual rights [s. 23] grants”[[166]](#footnote-166) and the vital role this section plays in ensuring the equal partnership of the two official language groups in the context of education.[[167]](#footnote-167) As a unanimous Supreme Court pointed out in *Solski*, “[s]ection 23 provides a comprehensive code of minority language education rights which afford special status to minority English- or French‑language communities”.[[168]](#footnote-168)
2. A textual interpretation of s. 23 supports this conclusion. Indeed, the text of s. 23(3)(*b*) refers to the right of certain Canadian citizens to have their children receive instruction “in minority language educational facilities”,[[169]](#footnote-169) and not “in the parents’ minority language educational facilities”. The words “minority language” must therefore be given their common, literal meaning – i.e., the minority language community as a whole, as opposed to a restricted group belonging to this community.
3. In fact, that is how these words have been understood across Canada, including in Quebec. Thus, when linguistic school boards were established in Quebec, there were no restrictions on who, among Canadian citizens belonging to the minority language community, could vote in school elections held by English‑language school boards.
4. Moreover, following *Mahe* and subsequent case law, the provinces and territories provided in their respective legislation that Canadian citizens who are members of the French‑language minority and are covered by ss. 23 (1) and (2) of the *Charter* are the ones who may vote and stand for election to the school bodies that manage and control the schools that provide minority language education, without restriction based on the status of being a parent of a student enrolled in a minority language school.[[170]](#footnote-170)
5. These are significant legislative facts that bolster the conclusion that it is indeed the members of the linguistic minority – and not just the parents of students enrolled in schools of the linguistic minority, as the AGQ submits – who participate in the management and control of minority language educational facilities by choosing their representatives for this purpose. As Major and Bastarache, JJ. pointed out for a unanimous Supreme Court in *Arsenault‑Cameron*, it is “the official language minority, which is itself a true beneficiary under s. 23”.[[171]](#footnote-171)
6. Moreover, when the *Constitution Amendment, 1997 (Quebec)* was enacted, making paragraphs (1) to (4) of s. 93 of the *Constitution Act, 1867* inapplicable to Quebec, it was understood that the rights of Quebec’s English‑speaking minority to manage and control its educational institutions were preserved by the effect of s. 23(3)(*b*) of the *Charter*.
7. As previously noted, during the debates in the National Assembly regarding this constitutional amendment, the then Minister of Education expressed the government of Quebec’s commitment to allow Quebec’s English community to manage the new English‑language school boards,[[172]](#footnote-172) as, in fact, s. 23 of the *Charter* provides. The National Assembly’s resolution to amend s. 93 of the *Constitution Act, 1867* also reaffirms the established rights of Quebec’s English‑speaking community, including the right to have those of its children who are entitled thereto receive their instruction in English‑language educational facilities that are “under the management and control of this community”.[[173]](#footnote-173) Moreover, during the debates on the enactment of the *Constitution Amendment, 1997 (Quebec)*, the federal minister in charge of the file informed the Canadian Parliament that this amendment would not have a negative impact on Quebec’s English‑speaking minority given the constitutional rights set out in s. 23 of the *Charter*, in particular the right of that linguistic minority to have separate school boards it can manage and control.[[174]](#footnote-174)
8. As Major and Bastarache, JJ. noted in *Arsenault*‑Cameron, “[t]he historical and contextual analysis is important for courts in determining whether a government has failed to meet its s. 23 obligations”.[[175]](#footnote-175) In *Conseil scolaire francophone de la Colombie‑Britannique*,[[176]](#footnote-176) Wagner, C.J. also emphasized the importance of this analysis, noting the role that s. 93 of the *Constitution Act, 1867* played in ensuring the protection of linguistic minorities in Canada, including Quebec.[[177]](#footnote-177)
9. Wagner, C.J. pointed out that the social context, demographics and history of each language group, including Quebec’s English‑language minority, must all be considered when analyzing the rights conferred by s. 23.[[178]](#footnote-178) He noted that this section must receive a broad and liberal interpretation that is consistent with the development of official language communities,[[179]](#footnote-179) and emphasized that “[m]any rights that have been granted to Canada’s minorities were dearly won over many years, and [that] it is up to the courts to give full effect to them, and to do so clearly and transparently”.[[180]](#footnote-180)
10. To close on this point, a textual and contextual analysis of s. 23 leads to the conclusion that it is those who make up the linguistic minority who benefit from the rights conferred by this section with regard to the management and control of their educational facilities, and that they do so through representatives they choose and designate for this purpose. This conclusion is bolstered in Quebec by the historical and contextual analysis of the *Constitution Amendment, 1997 (Quebec)*.
11. That said, it should be noted that by virtue of s. 59 of the *Constitution Act, 1982*, s. 23(1)(*a*) of the *Charter* is not in force in Quebec. As a result, a number of those within Quebec’s English‑speaking minority are not covered by the individual right to have their children receive instruction in English out of public funds, even though their first language learned and still understood is English.
12. For example, many immigrants from the United Kingdom, the United States, Australia, New Zealand, South Africa and numerous other countries, who have become Canadian citizens residing in Quebec, are not entitled to English‑language instruction for their children, even though English is their mother tongue. That said, they are nonetheless an integral part of Quebec’s English‑speaking community. Quebec legislation has allowed them, as members of Quebec’s linguistic minority, to participate in English‑language school board elections (as voters or candidates), unless they have children enrolled in a French‑language school.[[181]](#footnote-181) This is still the case, even since the enactment of *Bill 40*, given that s. 15 of the *New Act respecting school elections* still allows it. Indeed, s. 1.1 of that statute implicitly recognizes this.
13. While s. 59 of the *Constitution Act, 1982* delays the coming into force in Quebec of s. 23(1)(*a*) of the *Charter*, its effect is to exclude Canadian citizens whose first language learned and still understood is English from having the individual right to have their children receive instruction in English in Quebec, unless they otherwise have that right under s. 23(1)(*b*) or 23(2) of the *Charter*. However, s. 59 of the *Constitution Act, 1982*, has no effect on s. 23(3)(*b*) of the *Charter*. Consequently, it cannot limit the meaning of the words used in s. 23(3)(*b*), nor can it be used to deny that an individual belongs to Quebec’s linguistic minority for the purposes of the resulting rights of management and control over minority language educational facilities.
14. *Conclusions*
15. The management and control rights arising under s. 23(3)(*b*) of the *Charter* are those described in *Mahe*.[[182]](#footnote-182) Consequently, the measure of management and control may, depending on the number of students involved, warrant an independent school board for the linguistic minority. Those rights, include, at the very least, the exclusive authority of the minority language representatives to make decisions relating to the minority language instruction and facilities, particularly with regard to: (a) expenditures of funds provided for such instruction and facilities; (b) the appointment and direction of those responsible for the administration of such instruction and facilities; (c) the establishment of programs of instruction; (d) the recruitment and assignment of personnel, including teachers; and (e) the making of agreements for education and services for minority language pupils.
16. Those who effectively exercise these management and control rights are the representatives chosen by the individuals forming part of the linguistic minority. In Quebec, this linguistic minority includes, at a minimum, Canadian citizens: (a) whose first language learned and still understood is English (s. 23(1)(*a*) of the *Charter*); (b) who received their primary school instruction in Canada in English (s. 23(1)(*b*) of the *Charter*); or (c) of whom any child has received or is receiving primary or secondary school instruction in English in Canada (s. 23(2) of the *Charter*).
17. With these parameters in mind, we will now consider whether the judge erred in finding that s. 23 of the *Charter* is infringed.

**Did the trial judge err in concluding that ss. 50, 52 in respect of the addition of s. 155 to the *EA*, 66, 91, 93, 196, 208, 212 and 216 of *Bill 40*, as well as ss. 155 and 473.1 of the *EA* and s. 15 of the *New Act respecting school elections*, unjustifiably infringe s. 23 of the *Charter*?**

1. For reasons of logic and convenience, the Court will examine the provisions in question in the following order:
2. s. 212 of *Bill 40* and s. 15 of the *New Act respecting school elections*, which deal with the right to vote and the eligibility of candidates in minority language school elections;
3. ss. 50, 196, 208 and 216 of *Bill 40*, which deal with the composition of the boards of directors of English‑language school service centres and the manner in which the members of these boards of directors are selected;
4. s. 66 of *Bill 40*, which abolishes the remuneration of members of the boards of directors;
5. s. 52 of *Bill 40*, which establishes eligibility restrictions for the positions of chair and vice-chair of the boards of directors;
6. s. 93 of *Bill 40* and the amendments to s. 155 *EA*, which provide that the role of spokesperson of a school service centre is now entrusted to its director general;
7. s. 91 of *Bill 40*, which deals with the creation and mission of the commitment‑to‑student‑success committee; and
8. lastly, s. 473.1 of the *EA*, which provides for dedicated or protected funding measures.
9. *The electoral qualification allowing members of the linguistic majority to vote and run in school elections in the minority language school system (s. 212 of Bill 40 and s. 15 of the New Act respecting school elections)*
10. Prior to *Bill 40*, s. 15 of the *Act respecting school elections* essentially granted, since 1989,[[183]](#footnote-183) the unfettered choice to register on the electoral list of an English‑language school board if the elector was domiciled in the territory of the school board and did not have a child admitted to the educational services of a French‑ or English‑language school board. However, an elector who had a child admitted to educational services in either a French- or English‑language school board could only vote in elections held by the school board in which the child was enrolled. As for an elector whose child was enrolled in an English‑language school board when he or she finished school, the elector was deemed to have chosen to be registered on the list of electors of that school board and to vote in its elections.
11. Section 212 of *Bill 40* amends s. 15 while preserving the principle of free choice for electors who do not have a child enrolled in a school under the jurisdiction of a French- or English‑language school service centre. Section 212 of *Bill 40* simply adapts the text of s. 15 in light of the fact that there are no longer any school elections in the French‑language school network.It now reads as follows:[[184]](#footnote-184)

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| --- | --- |
| [**15.**](https://www.legisquebec.gouv.qc.ca/fr/document/lc/E-2.3#se:15) Any elector who has a child to whom section 1 of the Education Act (chapter I‐13.3) applies who is admitted to educational services provided by an English‑language school service centre having jurisdiction over the territory in which the elector is domiciled may vote at the election of the members of that centre’s board of directors.Any elector who does not have a child to whom section 1 of the Education Act applies who is admitted to educational services provided by an English- or French‑language school service centre having jurisdiction over the territory in which the elector is domiciled may vote at the election of the members of the English‑language school service centre’s board of directors, if the elector so chooses.However, an elector whose child was enrolled in an English‑language school service centre when he or she finished school is deemed to have chosen to be registered on the list of electors of that English‑language school service centre and to vote in its elections.The elector may exercise the voting option described in the second paragraph, outside election proceedings, if, on the date the option is exercised, the elector does not have a child to whom section 1 of the Education Act applies who is admitted to educational services provided by either of the school service centres having jurisdiction over the territory in which the elector is domiciled. | [**15.**](https://www.legisquebec.gouv.qc.ca/fr/document/lc/E-2.3?langCont=en#se:15) L’électeur qui a un enfant visé à l’article 1 de la Loi sur l’instruction publique (chapitre I‐13.3) et admis aux services éducatifs dispensés par un centre de services scolaire anglophone qui a compétence sur le territoire où est situé son domicile peut voter à l’élection des membres du conseil d’administration de ce centre.L’électeur qui n’a pas d’enfant visé à l’article 1 de la Loi sur l’instruction publique et admis aux services éducatifs dispensés par un centre de services scolaire anglophone ou francophone qui a compétence sur le territoire où est situé son domicile peut voter à l’élection des membres du conseil d’administration du centre de services scolaire anglophone, s’il en fait le choix.Toutefois, l’électeur dont l’enfant a terminé ses études à un centre de services scolaire anglophone est réputé avoir choisi d’être inscrit sur la liste électorale de ce centre de services scolaire anglophone et d’y voter.L’électeur peut faire le choix prévu au deuxième alinéa en dehors du processus électoral si, à la date où il est fait, il n’a pas d’enfant visé à l’article 1 de la Loi sur l’instruction publique et admis aux services éducatifs dispensés par l’un ou l’autre centre de services scolaire qui a compétence sur le territoire où est situé son domicile. |

1. The judge is of the opinion that the principle of free choice provided for in s. 15is incompatible with s. 23 of the *Charter*, since it allows an individual who is not part of the English‑language minority to participate in school elections in the English‑speaking sector.[[185]](#footnote-185) The judge therefore declared that s. 212 of *Bill 40* infringes the rights guaranteed by s. 23 of the *Charter*, that this infringement is not justified and that s. 212 must therefore be declared inoperative with regard to the English‑language sector.[[186]](#footnote-186) He did not formally invalidate s. 15 of the *New Act respecting school elections*,[[187]](#footnote-187) but nevertheless suspended the declaration of invalidity of this provision for a period of 18 months to allow the legislature to enact remedial legislation.[[188]](#footnote-188)
2. The AGQ submits that the judge erred in arriving at this conclusion. The Court disagrees.
3. As the AGQ rightly points out, there is no evidence in the record that members of the French‑speaking majority have abused the principle of free choice in English‑language school board elections held since 1989, that is, for over 35 years. In fact, there is no financial incentive, such as a reduced school tax rate, to encourage members of Quebec’s French‑speaking majority to vote in school elections held by an English‑language school board or school service centre, since the evidence shows that this rate is now standardized.[[189]](#footnote-189) Moreover, the interest of the French‑speaking majority in school elections in general is negligible, with turnout in the most recent elections held for French‑language school boards being extremely low.[[190]](#footnote-190)
4. That said, s. 15 of the *New Act respecting school elections* nevertheless allows an individual who is not part of Quebec’s English‑speaking minority and does not have a child admitted to the educational services of a French‑language or English-language school service centre to register on the electoral list for school elections in the English‑language educational sector. This choice is made by simply giving a written notice.[[191]](#footnote-191) Furthermore, once such a choice has been made, this individual, who is not part of the English‑speaking minority, can run for an elected position in the English‑language school system.[[192]](#footnote-192)
5. Conferring these voting and candidacy rights on individuals who are not part of the English‑speaking minority is contrary to s. 23 of the *Charter*. Although such cases are likely to be extremely rare, the respondents nonetheless consider this to be an infringement of s. 23 that should be corrected by the legislature. They have expressed the fear that these rights might be used maliciously in the future. The judge agreed with them and made no error of law in this respect.
6. As already noted above, the Supreme Court recognizes that s. 23(3)(*b*) confers exclusive management and control rights on representatives of the linguistic minority.[[193]](#footnote-193) Those who are not part of the minority language community cannot control and manage the educational facilities of that language community within the meaning of this provision. It is therefore the members of the minority language community – to the exclusion of others – who must choose their representatives for these purposes.
7. It is worth remembering that the members of Quebec’s minority language community include Canadian citizens residing in Quebec whose first language learned and still understood is English, Canadian citizens who received their primary education in Canada in English, as well as Canadian citizens of whom any child received or is receiving primary or secondary instruction in English in Canada.
8. It should be noted that it is not the unfettered choice provided for in s. 15 of the *New Act respecting school elections* that poses a constitutional problem in and of itself. Rather, what is at issue is the lack of a mechanism for excluding from the electoral list those who would abuse that freedom of choice. Ultimately, it will be up to the legislature to remedy the situation by enacting legislation that complies with the principles of s. 23 of the *Charter*.
9. It is therefore appropriate for the Court to intervene in order to replace the conclusion set out in paragraph [443] of the trial judgment with a declaration to the effect that s. 15 of the *New* *Act respecting school elections* infringes the rights guaranteed by s. 23 of the *Charter* to the sole extent that it allows an individual who is not part of Quebec’s linguistic minority to vote in school elections within the English‑language school system.
10. This section is therefore inoperative with regard to the English‑language education sector solely to this extent. Moreover, the judge rightly granted the AGQ’s request to suspend the declaration of inoperability of s. 15 for a period of 18 months following the end of the judicial process – a request the respondents had not opposed – and it is appropriate to do so here.
11. *The composition of the board of directors and the method for selecting its members: ss. 50, 196, 208 and 216 of Bill 40*
12. For the following reasons, the Court is of the opinion that the trial judge did not err in concluding that ss. 50, 196, 208 and 216 of *Bill 40* restrict the rights guaranteed to the linguistic minority under s. 23(3)(*b*) of the *Charter*.

Eligibility criteria for parent representatives

1. Before *Bill 40* was enacted, commissioners were, for the most part, elected in each electoral division established for that purpose on the territory served by the school board, with the exception of the chair, who was elected by suffrage of all electors in the school board’s territory.[[194]](#footnote-194) All electors domiciled in the school board’s territory were eligible to run as a commissioner.[[195]](#footnote-195) In addition, there were three or four commissioners appointed by the parents’ committee[[196]](#footnote-196) and, only if the council of commissioners considered it necessary, another one or two commissioners co-opted by a two-thirds majority of the commissioners.[[197]](#footnote-197)
2. For an English‑language school service centre, s. 50 of *Bill 40* now replaces the council of commissioners with a board of directors made up of three categories of individuals: elected parent representatives, elected community representatives, and members designated by and among staff of the school service centre. Each of these categories is definedin *Bill 40* and is subject to its own specific requirements. The board of directors of an English‑language school service centre is now made up of a variable number of members, ranging from 16 to 34,[[198]](#footnote-198) depending on the number of electoral divisions established within the centre’s territory under the *New Act respecting school elections*.[[199]](#footnote-199) Half of the total number of board positions is reserved for parent representatives,[[200]](#footnote-200) each of whom is elected for a given electoral division based on the division of the territory served by the school service centre.[[201]](#footnote-201)
3. In addition to occupying half the positions on the board of directors, parent representatives are also the only ones entitled to hold the positions of chair and vice-chair of the board of directors.[[202]](#footnote-202) They are therefore called upon to play a predominant role on the board of directors.
4. *Bill 40*, however, places severe restrictions on the eligibility of individuals to run for parent representative positions. Under ss. 50 and 216 of *Bill 40*, any individual who wants to be elected to such a position must satisfy the following cumulative conditions (on the polling day): (1) be the parent of a student attending an institution under the school service centre’s jurisdiction;[[203]](#footnote-203) and (2) sit as a parent representative on the governing board of a school or of a vocational training centre that is under the jurisdiction of the school service centre.[[204]](#footnote-204)
5. The judge is of the view that these two requirements combined have the effect of drastically reducing the pool of potential candidates for these positions. More specifically, he concludes from the evidence that these new rules have the effect of disqualifying nearly 99% of voters currently registered on the electoral lists of the English‑language school boards.[[205]](#footnote-205) This conclusion is supported by Professor Loewen’s expert report, which clearly demonstrates the “mechanical effect” of the new rules on the pool of potential candidates.[[206]](#footnote-206) The AGQ’s expert, Professor Olivier Lemieux, conceded that Professor Loewen’s demonstration was very convincing in this respect.[[207]](#footnote-207)
6. The judge points this out in his reasons,[[208]](#footnote-208) and the AGQ has not put forward any convincing reasons to set aside this evidence and the factual conclusions the judge drew therefrom.
7. Professor Loewen’s expert report also shows that the eligibility requirements for board of directors members, combined with the drastic reduction in their compensation through the abolition of their remuneration (replaced by an attendance allowance),[[209]](#footnote-209) are likely to discourage many potential candidates from taking part in school elections. The evidence he gathered – through a survey of members of the language minority, parents on the governing boards, and sitting commissioners – establishes that these individuals are less likely to stand as candidates in school elections held under the system instituted by *Bill 40*.[[210]](#footnote-210) In his expert report, he explains why *Bill 40* has such an effect on potential candidates:[[211]](#footnote-211)

[20] In addition to these mechanical effects, the legislation […] introduces substantial psychological costs for those considering running for office. As outlined in detail in Part IV of this report, I find that across all categories of people surveyed (rightsholders, parents on governing boards and commissioners), there is less willingness to run under this new system in comparison to the old system. Indeed, depending on the treatment, net 18 to 26 rightsholders out of 100 are less willing to run (net - 18 percent to net - 26 percent), net 32 to 62 parents on governing boards out of 100 are less willing to run (net - 32 percent to net - 62 percent), and net 54 to 77 commissioners out of 100 are less willing to run (net - 54 percent to net - 77 percent) (Table G.1, Appendix G). Importantly, the reduced willingness to run is more pronounced among parents on governing boards and even more among commissioners. These psychological effects, then, appear most pronounced among those who have already demonstrated a willingness to serve their communities as representatives and who understand the challenges of acting as representatives.

[21] There are at least two psychological effects that explain why individuals are less willing to run under the Bill 40 system. One is the effect of uncertainty over candidacies. The second is the effect of increasing the difficulty of the job – especially via requiring dual mandates for parent representatives and requiring that community representatives run and serve in the entire territory of service centres – while changing compensation.

[…]

[26] Similarly, the requirement that parent representatives have children in school and serve both on the governing board of a local school and on the service centre has dissuasive effects, as confirmed by my survey results. When told about the dual mandate for parent representatives, net 24 rightsholders out of 100 are less willing to run (net - 24 %). Net 32 parents on governing boards out of 100 are less willing to run (net - 32 %). Finally, net 54 commissioners out of 100 are less willing to run (net - 54 %). As I show throughout the detailed survey results, these negative effects hold when discussing various aspects of the new legislation and across a large number of demographic subgroups […]. These results are unsurprising as, for many representatives, meaningfully engaging on the school board is already a substantial time commitment.[[212]](#footnote-212) For example, in the survey of commissioners, more than 54% report spending 10 or more hours a week on their duties as commissioners (Figure K.1, Appendix K). Fifty percent of commissioners in fact indicate that they would not have time to fulfil their duties both as a commissioner and on a governing board (Figure K.4, Appendix K). […]

[27] Finally, by changing remuneration – even modest remuneration – for members of boards of directors of the new service centres, Bill 40 both removes incentives to running, and erects barriers to doing so for those at the bottom end of income distribution (Carnes 2018). This is supported by my survey data. First, I find that when respondents of all types – rightsholders, parents on governing boards, and commissioners – are told about changes to the compensation scheme, they report substantially reduced likelihoods of running, or belief in others’ willingness to run (see Table G.1, in Appendix G). Results indicate that net 26 rightsholders out of 100 are less willing to run (net - 26 %), net 62 parents on governing boards out of 100 are less willing to run (net - 62 %), and net 77 commissioners out of 100 are less willing to run (net - 77%). The combination of a dual role and the lack of remuneration may explain why parents in particular are dissuaded from running.

(References and boldface omitted; underlining added)

1. The judge concludes that this evidence is reliable and that the methodology on which it is based [translation] “is an adequate reflection of the reaction of currently elected representatives”.[[213]](#footnote-213) He therefore rejects Professor Lemieux’s criticisms of this evidence.
2. The AGQ has offered no valid reason for rejecting this finding of fact by the trial judge. Instead, he simply refers to his own expert’s evidence that [translation] “[o]n the French side, although parents are required to perform three functions, this requirement has not had the effect of reducing their participation”.[[214]](#footnote-214) The judge clearly did not accept this evidence, and the AGQ has not shown how he committed a palpable and overriding error in so deciding. As the respondents point out, the rules governing the eligibility and designation of members of the boards of directors of French‑language school service centres differ considerably from those applicable on the English side, starting with the fact that French‑language members of the board of directors do not have to be elected and that the legislation requires a much smaller number of them, particularly among parents. Professor Loewen expressly addressed this issue in his reply to the criticisms formulated by expert Olivier Lemieux:[[215]](#footnote-215)

[20] […] Prof. Lemieux does just that in parts of his report, when he relies on data from French‑language school service centres following the implementation of Bill 40 to draw inferences regarding what might happen in the English sector […]. Prof. Lemieux’s inferences here are, however, quite problematic given the major differences that exist in both sectors, including the fact that: (a) there are *no general elections* in the French sector, unlike in the English sector, and (b) there are two to three more times the amount of parent representatives on the English sector than on the French side (8 to 17 vs 5) […]. These differences will affect individuals’ willingness to participate on the boards of directors and the likelihood of seats being filled. Indeed, on the French side representatives can have greater individual impact (as they are one of 5, versus one of 8 to 17 members) and they do not need to go through the difficulty of elections. Election aversion is an important barrier to participation, especially among women (Kanthak and Woon 2015). There is thus little to learn from this particular comparison.

(Underlining added)

1. In short, based on the evidence, the judge could conclude that *Bill 40* unduly limits the number of potential candidates for the position of parent representative and that, moreover, [translation] “[t]he difficulty of recruiting candidates is exacerbated in outlying school boards, where the number of eligible rights-holders is decreasing and distances are increasing”.[[216]](#footnote-216)
2. This significant restriction on the pool of potential candidates for parent representative positions on boards of directors infringes s. 23 of the *Charter*. As the Court concluded above, the rights of management and control over minority language educational facilities arising under s. 23(3)(*b*) of the *Charter* are for the benefit of the linguistic minority as a whole. These rights must therefore actually be exercised by representatives chosen from and by members of the linguistic minority as a whole. By drastically reducing the pool of eligible candidates for parent representative positions, *Bill 40* severely limits the ability of members of the linguistic minority to choose the individuals who will act as its representatives on the boards of directors of English‑language school service centres. In a way, it neutralizes their right to choose their representatives and stand as candidates.

Eligibility criteria for community representatives

1. Under the new scheme, community representatives are granted between 4 and 13 of the 16 to 34 positions on the board of directors of an English‑language school service centre.[[217]](#footnote-217) Their number varies according to the number of electoral divisions established in the school service centre’s territory, from which the four positions reserved for centre staff members are subtracted.[[218]](#footnote-218)
2. Unlike parent representatives, community representatives are elected by suffrage of the electors in the entire territory of the school service centre.[[219]](#footnote-219) Moreover, in order to run as candidates, community representatives must now satisfy certain expertise profiles dictated by the government, namely:[[220]](#footnote-220)
* at least one person with expertise in governance, in ethics, in risk management or in human resources management;
* at least one person with expertise in finance or accounting or in financial or physical resources management;
* at least one person from the community, municipal, sport, cultural, health, social services or business sector; and
* at least one person aged 18 to 35.
1. The expertise profiles are attributed to the community representative positions in the order set out above. If the number of community representative positions is greater than four, the profiles are attributed to the additional positions according to the same order, and this is repeated until a profile has been attributed to each of the positions.[[221]](#footnote-221)
2. Based on Professor Loewen’s expert report, the judge concluded that these new requirements reduce the pool of eligible candidates for these positions by about 50%.[[222]](#footnote-222) Professor Loewen stated the following:[[223]](#footnote-223)

[17] Recall that in the previous legislative scheme, there were 2,440 potential eligible individuals for each commissioner position (as set out above). In the Bill 40 scheme, assuming that the positions reserved for persons “with expertise in governance, in ethics, in risk management or in human resources management” or “with expertise in finance or accounting, or in financial or physical resources management” (the first two profiles listed at section 50 of Bill 40 or new section 143.1 of the *Education Act*)correspond to the “management occupation” or “business, finance, and administration occupation” categories of Statistics Canada, there would be just 4,892 (or 16.7% of 29,295 adults) available to run for four positions, implying just 1,223 adults per position. This represents approximately 50% as many individuals eligible to run per seat as compared to the pre-Bill 40 regime.

(References omitted; underlining added)

1. The judge determined that these new requirements, combined with the new electoral system applicable to community representatives (i.e., their election by all electors in the school service centre’s territory, rather than by electoral division), with the abolition of the remuneration of directors[[224]](#footnote-224) and with the fact that community representatives cannot hold the positions of chair and vice-chair of the board of directors,[[225]](#footnote-225) will discourage many potential candidates from running for these positions.
2. The evidence filed by the respondents supports this conclusion. For example, in her affidavit, Joy Humeniuk, commissioner and vice-chair of the Eastern Townships School Board, states:[[226]](#footnote-226)

11. Because I no longer have children in school, the only positions I am eligible to run for now on the Board of directors of the English‑language school service centre are the community representative positions. I would never consider running across the entire territory of the ETSB [Eastern Townships School Board] for such positions. The ETSB covers 13 provincial ridings, in part or in full. It would take me hours by car to simply cover the territory. I have always run at the ward (electoral division) level where I know the people, community and schools, and my position as Commissioner has always involved regular visits of the community and the four schools associated with my ward (made up of around 600 or 700 students).

12. There are 20 elementary schools in the ETSB and three high schools (made up of around 5000 students) which are all very far apart. The level of investment of time and energy it would take to meet the communities, visit the schools and be aware of and respond to the issues in the entire territory would be prohibitive to me, especially with no remuneration. While I have never served as Commissioner because of the remuneration, it represents an acknowledgement of the work and investment that goes into these elected positions.

13. What’s more, community representatives are not eligible for vice chair-ship and I would not be interested in not exercising the leadership role I have now exercised for more than five years. I would not overcome the important challenges of running territory-wide with no prospect of a leadership role, where those leading the board would have the least experience.

(Underlining added)

1. Mary Ellen Beaulieu, commissioner of the Eastern Shores School Board, who lives in the North Shore region (Baie-Comeau), also states that she would not run for the position of director under the new scheme, particularly given the vastness of the election territory to be covered, which includes, among others, the North Shore and Gaspé regions:[[227]](#footnote-227)

9. I would not run to be a commissioner under the Bill 40 model. My children are no longer in school and I cannot run as a parent representative. I would never run in and seek to serve the entire territory of ESSB [Eastern Shores School Board] as a community representative. First, people from the Gaspé do not know me and I don’t know why they would vote for me. Moreover, I would not have the time, energy or money to cover the entire ESSB territory and manage it effectively and I do not think a person from another region could either. (…)

1. For similar reasons, Olivia Landry, commissioner of the Sir Wilfrid Laurier School Board, declares that she would not run in school elections under the new scheme.[[228]](#footnote-228)
2. Professor Loewen’s expert report is also to the same effect. It shows that the new requirements set out in *Bill 40* will lead to a decrease in the number of individuals wishing to stand for election as community representatives:[[229]](#footnote-229)

[25] Further, those interested in community representative positions face the increased difficulty of having to run and serve in the entire territories of school boards, which are extremely vast (unlike the current system where all commissioners with the exception of the chair run in their local wards). The Central Québec School Board for example spans 31 provincial ridings and 13 federal ridings. Its territory of approximately 391,755 km2 is around 788 times the area of the island of Montreal and larger than Germany. In addition to the uncertainty that the community profiles generate, the new requirements for community representatives (having to run and serve in the entire territory of the boards and fit the community profiles) decreases individuals’ willingness to run in school board elections, as my survey demonstrates. I find that all three types of survey respondents (rightsholders, current parent representatives on governing boards, and current or former commissioners) indicate that they are less willing to run under the new community representative positions than they are under the current system. Net 18 rightsholders out of 100 are less willing to run (net - 18 %), net 53 parents on governing boards out of 100 are less willing to run (net - 53 %), and net 77 commissioners out of 100 are less willing to run (net - 77%). Respondents also express a belief that others would be less willing to run for the community representative positions than under the new system as well (see Table G.1 in Appendix G).

(Underlining added; boldface omitted)

1. The judge accepted this testimonial and expert evidence. The AGQ has not shown how this finding of fact is tainted by a palpable and overriding error. Rather, he faults the judge for failing to take into account the legislature’s objectives and for accepting the expert evidence of Professor Loewen rather than the evidence relating to the effects of *Bill 40* on school governance participation in the French‑language sector. These two complaints are unfounded, for the reasons already provided above.
2. By significantly restricting the pool of potential candidates for the positions of community representative, the impugned provisions encroach on the ability of members of the linguistic minority to choose their representatives and run for these positions. In so doing, they infringe s. 23(3)(*b*) of the *Charter*.

Eligibility of staff members

1. Under s. 50 of *Bill 40* (s. 143.1 para. 1(3) of the *EA*), staff members of an English‑language school service centre are now granted a fixed number of positions on the board of directors – i.e., four positions, which must be filled by one teacher, one non‑teaching professional staff member, one support staff member and one principal of an educational institution. Unlike parent representatives and community representatives, staff representatives are not elected; instead, they are designated by their peers.[[230]](#footnote-230)
2. Like the judge, the Court concludes that this provision infringes s. 23(3)(*b*) of the *Charter*.
3. In *Mahe*, the Supreme Court established that when the number of children who are to receive instruction in the language of the minority is sufficiently large, the linguistic minority is entitled to the creation of an “independent school board”.[[231]](#footnote-231) In the present matter, it is undisputed that this is the case for Quebec’s English‑speaking minority, which is entitled to “independent school boards” that must, at a minimum, allow “minority language representatives” to exercise “exclusive authority to make decisions relating to the minority language instruction and facilities”.[[232]](#footnote-232)
4. By imposing the mandatory presence on the board of directors of a certain number of non‑elected employees who, moreover, are not necessarily part of the linguistic minority, *Bill 40* directly infringes the “full rights of management and control”[[233]](#footnote-233) that representatives of the linguistic minority must enjoy under s. 23(3)(*b*) of the *Charter*. Contrary to the AGQ’s argument, the fact that these staff members are initially hired by the school service centres is irrelevant, as their function as employees cannot dictate or even establish their legitimacy on a board of directors for the purpose of representing the linguistic minority. A linguistic minority’s choice of representatives to manage and control its educational institutions is altogether different from the hiring of school service centre staff, whose role is entirely distinct from the protective role that entails specifically preserving and encouraging linguistic and cultural vitality in the minority language community. The Court cannot accept the argument that the linguistic minority is represented through the staff hired by a school service centre.
5. *Abolition of the remuneration for members of boards of directors (s. 66 of Bill 40)*
6. The judge concluded, as a finding of fact, that under the old scheme, the chair of a school board was paid an annual remuneration ranging from $15,000 to $20,000, while the commissioners received about half that amount.[[234]](#footnote-234)
7. Section 66 of *Bill 40* amends s. 175 of the *EA* to provide that members of the boards of directors of school service centres will no longer be remunerated, but will, instead, receive an attendance allowance. The standards for the payment of this attendance allowance were established by order in council dated October 7, 2020:[[235]](#footnote-235)

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| Chair of the board of directors: | $200 per board meeting (maximum of $4,000 / year) |
| Vice-chair of the board of directors: | $150 per board meeting (maximum of $3,000 / year) |
| Other members: | $100 per board meeting (maximum of $2,000 / year) |

1. Based on the evidence, the judge concludes that, henceforth, a chair would receive approximately $1,000 per year, while other board members would receive around $500 per year – i.e., compensation approximately 15 times less than before.[[236]](#footnote-236) He is also of the view that this measure contributes to reducing the pool of potential candidates for the positions of parent representative and community representative on the boards of directors of English‑language school service centres.[[237]](#footnote-237)
2. Abolishing the remuneration and replacing it with attendance allowances, resulting in a very significant reduction in the annual amounts paid to board members, reflects the latter’s diminished functions in relation to the school commissioners they are replacing, as well as the limited time the legislature considers they must devote to these functions.
3. The Court agrees with the judge that this paradigm shift, when considered in conjunction with the other eligibility requirements for parent representatives and community representatives, contributes to significantly reducing the pool of potential candidates for these positions. In other words, the cumulative effect of these measures will necessarily drastically restrict not only the pool of members of the linguistic minority who will stand as candidates, but also the ability of the linguistic minority to choose its representatives who will actually exercise the management and control rights arising under s. 23(3)(*b*) of the *Charter*.
4. *Eligibility restrictions for the positions of chair and vice-chair (s. 52 of Bill 40)*
5. Section 52 of *Bill 40* amends s. 155 of the *EA* to provide that, henceforth, the chair and vice-chair of the board of directors of a school service centre are to be appointed from among the parent representatives. Prior to *Bill 40*, the chair was elected by universal suffrage of a school board’s electors. The judge is of the opinion that this measure violates s. 23 of the *Charter*, as it contravenes the minority’s management and control rights by preventing members elected by the community from holding these leadership positions. There is no basis for intervening with respect to this conclusion.
6. As mentioned above, due to the eligibility requirements *Bill 40* imposes, it considerably reduces the pool of potential candidates for the positions of parent representative. As a result, it also necessarily restricts the pool of candidates who can be chosen to act as chair or vice-chair of the board of directors of an English‑language school service centre. This is a demonstration of the “mechanical effect” of *Bill 40* referred to in Professor Loewen’s expert report.
7. Joy Humeniuk’s affidavit further shows that the inability of community representatives to hold the positions of chair and vice-chair, combined with the other measures provided for in *Bill 40*, is a disincentive to participation in school governance.[[238]](#footnote-238) In this regard, the Court notes the respondents’ argument, based on the expert evidence of Professor Loewen, that “[l]imiting leadership positions to parents with children in school and who sit on a governing board creates a term limit, reducing the ability of the chair and vice-chair to acquire valuable experience and expertise as elected officials and reducing their effectiveness”.[[239]](#footnote-239)
8. *Role of spokesperson entrusted to the director general (s. 93 of Bill 40 and amendment to s. 155 of the EA)*
9. The role of spokesperson of a school service centre is now entrusted exclusively to the director general of the centre,[[240]](#footnote-240) whereas this role was previously entrusted to a representative elected by and from among the members of the linguistic minority, namely the chair of the school board.[[241]](#footnote-241)
10. The evidence demonstrates the vital and leading role of a school board spokesperson in expressing the needs and concerns of the linguistic minority regarding educational matters. Stephen Burke, chair of the Central Québec School Board, explained the importance of this role in defending the educational interests of the linguistic minority vis-à-vis the provincial authorities and the public, indicating that he did not hesitate to be critical of the government when necessary:[[242]](#footnote-242)

6. I believe that one of the most important roles that the chair of a school board plays is to act as spokesperson for the school board. I take this responsibility very seriously.

7. Because I am elected by the English‑language minority, I can speak for the school board and the community it represents with legitimacy and authority, in a way that a staff (non-elected) member of the school board cannot. I can fulfill this role independently and can be critical of the government if needed, as I know that my position only depends on the support of my electors.

8. As chair, I handle relations with political leaders and government officials and give voice to the community’s concerns. At times, I must also voice the community’s opposition to measures proposed by the provincial government. Despite this, I strive to maintain a good working relationship with the government.

1. The affidavits of John Ryan, chair of the New Frontiers School Board,[[243]](#footnote-243) and Michael Murray, chair of the Eastern Townships School Board,[[244]](#footnote-244) are to the same effect.
2. The judge was right to conclude that the director general of a school service centre, in his capacity as an employee of the centre, clearly does not have the same role as spokesperson or the same freedom to act as a school board chair who is elected by the linguistic minority to represent it. The fact that the director general of a school service centre is appointed by the centre’s board of directors and has the obligation to ensure that the board’s decisions are carried out,[[245]](#footnote-245) does not change this finding. The director general is not chosen by the linguistic minority – of which he or she is not necessarily a member – to represent it.
3. By withdrawing the role of spokesperson from a linguistic minority representative and entrusting it to an employee hired for a specific function, without regard to the employee’s relationship of trust with this community or his or her qualifications as a spokesperson, *Bill 40* infringes on the management and control rights conferred on linguistic minority representatives and arising under s. 23(3)(*b*) of the *Charter*.
4. *Commitment-to-student-success committee (s. 91 of Bill 40)*
5. Before the *Bill 40* amendments, the *EA* provided that the development of the commitment‑to‑success plan was the direct and exclusive responsibility of the council of commissioners.[[246]](#footnote-246) The *EA* also provided that, as part of the commissioners’ contribution to defining the school board’s directions and priorities, their role included informing the council of commissioners of the needs and expectations of the population of their electoral division or their sector.[[247]](#footnote-247)
6. Henceforth, the members of the board of directors of a school service centre do not participate in defining and implementing the centre’s directions and priorities, and they no longer have the obligation or responsibility of informing the board of the population’s needs and expectations.[[248]](#footnote-248) Pursuant to the changes introduced by *Bill 40*, the commitment‑to‑success plan is, instead, developed, prepared and proposed by a committee made up exclusively of school service centre staff – i.e., the commitment-to-student-success committee.[[249]](#footnote-249) The board of directors’ role is now limited to approving the proposed plan, without any direct involvement in its development, preparation or content, and the board must formally justify any refusal to approve the plan.[[250]](#footnote-250)
7. This plan sets out the very essence of the directions and activities of the school service centre, including:[[251]](#footnote-251)
* a description of the context in which the school service centre acts, particularly the needs of its schools, the main challenges it faces, and the characteristics and expectations of the community it serves;
* the directions and objectives selected;
* the targets for the period covered by the plan;
* the indicators, particularly Quebec-wide indicators, to be used to measure achievement of those objectives and targets; and
* the centre’s objectives with regard to the level and quality of the services it provides.
1. These matters are at the core of the management and control rights guaranteed to the linguistic minority under s. 23(3)(*b*) of the *Charter*. Minority language representatives, however, are excluded from the commitment-to-student-success committee. The Court fully agrees with the trial judge’s conclusion that it [translation] “is inconceivable for a plan as fundamental as the commitment-to-success plan not to be the responsibility of the minority’s elected representatives”.[[252]](#footnote-252)
2. We note, again, that *Mahe* expressly recognizes that minority language representatives must have exclusive authority to make decisions relating to the minority language instruction and facilities.[[253]](#footnote-253) In this case, the development of the commitment‑to‑success plan is directly linked to this power. The commitment‑to‑success plan must also be considered within the context of the school’s educational project.[[254]](#footnote-254) The evidence filed by the respondents, which the trial judge accepted, demonstrates the importance of this tool in determining the educational needs, objectives and targets of the minority language community.[[255]](#footnote-255)
3. As the trial judge pointed out, *Bill 40* contains no requirement that the members of the commitment‑to‑student‑success committee be elected officials or even part of the linguistic minority.[[256]](#footnote-256) Nor is the requirement that the commitment‑to‑success plan be approved by the board of directors of the school service centre sufficient in and of itself to conclude that the board has effective control over the plan. As the Court already noted above, while the board of directors has the power to reject the plan, it must nonetheless justify its rejection and return the plan it to the commitment‑to‑student‑success committee, which is responsible for making any adjustments.[[257]](#footnote-257)
4. Thus, the primary responsibility for defining the needs, directions, targets and objectives to be achieved remains with a committee made up of employees who are not representatives of the linguistic minority, nor even necessarily members of that minority, thereby infringing s. 23 of the *Charter*. Indeed, these matters rather fall under the responsibility of the representatives of the linguistic minority. That said, it is useful to point out again that the rights of management and control accorded to the representatives of the linguistic minority under s. 23 of the *Charter* do not preclude provincial regulation.[[258]](#footnote-258) The government, however, cannot use pedagogical or other requirements established to address the needs of the majority language students to trump cultural and linguistic concerns appropriate for the minority language students.[[259]](#footnote-259)
5. *Dedicated or protected funding measures under s. 473.1 of the EA*
6. The Court agrees with the AGQ that the government has broad discretion in allocating public funding for minority language education. That said, funding for the minority language school system must, at a minimum, align with two imperatives in order to respect the rights guaranteed by s. 23 of the *Charter*.
7. The first imperative is that the level of funding provided from public funds for minority language students and educational facilities must be at least equivalent, in proportion to the number of students, to that provided for majority language students and educational facilities, taking into account the specific characteristics of each linguistic community.[[260]](#footnote-260) It is undisputed that this first imperative is satisfied in this case.
8. The second is that the management and control of this funding must be the responsibility of minority language representatives, who are nonetheless obliged to use it to reasonably meet the educational objectives established by the government for all students in the province. This second component excludes government micromanagement of funding provided for minority language students and educational facilities. It does not preclude budgetary rules to provide for the required funding for these students and facilities, but it does impose certain limits so as to prevent the government from taking the place of minority language representatives in managing and controlling the facilities in question.
9. At this point, it is important to reiterate the words of Dickson, C.J. in *Mahe*, where he pointed out that s. 23(3)(*b*) of the *Charter* guarantees, at a minimum, that “minority language representatives” will have “exclusive authority to make decisions relating to the minority language instruction and facilities”, including with respect to “expenditures of funds provided for such instruction and facilities”.[[261]](#footnote-261) This right would be illusory if a government could prescribe and dictate in minute detail how allocations of funds are to be used.
10. Yet this is precisely what s. 473.1 of the *EA* allows when it authorizes, without any limit, the implementation of budgetary rules that “may, subject to the conditions or in accordance with the criteria prescribed in them or determined by the Minister, stipulate that certain budgetary measures are intended for a transfer to the budget of educational institutions”. We turn to this now in greater detail.
11. Government subsidies for operating expenses are allocated to each English‑language school board through operating budgetary rules,[[262]](#footnote-262) which prescribe how financial resources are to be allocated. These budgetary rules make it possible to calculate the amounts of subsidies to be paid,[[263]](#footnote-263) while preserving a certain degree of autonomy for school boards in organizing services and choosing the means for implementing them.[[264]](#footnote-264) These subsidies mainly take the form of [translation] “basic allocations for educational services”,[[265]](#footnote-265) which are largely determined in light of the school population. These allocations are made to enable school boards to meet their obligations related to educational activities (i.e., teaching, teaching support, complementary services and professional development).[[266]](#footnote-266) These basic allocations are supplemented by additional sums for other areas of activity, such as additional support for students and teachers, special education, and support for schools in remote areas and small communities.[[267]](#footnote-267)
12. The operating budgetary rules categorize the various amounts allocated to school boards under separate [translation] “families” and [translation] “groups” of budgetary measures.[[268]](#footnote-268) This is where s. 473.1 of the *EA* comes into play, by allowing the Minister, since the 2016-2017 school year, to prescribe that certain funds must be allocated by school boards to educational institutions to be used solely for the purposes determined by the Minister.[[269]](#footnote-269)
13. These measures are identified in the operating budgetary rules as [translation] “dedicated” or [translation] “protected”.[[270]](#footnote-270) Dedicated measures are generally transferable to other measures within the group of measures of which they are a part.[[271]](#footnote-271) Protected measures are not transferable: they must be used for the purposes for which they are expressly intended by the Minister.[[272]](#footnote-272)
14. In his affidavit, Pierre-Luc Pouliot, director general of network support and funding at the Ministère de l’Éducation, explains that the purpose of protected measures is to ensure that [translation] “all students in all public school bodies can benefit from the elements provided under each of these measures, regardless of the governance of the school (senior school staff, governing board, SSC [school service centre] and SB [school board] committees and governance, etc.), so that the importance of these direct services to students is protected and so as to avoid jeopardizing students’ educational success”.[[273]](#footnote-273) As examples of protected measures, he mentioned the measure aimed at ensuring [translation] “a basic level of complementary services in each school offering direct services to students […] by qualified resources in order to meet their needs in terms of learning support, guidance and follow-up”,[[274]](#footnote-274) as well as the measure aimed at introducing full-time kindergarten classes for four-year-olds.[[275]](#footnote-275)
15. The trial judge found that s. 473.1 of the *EA* infringes s. 23(3)(*b*) of the *Charter* in that it runs directly counter to the exclusive authority of the minority language representatives to make decisions concerning the expenditure of funds provided for minority language instruction and facilities.[[276]](#footnote-276) This conclusion is well founded.
16. By allowing the Minister to dictate the transfer of subsidies to educational institutions to be used for specific purposes that he alone determines, whether as “dedicated measures” or “protected measures”, s. 473.1 of the *EA* cuts into the exclusive powers of management and control of minority language representatives over the expenditure of funds. In both cases, minority representatives lose control over these subsidies, since they must be used for specific purposes that do not necessarily correspond to the minority’s needs, objectives or linguistic and cultural interests.
17. The affidavit of Livia Nassivera, the English Montreal School Board’s Director of Financial Services, which affidavit the judge accepted, illustrates this well:[[277]](#footnote-277)

7. As explained in exhibits LN-1 to LN-5, the funds obtained under a protected measure must be transferred to schools and adult education and vocational training centres and must be used solely for the purpose identified by the Ministry for that measure (see for instance LN-5, p. XVII). The school board may decide the proportion of the subsidy that is allocated to each school but cannot decide to use any of the funds for any other purpose.

8. For example, measure 15026 *(Ajout d’enseignants spécialistes au préscolaire)* [translation: Adding specialized preschool teachers] in the budgetary rules of 2020-2021 is a protected measure that may only be used for the purpose of providing preschoolers with a 30-minute segment per week with a teacher specialized in physical education, health or arts, as appears from exhibit LN-5 (at p. 79).

9. The funds obtained under a dedicated measure must be transferred to schools and adult education and vocational training centres; the school board or the school can transfer the funds to another measure but only within the same grouping of budgetary measure (see for instance exhibit LN-5, at p. XVII).

10. For example, measure 15023 *(À l’école, on bouge!)* [translation: Get moving at school!] in the budgetary rules of 2020-2021 may be used for physical education projects that meet the criteria of measure 15023, or it may be transferred to any of the following seven measures that are part of the 15020 grouping of measures *(“Soutien à* *la persévérance”)* [translation: Supporting perseverance],all of which are themselves protected or dedicated measures, as appears from exhibit LN-5 (see pp 70-85):

15021 - *Soutien additionnel à* *la consolidation des apprentissages et à* *l’engagement scolaire des élèves en contexte COVID* [translation: Additional support for consolidating learning and engaging students in school in a COVID context] (dedicated measure);

15024 - *Aide aux parents* [translation: Assistance to parents] (dedicated measure);

15025 – *Seuil minimal de services pour les écoles* [translation: Minimum service threshold for schools] dedicated measure);

15026–- *Ajout d’enseignants spécialistes au préscolaire*

[translation: Adding specialized preschool teachers] (protected measure);

15027 – *Soutien à* *la réussite éducative des élèves doués* [translation: Support for the educational success of gifted students] (protected measure);

15028 *– Activités parascolaires au secondaire* [translation: Extracurricular activities in secondary schools] (dedicated measure);

15029 – *Cours d’école vivantes, animées et sécuritaires* [translation: Vibrant, lively and safe school playgrounds] (protected measure).

(Boldface omitted)

1. The evidence further reveals that since the 2016 legislative amendment to s. 473.1 of the *EA*, the number of dedicated and protected measures has more than doubled. Indeed, it rose from 14 in the 2016-2017 school year to 37 in the 2020-2021 school year,[[278]](#footnote-278) thereby increasingly restricting the budgetary flexibility of linguistic minority representatives. The evidence further establishes that unused “dedicated” and “protected” amounts are “lost” and cannot be reused for other purposes by a school board.[[279]](#footnote-279)
2. Thus, s. 473.1 of the *EA*, in its version in force since 2016, has the practical effect of stripping the minority language representatives of the authority of management and control over significant sums, without the possibility of recovering them, while allocating those sums directly to certain specific purposes that are determined by the Minister and that do not necessarily correspond to the needs, objectives or linguistic and cultural interests of the linguistic minority as determined by its representatives. This is an infringement of the management and control powers arising under s. 23(3)(*b*) of the *Charter*.

**Justification of these infringements under s. 1 of the *Charter***

1. Under s. 1 of the *Charter*, the rights and freedoms set out therein may be restricted, but “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. It is therefore possible to justify a limit on s. 23 language rights under s. 1 of the *Charter*.[[280]](#footnote-280)
2. However, for the reasons expressed by Wagner, C.J. in *Conseil scolaire francophone de la Colombie‑Britannique*,[[281]](#footnote-281) s. 23 “is one of the *Charter* provisions whose infringement is especially difficult to justify”.[[282]](#footnote-282) Any intrusions on this provision “must therefore be analyzed and justified on the basis of a very stringent standard”.[[283]](#footnote-283) Indeed, to date, the Supreme Court has never found that an infringement of s. 23 was justified under s. 1.[[284]](#footnote-284)
3. Wagner, C.J.’s comments regarding the autonomy conferred by s. 23 on the linguistic minority with respect to the management of its schools and their funding seem particularly relevant to the justification in the case at bar:[[285]](#footnote-285)

[149] What s. 23 does is to protect an official language minority from the effects of decisions of the majority in the area of education by granting the minority a certain autonomy in relation to its education system. The history of the relationship between the majority and the minority in this area shows that the minority’s interests are not well served if it does not have some control over the management and funding of its schools. 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.

1. It bears reminding that the onus in the s. 1 inquiry is on the party seeking to uphold the infringing measure[[286]](#footnote-286) – namely, the government.[[287]](#footnote-287) As a general rule, the government will have to present not only arguments, but also evidence to prove its justification.[[288]](#footnote-288) In certain cases, the government’s claims and evidence may be supplemented by “common sense and inferential reasoning”;[[289]](#footnote-289) as the Supreme Court pointed out in *Sauvé*, however, one must be cautious before accepting this type of justification.[[290]](#footnote-290)
2. To meet his burden, the AGQ must satisfy two criteria. First, he must prove the importance of the infringing measure’s objective. More specifically, to be characterized as sufficiently important, the objective must relate to concerns that are pressing and substantial in a free and democratic society.[[291]](#footnote-291) Second, once the importance of the objective has been established, the AGQ must show that the means chosen to attain the objective are reasonable. This second criterion has three components: (1) the measure must be rationally connected to the intended objective; (2) the means chosen should impair the right or freedom in question as little as possible; and (3) the effect of the measure limiting the right or freedom must be proportional to the objective that has been designated as important.[[292]](#footnote-292)
3. How does the foregoing apply to the matter at hand?
4. In his appeal brief, the AGQ does not precisely explain the important objective of the infringing provisions, merely referring to his submissions on the subject of infringement, thereby subsuming the justification analysis with the infringement analysis.[[293]](#footnote-293)
5. At trial, the AGQ provided a general explanation of the intended purpose.[[294]](#footnote-294) The trial judge described the main pressing and substantial objective identified by the AGQ in the outline of the oral argument that had been provided to the judge as that of [translation] “reviewing school governance to bring the decision‑making process closer to students”,[[295]](#footnote-295) and the ancillary objective as that of [translation] “giving parents a greater role in managing” school service centres.[[296]](#footnote-296)
6. However, as previously discussed, the main objective of *Bill 40* is actually to replaceschool boards – which are run by elected commissioners who are responsible for organizing educational services and ensuring their quality – with school service centres whose primary mission is to provide services to schools. There is therefore a shift from a political body in charge of organizing school services for the population to an administrative body that provides services. This paradigm shift is reflected in the governance structure, with decision‑making powers being for the most part conferred on school service centre staff acting largely in accordance with the many ministerial directives on pedagogical, budgetary and administrative matters. As explained earlier, the role of the board of directors of a school service centre is now essentially one of oversight rather than direction, in keeping with its new mission.
7. While these significant changes in school organization and governance were the result of circumstances specific to the French‑language sector, including low voter turnout in school elections in that sector, the evidence does not reveal that these changes address the needs of the English‑language sector or respond to a request from the linguistic minority – as, indeed, the trial judge determined as a finding of fact.[[297]](#footnote-297)
8. *Bill 40* radically alters existing structures, in particular by fundamentally transforming school boards in response to political imperatives specific to the French‑speaking majority. The resulting paradigm shift is simply imposed on the English‑speaking sector, tailoring it slightly, but with little regard for the realities and needs of the linguistic minority. The judge’s analysis of the evidence at paragraphs [329] to [339] of his reasons is particularly enlightening in this regard.
9. While it is not necessary to justify the legislative objective solely with respect to the linguistic minority, as the judge suggested,[[298]](#footnote-298) a legislative measure that is appropriate for the linguistic majority is not necessarily in and of itself a sufficient explanation to justify an infringement of a right guaranteed by s. 23 of the *Charter*.
10. As Dickson, C.J. wrote in *Mahe*,[[299]](#footnote-299) in comments that were reiterated in *Arsenault‑Cameron*:[[300]](#footnote-300) “[…] the specific form of educational system provided to the minority need not be identical to that provided to the majority. The different circumstances under which various schools find themselves, as well as the demands of a minority language education itself, make such a requirement impractical and undesirable”. It follows that the justification for a *Charter* infringement cannot simply be the desire to take the management model applicable to the linguistic majority and trace it onto the linguistic minority.
11. Apart from putting forward vague, commonplace objectives such as [translation] “bring[ing] the decision‑making process closer to students” or [translation] “giving parents a greater role in managing”[[301]](#footnote-301) school service centres, the AGQ has not presented any real pressing and substantial concern that would justify the changes made to the governance model in the English‑language educational sector. Moreover, the AGQ has not put forward any serious pedagogical objective to justify the provisions of *Bill 40* that infringe s. 23 of the *Charter*.
12. Consequently, the AGQ has failed to satisfy the first step of the analysis, which is to show that the infringing measures are in pursuit of a pressing and substantial objective. The Court therefore agrees with the following comments by the trial judge with regard to justification:

[translation]

[404] The AGQ has failed to show what national pedagogical objectives were not reached by the existing system or would be improved with the new regime.

[405] The demonstration of the growing involvement of the Minister of Education and the rationalization of the local management structures, which form the bulk of the evidence adduced by the AGQ, do not justify the legislature preventing a great majority of rights holders from running for certain positions in school elections, or discouraging them from doing so, by prohibiting them from occupying the positions of chair or vice-chair or being the spokesperson for the school board.

[406] They do not justify that these elected officials be excluded from the process of designing the commitment‑to‑student‑success plan.

[407] They do not justify the Minister becoming so involved in the management of funds allocated to school boards that certain amounts transferred to them cannot be used.

[408] The legislature had the low voter turnout for school elections in mind. It appears, however, that English‑language elector turnout is two to three times higher than French‑speaking elector turnout. The Court does not see how restricting candidates will increase the number of electors and stir up greater interest in these elections.

[…]

[414] The approach suggested by the AGQ is too flexible and too broad, and it does not meet the justification test. The infringements have not been individually justified by an in-depth analysis.

[415] With respect to minimal impairment, the AGQ submits that it is not necessary to prove that the legislator has chosen the least restrictive means of achieving its end. He argues that it is sufficient for the chosen means to be among the range of reasonable solutions to effectively achieve the objectives. This range has not been established.

[416] The AGQ argues that the impairment is minimal insofar as the commissioners or trustees are not appointed by the French‑speaking majority. The fact that certain aspects of control and management were preserved, while in several respects the “exclusive” nature was removed, does not constitute a minimal impairment justifying the measure.

(Reference omitted)

**Did the trial judge err in concluding that s. 23 of the *Charter* imposes a duty to consult on the state that applies as part of the law-making process and requires the National Assembly to respond to the concerns of Quebec’s English‑speaking community?**

1. The AGQ questions the trial judge’s conclusion that [translation] “[g]overnments, including legislatures, must take into account the needs and concerns of the linguistic minority when adopting statutes and imposing decisions”.[[302]](#footnote-302) In particular, he objects to the judge’s statement that the government’s duty in this case goes beyond consultation and involves an obligation of result aimed at meeting the needs of the linguistic minority.[[303]](#footnote-303) He also disagrees with the judge’s conclusion suggesting that the Superior Court could supervise this consultation process within the law-making procedure seeking to replace the provisions that have been declared inoperative.[[304]](#footnote-304)
2. In the AGQ’s view, the constitutional principles of the separation of powers, parliamentary sovereignty and parliamentary privilege are incompatible with the recognition of a duty to consult on the part of the legislature.[[305]](#footnote-305) The judge’s conclusion to the contrary amounts to transferring legislative jurisdiction over education to s. 23 rights holders, which is contrary to s. 93 of the *Constitution Act, 1867*, in which the provinces are given exclusive jurisdiction to enact laws in relation to education.[[306]](#footnote-306) The AGQ further submits that it is up to the provincial legislature to determine how it intends to fulfill its obligations under s. 23 of the *Charter*, provided legislation ultimately enacted is not otherwise incompatible with those obligations.[[307]](#footnote-307)
3. The Court agrees with the AGQ’s arguments that the trial judge erred in concluding that s. 23 of the *Charter* imposes a constitutional duty on the legislature to consult representatives of the linguistic minority, whether under the supervision of the Superior Court or otherwise, before enacting legislation with respect to education.
4. Generally speaking, legislatures have no constitutional duty to consult citizens before making laws, even when their legislation is likely to have a detrimental effect on citizens’ rights. This is so because of the principles of the separation of powers and parliamentary sovereignty.[[308]](#footnote-308)
5. Certainly, the government must take the needs of the linguistic minority into account and try to meet them as far as possible when it comes to educational needs – for example, when deciding whether a sufficient number of children warrants opening a class, establishing a minority language educational facility, or creating an independent school board.
6. The situation, however, is different when it comes to making laws. It goes without saying that if the legislature enacts a statute that proves to be incompatible with the rights of the linguistic minority, the statute may be invalidated by the courts, since legislative measures must respect the requirements of s. 23 of the *Charter*.[[309]](#footnote-309) That said, while it may be politically wise for the legislature to do so, the legislature has no constitutional duty to consult minority language representatives regarding the enactment of legislation in relation to education.
7. Indeed, s. 23 of the *Charter* lays down a comprehensive code that establishes the scope of minority language educational rights.[[310]](#footnote-310) This is why, in *Mahe*, the Supreme Court rejected the argument that s. 23 should be interpreted in light of ss. 15 (equality rights) and 27 (multiculturalism) of the *Charter*:[[311]](#footnote-311)

While I agree that it is often useful to consider the relationship between different sections of the *Charter,* in the interpretation of s. 23 I do not think it helpful in the present context to refer to either s. 15 or s. 27.Section 23 provides a comprehensive code for minority language educational rights; it has its own internal qualifications and its own method of internal balancing. A notion of equality between Canada’s official language groups is obviously present in s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada.

(Underlining added)

1. One must therefore reject the respondents’ proposal that s. 23 of the *Charter* should be interpreted by considering both the duty to consult Aboriginal peoples arising from s. 35 of the *Constitution Act, 1982* and the right of workers to collectively bargain their working conditions stemming from the freedom of association guaranteed by s. 2(*d*) of the *Charter*.[[312]](#footnote-312)
2. Not only is s. 35 of the *Constitution Act, 1982* not part of the *Charter*, but the resulting duty to consult is based on the fiduciary relationship of governments with Aboriginal peoples, which itself flows from the historical relationship between the Crown and Aboriginal peoples and from the honour of the Crown,[[313]](#footnote-313) which precludes any analogy for the purposes of s. 23 of the *Charter*.
3. As for s. 2(*d*) of the *Charter*, while the right of association provided for therein does indeed include a limited right to collectively bargain working conditions,[[314]](#footnote-314) this right is also based on the specific history of labour relations in Canada and on international conventions dealing with industrial relations.[[315]](#footnote-315) It is therefore not appropriate to apply to s. 23 of the *Charter* – directly or even by analogy – principles derived from the right of association of workers and from s. 2(*d*).
4. The duty to consult in relation to minority language educational rights – if such duty exists – must therefore flow from s. 23 itself. While the Supreme Court has recognized that this section imposes an obligation on governments to take the educational needs of the linguistic minority into account so as to ensure the concrete application of the rights conferred therein, it has not, to date, concluded that the legislature must consult the linguistic minority before enacting legislation.
5. In *Arsenault‑Cameron*, a ruling dealing with s. 23 of the *Charter*,Major and Bastarache, JJ. emphasized the following:[[316]](#footnote-316)

43 […] Where a minority language [school] board has been established in furtherance of s. 23, it is up to the board, as it represents the minority official language community, to decide what is more appropriate from a cultural and linguistic perspective. The principal role of the Minister is to develop institutional structures and specific regulations and policies to deal with the unique blend of linguistic dynamics that has developed in the province (for example, see *Reference re Public Schools Act (Man.)*, *supra*, at p. 863).

1. They added, however, that this obligation does not preclude provincial regulation:

53 The province has a legitimate interest in the content and qualitative standards of educational programs for the official language communities and it can impose appropriate programs in so far as they do not interfere with the legitimate linguistic and cultural concerns of the minority. School size, facilities, transportation and assembly of students can be regulated, but all have an effect on language and culture and must be regulated with regard to the specific circumstances of the minority and the purposes of s. 23.

1. While the implementation of s. 23 “will require the fullest understanding of the needs of the [linguistic] minority”, and while “[t]he participation of minority language parents or their representatives in the assessment of educational needs and the setting up of structures and services which best respond to them is most important”,[[317]](#footnote-317) the fact remains that courts “should be loath, however, to detail what legislation the [g]overnment […] must enact in order to meet its constitutional obligations”.[[318]](#footnote-318) As Dickson, C.J. noted in *Mahe*,[[319]](#footnote-319) “the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met”.
2. The trial judge’s conclusion that, when drafting legislation, the government of Quebec and even the National Assembly are subject to a duty to consult with the English‑language minority – a process that, moreover, is to be exercised under the supervision of the Superior Court – does not appear to be consistent with the teachings of the Supreme Court.
3. Evidently, the failure to consult minority language representatives could lead to legislation that does not fully take into account the rights conferred by s. 23 of the *Charter*, as is the case here. Such failure can thus lead to legal challenges that might otherwise have been avoided. It is therefore desirable for the government to consult representatives of the linguistic minority with respect to education‑related legislation that might be of particular interest to them, but as previously mentioned, there is no such constitutional duty under s. 23 of the *Charter*.

**Did the trial judge err in his choice of remedies?**

1. The AGQ argues that the judge made several errors regarding remedies. More specifically, he finds fault with the fact that the judge: (a) retained jurisdiction over the file (para. [446] of the judgment); (b) suspended the application to the English‑language school boards of the statutory provisions he found to be inconsistent with the Constitution (para. [445] of the judgment); and (c) extended the stay of application of *Bill 40* that he had previously ordered until the expiry of the time limit for appealing his judgment (para. [444] of the judgment).[[320]](#footnote-320)
2. *Applicable principles*
3. Although s. 24(1) of the *Charter* allows a person whose *Charter*-protected rights or freedoms have been infringed or denied to obtain a remedy that the court considers just and appropriate in the circumstances, the respondents did not request such a remedy in their originating application. At the appeal hearing, counsel for the respondents confirmed that they were still not requesting such a remedy. As the remedies sought by the respondents are based solely on s. 52(1) of the *Constitution Act, 1982*, it is appropriate to deal here only with that provision.
4. Section 52(1) of the *Constitution Act, 1982*provides as follows:

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| **52 (1)** The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. | **52 (1)** La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit. |

1. While s. 52(1) states the legal result where there is a conflict between a law and the Constitution – which includes the *Charter*[[321]](#footnote-321) – it does not explicitly provide courts with a grant of remedial jurisdiction. Rather, a general declaration of unconstitutionality pursuant to courts’ statutory or inherent jurisdiction is the means by which they give full effect to the broad terms of s. 52(1).[[322]](#footnote-322)
2. A court faced with a constitutional challenge to a law must determine to what extent it is unconstitutional and declare it to be so.[[323]](#footnote-323) A measure of discretion is inevitable when determining the appropriate response to an inconsistency between a statute and the Constitution.[[324]](#footnote-324) That said, fashioning constitutional remedies implicates the application of various principles. Thus, in exercising their discretion, courts “must strike an appropriate balance between these principles in determining how to give effect to s. 52(1) in a manner that best aligns with our broader constitutional order”.[[325]](#footnote-325)
3. In *Schachter*,[[326]](#footnote-326) a landmark ruling on constitutional remedies resulting from a statute’s invalidity, the majority of the Supreme Court, in reasons written by Lamer, C.J., indicated that courts may, depending on the circumstances:[[327]](#footnote-327) (1) immediately invalidate the inconsistent legislative provision; (2) invalidate it and temporarily suspend the declaration of invalidity; (3) apply the doctrine of severance, which consists in declaring as inoperative the infringing portion of the statute or provision and sparing the rest of the text;[[328]](#footnote-328) or (4) apply the techniques of reading in or reading down.
4. In *Ontario (Attorney General) v. G.*, the Supreme Court also specified the principles that should guide the courts in fashioning a remedy where a statute is inconsistent with the Constitution. The first step is to determine the extent of the legislation’s inconsistency with the Constitution. When granting a remedy for a statute that violates the *Charter*, the “nature and extent of the underlying *Charter* violation lays the foundation for the remedial analysis because the breadth of the remedy ultimately granted will reflect at least the extent of the breach”.[[329]](#footnote-329) This step therefore reflects the *Charter*’s rights‑protecting purpose, the public’s interest in having government act in accordance with the Constitution, and the text of s. 52(1) of the *Constitution Act, 1982*.[[330]](#footnote-330)
5. The second step is determining the appropriate form of declaration. At this point, remedies other than full declarations of invalidity of the challenged statute or provision “should be granted when the nature of the violation and the intention of the legislature allows for them”.[[331]](#footnote-331) To allow the public to benefit from legislation duly enacted by a democratically elected legislature, reading down, reading in, and severance – which are “remedies tailored” to the breadth of the violation – should be employed when possible so as to preserve the constitutional aspects of legislation.[[332]](#footnote-332)
6. Such remedies, however, can intrude on the legislative sphere. Consequently, tailored remedies should be granted only “where it can be fairly assumed that ‘the legislature would have passed the constitutionally sound part of the scheme without the unsound part’ and where it is possible to precisely define the unconstitutional aspect of the law”.[[333]](#footnote-333) If it seems unlikely that the legislature would have enacted the “tailored version” of the statute, such a remedy would not conform to its policy choice and would thus undermine parliamentary sovereignty.[[334]](#footnote-334) Moreover, tailored remedies should not be granted when they would interfere with the legislative objective of the law as a whole.[[335]](#footnote-335) Lastly, such remedies should be avoided when they do not flow “with sufficient precision from the requirements of the Constitution”.[[336]](#footnote-336)
7. *Application to the case at bar*

Order to hold a “dialogue” under court supervision (paras. [425], [426], [432] and [446] of the judgment)

1. It is apparent from the trial judgment that the judge wished to establish a form of consultation by allowing a “dialogue” to begin between the parties with a view to correcting the infringements of s. 23 of the *Charter*, which “dialogue” would take place under his supervision, for an initial period of six months or for such additional period as he might decree depending on the progress of the discussions.[[337]](#footnote-337) This is likely part of the reason why the judge decided to retain jurisdiction over the file.
2. As the Court concluded earlier, there are no grounds for confirming the judge’s conclusion that, in drafting legislation, the government of Quebec and the National Assembly are subject to a duty to consult with Quebec’s English‑language minority pursuant to a process that would take place under the supervision of the Superior Court.
3. Furthermore, in their pleadings, the respondents did not ask that the judge retain jurisdiction over the case. At the appeal hearing, counsel for the respondents confirmed that they were still not seeking such an order.
4. While it is possible for a judge to retain jurisdiction in a constitutional case to ensure that an appropriate remedy is implemented, this type of remedy is rare. To date, it has been used chiefly in exceptional circumstances, such as where it was shown that the government was delaying action or refusing to comply with its constitutional obligations.
5. For example, the Supreme Court confirmed the validity of such a remedy in *Doucet‑Boudreau*, a case in which the provincial government in question had delayed building schools for French‑language minority students, while assimilation of this community continued and French‑language school programs were in jeopardy. The Supreme Court concluded that the particular circumstances of the case warranted an order requiring the government to report to the court from time to time.[[338]](#footnote-338) This type of remedy was also used in the *Reference re Manitoba Language Rights*.[[339]](#footnote-339) In that case, the Supreme Court declared all of Manitoba’s unilingual legislation invalid and of no force or effect. It ordered a temporary suspension of this declaration, however, because it was of the view that its immediate implementation would create a legal vacuum with consequent legal chaos in the province. As the Supreme Court was unable to determine the period during which it would not be possible for the Manitoba legislature to comply with its constitutional duty to publish its laws in both official languages, the Court decided to retain jurisdiction over the case.
6. In the present matter, no such exceptional circumstance has been established. Indeed, there is no basis for presuming that the Quebec legislature will not respect its constitutional obligations at the end of the judicial process in the case at bar. Confirming the judicial remedy chosen by the judge would be tantamount to allowing him to oversee the law‑making process leading to remedial legislation, which – as the Court has already concluded – would be directly contrary to the principles of the separation of powers and parliamentary supremacy.
7. The Court must therefore intervene.

Suspension of the legislative provisions that are inextricably linked to the provisions declared unconstitutional (para. [445] of the judgment)

1. In the last version of their originating application before the Superior Court, the respondents argued that a considerable number of provisions of *Bill 40* are inextricably linked to the other provisions thereof that directly infringe the linguistic minority rights guaranteed by s. 23 of the *Charter*.[[340]](#footnote-340)In a schedule to their originating application, they provided a lengthy table setting out their reasons why the provisions of *Bill 40* they identified are inextricably linked to the infringing provisions.[[341]](#footnote-341)
2. Given these inextricable links, and in order to avoid the legal confusion that would result from the application of *Bill 40* to the English‑language education sector until remedial legislation were to be enacted, the respondents asked the judge to extend the stay of application of *Bill 40* in its entiretywith respect to English‑language school boards, which stay had previously already been ordered by the judge and confirmed by the Court.[[342]](#footnote-342) In the alternative, they asked the judge to order a stay of application of the provisions of *Bill 40* that, in their view, are inextricably linked to those contrary to s. 23 of the *Charter*.[[343]](#footnote-343)
3. The trial judge did not adopt the option to stay the application of *Bill 40* in its entirety, except until the expiry of the time limit for appealing his judgment, a matter we will address further below. Instead, he opted for the respondents’ alternative request, which he granted in part.
4. The judge noted that both the AGQ and the respondents agree that certain of the provisions of *Bill 40* are inextricably linked to those that infringe s. 23 of the *Charter*.[[344]](#footnote-344) He therefore focused on the provisions of *Bill 40* that the parties did not agree were “inextricably linked”. He rejected some of the AGQ’s arguments and some of the respondents’ arguments, ultimately drawing up a list of the provisions he found to be inextricably linked.[[345]](#footnote-345)
5. He suspended the application of these provisions of *Bill 40* to the English‑language school boards for a period of six months, to allow the parties to complete the “dialogue” he had ordered.[[346]](#footnote-346)
6. The AGQ submits two main criticisms regarding the judge’s approach. The first is that he was not entitled to suspend the application of these provisions of *Bill 40*. If the judge was of the view that certain provisions were inextricably linked to those he had ruled contrary to s. 23 of the *Charter*, he was required to declare that they are inoperative, so as to allow the legislature to decide how they should be amended.[[347]](#footnote-347) The AGQ’s second complaint is that some of the provisions of *Bill 40* that the judge identified as being “inextricably linked” are not so linked and therefore should not be declared inoperative. According to the AGQ, these are ss. 3, 76, 93(1), 94, 115(2), 193, 194, 200, 201, 203(1) and (2), 204, 205, 207(2), 217(1)(b), 233(1), 234(1)(b), 249 and 255 of *Bill 40*.
7. The Court is of the view that the AGQ is correct on the first point and partly correct on the second.
8. The doctrine of severance requires that a court define the extent of the inconsistency between the impugned statute and the requirements of the Constitution, and then declare inoperative both: (a) the inconsistent portion; and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.[[348]](#footnote-348) The court may suspend such a declaration of constitutional inconsistency if it deems it appropriate to do so.
9. That, however, is not what the judge did here. Instead, he suspended the application to the English school boards of the provisions of *Bill 40* that, in his opinion, would likely not have been enacted independently of the portions of *Bill 40* that are incompatible with s. 23 of the *Charter*. This is an unusual and unprecedented remedy that does not appear to have been recognized to date by the case law dealing with s. 52(1) of the *Constitution Act, 1982*.
10. While suspending the application of a statutory provision may, to some extent, produce an effect similar to that of an order declaring a statutory provision inoperative, the Court is of the opinion that it is prudent to adhere to existing jurisprudential teachings regarding the appropriate judicial remedies under s. 52(1). In addition, the judge did not explain what prompted him to suspend the application of the legislative provisions in question rather than declare these inoperative. Moreover, at the appeal hearing, counsel for the respondents acknowledged that they have no objection, in the circumstances of this case, to the provisions in question being declared inoperative, as the AGQ suggests. The Court should therefore intervene accordingly.
11. As for the provisions that the judge identified as “inextricably linked” and the AGQ has called into question, they can be grouped into three categories. The first concerns the abolition of the executive committee of the council of commissioners (ss. 3, 76, 93(1), 94, 115(2) and 234(1)(b) of *Bill 40*), the second relates to the replacement of the four‑year electoral cycle by a three‑year electoral cycle for school elections and the date of these elections (ss. 193, 194, 200, 201, 203(1) and (2), 204, 205, 207(2), 233, 249 and 255 of *Bill 40*), and the third pertains to the prohibition placed on concurrently holding elected positions within the school network and the municipal network (s. 217 para. 1(*b*) of *Bill 40*).
12. The abolition of the executive committee appears inextricably linked to the composition of the boards of directors of English‑language school service centres and the method for electing their members, as well as to the functions and powers conferred thereon. The greater the importance of the functions entrusted to the board of directors – the commitment‑to‑success plan comes to mind – the greater the need for an executive committee. Thus, one cannot assume that the legislature would abolish the executive committee for the English‑language education sector in light of the declaration of unconstitutionality of the provisions of *Bill 40* relating to the composition, mode of election, functions and powers of the members of the board of directors.
13. The same applies to the provisions concerning the replacement of the four‑year electoral cycle by a three‑year electoral cycle for school elections and the date of these school elections.
14. As for the prohibition on concurrently holding elected positions within the school network and the municipal network, the respondents posit in the schedule to their originating application that this prohibition applies only to elected members of a board of directors of an English‑language school service centre and not to members of this board who are designated by the centre’s employees.[[349]](#footnote-349) Moreover, they add that this prohibition on holding multiple elected positions does not apply to members of the board of directors of a French‑language school service centre, since none are elected.[[350]](#footnote-350) Thus, according to the respondents, the only individuals targeted by the prohibition in question are representatives of the linguistic minority. The respondents conclude that this disparity in treatment is inextricably linked to the changes to the electoral system applicable to school elections in the English‑language education sector that have been declared contrary to s. 23 of the *Charter*.
15. The respondents, however, are mistaken. Indeed, a few days after *Bill 40* was introduced in the National Assembly, another bill was introduced specifically to prohibit individuals from concurrently holding the positions of member of a municipal council and member – elected or not – of the board of directors of a school service centre.[[351]](#footnote-351) This prohibition therefore extends to all members of a board of directors of a French- or English‑language school service centre, whether elected, appointed or designated. The prohibition is set out in s. 300 of the *Act respecting elections and referendums in municipalities*.[[352]](#footnote-352) Thus, the disparity of treatment alleged by the respondents does not exist. Moreover, the prohibition on concurrently holding these positions falls within the purview of ethics and good conduct relating to public bodies. It is a political choice that, on its face at least, may appear legitimate and has nothing to do with s. 23 of the *Charter*.
16. The judge therefore erred in concluding that s. 217 para. 1(*b*) of *Bill 40* is inextricably linked to the provisions of this statute that he declared contrary to s. 23 of the *Charter*. The Court must intervene to correct this error.
17. Lastly, the trial judge included s. 93(1) of *Bill 40* in his list of “inextricably linked” provisions, even though he had previously declared s. 93 in its entirety contrary to s. 23 of the *Charter*. This is clearly a clerical error that should be corrected.

Extension of the stay of application of *Bill 40* until the expiry of the time limit for an appeal

1. The judge extended the stay of application of *Bill 40* that he had decreed – and which the Court had confirmed – until the expiry of the time limit for appealing his judgment on the merits of the case.[[353]](#footnote-353) The judge did not explain why he ordered this extension, but it is reasonable to assume that he sought to maintain the status quo between the parties while the legal proceedings were pending, so as to allow the Court, should it deem it appropriate, to extend this stay of application during the appeal proceedings if such an appeal were initiated.
2. Unlike the AGQ, the Court concludes that such an order was not inappropriate in the circumstances of this case. It was a precautionary measure to enable the Court to consider, in due course, the matter of extending the stay of application of *Bill 40* during the appeal proceedings.
3. No request to extend the stay of application of *Bill 40* during the appeal proceedings was, in fact, presented to the Court. The reason is quite simple. The government of Quebec adopted a regulation delaying the coming into force of *Bill 40* for the English‑language school network until a date that may be set at a future time and, where applicable, according to a schedule allowing for “a progressive and orderly application” of the statute.[[354]](#footnote-354) As a result of this regulation, *Bill 40* still does not apply to English‑language school boards. This will also likely be the case in the event of an application for leave to appeal from the Court’s decision to the Supreme Court.

Legal costs on appeal

1. Lastly, since the Court is allowing the AGQ’s appeal in part but is upholding the principal constitutional conclusions of the trial judgment, it is not appropriate to award legal costs on appeal.

**CONCLUSIONS**

**FOR THESE REASONS,** **THE COURT:**

1. **ALLOWS** the appeal in part only;
2. **REPLACES** paragraph [443] of the trial judgment with the following:

[443] **DECLARES** that section 15 of the *Act respecting school elections to elect certain members of the boards of directors of English‑language school service centres* infringes the rights guaranteed by s. 23 of the *Canadian Charter of Rights and Freedoms* to the sole extent that it allows an individual who is not part of Quebec’s linguistic minority to vote in school elections within the English‑language school system; **DECLARES** this section inoperative solely to that extent; and **SUSPENDS** such declaration of inoperability for a period ending no later than 18 months after any proceedings to appeal this judgment have been exhausted;

1. **SETS ASIDE** paragraph [445] as well as the Schedule to the trial judgment and **REPLACES** them with the following:

[445] **DECLARES** that the following provisions of the *Act to amend mainly the Education Act with regard to school organization and governance* are inoperative with respect to Quebec’s English‑language school boards because they are inextricably linked to the sections listed in paragraph [439] of this judgment: ss. 3, 11(3), 51 (insofar as it repeals ss. 145 to 148 of the *Education Act*), 53, 54, 55, 56, 57, 65(1), 67(1), 67(2)(a), 67(2)(c), 69(1), 70, 71, 73(2), 76, 80(1)(c), 88(2), 92, 94, 98, 101(2), 115(2), 129, 137, 139 (insofar as it interferes with the provisions of s. 457.8 of the *Education Act*), 140(1), 191, 193, 194, 195, 197, 198, 199, 200, 201, 203, 204, 205, 207(2), 218, 222, 223, 224, 225, 226, 227, 228, 229(1)(b), 229(2), 230, 231, 232(1), 233(1), 234(1)(b), 235, 236(1), 242(1), 242(4), 242(5), 243(1), 244(1), 249, 251(1)(b)(ii), 254(1), 254(3), 255, 260, 261, 262(2), 263, 328(3), 328(4) and 335 (insofar as it provides for the coming into force of provisions that have been ruled inoperative);

1. **SETS ASIDE** paragraph [446] of the trial judgment;
2. **THE WHOLE**, without legal costs on appeal.

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|  | ROBERT M. MAINVILLE, J.A. |
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| Mtre Jacques S. Darche |
| borden ladner gervais |
| For the New Frontiers School Board and Shannon Keyes |
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| Chris Eustace |
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| Hearing dates:  |  January 27, 28 and 29, 2025 |

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1. *Quebec English School Boards Association c. Procureur général du Québec*, 2023 QCCS 2965 (the “trial judgment”). [↑](#footnote-ref-1)
2. *An Act to amend mainly the Education Act with regard to school organization and governance*, S.Q. 2020, c. 1. [↑](#footnote-ref-2)
3. *Education Act*, CQLR, c. I-13.3. [↑](#footnote-ref-3)
4. This refers to the following provisions of *Bill 40*: ss. 3, 11(3), 51 (insofar as it repeals ss. 145 to 148 of the *EA*), 53, 54, 55, 56, 57, 65(1), 67(1), 67(2)(a), 67(2)(c), 69(1), 70, 71, 73(2), 76, 80(1)(c), 88(2), 92, 93(1), 94, 98, 101(2), 115(2), 129, 137, 139 (insofar as it interferes with the provisions of s. 457.8 of the *EA*), 140(1), 191, 193, 194, 195, 197, 198, 199, 200, 201, 203, 204, 205, 207(2), 217, 218, 222, 223, 224, 225, 226, 227, 228, 229(1)(b), 229(2), 230, 231, 232(1), 233(1), 234(1)(b), 235, 236(1), 242(1), 242(4), 242(5), 243(1), 244(1), 249, 251(1)(b)(ii), 254(1), 254(3), 255, 260, 261, 262(2), 263, 328(3), 328(4) and 335 (insofar as it provides for the coming into force of provisions that have been ruled inoperative or have been suspended). [↑](#footnote-ref-4)
5. *Quebec Community Groups Network v. Quebec English School Boards Association*, 2024 QCCA 897. [↑](#footnote-ref-5)
6. As the Supreme Court noted in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, para. 68, footnote 2: “Section 93 applies directly to Ontario, Nova Scotia, New Brunswick, British Columbia and Prince Edward Island. Section 93 also applies to Quebec, but [since 1997] not ss. 93(1) to 93(4): *Constitution Amendment, 1997 (Quebec)*, SI/97-141, s. 1; s. 93A of the *Constitution Act, 1867*. Modified versions of s. 93 apply in the other provinces and the territories: *Manitoba Act, 1870*, S.C. 1870, c. 3, s. 22; *Saskatchewan Act*, S.C. 1905, c. 42, s. 17; *Alberta Act*, S.C. 1905, c. 3, s. 17; *Constitution Amendment, 1998 (Newfoundland Act)*, SI/98-25, s. 1(2); *Northwest Territories Act*, S.C. 2014, c. 2 [as en. by the *Northwest Territories Devolution Act*], s. 18(1)(o); *Yukon Act*, S.C. 2002, c. 7, s. 18(1) (o); *Nunavut Act*, S.C. 1993, c. 28, s. 23(1) (m).” [↑](#footnote-ref-6)
7. This overlap is far from perfect; the cases of Catholics from England and Ireland, as well as French Huguenots and French‑speaking Swiss Protestants come to mind. [↑](#footnote-ref-7)
8. *The Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa v. Mackell* (1916), [1917] A.C. 62 (P.C.) (“*Mackell*”). [↑](#footnote-ref-8)
9. See, in particular: *Ottawa Separate Schools Trustees v. Ottawa Corporation* (1916), [1917] A.C. 76 (P.C.); *The Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa v. Mackell* (1916), [1917] A.C. 62 (P.C.); *Hirsch v. Protestant School Commissioners of Montreal*, [1928] A.C. 200 (P.C.); *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *Reference re: Education Act (Que.)*, [1993] 2 S.C.R. 511; *Ontario English Catholic Teachers’ Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470. [↑](#footnote-ref-9)
10. *Organisation mondiale sikhe du Canada c. Procureur général du Québec*, 2024 QCCA 254, par. 545, applications for leave to appeal to the Supreme Court of Canada granted, January 23, 2025, File No. 41231. [↑](#footnote-ref-10)
11. *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66 (“*Quebec Association of Protestant School Boards*”). [↑](#footnote-ref-11)
12. *An Act to promote the French language in Québec*, S.Q. 1969, c. 9. [↑](#footnote-ref-12)
13. *Charter of the French Language*, CQLR, c. C-11. [↑](#footnote-ref-13)
14. *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201 (“*Solski*”), paras. 9 and 21; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, pp. 79-80 and 84. [↑](#footnote-ref-14)
15. *Mahe v. Alberta*, [1990] 1 S.C.R. 342 (“*Mahe*”), p. 362. [↑](#footnote-ref-15)
16. *Id.*, p. 377. [↑](#footnote-ref-16)
17. *Ibid*. [↑](#footnote-ref-17)
18. *Ibid*. [↑](#footnote-ref-18)
19. *Reference re: Education Act (Que.)*, [1993] 2 S.C.R. 511. [↑](#footnote-ref-19)
20. Exhibit PGQ-19: National Assembly, *Journal des débats*, 35th Leg., 2nd Sess., vol. 35, No. 83, March 26, 1997, p. 6014 (P. Marois). [↑](#footnote-ref-20)
21. National Assembly, *Journal des débats*, 35th Leg., 2nd Sess., vol. 35, No. 88, April 15, 1997, pp. 6245‑6247; Secrétariat du Québec aux relations canadiennes, *Québec’s Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001*, Part 3: Documents, Document 33: “Resolution of the Québec National Assembly authorizing the amendment of section 93 of the *Constitution Act, 1867*, April 15, 1997”, online: https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document33\_en.pdf. [↑](#footnote-ref-21)
22. Exhibit PGQ-22: House of Commons, *House of Commons Debates.*, 36th Parl., 1st Sess., vol. 135, No. 31, November 17, 1997, p. 1743 (S. Dion). [↑](#footnote-ref-22)
23. *Constitution Amendment, 1997 (Quebec)*, SI/97-141. [↑](#footnote-ref-23)
24. See, by analogy, *Ontario English Catholic Teachers’ Assn. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 470, 2001 SCC 15, para. 29. [↑](#footnote-ref-24)
25. Exhibit P-11 establishes, among other things, that in the 2014 elections, the turnout rate for voters registered on the lists of electors for the French‑language school boards was only 4.87%, whereas it was 16.68% for the English‑language school boards: Exhibit P-11, Statistics regarding the 2014, 2007 and 2003 school board elections obtained from the Ministry of Education and Higher Education. [↑](#footnote-ref-25)
26. Exhibit GDB-15, Coalition Avenir Québec’s “Plan de gouvernance scolaire : Remettre l’école entre les mains de sa communauté, janvier 2018”. [↑](#footnote-ref-26)
27. *Act respecting school elections*, CQLR, c. E-2.3. [↑](#footnote-ref-27)
28. *Bill 40*, s. 190. [↑](#footnote-ref-28)
29. *Id.*, s. 335. [↑](#footnote-ref-29)
30. *Quebec English School Boards Association c. Procureur général du Québec*, 2020 QCCS 2444. [↑](#footnote-ref-30)
31. *Procureur général du Québec c. Quebec English School Board[s] Association*, 2020 QCCA 1171. [↑](#footnote-ref-31)
32. *Regulation respecting the application of provisions of the Act to amend mainly the Education Act with regard to school organization and governance to English‑language school service centres*, (2021) 153 G.O.Q. II, No. 32, 3369, p. 3370. [↑](#footnote-ref-32)
33. National Assembly, *Commission de la culture et de l’éducation*, Journal des débats, 42nd Leg., 1st Sess., vol. 45, No. 44, November 6, 2019, p. 5 (J.-F. Roberge); Exhibit P-1, Extract of the transcript of the November 6, 2019 session of consultations on Bill 40 in the Committee on Culture and Education at the National Assembly. [↑](#footnote-ref-33)
34. In the French text of *Bill 40*, the word “scolaire” does not qualify the word “services”, but rather the word “centre”. Consequently, the French text of *Bill 40* uses the expression “centre de services scolaire” in the singular and “centres de services scolaires” in the plural. [↑](#footnote-ref-34)
35. National Assembly, *Commission de la culture et de l’éducation*, Journal des débats, 42nd Leg., 1st Sess., vol. 45, No. 44, November 6, 2019, p. 5 (J.-F. Roberge). A fuller extract of the Minister’s remarks is reproduced earlier in these reasons. [↑](#footnote-ref-35)
36. Section 143 of the *EA* (as amended by s. 50 of *Bill 40*)*.* [↑](#footnote-ref-36)
37. Section 143 para. 1 subpara. (1) of the *EA* (as amended by s. 50 of *Bill 40*). [↑](#footnote-ref-37)
38. Section 47 para. 3 and s. 189 of the *EA* (as amended by ss. 11 and 312 of *Bill 40*). [↑](#footnote-ref-38)
39. Section 143 para. 1 subpara. (1) of the *EA* (as amended by s. 50 of *Bill 40*). [↑](#footnote-ref-39)
40. Sections 143.6 to 143.9 of the *EA* (as enacted by s. 50 of *Bill 40*) and ss. 7 to 17 of the *Regulation respecting the designation of members of the boards of directors of school service centres*, CQLR, c. I‑13.3, r. 5.1. [↑](#footnote-ref-40)
41. Section 143 para. 1 subpara. (2) of the *EA* (as amended by s. 50 of *Bill 40*). [↑](#footnote-ref-41)
42. Sections 143.10 to 143.12 of the *EA* (as enacted by s. 50 of *Bill 40*) and ss. 18 to 24 of the *Regulation respecting the designation of members of the boards of directors of school service centres*, CQLR, c. I‑13.3, r. 5.1. [↑](#footnote-ref-42)
43. Section 143 para. 1 subpara. (3) of the *EA* (as amended by s. 50 of *Bill 40*): “*(a*) one person with expertise in governance, in ethics, in risk management or in human resources management; *(b*) one person with expertise in finance or accounting or in financial or physical resources management; *(c*) one person from the community, sport or cultural sector; *(d*) one person from the municipal, health, social services or business sector; and *(e*) one person aged 18 to 35”. [↑](#footnote-ref-43)
44. Sections 143.13 to 143.15 of the *EA* (as enacted by s. 50 of *Bill 40*) and ss. 25 to 33 of the *Regulation respecting the designation of members of the boards of directors of school service centres*, CQLR, c. I‑13.3, r. 5.1. [↑](#footnote-ref-44)
45. Section 143.1 of the *EA* (as amended by s. 50 of *Bill 40*). [↑](#footnote-ref-45)
46. Section 143.1 para. 1 subpara. (1) of the *EA* (as amended by s. 50 of *Bill 40*). See also: s. 20 of the *New Act respecting school elections* (as amended by s. 216 of *Bill 40*). [↑](#footnote-ref-46)
47. Sections 4.1 to 7.6 of the *New Act respecting school elections* (see ss. 196 to 201 of *Bill 40*). [↑](#footnote-ref-47)
48. To calculate the number of community representative positions, see s. 11.0.1 of the *New Act respecting school elections* (as enacted by s. 208 of *Bill 40*). [↑](#footnote-ref-48)
49. Section 143.1 para. 1 subpara. (2) of the *EA* (as amended by s. 50 of *Bill 40*) and s. 20.1 of the *New Act respecting school elections* (as enacted by s. 216 of *Bill 40*). The order in which these expertise profiles are attributed is set out in s. 11.0.2 of the *New Act respecting school elections* (as enacted by s. 208 of *Bill 40*). [↑](#footnote-ref-49)
50. Section 4.1 para. 2 of the *New Act respecting school elections* (as amended by s. 196 of *Bill 40*). [↑](#footnote-ref-50)
51. Section 143.1 para. 1 subpara. (3) and para. 2 and s. 143.2 of the *EA* (as amended by s. 50 of *Bill 40*) and ss. 18 to 24 of the *Regulation respecting the designation of members of the boards of directors of school service centres*, CQLR, c. I‑13.3, r. 5.1. [↑](#footnote-ref-51)
52. Section 76 of *Bill 40*, which repeals ss. 179 to 182 of the *EA* dealing with the executive committee of the council of commissioners. [↑](#footnote-ref-52)
53. Section 52 of *Bill 40*, which replaces s. 155 of the *EA*. [↑](#footnote-ref-53)
54. Section 66 of *Bill 40*, which replaces s. 175 of the *EA*. [↑](#footnote-ref-54)
55. Section 93 of *Bill 40*, which amends s. 201 of the *EA*. [↑](#footnote-ref-55)
56. Sections 91 and 98 of *Bill 40* (which add ss. 193.6 to 193.9 to the *EA* and amend s. 209.1 of the *EA*). [↑](#footnote-ref-56)
57. This provision is not yet in force for the English‑speaking sector, presumably pending the outcome of the present dispute: s. 85 subpara. (2) of the *Act to amend mainly the Education Act and to enact the Act respecting the Institut national d’excellence en éducation*, S.Q., c. 2023, c. 32. [↑](#footnote-ref-57)
58. *Ibid.* [↑](#footnote-ref-58)
59. Section 53 of the *Act to amend the Education Act*, S.Q. 2016, c. 26. [↑](#footnote-ref-59)
60. Amended Application for Judicial Review and Declaratory Judgment, Notice of Constitutional Question, June 23, 2021. [↑](#footnote-ref-60)
61. Trial judgment, para. 41. [↑](#footnote-ref-61)
62. *Id.*, para. 42, citing *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3 (“*Arsenault‑Cameron*”), para. 57. [↑](#footnote-ref-62)
63. Trial judgment, para. 42, citing *Conseil scolaire francophone de la Colombie‑Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678 (“*Conseil scolaire francophone de la Colombie‑Britannique*”), para. 149. [↑](#footnote-ref-63)
64. Trial judgment, para. 43. [↑](#footnote-ref-64)
65. *Id.*, para. 47. [↑](#footnote-ref-65)
66. *Id.*, para. 56. [↑](#footnote-ref-66)
67. *Id.*, para. 147. [↑](#footnote-ref-67)
68. *Id.*, para. 167, citing Exhibit P‑78, Reply to Expert Report of Professor Termote’s by Diane Gérin-Lajoie, Professor of University of Toronto, dated April 7, 2021. [↑](#footnote-ref-68)
69. Trial judgment, para. 168. [↑](#footnote-ref-69)
70. *Id.*, paras. 308-309. [↑](#footnote-ref-70)
71. *Id.*, para. 188. [↑](#footnote-ref-71)
72. *Id.*, para. 191. [↑](#footnote-ref-72)
73. *Id.*, para. 212. [↑](#footnote-ref-73)
74. *Id.*, para. 213. [↑](#footnote-ref-74)
75. *Id.*, para. 236. [↑](#footnote-ref-75)
76. *Id*., para. 238. [↑](#footnote-ref-76)
77. *Id.*, para. 239. [↑](#footnote-ref-77)
78. *Id.*, para. 243. [↑](#footnote-ref-78)
79. *Id.*, para. 248. [↑](#footnote-ref-79)
80. *Id.*, para. 259. [↑](#footnote-ref-80)
81. *Id.*, para. 270. [↑](#footnote-ref-81)
82. *Id.*, para. 278. [↑](#footnote-ref-82)
83. *Id.*, para. 279. [↑](#footnote-ref-83)
84. *Id.*, paras. 284-285. [↑](#footnote-ref-84)
85. *Act to amend the Education Act*, S.Q. 2016, c. 26, s. 53. [↑](#footnote-ref-85)
86. Trial judgment, para. 293. [↑](#footnote-ref-86)
87. *Id.*, paras. 294-297. [↑](#footnote-ref-87)
88. *Id.,* paras. 303-304. [↑](#footnote-ref-88)
89. *Id.*, para. 307. [↑](#footnote-ref-89)
90. *Id.*, paras. 313-316. [↑](#footnote-ref-90)
91. *Id*., para. 318. [↑](#footnote-ref-91)
92. *Id*., para. 443. [↑](#footnote-ref-92)
93. *Id.*, para. 321. [↑](#footnote-ref-93)
94. *Id.*, paras. 323-324. [↑](#footnote-ref-94)
95. *Id.*, paras. 327 and 371-372. [↑](#footnote-ref-95)
96. *R. v. Oakes*, [1986] 1 S.C.R. 103 (“*Oakes*”). [↑](#footnote-ref-96)
97. Trial judgment, para. 383. [↑](#footnote-ref-97)
98. *Id.*, para. 392. [↑](#footnote-ref-98)
99. *Id.*, para. 393. [↑](#footnote-ref-99)
100. *Id.*, paras. 404-408. [↑](#footnote-ref-100)
101. *Id.*, para. 391. [↑](#footnote-ref-101)
102. *Id.*, paras. 410-418. [↑](#footnote-ref-102)
103. *Id.*, paras. 420 and 439-441. [↑](#footnote-ref-103)
104. It is clear from the judge’s reasons and conclusions that he suspended the application of the replacement of s. 155 of the *EA* provided for by s. 52 of *Bill 40*, so as to revive s. 155 of the *EA* as previously worded, which section prescribed in particular that the “chair shall see to the proper operation of the school board” and “shall […] ensure that all applicable legislative and regulatory provisions and all decisions of the council of commissioners are carried out faithfully and impartially”, and which also conferred on the chair the role of “official spokesman for the school board”. [↑](#footnote-ref-104)
105. Trial judgment, paras. 429-431 and 445. [↑](#footnote-ref-105)
106. As noted above, this refers to the following provisions of *Bill 40*: ss. 3, 11(3), 51 (insofar as it repeals ss. 145 to 148 of the *EA*), 53, 54, 55, 56, 57, 65(1), 67(1), 67(2)(a), 67(2)(c), 69(1), 70, 71, 73(2), 76, 80(1)(c), 88(2), 92, 93(1), 94, 98, 101(2), 115(2), 129, 137, 139 (insofar as it interferes with the provisions of s. 457.8 of the *EA*), 140(1), 191, 193, 194, 195, 197, 198, 199, 200, 201, 203, 204, 205, 207(2), 217, 218, 222, 223, 224, 225, 226, 227, 228, 229(1)(b), 229(2), 230, 231, 232(1), 233(1), 234(1)(b), 235, 236(1), 242(1), 242(4), 242(5), 243(1), 244(1), 249, 251(1)(b)(ii), 254(1), 254(3), 255, 260, 261, 262(2), 263, 328(3), 328(4) and 335 (insofar as it provides for the coming into force of provisions that have been ruled inoperative or have been suspended). [↑](#footnote-ref-106)
107. Trial judgment, paras. 432 and 445. [↑](#footnote-ref-107)
108. *Id*., paras. 425-426 and 446. [↑](#footnote-ref-108)
109. *Id.*, para. 443. [↑](#footnote-ref-109)
110. *Id.*, para. 444. [↑](#footnote-ref-110)
111. *Id.*, para. 447. [↑](#footnote-ref-111)
112. Argument in appellant’s brief, para. 32. [↑](#footnote-ref-112)
113. This question implicitly includes a challenge by the AGQ of the judge’s implicit conclusion as to the constitutional invalidity of s. 15 of the *New Act respecting school elections*. [↑](#footnote-ref-113)
114. Argument in appellant’s brief, para. 36. [↑](#footnote-ref-114)
115. *Id*., para. 163. [↑](#footnote-ref-115)
116. *Id.*, title preceding para. 36. [↑](#footnote-ref-116)
117. *Id.*, para. 49. [↑](#footnote-ref-117)
118. *Id.*, para. 51. [↑](#footnote-ref-118)
119. *Id.*, para. 52. [↑](#footnote-ref-119)
120. *Id.*, para. 53. [↑](#footnote-ref-120)
121. *Id.*, para. 68. [↑](#footnote-ref-121)
122. *Id.*, para. 76. [↑](#footnote-ref-122)
123. *Id.*, paras. 74-81. [↑](#footnote-ref-123)
124. *Id.*, para. 71. [↑](#footnote-ref-124)
125. *Id.,* para. 85. [↑](#footnote-ref-125)
126. Argument in respondents’ brief, para. 28. [↑](#footnote-ref-126)
127. *Id.*, para. 29. [↑](#footnote-ref-127)
128. *Id.*, paras. 31-33. [↑](#footnote-ref-128)
129. *Id.*, paras. 35-36, 38-39 and 43-47. [↑](#footnote-ref-129)
130. *Id.*, paras. 40 and 50. [↑](#footnote-ref-130)
131. *Id.*, paras. 91-97. [↑](#footnote-ref-131)
132. *Quebec Community Groups Network c. Quebec English School Boards Association*, 2024 QCCA 897, para. 4. [↑](#footnote-ref-132)
133. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, p. 344. See also: *Canada (Attorney General) v. Power*, 2024 SCC 26, para. 26; *Québec (Attorney General) v. 9147-0732 Québec Inc*., 2020 SCC 32, [2020] 3 S.C.R. 426, para. 7; *Conseil scolaire francophone de la Colombie‑Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, para. 4; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, para. 19; *Doucet‑Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 (“*Doucet‑Boudreau*”), para. 23. [↑](#footnote-ref-133)
134. *Société des Acadiens du Nouveau‑Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, pp. 579-580; *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460; *Bilodeau v. Attorney General of Manitoba*, [1986] 1 S.C.R. 449. [↑](#footnote-ref-134)
135. See, in particular, s. 133 of the *Constitution Act, 1867*. [↑](#footnote-ref-135)
136. *R. v. Beaulac*, [1999] 1 S.C.R. 768, para. 24. [↑](#footnote-ref-136)
137. *Id.*, para. 25 [underlining in the original]. See also: *Conseil scolaire francophone de la Colombie‑Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, para. 18; *Nguyen v. Quebec (Education, Recreation and Sports)*, 2009 SCC 47, [2009] 3 S.C.R. 208, para. 26; *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, para. 20; *Doucet‑Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, paras. 23-24. [↑](#footnote-ref-137)
138. *Conseil scolaire francophone de la Colombie‑Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, para. 18. [↑](#footnote-ref-138)
139. *Québec (Attorney General) v. 9147‑0732 Québec Inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, para. 8; *R. v. Poulin*, [2019 SCC 47](https://canlii.ca/t/j2st2), [2019] 3 S.C.R. 566, para. 64; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, para. 15. [↑](#footnote-ref-139)
140. *Québec (Attorney General) v. 9147‑0732 Québec Inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, para. 10. [↑](#footnote-ref-140)
141. *Act respecting the laicity of the State*, CQLR, c. L-0.3. [↑](#footnote-ref-141)
142. *Organisation mondiale sikhe du Canada c. Procureur général du Québec,* 2024 QCCA 254, para. 614, applications for leave to appeal to the Supreme Court of Canada granted, January 23, 2025, File No. 41231. [↑](#footnote-ref-142)
143. *Association des parents de l’école Rose‑des‑vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139, para. 26; *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238, para. 28; *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, para. 23. [↑](#footnote-ref-143)
144. *Conseil scolaire francophone de la Colombie‑Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, para. 15. [↑](#footnote-ref-144)
145. *Id.*, para. 3. [↑](#footnote-ref-145)
146. *Id.*, para. 157. See also: *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, para. 7. [↑](#footnote-ref-146)
147. *Commission scolaire francophone des Territoires du Nord‑Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, para. 80; *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238, para. 28; *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, para. 3; *Doucet‑Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, para. 26; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, pp. 849-850; *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 350. [↑](#footnote-ref-147)
148. *Conseil scolaire francophone de la Colombie‑Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, para. 1, cited in *Commission scolaire francophone des Territoires du Nord‑Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, para. 80. [↑](#footnote-ref-148)
149. *Arsenault‑Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, para. 26. See also: *Commission scolaire francophone des Territoires du Nord‑Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, para. 4; *Conseil scolaire francophone de la Colombie‑Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, para. 20. [↑](#footnote-ref-149)
150. *Conseil scolaire francophone de la Colombie‑Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, para. 15. [↑](#footnote-ref-150)
151. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 350. See also: *Conseil scolaire francophone de la Colombie‑Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, para. 12; *Association des parents de l’école Rose‑des‑vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139, para. 25; *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, para. 3. [↑](#footnote-ref-151)
152. *Association des parents de l’école Rose‑des‑vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139, para. 25; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, para. 28; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, p. 79. [↑](#footnote-ref-152)
153. *Nguyen v. Quebec (Education, Recreation and Sports)*, 2009 SCC 47, [2009] 3 S.C.R. 208, para. 23. [↑](#footnote-ref-153)
154. *Commission scolaire francophone des Territoires du Nord‑Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, para. 2; *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 365. [↑](#footnote-ref-154)
155. *Association des parents de l’école Rose‑des‑vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139, para. 25; *Arsenault‑Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, para. 26; *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 367. [↑](#footnote-ref-155)
156. *Doucet‑Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, para. 28. [↑](#footnote-ref-156)
157. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 393. [↑](#footnote-ref-157)
158. *Mahe v. Alberta*, 1987 ABCA 158. [↑](#footnote-ref-158)
159. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 368, referring to *Reference Re Education Act of Ontario and Minority Language Education Rights* (1984), 10 D.L.R. (4th) 491 (Ont. C.A.); *Commission des Écoles Fransaskoises v. Saskatchewan* (1988), 48 D.L.R. (4th) 315 (Sask. Q.B.); *Lavoie v. Nova Scotia (Attorney General)* (1989), 91 N.S.R. (2d) 184 (N.S. C.A.); *Reference Re Minority Language Educational Rights (P.E.I.)* (1988), 69 Nfld. & P.E.I.R. 236 (P.E.I. S.C. (A.D.)). [↑](#footnote-ref-159)
160. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, pp. 369-370. [↑](#footnote-ref-160)
161. *Id.*, pp. 371-372 and 379. [↑](#footnote-ref-161)
162. *Id.*, pp. 377-378. [↑](#footnote-ref-162)
163. *Arsenault‑Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, para. 42 [underlining added]. [↑](#footnote-ref-163)
164. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 377. [↑](#footnote-ref-164)
165. *Conseil scolaire francophone de la Colombie‑Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678. [↑](#footnote-ref-165)
166. *Commission scolaire francophone des Territoires du Nord‑Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, para. 3. [↑](#footnote-ref-166)
167. *Id.*, para. 4; *Arsenault‑Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, para. 26. [↑](#footnote-ref-167)
168. *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, para. 20 [underlining added]. [↑](#footnote-ref-168)
169. Section 23(3)(*b*) of the *Charter* [underlining added]. [↑](#footnote-ref-169)
170. Trial judgment, para. 319, referring to British Columbia: *Conseil Scolaire Francophone de la Colombie‑Britannique Regulation*, B.C. Reg. 2013/99, s. 6; *Francophone Education Authorities Regulation*, B.C. Reg 212/99, ss. 2-4; *School Act*, R.S.B.C. 1996, c. 412, ss. 1(1) (definition of “eligible person” and “immigrant parent”), 166.13 and 166.14. Alberta: *Education Act*, S.A. 2012, c. E‑0.3, ss. 1(1)(i), 87(1)(b) and 135(2). Saskatchewan: *The Education Act, 1995*, S.S. 1995, c. E‑0.2, s. 2(1) (“minority language adult” and “voter”), 64(2) and 65. Manitoba: *The Public Schools Act*, C.C.S.M., c. P250, ss. 21.1, 21.37 and 21.38; *Francophone Schools Governance Regulation*, Man. Reg. 202/93, s 11. Ontario: *Education Act*, R.S.O. 1990, c. E.2, ss. 1 (“French‑language rights holder”), 50.1(2), 54(2) and 219(1) and (4). New Brunswick: *Education Act*, S.N.B. 1997, c. E‑1.12, ss 36.31, 36.4, 36.41 and 36.5. Nova Scotia: *Education (CSAP) Act*, R.S.N.S. 1995‑96, c. 1, ss. 3(1)(h) and (i), 13, 46 and 47. Prince Edward Island: *Education Act*, R.S.P.E.I. 1988, c. E‑0.2, s. 1(1)(i) (definition of “eligible parent”); *Election Regulations*, P.E.I. Reg. EC525/16, s. 4; *Education Authority Regulations*, P.E.I. Reg. EC524/16, s. 2. Newfoundland and Labrador: *Schools Act, 1997*, S.N.L. 1997, c. S‑12.2, s. 95; *School Board Election Regulations*, *1998*, N.L.R. 146/97, s. 6. Yukon: *Education Act*, R.S.Y. 2002, c. 61, ss. 82(4), 86 and 151. Northwest Territories: *Education Act*, S.N.W.T. 1995, c. 28, s. 85; *Local Authorities Elections Act*, R.S.N.W.T. 1988, c. L‑10, ss. 18 and 19; *French First Language Education Regulations*, N.W.T. Reg. 166‑96, s. 12(2). Nunavut: *Education Act*, S.Nu. 2008, c. 15, ss. 156(1) and 166(4); *An Act to Provide for Elections for Municipal Councils and District Education Authorities*, S.Nu. 2017, c. 21, s. 8(3). [↑](#footnote-ref-170)
171. *Arsenault‑Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, para. 29 *in fine*. [↑](#footnote-ref-171)
172. Exhibit PGQ-19: National Assembly, *Journal des débats*, 35th Leg., 2nd Sess., vol. 35, No. 83, March 26, 1997, p. 6014 (P. Marois) (the text of this statement is reproduced earlier in these reasons). [↑](#footnote-ref-172)
173. National Assembly, *Journal des débats*, 35th Leg., 2nd Sess., vol. 35, No. 88, April 15, 1997, pp. 6245‑6247; Secrétariat du Québec aux relations canadiennes, *Québec’s Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001*, Part 3: Documents, Document 33: “Resolution of the Québec National Assembly authorizing the amendment of section 93 of the Constitution Act, 1867, April 15, 1997”, online: https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document33\_en.pdf. [↑](#footnote-ref-173)
174. Exhibit PGQ-22: House of Commons, *House of Commons Debates.*, 36th Parl., 1st Sess., vol. 135, No. 31, November 17, 1997, p. 1743 (S. Dion) (the text of this statement is reproduced earlier in these reasons). [↑](#footnote-ref-174)
175. *Arsenault‑Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, para. 29. [↑](#footnote-ref-175)
176. *Conseil scolaire francophone de la Colombie‑Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, paras. 4‑6 and 12. [↑](#footnote-ref-176)
177. *Id.*, paras. 7-8. [↑](#footnote-ref-177)
178. *Id.*, para. 17. See also: *Nguyen v. Quebec (Education, Recreation and Sports)*, 2009 SCC 47, [2009] 3 S.C.R. 208, para. 26; *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, paras. 5-7; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, p. 851. [↑](#footnote-ref-178)
179. *Conseil scolaire francophone de la Colombie‑Britannique v. British* *Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, para. 18. See also: *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238, para. 28; *Doucet‑Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, paras. 23 and 26. [↑](#footnote-ref-179)
180. *Conseil scolaire francophone de la Colombie‑Britannique v. British* *Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, para. 19. [↑](#footnote-ref-180)
181. *Act respecting school elections*, CQLR, c. E-2.3, ss. 15 and 20 (in their pre‑*Bill 40* version). [↑](#footnote-ref-181)
182. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 377. [↑](#footnote-ref-182)
183. *Act respecting school elections*, S.Q. 1989, c. 36, s. 15. [↑](#footnote-ref-183)
184. *New Act respecting school elections*, s. 15. [↑](#footnote-ref-184)
185. Trial judgment, para. 318. See also, para. 320. [↑](#footnote-ref-185)
186. *Id*., paras. 439 and 441. [↑](#footnote-ref-186)
187. *Id.*, para. 443. [↑](#footnote-ref-187)
188. *Id.*, para. 443. [↑](#footnote-ref-188)
189. Affidavit of Pierre-Luc Pouliot, director general of network support and funding at the Ministère de l’Éducation, March 18, 2021, para. 5; Exhibit PGQ‑52, pamphlet from the Ministère de l’Éducation et de l’Enseignement supérieur explaining the school tax reform - school boards section. [↑](#footnote-ref-189)
190. Exhibit PGQ‑50, general results of the 2003 and 2007 school elections, as well as 2014. [↑](#footnote-ref-190)
191. *New Act respecting school elections*, s. 18. [↑](#footnote-ref-191)
192. *Id.*, s. 20.1. [↑](#footnote-ref-192)
193. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, pp. 375 and 377. [↑](#footnote-ref-193)
194. Section 143 of the *EA* and ss. 6, 7, 71 and 72 of the  *Act respecting school elections*, CQLR, c. E‑2.3 (in their pre‑*Bill 40* version). [↑](#footnote-ref-194)
195. Section 20 of the *Act respecting school elections*, CQLR, c. E‑2.3 (in its pre‑*Bill 40* version). [↑](#footnote-ref-195)
196. Sections 143 and 145 of the *EA* (in their pre‑*Bill 40* version). [↑](#footnote-ref-196)
197. Sections 143 and 143.1 of the *EA* (in their pre‑*Bill 40* version). [↑](#footnote-ref-197)
198. Section 50 of *Bill 40* (s. 143.1 para. 1(1) to (3) of the *EA*). [↑](#footnote-ref-198)
199. Sections 5 and 11.0.1 (as amended by s. 208 of *Bill 40*) of the *New Act respecting school elections*. [↑](#footnote-ref-199)
200. Section 50 of *Bill 40* (s. 143.1 para. 1(1) of the *EA*) and s. 11.0.1 of the *New Act respecting school elections* (as amended by s. 208 of *Bill 40*). [↑](#footnote-ref-200)
201. Section 50 (s. 143.1 para. 1(1) of the *EA*) and s. 196 of *Bill 40* (ss. 4.1 para. 1 and 6 to 7.6 of the *New Act respecting school elections*). [↑](#footnote-ref-201)
202. Section 52 of *Bill 40* (amending s. 155 of the *EA*). [↑](#footnote-ref-202)
203. Section 50 (s. 143.1 para. 1(1) of the *EA*) and s. 216 of *Bill 40* (s. 20(1) of the *New Act respecting school elections*). [↑](#footnote-ref-203)
204. Section 50 (s. 143.1 para. 1(1) of the *EA*) and s. 216 of *Bill 40* (s. 20(4) of the *New Act respecting school elections*). [↑](#footnote-ref-204)
205. Trial judgment, para. 188. [↑](#footnote-ref-205)
206. Exhibit P‑45, Expert Report of Peter Loewen, PhD, Professor of Political Science and Global Affairs & Public Policy, dated February 5, 2021, paras. 13-15. [↑](#footnote-ref-206)
207. Expert report prepared by Olivier Lemieux, professor of educational administration and policy, Université du Québec à Rimouski, dated March 16, 2021, para. 148. [↑](#footnote-ref-207)
208. Trial judgment, para. 189. [↑](#footnote-ref-208)
209. Section 66 of *Bill 40*. [↑](#footnote-ref-209)
210. Exhibit P‑45, Expert Report of Peter Loewen, PhD, Professor of Political Science and Global Affairs & Public Policy, dated February 5, 2021, table G.1 (“The overall treatment effects on rightsholders, parents on governing boards and commissioners (p‑value indicated in parenthesis)”). [↑](#footnote-ref-210)
211. *Id*., pp. 12-14. [↑](#footnote-ref-211)
212. See also: Exhibit P‑58, Affidavit of Judith Kelley, dated January 22, 2021, para. 8; Exhibit P‑59, Affidavit of Lesley Llewelyn, dated January 22, 2021, paras. 4‑7; Exhibit P‑60, Affidavit of Eric Bender, dated January 22, 2021, para. 4. [↑](#footnote-ref-212)
213. Trial judgment, para. 212. [↑](#footnote-ref-213)
214. Argument in appellant’s brief, para. 112, referring to the expert report prepared by Olivier Lemieux, professor of educational administration and policy, Université du Québec à Rimouski, dated March 16, 2021, para. 152. [↑](#footnote-ref-214)
215. Exhibit P‑76, Reply to Olivier Lemieux’s Report by Peter Loewen, PhD, Professor of Political Science and Global Affairs & Public Policy, dated April 7, 2021. [↑](#footnote-ref-215)
216. Trial judgment, para. 195. [↑](#footnote-ref-216)
217. Section 50 of *Bill 40* (s. 143.1 para. 1(2) of the *EA*). [↑](#footnote-ref-217)
218. Section 50 of *Bill 40* (s. 143.1 para. 1(3) and para. 2 of the *E.A.*)and s. 208 of *Bill 40* (s. 11.0.1 of the *New Act respecting school elections*). [↑](#footnote-ref-218)
219. Section 196 of *Bill 40* (s. 4.1 para. 2 of the *New Act respecting school elections*). [↑](#footnote-ref-219)
220. Section 50 of *Bill 40* (s. 143.1 para. 1(2) of the *EA*). [↑](#footnote-ref-220)
221. Section 208 of *Bill 40* (s. 11.0.2 of the *New Act respecting school elections*). [↑](#footnote-ref-221)
222. Trial judgment, para. 191. [↑](#footnote-ref-222)
223. Exhibit P‑45, Expert Report of Peter Loewen, PhD, Professor of Political Science and Global Affairs & Public Policy, dated February 5, 2021. [↑](#footnote-ref-223)
224. Section 66 of *Bill 40*. [↑](#footnote-ref-224)
225. Section 52 of *Bill 40*. [↑](#footnote-ref-225)
226. Exhibit P‑47, Affidavit of Joy Humeniuk, dated June 15, 2020. [↑](#footnote-ref-226)
227. Exhibit P‑56, Affidavit of Mary Ellen Beaulieu, dated January 22, 2021. [↑](#footnote-ref-227)
228. Exhibit P‑57, Affidavit of Olivia Landry, dated January 22, 2021, para. 7. See also: Exhibit P‑59, Affidavit of Lesley Llewelyn, dated January 22, 2021, paras. 8‑9; Exhibit P‑61, Affidavit of Debbie Ford-Caron, dated January 22, 2021, paras. 5‑6. [↑](#footnote-ref-228)
229. Exhibit P‑45, Expert Report of Peter Loewen, PhD, Professor of Political Science and Global Affairs & Public Policy, dated February 5, 2021. [↑](#footnote-ref-229)
230. Section 50 of *Bill 40* (s. 143.1 para. 2 of the *EA*); *Regulation respecting the designation of members of the boards of directors of school service centres,* CQLR, c. I‑13.3, r. 5.1, s. 19. [↑](#footnote-ref-230)
231. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 377. [↑](#footnote-ref-231)
232. *Ibid*. [↑](#footnote-ref-232)
233. *Id.*, p. 380. [↑](#footnote-ref-233)
234. Trial judgment, para. 233. [↑](#footnote-ref-234)
235. *Décret 1027‑2020 concernant l’allocation de présence et le remboursement des frais des membres des conseils d’administration des centres de services scolaires et du Comité de gestion de la taxe scolaire de l’île de Montréal*, (2020) 152 G.O.Q. II, No. 42, p. 4515. [↑](#footnote-ref-235)
236. Trial judgment, para. 235. [↑](#footnote-ref-236)
237. *Id.*, paras. 236-238. [↑](#footnote-ref-237)
238. Exhibit P‑47, Affidavit of Joy Humeniuk, dated June 15, 2020, para. 13. [↑](#footnote-ref-238)
239. Argument in respondents’ brief, para. 75, referring to Exhibit P‑45, Expert Report of Peter Loewen, PhD, Professor of Political Science and Global Affairs & Public Policy, dated February 5, 2021, paras. 33‑36. [↑](#footnote-ref-239)
240. Section 201 of the *EA* (as amended by s. 93 of *Bill 40*). [↑](#footnote-ref-240)
241. Section 155 para. 2 of the *EA* before it was replaced by s. 52 of *Bill 40*. [↑](#footnote-ref-241)
242. Exhibit P‑53, Affidavit of Stephen Burke, dated January 22, 2021. [↑](#footnote-ref-242)
243. Exhibit P‑54, Affidavit of John Ryan, dated January 22, 2021, paras. 6ff. [↑](#footnote-ref-243)
244. Exhibit P‑55, Affidavit of Michael Murray, dated January 25, 2021, paras. 5ff. [↑](#footnote-ref-244)
245. Sections 198 and 201 of the *EA*. [↑](#footnote-ref-245)
246. Section 209.1 of the *EA* (in its pre‑*Bill 40* version). [↑](#footnote-ref-246)
247. Section 176.1 para. (1) of the *EA* (in its pre‑*Bill 40* version). [↑](#footnote-ref-247)
248. Section 73 para. 1(2) of *Bill 40*, which strikes out s. 176.1 para. (1) of the *EA*. [↑](#footnote-ref-248)
249. Section 91 of *Bill 40*, which inserts ss. 193.1 to 193.9 in the *EA*, and s. 98 of *Bill 40*, which amends s. 209.1 of the *EA.* [↑](#footnote-ref-249)
250. Section 91 of *Bill 40*, which inserts s. 193.9 in the *EA.* [↑](#footnote-ref-250)
251. Section 209.1 of the *EA* (in its pre‑ and post‑*Bill 40* versions). [↑](#footnote-ref-251)
252. Trial judgment, para. 270. [↑](#footnote-ref-252)
253. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 377. [↑](#footnote-ref-253)
254. Sections 37 and 74 of the *EA*. [↑](#footnote-ref-254)
255. See, for example, Exhibit P‑53, Affidavit of Stephen Burke, dated January 22, 2021, paras. 24‑34; Exhibit P‑55, Affidavit of Michael Murray, dated January 25, 2021, paras. 31‑40. [↑](#footnote-ref-255)
256. Trial judgment, para. 264. [↑](#footnote-ref-256)
257. Section 91 of *Bill 40*, which inserts s. 193.9 in the *EA*. [↑](#footnote-ref-257)
258. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 380. [↑](#footnote-ref-258)
259. *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, para. 38. [↑](#footnote-ref-259)
260. *Association des parents de l’école Rose‑des‑vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139, para. 47; *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 378. See also: *Ontario English Catholic Teachers’ Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470, para. 55 *in fine.* [↑](#footnote-ref-260)
261. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 377. [↑](#footnote-ref-261)
262. Affidavit of Pierre‑Luc Pouliot, director general of network support and funding at the Ministère de l’Éducation, March 18, 2021, para. 8. [↑](#footnote-ref-262)
263. Section 472 of the *EA*. [↑](#footnote-ref-263)
264. Affidavit of Pierre‑Luc Pouliot, director general of network support and funding at the Ministère de l’Éducation, March 18, 2021, paras. 9‑10. [↑](#footnote-ref-264)
265. *Id.*, para. 11. [↑](#footnote-ref-265)
266. *Ibid*.; Exhibit PGQ‑45, Ministère de l’Éducation et de l’Enseignement supérieur, *Guide général du financement – Publication 2019-2020 – Éducation préscolaire et Enseignement primaire et secondaire*, p. 19. [↑](#footnote-ref-266)
267. Affidavit of Pierre‑Luc Pouliot, director general of network support and funding at the Ministère de l’Éducation, March 18, 2021, para. 12; Exhibit PGQ‑45, Ministère de l’Éducation et de l’Enseignement supérieur, *Guide général du financement – Publication 2019-2020 – Éducation préscolaire et Enseignement primaire et secondaire*, pp. 20-21. [↑](#footnote-ref-267)
268. Affidavit of Pierre‑Luc Pouliot, director general of network support and funding at the Ministère de l’Éducation, March 18, 2021, para. 13. [↑](#footnote-ref-268)
269. *Id.*, para. 14. [↑](#footnote-ref-269)
270. *Id.*, para. 19. [↑](#footnote-ref-270)
271. *Id.*, para. 20. [↑](#footnote-ref-271)
272. *Id.*, para. 21. [↑](#footnote-ref-272)
273. *Ibid*. [↑](#footnote-ref-273)
274. *Id.*, para. 22, referring to Exhibit LN‑5, Ministry of Education and Higher Education’s budgetary rules of 2020‑2021, as amended in August 2020, p. 77 of Section A (p. 104 of 308 of Exhibit LN-5). [↑](#footnote-ref-274)
275. Affidavit of Pierre‑Luc Pouliot, director general of network support and funding at the Ministère de l’Éducation, March 18, 2021, paras. 22‑23. [↑](#footnote-ref-275)
276. Trial judgment, para. 295. [↑](#footnote-ref-276)
277. Exhibit P‑65, Affidavit of Livia Nassivera, dated January 22, 2021. [↑](#footnote-ref-277)
278. Trial judgment, para. 290, where the judge accepted the affidavit of Livia Nassivera, Director of Financial Services for the English Montreal School Board: Exhibit P‑65, Affidavit of Livia Nassivera, dated January 22, 2021, para. 12. See also: Exhibit P‑65.1, Second Affidavit of Livia Nassivera, dated February 12, 2021, paras. 3‑6. [↑](#footnote-ref-278)
279. Exhibit P‑65, Affidavit of Livia Nassivera, dated January 22, 2021, para. 13. [↑](#footnote-ref-279)
280. *Conseil scolaire francophone de la Colombie‑Britannique v. British* *Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, para. 143; *Association des parents de l’école Rose‑des‑vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139, para. 49; *Nguyen v. Quebec (Education, Recreation and Sports)*, 2009 SCC 47, [2009] 3 S.C.R. 208, para. 37. [↑](#footnote-ref-280)
281. *Conseil scolaire francophone de la Colombie‑Britannique v. British* *Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, paras. 147‑150. [↑](#footnote-ref-281)
282. *Id.*, para. 151. [↑](#footnote-ref-282)
283. *Ibid*. [↑](#footnote-ref-283)
284. *Id.*, para. 143 *in fine*. The Supreme Court’s most recent ruling on s. 23 of the *Charter* did nothing to change this: *Commission scolaire francophone des Territoires du Nord‑Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31. [↑](#footnote-ref-284)
285. *Conseil scolaire francophone de la Colombie‑Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678. [↑](#footnote-ref-285)
286. *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, para. 39; *R. v. Oakes*, [1986] 1 S.C.R. 103, pp. 136-137. [↑](#footnote-ref-286)
287. See in particular: *R. v. Brown*, 2022 SCC 18, [2022] 1 S.C.R. 374, para. 110; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, para. 58; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, paras. 111-113 and 116; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, paras. 94, 99, 102, 118 and 119. [↑](#footnote-ref-287)
288. *R. v. Oakes*, [1986] 1 S.C.R. 103, p. 138. [↑](#footnote-ref-288)
289. *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519 (“*Sauvé*”), para. 18. [↑](#footnote-ref-289)
290. *Ibid.* [↑](#footnote-ref-290)
291. *R. v. Oakes*, [1986] 1 S.C.R. 103, pp. 138-139. [↑](#footnote-ref-291)
292. *Id.*, pp. 139‑140. See also: *Conseil scolaire francophone de la Colombie‑Britannique v. British* *Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, para. 146. [↑](#footnote-ref-292)
293. In para. 147 of his brief, the AGQ explains the intended objective in a single sentence: [translation] “First, all the measures have an important objective, which has been explained in section (B) of issue I of this brief” [reference and boldface omitted], namely, the section of his brief dealing with infringement. [↑](#footnote-ref-293)
294. In *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, para. 46, the Supreme Court warned against a legislative purpose that is stated too broadly. [↑](#footnote-ref-294)
295. Trial judgment, para. 392. [↑](#footnote-ref-295)
296. *Ibid*. [↑](#footnote-ref-296)
297. *Id.*, para. 394. [↑](#footnote-ref-297)
298. Trial judgment, para. 391. [↑](#footnote-ref-298)
299. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 378. [↑](#footnote-ref-299)
300. *Arsenault‑Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, para. 48. [↑](#footnote-ref-300)
301. Trial judgment, para. 392, citing the AGQ’s outline of the oral argument at trial, paras. 563 and 565. [↑](#footnote-ref-301)
302. Trial judgment, para. 321. [↑](#footnote-ref-302)
303. *Id.*, para. 326. [↑](#footnote-ref-303)
304. Argument in appellant’s brief, paras. 170-173. [↑](#footnote-ref-304)
305. *Id*., para. 157. [↑](#footnote-ref-305)
306. *Id.*, para. 162. [↑](#footnote-ref-306)
307. *Id.*, para. 161. [↑](#footnote-ref-307)
308. *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, para. 32 (Karakatsanis, J.) and para. 102 (Brown, J.). [↑](#footnote-ref-308)
309. *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, para. 10. [↑](#footnote-ref-309)
310. *Nguyen v. Quebec (Education, Recreation and Sports)*, 2009 SCC 47, [2009] 3 S.C.R. 208, para. 25. [↑](#footnote-ref-310)
311. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 369. See also: *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, p. 857. [↑](#footnote-ref-311)
312. Argument in respondents’ brief, paras. 130-132 and 138. [↑](#footnote-ref-312)
313. *Behn v. Moulton Contracting Ltd.,* 2013 SCC 26, [2013] 2 S.C.R. 227, para. 28; *Haïda Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, paras. 25‑27. [↑](#footnote-ref-313)
314. *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, paras. 89‑91. [↑](#footnote-ref-314)
315. *Alliance autochtone du Québec c. Procureur général du Québec (Ministre des Ressources naturelles et de la Faune du Québec et Ministre délégué aux Affaires autochtones du Québec)*, 2024 QCCA 1472, para. 130, application for leave to appeal to the Supreme Court, File No. 41631. [↑](#footnote-ref-315)
316. *Arsenault‑Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3. [↑](#footnote-ref-316)
317. *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, p. 862. [↑](#footnote-ref-317)
318. *Id.*, p. 860 [underlining in the original]. [↑](#footnote-ref-318)
319. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 393. [↑](#footnote-ref-319)
320. Argument in appellant’s brief, para. 164. [↑](#footnote-ref-320)
321. Section 52(2) of the *Constitution Act, 1982*. [↑](#footnote-ref-321)
322. *Ontario (Attorney General) v. G.,* 2020 SCC 38, [2020] 3 S.C.R. 629, para. 85. [↑](#footnote-ref-322)
323. *Id.*, para. 86. [↑](#footnote-ref-323)
324. *Ibid*. See also paras. 89 and 92. [↑](#footnote-ref-324)
325. *Id.*, para. 89. [↑](#footnote-ref-325)
326. *Schachter v. Canada*, [1992] 2 S.C.R. 679 (“*Schachter*”). [↑](#footnote-ref-326)
327. *Id.*, pp. 695-700. [↑](#footnote-ref-327)
328. *Id.*, p. 696. [↑](#footnote-ref-328)
329. *Ontario (Attorney General)* v. G., 2020 SCC 38, [2020] 3 S.C.R. 629, para. 108. [↑](#footnote-ref-329)
330. *Id.*, para. 109. [↑](#footnote-ref-330)
331. *Id.*, para. 112. [↑](#footnote-ref-331)
332. *Ibid.*; *Schachter v. Canada*, [1992] 2 S.C.R. 679, p. 700. [↑](#footnote-ref-332)
333. *Ontario (Attorney General) v. G*., 2020 SCC 38, [2020] 3 S.C.R. 629, para. 114, citing *Schachter v. Canada*, [1992] 2 S.C.R. 679, p. 697. [↑](#footnote-ref-333)
334. *Ontario (Attorney General)* v. G., 2020 SCC 38, [2020] 3 S.C.R. 629, para. 114; *Schachter v. Canada*, [1992] 2 S.C.R. 679, pp. 705‑706; *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145, p. 169. [↑](#footnote-ref-334)
335. *Ontario (Attorney General)* v. G., 2020 SCC 38, [2020] 3 S.C.R. 629, para. 114. [↑](#footnote-ref-335)
336. *Schachter v. Canada*, [1992] 2 S.C.R. 679, p. 707. [↑](#footnote-ref-336)
337. Trial judgment, paras. 425, 426, 432 and 446, read in conjunction with para. 445. [↑](#footnote-ref-337)
338. *Doucet‑Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, paras. 7‑8 and 60‑88. [↑](#footnote-ref-338)
339. *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721. [↑](#footnote-ref-339)
340. Amended Application for Judicial Review and Declaratory Judgment, Notice of Constitutional Question, June 23, 2021, paras. 73 and 75. [↑](#footnote-ref-340)
341. *Id.*, para. 74 and Schedule A to the Application of the Quebec English School Boards Association, Lester B. Pearson School Board and Adam Gordon. [↑](#footnote-ref-341)
342. Amended Application for Judicial Review and Declaratory Judgment, Notice of Constitutional Question, June 23, 2021, para. 76. [↑](#footnote-ref-342)
343. *Ibid.* [↑](#footnote-ref-343)
344. Trial judgment, para. 433. [↑](#footnote-ref-344)
345. *Id.*, paras. 434-435 and Schedule. [↑](#footnote-ref-345)
346. *Id.*, para. 445 and Schedule. [↑](#footnote-ref-346)
347. Argument in appellant’s brief, para. 169. [↑](#footnote-ref-347)
348. *Schachter v. Canada*, [1992] 2 S.C.R. 679, p. 697. [↑](#footnote-ref-348)
349. Schedule A to the Application of the Quebec English School Boards Association, Lester B. Pearson School Board and Adam Gordon, p. 49. [↑](#footnote-ref-349)
350. *Ibid.* [↑](#footnote-ref-350)
351. *An Act to amend the Act respecting elections and referendums in municipalities, the Municipal Ethics and Good Conduct Act and various legislative provisions*, S.Q. 2021, c. 31, s. 6. This draft legislation (Bill 49) was introduced in the National Assembly on November 13, 2019, while the draft legislation that led to the enactment of *Bill 40* was introduced on October 1, 2019. [↑](#footnote-ref-351)
352. *Act respecting elections and referendums in municipalities*, CQLR, c. E‑2.2. [↑](#footnote-ref-352)
353. Trial judgment, para. 444. [↑](#footnote-ref-353)
354. *Regulation respecting the application of provisions of the Act to amend mainly the Education Act with regard to school organization and governance to English‑language school service centres*, (2021) 153 G.O.Q. II, No. 32, 3369, p. 3370. [↑](#footnote-ref-354)