Unofficial English Translation of the Judgment of the Court

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-029030-202
(500-17-112190-205)

DATE: September 17, 2020

CORAM: THE HONOURABLE FRANCE THIBAULT, J.A.
ROBERT M. MAINVILLE, J.A.
BENOÎT MOORE, J.A.

ATTORNEY GENERAL OF QUEBEC
APPELLANT – Defendant
v.

QUEBEC ENGLISH SCHOOL BOARDS ASSOCIATION
LEASTER B. PEARSON SCHOOL BOARD
ADAM GORDON
RESPONDENTS – Applicants
v.

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

JUDGMENT

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[1] The Attorney General of Quebec ("AGQ") seeks leave to appeal from the judgment rendered on August 10, 2020 by the Honourable Mr. Justice Sylvain Lussier of the Superior Court, District of Montreal, that ordered a stay of the application of *An Act to amend mainly the Education Act with regard to school organization and governance*, S.Q. 2020, c. 1 ("*Bill 40*") to the English school boards of Quebec until a judgment is rendered on the merits of the application for judicial review filed by the respondents, the Quebec English School Boards Association, the Lester B. Pearson School Board and Adam Gordon, with the support of all the English school boards of Quebec as impleaded parties.

[2] The parties agree that the matter is urgent, given that the upcoming school elections are to be held on November 1, 2020. Indeed, the judgment under appeal permits, among other things, the holding of such elections for the English school boards in accordance with the provisions of the *Act respecting school elections*, CQLR, c. E-2.3, and of the *Education Act*, CQLR, c. I-13.3, as they existed before the coming into force of *Bill 40*, and avoids the imposition of a new school governance model on Quebec's English-speaking minority as of these school elections.

[3] Given the urgency and the significant issues at stake in this matter, on August 20, 2020, a judge of this Court referred the application for leave to appeal to this panel, to be heard at the same time as the appeal.

* * *

[4] Leave to appeal a judgment suspending the application of legislation during proceedings contesting its constitutionality is governed by article 31 of the *Code of Civil Procedure* ("*C.C.P.*"). The criteria for obtaining such leave to appeal are well known and were summarized by Bich, J.A. in *Devimco Immobilier inc. c. Garage Pit Stop inc*., 2017 QCCA 1, para. 9:

> [TRANSLATION]
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> [9] That being said, the motion for leave to appeal is governed by article 31 *C.C.P.* (rather than by article 32) and, in order to succeed, the petitioners must demonstrate (1) that the impugned judgment determines part of the dispute or causes them irremediable injury and (2) that the proposed appeal is in the interests of justice (art. 9, para. 3 *C.C.P.*) in that it raises an issue meriting the attention of the Court, has a reasonable chance of success and is consistent with the guiding principles of procedure (ss. 17 and following *C.C.P.*).
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> [Reference omitted]

[5] As his grounds of appeal, the AGQ essentially argues that the judge erred: (1) by finding that there is irreparable harm based on a false premise, namely, the disappearance of the school boards, despite his statement that the evidence did not establish such harm; (2) by imposing a burden of proof on the AGQ that he does not have in connection with the balance of convenience test; (3) by ordering the stay without finding this to be a clear case; and (4) by suspending *Bill 40* as a whole.

[6] For their part, the respondents argue that the judge did not err in finding that there is harm. Such harm does indeed exist, if only by the mere fact that elections will be held under the new rules adopted by the legislature rather than the old rules. The respondents argue, in essence, that the interests of justice do not require that leave to appeal be granted, because, in light of the applicable standard of review, the appeal is destined to fail. They submit that the AGQ's grounds of appeal essentially amount to criticizing the judge's weighing of the various circumstances, which is not the role of this Court.

[7] It is true that the decision whether or not to stay legislation while it is being challenged is, as with interlocutory injunctions or safeguard orders, discretionary on the part of the trial judge and limited in time. In this regard, it is generally acknowledged that leave to appeal such a judgment will be granted only in exceptional circumstances. We are, however, of the opinion that this is the case in the matter at hand.

[8] The appeal raises questions of interest, and even if the appellant's burden is very heavy, the appeal is not necessarily destined to fail. We would add that determining the interests of justice is not limited to an assessment of the chances of success of an appeal—a highly speculative exercise—even if it is an important factor. A judgment ordering a stay of legislation enacted by the National Assembly, before presentation of the evidence and argument on the merits have occurred, has a significant effect that is both practical and symbolic and calls upon founding principles of our legal system, including the separation of powers. In the present case, the significance of these consequences is heightened by the impending school elections.

[9] For all of these reasons, it is in the public interest and in the interests of justice that leave to appeal be granted. We turn now to the appeal itself.

* * *

[10] The legal principles applicable to a stay of legislation are well known and were recently summarized in *Hak v. Attorney General of Quebec*, 2019 QCCA 2145, paras. 103-106 ("*Hak*"). Thus, a party seeking to stay the application of a statute must demonstrate that it meets the following tests: first, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Second, it must be determined whether the applicants or the persons on whose behalf they claim to act would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the relief pending a decision on the merits: *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR – MacDonald*").

[11] The third test—assessing where the balance of convenience lies—is particularly relevant, because it is here that the public interest, which is presumed to be reflected in the impugned legislation, must be considered and given the weight it should carry: *RJR – MacDonald*, pp. 342-347. As Sopinka and Cory, JJ., noted in *RJR – MacDonald*, p. 346, "[a] court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought", because doing so "would in effect require judicial inquiry into whether the government is governing well", which is not the role of the courts. On the contrary, the court should in most cases assume that harm to the public interest would result from a suspension of the statute. In this regard, the Supreme Court of Canada cautioned us in *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764, para. 9:

> [9] Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in *RJR – Macdonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, at pp. 348-49:
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> > When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.
>
> It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law—in this case the spending limits imposed by s. 350 of the Act—is directed to the public good and serves a valid public purpose. This applies to violations of the s. 2(b) right of freedom of expression; indeed, the violation at issue in *RJR – MacDonald* was of s. 2(b). The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.
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> [Emphasis added]

[12] When a judgment granting or refusing a stay of the application of a statute is appealed, an appellate court can intervene only in rare circumstances. Indeed, the decision regarding such a measure is a discretionary exercise on the part of the trial judge, and an appellate court must not interfere solely because it would have exercised the discretion differently. In *Metropolitan Stores*, pp. 155-156, the Supreme Court of Canada specified the circumstances under which the exercise of that discretionary power can be overturned. Those circumstances were recently reiterated by Brown, J., writing for

a unanimous Supreme Court in *R. v. Canadian Broadcasting Corp.,* 2018 SCC 5, [2018] 1 S.C.R. 196, para. 27:

> Appellate intervention is justified only where the chambers judge proceeded "on a misunderstanding of the law or of the evidence before him", where an inference "can be demonstrated to be wrong by further evidence that has [since] become available", where there has been a change of circumstances, or where the "decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge [. . .] could have reached it".

[13] It is readily apparent that this burden is a particularly heavy one. For the reasons that follow, while we do not endorse the trial judge's entire analysis, the AGQ has not convinced us that the Court should intervene.

* * *

[14] Given that the dispute before us deals essentially with the interpretation and application of s. 23 of the *Canadian Charter of Rights and Freedoms* (the "*Canadian Charter*"), it is useful to review its general principles.

[15] According to this section, in Quebec (a) citizens of Canada who have received their primary school instruction in Canada in English have the right to have their children receive primary and secondary school instruction in that language: s. 23(1)(*b*) of the *Canadian Charter*; and (b) citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English in Canada, have the right to have all their children receive primary and secondary school instruction in that language: s. 23(2) of the *Canadian Charter*.

[16] These rights are framed by s. 23(3) of the *Canadian Charter*:

23. (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	**23.** (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*) 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	*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*) 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.	*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.

[Emphasis added]

[17] Section 23 of the *Canadian Charter* is one component in Canada's constitutional protection of the official languages. The section is especially important because of the vital role of public education in preserving and encouraging the linguistic and cultural vitality of official language minorities in each of the provinces of Canada, that is, the English-speaking minority in Quebec and the French-speaking minorities in the rest of the country: *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 350 ("*Mahe*") (see also *Doucet-Boudreau v. Nova Scotia (Minister of Education*, 2003 SCC 62, [2003] 3 S.C.R. 3, para. 26 ("*Doucet-Boudreau*")).

[18] It is a novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with, which has a remedial purpose and allows for specific legal remedies, as Dickson, C.J., writing for a unanimous Supreme Court, noted in *Mahe*, p. 365 (see also Doucet-Boudreau, para. 27, and *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, paras. 3 and 15-16 ("*Conseil scolaire francophone de C.-B.*")):

> The provision provides for a novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with. Both its genesis and its form are evidence of the unusual nature of s. 23. Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures. Careful interpretation of such a section is wise: however, this does not mean that courts should not "breathe life" into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.

[19] Section 23 places positive obligations on governments to mobilize resources and enact legislation for the development of major institutional structures for the province's language minority, which gives the exercise of the rights set out therein a unique collective aspect: *Mahe*, pp. 365 and 389, *Doucet-Boudreau*, para. 28; *Conseil scolaire francophone de C.-B.*, para. 17.

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

measure of control and management varies based on the circumstances, but may include the management of the schools through school boards where the number of children warrants. As Dickson, C.J. indicated, "[i]n some circumstances an independent Francophone school board is necessary to meet the purpose of s. 23": *Mahe*, p. 374. While Dickson, C.J. had in mind the French-speaking minority in Alberta, these remarks are just as applicable to the English-speaking minority in Quebec. This approach was recently reiterated by Wagner, C.J. in *Conseil scolaire francophone de C.-B.*, para. 24: "The number of children of rights holders might also entitle the minority to the management and control of a separate school board".

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

> In my view, the measure of management and control required by s. 23 of the Charter may, depending on the numbers 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;
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> (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:
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> (a) expenditures of funds provided for such instruction and facilities;
>
> (b) appointment and direction of those responsible for the administration of such instruction and facilities;
>
> (c) establishment of programs of instruction;

> (d) recruitment and assignment of teachers and other personnel; and
>
> (e) making of agreements for education and services for minority language pupils.
>
> [Emphasis added]

[22] Likewise, "the persons who will exercise the measure of management and control described above are 's. 23 parents' or persons such parents designate as their representatives": *Mahe*, p. 379.

[23] Of course, the exclusive control does not preclude the application of provincial laws and regulations governing the content and the qualitative standards of educational programs, but the Supreme Court specified that these must not interfere "with the linguistic and cultural concerns of the minority": *Mahe*, p. 380. It provided a good summary of the limits imposed by s. 23 on legislative discretion in *Arsenault-Cameron v. Prince Edward Island,* 2000 SCC 1*,* [2000] 1 S.C.R. 3, para. 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.

[24] The rights conferred by s. 23 of the *Canadian Charter* must also be considered in light of the historical context of the linguistic minority in each of the provinces of Canada: *Conseil scolaire francophone de C.-B.*, para. 17. It is indisputable that this section is designed to correct the progressive erosion of minority official language groups through remedial measures: *Mahe*, pp. 363-364. It therefore imposes positive duties on governments to ensure that the linguistic minority has real and effective control of its schools if the number warrants.

[25] In Quebec, the protection of the school rights of the English-speaking minority seems, at first glance at least, to be tied in part to the rights formerly guaranteed in Quebec by s. 93 of the *Constitution Act, 1867*, which deals with denominational schools. Indeed, the principal respondent in the present matter, the *Quebec English School Boards Association*, which brings together all of the English school boards of Quebec, was founded in 1936 as the *Provincial Association of Protestant School Boards of the Province of Quebec* and changed its name only in 1999, when denominational school boards were abolished in Quebec. Thus, as Dickson, C.J. emphasized in *Mahe*, p. 373, denominational schools were the principal bulwarks of minority language education:

> Historically, separate or denominational boards have been the principal bulwarks of minority language education in the absence of any provision for minority

> representation and authority within public or common school boards. Such independent boards constitute, for the minority, institutions which it can consider its own with all this entails in terms of opportunity of working in its own language and of sharing a common culture, interests and understanding and being afforded the fullest measure of representation and control. These are particularly important in setting overall priorities and responding to the special educational needs of the minority.

[26] When the *Constitution Amendment, 1997 (Quebec)* (SI/97-141) was enacted, incorporating new s. 93A in the *Constitution Act, 1867* in order to make the constitutional rights guaranteed by s. 93 inapplicable in Quebec, the federal government, via Stéphane Dion, its Minister of Intergovernmental Affairs, who was in charge of the file, informed Parliament that this amendment would not have an impact on the English-speaking minority in Quebec, given the constitutional rights conferred in s. 23 of the *Canadian Charter*, in particular the right of that linguistic minority to have separate school boards it could manage and control (House of Commons, Debates of the House of Commons, 36th Parliament, 1st Sess., Vol. 135, No. 31, November 17, 1997, p. 1743 (Hon. S. Dion):

> 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.
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> 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 will enable the anglophone community to consolidate its school population of [*sic*] and gain the maximum benefit from the guarantees under section 23.
>
> [Emphasis added]

[27] Moreover, s. 23 is not subject to the notwithstanding clause in s. 33 of the *Canadian Charter*, which reflects the importance attached to the rights set forth therein and the intention that intrusions on it be strictly circumscribed: *Conseil scolaire francophone de C.-B.*, para. 148. Section 23 protects an official language minority, including Quebec's English-speaking minority, from the effects of decisions of the majority in the area of education by granting the minority certain control in that regard. By excluding s. 23 from the scope of the notwithstanding clause, the *Canadian Charter* prevents the government of a province from being able to circumvent its constitutional obligations: *Conseil scolaire francophone de C.-B.*, para. 149.

[28] This description of the state of the law regarding s. 23 makes it easy to distinguish the present case from the matter in *Hak*. Not only did that decision deal in part with s. 28 of the *Canadian Charter*, with respect to which the state of the law is more uncertain and embryonic than that pertaining to s. 23 of the *Canadian Charter*, but, above all, the legislature had used the notwithstanding clause of s. 33 of the *Canadian Charter*, which it has not done and cannot do here, as we have seen.

* * *

[29] In addition to this legal context, one must consider the demographic context, which is described in the respondents' pleadings filed in support of their application for an interlocutory injunction. Thus, in 1971 there were more than 250,000 students registered in elementary and secondary English schools in Quebec, all segments combined, while there were less than 100,000 in 2018-2019, representing a 62% decrease (*Application for Judicial Review and Declaratory Judgment, Notice of Constitutional Question and Application for Interlocutory Injunction and Provisional Execution of the Injunction Pending Appeal*, para. 16-21).

[30] Similarly, according to the respondents, while the number of French mother tongue speakers in Quebec rose from 4.8 million in 1971 to more than 6.2 million in 2016, the number of English mother tongue speakers decreased from approximately 788,000 to 600,000, which is a significant demographic decline, dropping from 13% to 7.5% of the total population of Quebec.

* * *

[31] Before addressing the criteria for granting a stay, it is necessary to carefully examine *Bill 40* and its effect on the rights of Quebec's language minority in light of the rights guaranteed in s. 23 of the *Canadian Charter*.

[32] The respondents argue that the very purpose of *Bill 40* is to effect a paradigm shift in school organization and governance in Quebec. This change involves abolishing the school boards and replacing them with "school service centres" whose mission would be radically different. In the respondents' view, as the new name implies, the school service centres are service delivery centres whose primary purpose is to ensure that school services are delivered in accordance with ministerial regulations and directives. Thus, school service centres no longer play a decisive governance role, but rather an implementing role.

[33] In support of this statement regarding the purpose of *Bill 40*, the respondents refer to the remarks of Quebec's Minister of Education in his news release at the time *Bill 40* was tabled as well as on November 6, 2019 during the National Assembly consultations on *Bill 40* leading to its enactment (trial judgment, para. 66):

[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 reversed, 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.
>
> [Emphasis added]

[34] But, over and above the Minister's presentation, the respondents argue in particular that this paradigm shift is reflected in the very text of *Bill 40.* It is useful to present some of the amendments raised by the respondents in support of their arguments. These pertain primarily to two aspects: the loss of power of school service centres to employees and the Minister and the loss of control by the English-speaking minority over its schools and the education provided there.

[35] First, the respondents point out that, unlike members of a council of commissioners, members of a board of directors of a school service centre will not be remunerated: s. 66 of *Bill 40*, replacing s. 175 of the *Education Act* ("*EA*"), which indicates their diminished role. They then point out that the Minister may annul any decision made between October 1, 2019 and November 5, 2020 by an English school board that has an impact on the school board's human, financial, physical or information resources that the Minister considers contrary to the future interests of a school service centre: s. 329 of *Bill 40*.

[36] The Minister may now determine, for all the school service centres or for one or certain centres, objectives or targets relating to their administration, organization or operation, thereby ensuring significant effective control over the activities of the centres: s. 142 of *Bill 40*, which adds s. 459.5.4 to the *EA*. These powers are in addition to the slew of imposing ministerial powers already provided for in the *EA* and added thereto over the years.

[37] The members of a board of directors of a school service centre no longer play any political role in educational matters and cannot express themselves as spokesperson. Henceforth, it is the director general, a civil servant, who acts alone as "official spokesperson" for the centre: s. 93 of *Bill 40*, which amends s. 201 *EA.* It may be presumed that the official spokesperson role extends to presenting observations to the

Minister regarding the educational needs of the English-speaking minority served by the school service centre.

[38] The powers of school service centres over school immovables and equipment are also substantially modified as compared with the powers of the school boards they replace. Besides the fact that they must now "facilitate the sharing of resources and services, especially administrative resources and services, with each other [or] with other public bodies" (s. 105 of *Bill 40*, which adds s. 215.2 to the *EA*), they can no longer acquire an immovable without the Minister's authorization (s. 117 of *Bill 40*, which amends s. 272 *EA*), nor can they construct, enlarge, develop, convert, demolish, replace or renovate their immovables without the Minister's authorization if the cost of the work exceeds the amounts determined by the Minister (s. 118 of *Bill 40*, which adds s. 272.1 to the *EA).* Henceforth, the school service centre's space requirement plan is also subject to the approval of the Minister (s 118 of *Bill 40*, which adds ss. 272.8 and 272.9 *EA*), who may determine the standards and procedures applicable to such forecasts (s. 139 of *Bill 40*, which adds s. 457.7.1 to the *EA*). The Minister may also order a school service centre to give a municipality access to its facilities (s. 142 of *Bill 40*, which adds s. 459.5.5 to the *EA*).

[39] In addition to these measures which diminish the powers previously held by school boards, the respondents argue that *Bill 40* also affects the control that the English-speaking minority in Quebec exercises over its schools, on two levels: (1) through a new electoral system and (2) through the creation of a commitment-to-student-success committee.

[40] Regarding the electoral system, *Bill 40* effects a fundamental reform for French-speaking school service centres, whose essential clientele represents over 92% of the population of Quebec, in that the members of their boards of directors are no longer elected. While the situation is different for English-speaking school service centres, which are now subject to a new electoral process, the respondents argue that the changes to that process significantly weaken the representative power of the boards of directors.

[41] Thus, the pre-*Bill 40 EA* and *Act respecting school elections* provide that the vast majority of commissioners (8 to 18) are elected for a four-year term by all the members of the English language minority based on a number of electoral divisions that varies depending on the total number of electors. These electoral divisions are delimited, keeping in mind, as far as possible, any natural community, in such a manner as to ensure that each electoral division has the greatest possible socioeconomic homogeneity. In addition to these elected commissioners, there are three or four representatives of the parents' committee and a maximum of two commissioners appointed after consulting with the groups most representative of the social, cultural, business and labour sectors in the region.

[42] *Bill 40* replaces this system with another one that confers the majority of positions on the board of directors to parents who sit on the governing board of a school or vocational training centre (from 8 to 17 members), who will be elected in electoral

divisions. As regards representatives of the minority language community who do not sit on the governing board (from 4 to 13 members), they will now be elected from a single electoral division comprising the territory for the entire school service centre. They must also meet certain additional eligibility requirements under *Bill 40*, which we will return to below. Lastly, four members of the board of directors are designated from among staff members, namely, one teacher, one non-teaching professional staff member, one support staff member and one principal of an educational institution.

[43] The English school boards, as representatives of the linguistic minority, firmly and unanimously, oppose this new electoral process, both because it prevents the linguistic minority from designating the representatives it wants and because the system is impracticable.

[44] According to the respondents, nearly all members of the minority language community will not be eligible in the upcoming elections as candidates for the seats reserved for the members of the governing boards, which is the majority of seats. According to the evidence filed by the respondents (Exhibit P-11), there were 267,104 electors registered on the English school boards' voting lists in 2014, all of whom were eligible as candidates for the position of commissioner. Since, according to the respondents' estimates, there will be at most between 1,134 and 4,093 members of the governing boards of these English-speaking school service centres, a significant portion of the official minority language electorate will henceforth be ineligible for these positions.

[45] As for the positions reserved for community representatives, *Bill 40* requires that at least one person have expertise in governance, in ethics, in risk management or in human resources management, that another person have expertise in finance or accounting or in financial or physical resources management, that another come from the community, municipal, sport, cultural, health, social services or business sector and that a fourth be 18 to 35 years old. In addition to the fact that these criteria are difficult to determine and will likely dissuade a number of individuals, the respondents argue that they disqualify a considerable number of members of the minority language community as candidates.

[46] Finally, there is no requirement that the four positions reserved for staff members be allocated to individuals from the minority language community.

[47] Lastly, the respondents argue that the establishment of the commitment-to-student-success committee also erodes the rights of the minority language community set out in s. 23 of the *Canadian Charter*. This committee is provided for in s. 91 of *Bill 40*, which adds ss. 193.6 to 193.9 to the *EA.* This new committee is made up solely of members of the staff of the school service centre, except for one member from the education research sector, without any requirement that one of the members be from the minority language community. It is this committee that develops and proposes the commitment-to-success plan provided for in s. 209.1 *EA*, which sets out, among other things, the needs of the official linguistic minority's schools, the directions and objectives selected by those schools and their targets. Although the commitment-to-success plan is

subject to the approval of the board of directors of the school service centre, it is clear, according to the respondents, that the objective is to delegate the principal directions of the school service centre to staff rather than to the board of directors.

* * *

[48] Given that the AGQ rightly conceded that the serious issue test has been met, he challenges the existence of an irreparable harm. He submits that the trial judge did not define the harm, save for stating, theoretically, that the disappearance of the school boards constitutes, in and of itself, irreparable harm.

[49] Regardless of how the judge expressed himself when considering the issue of harm, first, the AGQ gives the judge's reasons a narrow meaning which they do not have and, second, he disregards the judge's analysis of *Bill 40* in connection with the serious question test, an analysis during which the harm he relied on was identified.

[50] The replacement of English school boards by the school service centres forms part of what, at first glance at least, constitutes (a) a significant transfer of the power of management and control over the English language minority's educational system to the Minister and to the employees of the future school service centres, and (b) major restrictions on the candidacy of a significant segment of s. 23 rights holders for election to the boards of directors of the new school service centres.

[51] The trial judge dealt at length with these aspects (in paras. 39-48 and 62-126) when analyzing the existence of a serious question, an analysis that cannot be severed from his remarks as a whole. It was therefore by taking into consideration all of the effects of *Bill 40* on the linguistic rights of Quebec's official language minority that the judge, relying on the Alberta Court of Appeal ruling in *Whitecourt Roman Catholic Separate School District No. 94 v. Alberta*, 1995 ABCA 260 ("*Whitecourt*"), concluded that there was irreparable harm. The judge did not err on this point.

[52] In *Whitecourt*, the trial judge had refused to issue an interlocutory injunction in order to exempt the Catholic school network in Alberta—which enjoyed certain constitutional protections (see s. 15 of *Whitecourt*)—from the application of the provisions of provincial legislation intended to consolidate these school boards for purposes of administrative and financial rationalization. It is worth noting that the consolidation of the school boards in question did not affect the right to elect representatives to the consolidated school board. Notwithstanding this, the Court of Appeal of Alberta unanimously concluded that the proposed consolidation had sufficient effects to satisfy the irreparable harm test. In its view, measures that threaten self-governance of a public institution that serves a minority may constitute irreparable harm in appropriate circumstances:

> [29] In our view, evidence of actual harm is unnecessary where the alleged harm relates to the abolishment of the entity alleging it, and the substitution of another administrative body. Reconstitution of that entity could not fully redress

> prejudice arising from the period of its non-existence. Harm arising from the effects of changes in policy or philosophy is not fully reversible. Though the policy or philosophy may ultimately be reversed, those adversely affected by it during the interim cannot be wholly compensated. Ratepayers whose elected representatives would be deposed, students who may not be allowed to progress in accordance with their competency, aboriginal students whose special interests may not be adequately represented, and students and parents whose religious philosophy may be compromised, even on a temporary basis, would all suffer harm of the sort which is not compensable.
>
> […]
>
> [32] In our view, and with great respect, the learned chambers judge misunderstood the law regarding the concept of irreparable harm. He erred in too narrowly restricting that concept to the examples cited by Sopinka, J. and Cory, J. at p. 341 in *RJR-MacDonald* of cases involving market loss or damage to business reputation, and in concluding that any harm that might arise here would not constitute similar harm. He erred as well by failing to appreciate the nature of the critical harm that may result from the substitution of decision makers. Though it is the nature and not the magnitude of the harm that must be considered, the harm must nonetheless be serious. However, in our view, harm that threatens the essence of self governance is serious.
>
> [Emphasis added]

[53] This is precisely the irreparable harm invoked here by the English school boards. The distinction the AGQ is attempting to make—that in the case at bar the school boards are not disappearing but are merely being modified and are merely changing their name—seems, *prima facie*, both formalistic and unduly simplistic. It bears reminding that s. 23 of the *Canadian Charter* guarantees to the official language minority, if the numbers warrant it, "exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns" (*Mahe,* p. 376). In the present case, while it is true that the English-speaking minority retains a separate entity, the respondents submit that, in fact, the transfer of powers to the Minister and the method of selecting the members of the board of directors remove exclusive control thereof from the s. 23 rights holders, thereby infringing their guaranteed rights. Certainly, it will be up to the judge hearing the case on its merits to rule on this issue, but the fact remains that this is not a simple debate on structure, as the AGQ is attempting to convince us, but rather one pertaining to the effective continued exercise by the English-speaking minority of its right of exclusive control guaranteed by the Constitution.

[54] The amendments brought about by *Bill 40*, as presented by the respondents, were sufficient, in combination, to allow the trial judge to conclude, at this stage and at first sight, that there is a significant transfer to the Minister and to staff of the school service centres of the power to manage and control the English school boards. *Bill 40* also seems to impose significant restrictions on the candidacy of numerous members of the minority language community for positions on the boards of directors of the school service centres.

This leads to the conclusion that there is irreparable harm to the very governance of the English school boards by Quebec's official language minority. We would add that the courts have, on several occasions, accepted the fact that a potential infringement of s. 23 of the *Canadian Charter* could constitute irreparable harm, at least to those students receiving an education during the proceedings (*Conseil des écoles publiques de l'Est de l'Ontario v. Ontario Federation of School Athletics Associations*, 2015 ONCS 5328, and the cases cited, para. 70).

[55] The AGQ relies on *Hogan v. Newfoundland (Attorney General)* (1998), 163 D.L.R. (4th) 672, 1998 CanLII 18115 (NL CA) ("*Hogan*") to argue the contrary. The context in which that judgment was rendered indicates it has a very limited scope. Indeed, the decision rests largely on the specific facts of the case. In *Hogan*, religious representatives had sought an interlocutory injunction to delay the Government of Newfoundland and Labrador's efforts to implement school reform seeking to dismantle the denominational school system. The reform followed a referendum held on September 5, 1995 during which the province's population had approved the recommendation of a Royal Commission of Inquiry seeking to amend the constitutional covenant applicable to the province that conferred vast powers over education to the denominational institutions. The constitutional amendment was enacted by the province and the federal government and ultimately approved by the Parliament of Canada at the end of 1996.

[56] The interlocutory injunction was refused principally because the new school system had already been put into place and the students were to begin school imminently: *Hogan*, paras. 76-79. It is therefore on the basis of the balance of convenience and the chaos that would ensue for students if the interlocutory relief were granted that the injunction was refused: *Hogan* paras. 78 and 85. That is not the case here.

[57] Therefore, as regards the irreparable harm test, there is no error warranting this Court's intervention.

* * *

[58] We must now consider the balance of convenience test. While the Court does not necessarily endorse the trial judge's entire analysis, this test also favours the respondents.

[59] The public interest plays a leading role in weighing the balance of convenience when considering a stay of legislation. There is no doubt that the public interest is presumed to be reflected in the impugned legislation and that a court must tread very carefully before ordering an interlocutory stay of legislation without the benefit of all the evidence and of argument on the merits. This is why, as we stated above, such a measure must be reserved for "clear cases". However, although the government need not prove the existence of a substantial and pressing need or an urgent evil to be eradicated (*Hak*, paras. 104 and 105), the fact remains that it "does not have a monopoly on the public interest" and the public interest may not necessarily always gravitate in favour of enforcement of existing legislation: *RJR – MacDonald*, p. 343. Similarly, the public interest

is not solely that of society generally, but may also involve the particular interests of identifiable groups: *RJR – MacDonald*, p. 344; *Groupe CRH Canada inc. c. Beauregard*, 2018 QCCA 1063, para. 86. This is especially true in the present case, because, as the trial judge noted, the rights conferred by s. 23 of the *Canadian Charter* have a significant collective aspect.

[60] In the present case, the public interest must be assessed by considering the limited scope of the requested stay. It is not a question of staying the effect of *Bill 40* and the significant reform of the educational system it entails (a paradigm shift according to the responsible Minister) for the entire population of Quebec. Indeed, even if the stay ordered by the trial judge remains in effect, the reform that *Bill 40* introduces will nevertheless apply to all of the Francophone public educational institutions serving more than 92% of the population of Quebec.

[61] Therefore, there is no question here of preventing the government from implementing the legislative reforms for which it was elected and depriving the population of its benefits, as the AGQ argues, but rather of specifically weighing the effects of this reform on the constitutional rights of the official linguistic minority representing approximately 7.5% of the population according to the evidence in the record. Although this is not a case where a constitutional exemption may be sought (see *Hak*, paras. 154-155), the fact remains that the limited effect of the stay may play a role in weighing the balance of convenience, because the reform intended by the government already applies and will continue to apply to the vast majority of the citizens of Quebec.

[62] The exercise therefore consists in weighing the public interest presumed to be reflected in *Bill 40* against the interest of ensuring that the rights guaranteed to the official language minority in Quebec under s. 23 of the *Canadian Charter* are respected, including the right to exercise “exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns”: *Mahe*, pp. 375-376.

[63] As Iacobucci and Arbour, JJ. indicated in *Doucet-Boudreau*, at para. 29, the rights guaranteed in s. 23 are “particularly vulnerable to government delay or inaction”. They are also particularly susceptible to being weakened by subtle legislative erosion. In *Conseil scolaire francophone de C.-B.*, at para. 16, Wagner, C.J. noted that “[t]his means that the courts have a crucial role to play, as the framers made them responsible for overseeing the implementation and protection of *Charter* rights”.

[64] That being said, given that the changes in school governance resulting from *Bill 40* appear, at first glance at least, to withdraw powers of management and control from the English school boards and limit the eligibility of the members of the official language minority of Quebec for elected positions in the new school service centres, in this case the public interest leans in favour of protecting the rights of the official linguistic minority rather than implementing *Bill 40* in the English educational sector, at least until there is a judgment on the merits.

[65] Lastly, there is no need to limit the scope of the interlocutory injunction issued by the trial judge to only the impugned provisions of *Bill 40*, as the AGQ suggests. First, the trial judge concluded that there was much more at issue than the impugned provisions and that it would be appropriate to stay the effect of *Bill 40* as a whole, as the respondents, in fact, had requested. Second, a careful review of *Bill 40* and the laws it amends indicates that a partial stay would lead to extreme legal confusion surrounding the application of these various laws in the English educational sector, resulting in legal chaos. Third, the court proceedings have only just begun and it is possible that the respondents will add several other provisions of *Bill 40* to their constitutional challenge. Lastly, it is worthwhile repeating that, even though *Bill 40* as a whole is stayed, the stay affects only the English school boards. In this sense, the vast majority of the intended effects of *Bill 40* are following their normal course. In these circumstances, there is no reason to intervene in the judge's decision to stay *Bill 40* in its entirety as regards the English school boards.

* * *

FOR THESE REASONS, THE COURT:

[66] **GRANTS** the application for leave to appeal;

[67] **DISMISSES** the appeal;

[68] **THE WHOLE** with legal costs in favour of the respondents.

FRANCE THIBAULT, J.A.

ROBERT M. MAINVILLE, J.A.

BENOÎT MOORE, J.A.

Mtre Samuel Chayer
Mtre Manuel Klein
Mtre Alexandra Hodder
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Mtre Pierre Duquette
NORTON ROSE FULBRIGHT CANADA
For the impleaded party, Central Québec School Board

Chris Eustace
Intervening as *amicus curiae* (article 187 of the *Code of Civil Procedure*)

Date of hearing: September 14, 2020