Quebec appeal court confirms ruling finding provisions abolishing school boards unconstitutional

By Luis Millán - Listen to article

Law360 Canada (April 28, 2025, 2:45 PM EDT) -- The Quebec Court of Appeal confirmed that certain provisions of a provincial law that abolished school boards unjustifiably infringe the rights guaranteed to Quebec's minority language groups by the Canadian Charter, a ruling deemed by the English community as a sweeping win.

In a "very-well written, well-reasoned judgment" that examined the nature and scope of the rights conferred by s. 23 of the Charter, which guarantees minority language educational rights, the Appeal Court mostly upheld a lower court ruling that found sections of Bill 40 are inoperative to Quebec's English-language school boards.

Érik Labelle Eastaugh, Université de Moncton

"It's a perfectly sound, well-reasoned judgment from a legal standpoint, but I'm not surprised by the ruling," remarked Érik Labelle Eastaugh, dean of the faculty of law at the Université de Moncton and former head of the International Observatory on Language Rights. "Not surprising, but it's an important judgment, given that it deals with certain issues that had never been squarely addressed by the courts until now."

Stéphane Beaulac, professor of constitutional law at the Université de Montréal, specializing in language law, and counsel at Dentons Canada in Montreal, also believes the Appeal Court's "well-reasoned" ruling "clears up questions" while "giving ample context" over the issues raised by s. 23 of the Charter. But Beaulac asserts that the Quebec Appeal Court may have too broadly defined the scope of the English-language minority community in Quebec covered by s. 23 of the Charter.

The Quebec English School Boards Association (QESBA), whose nine boards serve about 100,000 students, said in a statement it was elated with the "sweeping" decision that "reinforces" the English-speaking community's rights to manage and control its institutions. "We are thrilled that our rights have been recognized once again with this decision," said QESBA president Joe Ortona. "We truly hope that the government will decide not to take this crystal-clear decision of the Quebec Court of Appeal to the Supreme Court of Canada in Ottawa."

Bill 40, adopted in February 2020, instituted a "profound transformation" in the governance of primary and secondary education as it recast school boards governed by elected councils of commissioners into school service centres that are run by a board of directors. "This represents a major paradigm shift," said the Appeal Court in *Procureur général du Québec c. Quebec English School Boards Association*, 2025 QCCA 383, a unanimous decision issued on April 3 by Justices Robert Mainville, Christine Baudouin and Judith Harvie.

Under Bill 40, the role of school boards has been restricted, from organizing education services and controlling its quality to a "more secondary role" of providing support and goods and services to deliver educational services. In its place, so-called service centres are now responsible for providing services in accordance with policies set by the government and objectives defined by a committee of employees. While Bill 40 is in force for French school boards, English school boards have been exempted following a successful legal challenge by the QESBA. In 2020, Quebec Superior Court granted a stay of application that was later confirmed by the Appeal Court.

The comprehensive 87-page Appeal Court decision on the merits, after tracing an overview of the evolution of s. 23 case law and its interplay with s. 93 of the *Constitution Act, 1867*, comes to the conclusion that the *Act to amend mainly the Education Act with regard to school organization and governance* "neutralizes" the right of members of the linguistic minority to choose their representatives. The Appeal Court also determined that Bill 40 infringes the management and control powers stemming from s. 23(3)(b) of the Charter, and just as crucially rejected the provincial government's contention that only parents with children currently in English schools are rightsholders under s. 23 of the Charter.

The underpinning behind the Appeal Court's conclusion that the management and control rights flowing from s. 23(3)(b) are intended to protect the linguistic minority "as a whole," and not just parents whose children attend schools, emanates from the leading Supreme Court of Canada decision in *Mahe v. Alberta*, [1990] 1 S.C.R. 342, explained Eastaugh. In *Mahe*, the SCC held that s. 23 of the Charter guarantees minority language communities the right to manage and control their own schools where the numbers warrant it. The SCC, added Eastaugh, defined the purpose of s. 23 as being to protect the interests of the community as a general matter because one of the purposes is to allow the community to sustain itself through time and to allow the language to survive and thrive.

"The question of whether people who don't meet the definitions set out in s. 23(1), in the sense that they don't have children and so they're not technically rightsholders under s. 23, the question of whether or not they had any justiciable or enforceable legal rights hadn't come up until now, to my knowledge," said Eastaugh. "This is the first time the court rules explicitly that they do, but the sort of broader intellectual architecture on which that ruling is based is something that has existed from the outset. So in that sense the court here isn't really innovating, it's simply drawing out an implication of the broader principles that were set out in *Mahe*."

Beaulac sees it differently and believes that a key element of the Quebec Appeal Court ruling may not hold up to the scrutiny of the nation's highest court if leave to appeal is sought by the provincial government.

The Appeal Court concluded that the linguistic minority in Quebec that can exercise management and control rights includes "at a minimum" Canadian citizens whose first language learned and still understood is English (s. 23(1)(a)), who received their primary school instruction in Canada in English (s. 23(1)(b)), or of whom any child has received or is receiving primary or secondary school instruction in English in Canada (s. 23(2)) of the Charter.

However, 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," points out the Appeal Court. In other words, Canadian citizens whose first language learned and still understood is English are excluded from 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.

The Appeal Court notes however that s. 59 of *Constitution Act, 1982*, has no effect on s. 23(3)(b). "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," held the Appeal Court.

The Appeal Court, heeding guidance from the SCC, stresses that language rights, including those set out in s. 23 of the Charter, must in all cases be interpreted purposively, noted Beaulac. However, these principles cannot prevail over the text of the Charter provision. The interpretation "must remain in the text, which is the starting point" for the interpretative exercise, said the Appeal Court. This emphasis on adopting a purposive approach to interpretation opens the door for the Appeal Court to give s. 23 a broad and liberal scope, said Beaulac.

But, added Beaulac, there is another principle that informs this constitutional interpretative approach — that is, the provisions of a statute or of the Charter must be interpreted in relation to each other, by promoting the meaning they have in common. The Appeal Court's conclusion that the fact that s. 23(1)(a) is not in force in Quebec should not limit the scope of the linguistic community stands a chance of being overturned by the SCC because the principle of asymmetry is accepted in linguistic law in Canada, said Beaulac.

"We have, in the language rights system, the right to minority language instruction, a provision that validates the idea of asymmetry in language rights in Canada," said Beaulac. "In other words, it is not exactly the same for the English-speaking community in Quebec as it is for the French-speaking community outside Quebec.

"The Appeal Court however reduces the scope of this explicit element in s. (23)(1)(a) to take into account the necessary asymmetry in language rights. Because s. 23(3) has been interpreted so broadly, so generously for the school boards, they choked, limited, the effect of s. 23(1)(a). They disregarded the influence s. 23(1)(a) should have on the interpretation of the expression minority language community in Quebec under s. 23(3)."

The Appeal Court, while it upheld much of the lower court's ruling, overturned Quebec Superior Court Justice Sylvain Lussier's conclusion that s. 23 of the Charter imposes a constitutional duty on the legislature to consult representatives of the linguistic minority before enacting legislation relating to education.

"That part of the trial judgment was innovative in the sense that it represented a new development," said Eastaugh. "I can understand how the trial judge got there, but at the same time, it would be a substantial departure from the way that the political system normally functions and normally deals with these types of issues. And so I'm not surprised that the Court of Appeal here said that, or concluded that, no such right exists."

Counsel for respondents did not respond to queries from Law360 Canada.

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