

Minority Language School Boards and Personal Federalism in Canada — Recent and Ongoing Developments in Quebec

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In April 2021, the Superior Court of Quebec ruled on the constitutionality of the *Act respecting the laicity of the State* (Bill 21).¹ In this awaited decision, the Court declared that the controversial ban on the wearing of religious symbols by some specifically designated public employees is consistent with the Constitution — because of the notwithstanding clause — but exempted English-language school boards from its application. Judge Marc-André Blanchard indeed concluded that Bill 21 violates section 23 of the *Canadian Charter of Rights and Freedoms* (*Charter* hereafter). According to Blanchard, section 23 grants constitutional rights to linguistic minorities in the management of their schools, as well as the right to establish policies for the hiring, retention and promotion of the personnel of their choice.²

This ruling creates a situation where Bill 21 would apply throughout Quebec, with the notable exception of the nine English-language school boards of the province. In response to the ruling, the Quebec Minister of Justice, Simon Jolin-Barrette, stated “the laws of Quebec must apply to everyone and to the entire territory of Quebec. There is only one system.”³ This also led Guillaume Rousseau, law professor, expert in local governance, and counsel for the intervenor Mouvement Laïque Québécois in the case to say: “[i]t is as if these school boards were becoming a state within the state.”⁴

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1 SQ 2019, c 12.

2 *Hak v Procureur général du Québec*, 2021 QCCS 1466 [*Hak*].

3 Marco Bélair-Cirino, “La Loi sur la laïcité de l’État est maintenue,” *Le Devoir* (21 April 2021), online: <www.ledevoir.com/politique/quebec/599155/la-loi-sur-la-laicite-de-l-etat-est-maintenue> (author’s translation).

4 *Ibid* (author’s translation).

This last observation is all the more interesting when placed in the broader context of the current educational governance reform in Quebec. Indeed, when it came to power in 2018, the Coalition Avenir Quebec (CAQ) government promised to abolish school boards and replace them with service centers, in order to improve institutional efficiency. To this end, it adopted the *Act to amend mainly the Education Act with regard to school organization and governance* (Bill 40).⁵ This statute, although it abolished all school boards (French and English), also provided a distinct regime for the English-speaking community of Quebec, including keeping their school elections.⁶ Nevertheless, the Quebec English School Boards Association (QESBA) is currently challenging Bill 40 before the Superior Court of Quebec, arguing that replacement of school boards by service centers is unconstitutional under section 23 of the *Charter*.

As such, Professor Guillaume Rousseau's comment suggesting that Quebec's English-language school boards are becoming a kind of "state within a state" is all the more interesting. Of course, the judicial challenge of Bill 21 is not over, as it shall probably last until the Supreme Court of Canada has decided the issue. The same is true of Bill 40, which has not yet been decided by the Superior Court.

All this leads to the question: Are English-language school boards in Quebec becoming a constitutionally protected order of (local) government? While it is still impossible to answer this question with authority at this point (we must wait for the courts to make final decisions first), it is nevertheless highly relevant to document and discuss the issue. Precisely, our objective here is to appraise critically the potential consequences on Canadian federalism of the future decisions courts shall make regarding this matter. To do so, we first provide insight into the historical and constitutional background of local governments in Canada (1), after which we focus on recent and ongoing developments in Quebec (2). We then conclude by discussing the possible evolution of minority language educational rights and the personal federalism these developments could bring (3).

1. The Historical and Constitutional Context of Local Governments in Canada

The Supreme Court once described local governments in Canada as "democratic institutions through which the people of a community embark upon and structure a life together."⁷ As "an authority that operates over a limited territory, providing a range of services to inhabitants,"⁸ local governments in Canada take many different forms. School boards are a specific type of local government, as are large cities and smaller municipalities, quasi-municipalities (in low-density areas of Canada), upper-tier county governments (performing more general functions on the territory), etc.

5 SQ 2020, c 1.

6 *Ibid*, s 50.

7 *Pacific National Investments Ltd. v Victoria (City)*, 2000 SCC 64 at para 33 [*Pacific National*]. See also *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3 ("The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity").

8 Robert Young, "Canada", in Nico Steytler, ed, *Local Government and Metropolitan Regions in Federal Systems* (Montreal and Kingston: McGill-Queen's University Press, 2009) at 108.

The Constitution of Canada does not formally protect local governments. Indeed, the *Constitutional Act, 1867*⁹ explicitly provides that “municipal institutions,”¹⁰ “the raising of a revenue for provincial, local, or municipal purposes,”¹¹ “local works and undertakings,”¹² and “generally all matters of a merely local or private nature”¹³ all fall within the provinces’ exclusive jurisdictions, as well as the powers over education.¹⁴ This explains the well-known formula following which local governments in Canada — including school boards — are “creatures of the provinces.”¹⁵

Hence, this justifies the local governments’ long-standing requests for greater autonomy. As Robert Young observes, “one political constant is the chafing of local governments against constraints imposed by provincial governments and irritation with unilateral action from above.”¹⁶ Indeed, “local governments have sought more autonomy and — a universal demand — more resources.”¹⁷ Furthermore, political actors in local governance — mostly in the municipal sector, and led by larger cities — have occasionally advocated for some constitutional recognition of a “third order of government” in the Canadian federal system, in order to protect the powers of local governments.¹⁸

But for now, there is no ambiguity: the Canadian Constitution provides that local governments are the “responsibility” or the “jurisdiction” of provincial governments. As such, the provincial order of government has the constitutional powers to create them, but also to adopt various laws that shall impact them, prescribe many of their policies, etc. It can also choose to abolish them or to amalgamate several entities into a larger one.¹⁹ Simply put, while complying with the rest of the Constitution, including obligations regarding minority language schools, provinces alone determine the extent of local government’s jurisdiction within their territory. That said, it is precisely in relation with the minority language school boards in Quebec that some developments are currently taking place.

2. Recent Developments in Quebec

There are two recent and ongoing major developments in Quebec, with regard to English-language school boards: the former was foreseeable, but the latter revealed to be more surprising. Both of these developments are “consequences” of a new “autonomist” government coming to power in Quebec in the aftermath of the general elections that took place on 1 October 2018.

9 (UK), 30 & 31 Vict, c 3.

10 *Ibid*, s 92(8).

11 *Ibid*, s 92(9).

12 *Ibid*, s 92(10).

13 *Ibid*, s 92(16).

14 *Ibid*, s 93.

15 See e.g., *Pacific National*, *supra* note 7 at para 33; *Ontario English Catholic Teachers’ Assn. v Ontario (Attorney General)*, 2001 SCC 15 at para 58; *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 52; *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34.

16 See Young, “Canada”, *supra* note 8 at 107

17 *Ibid*.

18 See Michael Dewing, William Young, and Erin Tolley, “Municipalities, the Constitution, and the Canadian Federal System”, Library of Parliament (2006) at 1.

19 See for instance, *Westmount (Ville de) v Québec (Procureur Général du)*, [2001] RJQ 2520 (Qc CA); *East York (Borough) v Ontario (Attorney General)*, [1997] 34 OR (3d) 789 (Ont CA).

Exactly a year after these elections, Bill 40 — *An Act to amend mainly the Education Act with regard to school organization and governance*²⁰ — was introduced in Quebec’s National Assembly. While the government had originally planned a reform that would apply uniformly within Quebec’s territory,²¹ it backed down less than a month before the bill was introduced in order to make an exception for English-language school boards.²² The exception was intended to maintain school elections, as the Minister of Education explicitly stated at the time of tabling the Bill.²³ While some pointed out that the reform changed very little of the system previously in place for the English-speaking community,²⁴ English-language school boards quickly made clear their intention to challenge the Bill before the courts, that is, even before it was enacted.²⁵

After the Bill was passed, the Superior Court granted an interlocutory injunction to suspend its application to English school boards, pending a decision on the merits.²⁶ The Court of Appeal subsequently confirmed the interlocutory injunction.²⁷ The English school boards argued that the statute infringes on the rights of the English-speaking minority in Quebec guaranteed by section 23 of the *Charter* because it “subverts a key public institution and governance structure that is run both by and for Quebec’s English-speaking community.”²⁸ The Superior Court heard the case in April of 2021.²⁹ Its decision is still pending as we write these lines.

At the exact same time the case was being heard, another judge of the Superior Court was rendering his decision on the constitutional validity of the *Act respecting the laicity of the State*,

20 SQ 2020, c 1.

21 Radio-Canada, “Un projet de loi pour abolir les commissions scolaires à l’automne” (23 April 2019), online: <ici.radio-canada.ca/nouvelle/1165713/abolition-commission-scolaire-caq-automne>.

22 Radio-Canada, “Les élections scolaires maintenues dans les communautés anglophones” (11 September 2019), online: <ici.radio-canada.ca/nouvelle/1296663/commissions-scolaires-anglophones-elections-structure>.

23 Quebec, National Assembly, *Journal of the debates of the National Assembly*, 42nd Leg., 1st Sess., November 27, 2018, online: <www.assnat.qc.ca/fr/travaux-parlementaires/assemblee-nationale/42-1/journal-debats/20191001/253251.html>:

Le projet de loi établit des processus électoraux distincts pour l’élection des membres parents d’un élève et des membres représentants de la communauté au conseil d’administration, selon que le centre de services scolaire soit francophone ou anglophone. Pour les centres de services scolaires francophones, ces membres sont élus par les parents et les élèves siégeant à ce titre, selon le cas, aux conseils d’établissement des écoles, des centres de formation professionnelle et des centres d’éducation des adultes, alors que, pour les centres de services scolaires anglophones, ces membres sont élus au suffrage universel.

24 Jean-Pierre Proulx, “Les commissions scolaires ne sont pas abolies, elles changent de nom,” *Le Devoir* (5 October 2019), online: <www.ledevoir.com/opinion/idees/564153/les-commissions-scolaires-ne-sont-pas-abolies-elles-changent-de-nom>.

25 Marco Fortier, “Tirs groupés contre les futurs ‘centres de services scolaires,’” *Le Devoir* (5 November 2019), online: <www.ledevoir.com/societe/education/566305/tirs-groupes-contre-les-futurs-centres-de-services-scolaires>.

26 *Quebec English School Boards Association v Procureur général du Québec*, 2020 QCCS 2444 [School Boards Association].

27 *Procureur général du Québec v Quebec English School Board Association*, 2020 QCCA 1171 [School Boards Association QBCA].

28 See *School Boards Association*, *supra* note 26 at para 3.

29 Véronique Lauzon, “Les commissions scolaires anglophones devant les tribunaux,” *La Presse* (14 April 2021), online: <www.lapresse.ca/actualites/education/2021-04-14/loi-40/les-commissions-scolaires-anglophones-devant-les-tribunaux.php>.

commonly known as Bill 21. While he upheld it for the most part because of the notwithstanding clause, Judge Blanchard concluded that the Act could not apply to English-language school boards because of section 23 of the *Charter*. He writes: “[a]ccording to the Supreme Court, the rights provided for in section 23 of the *Charter* contribute to the maintenance and enhancement of minority language education and culture while ensuring that the specific needs of the minority language community are the primary consideration in any decision affecting linguistic or cultural matters.”³⁰

Still using Supreme Court case law, notably in *Mahe v Alberta*³¹ and *Arsenault-Cameron v Prince Edward Island*,³² the judge wrote that “linguistic minorities must be able to control all aspects of their linguistic and cultural education and that the government cannot adversely affect the linguistic and cultural concerns of the minority.” He then concluded that Bill 21 does violate section 23 of the *Charter*³³ — without being able to be upheld by section 1 and the *Oakes* test — and that the ban on the wearing of religious symbols therefore does not apply to English-language school boards. Reacting only hours after the ruling, the Quebec Minister of Justice immediately announced his intention to appeal the decision.³⁴

As such, there is now a growing difference in the way the French-language and English-language school institutions *could* be governed in Quebec. The change was first instilled by the political power via the exception granted by the Quebec government for English-language school elections, but it was then amplified by the judiciary through the preliminary decisions of the Superior Court and the Court of Appeal with respect to the abolition of English-language school boards. This was followed by the ruling of the Superior Court with respect to the wearing of religious symbols by teachers in English-language schools. Some even talked of a discriminatory treatment against Francophones.³⁵

That being said, it is fundamental to note that, an order of government willingly deciding to provide asymmetrical treatment *in favour* of a minority group is not the same as the inability of that same order of government to act in one of its own jurisdictions, because of a broad interpretation of a constitutional protection. While the former scenario is a matter of policy choices to be made by elected governments, the latter is more akin to the creation of a constitutionally protected entity, an order of (local) government that can make important decisions and govern itself on specific issues that normally fall under provincial jurisdiction. Hence, if future court rulings were to confirm the impossibility of the Quebec government reforming the English-language school board system (even while maintaining school elections) and prohibiting the wearing of religious symbols by teachers in that system, this would be proof not only of *protection* but also of the broad (and evolving) *autonomy* for the English-language school boards in Quebec.

30 See *Hak*, *supra* note 2 at para 971 (authors’ translation).

31 *Mahe v Alberta*, [1990] 1 SCR 342 at 375-376 [*Mahe*].

32 *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1 at para 53 [*Arsenault-Cameron*].

33 See *Hak*, *supra* note 2 at para 1003.

34 See Bélair-Cirino, “l’État”, *supra* note 3.

35 Daniel Turp, “Gouvernance scolaire: le projet de loi 40 est discriminatoire,” *Le Devoir* (11 November 2019), online: <www.ledevoir.com/opinion/idees/566717/gouvernance-scolaire>.

By contrast, such constitutional protection and autonomy were denied during past debates over “forced” municipal mergers (“amalgamations”) in Montreal, even though the issue of protecting the linguistic minority was also raised before the courts. Indeed, in *Westmount (Ville de) v Québec (Procureur Général du)*,³⁶ the province’s Court of Appeal stated clearly, “the federal Parliament and the provincial legislatures have, within their respective spheres of competence, the power to impose their political choices.”³⁷ That case was initiated by those opposing the creation of the new City of Montreal resulting from the amalgamation of 28 previously independent municipalities.³⁸ Local resistance was partly founded on the argument that the local level of government is crucial for linguistic minorities (Westmount being primarily English-speaking). The Court of Appeal ultimately rejected this claim,³⁹ which leads us to note that school boards of linguistic minorities appear to enjoy far greater constitutional protection than it is the case for local governments more generally.

This is made possible because of section 23 of the *Charter*. Following Judge Blanchard’s reasoning, section 23 would introduce an exception to the Court of Appeal’s statement that provinces (or the federal order of government) have the power to impose their political choices when acting within their respective jurisdictions.

3. From Minority Language Educational Rights to Personal Federalism?

Until we have definitive answers from the courts as to the application of Bill 40 and Bill 21 to Quebec’s English-language school system, it remains impossible to measure accurately the actual scope of the protections and governance rights guaranteed by section 23 of the *Charter*. However, we believe that looking back at past cases where the Supreme Court of Canada interpreted this constitutional protection may be beneficial to better understand its extent.

According to the Court in *Mahe*, section 23 of the *Charter* implies that the “minority language representatives should have exclusive authority to make decisions relating to the minority language instruction and facilities,” including the “appointment and direction of those responsible for the administration of such instruction and facilities,” the “establishment of programs of instruction,” and the “recruitment and assignment of teachers and other personnel.”⁴⁰ Later, in *Doucet-Boudreau v Nova Scotia (Minister of Education)*,⁴¹ the Court writes, “[m]inority language education rights are the means by which the goals of linguistic and cultural preservation are achieved.... This Court has, on a number of occasions, observed

36 [2001] RJQ 2520 (QBCA).

37 *Ibid* at para 115 (authors’ translation).

38 See *An Act to reform the municipal territorial organization of the metropolitan regions of Montréal, Québec and the Outaouais*, SQ 2000, c 56.

39 The same conclusion was reached in *East York (Borough) v Ontario (Attorney General)*, *supra* note 19 with regard to the creation of the “megacity” of Toronto. See Andrew Sancton, “Why Municipal Amalgamations? Halifax, Toronto, Montreal” in Robert Young and Christian Leuprecht, eds, *Canada: The State of the Federation 2004: Municipal-Federal-Provincial Relations in Canada* (Montreal and Kingston: McGill-Queen’s University Press, 2006) 119. See also Dewing, Young, and Tolley, “Municipalities”, *supra* note 18 at 3.

40 *Mahe*, *supra* note 31 at 377.

41 2003 SCC 62.

the close link between language and culture.”⁴² And recently, in *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*,⁴³ it stated that “section 23 is intended to preserve culture and language, two core elements of the notions of identity and well-being of individuals and communities.”⁴⁴

As the Court also noted in the past, “section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures.”⁴⁵ However, provinces must nevertheless be able to act and legislate in the field of education:

it should be noted that the management and control accorded to s. 23 parents *does not preclude provincial regulation*. The province has an interest both in the content and the qualitative standards of educational programmes. Such programmes can be imposed without infringing s. 23, in so far as they do not interfere with the linguistic and cultural concerns of the minority.⁴⁶

Later, in *Arsenault-Cameron v Prince Edward Island*,⁴⁷ the Court wrote that a

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. 23.⁴⁸

Hence, in his ruling on Bill 21, Judge Marc-André Blanchard had to invoke a certain connection between culture and religion in order to conclude that section 23 of the *Charter* protects the latter: “there is no doubt that religion contributes to the cultural identity of a community.”⁴⁹ Moreover, he makes an additional distinction between Anglophones and Francophones, precisely on this ground:

Without denying or diminishing the fact that recognition of cultural and religious diversity exists and is valued in the French-language public education system, the court must find that the uncontradicted evidence leads to the conclusion that English-language school boards and their teachers or principals place particular emphasis on the recognition and celebration of ethnic and religious diversity.⁵⁰

Finally, the judge concludes by writing the following:

To the extent that one or more English-language school boards decide that their educational institutions wish to hire and promote persons wearing religious symbols because they consider that this helps to promote and reflect the cultural diversity of the population they serve, section 23 of the *Charter* prevents the legislature from directly or indirectly overriding such an objective.⁵¹

42 *Ibid* at para 26.

43 2020 SCC 13.

44 *Ibid* at para 13.

45 *Mahe, supra* note 31 at 365.

46 *Ibid* at 380 (emphasis added).

47 *Arsenault-Cameron, supra* note 32.

48 *Ibid* at para 53.

49 *Hak, supra* note 2 at para 978 (author’s translation).

50 *Ibid* at para 983 (author’s translation).

51 *Ibid* at para 993 (author’s translation).

The most recent interpretation of section 23 of the *Charter* by the Superior Court of Quebec therefore appears to go much further than was previously the case. As Professor Maxime St-Hilaire said, “[w]e are in the midst of stretching linguistic rights a bit too much.”⁵² Without a doubt, the consequences of such a broad understanding of the scope and reach of section 23 are significant. While some have gone so far as to speak of the “partition” of Quebec,⁵³ we instead tend to interpret this as a shift from the *protection of fundamental rights* to the *recognition of a political and constitutional autonomy* that is comparable to personal federalism.

According to Maarten Theo Jans, personal federalism “implies that the recipients of state power would be *population groups rather than territories*. In these state forms, communities could retain substantial autonomy in regions with mixed populations through the formation of separate political institutions.”⁵⁴ To a certain extent, we contend that the political principle underpinning this conception of federalism can be traced back to Karl Renner⁵⁵ and Otto Bauer’s⁵⁶ work on non-territorial autonomy, while they reflected on how dispersed political communities could coexist peacefully under the Austro-Hungarian Empire. In a nutshell, and even though both Renner and Bauer promoted original ideas, their understanding of the “personal principle” implies that an individual’s affiliation to a larger community is the direct consequence of his or her membership to said cultural, political, or spiritual community. Hence, they argue that many different institutional networks may coexist within the same delineated territory without each benefiting from mutually exclusive homeland territories.

Otherwise put, Renner and Bauer stress the idea that, just like religious communities or corporations, a political community can possess institutional structures beyond a single territory, and that it can indeed coexist with other similar institutional networks if the most salient variable to organize the polity is *personal* membership rather than being territory-oriented. Consequently, the “underlying principle of personal federalism is that governmental power is not distributed over territories but over population groups. *The limits of governmental jurisdiction are determined by group membership, not by territorial borders.*”⁵⁷ This is precisely what is happening with regard to Quebec’s English-language school system: section 23 would impose limits on Quebec’s government capacity to legislate within its jurisdictions over local governments and over educational matters.

52 Quoted in Luis Millán, “Quebec Superior Court upholds secularism bill, but exempts English-language schools,” *The Lawyer’s Daily* (22 April 2021), online: <<https://www.thelawyersdaily.ca/articles/26178/quebec-superior-court-upholds-secularism-bill-but-exempts-english-language-schools>>.

53 Antoine Robitaille, “La partition tranquille du Québec est commencée,” *Le Journal de Québec* (23 April 2021), online: <www.journaldequebec.com/2021/04/23/la-partition-tranquille-du-quebec-est-commencee?fbclid=IwAR3PTUPXomtqhGIPKpnQmNZuHIE65csavJQrGmi30_r12CTnHlNjChXg_sc>; Robert Dutrisac, “Deux régimes de droits au Québec,” *Le Devoir* (21 April 2021), online: <www.ledevoir.com/opinion/editoriaux/599173/loi-21-sur-la-laicite-deux-regimes-de-droits-au-quebec>.

54 Maarten Theo Jans, “Personal Federalism: A Solution to Ethno-National Conflicts? What It Has Meant in Brussels and What It Could Mean in Abkhazia” in Bruno Coppieters, David Darchiashvili, and Natella Akaba, eds, *Federal Practice: Exploring Alternatives for Georgia and Abkhazia* (Brussels: VUB Press, 1999) 219.

55 Karl Renner, “State and Nation” in Ephraim Nimni, ed, *National Cultural Autonomy and its Contemporary Critics* (London: Routledge, 2005) 13.

56 Otto Bauer, *The Question of Nationalities and Social Democracy* (Minneapolis: University of Minneapolis Press, 2000).

57 See Jans, “Personal Federalism”, *supra* note 54 at 219 (emphasis added).

This is consistent with Hugo Cyr's understanding of personal federalism, as he writes that such phenomenon is not grounded in a "division of state powers along territorial lines, but rather recognizes distinct legal orders applicable to each other according to their personal characteristics (chosen or not). These personal characteristics are in fact the markers of membership in one or another of the political communities relevant to federalization."⁵⁸ The issue of the language of education is explicitly mentioned as an example of that: "This personal federalism can be quite circumscribed — for example, self-declared membership in a language community may determine whether an individual and his or her children are governed by language school system A or B."⁵⁹

That being said, we believe the distinction between the protection of constitutionally enshrined rights, on the one hand, and the recognition of a certain degree of self-government, on the other hand, ought to be understood in at least two different ways. First, from a more abstract and formal fashion, the nuances between the two come from a differentiated ideological perspective: the protection of rights is thus related to the idea of "fundamental rights" (of individuals or even groups), whereas self-government is related more specifically to the organization of the regime, its institutions and their relative autonomy from one another in the political system. In the words of Wouter Pas, "personal or non-territorial autonomy can be defined as a form of self-rule of a group, with institutions and governing organs that exercise the powers of the autonomy over the persons belonging to the minority."⁶⁰ As such, it should be noted that section 23 of the *Charter* is to be found in a subdivision entitled "Minority Language Educational Rights."⁶¹ Therefore, it could be argued that it would be more logical to link its ensuing obligations to the notion of protection of fundamental rights, rather than to the idea of self-governance.

The second difference, though, relates more directly to what we may coin as the *degree of control*. On the one hand, a limited degree of control that directly addresses the nature of the protection of a minority situation may be characteristic of a "constitutional right." On the

58 Hugo Cyr, "Quelques opportunités et défis conceptuels, fonctionnels et politiques du fédéralisme" (2012) 21:1 Constitutional Forum 7 at 10 (authors' translation).

59 *Ibid* (author's translation).

60 Wouter Pas, "Personal Federalism and Human Rights" (2005) 11 Indian Journal of Federal Studies 62 at 67.

61 For an historical perspective, see *School Boards Association QBCA*, *supra* note 27 at paras 25-26 (author's translation):

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. [...]

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 *Charter*, in particular the right of that linguistic minority to have separate school boards it could manage and control.

other hand, a broader mechanism allowing for greater autonomy in various decision-making processes should be rooted more in the perspective of self-government and personal federalism. In Brussels, the French Community Commission (COCOF) is a good example of such personal federalism, as it has the power to act “with regard to culture, education, well-being and health. It can form and fund institutions or take initiatives itself within the scope of community responsibilities.”⁶²

As for now, it remains unclear whether minority language school boards in Quebec and Canada and their powers are rooted in the spirit of fundamental rights, or if we are rather observing a gradual shift to some kind of personal federalism. If this latter scenario were to be confirmed by the courts, it would amount to a certain evolution of Canadian federalism.

Conclusion

In 1984, the Supreme Court wrote that section 23 of the *Charter* “is not, like other provisions in that constitutional document, of the kind generally found in such charters and declarations of fundamental rights.”⁶³ The Court continues: “It is not a codification of essential, pre-existing and more or less universal rights that are being confirmed and perhaps clarified, extended or amended, and which, most importantly, are being given a new primacy and inviolability by their entrenchment in the supreme law of the land.”⁶⁴ Rather, for the Supreme Court, the “special provisions of s. 23 of the *Charter* make it a unique set of constitutional provisions, quite peculiar to Canada.”⁶⁵

Despite the uniqueness and the necessity of section 23 in the context of a bilingual country with official language minorities throughout its territory, it is doubtful that this provision was intended originally to create a constitutionally enshrined regime of personal federalism in the field of education. The consequences of such a development, if it were to be formally institutionalized, would be significant and could potentially create more problems than solutions for achieving cohesion and promoting togetherness within the Canadian federal system. For instance, Professor Maxime St-Hilaire wrote that it could “polarize the debate based on a language axis” and “increase already existing tensions between francophone Quebec and English Canada.”⁶⁶

As a living tree, it is normal for Canada’s Constitution to evolve, always within its natural boundaries. As a bilingual country, it is equally normal and desirable that official language minority communities are protected by the Constitution. But in a divided society like Canada, the search for cohesion, collaboration, and cooperation is essential for the system to work properly. And while a government’s policy choices can certainly be challenged, which is perfectly legitimate in a liberal democracy, we believe it is equally important that the “solutions” identified are internally coherent. This coherence could eventually be lacking in Quebec’s education system.

62 Brussels, “Commission communautaire française (COCOF)”, online: <be.brussels/a-propos-de-la-region/les-institutions-communautaires-a-bruxelles/cocof> (author’s translation).

63 *A.G. (Que.) v Quebec Protestant School Boards*, [1984] 2 SCR 66 at para 79.

64 *Ibid.*

65 *Ibid.*

66 Quoted in Millán, “Secularism Bill”, *supra* note 52.