

CANADA

## The battle against Quebec's Bill 21

Paul Wells on the Montreal school board that's challenging the province's controversial law and how it plans to win

by Paul Wells Nov 8, 2019



Haniyfa Scott reads to her Carlyle School class in the Town of Mount Royal, Quebec, on Oct. 29, 2019 (Nasuna Stuart-Ulin)

Sure, the leaders of Canada's federal political parties didn't have much to say during the election campaign when reporters asked what do about Quebec's Bill 21. The law, which prohibits public servants in the province from wearing religious headgear and other symbols, and politicians are reluctant to challenge it directly.

But that doesn't mean nobody is challenging the law. Controversial laws usually find their way into a courtroom. One of the most prominent has been filed by the English Montreal School Board (EMSB), which released the text of its Quebec Superior Court challenge three days before the federal election.

Unfortunately, lately the English Montreal School Board is a bit of a mess. On Wednesday the Quebec government placed the board under trusteeship. Education minister Jean-François Roberge appointed Marlene Jennings, a former federal Liberal Member of Parliament, to oversee the board's management.

As further reaction to "an appalling situation" that included apparent contracting irregularities and the use of taxpayer money to buy jewelry, Roberge handed the board's financial statements over to the anti-corruption unit of the Sûreté du Québec.

This is all a handy reminder that history sometimes rests on unsteady shoulders. But the Quebec government is allowing the board to challenge its Bill 21, which these days is just about the most popular thing the EMSB does.

Bill 21, "An Act Respecting the Laicity of the State," was one of the first laws passed by the government of Quebec premier François Legault, the founding leader of the popular, centre-right Coalition Action Démocratique (CAQ) party. It sets out a long list of government-affiliated members of the legislature, police, prosecutors, teachers and others—whose holders are henceforth banned from wearing "religious symbols" on the job.

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The law defines a “religious symbol” as “any object, including clothing, a symbol, jewellery, an adornment, an accessory or headwear” in connection with a religious conviction or belief” or that is “reasonably considered as referring to a religious affiliation.” That’s really bad practice it will most often be a device to keep female Muslim clerks, cops and teachers from wearing headscarves or veils at work.

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At the end of October, before the government took most of the board’s powers away, I visited Montreal to discuss the impact of Bill 21 with board officials. Angela Mancini, the board’s chairwoman, met me for breakfast.

Mancini said the board has had to turn down three teacher candidates it would otherwise have hired because Bill 21 doesn’t permit them to wear a headscarf. She worries about the message the law sends to students.

“When you tell a student that a teacher can’t wear her veil, or his kippa (a Jewish head covering for men) because it’s wrong, it’s almost like telling them that when they wear those religious symbols, it’s a wrong thing. So we risk having a generation of students grow up thinking that wearing a religious symbol, there’s almost something wrong with it,” she said.

Bill 21 is broadly similar to bills that were introduced by Quebec’s short-lived Parti Québécois government, led by then-premier Pauline Marois in 2013 and, in milder form, by the Liberal government of Philippe Couillard in 2017. Defenders of such measures say it’s important for the government to show no religious preference in its relations with citizens. It’s often said to be justified by the fact that, until a half-century ago, Quebec was in many ways a Roman Catholic theocracy. The text of the law says it is “important that the paramountcy of State laicity” be enshrined in Quebec’s legal order.

The EMSB’s Mancini isn’t impressed. “I think the separation of state and religion has been going on for a while, regardless of whether religious symbols are in a classroom,” she said. “In my mind it goes back to fundamental rights. People are allowed to wear the symbols that they choose. In a school setting, parents and students should rest easy, she said. Wearing a headscarf or a crucifix “doesn’t mean teachers are going to impose their religious convictions to their students, she said.

The board has retained the services of Power Law, a prominent Montreal firm, to challenge Bill 21. The lawyers’ argument is novel and we’ll see. And it’s probably for the best that the file has been turned over to outside experts, because Mancini and her colleagues have many concerns on their minds these days.

In January the majority on the board voted to cut Mancini’s pay from \$38,000 to \$10,000 after she missed a series of events in preceding months. “I’ve gone on record as saying I feel intimidated and harassed by certain members of the board,” she told *Macleans*.

The board was created in 1998 after a constitutional amendment replaced Catholic and Protestant boards in Quebec with French- and English-language boards. With 42,000 students, the EMSB is the largest English-language board in Quebec. Under Quebec’s language laws, or whose parents were both educated in English in Canada, or the children of foreign professionals on short-term postings in Quebec, all receive an English-language education.

The EMSB’s administration has been fractious for as long as the board has existed. In 2000 one commissioner attacked another, who had to be taken out on a stretcher and sent to hospital. But the board delivers results despite the fireworks, Mancini said. At 92 per cent, it has the highest success rate of students who complete high school within seven years of beginning. The province-wide seven-year success rate is 79 per cent.

That record of school success despite distractions might bolster the board’s case in challenging Bill 21.

The board's lawyers, Perri Ravon, Mark Power and Giacomo Zucchi, face a substantial obstacle: the law invokes the controversial "notwithstanding" clause of the 1982 Charter of Rights to affirm its effect despite the protections of Sections 2 and 7 through 15 of the Charter. Those are Charter rights. Section 2 lists "fundamental freedoms" including freedom of conscience and religion, thought, belief, opinion and expression. So you can't tell a judge the law defies freedom of religion. The Quebec government has already made full use of its ability to know, but we're doing this anyway."

Ravon, Power and Zucchi need to shop further down, in more obscure regions of the Charter that the "notwithstanding" provision can support. They've settled on two paragraphs. Section 23 guarantees minority-language educational rights. The EMSB's lawyers argue that "impermissibly infringes" the delivery of an education under Section 23, because it limits whom the board can hire and promote.

The lawyers' second line of attack is more novel and promising. They point to Section 28 of the Charter, which demands that rights be guaranteed equally to both men and women. It's a short paragraph: "Notwithstanding anything in this Charter, the rights and freedoms referred to in this Charter are guaranteed equally to male and female persons."

In the Charter's 37 years, very little jurisprudence has built up around Section 28. Most of the action has been around Section 2, the specific guarantee of fundamental rights. And when Section 2 isn't swept aside by the "notwithstanding" provision, which it almost never is, courts do consider Section 28. But in the case at hand, Section 28's guarantee of gender equality may prove powerful indeed.

Ravon and her colleagues point out that 88 per cent of preschool and elementary teachers in the EMSB are women and that 53 per cent of women in Canada, according to some public-opinion surveys, wear headgear. They further note that Simon Jolin-Barette, the cabinet minister who steered Bill 21 through the National Assembly, specifically restricted the law's applicability to men when he said facial hair, such as the Jewish or Sikh judges or police officers, is exempt from the law.

The government's repeated assertion, the board's lawyers write, is that Muslim women are "subjugated" into wearing religious garb. "If no consideration is given to women's agency and autonomy"—to the possibility that they simply want to dress as they do, the lawyers write.

The first two words of Section 28 are "notwithstanding anything." Kerri Froc, an assistant law professor at the University of New Brunswick, made a career out of studying the parts of the Charter everyone else ignores, wrote her doctoral thesis on Section 28. She notes that it certainly trumps Section 33, the "notwithstanding" clause. A 1982 federal government guide to the charter calls Section 28 "one guarantee that cannot be overridden by a legislature or Parliament."

What judges will do with all this, we'll have to wait and see. To add to the EMSB's internal struggles, there's a government-imposed, pre-existing problem. Bill 40, another proposed law introduced by Legault's CAQ government and making its way through the legislature to eliminate school boards in Quebec altogether. It'll probably be law early in the new year.

Can the EMSB's challenge to Bill 21 continue past the legal demise of the board that launched it? "Short answer: We don't know," an EMSB spokesman said when I asked.

Meanwhile, Bill 21 contains sunset provisions that protect the jobs of public servants who were already in place when the bill became law. In a school-board setting, that means teachers who wear headscarves can't be hired (or promoted), but they can keep the jobs they already have.

On my visit to Montreal I visited Carlyle Elementary School, a richly multicultural school in the leafy northwestern Montreal suburb of Mount Royal. I met Haniyfa Scott, a kindergarten teacher. She grew up a few kilometres from the school. She and her husband converted to Islam in the 1970s. She has adult daughters who were raised in the faith until they were 18, after which they could make their own choices. They have continued as observant Muslims.

Scott showed me an agenda she uses to keep track of plans and appointments, the sort of richly-decorated spiral-bound thing you see in a store. This one contains a note on one page which she read aloud to me. "Canada is multicultural. In 1971 we made a rule to be multicultural. We will continue to respect every one of our citizens." She says she uses it to remind herself to use of cookies.

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Scott looked up from the page. “Did the CAQ not read that? Did they not understand that?”

That’s actually the crux of the controversy, I reminded her. Supporters of Bill 21 intend it precisely as a rebuttal to multiculturalism “à la référence to the belief, widespread in Quebec nationalist circles, that Pierre Trudeau introduced his multiculturalism policy as a way to challenge Quebec nationalism. The state has no religion, the argument goes. Multiculturalism’s prerogatives end, or should, where Quebecers’ customs to define the terms of their distinct society begin.

Haniyfa Scott is skeptical of such claims. “I’m listening to you,” she said slowly as I repeated these arguments, then paused. “I don’t know. I don’t know.” She says she has a daughter with two young children, one of them a four-year-old girl. “She dresses just as I do. She takes the bus or Métro every day, and she is never offered a seat. Never offered a seat. Doesn’t that strike you as a little strange? And it brings me

As an emissary of the Quebec state, shouldn’t she be religiously neutral? “I don’t think I’m going to persuade anybody in my classes to become Muslim. I don’t think I have that much influence. I might influence them to do better in their math or their language or study science they would aspire to, but my job is not to convert anybody.”

I followed Scott into her classroom, where she quizzed a roomful of 5-year-olds on the sound the letter U makes. Some of them were immediately distracted by the presence of a *Maclean’s* photographer. None remarked on the wardrobe choices of their teacher, whom they’ve never noticed otherwise. Around them, all unseen, swirled a political, social and legal controversy that won’t end anytime soon. The kids paid all of their attention to the word “cup” have a U sound? Yes, they agreed solemnly, it sure does.

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