

2  Decision time for Slafkovsky: Move him up or mega minutes in...

3  Opposition parties set for reality check when National Assembly...

Opinion / Columnists

Opinion: Quebec and the right to be different

While Quebec asserts its right to be distinct from the rest of Canada, English-speaking Quebecers are asserting a similar right in the Bill 21 legal challenge.

David Johnston • Special to the Gazette

Nov 24, 2022 • 3 days ago • 3 minute read

98 Comments



Westmount High School teachers protest in October 2018 against the Coalition Avenir Québec government's plan to ban certain public employees from wearing religious symbols on the job. Bill 21 was enacted the following year. PHOTO BY JOHN MAHONEY /Montreal Gazette

The Quebec Court of Appeal ended hearings on Bill 21 last week, with its ruling expected sometime next year. Four groups of plaintiffs are contesting the so-called secularism law. The case is expected to eventually reach the Supreme Court of Canada.

Once again, over five days from Nov. 7 to 16, the government of Quebec chose not to justify the law's ban on the wearing of religious symbols by persons deemed to be in positions of authority in the Quebec public sector, including teachers.

It had similarly presented no justificatory evidence for the ban in Quebec Superior Court in November 2020, arguing that it had pre-emptively invoked the notwithstanding clause of the federal charter of rights to immunize the law from judicial review, and so no justification was necessary. It left the work of justifying the law to individuals and groups that had intervened in its support.

However, the notwithstanding clause cannot be used to override Section 23 of the charter, which protects official-language-minority education rights. One of the four groups of plaintiffs, led by the English Montreal School Board, maintains that Sec. 23 shields English-language school boards in Quebec from the application of Bill 21. Superior Court Justice Marc-André Blanchard agreed with the EMSB, in his ruling in April 2021 that otherwise found Bill 21 unconstitutional but valid considering Quebec's use of the notwithstanding clause. The government of Quebec appealed the Sec. 23 aspect of Blanchard's ruling and argued this month that Bill 21 should apply uniformly in Quebec, with no exceptions.

Sec. 23 refers only to language-of-education rights, but case law since 1990 has interpreted this section to give official-language minorities a generous measure of "control and management" over issues relating to "language and culture" — not just language. The case law says culture includes hiring practices, and the EMSB put forward evidence again this month demonstrating that appreciation of religious diversity is part of the "cultural heritage" of Quebec's English-speaking minority.

Lawyers for the Quebec attorney-general tried to pick holes in the case law and argued that the judiciary needs to reimagine first principles more aligned with Quebec realities. Its lawyers had put up essentially similar arguments at the trial stage, but Blanchard rejected them.

Blanchard did not dispute Quebec's right to use the notwithstanding clause, although he did express displeasure with its broad and pre-emptive use. But as he said that since there had been no request from plaintiffs for a judgment from him on its pre-emptive use, and since the text of the notwithstanding clause is silent on pre-emptive use, "this question is a matter for a higher court."

So it was that appellants this month argued that pre-emptive use should not be permitted at all in cases where a government refuses to present any evidence itself (not indirectly through interveners) demonstrating a "real and urgent" need to restrict rights, or a "legitimate objective."

We'll see what the appeal court says about that — and very likely the Supreme Court of Canada, too.

With Bill 21 but also Bill 96, Quebec has invoked the clause pre-emptively to aggressively assert the primacy of parliamentary sovereignty. It's ultimately an assertion of Quebec's right to be different — or "distinct," to borrow from the language of the Meech Lake accord — from the rest of Canada.

And yet here is Quebec now confronted by its own English-speaking minority asserting a mirror-image right to "be different" from the French-speaking majority.

We may not like the notwithstanding clause, but nobody is disputing Quebec's legal right to use it, only how it is used. A refusal by Quebec to accept a Sec. 23 ruling, on the other hand, would be something else. It's hard not to imagine the political trouble, in Quebec and nationally, that could potentially result.

David Johnston, a former Montreal Gazette reporter and editor, was the federal commissioner of official languages' regional representative in Quebec and Nunavut from 2014 until his retirement in July of this year.

RECOMMENDED FROM EDITORIAL



Religious symbols law is cruel, but notwithstanding clause makes it



Bill 21 appeal: English school board says law is 'affront' to values