

Catholic Dimension - Legally Speaking - Fall 2006

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One of these things is not like the others

For those readers who did not grow up with a gaggle of small children addicted to the quick lyrics and rhymes of Sesame Street, the "thing" that is "not like the others" is Alberta, the "others" are Quebec, Ontario, Manitoba, and Newfoundland and Labrador. For purists, Saskatchewan can be lumped in with Alberta as another "one of these things".

To attempt to bring clarity to this riddle, Catholic School constitutional rights, as guaranteed in Alberta and Saskatchewan by virtue of the *Alberta Act, 1905*, and the *Saskatchewan Act, 1905*, have significant differences from those rights as guaranteed in Quebec and Ontario at the time of Confederation, those rights granted and rescinded in the 1880s in Manitoba, granted in Newfoundland and Labrador in 1949 and rescinded in 1997, and those rights as they are currently exercised in the Northwest Territories, subject to ongoing litigation in those Territories. One of the significant problems with delivery of Catholic education in Canada has been the different treatment, constitutionally, of Catholic education rights as between provinces, and therefore, the different level of constitutional protection, method and mode of delivery of that education as between provinces, based upon the legislated Catholic education status quo in place in the jurisdiction at the time of constitutionalization.

Catholic education in the Maritime provinces of Nova Scotia, New Brunswick and Prince Edward Island, were based almost exclusively on verbal understandings and "gentlemen's agreements" before Confederation dating from the *Emancipation Act* (U.K., 1829). As a result, Catholic education in the Maritime provinces was characterized at Confederation with tolerance of Catholic education, sometimes supported by education grants, with a recognition of "de facto" Catholic schools, but no constitutional protections.

The situation in Newfoundland and Labrador was again significantly different from that which was constitutionalized in Alberta. Term 17 of the *Terms of Union between Newfoundland and Canada, 1949*, provided for denominational schools with a right to receive public funds provided for education, in accordance with scales determined on a non-discriminatory basis by the legislature. Those rights extended to the Roman Catholic, Salvation Army, Seventh Day Adventist, United, Anglican, Congregational and Presbyterian denominations. The Pentecostal Assemblies obtained the same rights in 1987. However, Term 17 was amended by public referendum in 1995, replacing 27 denominational school boards with 10 interdenominational boards, and making all denominational constitutional rights "subject to provincial legislation that is uniformly applicable to all schools", with some ability to designate uni-denominational schools. The Newfoundland Supreme Court issued an injunction against the closure of Catholic schools, except upon consent of Catholic schools representatives, which led to a second referendum in 1997, allowing Term 17 to be completely rewritten so as to eradicate publicly-funded Catholic schools in the province, prevent the teaching of denominational religious programs and provide for a government-drafted religion program.

In Quebec and Ontario, Catholic school protection is traced to the *Common Schools Act, 1841* in Upper Canada, and the *Education Act, 1846*, in Lower Canada. In what was to become Ontario, Catholic education constitutional rights set forth and protected those specific rights set out in the *Scott Act, 1863*, by which all separate school boards were to be Roman Catholic, five heads of families, being Roman Catholic, were entitled to call a meeting for the establishment for a separate school for Roman Catholics and to elect Roman Catholic trustees, separate school trustees were entitled to form a body corporate, which in turn could form "separate school unions". The trustees of each separate school section or union section were entitled to "impose, levy and collect school rates or subscriptions" for separate schools, all separate school supporters were to be exempted from the payment of common school rates, and be entitled to a pro-rata proportion of annual grants by the Legislature and "all other public grants, investments and allotments for Common School purposes."

Arising out of the 1846 legislation in Quebec, unique systems of education were established for the cities of Montreal and Quebec City, where there were two elected boards of denominational school commissioners, each autonomous, and neither designated as the majority or minority, public or separate. The school system in Quebec outside of the cities of

Montreal and Quebec City was based on a system of Protestant dissentient schools, whereby the members of the minority faith in rural Quebec were entitled to "collectively signify such dissent in writing" and elect three trustees to operate a dissentient school board. Arguably, therefore, in Quebec, there was no constitutional protection for minority school boards for the cities of Montreal and Quebec City, but only in rural Quebec. It was this *Education Act, 1846*, amended and consolidated by the *Education Act, 1861*, that was constitutionalized for Quebec at Confederation.

One of the principle issues debated by the Fathers of Confederation at the Charlottetown conference of 1864 and the London conference of 1866/67 was the "denominational school issue", and it is generally agreed that Confederation would not have been achieved in Canada without the protections accorded to denominational schools in both Quebec and Ontario. The result of this "Confederation compromise" was section 93 of the *Constitution Act, 1867*, which protected those rights already legislatively protected in those two provinces.

The implementation of the "Confederation compromise" proved highly problematic in Manitoba. Prior to Manitoba's entry into Confederation in 1870, education in the Red River colony was provided by religious denominations, Catholic and Protestant, and school funding was obtained from the Council of Assiniboia, the Hudson's Bay Company, sponsoring churches and tuition fees. The Parliament of Canada attempted to extend the constitutional protections of section 93 of the *Constitution Act, 1867*, to the new province of Manitoba, providing for Catholic denominational schools, supported by Catholic taxpayers, and Protestant denominational schools, supported by Protestant taxpayers. Unfortunately, the Red River Rebellion (1869-1870) and the Northwest Rebellion (1885) pitted the French/Métis/Catholic population directly against the English/Protestant population of the new province of Manitoba, and of course, Ontario. The result of that conflict was the *Manitoba Public Schools Act, 1890*, seizing all Catholic denominational school facilities, transferring them to the public school system, and allocating all public funding to the public system. Litigation proceeded to the Judicial Committee of the Privy Council in *Winnipeg v. Barrett* (1892) and *Brophy v. Manitoba* (1895), resulting in the 1896 compromise between Sir Wilfred Laurier and Manitoba Premier Thomas Greenway, which allowed limited Catholic religious instruction in public schools, but only during restrictive hours, employment of Catholic teachers in the public school system, and the use of the French language under very restrictive conditions. Specifically, the compromise did not allow for privately established Catholic schools to share in public funding, and continued to require Catholic ratepayers to support the public school system, even though their children attended the private Catholic system.

The history of the education debacle in Manitoba in the 1890s informed the constitutionalization of Catholic school rights in 1905 in Alberta and Saskatchewan, arising out of the *Northwest Territories Act, 1875* the *Northwest Territories School Ordinance, Chapter 29*, and the *Northwest Territories School Assessment Ordinance, c. 30*. Constitutionalization of Catholic school rights in Alberta and Saskatchewan was not a smooth process, and sparked the controversy now known as the "North-West Schools Question" in 1905, the resignation from Cabinet of Sir Clifford Sifton, and the near collapse of the Laurier government. Led by Justice Minister Sir Charles Fitzpatrick, eleven versions of the constitutional protections for Alberta and Saskatchewan were drafted and redrafted, and a new and different compromise was forged for Alberta and Saskatchewan, distinct and unique from that which existed in the older provinces.

These unique constitutional rights set forth in s. 17(1) of the *Alberta Act, 1905*, although not frozen in time, and although not capable of being comprehensively listed, include at least the following:

- a. In Chapter 29:
 - i. The right or privilege to form a new separate school district;
 - ii. The right or privilege to levy assessments upon the ratepayers of the separate school district;
 - iii. The right or privilege not to be liable to assessments levied by any party other than the separate school district;
 - iv. The right or privilege to set such mill rates as they determined to impose upon themselves;
 - v. The right or privilege to exercise all rights, powers, privileges and be subject to the same liabilities and methods of government as provided to public school districts; and
 - vi. The right to alter the boundaries of any separate school district, providing that the majority of the separate school electors would not be prejudiced, and that the boundary change was for the general good or general advantage;
- b. And in Chapter 30:

- i. The specific mechanisms for the exercise of the right or privilege to levy and collect, or requisition and receive taxes, upon the properties of separate schools ratepayers;
- ii. The right or privilege to access a proportionate share of individual taxes as declared with respect to jointly held properties; and
- iii. The right or privilege to access a proportionate share of company taxes.

In addition, and distinct from these constitutionalized s. 17(1) rights, s. 17(2) of the *Alberta Act, 1905* and the *Saskatchewan Act, 1905* also guaranteed a fair and equitable proportion of government grants and financial support.

It is clear that there are significant differences in Alberta and Saskatchewan as compared, for example, to Ontario, in that in the new provinces, the denominational minority, either Protestant or Roman Catholic, is entitled to form a separate school district, and this right is not restricted only to Roman Catholics. Secondly, in Alberta and Saskatchewan, a guaranteed method of expansion of school districts, distinct from 4x4 formation, was set out. Thirdly, in Alberta and Saskatchewan, Catholic separate schools have a dual constitutional right to a declared property assessment base and to equity and fairness in government funding, which cannot be merged into a single right. Those constitutional provisions have been reflected in Alberta's *School Act* in the preamble, the residency provisions, the requisition sections, the 4 x 4 formation division, and the separate school regions expansion provisions.

Litigation is currently ongoing in the Northwest Territories as to the effect of the *Northwest Territories Act, 1875*, on the *Northwest Territories Education Act*, although it is believed that the Catholic electors of the Northwest Territories will be accorded constitutional rights equivalent to those in Alberta and Saskatchewan.

It is therefore clear that, although some general principles of law apply in the various provinces across Canada which have or had constitutionally protected denominational school rights, the key to those rights is individual to each province. It is those specific rights set out in legislation and constitutionalized, as interpreted by the courts of the province, which set out the parameters of those constitutional rights. It is improper and erroneous to generalize the constitutional rights in effect in one province to another, without detailed review of the exact legislated and constitutional provisions.