

Catholic Dimension - Legally Speaking - Fall 2009

Kevin P. Feehan
Dentons Canada LLP

Knock, Knock... Opening up the School Act

There is a knock at the door. You go to open the door, not knowing who is behind it. You open the door. The news may be good, or bad, or neutral. It is the same with the proposed opening of the *School Act*, anticipated in the spring session of the Legislature, 2010.

The current *School Act* contains some provisions which should be retained, some which should be removed, and some which should be amended or added to the Act.

To be Retained

The preamble to the *School Act* is the aspirational statement which may be relied upon in the interpretation of all of the provisions of the Act. The preamble contains two very important clauses, providing that there is "one publicly funded system of education in Alberta... through its two dimensions, the public schools and the separate schools" and that "the rights guaranteed under the constitution of Canada of separate school electors are (to be) preserved and maintained". Those provisions are essential for the preservation and maintenance of Catholic education in Alberta and must be retained.

Sections 44(4) and 220(6) provide that where a separate school district is established, a person of the same faith as those who established the separate school district is a resident of the separate school district. Those residency provisions outline the basis upon which membership is established in a Catholic separate school district. They have been tested and upheld in the Courts of Alberta, including in *Re Schmidt* (1976), and must be retained.

Section 45(3) provides that a board shall enrol a resident student in its school system, and a non-resident student if, in the opinion of the board, there are sufficient resources and facilities available to accommodate the student. This provision allows a Catholic board to enrol non-Catholic students, but also allows it to require the non-resident student to enrol in the public board where that student cannot be accommodated due to a lack of resources or facilities. This flexibility must likewise be retained.

Also on the "to be retained" list are those provisions which allow a board to prescribe religious instruction and exercises, and for persons other than teachers to provide such religious instruction (s. 50), and indicate that a separate school district possesses all of the rights, powers, privileges, duties, liabilities and has the same method of government as the board of a public school district (s. 59). Those provisions which allow for separate boards to access their assessment base so as to be able to track and maintain democratic contact with its electors (ss. 154-164) must also be retained.

Sections 170 through 178, comprising the Alberta School Foundation Fund sections, are those provisions which were successfully defended in the Supreme Court of Canada in *Alberta Public School Boards' Association v. Alberta (Attorney General)* (2000). They provide a detailed system whereby a separate school board may "opt out" of the Fund and continue to requisition from its taxation assessment base but receive from the government the "same amount per student for the school year" as all other public and separate school boards (the "top-up"), and if the separate school district or division requisitions more from the municipality than the amount per student per year paid to all other public and separate school boards, any refund to the Fund will be "subject to the rights under the Constitution of Canada of separate school electors" (the "claw-back"). These provisions, for the first time, allow equal funding to be provided for separate school boards as compared to their public school counterparts under the principles of equity incorporated in section 17(2) of the *Alberta Act*, 1905. These provisions must be retained.

Sections 212 to 220 address the establishment and dissolution of separate school districts. These are the traditional 4 x 4 formation provisions of the Act which have been largely unaltered since Alberta became a province in 1905. They provide

for members of the minority denomination in a public school district to petition for a separate school district, call a meeting of separate school electors, and take a vote as to whether or not a separate school district should be established within the boundaries of the historical public school district. They provide details with respect to the notice, quorum and conduct of the meeting, and provide that if a majority of the electors forming a quorum vote for the establishment of a separate school district, the Minister shall by order establish the separate school district within the same boundaries as those of the public school district. These provisions are modelled on the School Ordinance of the Northwest Territories, 1901, which were constitutionalized for Alberta through the *Alberta Act*, 1905, and should be retained as the constitutional benchmark for the formation of Catholic Separate Schools.

Sections 252.1 through 257 address the establishment and dissolution of Francophone education regions. These sections are the product of a mediation between Calgary Catholic and the two southern Alberta francophone boards over the management and control of Ecolé Ste. Marguerite-Bourgeoys in Calgary, and entrenched in legislation both separate Catholic and francophone education constitutional rights so that "governance of separate schools which are both francophone and Catholic will be granted and reserved to the francophone Catholic community in a manner which enforces the constitutional protections of section 17 of the *Alberta Act*, 1905 and section 23 of the Charter." Once again, these essential constitutional rights must be retained.

To be Removed

Section 50(2) of the *School Act* entitles a parent of a student to allow the student to be excluded from religious instruction or exercises by having that student leave the classroom, or remain in the classroom without taking part in the religious instruction or exercises. This provision should not apply to Catholic separate or Catholic public schools. The essential purpose of Catholic schools is to fully permeate Catholic theology, philosophy, practices and beliefs, the principles of the Gospel and teachings of the Catholic church in all aspects of school life, and all resident students should be required to participate fully in religious instruction or exercises in a Catholic school. This same logic would require an amendment of section 11.1 of the *Alberta Human Rights Act* (Bill 44).

Likewise, section 221.3, which provides for regulations governing the establishment of a new separate school district in a Separate School Region, is in the wrong division of the Act, and section 225, which is the "forced regionalization" provision, is clearly unconstitutional with respect to separate schools and should be removed.

To be Amended or Added

While many sections should be amended during the opening of the *School Act*, there are a few which bear comment. A number of sections, including sections 22(3) and 39(1)(d) should be expanded to include reference not only to separate school boards but also Catholic public school boards so as to allow St. Albert Catholic public to establish school councils made up of members "of the same faith as those who established the ... school district" and to allow the board to "provide religious instruction" free from the discretion of the Minister.

It is also time to reintroduce into the *School Act* the ability of those in an interfaith or interdenominational marriage to designate their property to be held as a "unit" for either public or separate school assessment. The reintroduction of section 133 of the 1988 Act is in keeping with the unity of marriage and gives an ability to persons in an interfaith or interdenominational marriage to act as a family unit; good from a family, educational and taxation point of view.

Sections 208 through 211 provide for public school districts to be combined into "school divisions". They, however, do not allow separate school divisions the same rights. The difficulty with this exclusion is that, while public school districts are entitled to reorganize their wards and electoral subdivisions, or to dissolve and reform from time to time with different boundaries, separate school boards are not entitled to do so and are limited by the more restrictive provisions relating to regional divisions. Further, amendment to section 226 should allow for the reorganization of wards in a regional division, including elimination of a ward, to achieve proportionality as to trustees. It is time to allow separate school boards to combine in school divisions, subject to the agreement, approval and consent of the separate school electors and separate school boards consistent with their constitutional rights and privileges, as required in *Whitecourt Catholic Schools v. Alberta* (1995).

Perhaps it is also time to redraft the provisions allowing for the creation of Separate School Regions and the expansion of separate school districts across those regions. Litigation is ongoing with respect to the interpretation of these provisions in *Aspen View v. Lakeland Catholic*. Although these current sections are fully defensible, additional clarity, detail and explicit language might be of great assistance in resolving this litigation for the benefit of all involved. Similar explicit wording may be of assistance in section 239 in allowing the Minister to expand the area of a separate school district or division pursuant to the expansion provisions of the Act and to allow the Minister to amalgamate a Catholic separate school district with a Catholic public school district, already recognized as appropriate in *Sturgeon School Division v. Alberta (2000)*.

Conclusion

There has been a knock on the door. Catholic schools in Alberta have opened the door. It is now time to work with each of our MLAs, Cabinet Ministers, and the Department of Education to ensure that the opening-up of the door preserves those essential elements of the *School Act* which preserve, maintain and enhance Catholic education in Alberta, to delete those provisions which are a detriment to the teaching of Catholic education, and to seek amendments, where necessary, to avoid conflict, litigation and discord in the provision of a fully-permeated Catholic education to each of our students based upon Gospel values and fully alive, vibrant, Catholic theology, philosophy, practices and principles.