

# Catholic Dimension - Legally Speaking - Fall 2010

Kevin P. Feehan  
Dentons Canada LLP

## ABC, 123, Existence AND Equity: Back to Basics

It's timely to get back to basics. Alberta Catholics elected 39 new Catholic school trustees in the October 18th municipal elections. Alberta Catholic school trustees are engaged at multiple levels with the provincial government on the topic of Catholic school education including the Minister's consultations on separate school formation and expansion, the *Education Act, 2011 Proposed Framework*, Inspiring Education, Setting the Direction for Special Education in Alberta and Speak Out: The Alberta Student Engagement Initiative.

The time is therefore appropriate to repeat the ABCs, and the 123s of Catholic education in the Province of Alberta. The primary constitutional protection for separate school electors in Canada is set out in the *Constitution Act, 1867*, section 93(1):

"93. In and for each Province the Legislature may exclusively make Laws in relation to Education subject and according to the following provisions:-

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by law in the Province at the Union."

For Alberta, section 93(1) of the *Constitution Act, 1867* is modified by section 17(1) of the *Alberta Act, 1905*:

"17. Section 93 of the *Constitution Act, 1867*, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:-

'(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this *Act*, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said Ordinances'."

In Alberta, a second and distinct constitutional right was granted in section 17(2) of the *Alberta Act, 1905*:

"2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any *Act* passed in amendment thereof, or in substitution therefore, there shall be no discrimination against schools of any class described in the said chapter 29."

These constitutional protections are reinforced by section 29 of *The Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*:

"29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools."

The extent and particulars of the constitutional rights protected by the above provisions are not to be enumerated or cast in stone for all time, but are to be determined from time to time in the context of individual circumstances as they come before the Courts (*Alberta Public School Boards' Association v. Alberta (Attorney General)* Q.B. 1996, CA 1998, SCC 2000). However, some of those Catholic separate school rights have been described and enumerated in legislation and by the Courts, including the rights to existence, formation, expansion and equity.

The essentials of the protections to form or establish separate school districts are incorporated in sections 41 through 45 of chapter 29 of the Ordinances of the Northwest Territories, 1901, the School Ordinance as constitutionalized by section 17 (1) of the *Alberta Act*. Sections 41 and 45 read:

"41. The minority of the ratepayers in any district whether Protestant or Roman Catholic, may establish a separate school therein; and in such case the ratepayers establishing such Protestant or Roman Catholic separate school shall be liable only to assessments of such rates as they impose upon themselves in respect thereof.

45. After the establishment of a separate school district under the provisions of this Ordinance such separate school district and the board thereof shall possess and exercise all rights, powers and privileges and be subject to the same liabilities and method of government as is herein provided in respect of public school districts..."

These provisions entrench the right to form a new separate school district, the right or privilege to levy assessments upon the ratepayers for the district and the right or privilege not to be liable to assessments levied by any public school district or the Province of Alberta on behalf of a public school district. They also include the collateral right to deliver a wholly-permeated Catholic education based upon Catholic philosophy, theology, the principles of the Gospel and the teachings of the Church, the right to exclusive management and control of Catholic schools, the right to hire administrators, teachers and educational leaders who support Catholic education, and the right to preferential hiring, promotion and denominational dismissal for cause within the Catholic school system.

The right to expansion of separate school districts is constitutionalized by section 48 of the *1901 School Ordinance*:

"48. The commissioner may by order ... alter the boundaries of any district by adding thereto or taking therefrom or divide one or more existing districts into two or more districts or unite portions of any existing district with another district or with any new district in case it has been satisfactorily shown that the rights of ratepayers under section 14 of the *North-West Territories Act* to be affected thereby will not be prejudiced and that the proposed changes are for the general advantage of those concerned."

Section 14 of the *North-West Territories Act, 1886*, as amended in 1898, reads in part as follows:

"14. The Lieutenant Governor in Council shall pass all necessary ordinances in respect to education; but it shall therein always be provided, that ... the minority of the rate payers therein, whether Protestant or Roman Catholic, may establish separate schools therein, and in any such case, the rate payers establishing such Protestant or Roman Catholic separate schools shall be liable only to assessments of such rates as they impose upon themselves in respect thereof..."

This right to expansion is an implied or inherent right, or qualified privilege, that is necessary in order for express rights to be operationalized; that is the right or privilege to call upon the Minister to exercise his or her discretion, as an advantage given only to separate school electors, and a Minister may not refuse to exercise his or her discretion based upon the twin criteria that the expansion does not prejudice the rights of separate school electors in the expansion area, and "is for the general advantage of those concerned".

Section 17(2) of the *Alberta Act* requires fairness and equity in the funding of separate schools compared to public schools, in relation to government grants and all monies distributed by the province to school boards. As the Supreme Court of Canada said in *Regina School District No. 4 v. Grattan Separate School Trustees (1914)*, the object of section 17(2): "was to secure to all schools, whether public or separate, their fair share in the appropriation and distribution of any monies for the support of schools".

Taken together, sections 17(1) and (2) of the *Alberta Act, 1905*, incorporating chapters 29 and 30 of the Ordinances of the Northwest Territories, 1905 and by reference, section 14 of the *North-West Territories Act, 1886*, as amended in 1898, protect the rights to existence with a fully realized governance, formation, expansion and equity for separate schools in the Province of Alberta. It is the duty and responsibility of every Catholic school trustee, Catholic educator and Catholic parent to breathe life into these constitutional protections, to put denominational flesh on the bones of the educational structure, and to make Catholic education a truly vibrant, welcoming and exciting Christ-centered, faith-based learning experience for all of our children.