

Catholic Dimension - Legally Speaking - Fall 2011

Kevin P. Feehan
Dentons Canada LLP

IN MEDIAS RES

We are currently In medias res: in the heart of the matter.

At the time of writing, Bill 18: the Education Act, 2011 is still in limbo. We do not know whether it will progress through legislative process in the fall session to recommence November 21, 2011, be delayed to the spring session, 2012, or die on the order paper; whether it will proceed unamended, receive minor drafting amendments, or be substantially revised.

Bill 18: the Education Act, 2011, was given first reading in the Legislature on April 27, 2011 and second reading was moved on April 28, 2011. The Legislature rose for the spring session on May 12, 2011 at which time there had been no debate on second reading.

Bill 18 constituted a fundamental rethinking and rewrite of the current School Act, reorganizing educational governance into the topics: access to education, opportunities for learning, responsibilities and dispute resolution, board powers and elections, structure of school authorities, and education professions. A number of the provisions are of significant concern in the Catholic community.

Section 71 of the Bill, and section 132(4) with respect to francophone regional authorities, provides that separate school residents may elect to vote or run for public school trustee, rather than separate school trustee. Separate school residents maintain their residence in the separate school division, maintain their declaration that they are of the minority faith, but are allowed the additional option to vote and run for public school trustee. No rights are lost to separate school electors; more rights are granted to them. Nevertheless, it is clear that public school electors are unhappy with this grant of additional rights to separate school electors and this may eventually lead to a request from public school electors that they be given the equivalent right to vote and run for separate school trustee, which would be constitutionally and unlegislatively unsound. This grant of additional rights to separate school electors benefits a very small minority within the Catholic community, is contrary to the "no choice" Court of Appeal decision in Schmidt and Calgary Board of Education (1996) and is rife with political and legal consequences now and in the future.

Sections 106 through 119 of Bill 18 establish a new model for formation of separate school districts, colloquially known as the "flower petal" formation. The first step in that formation would be a collaborative effort between the electors, separate and public school divisions to determine an establishment area. In lieu of agreement, the Minister may determine that the establishment area for a new separate school district be the area of the original public school district, together with those districts which are "contiguous" to the "public school district in which the initiating separate school electors reside" and are "located in the separate school region", thus constituting the "flower petal". This is an innovative and interesting provision which should be watched with an open mind, but also with caution.

However, these new establishment provisions fail to expressly preserve the traditional “4 x 4” establishment provisions, constitutionally protected by incorporation into section 17(1) of the Alberta Act, 1905 of the provisions of sections 41 through 45 of the School Ordinance, 1901. This constitutional benchmark must always be maintained as the recognized minimal protection for the establishment of separate school districts.

Sections 79 and 81 of the Bill provide for Ministerial appointment of trustees where two attempts to fill a vacancy on a board have been made and no nominations have been put forward, or to allow for the appointment of a trustee to represent First Nation students on the board. Those appointments do not seem objectionable in principle, as long as appointments to a separate school board are members of the denominational minority. This caveat should be expressly stated in the Bill.

Of more concern is the provision in section 95(1) that allows the Minister to establish a school division consisting of “any number of public school districts, separate school districts and school divisions”, which appears to allow a school division to be comprised of a combination of public school districts, separate school districts, public school divisions and separate school divisions. A public school division should only be comprised of public school districts or public school divisions, and a separate school division should only be comprised of separate school districts or separate school divisions, except where the public school division is a Catholic public school division, when it may also be comprised of Catholic separate school districts. This proposed amendment in Bill 18 may allow for rationalization in the Greater St. Albert area and the Sturgeon Valley, but would not otherwise allow “blended” school boards.

Of significant concern is the provision in section 188(3) of the Bill, which allows the Minister, should space be available in a school building, to direct a board to make that space available to another board. This would be problematic if the Minister determined to direct a Catholic school board to provide space in one of its schools to a non-Catholic school board or vice versa, thus establishing a shared facility which would be contrary to ACSTA’s standing Facilities Covenant.

Another provision of interest is section 55 of Bill 18, which like section 50 of the School Act and section 11.1 of the Alberta Human Rights Act, allows a parent to request that a student be excluded from religious instruction. An exemption should be made to that provision for Catholic schools, where religious instruction or exercises comprise the totality of the school day, with the essential purpose of fully-permeating Catholic theology, philosophy, practices and beliefs, the principles of the Gospel and teachings of the Catholic Church, in all aspects of school life, including in the curriculum of every subject taught, both in and outside of formal religious classes, celebrations and exercises.

These and other provisions of Bill 18 require careful monitoring, and hopefully some necessary amendments in order to preserve the essential Catholicity of our Catholic schools, the right to efficient establishment of new districts, expansion of existing districts, and the maintenance of a truly Catholic education focused on the development of the whole child; mentally, physically, emotionally and spiritually. We are truly, therefore, in medias res.