

## Catholic Dimension - Legally Speaking - Spring 2000

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### What is the connection between Quebec Secession and Catholic school rights in Alberta?

#### The Charter of Rights and Freedoms

The Constitutional enactment which brought Alberta into confederation was the Alberta Act, 1905. Section 17 of that Act, section 93 of the Constitution Act 1867 and sections 41 to 45 of the Northwest Territories School Ordinance 1901, guarantee Catholic ratepayers the right to establish a separate school district, set assessments, collect taxes, permeate Catholicism in all aspects of education and enjoy all the rights, powers, privileges allowed to public school districts.

#### A history older than Alberta

On July 15, 1870, Canada assumed Rupert's Land from the Hudson's Bay Company, effectively gaining control over education in what is now Alberta and Saskatchewan. In 1875, the first North-West Territories Act was passed. Section 11, entitled public and separate school jurisdictions to establish. There were no restrictions on the geography of those school jurisdictions.

In 1884, the School Ordinance provide that a public or separate school district "comprise an area of not more than 36 square miles" (a 6x6). Separate school districts were not bound by the geography of public school districts. In addition, public or separate school districts could be expanded at the request of landowners. Under the School Ordinance of 1884, four Catholic Public boards (Fort Saskatchewan, St. Albert, St. Leon and Cunningham) and three Catholic Separate boards (Calgary, St. Joachim's (now Edmonton) and Bellerose) were established.

By 1886, the formation of separate districts was restricted to the boundaries of public school districts established on a 6x6 basis, and in 1887, the formation area for public districts, and therefore separate districts, was reduced to twenty five square miles (a 5x5).

By 1901, a separate school district could be established within the boundaries of any public school district established without reference to specific geography (1875-1884), on a 6x6 basis (1884-1887), on a 5x5 basis (1887-1901), or on any other basis allowed in the discretion of the Minister subject to protection of separate school constitutional rights. It was this right of establishment that was constitutionally protected in the Alberta Act, 1905.

Then, in 1913 the basic geography of a school district was again reduced, this time to a 4x4 area.

#### The 4x4: wrong assumption

For reasons unknown, it became assumed after 1913 that Catholic school districts could only be formed on the basis of 4x4s. This assumption persisted, despite the continuing evolution of public school geography.

In 1913, the Minister was enabled to create public consolidated school districts no longer bound by the 4x4 geographical jurisdictions. In 1916, the Minister was authorized to organize "any portion of the province into a district", so that districts could now be of any size or dimension. By 1919 consolidated school districts were allowed to include any territory of not less than 30 and not more than 80 square miles.

The first Schools Act of Alberta was passed in 1922. This Act recognized basic 4x4 school districts, larger basic school districts "in special cases", consolidated school districts and secondary consolidated school districts. In 1931, a new type of district was added to the jurisdictional list, the "rural high school district".

In 1966, the qualifying boundaries for school districts and consolidated school districts were repealed so the public school districts and consolidated school districts could be established without restriction as to geography. In 1970, the Minister was entitled to establish divisions of any number of public school districts.

In 1988, the Minister was confirmed in the right to establish any portion of Alberta as a public school district, or to establish divisions consisting of any number of public school districts. A separate school district could be established within a public school district and the Minister could by order add land to, or take land from, a district or division, or divide a district or division into two or more districts or divisions. There were no references in this act to specific geographical dimensions for districts or consolidated districts, as those references had been deleted in 1966.

Finally, recent legislative amendments, while preserving all of the above jurisdictions, added the concept of a regional division, either formed on a voluntary basis (School Amendment Act 1993) or forced basis (School Amendment Act 1994).

#### **The 4x4: no foundations in law**

***There is no foundation in law to require separate school districts to be formed on a 4x4 basis.***

Separate School districts were entitled to form between 1875 and 1884 without reference to specific geography; between 1884 and 1887 on the basis of 6x6 jurisdictions, but separate school districts need not have been based upon public school districts; from 1887 to 1913 on the basis of 5x5 jurisdictions; from 1913 to 1966 on the basis of 4x4 jurisdictions, and without restriction as to specific geography from 1966 to present. Yet, the practice continues; the Catholic ratepayer is legally and administratively directed to do just that.

***There is no foundation in law for restricting separate school jurisdictions to the original 6x6/5x5 or 4x4 public school jurisdictions.***

Public school districts were not limited to such original geographical restrictions. They included, beginning in 1913, consolidated school districts which by 1919 could be of no less than 30 square miles nor more than 80 square miles; from 1922, secondary consolidated school districts; from 1931, rural high school districts; and from 1970, regional districts. Even these larger jurisdictional areas became artificial, being subject to orders of the Minister adding land to, taking land from, conjoining districts, separating districts and otherwise altering the basic shape, configuration and size of these geographical areas. In addition, the Minister always had power and authority to create school jurisdictions without reference to specific geographical boundaries, subject only to the constitutional rights of separate school ratepayers.

***There is no foundation in law for restricting formation of separate schools to the geography of public school districts, even including larger district jurisdictions.***

The Supreme Court of Canada has made it quite clear that protection of minority educational rights is "itself an independent principle underlying our constitutional order" (the Quebec Secession case, 1998), that educational rights cannot be stereotyped by the type of educational jurisdictions and rights existing at confederation (in the case of Alberta; 1905) (*Hirsch v. Montreal Protestant School Commissioners* (1928), *Greater Montreal Protestant School Board v. The Attorney General of Quebec et al* (1989) and *Reference re: Education Act (Quebec)* (1993)). Likewise, separate school constitutional rights cannot be confined to literal wordings or stereotyped to avoid the purpose and intent of the protection of minority rights (*Greater Montreal Protestant School Board v. The Attorney General of Quebec et al* (1989), *Ontario Home Builders' Assn. v. York Region Board of Education* (1996)). Finally, the Supreme Court of Canada has said many times that the constitutional rights of separate school supporters cannot be restrictively interpreted so that they are "hollow rights" which cannot be effectively exercised in the modern context (*Reference re: Bill 30* (1987), *Attorney General of Quebec v. Greater Hull School board* (1984), *Greater Montreal Protestant School Board v. The Attorney General of Quebec et al* (1989), *Reference re: Education Act (Quebec)* (1993), *Ontario Homes Builders' Assn. v. York region Board of Education* (1996)).

### **Hollow rights wholly illusory**

To restrict separate school formation to the archaic boundaries of 6x6s, 5x5s or 4x4s, or even to the larger unified boundaries of consolidated school districts, secondary consolidated school districts, rural high school districts or regional districts, when public school jurisdictions are now comprised of divisions and regional divisions, is only to accord separate school supporters "hollow rights" which are "wholly illusory" with respect to the formation of their districts.

### **Constitutional protection**

It was the intent, purpose and substance of constitutional protection that separate school supporters would be entitled to establish separate school jurisdictions in any area of the province of Alberta which was established and organized for public school purposes.

This purposive interpretation is not to be limited by archaic geographical boundaries.

## **The challenge**

The challenge for Catholic schools now is formation or expansion on geographical areas unfettered by 86 years of administering the 4x4 assumption in Alberta. Perhaps we should envision coterminous boundaries with public school divisions or wards of public school regional divisions, or creative areas for separate school expansion limited only by the needs of separate school ratepayers and students. Perhaps it is time to seize the opportunity to bring separate school education to all Catholic students in Alberta. It would not be impossible for the government to make it happen; all that is required is the political will.