

# Catholic Dimension - Legally Speaking - Spring 2004

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## Public meetings, public questions, public answers

The Separate School Regions Establishment and Provision of Services Order, A.R. 109/2002, allows separate school boards the right to expand, at the request of electors, within separate school regions. It is an alternative to the establishment of new 4x4 districts, later amalgamated into existing separate school districts or regional divisions.

Such expansions have been approved by the Minister of Learning for the Grande Prairie and Holy Spirit Catholic school boards and are currently in progress in the jurisdictions of the Calgary, Elk Island, Evergreen, Holy Family, Holy Spirit, Lakeland and Living Waters Catholic school boards.

One of the most significant events during the expansion process is the holding of a public meeting to discuss the request for expansion and answer questions from the public. A number of the questions and answers given at public meetings to date have been fundamental to understanding the following:

- the rights of Catholic electors to such expansion;
- the fundamental difference between expansion and traditional 4x4 formation; and
- the effect of expansion upon Catholic electors, public electors and the community at large.

Set out in this article are a number of the questions which have been asked or may be asked, and answers given with respect to this new process.

### Legislation Allowing Expansion of Catholic School Districts

**1. Question:** What is the specific legislation that constitutionally allows separate Catholic electors to expand or alter the boundaries of established separate school districts?

**Answer:** Chapter 29 of the Ordinances of the Northwest Territories, 1901, the School Ordinance, contains the following:

"48. The commissioner may by Order notice of which shall be published in the official gazette 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 rate payers 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 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 a majority of the rate payers of any district or portion of Territories, or of any less portion or subdivision thereof, by whatever the same is known, may establish such schools therein as they think fit, and make the necessary assessment and collection of rates therefore; and also 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 . . ."

The provisions of the School Act which address the above mentioned sections are sections 221.2, Division 2.1: "Establishment of Separate School Regions" and section 229, proceduralized in the Separate School Regions Establishment and Provision of Services Order, M.O. 011/2002, A.R. 109/2002. That is made clear by the provisions of section 22 of that Regulation which specifically adopts the wording of section 48 of the Northwest Territories School Ordinance, 1901:

"22. Upon receipt of a statement from the Public School Board and following a public meeting under section 21 and upon receipt of the minutes of the public meeting, the Minister may, under section 239 of the School Act, add land in the Separate School Region to the separate school district or division if the Minister is satisfied that the addition of the land does not prejudice the rights of separate school rate payers in the expansion area and is for the general advantage of those concerned."

### **Affect on Traditional 4x4 Formation**

**2. Question:** Does the new consultative expansion process under the Separate School Regions Establishment and Provision of Services Order affect traditional 4x4 formation?

**Answer:** This new process specifically provides in section 24 that it does not affect traditional 4 x 4 formation which is constitutionally protected and remains unamended in sections 212 through 221, Division 2, Part 8 of the School Act. It merely contemplates an equally constitutionally-protected method of expansion of Catholic Education which is supplemental, and in addition to, the traditional constitutionally-protected 4 x 4 formation.

### **The Right to Vote**

**3. Question:** In the new consultative expansion process, is it necessary that members of a minority faith who live in the proposed expansion area be given the right to vote for or against the expansion?

**Answer:** The right to vote of a member of the minority faith is essential with respect to the constitutionally-protected right for "formation" of a new separate school district. However, it is not the test with respect to the constitutionally-protected "expansion" of separate school districts. The appropriate test with respect to expansion is found in section 22 of the Separate School Regions Establishment and Provision of Services Order:

". . . the Minister (must be) satisfied that the addition of the land does not prejudice the rights of separate school rate payers in the expansion area and is for the general advantage of those concerned."

However, we believe that the process for expansion allows for very extensive consultation, participation and co-operation of all parties affected, including but not limited to members of the minority faith.

### **Fully Permeated Catholic Education**

**4. Question:** Must a Catholic separate school be Catholic and provide a fully permeated denominational education?

**Answer:** Under the system of separate school 4x4 formation (School Act, Part 8, Division 2, ss. 212-221) it is clear that once a new separate school district is established or formed, it "must have some degree of denominational character," "cannot simply operate a public school by another name" and should offer "formal religious education (as a) . . . means of promoting or preserving Roman Catholic beliefs and values . . ." (Jacobi v. Newell No. 4 (County), (1994) 16 Alta. L.R. (3d) 373 at 395). If that rationale extends to the new system of expansion of separate school districts or regional divisions within Separate School Regions (School Act, Part 8, Division 2.1, ss.221.1 and 221.2) the expanding separate school district or regional division will be required by law to provide a fully permeated Catholic Education. This will include denominational character in the schools in the expansion areas, with Catholic administration, utilizing the approved separate school curriculum and be under the guidance, authority and control of the local bishop.

### **Census of Catholic Electors**

**5. Question:** Is it necessary to take a census of Catholic separate school supporters as part of the expansion or alteration of boundaries of a Catholic separate school district?

**Answer:** A census of school electors in the areas proposed for expansion is not a requirement for the expansion or alteration of boundaries of an existing separate school district or regional division (Section 221.2 of the School Act and the Separate School Regions Establishment and Provision of Services Order). A census is a requirement for the establishment

or formation of a new separate school district (Part 8, Division 2, Sections 212 to 221 of the School Act). The reason a census is not required under the currently-utilized consultative expansion system is that a new separate school district is not being created. The Minister of Learning is simply using the Ministerial powers provided to him to "add land to . . . a district or a division" (Section 239 of the School Act). The question as to whether Catholics or Protestants are in the majority or the minority is only relevant to the establishment or formation of a new separate school district because the minority status and "separateness" of the existing separate school district has already been established. As a result, a census to establish majority or minority status is not necessary under the Separate School Regions Establishment and Provision of Services Order.

### **Constitutional Protections for Catholic School Rights**

**6. Question:** What are the basic constitutional protections for Catholic separate school rights?

**Answer:** Constitutional protections for separate school ratepayers in Canada are set out in the Constitution Act, 1867 in the following section:

"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 a 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 North-west 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."

These constitutional protections are reinforced by section 29 of The Charter of Rights of Freedoms:

"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."

### **Legislation Allowing Formation of Catholic School Districts**

**7. Question:** What is the specific legislation that constitutionally allows separate Catholic ratepayers to form new separate school districts?

**Answer:** Chapter 29 of the Ordinances of the Northwest Territories, 1901, the School Ordinance, contains the following sections with respect to the formation of new separate school districts:

41. The minority of the rate payers in any district whether Protestant or Roman Catholic, may establish a separate school therein; and in such case the rate payers 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.

42. The petition for the erection of a separate school district shall be signed by three resident rate payers of the religious faith indicated in the name of the proposed District; and shall be in the form prescribed by the commissioner.

43. The persons qualified to vote for or against the erection of a separate school district shall be rate payers in the district of the same religious faith Protestant or Roman Catholic as the petitioners.

44. The notice calling a meeting of the rate payers for the purpose of taking their votes on the petition for the erection of such school district shall be in the form prescribed by the commissioner and the proceedings subsequent to the posting of such notice shall be the same as prescribed in the formation of public school districts.

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.

(2) Any person who is legally assessed or assessable for a public school shall not be liable to assessment for any separate school established therein."

The School Act provisions which address the formation rights of separate school electors, as guaranteed by sections 41 through 45 of the Northwest Territories School Ordinance, 1901, are sections 212 through 220, Division 2: "Establishment and Dissolution of Separate School Districts". Those provisions are commonly known as the "4 x 4" provisions of the School Act.

### **Concerns About Fragmentation**

**8. Question:** Doesn't the expansion of Catholic separate school districts cause a fragmentation of public school education and fragmentation of the community?

**Answer:** The constitutional compromise forged by the Fathers of Confederation at the Charlottetown Conference in 1864 and at the London Conference in 1866 specifically recognized that this country would not come into being without allowance for members of the minority faith to educate their children in their own faith, even if it meant that for some purposes of education they were "separate" or "fragmented" from the majority public education system. That sentiment was reflected by Prime Minister Sir Charles Tupper, in the House of Commons on March 3, 1896:

". . . I say it within the knowledge of all these gentlemen.... that but for the consent to the proposal of the Hon. Sir Alexander Galt, who represented especially the Protestants of the great province of Quebec on that occasion but for the assent of that conference to the proposal of Sir Alexander Galt, that in the Confederation Act should be embodied a clause which would protect the rights of minorities, whether Catholic or Protestant, in this country, there would have been no Confederation . . . I say, therefore, it is important, it is significant that without this clause, without this guarantee for the rights of minorities being embodied in that new constitution, we should have been unable to obtain any confederation whatsoever."

In addition, the existence of separate schools, alleged to be a "fragmentation" of the community and of the public school system, has provided Alberta with one of the best educational systems in the world, substantiated over and over again by international testing standards. Alberta's success, in part, is due to this dual dimension of the public education system-the Catholic and public school systems. Catholic schools in communities enhance educational opportunities and provide alternative choices for parents. This applies to communities both large and small. The very educational success we are now enjoying internationally is due, in part, to this dual nature of the system that allows choice for parents.

### **Enrollment of Non-Catholic Students**

**9. Question:** If the separate Catholic school district is expanded, is it required to accept in the expansion area all persons of all denominations for enrollment in its schools?

**Answer:** Sections 44 and 45 of the School Act require that if a Catholic separate school district is expanded over a new area, then those individuals residing within the expanded boundaries of the separate Catholic school district who are Catholic, will become residents of the Catholic separate school district and cease to be residents of the public school district. However, a school board is required to enroll resident students of another board upon request of the parent of the student, if in the opinion of the enrolling board there are sufficient resources and facilities available to accommodate the student. If non-resident students of the board of an expanding separate school district or regional division make an appropriate request, the board will be required to determine whether there are sufficient resources and facilities available

to accommodate the non-resident student and if so, to enroll them in any of its schools, including schools which may be transferred to it by expansion.

### **Affect on School Utilization Rates**

**10. Question:** Doesn't the expansion of Catholic separate school districts or regional divisions affect the school utilization rates of the public school board?

**Answer:** The concern with school utilization rates is shared by virtually all rural school boards in Alberta. The solution to low utilization rates must be a joint solution arrived at between rural school boards and Alberta Infrastructure. We recognize that declining population in rural areas, including the issue of school utilization rates, is a complex and multi-faceted issue that needs the attention of both public and Catholic school boards, but it is not a reason to deny anyone their constitutional rights to choose Catholic Education.

Alberta has one of the best educational systems in the world and this has been substantiated repeatedly by international testing standards. Alberta's success, in part, is due to our multi-dimension of the public education system, of which Catholic schools are a part. Catholic schools enhance educational opportunities and provide alternative choices for parents. The very success we are now enjoying internationally is due, in part, to the multi-dimensional nature of our system that allows this choice for parents.

### **Co-Terminality**

**11. Question:** It is true that when a Catholic separate school district expands or alters its boundaries, it must become coterminous with its public school neighbours?

**Answer:** It is true that when separate school electors wish to form new separate school 4x4's, they must do so based upon the boundaries of the original and now long obsolete 4x4 public school districts. Section 219(1) of the School Act provides that "the Minister shall by Order establish the separate school district with the same boundaries as those of the public school district." This section falls within Part 8, Division 2, ss.207 through 221 of the School Act, which addresses the formation of new separate school districts by what we know as "4x4 formation." Requests of separate school electors under the Separate School Regions Establishment and Provision of Services Order is not for a new 4x4 formation, but for expansion of an already established separate school district or regional division and provision of services in the expanded area (Part 8, Division 2.1, Sections 221.1 and 221.2 of the School Act). The 4x4 process is completely separate from and not affected by the new consultative expansion process. The 4x4 formation can proceed without the new consultative expansion process, at any time during the new consultative expansion process, or if the process has not resulted in expansion of the existing separate school jurisdiction (Section 24 of the Separate School Regions Establishment and Provisions of Services Order).

### **Rolled-Up 4x4s**

**12. Question:** What are "rolled-up 4x4s," and are they different than this new consultative expansion process?

**Answer:** The Minister of Learning has the ability to re-arrange the original and now obsolete public school 4x4's into a single, larger public school district for the purpose of forming in this larger area a new separate school district. Separate school electors in adjoining original 4x4 public school districts are entitled to request that the Minister "roll-up" these original 4x4 public school districts for the purpose of forming a larger separate overlaying school district. These "rolled-up 4x4 formations" are also accomplished pursuant to Part 8, Division 2, Sections 212 through 221 of the School Act and are also completely distinct from and not affected by this new consultative expansion process.

### **Affect on the Public School District**

**13. Question:** Does the new consultative expansion process take land away from or leave a large hole in the public school district?

**Answer:** The request for the expansion or alteration of boundaries of a separate school district does not entail the transfer of land from the public school district or division to the separate school district or regional division. The jurisdiction of the public school district or division would not be altered and would always underlie any expanded jurisdiction of the Catholic separate school district or regional division as public school districts always, by definition, underlie separate school districts. There would never be "a large hole" in the area served by the public school jurisdiction, as the public school jurisdiction would be unaltered despite the expansion or boundaries alteration.

#### **Formation vs. Expansion**

**14. Question:** Does Section 221.3 of the School Act require that a new separate school district be formed under Division 2 of the School Act whenever services by a separate school board are to be extended to areas where such services have not been previously provided?

**Answer:** The Separate School Regions Establishment and Provision Of Services Order is a Ministerial Order confirmed by Alberta Regulation pursuant to sections 221.1, 221.2 and 239 of the School Act. It allows the Minister of Learning to "provide for services by a separate school board in a Separate School Region and is the consultative expansion process. On the other hand, section 221.3 allows the Minister to make regulations in respect of the establishment or formation of a new separate school district in the region "under Division 2." This is an establishment or formation provision, not an expansion provision and references establishment or formation under Division 2, rather than expansion under Division 2.1. Therefore, section 221.3 of the School Act is referable to the traditional 4x4 formation provisions of Part 8, Division 2, sections 212 through 221 of the School Act.