Catholic Dimension - Legally Speaking - Spring 2007

Kevin P. Feehan
Dentons Canada LLP

Behind every successful right

...is another constitutional right. The very dated quote from which the title of this article is taken was meant to indicate that the successful person is only enabled to be successful due to the support, effort and abilities of those who stand behind or beside them, lending the infrastructure, resources and grounding which allows for such success to be achieved.

If such is the case for individuals, so too is it the case for Catholic educational constitutional rights.

It is well-known that denominational education rights in Canada find their genesis in section 93(1) of the *Constitution Act, 1867* which grants a plenary right over education to the provinces subject to the protection of such minority denominational education rights as existed at the time of Confederation. For Ontario, whose rights so protected were primarily, although not exclusively, set out in the *Common Schools Act, 1859* and the *Scott Act, 1863*, and for Quebec in the *Education Act, 1846*. In Alberta and Saskatchewan, the constitutional protection set out in section 93(1) of the *Constitution Act, 1867* was modified by section 17 of the *Alberta Act, 1905* and the *Saskatchewan Act, 1905* which preserved for the denominational minority, whether Protestant or Roman Catholic, in those two new provinces the minority denominational guarantees set forth in chapters 29 and 30 of the *Northwest Territories Ordinances, 1901*.

Although those rights are not frozen in time, nor can or should be comprehensibly listed, to be determined in each factual situation in context, as they arise, those rights include at least the right of the denominational minority to establish denominational schools, be liable only to assessments of such rates as they impose upon themselves, not be liable to assessments imposed by the school board of the majority, and to permeate their denominational belief in all aspects of the educational system.

Behind those well-known constitutional rights is a less examined constitutional right, which has effect in Alberta, Saskatchewan, Manitoba, the Northwest Territories and Nunavut which pre-dates, supports and made mandatory the constitutional rights to which we more commonly refer.

The Supreme Court of Canada has adopted the theory of a "mé canisme de constitutionalization", or what the Court has called the "black box theory of constitutionalization" by which some legislation, for reasons of national interest and upholding the fundamental principles of society, become "constitutionalized", such that they are said to no longer be subject to amendment by the legislature or parliament, but only pursuant to the constitutional amending formula set out in the *Constitution Act, 1982*.

One such document, listed in the schedule to the *Constitution Act, 1982*, is the *Rupert's Land and North-Western Territory Order*, signed by Queen Victoria at the Court at Windsor on June 23, 1870.

When the Canadian Parliament presented their address to Queen Victoria in 1870, asking that Rupert's Land, acquired from the Hudson's Bay Company, and the North-Western Territory be united with Canada, they specifically requested in this vast new area "the formation... of political institutions bearing analogy, as far as circumstances will admit, to those which exist in the several provinces of this Dominion." The Order of Queen Victoria in response to that address, which became a constitutional document for Canada, acknowledged that "from and after [July 15, 1870]... [Rupert's Land and] the ... North-Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the... recited address." As a result, all of Rupert's Land and the North-Western Territory was brought into Canada with a guarantee that its political institutions would be established and protected in the same manner as those in the existing provinces.

What that specifically meant in 1870 by the Order was reviewed during the autonomy debates of 1905 on the addition of Saskatchewan and Alberta to Confederation. At that time, the leading proponent of Catholic education rights in the new

provinces was Sir Charles Fitzpatrick who had been legal counsel to Louis Riel in 1885, became Solicitor-General of Canada from 1886 to 1902, Minister of Justice for Canada from 1902 to 1906, was the primary drafter of the *Alberta Act, 1905* and the *Saskatchewan Act, 1905* and later went on to become Chief Justice of the Supreme Court of Canada from 1906 to 1918. On July 5, 1905, Sir Charles Fitzpatrick acknowledged that when Rupert's Land and the North-Western Territory were gathered into Confederation "they were brought in under a compact entered into between the people of Canada and the Imperial authorities" which was recorded in the petition to Queen Victoria and the Order of 1870. Minister Fitzpatrick said that compact included "separate schools" in the new territories.

Quoting from the speech of Sir Edward Blake in 1875 on the passage of the first *Northwest Territories Act*, he said:

"We are taking out of provincial politics and out of municipal control, this vexed question of education and are settling it for all time insofar as these Territories are concerned... and those who shall hereafter go into the Territories to establish their homes for themselves and their children will know the conditions under which they take possession of the said land. They will know that their children will be educated under the system we are creating today, which provides for a separate school system."

Sir Charles Fitzpatrick went on to say that a denial of separate education rights in the vast new territories would have been a repudiation of the contract with the Hudson's Bay Company by which much of these lands came into Confederation, and "the implied parliamentary contract entered into with the minority of the Northwest Territories".

As a result, from 1870 Catholic separate education was a constitutional right vested in all of the peoples in what was to become Manitoba, Saskatchewan, Alberta, the Northwest Territories and Nunavut.

That view of a constitutional right behind a constitutional right was supported by the correspondence of Archbishop Alexandre-Antonin Taché , Bishop of the North-west Diocese and St. Boniface, and Archbishop of St. Boniface between 1850 and 1894, on the promise made to him personally by Governor General Sir John Young, Lord Lisgar, on behalf of Queen Victoria, in 1870. Archbishop Taché was, at the time, being asked by Sir George-Etienne Cartier to attend in the Red River Colony to present the position of the federal government to Louis Riel in an effort to bring an end to the first Riel Rebellion of 1869/1870.

Archbishop Taché said in his correspondence to the Honourable Council of Canada, now the Privy Council of Canada, in 1894 that he was assured "that on the union with Canada, all [the persons of the Northwest Territories] civil and religious rights and privileges [would] be respected." He said that Queen Victoria was anxious that he should persuade the people of the Red River Colony that they had "nothing to fear on account of their religion" and that "the people may rely that respect and attention will be extended to the different religious persuasions". By this, Archbishop Taché was referring to the guarantee of Catholic separate education rights in all of Rupert's Land and the North-Western Territory.

So when we in Alberta point to the strong protections given to Catholic education in the *Alberta Act, 1905* and the *Northwest Territories Ordinances, 1901*, we trace that constitutional protection to a much earlier constitutional right, that which was granted by Queen Victoria in 1870 for the purpose of bringing Rupert's Land and the North-Western Territory, including the Red River Colony, into Canada and bringing an end to the first Riel Rebellion, and that which is embodied in the constitutional right behind the constitutional right: *The Rupert's Land and the North-Western Territory Order, 1870*.