

Catholic Dimension - Legally Speaking - Spring 2009

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Here comes da Judge

One of the realities for Catholic education, separate or public, in Alberta is that it has from time to time been forced to the Courts in order to maintain and defend its right to exist, including rights to adequate funding, the right to preferential hiring, promotion, and discipline, and the collective right of the majority of Catholic electors to have all Catholic electors support the Catholic school system.

The almost unbroken rule in litigation in the Province of Alberta has been that Catholic separate school rights are not used as a sword, but only as a shield; that is, Catholic school systems attend before the Courts almost exclusively in the role of defendants or intervenors, and not as plaintiffs; defenders of their rights rather than aggressors in expanding or extending those rights. However, the history of Catholic school litigation is a history of remarkable success. In almost every instance in which Catholic separate schools have litigated in the Courts in Alberta, they have been successful in defending Catholic school rights, particularly in the areas of funding, the right to preferential hiring, promotion, and discipline, and the maintenance of rights as collective in the support of Catholic schools.

Funding

Much of the litigation in the 1960s and 1970s in Alberta surrounded funding of separate Catholic schools from the taxation assessment base.

In the 1976 decision *Jones v. Edmonton Catholic Schools*, the Supreme Court of Canada addressed and upheld the right of a corporation to designate a percentage of its property to be assessed for separate school purposes based upon the value of shares in the corporation owned by separate school supporters in relation to the total value of all of its shares, and the right of a separate school district to require corporate assessment based upon the percentage of the corporation's assessable property to be entered and assessed for separate school purposes in the same ratio as the total assessed value of the property of the corporation in the district to the total assessed value of the property in the district of all persons other than corporations. This decision, and the legislation upon which it was based, significantly improved the access of Catholic separate school boards to a corporate assessment base in Alberta.

In 1979, the Calgary Board of Education challenged the provisions of the *School Act* in the way that it provided for the distribution of corporate taxes, for payments in lieu of taxes and for the ability of a non-Catholic to opt to support a separate school board, in the decision *Calgary Board of Education v. Alberta*. The trial Court came to the conclusion that the constitutional protection granted under section 17(1) of the *Alberta Act, 1905* was "protective legislation" guaranteeing rights only to minority denominational residents and the boards established by them, and that section 17(2) of the *Alberta Act, 1905*, prohibited discrimination of any sort in the allocation of grants to school boards. As a result, the challenge by the Calgary Board of Education to the assessment and funding provisions of the *School Act* failed. In the Court of Appeal, the Court said that the protection of section 17(1) of the *Alberta Act, 1905* existed: "to protect the minority, leaving the majority to protect themselves through the use of the democratic instrument, the ballot box", and therefore again denied the challenge to the corporate division of taxes between separate and public schools, or the ability of non-Catholics to support the separate school system.

In 1994, the Government of Alberta passed the *School Amendment Act, 1994* which created a new scheme utilizing the Alberta School Foundation Fund, for funding school boards in order to remove fiscal inequality in the school system. Under this scheme, school boards could not raise money through direct taxation, but revenues from the property assessment base were disbursed by the provincial government to school boards on an equal amount per student basis. Separate school boards were permitted to "opt-out" and requisition taxes directly from their electors, and then receive a "top-up" payment in order to insure that they received the same amount per student as public boards. This "opt-out, top-up" system existed only with respect to the taxation assessment base and was in addition to the system of grants from the

province's General Revenue Fund. The ability of separate schools to opt-out of the Alberta School Foundation Fund, but be topped up to the equal per pupil funding amount from the assessment base was challenged by the Public School Boards' Association of Alberta in *PSBAA v. Alberta*, on the basis of "reasonable autonomy", "discrimination" and "mirror equality."

The Alberta Court of Appeal rejected all of the arguments advanced against this funding scheme. It found that the Funding Framework's conditions were intended by the government to apply only to tax monies requisitioned by opted-out school boards, and the only difference in treatment between public and separate school boards was the ability of separate school boards to opt-out of the central fund and receive a portion of their property assessment money directly from the electors. That scheme was found not to discriminate against public school boards, using a standard of fairness. The Court of Appeal found that no unfairness occurred when separate and public boards received the same dollar amount per student from property assessment, whether through a central fund or through a combination of the central fund and opted-out requisition.

In a separate concurring decision in the Court of Appeal, Mr. Justice Berger further said that one of rights protected under section 17(1) of the *Alberta Act, 1905* was the right of separate schools to tax their own supporters and control the spending of the money raised through property assessment in pursuit of their denominational objectives. As a result, the ability of separate school boards to opt-out of the new funding scheme preserved the constitutional right of separate school boards to levy taxes from their supporters, and the government could not impose "envelopes" or spending restrictions which affected any funds raised by opted-out separate school boards through the taxation of their own supporters.

The Supreme Court of Canada confirmed that this funding scheme was constitutional and did not discriminate against public school boards in the appropriation or distribution of monies for separate schools. It said that section 17(2) of the *Alberta Act, 1905* imposed a standard of fairness in the distribution of government monies and said that the unique ability of separate school boards to opt-out of the scheme and be topped-up was not a source of discrimination, but was financially fair. It also agreed that section 17(1) of the *Alberta Act, 1905*, did not create a principle of mirror equality, because it was separate school protective legislation.

The Right to Preferential Hiring, Promotion, and Discipline

In 1987, the Alberta Court of Queen's Bench addressed the issue as to whether a Catholic separate school board had a preferential right to discipline or dismiss for denominational cause in *Re Casagrande and Hinton Roman Catholic Separate School District No. 155*. It concluded that the right to establish a Catholic separate school included all of the rights and powers necessary to maintain the denominational character of the schools, and specifically included the right to discipline or dismiss teachers for denominational cause. The Court said that those rights were reaffirmed by section 29 of the Charter, override all other provisions of the Charter and any provisions of the *Individual Rights Protection Act*, now the *Human Rights, Citizenship and Multiculturalism Act*, to the extent that such other rights conflicted with the constitutional rights of a separate school board to fully protect its denominational flavour and character.

Collective Rights

It has always been accepted that denominational school rights are "collective" such that the majority of the denominational minority compel all of the denominational minority to support a separate school system, once established. This concept was challenged in Alberta in the 1975 decision *Re Schmidt and Calgary Board of Education*. At the Alberta Court of Appeal, the Court upheld the provisions of the *School Act* which provided that all members of the minority religious faith were required to support separate schools and were not residents of the public school system. They said the following:

"The majority of the minority have the right to compel the entire minority to join the separate school division. That is the situation as it was in 1901, and in 1905 and the way it is in Calgary today. In my opinion there is no legislative authority in Alberta to abolish that scheme..."

As a result, student residency, and the ability to vote and run for the position of school trustee are determined by one's denomination.

Conclusion

Catholic schools, separate and public, are cautious about appearing before the Courts of Alberta relying upon their constitutional rights. However, when forced to do so, they have been very successful in protecting and defending those constitutional rights. The position of Catholic schools should remain as it has been for more than 100 years; that is, litigation to defend constitutional rights if necessary, but not necessarily litigation to defend constitutional rights. The shield but not the sword is the best philosophy, and a philosophy that has been successful and proven in this province to the present.