

## Catholic Dimension - Legally Speaking - Spring 2013

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### Act 3, Scene 4

If this were Shakespeare, in Act 3, Scene 4, Macbeth would be horrified at the appearance of the ghost of Banquo at the banquet table, or Lady Capulet would retire to Juliet's room to mourn the death of Tybalt. But in Alberta, Act 3 is the third iteration of the Education Act, Bill 3, 2012, following Bill 18 (Spring Session, 2011) and Bill 2 (Spring Session, 2012), and Scene 4 is the beginning of work on the regulations to the Act. The Education Act was given first reading on October 23, second reading on October 24, went to Committee-of-the-Whole from October 25 to 31, given third reading on November 19, and Royal Assent on December 10, 2012, to come into force on proclamation.

#### Shared Facilities

The first draft of section 192(2) of this Bill allowed the Minister to order a separate school board to make space available in a Catholic school to the students of a public school board, providing to the Minister the discretion to order the sharing of the facilities. That provision was deleted from Bill 3, and there is no other provision in the Act as passed, that would allow the Minister to order shared facilities.

#### Blended Board

The first draft of section 112(1) allowed the Minister to establish a school division consisting of "any number of public school districts, separate school districts, and school divisions", effectively allowing the Minister to create "blended boards" whereby one board would administer both public and separate schools within their jurisdiction. That original provision has been modified by the addition of section 112(2) which provides that a school division may only be established consisting of both public and separate school districts, or a public and a separate school division on the request of both school divisions. Section 112(3) provides that a school division may include both a public and separate school division, which finally legalizes the blended board arrangement in the St. Paul area.

#### The Alberta Human Rights Act

The earlier draft of section 16 of Bill 3 imported into the Education Act an explicit application to schools of the Canadian Charter of Rights and Freedoms and the Alberta Human Rights Act, and in effect made the Minister the interpreter of decisions under those statutes as they applied to school boards. However, in the final version of the Education Act, that provision was removed and the language reverted to that of section 3(1) of the School Act, requiring that the educational program and materials must "reflect the diverse nature and heritage of society in Alberta, promote understanding and respect for others and honour and respect the common values and beliefs of Albertans" and "must not promote or foster doctrines of racial or ethnic superiority or persecution, social change through violent action or disobedience of laws".

#### Eligibility to Run for Public School Trustee

Section 74(4), and Section 135(4) for Francophone regional authorities, enables separate school residents to vote or run for the position of public school trustee. This provision, known as the

“Brassard Choice Provision”, has been specifically drafted to avoid the constitutional question addressed in *Re: Schmidt and Calgary Board of Education et al (1976, C.A.)* which provided that one could not alter residence by legislation. In these provisions, separate school residents maintain their residence in a separate school district and their declaration that they are of the minority faith (sections 4, 5, 74, 98(d) and 109(5)) but are granted the additional right, without interference with their residence or minority faith declarations, to vote and run for public school trustee. No rights are lost to separate school electors, although there is concern that this additional right given to separate school electors, opposed by the Alberta Catholic School Trustees’ Association, has the potential to cause political division and discord, because equivalent rights have not been, and cannot constitutionally be, granted to public school electors.

#### Exclusion from Religious Instruction

Section 58(2) of the Education Act continues to permit a student to be excluded from religious instruction or exercises, upon written request from a parent, and mirrors similar provisions in place since the 1988 School Act.

Section 11(1) of the Alberta Human Rights Act, allows the same right of exclusion from religious instruction or exercises, but places a reverse onus upon teachers and school boards to give notice whenever courses of study, educational programs or instructional materials deal primarily and explicitly with religion, human sexuality or sexual orientation.

An accommodation has been made for Catholic separate schools to allow compliance with this reverse notice provision by placing a notice of permeation in the registration materials of each school district. The standard Notice of Religious Permeation provides that all Catholic separate schools exist to fully permeate Catholic theology, philosophy, practices and beliefs, the principles of the Gospel and teachings of the Catholic Church, in all aspects of school life, including the curriculum of every subject taught, both in and outside of formal religious class, celebrations and exercises, and explicitly indicates that all instructional materials, instruction and exercises in the school will at all times include subject matter that deals primarily and explicitly with religion. Notice, however, must still individually be given with respect to instruction that deals primarily and explicitly with human sexuality or sexual orientation.

#### Establishment of New Separate School Districts

Sections 98 through 109 of the Act set out the establishment provisions for new separate school districts, colloquially known as the “flower-petal formation”. Separate school formation is initiated by at least three separate school electors wishing to establish a separate school district within the area of the public school district (s. 99). Separate school electors must notify the Minister, the operating separate school division, the public school division, and the municipalities affected, of their intention (s. 100).

An initial meeting between the separate school electors, the separate school division and the public school division must be held to determine whether an agreement can be reached on the proposed establishment area (s. 101(1)). That establishment area may be of any size agreed upon, and the Minister must approve the agreed upon establishment area, providing it meets the requirements of the regulations (s. 101(2)). If agreement on the establishment area cannot be reached, the Minister

may determine that the establishment area be the area of the original public school district (4 x 4) 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” (s. 101(3)). This is the “flower petal”. It is important to note that in this section, the word “may” indicates legislative empowerment, not discretion in the Minister. It is also important to note that all of these provisions, like most of the provisions in this division are “subject to the regulations” (sections 101(2), (3), (4), 103(2), (3) and (5), 104(4)(b), and 105(b)). The drafting of these regulations will clearly be critical to the operations of these formation provisions.

After the establishment area has been determined, either by agreement (s. 101(1)) or by the Minister (s. 101(3)), the initiating separate school electors must prepare a petition signed by no fewer than three of the initiating separate school electors (s. 102(1) and (2)(a)). The petition must be provided to the Minister, the separate school division and the public school division (s. 102(3)).

After the petition has been prepared, there must be a community information meeting to provide “information with respect to the process and operational implications of the establishment of a separate school district” (s. 103(1)), but no meeting quorum is required and no vote will be taken at the meeting.

After the community information meeting, the petitioners may request that the separate school division call a vote of the separate school electors in the establishment area and the vote must be held on a day separate from and after the community information meeting (s. 104). A notice must be given with respect to the conduct of the vote in a manner to be provided in the regulations (s. 105). Section 106 maintains the voting quorum at 25% of the separate school electors eligible to vote and cast a ballot (s. 106(1)), which voting quorum is unchanged from section 217 of the School Act. Within 10 days of the vote, notification of the result of the vote must be sent to the Minister (s. 107) and if the vote is successful, the Minister is required mandatorily to establish the separate school district in the separate school establishment area (s. 108). If the vote is unsuccessful, there must be a hiatus before a new petition may be taken, of either one or two years (depending on the magnitude of the vote, more or less than 60% against formation) (s. 110).

Once established, the separate school district will be added to the separate school division (s. 109(2)), although the newly resident students of the separate school district are entitled to finish the school year, including the right to transportation, at the public school (s. 109(3)).

A separate school district may be disestablished on the request of the separate school division, and after a plebiscite requesting disestablishment (s. 111(1) and (2)), and if disestablished, the residents of the separate school district become residents of the public school division (s. 111(4)).

#### Other Provisions

The Education Act also addresses in detail the concepts of residency and resident students (ss. 4, 5, 74, 98(d) and 109(5)). Section 18(1)(d) provides that the Minister may not prohibit any course or program, study, learning, or teaching resource, within “the right of a board to provide religious instruction”, and therefore may not prohibit curriculum which is specifically focused on Catholic religious content. Section 32 of the Act provides that a parent “has the prior right to choose the kind

of education that shall be provided to the parent's child" and the responsibility to "act as the primary guide and decision-maker with respect to the child's education", supporting the primacy of the parent in the education of the child.

Section 51 gives broad "natural person" powers to school boards as long as those boards do not act inconsistently with their responsibilities as set out in section 33. This is important for Catholic school boards which may now rely upon those natural person powers to assert their entitlement to act in accord with directions of the local Bishop, pursuant to the Code of Canon Law, in accordance with Catholic principles and doctrine, as these are civilly permissible as a "right ..., power ... (or) privilege ... of a natural person". Section 58 of the Education Act provides that a board may prescribe religious instruction and exercises and permit persons other than teachers to provide religious instruction in the schools.

Other provisions of the Act address the alteration of school division boundaries (s. 114), affirm the establishment of Separate School Regions (s. 123), repeat the provisions from the School Act with respect to francophone education regions (s. 124-136), and repeat familiar provisions with respect to finance and property (s. 146 & 147).

#### The Regulations

Many provisions of the Act call for further provisions to be set out in the regulations. The regulations are currently being drafted by Alberta Education officials, and there has been a request for input from school associations, boards, parent groups and interested parties. ACSTA has agreed to propose regulations with respect to the new "flower-petal" separate school formation provisions.

On April 17th, the Alberta Government announced the formation of The Minister's Education Act Regulatory Review Committee chaired by MLA and former ASBA President, Maureen Kubinec. ACSTA will participate closely with this committee in the development of the regulations under the Act. Once the regulations are complete and proclaimed, it is expected that the Education Act will receive proclamation for the 2015-2016 school year.