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May 3, 1999

To Unit Presidents
From Marshall Jarvis, President
Re Bill 160 Constitutional Reference

Please find enclosed the following important documents:

1. OECTA's Constitutional Challenge to Bill 160: A Summary of the Court of Appeal's Decision
2. Commentary by Paul Cavalluzzo: What is the significance of the Court of Appeal decision for separate school supporters?

Of particular importance is the commentary provided by legal counsel on the meaning of the of the Ontario Court of Appeal's ruling should it be allowed to stand as the final word on this issue. I would suggest that the enclosed documents should be shared with your local school council, school board officials and local trustees. In the commentary, the OCSTA position on the right to tax as a constitutionally protected right of Roman Catholic ratepayers is detailed. In the light of the Ontario Court of Appeal ruling, it would now appear that OCSTA has totally abandoned this long held position. Of interest is the fact that other Catholic trustee bodies in Canada, most notably, Alberta, support the OECTA position. As this case moves to the Supreme Court of Canada, it is anticipated that these Catholic trustee organizations will seek intervenor status in support of the OECTA position.

MJ: mj

OECTA's CONSTITUTIONAL CHALLENGE TO *BILL 160*

A Summary of the Court of Appeal's Decision

On 27 April 1999, a five-judge panel of the Ontario Court of Appeal unanimously ruled that *Bill 160* does not violate separate school supporters' Constitutional rights to a separate denominational school system. Specifically, the Court ruled that section 93(1) of the *Constitution Act, 1867* does not protect separate school boards' right to tax their supporters or to have financial autonomy in managing the separate school system.

This paper contains the following:

- * information on the background to the court challenges;
- * a summary of the Court of Appeal's decision; and
- * a commentary on what the Court of Appeal's decision means for separate school supporters.

BACKGROUND

The Changes that were made by *Bill 160*

In December 1997, the Harris Government passed *Bill 160* which made fundamental changes to the education system in Ontario. The Bill made similar changes to both the separate school system and the public school system.

As it relates to the separate school system, *Bill 160* removed separate school boards' right to raise money for education by taxing separate school supporters. Under *Bill 160*, the Government gave itself complete control to decide how much money the separate school system will receive and to decide how much property tax separate school supporters will pay to support the system.

The Government followed up on *Bill 160* by introducing its Funding Formula which put further restrictions on separate school boards' ability to control and manage the separate school system. Through the Funding Formula, the Government controls how much money each individual school board will receive and directs how that money must be spent. For example, the Funding Formula directs how much money can be spent on cleaning and heating the schools, how much can be directed towards teacher salaries, how much can be directed towards repairing school facilities, etc.

An Outline of the Constitutional Challenge

In December 1997, the Ontario English Catholic Teachers' Association (OECTA) applied in court to challenge *Bill 160* on the ground that it was unconstitutional. OECTA argued that *Bill 160* violated separate school supporters' constitutional right to have a separate denominational school system that was controlled and managed by separate school supporters. In essence, OECTA argued that by removing the right to tax and by imposing control on how boards can spend funds for education, the provincial Government had taken complete and effective financial control over the separate school system and so had violated the right of Roman Catholics in Ontario to have a separate denominational school system controlled by Roman Catholics. Under *Bill 160*, the system would be effectively controlled by Queen's Park.

The Ontario Catholic School Trustees' Association (OCSTA) opposed OECTA's court challenge and in court sided with the provincial Government. OCSTA took the position that while separate school boards may have a constitutional right to tax their supporters, *Bill 160* did not violate the Constitution because under the Funding Formula the Government had decided to give separate school boards the same amount of funding as they gave to the public school boards. OCSTA took the position that because separate school boards were getting the same amount of money as public boards, the right to a separate denominational school system was not violated.

The Elementary Teachers' Federation of Ontario, Ontario Secondary School Teachers' Federation, Ontario Public School Boards' Association, and some individual teachers also applied to challenge *Bill 160*. They claimed that under the Constitution, the public school system enjoys the same rights as the separate school system and so their rights had been equally violated by *Bill 160*.

The Decision of Justice Peter Cumming

The court case was first heard by Justice Peter Cumming in the Ontario Court General Division. On 22 July 1998, Justice Cumming ruled that *Bill 160* violated Roman Catholic school supporters' constitutional rights.

In particular, Justice Cumming ruled that:

- * Only to the extent that *Bill 160* removes or affects the right of separate school boards to tax separate school supporters to support denominational schools, *Bill 160* is unconstitutional and should be struck down.
- * He ruled that the restrictions on spending which were imposed by the Funding Formula were valid under the Constitution and so the Funding

Formula could stand.

- * He ruled that the unconstitutional parts of *Bill 160* would not be struck down until January 2000 to allow the government time to restore the right to tax.

The Government appealed Justice Cumming's ruling on the right to tax. OECTA appealed Justice Cumming's ruling on the Funding Formula.

The Decision of the Court of Appeal

On 27 April 1999, the Court of Appeal released its decision and ruled in favour of the Government. The Court ruled that *Bill 160* did not violate the Constitution. The summary below explains the Court of Appeal's decision in more detail.

SUMMARY OF THE COURT OF APPEAL'S DECISION

The Court of Appeal addressed five issues. The first two issues were raised by OECTA and relate directly to the separate school system:

1. Does *Bill 160* violate separate school boards' constitutional right to tax?
2. Does *Bill 160* violate separate school boards' constitutional right to make independent decisions in relation to education spending?

The other three issues were raised by the public school unions and boards:

3. Do the public school boards have the same constitutional rights as separate school boards?
4. Does the Constitution include an unwritten convention that grants school boards the right of local taxation?
5. Does *Bill 160* violate the Constitution by giving the Minister of Finance sole power to set the school tax rate by regulation free from debate and approval by the Legislature?

Ruling on Separate School Boards' Right to Tax

First, the Court considered whether *Bill 160* violates s. 93(1) of the *Constitution*

Act, 1867 by removing the right to tax from separate school boards. Prior to *Bill 160* separate school boards had the power to determine what level of funding was appropriate for the local separate school board and could set property taxes accordingly.

Section 93(1) of the *Constitution* provides that the provincial legislature has the exclusive power to pass laws on education but that it cannot pass any law that prejudicially affects any right or privilege with respect to denominational schools that existed in law at the time of Confederation.

The Court of Appeal found as follows:

- * Separate school boards' right to tax is not protected under the Constitution.
- * Even though separate school boards had the legal right to tax in 1867 this right is not protected under the Constitution because it is not necessary to ensure the survival of the separate school system.
- * The right to tax does not serve denominational ends that other ways of funding the system cannot provide. In particular, the right to tax does not protect the financial autonomy of the separate school system.
- * What is protected under the Constitution is the right of the separate school system to receive Government funding in a fair and non-discriminatory way. It is the right to funding, not the right to tax, that is guaranteed by the Constitution.
- * Under *Bill 160*, separate school boards are receiving more money than they did before and the separate and public systems are being funded at the same level. As a result, *Bill 160* does not violate the Constitutional right to funding.
- * As a result, the Court of Appeal overturned Justice's Cumming's declaration that *Bill 160* was unconstitutional.

Ruling on Separate School Boards' Right to Make Spending Decisions

Second, the Court of Appeal considered whether *Bill 160* violated a Constitutional right to financial control and management of the separate school system by separate school boards.

The Court of Appeal ruled as follows:

- * The Constitution does not protect a right of separate school boards to have full independence in making financial decisions.
- * The Constitution only protects the limited right of separate school boards to make spending decisions which are necessary to secure the “denominational character” of the separate schools. The Court lists hiring Roman Catholic teachers and chaplains, providing space for chapels and designing and delivering “denominational aspects” of the curriculum as examples of the kind of spending decisions that are protected under the Constitution.
- * The Funding Formula imposes specific restrictions on how school boards may spend their funds and determines the total funding that each board will receive each year. However, the Funding Formula applies equally to public and separate school boards to limit the spending power of trustees in both systems and it limits their power to spend in matters that are “entirely non-denominational”.
- * The Court ruled that the Funding Formula did not prejudicially affect the “denominational” matters listed above and so did not appear to damage the continuing viability of the separate school system or its ability to provide suitable education “with a denominational character”. Therefore the Funding Formula is allowed to stand under the Constitution.
- * Likewise, the Court ruled that Division D of *Bill 160* was constitutional. This part of *Bill 160* provides that when a school board is in financial difficulty, the provincial Government can take over supervision of the school board’s affairs. The Court of Appeal ruled that Division D did not violate any Constitutional right of separate school supporters because it provides sufficiently defined and precise limits on when the Minister can take control over a school board and when the Minister must return control to the school board. The Minister does not have unlimited discretion and the provincial control cannot last indefinitely so Division D cannot be said to prejudicially affect the right of separate school trustees to financially manage their schools.

Constitutional Rights of Public School Boards

The public school bodies argued that the Constitution gave them the same rights

as exist for the Roman Catholic community. In view of its ruling above that *Bill 160* did not violate the constitutional rights of the Roman Catholic community, the Court held that the legislation did not violate any alleged rights of the public school community. The Court did not actually rule on whether the public school system has protected rights under the Constitution.

Constitutional Convention of Local Taxation

The Court of Appeal rejected the argument that there was a constitutional convention which granted school boards a right of local taxation. Even if such a convention existed it could not be used to strike down or overrule a specific law passed by the Government.

Delegation of the Power to Set the Tax Rate

Finally, the Court considered and rejected the argument that *Bill 160* violated the Constitution because it gave the Minister of Finance the power to set the school tax rate by regulation without any debate or approval in the Legislature. The *Constitution Act, 1867* requires that Bills for imposing a tax must originate in the Legislature. The Court of Appeal ruled that the power to impose the school tax in the first place is contained in legislation -- the *Education Act* -- which did properly originate in the Legislature. It was not unconstitutional, then, for the Legislature to delegate an administrative detail of the tax -- setting the tax rate -- to the Minister of Finance.

Outstanding Issue: Eligibility for Election as Trustee

The final issue which was argued in the case was whether *Bill 160* violated the *Charter* by prohibiting spouses of school board employees from standing for election as trustees. The Court of Appeal's decision did not address this issue and it will release a decision on this question at a later date.

Conclusion

Overall, then, the Court of Appeal ruled that *Bill 160* did not violate the Constitution. The Court unanimously allowed the Attorney General's appeal from Justice Cumming's decision, dismissed OECTA's appeal on the question of school boards' spending powers, and dismissed the appeal by the public school unions and boards.

COMMENTARY

WHAT IS THE SIGNIFICANCE OF THE COURT OF APPEAL'S DECISION FOR SEPARATE SCHOOL SUPPORTERS?

The Court of Appeal's decision that *Bill 160* is constitutionally valid has a number of important implications for separate school supporters. In particular, by failing to grant constitutional protection to the right to tax and the right to financial control and management by separate school boards, the decision threatens the autonomy of the separate school system and accepts that the provincial Government can have virtually exclusive control over financing separate school education.

Because of the threat *Bill 160* poses to the separate school system, OECTA will be seeking leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.

Loss of the Right to Tax

Until *Bill 160*, the right to tax has been a fundamental part of the separate school system which pre-dates Confederation. The right of separate school boards to tax their supporters had been crucial in providing not only a means of financing the separate school system but also of securing for the Roman Catholic community autonomy in relation to the school system. The right to tax separate school supporters had provided a guarantee of "separateness" for the system by ensuring that the separate system is not entirely subject to the whims of the majority population and the government of the day.

That right to tax was removed in *Bill 160*. In finding that the Constitution does not protect a right to tax, the Court of Appeal has dealt a significant blow to the "separateness" of the separate school system.

The Court of Appeal has ruled that it is permissible under the Constitution for the provincial Government to have exclusive power to determine the level of funding that is available to the separate school system and to direct how separate school boards must spend their funds.

The Court of Appeal's decision indicates that as long as the public and separate school systems are treated the same, there is no violation of the Constitution. The level of funding is entirely at the discretion of the Government of the day. While today the Government may decide to provide a particular level of funding, there is no constitutional right to adequate funding and no guarantee of adequate funding into the future.

As long as the right to tax was protected, it ensured that the Roman Catholic community had some autonomy to determine how much funding was adequate for the separate school system. If the grants provided by the government were unable to address local denominational concerns, the separate school board had the autonomy to raise further funds from the Roman Catholic community to provide what the community determined was an appropriately denominational education for their children. Prior to *Bill 160*, most separate school boards used their taxing power to raise funds over the ceiling set for government funding of education.

As a result of *Bill 160* and the Court of Appeal's ruling that *Bill 160* is constitutional, separate school boards no longer have this measure of autonomy. They are entirely dependent on the Government of the day to determine what funding is appropriate for a denominational education. If the government fails to provide an amount that is sufficient for suitable denominational programming, the school boards' only option is to take money away from other programmes. The school board can no longer look to the community for tax support even if the community itself wants to see the particular denominational education programming implemented.

Moreover, separate school boards are now entirely dependent on changing political policies in relation to education funding. For example, should the Government decide that it no longer supports the principle of fully funding public education, or should it decide that the private sector should bear a portion of education costs, the Government could decide to reduce the amount of money which it grants to the system and could even reduce that amount to zero. The Court of Appeal's decision suggests that as long as the public and separate school systems are treated the same, there is no recourse under the Constitution.

Ultimately, the loss of the right to tax is the loss of autonomy. The separate school system has become dependent upon the largess of the provincial Government to determine what is appropriate for denominational education.

OCSTA's Failure to Protect the Right to Tax

In the past, in numerous documents OCSTA (and before it OSSTA) has supported the position that the right to tax was fundamental to ensuring the separateness of the separate school system and has defended the right to tax as an important denominational right under the Constitution.

* In a 10 July 1992 publication, "A Matter of Principle" the OSSTA wrote:

"The autonomy of school boards is critical to Catholic education. It ensures that we will be able to 'Catholicize' our schools through hiring,

curriculum development, professional development and countless other activities. The constitutional power to tax given to Roman Catholic separate school boards was intended to assure a measure of autonomy for the minority that did not depend on the whim of the majority.²⁵ [Attorney General of Québec v. Greater Hull School Board, [1984] 2 S.C.R. 575.]

....

“[O]SSTA believes that a measure of financial autonomy is necessary for schools boards to function effectively. Such autonomy derives partly from the ability to raise funds locally, and partly from discretion in the spending of funds.”

- * In “The Catholic School Trustee: Service & Stewardship in Christ”, (1st Edition - May, 1994, 2nd Edition - Revised May, 1997), the OSSTA wrote:

“Catholics in Ontario are privileged to have their own school system as a constitutional right. This fundamental right includes the right to:

....

collect taxes; “

- * In its “Brief to the Standing Committee on Finance and Economic Affairs, ‘Fair Taxation in a Changing World’ The Report of the Ontario Fair Tax Commission,” January, 1994, OSSTA wrote:

“Subject to our concerns about the designation of school support, the Recommendations of the Fair Tax Commission in relation to education finance would appear to be ‘fair and non-discriminatory’, and would appear to ensure ‘equality of access to public funds’ and ‘to means of taxation’. **Because the right to tax is an important protection against less benign provincial governments, OSSTA would oppose its elimination.** Instead we recommend a slightly different approach that has an historical precedent.” [emphasis in original]

- * In *Catholic Education and Separate School Boards in Ontario*, Completion Office - Separate Schools, April, 1988, again constitutional protection for the right to tax was supported:

“This report analyses the separate school system in Ontario to determine

what functional and structural features of a Roman Catholic separate school board are essential to ensure its ability to provide Catholic education.

....
“The position of the members of COSS [which included the OSSTA] is that the protection contained in s.93(1) of the *Constitution Act, 1867*, and s.29 of the *Charter*, is not only functional, since it preserves the ‘essential Catholic nature’ of separate schools and ‘conduct essential to the proper functioning of a Catholic school’², but is also structural since:

‘[t]hese rights and privileges include the large measure of autonomy in the control and management of their schools which Roman Catholics enjoyed at Confederation. But they involve more than the administrative structure, which, in itself, is intended only to be the means of preserving and fostering the religious and other values of denominational education.’³

“We share the view of the Supreme Court of Canada that legislation which impairs the right of Catholics, as a class of persons in the Province of Ontario, to the exclusive financial and pedagogic control of their schools, is beyond the jurisdiction of the provincial Legislature.”⁴

* Finally, in a letter from Patrick Daly to The Honourable Charles A. Harnick and The Honourable John Snobelen dated July 31, 1997 and Ontario Separate School Trustees’ Association Press Release dated July 31, 1997, OSSTA took the position that in litigation it would defend separate school boards’ constitutional right to tax:

“If the decision of the Court [in the Bill 104 Litigation] does anything to qualify, limit or reduce what OSSTA understands to be the constitutionally protected rights of Roman Catholic separate school boards under section 93(1) of the *Constitution Act, 1867*, including the authority to tax ratepayers, OSSTA will not hesitate to join an appeal of the decision to vindicate their rights.”

“The OSSTA President indicated that if the Attorney General’s department follows its line of argumentation and Catholic school taxing rights are adversely affected by any court ruling, then the Catholic boards would have little choice but to intervene and join in an appeal of such a court decision.”

However, following the Court of Appeal's decision on *Bill 160*, OCSTA has publicly stated that it considers the Court of Appeal decision to be a victory because *Bill 160* and the Funding Formula have provided "equitable" funding for the separate school system. However, in exchange for "equitable" funding today, the separate school system has lost the autonomy which the right to tax had provided.

Implications for the Future of Denominational Schooling

The Court of Appeal's decision has applied a very narrow understanding of what is denominational education. Rather than following the Supreme Court of Canada's understanding of the denominational perspective infusing the entire curriculum and approach to education in the separate school system, the Court of Appeal has treated denominational education as being more limited. The only spending decisions which it considers to affect denominational rights are those which seem to relate to religion narrowly defined: hiring Roman Catholic teachers and chaplains, providing space for chapels, designing and delivering "denominational aspects" of the curriculum.

If this is the extent of denominational protection which will be protected under the Constitution, this leaves the separate school system open to political attacks on the basis that it is too expensive to have two separate school systems when religion classes could be provided more economically within the public school system.

