

# 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.