

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.

