

## Of Storms, School Boards and the Supreme Court

By J. Paul R. Howard

As I sit here on a July weekend speculating how the nine Justices of the Supreme Court of Canada will address the two most politically charged cases currently before the Court concerning the governance of the public education system, it occurs to me we're experiencing the calm before the storm. Fans of a certain Marvel Comics' super-hero would say their "Spidey senses are tingling".

The two decisions, one from Alberta, the other from Ontario, both involve constitutional challenges to each province's government attempts to restructure the funding of public education. Both carry the potential to re-ignite divisive debate amongst competing education stakeholders.

In late March 2000, the Supreme Court of Canada heard argument in *Public School Boards' Association of Alberta v. Alberta (Attorney General)*,<sup>1</sup> involving the Alberta Government's 1994 amendments to the *School Act*, which sought to reduce the fiscal disparity amongst publicly funded boards and eliminate the dramatic variance in school requisition mill rates by creating a new provincial funding scheme, from which pooled revenues are disbursed to boards on an equal amount per student basis. Under the new scheme, public boards may no longer raise money through local taxation but separate boards have the option to continue direct taxation of their ratepayers, subject to certain limitations. The Alberta Court of Appeal held that school boards do not possess any constitutional right to reasonable autonomy. The Supreme Court reserved judgment in March and does not plan to release its decision until the Ontario case is also determined.

In its fall session commencing October 2000, the Supreme Court will turn to the challenge brought in *Ontario English Catholic Teachers' Association v. Ontario (Attorney General)*,<sup>2</sup> which united the separate school teachers with the public school boards, their teachers and others in their collective attack against the Harris Government's controversial Bill 160, defended by the Attorney General and the Catholic board trustees. The Ontario Court of Appeal had ruled that the legislation's removal of all school boards' ability to tax their supporters is not unconstitutional, although the court at first instance initially held that the separate school boards – but not the public boards – were guaranteed the right to tax by the denominational school guarantees under section 93(1) of the *Constitution Act, 1867*.

Since municipal institutions, including school boards, are statutory creatures of their provincial governments, the argument that school boards themselves possess some constitutionally entrenched right to "reasonable autonomy" will be difficult to sustain, and I expect the Supreme Court, like the Alberta courts, will reject that contention.

To my mind, the more interesting claim is the "mirror equality" argument advanced by the public boards in both the *PSBAA* and *OECTA* cases. In short, mirror equality posits that since section 93(1) of the *Constitution Act, 1867* prohibits provincial legislation which prejudicially affects any denominational right enjoyed by separate school supports at the time of Union, and since Roman Catholic boards possessed the right to raise revenue through local taxation at that time, then it must follow that the public school system also has a right to tax that cannot be defeated by provincial legislation because "public schools form an essential part of the constitutional fabric in the sense that

the rights of public schools at the time of Union are the bench-marks for determining the rights that are constitutionalized under s. 93(1) for denominational schools”.<sup>3</sup> Many commentators reject as unsound and counter-intuitive the suggestion that public boards do not enjoy the same taxation rights as do separate boards when the whole point of the constitutional protection of the separate school system was to put it on equal footing with its public counterpart.

In *OECTA*, the Ontario Court of Appeal was not required to address the substantive merits of the mirror equality argument because it concluded that even the separate boards are not guaranteed a right of taxation *simpliciter*; rather, direct taxation is merely one particular method of funding denominational education, which is the true constitutional imperative.

In this conclusion, the Court of Appeal differed from not only the judgment below, which was overturned on point, but also, interestingly enough, the concurring reasons of Mr. Justice Berger of the Alberta Court of Appeal in *PSBAA*, who expressly held that, “the position of the Supreme Court of Canada has consistently been that the right of separate schools to tax their supporters was part of the bundle of protected rights and privileges under s. 93(1)”.

Consequently, it may not be quite as easy for the SCC to sidestep the mirror equality argument. While perhaps not quite “perfect”, the potential storm coming this autumn is formidable. Batten down the hatches.

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1. *Alberta Public School Boards’ Assn. v. Alberta (Attorney General)*, [1998] A.J. No. 317 (C.A.); appeal to the S.C.C. heard March 21, 2000 (S.C.C. File No. 26701).

2. *Ontario English Catholic Teachers’ Assn. v. Ontario (Attorney General)* (1999), 44 O.R. (3d) 7 (C.A.); leave to appeal to S.C.C. granted (S.C.C. File No. 27363).

3. *PSBAA*, *supra* at para. 121 per Russell J.A.

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