Public School Boards' Association of Alberta v. *Alberta*
THE ARGUMENTS FAVOURING CONSTITUTIONAL PROTECTION FOR ALBERTA'S PUBLIC SCHOOL BOARDS: WOLVES IN SHEEP'S CLOTHING

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What protection, if any, does the Canadian Constitution provide for public school boards in Alberta? As illustrated by the Alberta Court of Appeal's recent decision in *Public School Boards' Association of Alberta* v. *Alberta (Attorney General)*,[1] this deceptively simple question has potentially profound procedural and substantive implications for Canada's constitutional law. First, resolving this question necessarily requires decisions to be made about how far the Courts should go in interpreting the written words of the constitution regarding government institutions. In other words, should the Courts read the provisions as written or infuse the provisions with meaning which reflects current practices or values? Second, the determination of what constitutional protections are available to Alberta public schools has serious implications for the constitutional status of all local government authorities in Canada.

The *Alberta Public School Boards Case* concerns various constitutional challenges raised on behalf of the Alberta Public School Boards Association and others [collectively the "PSBA"] to the Alberta government's decision to replace the province's localized school fund-raising system with a centralized funding system. The PSBA's overriding concern with the new program is a familiar and typical one: namely, the perceived loss of local control. Two innovative constitutional arguments utilized by the PSBA to bring this matter before the Courts make this case especially notable, however. In particular, the PSBA argued that the Constitution guarantees school boards "reasonable autonomy" over their operations such that the province cannot unilaterally restructure school board funding mechanisms. The PSBA also argued that the Constitution guarantees "mirror equality" to separate and public school boards in Alberta: that is, that all school boards in the province are constitutionally guaranteed identical powers and privileges.

No doubt, these arguments are inspired, creative and intellectually appealing. From a legal perspective, however, the arguments ignore the fundamental distinction between what constitutional protections arguably *should* be afforded to public school boards and what constitutional protections *are* presently provided to public school boards. Accordingly, as a closer examination of these arguments will show, the Court of Appeal correctly rejected the PSBA's arguments and properly concluded that the Constitution does not support the protections sought for public schools.

BACKGROUND TO THE ALBERTA PUBLIC SCHOOL BOARDS CASE

In 1994, the Government of Alberta substantially amended certain provisions of the *School Act*,[2] via the *School Amendment Act, 1994*[3] and the *Government Organization Act*.[4] With the expressed intention of removing fiscal inequity in the school system, the amendments restructured the funding system for school boards in the province. In brief, the new system includes the following features:[5]

- the replacement of direct taxation by each school board with the pooling of education revenues from a province-wide property assessment base into a government fund called the Alberta School Foundation Fund [the "ASFF"], with ASFF dollars

[1] (1998), 158 D.L.R. (4th) 267, hereinafter referred to as the "*Alberta Public School Boards Case.*" Leave to appeal to the Supreme Court of Canada granted November 19, 1998 (without reasons). *S.C.C. Bulletin*, 1998, at 1767.

[2] S.A. 1988, c. S-3.1.

[3] S.A. 1994, c. 29.

[4] S.A. 1994, c. G-8.5.

[5] Summarized from the Queen's Bench and Court of Appeal decisions in the *Alberta Public School Boards Case.*

being dispersed to school boards on an equal amount per student basis;

- the right of separate school boards to opt out of the ASFF system and to continue to requisition funds through the direct taxation of separate school supporters. Opted-out separate school boards are entitled to receive a "top-up" payment from the ASFF if their direct taxation revenues are less than the per student amount received by school boards operating under the ASFF. On the other hand, opted-out separate school boards are required to pay to the ASFF any funds received from direct taxation in excess of the per student amount received from school boards operating under the ASFF;

- in addition to the ASFF, funds for school boards are available through a system of grants from the province's General Revenue Fund, which grants are distributed in accordance with the government's "Framework for Funding School Boards in the 1995-96 School Year" [the "Framework"]. The Framework provides for funding allocation to school boards depending on several factors pertaining to the distinct needs of the students served by the school boards (for example, the number of severely disabled students, transportation requirements, etc.). The amount of grant dollars available from the General Revenue Fund is determined by subtracting the amount available from property assessments (either under the ASFF or the opted out system) from the amount of the total funding allocation or entitlement under the Framework. The Framework also contains a series of restrictions on a school board's use of funds and these restrictions are enforced through penalties levied against future grants.

- an increased role for the Minister in supervising board senior staff and the addition of provisions compelling boards to meet certain Ministerial standards.

Unhappy with the loss of local control caused by this new system, the PSBA challenged the constitutionality of the statutory amendments giving rise to this system.[6]

Specifically, both at trial and before the Court of Appeal, the PSBA argued that:

1. The amendments violate the constitutional right of local school boards to "reasonable autonomy" as provided for by constitutional law, by constitutional convention, or by sections 2(b) and 7 of the *Canadian Charter of Rights and Freedoms*.[7]

2. The amendments discriminate between public and separate school boards contrary to section 17(2) of the *Alberta Act*[8] which provides that:.

> In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. The amendments violate the principle of "mirror equality," which would require public and separate school boards to have identical powers and privileges. According to the PSBA, "mirror equality" is implicitly guaranteed to both types of

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[6] The Alberta Catholic School Trustee's Association, the Board of Trustees of Lethbridge Roman Catholic Separate School District No. 9, and others [collectively the "ACSTA"] intervened at both court levels, arguing that, whatever the Court's ultimate finding on the issues raised, the Court's decision should not expressly or implicitly reduce or define the rights and privileges currently enjoyed by separate school boards under the *Alberta Act*, S.C. 1905, c.3..

[7] As per Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. These *Charter* arguments were dismissed by both the Alberta Court of Queen's Bench and by the Alberta Court of Appeal for lack of evidence supporting the alleged *Charter* breaches. Accordingly, since neither Court considered the substantive question of whether "reasonable autonomy" could be part of the s. 2(b) and s. 7 guarantees, the merits of the *Charter* arguments will similarly not be dealt with in this paper.

[8] Supra, note 6.

school boards by section 17(1) of the *Alberta Act*[9] which provides that:

> Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-west Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

The trial decision of Smith J. was issued on November 28, 1995. Justice Smith rejected the reasonable autonomy and discrimination arguments but accepted the mirror equality argument, finding the amendments to be invalid to the extent that they did not allow public boards to opt out of the ASFF funding scheme.[10] On March 31, 1998, the Alberta Court of Appeal unanimously rejected all of the PSBA's arguments.[11]

THE SIGNIFICANCE OF THE REASONABLE AUTONOMY AND MIRROR EQUALITY ARGUMENTS

This paper will focus on the merits of the first and third issues raised by the PSBA, namely, whether the Canadian Constitution guarantees reasonable autonomy and mirror equality to Alberta's public school boards. As noted at the outset, these arguments hold profound implications for the future application of Canada's constitution. The discrimination argument really only requires the Court to evaluate the fairness of the new funding system in light of the express protection against discrimination found in section 17(2) of the *Alberta Act*. In contrast, the reasonable autonomy and mirror equality arguments call upon the Court to recognize, interpret and give constitutional authority to public school board rights which are not expressly set out in the Constitution and which have not been specifically recognized by the Courts to date. Accordingly, these two arguments have the potential to significantly change the impact of the Constitution on school boards and numerous other municipal institutions. Moreover, the reasonable autonomy and mirror equality arguments beg for resolution because they are being raised with increasing frequency by various municipal institutions seeking judicial recognition of their independent constitutional status.[12]

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[9] *Ibid.* As Alberta's provincial constitution, the *Alberta Act* established Alberta as a province of Canada in 1905. Generally, pursuant to s. 3 of the *Alberta Act*, the provisions of the *Constitution Act, 1867* apply to the province. One exception is the replacement of s. 93 of the *Constitution Act, 1867* with s. 17(1) of the *Alberta Act*. Section 93 provides that:

> Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union.

Prior to Alberta becoming a province, schools in the area operated pursuant to chapters 29 and 30 of the *Ordinances of the Northwest Territories, 1901*. Section 45(1) of chapter 29 provided that:

> After the establishment of a separate school district under the provisions of this Ordinance such separate school district and the board thereof shall possess and exercise all rights, powers, privileges and be subject to the same liabilities and method of government as is herein provided in respect of public school districts.

[10] The declaration of invalidity was suspended until June 15, 1996. In February 1996, a stay of Smith J.'s finding was granted pending appeal and a contemplated additional stay of six months was granted if the Government's appeal on mirror equality was unsuccessful.

[11] The Court of Appeal issued two judgments, one written by Russell J.A. for the majority of the Court, and one written by Berger J.A.. The difference between the judgments is that Berger's reasoning includes an analysis of the scope of existing separate school board rights whereas Russell's decision complies with the ACSTA's request that such an analysis not be undertaken in this case.

[12] For example, in *East York (Borough)* v. *Ontario (Attorney General)* (1997) 34 O.R. (3d) 789 (Ont. Ct. Gen. Div.); aff'd (1997) 36 O.R. (3d) 733 (Ont. C.A.); leave to appeal to S.C.C. refused April 2, 1998 (the "*Megacity Case*"), several parties challenged the provisions of the *City of Toronto Act*, 1997, S.O. 1997, c. 2 which reorganized several municipalities into a single corporate municipal body called the "City of Toronto." In part, this challenge was brought on the basis that Canadian municipalities were guaranteed a certain level of reasonable autonomy by Canadian constitutional law or convention. (This argument was rejected by both courts). Similarly, in *Ontario English Catholic Teachers' Association et. al.* v. *Ontario (Attorney General)* (1998), 162 D.L.R. (4th) 257 (Ont. Ct. Gen. Div.), rev'd in part *(1999), 172 D.L.R. (4th) 193* (Ont. C.A.) [hereinafter the "*OECTA Case*"], both separate and public schools sought declarations that parts of a proposed statute which would remove the ability of school boards to directly tax were unconstitutional. The trial court accepted the argument that s. 93 of the Constitution provided separate school boards with autonomy over taxation but this finding was overturned on appeal. Both court levels rejected the notion that school boards were empowered by constitutional convention to tax their supporters. (It is notable that the Court decisions in this case do recognize a certain degree of autonomy of Ontario school boards, however, this autonomy is found in the legislation which governed Ontario school boards at the time of Confederation). Both court levels also rejected the argument that s. 93 provided equal powers or "mirror equality" to public

REASONABLE AUTONOMY

The PSBA's reasonable autonomy argument suggests that "there is implicit in the Constitution of Canada, particularly in the term 'municipal institutions' as used in section 92(8) of the Constitution, a law or convention of the Constitution guaranteeing and requiring preservation of, and respect for, reasonable autonomy of local government institutions including local school boards, in Canada."[13] According to the PSBA, local school boards exercised a high degree of local democratic autonomy in 1867 and 1905 when the *Constitution Act* and the *Alberta Act* were respectively initially enacted and therefore this autonomy must be implicit in the Canadian Constitution. Further, since Alberta school boards continued to exercise a high degree of local democratic autonomy up to 1994, this autonomy must constitute a constitutional convention.

Two points are notable with respect to the source and implications of the PSBA's reasonable autonomy argument. First, of all the contentions raised by the PSBA, this argument appears to be the only one which truly reflects the motivation of the PSBA in bringing this action: specifically, public school boards regaining their local control. Unlike the mirror equality or discrimination arguments, the reasonable autonomy argument expressly recognizes that, at the end of the day, public school boards do not just want to be treated like separate Boards, they want the ability to control their own activities. Second, of all the arguments raised by the PSBA, the reasonable autonomy argument carries the greatest implications for fundamental and broad-ranging changes to our current understanding of Canada's local government institutions. While the discrimination and mirror equality arguments pertain to provisions of the Constitution which specifically address the topic of education, the reasonable autonomy argument can be easily expanded beyond school boards to virtually any municipal institution or delegate of the provincial government that has historically exercised local decision-making authority.

In addressing this reasonable autonomy argument for the Court of Queen's Bench, Justice Smith noted that current law characterizes municipal institutions, such as school boards, according to either the "traditional approach" or the "dual character approach." The traditional approach describes municipal institutions as mere creatures of provincial legislatures, with powers entirely subject to the control of the legislatures. According to this view, school boards only have the powers which are expressly provided by statute or which are necessarily implied by statute. The dual character approach also considers municipal institutions to be delegates of the provincial legislatures but acknowledges that municipal institutions may have inherent powers over local needs when the legislatures have expressly conferred discretion upon these institutions. Ultimately, however, given the applicable Alberta legislation regarding school boards, Justice Smith concluded that neither of the above two characterizations of school boards supports the PSBA reasonable autonomy argument. According to Justice Smith, the relevant legislative provisions do not provide school boards with an express or implied guarantee of autonomy. Further, Alberta school boards are and have always been dependent on the province for their existence and powers.[14] Any school board structures which may have existed in the past "were designed and created in response to the needs and expectations" of the times and are not "engraved in stone" or otherwise endowed with constitutional status.[15]

Affirming Justice Smith's conclusion that the wording of the Constitution does not expressly or implicitly support the notion of reasonable autonomy of school boards, the Court of Appeal emphasized the fact that sections 93 and 92(8) of the Constitution reflect a historical compromise between national and regional interests. This compromise provides for local control over education at the provincial level but does not expressly or implicitly empower school boards or other municipal delegates of the provinces to exercise this local control:[16]

> [A]cademic and judicial authorities have consistently adopted the view that neither the legal status nor the powers of municipal institutions are constitutionally guaranteed, and that they are provincial statutory bodies with only those powers conferred upon them by the legislatures ... It was conceded that there are no precedents to the contrary. Section 92(8) of the *Constitution Act, 1867* authorizes a province to create municipal governments and delegate to them certain powers. But it does not entrench those

and separate school boards.

[13] *Public School Boards Association (Alberta) et. al.* v. *Alberta (Attorney General et al.)* (1995), 198 A.R. 204 at 210 (Q.B.).

[14] *Ibid.* at 220.

[15] *Ibid.* at 220.

[16] *Supra* note 1 at 289.

creations, or restrict the province's right to change them.

Further, while the Court acknowledged that the provinces have historically utilized local school boards to deal with education matters, the Court of Appeal noted that this voluntary action by the provinces does not give constitutional status to the school boards.[17]

The reasoning of both the trial and appeal courts recognizes that, in order to accept the proposition that school boards are constitutionally guaranteed reasonable autonomy as a matter of law, the Courts would have to go beyond the wording of the Constitution itself. The courts would have to find a reason, substantiated by compelling evidence, to interpret the applicable constitutional provisions as recognizing or including the notion of reasonable autonomy. As effectively demonstrated by both court decisions, there is simply no support for reasonable autonomy in the wording of the Constitution or in the evidence presented. In fact, "school boards" are not expressly recognized as entities in any part of the Constitution: the applicable provisions refer only to "education" and "schools." The Constitution empowers the provinces to legislate with respect to education and, utilizing this power, the province of Alberta has created school boards as part of its educational structure. As conceded by the PSBA, the province still has the constitutional power to do away with the school board system in its entirety. If the province has this ultimate power, it seems illogical to suggest that, as long as the province continues to operate its education system through school boards, the province has a constitutional obligation to allow those school boards to exercise any level of autonomy. How can the Constitution offer a legal guarantee of autonomy to an institution it does not even recognize?

The Court of Appeal also refused to find that local school board autonomy is guaranteed by constitutional convention, finding instead that the three part constitutional convention test established by the Supreme Court of Canada in *Reference re Resolution to Amend the Constitution*[18] is not satisfied in this case. In particular, the Court of Appeal found that the historical evidence does not offer a single precedent indicating that relevant political actors felt bound by a high level of autonomy of school boards, either prior to Confederation or since.[19] Key to the courts' finding on this point is the fact that the convention test not only requires proof of a precedent, but also proof that the applicable political actors felt bound by the precedent. In any event, the Court of Appeal pointed out that conventions are not legally binding and "should not be used in any manner to override explicit constitutional guarantees"[20] such as the provincial power over education.

A fundamental question not expressly addressed by either the trial or appeal court is whether a constitutional convention can exist with respect to the activities of an entity which is not expressly recognized by the Constitution or implicitly necessary to the operation of the Constitution. It seems logical (if not tautological) that the convention test should necessarily apply only to an inherently constitutional matter. Hence, a question pertaining to constitutional amendment may support the finding of a convention because constitutional amendment has an express or necessarily implied constitutional character. On the other hand, the fact that the Constitution empowers the provinces to legislate on local matters does not expressly or implicitly give local governments or regulations constitutional import. For example, while the provinces are constitutionally empowered to legislate on traffic control as a matter of local concern, this constitutional power does not explicitly or implicitly transform traffic practices into constitutional matters. Thus, even though "red light means stop" has been a long-standing rule or practice established by the provinces pursuant to their constitutional authority, "red light means stop" cannot be a constitutional convention because traffic control is not expressly or implicitly a constitutional matter. Similarly, the fact that provinces have, to date, exercised their power over education through school boards does not transform the operations or control of school boards into constitutional matters capable of supporting a constitutional convention.

Another point which was not raised in the *Alberta Public School Boards Case* but which might be used in support of the reasonable autonomy argument is the notion that reasonable autonomy for school boards is supported by the "underlying principles" of our constitution which were recently recognized by the Supreme Court of Canada in *Reference re Secession of*

[17] *Ibid.* at 291.

[18] [1981] 1 S.C.R. 753. The test established by this case requires the following elements to be proven in order to find a constitutional convention: (1) at least one precedent for the practice in question must exist (2) the actors in the precedent(s) must believe that they were bound by a rule to follow the practice and (3) there must be a good reason for the rule.

[19] *Supra* note 1 at 294.

[20] *Ibid.* at 295.

Quebec.[21] In the *Secession Reference*, the Supreme Court noted that Canada's constitution consists of the written constitutional texts as wells as "supporting principles and rules, which include constitutional conventions."[22] This comment suggests that, if constitutional authority for a given practice (such as the autonomy of school boards) cannot be found in the written constitution or in constitutional conventions, this authority may still be found in the underlying principles and rules of the Constitution. Arguably, then, the reasonable autonomy of school boards may be authorized by one of the Constitution's underlying principles, such as that of minority protection which the Supreme Court of Canada recognized as being the motivating factor behind section 93's protection of denominational schools.[23] Once again, however, closer examination reveals that this argument is flawed. Taken as a whole, the Supreme Court's comments about underlying principles deal with the legitimacy of constitutional practice and not with the constitutional status of institutions which are not expressly created or recognized by the written constitution. In fact, the Court's comments in the *Secession Reference* clearly indicate that Canada's constitution only empowers two orders of government (federal and provincial) and that the mere ability of a group or organization to act in a certain manner does not necessarily give that action legal or constitutional authority.

Thus, on all grounds, the unavoidable problem with the reasonable autonomy argument is that reasonable autonomy cannot be constitutionally guaranteed to school boards by law, convention, or underlying principles because school boards themselves are not constitutionally recognized. In commenting on the Court's rejection of the reasonable autonomy argument raised by various municipalities in the *Megacity Case,* John McEvoy notes that:[24]

> ... opponents of amalgamation marshalled the legal arguments available to them but could not prevail against the fundamental weakness of their own case — the complete lack of constitutional recognition of the status of municipal corporations as a local constituent unit of democratic government.

This comment applies equally to the PSBA's argument of reasonable autonomy.

MIRROR EQUALITY

The "mirror equality" argument advanced by the PSBA suggests that, by indicating that separate school districts should have the same powers, privileges and rights as public school districts, section 17(1) of the *Alberta Act* effectively stands for the proposition that separate and public school boards must be treated equally or that they must "mirror" each other in terms of rights and privileges. In other words, if separate school districts are entitled to the same powers, privileges and rights as public school districts under section 17(1), then public schools must be entitled to all of the same powers, privileges and rights as separate school districts. In the context of the new funding system, mirror equality would require the public school boards to share the ability of separate school boards to opt out of the centralized funding program. In support of this argument, the PSBA placed heavy reliance upon *Adler* v. *Ontario*,[25] in which the Supreme Court of Canada held that a province's refusal to fund private religious schools does not violate freedom of expression or equality under the Charter. In particular, the PSBA relied upon the majority judgment in *Adler*, in which Justice Iacobucci stated that public schools are impliedly part of the regime established by section 93.[26]

The trial judge accepted the PSBA argument of mirror equality and found that the opt-out provision of the new system, available only to separate school boards, violated the principle of mirror equality inherent in section 17(1). Although the judge noted that prevailing case law supports the view that section 17(1) only protects separate school boards, he concluded that the overall intention was always for public and separate schools to have the same rights and privileges. The trial judge also concluded that section 17(1) must be read in light of section 17(2) which prohibits financial discrimination against either public or separate schools.

As Justice Smith's comments illustrate, the mirror equality argument is very appealing to one's intellectual sense of fairness and equality. Initially, it seems sensible to conclude that, since section 17(1) expressly provides separate schools with all of the rights and privileges of public schools, by definition public schools should be entitled to all of the rights and

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[21] [1998] 2 S.C.R. 217 [hereinafter the "*Secession Reference*"].

[22] *Ibid.* at 240.

[23] *Ibid.* at 261.

[24] J.P. McEvoy, "Democracy, the Constitution and Municipal Reorganization: *Borough of East York* v. *Attorney General of Ontario*" (1997) 36 Alta. L. Rev. 237 at 244.

[25] [1996] 3 S.C.R. 609 [hereinafter *Adler*].

[26] *Ibid.* at 646.

privileges of public schools. Upon closer examination, however, this "mirror equality" conclusion does not logically or necessarily flow from the wording of section 17(1). Accordingly, this argument was appropriately rejected by the Court of Appeal.

The Court of Appeal's finding is primarily based on the fact that section 17(1) does not expressly provide any protection for public school boards even though it could easily have been worded to do so. The Court of Appeal noted that both section 17(1) of the *Alberta Act* and the relevant provision of *Ordinance 29* mentioned in section 17(1) only expressly reference the rights of separate schools. Accordingly, the Court found that, "[b]y its clear wording, section 17(1) applies to constitutionalize only the rights and privileges with respect to separate schools that existed under chapters 29 and 30."[27]

The Court of Appeal also rejected the suggestion that the mirror equality principle is accepted or recognized by the *Adler* case. First, the Court pointed out that in *Adler*, four of the nine Supreme Court of Canada Justices "disagreed with the notion that public schools receive any protection under the terms of section 93(1)."[28] Second, the Court of Appeal refused to interpret the majority reasons of Justice Iacobucci in *Adler* as necessarily supporting the mirror equality argument, noting instead that the *Adler* decision should be limited to its facts: that is, a consideration of the interaction between the provisions of the Charter and section 93:[29]

> In summary, there is nothing in Iacobucci J.'s decision that breathes any life into the mirror equality argument. A close reading of the decision reveals that whatever the nature of the constitutional protection granted to public schools under section 93, it is far more limited in scope than the protection given to denominational schools.

Finally, the Court of Appeal noted that section 17(1) only expressly refers to rights or privileges pertaining to religious instruction. According to the Court of Appeal, the singling out of religious instruction indicates that, even if section 17(1) does provide some protection to public schools, this protection only applies with respect to religious instruction considerations.

In summary, the Alberta Court of Appeal based its findings on the reasoning it had expressed earlier in *Calgary Board of Education* v. *Alberta (Attorney General)*,[30] wherein the Court found that the intention of section 17(1) of the *Alberta Act* was to protect the interests of the minority, "leaving the majority to protect themselves through the use of the democratic instrument, the ballot box."[31] Ultimately, then, the Court's rejection of the mirror equality argument turned primarily upon the express wording of section 17(1). In the words of the Court, "[h]ad the drafters of the provision intended to grant public schools the same rights they granted to separate schools, they would have said so."[32]

In the end, the Court of Appeal's analysis of section 17(1) is simply more logical than the analysis suggested by the mirror equality argument. On its face, section 17(1) is not worded in terms of complete equality. Therefore, rather than trying to draw the inference of complete equality from this section, it makes more sense to determine what the plain words of section 17(1) mean. Taking this approach, section 17(1) plainly requires separate schools to have all of the rights and privileges of public schools and allows separate schools to have additional rights and privileges specific to denominational schools. In other words, rather than necessarily providing for complete equality between the school systems, section 17(1) requires that, *at a minimum*, separate schools must have all of the rights and privileges of public schools. The guaranteed rights in section 17(1) are only a subset of all of the rights and privileges which may be available to denominational schools,[33] preventing public school boards from

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[27] *Supra* note 1 at 308.

[28] *Ibid.* at 309.

[29] *Ibid.* at 310.

[30] [1981] 4 W.W.R. 187 (Alta. C.A.).

[31] *Supra* note 1 at 311.

[32] *Ibid.* at 311.

[33] The logical fallacy of the mirror equality argument is further explained by Justice Cumming at the trial level of the *OECTA Case*, *supra* note12 at 310-311.

> The choice of the word 'reciprocity' illustrates the reasoning the applicants rely on: the separate school system uses the public school system as a frame of reference, to determine if it is receiving appropriate treatment by the majority ... Put even more crudely, the reciprocity argument says that because what we get you get, what you get we get. I mean no disrespect to the very able arguments of counsel when I phrase things in this fashion. It is simply that by framing the argument in these terms, it demonstrates how the applicants are relying on a false syllogism....

obtaining greater privileges than separate school boards.

This latter interpretation of section 17(1) certainly seems consistent with the fact that the education provisions of the *Constitution Act, 1867* were initially designed to protect the interests of religious and linguistic minorities within the provinces. Again, as indicated by Justice Cumming in the *OECTA Case*:[34]

> The constitutional existence of separate schools versus the constitutional non-existence of public schools is merely a recognition that constitutional protection of one system was deemed necessary while constitutional protection of the other was not.

In any event, the Courts should not define the rights of public schools under section 17(1) pursuant to the principle of mirror equality where section 17(1) does not necessarily or easily give rise to that interpretation. While our modern day ideals may suggest that fairness requires public and separate schools to receive equal constitutional protection, the fact is that such equal protection is not expressly or implicitly provided by section 17(1) of the Constitution.

Conclusion

If the education provisions of Canada's constitution were being written today, they would probably take a substantially different form than we currently find in section 17 of the *Alberta Act* or in section 93 of the *Constitution Act, 1867*. For example, given the various protections offered and the values expressed by the *Charter of Rights*, it might seem most reasonable and fair for the Constitution to be written in a manner that would provide equal rights and privileges to all schools. Looking at the PSBA's arguments in this benevolent light, it is tempting to give in to the intellectual appeal of the reasonable autonomy and mirror equality arguments in order to grant constitutional status to public school boards. Unfortunately, this approach does not recognize the inherent constitutional dangers involved in accepting the PSBA's arguments.

A desire for section 17 of the *Alberta Act* or section 93 of the *Constitution Act, 1867* to be written differently does not change the way that these provisions are currently written and should not change the way these provisions are interpreted and applied. In their current form, these sections provide a very limited and specific protection for denominational schools only. Attempting to broaden the application and meaning of these provisions through the concepts of reasonable autonomy or mirror equality threatens to take these constitutional provisions far beyond their expressed intentions. Accepting the reasonable autonomy argument advocated by the PSBA potentially endows every local authority with constitutional status. Similarly, accepting the mirror equality argument opens the door for Courts to grant broad-ranging powers to any institution mentioned in the Constitution. Surely, endowing any entity with this type of constitutional status and power should only be done via a constitutional amendment rather than through an implied reading of existing constitutional provisions.

Ultimately, there is a fine but distinct line between a "large and liberal" interpretation of the Constitution and a fundamental misinterpretation of the Constitution. In the *Alberta Public School Boards Case*, the Court of Appeal recognized this distinction and rightly avoided misinterpreting the constitutional provisions at issue, even though the results of this finding may be somewhat disappointing, given modern day values and social structures. The proper resolution of this case requires one to keep in mind the fundamental distinction between what the law should be and what the law is. As noted by the Ontario Court of Appeal in the *Megacity Case*: "what is politically controversial is not necessarily constitutionally impermissible."[35]❑

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In this case, the first premise of the applicants is that the separate school system has constitutional recognition. The second premise is that the public school system has constitutional recognition ... (... solely for the purpose of present analysis, I assume without deciding that *Adler* constitutionally protects *a* right of public funding for a public school system.) The deduction which follows, in the applicants' argument, from these two premises, is that because both school systems have a constitutional existence, they both have exactly the same constitutional rights. In my view, this is an invalid deduction, and therefore the syllogism is a false one.

[34] *Ibid.* at 313.

[35] *Supra* note 12 at 738.