ALBERTA CATHOLIC SEPARATE SCHOOL
CONSTITUTIONAL RIGHT TO A
TAXATION ASSESSMENT BASE

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1. **Introduction**


2. **The Statutory Provisions Relevant To Alberta**

(a) **The Northwest Territories Acts**

By the provisions of the *Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c.3, s.146, the Federal Government was empowered to pass the various *Northwest Territories Acts*. Section 11 of the *North-West Territories Act, 1875*, S.C. 1875, s.49 read as follows:

“11. When, and so soon as any system of taxation shall be adopted in any district or portion of the North-West Territories, the Lieutenant-Governor, by and with the consent of the Council or Assembly, as the case may be, shall pass all necessary ordinances in respect to education; but it shall therein be always provided, that a majority of the ratepayers of any district or portion of the North-West Territories or any lesser portion or sub-division thereof, by whatever name the same may be known, may establish such schools therein as they may think fit, and make the necessary assessment and collection of rates therefore; and further, that the minority of the rate-payers therein, whether Protestant or Roman Catholic, may establish separate schools therein, and that, in such later case, the rate-payers establishing such Protestant or Roman Catholic Separate schools shall be liable only to assessments of such rates as they may impose upon themselves in respect thereof.”
In 1880, the Federal Parliament determined to consolidate the several Acts with respect to the Northwest Territories in *An Act to amend and consolidate the several Acts relating to the North-West Territories 1880*, S.C. 1880, c. 25. Section 10 of that consolidation act confirmed that the Lieutenant Governor of the Territories had jurisdiction to pass all necessary Ordinances with respect to education, but subject to the condition that the majority of ratepayers in any district or portion of the Territories could establish a public school, and the minority could establish a separate school.

The important codification of this education right was s. 14 of the *North-West Territories Act*, R.S.C. 1886, c. 50, s. 14:

“14. The Lieutenant Governor in Council shall pass all necessary ordinances in respect to education; but it shall therein always be provided, that a majority of the rate-payers of any district or portion of the Territories, or of any less portion or subdivision thereof, by whatever name the same is known, may establish such schools therein as they think fit, and make the necessary assessment and collection of rates therefore; and also that the minority of the ratepayers therein, whether Protestant or Roman Catholic, may establish separate schools therein, - and in such case, the ratepayers establishing such Protestant or Roman Catholic Separate schools shall be liable only to assessments for such rates as they impose upon themselves in respect thereof.”

Section 14 of the *1886 Act* was modestly amended in 1898 by replacing the words “Lieutenant Governor in Council” by the words “Legislative Assembly” (*An Act further to amend the Acts respecting the North-west Territories*, S.C. 1898, c.5). This was the last version of the *Northwest Territories Act* in effect before proclamation of the *Northwest Territories Ordinances* of 1901, chapters 29 and 30 of which were constitutionalized for the Province of Alberta.
(b) **The Constitution Act, 1867**

Section 93(1) of the *Constitution Act, 1867* reads as follows:

“93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions: -

(1) 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.”

(c) **The Alberta Act, 1905**

The equivalent provisions of the *Alberta Act, 1905* and the *Saskatchewan Act, 1905* read as follows:

“17. Section 93 of the *Constitution Act, 1867*, shall apply to the said province, with the substitution for paragraph (1) of the said s.93 of the following paragraph:

(i) ‘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 Northwest 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.’

(ii) 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 therefore, there shall be no discrimination against schools of any class described in the said chapter 29.

(d) **The Northwest Territories Ordinances, 1901**

The most relevant provisions of Chapter 29 of the *Ordinances in the Northwest Territories, 1901*, are as follows:

“41. The minority of the ratepayers in any district whether Protestant or Roman Catholic may establish a separate school therein; and in such case the ratepayers establishing such Protestant or Roman Catholic separate school shall be liable only
to assessments of such rates at they impose upon themselves in respect thereof.

42. The petition for the erection of a separate school district shall be signed by three resident ratepayers of the religious faith indicated in the name of the proposed district; and shall be in the form prescribed by the commissioner.

43. The persons qualified to vote for or against the erection of a separate school district shall be the ratepayers in the district of the same religious faith Protestant or Roman Catholic as the petitioners.

44. The notice calling a meeting of the ratepayers for the purpose of taking their votes on the petition for the erection of a separate school district shall be in the form prescribed by the petitioner and the proceedings subsequent to the posting of such notice shall be the same as prescribed in the formation of public school districts.

45. 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.

(2) Any person who is legally assessed or assessable for a public school shall not be liable to assessment for any separate school established therein.”

[emphasis added]

The second Ordinance constitutionalized for the Province of Alberta, the *School Assessment Ordinance* (N.W.T.) 1901, c. 30, set out in detail the mechanism and method for Separate Catholic schools to access their taxation assessment base. Sections 4, 8, 9 and 12 addressed access to “Assessment in Rural Districts”, sections 25 and 42 addressed “Assessment and Taxation in Village Districts”, sections 88 and 89 addressed “Assessment and Taxation in Town Districts”, sections 91, 92 and 93 addressed “Village and Town Districts” and section 94 addressed the situation where land was owned by a person of one denomination and occupied by a person of another denomination, in terms of the right to separate school assessment. It is in the
detail of the assessment rights as set out in this chapter 30 that the constitutional ability of Separate Catholic boards is further constitutionalized.

(e) The Charter of Rights and Freedoms, 1982

All of these constitutional protections are reinforced by the provision of section 29 of the Charter of Rights and Freedoms:

“29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools”.

It is clear that s.93(1) of the Constitution Act, 1867, s.17(1) of the Alberta Act, 1905 and the Saskatchewan Act, 1905, grant to the Provinces of Ontario, Alberta and Saskatchewan exclusive right over education, subject to the protection of minority denominational education rights. Although those rights are not frozen in time, nor can or should be comprehensively listed, they at least include the following:

1. The right or privilege to form a new separate school district;

2. The right or privilege to levy assessments upon the ratepayers of the separate school district; and

3. The right or privilege not to be liable to assessments levied by any party other than the separate school district.

3. The PSBAA Case

(a) The Legislation

In 1994, Alberta passed the School Amendment Act, 1994, S.A. 1994, c. 29 in which it removed the right of school boards to requisition taxes at the local level, required municipalities to pay those taxes into the Alberta School Foundation Fund (“ASFF”), set mill rights established by the provincial government and distributed funds to school boards on a per student pro-rata basis. However, under the amendment, Separate school boards were entitled to opt out of the ASFF and to requisition taxes locally, receiving a top up from the ASFF to bring their revenues up to the level of the provincial average of all boards.
(b) **The Trial Decision**

In this case Alberta specifically advanced the argument that they were only required to ensure “that funds be distributed fairly and (the constitutional protection) does not apply to how the funds are raised”, arguing that “it is irrelevant whether a school receives its money through the ASFF or through direct taxation as long as there is no discrimination in the distribution of the monies” (para. 7). In addition, Alberta specifically challenged the existence of the Separate school board rights “to tax their supporters directly and…. to spend those taxes in any way they choose without interference or ‘enveloping’ by the provincial government” (paras. 9 and 10).

The trial judge held that in Alberta section 17(1) and (2) of the *Alberta Act, 1905*, had two different roles:

> “s. 17(1) is directed towards property assessment support and s. 17(2) towards the support of boards in other ways” (para. 78).

In addition, he held that “s. 17(2) covers grants only, not property taxes” and in Alberta “s.17(2), unlike s. 17(1) was never intended to refer to property taxes. Instead, it was intended only to prohibit discrimination in the distribution of government grants.”

It is clear that the s. 17(1) protection of an assessment base “does not apply to public school boards but only to separate boards” (para. 124); it is “protective legislation” guaranteeing “certain rights to the minority residents and the boards established by them” (para. 128).

Most importantly, the trial judge indicated that the rationale for s. 17(1) was protection of the denominational minority, with respect to their taxation rights, from the tyranny of the majority:

> “From whom is protection required? Protection is required from the majority who would, otherwise, have the power, through elected officials, to take away the rights of the minority. Section 17(1) was designed to protect separate schools from this eventuality and to ensure that they would have the same rights as public schools” (para. 129).

In the subsequent costs decision at the trial level, the Court found that it was the arguments of the Alberta which “posed the risk of adverse consequences” to the claims of the Separate school boards, and costs were awarded to ACSTA.
(c) The Appeal Decision

At the Court of Appeal, the decision of Justices Russell and Picard held that:

“…separate boards are not compelled to participate fully in the ASFF. Because of their special constitutional status, separate school boards are permitted to opt out and requisition taxes directly from ratepayers” (para. 5).

They said:

“Separate school supporters have rights that are constitutionally protected by s.17(1) of the Alberta Act….

…section (17(1)) protects the denominational rights of separate school supporters and the separate school protection is set out in the 1901 North-west Territories Ordinances under The School Ordinance, 1901 (N.W.T.), c.29 and The School Assessment Ordinance, 1901 (N.W.T.), c. 30” (para. 81).

On the issue of discrimination, Justices Russell and Picard said that “for the purposes of the s. 17(2) claim… the ability of separate boards to opt out of the ASFF…. means that separate boards can get a portion of their property assessment money directly from their ratepayers, whereas public boards cannot” (para. 92).

They said “s.17(1) has application only to separate schools and their supporters” (para. 112), and that:

“Whatever the nature of the constitutional protection granted to public schools under s. 93, it is far more limited in scope than the protection given to denominational schools.” (para. 122).

They concluded that “the intention behind s.17(1) was to protect the minority, leaving the majority to protect themselves through the use of the democratic instrument, the ballot box”. (para. 125).

In a separate but concurring decision, Justice Berger tackled head-on the constitutional right of Catholic Separate schools to a guaranteed taxation assessment base. He specifically said that “one of the rights protected under s. 17(1) is the right of separate schools to tax their own

“The position of 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)” (para. 143).

and:

“Subject only to the government’s plenary jurisdiction to establish minimum standards of education, the right of separate schools to tax and spend is, in my opinion, inviolable. It is fundamental to the protection of denominational rights. An erosion of the right to tax and spend requires no evidence of consequential prejudicial impact upon denominational pursuits. The prejudicial effect upon denominational rights is established by the very enactment that purports to subject the taxing and spending powers of separate boards to the will of the majority” (para. 152).

Finally, Justice Berger held that the most significant benefit of a direct right of access to the assessment base was that the funds from the Separate school assessment base were not subject to government regulation:

“The Government is precluded from withholding grants from separate boards that do not comply with the Framework’s conditions relative to locally requisitioned funds” (para. 182).

He said:

“The legislature may not deprive the separate schools of their constitutionally entrenched rights and privileges including the right to levy taxes from their supporters. The legislature may not deny the separate schools their constitutionally protected right to then spend those taxes in pursuit of denominational objectives as they see fit. Any restriction on that right (apart from the imposition of minimum standards) is a breach of s.17(1)…. Section 17(2) ensures that, subject to the fairness doctrine, public and separate schools will receive equal amounts from Government coffers. No
discrimination within the meaning of s.17(2) flows from the exercise by separate schools of their s.17(1) rights. Section 17(2) must be read subject to s.17(1)” (para. 186).

(d) The Supreme Court of Canada

At the Supreme Court of Canada, the decision of the Court was written by Justice Jack Major, the Alberta appointee to the Supreme Court of Canada. Justice Major began his review in this matter by confirming the constitutional right of separate schools to a tax assessment base:

“As a result of their constitutional status, separate school boards could and did opt out of the ASFF and continued to requisition taxes directly from ratepayers” (para. 7).

He then said that it is s. 17(2), not s. 17(1), which constitutes a guarantee of “proportionality between the educational opportunities of separate and public school supporters” (para. 48). He says however that there “are two significant limits… on the content of this notion of fairness. First, it does not prohibit all distinctions in funding, as it does not guarantee absolute or formalistic equality but rather a general concept of fairness. Second, it does not deal with distinctions in the distribution of rights, but only with a general fairness in the distribution of monies” (para. 48).

Given what he had said about the different roles of s.17(1) and (2) of the Alberta Act, 1905, he held:

“It follows that it is unnecessary to ascertain the scope of separate school rights under s. 17(1) in adjudicating whether the impugned funding scheme meets a standard of fairness under s. 17(2). Equally, the unique ability of separate schools to opt out of the scheme cannot be a source of discrimination under s.17(2)” (para. 49).

He said:

“It is clear that s. 17(2) does not apply to property assessment monies not appropriated by the Legislature or distributed by the Government.” (para. 51).
And:

“…s. 17(1) is primarily separate school protective legislation which affords only limited and non-equivalent protection to public schools” (para. 61).

(e) **PSBAA Conclusion**

In conclusion, then, the three levels of Court in the PSBAA case are unanimous and consistent. Separate schools in Alberta have a constitutional right to access their taxation assessment base. That constitutional right is protected pursuant to section 17(1) of the *Alberta Act, 1905*, by constitutionalization of both chapters 29 and 30 of the *Ordinances of the North-West Territories*, 1901. The separate and distinct right to “fairness” in the distribution of government monies is protected by section 17(2) of the *Alberta Act, 1905*, and that right to “fairness” is not to be confused with the right to access the assessment base under s. 17(1), as those rights are distinct and unique. Section 17(1) is a right granted only to separate schools, with the minor exception of a right to limited religious education vested in public schools. The s. 17(2) right to “fairness” in the distribution of government monies is a right granted to both public and separate schools, but does not impinge upon the taxation right of separate schools.

4. **The OECTA Case**

(a) **The Legislation**

The facts and constitutional protections considered by the *OECTA Case* are fundamentally different than those considered in the *PSBAA* case. Those who see these cases as being contrary in conclusion ignore this factual, legislative and constitutional context.

In December, 1997 the Ontario government passed the *Education Quality Improvement Act*, S.O. 1997, c. 31 (“EQIA”) or Bill 160. It is important to note that Bill 160 was drafted with the assistance of legal counsel for the Ontario Catholic School Trustees’ Association, (“OCSTA”) and throughout the case OCSTA argued for the validity of this legislation alongside the government of Ontario.

Division A, ss. 236 and 237 of the *Education Act*, as amended by the EQIA, set out an education taxation system whereby individuals, partnerships and companies owning residential property
declare taxation support to a designated school board, and in default of declaration all corporate and partnership residential tax monies are deemed to support the English Public Board. Business property taxes did not require declarations of support (s. 257.8).

Division B of the Education Act provided that all assessable property was liable for education taxes (s. 257.6), the Minister set tax rates (s. 257.12) and municipalities levied and collected school taxes (s. 257.7). Taxes from individually-owned residential properties, declared partnership and corporate residential properties, were distributed by municipalities to the boards for which declarations were made (s. 257.9). Distribution of education taxes on business properties was made in proportion to enrollment (s. 257.8).

By this system, an assessment base for school support was maintained, taxes were collected from that assessment base by municipalities and paid to designated boards on their assessment base. The Funding Regulations (s. 234), provided for essentially equal per-pupil funding by the addition of government grants to assessment based funds.

Division C provided that a board may individually “determine, levy and collect rates”, Catholic boards could collect subscriptions directly from their ratepayers (s. 257.16), all boards could agree with municipalities to levy and collect taxes on their behalves (s. 257.18) and individuals and corporations could designate school taxes for business properties to a designated board (s.257.20).

By Division F, s.257.106, Division C was said to be “inoperative”. As a result, the provisions giving authority to a board to “determine, levy and collect rates”, to Catholic Boards to collect subscriptions directly from their ratepayers, and to individuals and corporations to designate school taxes for business properties to a designated board, were made “inoperative”.

What is important in this legislative scheme is that at no time was the taxation assessment base altered or removed for Catholic Separate schools. The system of taxation declarations, assessments of property for education taxes, the setting of mill rates, and the levying and collection of taxes remained in place. The division of taxes into separate and public school pools remained in place. Taxes were collected and paid to the designated boards on their assessment base. All that Bill 160 did was, in exchange for a guarantee of equal per-pupil funding from the
taxation assessment base, which did not exist for Catholic Separate schools because of the assessment default provisions to the English Public Board, the fact that business property taxes were not subject to declarations in support of Catholic Separate boards, and other inequities in the system, was to suspend the ability of Catholic Separate boards to determine, levy and collect their own taxes, so long as they received a fair and equitable distribution of taxes through the EQIA. This was not legislation that removed a tax assessment base in any way. This was legislation that specifically preserved that tax assessment base and simply exchanged equity and funding for Catholic Separate schools.

It was generally agreed that the EQIA constituted a substantial reallocation and shift of resources from assessment rich to assessment poor boards and from public to separate boards (Trial decision, para. 29).

(b) The Trial Decision

At the trial level, despite the preservation of the tax assessment base and the entire tax collection system, subject only to the suspension of direct taxation by the Catholic Separate boards, the Court still found the suspension provision contrary to section 93(1) of the *Constitution Act, 1867*.

The trial judge held that in Upper Canada at the time of Confederation there were four different statutes that needed to be interpreted in the context of section 93(1) of the *Constitution Act, 1867*, the *Common Schools Act, C.S.U.C. 1859*, c.64, the *Separate Schools Act, C.S.U.C. 1859*, c. 65, the *Scott Act, S.U.C. 1863*, c. 5, and the *Grammar Schools Act, S.U.C. 1865*, c. 23 (para. 47).

The *Scott Act* guaranteed the right to separate school supporters to establish separate school boards managed by elected trustees, levy taxes upon separate school supporters, and have elected school trustees with the same powers as common school trustees (para. 49). Section 7 provided the power to levy taxes upon persons sending children to separate schools or supporting separate schools. Section 14 of the *Scott Act* exempted separate school supporters from the payment of common school rates, section 20 provided for a proportional share in the funds granted by the legislature for the support of common schools on the basis of pupil attendance, and section 21 provided that separate schools were not to share in the monies arising from the local assessment for public schools.
The overarching result at trial was legally expressed in the single concluding paragraph:

"There are five certainties. First, there is a denominational right of Roman Catholics in Ontario to the separate school system. Second, adequate financing is a necessary means to the real achievement of that separate school system. Third, the language of s. 7 of the Scott Act in conferring the right to tax locally is clear and express in providing an independent means to the Roman Catholic community to achieve the realization of their separate school system. Fourth, the language of s. 93(1) protects the rights and privileges 'with respect Denominational Schools' accorded by the law, including s.7 of the Scott Act, at Confederation. Fifth, the right to tax locally, recognized by s. 7 of the Scott Act, is repealed by Bill 160. Constitutional rights are constitutional rights. In the absence of a constitutional amendment the province cannot lawfully infringe upon such rights” (para. 97).

(c) The Appeal Decision

The Court of Appeal focused in on the preservation of the school board assessment base as being essential to the constitutionality of the EQIA. It said:

"Since the EQIA provides for provincially imposed taxes to be levied on separate school supporters, this assessment base is preserved by the challenged legislation” (para. 34).

Based upon the preservation of the school board assessment base under the legislation, the Court of Appeal concluded:

"…there is a constitutionally guaranteed right to funding which the EQIA does not diminish. It is, therefore, unnecessary to address the argument of OCSTA that this constitutional protection extends to protect the denominational assessment base. OCSTA acknowledges that the EQIA preserves that base and cannot, therefore, be said to prejudicially affected. This constitutional issue is best left to be resolved in the context in which legislation puts that assessment base at risk” (para. 55).

(d) The Supreme Court of Canada

The Supreme Court of Canada recognized that the EQIA preserved the assessment base, as constitutionally guaranteed, for separate schools:
"The new funding model provides five sources from which school boards derive revenue…:

(i) residential property tax revenue from their own school supporters;

(ii) business property tax revenue shared between coterminous boards on the basis of the student enrollment;

(iii) provincial grants, which equalize board disparities in revenues;

(iv) education development charges; and

(v) other sources, such as tuition fees from non-residents and the rental, lease or sale of surplus properties.

(para. 12)

With regard to education taxes, s. 257.106 of the new Education Act, declares inoperative the previous ability of all school boards in the province to raise funds through local taxation. Pursuant to s. 257.7, property tax rates are still levied for school purposes and collected by municipalities. However, s. 257.12(1)(b) now empowers the Minister of Finance to make regulations “prescribing the tax rates for school purposes for the purposes of s. 257.7.”… Residential taxpayers continue to designate their education taxes for either of the public or separate system, meaning that the denominational tax base has not been altered by the EQIA.” para. 13).

It is the preservation of the assessment base for school support, the levying of property taxes for school purposes, the collection of those taxes by municipalities and the ability of residential tax payers to designate their education taxes for the separate system, which makes the taxation scheme in the EQIA constitutionally valid.

The Supreme Court of Canada stated that the constitutional protection with respect to denominational schools has both denominational and non-denominational components or aspects (para. 32), and is to be applied in context (para. 34). In the context of the EQIA preserving the assessment base, the designation of property tax rates for school purposes, the collection of those rates by municipalities and the ability of taxpayers to designate their education taxes for the separate school system, The Supreme Court of Canada said “section 93(1) protects the right to
funding for denominational education, not the specific mechanism through which that funding is delivered” (para. 49).

In Ontario, the interrelationship of section 7 and section 20 of the *Scott Act* is significantly different than the interrelationship of between section 17(1) and 17(2) of the *Alberta Act, 1905* and chapter 29 and 30 of the *North-west Territories Ordinances, 1901*. The Supreme Court of Canada said the following about the particular Ontario constitutional scheme:

“The *Scott Act* includes two funding mechanisms for denominational schools in Ontario: local taxation (s. 7) and provincial grants (s. 20). The province is generally free to alter the funding allocation between these sources as it sees fit, provided that source relied on provides sufficient funds to operate a denominational education system which is equivalent to the public education system in place at the time. The animating principle is equality of educational opportunity. I need not decide the constitutionality of removing the local tax base altogether, as the EQIA does not attempt to do so. While it removes the ability of school boards to set the rate that is to be applied to raise funds through local taxation, it does not remove the funding mechanism of property taxation” (para. 50).

[e] [emphasis added]

(e) *OECTA Conclusion*

The *OECTA Case* stands for the proposition that in Ontario, so long as the school board assessment base is preserved, property tax rates are levied for school purposes and collected by municipalities, and ratepayers are entitled to designate their taxes for the separate school system, for the purpose of substantially increasing revenues for separate schools and poorer school jurisdictions, the suspension of the school boards right to set the mill rate, and directly collect their own taxes is not unconstitutional, because the right to fair and equitable funding pursuant to section 20 of the *Scott Act* fulfills the right of direct taxation guaranteed in section 7 of the *Scott Act*. However, the Courts specifically indicated that they would not provide an opinion as to what their rulings would have been had the legislation removed the assessment base for school purposes.
5. **Conclusion as to the Alberta Catholic Separate School Constitutional Right to an Assessment Base**

The Alberta Catholic Separate school constitutional right to a taxation assessment base must be founded in constitutional provisions, legislation and case law.

In Alberta, the *Constitution Act, 1867*, the *North-West Territories Acts* from 1875 to 1898, the *North-west Territories Ordinances, 1901*, chapters 29 and 30, the *Alberta Act, 1905* and the *Charter of Rights and Freedoms*, section 29, set out a comprehensive constitutional and statutory framework with respect to those rights. It is clear from those provisions that Alberta is granted plenary rights over the education system, subject to the protection of minority denominational education rights and those non-denominational rights essential for the protection of denominational rights. Although those rights are not frozen in time, nor can or should be comprehensively listed, they include at least the right or privilege to form a new Separate school district and expand existing districts, the right or privilege to levy assessments upon the ratepayers of the Separate school district, and the right or privilege not to be liable to assessments levied by any party other than the Separate school district. The mechanism and method for Separate Catholic schools to access their taxation base is set out in detail in the *School Assessment Ordinance, 1901*, which reinforces the provisions of the *School Ordinance, 1901*, granting the right to a school assessment base.

The leading case in Alberta with respect to the right to an assessment base is the *PSBAA Case*. In that case an important distinction was made between section 17(1) Alberta Act Rights and section 17(2) *Alberta Act* rights, the former protecting only Separate schools, and directed only to protect property assessment support, and the latter protecting both Separate and Public school boards, guaranteeing equity and fairness in funding as between these boards. In Alberta, therefore, there are two distinct constitutional rights; the right to access the property assessment base for financial support, and the right to equity and fairness in funding. The Court of Appeal of Alberta clearly held that Separate Catholic boards had a “special constitutional status” and an absolute right to “requisition taxes directly from ratepayers”. Such a right is granted only to Separate boards, to protect them from the “tyranny of the majority”. Justice Berger specifically said that “the right of the separate schools to tax their supporters was part of the bundle of protected rights and privileges” to which they were constitutionally entitled and that “the right of
separate schools to tax and spend is … inviolable” to such an extent that the provincial
government has no right to regulate how the funds from the opted-out assessment base may be
spent by Catholic Separate boards. The Supreme Court of Canada agrees that separate school
boards have a special constitutional status which allow them “to requisition taxes directly from
ratepayers”.

In Ontario, the constitutional scheme and legislative scheme are different. The Scott Act does
not have as strict a division between the right to an assessment base and the right to equity and
fairness, and did not constitutionally incorporate two separate ordinances, differentially
protecting both constitutional rights. In addition, the Ontario legislation considered in the
OECTA Case specifically preserved the right to a school board taxation assessment base, a
system of taxation declarations, assessments of property for education taxes, the setting of mill
rates and the levying and collection of education taxes, dividing the taxes into separate and
public school pools. All that the legislation in Ontario did was to suspend the rights of boards to
determine, levy and collect their own taxes, based upon this continuing education tax scheme, so
long as Catholic Separate boards received a fair and equitable distribution of taxes. The Trial
Court held that, even in the face of the preservation of the school assessment base, there was a
breach of the rights of Catholic Separate schools to directly determine, levy and collect their own
taxes. The Court of Appeal held that where the assessment base was specifically preserved by
the legislation, and where there was a temporary suspension of the right to direct taxation, the
right of equity and fairness subsumed the right of direct taxation. The Supreme Court of Canada
recognized that as long as “property tax rates are still levied for school purposes and collected by
municipalities”, and as long as “residential taxpayers continue to designate their education taxes
for either the public or separate system” the constitutional right to a denominational tax base has
not been altered and the suspension of the school boards rights to raise funds through local
taxation is not unconstitutional. The Supreme Court of Canada specifically said that the
“preservation of the assessment for school support, levying of property taxes for school
purposes, the collection of those taxes by municipalities and the ability of residential taxpayers
to designate their education taxes for a separate system,” makes the taxation scheme in Ontario
valid. The Supreme Court of Canada declined to rule on what would occur if the legislation
attempted to remove the educational tax assessment base altogether.
As a result, there is no conflict between the PSBAA Case and the OECTA Case, and it is clear, constitutionally, legislatively and in case law, in Alberta, Catholic Separate schools have dual constitutional rights to a declared property assessment base (section 17(1) of the Alberta Act, 1905, and chapters 29 and 30 of the Ordinances of the North-west Territories, 1901) and to equity and fairness in government funding (s.17(2)). Even in Ontario, where that distinction is not as firm, the suspension of a direct right of taxation in school boards was only allowed in the context of the preservation of the educational assessment base, the levying of property taxes for school purposes, the collection of those taxes by municipalities and the designation of educational taxes for separate and public schools.

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Per: ________________

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