

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF THE SCHOOL AMENDMENT ACT, 1994, being Bill 19:
AND IN THE MATTER OF THE SCHOOL ACT, S.A. 1988, c. S-3.1, as amended;

BETWEEN:

THE PUBLIC SCHOOL BOARDS' ASSOCIATIONS OF ALBERTA,
THE BOARD OF TRUSTEES OF THE EDMONTON SCHOOL
DISTRICT NO. 7 and CATHRYN STARING PARRISH

Respondents (Applicants)

- and -

THE ATTORNEY GENERAL OF ALBERTA, THE GOVERNMENT
OF ALBERTA and the MINISTER OF EDUCATION

Applicants (Respondents)

MEMORANDUM OF DECISION
OF THE HONOURABLE MADAM JUSTICE J.B. VEIT
Motion Heard: September 23 and October 7, 1994
Issued: October 20, 1994

Summary

The Government of Alberta asks the court to prohibit the Public School Boards' Association from access to court, from presenting their evidence and argument to the court, from asking the court to rule that there is a core notion of some form of local autonomy in the matter of schools administration. The Government relies on the provisions of R. 129. That Rule allows a court to strike out pleadings if it finds that the pleadings disclose no cause of action, if the pleadings are scandalous, frivolous or vexatious, or if the pleadings constitute an abuse of the process of the court. The Government asserts that there is no chance that the School Boards will eventually convince the court that they are entitled to relief. It claims complete control over municipal institutions; it alleges that it could, if it wished, for example abolish the City Council of Calgary. Because, so the Government argues, there is no chance of success for the School Boards' Association, the court should nip these proceedings in the bud, by striking out most of the paragraphs of the Originating Notice of Motion filed by the Public School Boards' Association before time and money are wasted.

The School Boards' Association maintains that it has a serious issue to be tried and that, in any event, there are sufficient questions of fact and law to be tried that it should be allowed to try to make its case in court.

The motion is denied. The Association is entitled to a hearing of its originating motion.

The burden on a litigant who wants to strike out pleadings and prevent an action from being heard in the courts is, understandably, heavy. If anything, that heavy burden weighs yet more heavily on the litigant who maintains that another person has no constitutional right and therefore no cause of action. Here, the applicant's own materials demonstrate that constitutional rights of the type asserted by the School Boards may exist.

This motion is not about whether the government's proposals for school funding are valid, or whether its legislation to control school board superintendents is valid, or whether any of the other government actions surrounding the control of education are valid. It is only about whether the Public Schools' Association is entitled to ask the court to decide on these issues.

CASES AND AUTHORITY CITED

BY THE APPLICANT, GOVERNMENT OF ALBERTA: Cerny v. Canadian Industries Ltd. [1972] 6 W.W.R. 88 (App. Div.); Operation Dismantle v. The Queen (1985), 18 D.L.R. (4th) 481 (S.C.C.) (excerpt); Board of Trustees of St. Paul School District #2228 v. The Queen, unreported, February 3, 1993 (Alta. Q.B.); OPSEU v. National Citizens' Coalition (1990), 69 D.L.R. (4th) 550 (Ont. C.A.); Cosyns v. Canada (A.G.) (1992), 7 O.R. (3d) 641 (Ont. Div. Ct.); Rural Route Mail Carriers of Canada, Local 1801 v. Canada (1989), 29 F.T.R. 105 (F.C.T.D.); I.M. Rogers, *The Law of Canadian Municipal Corporations* (Carswell: Ottawa, 1994) 10-11, 309-311; D.P. Jones and A.S. de Villars, *Principles of Administrative Law*, 1994; Jacques L'Heureux, "Municipalities and the Division of Powers", *Intergovernmental Relations*, R. Simeon ed., (Toronto: U. of T. Press, 1985); H.M. Kitchen and M.L. McMillan, "Local Government and Canadian Federalism", *Intergovernmental Relations*, AD. Simeon, R. (Toronto: U. of T. Press, 1985); S.M. Makuch, *Canadian Municipal and Planning Law* (Toronto: Carswell Company Ltd., 1983) at 107-115; D. Gibson, "The Constitutional Position of Local Government in Canada", (1980) 11 Man. Law J. 1; D.M. Cameron, "Provincial Responsibilities for Municipal Government" (1980) 23 *Canadian Public Administration* 222; L.D. Feldman and K.A. Graham, *Bargaining for Cities*, 1979, 5-13; T.J. Plunkett and G.M. Betts, *The Management of Canadian Urban Government* (Institute of Local Government: Kingston, Ontario, 1978), 59-97; D.J.H. Higgins, *Urban Canada: Its Government and Politics* (MacMillan of Canada, Toronto, 1977), 45-77; K. Antoft (ed.), *A Guide to Local Government in Nova Scotia* (Halifax: The Institute of Public Affairs Dalhousie University, 1977), 1-3, 12-15; C.R. Tindal, *Structural Changes in Local Government: Government for Urban Regions* (Toronto: The Institute of Public Administration of Canada, 1977), 2; T.J. Plunkett, *The Financial Structure and the Decision-Making Process of Canadian Municipal Government*, 1972, 9-14; J.S. Dupre, *Intergovernmental Finance in Ontario: A Provincial-Local Perspective* (Frankfogg Queen's Printer), 1968, 2-6; H.J. Whalen, *The Development of Local Government in New Brunswick*, 1963, 103-109; K.G. Crawford, *Canadian Municipal Government* (Toronto: University of Toronto Press, 1954), 18, 208-209; R. v. Greenbaum (1993), 100 D.L.R. (4th) 183 (S.C.C.); Shell Canada. Products v. Vancouver (1994), 20 M.P.L.R. (2d) 1 (S.C.C.); Verdun v. Sun Oil Co. (1952), 1 D.L.R. 529 (S.C.C.); Brandon v. Municipal Commissioner (1931), 3 D.L.R. 397 (Man. K.B.); Cornwall v. West Nissouri (1875), 25 U.C.C.P.R. 9 (C.A.); Smith v. London (1909), 20 O.L.R. 133 (Div. Ct.); McKay v. The Queen (1965), 53 D.L.R. (2d) 532 (S.C.C.); Re Weinstein and Minister of

Education for B.C. (1985), 20 D.L.R. (4th) 609 (B.C.S.C.); Johnson v. Board of Education of Ponoka County #3 (1988), 88 A.R. 31 (Alta. Q.B.); Atkins v. Calgary (1994), 16 Alta. L.R. 429 (Alta. Q.B.); J.G. Bourinot, *Local Government in Canada: A Historical Study*, 1887, Reprinted by Johnson Reprints Corporation (New York: 1973) at 56; "Report of the Resource Task Force on Constitutional Reform Federation of Canadian Municipalities", *Municipal Government in a New Canadian Federal System*, Ottawa, 1980; House of Commons Debates, February 14, 1979 at 3214; P.W. Hogg, *Constitutional Law Of Canada*, 3d ed. (1992) at 12-3; A.G. Ont. v. A.G. Can. (Reference Appeal), [1912] A.C. 571, 581, 583; Bank of Toronto v. Lambe (1887), 12 App. Cas. 575, 587; Saumur v. City of Quebec, [1953] 2 S.C.R. 299 at 322-3; J. Zimmerman, *State-Local Relations*, 1983 at 17-48; E. McQuillin, *The Law of Municipal Corporations* 3d ed., 1988 at 182-186; H.L. McBain (1916) 16 Col. Law Rev. 190-216, 299-322; T.Sandalow "The Limits of Municipal Power Under Home Rule: A Role for the Courts" (1964) 48 Minn. Law Rev. 643 at 646, n. 10; Note, (1959) 72 Harvard Law Rev. 737, n. 2; Haig v. Canada (1993), 105 D.L.R. (4th) 577 at 607-608; Barke v. Calgary (City) (1990), 98 A.R. 157 at 159 (Q.B.); Jones v. Ontario (A.G.); Rheume v. Ontario (A.G.) (1992), 89 D.L.R. (4th) 11 at 14-15 (Ont. C.A.); Mason v. Alberta (unreported, August 21, 1989, Alta. Q.B., per Roslak J.) at 8; Board of Education of Antigonish v. Cameron et al. (No. 2) (1992), 113 N.S.R. (2d) 107 at 110 (N.S. Co. Ct.); Sacco v. Ontario (Attorney-General) (1991), 77 D.L.R. (4th) 764 at 767 (Ont. Gen. Div.); Reference Re Sections 193 and 195.1 (1)(c) of the Criminal Code, [1990] 4 W.W.R. 481; Bennett v. British Columbia (Securities Commission) (1992), 94 D.L.R. (4th) 339 at 355 (B.C.C.A.); R. v. Danson (1990), 73 D.L.R. (4th) 686 at 695-697 (S.C.C.); R. v. Goitz (1992), 67 C.C.C. (3d) 481 at 497 (S.C.C.); Slaight Communications v. Davidson (1989), 59 D.L.R. (4th) 416; Schachter v. Canada (1992), 93 D.L.R. (4th) 1 at 28-29 (S.C.C.); Irwin Toy Ltd. v. Quebec (1989), 58 D.L.R. (4th) 577 at 630-633; L.L.W.U. v. The Queen (1992), 96 D.L.R. (4th) 513 at 521 (F.C.A.); Whitbread v. Walley (1991), 77 D.L.R. (4th) 25 at 32 (S.C.C.); Whitbread v. Walley (1988), 51 D.L.R. (4th) 509 (B.C.C.A.); Budge v. Alberta (W.C.B.) (1991), 77 D.L.R. (4th) 361 at 369 (Alta. C.A.); Filip v. Waterloo (1992), 98 D.L.R. (4th) 534 at 537-538 (Ont. C.A.); Wowk v. Edmonton Board of Health [Alta.], [1994] 7 W.W.R. 78 at 82-83; Reference Re Authority to Perform Functions..., [1938] S.C.R. 398 at 402 (S.C.C.); Rex v. Ulmer (1922), 1 D.L.R. (N.S.) 304 at 308, 310-311, 313 (Alta. C.A.); Bailey v. Lethbridge School Division, [1940] 2 W.W.R. 21 at 30-31 (Alta. S.C.); Re Calgary Board of Education and A.G. Alta. (1981), 122 D.L.R. (3d) 249, 252 (Alta. C.A.); Calgary Board of Education v. A.G. Alta., [1980] 1 W.W.R. 347 at 355-356 (Alta. S.C.); G. Marshall, *Constitutional Conventions*, 1984 at 16-17; Wittman v. Emmott, [1991] 4 W.W.R. 175 (B.C.C.A.); Sellars v. The Queen (1980), 110 D. L. R. (3d) 629 (S.C.C.); Air Canada v. City of Dorval, [1985] 1 S.C.R. 861 at 866; City of Outremont v. Protestant School Trustees, [1952] 2 S.C.R. 506 at 511; Sainte-Rose-du-Nord v. Quebec (1992), 17 M.P.L.R. (2d) 80 at 81, 87-91 (Que. S.C.); The Task Force on Canadian Unity, the Words of the Debate, February 1979 ('the Peppin-Robarts Report') at 70-71; The Task Force on Canadian Unity - Observations and Recommendations, January 1979 ('the Peppin-Robarts Report') at 81-99; K.D. Cameron, Tenth National Seminar: Summary of Discussions" (1980) 23 Canadian Public Administration 195 at 204.; (Veit Efone); A.G. Canada v. Dupond (1978) 420 (S.C.C.); J.P. McEvoy, review of Canadian Constitutional Conventions: The Marriage of Law and Politics and Reasoning with the Charter, CJLS/RCDS Vol. 8 #1 (Spring 1993).

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BY THE COURT: Galand Estate v Stewart (1992) 6 Alta. L.R. (3d) 399; Adler v Ontario (1994) 19 O.R. (3d) 1 (C.A.)

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1. Background

By Originating Notice of Motion dated June 29, 1994, the Public School Boards' Association of Alberta, the Board of Trustees of the Edmonton School District No. 7 and Cathryn Staring Parrish, a ratepayers filed an Originating Notice challenging the constitutional validity of a large number of provisions of the School Amendment Act, 1994. The affidavit of David T. King, Executive Director of the Association, was filed in support of the application. Subsequently, two additional experts' affidavits were filed. The Originating Notice raises a number of arguments about the constitutional validity of the impugned provincial schools legislation: it bases its arguments on s. 17(2) of the Alberta Act, the preamble of the Constitution Act, 1867 (formerly known as the British North America Act) and ss. 2(b) and 7 of the Charter. The Originating Notice is attached as Appendix A.

By Notice of Motion dated August 9, 1994, the Attorney General of Alberta filed a Notice of Motion applying to strike out paragraphs 3, 4, 5, 6, and 7 of the Originating Notice on the grounds that they disclose no cause of action, that they are scandalous, frivolous or vexatious, or that they otherwise constitute an abuse of the process of the court.

The School Amendment Act, 1994 constitutes a major restructuring of the education system. The Government of Alberta states that the purpose of the restructuring is to:

Put in place a fair system of funding education; Focus resources on students in the classroom; Ensure more decision making at the school level; Lower administrative costs.

The Government states that the legislation was designed to address the problem of inequity of funding between school districts. The Government's answer to the problem of inequitable funding is to create the Alberta School Foundation Fund into which locally raised revenues are

placed. All public and separate districts are included in the fund, although separate boards have the option to opt out. The impugned legislative provisions remove the power of general tax requisition currently enjoyed by school boards. The amendments also give to the Minister of Education the right of approving, every 3 years, the continued appointment of school board superintendents. Other legislative changes are also contested by the School Boards; the foregoing specific complaints are representative of the type of complaints made by them. Before making these legislative changes, the government did not consult with the representatives of the public school boards as it did with representatives of the separate school boards.

2. What is the burden on the government?

On this motion, the government must satisfy the court that there is no chance that the school boards could succeed in obtaining the declaration they want. This is a very difficult test to meet. So it should be since, if the government is successful, the school boards will never have the opportunity of putting their case forward; they will never have their day in court.

Obversely, if the school boards are allowed to bring their motion to court, this would not mean that they have a good chance of winning, or a probable chance of winning, or even a fairly good chance of winning.

The most recent comments by the Supreme Court of Canada on the burden of an applicant in applications of this type were made in Hunt. There, Wilson J., speaking for the court, reviewed the history of the comparable British Columbia Rule. The Alberta and British Columbia Rules establishing a motion to strike out pleadings are virtually identical; if anything, the British Columbia Rule sets a higher, tougher standard than the Alberta Rule. In Alberta, in order to have a pleading struck out a litigant must show that there is no cause of action. In British Columbia the litigant must prove that there is no "reasonable" cause of-action. In any event, Wilson J. held that the B.C. Rule, and similar rules in each of the provinces including Alberta, were designed to allow the courts to get "rid of an action that was on its face manifestly groundless". The Supreme Court of Canada adopted the observations of an earlier court to the effect that:

the rule was not intended to prevent a 'substantial case' from coming forward. Its summary procedures were only to be used where it was apparent that allowing the case to go forward would amount to an abuse of the court's process.

Wilson J. summarized the authorities in these words:

Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed.. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

at pp. 969, 970, 991

In Galand Estate, our own Court of Appeal emphasized that the Hunt case also stands for the proposition that:

a claim should not be struck out if the trend of recent decisions suggests that the law is moving toward supporting such a claim and in a few years that may well be the law.

at p. 408

In an earlier case, Cerny, our Court of Appeal had set similarly high standards for the discretionary striking out of pleadings:

It is clear [from a long line of authorities cited with approval] that a court should not strike out a pleading or part thereof as disclosing no cause of action or as being frivolous or vexatious or as being an abuse of the process of the court, which in most cases would have the effect of dismissing an action or denying a party a right to defend, unless the question is beyond doubt and there is no reasonable cause of action; or a question is raised fit to be tried by a judge or jury, or merely because it is demurrable; or where the matter complained of is only part of the action set up, or where by going to trial the facts could be elicited which would have some effect on the case, or where justice and reason dictate that it should go to trial; or where a pleading is not clearly vexatious or frivolous but which would, if it were allowed to stand, be an abuse of the process of the court; or where questions of general importance are raised or serious questions of law are in issue, unless the matter is entirely clear.

(emphasis added)

In summary, the onus or burden on the applicant Government of Alberta is extremely heavy. Not only must it establish that it is entirely clear that the Public School Boards' Association has no cause of action but that it is entirely clear that it is not possible that the trend of the cases is towards recognizing a cause of action of the type that the Association is advancing.

Moreover, it must be recognized that when the Supreme Court of Canada set the extremely high standards in Hunt, it was dealing with tort law. Tort law is grounded in common law; its principles have evolved over hundreds of years. Where we are dealing, however, with Charter rights, we are dealing with rights that were created or constitutionalized as recently as 1982. The shape of these rights has not yet been defined. Unless there is unambiguous authority from the Supreme Court of Canada on the specific issues that are raised in litigation, it will be difficult for a litigant to successfully assert that a claim for a Charter right has no chance of success.

3. What materials can the court examine in making its decision on this motion?

Normally, a motion to strike out pleadings is brought in connection with the filing of a statement of claim or a statement of defence. Rule 129 extends this procedure to proceedings initiated by way of Originating Notice: R. 129(3). In a statement of claim, plaintiffs must set out the facts which entitle them to the relief that they seek. The rule in those cases is that in order to determine if the plaintiff has a cause of action the court examines the statement of claim and assumes, for the purpose of the motion, that the plaintiff will be able to prove those facts. In other words, the court does not go into an examination of the facts. Indeed, any process such as cross-

examination etc. would be counter-productive because that is what would be done at a trial. The defendant in such cases does not want a trial.

Here, there is no statement of claim. The School Boards have merely asked for relief; this is procedurally correct. They have also filed affidavits. They ask me to treat the affidavits as if they were facts pleaded in the originating notice.

The affidavit from Mr. King was filed on June 29, 1994, at the same time as the Originating Notice. This affidavit states that the 1994 schools legislation "severely reduces the autonomy of all democratically elected school boards, whether public or separate" in a variety of areas: superintendents, who are now made responsible to the Minister of Education; principals, who were previously answerable only to their superintendents and boards, and who are now made responsible to the Minister of Education; school councils; which used to be optional and are now compulsory; the removal of the right to raise revenue for education; the system of "envelope" or "block" funding proposed by the government of Alberta; early childhood services programs, and in other ways.

The affidavit asserts that there is discrimination against public schools, contrary to the provisions of the Alberta Act, 1905 because separate schools are permitted to opt out of the province's funding program but public schools are not.

The Association also filed an affidavit from one A.F.J. Artibise, a historian who states that he has a specialty in local government. This affidavit was filed on September 16, 1994. Finally, the Association filed an affidavit from one A. Sancton, a professor of political science at the University of Western Ontario, who indicates that he has published widely on the subject of local government in Canada. This affidavit was filed on September 19, 1994.

The Rules provide that where there is no specific process contemplated in the Rules, existing rules may be used by analogy: R.4. Here, the original affidavit filed, Mr. King's affidavit, sets out the facts in which the School Boards ground their claim for relief. By analogy to a statement of claim, the King affidavit can be used to establish the factual basis for this application. The purposes of this motion, therefore, where the court is assessing whether the School Boards have a cause of action, the facts as set out in the King affidavit will be accepted as the truth.

The subsequent affidavits - those of Artibise and Sancton - are analogous to the evidence through which the School Boards will attempt to prove. These affidavits will therefore not be considered in this motion.

In order to complete the outline of this part of the process, I note that the Government has not argued that the School Board's claim is frivolous, vexatious or is otherwise an abuse of the court's process. Therefore, the Artibise and Sancton affidavits are not admissible under those headings.

4. Is there, in Canadian constitutional law, a concept of some form of reasonable local autonomy?

The government argues that there is no concept of local constitutional authority in Canada. Its position is that the provincial government can do what it likes with all the agglomerations of

people within their province. It could, if it wished, eliminate at a stroke the city council of Calgary and run the city of Calgary from Edmonton. The government says that it would probably not make such an order, for political reasons, but asserts that it could abolish Calgary City Council if it wanted to.

There is no case law that goes so far as this; although some academic opinion supports the Government's position.

Indeed, one of the cases cited by the government of Alberta itself, Sainte-Rose-du-Nord, expressly leaves open the issue of some level of constitutional authority. That case was dealing with police authority. The government of Quebec had passed a law which required all local municipalities to have their own police force, or would have to pay a fee to the Quebec government for using the provincial police force. The court refused to strike down the legislation; it said that municipal bodies did not have the power to decide for themselves how they would be policed in contravention of provincial legislation on the issue. However, the learned trial judge said:

Le Tribunal n'a pas à décider si l'Assemblée nationale du Québec pourrait abolir les institutions municipales puisque les articles de la loi 145 faisant l'objet du présent recours n'ont d'aucune façon cet effet.

That extract could be translated roughly as follows:

The court does not have to decide if the National Assembly of Quebec could abolish municipal institutions because the sections of Statute 145 that are the object of the present proceedings do not, in any way, have that effect.

It may be fairly said that the court was careful to limit its reasoning to the determination of policing; it specifically did not wish to assert that the provincial government could abolish municipal institutions.

The administration of schools involves more direct democracy than the administration of police. In Canada there is no historical, direct, election of police commissions in the same way that there is a history of election of city councils and, in Alberta, of school boards.

The Government of Alberta relies on a long line of cases and academic commentaries holding that municipalities are subject to the supervision and control of provincial governments. The School Boards' Association does not deny that municipal institutions come within the control of provincial governments. It notes that a provincial government may step in to govern municipalities if the district is large and sparsely populated, if the municipalities are bankrupt, if there is some serious problem of municipal administration, etc. However, it wishes to have the chance to prove that there are some aspects of local autonomy, some core of local government by residents themselves, which provincial governments cannot abolish. It distinguishes the case law cited by the government on the grounds that none of these cases deal with the core of local autonomy; the cases that have been decided deal only with the peripheral exercise of some local autonomy.

I conclude that the Government has not established, in this motion, that the School Boards have no chance of establishing that there is, in Canadian Constitutional Law, a case of local autonomy that must be respected by provincial governments.

5. Can the school boards rely on s. 7 of the Charter when they are only asking for money?

The government says that, in any event, the School Boards are not entitled to rely on the Charter for the portion of their argument relating to a call for tax money because School Boards are artificial persons and artificial persons do not have any constitutional claim to life, liberty and security of the person. Moreover, one of the main complaints from the Association is its deprivation of control over money and money is not one of the interests protected by the Charter.

However, in one of the very cases that the government relies on, Whitbread, the courts have indicated that while many mere economic interests do not come within s. 7 of the Charter, it is not impossible for an economic interest to be so protected. That case dealt with the Canada Shipping Act. Mr. Whitbread took a pleasure craft from its moorings in Coal Harbour and set out for an inn at the north end of Indian Arm, a navigable arm of the sea. During the trip, Whitbread asked one of his passengers, Walley, to take over the helm. Whitbread went to sleep. The pleasure craft ran aground with Walley at the controls. Whitbread suffered injuries that made him a quadriplegic. Whitbread sued Walley and the owners of the pleasure craft. The Canada Shipping Act limits the damages for personal injury caused on board ships to 3,100 gold francs for each ton of the ship's tonnage. In the specific case, this limited Whitbread's damages to approximately \$40,000. Although the court does not refer to the health and social services network in Canada, we might assume that Whitbread's hospital, medical, and future care needs would be provided to him free of charge under Canada's health system and that some level of other needs would be met, if Whitbread was impecunious, by Canada's social service network. The Court of Appeal in Whitbread over-ruled the trial judge and held that the limit on damages in the shipping legislation applied to Whitbread. However, McLaughlin J.A. as she then was said this:

I would not wish to be taken as asserting, however, that s. 7 of the Charter can never include an interest with an economic component. I prefer to leave that question for a case in which it squarely arises.

p. 522

This same concern to avoid stating that no interest, expressed in economic terms, will ever be protected by the Charter can be found in many other cases cited by the parties. In particular, the Supreme Court of Canada was careful to so limit its comments in the Prostitution Reference.

Here, the School Board's position is that money is required to fund education. They say that education is just one aspect of the -overall concern which is education.

The Government relies on a recent decision of McMahon J. of this court in Board of Trustees of St. Paul School District #2228. However, that case is not very analogous to this one. Although School Boards were bringing similar complaints there, they framed their complaints in terms of the Charter's s. 15 rights. McMahon J. found that geography (the alleged unequal treatment of urban and rural school districts) was not a value protected under s. 15.. In that case, the court was mainly concerned with the standing of the School Boards, that is with whether the School Boards had sufficient interest in the outcome to challenge school legislation. The court concluded that the School Boards did not have standing. The Government has not challenged the standing of the School Boards in this litigation. In St. Paul, the court did not make any direct

findings about s. 7 issues because of the decisions it had already made on the s. 15 and standing issues. Therefore, that case is of no assistance to the Government on this motion.

I conclude that the Government has not established, on this motion, that the School Boards have no chance of establishing that s. 7 of the Charter protects a right expressed in economic terms.

6. Other issues: the "mirror" effect of the Alberta Act; the right to vote; the right of expression; the effect of constitutional conventions

In addition to the issues relating to the core of reasonable autonomy for local government and the Charter protection of interests expressed in economic terms, the School Boards raise a bundle of related issues: the "mirror" effect of the Alberta Act which, they assert, protects the rights of public school boards to be treated equally to other school boards; the alleged right of citizens to elect local governors of the education system by democratic vote; the right of expression as translated into a right to be consulted about core issues; the effect of constitutional conventions as the legislative shaping of rights, etc.

Without analyzing each of these issues separately, one can say that each of these issues is linked to one of the School Boards' major contentions. Therefore, these issues should be treated in the same way as the main issues have been dealt with: the applicant government has not established, on this motion, that the School Boards could never establish the validity of these points.

7. Can the School Boards obtain relief against the governments announced plan of enveloping or setting out blocks of funding?

The School Boards want the court to declare unconstitutional a funding plan proposed by the government for enveloping or blocking - that is a plan whereby the government would raise money for education by taxing citizens across the province according to their means and distributing envelopes or blocks of these monies to each school district according to its needs.

The government says that it is premature for the school board to seek this relief. It says that it has announced some plans, but that it is open to a change of policy, depending on input that it receives from the public. Since there is no certainty that there will be an enveloping plan, and since there is no certainty about how any enveloping plan would be developed, it is premature for the court to be determining rights about any such plan.

I have concluded that it is not premature for the School Boards to raise this issue. The evidence establishes that government planning has gone much beyond the talking stage or the 'asking for political input stage. Groups described as "Education Stakeholders" have received a paper called "Decisions to Make", a proposed framework for funding discussions prepared by a MLA implementation team. However, this paper is not distributed by political sources, but by administrative sources - an official of Alberta Education. When this administrative distribution is assessed in the context of the earlier political pronouncements, one may conclude that the concept of "enveloping" or "block funding" of education has moved from the speculative stage to the operational one.

Therefore, I conclude that it is not premature for the School Boards to raise this issue in their Originating Notice.

8. Further Process

Once it has been decided that the School Boards' Association is entitled to continue, two additional questions will have to be decided. By agreement, counsel had agreed to postpone the early November hearing, pending the release of these reasons. New dates for the hearing will have to be chosen. More importantly, the parties will have to determine if the time originally reserved is adequate, whether there is any additional pre-hearing process required and whether time limits should be set for that process, whether witnesses will be heard on the motion, etc. Unless the parties are agreed on all these issues, I will manage these proceedings until they come to hearing.

9. Costs

If the parties are not agreed on costs, I may be spoken to within 30 days' of the release of these reasons.

DATED at the City of Edmonton,
this 20th day of October, 1994.

APPEARANCES:

R.C. Maybank, Esq., and
P.B. Michalyshyn, Esq.
for the applicants, the Government of Alberta

Ms. P.E.S.J. Kennedy, and
Prof. R.D. Gibson
for the respondents, the School Boards' Association

APPENDIX

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF THE SCHOOL AMENDMENT ACT, 1994, being Bill 19;
AND IN THE MATTER OF THE SCHOOL ACT, S.A. 1988, c. S-3.1, as amended;

BETWEEN:

THE PUBLIC SCHOOL BOARDS' ASSOCIATION OF ALBERTA, THE BOARD OF
TRUSTEES OF THE EDMONTON SCHOOL DISTRICT NO. 7
and CATHRYN STARING PARRISH

Applicants

- and -

THE ATTORNEY GENERAL OF ALBERTA, THE GOVERNMENT OF ALBERTA
and the MINISTER OF EDUCATION

Respondents

ORIGINATING NOTICE

TO: THE ATTORNEY GENERAL OF ALBERTA
4th Floor, 9833 - 109 Street
Edmonton, Alberta
T5J 3V5

AND TO: THE MINISTER OF EDUCATION
Room 324, Legislature
T5K 2B6

TAKE NOTICE that an application will be made on behalf of the Applicants, the Public School Boards' Association of Alberta, the Board of Trustees of the Edmonton School District No. 7, and Cathryn Staring Parrish, ratepayers of the City of Edmonton, in the Province of Alberta, before the presiding Justice in Special Chambers, at the Law Courts Building, Edmonton, Alberta, commencing on Tuesday, November 1, 1994 at the hour of 10:00 o'clock in the forenoon or so soon thereafter as counsel may be heard, seeking the following relief:

- 1 An Order declaring that the following sections or portions of sections of the School Amendment Act, 1994 (hereinafter referred to as the "Amendment Act"), are of no force and effect on the ground that they

contravene the requirements of subsection 17(2) of the Alberta Act, 1905:

- section 8 (the School Act, S.A. 1988, c. S-3.1, subsection 17(8)(d);
- section 12 (the School Act, subsections 26.1(2)(b),(d) (e) (f) (g) and (h); and 26.1(3));and
- section 49 (the School Act, subsection 158(1), 158 (1.1) (c)and (d); and 158(2)).

2. An Order declaring that the following words enacted by sections 48 and 51 of the Amendment Act are of no force or effect on the ground that they contravene the Alberta Act, 1905, section 17(2):

- a. "11 separate school" and "made up only of separate school districts" in School Act, subsection 157.1(2), with the result that the subsection be declared to read:

"(2) The board of a district or a division may, pursuant to a resolution, certify to the Minister under the seal of the district or division that this Division does not apply to it."

- b. "separate school," "made up only of separate school districts," and "not more than 30 days after the date on which this section comes into force" in School Act, subsection 157.1(6), with the result that the subsection be declared to read:

"(6) Notwithstanding subsections (4) and (5), a board of a district or division may make a resolution referred to in subsection (2) and the resolution is deemed to be effective with respect to the 1994 and subsequent taxation years unless it is rescinded in accordance with this section."

- c. "separate school" in School Act, subsection 159.1(1.4), with the result that the subsection be declared to read:

"(1.4) The receipt of money from the Alberta School Foundation Fund does not make this division apply to a board of a district or division that has a subsisting resolution certifying that this Division does not apply to it."

3. An Order declaring that whereas:

- a. Canada was given by the Constitution Act, 1867 a constitution described in the Preamble as being "similar in principle to that of the United Kingdom,"

- b. the Constitution of the United Kingdom included, since before Magna Carta and certainly by 1867, reasonable autonomy of local government institutions,

- c. such autonomy also existed in British North America in 1867, and
- d. for other reasons;

there is implicit in the Constitution of Canada generally; in the term "municipal institutions" as that expression is used in s. 92(8) of the Constitution Act, 1867; and in sections 2(b) and 7 of the Canadian Charter of Rights and Freedoms, a law or convention of the Constitution requiring preservation of, and respect for, reasonable autonomy of local government institutions, including local school boards, in Canada.

- 4. An Order declaring that reasonable autonomy of local government institutions in Canada includes:
 - a. democratic election, at the local level, of representatives responsible for each institution, which representatives are not subject to removal from office except by their peers, or by the courts, or by their electors;
 - b. the right of each institution to raise revenue, by local taxation or otherwise as it determines, necessary to carry out its responsibilities;
 - c. freedom of each institution from constraints by other governments on decisions with primarily local consequences within its mandate; and
 - d. freedom of each institution to recruit, select, appoint, direct, evaluate, and discharge its chief executive officer without constraint by other governments.
- 5. An Order declaring that the following sections and/or portions of sections of the Amendment Act, are of no force or effect because they contravene the guarantee of reasonable autonomy of local government institutions implicit in the Constitution of Canada:
 - section 7 (the School Act, subsections 15(c.1) and (i));
 - section 8 (repeal of and substitution for the School Act, section 17);
 - section 13 (the School Act, subsection 28(6));
 - section 18 (the School Act, subsections 44(2)(a), (a.1), and (b), and 44(3)(c));
 - section 22 (the School Act, subsections 94(1), (3) and (4), and section 94.1);

- section 48 (the School Act, subsection 157.1(8));
 - section 49 (the School Act, subsection 158(4));
 - section 51 (the School Act, subsection 159.1(1.3));
 - section 54 (the School Act, subsection 165(2));
 - section 55 (the School Act, subsections 167(2) (only the words "with the prior approval of the Minister"), and 167(3.1));
 - section 56 (repeal of the School Act, sections 168 to 175),
 - section 57 (the School Act, heading "Division 7 Special School Tax Levy," and sections 181.1, 181.2, 181.3, and 181.5);
 - section 58 (repeal of the School Act, subsections 190(1) and (2)(b));
 - section 59 (repeal of and substitution for the School Act, subsection 192(1));
 - section 63(1) and (3).
6. An Order declaring that imposition by the Minister of Education, Alberta Education or other authorities of the Government of Alberta, of an "enveloping" scheme of educational funding, whereby conditions are set as to the particular purposes for which, and the amounts in which, particular funds may be expended by school boards; or the imposition of financial or other restrictions on the ability of school boards to provide Early Childhood Services (Kindergarten) for children in their Districts or Divisions, would contravene section 17 of the Alberta Act, 1905, as well as the guarantee of reasonable autonomy of local government institutions implicit in the Constitution of Canada.
7. An Order declaring that:
- a. section 42.3 (School Act, subsection 155(6)); and
 - b. the failure of the Government of Alberta to consult with representatives of the public school boards, as it did with representatives of the separate school boards, before the enactment of the Amendment Act;
- are contrary to section 7 of the Canadian Charter of Rights and Freedoms, and that subsection 155(6) of the School Act is accordingly of no force or effect.
8. Such further and other relief as this Court deems just and proper.

AND FURTHER TAKE NOTICE that this application is pursuant to the Alberta Rules of Court, Rule 410 (e).

AND FURTHER TAKE NOTICE that the grounds for this application are that the stated provisions of the School Amendment Act, 1994 are contrary to the provisions of the Constitution of Canada including, *inter alia*, the Constitution Act 1867, Preamble and section 92(8); and the Alberta Act, 1905, s. 17 as incorporating the School Ordinance, O.N.W.T. 1901, c. 29 and the School Assessment Ordinance, O.N.W.T. 1901, c. 30; and the Canadian Charter of Rights and Freedoms, sections 2(b) and (7).

AND FURTHER TAKE NOTICE that in support of the said application will be read the affidavit of David T. King, filed together with such further and other material as counsel may advise.

THIS ORIGINATING NOTICE OF MOTION was taken out by Messrs. Parlee McLaws, Solicitors for the Applicants, whose address for service is in care of the said Solicitors as 1500, 10180 - 101 Street, Edmonton, Alberta, T5J 4K1.

ISSUED out of the Office of the Clerk of the Court of Queen s Bench of Alberta, Judicial District of Edmonton, this 29th day of June, 1994.

CLERK OF THE COURT OF QUEEN'S
BENCH OF ALBERTA