E D M O N T O N  P U B L I C  S C H O O L S

February 13, 2001

TO: Board of Trustees

FROM: E. Dosdall, Superintendent of Schools

SUBJECT: ASBA Proposal Regarding Minority Faith Education

ORIGINATOR: Jim Davies, General Counsel

RECOMMENDATION

"That the Minister of Learning not change the *School Act* provisions relating to the formation of separate school jurisdictions", be approved.

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This report is provided in response to Trustee Request #291, Re: ASBA 4 X 4 Committee Request for the Board to vote on a resolution.

- Bring this item back to conference committee with a recommendation of whether it should be supported or not. (Trustee Sulyma)
- Include a legal opinion on the ASBA's proposal in the report. (Trustee Melnychuk)
- Provide clarification on what the Minister had initially agreed to. (Trustee Williams)

Background

The ASBA has proposed an alternative to the current process of establishing new separate school jurisdictions, as described in a document entitled "*ASBA 4 X 4 Committee: Presentation of Findings and Outcomes*" (Appendix I). This issue initially surfaced as an initiative of the Alberta Catholic School Trustees' Association (ACSTA) to expand the boundaries of existing separate school jurisdictions throughout the Province so as to prevent the future formation of separate jurisdictions. The ostensible reason for the initiative was that the creation of new separate jurisdictions has from time to time been divisive at the local level, and the ACSTA wanted to avoid such confrontations through a sudden and sweeping expansion of separate jurisdictions throughout the Province.

It is believed that the Minister of Learning was keenly interested in the proposal. However, it suffered from one major legal flaw: its effect would be to take from Protestants throughout the Province their constitutional right to form separate school jurisdictions wherever they constituted the minority faith. *School Act* amendments to implement that proposal would therefore have required prior constitutional amendment.

ASBA Proposal

In order to seek Ministerial approval of its proposal, the ASBA has asked each board in the province to vote on a motion that would read as follows:

*Be it resolved that the Minister of Learning, after first satisfying himself regarding any constitutional questions, introduce the necessary legislation and regulations to implement the recommendations of the Alberta School Boards Association 4x4 Committee as outlined in the November 20, 2000 Presentation of Findings and Outcomes Report, specifically:*

1. *Alternative to the Current 4x4 Process (pages 8, 9, and 10)*
   *Route A*
   *Route B*

2. *Consultation Protocol (pages 11 and 12)*

3. *Binding Dispute Settlement Mechanism (pages 13 to 16)*

4. *Transition Funding (page 16).*

Administrative Recommendation

The proposed motion makes reference to the Minister of Learning "satisfying himself regarding any constitutional questions." In fact, constitutional impediments may well form the basis on which potentially affected groups could challenge those amendments to the *School Act* that would be required to give effect to the ASBA proposal. The administration doubts that the Government is at present interested in an initiative potentially involving protracted legal processes relating to highly contentious issues such as religious faith and historical guarantees. This is particularly so when one considers that the ASBA process has no discernible practical advantages over the existing process. It is not more expedient, but in fact more protracted. It does little to sidestep the contentious issues that sometimes arise during the formation of new separate districts. It potentially pits various ASBA members against each other (rural against urban, separate against public). In fact, some members of the ASBA construe the proposal as nothing more than uninvited meddling in the affairs of those potentially affected (rural public boards) by urban public boards (who would be unaffected by any changes) and separate boards (who are perceived as desirous of expansion). Finally, the proposal invites legal challenge. Those who would wish to challenge the *School Act* amendments that would be required to implement the proposal could utilize court processes to do so, or, perhaps more likely, could utilize section 93(3) of the *British North America Act* (see Appendix II) to appeal to the Governor General. As a result, the administration recommends that a motion be passed in the form recommended, and not as requested by the ASBA. Details as to the nature of the proposed amendments and the legal issues involved are set out below.

The Legal Issues Involved in Implementing the ASBA Proposal

Certain elements of the ASBA proposal seriously conflict with the constitutional guarantees of the religious minority contained within the *British North America Act, 1867* and the *Alberta Act* (see Appendix II). The ASBA may have been advised that because the proposal is in addition to, rather than replacement of, the existing mechanisms for establishment of separate schools, there is no offense to the constitutional guarantees. However, this is to ignore the fact that the constitutional guarantees belong to *individuals*. Therefore, even if the parallel process is theoretically optional, there is a strong argument that the moment it begins to be exercised by some members of the minority faith, the constitutional guarantees of those of that faith who are not in agreement with the new process are violated because they are essentially dragged along with the process whether they want to be or not: if a separate jurisdiction is created, they have no choice but to belong to it (this point is elaborated upon in section 1(b) below). They have no valid legal complaint if they are dragged along in a process that is constitutionally mandated; however, if the process is one which is in violation of their constitutional guarantees, serious legal issues are raised and they may have valid grounds for objection. It is no answer to these objections that they have available a constitutionally valid process they could initiate to realize the same end, for their "end" may be to remain with the status quo, which is their prerogative unless taken away *by constitutionally mandated means*. In short, the majority of the minority may only tyrannize the minority of the minority in accordance with the constitution.

1. Alternative to the Current 4x4 Process

The ASBA process described above consists of two routes through which minority-faith education could be expanded. Route A is the mandatory first step, and is described in the proposal as follows:

"*The development of a local agreement between boards is strongly encouraged. In this case, the public board and the designated separate board agree locally to a change in the designated separate board's boundary. Legislation will be written to permit local implementation of these agreements, without further need for legislative or regulatory change. Members of the minority faith shall have the personal option of remaining supporters of the public board or becoming supporters of the designated separate board*."

Unfortunately, Route A may well suffer from the same legal flaw as the ACSTA proposal. First, it requires minority-faith residents to "request that their area be included in the service area of their designated separate board". This would be legally acceptable if all minorities who might make such a request were of the same faith of those who had established that designated separate board. However, if such a minority were of the opposite faith, then the provision would likely be contrary to the provisions of section 17(1) of the *Alberta Act* prohibits the creation of any law which would prejudicially affect any right or privilege with respect to separate schools which *any class of persons* have, and guarantees both Catholics *and Protestants* the rights they had in chapters 29 and 30 of the 1901 version of the *Ordinances of the North-West Territories* (see Appendix II). For present purposes, the relevant section of the *Ordinances* is section 41, which states:

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

Since the Protestant or Catholic minority has the right to establish *their own* separate school, it would be contrary to section 41 to require, for example, a Protestant minority to request a Catholic separate board to establish and operate a Protestant separate school. Furthermore, since the minority also has the right to be subject "only to assessment of such rates as they impose upon themselves" under section 41, it would be unlawful to force the minority to be part of the established board and therefore subject to assessment by the dictates of that board. Such action would also be contrary to section 48 of the 1901 *Ordinance*, which, although allowing alteration of district boundaries, first requires evidence that such alteration will not prejudice the rights of any class of ratepayers. Clearly, the rights of a Protestant minority which wished a separate school jurisdiction would be violated by the extension of a Catholic jurisdiction to serve them.

The real effect and intent of the ASBA proposal is to assume that Protestant minorities, where they exist, will forever choose not to exercise their constitutional right to establish a separate system. While that assumption may reflect today's practical reality, it would not be possible to create a law that prejudged the issue for subsequent generations without constitutional change.

The second problem with Route A is that it also provides that members of the minority faith would have the personal option of remaining supporters of the public board. This, too, would require constitutional change in order to be legally possible, because of the decision of the Alberta Supreme Court, Appellant Division, in *Re Schmidt and Calgary Board of Education et al* [1976] 72 D.L.R. (3rd) 330. In that case, the Court held that section 53 of the *School Act* (see Appendix II for that section and for its current equivalent, section 207(6)) meant that once a separate school jurisdiction was erected, all of the members of the minority faith in that area ceased to be residents of the public school board, became residents of the separate board, and could not become residents of the public board again without religious conversion. The Court went on to say that, in this regard, the *School Act* was merely a reflection of the constitutional guarantees contained within section 93 of the *British North America Act* and section 17 of the *Alberta Act*:

*"The scheme of public and separate schools as it existed in 1901 – protected as it is by s. 17 of the Alberta Act – is the separate and public school system we have today. The existence of two systems is guaranteed to the minority. The majority of the minority have the right to compel the entire minority to join the separate school division. That is the situation as it was in 1901, and in 1905 and the way it is in Calgary today. In my opinion there is no legislative authority in Alberta to abolish that scheme…."*

As a consequence, amendment of the *School Act* would not have any effect on the issue of residence. Any law that purported to derogate from the constitutional principle excluding residents of the separate board from being residents of the public board could be readily

struck down, either on application to the Court, or by appeal to the Governor General pursuant to section 93(3) of the *British North America Act*, unless prior constitutional change were enacted.

Aside from the legal issues, the ASBA proposal is intended to be a *less divisive* alternative to the present system. Allowing members of the separate school faith to abandon their system in favour of the public system may prove to be more divisive, not less.

Route B

The ASBA proposal indicates that Route B would be followed only if local agreement were not achieved under Route A. It is described in the proposal as follows:

*"Step 1 – Minority faith residents within a defined area may request that their area be included in the service area of their designated board.*

*Step 2 – The designated separate board shall consult with the appropriate public board and issues such as viability and impact on local schools and programs shall be given thorough consideration. The public board and designated separate board shall establish a protocol which will outline minimum standards for number of meetings, minimum notice for such meetings and the procedures for conducting such meetings.*

*Step 3 – If the designated separate board decides to proceed further it shall gauge interest in the proposed area to determine the extent of interest.*

*Step 4 – If the designated separate board determines that there is sufficient interest to consider extending service, a public meeting shall be held so that all residents of the impacted area can provide input. This meeting shall be chaired by an impartial facilitator, chosen jointly by the designated separate board and the impacted public board.*

*Step 5 – Following the public meeting, the designated separate board shall then decide whether, or not, it will extend service to the area making the request. Should the designated separate board decide to extend service, it shall give the public board a minimum of 8 months notice with the effective date to be September 1st of the next school year.*

*Step 6 – If the designated separate board decides on extension, it shall pass a resolution to add the new area to its boundaries. Members of the minority faith within that area shall then be given the personal option of being ratepayers of the designated separate system or remaining public school system ratepayers."*

Route B suffers from the same basic flaw as described in point 1 in relation to Route A, that is, unless one can presuppose that the minority faith in an area would always be the same as the faith of those who belong to the designated separate board, the scheme is unlawful without constitutional change. There are other flaws as well. In step 4, *all* residents of an area are to be afforded the ability for input regarding the extension of the separate district. Again referring to section 41 of the 1901 *Ordinances*, the constitutional right to determine whether a separate system is to be established in an area belongs to the individual ratepayers

who comprise the minority faith in that area. It is therefore their business alone to make this determination and there is no constitutional room for input by the majority-faith residents. Step 6 includes the possibility of members of the minority faith opting out of being members of the separate system, once it is established, and remaining public school residents. This is contrary to the *Schmidt* decision and therefore unlawful.

2. Consultation Protocol

The ASBA proposal goes on to describe a consultation protocol to be followed when minority-faith residents in an area not served by a separate board request extension of service to them. First, they make their request to the separate school board, which then must advise the public board of the request. Step 2 requires the separate board to consult with the public board "regarding impacts or concerns associated with responding to the request." Step 4 provides for *all* residents (ie. those of all faiths) to have input regarding the extension of minority rights. The problem with these provisions is that minority-faith education is a constitutional right of *individuals*, not school boards. Thus, requiring consultation with public boards is contrary to the constitutional guarantee made for the benefit of those individuals, as is allowing those of the majority faith to influence whether or not a separate school will be established.

3. Binding Dispute Settlement Mechanism

This mechanism suffers from the same flaws as the Consultation Protocol.

4. Transition Funding

This provision would see public boards who lose students to a newly created separate jurisdiction retain full funding for those students in the first year following the establishment, 66% funding in the second year, and 33% in the third year. It is difficult to see how this could be justified under the "equal funding" provisions of the *School Act*.

WJD:cv

APPENDIX I: ASBA 4 X 4 Committee: Presentation of Findings and Outcomes
APPENDIX II: Pertinent Legislation

## Appendix II

## Pertinent Legislation

### Section 93 of *The British North America Act, 1867*

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;

(2) All the powers, privileges and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec;

(3) Where in any province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the Legislature of the province an appeal shall lie to the Governor General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education;

(4) In case any such provincial law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf then and in every such case and as far only as the circumstances of each case require the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor General in Council under this section.

### Section 17 of the *Alberta Act*

17. Section 93 of The British North America Act, 1867, shall apply to the said Province, with the substitution for paragraph (1) of the said section 93 of the following paragraph:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to the 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.

(2) 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.

Where the expression" by law" is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30: and where the expression "at the union" is employed, in the said paragraph (3), it shall be held to mean the date at which this Act comes into force.

Sections 41, 45 and 48 of the 1901 *Ordinances*

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

45. After the establishment of a separate school district under the provisions of this Ordinance such separate school district and 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.
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(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.

48. The commissioner may by order notice of which shall be published in the official gazette alter the boundaries of any district by adding thereto or taking therefrom or divide one or more existing districts into two or more districts or unite portions of any existing district with another district or with any new district <u>in case it has been satisfactorily shown that the rights of rate payers under Section 14 of The North-West Territories Act to be affected thereby will not be prejudiced and that the proposed changes are for the general advantage of those concerned</u>. (emphasis added)

Section 53 of the *School Act*, RSA 1970 (in force at the time of the *Schmidt* case)

53. After the establishment of a separate school district, a person residing within the boundaries of the separate school district who is of the faith of those who established that district, whether Protestant or Roman Catholic, is a resident of the separate school district and a separate school supporter and is not a resident of the public school district or a public school supporter.

Section 207(6) of the *School Act*, RSA 1988 (currently in force)

207(6) Subject to Part 6, Division 2, after a separate school district is established, a person residing within the boundaries of the separate school district who is of the same faith as those who established that district, whether Protestant or Roman Catholic, is a resident of the separate school district and is not a resident of the public school district.