QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2017 SKQB 109**

Date: **2017 04 20**
Docket: QB 118 of 2005
Judicial Centre: Yorkton

BETWEEN:

GOOD SPIRIT SCHOOL DIVISION NO. 204

PLAINTIFF

- and -

CHRIST THE TEACHER ROMAN CATHOLIC SEPARATE SCHOOL DIVISION NO. 212 and THE GOVERNMENT OF SASKATCHEWAN

DEFENDANTS

Counsel:

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Colin K. Hirschfeld, Q.C./ Curtis J. Onishenko — for Christ the Teacher Roman Catholic Separate School Division No. 212

Sharon H. Pratchler, Q.C./Theodore J.C. Litowski, Barbara C. Mysko and Thomson J. Irvine, Q.C. — for the Government of Saskatchewan

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JUDGMENT — LAYH J.
APRIL 20, 2017

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PART ONE: OVERVIEW AND STATEMENT OF ISSUES

I. INTRODUCTION

[1] In the spring of 2003 happenings in the village of Theodore, Saskatchewan would become a flashpoint, bringing to a head a vital issue in Saskatchewan education: the extent of separate school rights. That spring the community of Theodore was faced with the decision of Yorkdale School Division [Yorkdale] to close its community kindergarten to grade 8 school. Its 42 students would be bussed to the neighbouring school in Springside, 17 kilometres away on the Yellowhead Highway. After several unsuccessful efforts to keep their school open, a minority group of Roman Catholics using the provisions of *The Education Act, 1995*,[1] successfully petitioned the Minister of Education to form Theodore Roman Catholic School Division. After protracted negotiations with Yorkdale, the newly formed school division purchased the school building and opened one school, St. Theodore Roman Catholic School. The community saved its school but prompted one of the most significant lawsuits in the province's history.

[2] St. Theodore Roman Catholic School adopted the attributes of a Catholic school and offered a program that accorded with the usual operation of a Roman Catholic separate school. When the school opened in 2003, 13 of the 42 students were Roman Catholic or 31 percent of the student enrolment. That percentage has varied since then from a high of 39 percent to a low of 23 percent. At trial, 26 students were enrolled at St. Theodore Roman Catholic School. Nine are Catholic. Dwayne Reeve, former Director of Education of Good Spirit Public School Division (the successor to Yorkdale) [GSSD] estimated that 12 to 15 elementary students from the Theodore

[1] SS 1995, c E-0.2

attendance area no longer attend St. Theodore Roman Catholic School and, instead, attend school in Springside.

[3] Basic to this litigation is an understanding of the historic constitutional guarantee operative in three Canadian provinces – Alberta, Saskatchewan and Ontario – that entitles Roman Catholics and Protestants to petition the provincial government to create a separate denominational school if they form a minority in a school attendance area. This right is an immutably cast constitutional right under s. 93 of *Constitution Act, 1867*[2] and is unquestioned in this action. Instead, what drives this litigation is the provincial government's policy to fund separate schools in Saskatchewan based solely on student enrolment without regard to the religious affiliation of students. As I understand GSSD's position, it is not opposed to non-Catholic students attending St. Theodore Roman Catholic School, but submits that the historic constitutional protection of separate schools does not include the right for the school to receive government funding for non–Catholic students who attend the school. More significantly, GSSD submits that since such funding is not constitutionally guaranteed, it is exposed to scrutiny under the *Canadian Charter of Rights and Freedoms*[3] and infringes freedom of religion under ss. 2(a) and equality rights under s. 15.

[4] In essence then, this action, begun 12 years ago, poses two basic questions. First, is government funding of non-minority faith students in Saskatchewan's separate schools a constitutionally protected component of separate schools under s. 93 of the *Constitution Act, 1867*? The defendants,

[2] (U.K.), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II No 5

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

the Government of Saskatchewan [Government] and Christ the Teacher Roman Catholic School Division [CTT], the successor to Theodore Roman Catholic School Division, submit such funding is; GSSD submits such funding is not. Second, if such funding is not constitutionally protected under s. 93 of the *Constitution Act, 1867*, does it infringe ss. 2(a) and 15 of the *Charter*? The Government and CTT submit it does not infringe the *Charter*; GSSD submits it does infringe the *Charter*.

[5] In an interlocutory fiat in August 2012, Justice Mills stated that at its "simplest," this case involves the ability of the Government to fund non-denominational students attending a denominational school. With prescient accuracy, he forewarned that "the case is much more complex than this simple statement, and if this matter were ever to proceed to trial…significant and complex issues" would have to be adjudicated. That time has now come. If funding of non-Catholic students at St. Theodore Roman Catholic School violates *Charter* rights, then funding of any non-Catholic students in Catholic schools in Saskatchewan similarly violates the *Charter.*

II. STATEMENT OF ISSUES

[6] Prior to the parties' final arguments, I directed GSSD to provide to the defendants a statement of the issues the court needed to address to resolve this action. Upon receipt of the issues from GSSD, the Government filed a statement of objection respecting the issues proposing a different statement. After considering the statement of issues exchanged between the parties and the nature and content of the pleadings, I have determined the issues that I must resolve in this lawsuit as follows:

1. Does GSSD have the requisite standing to bring this constitutional action seeking the remedies it requests? If "No," GSSD's action will be dismissed. [PART TWO]

2. If "Yes," is St. Theodore Roman Catholic School a legitimate separate school? If "No," the result is apparent: students cannot attend and governments cannot fund an illegitimate school. [PART THREE]

3. If "Yes," do ss. 93(1) and 93(3) of the *Constitution Act, 1867* constitutionally protect legislation and government action[4] that funds non-Catholic students at St. Theodore Roman Catholic School? If "Yes," GSSD's claim must be dismissed. [PART FOUR]

4. If "No," does s. 17(2) of the *Saskatchewan Act*[5], which constitutionally guarantees no discrimination in the distribution of money among any class of school, protect legislation and government action that funds non-Catholic students at St. Theodore Roman Catholic School? If "Yes," GSSD's claim must be dismissed. [PART FIVE]

5. If "No," is the Government's funding of non-Catholic students at St. Theodore Roman Catholic School:

   a. a violation of ss. 2(a) of the *Charter*; [PART SIX] or

   b. a violation of s. 15 of the *Charter*? [PART SEVEN]

   If "No," to both questions GSSD's claim must be dismissed.

6. If, "Yes," does s. 1 of the *Charter* justify the violation of the *Charter* as a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society? If "Yes," GSSD's claim must be dismissed. [PART EIGHT]

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[4] Included as government action are actions of school boards because they operate under the authority of the legislature: s. 32(1) of the *Charter.*

[5] 4-5 Edward VII, c 42

7. If, "No," is GSSD entitled to the declarations it seeks? [PART NINE]

[7] Perhaps as important as identifying issues requiring adjudication is identifying issues that need not be adjudicated. This case is not about government funding of Catholic students attending St. Theodore Roman Catholic School or any other separate school in Saskatchewan. The existence of these schools and their funding is guaranteed by s. 93 of the *Constitution Act, 1867,* even if incompatible with *Charter* rights.

[8] Nor is this case an inquiry into the quality of education offered in Saskatchewan's public and separate schools, other than an understanding of their broad character.

[9] Nor is this case about the authority of Yorkdale to close Theodore Elementary School in 2003. Under *The Education Act, 1995* it had full authority to make this decision.

III. CERTAIN PRELIMINARY FINDINGS AND OBSERVATIONS

[10] Certain rather random preliminary observations and findings will clarify and simplify issues as they arise in this judgment. I will state them at the outset.

GSSD's Sought Remedy

[11] As a remedy, GSSD seeks a declaration that the legislative provisions which implement the funding regime in Saskatchewan, specifically

sections 53, 85, 87 and 310 of *The Education Act, 1995*[6] and ss. 3 and 4 of *The Education Funding Regulations,*[7] are unconstitutional to the extent they provide funding to educate non-Catholic students attending Catholic separate schools.

Public Section and Catholic Section Support

[12] Indicative that this action has implications far beyond St. Theodore Roman Catholic School is the support and leadership that GSSD has received from the Public Section of the Saskatchewan School Board Association [SSBA] in advancing this action and, similarly, the support and leadership that CTT has received from the Catholic Section of the SSBA in defending this action. The SSBA, established in the 1950s by a special Act of the Legislature, consists of three main groups: the Public Section, the Catholic Section and Conseil des écoles fransaskoises.

Various Funding Regimes

[13] During the trial many sub-themes emerged about non-minority faith students attending separate schools, including competition between the public and separate school systems in programming and student transportation, the role of public education in a modern society, inherent parental rights to have educational choices for their children and the decline of religious observance in public schools. These sub-themes are peripheral because government funding is the linchpin of this action. Given finite government resources for education, funding given to separate schools beyond their mandate necessarily means funds not given to public schools. On the other

[6] ss 53, 85, 87 and 310 Appended as Appendix 1
[7] RRS c E-0.2 Reg 20 - ss 3 and 4 Appended as Appendix 2

hand, without funding for non-minority faith students in separate schools, the result is clear: enrolment in Saskatchewan's 119 Catholic schools and a sole Protestant school will be dramatically affected.

[14] I heard voluminous testimony about the various iterations of government funding given to Saskatchewan schools to suit shifting needs and department policies. From 1905 to now, a significant, albeit varying, component of provincial educational funding can be tracked to per student grants. I heard much evidence about the funding arrangements between the provincial government and Saskatchewan school boards, and specifically from 2003 when Theodore Roman Catholic School Division was formed, to the current funding regime. Much of the evidence offered by GSSD was to show the net funding loss occasioned Yorkdale and GSSD by the formation of the Theodore Roman Catholic School Division.

[15] In 2009 the province introduced a significant change in the funding regime when it set and capped province-wide mill rates for education taxes respecting public school divisions. Public school divisions were obligated to use the new arrangement, but because separate school divisions have a constitutional right to levy taxes to fund separate schools, they could notify and advise municipal authorities of their right to set their own mill rates. Before 2009, each school division set its own mill rate and raised revenue based on the available property assessments. School divisions with low property assessments suffered inequities. After the change, revenues were equalized and offset by provincial funding from general revenue so richer and poorer assessment levels across the province were flattened. The annual funding formulae in use since 2009 are not easy to explain. They have

changed according to the Ministry's objectives of achieving equity, simplicity, transparency and accountability. Certain funded costs are simply on a per student basis, like administration and governance. Others are less sensitive to student enrolment since, for example, a larger school can more inexpensively accommodate additional students than smaller schools.

[16] The various iterations of school funding in Saskatchewan are determinative of this action. Regardless of the funding formula in vogue at any time, the largest component of government funding is tied to student enrolment. Simply stated, the more students, the more government funding.

Who is Catholic?

[17] Another highly relevant matter in this action is understanding who is Catholic. I accept the evidence of Dr. Robert Dixon, GSSD's expert witness, that proof of one's Catholic identity is baptism in the Catholic tradition, commonly evidenced by a baptismal certificate. A child is usually baptized by a Catholic priest or, in the case of an emergency, by a Catholic lay person.

Number of Non-Catholic Students in Catholic Schools

[18] Another significant question that arises is the extent to which non-Catholic students currently attend Catholic schools in Saskatchewan. Ken Loehndorf, current executive director of the Catholic Section, testified that sound statistical information is not readily available. I find this lack of statistical information surprising since Catholic schools distinguish between Catholic and non-Catholic students for sacramental participation. Only

Catholic students can participate in the three sacraments initiated during a child's tenure in a Catholic elementary school: First Eucharist (usually in grade one or two), Reconciliation or Confession and Confirmation (usually in grade seven). Non-Catholic students cannot participate in the sacraments, although they are required to participate in religious instruction and liturgical celebrations, including sacramental preparation.

[19] When Mr. Loehndorf was director of the North Battleford Roman Catholic School Division (later Light of Christ Roman Catholic School Division), he tracked the number of non-Catholic students. Mr. Loehndorf testified that on average, 30 percent of the students in the division's schools were non-Catholic with a lower percentage of approximately 20 percent in English elementary schools and up to 35 percent in the French Immersion Catholic schools.

[20] Other statistical information respecting enrolment of non-Catholics in Catholic schools comes from the Saskatoon Catholic Board of Education's confidential report dated November 10, 1978 prepared by the Director of Education, W. Podiluk, based, in turn, on a confidential "Annual Enrolment Review" prepared by Assistant Superintendent W. Coumont [November 10, 1978 Confidential Report]. Although the information is now nearly 40 years old, this action itself takes meaning from Saskatchewan's historical changes in demographics and school enrolment. The report shows that from 1973 to 1978, the percentage of students in Catholic schools increased from 26.22 to 27.08 percent of the total Saskatoon school population. The most significant increases were in elementary schools, increasing from 19.5 percent of the total school population in 1958 to 29.6

percent in 1978. In the same year, 22.9 percent of Saskatoon's high school population attended Catholic high schools.

[21] Most significantly, the report includes the following data and commentary respecting non-Catholic attendance at Saskatoon's Catholic schools:

> Very few non-Catholics were enrolled in Catholic schools prior to the fee-for-service agreement. Since that time, their numbers have been increasing. In a five year period, the percentage of non-Catholics in the elementary schools has increased from 3.41% to 10.02%.
> …
> If the present circumstances suggest a trend, it is possible that:
>
> – In five years the non-Catholic population could reach a total of 750 students which would amount to 12.5% of the total population.

This report gives some indication that the enrolment of non-Catholic students in Catholic schools was becoming prevalent by the 1970s.

Defendants Acting Independently

[22] At trial, the defendants presented separate witnesses and advanced positions independently of each other. Each prepared separate pre-trial and trial briefs of law, each cross-examined GSSD's witnesses independently and advanced their defences as suited their interests. I do not intend to conflate their positions but, not surprisingly, their positions are often similar. I will draw distinctions in their positions when necessary.

A Basic Principle of Separate Schools

[23] Perhaps surprising to many is the rather anti-intuitive reality that under s. 49 of *The Education Act, 1995* (as specifically permitted by constitutional authority) a separate Catholic school cannot be created, for example, in a community where Catholics are a majority and where a faith-based school might receive its greatest endorsement. Separate schools are only to protect Catholics or Protestants when they are in a minority in a school attendance area.

Essentially Catholic Schools

[24] As a final introductory comment, since Saskatchewan has only one Protestant separate school, at Englefeld, the practical implications of this decision primarily affect Roman Catholic schools. Therefore, throughout this judgment I will commonly refer to separate schools as Catholic schools and non-minority faith students as non-Catholic students.

IV. WITNESS SUMMARY

[25] The parties presented approximately 11 weeks of evidence and three days of argument. Over 6,100 pages have been transcribed from the trial and hundreds of exhibits marked. Several experts and lay witnesses provided testimony. Although I appreciate that a recitation of testimony in isolation of an analysis is seldom advantageous, the wide interest in this judgment might be best served by a brief synopsis of the witnesses and their testimony. I find that resolution of the issues in this case is not primarily complicated by

divergent facts. The resolution of this case is highly dependent upon a legal analysis and a consideration of largely uncontroverted facts.

A. GSSD's Witnesses

[26] Dwayne Reeve became director of Yorkdale School Division in 2000, a position he held with successor divisions until 2015. In 2003 Yorkdale amalgamated with the Yorkton Public School Division and then with the Yorkton Regional High School Division on January 1, 2004 to become York School Division. In turn, York School Division amalgamated with five other school divisions in 2006 to create GSSD with Mr. Reeve continuing as director. Mr. Reeve provided extensive testimony detailing his experiences with closing several small rural schools during his tenure and the challenges of providing effective education within budget limitations. He specifically provided testimony respecting the closure of Theodore School and the consequences to GSSD.

[27] Dr. Robert Dixon (expert witness) holds several degrees including a M.T.S. (Theology) and Ed. D. He has taught and written extensively respecting all matters of Catholic education. In the conclusory statements of his report, he opined that the Roman Catholic elementary schools in the Northwest Territories were established and maintained exclusively for the education of Catholics. Non-Catholics were admitted only on an exceptional basis. He opined that legislation empowering Catholic separate schools to accommodate non-Catholic children would have conflicted with the mission of Catholic schools as a community of believers gathered together for religious education. Non-Catholics students were not part of that mission.

[28] Dr. Irving Hexham (expert witness), professor in the Department of Classics and Religion at the University of Calgary, was asked to provide a report describing the extent to which evangelization and dissemination of faith is a component of different religious practices. Dr. Hexham opined that certain religions - the Hindus, Sikhs, and to a lesser extent Jews – are most concerned with passing the faith to their next generation. Other religions – Buddhism, Christianity, Islam and Mormonism – are committed to the dissemination of their faith outside their community and to the next generation and embrace education as a means of disseminating and evangelizing their faith.

[29] Larry Huber has been the Executive Director of the Public Section of the SSBA (successor to the Public Urban Caucus) since 2003. The Public Section consists of 15 public school boards, which includes all the public school boards except the three northern Saskatchewan school boards. Previously, Mr. Huber was director of education of Regina Public School Division from 1990 to 1998. He has been deeply involved in what has been called the “mandate issue” of Catholic schools since he was director of the Regina Public School Division in the 1990s.

[30] Thomas Chell was Regional Director from 1997 to 2006 in Region 1 of the Province (southeast portion including Yorkton), reporting to the Ministry of Education. Mr. Chell described the challenges facing school divisions during his tenure. He was familiar with the five year plan developed by Yorkdale to deal with what he called "devastating declining enrolments." In Mr. Chell's opinion, the closure of the Theodore School in 2003 was in the best interests of the students and appropriately implemented by Yorkdale.

[31] Lenore Pinder grew up on a farm near Springside. After her daughter was born, Ms. Pinder considered moving to her parents' farm allowing her daughter to attend Springside School as she had. Given the spectre of rural school viability, she was concerned that before her daughter finished grade 8, even the viability of Springside School might be questionable. In her view, Springside School's viability had been imperilled when the Theodore students did not come to Springside. Given her concerns about the viability of Springside School, Ms. Pinder chose to live in Yorkton.

[32] Dr. Ayman Aboguddah, president of the Regina Huda (Muslim) School since its inception in 1999, testified that the school has 430 students enrolled and a waiting list of approximately 100 students. Initially, when establishing the school, he thought a Muslim school, like Catholic schools, would receive full government funding. When Muslims learned otherwise, they established an independent school. Then, in 2001, the Huda School became an associate school under the Regina Public School Division. Under a 2012 government policy, associate schools, including the Huda School, began to receive 80 percent of the per-pupil funding available to public and Catholic schools but no capital, infrastructure or transportation funding. Dr. Aboguddah explained that receiving full funding for non-Muslim students could address the stigma and stereotyping that exists against Muslims. All but one teacher in the Huda School are non-Muslim.

[33] Dr. Roderic Beaujot (expert witness), Emeritus Professor of Sociology at the University of Western Ontario, prepared a report providing demographic evidence of the religious affiliations found in Canada, Saskatchewan and Alberta as taken from various census data.

[34] Rabbi Jeremy Parnes serves Regina’s Jewish community as spiritual leader at Beth Jacob Synagogue. Rabbi Parnes offers after-school Hebrew classes to three groups. In recent years around 22 children have attended, with 10 students currently attending. Rabbi Parnes testified that six children from one non-Jewish family attended the Hebrew School, a benefit he described in terms of "interfaith bridge building and building understanding between faiths."

[35] Jason Gordon currently is principal of Dr. Brass School in Yorkton. In 1999, he was a half-time teacher in Theodore School and in Saltcoats School, both elementary public schools within the Yorkdale School Division. He was principal of Theodore School for two years before its closure in 2003. While a teacher in Saltcoats (29 kilometres southeast of Yorkton) the neighbouring school in Bredenbury closed. He testified that he observed significant benefits when the Bredenbury students joined Saltcoats School: a single grade seven classroom, new friendships between students and greater ability for extracurricular sports. Mr. Gordon and two other teachers taught three classes of multi-grade configurations prior to Theodore School's closure. He testified that while teachers with teaching experience were able to handle multi-grade classrooms, new teachers were challenged to meet curriculum requirements. Mr. Gordon became the principal of Springside School upon the closure of Theodore School. In his view, the attendance of the Theodore students at Springside School would have created "a nice sized school" that would have enhanced teaching and learning experiences.

[36] Wayne Steen is a school board trustee and former chair of Saskatchewan Rivers Public School Division, which includes the city of

Prince Albert and surrounding area. He also chaired the Public Section of the SSBA from 2001 to 2009. Mr. Steen testified that Saskatchewan Rivers developed a transportation policy in reaction to a policy that Prince Albert Roman Catholic School Division instituted in June 2012 when it advertised in a local newspaper that it would provide in-city bussing the following September. Mr. Steen attributed a significant decrease in enrolment in Prince Albert's public schools in 2012 and 2013 due to the Catholic division's bussing policy. In 2014 Saskatchewan Rivers mirrored the competing bussing program by offering bussing to grade 1 to 4 students living beyond 400 metres of the school and younger students living beyond 200 metres of the school. He testified that public school enrolment immediately increased by 199 students, adding that 150 students equates to approximately $1 million in government funding. The new bussing policy cost $685,000.00 to purchase buses plus annual operating costs of $260,000.00. As chair of the Urban Public Caucus (predecessor to the Public Section of the SSBA), Mr. Steen produced a copy of a letter he sent to Minister of Learning, Andrew Thompson, on June 10, 2005 (copied to Premier Calvert) written when he learned that the province had cancelled the planned reference to the Court of Appeal respecting government funding of non-Catholic students attending Catholic schools. Mr. Steen advised the Minister that the Caucus expected the Minister to stand by his commitment to proceed to a reference.

[37] Audrey Trombley is a practicing Roman Catholic and chair of South East Cornerstone Public School Division encompassing the cities of Estevan and Weyburn and surrounding areas with an overlapping boundary with Holy Family Roman Catholic School Division. Ms. Trombley testified

that several rural schools in the division are below or close to the minimum threshold enrolments set out for automatic review by department regulation. She testified that whenever the division closes schools or discontinues grades in non-viable schools, the board is concerned about the potential establishment of a separate school division given the experience in Theodore and in Wilcox where separate schools have been created. Ms. Trombley explained that in Radville the public school division operates a grade 7 to 12 school, but the only kindergarten to grade 6 facility is the Catholic school. Several years ago, a public and Catholic school division each operated an elementary school. After a new Catholic school was built, the public school burned. The two boards agreed that the Catholic board would operate the elementary school but the agreement could be terminated upon two years' notice. The public school division would now like to terminate the agreement and establish an elementary public school but the board is waiting for the results of this trial before moving forward.

[38] Joelann Pister resides near Rhein, north of Yorkton within the GSSD. She attended a Catholic school in Yorkton and was raised Catholic but is now Lutheran. Ms. Pister served as a public school board trustee from 1993 to 2012 when the public schools in the villages of MacNutt, Ebenezer, Bredenbury and Rhein were closed. Her three children, now adults, began school in Rhein. She testified that her daughter, who was in grade 4, was the only girl in her class at Rhein and, with triple grading, experienced difficulty in math. After the closure of the Rhein school, her daughter entered a single grade class in Yorkton where she was happier with girls her age. Ms. Pister described her experience as a trustee during the closure of the Theodore

School, stating her inability to understand how another school division could operate the school when the Government was "squeezing our funds." She stated that although keenly interested in the outcome of this trial, she could not have financially afforded to bring the action.

[39] Larry Pavloff, with 30 years of teaching experience, is currently chair of the Prairie Spirit Public School Division, a donut-shaped division surrounding Saskatoon, including the growing cities of Martensville and Warman north of Saskatoon. Mr. Pavloff testified that a Catholic school division was formed in Martensville in 2010 and shortly amalgamated with Greater Saskatoon Catholic School Division. By 2013, elementary school enrolments had dramatically increased in Martensville and in Warman. In March 2013, the provincial government announced that it was going to construct joint use (Catholic/Public) schools in each city although neither a Catholic parish nor a Catholic school division existed in Warman. After the announcement, a Catholic school division was created in Warman. It, too, immediately amalgamated with Greater Saskatoon Catholic School Division. Each new school will accommodate 650 public school students and 450 Catholic students. The public board was concerned because the building of a Catholic school in Warman was announced even before a Catholic school division was created. Also concerning were a digital sign erected in Warman which read "Greater Saskatoon Catholic now represents Warman" and pamphlets being mailed to all households in Warman announcing Catholic education had arrived in Warman. Mr. Pavloff stated the board is concerned that at a time of budget constraints, the province is building a Catholic school

and a public school on the same site and allowing Catholic students and non-Catholic students to go to either school.

[40] Bert Degooijer has served as trustee of Prairie Valley Public School Division and predecessor boards since 1999. He is a practicing Roman Catholic. His four children were educated in public schools. Prairie Valley overlaps boundaries with Holy Family Roman Catholic School Division. In 2006, 11 rural schools in the public school division were put under review because of declining enrolments. Eight were closed in 2007, including the elementary school in Wilcox with an enrolment of 46 students The Wilcox students were transported to Milestone public school where they attended for one year. As a result of a one-year lag time then recently introduced into legislation before a separate school could be opened following a public school closure, a separate school division was not created until the next year. When it was, all the Wilcox students enrolled in the newly created separate school in Wilcox which continues to operate under the Holy Family Roman Catholic School Division.

[41] Sherry Todosichuk is currently deputy director of corporate services and formerly superintendent of business administration with GSSD from 2005 to 2016. Ms. Todosichuk described her involvement in the preparation of the school division's budget and in audits of the division's finances. Ms. Todosichuk provided to the court various detailed calculations of the loss of government funding associated with the students attending St. Theodore School.

B. CTT's Witnesses

[42] In 2003 Kelly Kunz, his wife and three children lived in Theodore. As a Roman Catholic, Mr. Kunz was instrumental in creating a separate school division. Mr. Kunz provided three reasons why he wanted a Catholic school in Theodore: Catholic education for his children, so his autistic son would not have to be bussed to Springside and to maintain a school in Theodore. Mr. Kunz explained the process he followed with the assistance of others to obtain the Minister's order creating a Catholic school division. The new school division, with Mr. Kunz as its chair, then contracted the administrative services of the Yorkton Catholic School Division with which it amalgamated in 2005. In cross-examination Mr. Kunz accepted that any attempt to create a separate Catholic school while Theodore School was operative would have divided the community. As well, he accepted that of the various options to keep a school in Theodore, the last resort the Save our School Committee considered was to create a Catholic school division.

[43] Dr. Ted Paszek (expert witness) is an adjunct professor at the University of Alberta, trustee with Elk Island Catholic School Board and sessional lecturer at Newman Theological College in Edmonton. He obtained a PhD in 2012 after 35 years' experience in Catholic education. He (as well as Dr. Frank Peters) was tendered as an expert in the historical, social and political context of public and separate schools in Alberta and Saskatchewan. His review of literature, legislation and court cases allowed him to opine that no evidence exists of any prohibition of non-Catholic students attending Catholic schools in Canada. To the contrary, he opined that non-Catholics have attended Catholic schools. Dr. Paszek introduced historical evidence

from Prince Albert and Edmonton to show that before 1905, Protestant children attended Roman Catholic separate schools. He produced a copy of an excerpt from the Saskatoon Daily Star, dated October 2, 1913, that the first Catholic separate school in Saskatoon would soon open and enrolment was not restricted to Catholics. In his estimation, during his teaching tenure with two Catholic schools in Edmonton, up to 25 percent of the students may have been non-Catholic. Dr. Paszek provided his understanding of the School Ordinances from 1884 to 1901 as indicative of no prohibition against non-Catholic attendance at Catholic schools. He offered that the government has always provided grants to Catholic schools based on enrolment, never on religious affiliation.

[44] Dr. Frank Peters, Professor Emeritus, (expert witness) was raised in Ireland, began teaching in Canada in 1965 and obtained his PhD in 1986 at the University of Alberta. Dr. Peters provided an extensive review of his interpretation of the School Ordinances, concluding that he was unable to find any pre or post-1905 legislative provisions where a Catholic school board was prevented from accepting non-minority faith students and, at no time, did a student's religion play a part in eligibility to receive government funding.

[45] Julian Pawlawski taught several years with the Saskatoon Roman Catholic School Board and served 19 years as superintendent. He testified that at one time the board counted the number of non-Catholic students attending Saskatoon Catholic schools (by reference to their baptismal certificates) because of a tuition exchange agreement between the Catholic and public boards in Saskatoon. The public board paid the Catholic board for the non-Catholic students enrolled in Catholic schools and the Catholic board paid the

public board for Catholic students enrolled in public schools. When the agreement was discontinued, the Saskatoon Catholic board no longer counted non-Catholic students in Catholic schools. From 1988 to 2007, as Executive Secretary of the Catholic Section of the SSBA, he consulted with and assisted several communities to explore creation of Catholic school divisions. He attended a meeting in Theodore on March 12, 2003 where he explained to parents that upon creating a Catholic school division, Catholic ratepayers would pay their taxes to the Catholic school division and non-Catholics would continue to pay to the public system irrespective of their children's attendance. Mr. Pawlawski worked closely with Kelly Kunz. Mr. Pawlawski stated that he was unconcerned that St. Theodore School would operate with a majority of non-Catholic students since the admission policy of each Catholic school division was and remains a local matter.

[46] Expert witness, Dr. Thomas Groome Professor of Theology and Religious Education at Boston College, lives in Newton, Massachusetts. He presented testimony detailing the history of international Catholic education. He testified that until the Reformation and Martin Luther's call for public schools, the Catholic Church provided the only schools in the western world. He distinguished between evangelizing - telling others what one believes - and proselytizing - telling others what they should believe. Dr. Groome described a world view of Catholic education citing examples from several countries in different historical contexts.

[47] Ken Loehndorf holds a post-graduate diploma in Catholic school administration. For the past nine years he has been executive director of the Catholic Section of the SSBA where he works in conjunction with the eight

Catholic school boards, Saskatchewan's bishops and the Ministry of Education. He described himself as the "go-to person" respecting the formation of Catholic school divisions in Saskatchewan. He described a document titled "Protocol for the Formation of Roman Catholic Separate School Divisions" which arose as a result of this action and was intended to create a transparent process to ease the unrest between Catholic and public school divisions. As well, since this action, the Catholic Section has recommended guidelines for the admission of non-Catholic students in Catholic schools encouraging principals to meet with non-Catholic parents to advise them that they cannot vote nor seek election as a trustee and their children are expected to participate in all faith related activities short of the reception of the sacraments. Although the Catholic Section supports the construction of joint use schools, it is unprepared to accept shared program space since Catholic schools place importance on displaying religious symbols, icons and crucifixes in classrooms and entranceways. In cross-examination, Mr. Loehndorf accepted that a Catholic school's receipt of funding for non-Catholic students means larger schools and an economy of scale that permits a more varied program for Catholic students.

[48] Dr. Ayaz Ramji is a pediatrician in Prince Albert whose three sons attend or have completed their education at Catholic schools. He was raised in England as a Muslim but attended a Roman Catholic private school. He and his wife, raised Anglican, chose Catholic education because they wanted a faith-based experience for their children. They value the choice allowed them to educate their children in a faith-based school.

[49] Kevin Wiens is a pastor at Forest Grove Community Church in Saskatoon, a Mennonite Brethren denomination. He and his wife (a former teacher at Saskatoon Christian School) have three children. The two oldest attend St. Volodymyr Catholic School. When they decided whether their children would attend either the Catholic or public schools located on the same school grounds, they favoured St. Volodymyr because it was closer and offered a theological theistic based education. Pastor Weins was complementary of the theological and practical education his children are receiving.

[50] Irene Thompson has been a resident of Theodore since 1988. She testified that Theodore's Catholic Church discontinued services in 1991. Ms. Thompson, a practicing Catholic, has three adult children. Only her youngest son attended St. Theodore School. She supported the creation of the separate school and served as trustee until the board amalgamated. She testified that the Catholic faith was clearly integrated into the daily operation of the school.

[51] Carla Madsen and her husband, residents of Theodore, are United Church members. Their two sons attended St. Theodore Roman Catholic School. Ms. Madsen described her sons' positive experiences at St. Theodore Roman Catholic School: academics, extracurricular activities, community-mindedness and a focus on values and morals. Since her sons are not Catholic they could not participate in sacramental celebrations in the school.

[52] Dr. Michelle DuRussell is a pediatrician in Prince Albert. She and her husband, both raised in the Christian (but non-Catholic) faith, have two children, aged 8 and 10. They chose to educate their children in the Catholic

school system because the public school system did not stress faith and values. They found a similar faith in the teachings offered at the Catholic school. She testified that her children's experience has been positive. She summarized her position as a parent and Christian as "pursuing education in a Catholic school system as non-Catholics, but believers in the same Jesus, the same Bible."

[53] Donald Bolen testified as the Bishop of Diocese of Saskatoon (but who was about to become Archbishop of Regina). As Bishop, he ensures that the teaching in all Catholic institutions, including Catholic schools, falls within church doctrine. He testified that "visiting schools, meeting with teachers, meeting with school trustees is…a part of a Bishop's life." Bishop Bolen described ecumenism as the search for Christian unity within Christian Churches, to bring reconciliation among Christians. He testified that a Catholic school sees Jesus' life, death and resurrection as pivotal events in human history and seeks to imbue and permeate Christian values through the entire school. Bishop Bolen strongly favoured admission of non-Catholic students in Catholic schools because they create a culture of encounter and enrichment in a place where religion is respected and valued. Bishop Bolen testified that "A Catholic school does not treat all religions as equal. It treats all religions with respect."

[54] Brian Boechler was Director of Yorkton Roman Catholic School Division and of Theodore Roman Catholic Separate School Division after it was formed. Both school divisions later amalgamated with other Catholic school divisions to form CTT in 2010. He testified that a delegation from Theodore met with the Yorkton Roman Catholic School Division to air its frustrations about the school's closure, asking if the board would provide

administrative services if a Catholic school board was formed in Theodore. The board stated its disinclination to get involved in "local politics" but if a new school division were created, the Yorkton Roman Catholic School Board would consider options to provide administrative services. Mr. Boechler attended the Theodore Roman Catholic School Division's first meeting on July 21, 2003. The two boards reached an agreement whereby Yorkton Roman Catholic School Division provided administrative services to the newly formed Theodore Roman Catholic School Division. Mr. Boechler led the newly formed school board through the protracted negotiations with Yorkdale to purchase the Theodore school building after St. Theodore Roman Catholic School initially found accommodation in the community hall.

C. Government Witnesses

[55] Angela Chobanik is the Executive Director of the Education Funding Branch of the Ministry of Education. She is responsible to calculate and disperse the operating grants to all school divisions. Ms. Chobanik provided detailed testimony of the budgeting and funding policies of the department. She confirmed that independent schools receive 50 percent of the provincial average per-student grants and associate schools receive 80 percent of the provincial average per-student amount, but no infrastructure or capital funding.

[56] Timothy Anderson, his wife and their three children, live in Yorkton. They are Baptists. Mr. Anderson strongly supported the education his children receive at St. Michael’s Roman Catholic School and would be

extremely disappointed if he was denied the choice to send his children to a publicly-funded, Christian, faith-based school.

[57] Michael Sinclair is the rector of St. Paul's Anglican Cathedral in Regina and also serves as the Dean of the Anglican Diocese of Qu'Appelle. He and his wife, also Anglican, have three sons who attend Catholic school. They chose and are pleased with Catholic education because it nurtures their family's faith values and focuses on love, compassion and grace. In cross-examination, Dean Sinclair accepted that his family received the benefit of a fully funded, faith-based education which may be unavailable to other parents.

[58] Ingrid Currie (Bintner) provided testimony respecting her father's involvement in *Bintner v Regina Public School Board District No. 4,* (1965), 55 DLR (2d) 646 (SK CA), litigation that occurred when she was a young child respecting public and separate school policies in place in Regina at that time.

V. A NECESSARY FRAMEWORK

A. Legislative and Constitutional Provisions

[59] In para. 59(h) of its statement of claim, GSSD seeks a declaration that ss. 53, 85, 87 and 310 of *The Education Act, 1995* and ss. 3 and 4 *The Education Funding Regulations*, and "any legislative provisions" that implement or authorize school funding offend ss. 2(a) and s. 15 of the *Charter* to the extent they provide grants: 1) for the establishment and operation of St. Theodore Roman Catholic School to educate non-Roman Catholic students; and 2) to educate any non-minority faith students attending a separate school.

This legislation, says GSSD, is not constitutionally protected and therefore is subject to *Charter* review.

[60] Under the *Constitution Act, 1867*, provincial legislation enacted under any head of provincial power, other than education – for example, under the province's jurisdiction over property and civil rights – is subject to *Charter* scrutiny. The province's jurisdiction over education, however, is not as simple as other heads of provincial power. Jurisdiction over education is unique because it illustrates an early Canadian endeavour to protect minority rights. Justice Iacobucci framed his historical survey of Canada's experience with educational rights in the opening two sentences in *Ontario English Catholic Teachers' Assn. v Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 SCR 470 [*English Catholic Teachers*] stating, at para 1:

> 1. In many countries, education issues are matters of public policy, to be decided by democratic debate. In Canada, we are in the rather unusual position of having certain education rights constitutionally entrenched in s. 93 of the *Constitution Act, 1867*. …

[61] Each party, whether GSSD in advancing the action or the defendants in defending the action, seeks to legitimize its position based on its version of the constitutional rights referred to by Justice Iacobucci. GSSD asserts rights under the *Charter*. The defendants assert rights originating at confederation, as altered nearly 40 years later, in 1905, when Saskatchewan gained provincial status under the *Saskatchewan Act*. The defendants say these constitutionally entrenched rights protect public funding of non-Catholics students.

[62] Section 93 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:
>
> (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.

[63] When Saskatchewan gained provincial status, s. 93(1) was replaced with three new provisions under the *Saskatchewan Act*. Sections 93(2) to (4) remained, although s. 93(2) has never applied in Saskatchewan. The provisions replacing s. 93(1) read as follow:

> 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 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.
>
> 3. 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.

[64] Section 17(1) added specificity by including protection for both public and separate schools respecting “religious instruction.” As well, by freezing rights and privileges as they were found in Chapters 29 and 30 of the 1901 Ordinances of the North-West Territories, Saskatchewan avoided the more ambiguous provision of “by Law” found in s. 93(1) of the *Constitution Act, 1867* or “by Law or practice” as in the *Manitoba Act, 1870*, SC 1870, c 3. Section 17(2) disallowed any discrimination in government funding against any class of school, a provision the defendants say provides a short and obvious answer to this action, a type of trump card assuring equal funding of separate and public schools. The original ss. 93(3) and (4) of the *Constitution Act, 1867* were unchanged under the *Saskatchewan Act*.

[65] Regrettably, a certain amount of confusion results when referring to the entirety of s. 93 of the *Constitution Act, 1867* as it ultimately applies to

Saskatchewan. Sections 17(1) to (3) of the *Saskatchewan Act* replace s. 93(1) of the *Constitution Act, 1867*. Logically, then, ss. 93(2), (3) and (4) might have been sequentially renumbered. Furthermore, s. 93(2) has no application to Saskatchewan and could have been deleted. More confusingly, although s. 17(3) replaces s. 93(1), it has nothing to do with s. 93(1) but instead clarifies s. 93(3) of the *Constitution Act, 1867*. Because s. 17(1) of the *Saskatchewan Act* is largely modelled on s. 93(1) of the *Constitution Act, 1867*, and because most of the case law respecting s. 93(1) originates from Ontario and Quebec, I often interchangeably refer to either section. Chief Justice Dickson, in *Mahe v Alberta*, [1990] 1 SCR 342 [*Mahe*] stated that jurisprudence respecting s. 93(1) is equally applicable to s. 17 of the *Alberta Act*, 4-5 Edw VII, c 3 which is identical in wording to s. 17 of the *Saskatchewan Act*. He wrote (at 381):

> In view of the similar contexts in which s. 93(1) and s. 17 were introduced, it can be presumed that the shared phrase carries the same meaning in each provision. Thus, the jurisprudence on s. 93(1) of the *Constitution Act, 1867* is relevant in interpreting s. 17 of the *Alberta Act*.

[66] By necessary invitation, Chapter 29 of *The School Ordinance, 1901*, ONWT 1901, c 29 is pivotal. The following provisions concern separate school rights as they stood in 1901:

> SEPARATE SCHOOLS
>
> **Separate Schools/Assessments**
> 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 as they impose upon themselves in respect thereof.
>
> **Petition for erection**

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.

Qualification of voters
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.

Notice of ratepayers' meetings / Subsequent proceedings
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 commissioner and the proceedings subsequent to the posting of such notice shall be the same as prescribed in the formation of public school districts.

Rights and liabilities of separate school districts
45 After the establishment of a separate school district under the liabilities of 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.

[67] The elected trustees of a board of education, whether of a separate or pubic school, had powers under s. 95:

Duties of trustees
95 It shall be the duty of the board of every district and it shall have power:

…

Engage teacher
17. To engage a teacher or teachers duly qualified under the regulations of the department to teach in the school or schools in its charge on such terms as it may deem expedient; the contract wherefor shall be in writing and may be in form prescribed by the commissioner and a certified copy of such contract shall forthwith be transmitted to the department;
Suspend or dismiss teacher

> **Suspend or dismiss teacher**
> 18. To suspend or dismiss any teacher for gross misconduct, neglect of duty or for refusal or neglect to obey any lawful order of the board and to forthwith transmit a written statement of the facts to the department;
>
> **Conduct of school**
> 19. To see that the school is conducted according to the provisions of this Ordinance and the regulations of the department;
>
> **Teachers' salary**
> 20. To provide for the payment of teachers' salaries at least once in every three months;
>
> **Management of school**
> 21. To make regulations for the management of the school subject to the provisions of this Ordinance and to communicate them in writing to the teacher;

[68] Sections 131, 162 and 163 addressed the payment of fees by non-residents, a provision CTT cites as significant in this action. These sections state:

> **Free School**
> 131 No fees shall be charged by the board of any district on account of the attendance at its school of any child whose parent or lawful guardian is a ratepayer of the district.
>
> **Application for education of nonresident children**
> 162 The parent or lawful guardian of any child residing outside the limits of any district may apply to the board for the admission of such child to its school and it shall be the duty of the board to admit such child:
> **Inspector's statement required**
> Provided always that the board may demand that the application for the admission of any nonresident child be accompanied by a statement from the inspector of the district to the effect that the accommodation of the school is sufficient for the admission of such child;
> **Fees**
> Provided further that the board may demand from such parent or guardian the payment of school fees at a rate not exceeding four

> cents per day per family which fees shall be payable monthly in advance and shall be calculated according to the number of actual teaching days in each month.
>
> **Resident children**
> 163 The parent or lawful guardian of any child residing within the limits of any district and who is not a ratepayer thereof may send his children to the school operated within the district subject to the second provision of the next preceding section.

[69] Chapter 29 also regulated the teaching of religion in both public and separate schools:

> **Religious instruction**
> 137 No religious instruction except as hereinafter provided shall be permitted in the school of any district from the opening of such school until one half hour previous to its closing in the afternoon after which time any such instruction permitted or desired by the board may be given.
>
> **Time for the Lord's prayer**
> (2) It shall however be permissible for the board of any district to direct that the school be opened by the recitation of the Lord's prayer.
>
> **Attendance not compulsory during religious exercise**
> 138 Any child shall have the privilege of leaving the school room at the time at which religious instruction is commenced as provided for in the next preceding section or on remaining without taking part in any religious instruction that may be given if the parents or guardians do desire.
>
> **No pupil to be deprived of ordinary education**
> 139 No teacher, school trustee or inspector shall in any way attempt to deprive such child of any advantage that it might derive from the ordinary education given in such school and any such action on the part of any school trustee, inspector or teacher shall be held to be a disqualification for and voidance of the office held by him.

[70] Chapter 30 of *The School Ordinance*, 1901, ONWT 1901, c 30, *The School Assessment Ordinance*, dealt with assessment issues, including instances when property was jointly owned by a Protestant and Roman

Catholic owner. Other than assessment issues, Chapter 30 did not specify separate school rights.

[71] The Ordinances, incorporated by reference under the *Saskatchewan Act*, are part of the Constitution of Canada.[8] Accordingly, the rights afforded separate schools under the Ordinances cannot be lessened even in face of *Charter* infringement under either ss. 2(a) or s. 15 because of s. 29 of the *Charter*. Respectively, these *Charter* provisions read as follows:

> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
> …
>
> …
> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> …
> 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.

[72] The defendants state that funding of non-Catholic students at Catholic schools is a right protected by s. 93 and, therefore, immune under s. 29 from *Charter* review. GSSD says such funding goes beyond the denominational elements of Catholic education so that the funding of non-Catholics students is not an entrenched constitutional right. Accordingly, government action that funds non-Catholic students at Catholic schools is exposed to review under the *Charter*.

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[8] *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11, s 52(2); Schedule, Item 13.

B. The Confederation Compromise

[73] Section 93's accommodation of separate school rights is rooted in Canada's history of state formation. Confederation required statesmanship and compromise to bring together two founding nations, one with strong ties to Britain and the other with strong ties to France; one English-speaking, the other French-speaking; one essentially Protestant, the other Roman Catholic; one a victor in war, the other vanquished in war.[9] In *Reference re: Bill 30*, [1987] 1 SCR 1148 [*Reference re Bill 30*], the Supreme Court recognized the s. 93 compromise as the "solemn pact," "which made confederation possible." Justice Wilson cited Sir Charles Tupper in the House of Commons debates offered 30 years after confederation at 1173-1174):

> . . . I say it within the knowledge of all these gentlemen...that but for the consent to the proposal of the Hon. Sir Alexander Galt, who represented especially the Protestants of the great province of Quebec on that occasion, but for the assent of that conference to the proposal of Sir Alexander Galt, that in the Confederation Act should be embodied a clause which would protect the rights of minorities, whether Catholic or Protestant, in this country, there would have been no Confederation .... I say, therefore, it is important, it is significant that without this clause, without this guarantee for the rights of minorities being embodied in that new constitution, we should have been unable to obtain any confederation whatever. That is my reason for drawing attention to it at present.[10]

[74] One must also understand the significance of religion and language in pre-confederation Ontario and Quebec.[11] At confederation and for several decades after, the only religious groups were Roman Catholic and

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[9] Chief Justice Deschenes provides an insightful history of conquest to confederation in *Protestant School Bd. of Montreal v Minister of Education* (1976), 83 DLR (3d) 645 (Que Sup Ct) [*Protestant School Bd. of Montreal v Minister of Education*]

[10] Debates of the House of Commons, 6th Sess 7th Parl, 59 Vict 1896, col 2719 at 2724, March 3, 1896.

[11] At the time of confederation Canada West (previously Upper Canada) and Canada East (previously Lower Canada) were one province, Canada. For ease of reference I will refer to the former as Ontario, the latter as Quebec.

largely French-speaking, and Protestants and invariably English-speaking.[12] Religion permeated all aspects of life, particularly education. Deep seated prejudices and conflicts existed between Catholics and Protestants. Confederation united these religious and language factions into a workable nation, particularly when minority groups of each religion were found in the most populous uniting provinces of Ontario and Quebec.

[75] Education had historically been the domain of the churches. The Catholic Church showed little interest in abdicating its influence over education in face of a movement toward publicly-funded common schools developing in Ontario from 1840 to confederation. Dr. Dixon testified extensively respecting the influence that Dr. Egerton Ryerson, a Methodist minister, exerted on education in Ontario during his tenure as Superintendent of Education from 1844-1867. His vision of education was to develop common or mixed schools, open to all, with an emphasis on civic duties and development of the child with a religious component of sufficient breadth to accommodate the faith of all Christians. Roman Catholics opposed these developments, not just on the parochial scene, but directly from the Vatican. Bishop Charbonelle, the Bishop of Toronto whom Dr. Dixon described as a "warrior" against liberalism and common schools, issued a statement that Roman Catholic parents who failed to send their children to Catholic schools were committing a mortal sin and liable to eternal damnation.

[76] In 1867, when legislative powers were divvied up between the new federal and provincial governments, jurisdiction over education was

[12] Dr. Beaujot's summary of the religious affiliation of the four about-to-unite provinces (Ontario, Quebec, New Brunswick and Nova Scotia) shows 99.30% were either Roman Catholic or Protestant in 1861.

exclusively allocated to the provinces. Although s. 92 of the *Constitution Act, 1867* was the repository of other provincial heads of power, education was uniquely set out in s. 93. And while s. 93 used identical introductory wording to grant power over education as was used for other enumerated powers, s. 93 restricted provincial power over education with the phrase, "subject and according to the following Provisions." Thereafter followed ss. 93(1) to (4). They reserved certain powers to the federal government, thereby curtailing provincial authority over education. Otherwise, education would have been another enumerated power among the 16 heads of power described in s. 92, without federal control or restriction. Sections 93(3) and (4) allowed the federal government to provide redress if a province either abrogated the rights of denominational schools as they existed at union, or if augmenting such rights, the province then abrogated them.

[77] In this action, Government counsel repeatedly encouraged me to accept the 1867 constitutional compromise accommodating minority Catholic and Protestant schools as qualitatively "good." I, though, hesitate to base my analysis on this presumption. Instead, I accept that the historic compromise embodied in s. 93 gave privileged status to Catholic and Protestant minorities, described by the Court of Appeal of the Northwest Territories in *Yellowknife Public Denominational District Education Authority v Euchner*, 2008 NWTCA 13, [2009] 3 WWR 10 [*Yellowknife*], (leave to appeal to the Supreme Court of Canada denied at 2009 CANLII 28593 (SCC)), as "the only religious groups then of concern to the Fathers of Confederation." My disinclination to anchor my decision on the premise that the constitutional compromise is normatively "good," finds favour with statements of commentators such as Irwin Cotler

who wrote that s. 93 has caused more bitterness than any other section of the Constitution[13] or M. H. Ogilvie who wrote that s. 93 "shackled the new nation of Canada with the chains of nineteenth-century sectarian strife."[14]

C. The Experience of the Provinces

[78] A proper understanding of this lawsuit requires an appreciation for separate school rights across Canada. Although *Charter* rights are consistent across Canada, separate school rights are glaringly inconsistent. Of the four provinces entering confederation in 1867, only Ontario and Quebec had denominational schools. Nova Scotia and New Brunswick (although the latter only after much acrimony and the Privy Council's decision in *Maher v Town Council of Portland*, [1874] UKPC 83 (BAILLI) [*Maher*]) had no denominational schools at confederation so s. 93(1) did not apply to them. Nor did British Columbia or Prince Edward Island when it joined the union, respectively, in 1871 and 1873. In 1949, Newfoundland's schools were denominational and similarly protected by Term 17 of the Terms of Union of Newfoundland with Canada (December 11, 1948). Newfoundland constitutionally amended its denominational school system and discontinued confessionally based schools in favour of a single public school system after a referendum in 1997.[15] Denominational school rights were never constitutionally entrenched in the Northwest Territories (*Yellowknife*).

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[13] Irwin Cotler, (Member of Parliament for Mount Royal from 1999 to 2015 and Minister of Justice and Attorney General of Canada from 2003 to 2006) "Chapter 5: Freedom of Conscience and Religion (Section 2(a))" in Hon. Gérald-A. Beaudoin & Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2d ed (Toronto: Carswell, 1989) 65 at 168.

[14] M.H. Ogilvie, "What Is a Church by Law Established?" (1990) 28 Osgoode Hall LJ 179 at 219

[15] *Constitution Amendment, 1998 (Newfoundland Act)*, SI/98-25

[79] In Quebec the Quiet Revolution of the 1960s replaced the primacy of religion in schools with the primacy of language. In 1997 Quebec, using s. 43 of the *Constitution Act, 1982*, rescinded denominational school rights and replaced them with a language-based education system.[16] Accordingly, s. 93 no longer applies in Quebec.

[80] When Manitoba gained provincial status in 1870, s. 93 of the *Constitution Act, 1867* was replaced by s. 22 of the *Manitoba Act, 1870*, (with s. 22(3) identical to s. 93(4) of the *Constitution Act, 1867*), but with slightly nuanced differences. It protected separate schools existing "by Law or practice" and noticeably did not refer to separate schools being "thereafter established."[17] In 1870, Manitoba's population was approximately equally split between Roman Catholics and Protestants (*Brophy v Attorney-General of Manitoba*, [1895] AC 202 (PC) [*Brophy*]). One year later, Manitoba enacted a true dual denominational school system. But with an influx of English-speaking Protestants, the Province enacted the *Public Schools Act*[18] in 1890, reversing the policy of the preceding years by creating a single, English, non-denominational, tax-funded, school system. Catholics, obligated to pay taxes to support the new common school, could send their children to Catholic schools but at their expense. The City of Winnipeg sued a non-complying Catholic taxpayer in *Barrett v City of Winnipeg* (1891), 19 SCR 374 [*Barrett*].

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[16] *Constitution Amendment, 1997 (Quebec)*, SI /97-141

[17] 22. In and for the Province, the said 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 or practice in the Province at the Union:

(2) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or 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

[18] *Public Schools Act*, 53 Vic, ch 38

The Manitoba courts found the new Act inoffensive to s. 22(1) and valid. The Supreme Court of Canada unanimously allowed *Barrett's* appeal, a decision reversed by the Judicial Council which gave little credence to concerns advanced by Roman Catholics and the Church of England.

[81] Catholic school supporters pressured the federal cabinet to act remedially under s. 22(2) of the *Manitoba Act, 1870*. A reference in *Brophy* to the Supreme Court asked whether the government could intervene to remedy the rights of the Catholic minority. The Privy Council (again reversing the Supreme Court) found that Parliament could intervene. It did. When Manitoba rejected the federal commission's proposals, the Conservative federal government attempted to enact a remedial bill. The Liberal opposition blocked its passage. The school question became a federal election issue in 1896 with Wilfred Laurier claiming that by "sunny ways" a compromise with the Manitoba government would satisfy the Catholic claims. The federal election was fought on the School Question. A year later, Prime Minister Laurier negotiated a compromise with Manitoba, with Pope Leo XIII's approval. The Manitoba School Question engendered a national firestorm that brought down the federal Conservative government and spilled over into an acrimonious and animated discussion of denominational schools just as Saskatchewan and Alberta were in the throes of gaining provincial status.

[82] In 1905, Saskatchewan and Alberta were carved out of the Northwest Territories as new provinces. Each party in this action led significant testimony and provided reference to several historical sources (Sessional Papers, Hansard, School Board Reports and newspaper reports) to illustrate the complexity, intensity and acrimony of the debates that

accompanied the passage of the *Saskatchewan Act* and the *Alberta Act*, commonly called the Autonomy Bills. Religious education in the new provinces was foremost among these debates and resulted in s. 17 of the Autonomy Bills modifying s. 93(1) of the *Constitution Act, 1867*, as previously cited.

PART TWO: DOES GSSD HAVE STANDING?

I. HISTORY OF PROCEEDINGS RESPECTING STANDING

[83] This trial is the sixth time within this action that the matter of standing has come before the court in one form or another. From the outset of this action, the defendants have questioned GSSD's standing as a public school board to advance its constitutional claim. Initially, in 2008, GSSD applied to amend its pleadings respecting the constitutional dimensions of its claim. Over the defendants' objections that GSSD lacked standing to seek the amendments, Justice Pritchard allowed the amendments (*York School Division No. 36 v Theodore Roman Catholic School Division No. 138*, 2008 SKQB 384). Then, by fiat of August 27, 2012, Justice Mills declined CTT's application under former Rule 188 to determine a point of law and under former Rule 173(a) to strike GSSD's statement of claim, both advanced on the assertion that GSSD did not have requisite standing (*Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212*, 2012 SKQB 343). Justice Cameron of the Court of Appeal declined CTT's application seeking leave to appeal Justice Mills' fiat (*Christ the Teacher Roman Catholic Separate School Division No. 212 v Good Spirit School Division No. 204*, 2012 SKCA 99, 399 Sask R 278). However, Justice

Cameron was sensitive to CTT's concerns that its ability to raise the matter of standing might be seen as *res judicata*. Justice Cameron assured CTT that the matter of standing would remain alive to trial, stating, at para. 21, that he was "confident the trial judge will give the Separate School Division an open and fair crack at this business of standing."

[84] Yet again, in May 2015, GSSD sought an amendment to its statement of claim requesting that the Public Section of the SSBA be added as a plaintiff, requesting that the action become a representative action, assuredly to deal with the defendants' ongoing concern that GSSD lacked standing. In a fiat of May 1, 2015, Justice Mills found that given the proceedings taken to that date, the defendants would suffer prejudice with such an amendment unless the trial date was postponed, something neither party wished. GSSD's requested amendment was denied.

[85] Finally, CTT brought a pre-trial application, asking that I determine the issue of standing prior to trial. In a fiat of August 6, 2015, I declined the application stating that bifurcating the trial was practically ill-advised and not in keeping with the governing principles of splitting issues for adjudication (Unreported, August 6, 2015). So, now is the time to finally reckon the issue of standing.

[86] I have parsed the defendants' arguments and find that they have raised three essential but inter-related questions respecting standing. First, CTT says that GSSD cannot even raise a constitutional question respecting separate schools because it holds no separate school rights under s. 93 of the *Constitution Act, 1867*. These rights belong exclusively to members of an

entitled group, Roman Catholics in this action. Second, even if the court allows GSSD to argue a constitutional challenge respecting rights it does not hold, the defendants say that GSSD cannot satisfy either of the two articulated tests to gain standing to mount a *Charter* argument – the exceptional prejudice test or the public interest test. Third, the defendants say that ss. 2(a) of the *Charter*, which states that "everyone" is guaranteed freedom of religion, and s. 15, which states that "every individual" has the right to equal protection under the law without discrimination, disallows a litigant like GSSD, a statutorily-created institution, to advance a claim of *Charter* infringement.

[87] The first two positions the defendants advance are general in nature and inter-related. I will address them and leave resolution of the third question to the specific analysis of alleged breach of s. 2(a) of the *Charter*.

II. PARTIES' POSITIONS

A. GSSD's Position

[88] GSSD asserts that it has appropriate standing under both tests, exceptional prejudice and public interest. In relying upon the principle of "exceptional prejudice," GSSD seeks support from the long-standing decision in *Smith v Ontario*, [1924] SCR 331 where, in 1924, the Supreme Court of Canada allowed that if legislation prejudicially affects the rights of a plaintiff differently than others, the plaintiff may be allowed standing to seek a declaration of the legislation's invalidity. GSSD argues that it represents its non-Catholic ratepayers, parents and students, all of whom have been exceptionally prejudiced by the impacts arising from the funding of non-Catholic students in St. Theodore Roman Catholic School.

[89] GSSD supports its exceptional prejudice position stating that it is "inconceivable" that it would have brought this complex action before the court as unnecessary litigation without a real interest in the outcome. Additionally, it points to the long history of this action, including an initial plan to refer the matter to the Court of Appeal, a plan the defendants later refused.

[90] In the alternative to exceptional prejudice, GSSD argues that it meets the test of public interest standing, citing *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 [*Eastside Sex Workers*] and *Canada (Minister of Justice) v Borowski*, [1981] 2 SCR 575 [*Borowski*]. GSSD states it meets the three criteria set out in *Eastside Sex Workers*. First, its claim discloses a serious, important and substantial legal issue as set out at para 42 of *Eastside Sex Workers*: "Once … the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question." Second – "whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise" (para. 43) – GSSD compares its quest for standing to Mr. Borowski (in *Borowski*), a prominent male anti-abortion crusader. As GSSD states, if Mr. Borowski was held to have a genuine interest in abortion, notwithstanding "he was not pregnant, not a doctor, nor the father of a fetus," then GSSD should have standing to challenge government funding of non-Catholic students in Catholic separate schools. Third – that there must be an effective and practical way to challenge the legality of state action – GSSD argues that it is only one

of few with the resources and expertise to bring forward this complete and expensive litigation.

B. Defendants' Position

[91] CTT argues, as a preliminary position, that GSSD has no ability to even advance a constitutional challenge. It says rights-holders are "the only appropriate persons, to assert the entitlements and request adjudication before the Court."[19] CTT states that the only parties who "should be raising the content of the entitlements under s. 93 and s. 17 are the parties that possess those entitlements themselves."[20] CTT suggests that statements in *Ontario Home Builders' Association v York Region Board of Education* (1994), 109 DLR (4th) 289 (Ont CA) [*Ontario Home Builders' Association CA*] and *Public School Boards' Assn. of Alberta v Alberta (Attorney General)*, 2000 SCC 45, [2000] 2 SCR 409 support its view (as will be discussed more fully in the following analysis).

[92] More explicitly, though, CTT maintains that aside from standing afforded those whose rights are protected, the only other method to seek a court's adjudication of separate school rights, similarly to minority language education rights or aboriginal and treaty rights, is via a constitutional reference. CTT states, "Other than through such a [reference] process, the interested groups are the appropriate persons, and the only appropriate

[19] CTT Trial Brief Para 20
[20] CTT Trial Brief Para 25

persons, to assert the entitlements and request adjudication before the Court."[21]

[93] If GSSD is allowed as a non-rights-holder under s. 93 to advance a constitutional argument, CTT argues that GSSD cannot bring its claim within either the exceptional prejudice rule or the public interest rule. It states that GSSD has presented no evidence that it has suffered exceptional prejudice. Although GSSD may suggest it has suffered loss of grant money, it has also been spared expense because it has not had to educate students attending St. Theodore Roman Catholic School. It points to GSSD's nine years of surplus budgets since the establishment of St. Theodore Roman Catholic School. GSSD has been treated no differently in terms of funding than any other school division, separate or public. It received funding according to formulae applied equitably to all divisions and suffered no prejudice and clearly no "exceptional prejudice."

[94] CTT cites *Charlottetown (City) v Prince Edward Island* (1998), 168 DLR (4th) 79 (PEI CA) [*Charlottetown*] as an appropriate example for finding exceptional prejudice. There, the court found that the City of Charlottetown was the appropriate authority for a community claiming to be inadequately represented in the Legislature as the result of boundary change legislation. Because the community as a whole suffered exceptional prejudice, the city was appropriately granted standing. In comparison, CTT states that GSSD "cannot be said to be the representative of the ratepayers of the public school boards," because it neither provided notice to nor consulted with its ratepayers about this action. CTT states that GSSD seeks a remedy that is

[21] CTT Trial Brief Para 20

inimical to the interests of its ratepayers, particularly non-Catholic parents whose children attend St. Theodore Roman Catholic School. In essence, if GSSD is successful, it is these parents, not GSSD, whose interests are exceptionally prejudiced.

[95] Respecting the alternate grounds to gain standing – public interest standing – CTT accepts the authority of *Eastside Sex Workers* and the three criteria posed by the Supreme Court to gain such standing whether: (1) a serious justiciable issue has been raised; (2) the plaintiff has a real stake or a genuine interest in it; and (3) the proposed suit is a reasonable and effective way to bring the issue before the courts. CTT states that GSSD is not concerned with religious freedoms or practices since it does not have any. CTT argues that government funding of non-minority faith students does not coerce any religious observance by anyone.

[96] The Government questions whether the exceptional prejudice rule is still a sound constitutional principle. Minimally, though, it concludes that whether the principle continues, it requires (1) evidence of exceptional prejudice; and (2) the prejudice must be to the plaintiff's "personal, proprietary or pecuniary rights." The Government cites *Charlottetown* and *Cape Breton (Regional Municipality) v Nova Scotia (Attorney General)*, 2009 NSCA 44, 277 NSR (2d) 350 as examples of how persons collectively suffering "exceptional prejudice" might bring an action through a municipal corporation. The Government states that GSSD cannot advance an exceptional prejudice argument because it "does not have authority to represent its students, parents, or ratepayers broadly in relation to their freedom of religion

(or equality on the basis of religion) without explicit confirmation of that authority from those individuals."[22]

[97] The Government also states that GSSD fails to establish public interest standing. GSSD is no different than any other public school division. It has no ability to control the establishment of separate schools or the admissions policies of separate school divisions.

III. ANALYSIS

A. Two Preliminary Questions

1. Standing on Behalf of Whom?

[98] Throughout the trial, the defendants stated that GSSD presented a moving target, leaving ambiguous exactly for whom it was litigating. Although just a few months before trial Justice Mills declined GSSD's application to name the Public Section as a party and to make the action a representative action under Rule 2-10 of *The Queen's Bench Rules*, the defendants remain concerned about the nature of the testimony provided by many witnesses from various public school boards. The defendants considered the testimony of these witnesses as contrary to Justice Mills' order, a disguised attempt to broaden the litigation beyond GSSD's interests arising from the closing of the Theodore School.

[99] Clearly, the testimony of GSSD's witnesses illustrated several perceived problems with the growing numbers of non-Catholic students

[22] Government Trial Brief Para 260

enrolled in Catholic schools throughout Saskatchewan. As exemplary of those concerns, but not exhaustive, I heard testimony, respecting:

1. The costs of building new dual-purpose schools in Saskatchewan which accommodate significant numbers of non-Catholic students (as Larry Pavloff, Chair of the Prairie Spirit Public School Division, testified happened in Warman);

2. The costs of providing competing, in-city, bus transportation to public schools in response to generous transportation policies offered by Catholic school divisions, even though the transportation policy offended the public board's ideals of promoting physical exercise (as Wayne Steen, trustee with Saskatchewan Rivers Public School Division, testified happened in Prince Albert);

3. The interference with closing inefficient rural schools by opening new Catholic schools (as Bert Degooijer, trustee of the Prairie Valley Public School Division, testified happened with the Wilcox School slated for closure in 2007);

4. The threat of communities recruiting the minority faith (usually Catholic) to thwart closure of rural schools by petitioning for a separate school board, thereby forcing public boards to keep open high-cost and inefficient rural schools (as testified by Audrey Trombley, trustee with Southeast Cornerstone Public School Division);

5. The open competition for recruiting students as illustrated by CTT's advertising to increase enrolments (as solicited from Brian Boechler, Director of Education at Christ the Teacher Roman Catholic School Division until 2010, in cross-examination).

[100] The nature of the testimony from these witnesses poses this question: "On whose behalf is GSSD speaking and, therefore, seeking standing?" If Justice Mills denied GSSD's request to make its claim a representative action, what consequence did his order have to GSSD's presentation of its case? Rule 2-10 states:

> **Representative actions**
>
> **2-10**(1) If numerous persons have a common interest in the subject of an intended claim, one or more of those persons may make or be the subject of a claim or may be authorized by the Court to defend on behalf of or for the benefit of all.

[101] Did Justice Mills' ruling restrict any attempt by GSSD to broaden its claim beyond the closing of the Theodore School and its singular effect upon GSSD? Justice Mills' introductory statements in his unpublished fiat of May 1, 2015 in this matter illustrate the involvement of both the Public and Catholic Sections of the SSBA in this action and the effect this decision could have "upon all students in the Province." He stated:

> [1] The issue of government funding for non-minority faith students in minority faith schools has been a matter of significant controversy for over a decade. …[The] public section [of the SSBA] has lobbied for the elimination of provincial government funding for non-Catholic students in Catholic schools. A little over 10 years ago the Government of Saskatchewan was close to making a reference to the Saskatchewan Court of Appeal for a determination of this and related issues. The Government changed its mind and the reference did not move forward. At around the same time this court case was commenced. The public section…is the driver

> behind the commencement of this action. It determined that a situation arising in Theodore would be a good factual nexus to present to the court in respect of constitutional challenges under the *Canadian Charter of Rights and Freedoms* to the funding issue. The defendant, Christ the Teacher…was assisted in its defence by the other provincial Catholic divisions.
>
> [2] Extensive informal discussion, court activity and mediation have occurred over the past 10 years of this action. Throughout, the public section…and the provincial Catholic school board have been involved in every aspect of the case. The extensive mediation efforts in an attempt to settle the dispute were not restricted to representatives of the plaintiff and the defendant alone but included the wider representatives of the plaintiff and the defendant alone but included the wide representatives of public and Catholic education in the Province. All parties understood that the constitutional and *Charter* issues raised in this case would impact upon all students in the Province.

[102] Certainly Justice Mills anticipated that the resolution of this action would result in broad application across Saskatchewan. However, in response to GSSD's request to make the Public Section a party and the action representative, Justice Mills continued:

> [12] The defendants claim that prejudice to them will result from the attempt at amendments of this area. I agree. This case involves significant legal and factual issues. The plaintiff chose many years ago to present the factual issues arising out of Theodore. The question of standing arising out of those factual issues has been a matter in the minds of all parties for a considerable length of time. The attempt to amend the claim to make this a representative action seems designed to assist the plaintiff's argument in respect of the standing issue. It has had ample opportunity before this time to amend its pleadings to deal with that matter. It has chosen not to until this late stage.

[103] Justice Mills stated that standing would be resolved within the factual setting of Theodore School's closing. Accordingly, I will approach the matter of standing from the factual nexus that GSSD chose: the circumstances

and consequences of the closing of Theodore School. However, that being said, I accept that the testimony of school board witnesses outside of GSSD may be relevant and helpful to adjudicate other issues in this litigation. I readily accept and endorse the statement of Justice Iacobucci in Windsor Yearbook of Access to Justice (2002), 21 Windsor YB Access Just 3 "The *Charter*: Twenty Years Later" at p 6. He wrote:

> …one characteristic of *Charter* analysis is that it frequently involves the consideration of broad policy issues involving the competing interest of groups other than parties to the dispute. This has had an impact not only upon the participation of intervenors and the types of evidence that courts are willing to consider, but also upon the very likelihood that a court will consider an issue in the first place. [Emphasis added]

[104] Justice Iabobucci provides the evidentiary framework within which I shall broadly consider evidence from parties other than those named in the pleadings.

2. Can Only Beneficiaries of Separate School Rights Have Standing?

[105] As stated earlier, CTT makes a pre-emptory objection to GSSD's standing, even before addressing the issue of exceptional prejudice and public interest. It states that s. 93 rights accrue only to specific, identifiable groups – Catholics and Protestants – and, like minority language rights and aboriginal rights, these rights cannot be challenged by anyone other than the right-holders.[23]

[106] To advance this position CTT relies upon the Ontario Court of Appeal decision in *Ontario Home Builders' Association CA*. The Association,

[23] CTT Trial Brief Paras 15 and 25

representing Ontario home builders, applied for judicial review of the York Board of Education bylaws which imposed a development charge on new building permits to offset capital costs of new school construction, with the generated revenue distributed without distinction between public and separate schools. The Association alleged that the bylaw infringed the constitutional rights of the separate school boards to receive a proportionate share of the revenues raised and that separate school supporters were not exempt from paying assessments for public school purposes.

[107] The Ontario Court of Appeal found the lower court erred in granting the Association standing. The Association members may have had an interest in not paying the charge, but they had no interest in proportional allocation of funds to separate schools and even less in the overall education funding model. At the Supreme Court (*Ontario Home Builders' Association v York Region Board of Education*, [1996] 2 SCR 929 [*Ontario Home Builders' Association SCC*], standing was assumed without deciding the matter, apparently so the court could give a fulsome decision respecting the merits of the s. 93(1) argument. The Supreme Court held that the Association failed to prove that s. 93 rights had been derogated, even accepting that it had standing.

[108] CTT compares GSSD's claim to standing to the Association's claim and concludes that GSSD, like the Association, has no interest in determining the constitutional rights held by Catholic schools to receive equal funding to public schools.

[109] I agree with the Ontario Court of Appeal. As it must have asked, I also ask why a group of home builders would worry about whether the charge

they were obligated to pay was appropriately allocated to separate schools in accordance with s. 93. They seemingly made no argument that they were separate school supporters or that their interests were affected by the allocation of the charges between separate and public schools. The court correctly characterized their true interest as not paying the charge. The Association's concern about separate schools had a ring of disingenuousness. In fact, one of the parties opposing the Association was a separate school board which testified it suffered no prejudice under the allocation of the new charge.

[110] I do not see the Ontario Court of Appeal's decision in *Ontario Home Builders' Association CA* going as far as CTT urges. The Association was denied standing because it was solely interested in avoiding the charge. I see ready distinction between the Association's feigned interests in separate school rights and GSSD's interests in this litigation. I accept GSSD's assertion of certain direct interests arising from non-Catholic students attending St. Theodore Roman Catholic School: the loss of the non-Catholic Theodore students and associated government funding; the loss in efficiencies and educational opportunities associated with the anticipated higher enrolment in Springside School; and the threat of other communities creating separate schools in face of sound reasons to close a rural public school. These are among the immediate and direct interests. But I also see GSSD's broader interests being affected as well, which I shall canvass later.

[111] This conclusion is supported by *Protestant School Bd. of Montreal*. There, the Protestant school boards sought standing, alleging that s. 93 protected not only religious rights but also language rights associated with

Protestant schools which were allegedly breached by the *Official Languages Act*[24]. The Attorney-General argued that the school boards were not persons who were part of a "class of persons" under s. 93 of the *Constitution Act, 1867,* suggesting that only "physical persons," not corporate bodies, held rights under s. 93 since only individuals could have attributes of faith and language.

[112] I find that CTT suggests a similar restriction – that only a "class of persons" who holds rights under s. 93 has standing to litigate those rights. Chief Justice Deschenes, in *Protestant School Brd. of Montreal v Minister of Education*, citing cases including *Board of Education for Moose Jaw School District No. 1 v Saskatchewan (Attorney General)* (1975), 57 DLR (3d) 315 (Sask CA) [*Moose Jaw School District*] (where a public school board was given standing to litigate the potentially adverse consequence of legislation introducing provincial bargaining, including separate schools), stated at 649-650:

> … It matters little at the outset whether or not they have a right to complain: the plaintiff School Boards are certainly affected by the *Official Language Act* and, if the Act is invalid, they have a "sufficient interest" to seek the judicial declaration of legislative *ultra vires*.
>
> Finally, during the last two years, the Supreme Court of Canada has demonstrated a willingness to enlarge and facilitate access to the courts, as in the cases of *Thorson v A.-G. Can. et al. (No. 2)* (1974), 43 D.L.R. (3d) 1, [1975] 1 S.C.R. 138, 1 N.R. 225, and *Nova Scotia Board of Censors v. McNeil* (1975), 55 D.L.R. (3d) 632, [1976] 2 S.C.R. 265, 32 C.R.N.S, 376. As this Court said on March 9th:
>
> > The Court must establish that the plaintiff school boards are public oriented organisms

[24] RSC 1985, c 31 (4th Supp)

> whose members are elected by all citizens, within the limits of the right to vote given by the *Public Education Act*. The Court must establish that the school boards have a responsible role to play in our society. Some of them thought it was their duty to come to court regarding the validity of legislation which, they say, affects them. It is the opinion of the Court the public interest compels us to hear them entirely on this matter.
>
> For these reasons, it is therefore the opinion of the Court that the last issue of lack of standing, drawn from the alleged absence of interest of the plaintiffs in this case, must also be dismissed.

[113] Like Chief Justice Deschenes, I accept that the more appropriate test is being "affected" – obviously in a real way – and not necessarily having a "right," to sufficiently establish standing. I agree with his Lordship's characterization of public school boards: they are public oriented organisms, their members are elected, and they have a responsible role to play in society. The initial position advanced by CTT that GSSD must be a person holding separate school rights before it can argue standing is not supported by the case law. Noticeably, Chief Justice Deschenes went further than merely refuting the notion that only holders of a constitutional right have standing. He distinctly accepted the court's earlier decision that the principle of "public interest" compelled the court to hear the Protestant school boards "entirely on the matter."

B. Public Interest Standing

1. The Direction in Eastside Sex Workers

[114] Although all three parties raised the issue of exceptional prejudice as a ground to establish standing, I have chosen to consider only the public interest justification for two reasons. First, and primarily, I have decided that GSSD has standing on the basis of public interest so there is no need to consider whether GSSD has satisfied the exceptional prejudice test. Second, I agree with the submissions of the Government that the principle of exceptional prejudice may no longer persist given the nuanced rules that now guide public interest standing. In *Hy and Zel's Inc. v Ontario (Attorney General)*, [1993] 3 SCR 675, Justice Major, at 694, noted that the principle may have been subsumed "in view of the more liberal views relating to public interest standing."

[115] The parties agree that the authoritative case establishing public interest standing is *Eastside Sex Workers* where the Supreme Court held that standing may lie with a plaintiff seeking to vindicate the public interest. Justice Cromwell, writing for a unanimous court, stated at para. 37:

> 37 In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts…

[116] I adhere to Justice Cromwell's caution at para. 20 that these "are interrelated factors" and "should not be treated as hard and fast requirements or free-standing, independently operating tests." He suggested that the factors

should be weighed cumulatively, understanding the purposes of limiting standing, and "applied in a flexible and generous manner." As a counterpoint to what factors allow standing, he cited three traditional concerns which justify disallowing standing, implicitly permitting standing where these concerns are absent.

[117] First, Justice Cromwell identified the need of "screening out the mere busybody" to ensure the court is "properly allocating scarce judicial resources." I am satisfied that GSSD is not a "busybody" looking for meaningless litigation. The funding of non-Catholic students at St. Theodore Roman Catholic School resulted in both financial and educational consequences at Springside School where the Theodore students would have been accommodated. Justice Cromwell's second concern was whether the court had "the benefit of contending points of view of those most directly affected by the determination of the issues." I have no concern in this regard. The court has had the benefit of strongly contested positions, ably argued in great detail by experienced counsel. Third, Justice Cromwell suggested limiting standing to preserve "the proper role of courts and their constitutional relationship to the other branches of government." The Government originally intended to ask the Court of Appeal to answer a reference question on the subject of this action. I cannot see that allowing GSSD standing offends the relationship between the judiciary and other branches of government. As has often been said, "the judiciary is the guardian of the constitution." (*Hunter v Southam Inc.*, [1984] 2 SCR 145 [*Hunter*])

[118] None of Justice Cromwell's three cautions are triggered in GSSD's quest for standing. These cautions satisfied, I will explain why I am

also satisfied that the three requirements of standing as set out in *Eastside Sex Workers* have been met.

2. Serious Justiciable Issue

[119] A justiciable issue, in a broad sense, is a matter capable of being brought to trial. In the context of standing, Justice Cromwell referred to previous Supreme Court decisions and, drawing from them, described the requirements of a serious justiciable issue at para. 42, as follows:

> 42 To constitute a “serious issue”, the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski*, at p. 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel's*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690) … In *Canadian Council of Churches*, the Court had many reservations about the nature of the proposed action, but in the end accepted that "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation" (p. 254). Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question.

[120] I must ask whether the funding of non-Catholic students at Catholic schools is a “substantial constitutional issue.” I need only refer to the voluminous case law that has arisen since confederation respecting s. 93 rights to conclude that this action triggers a substantial constitutional issue. Section 93 issues have been a frequent subject of constitutional litigation in Canada, coming before the court in various ways: by constitutional reference (*Reference re Bill 30; Brophy*), by Roman Catholic separate school supporters (*Barrett*), and by private school supporters (*Adler v Ontario*, [1996] 3 SCR

609 [*Adler*]). This litigation, though, is novel. In 150 years of separate school rights, never has a case considered whether or not government funding of non-minority faith students is a constitutionally protected right.

[121] I am confident that each party in this action understands the import and consequence of this lawsuit, the "serious issue" the lawsuit raises. Few lawsuits have greater impact than this action as evidenced by counsels' extensive legal research, their obvious preparation, their ardent arguments at trial's closing, the length of the trial and the magnitude of public attendance at court, particularly at the summation of the trial.

3. Does GSSD Have a Real Stake or Genuine Interest?

[122] *Eastside Sex Workers* asks whether the plaintiff has a real stake or a genuine interest in the contested issue. Is GSSD seriously attempting to resolve a dispute involving contested rights or, as Justice Laskin (as he then was) asked in *Borowski* at 579, is it merely asking "questions in the abstract merely to satisfy a person's curiosity or perhaps his or her obsessiveness with a perceived injustice in the existing law." In this case, the answer is found in the characterization of the proceedings offered by Justice Mills in his fiat of May 1, 2015: the action has been a "matter of significant controversy for over a decade" and has involved "wide representatives of public and Catholic education in the Province." Justice Mills referred to the "informal discussions, court activity and mediation…over the past 10 years of this action," concluding with an observation that answers the inquiry whether GSSD has raised a genuine interest in the litigation: "All parties understood that the

constitutional and *Charter* issues raised in this case would impact upon all students in the Province." I agree.

[123] I am satisfied, in the words of Justice Laskin, that this litigation does not merely pose "abstract" questions to assuage GSSD's "curiosity." Few matters are more significant to a province's interests than those that affect children's education. There is nothing frivolous in this lawsuit. Each party has marshalled huge resources, not only to establish or challenge GSSD's standing, but to argue the merits of the constitutional questions the action poses.

[124] Specifically, GSSD cites government funding of non-Catholic students attending St. Theodore Roman Catholic School as harming GSSD's interests. Dwayne Reeve and Sherry Todosichuk, deputy director of corporate services with GSSD, explained that the loss of the Theodore students resulted in reduced efficiencies and educational opportunities that would have accompanied higher enrolments in Springside; loss of government funding respecting the Theodore students; the negative impact upon GSSD considering the closure of other rural schools because of the threat of creating a separate school to circumvent such plans; frustration of the need to accommodate shrinking enrolment in rural schools and sustain public education in the longer term; and creation of a competitive publicly-funded separate school in contradiction to the government's drive for school division amalgamation which was initially voluntary and later mandatory.

[125] At the core of this litigation is the issue of financing education in Saskatchewan and how the public purse should be spent within the reality of

constitutionally guaranteed separate schools. I accept Dwayne Reeve's testimony that when school enrolment falls below certain numbers, numerous reasons support a decision to close the school. One reason is the lack of economic efficiency. When finite dollars allocated to education are spent inefficiently anywhere in Saskatchewan, everyone with an interest in education is adversely effected. Because St. Theodore Roman Catholic School remains open, Christ the Teacher Roman Catholic School Division continues to receive government funding for a school with an enrolment of 26 kindergarten to grade 8 students in 2014-2015 when the public school was slated for closure in 2003 with an enrolment of 42 students. St. Theodore Roman Catholic School remains open 14 years after Yorkdale considered it a non-viable school, following previous closures in the villages of MacNutt, Bredenbury, Ebenezer and Rhein.

[126] Quantifying its loss, GSSD, in its cross-examination of Angela Chobanik, Executive Director of the Education Funding Branch of the Ministry of Education, solicited testimony that in 2016-2017, by virtue of St. Theodore Roman Catholic School remaining operative, the province would pay CTT approximately $220,370.58 in base instruction, $106,971.00 in instructional resources funding, $10,200.00 in administration funding and $3,960.00 in governance funding in addition to school operation and maintenance. If St. Theodore Roman Catholic School were not operative, these funds, GSSD states, would have been available to other public school divisions in Saskatchewan and spent more effectively and efficiently.

[127] I find that GSSD has shown that it has a real stake and a genuine interest in determining whether St. Theodore Roman Catholic School is entitled to receive government funding respecting non-Catholic students.

4. An Effective Way to Bring the Issue Before the Court

[128] Justice Cromwell provided a list of non-exhaustive considerations in assessing the third criterion: the plaintiff's capacity to marshal resources and expertise to present the case, whether the issues will be presented in a concrete factual setting, whether the public interest transcends the interests of those most directly affected, and whether a realistic alternative exists for a more efficient and effective use of judicial resources. At para 51 of *Eastside Sex Workers* he stated:

> 51 …
>
> - The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting.
>
> - The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action…
>
> - The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be

> considered in light of the practical realities, not theoretical possibilities. …
>
> …

[129] Justice Cromwell identifies “capacity to bring forward a claim” as a determinative of standing. Who, among the many persons potentially affected by the results of this action, has the capacity to bring the action? Saskatchewan parents hold strong opinions (as I heard during testimony of some of those parents) respecting the issues before the court. However, I doubt that parents on either side of this issue would feel sufficiently impacted to commence constitutional litigation. Most individuals would be daunted by the cost and time to see constitutional litigation to the end of trial and its expected appeals.

[130] Two parents from the GSSD attendance area, Joelann Pister and Lenore Pinder, testified that they desired a determination of the constitutional issues in this action. Each of them would lack financial ability to mount the resources to advance constitutional litigation, especially when, as an individual parent whose children attend school for a finite time, their interest may not be significant enough to endure the expense and time to seek an answer. The duration of this lawsuit, launched in 2005, and decided at the trial level in 2017 (with the possibility of appeals), exceeds the length of a child’s school education.

[131] The Government states that GSSD should be denied standing because “neither the public school divisions nor the SSBA met with or consulted with ratepayers or parents in relation to the issues raised in this

action…"[25] No evidence was led of any consultation with ratepayers. However, school boards trustees are elected to represent parents, students and the public to permit democratic control over education in a school division, as provided by *The Education Act, 1995*. School democracy is representative democracy founded on the principle of elected trustees representing ratepayers and answerable to them through elections. I find it an odd result, as implied by the Government, that parents more aptly have standing while the organization that represents them is less apt to have standing. The provincial government functions on the principles of representative democracy, similar to a school board. It must understand that the lawfully taken actions of a school board in advancing this action are as effective and legitimate as the government's action in defending it.

[132] In *Conseil du patronat du Quebec Inc. v Quebec (Attorney General),* [1991] 3 SCR 685, Justice Chouinard's dissenting reasons at the lower court ((1988) 55 DLR (4^{th}) 523) were accepted by Justice Lamer writing for a unanimous Supreme Court, by simply making Justice Chouinard's reasons his own. Justice Chouinard identified the odd result of granting standing to an employer while denying standing to the Conseil whose "purpose is to promote the interests of a very large number of employers or firms, a majority of whom appear to be unionized." As he stated, "surely it has just as much interest as each of its members does."

[133] As further support that school boards, not ratepayers, often advance constitutional questions, I refer to the previously quoted statement in *Protestant School Brd. of Montreal v Minister of Education*, at 649, where

[25] Government Trial Brief Para 224

Justice Deschenes stated that “the plaintiff school boards are public oriented organisms whose members are elected by all citizens, within the limits of the right to vote given by the *Public Education Act*.” Given these statements, I cannot find weakness with GSSD’s claim to standing only because it provided no evidence that its position is supported by its ratepayers. I accept that several school board elections have come and gone since the trustees of GSSD initiated this litigation. That is when the ratepayers implicitly, if not expressly, endorsed this litigation.

[134] As Justice Cromwell, in *Eastside Sex Workers*, also required, I find that GSSD has expended the resources necessary for a "well-developed factual setting." The factual nexus of the action arising from the closure of Theodore School has been thoroughly canvassed, particularly given the lengthy and detailed testimony provided by the Director of Education, Dwayne Reeve, and through cross-examination of Kelly Kunz who, as a member of the Catholic faith, petitioned for the creation of a separate school board. Their testimony revealed the reasons for closing Theodore School; the detailed plans the school division made for its closure, including community meetings and consultation; the efforts of the Theodore community to retain its school; the formation of St. Theodore Roman Catholic School; the enrolment of non-Catholic students in the school; and the consequences to GSSD’s ability to control and manage its schools with an eye to accountability of the public purse and effective education of its students. Marshalling these facts required the type of resources and skills inherent in the administrative expertise possessed by a public school division such as GSSD, and would be well beyond the ability of almost any individual parent or ratepayer.

[135] Although determining constitutional standing is dependent upon the plaintiff's ability to expend resources necessary for a well-developed factual setting, I also recognize the defendants' ability to marshal evidence and argument to offer a vigorous counter position. CTT has received the support of the Catholic Section of the SSBA. It has engaged with representatives of the Public Section of the SSBA in pre-trial negotiations, mediations, reference discussions and pre-trial motions. Clearly this issue is hugely significant to Catholic education in Saskatchewan and beyond. Ken Loehndorf testified about the interprovincial interest among Catholic administrators. The Catholic Section and the Knights of Columbus have helped fund the litigation. Dr. Paszek, one of CTT's expert witnesses, acknowledged interest in this case in Alberta's Catholic system. CTT also enjoys the able and considerable assistance of the Government. I find that the question of standing has received a vigorous, thorough and well-matched evidentiary and legal airing.

[136] I also find that another of Justice Cromwell's criteria has been satisfied, that "the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action." Given evidence that a significant portion of enrolments in Catholic urban schools is comprised of non-Catholic students, this litigation will obviously have far-reaching consequences that transcend the interests of ratepayers in either GSSD or CTT. Bert Degooijer, Chairperson of the Public Section, testified about the Public Section's efforts to garner funds to pursue an answer to what the Public Section has called the "mandate question." He testified that 13 of the Public Section's 15 member boards have financially supported this

litigation at various times, and 11 continue to do so. In my view, this investment illustrates that what happens in Theodore will be important to public and separate school boards of education throughout the province.

[137] Of the guidance Justice Cromwell offered, I place considerable importance on his instruction to inquire whether "there are realistic alternative means which would favour a more efficient and effective use of judicial resources." In this vein, I agree with the statement in Sara Blake's "Standing to Litigate Constitutional Rights and Freedoms in Canada and the United States,"[26] drawn from the case law (*Borowski, Nova Scotia Board of Censors v McNeil* [1976] 2 SCR 265 [*McNeil*] and *Thorson v Attorney General of Canada* [1975] 1 SCR 138 [*Thorson*]), that before a court will allow a concerned citizen to gain standing, "it may require him to attempt a resolution of the issue by other means."[27] Citing *Borowski*, *Thorson* and *McNeil*, the author suggests that before granting standing, courts have considered whether the plaintiff has "engaged in political protests and lobbying, launched appeals of administrative decisions as provided for by the challenged statute, and requested Attorneys General to refer the law to the appropriate courts for consideration of its validity."

[138] If these types of attempts to resolve a constitutional issue are a measure of the legitimacy of standing, I find that GSSD has succeeded. It has demonstrated a long-standing interest to determine the mandate question, well before events in Theodore in 2003. Larry Huber, Executive Director of the Public Section since 2003, described the concerns of the Urban Public Boards

[26] Sara Blake in "Standing to Litigate Constitutional Rights and Freedoms in Canada and the United States, "(1984) 16 Ottawa L Rev 66 at 72 ["Standing to Litigate"]
[27] "Standing to Litigate", at 71

Caucus, predecessor to the Public Section. During the late 1980s and early 1990s, the Caucus became concerned with the non-restrictive admission policies at urban Catholic schools. While previously Catholic schools required baptismal certificates and references from the parish priest, Mr. Huber testified that these practices changed. As illustrative of its growing concern, Regina Public School Division, under his directorship from 1990 to 1998, sought a private legal opinion in 1997 respecting the mandate question. This opinion was shared with the Saskatoon Public School Division and Minister of Education, Patricia Atkinson. On April 20, 1998, Deputy Minister Craig Dotson met with concerned directors of public school divisions. Minutes of that meeting record "considerable discussion on issues of selective recruitment [of non-Catholic students], competition [between Catholic and public schools], and the implications of the legal opinion offered."

[139] Not only public boards were engaged in the evolving mandate issue by the late 1990s. Twenty years earlier, in the November 10, 1978 Confidential Report, the Saskatoon Catholic School Board had already identified looming issues that might arise from the growing numbers of non-Catholic students in its elementary schools. Most significantly, this confidential 1978 report contained an express caution:

> All comparisons, particularly with the Public Board of Education, must be carefully handled. We do not want an open war for kids.

This lawsuit may be the type of "open war" the report's author envisioned. When parties cannot resolve disputes they often move to the courts. If, as long as 40 years ago, the Saskatoon Roman Catholic School Board anticipated that increased enrolment of non-Catholic students might instigate "an open war"

with the Public Board of Education, CTT's current position (as endorsed and supported by the Catholic Section) that GSSD should not have standing appears disingenuous. The mandate question of Catholic schools has been fomenting for 40 years, coming to a head in 2005 when GSSD commenced this action. I see nothing in GSSD having standing that should be surprising to CTT. This action is more prophetic than surprising. The creation of Theodore Roman Catholic School Division provided the factual nexus to drive litigation that had long been brewing in the province. There is ample evidence that well before this action Catholic and public school interests had been engaged in high-level discussions, all in an effort to resolve the mandate issue.

[140] Of these various efforts, I am particularly alive to the effort all parties – Saskatchewan Justice, the Department of Education, and the Catholic and Public Sections – took when they considered a formal reference to the Saskatchewan Court of Appeal. Briefing notes prepared for The Department of Education on September 7, 2006 by Wayne Beck, then Director of Education in the Region 3 office, provide a concise history of how the constitutional reference originated but ultimately did not proceed. The importance of the proposed reference is evidenced by Cabinet's involvement. It directed Saskatchewan Learning to work with Saskatchewan Justice to explore the possibility of a reference to the Court of Appeal. Mr. Beck wrote:

> **BACKGROUND:**
>
> - Over the years many of the public boards expressed concerns about the funding of non-faith students in Catholic schools.
>
> - With the formation of Englefeld Protestant School Division and Theodore Catholic Separate School

> Division, in response to school closures, the concerns were exacerbated.
>
> - In June 2004, the Cabinet directed Saskatchewan Learning to work with Saskatchewan Justice to explore the possibility of a Constitutional Reference to the Court of Appeal to develop questions to address the areas of concern.

[141] The possibility of a reference progressed to the point where specific questions were formulated for the Court of Appeal's determination. As Mr. Beck stated in his briefing notes, the Catholic Section and the Public Section were involved in drafting the questions, described by Mr. Beck as follows:

> - A consultative process was developed by Saskatchewan Learning to draft sample questions related to the issues of concern. Issues being considered were:
>
> - Does Section 17 of *The Saskatchewan Act* give separate schools the constitutional right to accept students who are not of the minority faith?
>
> - If separate school have a constitutional right to accept non-minority faith students, does the Government have the authority to regulate or restrict that right or to establish a maximum number of non-faith students who may attend a separate school?
>
> - If the majority of students in a school are not of the minority faith, is the school a separate school within the meaning of Section 17 of *The Saskatchewan Act*.
>
> - Does the Government have the authority to base funding to separate schools only on the number of students of the minority faith or is there an obligation

> to fund all students that attend the school?
>
> - The SSBA, the Urban Public Boards Caucus and the Catholic Section were all part of the consultative process to develop the questions.

[142] The reference did not materialize. Mr. Beck's notes explain why and describe further events from February to June 2005:

> - In February 2005, Cabinet directed the Departments of Learning and Justice to proceed with the Constitutional Reference process.
>
> - In the spring of 2005, the Catholic Section of the SSBA notified the Government that it was not in support of the Constitutional Reference process, but would rather explore other options to find solutions.
>
> - In June 2005, the Cabinet gave direction not to proceed with the Constitutional Reference process.
>
> - In June 2005 seven new Catholic school divisions were formed. Subsequently all seven school divisions were disestablished and joined with larger Catholic school divisions.

[143] Mr. Beck explains that in June 2005, at the request of the Catholic Section of the SSBA, Cabinet directed Saskatchewan Justice to cease preparation of the reference.

[144] The history of the cancellation of the reference augurs against both the defendants' objections to GSSD's quest for standing. Initially, both Cabinet and the Department of Learning endorsed a reference to seek answers to the pressing constitutional questions. Saskatchewan Justice was instructed to consult and prepare the constitutional questions. Court action was clearly anticipated, the issues were readied and the mandate question was coming to a head in a reference, an efficient and economical proceeding. That changed

when the Catholic Section of the SSBA decided not to participate and the Government did not proceed. I fail to see how either CTT or the Government, knowing that all parties were considering a constitutional reference, can object when GSSD, a member of the Public Section of the SSBA, seeks answers to questions posed in the reference.

[145] If I were to pose the question whether GSSD took all necessary steps "in order to make the question of [its] standing ripe for consideration" – the inquiry applied in *McNeil* – I would, on the basis of the withdrawn reference alone, find that it had. Moreover, I find evidence that even though the reference was cancelled, GSSD, through the Public Section, participated in further attempts to reach an agreement or understanding of the constitutional rights of Catholic schools. As Mr. Huber testified, well after the action was commenced, from November 2008 to October 2011, the Public Section participated in 40 days of mediation with the Government and the Catholic Section in an attempt to settle the issues raised in the action.

[146] As Sara Blake described in her previously-referenced article, "Standing to Litigate", in determining the merits of standing, the court looks for the plaintiff's efforts to resolve an issue such as lobbying, political protests, or a request to the Attorney General for a reference. Exemplary of GSSD's continued efforts to seek an answer to the constitutional conundrum is the Public Section's continued discussions and negotiations with successive Ministers of Education and the Premier of Saskatchewan, hopeful of re-initiating the cancelled reference. In correspondence of June 10, 2005 after the reference was cancelled, Wayne Steen of the Urban Public Boards Caucus wrote to Premier Calvert, stating, "We believe that the Constitutional

Reference process needs to be put back on track and the time line that was committed to be re-established."

[147] In summary, I find that GSSD has met the requisite tests to be granted standing. To disallow standing on such a vital question with such broad importance to the province would be tantamount to leaving an legal lacuna respecting governmental action, alleged to be unconstitutional, without judicial review.

PART THREE: IS ST. THEODORE ROMAN CATHOLIC SCHOOL A SEPARATE SCHOOL?

[148] GSSD argues that "St. Theodore is not a separate school." GSSD advances its position by first explaining the legitimacy of Yorkdale's reasons for closing the Theodore public school and then by examining the motives why the community created a separate Roman Catholic school. GSSD states that St. Theodore Roman Catholic School is a "community school," not a separate school. It states that prior to the petition for a separate school, everyone anticipated that St. Theodore Roman Catholic School would have a majority population of non-Catholic students in attendance. This fact was well known by both the Catholic electors in the school attendance area and the Government. St. Theodore Roman Catholic School opened with a majority of non-Catholic students and continues to operate with a majority of non-Catholic students.

[149] The closure of Theodore's public school and the creation of St. Theodore Roman Catholic School are inexorably linked to rural depopulation in Saskatchewan. I heard much evidence giving detail to two facts notoriously

known in Saskatchewan. First, Saskatchewan school boards often make difficult decisions to close small rural schools and transport students to larger centres – that has been happening in Saskatchewan for decades. Second, small towns and villages see the closure of their schools as a death knell to the community – a school closure can wring the last vestiges of commerce and vitality from a community. In the early 2000s, the first fact faced Yorkdale School Division; the second faced the village of Theodore.

[150] Rural depopulation pitted the intentions of Yorkdale against the interests of the community of Theodore. Tension was inevitable. I accept the evidence of Dwayne Reeve. He provided a detailed explanation of the Theodore school closure from his vantage point as Director of Education for Yorkdale from 2000, continuing as director through two amalgamations with other neighbouring school divisions until the formation of GSSD in 2005 where he continued as director until July 2015. Mr. Reeve's directorship coincided with a time when rural depopulation prompted school closures with the provincial government providing strong incentives for school boards to voluntarily amalgamate, incentives which later turned to mandatory amalgamations. Clearly, Mr. Reeve's tenure was commensurate with a time of change and challenge. He arrived at Yorkdale after the board's closure of schools in the villages of Ebenezer and Wroxton. He oversaw the closure of several schools in the division, including those in the villages of Bredenbury, MacNutt, Rhein, Theodore and Willowbrook.

[151] In a transcript of her examination for discovery read into the trial, Darlene Thompson, the Government's designated representative during pre-trial questioning, explained that from 1996 to 2004 the number of school divisions in the province contracted through voluntary initiatives from 118 to approximately 80. The government decided to take further mandatory action believing that voluntary amalgamations would not accomplish the goals of fewer school divisions. By 2014-2015, 28 school divisions were present in Saskatchewan: 18 public school, eight Roman Catholic, one Protestant and one Conseil des écoles fransaskoises.

[152] I also accept the evidence of Thomas Chell, witness for GSSD. He testified about developments in Saskatchewan from 1997 to 2006 when he was Regional Director with the Department of Learning for Region 1. He described a Regional Director's role as being the "eyes and ears for the department," reporting through monthly meetings with senior officials and, similarly, meeting monthly with Directors of Education in his region. Mr. Chell described these years as a "difficult time" in rural Saskatchewan. Rural depopulation led to declining enrolment; crumbling infrastructure; increased public expectations about programs and curriculum; schools using a fraction of the space for which they were built; multi-grading; challenges with teacher recruitment and retention in small centres; concerns and complaints about rising mill rates; and dwindling budgets.

[153] In summary, Mr. Reeve and Mr. Chell offered a myriad of reasons to justify Yorkdale's decision to close Theodore school. I find it unnecessary

to extensively review the reasons for and the manner in which Yorkdale went about its decision. Under *The Education Act, 1995*, Yorkdale had statutory authority to close the school and it acted throughout with the involvement and approval of the Regional Director and the Department of Learning. Yorkdale sought public input, provided ample statistical information to those requesting it, and adhered to the legislation and department policy respecting school closures. Yorkdale passed a motion of intention on December 16, 2002, stating that the board would consider closing the Theodore School effective August 20, 2003 because of declining and low enrolment. Students would be accommodated at Springside School, 17 kilometres distant, to bring its enrolment to over 100 students. On April 28, 2003, the board moved that the Theodore School be closed effective August 20, 2003. I find that Yorkdale acted within the powers and duties of *The Education Act, 1995* in closing Theodore School and did so *bona fide* and responsibly. I heard no argument from either defendant that Yorkdale acted inappropriately or without statutory authority in closing Theodore School.

[154] Now, turning to the efforts of the Theodore community to keep its school open, I similarly observe that little is gained by extensively reciting the numerous efforts that Theodore parents undertook to keep their school open. Suffice it to say, community members were tenacious. They made several presentations to the Yorkdale board, including proposals to close other neighbouring schools (Springside and Willowbrook) instead of Theodore

which would have made Theodore School an “isolated” school to permit the board to gain access to increased funding. They also asked the neighbouring Shamrock School Division if it would incorporate their school district. They proposed delaying closure, hopeful of increasing the school’s population. They wrote letters to politicians, the Ministry and to Thomas Chell. They formed a “Save Our School” committee. In these parental efforts I find little unexpected about their efforts to save their school.

[155] Respecting religious education, no evidence was presented that anyone in Theodore was concerned about religious education in Theodore prior to the inevitability of the school’s closure. Kelly Kunz, a Catholic ratepayer living in Theodore, provided frank testimony that the idea to create a separate school division was brought forward by non-Catholic parents. I find no evidence that Catholic parents in Theodore wished to educate their children apart from the majority of non-Catholic children. Instead, both Catholics and non-Catholics saw creation of a separate school, not as a constitutional right to protect minority-faith education, but as an opportunity to keep their local school open. *The Education Act, 1995* provided the ready means to implement that goal.

[156] Nor was resorting to the separate school provisions of *The Education Act, 1995* a new-found idea in Saskatchewan to thwart a public school division’s plans to close a rural school. I heard evidence from several witnesses who testified that parents in Catholic-majority Englefeld, Saskatchewan, a few years previously, invoked the separate school provisions to create the Englefeld Protestant Separate School Division, the only Protestant separate school division in Saskatchewan and with only one school.

[157] The creation of Theodore Roman Catholic School Division was unusual, but I find it to be a legitimate entity. The Catholic community in Theodore followed the provisions of *The Education Act, 1995* when it petitioned for a separate school division. Accordingly, I will not explain, in detail, the rather simple process that existed in 2003 to create a separate school (a process that was subsequently amended to require a more prolonged procedure). As a religious minority, Catholics in Theodore who chose to attend a public meeting voted to create a separate school division. Neither the Minister nor the government had any authority to veto that vote. In compliance with the then-provisions of *The Education Act, 1995,* a petition was submitted to the Minister to establish a Catholic school division. *The Education Act, 1995* states that the Minister "shall establish" a separate school division by issuing the necessary documents.

[158] Justice Wright in *Saskatchewan Rivers School Division No. 119 v Saskatchewan (Minister of Education)*, 2000 SKQB 390, 197 Sask R 218, faced a similar issue when the public school division sought an order to quash the Minister's creation of St. Jude's Roman Catholic School Division, which soon amalgamated with a larger Roman Catholic school division. Justice Wright stated:

> [14] It must be remembered that the electors of the minority faith in the West Central School District were exercising their constitutional right. The obligation of the Minister to create a separate school division at their behest is imposed upon him by statute. That obligation finds its roots in *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11, *The School Ordinance*, O.N.W.T. 1901, c. 29 and *The Saskatchewan Act*, 4-5 Edward VII, Chapter 42, of 1905 guaranteeing the rights of the minority ratepayers to establish a separate school division. It is also noteworthy that it is not

> electors of the minority faith, the only persons entitled to notice, who are bringing this application.

[159] I find that the late-come-upon idea for a separate school was a means to an end – to keep an elementary school in Theodore by creating a Roman Catholic school division. This newly created separate school division with only one school – St. Theodore Roman Catholic School – soon amalgamated with Yorkton Roman Catholic School Division and St. Henry Roman Catholic School Division (in Melville, Saskatchewan) to become Christ the Teacher Roman Catholic School Division, indicative that viability of the new school division was better assured by joining established neighbouring Roman Catholic School divisions. What the defendants say is that once opened, the school was a true Catholic school and has operated as a Catholic school ever since. As the Government puts it, the school "did everything that was needed to ensure it offered and focused on a faith-based education, from the priest who liberally sprinkled the school with holy water to bless it, to the prayer said before every School Board meeting."[28]

[160] The fact that a Catholic minority might create a Catholic school without wanting their children to separate from the children of their non-Catholic neighbours (indeed, where Catholic students would be a minority and would be educated together with the majority-faith children) or that non-Catholics would be eager to send their children to a Catholic school, was beyond the imagination of the draftspersons of the *Saskatchewan Act*, or Protestant and Catholic school leaders. Saskatchewan in 2003 had obviously changed from Saskatchewan in 1905. I find that non-Catholic parents in

[28] Government Trial Brief Para. 351

Theodore, like non-Catholic parents in other districts with Catholic schools, chose to send their children to Catholic schools for various reasons. Specifically, Carla Madsen, an active member of the United Church in Theodore (the only church with regular services in Theodore) offered several reasons why she comfortably sent her children to St. Theodore Roman Catholic School: it was a "community school," it was "close," and it was "important" that her children have a faith-based education.

[161] I find that St. Theodore Roman Catholic School has honoured its Catholic mandate in its classroom instruction and in the administration and atmosphere of the school. I heard ample evidence that Catholic education is based on the teachings and example of Jesus Christ, where the child's spiritual development is critical. I do not question whether St. Theodore Roman Catholic School has fulfilled and continues to fill this mandate. Admittedly, with only 26 students enrolled in 2014-2015 from kindergarten to grade 8, a time might come when St. Theodore Roman Catholic School may have no Catholic students enrolled. I muse at the oddity if a Roman Catholic school were without Roman Catholic students.

[162] The Minister had no authority to challenge any Catholic in Theodore why he or she voted to create a separate school division. I agree with the Government's assertion that the decision to create a separate school division rests with the religious minority.

[163] The Government's position at trial, though, is of a different spirit than the views of the Ministry of Learning at the time of creation of the Theodore Roman Catholic School Division. For example, the Briefing Note

prepared by Dr. Michael Littlewood, Executive Director of School Legislation, on May 7, 2003, titled, "Issue: Process for Establishing a Roman Catholic Separate School Division (Theodore)" candidly stated that what had happened in Theodore was "inappropriate." He wrote:

> - The provisions for separate school divisions do not exist to provide an alternative form of schooling for a community. It is inappropriate for the provisions to be used simply to maintain a school in a community in which a public school is being closed.

[164] Similarly, five months later, when St. Theodore Roman Catholic School was operative, Dr. Littlewood's Briefing Note of October 24, 2003, titled, "Establishment of Roman Catholic Separate School Division in Theodore" illustrates the department's dissatisfaction with happenings in Theodore. Dr. Littlewood saw the "misuse of the constitutional provisions" as undermining "the credibility and integrity" of the constitutional protections. He wrote:

> … the misuse of the constitutional provisions for purposes unrelated to the provision of minority-faith education undermines the credibility and integrity of the current constitutional regime. It has the potential to inflame relationships between public and separate school boards and increases the potential for litigation in which the government would be directly implicated.

[165] Government viewpoints have changed from the time Dr. Littlewood characterized the concerns of the Department of Learning in 2003 to the position the Government now takes in this lawsuit.

[166] In any event, I find that St. Theodore Roman Catholic School is a legitimate separate school. I deny the relief sought by GSSD that the court

should declare that St. Theodore Roman Catholic School is not a separate school.

PART FOUR: IS FUNDING OF ST. THEODORE ROMAN CATHOLIC SCHOOL A PROTECTED CONSTITUTIONAL RIGHT UNDER SS. 93(1) AND (3) OF THE CONSTITUTION ACT, 1867?

I. DIVERGENT POSITIONS RESPECTING OPERATION OF SS. 93(1) AND 93(3)

A. Essential Elements of GSSD's Position

[167] The interpretation of s. 93 is crucial in this action. It either allows an aperture through which GSSD gains the chance to invoke the *Charter* or it blocks *Charter* application. If funding of non-Catholic students is constitutionally protected under s. 93, GSSD's action fails because it loses the opportunity to argue that the funding of non-Catholic students offends ss. 2(a) and 15 of the *Charter*. Obviously GSSD argues for a narrow interpretation of s. 93 rights; the defendants, a broad interpretation. Nonetheless, common ground exists. Both seemingly agree that s. 93(1) freezes and entrenches separate school rights as found in the 1901 Ordinances so long as such rights fall within a doctrine called the "denominational aspects" test. Both agree that this test was given its modern context by Justice Beetz in *Greater Montreal Protestant School Board v Quebec (Attorney General)*, [1989] 1 SCR 377 [*Greater Montreal*]. Earlier uses of the term "denominational aspects" can be found in *Protestant School Brd. of Montreal v Minister of Education* and has been endorsed in subsequent Supreme Court decisions: *English Catholic Teachers*; *Mahe*; and *Reference re: Education Act (Que.)*, [1993] 2 SCR 511 [*Reference re Education Act (Que.)*].

[168] Since Justice Beetz's articulation, the denominational aspects test has since been frequently paraphrased and perhaps was most clearly adopted by Chief Justice Dickson in *Mahe* in answer to a question he posed as follows at 382-383:

> In that case [*Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377], Beetz J., writing for the majority, held that the phrase "Right or Privilege with respect to Denominational Schools" in s. 93(1) of the *Constitution Act, 1867*, means that the section protects powers over denominational aspects of education and those non-denominational aspects which are related to denominational concerns which were enjoyed at the time of Confederation. The phrase does not support the protection of powers enjoyed in respect of non-denominational aspects of education except in so far as is necessary to give effect to denominational concerns. …

[169] This articulation of the denominational aspects test does not readily give up the nature of the test. A plainer introductory statement might state the test as the types of allowances and conduct that must be afforded to Catholic schools as being essential to their proper functioning, to ensure that the goals of Catholicism and the Catholicity of the school are protected as intended under the 1901 Ordinances (in Saskatchewan).

[170] Insofar as s. 93(1) is concerned – that no provincial legislation can lessen separate school rights existing at union – the parties apparently agree: if provincial legislation falling outside of the denominational aspects test is not constitutionally entrenched under s. 93(1) it may be exposed to *Charter* review. However, the parties' interpretation of s. 93(3) – that provincial separate school legislation can be passed post-union – is a different matter. The defendants lean heavily on their view of this constitutionally-protected, provincial right. They say s. 93(3) gives the province a wide-

ranging ability to enact post-union separate school legislation with complete immunity to *Charter* review. On the other hand, while GSSD also accepts that s. 93(3) allows the province to enact separate school legislation after 1905, it submits that the denominational aspects test applies to both s. 93(1) and 93(3) rights. The defendants separate s. 93(1) guaranteed rights, frozen at 1905, from s. 93(3) rights created post-1905. They assert that while the denominational aspects test applies to qualify s. 93(1) rights, it does not apply to post 1905 legislation under the s. 93(3) power.

[171] Relying upon *Mahe* and the principle that only denominational aspects of education are protected, GSSD states that two steps are involved to determine the extent of constitutional rights under s. 93. First, respecting s. 93(1), the rights must have existed in law under the 1901 Ordinances and they must be rights relevant to the denominational aspects of separate schools. Second, respecting s. 93(3), the rights may be enacted post-1905, but just like constitutionally protected rights under s. 93(1), s. 93(3) rights will avoid *Charter* scrutiny only if they either protect a denominational aspect of education or a non-denominational aspect necessary to give effect to a denominational aspect of education. Failing this test, legislation, whether under the 1901 Ordinances (protecting existing rights) or post-1905 (creating new school rights) is exposed to *Charter* scrutiny.

[172] Whether the denominational aspects test applies to both s. 93(1) and s. 93(3) powers, GSSD and the defendants are essentially at odds over the meaning to be attributed to certain of Justice Wilson's statements in *Reference re Bill 30*. In that case, Ontario's Attorney General posed reference questions

to the Ontario Court of Appeal, ultimately decided by the Supreme Court of Canada, asking whether a Bill to fund Catholic high schools was a valid exercise of the provincial power under ss. 93(1) or (3) of the *Constitution Act, 1867*. The court was asked to consider both subsections to obviate any further controversy respecting rights of Roman Catholic school supporters. The court found that Bill 30 was a valid exercise to add to the rights of Roman Catholic school supporters under the combined effect of the opening words of ss. 93 and 93(3). The court also found the Bill a valid exercise of the province's power to return rights constitutionally guaranteed to separate schools by s. 93(1) of the *Constitution Act, 1867* since a proper interpretation of rights at confederation necessarily included funding Catholic high schools.

[173] The defendants say that Justice Wilson found that the s. 93(3) power stands independently from the rights under s. 93(1). The defendants say that Justice Wilson, without regard to the doctrine of "denominational aspects," straightforwardly stated that s. 93(3) powers are free from *Charter* review. GSSD disagrees. It says that Justice Wilson's statement is not as free-ranging as the defendants suggest. *Charter* immunity follows s. 93(3) legislation, but only, as Justice Wilson wrote, "in relation to denominational, separate or dissentient schools." GSSD emphasizes this phrase as pivotal in its assertion that Justice Wilson did not say that the province's exercise of its plenary power over education was free from the denominational aspects test. Only when the province legislates under its plenary power within the confines of the denominational aspects test, *i.e.* "in relation to denominational, separate or dissentient schools," is the province a master of its own house. GSSD states that since the Ontario legislation in question in *Reference re Bill 30* was,

indeed, legislation of a denominational concern – the funding of Catholic students in Ontario high schools – her statements must be read in that context.

B. Essential Elements of the Defendants' Position

[174] The defendants proffer a nuanced approach to s. 93, saying it has three components. The first is the opening phrase of s. 93 which grants a general plenary legislative power to the province over education. Little need be said of this general power as it confers similar powers as other provincial powers under s. 92 of the *Constitution Act, 1867*. Any legislation respecting education enacted solely under this general plenary power is subject to *Charter* scrutiny.

[175] In distinction to the general plenary power, the defendants contend that s. 93(1) and s. 93(3) operate independently of each other, s. 93(1) looking backward to freeze and protect rights as found in the 1901 Ordinance and s. 93(3) looking forward to permit new legislated rights respecting religious education in the province. Of these two subsections, the defendants look principally to s. 93(3) since, in their view, s. 93(3) provides a legislative, post-1905 right to the province to fund non-Catholic students in Catholic schools. The defendants say that if the right to fund non-Catholic students lies within s. 93(3) the court need neither delve into a historical analysis of the 1901 Ordinance to see if such right existed pre-union, nor decide whether funding of non-Catholic students is a "denominational right" – both tasks being required under a s. 93(1) analysis. The Government suggests that in the interests of "judicial restraint" the funding of non-Catholic students can be dealt with solely and quickly under s. 93(3). The Government interprets Justice Wilson's statements as providing blanket *Charter* immunity if post-

union legislation enacts religious minority education rights: "It authorises the Province to go beyond the constitutionally protected rights which existed at Confederation, even to the point of creating new separate school systems for religious minorities."[29]

[176] The defendants also rely upon the statements offered after *Reference re Bill 30*, in *Adler* at para 48, as illustrative of the province's broad plenary powers under s. 93(3) where the court commented on the s. 93(3) power:

> 48 One thing should, however, be made clear. The province remains free to exercise its plenary power with regard to education in whatever way it sees fit, subject to the restrictions relating to separate schools imposed by s. 93(1). Section 93 grants…the power to legislate with regard to public schools and separate schools. However, nothing in these reasons should be taken to mean that the province's legislative power is limited to these two school systems. In other words, the province could, if it so chose, pass legislation extending funding to denominational schools other than Roman Catholic schools without infringing the rights guaranteed to Roman Catholic separate schools under s. 93(1). …

[177] The Government addresses the vernacular used by Justice Wilson in *Reference re Bill 30* when she describes s. 93(3) as a "plenary power" saying that confusion has arisen from her characterization of the plenary power. The Government suggests that the court has used the phrase "plenary power" to describe different aspects of the province's jurisdiction under the opening phrase of s. 93 and under s. 93(3). As clarification, the Government suggests a "first" and "second" plenary power. The first plenary power is the province's power over education in the sense that all the provincial heads of power in s. 92 are plenary giving the provinces jurisdiction to regulate within

[29] Government Trial Brief Para. 15

the field of education. The second plenary power, the Government says, is what the Supreme Court cited in *Reference re Bill 30*, more colloquially known as the "section 93(3) power." The Government states that s. 93(3) allows the province to enact post-union legislation to deal with minority religious education and permits the province to add to denominational school rights without *Charter* scrutiny. The Government succinctly states its position: "The issues of school attendance, school funding, and the creation of a separate school are therefore not subject to *Charter* review and this action should be dismissed on that basis."[30]

[178] The defendants say that even if funding of non-Catholic students was not part of the Ordinances of 1901, the province has the ability under s. 93(3) to augment separate school rights under the s. 93(3) power, including the funding of non-Catholic students at Catholic schools, all without *Charter* scrutiny.

[179] The Government contends that because the 1901 Ordinances are silent as to student admission at separate schools, under the s. 93(3) plenary power Saskatchewan has exercised the choice to not impose any restriction on the attendance of non-minority faith students at separate schools. While the Ordinance set up the structure of separate schools, it left the issue of attendance to separate school boards and parents, thereby keeping the government out of the arena of regulating a person's religious values and beliefs. Furthermore, because s. 53 of *The Education Act, 1995* specifically gives to boards of education of separate school divisions the same rights and

[30] Government Trial Brief Para 7

powers as other school divisions, the Government posits both public and separate schools have the authority to adopt an open attendance policy. This statutory framework is an exercise of the province's s. 93(3) power over separate schools, free of *Charter* review.

[180] The Government completes its distinction between s. 93(3) enabling powers and s. 93(1) protecting powers by submitting that the denominational aspects test has never been used by any court to limit new rights and privileges being granted by the province pursuant to its s. 93(3) plenary power. The Government asserts that the denominational aspects test is the domain of s. 93(1), creating a core of separate school rights and privileges, not limiting an expansion of those privileges.

[181] GSSD and the defendants present to the court widely different interpretations of Justice Wilson's statement. Ultimately, I must determine whether GSSD's interpretation of the statements in *Reference re Bill 30* is valid. If I agree with GSSD, *Charter* immunity will be limited to those rights accorded under the 1901 Ordinances or any post-1905 provincial legislation under s. 93(3) only if they fall within the scope of the denominational aspects test.

C. Analysis

1. The Legal Framework of s. 93 of the Constitution Act, 1867

[182] Given the parties' discrepant positions, I must determine the operative framework of s. 93 of the *Constitution Act, 1867*. Case law shows s. 93 does not easily yield its meaning. Section 93(1) necessarily requires a determination of the legal rights accorded separate schools under the 1901

Ordinances, a constitutionalized "snapshot."[31] Depending on the province, sometimes the snapshot includes rights given "by law" (as in Ontario) and sometimes by "law or practice" (as in Manitoba), thereby requiring reference to pre-union ordinances, statutes and practices. As successive provinces gained provincial status, s. 93 was altered, sometimes by adding nuanced phrases, sometimes by deleting others, as under the *Manitoba Act, 1870*, and sometimes by replacing entire provisions, as in the *Saskatchewan Act*.

[183] The extensive s. 93 case law adds complication including cases from the Privy Council and several from the Supreme Court of Canada both before and after the *Charter's* enactment.[32] Threading a consistent and coherent line of interpretation through these cases is challenging and optimistic.

[184] While the opening clause of s. 93 gives the provinces jurisdiction over education, thereafter follow curtailments of this power. Section 93(1) provides a guarantee, a minimum assurance, that a province cannot lessen the rights of classes of persons respecting denominational schools as they stood at the time of union or, as in Saskatchewan, under the 1901 Ordinances. If a province did not have denominational schools at the time of union, no rights were guaranteed under s. 93(1) and it was inoperative. Section 93(2) is of little moment in this action since it manifestly applies only to the Provinces of Ontario and Quebec.

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[31] A term Justice Gonthier used in *Reference re Education Act (Que)*,at p 539; adopted by Justice Iacobucci in *Adler* at para 42.

[32] *Barrett*; *Brophy*; *Ottawa Separate Schools Trustee v Mackell*, [1917] AC 62 (PC) [*Mackell*]; *Ottawa Separate Schools Trustees v Ottawa Corporation*, [1917] AC 76 (PC); *Hirsch v Protestant School Commissioners of Montreal*, [1928] AC 200 (PC) [*Hirsch*]; *Roman Catholic Separate School Board v The King*, [1928] AC 363 (PC); *Attorney General of Quebec v Greater Hull School Board*, [1984] 2 SCR 575 [*Greater Hull*]; *Reference Re Bill 30*; *Greater Montreal*; *Reference Re Education Act (Que.)*; *Ontario Home Builders' Association (SCC)*; *Adler*; *Public School Boards' Assn. of Alberta v Alberta (Attorney General)*, 2000 SCC 45, [2000] 2 SCR 409.

[185] While s. 93(1) froze time to the 1901 Ordinance, s. 93(3) looked forward and recognized not only that separate schools might exist at union but that a province might decide after union to establish separate schools or add to the rights of existing separate schools. Regardless, a right of appeal lay to the Governor General in Council if the province undertook any act that abrogated the rights of separate schools. And, under s. 93(4), recourse lay with Parliament to enact remedial legislation if a province failed to execute a decision of the Governor General in Council.

[186] Aside from Manitoba, notwithstanding the "invitation" under s. 93(3), no province has legislatively established a system of faith-based separate schools after union where none existed before. While Manitoba Catholics attempted to exercise the appeal mechanism of s. 93(3) in the *Brophy* matter in 1895 to invoke the remedial provision of s. 93(4), their attempt was unsuccessful. Since *Brophy*, s. 93(3) and (4) have been referred to in the case law to aid in interpreting s. 93 denominational rights (for example *Tiny Separate School Trustees v The King*, (1928) AC 363 (PC) and *Reference re Bill 30*), but the appeal powers under s. 93(4) have never been successfully used even though the provision is now 150 years old.

[187] To appreciate the workings of ss. 93(3) and (4) one must cast one's mind to legal principles of Canada's Victorian age when legislation, once passed, was supreme. No constitution protected freedom of religion, speech or equality. In 1867 the protection of minority rights had to be creatively accomplished. Sections 93(3) and (4) exemplified such means respecting minority faith schools. Although never used, Parliament reserved the right to step into the provincial realm of education if either the federal

cabinet thought that a province was not complying with s. 93 or a province did not heed the cabinet's decision under a s. 93(3) appeal.

[188] Having studied the respective positions of the parties, particularly in light of the *Reference re Bill 30*, I find that rights are constitutionally protected and no provincial legislation can derogate from such rights so long as:

1. They are found under the 1901 Ordinances, concern a right or privilege affecting a denominational school and are enjoyed by a class of persons;

2. They meet the requirements of the denominational aspects test, *i.e.* the rights prejudicially affected relate to a denominational aspect of education or a non-denominational aspect of education necessary to give effect to denominational concerns (*Greater Montreal* and *Mahe*);

3. In addition to the inability of the legislature to derogate from such protected rights, they are also immune from *Charter* review because one constitutional document (the *Charter*) cannot override the provisions of another constitutional document (the *Constitution Act, 1867*); and

4. If constitutionally protected under s. 93(1), such rights cannot be subsequently abrogated by provincial legislation without exposing such diminishing legislation to appeal to the cabinet.

[189] On the other hand, rights under s. 93(3) allow provincial legislation to augment existing rights or establish new denominational schools, post union. These rights can be characterized as follows:

1. Since newly enacted, they are not constitutionally "guaranteed" under the *Constitution Act, 1867* in the same way as s. 93(1) rights so that, unlike s. 93(1) rights, a

province can remove or amend such rights and privileges as it sees fit (at 1197-98 of *Reference re Bill 30*);

2. Although subject to the province's right to amend or repeal such legislation, they are immune from *Charter* review, but not because such rights are constitutionally guaranteed under the *Constitution Act, 1867*, but because *Charter* immunity comes from "the guaranteed nature of the province's plenary power to enact that legislation," so long as such rights are necessary to give effect to denominational aspects of education and to non-denominational aspects of education necessary to give effect to denominational concerns.

3. Similar to s. 93(1) rights, if the provincial legislature abrogates rights under s. 93(3), an appeal lies to the cabinet and Parliament can enact remedial legislation.

[190] The defendants will strongly disagree with the insertion of the underlined phrase in the above paragraph. They submit that s. 93(3) allows the province to legislate, post-union, and most importantly that such legislation is not subject to the denomination aspects test and *Charter* review. GSSD, though, insists that the denominational aspects test applies to both s. 93(1) and s. 93(3) powers and restricts *Charter* immunity to those rights necessary to ensure the denominational rights of separate schools. I agree with GSSD's interpretation of the s. 93(3) power.

2. Four Reasons Why the Denominational Aspects Test Applies to s. 93(3)

[191] I have determined that legislation under ss. 93(1) and 93(3) can be *Charter*-immune but to gain this immunity the legislation must be equally

subjected to the denominational aspects test. I have reached this decision for four basic reasons:

1. A review of the case law shows the denominational aspects test has been applied to both s. 93(1) and s. 93(3) powers.

2. Applying a denominational aspect test to pre-union legislation but not to post-union legislation augurs unreasonable results.

3. Allowing legislation, unprotected under the 1901 Ordinances (and therefore exposed to *Charter* scrutiny), to gain legitimacy under s. 93(3) as post-union legislation (because it augments the rights of separate school) with the consequence that it is *Charter*-immune without any qualification of the denominational aspects test, gives the Government *carte blanche* to enact any legislation it chooses under s. 93(3) without *Charter* overview.

4. The defendants, having premised their case on evidence that funding of non-Catholic students was a right under the 1901 Ordinances, have chosen to advance their case under s. 93(1) and cannot simultaneously advance their case under s. 93(3) which necessarily requires evidence that the impugned act or legislation arose after 1905.

[192] I will address each of these four reasons, in turn, under separate headings.

a. Does case law support applying the denominational aspects test to s. 93(3) power?

[193] GSSD and the defendants are locked in a tug-of-war over the meaning to be attributed to Justice Wilson's statements in *Reference re Bill 30*. To illustrate its point, GSSD quotes Justice Wilson's statement with bold emphasis and, as a counterpoint, the Government does similarly with underlined emphasis, as follows at p 1198:

> …The section 93(3) rights and privileges are not guaranteed in the sense that the s. 93(1) rights and privileges are guaranteed, i.e., in the

> sense that the legislature which gave them cannot later pass laws which prejudicially affect them. But they are insulated from *Charter* attack as legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise. Their protection from *Charter* review lies not in the guaranteed nature of the rights and privileges conferred by the legislation but in the guaranteed nature of the province's plenary power to enact that legislation. What the province gives pursuant to its plenary power the province can take away, subject only to the right of appeal to the Governor General in Council. But **the province is master of its own house when it legislates under its plenary power in relation to denominational, separate or dissentient schools.**

[194] Seldom do litigants so strongly braced against each other seek support for their competing positions in the same judicial statement. Respecting the underlined segment, the Government states the "rights and privileges…enacted pursuant to the province's plenary power…was the bargain of confederation, and the *Charter* must respect it."[33] Respecting the bolded segment, GSSD says the Justice Wilson "is not saying that the exercise by the Province of its plenary power in education is beyond *Charter* review for all purposes."[34] Only when the province enacts legislation "in relation to denominational or separate or dissentient schools" is it *Charter*-immune, a phrase GSSD equates to the denominational aspects test.

I am not surprised that the parties leverage Justice Wilson's statement to different ends. With respect, I find Justice Wilson's statements respecting the powers under s. 93(3) confusing since she interchangeably refers to the s. 93(3) power and to the general plenary power under the opening phrase of s. 93. I am unclear if she sees s. 93(3) power as completely separate from the general plenary power, as a subset of the general plenary power, or as the

[33] Government Opening trial Brief Para 114.
[34] GSSD Trial Brief Para 62

same power. The Government apparently also sees this quandary because, as explained previously, it states that a measure of confusion has arisen from the Supreme Court's characterization of the plenary power over education.[35] In any event, Justice Wilson found that Ontario's proposed funding of Catholic high schools was constitutionally protected under s. 93(1) because, at confederation, Roman Catholic separate school supporters had a right to have their children receive an education, including instruction at the secondary school level. Accordingly, because the proposed legislation only did what was protected under pre-union school enactments contemplated by s. 93(1), she found the funding of secondary Catholic schools was constitutionally protected. And, being constitutionally protected, such funding was shielded from *Charter* review, because one part of the constitution cannot override another.

[195] However, among the reference questions in *Reference re Bill 30*, the court was asked whether the proposed legislation could also be constitutionally upheld under the s. 93(3) power which allows post-union legislation to augment separate school rights. Justice Wilson held that the proposed legislation could fall within the province's legislative ability under s. 93(3), but such rights were not guaranteed in the same sense as s. 93(1) rights. Unlike legislation in force at union, legislation enacted post-union under s. 93(3) was subject to the province's right to amendment and repeal. As she said at p 1198, "the province is master of its own house when it legislates under its plenary power in relation to denominational, separate or dissentient

[35] Government Opening Trial Brief para. 102: "There is a measure of confusion in the Supreme Court's characterization of the plenary power over education. This confusion is linguistic – the phrase plenary is used to describe multiple aspects of the provinces' jurisdiction under section 93. The Court's broad usage of the phrase "plenary" is not incorrect, *per se*, but confusion arises between the inconsistent uses."

schools." Unlike pre-union rights and privileges which the province cannot abrogate, s. 93(3) rights and privileges are subject to the right to appeal to the federal cabinet. She wrote precisely on this point at p 1197:

> … It is clear from the wording of s. 93(3) that post Confederation legislation referred to in that subsection may be subsequently amended or repealed by the legislature which passed it in a way which affects rights or privileges initially granted by it. The only recourse if such occurs is an appeal to the Governor General in Council. It cannot be concluded, therefore, that rights and privileges conferred by post-Confederation legislation under s. 93(3) are "guaranteed" within the meaning of s. 29 in the same way as rights or privileges under s. 93(1).

[196] Having distinguished s. 93(1) rights as being guaranteed under the *Constitution Act, 1867* from s. 93(3) rights as lacking a similar guarantee, the next question was whether s. 93(3) rights were insulated from *Charter* review. If the province can add and subtract from separate school rights under s. 93(3) with the only censure being an appeal to the Governor General in Council, can such rights enjoy immunity from *Charter* review? One might think that absent constitutional protection under the *Constitution Act, 1867,* any post-union legislation affecting separate schools would be exposed to *Charter* review. However, Justice Wilson found that s. 93(3) enactments enjoyed a measure of *Charter* immunity because they were shielded by the "guaranteed nature of the province's plenary power to enact [such] legislation." She concluded at p 1199, stating:

> 64. I would conclude, therefore, that even if Bill 30 is supportable only under the province's plenary power and s. 93(3) it is insulated from *Charter* review.

[197] This broad statement suggests that when a province accepts the implicit invitation under s. 93(3) to pass legislation augmenting separate school rights, the legislation gains *Charter* immunity notwithstanding that the

province can repeal it (subject to the right of appeal to the Governor General in Council). This conclusion, at first glance, suggests that the defendants' assertion may be correct: any legislation passed under the s. 93(3) power is *Charter* immune.

[198] However, I find that Justice Wilson's statements must be placed in context of the specific articulation of the denominational aspects test. Justice Wilson found that the proposed legislation to fund Catholic high schools could be supported by either the s. 93(1) protection (since the legislation reflected a pre-union right) or the s. 93(3) power (since it would augment separate school rights). Justice Wilson did not invoke the "denominational aspects test" in her analysis of either s. 93(1) protection or s. 93(3) power (not surprisingly, because the test was not formalized until two years later in *Greater Montreal*). However, all parties in this action agree that s. 93(1) protection applies if the rights existed in pre-union law, but only if they satisfy the denominational aspects test. While Justice Wilson does not refer to the denominational aspects test, she nonetheless finds that the proposed legislation is *Charter*-immune regardless whether it is enacted to preserve rights under s. 93(1) or to enhance rights under s. 93(3). Even though Justice Wilson did not expressly apply the "denominational aspects test" to reach her conclusion respecting s. 93(1), the defendants accept the test is appropriate to qualify *Charter* immunity under s. 93(1). If s. 93(1) enactments draw the denominational aspects test without Justice Wilson's express application, I do not accept that the absence of Justice Wilson's express application of the test to s. 93(3) powers means she considered the test as irrelevant to s. 93(3).

[199] I am not surprised with the dearth of discussion respecting the application of the “denominational aspect test” in *Reference re Bill 30*. Justice Wilson’s statements were offered 40 years ago in the gap between two seminal decisions from her court. Three years earlier, in 1984, in *Greater Hull*, the court determined that a new system of school financing based on government grants offended rights guaranteed by s. 93(1) because, among other reasons, the legislation did not provide grants on a proportionate basis. Without using the exact term “denominational aspects test,” Justice Chouinard approvingly quoted Francois Chevrett, Herbert Marx & Andre Tremblay, *Les problèmes constitutionnels posés par la restructuration scolaire de l'île de Montréal*, (Québec, Department of Education, 1972) at 22 [*Les problèmes constitutionnels*],who explained the intended purpose of s. 93(1) in words that encapsulate the principles of the denominational aspects test. The quotation, in translation, states:

> [T]he spirit of s. 93 seeks to guarantee the denominational status of education as that status existed in 1867, that is, in relation to education provided in dissentient schools in the province and in the schools of Montréal and Québec. In this regard, the ultimate aim of the section is a religious one, and that aim was undoubtedly given constitutional form. The question remains whether only that aim was so treated, or whether certain concrete means of achieving it were as well, namely a number of powers and administrative devices to ensure that the denominational status of education would be respected and maintained in practice. There is also no doubt of the answer to this question: constitutional form was also given to a number of means of achieving the result, and the wording of s. 93 itself seems clear in this regard, since it speaks of any "Right or Privilege with respect to Denominational Schools" rather than referring merely to "denominational schools".

[200] This statement was the modern forerunner of the denominational aspects test. Five years later (and two years after *Reference re Bill 30*), in

1989, in *Greater Montreal*, Justice Beetz approvingly cited and requoted the *Les problèmes constitutionnels* statement. He then set out the authoritative statement that s. 93(1) protects the denominational aspects of denominational schools necessary to give effect to denominational guarantees. After *Greater Montreal*, his statement was repeatedly quoted whenever s. 93(1) protected rights were set against a *Charter* challenge. (Among other citations, *Mahe* and *English Catholic Teachers*; *Hall (Litigation Guardian) v Powers* (2002), 213 DLR (4th) 308 (Ont Sup Ct) [*Hall*])

[201] I also find that notwithstanding the absence of the term "denominational aspects test" in *Reference Re Bill 30* – as one would expect since the decision pre-dates *Greater Montreal* – Justice Wilson essentially provides an analysis of the legislation which models the denominational aspects test. She carefully reviewed Ontario's pre-union separate school legislation and concluded that funding was "fully consistent with the clear purpose of s. 93." She wrote at p 1196 a statement that, just as aptly as the statement of the learned authors or the formal denominational aspect test articulated by Justice Beetz, encapsulates the same principles:

> … [separate schools in Ontario] were entitled to the proportionate funding provided for in s. 20 of the *Scott Act*. This conclusion, it seems to me, is fully consistent with the clear purpose of s. 93, namely that the denominational minority's interest in a separate but suitable education for its children be protected into the future. I would therefore conclude…that Bill 30, which returns rights constitutionally guaranteed to separate schools by s. 93(1) of the *Constitution Act, 1867*, is *intra vires* the Provincial Legislature. [Emphasis added.]

[202] This statement is essentially a formulation of the denominational aspects test. She finds that the proposed funding legislation was pivotal to sustain Catholic education – a finding paralleling the denominational aspects

test. She then concludes that the legislation was *Charter*-immune under either the s. 93(1) protection or the s. 93(3) power. To say that Justice Wilson's analysis requires the denominational aspects test as a necessary pre-condition to determine *Charter* immunity under s. 93(1), but not s. 93(3), is a difficult distinction to sustain.

[203] Further clarity can be gleaned from Justice Wilson's paraphrasing and quoting of the Court of Appeal's statement respecting *Charter* immunity and separate school legislation. She wrote at p 1164:

> …
>
> The majority added by way of caveat that its decision in this case did not mean that separate schools were completely immune from scrutiny under the *Charter*. Not at all. They were shielded from review only in their essential Catholicism. The majority stated at p. 576:
>
> > Laws and the Constitution, particularly the *Charter*, are excluded from application to separate schools only to the extent they derogate from such schools as Catholic (or in Quebec, Protestant) institutions. It is this essential Catholic nature which is preserved and protected by s. 93 of the *Constitution Act, 1867* and s. 29 of the *Charter*. The courts must strike a balance, on a case by case basis, between conduct essential to the proper functioning of a Catholic school and conduct which contravenes such *Charter* rights as those of equality in s. 15 or of conscience and religion in s. 2(a). Thus, the right of a Catholic school board to dismiss Catholic members of its teaching staff for marrying in a civil ceremony, or for marrying divorced persons, has been upheld as permissible conduct for a separate school board, but would the same protection be afforded a board which refused to hire women or discriminated on the basis of race, national or ethnic origin, age or disability? [Emphasis added]

[204] Justice Wilson's comment, "Not at all" in response to the rhetorical question whether separate schools were completely immune from

Charter scrutiny contradicts the defendants' assertion that post-union legislation is unshackled by the denominational aspects test.

[205] The Government agrees that the formulation of the denominational aspects test is a "recent" formulation. It states: "The fine distinction between the two categories of protected rights [non-denominational and denominational rights] is a recent formulation, though it has antecedents in early Judicial Committee of the Privy Council jurisprudence."[36] I agree with the Government's statement of denominational aspects test "crystallizing in the decision of Justice Beetz in *Greater Montreal*" (two years after *Reference re Bill 30*). The "recent" formulation of the denominational aspects test, crystallizing in *Greater Montreal*, explains why Justice Wilson did not expressly name or endorse the denominational aspects test in her allowance of the funding of Catholic high schools whether under s. 93(1) or s. 93(3). In either instance such funding was a denominational aspect of Catholic education or a non-denominational aspect necessary to give effect to a denominational aspect of Catholic separate schools.

[206] The Government also states, "The denominational aspects test has, to date, never been used by the Supreme Court or any other Court as an internal limit to new rights and privileges which may be granted by the province pursuant to its plenary power in section 93(3)."[37] This point may well be accurate. But, one must ask the corollary question: "Has any case been presented to the court where a 'new' or additional right has been given a separate school and someone has challenged the addition of that new or

[36] Government Opening Trial Brief Para 98
[37] Government Opening Trial Brief Para 122

additional right as infringing the *Charter*?" I know of none and none was cited to the court.

[207] The appropriate interpretation of *Reference re Bill 30* has been the subject of comment by Peter W. Hogg in *Constitutional Law of Canada*, loose-leaf (2016-Rel 1) 5th ed, vol 2 (Toronto:Carswell, 2016) at 57-9 [*Hogg* or *Constitutional Law*] affirming that s. 93(3) powers are *Charter*-protected, but only if they further the denominational aspect of separate schools. He wrote:

> It does not follow from the *Ontario Separate School Funding Reference* that the Charter of Rights has no application to a law establishing or extending a denominational school system of a kind contemplated by s. 93(3). On the contrary, all of the Charter guarantees, including the equality guarantee, apply to such a law, with just one exception. The exception is that the law may discriminate on the basis of religion to the extent necessary to give the school system its denominational character. The exception is what is decided by the *Ontario Separate School Funding Reference*. But a denominational school law could not authorize discrimination on the basis of race, or any other ground that was not necessary to the denominational character of the schools. Nor could the law provide for unreasonable search or seizure, or cruel and unusual punishment, or anything else prohibited by the Charter, unless the provision was necessary to the denominational character of the schools. [Emphasis added.]

[208] Professor Hogg's commentary in *Constitutional Law* at 57-9 assists me in settling the dichotomous interpretation of *Reference re Bill 30* in favour of finding that regardless whether s. 93(1) or s. 93(3) rights are sought to be shielded from *Charter* challenge, only those rights satisfying the denominational aspects of separate school gain such protection. I agree with Professor Hogg that the s. 93(3) power shelters legislation from *Charter* review only if it satisfies the denominational aspects test.

[209] Although I am satisfied that s. 93(3) power attracts the denominational aspects test, I will address another Supreme Court decision the Government and GSSD raised. In *Adler*, Jewish and Christian parents argued that because *Reference re Bill 30* ensured that Catholic secondary students received funding, and because the government had historically funded public secular schools, the government's failure to fund other faith-based schools infringed *Charter* rights. The Ontario Court of Appeal denied the applicants' request, deciding that Catholic separate schools were constitutionally unique and that the public school system was solely secular and did not discriminate because it did not provide public funding for religious education. I find that the Supreme Court offered a complex analysis which, in my respectful view, left ambiguity.

[210] GSSD and the Government seized upon this ambiguity. Each cited adjacent portions of Justice Iacobucci's decision in *Adler* as supportive of its contrary view of s. 93(3). Illustrative of the elusiveness of Justice Iacobucci's statements, GSSD cites paras. 47 and 49 of his decision, using ellipses to omit paragraph 48; the Government cites paragraph 48 but omits paragraphs 47 and 49. I quote the three paragraphs bearing the original bold and underlined emphasis placed by the Government:

> 47 This protection exists despite the fact that public school rights are not themselves constitutionally entrenched. It is the province's plenary power to legislate with regard to public schools, which are open to all members of society, without distinction, that is constitutionally entrenched. This is what creates the immunity from Charter scrutiny. To paraphrase Wilson J., in *Reference Re Bill 30, supra*, at p. 1198, funding for public schools is insulated from Charter attack as legislation enacted pursuant to the plenary education power granted to the provincial legislatures as part of the

> Confederation compromise. If the plenary power is so insulated, then so is the proper exercise of it.
>
> 48 One thing should, however, be made clear. **The province remains free to exercise its plenary power with regard to education in whatever way it sees fit, subject to the restrictions relating to separate schools imposed by s. 93(1).** Section 93 grants to the province of Ontario the power to legislate with regard to public schools and separate schools. However, nothing in these reasons should be taken to mean that the province's legislative power is limited to these two school systems. In other words, the province could, if it so chose, pass legislation extending funding to denominational schools other than Roman Catholic schools without infringing the rights guaranteed to Roman Catholic separate schools under s. 93(1). See the words of Gonthier J., writing for the Court, in *Reference re Education Act (Que.)*, *supra*, at p. 551. **However, an <u>ability</u> to pass such legislation does not amount to an <u>obligation</u> to do so.** To emphasize, s. 93 defines the extent of the obligations of the province to set up and fund denominational schools when public schools are established. In this respect, it is a comprehensive code thereby excluding a different or broader obligation regarding denominational schools, while not restricting the plenary power of the province to establish and fund such other schools as it may decide.
>
> 49 Furthermore, it should be pointed out that all of this is not to say that no legislation in respect of public schools is subject to Charter scrutiny, just as this court's ruling in *Reference Re Bill 30* did not hold that no legislation in respect of separate schools was subject to Charter scrutiny. Rather, it is merely the fact of their existence, the fact that the government funds schools which are, in the words of the Lord Chancellor, in *Brophy*, *supra*, at p. 214, "designed for all the members of the community alike, whatever their creed" that is immune from Charter challenge. Whenever the government decides to go beyond the confines of this special mandate, the Charter could be successfully invoked to strike down the legislation in question.

[211] Paragraph 47 takes its meaning from the preceding paragraph and refers to Ontario's legislation at confederation when Catholic parents could choose to allocate taxes to either the local separate school or the common school, giving them a choice between the two publicly funded systems. Justice Iacobucci found that this choice was "an integral part of the Confederation compromise" and was therefore protected against *Charter* attack.

[212] In paragraph 48, Justice Iacobucci states that under the plenary power the province could fund all religious schools if it chose to, but without any obligation to do so. Most significantly, I find paragraph 49, which the Government did not quote, is on point with the crux of this action. He affirms that nothing in *Reference re Bill 30* holds that all legislation respecting separate schools will be *Charter*-immune. His statement that "this court's ruling in *Reference re Bill 30* did not hold that no legislation in respect of separate school was subject to *Charter* scrutiny" cannot be squared with the Government's statement in its trial brief that "The province's plenary power itself is not subject to Charter review. That power is a constitutional power granted to the Legislature and is not affected by the Charter."[38]

[213] Further, I do not see how Justice Iacobucci's bold statement accords with another statement the Government offers. In its opening trial brief the Government gives a nod to certain application of the *Charter* to post-union legislation, at least in limited instances. It states:

> The *Charter* still applies to denominational school legislation which exceeds the mandate of section 93 and the constitutional compromise therein. For example, legislation which prohibited all persons of a certain race from attending minority religious schools would very probably violate the *Charter*, despite notionally pertaining to separate school.[39]

[214] I agree with the Government statement that what "exceeds the mandate of section 93 and the constitutional compromise therein" is the measure of legislation that attracts potential *Charter* scrutiny. I disagree that only egregious *Charter* infractions, such as racial discrimination, trigger *Charter* review. I can think of no logical reason why exposure of legislation to

[38] Government Trial Brief Para 27
[39] Government Opening Trial Brief Para 124

Charter review would be dependent upon the seriousness of the *Charter* infraction. Instead, saying legislation that exceeds the "mandate of s. 93" (using the Government's phrase) is subject to *Charter* review is simply another way of saying what Justice Wilson said in *Reference re Bill 30*, that legislation within "the clear purpose of s. 93" is immune from *Charter* scrutiny. Both phrases, in my view, are a restatement of the denominational aspects test.

b. Do unreasonable results arise if the denominational aspects test is applicable to s. 93(1) but not to s. 93(3) rights?

[215] The defendants' position gives rise to unreasonable results. They balance their position on the fulcrum of September 1, 1905, the date Saskatchewan gained provincial status. All parties agree that if, on that date, a right was found in the 1901 Ordinances it is saved from *Charter* review under s. 93(1), so long as the right satisfies the denominational aspects test. If, however, the province enacted separate school legislation after September 1, 1905, the defendants say it is *Charter*-immune under s. 93(3), without qualification. Much confusion would arise from such a result.

[216] For example, if after 1905 Saskatchewan created new denominational schools for Jews (the defendants suggest creation of new religious schools, not necessarily Protestant or Roman Catholic, is possible under s. 93(3)), the rights of the Jewish schools would not be subject to *Charter* review even if such rights did not meet the denominational aspects test because the legislation (in the words of s. 93(3)) was "thereafter established." On the other hand, Catholic schools with rights intact as of 1901 would only have *Charter* immunity against provincial encroachment to the

extent that the denominational aspects test applied to protect such rights. So, furthering the example, the imagined and impugned provincial legislation might disallow discrimination on the grounds of race when hiring teachers. In face of a *Charter* challenge, if such discrimination failed the denominational aspects test of both the Catholic and Jewish schools, Catholic schools could no longer discriminate, but Jewish schools could discriminate because they were established post-1905. This result illustrates the many difficulties with the defendants' assertion of the *Charter*-free status of post 1905 separate school legislation. *Charter* infringement versus *Charter* immunity cannot be balanced on such a capricious difference.

[217] Nor can I accept the position that s. 93(3)'s invitation to "thereafter establish" a system of separate or dissentient schools is so powerful as to allow the result suggested by the Government, namely 1) to permit the province to create a "new separate school system for religious minorities;" and 2) to shield such legislation from *Charter* review. If, for example, the province today were to use its s. 93(3) powers to create and fund Jewish schools (clearly a minority in Saskatchewan) but refuse to create or fund Buddhist schools, I can see no resort to the plenary power to shield such obviously unequal treatment from *Charter* scrutiny.

[218] I take a more restrictive view of the s. 93(3) power than the defendants advocate. In light of the entirety of s. 93, s. 93(3) permits, after union, additional rights to be given to existing dissentient (Roman Catholic and Protestant schools) and to establish dissentient schools in a province where none existed at union. Although not particularly important to decide, I view the expansive power of s. 93(3) being restricted to the creation of

separate Roman Catholic and Protestant schools, not any type of religious schools as the Government suggests. It is difficult to imagine that in 1867 the Fathers of Confederation were concerned with protecting non-Christian religions when the 1861 census data show 0.7% of the population of the uniting provinces was not Catholic or Protestant. In any event, whether granting additional rights to existing dissentient schools or creating dissentient schools after union, *Charter* immunity is only gained if the additional rights and privileges given to such separate schools are denominational rights. Rights given post-1905 which do not protect a denominational aspect of minority faith education can fare no better in withstanding a *Charter* challenge than pre-union rights. Both must further a denominational aspect of minority faith education. To gain *Charter* immunity, the quality of rights that impugned legislation cannot take away from separate schools under s. 93(1) is the same quality of rights that can be added to separate schools under s. 93(3). What the province is constitutionally prevented from taking away under s. 93(1) is the same that the province can constitutionally add under s. 93(3) – that is, denominational rights. In either case, the legislation is free from *Charter* review.

c. Does Government's reliance on s. 93(3) power give it carte blanche to avoid the Charter?

[219] The defendants' position respecting s. 93(1) and 93(3) gives the impugned legislation an ever-present constitutional justification. If the plenary power over education is so assured of *Charter* immunity, an easy avenue to avoid *Charter* review presents itself whenever a right is not protected under s. 93(1) because it either was not found in the Ordinances or it was not a denominational right. One can simply assert that the right is found in the s.

93(3) power as post-union action or legislation enlarging separate school rights and cite *Reference re Bill 30* as giving blanket immunity from *Charter* review.

[220] The Government attempted such an argument in *Fancy v Saskatoon School Div. No. 13*, 1999 CanLII 20579 (CanLII) (SK HRT) [*Fancy*]. The complainants alleged violation of *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1 which guaranteed the right to enjoy education without discrimination because of race, creed or religion. Section 182 of *The Education Act, 1995* permitted the school board to open the school day with the Lord's Prayer or a Bible passage as the Minister of Education prescribed. The complainants challenged both practices. The issue was whether the 1901 Ordinances constitutionally entrenched such practices and, consequently, shielded them from human rights scrutiny (analogous to *Charter* scrutiny in this action). The 1901 Ordinance stated that no religious exercises were permissible except one half hour at the end of the school day but expressly allowed the Lord's Prayer as part of opening exercises at the board's direction. Former Justice Kenneth Halvorson found that the Ordinances shielded the school board's practice of reciting the Lord's Prayer at the beginning of the day. However, Saskatoon public schools were allowing Bible passages to be read at varying times of the school day, not limited to after 3:30 p.m. The Attorney General of Saskatchewan relied upon the province's s. 93(3) power and cited *Reference re Bill 30* to support the practice of reading Bible passages other than at the end of the day, essentially saying religious practices could be broadened under the s. 93(3) power beyond the Ordinances to immunize the legislation from human rights review (analogous to immunizing

funding for non-minority faith students in this action). Mr. Halvorson described the Attorney General's position as follows:

> [88] Insofar as s. 182(3) allows Bible readings at the school opening, it is inconsistent with s. 137 of the 1901 Ordinance which allows religious instruction after 3:30 pm. The Attorney General advanced two reasons why the constitutional protection of s. 137 remains to shield s. 182(3) from the [*Act*]. Firstly, the Attorney General submits s. 182(3) can be justified under the plenary powers of the Legislature to legislate with respect to education under s. 93 of the Constitution, as recognized by the Supreme Court of Canada in *Reference Bill 30*, *supra*. Alternatively, it can be justified as an example of the "living tree" approach to progressive constitutional interpretation. As society evolves, the scope of a constitutional provision can evolve with it, as recognized in *Edwards v. Attorney General for Canada*, [1930] A.C. 124 (P.C.).

[221] Mr. Halvorson gave little credence to either the plenary power or the living tree argument, stating, "It is unnecessary for the Board of Inquiry to venture very far down the road of plenary power and 'living tree' interpretation." He found that the school board's practices were not within the mandate of the 1901 Ordinance and concluded, "The practice of Bible readings in public schools must cease, and the Board of Inquiry so orders."

[222] I find that the Attorney General's attempt in *Fancy* to invoke a general plenary power to broaden provincial education legislation beyond the ambit of the 1901 Ordinances to skirt Saskatchewan's human rights legislation is akin to its attempt in this action to suggest post-1905 legislation broadens funding to non-Catholic students beyond the 1901 Ordinances regardless whether such legislation meets the denominational aspects test.

[223] Unlike the attempt by Saskatchewan's Attorney General in *Fancy* to invoke a plenary power to avoid human rights legislation concerning public

schools, I see no similar attempt in other jurisdictions in similar cases to support post-union legislation in face of a *Charter* challenge. For example, in *Canadian Civil Liberties Association v Ontario (Minister of Education)* (1990), 65 DLR (4th) 1 (Ont CA) [*Canadian Civil Liberties*] the Ontario Court of Appeal, without mention of any plenary power over education, held that a provincial regulation providing for religious instruction in public schools with a curriculum of predominantly Christian teachings offended ss. 2(a) of the *Charter* even though parents could have their children opt out of the class. Nor in *Zylberberg v Sudbury Board of Education* (1988), 65 OR (2d) 641 (Ont CA) [*Zylberberg*] did the board of education attempt to invoke the plenary power when the Ontario Court of Appeal struck down a regulation requiring religious exercises for the opening and closing of each school day in public schools as being offensive to s. 2(a) of the *Charter*.

[224] *Hall* exemplifies this point and, unlike *Canadian Civil Liberties* and *Zylberberg*, concerns a separate school. The Catholic school board denied permission to a grade 12 student to bring his boyfriend to the school prom as such conduct "would be seen both as an endorsement and condonation of conduct…contrary to the Catholic church teachings." In granting an interlocutory injunction restraining the school from preventing the student from bringing his boyfriend to the prom, Justice MacKinnon held that the school's decision was not justified under s. 93(1), both because the specific right in question was not in effect in 1867 and because the conduct in question did not go to the denominational nature of a Catholic school. If the plenary power under s. 93(3) could stand separately from s. 93(1), one would have

expected the Catholic School to have invoked such an argument. However, the case is bereft of any discussion of the s. 93(3) power.

[225] The absence of any attempt to invoke plenary powers to gain *Charter* immunity in the above cases suggests that the Government, both in this case and its attempted argument in *Fancy*, reaches for the s. 93(3) power to avoid scrutiny under either the *Saskatchewan Human Rights Code*, SS 1979, c S-24.1 or the *Charter*. If, as in *Fancy*, the impugned legislation is not protected by the 1901 Ordinances, or goes beyond the denominational aspects tests of s. 93(1), the Government suggests it can characterize the legislation as a post-union augmentation of separate school rights under the s. 93(3) power. Then, citing *Reference re Bill 30*, it argues that the legislation is immune from *Charter* scrutiny with disregard to the denominational aspects test. The Government attempts to use the province's s. 93(3) power under s. 93(3) to permit the province a free-wielding hand in giving non-denominational rights to either separate schools (as in this action) or public schools (as in *Fancy*).

[226] A dissentient school system must seek, at its core, to protect aspects of education necessary to ensure the rights and privileges to educate children in the tenets of the minority faith. I agree with the Government that the implied allowance to create separate schools post-1905 informs the interpretation of the s. 93(3) power. However, informing is not reinventing. The s. 93(3) power does not enfranchise the province to reinvent the character of separate schools and create any type of minority school rights as it might choose without *Charter* scrutiny. Separate school rights created after 1905 (under s. 93(3)) must, in principle, be like separate school rights under the Ordinances. They must protect a denominational aspect integral to the

education of the minority faith to be immune from *Charter* scrutiny. No power gives licence to the province to create or maintain separate schools with disregard to the denominational aspects of separate schools and to the *Charter*. To be able to create a new regime of separate schools without a true denominational aspect could not have been the intention of Parliament in 1905 and can find no favour under the *Charter*.

d. Does defendants' evidentiary basis preclude reliance on s. 93(3)?

[227] Throughout the trial the defendants have singularly asserted that the right to admit and fund non-Catholic students is protected as a denominational right under the 1901 Ordinances. They have argued that the protection afforded Catholic schools emanates from s. 93(1) which they agree attracts the censure of the denominational aspects test before being safeguarded from *Charter* review. On the other hand, to genuinely advance the s. 93(3) argument, they must assert that the right to admit and fund non-Catholic students was, in relation to September 1, 1905 and in the words of s. 93(3), "thereafter established." If the right to fund non-minority faith students originated under the 1901 Ordinances and was not "thereafter established," s. 93(1), not s. 93(3), must apply. However, the defendants presented significant evidence from expert witnesses, provided voluminous excerpts from *Hansard*, vigorously cross-examined Dr. Dixon respecting the status of Catholic schools under the 1901 Ordinances, and mounted detailed and lengthy arguments, all to advance a contrary position: funding of non-Catholic students was a right firmly anchored in the 1901 Ordinances and enabled under legislation and regulation since then. Having singularly mounted an evidentiary basis to establish that funding of non-Catholic

students was a guaranteed right under the 1901 Ordinances, the defendants cannot, at the same time, invoke s. 93(3) which is predicated on rights being established after 1905.

[228] Indeed, once the defendants committed their position to proving that the rights to admit and receive funding for non-Catholic students was part of the 1901 Ordinances, it is impossible to present contrary evidence at the same time that such rights were established after union. Although one might be able to present arguments in the alternative, one cannot present facts in the alternative. As the saying goes, "You cannot ride a horse in two directions at the same time." Constitutional protection must emanate from either ss. 93(1) or 93(3), and each requires a unique factual underpinning. But one cannot mount s. 93(3) arguments on s. 91(1) facts. In any event, regardless of the direction the horse is ridden, it will encounter the obstacle of the denominational aspects test before gaining the measure of *Charter* immunity that the defendants advocate.

[229] In summary, I do not accept the defendants can maintain that funding of non-Catholic students is a post-1905 right or privilege with automatic *Charter*-free status. The entirety of the defendants' evidence attempted to establish that funding of non-Catholic students was a right protected by the 1901 Ordinances, not legislation enacted post-1905. I have explained the inconsistent and unreasonable results if *Charter* immunity balances on the temporal fulcrum of Saskatchewan's status as a province. Even if I were to consider that funding of non-Catholic students is a right protected by post-1905 legislation, my reading of the case law would not give such legislation automatic *Charter*, home-free status. Finally, if legislation or

action not part of the 1901 Ordinances can be considered a post-1905 augmentation of separate school rights which draws no censure from the *Charter*, then any and all separate school rights enacted post-1905 are free of *Charter* scrutiny while pre-1905 rights are not.

II. IS THE FUNDING OF NON-CATHOLIC STUDENTS A RIGHT FOUND UNDER THE 1901 ORDINANCES AND, IF SO, DOES THE RIGHT SATISFY THE DENOMINATIONAL ASPECTS TEST?

A. Section 93(1) – A Two Step Inquiry

[230] Engaging the protection of s. 93(1) requires satisfaction of the two steps described in *English Catholic Teachers* at para 30. First, as applied in the circumstances of this action, the right must be found in the 1901 Ordinances, be enjoyed by a class of persons and be prejudicially affected. The second step, as described in *Greater Montreal* and thereafter coined the "denominational aspects test," is really an elaboration of the nature of prejudice that must be found. To be guaranteed, the right must relate to a denominational aspect of separate schools.

[231] The first question is primarily answered by examining the Ordinances and applying interpretative principles relevant to the unique task of elevating ordinances enacted in 1901 by the North-West Territories Legislative Assembly to the status of constitutional protection. During the trial, the parties led monumental amounts of evidence to aid in the interpretation of the 1901 Ordinances. Because Canada's constitutional protection of minority education originated in Central Canada and reflected Catholic and Protestant attitudes during a Victorian era, the parties necessarily provided evidence of religious and educational attitudes in Canada before and

during the confederation negotiations and nearly 40 years later when Saskatchewan gained provincial status. As well, GSSD and CTT led evidence respecting the changing theological teachings of the Catholic Church over several decades, the political climate both in Canada and the North-West, and local practices in various schools districts in the Territories. The parties invested heavily in expert evidence including GSSD's experts, Dr. Dixon, Dr. Hexham, and Dr. Beaujot and CTT's experts, Dr. Peters, Dr. Paszek and Dr. Groome. Each party offered evidence from historical writings, voluminous reports from *Hansard* respecting parliamentary and senate debates, Sessional Papers, newspaper clippings, letters, affidavits, census reports, and Northwest Territories Reports, all efforts to convince the court that non-Catholic students did or did not attend Catholic schools and receive funding as a right under the 1901 Ordinances.

[232] Merely finding a right existed under pre-union law, however, requires further examination of whether that right concerned a denominational aspect of education, because s. 93(1) protects only those rights "with respect to separate schools." Non-denominational rights, even those found in the 1901 Ordinances, are not protected under s. 93(1).

B. Essential Elements of GSSD's Position

1. GSSD Submits 1901 Ordinances Did Not Include Right to Fund Non-Minority Faith Students

[233] GSSD asserts that the 1901 Ordinances did not provide Catholic schools a right to admit and receive commensurate funding for non-Catholic students, and if such right existed under the 1901 Ordinances it was neither a denominational right nor a non-denominational right of Catholic schools. Encapsulating the parties' evidentiary bases and legal arguments would require a condensation of dozens of pages from trial briefs, volumes of exhibits, and reference to hundreds of pages of trial transcripts. At best, I can provide a summary of the parties' respective arguments with findings of seminal facts stated in the "Analysis" portion that follows.

[234] GSSD presents several historic themes, attempting to establish the religious, political and educational climate leading to the *Saskatchewan Act*, to determine the nature of the rights and privileges that the 1901 Ordinances protected. GSSD asserts that developments within the Catholic Church and societal changes since 1905 cannot justify current funding of non-Catholic students in Catholic schools because such funding does not honour the purpose for which the schools were intended, namely to educate Catholic children separated from the non-Catholic majority. I will describe GSSD's position under the following sub-headings.

Historical Background of Separate Schools

[235] GSSD points to Dr. Dixon's report, that mid-nineteenth century Canada saw a movement away from church operated and financed schools to

publicly funded, “mixed” schools, a movement that was anathema to Catholic teachings. Pope Pius IX condemned mixed schools and in 1846 published *Qui Pluribus*, a papal encyclical, with an attached Syllabus of Errors, three of which pertained to mixed schools. Denounced as a doctrinal error was the following belief: “Catholics may approve of the system of educating youth unconnected with Catholic faith and the power of the Church…” GSSD also cites another papal encyclical of 1897 (*Affari Vos*) issued in response to the Manitoba School Question and Bishop Tache’s response to changes in The School Ordinance, ONWT 1894, c 9 (widely seen as diminishing Catholic influence in schools. Both expressed a singular concern for education of Catholic children in their parents’ faith, without any concern for the education of non-Catholics. GSSD cites the historical record as illustrative that the singular purpose of separate schools was to allow parents to educate their children in the tenets of the Catholic faith, separate and apart from non-Catholic children.

Development of Saskatchewan’s School Systems

[236] GSSD points to historical reports of the Department of Education showing that in 1905 public schools in Saskatchewan outnumbered separate schools by approximately 100 to 1. From the first Ordinances in 1884 to December 31, 1904, 1,212 public school divisions were formed in the Territories with only 15 Roman Catholic and three Protestant separate schools during that time. In Saskatchewan, in 1904-1905, only seven Roman Catholic and two Protestant separate schools are reported. GSSD also cites the relatively few students attending Catholic separate schools compared to public schools: in 1898 enrolment in Catholic separate schools was 739 students; in

other schools it was 16,015 students. GSSD does not articulate what conclusions or inferences the court should draw from these statistics but presumably the demand for separate Catholic education in 1905 was neither pressing nor predominant.

Non-Catholic Attendance at Catholic Separate Schools

[237] GSSD states as "hardly surprising" that non-Catholic students may have attended Catholic separate schools at or near 1905. Certain separate schools evolved out of early mission schools, before the advent of public schools, leaving "remnants" of non-Catholic students to continue attending mission schools. Some separate schools, such as those operated by the Faithful Companions of Jesus in Calgary, offered the amenities of a boarding school or high school, thereby attracting non-Catholic students. Another reason for non-Catholic attendance might have included remoteness of an accessible public school. GSSD criticizes the paucity and quality of evidence CTT offers respecting non-Catholic students' attendance at Catholic schools and suggests that if attendance of non-Catholic students had a denominational significance to Catholic schools, historical evidence should be available, particularly when CTT specifically directed its expert historians to conduct research into this subject. GSSD asserts that whether or not some non-minority faith students attended separate schools during the currency of the Ordinances is ultimately irrelevant. Their attendance cannot change the denominational purpose for separate Roman Catholic schools.

Evolved Catholic Doctrine

[238] GSSD accepts that post-Vatican II (1962-1965) Catholic doctrine evolved to be more accommodating of other faiths. However, GSSD suggests that whether or not the 1901 Ordinances include the right of Catholics to educate non-Catholic students cannot be determined by reference to shifting Catholic theology. GSSD points out from the report of Dr. Peters, CTT's expert, that after Vatican II the Church "changed drastically" to permit "greater trust between members of different religions and associating with one another [no longer was]…seen as being a hazard to one's eternal salvation as it might have been a century ago." GSSD says that a more accurate Catholic description of non-Catholics in 1905 would have been as "schismatics" and "heretics," as Bishop Bolen testified. GSSD says that this Catholic sentiment more appropriately reflects whether Catholic schools had or even wanted the right to accept non-Catholic students in 1905.

Recent Attendance Trends

[239] GSSD refers to the Saskatoon Catholic Board of Education's of November 10, 1978 Confidential Report and the statistical data showing increasing enrolments of non-Catholic students in Catholic schools, quoting the statement that "[b]esides the increased number of non-Catholic students in our schools, there are other indicators which suggest we are being regarded as an alternate school system rather than a separate school system for Catholics only." GSSD suggests that far from being a separate school system for Catholics only, Catholic schools have become an alternate school system providing a faith-based education in the Catholic tradition. It says that since

the 1978 Report, non-Catholic student attendance has become "a province-wide phenomenon." GSSD cites Mr. Pawlawski's testimony that when he was employed by the Saskatoon Catholic School Division around 1987, non-Catholic enrolment was approximately 25 to 30 percent and Ken Loehndorf's testimony that, on average, approximately 30 percent of students in North Battleford's separate school were non-Catholic at the end of his administration at Light of Christ Roman Catholic School Division. This trend, GSSD suggests, shows a veering away from the purpose of Catholic schools with a "significant impact on the operations of Saskatchewan's public schools."

Public Christian Education in a Catholic Context

[240] GSSD addresses the testimony presented by CTT's non-Catholic parent witnesses who have chosen to send their children to Catholic schools: John Anderson, Michael Sinclair, Carla Madsen, Kevin Weins, and Michelle DuRussel, being of Christian persuasion, and Ayaz Ramji, being of the Muslim faith (whose spouse is Christian). They testified that they preferred the Christian values inherent in Catholic education over the secular education offered in public schools. Since the principle of state neutrality has largely driven historically predominant Christianity from public schools, Catholic schools have become increasingly attractive to non-Catholic parents who either endorse the Catholic faith or are prepared to accept its basic tenets as superior to secular public education. Kevin Weins, a Mennonite pastor whose two children attend St. Volodymyr Roman Catholic School in Saskatoon, expressed these sentiments. When asked about the commonalities between his faith and Catholicism, he explained that the "big one" was the "centrality of the figure of Jesus Christ, his person, his crucifixion, his death, his

resurrection, his ascension, the triune God…[and] the role of the Bible as an authoritative statement of how to live our life in accordance with God's direction." As other parents, Pastor Weins believes that parents should have a choice to send their children to either public or Catholic schools.

[241] Julian Pawlawski, former Executive Secretary of the Public Section of the SSBA, acknowledged that, "there are a very large number of non-Catholic people who access Catholic schools … because of the faith dimension."

[242] GSSD states this use of Catholic schools by non-Catholic parents shows that a different purpose is now being served by Catholic schools, other than ensuring that Catholic traditions are protected for Catholics when they are a minority in a school attendance area.

Evolution of the School Ordinances

[243] GSSD refers to the evolution of the School Ordinances from 1884 to 1901. It suggests that the term "separate schools," as used in the first Ordinance in 1884, illustrates that the intent was to separate or detach minority faith students from the majority. GSSD looks to the 1884 Ordinance which required all schools to be designated either Protestant or Catholic, whichever formed the majority in the district. The first established school was the public school and all children would attend it. Only when a Protestant or Catholic minority in the district wished to separate their children from the majority was a separate school created. The essence of Catholic schools was to separate from the majority, inimical to any suggestion that the same Ordinances countenanced admission and funding of non-Catholic students.

[244] GSSD also looks to the 17 year period of School Ordinances from 1884 to 1901 and the widely accepted reality that amendments consistently tended to erode minority control over education. As exemplary of this tendency and the subsequent reaction of the Catholic Church, GSSD cites s. 25 of the 1884 Ordinance which permitted a separate school district to include areas adjacent to an existing public school district. This more liberal allowance to form a separate school was removed in the 1886 Ordinances, limiting separate schools to the boundaries of existing public school districts. A prominent Catholic clergyman in the North-West, Reverend Father Leduc, expressed his concern that forming Catholic schools had become more difficult and would be "fatal to the interests of the minority" since Catholics residing within the limits of a public school district may not have been numerous enough to form a "separate district" as they formerly could when they were able to "join their fellow catholics residing immediately outside of these limits."[40] GSSD cites Father Leduc's writing as proof that the Catholic leadership was solely concerned about educating Catholic children, not non-Catholic children.

Historical Record

[245] GSSD looks to the Sessional Papers (1894) as "replete" with the sentiment that the primary Catholic concern during the amendments to the Ordinances was control over the administration and educational content, curriculum and books in Catholic schools. Church leaders focused on maintaining Catholic doctrine and faith within separate schools, without mention of educating non-Catholic students. GSSD states that only members

[40] Pp. 61-97 of the Sessional Papers **(No 40C) 1894**

of the religious minority could petition for the creation of a separate school and, when created, only members of that faith could vote for the election of trustees. Having voted to separate, these minority-faith members would not likely have wanted the right to educate the group from whom they separated.

[246] Respecting the Government's reference to *Hansard* as illustrative that non-minority faith students attended separate schools, GSSD cautions that admitting the contents of *Hansard* debates as proof of facts does not accord with judicially stated cautions. GSSD cautions against reliance upon parliamentarians' speeches because the school debates were coloured by partisan bias and speakers often lacked comprehensive knowledge of the situation in the West.

2. GSSD Submits Funding of Non-Minority Faith Students is Not a Denominational Right

[247] Although GSSD maintains that no right existed under the 1901 Ordinances to admit and receive funding for non-Catholic students, it also addresses the second step in the s. 93(1) analysis, that if such right existed it did not protect a denominational aspect of Catholic education. Aside from the historical record which GSSD says allows no other interpretation, it looks to statements offered by the Privy Council in *Hirsch* and *Reference re Education Act (Que.)* These two cases are significant. I have extensively referred to them in my later analysis.

C. Essential Elements of the Defendants' Position

1. Defendants Submit 1901 Ordinances Include Right of Funding for Non-Minority Faith Students

[248] The defendants say that a "snapshot" of the 1901 Ordinances establishes a right for Catholic schools to admit and receive funding for non-Catholic students. The Government asserts that the 1901 Ordinances were silent as to admission of students and did not limit admission in separate schools to the members of the minority faith. The Government relies upon the absence of any provision in the 1901 Ordinances restricting attendance as evidence that a right or privilege existed to admit non-minority faith students in separate schools: "Nothing in the Ordinance restricted school attendance based on religion."[41]

[249] The Government looks to *Hansard* and parliamentary debates as a counterpoint to the evidence presented by GSSD's expert, Dr. Dixon. The Government suggests he offered "Ontario-centric" research with limited western sources when he described the unlikelihood of non-Catholic students attending Catholic schools before 1905. The Government suggests that a truer picture of the intended result of incorporating the 1901 Ordinances lies in an understanding made apparent from the Parliamentary debates of 1905. The Government relies upon Prime Minister Laurier's original introduction of the Autonomy Bills into Parliament on February 21, 1905 which, if passed, would have carried the stronger minority school provisions of the *North-West Territories Act*, 1875, SC 1875, c 49 not the 1901 Ordinance, into the new provincial constitution. Laurier's Minister of the Interior, Clifford Sifton,

[41] Government Trial Brief Para 56

resigned from Cabinet over his disagreement with Laurier's proposed education clause. The Government cites Laurier's speech at the second reading of a new Bill which benchmarked separate school rights to the 1901 Ordinances. Laurier acknowledged that amendments to the School Ordinances in 1892 were met with opposition from Catholic interests as an abridgment of their rights, and recalled that Catholics had complained to Ottawa asking for a disallowance of the amendments. However, Laurier stated that the amendments had been in force for 13 or 14 years and to avoid confusion, the federal government would incorporate the Ordinances as they stood at the time of union.

[250] The federal government's movement away from the original Bill, based on the *North-West Territories Act,1875*, to the 1901 Ordinances engendered support from western Members of Parliament. Those members characterized the West's general acceptance of the *status quo*, reflected in the 1901 Ordinances, as workable with no ill-will toward the school system then in practice. The Government offers this extensive history of the enactment of s. 17(1), substantiated by the voluminous quotes from Hansard, to illustrate that the 1901 Ordinances appropriately captured the satisfaction with separate schools then in existence, including instances of non-minority students attending separate schools.

[251] The Government points to several of these instances to establish that before 1905, admission of non-minority faith students in separate schools, was a common practice and well within the knowledge of the members of Parliament and the Senate. For example, MP John Crawford for Portage la Prairie, Manitoba, quoting from an editorial in the Toronto Globe on March

20, 1905, spoke in Parliament specifically referring to separate schools in the North-West Territories admitting non-minority faith students.

[252] The Government also cites the mixed attendance at separate schools in other than the North-West Territories. Manitoba Senator T.A. Bernier reported that in Manitoba, pre-1890, Catholic schools contained over 30 percent English-speaking Protestant students. Senator Bernier also read from a previous speech by the late Senator Boulton of Manitoba who told the Upper House about a separate school in Manitoba run by Father DeCorby which had also served Protestant children in the neighbourhood.[42]

[253] CTT also offers its analysis respecting both fronts of the denominational aspects doctrine: that admission and funding of non-Catholic students is a right or privilege protected under s. 93(1) and is a denominational right of Catholic separate schools. Respecting the existence of such right, CTT asserts that the Ordinances did not expressly restrict the right to admit and such restriction cannot be implied. Specifically, it looks to s. 45 of the 1901 Ordinances, emphasizing that "…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." If public school boards could accept all students, regardless of religion, and if public and separate school boards were on equal footing respecting their powers, then Catholic schools had similar rights of admission.

[42] Senate Debates (14 July 1905) at 708, IT. A. Bernier)

2. Defendants Submit Funding of Non-Minority Faith Students Was a Denominational Right

[254] After asserting the existence of a right to admit and receive funding for non-Catholic students, CTT asserts that such right is a denominational right. Integral to the functioning of a separate school is the right of management and control, including the right to set admission policy. CTT asserts that members of the minority faith create separate schools because of their objection to the "environment" of public schools, "not necessarily who [is] there." In support of the constitutionally guaranteed right to control and manage separate schools, CTT cites several cases, *Ottawa Separate School Trustee v City of Ottawa* (1916), 32 DLR 10 (PC); *Hirsch*; *Greater Hull* at 585; *Greater Montreal*; *Daly v Ontario (Attorney General)*, (1997), 154 DLR (4th) 464 [*Daly*]; and *Reference re Bill 30* with the statement in *Daly*, at 492, perhaps best encapsulating CTT's position:

> …the right at issue includes as one of its significant elements the right to manage and control a public institution. The constitutional right is framed in terms that recognize that its enjoyment can only be assured if the rights holders themselves are accorded responsibility for the management and control of separate schools.

[255] CTT asserts that the inclusion and education of non-Catholic students has always been a core belief of Catholic separate schools. While an earlier focus of the Catholic Church may have been on conversion or proselytization, today evangelization – the spreading of the Word – is a major goal of Catholic education. CTT cites Justice Beetz's statement in *Greater Montreal* that "the rights guaranteed by s. 93(1) do not replicate the law word-for-word as it stood in 1867." CTT asserts that the inclusion of non-Catholic students "reflects a recent shift in Catholic beliefs and teachings" and their

attendance remains a "fundamental belief at the core of Catholic education today…"[43]

[256] CTT also asserts that Catholic schools' right to receive funding for non-Catholic students is a non-denominational aspect necessary to deliver the denominational elements of Catholic education. This assertion is explained in its trial brief as a type of necessary leveraging of the funding for non-Catholic students to ensure adequate funding for Catholic schools:

> 211. The presence of non-minority faith students in separate schools therefore allowed the separate school to obtain more funds for its operation, allowing it to provide equivalent educational opportunity to students, as well as to protect the denominational character and environment. …And, because funding was directly tied to the non-minority faith students, their presence ensured there would be funding to help maintain and protect the denominational character of the school.
>
> 212. As such, the funding of non-minority faith students in separate schools represents a non-denominational aspect that is essential to protect and maintain the denominational character.[44]

[257] After this review of the parties' respective positions, I turn to the pivotal issue in this action: does s. 93 protect the right of St. Theodore Roman Catholic School to accept the attendance of non-Catholic students and permit the Government to fund non-Catholic students attending the school and, by necessary extension, to fund all non-Catholic students attending Catholic schools in Saskatchewan?

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[43] CTT Trial Brief Para 205
[44] CTT Trial Brief

D. Analysis

1. Conclusion: Section 93(1) Does Not Protect Funding of Non-Minority Faith Students

[258] As previously stated, the s. 93(1) analysis asks two questions. First, did the 1901 Ordinances include a right or privilege for Catholic schools to admit and receive funding for non-Catholic students? Second, was the right a denominational right or a non-denominational right necessary to give effect to denominational concerns? The answer to both questions is "No." My reasons are based upon an analysis of the Ordinances as they developed from 1884 to 1901 and the principles of constitutional interpretation.

2. The Basic Premise of the 1901 Ordinances

[259] My overarching obligation is to give effect to the true intention of Parliament in elevating the 1901 Ordinances to constitutional status. I begin with a basic premise. The reason for the existence of separate schools was to ensure that after the first public school was created in a school district, parents of the minority faith could separate their children from the majority's children to inculcate their children in the minority's faith, away and separate from the influences of the majority. If separating students was the essential reason for separate schools' existence, I fail to see why the minority would simultaneously seek a right to admit children of the majority faith from whom they took deliberate action to separate. One act belies the other.

[260] The adjectives "separate" and "dissentient" are repeatedly used in s. 17(1) and s. 93(3). They describe the nature of a school different from the school of the majority. "Separate" is not a term of great complexity. Various

on-line and standard dictionaries define "separate" as "to set, force, or keep apart; to form a border or barrier between two areas or groups; to place in different groups; to withdraw or break away."[45] "Dissentient" is defined as "in opposition to a majority of official opinion"[46] or "dissenting, especially from the sentiment or policies of a majority."[47] To "dissent" from the majority is at the heart of separate schools. I find Canada's earliest reference to dissentient schools in the *Act of Union, 1840*[48] which abolished the legislatures of Upper and Lower Canada and created the Province of Canada. Section XI of that *Act* enshrined the concept of dissentient schools, stating:

> … be it enacted, that whenever any number of the Inhabitants of any Township or Parish professing a religious faith different from that of the majority shall dissent from the regulations, arrangements, or proceedings of the Common School Commissioners and it shall be lawful for the Inhabitants so dissenting, collectively, to signify such dissent in writing and…establish and maintain one or more schools.

[261] From the outset, to create a separate or dissentient school has meant exactly that – a school in which students of a minority faith are separated and disunited from, or in dissent to, the students of the majority faith. This constitutional right was accorded Protestants and Catholics as early as 1840 and continued under s. 93 of the *Constitution Act, 1867* and 17(1) of the *Saskatchewan Act*. As Meredith C.J.C.P. stated in *Ottawa Separate School Trustees v City of Ottawa*, (1915), 24 DLR 497 (Ont SC) at 630, "The right and privilege [protected in Ontario] was and is a right to separation…" And, as Justice Iacobucci stated at para 54 in *English Catholic Teachers*, the

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[45] The Free Dictionary by Farlex, online: http://www.thefreedictionary.com/dissentient (1 March 2017)
[46] English Oxford Living Dictionaries, online: <https://en.oxforddectionaries.com/definition/dissentient>(1 March 2017)
[47] The Free Dictionary by Farlex, online: http://www.thefreedictionary.com/dissentient (1 March 2017)
[48] *The British North America Act, 1840*, 3 & 4 Vict, c35, commonly called the *Act of Union 1840*, enacted in July 1840 and proclaimed February 10, 1841.

purposed new funding arrangement introduced into Ontario did not prejudicially affect Catholic schools because it preserved "the 'separateness' of separate schools."

[262] On this point, I find the opening paragraph of the Government's trial brief reveals a recurring theme. The Government argues that GSSD seeks to use the *Charter* to separate students based on religion. The Government states:

> **I. Introduction**
>
> This case raises a fundamental issue: does the Constitution require that schools in Saskatchewan be segregated by religion? Does the *Canadian Charter of Rights and Freedoms* require religious segregation of school children? The Government of Saskatchewan submits that the *Charter* does not. Segregation is not constitutionally required and in fact runs contrary to *Charter* values of equality and respect for religious differences. The *Charter* of Rights cannot be turned into a Charter of Segregation.

[263] Similarly, CTT strongly objects to segregation of students and lays fault with GSSD for advocating separating students in Saskatchewan schools, comparing it to segregation in penal institutions. It states:

> When one considers the fundamental constitutional principles of democracy, constitutionalism, and protection of minority rights, it becomes impossible to see a scenario anywhere in Canada where a group in a public funded institution would be kept segregated from everyone else, with the only exception being penal institutions.[49]

[264] The defendants' statement inverts the question. If the Government's first rhetorical question – "Does the Constitution require that schools in Saskatchewan be segregated by religions?" – had been posed in the context of the autonomy debates of 1905, the time relevant in this inquiry, I suspect that proponents of a single, publicly-funded school system would have

[49] CTT Trial Brief Para 249

answered a resounding “No.” Proponents of denominational schools, largely Catholic interests, on the other hand, would have answered a resounding “Yes.” History shows that the latter prevailed and segregated schools have since been Saskatchewan’s constitutional reality. As a premise of their entire argument, the defendants must defend the principle of separate schools and, from that vantage point, they must mount an awkward argument that, despite their position being historically anchored in the constitutional right to separate students based on religion, somehow Catholic schools now hold the right to admit and receive funding respecting non-Catholic students from whom they wished to separate.

[265] The Government states that the *Charter* does not countenance segregation of students based on religion. I agree. But the *Charter* must defer to another constitutional document – s. 17 of the *Saskatchewan Act* which not only countenances segregation by religion but provides, by reference to the 1901 Ordinances, a detailed formula to implement segregation of students of a minority faith. I agree that the *Charter* cannot be turned into a “Charter of Segregation,” the position the Government attributes to GSSD. However, s. 17 of the *Saskatchewan Act* does segregate students because it supersedes the *Charter*, leaving s. 17 an instrument of segregation as it was intended and as denominational school proponents desired in 1905. The constitutional right to segregate shields a *Charter* challenge and insulates separate schools from the *Charter* values that the Government espouses in its opening paragraph. The historical record shows that Catholic interests heavily lobbied for separate school rights in 1905, but now they argue that segregation of students based on religion is inappropriate and anti-*Charter*. Like it or not, the defendants

must accept the foundation of their case: separate schools were meant to separate students. From this fact the defendants cannot escape and from it they must advance their argument.

[266] In the opening paragraph of its brief, the Government refers to "segregation" as though it were a sullied concept. I would readily interchange the term "segregated schools" for "separate schools" and join either term with others used in s. 93, "dissentient schools" or "denominational schools." The defendants must support the principle of separate or segregated schools. Then, if the defendants wish to gain traction with their argument, they face the challenge of showing that despite the deliberate steps dissentient school supporters must take to create separate schools, the dissenters simultaneously have always wanted to include students of the group from whom they dissent. Indeed, this manoeuvring creates a logical pretzel that remains unresolved by blithely suggesting that GSSD supports segregation in Saskatchewan's schools and is anti-*Charter*. The defendants must accept that this lawsuit can happen in Saskatchewan, but not for example in British Columbia, for one reason: Saskatchewan has constitutionally protected separate schools and British Columbia has not.

[267] Dr. Dixon also raised a different point of view respecting admission of non-Catholic students to an institution that desires to permeate all aspects of education with Catholic ideals. Might non-Catholic students lessen the community of faith, the ideal of a Catholic school? Dr. Dixon concluded in his report that any legislative right to educate non-Catholic students would have conflicted with the practice of fostering community in a Roman Catholic school including assembling Catholic students in "a

segregated school building, sheltered originally from a predominantly Protestant, sometimes anti-Catholic, environment."

[268] I question whether St. Theodore Roman Catholic School would remain a Catholic school if, in the future, no Catholic children attended at the school even though its teachers and trustees must be Catholic. I have difficulty accepting that within the meaning of the 1901 Ordinances a school remains a separate school when a critical proportion of the students is no longer Roman Catholic.

[269] In face of the defendants' assertion that the enrolment of non-Catholic students is a fundamental and historic part of the denominational aspect of Catholic schools I find that Dr. Dixon's report and the observations of J.K. Donlevy in "Catholic Schools: The Inclusion of Non-Catholic Students" (2002), 27 Can J Education 101, suggest otherwise. The author cautions against the over-enrolment of non-Catholic students in Catholic schools after the broadened inclusivity of the Church under Vatican II. Such concern belies any notion that Catholic interests in 1905 were concerned that they had a constitutional right to educate non-Catholics. J. K. Donlevy writes:

> School boards translate the above text [as laid out in Vatican II] to their community through their inclusionary policies. The importance of this policy cannot be overstated because, when it is deficient in meeting the spirit of the text and balancing the overall purpose of Catholic education, unintended consequences can occur that go to the root of Catholicity within the school. Mulligan (1999) quoted an Ontario Catholic school chaplain who said, "It is extremely difficult, if not impossible, to maintain, let alone deepen, the Catholic character of the school with . . . a large [32%] non-Catholic population" (p. 182). The Ontario Catholic School Trustees Association (2000) identified what they believed to be one of the major issues facing Catholic education in: *Our Catholic Schools: A Report on Ontario's Catholic Schools & Their Future*, "many are

> worried about internal factors that could threaten our existence. . . . *Many wondered if the increasing number of non-Catholic students who are present in the secondary schools would change the tone of the schools*" (p. 17) [italics added]. Francis and Gibson (in press) added to the concern of the Ontario school trustees, asking a question about school ethos: "*the presence of non-Catholic pupils may . . . have a deleterious impact on the overall school ethos as reflected in the attitude toward Christianity of the student body as a whole*" (p. 18) [Italics original].

[270] If the presence of non-Catholic pupils is considered to have a deleterious impact on the Catholic ethos of Catholic schools at a time well after the inclusionary doctrine of Vatican II was promulgated, I am reinforced in my conclusion that in 1905 admission of non-Catholic students was not a right that was in the minds of proponents of separate Catholic schools. Although Mr. Donlevy cites concerns arising in Ontario, his comments were made in an analysis of Saskatchewan's Catholic school districts' post-Vatican inclusionary policy in admitting non-Catholic students.

3. Judicial Authority and Guiding Principles of Constitutional Interpretation

[271] Not surprisingly, given over 150 years of interpreting s. 93, judicial statements are numerous and variable. This variability caused Justice Beetz, in *Greater Montreal*, after reviewing several interpretative principles, some liberal and some restrictive, to caution against misusing either approach. He said, "Both the restrictive and liberal methods of interpretation, when misused, wrongly become rhetorical devices rather than rules of law." This statement forewarns that judicial opinions vary respecting the court's inclination to provide expansive or restrictive interpretations of s. 93(1) rights. I will set out and apply interpretative principles germane to this inquiry using the following subheadings.

First Principle – The Evolution of the School Ordinances

[272] Justice Sharpe, in *Daly*, where denominational rights were at issue, recognized that in an evolution of legislative enactments the last will of the legislature is paramount. Accordingly, the evolution of school Ordinances from 1884 to 1901 informs the court of their appropriate interpretation.

[273] I heard from various non-legal experts how the Ordinances may or may not have countenanced non-minority students attending separate schools. The defendants provided newspaper articles and local historical accounts to illustrate that non-Catholic students attended Catholic schools. In my view, non-legal experts' interpretation of statutes or anecdotal experiences of school attendance are of limited assistance. Instead, I take my task from Justice Wilson in *Reference re Bill 30*: look to the legislation above all else. She said, with necessary insertions applicable to Saskatchewan:

> It must be remembered…that [s. 17(1)] only protects rights and privileges guaranteed by law [as found in the 1901 Ordinances]. Our task therefore is to examine the laws in force prior to Confederation [under the 1901 Ordinances] to see what rights or privileges they gave.

[274] In interpreting the 1901 Ordinances I must give expression to the intention of s. 17. Foremost, I must find whether minority faith schools held a right to accept non-minority students with attendant funding. To understand the 1901 Ordinances one must understand the evolution of the Ordinances from the first Ordinances in 1884 to the last in 1901.

[275] The territorial Ordinances gained their legitimacy from the federal government's enactment of the first *North-West Territories Act, 1869* providing territorial government power to pass Ordinances. In 1875 the Act

was amended to permit the territorial government to pass Ordinances to establish schools and collect rates and specifically to create separate Protestant and Roman Catholic schools when the adherents to these faiths were in a minority.

[276] The first territorial school Ordinance was enacted in 1884. Previously, no schools were publicly funded in the Territories; only Protestant or Catholic mission schools existed. The first Ordinance permitted electors to petition for the formation of local school districts, each to be a minimum of 36 square miles with a minimum of 10 school age children. When formed, trustees could hire teachers, procure suitable buildings and raise taxes. Every district was designated as either Protestant or Catholic, depending on the religious makeup of the majority of the population. The first school established in the district was the public school that carried in its name "Catholic" or "Protestant," so that all public schools, as well as separate schools, were religiously affiliated and carried a denominational moniker. All children in a district attended the public school, unless a minority of the ratepayers in any district, whether Protestant or Roman Catholic, established a separate school district.

[277] Separate school districts could be formed if any number of property holders resident within any 36 square mile public school district or in two or more adjoining pubic school districts, successfully petitioned the Lieutenant-Governor. Upon the formation of such separate school district, the Lieutenant-Governor then notified the board of trustees of any public school district that included the whole or part of such separate school district within its limits of the creation of the separate school district.

[278] The 1884 Ordinance established a Board of Education, comprised of one Catholic and one Protestant section, each with equal appointees and each with power over the administration of the schools of its section, the licensing of teachers, approval of textbooks and appointment of school inspectors. Essentially, the Ordinance created a dual school system, largely under religious control. This Ordinance was the apex of religious control over education. Successive Ordinances whittled away religious influence over schools in favour of a secular system, but retaining dissentient minority schools. Power shifted from the Board of Education, separated into two religious sections, to the Board of Education as a whole.

[279] The 1884 Ordinance placed Catholic and Protestant schools on identical and equal footing. Section 83 limited religious practices in all schools to an opening prayer as adopted by the board of trustees. Section 84 disallowed religious instruction in any public or separate school until 3:00 p.m. and then only if permitted by the trustees and if children from other religious faiths were permitted to withdraw. Section 85 implicitly acknowledged that non-adherents to the first-formed school might be in attendance since parents could have a child excused from religious instruction. Section 85 read as follow:

> 85. Any child attending any school whose parent or parents or guardian is or are of the religious faith different from that expressed in the name of such school district, shall have the privilege of leaving the school room at the hour of three o'clock in the afternoon, or of remaining without taking part in any religious instructions that may be given, if the parents or guardian so desire.

[280] Public funding, called "aid" (equal to half of a teacher's salary) was given to both Protestant and Catholic schools from a General Revenue

Fund. Each school district met its general funding requirements from property owners within each district who were of the same religious faith.

[281] The territorial government effected several annual amendments to the 1884 Ordinance. Sometimes the amendments subtly changed the wording of the previous ordinance, and often quite significantly. Frequent renumbering and rearranging of sections makes comparisons difficult. Amendments show a distinct watering down of separate school rights originally paralleled on Quebec's model where Catholic or Protestant churches played a primary role in school affairs. The Ordinances move incrementally away from this model to a distinct state-controlled, non-sectarian school system with an option for minority denominational districts.

[282] In 1885 amendments introduced government grants to schools to augment tax revenues, providing an annual grant of $2.00 for every child who attended school 100 school days where the school was open only during one term and $2.50 for every child who attended school 160 school days where the school was open during both the winter and summer terms. Religious instruction became impermissible in public schools until 3:00 p.m., but not in separate schools. As well, in 1885 public schools no longer were required to include "Roman Catholic" or "Protestant" in their name.

[283] In 1886 restrictions were placed on the formation of separate school districts, requiring the existence of a pre-existing public school before a separate school district could be formed, a restriction continued in the 1901 Ordinance. As well, the separate school district had to be coterminous with the 36 square mile boundaries of the public school and could no longer reach

beyond the boundaries to adjacent districts, a requirement that made formation of a separate school district more difficult if the minimum number of students was lacking. The 1886 amendments also clarified that separate schools could be formed by either Protestant or Catholic ratepayers if they were a minority, a stipulation not found in the 1884 Ordinance. The school of the majority, whether called Protestant or Catholic, was the public school and its control was placed in the hands of the Board of Education as a whole. Because the majority formed the public school, the 1885 restriction on religious instruction in public schools applied to the Protestant or Catholic majority while the minority in a separate school had more generous privileges for religious instruction.

[284] In 1887 the members of the Board of Education changed from two Protestant and two Catholic members to five Protestant and only three Catholic, effectively giving Protestant members a majority in all decisions involving the Board's joint authority, including the formation of a uniform system of inspection of all schools and the licensing of all teachers.

[285] In 1888 the federal government created a Legislative Assembly of 25 members to replace the former Council of the Territories. Following, in 1892, while the Manitoba School Question was erupting, the Assembly passed significant amendments to the School Ordinance. The Board of Education was replaced with a Council of Public Instruction comprised of the Executive Committee, and two Roman Catholic and two Protestant appointees, but without voting power. Effectively, with the religiously-affiliated appointees having no voting power, and with the real power of the Council of Public Instruction lying with the Protestant majority of the Executive Committee,

Catholics no longer had effective input into the administrative authority of the Council. The Council of Public Instruction was no longer divided into Protestant and Catholic sections and had authority to examine, certify, train and license teachers, to select texts and to impose duties upon inspectors who were appointed by the Lieutenant-Governor in Council.

[286] Under s. 6 of the 1892 Ordinance, the Lieutenant-Governor appointed a Superintendent of Education for the Territories who held broad authority over all schools to insure compliance with the Council's rules and regulations. Effectively, the 1892 Ordinance placed the general administration of all schools, public and separate, in the hands of the Council of Public Instruction.

[287] Section 32 of the 1892 Ordinance continued minority schools. If a minority of ratepayers, either Protestant or Catholic, wished to create a separate school in any organized public school district, the ratepayers would be liable only to the assessments of the rates they imposed upon themselves. Once a separate school district was established, s. 36 assured that it would "possess and exercise all rights, powers, privileges and be subject to the same liabilities and method of government, as…provided in respect of Public School Districts." School district size was reduced to no more than 25 square miles.

[288] In 1901 the Assembly enacted another school Ordinance. Again, its provisions showed a progression from the 1884 Ordinance, away from religious to state control over education. The Ordinance abolished and replaced the Council of Public Instruction with a Department of Education as a

branch of the public service. Premier of the Territories, Frederick Haultain, became the first Commissioner of the Department, charged with the administration, control and management of the department.

[289] Although the 1901 Ordinance also established an Educational Council of five members, requiring two to be Catholic, it was directed to "consider such matters as may be referred to it" and to "report thereon to the Lieutenant-Governor in Council." Accordingly, "discussion and report" were the only teeth given to the Council, making it only an advisory body with little power. Religious control of schools was abandoned in favour of a department-controlled administration. The Ordinance also restricted religious instruction to the last half-hour of class per day for all schools, public and separate, whereas the 1885 Ordinance applied this restriction only to public schools. Other than this one-half hour allowance, separate schools were under the control of the Department of Education.

[290] Frederick Haultain (later Chief Justice of the Saskatchewan Court of Appeal) was the driving force behind the 1901 Ordinance. He faced strong criticism from the Roman Catholic leadership but denied that the Ordinances deprived them of their rights, even though the evolution of the Ordinances showed a distinct erosion of sectarian control in favour of a unitary system, more similar to Ontario than the dual system of Quebec. Premier Haultain's statement in 1884, even before the most significant movement to government control of schools exemplifies the trend of the Ordinances:

> The responsibility for the general management of our schools, for the educational policy of the Territories, and for the expenditure of the school vote is above and beyond any sectarian difference. Expenditure and control are inseparable, and so long as schools

> continue to receive government grants, they will be subject to government control.[50]

[291] In my review of the evolution of the School Ordinances, I find that the territorial government was progressively moving to less religious involvement in education with a strong inclination toward state, not sectarian, control. I see little support that the 1901 Ordinances would have generously included an expansion of separate school rights so that government grants would have been purposively given to separate schools as a right to educate students who were non-members of the dissentient faith.

[292] The evolution of the School Ordinances, indisputably showing a progression away from protecting predominantly Catholic interests in separate schools, is only exemplary of a broader trend emerging in Saskatchewan's population on the eve of union as it moved toward a secular and largely British view of society. One must remember, too, that the Catholic faith and the French language were inextricably linked during the years leading to union. Bill Waiser, in his recently published *A World We Have Lost: Saskatchewan Before 1905*, (Markham, ON: Fifth House, 2016), as part of his review of the province from "eighteen thousand years ago" to 1905 and with a historically impartial viewpoint, explained the growing ideals of Saskatchewan's population during the years preceding provincial status. Bill Waiser's assessment at pp 602 – 605 offers comments informative of the context in which the 1901 School Ordinances should be interpreted:

> That western society was to be British in sentiment and character became more pronounced after the [North-West] rebellion. …

[50] Sessional papers of the Dominion of Canada: volume 17, fourth session of the seventh Parliament, session 1894 at 40C-14.

…

This Anglo-Canadian emphasis also led territorial politicians to try to do away with French language and separate school guarantees. French had been employed in territorial government business as early as 1874 when the NWT Council published a consolidation of its ordinances in both French and English. … Separate schools, by contrast, were part of the 1875 NWT Act. The religious minority in any district (Catholic or Protestant) could establish a separate school and support it through self-assessment….

These aspects of territorial life had generated little controversy – hardly any comment – up until 1885. But any toleration quickly evaporated after the rebellion as the Anglo-Canadian majority moved to affirm the British character of the North-West. The general mood was that separate schools and the use of French had been foisted on the region by Ottawa and were not representative of the wishes and interests of the dominant society. There was also a widespread belief that French Canadians had failed the country because of their sympathetic support of the Métis traitor Riel, while Roman Catholics could not be trusted because they owed their allegiance to Rome and the pope. The territorial government in Regina was expected to set things right. … Legislators [in the North-West] responded in 1889 by preparing two petitions to Parliament, one calling for the repeal of French as an official territorial language and the other for the repeal of separate schools. During the debate over the resolutions, the vocal majority questioned the legitimacy of official bilingualism and separate schools, repeatedly pointing out that local opinion had never been taken into consideration.

Nothing was done at the federal level, though, because politicians in Ottawa were already grappling with the thorny Manitoba schools question and did not want more controversy. The simmering issues were simply dropped back in the lap of the territorial government, effectively leaving it up to Regina to take action. That it did in early 1892, when the territorial government passed resolutions abolishing the official use of French and discontinuing the religious control of schools in favour of a single government-run Council of Public Instruction.

[293] This nonpartisan assessment of attitudes in the North-West as Alberta and Saskatchewan tussled to become provinces is highly suggestive that the territorial government felt that minority faith education, largely championed by Catholic interests, was less a requested right or privilege, but more an obligation "foisted on the region by Ottawa."

Second Principle – The "Solemn Pact"

[294] A recurring theme respecting s. 93 is the principle that constitutional accommodation to educate the Catholic and Protestant minorities was critical in achieving confederation. Section 93 has been called the "solemn pact," (*Québec (Procureur général) c Conseil scolaire de l'île de Montréal*, 1990 CanLII 2677 (QC CA)); the "confederation compromise," (*Reference re Bill 30*); "one of the cardinal terms of the Confederation arrangement," (*Reference Re Adoption Act, 1938*, [1938] SCR 398 at 402); and a "central consideration…leading to confederation." (*Reference re Secession of Quebec*, [1998] 2 SCR 217). Few cases concerning s. 93 are without reference to this principle. The defendants understandably rely upon the principle, stating, "The importance of s. 93 to the Confederation compact cannot be over-stated."[51]

[295] I question whether the principle of a "solemn pact" should weigh as predominantly in interpreting s. 17(1) of the *Saskatchewan Act* as it has in interpreting s. 93(1) of the *Constitution Act, 1867* in cases dealing with separate school legislation in Ontario and Quebec. The solemn pact was a constitutional arrangement between the four original confederating colonies,

[51] Government Trial Brief Para 14

but essentially applicable only in Quebec and Ontario since New Brunswick and Nova Scotia did not have separate schools. One might suggest that the notion of a "solemn pact" is losing significance. In 1997 Quebec sought a constitutional amendment under s. 43 of the *Constitution Act, 1982* and rescinded denominational school rights and replaced them with a language-based education system.[52] The *Constitution Act, 1867* now includes s. 93A: "Paragraphs (1) to (4) of section 93 do not apply to Quebec." The "solemn pact" between Ontario and Quebec has effectively become a partner-less pact since 1997.

[296] Applying the "solemn pact" principle is less apparent given Saskatchewan's initiation to separate school rights. Canada had jurisdiction over the North-West Territories for 35 years before Saskatchewan gained provincial status. The North-West Territories became part of Canada in 1870 under the *Rupert's Land and North-Western Territory Order*, not the *British North America Act* from whence came the principle of the "solemn pact." Separate schools were brought to the North-West Territories, not by way of a negotiated confederating "compromise," but by federal legislation under s. 11 of *The North-West Territories Act,1875*, enacted when the North-West was without representation in the federal government. Saskatchewan's introduction to separate schools was granted (some might say imposed) by federal legislation from the outset and not by constitutional compromise.

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[52] *Constitution Amendment, 1997 (Quebec)*, SI /97-141

[297] From 1870 the federal government held the constitutional ability to create new provinces from the territories incorporated into Canada.[53] In 1905, Saskatchewan was given provincial status by the *Saskatchewan Act.* Saskatchewan gaining provincial status is different than the confederation of four separate colonies in 1867. Saskatchewan's provincial status was accomplished by an Act of Parliament, the *Saskatchewan Act*. On the other hand, confederation required an Act of the United Kingdom Parliament. Interpreting s. 17(1) of the *Saskatchewan Act* might differ from interpreting s. 93(1) of the *British North America Act*, at least insofar as invoking the "solemn pact" principle. Albeit, the *Saskatchewan Act* has constitutional authority under s. 52(2) of the *Constitution Act, 1982*, but it originated from something different than a pact between independently governed entities.

[298] The author, C. Cecil Lingard, *Territorial Government in Canada: The Autonomy Question in the Old North-West Territories*, (Toronto: University of Toronto, 1946) at 196-197, after a thorough review of the 1901 Ordinances and the autonomy debates, offers his assessment respecting the origins of the separate school provisions in the *Saskatchewan Act*. He would not have considered that Saskatchewan had entered a "solemn pact," quite the contrary. He wrote:

> The system of separate schools in the North-West was the result of Dominion legislation, passed after it entered the Union, without its request or assent, and at a time when there was little conception in the general mind as to the modern non-sectarian public school. The Dominion government had no precedent to support its claim that the school system set up subsequent to 1875 or that in force in the Territories in 1905 must be maintained by constitutional obligation after the North-West assumed the rights and responsibilities of

[53] The Northwest Territories Court of Appeal in *Yellowknife* provides a detailed and helpful review of the how Rupert's Land and the North-Western Territory became part of Canada.

> provincial self-government. If the spirit as well as the B.N.A. Act was to prevail, the new provinces were entitled to full constitutional powers possessed by all the other provinces, except the two Canadas who made their own compact with respect to separate schools. Such are the views of the writer, after reading the debates and correspondence relating to the constitutional question. [Emphasis added.]

[299] Mr. Lingard's assessment lends support to the interpretation of s. 17(1) as a constitutional document, but without the accompanying, rather rigid notion that Saskatchewan entered a "solemn pact" with anyone, as was the case between Ontario and Quebec. Nor does the notion that separate school rights were a "solemn pact" accord with Bill Waiser's characterization of the sentiment in the North-West, "that separate schools … had been foisted on the region by Ottawa and were not representative of the wishes and interests of the dominant society."

[300] Even in Ontario the concept of a "solemn pact" may have less sway since Quebec's constitutional amendment has effectively left Ontario alone among the four provinces of confederation, bound (seemingly with no one else) to the original framing of s. 93(1) of the *British North America Act.*

[301] In my assessment of the 1901 Ordinances, I might lessen the strictures of the "solemn pact" principle insofar as interpreting s. 17(1) of the *Saskatchewan Act* in comparison to other courts' interpretation of s. 93 of the *Constitution Act, 1867.* This action arises in Saskatchewan and, unlike previous adjudications of separate school rights in Ontario and Quebec, requires an interpretation sensitive to Saskatchewan's history of separate school rights. However, such lessening has not been determinative of my

ultimate decision that the 1901 Ordinances do not guarantee funding for non-minority faith students in separate schools.

Third Principle – Changing Societal Norms

[302] Section 93(1) is 150 years old; s. 17(1) is over 110 years old. Many norms and expectations inherent in these constitutional provisions have changed, including educational concepts and practices, but more particularly religious practices, religious affiliations and societal norms. How should a constitutional provision anchored in religious rights and attitudes from a Victorian era, pertaining to Roman Catholics and Protestants, be interpreted in a society which has become increasing secular and diverse?

[303] Today, perched on the cusp of Canada's Sesquicentennial, I find appropriate the words of Chief Justice Deschenes in *Protestant School Bd. of Montreal v Minister of Education*, a 1976 decision involving s. 93 rights. Accepting that the court had to "breathe into an over 100-year-old text a spirit which would correspond to the new reality of Canadian society… without… suddenly breaking away from tradition," he insightfully stated:

> …[we] shall then remember that the Fathers of Confederation, while hoping to shape the future, never claimed to possess gifts of clairvoyance or prophecy.

[304] The Northwest Territories Court of Appeal, in *Yellowknife*, also identified this theme and specifically addressed interpretation of constitutionalized denominational rights in the face of changing social needs, stating at para. 62 that a constitution "must be capable of responding to changing social needs and legitimate public expectations." If not, "what might have been suitable for an earlier time and vastly different society would

prohibit interpretations rooted in the reality of the present." The court concluded that if alternate interpretations are reasonably available, "then preference should be given to the interpretation that best accords with constitutional norms and values, including *Charter* values." One might ask, in the words of the Northwest Territories Court of Appeal, whether 1905 in Saskatchewan was an earlier time with a "vastly different society" and might there now be "changing social needs and legitimate public expectations."

[305] Rather profound changes have occurred in the religious affiliations of Saskatchewan's population since 1905. Coincidentally, 1901 was also the year of census-taking in the North-West. Section 41 of the 1901 Ordinances (now s. 49 of *The Education Act, 1995*) provided the right to create a separate school division when "a minority of the electors in a school district, whether Protestant or Roman Catholic" followed a specified procedure. The rights of these minority electors – whichever of the two was fewer in number compared to the other – was constitutionally protected. Of interest, however, in understanding and protecting minority rights of Saskatchewan's Catholics and Protestants, is the change in religious affiliation since 1901.

[306] Dr. Roderic Beaujot, Emeritus Professor of Sociology at Western University, provided demographic evidence that in 1901 (the year closest to Saskatchewan gaining provincial status) Catholics comprised 18.40% of the population; Protestants 74.35%; other Christians 2.77%; other religious groups 3.33%; and no religious affiliation 1.15%. In 2011, census data show Saskatchewan's religions affiliations as Catholic 29.52%; Protestants 35.74%; other Christians 6.83%; other religious groups 3.49%; and no religious

affiliation 24.4%. Expressed as a ratio, for every 100 Protestants there were 24.7 Catholics in 1901 and 82.6 in 2011. The Protestant category is the largest group from 1901 to 2011, but declining from 74.4% in 1901 to 35.7% in 2011. In 2011 those with religious affiliations other than Protestant or Catholic, plus those with no religious affiliation, represented 34.7% of the population, more than Catholics and Protestants. Statistics Canada's projections to 2031 suggest that between 31.58% and 31.96% of Saskatchewan's population will be Catholic; between 34.68% and 35.06% will be Protestant; between 5.84% and 5.96% will be other Christians; other religious groups will be between 3.85% and 4.42%; and those with no religious affiliation will be between 23.30% and 23.58%.

[307] Dr. Beaujot's report shows that in 1861, just before confederation, 99.30% of the population in the four confederating provinces was either Catholic or Protestant. The confederation compromise, equally and only accommodating of Catholic and Protestant educational rights, bore a strong semblance to the provinces' religious reality. In 1901, 92.75% of Saskatchewan's population was either Catholic or Protestant, dropping to approximately 65% of the population in 2011. Put another way, in 1901, the allocation of rights and privileges to protect Catholics and Protestants excluded only 7.25% of the population; in 2011 that protection excluded 34.80% of the population.

[308] Protestant denominations have never been as homogenous in their beliefs as the Roman Catholic faith with its singular allegiance to Rome. Since the 1901 census, Protestant denominations have become even more distinct from each other with the immigration to Saskatchewan of diverse Protestant

groups. Pastor Wiens testified that as a Mennonite, he would distinguish himself from Protestants, preferring the term Anabaptist. Today in Saskatchewan, unlike 1901 when Protestants were overwhelmingly the majority and less disparate from each other, no single faith or non-faith group creates a majority. Given the diverse nature of groups considered "Protestant," the largest minority among minorities in Saskatchewan is Roman Catholic and that "minority" has significantly increased from 18.40% of the province's population in 1901 to 29.52% in 2011. The continued protection of Saskatchewan's largest, most homogenous and historically growing minority from the influences of smaller minorities might, in the minds of many observers, show the apparent anachronism of constitutional protection of Roman Catholic and Protestant minority rights in Saskatchewan.

[309] The Court of Appeal of the Northwest Territories in *Yellowknife* commented on the unexpected changes in religious affiliation that have happened since the School Ordinances were first enacted. It stated at para. 43:

> A review of the 1884 School Ordinance reveals that it was based on a simpler societal structure than exists today. School districts were either Protestant or Catholic. No other religious affiliation was contemplated in the 1884 School Ordinance.

[310] Religious affiliations have significantly changed. Has Saskatchewan reached a point where, like the Court of Appeal in *Yellowknife* stated, the court must realize that "what might have been suitable for an earlier time and vastly different society would prohibit [constitutional] interpretations rooted in the reality of the present?"

[311] I also take guidance from Chief Justice Dickson in *Hunter v Southam Inc.*, [1984] 2 SCR 145 at 155 where he explained that interpreting the constitution is fundamentally distinct from interpreting statutes:

> A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.

[312] In my view, the "new reality" Chief Justice Dickson spoke about is evident in Saskatchewan, as shown by the growing number of persons with no religious affiliation, growing numbers of persons of non-Christian faiths and the significantly expanded proportion of Roman Catholics in Saskatchewan since 1901. Although my judicial task involves interpretation of the 1901 Ordinances, I cannot be expected to be locked in a century-old mind-set. An interpretation of s. 17(1) must be sensitive to twenty-first century Saskatchewan realities. Accordingly, I am not apt to unnecessarily enlarge constitutional protection of Roman Catholic and Protestant rights in face of Saskatchewan's increasingly religiously diverse population.

Fourth Principle – Balance between Adaptation and Amplification

[313] Courts have identified a tension between the dangers of freezing rights of separate schools to 1867 (or 1901) on the one hand and being too expansive and amplifying rights beyond their original intention on the other hand. Interpreting at-union legislation should not leave separate schools

"forever in the educational wilderness of the enactments in force in 1867," as stated by Meredith C.J.C.P. in *Ottawa Separate School Trustees v City of Ottawa,* at 501-2) but should be interpreted "to meet new circumstances and needs as they arise" as stated by Viscount Cave L.C. in *Hirsch*. Justice Iacobucci in *Ontario Home Builders' Association SCC* said that s. 93(1) does not turn pre-union legislation from 1867 into "procrustean obligations" to which modern education systems must conform.

[314] As a counterpoint, though, Justice Iacobucci, in *English Catholic Teachers,* after citing the concerns of an overly stagnant interpretation of s. 93(1), tempered an overreaching of this concern to an unjustified amplification of s. 93(1) rights that was never intended. He cautioned against using the purposive approach to expand the original purpose of s. 93 and cited Justice Beetz in *Greater Montreal* who rejected an approach to s. 93(1) that would "improperly amplify the provision's purpose" to transform s. 93(1) into "a blanket affirmation of freedom of religion or freedom of conscience."

[315] This discussion begs the question – accepting that admission and funding of non-minority students in separate schools under the 1901 Ordinances was not expressly stated – whether "new circumstances and needs" have arisen since then to make funding of non-minority faith students in separate schools a natural and necessary adaptation to accommodate separate schools within the intent of s. 17(1). Or, is such funding an unwarranted amplification of s. 17(1)'s purpose? I see little reason to move the indicator of claimed denominational rights for funding of non-minority faith students from silence in 1901 to amplification today.

[316] I see as an example of amplification the position advanced by CTT, that funding of non-Catholic students is now, and has always been, a non-denominational aspect protected under s. 17(1) because funding for non-minority students is necessary to permit the separate school "to obtain more funds for its operation, allowing it to provide equivalent educational opportunity to [minority-faith] students…"[54] Admittedly, the cost of educating Saskatchewan children is high. Ms. Chobaniak testified that the annual education budget in Saskatchewan is approximately $1.2 billion, second only to health care costs. However, I do not accept the logical extension of saying, as CTT has said, that the presence of non-minority faith students has historically "ensured there would be funding to help maintain and protect the denominational character of the [separate] school." This position leads to an obvious and disquieting question: how many non-minority students optimally should attend Catholic schools to ensure their denominational aspect? I see the practical benefit of separate schools receiving funding for non-minority faith students to create greater financial viability to promote the tenets of Catholic education, but I do not equate a practical benefit as creating a constitutional right. I do not accept that the 1901 Ordinances gave separate schools the constitutional right to leverage funds otherwise destined to public schools to assure the denominational character of Catholic schools.

Fifth Principle – Implicit Rights

[317] I agree with the defendants that nothing in the 1901 Ordinances expressly restricts funding to only the minority faith students in a separate school. The legislative absence of a restriction, though, can hardly create a

[54] CTT Trial Brief Para 211

right "in law." As Justice Wilson in *Reference re Bill 30* stated, the right has to exist "by law." If the absence of an express prohibition creates a constitutional right, separate school rights would be unlimited.

[318] Perhaps, though, the claimed right was implicit. Case law suggests that in examining pre-union law, the court must have an ear to what might not have been express, but may have been implicit. In *Reference re Bill 30*, Justice Wilson stated that while a right may not have been expressly given under Ontario's pre-confederation school legislation, the court could find an "implicit" right under the legislation which would satisfy the requirement under s. 93(1). Citing Justice Wilson's statement, Justice Sharpe in *Daly* found that while the *Scott Act* (pre-union law in Ontario) did not give to school trustees the right to prefer Roman Catholics when hiring teachers, he concluded that separate school trustees had the "implicit legal right to prefer those of the Roman Catholic faith when making employment decisions relating to teachers."

[319] Accordingly, in this action, the mere absence of an express right of separate schools to accept and receive funding for non-minority faith students is not necessarily determinative of the non-existence of such a right. Such a right might be implicit from other provisions of the 1901 Ordinances and necessary to protect the denominational aspects of Catholic education. For example, the earliest School Ordinance of 1884 implies that a student not of the faith of the particular school might be in attendance. The court found similarly in *Yellowknife*, stating:

> 44 The 1884 School Ordinance did not limit attendance at Catholic or Protestant schools to students of the same religious faith. Section 85 expressly provided that a student attending a school of a different

> denomination than his or her own need not take part in the religious instruction, if any, offered by that school. This clearly implies that students attending a particular school district did not have to be of the same religion as indicated in the school district's name.

[320] However, one must bear in mind that the 1884 Ordinances contemplated that all schools were denominational and even had to carry the name "Roman Catholic" or "Protestant," although they were public schools. Not surprisingly then, students not of that religion may have attended such school being the only school in the district.

[321] Other reasons have been offered to explain why the 1884 Ordinance permitted a student's exemption from religious instruction. Dr. John Hiemstra, then Associate Professor of Political Studies at The King's University College in Edmonton, Alberta in *Domesticating Catholic Schools (1885-1905) The Assimilation Intent of Alberta's Separate School System*[55] explains the exemption provision as an approach, "…thought necessary to accommodate the variety of views within the multi-denominational Protestant sector."

[322] The question at hand – the funding of non-minority faith students in separate schools – presupposes that both a public and separate school exist. Later versions of the Ordinances provided an exemption from religious instruction to all parents in all schools, a provision still found in *The Education Act, 1995*. I see nothing in s. 138 of the 1901 Ordinances allowing a student to be exempted from religious instruction as proving non-minority students were commonly in attendance at separate schools and thereby creating a right of funding in favour of the separate school.

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[55] Paper given at the Canadian Political Science Association Annual Meetings Dalhousie University, May 30 – June 1, 2003

Sixth Principle – Rights Anchored in Law, not Voluntary Practice

[323] The Supreme Court in *Tiny Separate School Trustees v The King*, [1927] SCR 637 called for a purposive interpretation of s. 93 but it cautioned that any rights had to be anchored in law, not in practice of a voluntary nature. The court cited *Mackell*, where the Privy Council cautioned against elevating a "practice" or a "privilege of a voluntary character" to a protected right, stating at p. 655 :

> …any practice, instruction or privilege of a voluntary character, which, at the date of the passing of the Act, might be in operation is not a "legal right or privilegehttps://www.canlii.org/en/ca/scc/doc/1927/1927canlii9/1927canlii9.html - ftn8 …

[324] I have misgivings about the defendants' proof of attendance of certain non-minority faith students in separate schools pre-dating 1905 as proof of a right to receive funding. The defendants went to great effort to gather rather anecdotal evidence that non-minority faith students attended separate schools without known restriction of funding. I accept that several instances could be found of non-Catholic students attending Catholic schools and non-Protestants attending Protestant schools (as few as there were). However, I cannot see that occasionally accommodating non-minority students establishes a right in law or makes the right a denominational right.

[325] Probably no greater percentage of non-Catholic students attending Catholic schools can be found than in St. Theodore Roman Catholic School where in 2012-2013 the number of Catholic students in attendance was only 23 percent of the total. I do not accept the inverted rationale that allowing a practice creates a right. I see nothing in the scattered incidents of attendance immediately prior to and after 1905 or the prevalence of non-Catholic students

in today's Catholic schools that make such practices a constitutional "right or privilege" under the 1901 Ordinances.

[326] *Reference re Education Act (Que.)* further supports the conclusion that a practice does not make a constitutional right. In a five question reference to the court, one question was highly relevant to the issue in this action. It asked, "Does the *Education Act*…prejudicially affect the rights and privileges protected by s. 93(1) and (2) of the *Constitution Act, 1867* in its provisions…which restrict access to these school boards to persons who belong to the same religious denominations as that of these boards?" The Supreme Court held that s. 93 did not confer a denominational right to admit and educate non-minority faith students in separate schools. The court accepted the decision of the Quebec Court of Appeal, writing at para. 130:

> In the opinion of Beauregard J.A. the fact that at Confederation a school board could admit or refuse to admit a child from another religion was not an essential characteristic of the right to dissent. I share his view when he says at p. 2585 that this situation "has nothing to do with the right of a religious minority to dissociate itself from the majority with respect to teaching in schools".

[327] In *Reference re Education Act (Que)*, even though rural dissentient schools could accept non-minority faith students "as a matter of favour" prior to confederation, this silence did not confer a denominational right to accept non-minority faith students. The court stated:

> The mere possibility in view of the law's silence of a dissentient school accepting children from another denomination "as a matter of favour" is not in my view a denominational right or privilege *stricto sensu*. Could it nevertheless be part of what Beetz J. in G.M.P.S.B. regards, to use the words of McCarthy J., as a non-denominational aspect necessary to give effect to the denominational guarantees? I refer here to attendance as related to financing. However, contrary to what some may argue, the admission of children from other denominations does not seem to have been particularly advantageous

> for a dissentient school board. In particular, the trustees could only impose taxes on parents of the dissentient faith, as provided in ss. 55(4), 57(1) and (5) and 58. I conclude that the admission of children of other denominations was not a necessary factor to the effectiveness of the constitutional guarantees and was not related thereto. [Emphasis added]

[328] In the urban municipalities in Quebec, denominational common schools had express legislative authority, at confederation, to accept children of other faiths. Nevertheless, at p 580-81, the court held that this was not a right "with respect to denominational schools" within the meaning of s. 93(1). The *Education Act, 1995* could just as effectively restrict access to denominational schools in the urban municipalities to students of the minority faith.

[329] *Reference re Education Act (Que)* confirms that Catholic separate schools in Saskatchewan do not enjoy a right or privilege pursuant to s. 93 to admit non-Catholic children, even if the 1901 Ordinances had provided separate schools with the implied authority to admit non-Catholic students (which I have not found). The fact that some non-minority faith students attended separate schools should, in the words of the Supreme Court, be seen "as a matter of favour." I do not accept, though, that such attendance created a denominational right.

[330] I agree, too, with GSSD's reliance upon *Hirsch* as support that separate schools have a denominational right to exclude non-denominational students to preserve their denominational character. The Privy Council struck down a Quebec law that permitted Jews to be considered as Protestants for separate school purposes. The court held that by permitting Jews to join Protestants in forming separate schools, to appoint trustees and to have their

children attend Protestant schools, Protestant rights under s. 93(1) would be infringed.

Seventh Principle – Changing Religious Attitudes

[331] Another question may arise: what latitude should a religious minority have in advancing changing religious views to support its interpretation of rights and privileges? In this trial, evidence was offered that the teachings of the Catholic Church have substantively changed, particularly since Vatican II. As Dr. Groome, CTT's expert witness suggested, the Church may have once converted followers at the point of a sword, but today the Church evangelizes. As Bishop Bolen described, Vatican II clearly moved the Church away from considering non-Catholics as "schismatics" and "heretics," to a deeper acceptance of other faiths. Dr. Peters, CTT's expert witness, described changes to Catholic theology over the last 100 years as follows:

> These understandings [that there is only one true Church] changed drastically as a result of the Second Vatican Council and they are continuing to evolve, in an uneven and hiccupping manner, in the decades since. Members of other faiths discover that they share many beliefs and preferences with Catholics as to how the world should be, and the idea of the Catholic Church as a monolithic structure, controlled dictatorially from Rome, has largely dissipated. There is greater trust between members of different religions and associating with one another is not seen as being a hazard to one's eternal salvation as it might have been a century ago.

[332] To what extent should Catholic theologians be able to redefine the tenets of their faith as they relate to education and claim these evolving tenets as being protected, even though they have been "uneven and hiccupping?" Justice Sharpe in *Daly* addresses this question, stating:

> Accordingly, while I agree that in the final analysis, separate school supporters are not at liberty to define for themselves the scope of their constitutional rights and that it is necessary to subject their

> claims to objective scrutiny, that review must necessarily take into account the perspective of the minority claiming the benefit of the constitutional right. The bona fide belief of the applicants that the denominational character of their schools is threatened by s. 136 is not determinative, but neither is it irrelevant. In particular, the court must pay heed to and respect the religious convictions that underlie that belief.

[333] While the constitution must have a modern sensibility, claimed rights cannot shift with variations in Catholic theology. In *Daly v Attorney General of Ontario* (1999), 172 DLR (4th) 241 (Ont CA), the Ontario Court of Appeal held that employing only Catholic teachers was a right of separate schools under pre-confederation law given the "purpose and philosophy of separate schools." The court anchored its decision "at the time of confederation," considering "the prevailing attitudes of the day with respect to religion."

[334] Dr. Peters, CTT's expert witness, explained the Catholic theological viewpoint a century ago, at the time of the 1901 Ordinances. Associations outside the Catholic Church were "seen as being a hazard to one's eternal salvation," a viewpoint that accords with Pope Pius IX's admonition in 1846 published in *Qui Pluribus*: it was an error for Catholics to approve of a system of education unconnected with Catholic faith and the Church. Taking Justice Sharpe's statement that prevailing attitudes at the time of confederation govern the interpretation of s. 93(1) of the *Constitution Act, 1867,* then, similarly, the prevailing attitudes of Catholicism in 1905 should govern the interpretation of s. 17(1) of the *Saskatchewan Act*. Those attitudes were described, even by CTT's expert witnesses, as essentially intolerant of non-Catholic religions, where associations with non-Catholics was hazardous to one's eternal salvation. That intolerance suggests that Catholics in 1905

would hardly have wanted or sought the constitutional right to bring non-Catholic students into their schools.

[335] Even if I accept, as I do, that Catholic theology has accepted a more ecumenical and inclusive view of other religions, where evangelization has replaced proselytization, where inclusion and accommodation of other faiths is part of Catholic doctrine, and even if I accept that such shift warrants constitutional protection under s. 17(1), I am left with one final question: would this shift allow enrolment and funding of non-minority faith students to become a denominational right of Catholic schools? I see the protection of Catholic values for Catholic children, not the dissemination of Catholic values to non-Catholic children, as the protected denominational aspect of Catholic education, a finding I will elaborate upon under the next principle.

Eighth Principle – The Essence of a Catholic School and Denominational Rights

[336] Above all, the interpretation of constitutional documents must give meaning to both the express and implied meaning of the 1901 Ordinances. I therefore have searched for the true purpose of s. 17(1). The "class of persons" whose rights are protected under s. 17(1) obviously includes Roman Catholics (*Mackell*), primarily Roman Catholic parents and their children. Section 17(1) is not about the right of Catholics or Protestants to gain ascendancy or influence in their community through the right to educate children of other faiths. Section 17(1) is to ensure that future generations of children, when their parents are in a religious minority (Catholic or Protestant), are inculcated in the parents' religious beliefs and not absorbed into the values of the majority.

[337] Catholic children are the primary beneficiaries of separate school legislation, a truism recognized as early as 1895 in *Brophy* when the Privy Council struck to the core of the constitutional protection to divine its true purpose. Its statement pre-dates Saskatchewan's provincial status and offers a view that was known when the 1901 Ordinances were adopted as Saskatchewan's constitutional protection of separate schools. The Privy Council in *Brophy* explained the underlying purpose of s. 93(1)'s protection of the religious rights of the minority to educate its children, as would be quoted and emphasized by Justice Wilson in *Reference Re Bill 30*, at 1174, nearly a century later:

> There can be no doubt that the views of the Roman Catholic inhabitants of Quebec and Ontario with regard to education were shared by the members of the same communion in the territory which afterwards became the Province of Manitoba. They regarded it as essential that the education of their children should be in accordance with the teachings of their Church, and considered that such an education could not be obtained in public schools designed for all the members of the community alike, whatever their creed, but could only be secured in schools conducted under the influence and guidance of the authorities of their Church.

[338] This purposive interpretation offered over 110 years ago shows that the overarching reason for separate schools focuses on Catholic parents, ensuring "that the education of their children should be in accordance with the teachings of their church." Section 17(1) was to allow the minority religion – Protestant or Catholic – to remove their children from the influence of the majority, so their children could be educated in the faith and values of their religion, untrammelled by the domination of the larger group.

[339] Inherent in protecting separate Catholic schools is the understanding that perpetuating the Catholic faith is best accomplished when a

child adheres to the beliefs of his or her parents and, when in a minority, by separating the child from members of other faiths to ensure an immersion in Catholic faith. Many judicial statements have referred to the inculcation of children in the faith of their parents as the paramount concern of separate schools. In *Daly*, Justice Sharpe stated that the constitutionally protected goal of Catholic separate schools was to transmit the Church's teaching to children:

> …The purpose of granting to Roman Catholics the right to funding for separate schools and the right to elect trustees to manage their own schools was to enable the teachings of the Roman Catholic faith to be transmitted to the children of Roman Catholics …

[340] Justice Sharpe drew a direct line from the right to receive "funding" to the purpose of separate schools, namely to transmit Catholic values to "children of Roman Catholics."

[341] In conclusion, applying a purposive interpretation to the 1901 Ordinances I find that Catholic separate schools have no constitutional right to admit and receive funding for non-Catholic students. In any event, if such a right were implicit, I do not find it to be a denominational right.

PART FIVE: IS FUNDING OF NON-MINORITY FAITH STUDENTS AT ST. THEODORE ROMAN CATHOLIC SCHOOL A CONSTITUTIONAL RIGHT UNDER S. 17(2) OF THE SASKATCHEWAN ACT?

I. ESSENTIAL ELEMENTS OF THE DEFENDANTS' POSITION

[342] The defendants say s. 17(2) of the *Saskatchewan Act*, provides a full answer to this action because it requires the government to fund both Catholic and public schools without discrimination. They say that s. 17(2) essentially finesses the entirety of this lawsuit since it so directly and emphatically states that public and separate schools must be funded equally.

[343] Section 17(2) of the *Saskatchewan Act* reads as follows:

> 17(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.

[344] In its trial brief, GSSD did not address s. 17(2) of the *Saskatchewan Act*. Accordingly, I will canvass the defendants' position and offer my analysis. I will, however, state my conclusion here. I agree that public schools and separate schools must be funded without discrimination. But one must first determine the rights of separate schools to receive funding, which begs the question in this lawsuit. Only upon answering this question are public and separate schools entitled to the same level of funding without discrimination.

[345] The Government states that because s. 142 of *The Education Act, 1995* provides that any child may attend a school where the child's parents live and s. 142(3) bars schools from charging tuition to any student, funding must be provided equally to Catholic schools as to public schools. In its trial brief, the Government provides wide-ranging reasons why Catholic schools would be disadvantaged if government funding was denied to them respecting non-Catholic students. The Government points out the obvious consequences to Catholic schools if GSSD were successful, stating:

> 103. …the majority public schools board's argument for a ban on funding would inevitably have the effect of making it financially difficult for the separate school to accept non-minority faith children.
>
> 104. At the same time, the majority public school board appears to argue that it would be able to receive full funding for all students

> attending its schools, without taking their religion into account. That would clearly give a financial advantage to the public schools compared to the separate schools.
>
> 105. Overall, it is hard to see how the majority public school's position is anything but discriminatory, and therefore contrary to s 17(2) of the *Saskatchewan Act.*

[346] The Government then suggests that if public schools can accept full funding regardless of their students' religion and Catholic schools cannot, the result would not be "fair." The Government's position is unique and bears further direct quotation from its trial brief:

> 107. …[I]t [Good Spirit] wants the separate school boards to have funding only for children of the minority faith attending its schools, while the public school will receive full funding for all children at its schools, regardless of religion. It is difficult to see how this is fair.
>
> 108. …It argues that children of the non-minority faith do not have a right to the same level of funding, and hence education, if they attend a separate school. They argue that minority separate school boards should receive less money per student than the majority public school boards receive. These arguments are not about fairness and are contrary to s. 17(2).

[347] Finally, the Government states that public and separate schools must receive equal funding to protect notions of parental autonomy and freedom of religion:

> 110. As well, tying funding to the religion of students comes very close to an argument that the majority public school division believes that it is entitled to have the non-minority faith children attend its schools. That is completely contrary to the notions of parental autonomy, freedom of religion – and fairness.

II. ANALYSIS

[348] The result would be strange if, as the defendants suggest, s. 17(2) provided a simple and emphatic answer to the entirety of the constitutional questions this litigation poses. Such an answer would obviate

the need to look at the rights accorded under the 1901 Ordinances, would ignore applying the denominational aspects test and would render all judicial determinations on this issue in Canada of little relevance. In my view, s. 17(2) presupposes that separate schools are serving the purposes for which they were intended – the perpetuation and protection of the minority's faith through separate education. The words of s. 17(2) expressly state that in the distribution of money for the "support of schools organized and carried on in accordance with…chapter 29" separate schools are to receive equal funding. Schools not carried on in accordance with chapter 29 are not included in the guarantee of equal funding. Section 17(2) does not finesse the entire application of constitutional principles that have been the centre of this lawsuit since its inception.

[349] Justice Iacobucci in *English Catholic Teachers* upheld Ontario's proposed new provincial funding arrangements affecting public and separate schools because the legislation continued to "preserve the 'separateness' of separate schools." Of deep importance to any funding of Catholic schools is the protection of their right to remain separate. If Justice Iacobucci had found that the newly proposed funding legislation in some manner adversely affected the ability of Catholic schools to retain their "separateness" he would have found the legislation encroached on guaranteed rights. If, as Justice Iacobucci found, preserving separateness is the hallmark of separate school funding, then preserving separateness is the requisite consideration that must be applied before separate schools can claim equal funding under s. 17(2).

[350] Section 17(2) could not have been intended, as the Government suggests, to create a second publicly funded school system to provide choice

to parents. The Government repeatedly states that public funding for non-Catholic students is necessary to provide choice to non-Catholic parents who wish to enrol their children in Catholic schools. The Government states that many non-Catholic parents "desire a choice of schools"[56] and GSSD's position does not "sit comfortably with the concept of parental choice."[57] The Government poses questions such as, "Why then, does the majority public school division not want to respect the choice of school…made by children's parents, who best know the needs of their own children?"[58] The Government equates GSSD's position not only with a denial of parental choice and autonomy, but with a denial of parents' "freedom of religion."[59] This case takes on a strange dimension when a party (GSSD) cites government action as infringing freedom of religion and the government defends its action, saying that without the action, freedom of religion would be denied.

[351] The religious freedom of non-Catholic parents wishing to send their children to Catholic schools has not been infringed if funding is unavailable for them. Parents are legislatively entitled to send their children to religious schools of their choice, but such choice may be accompanied by a financial obligation. This principle was clearly stated in *Adler* when Justice Sopinka wrote, at para. 171, that the state's refusal to fund non-Catholic separate schools did not infringe freedom of religion because the *Education Act* in Ontario (as in Saskatchewan) "allows for the provision of education within a religious school or at home… [and the Act] does not compel the [parents] to act in any way that infringes their freedom of religion."

[56] Government Trial Brief Para 313
[57] Government Trial Brief Para 336
[58] Government Trial Brief Para 350
[59] Government Trial Brief Para 110

[352] The defendants cannot advance a religious freedom argument on the testimony of non-Catholic parents whose children are currently attending Catholic schools. It is an odd religious freedom that does not provide an equal measure of freedom to all citizens, but only to those whose principles are commensurate with Catholic doctrine. Non-Christian parents, for example, may not be too sympathetic to hear non-Catholic Christians complain if they are unable to receive government funding to educate their children with Christian values within a Catholic school. These non-Christian parents might think that non-Catholic parents should be, like them, equally denied or equally afforded the benefit of publicly-funded faith-based education.

[353] Furthermore, if the purpose of separate schools is to provide choice to parents, many regions of Saskatchewan do not have Catholic schools so choice is largely restricted to urban centres. If choice is a government goal, choice should be reasonably available to all. Better choice to no one (aside from those constitutionally preferred), than choice to some based on the whims of geography and acceptance of Catholic doctrine.

[354] The Government's position, that Catholic schools should receive funding to educate students regardless of faith just like public schools, ignores the genesis of separate schools and erases legal differences between public and separate schools. Effectively the defendants would give Saskatchewan two competing public school systems with little to legally distinguish them, certainly not government funding. I see no grounds to think that the 1901 Ordinances were meant to create two parallel and competing public school systems.

[355] I disagree with s. 17(2) being leveraged to ensure ideals of "freedom of religion – and fairness."[60] To the contrary, and ironically, separate schools have been described in *Reference re an Act to Amend the Education Act* (1986), 25 DLR (4th) 1 (Ont CA) as "mak[ing] it impossible to treat all Canadians equally [since] [t]he country was founded upon the recognition of…unequal educational rights for specific religious groups." After the Ontario Court of Appeal so pointedly described separate school rights it also offered at p. 64 that the *Charter* (and its guarantees of religious freedom) could remedy this unequal treatment, but that "a specific constitutional amendment would be required to accomplish that."

[356] The defendants do not yield to the truism that s. 93 rights create unequal treatment. Nor, assuredly is CTT interested in advocating for a constitutional amendment. The defendants must accept that "unequal" and therefore "unfair" treatment is inherent to separate school rights. The Supreme Court has said so. To shift to GSSD an allegation that its position lacks "fairness" is a sleight of hand that gains no traction.

[357] Separate schools were not created to give rights or choice to the majority. They were created so that a minority faith could separate their children from the majority, the same majority the defendants now say has always been their right to educate at public expense. The defendants advocate that rights originally intended to protect Catholic minorities have morphed into rights to protect certain elements of the non-Catholic majority by invoking the legally uncertain rubric of "parental autonomy" and "fairness."

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[60] Government Trial Brief Para 110

[358] The Government also states that GSSD argues "that minority separate school boards should receive less money per student than the majority public school boards receive."[61] Unless I missed a significant point in this litigation, I heard no argument from GSSD that per pupil grants to Catholic school divisions should be less than per pupil grants to public school divisions.

[359] In conclusion, I do not accept that s. 17(2) is a constitutional guarantee that Catholic schools are automatically entitled to equal funding to public schools with disregard to the faith-affiliation of students enrolled in Catholic schools.

PART SIX: DOES GOVERNMENT FUNDING VIOLATE S. 2(a) OF THE CHARTER?

I. ESSENTIAL ELEMENTS OF GSSD'S POSITION

[360] I have found that the admission and funding of non-Catholic students in Catholic schools is not a protected right under the *Saskatchewan Act* and is therefore not immune from *Charter* scrutiny. Accordingly, such funding is open to a potential challenge under the *Charter* as infringing s. 2(a) and s. 15.

[361] GSSD leans heavily on Justice Estey's statement in *Reference re Bill 30* that once the state passes discriminatory or preferential legislation outside the confines of the denominational education guarantees of the Constitution, a violation of the *Charter* is "axiomatic." He stated:

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[61] Government Trial Brief Para 108

> It is axiomatic (and many counsel before this Court conceded the point) that if the Charter has any application to Bill 30, this Bill would be found discriminatory and in violation of s. 2(a) and s. 15 of the Charter of Rights…

[362] GSSD says that Justice Estey's statement provides a full answer: except as protected by s. 17, state-funding of separate schools is contrary to the *Charter*.

[363] Since Justice Estey found that Bill 30 garnered protection under s. 93, he did not provide an analysis for his broad statement. GSSD explains his statement stating that funding of non-Catholic students infringes the *Charter* because it violates the state's duty of religious neutrality by endorsing a particular religion and excluding others. Funding of non-minority faith students confers benefits upon Catholics and Protestants not conferred upon any other faith. In this case, government funding of non-Catholic students attending Catholic schools has the effect of the government lending active state support to the dissemination and evangelization activities of the Catholic Church to non-Catholics, and the concomitant devaluing of other faiths. A tenet of Catholicism is evangelization, a mission applied to non-Catholic students in Catholic schools. GSSD points to the testimony of Brian Boechler, Director of Education of Christ the Teacher until 2010. He testified that teachers are trained to pass their faith to all students. Non-Catholic students are required to attend and participate in all religious instruction, prayer and religious celebrations. Mr. Boechler, during his examination for discovery (read into the trial), stated that students who no longer wish to participate in religious instruction may be asked to leave the school.

II. ESSENTIAL ELEMENTS OF DEFENDANTS' POSITION

[364] While GSSD understandably relies heavily upon Justice Estey's statement as concluding that *Charter* breach is axiomatic, to my considerable surprise neither defendant mentions or qualifies Justice Estey's statement in its extensive brief of law. The court is left without the assistance of an opposing argument. Nevertheless, both defendants hold firmly that funding non-Catholics students does not offend either s. 2(a) or s. 15 even if such funding falls beyond the protection of s. 93. Furthermore, each submits that any infringement is justified under s. 1 of the *Charter* as a reasonable limit on such *Charter* rights.

[365] CTT asserts that GSSD cannot prove that students are being compelled to observe or involuntarily express religious beliefs or practices. It argues that no individual has demonstrated an infringement of religious freedom. Nor has GSSD been denied any religious freedom since it is an institution which cannot hold a religious belief. CTT cites Professor Hogg's statement at para 37.1(b) in *Constitutional Law* that "the right to "freedom of conscience and religion" in s. 3(1) does not apply to a corporation, because a corporation cannot hold a religious belief or any other belief…"

[366] The Government states that even if GSSD can claim public interest standing, it is not released of its responsibility to prove infringement in the usual way, in conformity with the tests developed through *Charter* jurisprudence. The Government states that GSSD led no evidence from any individual who was unable to practice his or her religion as he or she wished. The Government's objection to GSSD's allegation of *Charter* infringement

overlaps with its objection respecting standing and forms a recurring theme: GSSD is not the person to have brought this action and is not entitled to seek the remedies it claims. The Government states that s. 2(a) provides freedom of religion to "everyone," but "given the nature of religious beliefs, only natural persons can have a right under s. 2(a)."[62]

[367] The defendants qualify the essence of religious freedom as seminally explained by Chief Justice Dickson in *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 [*Big M*]. The Government accepts that freedom of religion "requires the government to be neutral on the issue of religion, and not to give preference to one religion over another."[63] However, the Government relies upon *Mouvement laique québécois v Saguenay (City)*, 2015 SCC 16 [2015] 2 SCR 3 [*Mouvement laique québécois*] submitting that any governmental preference of one religion over another must be more than "trivial or insignificant." It states that infringement of state neutrality must typically be "coercive or intrusive in nature."[64] The Government asserts the impugned government action of funding non-Catholic students at Catholic schools is not coercive and no individual's religious beliefs or practice has been threatened.

III. ANALYSIS

A. Is Charter Breach Axiomatic?

[368] Some might suggest that Justice Estey's forceful statement, in *Reference re Bill 30*, is *obiter*. After all, he provides no detailed analysis of

[62] Government Trial Brief Para 273
[63] Government Trial Brief Para 286
[64] Government Trial Brief Para 291

either s. 2(a) or s. 15 and instead states a conclusion absent reference to case law.

[369] I am loath to qualify or dismiss Justice Estey's emphatic statement. It illustrates the starting point of his entire analysis, that "but for" the presence of a saving constitutional provision, proposed legislation granting funding to Catholic high schools, but no other religious schools, is contrary to the *Charter*. He states that Bill 30 would have violated the *Charter* unless shielded by separate school rights under s. 93 of the *Constitution Act, 1867*. Justice Estey's statement is not tentative; it is forceful. "Axiomatic" is not an equivocal word. "Axiomatic" is equivalent to "self-evident," "obvious," "clear," or "it goes without saying." Similarly, he used an equally charged phrase to describe that shy of constitutional protection, the impugned legislation "would be found discriminatory and in violation…of the *Charter*." He did not say, for example, "might be contrary to the *Charter*," "potentially is *Charter* offensive," or "arguably discriminatory." Nor was Justice Estey ambivalent about the specifics of *Charter* violation. He cited the violation of both freedom of religion and equality. He refers to both the *Constitution Act, 1867* and specifically to s. 2(a) and s. 15 of the *Charter*.

[370] I cannot imagine a Supreme Court Justice casually or carelessly offering such a vital statement respecting the constitutional rights of separate schools on such a significant and often-litigated issue. Nor does Justice Estey's statement stand alone. In *Adler*, Justice Iacobucci offered a similar statement, starting from the opposite point of the constitutional analysis – that an equality argument failed only because s. 93 saved it. At paras. 26 and 27 he said:

> 26. The appellants advance, in essence, two *Charter* arguments. The first is that s. 2(1)'s guarantee of freedom of religion requires the province of Ontario to provide public funding for independent religious schools. The second is that, by funding Roman Catholic separate and secular public schools at the same time as it denies funding to independent religious schools, the province is discriminating against the appellants on the basis of religion contrary to s. 15(1).
>
> 27. I propose to deal with these arguments in turn. As will be explained more fully below, it is my opinion that the s. 2(a) claim fails because any claim to public support for religious education must be grounded in s. 93(1) which is a "comprehensive code" of denominational school rights. With regard to the appellants' equality argument, this claim fails because the funding of Roman Catholic separate schools and public schools is within the contemplation of the terms of s. 93 and, therefore, immune from *Charter* scrutiny.

Put slightly differently, but as accurately, Justice Iacobucci might have said that the legislation resulted in a violation of religious freedom and in unequal treatment, saved only by the constitutional guarantees of s. 93.

[371] Yet another example of the axiomatic result of unequal treatment inherent to separate schools but saved by s. 93 is found in *Reference re Bill 30* where Justice Wilson approvingly cited the Ontario Court of Appeal's statement respecting Bill 30 as infringing the *Charter*, save for s. 93 (at p 1164):

> These educational rights, granted specifically to...Roman Catholics in Ontario, make it impossible to treat all Canadians equally. The country was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario...

Then, indicative of her approval of the above statement, and in her own words, at p 1197, Justice Wilson stated, "special treatment guaranteed by the constitution to denominational, separate or dissentient schools [is protected] even if it sits uncomfortably with the concept of equality embodied in the

Charter…" Admittedly, "sits uncomfortably" is not as emphatic as Justice Estey's statement that Bill 30 would be "in violation" of the *Charter*. Nevertheless, "sitting uncomfortably" connotes *Charter*-infringement, saved only by the constitutional guarantees under s. 93.

[372] These statements emanating from the Supreme Court and pointing to offence of s. 2(a) and s. 15, but for the shielding constitutional protection of s. 93, are consistent and powerful. These pronouncements are tantamount to saying that separate school legislation in the three provinces that provide unequal educational rights for Roman Catholics and Protestants are *prima facie* in violation of the *Charter*.

[373] As a simple truism, when a government body provides direct payment to any religious group – in this case Roman Catholics and Protestants – to the exclusion of all other religious groups, a *Charter* violation is axiomatic. Such preferential treatment cannot be *Charter* compliant, except of course, if another part of the constitution condones such payment and, in that instance, only to the limited extent of such condonation.

[374] The *Charter* itself implies that s. 93 separate school rights are offensive to freedoms guaranteed by the *Charter*. Hence the need for s. 29 of the *Charter* – that nothing in the *Charter* would abrogate any rights guaranteed by the Constitution of Canada respecting "denominational separate or dissentient schools." The necessary corollary of s. 29 is that those aspects of separate schools *not guaranteed* by the Constitution of Canada would be abrogation of *Charter* rights. The Ontario Court of Appeal, as quoted in *Reference Bill 30* at p. 1164, said as much: "Section 29 of the *Charter* makes

it clear that minority education rights … are not to be abrogated by ss. 2(a) or 15."

[375] Note, too, the statement offered by Brad A. Elbert & Mark C. Power in *Canadian Charter of Rights and Freedoms*, 4th ed, (Toronto: LexisNexis Butterworth, 2005) at 247, in the chapter entitled Freedom of Conscience and Religion, a statement the authors anchored in the *ratio decidendi* of *Reference re Bill 30*. They concluded that the Supreme Court endorsed a basic principle: that respecting funding of religious education, excepting s. 93 schools which "are in a special place to which others cannot aspire," contemporary Canadian society and the Court are committed to non-denominational education and state neutrality. The authors wrote:

> In fact, to justify the conclusion in *Reference re Bill 30*, it could be argued that one cannot look to history alone, but rather must also draw conclusions about contemporary society and the meaning of equality and religious freedom today. If section 93 schools are in a special place to which others cannot aspire, the Supreme Court of Canada must be concluding that contemporary society is generally committed to non-denominational education and state neutrality with respect to funding of religious education, except in the case of this historical anomaly. Thus, section 29 of the *Charter* helps define section 2(a) and to protect religious funding that would otherwise be in violation of the *Charter*'s commitment to religious freedom and equality.

[376] The authors point to the Supreme Court's characterization of s. 93 schools necessarily being in a "special place" to which other schools cannot aspire. I agree that if not for this special place, *i.e.* when rights are not constitutionally protected under s. 93, separate schools are subject to the *Charter* and specifically the state's duty of religious neutrality.

[377] I agree with GSSD's characterization of Justice Estey's statement in *Reference re Bill 30*: that "as soon as the Government and Catholic schools step outside the sheltered confines of s. 17 of the *Saskatchewan Act,* a violation of the *Charter* follows."[65]

B. Going Beyond "Axiomatic" Charter Breach: Obligation of State Neutrality

1. Freedom of Religion Embraces Obligation of Religious Neutrality

[378] Given the Supreme Court's statements that separate school funding for only certain faiths is "unfair" and "unequal," (save for protection under s. 93) I cannot conclude otherwise. Justice Estey and Justice Wilson, having found that the extension of funding to Catholic secondary schools was protected under s. 93, had no need to give specific reasons why state funding of certain, but not all, religious schools is contrary to *Charter* values. However, I will articulate why *Charter* rights have been violated because I must necessarily provide an analysis under s. 1 of the *Charter.*

[379] GSSD, perhaps anticipating that I would look for a further evidentiary and legal basis for a *Charter* breach, states that "the funding of non-Catholics in Catholic schools violates…the Government's duty of religious neutrality owed to the collective citizenry."[66]

[380] Two issues must be determined to resolve the parties' opposing views respecting the state's duty to remain religiously neutral. First, I must determine whether funding of non-Catholic students to attend Catholic schools

[65] GSSD Trial Brief Para 143
[66] GSSD Trial Brief Para 144

offends the Government's duty of religious neutrality. Second, and as contentiously argued by the defendants, I must determine whether a public school board, as an institution created by statute and not as an individual, can argue that the government has violated its duty to remain religiously neutral.

2. The Principle of Religious Neutrality

[381] The duty of state neutrality requires neutrality between religions. Chief Justice Dickson in *Big M*, at p 296, said as much over 30 years ago: "[t]he protection of one religion and the concomitant non-protection of others imports a disparate impact destructive of the religious freedom of society."

[382] This litigation provides another opportunity for the courts to define the evolving doctrine of state neutrality respecting religion. Professors Rosalie Jukier and José Woehrling have described the doctrine of religious neutrality as the Supreme Court's recognition of an "implicit consequence of freedom of religion."[67] The *Charter*, in embracing the ideals of freedom of religion and conscience, does not expressly address the state's obligation to remain religiously neutral. In *Mouvement laïque québécois*, Justice Gascon stated that the *Charter*, in guaranteeing freedom of religion and conscience, does not expressly impose religious neutrality from the state:

> [71] Neither the Quebec Charter nor the Canadian Charter expressly imposes a duty of religious neutrality on the state. This duty results from an evolving interpretation of freedom of conscience and religion.

[67] Rosalie Jukier and José Woehrling, *Religion and the Secular State in Canada* (Madrid:servicio publicaciones facultad derecho Universidad Complutense Madrid, 2015) at 171

The Canadian courts have read a developing principle into s. 2(a) that government action and legislation cannot favour one religion over another, except for the allowance under s. 93 of the *Constitution Act, 1867*.

[383] The evolving nature of the state's duty of neutrality respecting religion referenced by Justice Gascon will present challenges as Canada grows increasingly pluralistic. Professor Bruce Ryder, in "State Neutrality and Freedom of Conscience and Religion" (2005), 29 SCLR 169, has described Canada's movement from a Christian-centric state to a pluralistic state, forewarning that the course will be an "uneasy transition." He wrote at p. 169:

> While religion has always been a significant force in Canadian public life, the relationship between religious and state authority has changed profoundly. An explicit and implicit alliance between state norms and the teachings of the dominant Christian religions, long taken for granted, has been steadily challenged, especially in the last half century. The state is now conceived, in popular and constitutional discourses, as officially secular yet supportive of religious pluralism and multiculturalism. The path from a *de facto* Christian state to a secular pluralist state is not easily travelled…. We are still in the early stages of trying to work out what it means for the Canadian state to e [sic] both officially secular and supportive of religious pluralism. In this period of uneasy transition the respective roles of secular and religious norms in shaping public policy are matters of considerable political debate and scholarly attention.

[384] In *Mouvement laïque québécois*, Justice Gascon began his discussion of the evolving nature of the concept of religious neutrality by citing Justice LeBel's statement in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650 (which, although in dissent, was not contradicted by the majority). Noticeable is Justice LeBel's description of a new constitutional concept in Canadian law. It merits quotation:

[66] The duty of neutrality appeared at the end of a long evolutionary process that is part of the history of many countries that now share Western democratic traditions. Canada's history provides one example of this experience, which made it possible for the ties between church and state to be loosened, if not dissolved. There were, of course, periods when there was a close union of ecclesiastical and secular authorities in Canada. European settlers introduced to Canada a political theory according to which the social order was based on an intimate alliance of the state and a single church, which the state was expected to promote within its borders. Throughout the history of New France, the Catholic church enjoyed the status of sole state religion. After the Conquest and the Treaty of Paris, the Anglican church became the official state religion, although social realities prompted governments to give official recognition to the status and role of the Catholic church and various Protestant denominations. This sometimes official, sometimes tacit recognition, which reflected the make-up of and trends in the society of the period, often inspired legislative solutions and certain policy choices. Thus, at the time of Confederation in 1867, the concept of religious neutrality implied primarily respect for Christian denominations. One illustration of this can be seen in the constitutional rules relating to educational rights originally found, inter alia, in s. 93 of the *Constitution Act, 1867*.

[67] Since then, the appearance and growing influence of new philosophical, political and legal theories on the organization and bases of civil society have gradually led to a dissociation of the functions of church and state; Canada's demographic evolution has also had an impact on this process, as have the urbanization and industrialization of the country. Although it has not excluded religions and churches from the realm of public debate, this evolution has led us to consider the practice of religion and the choices it implies to relate more to individuals' private lives or to voluntary associations (M. H. Ogilvie, *Religious Institutions and the Law in Canada* (2nd ed. 2003), at pp. 27 and 56). These societal changes have tended to create a clear distinction between churches and public authorities, placing the state under a duty of neutrality. Our Court has recognized this aspect of freedom of religion in its decisions, although it has in so doing not disregarded the various sources of our country's historical heritage. The concept of neutrality allows churches and their members to play an important role in the public space where societal debates take place, while the state acts as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society.

[385] Justice Gascon then gave more concrete shape to the state's obligation to be religiously neutral, again describing the doctrine as an "evolution." He stated, at paras. 72, 74-76 of *Mouvement laïque québécois*:

> [72] …the evolution of Canadian society has given rise to a concept of neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard. This neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief…. It requires that the state abstain from taking any position and thus avoid adhering to a particular belief.
> …
>
> [74] By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. I note that a neutral public space does not mean the homogenization of private players in that space. Neutrality is required of institutions and the state, not individuals… On the contrary, a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity. The neutrality of the public space therefore helps preserve and promote the multicultural nature of Canadian society enshrined in s. 27 of the Canadian Charter. Section 27 requires that the state's duty of neutrality be interpreted not only in a manner consistent with the protective objectives of the Canadian Charter, but also with a view to promoting and enhancing diversity…
>
> [75] … The state may not act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice versa.
>
> [76] When all is said and done, the state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others. It is prohibited from adhering to one religion to the exclusion of all others. …Today, the state's duty of neutrality has become a necessary consequence of enshrining the freedom of conscience and religion in the Canadian Charter and the Quebec Charter. [Emphasis added.]

[386] In my view, these descriptions of the state's duty to remain religiously neutral, are a mirror of the previously quoted statements of Justice Estey and Justice Wilson. Separate schools for Roman Catholics and Protestant minorities are, by definition, contrary to this duty, saved only by s. 93 of the *Constitution Act, 1867*.

[387] Separate schools, when envisioned as early as the *Act of Union, 1840* and continued in 1867 and again in 1905, perhaps cannot be criticized for favouring one religion over another since the only two existing religious prevalent (indeed existent) at the time – Roman Catholic and Protestant – had equal rights. However, in today's Canada, no newly enacted legislation would be constitutionally permissible if it provided benefits to Roman Catholics and Protestants but no other religious groups. So, if separate schools are, by definition, contrary to the doctrine of neutrality, any constitutionally unprotected attribute of separate schools is highly suspect of offending the state's duty of religious neutrality.

[388] The Government, citing *Mouvement laique québécois*, states that funding of non-Catholic students at Catholic schools should be excused because it is "trivial or insignificant" whereas an infringement of state neutrality must typically be "coercive or intrusive in nature." I agree with the general principle but I disagree with the Government's application of the principle. The government's decision to fund non-minority faith students at separate schools proves an obvious – Justice Estey would have preferred "axiomatic" – public preference for the ideals of Catholicism and Protestantism shown to no other religion. This preference is neither trivial nor insignificant.

[389] To establish the extent of the state's duty of religious neutrality, the defendants refer to *S.L. v Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 SCR 235 [*S.L.*]. In that case, Justice Deschamps stated at para. 31 that "absolute neutrality does not exist" and "absolutes hardly have any place in the law." In *S.L.*, certain Catholic parents asked to have their children exempted from participating in an ethics and religious cultures course in Quebec schools, claiming they were denied the right to educate their children in their own religious beliefs. The court held that the state's duty of religious neutrality was not so broad as to support an order exempting students from a course of study that provided an even-handed exposure to world religions.

[390] Justice Deschamps' statement must be taken in context. I find a difference between the state sponsoring an ethics and religious course aimed to even-handedly expose students to various world religions and the state funding Catholic schools to educate non-Catholic students in the teachings of the Catholic faith. Catholic schools do not have an obligation to provide an even-handed approach to expose students to other religious beliefs, an assurance given by Chief Justice McLachlin in *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, at para 160, [2015] 1 SCR 613 where she stated "…requiring a religious school to present the viewpoints of other religions as equally legitimate and equally credible is incompatible with religious freedom." However, when the state, at public expense, funds and thereby promotes the interest of the Catholic faith by enabling it to disseminate its teachings to non-Catholic students in a manner denied to any other religious group, the state has infringed its duty of religious neutrality.

[391] I heard rather equivocal testimony about the character of Catholic education respecting non-Catholic students. On one hand, I heard that Catholicism infuses the entirety of a school's program – one of the reasons why Catholic school boards insist upon separate buildings for Catholic schools, and why teachers and school board trustee must be Catholic. On the other hand, I also heard that Catholic schools are accommodating of other faith backgrounds. I heard testimony that non-Catholic students are evangelized, not proselyted. However, I do not accept that Catholic theology is as benign toward acceptance of non-Catholic beliefs as some witnesses suggested.

[392] I accept the testimony of Bishop Donald Bolen. He explained the Church's movement toward ecumenism as being the search for Christian unity within Christian churches. Bishop Bolen and Mr. Leuer, counsel for GSSD, engaged in cross-examination with Mr. Leuer reading to Archbishop Bolen an excerpt from the papal encyclical of 1897 published after the Manitoba School Question:

> Similarly, it is necessary to avoid at all costs, as most dangerous, those schools in which all beliefs are welcomed and treated as equal, as if in what regards God and divine things, it makes no difference whether one believes rightly or wrongly and takes up with truth or error. You know well, Venerable Brethren, that every school of this kind has been condemned by the church, because nothing can be more harmful or better calculated to ruin the integrity of the faith and to turn aside the tender minds of the young from the way of truth.

[393] Then followed the respectful and candid exchange between Mr. Leuer and Bishop Bolen:

> Q. ….what room exists in today's Catholic schools for a statement like that?
>
> A. So the -- the central part of the quotation that…we've read is "Those schools in which all beliefs are welcomed and treated as equal, as if in what regards God and divine things, it makes no difference whether one believes rightly or wrongly and takes up with truth or error". That sounds very much like what Pope Benedict [2005-2013] described as relativism; right? So this would be from much earlier, from an earlier century, a fairly accurate description of – of relativism. But it doesn't matter so much what you believe, that every belief is equal. That if you put it in religious terms, all paths are a path to God of – of equal value. Everybody is entitled to their own opinion. You can't -- you can't rightly say that your convictions are true, and another's aren't true. So I think that that stands as -- as a statement. It would be phrased probably a little differently today. …But stands…as a statement that we would hold.
>
> Q. But what about the notion that this document, at least as I interpret it, is criticizing the notion that all beliefs are welcomed and treated as equal. Would that speak to today's Catholic school?
>
> A. A Catholic school does not treat all religions as equal. …It treats all religions with respect. But it's working, not from a Buddhist perspective, it's working from a Catholic…perspective. It's working with Jesus Christ as the heart of faith, as the description of what it is to be fully human. The values that are taught at a Catholic school may have some similarity, may have some common ground with values of other religious traditions, but they come out of the Christian tradition and out of Christian lived experience. … So there is a difference between openness, desire to encounter, desire to enter into dialogue with the other -- a religious tradition of the other. And to say that all are equal, and to distance one's self from the question of truth or error. Because a Catholic school should never distance itself from the question of truth or error. It should be about the pursuit of truth. [Emphasis added.]

[394] Bishop Bolen clarifies that Catholic Church doctrine is not equivocal about "truth or error." At the heart of Catholic schools is a theistic Catholic view, understandably and correctly fostered in Catholic schools, but offensive to the state's duty of neutrality when state-promoted beyond constitutional protection.

[395] Bishop Bolen's doctrinally-based response that a "Catholic school does not treat all religions as equal" is reiterated in "Catholic Schools: The Inclusion of Non-Catholic Students", where Mr. Donlevy cautions that non-Catholic parents must understand the Catholic mandate of Catholic schools and, just like Bishop Bolan, cites Pope Benedict XVI's writings respecting ecumenism and relativism, to conclude:

> It is further arguable that the school board has an obligation to provide non-Catholic parents and students with a clear understanding that the Catholic Church does not accept that all churches are the same in their spiritual effect and the affect of their faith.
>
> In this postmodern world it is not seen as politically correct or intellectually valid to claim any superiority to the truth. However, that is exactly the position taken by the Catholic Church in Dominus Iesus (Congregation, 2000a; Congregation, 2000b) and it should not be avoided by a lay Catholic Board of Education. The Church accepts and embraces ecumenism but it sees religious relativism as the greatest current threat to the Faith (Ratzinger, 1996). [Emphasis added.]

[396] Justice Gascon in *Mouvement laique québécois* stated that government action in the form of Christian prayer in city council meetings cannot be "turned into…preferential space for people with theistic beliefs." Reciting a Christian prayer before council meetings is not a time-consuming or costly action when compared to the attendance and public funding of non-Catholic students in Catholic schools. If an adult having to hear a Christian prayer before the opening of a city council meeting is not considered a "trivial" or "insignificant" infringement of state neutrality, then, by comparison, nor can funding of non-Catholic children in Catholic schools.

[397] Even if Catholic education's predominant goal for non-Catholic students is evangelical or ecumenical, I find that allowing one faith group the

opportunity, at public expense and incommensurate with rights of other faiths, to model the virtues of its religion to non-members is an advantage that offends the state's duty of neutrality. In part, I base this view on testimony proffered by Dr. Aboguddah, the president of the Huda School. His testimony allowed me to draw two conclusions. First, he understood (and accepted within the framework of the constitution) that the funding of Catholic schools in Saskatchewan, although assured, is inherently discriminatory: the Huda School receives no capital funding and only 80 percent of the per pupil funding received by public and Catholic schools. However, moving beyond the constitutional rights of Catholic schools, and putting the Huda School on parallel grounds with Catholic schools (except for the latter's constitutionally guaranteed status to educate Catholic students) he asked why the Huda School cannot receive funding to educate non-Muslim students, just like Catholic schools receive funding to educate non-Catholic students. The Huda School does not discriminate against hiring non-Muslim teachers (unlike Catholic schools). The majority of its teaching staff is non-Muslim. Dr. Aboguddah testified that the Huda School would welcome non-Muslim students to its growing school of 430 students (in 2016) which would provide an opportunity to build bridges with the broader Canadian community to reduce the stereotyping and negative image affecting the Muslim community in light of recent world events.

[398] By comparison, Bishop Bolen accepted that the Catholic Church has benefitted from admission of non-Catholic students as providing an opportunity for parents and children to adopt a positive view of the Catholic Church. He testified that the Catholic Church also has not had the best public

image and admitted that among a "significant constituency of people" the Church in Canada faces a negative image, answering, "Yes…there are parts of our society who view the Church very negatively."

[399] In my view, if both Catholic and Muslim institutions are advantaged by having non-adherent students attend their schools, and the former receives government funding to heighten this advantage and the latter receives none, the principle of state neutrality toward religion is offended. As Justice Gascon stated, in *Mouvement laïque québécois*, "neutrality requires that the state neither favour nor hinder any particular belief..."

[400] I accept, as well, the evidence of Dr. Hexham, GSSD's expert witness who testified that a number of non-Catholic faith traditions, including Mormons, Muslims and Hindus, also consider evangelism or dissemination of faith to non-members as an important component of their faiths. Current government policy of funding only Catholic schools for the attendance of non-Catholic students preferentially favours the Catholic faith among many faiths that value evangelism.

[401] Government funding of non-Catholic students at Catholic schools creates state-sponsored advantage to Catholic parents. As CTT has agreed, Catholic schools' receipt of funding for non-Catholics students allows a Catholic school "to obtain more funds for its operation"[68] than would otherwise be possible. This ability to receive funds unrelated to the enrolment of Catholic students, an advantage that goes beyond rights protected by s. 93, means that state action gives the Catholic faith an advantage to leverage funds

[68] CTT Trial Brief Para 211

from non-Catholic students to ensure a better quality of Catholic education than Catholic schools would receive without access to such funding. While parents who enrol their children in other faith-based schools in Saskatchewan must accept the constitutional advantage of Catholic schools receiving 100 percent government funding to protect Catholic parents' right to educate their children in the tenets of their faith, they should not have to accept that, in addition to this benefit, the government provides a further "leveraging" advantage. In my view, this advantage, unprotected by s. 93, proves that the government is not acting neutrally between religions.

3. Can a Non-Individual Advance a Claim for Religious Freedom Under the Doctrine of Religious Neutrality?

[402] Having concluded that funding of non-Catholic students at Catholic schools violates the principle of state neutrality, I turn to the defendants' argument that a school division, like GSSD, cannot advance a freedom of religion or equality argument. Both look to the *Charter's* introduction of the ss. 2(a) and s. 15 rights, namely that the nouns "everyone" and "every individual" qualify the persons entitled to those rights. Given this apparent qualification, CTT states that a violation of *Charter* rights must be based on the "personal, or subjective experience of individuals,"[69] and only upon proof of the infringement of the "rights of a natural person."[70] The Government, too, advocates the same position. It argues that *Charter* rights "are deeply personal,"[71] and meant "to ensure equality in their creation and

[69] CTT Trial Brief Para 229
[70] CTT Trial Brief Para 234
[71] Government Trial Brief Para 274

application of laws to individuals."[72] [Emphasis original] The Government argues that proving an infringement of a *Charter* right must be "rooted in the personal experiences of individuals"[73] and grounded in "the centrality of the individual."[74]

[403] In my view, the defendants have mounted an argument that would apply if the impugned legislation was neutral on its face and an individual with a particular religious belief wished to prove that the legislation had a disparate and deleterious impact upon her. For example, if the basis of the claim was infringement of an individual's religious freedom, before gaining a remedy the individual would have to prove the honesty and sincerity of her belief to show that the otherwise neutral government action worked a disparate impact upon her. In this light, I agree with CTT's looking to *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551, [*Amselem*] as illustrative of this principle. However, what must be remembered in *Amselem* is that, unlike this case which involves the funding of Catholic schools, the impugned by-law in *Amselem* was neutral in its effect. In *Amselem*, Jewish purchasers of certain condominium units failed to thoroughly read the declaration of co-ownership which prohibited certain balcony structures – a clearly neutral provision enacted before Mr. Amselem purchased his unit. As a practicing Jew, Mr. Amselem erected a succah on his balcony fulfilling the biblically mandated obligation of dwelling in such small temporary huts during the annual nine-day Jewish religious festival of Succot. The Supreme Court found that Mr. Amselem was sincere and honest in his religious beliefs

[72] Government Trial Brief Para 275
[73] Government Trial Brief Para 277
[74] Government Trial Brief Para 278

and the impugned, albeit neutral, by-law had an impact that violated his freedom of religion.

[404] Unlike *Amselem*, this action presents an obvious *Charter* infringement since the impugned government action countenanced by provisions of *The Education Act, 1995* and the *Education Funding Regulations* is not neutral. Rather, on its face, the government provides funding precisely on the basis of religion – to Catholic schools for the education and attendance of non-Catholic students. Case law has distinguished the types of questions raised in cases like *Amselem* from the question raised in this litigation. In *Public School Boards' Assn. of Alberta v Alberta (Attorney General)*, 1998 ABCA 94, 158 DLR (4th) 267 [*Public School Board's Association*], the court acknowledged at para. 63 that certain legislation, on its face, can expressly or implicitly infringe *Charter* rights. It stated at para. 63:

> 63. This is not a case in which the legislation on its face conveys either an express or implicit *Charter* breach, and thus evidence of impairment is essential. Because no evidence has been introduced establish such effect, we also decline to deal with it.

[405] I agree with the Court of Appeal's implicit direction: one must first determine whether the impugned legislation "on its face conveys … *Charter* breach." In certain instances the state's breach of religious neutrality will be glaringly apparent; in others, subtle. For example, if legislation allowed Anglicans to claim a charitable exemption for tithing, but disallowed all other religions the same privilege, the court would hardly have to hear from a Mennonite, for example, that she held an honest and sincere belief that tithing was religiously significant before determining that the law, on its face, violated the state's duty of religious neutrality. Why would a court need to

hear evidence from a Mennonite to reach this conclusion when the legislation, on its face, so obviously is not religiously neutral? In such an instance, why could not a fair-minded Anglican seek court intervention to argue that such discriminatory legislation offends the state's obligation to remain religiously neutral? Indeed, in this action, I heard evidence (previously summarized) from Audrey Trembley and Bert Degooijer, both public school trustees and practicing Roman Catholics. They explained the adverse consequences their public school boards have experienced because of government funding of non-Catholic students in Catholic schools.

[406] The most formative decision respecting freedom of religion pre-dates much of the Supreme Court's express articulation of the doctrine of state neutrality. In *Big M*, Justice Dickson (as he then was) rejected the argument that a *Charter* challenge had to be launched by an individual who advanced the *Charter* right. Justice Dickson looked to the qualities of the law being challenged as being of foremost importance in determining whether s. 2(a) had been violated, not the qualities of the person who might have alleged the violation. He stated, at p 314:

> The argument that the respondent, by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights under s. 2(a) of the *Charter*, confuses the nature of this appeal. A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the Charter and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue. …

[407] I am aware that *Big M*, unlike this action, dealt with a corporation faced with a penal offence. But the principle in *Big M* is equally applicable to

this action. Just as one cannot be convicted under an unconstitutional statute, one cannot receive government funding under an unconstitutional statute. More precisely, if a corporation cannot be convicted and fined under an unconstitutional enactment anchored in the Christian notion of a holy day of rest, nor can a Catholic school division receive government funding under an unconstitutional enactment based solely on the religious affiliation of the recipient. I see no legal difference between the two situations.

[408] *Big M,* although decided more than 30 years ago, closely parallels this action. Although the phrase "religious state neutrality" is not found in *Big M*, the centrality of the principle is unmistakeable. Justice Dickson found that obligatory Sunday closings of a corporately owned business infringed religious freedoms without proof of the religious beliefs of Big M Drug Mart – it had none – but rather on the "nature of the law." He found that when the legislation required everyone to keep holy the Lord's Day of Christians, the state violated the *Charter*. He stated "The protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity." His statement is powerful when applied in the context of the favourable government treatment Catholic schools receive in Saskatchewan when they receive funding to educate non-Catholic students.

[409] Justice Dickson also anchored his analysis in light of the remedies available to Big M Drug Mart Ltd. upon proof of *Charter* infringement. While s. 24 of the *Charter* speaks to a wide range of "appropriate and just" remedies available to an individual who has proven an infringed *Charter* right, s. 52 of the *Constitution Act, 1982* provides a broader more emphatic remedy, a

remedy GSSD has specifically pleaded. Respectively, s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982* state:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. [Emphasis added.]
>
> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[410] The *Charter* is part of the "Constitution of Canada," and, as referenced in s. 52 of the *Constitution Act, 1982*, any law that infringes the *Charter* is of no force or effect. Government action that on its face infringes the state's duty of neutrality, as found in *Big M* and as I have found in this instance, is subject to the consequences of s. 52 and must be declared of no force and effect. In my view, Justice Dickson's statement at p 313 of *Big M* is as clear as it is applicable in this action:

> Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the Charter have been infringed. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.
>
> Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. …

[411] *Big M* establishes that if a law on its face is unconstitutional, recourse to s. 24 is unnecessary. And, if the supremacy of the Constitution dictates that no one can be convicted under an unconstitutional law, then,

equally so, no one can receive government funding under an unconstitutional law. Furthermore and in the context of this action, if no individual associated with Big M Drug Mart Ltd. had to prove his or her subjective religious beliefs were infringed, nor does an individual associated with GSSD have to prove that his or her religious beliefs were violated by the funding of non-Catholic students in Catholic schools.

[412] The principles stated in *Big M* are basic in a constitutional democracy. To allow a clearly unconstitutional law to stand would be tantamount to giving the government a free hand to violate norms of public law, awaiting a better, more appropriate person to bring the argument. Lord Diplock in *R v Inland Revenue Commissioners; Ex parte National Federation of Self-Employed and Small Businesses Ltd.*, [1982] AC 617 at 644 explained this principle:

> [I]t would, in my view, be a grave lacuna in our system of public law if a pressure group like the federation…were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. …

[413] Applied to this case, Lord Diplock's words are powerful. Put starkly, if the Government is unconstitutionally funding non-Catholic students to attend Catholic schools, the court must provide redress. If the court imposes stringent rules to the nature of the person seeking redress rather than examining the nature of the law, then public confidence in democratic institutions is endangered.

[414] In summary, GSSD has proved that the government's funding of Catholic schools respecting non-Catholic students is an infringement of ss. 2(a) of the *Charter*.

PART SEVEN: DOES GOVERNMENT FUNDING VIOLATE S. 15 OF THE CHARTER?

1. POSITION OF THE PARTIES

[415] Since I have found that funding Catholic schools respecting the attendance of non-Catholic students infringes the state's obligation to remain religiously neutral, whether the same government action also infringes s. 15 equality rights may yield an obvious answer. A favouring of the members of one religion must necessarily mean discrimination against the members of other religions. However, since the parties have asked for an adjudication of all issues, I will offer more specific findings respecting equality rights under s. 15. The question is this: does funding Catholic schools respecting non-Catholic students, government action I have found infringes the principle of state neutrality under s. 2(a), also constitute an infringement of equal benefit of the law without discrimination based on religion under s. 15(1)?

[416] Section 15(1) states:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[417] GSSD says the evidence establishes two separate violations of equality under and before the law. First, funding of non-Catholic students in Catholic schools is discriminatory because, at public expense, members of the

Catholic faith can evangelize and promote good will toward Catholicism but other faith groups do not have an equal benefit to similarly evangelize and promote good will toward their faith. Second, such funding discriminates between parents who seek a faith-based education for their children and find a commonality with Catholic education and those parents who equally wish a faith-based education but do not find a commonality with Catholic education.

[418] The Government, on the other hand, describes equality in discursive terms, stating that equality rights in this case should be about "raising the bar for protected minorities [presumably Catholic minorities] not lowering it for the benefit of the majority."[75] Again, as with its s. 2(a) analysis, the Government leans on its argument that an infringement of s. 15(1) can only be made out by showing "an infringement on behalf of an individual claimant." Relying upon *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 [*Withler*], the Government states that the centrality of the individual is pivotal. Inequality is made out only when a law perpetuates prejudice or disadvantage or negatively stereotypes individuals.[76]

[419] CTT's main objection to GSSD's claim of s. 15 infringement is essentially a restatement of its objections to GSSD having standing: GSSD is not an individual, and thus it has no religion. CTT states that GSSD, as a public school board, is treated equally to separate school boards since it receives funding for all students who attend its schools, including Catholic students. CTT asserts that even if GSSD can rely upon the testimony of individuals, none showed discrimination. It states that even the Huda School

[75] Government Trial Brief Para 320
[76] Government Trial Brief Para 219

receives some government funding for its students, including non-Muslims students if any were to attend: "Rather than being discriminated against..[the Huda School] was actually receiving public funding to further…religious education."[77]

II. ANALYSIS

A. A Preliminary Point: Section 15 Infringement Follows s. 2(a) Infringement

[420] In my view, in an instance where the state has violated its duty of religious neutrality under s. 2(a) of the *Charter* by conferring a benefit upon one religion (the funding of Catholic schools respecting the attendance of non-Catholic students, a benefit unprotected by s. 93) but not upon other religions, an axiomatic result follows: the state has discriminated against and has unequally treated adherents of other religions. I see no other possible conclusion. The state must remain neutral regarding religion, not only to guarantee freedom of religion under s. 2(a), but also to prevent discrimination based on religion under s. 15.

[421] The Supreme Court has offered several statements that reinforce the view that breach of state neutrality respecting religion is concomitant with discrimination based on religion. One infringement is inexorably linked to the other. In *S.L.* Justice Deschamps wrote at para. 17:

> …Canadian courts have held that state sponsorship of one religious tradition amounts to discrimination against others. [Emphasis added.]

[77] CTT Trial Brief Para 247.

[422] Three years later in *Mouvement laique québécois* Justice Gascon approvingly cited Justice Deschamps's statement and characterized as discrimination the reciting of a Christian prayer at council meetings given the state's favouring of one religion over other beliefs. At para. 64 he referred to discrimination arising from the state's disregard to its duty of neutrality:

> Sponsorship of one religious tradition by the state in breach of its duty of neutrality amounts to discrimination against all other such traditions. If the state favours one religion at the expense of others, it imports a disparate impact that is destructive of the religious freedom of the collectivity. In a case such as this, the practice of reciting the prayer and the By-law that regulates it result in the exclusion of Mr. Simoneau on the basis of a listed ground, namely religion. That exclusion impairs his right to full and equal exercise of his freedom of conscience and religion. The discrimination of which he complains relates directly to the determination of whether, on the one hand, the prayer is religious in nature and whether, on the other hand, the City is entitled to have it recited as it did. [Case authorities omitted.] [Emphasis added]

[423] I also find that Justice Estey's emphatic statement in *Reference re Bill 30* draws no distinction between the breach of s. 2(a) religious freedoms and s. 15 protection against religious discrimination when separate school rights exceed s. 93 guarantees. As quoted earlier, he wrote:

> It is axiomatic (and many counsel before this Court conceded the point) that if the Charter has any application to Bill 30, this Bill would be found discriminatory and in violation of s. 2(a) and s. 15 of the Charter of Rights… [Emphasis added.]

[424] In holding that a breach of state neutrality respecting religion under s. 2(a) of the *Charter* augurs for an accompanying breach of s. 15 equality rights, I am also guided by Justice Iacobucci's statement in *Adler*. At para. 32 he characterized s. 93 rights as "entrenched inequality." Accordingly,

if rights exceed s. 93 protection, this “entrenched equality” becomes exposed to the *Charter’s* guarantee of equality “before and under the law.”

[425] Similarly, Justice Wilson in *Reference re Bill 30* stated that the “special treatment” that separate schools receive “sits uncomfortably with the concept of equality embodied in the *Charter.*” When this “special treatment” is unprotected by s. 93 the equality provisions of the *Charter* come to the fore to limit unequal or discriminatory treatment under s. 15.

[426] Both Justice Iacobucci and Wilson describe separate school rights in terms of unequal treatment based on religion. If separate school rights are inherently discriminatory even when protected by s. 93, I must accept that conferring yet more rights to Catholic schools than was intended under s. 93 must amplify this unequal and discriminatory treatment.

B. A Recurring Theme – Must an Individual Show Discriminatory Impact?

[427] In what continues to be the Supreme Court’s leading case on s. 15 discrimination, *Law Society of British Columbia v Andrews*, [1989] 1 SCR 143 at 170 [*Andrews*], the court stated that s. 15(1) of the *Charter* provides four essential rights: 1) the right to equality before the law; 2) the right to equality under the law; 3) the right to equal protection of the law; and 4) the right to equal benefit of the law. These rights are granted "without discrimination."

[428] *Andrews* initiated a two-part test to determine whether equality rights have been infringed, a test which has been continued and refined in *Withler* and repeated in *Quebec (Attorney General) v A.*, 2013 SCC 5 at paras

325 and 327, [2013] 1 SCR 61 [*Quebec v A*]. The test requires two questions to be affirmatively answered:

1. Does the law create a distinction that is based on an enumerated or analogous ground?

2. Does the distinction create a discriminatory impact?

[429] The first question requires proof of an enumerated or analogous ground as a basis of a distinction. Distinction requires that the claimant has been treated differently than others – either denied a benefit granted to others or borne a burden not imposed upon others – due to a religion. In this instance, the government action of funding Catholic schools for the attendance of non-Catholic students, while no other religion receives such treatment, creates a distinction based on the enumerated ground of religion. The first question is answered affirmatively.

[430] The second question asks whether the distinction creates a discriminatory impact. Justice McIntyre described discrimination in *Andrews* at p. 174 as a distinction "which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society."

[431] At this point, in finding a discriminatory impact, I take a different view than either GSSD or the defendants. The defendants continue to argue their position that GSSD must show that an individual suffered a discriminatory impact. Just as the defendants insisted that only harmed

individuals have a right to standing and, further, that only individuals can establish s. 2(a) infringement, they continue to argue that proof of specific prejudice or stereotyping of an individual is necessary to prove discrimination and a s. 15(1) violation. I do not agree with this restrictive approach.

[432] Again, as I found in the s. 2(a) analysis, challenged legislation can be of two types. Less frequently, the impugned legislation violates the *Charter* on its face requiring the legislation to be struck down under s. 52 of the *Constitution Act, 1982*. Such was the case in *Big M*. As stated previously, the Alberta Court of Appeal in *Public School Board's Association* recognized this principle. It identified that some legislation on its face conveys a *Charter* breach and no evidence is required of anyone's impairment. On the other hand, some impugned legislation is neutral on its face (as previously discussed under the s. 2(a) analysis respecting the *Amselem* case) but may have an unexpected discriminatory impact upon certain individuals. In these instances, an individual must prove that his or her freedoms have been disparately impacted by the otherwise neutral legislation.

[433] In my view, this action involves legislation and government action that on its face is based on religion: Catholic schools receive government funding (which, of itself is unequal treatment as the Supreme Court has said, albeit protected), but more importantly, Catholic schools also receive government funding for non-Catholic students which I have found is not constitutionally protected. The government action, permitted by the impugned provisions of *The Education Act, 1995* and *The Education Funding Regulations*, draws distinctions based on religion. Catholic schools receive

complete funding for the attendance of non-Catholic students, but no other faith-based schools receive funding for non-adherent students.

[434] The impugned legislation in this case is not "neutral" legislation, as it was in *Withler*, a case referred to by all parties. In that case, the claimant widows had to show that the legislation had a disparate or discriminatory impact upon them. As the surviving spouses of federal employees, they received a suite of benefits upon their spouses' deaths. The claimants alleged they were discriminated against based on their deceased husbands' ages. The court found the law created a distinction, but did not find the distinction perpetuated prejudice or stereotyping. The age-based rules were effective to meet the claimants' needs and achieved important goals to ensure retiree benefits were meaningful. As a full suite of benefits meant to cover the competing interests of various age groups, the court found the distinction based on age was appropriate to address different needs.

[435] Because government funding of Catholic schools respecting non-Catholic students is grounded in government action that is unconstitutional on its face as ostensibly permitted by *The Education Act, 1995* and *The Education Funding Regulations*, I find that the nature of this legislation, not the nature of unequal treatment individuals might prove they have received, governs the result. This is what *Big M* stated. When the government funds Catholic schools respecting non-Catholic students, which I have found is an unconstitutionally protected benefit to the Catholic faith, but does not equally fund other faith-based schools to educate non-adherents, discrimination is evident on the face of the enabling legislation and regulations.

[436] GSSD has not argued that the discrimination is evident in the "nature of the law" (as Justice Dickson stated in *Big M*). Instead it seemingly has accepted the burden of proving that the funding distinction has created a discriminatory impact. I accept that GSSD makes a strong argument that certain individuals and groups have suffered a discriminatory impact.

[437] Similar to the violations of the government's duty of religious neutrality, GSSD looks to two violations of equality under s. 15. First, the legislation discriminates between Catholics and non-Catholics in relation to the funding of non-adherents in faith-based schools. Second, the legislation discriminates between those parents who, desiring a faith-based education, are comfortable with a Catholic education and those parents who desire a non-Catholic faith-based education (and both wanting full government funding).

[438] I have found that through its witnesses, GSSD has established a discriminatory impact. Sensibility tells me that since only Catholic schools receive full funding to admit non-adherents, Catholic schools are able to attract non-Catholic students while other faith-based schools that must charge tuition are less able to attract non-adherents. Associate schools like the Huda School receive only 80 percent of the provincial average per-student funding. If the Huda School wished to attract non-Muslim students (as Dr. Aboguddah said it would), it would not receive government funding for the attendance of non-adherent students as Catholic schools receive. The Huda school would have to charge its ordinary tuition of $2,500.00 for the first child and lesser amounts for more children, as well as $1,800.00 annual transportation fee.

[439] GSSD also refers to the testimony of Dr. Aboguddah and Ms. Chobanik. They testified that independent and associate schools wishing to admit non-adherents must absorb all costs of funding infrastructure and capital funding (just as they constitutionally must accept when educating their own students). I accept Dr. Aboguddah's testimony that with 430 students in the Huda School using all available space, and with 100 students on its waiting list for the past four years, it is financially unable to accommodate non-Muslim students. Discriminatory impact is obvious in my view. If the Huda School received complete government funding for non-Muslim students as Catholic schools receive for non-Catholic students, the Huda School and non-Muslim parents would enjoy significant benefits, similar benefits the defendants argue now accrue to Catholic schools and non-Catholic parents: schools can leverage a greater source of funds to educate their adherents and Saskatchewan parents would have, in the words of the defendants, greater "parental choice," "parental autonomy," "freedom of religion," and "fairness." These benefits should be equally available to all religious schools and all parents, or to none.

[440] I also accept Rabbi Parnes's testimony that certain advantages would accrue to the small Jewish school in Regina if it received complete government funding for non-Jewish students. Historically, approximately 22 students attend once-a-week classes. Rabbi Parnes testified that recently, six non-Jewish students have attended the religious classes offered in the synagogue. A ready comparison comes to mind. In Regina there exists a Jewish interest in creating a viable Jewish school that would welcome non-Jewish students; in Theodore there exists a Catholic interest in keeping open a

Catholic school that accepts non-Catholic students. Fully funded non-adherents are admittedly necessary in either instance to make either school viable. Discrimination is obvious: Catholics in Theodore receive a constitutionally protected advantage to educate their children in the tenets of Catholic faith only because non-Catholic students are fully funded; Jews in Regina cannot avail themselves of the same benefits.

[441] Again, since I find that the funding of Catholic schools for the attendance of non-Catholic students is discriminatory on its face, I will make rather cursory findings of further discriminatory impact. I accept, largely from the testimony of Dr. Aboguddah, that many religious faiths wish to advance societal acceptance and awareness of their faith traditions to the larger community. Allowing one faith – Catholics – the ability to inculcate Catholic values into a broader community at public expense but disallowing others, particularly smaller religious groups like Muslims and Hindus, implies a message that some faiths are more valued than others. Asking non-Catholic parents to accept the unequal treatment of the s. 93 guarantee is a constitutionally inescapable reality, but asking non-Catholic parents to accept yet further Catholic rights to educate non-adherents while they are denied those rights is further proof of a discriminatory impact.

[442] Finally, I find that given a group of non-Catholic parents who wish a faith-based education for their children (like Carla Madsen, Michelle DuRussell, Kevin Wiens, Dean Mike Sinclair and John Anderson – all Christians), a distinction is drawn between those parents who are comfortable in Catholic doctrine so they can receive a faith-based, government funded education for their children and those parents who are not comfortable with

Catholic doctrine and cannot avail themselves of this benefit. I see the impugned legislation as perpetuating an advantage to the interests of the first group of parents and effectively deeming the interests of the second group as less worthy of state support.

[443] Wishing to deal with each party's position, I make a final reference to the Government's position respecting s. 15 equality rights. In its trial brief the Government states:

> 320. The *Charter's* equality rights protection is about raising the bar for protected minorities, not lowering it for the majority. When a public service is available, but that availability is legitimately limited, the solution is not to restrict the availability of the service even more. It is to make the service as available as possible within the existing framework. That is the essence of Saskatchewan's approach to the admissions policies of separate schools.

[444] I again see an inversion of the issues when the Government states that equality rights should raise the bar to protect "minorities" [presumably Roman Catholics in this action] and should not lower the bar to benefit the "majority" [presumably public school divisions like GSSD]. This statement suggests that the interests of Roman Catholics, as a minority, require raising the bar of equality rights to further protect their interests. This position does not accord with the repeated statements of the Supreme Court. It has variously described existing separate school rights under s. 93 as creating a "privileged status on religious minorities" (*Adler*, at para 33); a status which may "sit uncomfortably with the concept of equality embodied in the Charter" (*Reference re Bill 30* at 1197); and which gives a "special status to particular classes of people" (*Adler*, at para 32). Given these authoritative statements, I cannot accept that GSSD's position lacks merit because it fails to raise the bar

even further to protect what the Supreme Court has repeatedly called "unequal" rights. The defendants fail to acknowledge that the bar is already unequal, that Catholic and Protestant minorities have long held rights that make equal treatment of Canadians impossible. The defendants are in an awkward position to convince the court that seeking to lessen certain rights (but only those that are not constitutionally protected), is advocating inequality. I see nothing in GSSD's position that seeks to lessen the denominational rights of Catholics to educate Catholic children. GSSD seeks only to keep this inequality in check by challenging the benefits Catholic schools hold under legislation it argues (and I have found) is unprotected by s. 93.

[445] In conclusion, I find that the impugned provisions of *The Education Act, 1995* and *The Education Funding Regulations* that enable funding to Catholic schools respecting the attendance of non-Catholic students infringes equality rights under s. 15(1).

PART EIGHT: DOES S. 1 OF THE CHARTER JUSTIFY CHARTER VIOLATION?

I. BURDEN OF PROOF AND OAKES TEST

[446] GSSD has proven that funding of non-Catholic students in Catholic schools is not protected by s. 93 of the *Constitution Act, 1867* and is contrary to ss. 2(a) and 15 of the *Charter*. Now the defendants must accept the burden of proving that the *Charter* infringements can be demonstrably justified in a free and democratic society under s. 1. Section 1 states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits

> prescribed by law as can be demonstrably justified in a free and democratic society.

[447] The standard of proof incumbent upon the defendants is the preponderance of probability, without any presumption of constitutionality. *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd.*, [1987] 1 SCR 110.

[448] All parties agree that Chief Justice Dickson's statements in *R v Oakes*, [1986] 1 SCR 103 [*Oakes*] lead the s. 1 analysis. Chief Justice McLachlin explained and applied the *Oakes* test in *Adler*. Applied to this case, the s. 1 inquiry can be posed as follows: Is providing funding to Catholic schools respecting non-Catholic students a reasonable limit on *Charter* rights and demonstrably justifiable in a free and democratic society? The onus is on CTT and the Government to establish that such funding is justified. To do so, the defendants must show that the funding has an objective of pressing and substantial concern in a free and democratic society and the objective is proportionate to and not outweighed by the effect of the infringing action. Proportionality requires proof that continued funding is rationally connected to the objective; that it impairs the right or freedom as little as possible; and that there is proportionality between the effects of the funding and the objective sought.

[449] Put in numerical sequence, the *Oakes* test requires a total of four inquiries, as summarized by Professor Hogg (*Hogg: Constitutional Law of Canada* at 38-8(b)):

1. Sufficiently important objective: The law must pursue an objective that is sufficiently important to justify limiting a *Charter* right.

2. Rational connection: The law must be rationally connected to the objective.

3. Least drastic means: The law must impair the right no more than is necessary to accomplish the objective.

4. Proportionate effect: The law must not have a disproportionately severe effect on the persons to whom it applies.

[450] The *Oakes* test has endured for three decades. Chief Justice Dickson set out a "stringent standard of justification" before the court will permit a justification for *Charter* infringement. The proponent of the infringing law must provide a strong demonstration that the continued exercise of the rights "would be inimical to the realization of collective goals of fundamental importance."[78] Accordingly, the Government and CTT must prove to the court that the continued funding of Catholic schools respecting the attendance of non-Catholic students, although it violates the state's duty of religious neutrality and provides unequal benefits on the basis of religion, remains a "reasonable limit" of these infringed freedoms that "can be demonstrably justified in a free and democratic society." Ordinarily, as Chief Justice Dickson stated, evidence would be required to demonstrate the limit and its reasonableness unless certain elements of the s. 1 analysis are obvious or self-evident.

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[78] *Oakes*, at p 136.

II. IS THERE A PRESSING OBJECTIVE TO FUND NON-CATHOLIC STUDENTS?

[451] Does the funding of non-Catholic students in Catholic schools have a "pressing and substantial" objective in a free and democratic society? Relying upon the evidence of Angela Chobanik and non-Catholic parent witnesses, CTT identifies two pressing and substantial objectives to justify the funding of Catholic schools respecting non-Catholic students. CTT states its first objective as follows:

> 258 …First, the aim is to provide each student in the Province of Saskatchewan an equitable opportunity to education regardless of where they live. The Province has a pressing interest in educating children in the Province for socioeconomic reasons.[79]

[452] I see nothing in the objective of equitable educational opportunity that is linked to funding non-Catholic students in Saskatchewan's Catholic schools. This objective – to provide opportunity for education regardless where students live – must be an objective of all Canadian provinces, including provinces without separate schools. These provinces seemingly meet this objective without separate schools. I fail to see that if a province has separate schools, funding non-minority students within those schools is necessary to provide students with an education "regardless of where they live." Nor do I find assistance is afforded CTT in its s. 1 justification by offering that the province has an interest in educating children for "socioeconomic reasons." This vague and general statement provides no justification for funding non-Catholic students in Catholic schools.

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[79] CTT Trial Brief Para 258

[453] CTT offers a second pressing and substantial objective for the Government's continued funding of non-Catholic students in Catholic schools: the importance of parental choice. CTT states:

> 258 … A second objective of the funding of education is to provide parents with a choice in terms of how they best feel their children should be educated. Parents are entitled to have their children receive a free education, regardless of religion. That choice represents a pressing objective as it is widely recognized that parents are generally in the best position to assess the educational needs of their children. The current system of education allows for that choice to those who send their children to separate schools and to provide funding for those who choose to opt out of the public or separate school to establish their own religious school.
>
> …
>
> 260. …the admission and funding of non-minority faith students at separate schools supports the objective of equitable opportunity for education across the Province. …[T]he funding of all students, regardless of religion helps reach and achieve the goal of ensuring a sufficient level of funding is present for all schools, regardless of creed or religion, to provide equal opportunity.
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> 261. As for the objective of parental choice, the admission and funding of nonminority faith students in separate schools gives a substantial number of parents a choice as to the education of their children. The funding support provided to associate schools and independent schools, i.e. funding regardless of the religion of students, again gives parents of all faiths and beliefs financial support for options for the education of their children. Albeit the current system does not fully fund all religious alternatives, it is a far preferable situation to the Plaintiffs attempt to segregate Catholic separate schools and preclude support outside of the public school system.

[454] CTT's asserted objective of providing parental choice is also problematic. In suggesting that a pressing objective for funding non-minority faith students is to give "a substantial number of parents a choice as to the education of their children," CTT acknowledges what I have already found violative of *Charter* rights: choice given to some parents based on religious beliefs, but not to others, is a breach of the state's duty of religious neutrality.

Government action that I have found to be *Charter*-infringing cannot become *Charter*-justifying.

[455] I also disagree with CTT's assertion that a "far preferable situation" lies if the Government's funding of non-minority students at least gives some choice to some parents rather than giving no choice to any parents. If such choice is based on a parent's unique religious beliefs, if such choice gives advantage to a particular faith group, and if such choice is publicly funded, then contrary to being a "pressing and substantive objective," the choice shows the state's disregard for religious neutrality. An objective that itself contradicts *Charter* values cannot justify *Charter* infringement.

[456] Now I turn to the s. 1 argument presented by the Government. I find nothing in its brief of law or argument that attempts to offer a pressing objective to justify the continued *Charter* infringement of funding non-minority faith students in separate schools. Although the Government summarizes the principles of law that apply in a s. 1 analysis, and includes in its brief of law a heading, "B. Application to the Evidence," it states no objectives of the continued funding and, therefore, no evidence in support of any objectives. It is as though the Government is satisfied that its case lay with opposing an allegation of *Charter* violation and, if a violation were found, that s. 1 could not justify the infringement.

III. PROPORTIONALITY

[457] Although the defendants have not met the first requirement of a s. 1 *Charter* justification and the question of proportionality does not arise, for the sake of completeness I will offer conclusions how I would have

determined proportionality if necessary. Proportionality requires proof that funding of non-Catholic students is rationally connected to the pressing and substantial objective of the infringing legislation, that such funding impairs the right to religious neutrality as little as possible and that the benefits of the impugned government action outweigh the harm suffered by those respecting whom freedoms are denied.

[458] CTT has described as the objective of funding non-Catholic students the necessity of "ensuring a sufficient level of funding is present for all schools, regardless of creed or religion, to provide equal opportunity."[80] I fail to see a rational connection between this alleged objective and the funding of non-Catholic students at Catholic schools. In my view, quite the contrary: the public system of education in Saskatchewan ensures that all students, regardless of creed or religion, are admitted and funded. Public schools are legislatively obligated to educate all students. On the other hand, I heard no evidence from any of the defendants' witnesses that Catholic schools are prepared to accept enrolment of all students to ensure educational opportunity "regardless of creed or religion." For example, if a student is a vocal advocate of rights contrary to Catholic doctrine such as abortion rights or same-sex marriage, will she be permitted to enrol in a Catholic school? These students, though, regardless of their personal beliefs, and whether Catholic or non-Catholic, must be accepted in public schools. Accordingly, I see no rational connection between CTT's asserted objective that the Government must ensure that there is "a sufficient level of funding…present for all schools,

[80] CTT Trial Brief Para 260

regardless of creed or religion" and the funding of non-Catholic students in Catholic schools.

[459] As part of the proportionality test, the Government must also demonstrate through evidence that its alleged objectives of funding non-Catholic students only minimally interferes with the state's obligation to remain religiously neutral. In my view, the best (and perhaps only) way that the government can minimally offend its duty to remain religiously neutral is to accept s. 93 of the *Constitution Act, 1867*, which the Supreme Court has said makes equal treatment of religions impossible, and not augment or complement these unbalanced religious rights with further empowering rights. I cannot see how the "special or unequal educational rights" (*Reference re Bill 30* at 1199) already given to Catholics do not become even more "special" and more "unequal" when additional rights are given to them to receive funding to educate non-Catholic students.

[460] A further element of the proportionality test requires that the benefits of the impugned government action must outweigh the harm suffered by the infringing law. I see such harm, a harm that drives this litigation, in the thwarting of public school boards' decisions to close rural schools which have experienced diminished enrolments. Testimony at trial and from read-ins from examination for discovery prove separate school rights have been used to circumvent public school closures, often and ironically, concurrently with the Government's voluntary, then mandatory, rationalization of the number of school boards in the province. Darlene Thompson, the Government's representative during discovery, explained that the Humboldt Rural School Division closed the Englefeld public school with plans to bus students to

Watson. The Protestant minority in the community established a Protestant "separate" school which, in turn, admitted a majority of non-Protestant students and received full funding.

[461] Similarly, Ms. Thompson also explained that Prairie Valley School Division closed the Wilcox public school because of minimal enrolment. Bert Degooijer, trustee of the Prairie Valley School Division when the public school was closed, explained the reasons for closure and the plan to transport the students to Milestone's public school where the Board believed it could provide superior educational programming at less cost. Students from Wilcox attended the Milestone school for one year. After the separate Catholic school division was operative in the following school year, all the children from Wilcox, including those who were attending the Milestone public school, enrolled in the Wilcox separate school. Today St. Augustine Roman Catholic School continues to operate under the Holy Family Roman Catholic Separate School Division with 55 students enrolled.

[462] Between the Englefeld and Wilcox experience, Theodore Roman Catholic School Division was formed in 2003 and eventually amalgamated with other Roman Catholic school divisions to form Christ the Teacher Roman Catholic School Division. I am satisfied that St. Theodore Roman Catholic School was formed, not because of a desire to have Catholic education in Theodore, but to keep open a school that the public school division legitimately had a right to close. These are the harms caused by continued government funding of non-minority faith students at separate schools.

[463] These examples illustrate to me that a constitutional provision originally meant to protect minority religious rights in education have been harnessed for a different purpose. I see the impugned government action not only unrelated to the defendants' alleged objective of equality in education and parental choice (objectives I have found neither pressing nor substantial), but I see the impugned legislation as creating a result that undermines the reasonable and statute-authorized decisions of school boards to close rural schools to fulfil their mandate of effective education and accountability to taxpayers. I accept that the planned closure of a rural school is invariably met with some local opposition. From the testimony of several trustees of rural public school boards, I accept as well that looming in these decisions is the threat that the local religious minority, be it Protestant or Catholic, will use the constitutional guarantee of a separate school to thwart a reasoned decision to close rural schools when enrolment numbers merit their closing. These results of the impugned government action have occasioned harm and are unrelated to the objectives CTT has attempted to assert.

[464] Finally, I also find that funding of non-minority faith students in separate schools does not minimally impair the duty of neutrality and is inimical to the growing reality that Saskatchewan, like the rest of Canada, is becoming a far more complicated mosaic of religious (and non-religious) traditions. A modern Saskatchewan community needs to address religious intolerance and discrimination, often arising and rooted, not only at home, but as diversely as international conflicts. In a free and democratic province, Saskatchewan needs to be sensitive to lingering notions of traditional Christian privileges.

[465] I endorse the statements offered by Chief Justice McLachlin at para 722 in *Adler* when describing applicable principles of proportionality under s. 1 she identified the need for "encouragement of a more tolerant harmonious multicultural society," stating the goal of a free and democratic country is "fostering multiracial and multicultural harmony." These goals might justify otherwise *Charter*-infringing legislation, not the defendants' assertion that legitimate goals include parental choice for some (but not all) and the unusual assertion that funding non-Catholic students ensures a "sufficient level of funding is present for all schools, regardless of creed or religion."

[466] I also find that the directive of s. 27 of the *Charter* has specific application in a case involving religious guarantees of religious neutrality, specifically in a s. 1 analysis. It states:

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

[467] The Supreme Court in *Big M* and in *Edwards Books and Art Ltd.* (*R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713) stated that religion forms an integral part of the multicultural heritage of Canada. Government action advancing these principles may survive a *Charter* challenge in a free and democratic society, but not government action further expanding constitutionally unprotected separate school rights, rights which Justice Iacobucci at para 641 in *Adler* has called "entrenched inequality."

IV. A POINT OF CLARIFICATION: TIME FRAME OF PRESSING OBJECTIVES

[468] Although I have concluded that the defendants have not demonstrated a justification under s. 1 for the *Charter* infringement, I will make certain findings of fact that might be significant to an appellate court. A well accepted principle of the s. 1 analysis is the need to find the pressing objective of the impugned law as it existed at the time the law was created. In the instance of this litigation, that date may be difficult to ascertain because the admission and consequential funding of non-minority students has been an evolution, not marked discretely as, for example, the enactment of an infringing statute.

[469] Larry Huber, with over 50 years of experience in Saskatchewan education, including several years as Director of Education for Regina Public School Division, has had a long association with the concerns of the Public Section respecting the government's funding of non-Catholic students in Catholic schools. He testified that the predecessor to the Public Section, the Urban Public Boards Caucus, an *ad hoc* group of urban public school boards, came together concerned about the change in practice of Catholic School Boards' admission policies. He testified that in the late 1980s, Catholic boards of education moved from a clear policy of admitting only Catholic students to admitting more non-Catholic students. Government funding followed these students. Mr. Huber testified this new admission policy "was something that happened over a period of time." He was uncertain if the Catholic boards' new admission policy "was an encouragement or an openness to accepting non-Catholic students."

[470] Mr. Huber's testimony that this trend had developed by the late 1980s is confirmed by the November 10, 1978 Confidential Report. At that time, Saskatoon Catholic School Division must have kept records of non-Catholic students attending its schools since Mr. Coumont was able to comment that, "In a five year period prior to the report, the percentage of non-Catholics in the elementary schools has increased from 3.41% to 10.02%." I accept that non-Catholic students had begun attending Catholic schools in significant numbers by the 1970s. Mr. Coumont also forewarned, "We do not want an open war for kids. At no time should we be actively trying to recruit non-Catholics. Our target population must be the Catholic community." Obviously, the beginnings of the mandate question were already in the making in the mid- 1970s.

[471] Mr. Huber testified that by 1997 the Regina Public School Division had become so concerned with the growing number of non-Catholic students attending Regina's Catholic Schools that it sought a legal opinion respecting the mandate issue. This opinion was shared with the Saskatoon Public School Division and, in turn, with the Minister of Education. At least from that time, 1997, the government has been aware that public school boards have been concerned with the liberal admission policies of Catholic school boards and the government's continued funding of non-Catholic students in Catholic schools.

[472] I state this history of the increasing numbers of non-Catholic students being admitted to Catholic schools to establish that any pressing and substantial objectives that either CTT or the Government advance under s. 1 must be anchored in the objectives of government action starting as early as

the 1970s, coming to the fore in the 1990s, and continuing to the present day. I heard no evidence from the defendants stemming from this time frame to establish a pressing and substantial objective in funding non-minority faith students in separate schools.

[473] The evidence suggests that what prompted government funding of non-Catholic students was not driven by any momentous government policy choice. Ms. Chobanik testified that the department does not track the number of non-Catholic students in Catholic schools. It simply funds separate schools on a per-pupil basis, just as it does for public schools, without inquiry as to the students being of the minority faith.

PART NINE: REMEDIES

[474] I have determined the issues in this action as follows:

1. GSSD has requisite standing to seek judicial review of the Government's action in funding non-minority faith students in separate schools in Saskatchewan.

2. St. Theodore Roman Catholic School is a separate school, properly constituted within the meaning of *The Education Act, 1995*.

3. The *Constitution Act, 1867* does not provide a constitutional right to separate schools in Saskatchewan to receive provincial government funding respecting non-minority faith students because funding respecting non-

minority faith students is not a denominational right of separate schools.

4. Section 17(2) of the *Saskatchewan Act,* which provides constitutional protection against discrimination in the distribution of moneys payable to any class of school, only protects separate schools to the extent they admit students of the minority faith.

5. Provincial government funding of non-minority faith students attending separate schools is a violation of the state's duty of religious neutrality under s. 2(a) of the *Charter*.

6. Provincial government funding of non-minority faith students attending separate schools is a violation of equality rights under s. 15(1) of the *Charter.*

7. The *Charter* violations, as found, are not reasonable limits as can be demonstrably justified in a free and democratic society.

[475] Having found that funding of non-minority faith students violates ss. 2(a) and 15(1) of the *Charter* and cannot be justified under s. 1, I declare, pursuant to s. 52 of the *Constitution Act, 1982*, that those provisions of *The Education Act, 1995* and *The Education Funding Regulations,* to the extent that the Government of Saskatchewan has provided

funding grants to separate schools respecting students not of the minority faith, are of no force and effect.

[476] Appreciating that the implementation of this declaration will cause significant repercussions in the province, this declaration is stayed until June 30, 2018.

[477] Respecting costs I accede to the recommendation made by GSSD and CTT that the matter of costs shall be reserved to be spoken to following 14 days' notice by any party to return this matter to me.

[478] As a final comment, I recognize the herculean efforts counsel for the Government of Saskatchewan, Christ the Teacher Roman Catholic School Division and Good Spirit School Division devoted to this trial. They stinted no effort and spared no zeal in advocating their clients' interests. I am appreciative of their assistance to the court.

D.H. LAYH

APPENDIX 1

The Education Act, 1975

Powers and duties of separate school divisions
53(1) On the establishment of a separate school division pursuant to this Act, that division and the board of education of the division shall possess and exercise the same rights and powers and be subject to the same liabilities and method of government as other school divisions continued or established pursuant to this Act.
(2) Where, the minority religious faith, whether Protestant or Roman Catholic, has established a separate school division, a property owner is to be assessed with respect to his or her property:

(a) in the case of a member of the minority religious faith, as a taxpayer of the separate school division;
(b) in any other case, as a taxpayer of the public school division.

…
Duties of the board of education
85(1) Subject to section 86, to any directive of the minister and to the duties of the conseil scolaire with respect to the division scolaire francophone and any fransaskois school in a francophone education area, a board of education shall:

(a) administer and manage the educational affairs of the school division in accordance with the intent of this Act and the regulations;
(b) exercise general supervision and control over the schools in the school division and make any bylaws with respect to school management that may be considered necessary for effective and efficient operation of the schools;
(c) subject to the other provisions of this Act, approve administrative procedures pertaining to the internal organization, management and supervision of the schools, but educational supervision authorized by the board of education is to be subject to the approval of the department;
(d) provide and maintain school accommodation, equipment and facilities considered necessary and adequate for the educational programs and instructional services approved by the board of education for each of its schools;
(e) appoint and employ under written contract qualified teachers for the schools of the school division, and any principals and other assistants as the board of education considers necessary;
(f) prescribe, subject to sections 156 to 162, the age and time at which pupils may be admitted to kindergarten and grade 1 in any school in the school division;
(g) determine what school any of the children of the school division shall attend;
(h) determine what classrooms and schools are to be maintained in operation in the school division;
(i) subject to section 120, determine and define the boundaries of school districts in the school division and make any changes to the boundaries that may be considered necessary;
(j) subject to the regulations, authorize and approve the courses of study that constitute the instructional program of each school in the school division;
(k) subject to the regulations, furnish transportation services to pupils and to children attending kindergarten or prekindergarten programs to and from school that may be considered by the board of education to be necessary to ensure access of pupils and children attending kindergarten or prekindergarten programs to, and regular attendance in, the schools of the school division;
(l) subject to section 169, provide programs of instruction to the pupils resident in the school division at the cost of the school division and at reasonable

convenience to the pupils;
(m) prescribe, subject to sections 156 to 162, procedures for the administration of the provisions of this Act with respect to regular school attendance by pupils;
(n) subject to the regulations, register and administer home-based education programs;
(o) suspend or expel pupils for cause, subject to sections 154 and 155;
(p) determine the location of, and make provision for, a head office of the board of education;
(q) employ any staff considered necessary for the efficient management and execution of the policies, programs and business of the board of education;
(r) keep a full and accurate record of the proceedings, transactions and financial affairs of the board of education;
(s) appoint an auditor for the board of education who is a member in good standing of an accounting profession recognized pursuant to *The Management Accountants Act*, *The Certified General Accountants Act, 1994* or *The Chartered Accountants Act, 1986* to audit the books and accounts of the board of education at least once in each fiscal year, but no person shall be appointed:

(i) who is then, or was during the preceding year, a member of the board of education;

(ii) who is then, or was during the preceding year, chief financial officer of the school division;

(iii) who has then, or had during the preceding year, an interest in a contract made by the board of education other than in a contract appointing that person as auditor; or

(iv) who is then, or was during the preceding year, employed by the board of education in any capacity except that of auditor;

(t) procure a corporate seal for the board of education;
(u) require that all funds in the control of the board are kept in a chartered bank or credit union, to be paid out in any manner that the board may determine;
(v) prepare or cause to be prepared any reports and returns concerning statistical data, budgetary information and reports respecting the operation of the board of education and its schools that may be required from time to time by the minister;
(w) prescribe procedures with respect to the design, maintenance and supervision of school accommodation for the purposes of maintaining satisfactory standards of comfort, safety and sanitation for the pupils and other users of the accommodation;
(x) define, regulate and control the uses, in addition to the regular school program, to which school buildings and other facilities of the school division may be put during both school and out-of-school hours;
(y) contract, in writing, with teachers and other personnel required for the administration of the services of the board, and terminate those contracts for cause in accordance with the provisions of this Act;
(z) participate in programs approved by the minister for the education and training of teachers;
(aa) subject to the regulations, furnish pupils with textbook, library book, reference book or other learning resource services at the cost of the school division;
(bb) insure and keep insured the school buildings and the equipment,

furnishings and property of the school division;

(cc) keep in force a policy of insurance for the purpose of indemnifying:

(i) the board of education and its employees with respect to any claim for damages to property or for personal injury or death arising from any program, activity or service authorized or provided by the board of education, or from any approved activity mentioned in section 232;

(ii) the board of education and teachers employed by the board of education with respect to any claim for damages arising from the performance of duties and functions of teachers pursuant to this Act that are required or approved by the board of education;

(iii) the school division with respect to any claim for damages arising out of arrangements of the board of education for the transportation of persons to and from school or to and from other places for the purpose of engaging in activities authorized by the board of education; and

(iv) in the board of education's discretion, parents and citizen volunteers;

(dd) subject to the other provisions of this Act and the regulations, establish and approve policies and procedures respecting the formation, membership, elections, responsibilities and operation of school community councils.

(2) **Repealed.** 1996, c.45, s.6.

…

Powers of board

87(1) Subject to the powers of the conseil scolaire with respect to the division scolaire francophone and minority language instruction programs, a board of education may:

(a) employ, or retain the services of, any ancillary personnel that may be considered necessary to administer the policies and programs of the board of education;

(b) enter into agreements for any purpose considered necessary and advantageous to the quality and efficiency of educational and related services with:

(i) other boards of education;

(ii) the conseil scolaire;

(iii) **Repealed.** 1998, c.21, s.37.

(iv) municipalities;

(v) specialized institutions;

(vi) universities;

(vii) departments of the Government of Saskatchewan;

(viii) governments of other provinces of Canada or an agency of any of those governments;

(ix) the Government of Canada or an agency of that Government;

(x) any Indian band;

(c) enter into agreements with other boards of education or with the conseil scolaire or with Indian bands for the purpose of providing, procuring or administering jointly any service of mutual benefit and convenience;

(d) enter into agreements with Indian bands with respect to the payment of compensation to the board of education for the loss of taxes, levies or grants in lieu of taxes resulting from lands within the school division being set apart as an Indian reserve;

(e) furnish educational supplies and food services at a nominal cost to pupils or, where it is considered advisable by the board of education, at the cost of

the school division;
(f) subject to the regulations, approve textbooks, library books, reference books and other learning resources;
(g) approve of and provide for membership in provincial and national educational associations by the board of education and officers of the board of education, and provide for attendance at meetings of those associations;
(h) authorize expenditures with respect to functions and activities that have been approved by the board of education with respect to a school community council;
(i) acquire by gift, devise or bequest real or personal property of any kind on behalf of the school division, for the purposes of the school division, subject to the terms, if any, of the gift, devise or bequest and, notwithstanding any other provision of this Act, shall dispose of any real or personal property acquired in accordance with those terms;
(j) invest any moneys of the board of education in any security or class of securities authorized for investment of moneys in the general revenue fund pursuant to *The Financial Administration Act, 1993*;
(k) dispose of any investment made pursuant to clause (j) in any manner, on any terms, and in any amount that the board of education considers expedient;
(l) subject to section 347 and to the regulations, dispose of or lease property of the school division and grant easement over any of the real property of the school division;
(m) become a member of a co-operative association or a credit union or hold additional shares of which the board of education becomes the owner by application of the dividends;
(n) provide for any meetings, seminars, workshops and conventions of members of the board of education, members of school community councils, electors and teachers that may be considered advisable for the purposes of educational planning and development in the school division;
(o) **Repealed.** 2006, c.18, s.12.
(p) grant leave of absence to teachers and other employees of the board of education;
(q) provide scholarships, bursaries or similar awards for the purposes of the attendance of teachers and pupils at post-secondary institutions;
(r) provide for the payment of a gratuity or an annual allowance to any employee of the board of education on retirement on account of age and may, in its discretion, adjust or revise the annual allowance of that employee in subsequent years;
(s) pay from funds of the school division the employer’s contribution to an approved pension plan to which the board of education and its employees, other than teachers, are parties under a contract for that purpose;
(t) in the case of a separate school division, prescribe the qualifications of teachers who are to provide religious instruction;
(u) pay, for membership in an association of trustees organized in the province, the appropriate sum set out in a schedule of fees adopted by the association at an annual convention or by the executive committee of the association pursuant to a direction of the association at an annual convention, and submitted to the minister and approved by the minister, but, where the minister does not approve a schedule of fees submitted to him or her, the last schedule of fees approved by the minister continues to apply;

(v) provide for the collection of a reasonable sum from pupils for:

(i) the purposes of recovery of inadvertent or accidental damage or loss of school property resulting from acts of the pupils that are not necessarily attributable to wilful neglect or disregard for school property;

(ii) the purposes of fees or dues with respect to student organizations and related activities approved by the school;

(w) with respect to any school that is not situated in a school district, close the school or discontinue one or more grades or years taught in the school;

(x) with respect to any school situated in a school district, in accordance with sections 87.1 to 87.7 but subject to section 87.8, close the school or discontinue one or more grades or years taught in the school;

(y) where it is considered advisable and expedient by the board of education to provide certain instructional services at schools or institutions outside the school division, enter into agreements with boards of education of other school divisions, conseils scolaires or the governing bodies of any agencies or institutions approved by the department to furnish the desired services;

(z) where provision is made by the board of education for the attendance of a pupil at a school outside the school division, provide for payment to the parent or guardian of that pupil any sum that the board of education may determine on account of, or in lieu of, the cost of transportation;

(aa) offer courses during a summer vacation and charge a fee to individuals who enrol in the courses;

(aa.1) co-operate in, participate in or facilitate the co-ordination, administration or provision of educational programs for children who are not yet eligible to be enrolled in kindergarten in a school in the school division pursuant to clause 85(1)(f);

(bb) by resolution, provide for or authorize any actions, procedures or policies that are ancillary to or necessary for the carrying out of any duties or the exercise of any powers imposed or conferred on it by this Act.

(2) **Repealed.** 2008, c.11, s.5.

(3) **Repealed.** 2008, c.11, s.5.

…

Operating grants to boards of education

310(1) Subject to subsection (2), the regulations and any directive of the minister, the minister shall pay to each board of education an operating grant for the period commencing on April 1 in one year and ending on March 31 of the following year.

(2) The minister may deduct from any annual operating grant payable to a board of education the amount of the fees for membership in an association recognized and approved for the purposes of clause 87(1)(u) unless:

(a) on or before December 1 in any year, the board of education requests the minister, in writing, not to make the deduction; and

(b) the minister approves the request mentioned in clause (a).

APPENDIX 2

The Education Funding Regulations

Application

3(1) These regulations apply to operating grants and capital grants payable for the period commencing on April 1, 2009 and ending on the date on which these regulations are repealed:

(a) to boards of education and the conseil scolaire pursuant to sections 310 to 315 of the Act; and

(b) to registered independent schools, including historical high schools, and to any other educational institution and organization pursuant to section 19 of *The Government Organization Act*.

(1.1) Pursuant to section 19 of *The Government Organization Act*, these regulations apply to operating grants payable to qualified independent schools for the period commencing on April 1, 2012 and ending on the date on which Part III.1 of these regulations is repealed.

(2) The minister shall distribute operating grants pursuant to these regulations on a monthly basis or at any other intervals that the minister may determine.

Operating grants

4(1) In this section:

(a) **"fiscal year"** means:

(i) in clause (2)(a), the fiscal year of the board of education or conseil scolaire, being the period commencing on September 1 in one year and ending on August 31 of the following year; and

(ii) except in clause (2)(a), the fiscal year of the Government of Saskatchewan, being the period commencing on April 1 in one year and ending on March 31 of the following year;

(b) **"separate school board"** means the board of education of a separate school division.

(2) In calculating the operating grants payable to a board of education or the conseil scolaire for any fiscal year, the minister may take into account:

(a) the final approved budget of the board of education or conseil scolaire, as the case may be, for the relevant fiscal year of the board of education or conseil scolaire;

(b) the minister's estimates of revenues available to the board of education or conseil scolaire, as the case may be, for the relevant fiscal year of the Government of Saskatchewan, including:

(i) education property taxes;

(ii) grants in lieu of taxes;

(iii) in the case of a board of education, the board of education's percentage of licence fees charged by the municipality respecting trailers and mobile homes located within the school division;

(iv) tuition revenue and other fees;

(v) federal grants;

(vi) interest on investments and assets; and

(vii) such other revenue as the minister may determine;

(c) the minister's estimates of expenses incurred by the board of education or conseil scolaire, as the case may be, for the relevant fiscal year of the Government of Saskatchewan, including:

(i) the effects of inflation on expenses outlined in the final approved

budget of the board of education or conseil scolaire for the government's previous fiscal year; and

(ii) teacher salary increases;

(d) financial information furnished by the board of education or conseil scolaire, as the case may be, in consultations with the minister or at the request of the minister; and

(e) such other matters as the minister determines may be relevant to the funding of educational programs for pupils, kindergarten children and children who are not yet eligible to be enrolled in kindergarten.

(3) Without restricting the generality of clause (2)(b), if a separate school board, pursuant to subsection 288(7) of the Act, determines mill rates for a particular taxation year that are higher than those determined by the Lieutenant Governor in Council for that taxation year, the minister, given the final approved budget of the separate school board, shall reduce the operating grant payable to the separate school board by the amount by which the tax revenue allocated to the separate school board based on the mill rates set by the separate school board for that taxation year exceeds the tax revenue that would otherwise have been allocated to the separate school board based on the mill rates set by the Lieutenant Governor in Council for that taxation year.

(4) Without restricting the generality of clause (2)(b), if a separate school board, pursuant to subsection 288(7) of the Act, determines mill rates for a particular taxation year that are lower than those determined by the Lieutenant Governor in Council for that taxation year, the funding requirements of the separate school board shall be deemed to have decreased and the minister shall refrain from increasing the operating grant payable to the separate school board.