

## Legally Speaking:

# Government funding of non-Catholics in Catholic schools held Unconstitutional by the Saskatchewan Court of Queen's Bench



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### I. Introduction

This recent decision of the Saskatchewan Court of Queen's Bench, *Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212*<sup>1</sup> interprets the age-old constitutional guarantees for publicly funded Catholic schools in Saskatchewan. The plaintiff, Good Spirit School Division No. 204 (GSSD), sought a declaration that certain provisions of Saskatchewan's *Education Act*, 1995<sup>2</sup> and The Education Funding Regulations offend ss. 2(a) and s. 15 of the *Canadian Charter of Rights and Freedoms* (the Charter).

Despite the numerous issues put forward by the parties, the essence of the decision turns on two very important issues:

1. 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?
2. If such funding is not constitutionally protected under s. 93 of the Constitution does it infringe ss. 2(a) and 15 of the Charter?

The trial judge recognized that the constitutional guarantee that operates in three Canadian provinces, namely Alberta, Saskatchewan and Ontario, 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, "... is an immutably cast constitutional right under s. 93 of the Constitution and is unquestioned in this action."<sup>3</sup> However, he held that the extension of that right to *funding of all students* is not constitutionally guaranteed, which exposed the claim to scrutiny under the *Charter*. Without the protection of the Constitution, he found that funding of non-Catholic students in Catholic schools automatically infringed both ss. 2(a) and 15 and could not be saved by s. 1.

### II. Brief facts

In 2003, Yorkdale School Division closed its community K-Grade 8 School in Theodore, Saskatchewan. Its 42 students would have to be bussed to the neighbouring school in Springside, 17 km away. Using the rights pursuant to *The Education Act*, 1995, a group of Roman Catholics successfully petitioned the Minister of Education to form the Theodore Roman Catholic School Division.

In 2005, Yorkdale School Division (now GSSD) commenced an action against what is now Christ the Teacher Roman Catholic School Division #212 ("CTT") and the Government of Saskatchewan. GSSD alleged, amongst other things, that per student grants paid to a Catholic school division for non-Catholic students is discriminatory against public schools under the Charter of Rights and Freedoms. GSSD argued that such funding goes beyond the denominational elements of Catholic education so that the funding of non-Catholics students is not an entrenched constitutional right and therefore, government action that funds non-Catholic students at Catholic schools is exposed to review under the Charter. The defendants took the position that funding of non-Catholic students at Catholic schools is a right protected by s. 93 of the Constitution and, therefore, immune under s. 29 of the Charter from any challenge.

### III. Trial judge's decision

#### 1. Catholic schools have no constitutional right under s. 93(1) to receive funding for non-Catholic students

At the heart of the trial judge's decision is the issue of whether the Constitution provides a denominational right to separate schools in Saskatchewan to receive provincial government funding to educate non-minority faith students. If the funding of non-Catholic students is constitutionally protected under s. 93, GSSD's action would have failed because it would have been immune from challenge pursuant to s. 29 of the *Charter*.

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Section 93(1).<sup>4</sup> 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. Section 93(3) permits a post-union extension of the denominational rights protected by s. 93(1). The trial judge held that legislation under ss. 93(1) and 93(3) can be Charter-immune; however, to gain this immunity the legislation must be equally subjected to the “denominational aspects test” - i.e., the purpose of the legislation must be tied to upholding the religious essence of the denominational school.<sup>5</sup> The defendants argued that funding of all students was a denominational right at the time of the union as opposed to after the union, and was therefore protected by section 93(1).

The trial judge held that s. 93(1) does not protect funding of non-minority faith students based on two reasons. First, in reviewing the historical evidence of the creation of the 1901 Ordinances, he found that it did not include a right or privilege for Catholic schools to admit and receive funding for non-Catholic students. Second, he held that funding was not a denominational right. He concluded as follows:

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.<sup>6</sup>

The trial judge rejected parental choice as part of the equation. Rather, he held that “[t]he 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.’”<sup>7</sup> In applying a purposive interpretation to the 1901 Ordinances, the trial judge held that Catholic separate schools have **no constitutional right to admit and receive funding for non-Catholic students**. The upshot is that non-Catholic students who attend a separate school will be required to pay the full freight in order to continue to attend

the school of their choosing, even though it is part of the dual public system.

## 2. Funding of non-minority faith students at Catholic schools is not a constitutional right under s. 17(2) of the Saskatchewan Act

The trial judge also refused to accept that funding of all students at a separate school is a denominational right on the basis that the equality in funding is guaranteed to the school pursuant to s. 17(2) of the *Saskatchewan Act*, and is not tied to the student's religious affiliation. Section 17(2) states as follows:

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. (emphasis added)



The defendants argued that s. 17(2) of the *Saskatchewan Act* (which is incorporated into the Constitution) provides a full answer to this action because it requires the government to fund both Catholic and public schools equally and without discrimination. In addition, the Government argued that s. 17(2) was intended to create a second publicly-funded school system to provide choice to parents.

The trial judge rejected both arguments. In his view, preserving separateness is the hallmark of separate school funding, and as such, “preserving separateness is the requisite consideration that must be applied before separate schools can claim equal funding under s. 17(2).”<sup>8</sup> The trial judge relied on the historical evidence that separate schools were created so that a minority faith could separate their children from the majority and concluded that the purpose was unrelated to parental autonomy and fairness. Accordingly, he concluded that s. 17(2) is not a constitutional guarantee in these circumstances, which then opens the door to a Charter analysis.

## 3. Government funding violates ss. 2(a) and 15 of the Charter

Having found that the admission and funding of non-Catholic students in Catholic schools is not a protected

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right under the *Saskatchewan Act*, the trial judge proceeded to determine whether funding of non-Catholic students is a breach of the Charter as infringing ss. 2(a) (freedom of religion) and 15 (equality). He concluded that funding of non-Catholic students infringes s. 2(a) of the Charter because it violates the state's duty of religious neutrality by endorsing a particular religion and excluding others, i.e., funding of non-minority faith students confers benefits upon Catholics and Protestants not conferred upon any other faith.<sup>9</sup> Given that the purpose for the constitutional protection was to give the minority Catholics a guarantee of a fully-funded separate education system that could withstand the test of time, it is not a surprise that it would be seen as a benefit conferred on one religious group over other denominations. However, as the defendants argued, this was the reason that s. 17 of the *Saskatchewan Act* should have been shielded from any Charter analysis. Accordingly, where there is a "breach 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 deemed unprotected by s. 93), but not upon other religions, the Court held that an axiomatic result follows: the state has discriminated against and has unequally treated adherents of other religions."<sup>10</sup>

Similarly, the trial judge found a breach of s. 15(1) on the basis that (i) 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; and (ii) that this distinction creates a discriminatory impact. For example, 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.<sup>11</sup> In other words, allowing one faith – Catholics – the ability to inculcate Catholic values into a broader community at public expense but disallowing others, particular smaller religious groups like Muslims and Hindus, implies a message that some faiths are more valued than others.<sup>12</sup>

#### 4. The Charter breaches cannot be saved under s. 1

In assessing whether the Charter breach can be saved by s. 1, the trial judge analyzed the question of whether providing funding to Catholic schools respecting non-Catholic students is a reasonable limit on Charter rights and demonstrably justifiable in a free and democratic society. The onus was on the defendants to show that the funding has an objective of pressing and substantial concern in a free and democratic society and that the objective is proportionate to--and not outweighed by--the effect of the infringing action. The trial judge concluded that the defendants did not meet their burden under s. 1. He found 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."<sup>13</sup>

#### IV. Implications for Catholic education in Alberta and Ontario

On April 28, 2017, CTT announced that it will be appealing the Decision. Among the grounds of appeal it listed errors that the trial judge made in respect of the application of s. 17(2), which CTT argues expressly prohibits any such discrimination, as well as other interpretation errors in respect of several long-standing principles related to the Constitution.

The Government of Saskatchewan, through its Premier, Brad Wall, has indicated that the government is "examining all legal and legislative options to reverse this," including invoking the notwithstanding clause contained in the Charter<sup>14</sup>. The notwithstanding clause is contained in s. 33 of the Charter and allows provincial legislatures to temporarily circumvent certain Charter-protected rights and freedoms in order to maintain current laws or pass new ones.

The Decision is not binding law in Alberta or Ontario. In response, Education Minister David Eggen has stated that it has no impact on the Alberta education system.<sup>15</sup> Nevertheless, it may have potential negative impact on future jurisprudence in Alberta given the similarity of the *Alberta Act* and the *Saskatchewan Act*. In addition, there could be significant implications for Catholic education in Alberta and Ontario, as many detractors will be looking for justification to curtail public funding. Further, if the decision is appealed to the Supreme Court of Canada, a final decision by that Court will impact the interpretation of the constitutional provisions affecting Catholic education in Alberta and Ontario.

For the complete list of footnotes and citations in this article, please visit the online version at the link below.

<https://www.dentons.com/en/insights/articles/2017/may/11/govt-funding-of-non-catholics-in-catholic-schools-held-unconstitutional>

