Funding Non-Minority Faith Adherents in Minority Faith Schools in Saskatchewan

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As Saskatchewan's community leaders fight against school closure, constitutional guarantees for minority faith adherents are being used to maintain their local schools. Originally intended to assure parents of minority faiths the right to educate their children according to their religious tenets, these constitutional guarantees are being used by communities to reopen a closed public school as a separate minority-religious school. These newly-formed separate schools have typically served all students in the affected areas, not simply students of the minority faith which established the separate school. This misuse of constitutional protections has caused concern for public school boards as it has resulted in the loss of students and property assessment. The issue has also highlighted another area of dispute between public and separate boards — the provincial funding of non-minority faith students who attend separate schools. This article addresses the issue of public funding for minority faith schools and builds the case that provincial funding should be provided only for those students who are of the minority faith that established the separate school. Failure to resolve this issue leaves the Saskatchewan government vulnerable to a constitutional challenge.

Alors que des leaders communautaires de la Saskatchewan s'insurgent contre la fermeture d'une école,on invoque des garanties constitutionnelles protégeant les membres de groupes confessionnels minoritaires pour plaider en faveur du maintien de leur école locale. Conçues à l'origine pour assurer aux membres de groupes confessionnels minoritaires le droit d'éduquer leurs enfants en fonction de leurs croyances religieuses, ces garanties constitutionnelles sont présentement invoquées par des communautés afin d'ouvrir une école de confession minoritaire séparée dans une ancienne école publique. Généralement, ces nouvelles écoles séparées desservent tous les étudiants de la régions et non pas uniquement les étudiants appartenant au groupe religieux ayant fondé l'école. L'usage impropre de ces protections constitutionnelles a été une source d'inquiétudes pour les commissions scolaires publiques dans la mesure où il a entraîné la perte d'étudiants et des impacts négatifs sur l'évaluation foncière. Cette question a aussi permis de mettre en lumière un autre

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contentieux opposant les commissions scolaires publiques et les commissions scolaires séparées, soit l'aide financière provinciale accordée aux étudiants fréquentant les écoles séparées mais qui n'appartiennent pas à un groupe religieux minoritaire. Cet article traite de la question du financement public des écoles de confession minoritaire et plaide que seuls les étudiants appartenant à la religion du groupe confessionnel minoritaire ayant fondé l'école séparée devraient avoir droit à l'aide financière gouvernementale. À défaut de régler cette question, le gouvernement de la Saskatchewan s'expose à une poursuite d'ordre constitutionnel.

1. INTRODUCTION

School closures have long been a fact of life in Saskatchewan. From the heyday of the one-room school house in the 1930s and 1940s, to the rural school division amalgamations in 2006, the number of schools in the province has decreased from almost 3,500 to fewer than 750.[1] Originally, this change could be explained by the improving road systems and the increased ability to travel greater distances in less time, which allowed several one-room schools to combine and form one larger school. However, since 1970, the primary factor behind school closures has been the depopulation of rural communities in Saskatchewan. For example, between 1991 and 2001 the total population of Saskatchewan dropped by approximately 10,000 people; however, the population in rural areas dropped by over 15,000 whereas the population in urban areas increased by almost 6,000.[2] During this same time span, 78 rural schools closed as the number of schools in rural Saskatchewan decreased from 526 to 448; the number of schools in urban areas changed by only one from 303 to 302.[3]

These school closures are often seen as a death blow to a community as it loses one of the amenities which would allow it to attract new families and to retain businesses. As community leaders fight against school closure, they are turning more frequently to the constitutional guarantees for minority faith adherents as a means of maintaining their local schools. Originally intended to constitutionally protect the right of parents of minority faiths to educate their children according to their religious tenets, these guarantees are apparently being used by communities to avoid

1 Saskatchewan Department of Education, *Annual Report, 1940*, and Saskatchewan Learning, *Provincial School Statistics, 2006.*

2 Statistics Canada, *Population urban and rural, by province and territory* (Saskatchewan), 2007. Retrieved December 11, 2007 from http://www40.statcan.ca/l01/cst01/demo62i.htm

3 Saskatchewan Learning, *Saskatchewan Education Indicators, 2004* at 51.

school closure by reopening their local public schools as separate minority-religious schools.

For example, in the spring of 2007, the Prairie Valley School Division closed eight schools, including those in the villages of Lang, Gray, and Wilcox.[4] The students attending these three schools became part of the Milestone School attendance area. A contingent of Roman Catholic ratepayers from the recently expanded attendance area subsequently petitioned the provincial government to establish a separate school for their school attendance area. If a majority of the Roman Catholic ratepayers in this district vote to establish a new separate school for their children, it will be the third time in the last ten years that constitutional provisions designed to protect the educational rights of minority faith adherents have been invoked to avoid the closure of a community's public school. These newly-formed separate schools have typically served all students in the affected villages, not simply the students of the minority faith that established the separate school.

These misuses of constitutional protections have caused concern for public school boards as the formation of the separate schools has resulted in the loss of students and of property assessment bases and, hence, taxes. The issue has also highlighted another matter of dispute between public and separate boards: the provincial funding of non-minority faith students who attend separate schools. Finally, provincial government officials have been forced to re-examine and, in some cases, rewrite the legislative clauses protecting this minority faith guarantee.

This article will address the issue of public funding for minority faith schools and build the case that provincial funding should be provided only for those students who are of the minority faith that established a specific separate school. This change in the funding mechanism would still allow those minority faith adherents who wish to establish a denominational separate school to do so; however, the apparent misuse of these rights would be curtailed as only students of the Protestant or Roman Catholic minority faith would be eligible for public funding.

As education is a provincial responsibility, each province has dealt differently with the expectations that have arisen from the great Confederation compromise, that is, section 93 of the *Constitution Act, 1867*.[5] Ontario, Alberta, and Saskatchewan have developed similar systems that

4 Prairie Valley School Division, "Prairie Valley board makes school review decisions", May 7, 2007. Retrieved December 15, 2007 from http://www.pvsd.ca/School%20Decisions%20release.pdf

5 *Constitution Act, 1867* 30; 31 Victoria, c. 3 (U.K.).

allow for the establishment of separate schools. In all three provinces, a minority faith group (either Roman Catholic or Protestant) can petition the government to establish a separate school. Questions regarding the constitutionality of the current funding model will be addressed in the following section through a brief outline of the historical events that led to the constitutional compromise and to the entrenching of these minority faith rights in the Saskatchewan education system. It will then be argued that public funding should be provided only for students who are of the minority faith that established the separate school.

2. THE SASKATCHEWAN CONTEXT

School closures and the depopulation of rural areas are not trends unique to the province of Saskatchewan; however, given the traditional agricultural focus of life in the province, the impact on communities across the province has been significant. As shown in table 1, over the last century the percentage of the population classified as "rural" has been cut in half.

Table 1: Population urban and rural, by province and territory (Saskatchewan)

	Numbers			Percentages	
Year	Total	Urban	Rural	Urban	Rural
1901	91,279	14,266	77,013	16%	84%
1911	492,432	131,395	361,037	27%	73%
1921	757,510	218,958	538,552	29%	71%
1931	921,785	290,905	630,880	32%	68%
1941	895,992	295,146	600,846	33%	67%
1951	831,728	252,470	579,258	30%	70%
1961	925,181	398,091	527,090	43%	57%
1971	926,240	490,630	435,615	53%	47%
1981	968,313	563,166	405,147	58%	42%
1991	988,928	623,397	365,531	63%	37%
2001	978,933	629,036	349,897	64%	36%

Note: The rural population for 1981 to 2001 refers to persons living outside centres with a population of 1,000 or more *and* outside areas with 400 persons per square kilometre. Before 1981, the definitions differed slightly but consistently referred to populations outside centres of 1,000 or more people.

(Source: Statistics Canada, Censuses of Population, 1851–2001.)

Several different factors have contributed to this population shift from rural to urban population centres. The decrease in average family size shown in table 2, as well as the trend towards larger family farms and an overall aging population, have combined to cause a dramatic drop in population—especially for schools in rural agricultural areas.

Table 2: Census families, average size

Year	All families	Husband-wife families	Lone-parent families
1971	3.7	3.8	3.1
1976	3.5	3.5	2.9
1981	3.3	3.3	2.7
1986	3.1	3.2	2.6
1991	3.1	3.1	2.6
1996	3.1	3.1	2.6
2001	3.0	3.1	2.5
2006	3.0	3.1	2.5

Source: Statistics Canada, Catalogue no. 91-213-X.

With fewer and smaller families living on farms, rural schools have taken a predictable and significant drop in enrolment. Table 3 shows the gradual loss of students in all areas within Saskatchewan; however, the greater impact on rural schools is apparent. Over the fourteen years in which the data was collected, enrolment in the rural schools decreased in enrolment by 24%, as compared to 4% for both urban and northern schools.

Table 3: Numbers of Students in Publicly Funded Provincial Schools, 1991-92 to 2006-07

Year	Rural	Urban	North	Total
1991-92[1]	85,263	105,227	5,446	195,936
1992-93[1]	84,247	106,618	5,370	196,235
1993-94[1]	82,935	107,523	5,493	195,951
1994-95[1]	81,540	108,129	5,613	195,282
1995-96[1]	80,420	108,782	5,401	194,603
1996-97[1]	79,372	109,092	5,458	193,922
1997-98[1]	78,139	108,979	5,532	192,650
1998-99[1]	76,795	108,553	5,548	190,896
1999-00[1]	75,069	108,014	5,536	188,619
2000-01[1]	72,407	106,490	5,597	184,494
2001-02[1]	70,160	105,501	5,442	181,103
2002-03[1]	68,077	103,890	5,408	177,375
2003-04[1]	66,153	102,845	5,265	174,263
2004-05[1]	64,768	101,049	5,235	171,052
2005-06[2]	—	—	—	167,132
2006-07[2]	—	—	—	163,311

Sources: 1 Saskatchewan Education Indicators (Kindergarten to Grade 12), 2004, p. 37; 2 Saskatchewan Learning, Provincial School Statistics 2005-06 and 2006-07

It is interesting to note that this decline in student enrolment has not been felt by the separate school systems in the province. In 1991-92, there were 33,928 students enrolled in the various separate school divisions located across the province; by 2004-05, this enrolment had increased to 36,739. In contrast, student enrolment in the various public school systems in Saskatchewan decreased from 162,008 in 1991-92 to 133,279 in 2004-05 (see Table 3).[6] This decrease of almost 27,000 students between 1997 and 2006 corresponded to approximately 50 school closures.

When the provincial government announced a system-wide restructuring of school divisions to take effect on January 1, 2006, it also declared "a moratorium on school closures during the transition period from September 1st, 2004 to December 31st, 2006, to ensure that the transition [did] not impact on school closures."[7] Upon the lifting of this moratorium

6 Above, note 3 at 37.

7 Government of Saskatchewan, *Province responds to Boughen Commission*, May 13, 2004. Retrieved Feb. 24, 2008 from http://www.gov.sk.ca/news?newsId=9d0c2930-22b5-4f9c-

in 2007, there were twenty-eight schools in the province that were affected by school closure or grade discontinuance motions. As the rural depopulation trend shows no sign of abating, neither does the threat of school closure in rural communities. It seems reasonable to assume, therefore, that more communities may be tempted to use the constitutional guarantees afforded to minority faith adherents to establish what might be referred to as "separate schools of convenience."

3. SEPARATE SCHOOLS OF CONVENIENCE

One of the reasons that the issue of public funding for separate schools has arisen is the recent trend of establishing minority faith schools in communities where the public school board moved to close the public school. Historically, there have been two primary reasons for establishing a separate school. The first is the continuing view of the Roman Catholic Church that "it is the primary and essential function of a school to teach revealed truth of a definite and indisputable character in order to ensure the eternal salvation of the child."[8] There is also the desire to form a dissentient school because of the potential for the majority to proselytize members of the minority faith or discriminate against them. This concern about bias in the education system could be felt by either a Roman Catholic or a Protestant minority, as suggested by Langley, who claimed that Protestants were "emphatic that the Roman Catholic majority in their district had elected a school board which engaged members of a religious order to teach in the Public School and the Protestant minority did not want to have their children taught by a member of a religious order."[9]

Both of these situations — the desire to educate children according to the tenets of a particular faith, and the concern about bias against those of the minority religion — are concerned with the fundamental denominational rights that led to the embedding of separate school rights within the Canadian constitution. However, if these constitutionally based minority faith guarantees are used to protect against public school board decisions that are not of a denominational nature, then they have been abused. In Saskatchewan, when communities have invoked these separate

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8 C. E. Phillips, *The Development of Education in Canada* (Toronto: W.J. Gage and Company Limited, 1957) at 305.

9 G. J. Langley, *Saskatchewan Separate School System: A Study of One Pattern of Adjustment to the Problem of Education in a Multi-religion Democratic Society*. Unpublished doctoral dissertation, Columbia University, New York at 126.

school rights to prevent a school closure, they have been misused to form a new hybrid educational institution, a minority faith school which educates the entirety of a population, the majority of whom may not be of the minority faith — a separate school of convenience.

The first of these separate schools of convenience was opened in 1998 in Englefeld, a community of about 250 people located approximately 140 kilometres east of Saskatoon. In April, 1997, the Humboldt Rural School Division passed a motion to close the public school in the predominantly Roman Catholic village of Englefeld. The school remained closed for the year and reopened as a Protestant separate school the following August.

Before using the constitutional guarantee for minority-faith adherents, the ratepayers in the community first voted overwhelmingly "in favour of turning the school tax portion of their property taxes over to the Tiger Lily division,"[10] an adjoining school division. This request was rejected by Department of Learning officials upon the recommendation of the Educational Boundaries Commission, who concluded "that the authority and autonomy of boards of education throughout the province would be seriously undermined if schools were allowed to leave divisions to avoid the consequences of school boards' decisions."[11] It was not until after the school's official closure in August of 1997 that the community decided to bring together "concerned residents to discuss all options, including establishing a private or separate school."[12]

The community members who worked towards the reopening of the school were quite clear that this was not a matter of religious beliefs. Rather, as illustrated by the attempt to join an adjacent public school division, the concern was about ensuring that a school remained open in their village. The issue was addressed in the Saskatchewan Legislature when June Draude, the Saskatchewan Party MLA for the Englefeld area, said,

> I'm sure that the Minister of Education knows the name of the town Englefeld quite well, because Englefeld is now the home of the first Protestant separate school division in Saskatchewan. This school division came about not because they've set out. . .to start their own school division; it came about because the

10 D. Zakreski, "Schools ask to leave Humboldt division," *Star-Phoenix,* 1997, April 23, at.

11 B. A. Adam, "Rural schools loses request to switch to new division," *Star-Phoenix,* 1997, June 24, at A3.

12 J. Warick, "Judge closes door on Englefeld school," *Star-Phoenix*, 1997, August 26, at A2.

> government, through the wisdom of cutbacks to education, forced the school board to decide that they had to close some schools.[13]

Five years later, a similar situation occurred when the York School Division passed a motion to close the public school in the village of Theodore. The closure motion was made on April 28, 2003; the Theodore Roman Catholic School opened in August, 2003. Cyndi McBride, a parent who was active in the formation of the Roman Catholic School District, described the situation as follows:

> The Theodore school board and the Save Our School committee may have lost the right to retain a school under the public school system, but the Catholic ratepayers took up the fight and won the right to provide the children of this district a faith-based education.[14]

Note the wording of her description; the community felt very strongly that the school would be for "the children of this district," not just the children of the minority faith. In June, 2003, Theodore School's enrolment was 49 students; when the Roman Catholic Separate School opened in September of that year, the actual enrolment was around 40.[15] This minority faith school, which was attended by the majority of the students in the community, clearly illustrated the "separate school of convenience" construct because "the formation of the new school had little to do with religious affiliation. . .about 75 per cent of the students [were] not Catholic."[16] Dwayne Reeve, the Director of Education for the York School Division argued, "We believe that these students have attended out of convenience, rather than out of religious preference; in our view, it is an abuse of the right to move to form a separate, Catholic school division."[17]

To ensure that other separate schools did not open immediately following a school closure in a community, the processes to be followed to establish a separate school for minority faith adherents (as outlined in the *Education Act, 1995*[18]*)* were amended in the fall of 2006. As highlighted by the Honourable Deb Higgins, the Minister of Learning, these changes included

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13 Legislative Assembly of Saskatchewan: Twenty-third legislature, *Saskatchewan Hansard*, October 22, 1998 at 2103.

14 C. McBride, "Struggle to start new school," *Leader Post*, 2003, July 26 at B8.

15 Enrolment figures are taken from the Statement of Claim between the York School Division No. 36 and the Theodore Roman Catholic School Division No. 138 and the Government of Saskatchewan.

16 A. Pulga, "Theodore saves school," *Leader* Post, 2003, September 24 at B1.

17 *Ibid.*

18 S.S. 1995, c. E-0.2.

> increasing the number of electors required to petition the minister from three to six to ensure increased participation; requiring petitions be submitted to the minister by November 1 for the school year prior to that in which the separate school division is to be established, and this will ensure that enough time for the establishment process to occur and for both the existing public board of education and the new separate board of education to plan and budget for the upcoming year; and increasing the public notice period from 8 to 30 days prior to submission of a petition to the minister to allow additional time for public notification.[19]

These amendments had the support of "all boards of education including the Catholic section and the public boards caucus."[20] Although the changes were ostensibly to clarify the process that must be followed to ensure that newly created separate schools have budgeting and staffing issues resolved prior to opening, Don Morgan, a Saskatchewan Party MLA, pointed out that

> questions often arise as to whether the school divisions were established to promote and protect and preserve a minority faith or whether they're being used for another purpose. And. . .there is concern being raised now whether this is something that's being used to prevent the closure of schools.[21]

These changes reflect the increasing apprehensions of the Saskatchewan School Boards Association (SSBA) regarding the potential impact when a separate school opens in response to a school closure. As mentioned by Lance Bean, the president of the SSBA, "if there is a need for minority faith education in a community. . .they have a process, a time, and it's for that reason and not another reason."[22]

These amendments to the *Education Act, 1995* were made during the final months of a provincial school closure moratorium. Following the lifting of the moratorium, motions to close or to discontinue grades were made for 28 schools in 6 different school divisions. Because these modifications to the *Education Act* were in place, affected schools now had to wait a year before they could follow the lead of Englefeld and Theodore, namely, re-opening a closed public school as a separate minority-religious school. In one of the affected communities, the village of Smeaton, "community members banded together to create an independent school"[23] rather than wait the year required in the legislation. As mentioned above,

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19 Legislative Assembly of Saskatchewan: Twenty-fifth Legislature, *Hansard Verbatim Report*, November 8, 2006 at 279.

20 Legislative Assembly of Saskatchewan: Twenty-fifth Legislature: Standing Committee on Human Resources, *Hansard Verbatim Report*, November 20, 2006 at 670.

21 Above note 19 at 280.

22 Above note 20 at 682.

23 J. Smith, "Smeaton creates independent school," *Regina Leader Post*, 2007, Sept 29 at A10.

three schools that closed in June of 2007, Gray, Lang, and Wilcox, have submitted a joint petition from representatives of their Roman Catholic ratepayers to establish the St. Augustine Roman Catholic Separate School Division to be opened in the fall of 2008. The community members on the steering committee expect "all the children would attend school in Wilcox if a Catholic school is re-opened in town."[24] While other schools have contacted the Ministry of Education, "Wilcox is the only petition the minister has received to open a separate school division this year."[25]

4. NON-CATHOLICS ATTENDING CATHOLIC SEPARATE SCHOOLS

In communities where both public and separate school systems are established, parents of non-Catholic children are increasingly choosing to send their children to Catholic schools. This choice has, in part, been a response to the dilemma presented by the following question: "If Protestant schools have become public schools and if public schools can no longer teach religion, Protestant or other, in which schools can Protestants now find the religious education which was available to them from pre-Confederation days and which appeared to be constitutionally protected?"[26] Although parents are not legally able to transfer their property taxes based on school choice, the student funding provided by the Saskatchewan government follows these students from the public to the separate system. This funding concern has been a long-standing issue for public school systems.

Both Alberta and Saskatchewan entered Confederation with identical separate school legislation. After 1905, each jurisdiction passed different legislation regarding the educational rights of the minority faiths, resulting in some deviation between the two new provinces. One of the major differences surrounded the issue of government support for separate high schools. Johnson explained the situation as follows:

> Ontario had limited the separate schools' privileges to the elementary grades, but in the Prairie Provinces many elementary schools were teaching a year or two of high school work. The Alberta interpretation of separate school jurisdiction was taken to extend right through the high school grades and separate high

24 V. Rhodes, "Wilcox parents push for Catholic school," *Regina Leader Post*, 2008, Jan. 22 at A3.

25 *Ibid.*

26 F. Peters, "The Changing Face of Denominational Education in Canada" (1995-96) 7 Educ. & L.J. 229 at 231.

> schools were given the regular provincial grants. Saskatchewan, on the other hand, introduced legislation (the *Secondary School Act* of 1907[27]) which specifically established the Ontario principle that the separate school privileges must end with the elementary grades.[28]

Saskatchewan's *Secondary School Act* of 1907 "took steps. . .to establish a system of four year collegiate institutes and high schools."[29] After this legislation was in place, "high school enrolment grew rapidly"[30] but Saskatchewan's legislation clearly "refused to grant state aid to Catholic secondary schools."[31] The *Secondary School Act* of 1907 and the 1964 change, which would finally allow for Catholic high schools, are described by Noonan:

> Because the *Secondary School Act* of 1907 permitted public high schools only, Catholic separate schools offered education only up to grade eight; Catholic high schools, where they existed, were privately funded as in Ontario after grade ten. . ..In 1964 as a result of an extensive lobbying campaign by the Catholic bishops of the province and Catholic organizations such as the Knights of Columbus, the legislation was changed to allow tax support for Catholic high schools. This has been important to the continued existence of separate schools insofar as most students since the 1970s have continued through high school. These amendments to the *Secondary Education Act* were an important factor in the preservation of separate schools in the province.[32]

Accompanying the introduction of separate high schools was the simultaneous introduction of school choice for high school students. The *Education Act, 1978*, contains the following clause describing students' and parents' rights in terms of access to high schools:

> pursuant to the amendments made to *The Secondary Education Act* by chapter 18 of the *Statutes of Saskatchewan*, 1964, which provided for the establishment of separate high school districts, parents or guardians who resided in cities in which both a separate high school district and a public high school district existed had the right to enrol their children in either the public high school system or the separate high school system.[33]

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27 *The Secondary Education Act*, 1907, S.S. c. 25.

28 F. H. Johnson, *A Brief History of Canadian Education* (Toronto: McGraw-Hill, 1968) at 100.

29 *Ibid.* at 99.

30 Above, note 8 at 229.

31 M. R. Lupul, "Education Crises in the New Dominion to 1917." In J. D. Wilson, R. M. Stamp, and L.-P. Audet (Eds.), *Canadian Education – A History* (266–289) (Scarborough, ON: Prentice-Hall, 1970) at 287.

32 B. W. Noonan, "Saskatchewan Separate Schools." In B. W. Noonan, D. M. Hallman, and M. P. Scharf (Eds.), *A History of Education in Saskatchewan* (21–31) (Regina, SK: Canadian Plains Research Centre, 2006) at 29.

33 *Education Act* (repealed), R.S.S. 1978 (Supp.), c. E-0.1, s. 144.1 (1a).

This clause, first introduced in 1964, is still in force. The current version of the *Education Act*, 1995 allows parents in locations where both public and separate high schools exist to enrol their children "in Grade 9, 10, 11 or 12 in a school in either the public school division or the separate school division."[34] Whereas the 1995 *Education Act* mentions this concept of school choice as applying only to high school students, the 1979 version outlines the original intent of this clause and states that "at the elementary school level the religious faith of the parents determined which system, public or separate their children were entitled to attend."[35] In Alberta, this concept of school choice has raised some concern because some

> Catholic schools have been insisting. . .they have the right to limit enrolment to Catholics or at least to those willing to comply with the philosophical, theological and operational underpinnings of the school. Officials from Alberta Education indicate that Catholic schools may not impose these limitations."[36]

The option to attend either a public or a separate high school is illustrated in division policy manuals of the separate school systems throughout Saskatchewan; however, few, if any, policies restrict this choice to high school students other than through vague references to "age and academic requirements."[37] Some separate school boards do require certain religious requirements to be met before students of other faiths may attend their schools; others are more open. The expectation that students who are not of the minority faith which established the separate school need to take part in religious activities in the high school is consistent with the current legislation which provides as follows:

> Notwithstanding subsection 182(3), where a pupil attends a public high school or a separate high school as a result of the making of a declaration of intention pursuant to this section, the pupil shall abide by all policies of the board of education of the school division in which the high school is situated, including any policies relating to religious instruction, religious activities and other programs conducted by the high school.[38]

These sections of the *Education Act, 1995* translate into policy in various ways. For example, St. Paul's Roman Catholic Separate School Division policy regarding non-Catholic children states,

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34 Above, note 18 at s. 145(1).

35 Above, note 33 at s. 144.1 (1b).

36 Above, note 26 at 241.

37 St. Paul's Catholic Board of Education Policy Manual (n.d.). *School admission: Non-Catholic children whose parents or guardians reside in Saskatoon*. Retrieved June 1, 2007 from http://canaveral.scs.sk.ca/board_information/administrative_manual/IBD.pdf

38 Above, note 18 at s. 145(5).

> Non-Catholic children whose parents or guardians reside in Saskatoon will be permitted to register providing:
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> a) They meet the age and academic requirements for admission.
> b) Their parents or guardians complete the necessary documentation indicating that their children will participate in the formal religious instruction offered at the school.[39]

St. Paul's is one of the largest school systems in the province with 14,962 students.[40] Of these almost 15,000 students, it is estimated there are "approximately 5,000 non-Catholic students attending separate schools."[41] A more conservative estimate can be found using data from Statistics Canada which states that approximately 33 percent of the population of Saskatoon declare themselves to be Roman Catholic.[42] Using this figure, it would be expected that, of the 35,000 students enrolled in either public or separate schools in Saskatoon, there should be around 11,500 students in the Roman Catholic system. The actual enrolment of 14,962 students is almost 3,500 students higher than would be expected using the Statistics Canada information. These calculations of the numbers of non-Catholic students in Catholic schools are consistent with many schools in Ontario where

> anecdotal evidence suggests that the number of non-Catholic students in Canada's constitutionally protected Catholic separate schools varies widely from district to district and within each district from school to school but that, depending upon the school district, it may be as high as thirty-two percent.[43]

Other separate school divisions in Saskatchewan have policies similar to St. Paul's, which require students be "member[s] of. . .a recognized world religion which respects the teaching of the Catholic Church."[44] Policies such as this, which indicate that non-Catholic children must agree to "comply with and support, to the best of their ability, the philosophy

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39 Above, note 37.

40 Saskatchewan Learning, Education Finance and Legislative Services Branch, *Active List of Saskatchewan Schools: Provincial K-12 Enrolment*. Regina, SK: Ministry of Education, 2006. Retrieved December 8, 2006 from http://www.sasklearning.gov.sk.ca/branches/ed_finance/as_pdf/full_active_list_2006.pdf

41 W. Steen, "Role of catholic system needs clarification," *Star-Phoenix,* 2005, December 3 at A16.

42 Statistics Canada, *2001 Census Data*. Retrieved December 4, 2007 from http://www12.statcan.ca/english/profil01/CP01/Details/Page.cfm?Lang=E&Geo1=HR&Code1=4706&Geo2=PR&Code2=47&Data=Count&SearchText=Saskatoon&SearchType=Begins&SearchPR=01&B1=All&Custom

43 J. K. Donlevy, "Re-visiting Denominational Cause and Denominational Breach in Canada's Constitutionally Protected Catholic schools" (2005-06) 15 Educ. & L.J. 86 at 98.

44 Prince Albert Roman Catholic Separate School Division Policy Manual (n.d.). *Admission of students*. Retrieved June 1, 2007 from http://cec.pacsd6.sk.ca/info_policy.html, p. 1.

of the school division, the Religious Education program, the Family Life program and the religious celebrations of the Catholic school division"[45] have allowed non-Catholic parents to choose a Catholic school for their children's education. It is estimated, that for Saskatchewan's "urban centres, Catholic divisions collect 29.5% of the property taxes. . .but educate 34.2% of the children."[46]

In 2001, John Conway, a University of Regina sociology professor and a long-serving member of the Regina Public School Board, spoke out about the issue of Catholic schools' student "recruitment." The *Leader Post* reported the story in this way:

> [Conway] accused Catholic boards of overstepping their bounds and urged the Urban Public Boards Caucus (UPBC), for which he served as chair for 10 years, to "publicly and aggressively" challenge the constitutionality of the funding of Catholic schools and, if necessary, take it to the Supreme Court. "The Catholic section has embarked on an aggressive expansion of its role and mandate in publicly funded education at the expense of public education, most particularly, urban public education," he stated in his last UPBC chair report.[47]

Conway has been a frequent and outspoken critic of minority faith education rights with claims that separate school boards overstep the boundaries defined by the Constitution. In a letter to the *Star-Phoenix*, Conway is quoted as saying,

> Without its special constitutional status, the provision of public funding to Roman Catholic schools would be a violation of the *Charter of Rights and Freedoms*. The Charter prohibits discrimination on the basis of religion, so providing funding to one religious group would obviously discriminate against members of all other groups. These provisions of the Constitution allow an exception to that rule but only to the extent that separate schools provide educational services to the children of the religious faith that founded them. Roman Catholic school divisions are currently recruiting students who are members of other 'world religions.'[48]

The high number of non-Catholic students attending Catholic schools has caused significant concern for the Saskatoon Public School Division. In a letter to the Minister of Education regarding the public division's desire to build a new public high school in the north-east section of Saskatoon, Mr. D. Morgan, the Board Chair, indicated,

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45 *Ibid.* at 2.

46 J. Carriere, "Consider facts of catholic education," *Star-Phoenix*, 2005, October 21 at A16.

47 D. Bernhardt, "Conway attacks catholic schools," *Leader Post*, 2001, November 21 at A1.

48 Above, note 41.

> We estimate that at least 300 non-Catholic students attend St. Joseph [Catholic High School]. We are also concerned that our elementary school enrolments in the north-east communities suffer because some non-Catholic parents have decided to start their young people in Catholic elementary schools because they will eventually attend St. Joseph.[49]

In Ontario, *Bill 30*,[50] which legislated provincial funding for separate high schools, also introduced the idea of school choice for children of both Roman Catholic and non-Roman Catholic parents into the public and separate system debates. The current Ontario *Education Act* provides as follows:

> A person who is qualified to be a resident pupil of an English-language public board and to receive instruction in a secondary school grade is entitled to receive instruction provided in a secondary school operated by an English-language Roman Catholic board if the area of jurisdiction of the public board is in whole or in part the same as the area of jurisdiction of the Roman Catholic board.[51]

> A person who is qualified to be a resident pupil of an English-language Roman Catholic board and to receive instruction in a secondary school grade is entitled to receive instruction provided in a secondary school operated by an English-language public board if the area of jurisdiction of the Roman Catholic board is in whole or in part the same as the area of jurisdiction of the public board.[52]

Donlevy[53] has raised concerns about the constitutionality of school policies and provincial legislation that allow parents to make choices that require students to take part in religious exercises that are not of their faith. Although the Ontario *Education Act* does provide exemption from religious instruction for non-Catholic students who enrol in a Catholic separate school for reasons of practicality (distance or terrain) or of availability of program, a non-Catholic student who attends "a secondary school operated by a Roman Catholic board for a reason other than the one[s] mentioned. . .is considered to have enrolled in all of the school's programs and courses of study in religious education."[54] However, a 2006 amendment to the *Act* provides that no such students shall be required to participate in any program or course of study in religious education if

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49 G. Morgan, *Letter to the Honorable Jim Melenchuk, Minister of Education*, October 9, 2001. Retrieved December 18, 2007 from http://members.shaw.ca/necollegiate/correspondence/letter_to_melenchuk_oct9_01.pdf

50 *An Act to Amend the Education Act*, S.O. 1986, c. 21.

51 *Education Act*, R.S.O. 1990, c. E.2, s. 42(1).

52 *Ibid.* at s. 42(3).

53 J. K. Donlevy, "Catholic Schools: The Inclusion of Non-Catholic Students" (2002) 27 *Canadian Journal of Education* [Electronic version].

54 Above, note 51 at s. 42(12).

their parents (or the students themselves depending upon their age) apply in writing for such an exemption.[55]

Donlevy is also apprehensive, following the increased exclusivity communicated in Vatican II, about the ability of Catholic secondary schools to maintain "loyalty to the educational aims of the Catholic school"[56]:

> School boards translate the above text 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 added].[57]

It is interesting to note that the concern for the Catholic character of separate schools has disappeared from the 2006–2007 version of *Our Catholic Schools*, which is distributed by the Ontario Catholic School Trustees Association. Rather than being concerned with the high number of non-Catholic students attending Catholic schools, the focus has shifted to anxiety regarding the degree of public support for separate schools. In light of the 1999 United Nations ruling that found that "the funding of Catholic schools in Ontario is discriminatory and violates the International Covenant on Civil and Political Rights,"[58] the 2007 Ontario election saw

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55 Subsection 40(13) enacted by S.O. 2006, c. 28, s. 9.

56 *Sacred Congregation for Catholic education: The Catholic School* (n.d.), §67. Retrieved December 15, 2007 from http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_19770319_catholic-school_en.html

57 Above, note 53 at 102.

58 Ontario Catholic School Trustees Association, *Our Catholic Schools 2006-07: A Discussion on Ontario's Catholic Schools and Their Future* at 6. Retrieved December 1, 2007 from http://www.ocsta.on.ca/pdf/PDFdiscussion%20points.pdf , referring to the decision of the United Nations Human Rights Committee decision in *Waldman v. Canada* (2000), 7 IHRR 368 (Inter-Am. C.H.R.), (1999), United Nations Human Rights Com-

an increased focus on the issue of funding for separate schools. Several pundits place much of the blame for the Progressive Conservatives' failure to unseat the Liberal government on their pre-election campaign promise to "address the funding needs of Ontario's private faith-based schools through a possible tax-credit to parents and [to] continue to acknowledge the Constitutional rights of Ontario's Catholic community."[59]

5. SCHOOL FUNDING IN SASKATCHEWAN

The issue of providing provincial funding for non-minority faith students who attend minority faith schools requires an understanding of the public funding mechanisms within Saskatchewan. The money for school divisions to operate schools comes from two primary sources: the property assessment as determined by the local school division and the provincial government Foundation Operating Grant (FOG). The FOG formula is an attempt by the province to ensure an equitable distribution of the almost $600,000,000 annually allotted to education. The amount of money given to each school division is determined through a funding formula:

A	–	B	=	C
(recognized expenditures)		(recognized revenues)		(provincial grant)

As outlined in the K-12 Operating Grant Funding Manual (2007), "the most significant factor is the basic per pupil rate."[60] In the 2007–2008 school year, this per pupil rate was $6,426 for each student enrolled in Grades One through Twelve and $3,213 for each Kindergarten student.

While there are differences in this amount for home-based students and increased funding for transportation requirements and special needs factors, there are no distinctions made which would result in funding below the designated per pupil FOG rates for particular students. In light of the issues raised regarding the opening of minority faith schools in communities to combat school closure motions and the high numbers of non-minority faith adherents attending separate schools, a question has

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mittee. Online: http://www.pch.gc.ca/progs/pdp-hrp/docs/iccpr/waldman_e.cfm

59 *Ibid*. at 7.

60 Saskatchewan Learning, Education Finance and Legislative Services Branch, *K-12 Operating Grant Funding Manual*, 2007 at A3. Retrieved March 22, 2007 from http://www.sasklearning.gov.sk.ca/branches/ed_finance/funding/pdfs/funding_manual_07-08.pdf

arisen about the provincial government providing this per pupil grant for non-minority faith students who attend separate schools. In fact, there have been some promises made regarding provincial funding of non-Catholic students in separate schools. According to Steen, the government had plans that a

> constitutional reference would be initiated to clarify and confirm the constitutional, legal, and financial responsibilities in the following areas: defining a minority faith schools, and registering and funding of non-minority faith students in minority faith schools. Unfortunately the UPBC was told. . .that the cabinet reversed the decision.[61]

These plans to initiate a constitutional reference were put on hold when legal action arose following the opening of the Theodore Roman Catholic School. The York School Division, now part of the Good Spirit School Division, is suing both the provincial government and the Christ the Teacher Roman Catholic School Division, arguing that the funding of non-Catholic students in Catholic schools is not constitutionally guaranteed. The impact of the court's decision in this litigation will be significant. If it is decided that the province is constitutionally bound to fund only those students attending a separate school who are of the minority faith, schools such as Englefeld and Theodore will see their funding drop to a fraction of its current rate, possibly resulting in their closure. In St. Paul's Roman Catholic Separate School Division, with $6,426 of funding tied to each of the approximately 3,500 to 5,000 non-minority faith students, the decision could have an impact of between twenty and thirty million dollars in provincial government funding.

6. MINORITY FAITH EDUCATION IN CANADA (1763 – 1867)

The current state of minority faith education in Saskatchewan and the provincial funding provided to maintain these systems have evolved in the context of more than a century of legislation and disputes regarding such rights on a national level. In fact, "in any attempt to investigate adequately the legal phases of the separate school question, as pertaining to the Prairie Provinces, reference must be made to the federal background of the subject."[62] The roots of minority faith rights in Canada can be traced back 250 years to the Treaty of Paris. Signed in 1763 by Britain, France,

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61 Above, note 41.

62 G. M. Weir, *Evolution of the Separate School Law in the Prairie Provinces*. University of Saskatchewan, Saskatoon, Saskatchewan, 1917 at 12.

and Spain, this treaty established ownership of the colonies in the New World following a British victory in the Seven Years War. Although "it was usual for a conquering nation to completely assimilate a conquered people and to impose its language through the schools,"[63] the British victors did not expect French-speaking Canadians to give up their language. In addition, the British Crown granted the conquered minority the right to keep their own religion as outlined in Article IV of the treaty:

> His Britannick Majesty, on his side, agrees to grant the liberty of the Catholick religion to the inhabitants of Canada: he will, in consequence, give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish church, as far as the laws of Great Britain permit.[64]

After the 1837 rebellions in Upper and Lower Canada, Lord Durham was instructed to detail the causes of discontent in the colonies. In his 1839 report, Durham was ruthless regarding the state of education in both provinces. He found that "the British government [had], since its possession of this province, done, or even attempted, nothing for the promotion of general education."[65] Durham noted that attempts to anglicize Lower Canada had led to an "indifference of French-Canadians toward education" and further showed "the rift between English and French in education had already been defined; henceforth, the two cultures were each to be cultivated within their separate school systems."[66] Both the Anglican Church and the Roman Catholic Church were opposed to sharing their prerogatives as the sole educational authority for their people.

One of Durham's recommendations was to combine the two colonies and have one central government. The *Act of Union* of 1840 did this, placing both Canada East (Lower Canada) and Canada West (Upper Canada) under a Governor who was "determined to act immediately. . .not only to alleviate the deplorable state of education but also to devise a unified school jurisdiction for both provinces."[67] Unfortunately, this de-

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63 L.-P Audet, "Attempts to Develop a School System for Lower Canada." In J. D. Wilson, R. M. Stamp, and L.-P. Audet (Eds.), *Canadian Education – A History* (145–166) (Scarborough, ON: Prentice-Hall, 1970) at 145.

64 Treaty of Paris (1763). Retrieved June 1, 2007 from http://www.yale.edu/lawweb/avalon/paris763.htm

65 *Durham Report (*also known as *Report on the affairs of British North America)*, 1839 at 42. Retrieved September 27, 2007 from http://www.canadiana.org/ECO/ItemRecord/32374?id=5c7c1fcee021147c

66 Above, note 28 at 20.

67 J. D. Wilson, "Education in Upper Canada: Sixty Years of Change." In J. D. Wilson, R. M. Stamp, & L.-P. Audet (Eds.), *Canadian Education – A History* (190–213) (Scarborough, ON: Prentice-Hall, 1970) at 210.

sire was "rendered unworkable by the fact that each section of the union had evolved over several decades quite distinct education structures which were felt best to serve the needs of their respective populations."[68]

Section XI of the *Act of Union* allowed "any number of the Inhabitants of any Township or Parish professing a religious faith different from that of the majority [to] dissent from the regulations, arrangements, or proceedings of the Common School Commissioners. . .[and] establish and maintain one or more schools."[69] This section translated into the *School Act* of 1841,[70] which was intended to create one school system for the entire colony; however, the Act included "the historic 'dissentient clause' which was responsible for the dual school system of Quebec and for 'separate' schools in Ontario and subsequently in the Prairie Provinces."[71] The importance of Section XI of the *Act of Union* of 1840 cannot be understated — "if the statute uniting Ontario and Quebec in 1840–41 had not been enacted, there would have been no separate schools in Ontario."[72]

The basic framework for Canada's use of public monies for separate and denominational schools and, more generally, for the relationship between the state and schooling was established in legislation following the *Act of Union*. Fundamental to the creation of a system of free and universal education was a common notion that education and religion were inseparable and that the state had a responsibility to foster, wherever possible, a harmonious relationship between them. Religion in education was important, even essential, to both Protestants and Catholics. The Honourable William Morris, a Church of Scotland spokesperson, stated that "if the use, by Protestants, of the Holy Scriptures in their Schools, is so objectionable to our fellow subjects of that other faith, the children of both religious persuasions must be educated apart."[73]

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68 *Ibid.*

69 *Act of Union (also known as Provincial Statutes of Canada), 1841* at 108-109. Retrieved December 18, 2007 from http://www.canadiana.org.libproxy.uregina.ca:2048/ECO/PageView?id=354536496ad36684&display=9_00924_1+0109 and http://www.canadiana.org.libproxy.uregina.ca:2048/ECO/PageView/9_00924_1/0110?id=354536496ad36684

70 *Act for the Establishment and Maintenance of Common Schools in Upper Canada (Common Schools Act)*, 7 Vict., c. 29.

71 Above, note 28 at 33.

72 J. Manning, "The Separate Roman Catholic Schools of the Province of Ontario" (1952) 3 *History of Education Journal* 97 at 100.

73 As cited in J.G. Hodgins, *Documentary History of Education in Upper Canada: From the Passing of the Constitutional Act of 1791 to the Close of the Reverend Doctor Ryerson's Administration of the Education Department in 1876* (Toronto: Warwick Bros. & Rutter, Printers, 1952) at 19.

Canada West's first school superintendent, Egerton Ryerson, was a strong opponent of separate schools but was convinced they would "die out, not by force of legislative enactment, but under the influence of increasingly enlightened and enlarged views of Christian relations, rights and duties between different classes of the community."[74] Ryerson held fast to three beliefs:

> First, he believed the freedom of individual Roman Catholics to support the common schools must be ensured. To this end he continually opposed any suggestion that Catholics should be obliged to support separate schools. This illustrates his belief in the individual right of the parent to choose the type of education he wished his child to have within the limits set by the community. A second principle, the centralized control of curriculum and textbooks, resulted from his opposition to the development of two separate and distinct systems of education such as had occurred in Canada East. His third principle was equal public grants for all schools both common and separate in return for common instruction, which. . .would insure a modicum of uniformity in all schools.[75]

Many influential people disagreed with Ryerson's position. In letters to Ryerson, Count de Charbonnel, the Bishop of Toronto and a frequent agitator for Catholic Schools, wrote, "It is forbidden to our faithful to send their children to public schools, on pain of the refusal of the Sacraments." In his 1856 Lenten Pastoral, he reminded the faithful of their sacred obligation to secure a separate Catholic education for their children:

> Catholic electors in this country who do not use their electoral power in behalf of separate schools are guilty of mortal sin. Likewise parents who do not make the sacrifices necessary to secure such schools, or sending their children to mixed schools. Moreover, the confessor who would give absolution to such parents, electors or legislators as support mixed schools to the prejudice of separate schools would be guilty of mortal sin.[76]

Ryerson, however, resisted the calls for separate schools by "pointing to the limited demands for separate schools, a demand he was certain would fade into insignificance as the benefits derived from. . .common schools became apparent."[77] Even with changes to legislation that ended double taxation on separate school supporters and allowed for the sharing of the provincial grant, some Catholics were still unsatisfied. They wanted

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74 As cited in C. B. Sissons, *Church & State in Canadian Education: An Historical Study* (Toronto: The Ryerson Press, 1959) at 20.

75 J. D. Wilson, "The Ryerson Years in Canada West." In J. D. Wilson, R. M. Stamp, and L.-P. Audet (Eds.), *Canadian Education – A History* (214–240) (Scarborough, ON: Prentice-Hall, 1970) at 233.

76 As cited in N. Hans, *Comparative Education: A Study of Educational Factors and Traditions*, 2nd ed. (London: Routledge & Kegan Paul, 1951) at 121–122.

77 Above, note 75 at 234.

to "attain for the Catholic minority of Canada West the same educational advantages enjoyed by the Protestant minority in Canada East."[78] Ryerson pointed out "that Canada East possessed a dual confessional system whereas [Canada West] had a national system of which denominational separate schools were a part."[79]

Ryerson faced considerable pressure to implement a dual confessional system in Canada West and "throughout the struggle over separate schools. . . Ryerson had to give ground little by little, but in his prime objective — to maintain one public school system — he was successful."[80] It is estimated that in 1865, "almost 75% of the Roman Catholic children were attending a public school, most under teachers of the same faith."[81]

7. FUNDING OF SEPARATE SCHOOLS IN UPPER CANADA

In 1863, the *Scott Act*[82] gave separate schools the right to share in municipal grants. The opposition to the bill came from the Lower Canadian members who were reluctant to grant the concessions listed. This Act

> marked a further consolidation of the separate school position in Canada West. Separate schools could receive a share of municipal as well as provincial grants. Facilities for establishing separate schools were extended to rural areas. In return for these concessions, separate schools had to accept inspection by provincial inspectors, centralized control of curriculum and textbooks, and government control of all teacher training. This act was considered by many to constitute the final settlement of the separate school question. . ..It has proved the basis of Ontario's separate school system.[83]

School funding in Upper Canada was achieved through two primary sources. The first was the government of Upper Canada, which oversaw the distribution of money through the common school fund. As outlined in the *Scott Act*, the moneys in this fund were distributed to public and separate schools based on the number of months the school was open and

78 *Ibid*. at 237.
79 *Ibid.*
80 Above, note 28 at 41.
81 *Ibid.*
82 *Scott Act* (also known as *An Act to Restore to Roman Catholics in Upper Canada Certain Rights in Respect to Separate Schools*)*, 1863*. Retrieved September 27, 2007 from http://www.canadiana.org.libproxy.uregina.ca:2048/ECO/PageView?id=354536496ad36684&display=23099+0016
83 Above, note 75 at 237.

the average attendance during those months. Secondly, the duly elected school trustees were required to "raise all money, in the manner (i.e. by rate-bill, subscription, or school rate) authorized by the school meeting."[84] Roman Catholic ratepayers were subject only to those rates decided by separate school trustees with the following exception:

> Nothing, in the last three preceding sections contained, shall exempt any person from paying any rate for the support of Common Schools or Common School Libraries, or for the erection of a School House or School Houses, imposed before the establishment of such Separate School.[85]

Of particular interest in this 1863 legislation, the last school act in Ontario prior to Confederation, is the issue of funding for non-Roman Catholic students in separate schools. The government of Upper Canada had made the basis for calculating the share of the Common School Fund very clear in the *Common School Act* of 1847:

> Such separate School is entitled to a share of the Common School fund, not according to the number of children who attend such School, nor according to the number of children in the School Section of the religious faith of the applicants, but *according to the number of the children of that faith who attend such separate School.*[86]

This clause, which stated that separate schools would receive a portion of the common school fund only for children of the same faith who attended the school, was carried over into all subsequent school legislation up to and including the *Scott Act*, section XII of which states:

> The Trustees of Separate Schools may allow children from other School Sections, whose parents or lawful guardians are Roman Catholics, to be received into any Separate School under their management, at the request of such parents or guardians; and no children attending such School shall be included in the return, hereafter required to be made to the Chief Superintendent of Education, *unless they are Roman Catholics*.[87]

Because school funding was distributed based on these school returns, it was distributed to Roman Catholic separate schools only for Roman

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84 Above, note 82.

85 *Ibid.* at p. 10. Retrieved September 27, 2007 from http://www.canadiana.org.libproxy.uregina.ca:2048/ECO/PageView/23099/0011?id=354536496ad36684

86 *Common School Act* (also known as *Forms, Regulations, and Instructions for the better organization and government of Common Schools in Upper Canada), 1847*, p. 18 [italics added]. Retrieved September 27, 2007 from http://www.canadiana.org.libproxy.uregina.ca:2048/ECO/PageView?id=354536496ad36684&display=9_01222+0024

87 Above, note 82 at pp. 8-9 [italics added]. Retrieved September 27, 2007 from http://www.canadiana.org.libproxy.uregina.ca:2048/ECO/PageView?id=354536496ad36684&display=23099+0009 and http://www.canadiana.org.libproxy.uregina.ca:2048/ECO/PageView/23099/0010?id=354536496ad36684

Catholic students. It is worth noting that these issues of non-funding for students who were not of the appropriate minority faith were in accordance with Ryerson's beliefs regarding the importance of a strong public school system.

8. SECTION 93 OF THE *CONSTITUTION ACT, 1867*

Notwithstanding the opposition of certain Fathers of Confederation and of some politicians and church leaders in each of the provinces, it was decided that the settlements contained in the *Scott Act* of 1863 should be embodied in the new federal constitution. This decision was made after much heated debate in the four provinces that were becoming a nation. As a result "the union was consummated with the Quebec Protestants guaranteed less than they already possessed, the Ontario Catholics guaranteed less than they had desired, and the Maritime Catholics guaranteed as much in law as they could secure from the provincial Legislatures after the union."[88]

The various subsections of section 93 have had a great bearing on the status of separate schools in Canada. Subsection 93(1) has served to guarantee that the rights and privileges afforded in each province upon entering the Dominion of Canada remain in force afterwards. It has impacted the separate school legislation passed by each province and territory since Confederation. Phillips writes,

> Against this rock of the first proviso, arguments regarding separate schools have broken, and approved plans for school reorganization have been shattered. It is doubtful whether any other law or pact in later Canadian history has evoked controversy, bitterness, litigation, and frustration in comparable measure.[89]

Subsection 93(2) gave "the Protestant dissentient schools in Quebec the security and privileges enjoyed by Roman Catholics separate schools in Ontario"[90] and continued the tradition of recognizing minority faith rights as established in the Treaty of Paris, 1763. It was instrumental in ensuring support for Confederation from Quebec's Protestant minority.

The last two subsections permit appeals on provincial decisions, laws, or regulations regarding separate schools to a federal authority — the "governor-general in council, an authority likely to be sympathetic to-

88 Above, note 31 at 269.
89 Above, note 8 at 316.
90 *Ibid.*

wards English-speaking Protestants."[91] Arricale summarizes the impact of section 93 as follows:

> Section 93 of the *British North America Act* of 1867 is looked upon as the "Bill of Rights" for religious schools in Canada. This section stipulates that although the provinces have exclusive control of education, no future law of the provincial legislature shall affect prejudicially any right or privilege which denominational schools had in the individual province at the time the province took on its status as part of the Canadian Confederation. Since early education in many parts of Canada was in many cases denominational and since in a number of such places denominational schools enjoyed a share of taxation, the provision of the 1867 *Act of Union* was intended to safeguard existing rights from future encroachment by provincial legislatures.[92]

Subsequent to Confederation, the "Roman Catholic majority in Quebec fulfilled a pledge to pass legislation granting further concessions to the Protestant minority, whereas Ryerson and others in Ontario were indignant at pre-Confederation demands of the Ontario minority."[93] In Quebec, there were few disagreements or difficulties and the dual confessional system of denominational schools continued without controversy; in Ontario, there was still hope of having a single school system. The rest of the nation has also seen controversy and conflict arising from the guarantees given in section 93. In some respects, these conflicts were predictable as "many of the legislators who had a voice in the framing of the Canadian constitution recognized the potential danger inherent in section 93, but felt that to oppose it would jeopardize the chances of bringing about the union of the colonies."[94]

9. MINORITY FAITH EDUCATION IN SASKATCHEWAN

During the first decades of the nineteenth century, the region that included what would eventually become the provinces of Saskatchewan and Alberta was known as Rupert's Land and was owned by the Hudson's Bay Company. Shortly after Confederation in 1867, this vast area was ceded to the new Canadian government by the British Crown and for the

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91 *Ibid.*

92 F. C. Arricale, "Varieties of Church-state Relations in Canadian Education" (1963) 7 *Comparative Education Review* 36 at 36.

93 Above, note 8 at 317.

94 C. J. Langley, "Separate Schools in Canada" (1951) 2 *History of Education Journal* 48 at 51.

next thirty years was governed as a single territory under the "federal government and its agencies."[95]

Owned by the Hudson's Bay Company, the only schools in these territories were either Company schools or missionary schools; in either case the "clergy initially controlled the schools."[96] In his *Historical Overview of the Organization of Education in Saskatchewan*, Scharf wrote,

> By the early 1820s, the Company had begun to encourage missionaries to establish schools by offering grants of money and other material aid. Roman Catholic, Anglican, Methodist, and Presbyterian churches all eventually established missions and schools primarily for the Aboriginal population. These missions established their own policies and programs; they did not establish formal school districts nor did they have a common curriculum of instruction or system of supervision. Settlers wishing to establish schools also received Company assistance. By 1870, however, it had become evident that neither the churches nor the Company had the resources necessary to meet the educational needs of an expanding non-Aboriginal population.[97]

In 1875, the federal government passed *The North-West Territories Act*[98] and established a territorial government. Lupul estimates "the scant white population [was around] 2,500" in 1875,[99] and indicates that in 1881 the population of the Territories would best be described as "small [and] scattered (59,000, including 50,000 Indians)."[100]

(a) *The North-West Territories Act of 1875*

When Rupert's Land originally became a Canadian jurisdiction, "these territories were governed. . .by a council of twelve men presided over by the lieutenant-governor of Manitoba."[101] It was not until 1875 and the passage of the *North-West Territories Act* that the area "had a resident lieutenant-governor of [its] own and a council, consisting at first of only five appointed members."[102] Even with these appointments, and

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95 M. P. Scharf, "An Historical Overview of the Organization of Education in Saskatchewan." In B. W. Noonan, D. M. Hallman, and M. P. Scharf (Eds.), *A History of Education in Saskatchewan* (3–20) (Regina, SK: Canadian Plains Research Centre, 2006) at 4.

96 Above, note 31 at 279.

97 Above, note 95 at 3–4.

98 *An Act to amend and consolidate the laws respecting the North-West Territories*, 1875, c. 29. Retrieved February 28, 2008 from http://www.ainc-inac.gc.ca/pr/lib/phi/histlws/hln/b75c49a_e.html.

99 M. R. Lupul, "Education in Western Canada" (1967) 11 *Comparative Education Review* 144 at 156.

100 Above, note 31 at 279.

101 Above, note 8 at 155.

102 *Ibid*.

the introduction of a legislative assembly in 1888, "the North-West was essentially a colony of the federal government and lacked the legislative freedom of a province."[103] This governance structure meant that "although the *British North America Act* of 1867 had given responsibility for education to the provinces, education in this new region shifted from the Hudson's Bay Company and mission schools to the Government of Canada."[104]

As would be expected of a bill passed by a federal government that had worked hard to ensure that provincial authorities would respect the educational rights of minority faith adherents, the *North-West Territories Act* contained "the all-important proviso that a minority of Catholic or Protestant rate-payers in any area could establish a separate school free of double taxation."[105] Section 11 of the *Act* established and limited territorial autonomy over education. This section stated that the

> Lieutenant-Governor by and with the consent of the Council or Assembly, as the case may be, shall pass all necessary ordinances in respect to education; but it shall therein be always provided, that a majority of the ratepayers of any district or portion of the North-West Territories, or any lesser portion or sub-division thereof, by whatever name the same may be known, may establish such schools therein as they may think fit, and make the necessary assessment and collection of taxes therefore [*sic*]; and further that the minority of the ratepayers therein whether Protestant or Roman Catholic, may establish separate schools therein, and that, in such latter case, the ratepayers establishing such Protestant or Roman Catholic separate schools shall be liable only to the assessments of such rates as they may impose upon themselves in respect thereof.[106]

Given the context of the times, it should not be surprising that "Parliament ensured that the rights and privileges of both Protestants and Catholics would be protected in an attempt to prevent the sectarian disputes that had accompanied the introduction of public schooling in Ontario, Quebec, and New Brunswick."[107] This meant that, while education was to be a local responsibility, "the separate school principle was introduced into the Territories by the federal government."[108] Of particular note is the fact that the North-West had no representative in Ottawa until

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103 Above, note 31 at 278.
104 Above, note 95 at 4.
105 Above, note 31 at 279.
106 *North-West Territories Act, 1875*, s. 11. Retrieved December 15, 2007 from http://www.canadiana.org.libproxy.uregina.ca:2048/ECO/PageView/9_08051_4_1/0469?id=354536496ad36684 and http://www.canadiana.org.libproxy.uregina.ca:2048/ECO/PageView/9_08051_4_1/0470?id=354536496ad36684
107 Above, note 95 at 4.
108 Above, note 31 at 279.

1877; therefore, the provision for separate schools "had not [been] asked for. . .and it was passed without representation from the region for which it was intended."[109]

(b) *North-West Territories Education Ordinances, 1884 – 1892*

Even though the government had "made its first grants in support of schools in 1880,"[110] the first school legislation passed by the "federally administered territorial government"[111] was the *North-West Territory School Ordinance* of 1884. Until this time, many of the schools in this vast territory were still operated by church missionaries, primarily Roman Catholic and Anglican.

Section 11 of the *North-West Territories Act*, 1875 was "not entirely clear on whether a dual confessional model or a non-sectarian state school system with minority denominational districts was preferred."[112] While the 1884 school ordinance made provision for "a dual school system governed by an appointed Board of Education which (like Quebec's) met in two sections, Protestant and Roman Catholic, each controlling its own school system completely,"[113] the system shifted from one that resembled Quebec's dual system to one modeled more closely on Ontario's. Scharf writes that the 1884 ordinance

> created the initial framework for a schools system, that is, a system of school districts with every district to be designated as either Protestant or Catholic. The first school established in the district was the public school; a separate school district could then be formed to accommodate the religious minority. Thus, the boundaries for public and separate schools were required to be coterminous. Initially, there were both Protestant and Catholic public schools and separate schools.[114]

This dual Protestant and Catholic administration of the territorial education system was established when "a preponderance of Roman Catholics secured the adoption of the Quebec pattern. . .[of a] dual central authority."[115] An 1885 ordinance established a

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109 *Ibid.*
110 Above, note 28 at 97.
111 Above, note 32 at 21.
112 J. L. Hiemstra, *Domesticating Catholic schools (1885–1905): The Assimilation Intent of Alberta's Separate School System*. Paper presented at the Canadian Political Science Association Annual Meeting, Halifax, Nova Scotia, May 2003 at 5. Retrieved September 17, 2007 from http://www.cpsa-acsp.ca/paper-2003/hiemstra.pdf
113 Above, note 28 at 97.
114 Above, note 95 at 4.
115 Above, note 8 at 320.

> Board of Education. . .with two sections, one Roman Catholic, the other Protestant. Each section had complete control of its own state-supported denominational *public* schools, designated 'Catholic' or 'Protestant' according to the religion of the majority of the district. (All Protestants were treated as a single group for school purposes.) As required, the Ordinance also provided for state-supported denominational separate schools for the religious minority in the district. It also sanctioned the opening of school with prayer and religious instruction after three o'clock.[116]

Through a series of changes to the Education Ordinances, the powers and responsibilities given to each denominational section of the Board of Education gradually came to lie with the Board itself, which consisted of "two Protestants, two Catholics, and the lieutenant governor."[117] This transfer of power, in practice if not in law, had the effect that "Protestants, thereby, came to contribute to establishing policies for Catholic schools and Catholics for Protestant schools in a system that recognized, in principle, the appropriateness of duality."[118]

Several unrelated occurrences had great effects on life and on the school systems in the North-West Territories. The 1873 creation of the Northwest Mounted Police "succeeded remarkably not only in maintaining law and order over a vast domain but in creating a respect for the institutions of justice."[119] As well, "the *Free Land Homestead Act* of 1872 induced farmers to leave exhausted land in the east and migrate to the west."[120] This *Act* and the arrival of the railroad in 1883 "brought in a steady flow of immigrants. . .in their land-hungry thousands — Hungarians, Ukrainians, Poles, Germans, Scandinavians, and Doubkhobors poured into the promised land of the Great North-West."[121]

During this period of relative peace and increased immigration, the North-West Territories saw "increasingly strong opposition to denominationalism."[122] These feelings arose following the 1885 Riel Rebellion and were exacerbated by non-French and non-Catholic settlement in the North-West Territories. This change in religious character as the Territories became more predominantly Protestant is illustrated by Phillips (1957) in the following description regarding the number of schools:

> although the number of Roman Catholic and Protestant schools was about equal in 1883, the new population was so predominantly Protestant that even by 1886

116 Above, note 31 at 279.
117 Above, note 95 at 4–5.
118 *Ibid.* at 5.
119 Above, note 8 at 157.
120 *Ibid*.
121 Above, note 28 at 68.
122 Above, note 8 at 320.

> schools of that category outnumbered Roman Catholic schools in the ratio of five to one, and the difference continued to increase.[123]

By 1889, this difference had climbed to the point that "there were only 969 pupils and 36 teachers in 31 Roman Catholic schools out of 4574 pupils and 183 teachers in the 163 schools of the territories."[124]

In 1888, the appointed council that oversaw the Territorial Government was required to report to an elected legislative council which was described as a "predominantly Protestant North-West Council. . .[that] was unhappy with the Board of Education from the beginning."[125] As explained by Lupul, this unhappiness arose because

> [t]he Board disposed of public funds without accounting to the elected representatives. The Council's executive and legislative functions were hopelessly confused, enabling bodies like the Board to function without direct responsibility to territorial public opinion. This helped to secure the educational interests of the Catholics (a distinct minority by 1885), but it only served to increase the majority's frustrations.[126]

For several years, changes were made through practice and legislation that had the effect of making the "school system less dualistic."[127] These changes served to "increase the responsibility of the board and decreased the powers of the Roman Catholic and Protestant sections, thereby moving the educational system further from the dual system desired by the Roman Catholic section."[128] Lupul provides a list of these modifications:

> In 1885 the whole Board was empowered to appoint inspectors to examine and license teachers; in 1886 the necessity to designate public schools districts Protestant or Catholic disappeared and non-designated schools came under the authority of the whole Board; far more important, in the same year, the formation of a separate school district was restricted to the limits of a previously organized public school district, thus ensuring that the first school would always be a public school and that a Catholic group which was too small to support a separate school could not merge with a neighbouring group of Catholics outside the boundaries of the public school district; in 1887 Catholic membership on the Board was decreased from two in five to three in eight; in 1888 all schools were obliged to offer 'a primary course' in English; and in 1889 the Legislative Assembly, which replaced the Council in 1888, petitioned the federal government to repeal the 1875 separate school clause and the 1877 bilingual clause, viewing both as an impediment to responsible government.[129]

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123 Above, note 8 at 228.
124 Ibid. at 321.
125 Above, note 31 at 279.
126 *Ibid.*
127 *Ibid.*
128 Above, note 32 at 22.
129 Above, note 31 at 279.

In 1892, emboldened by the federal government's slight relenting on bilingualism, and encouraged by Manitoba's similar 1890 legislation, "the Assembly assumed complete control of the schools by replacing the Board with a Council of Public Instruction, consisting of its own four-man Executive Committee and four non-voting advisory members, two Catholics and two Protestants."[130] Arricale adds that "by 1901 laws and ordinances had been passed which curtailed the rights and privileges of the denominational schools. . ..Its powers of certification of teachers, curriculum and text selection, and inspection were taken over by the central authority."[131]

Sir Frederick Haultain, a powerful elected member of the territorial council, was the man driving these changes. Haultain, the 'premier' of the territories, had effectively "overturned the dual system and replaced it with a unitary system, similar to that of Ontario."[132] Haultain hoped to "establish a system of 'national schools' — schools common to all, in which civic and commercial ideals replaced religious and sectarian ideals in the interests of a more tolerant and united national sentiment, less driven by difference of culture, race, creed, and class."[133] Even though these changes satisfied the legal requirements of the *North-West Territories Act* of 1875, the Roman Catholic minority was quite displeased. Haultain denied that the ordinances deprived Roman Catholics of their rights and staunchly defended the legislation, stating,

> 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 must be subject to government control.[134]

Changes to legislation that took place as the territorial government prepared for the attainment of provincial status included a provision that "authority for offering religious instruction within the allowed one-half hour per day [was delegated] to the local jurisdictions — both Protestant and Catholic."[135] As well, in 1901 the Council of Public Instruction was

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130 *Ibid.*

131 Above, note 92 at 38.

132 Above, note 95 at 5.

133 Above, note 31 at 280.

134 Sessional papers of the Dominion of Canada : volume 17, fourth session of the seventh Parliament, session 1894 at 40C-14. Online at: http://www.canadiana.org.libproxy.uregina.ca:2048/ECO/PageView?id=354536496ad36684&display=9_08052_27_17+0088

135 Above, note 95 at 5.

replaced by the Department of Education. As provided in the *School Ordinances* of 1901, this department was given the "responsibility for the control and management of all kindergartens schools, public and separate schools, normal schools, teachers' institutes, and the education of the deaf and blind person."[136] These legislative changes allowed Haultain to effectively define the framework under which separate schools were to operate in the territories. Hiemstra sums up the changes that occurred in this twenty-year span as follows:

> In 1884, the Northwest Territories school law was patterned explicitly on Quebec's model of 'concurrent endowment of confessional systems'. A series of amendments up to 1901, however, resulted in the gradual adoption of the Ontario model.[137]

(c) Becoming a Province

Prior to 1905, Haultain had frequently lobbied the federal government for provincial status; "at the beginning of the twentieth century the Territorial Assembly passed a resolution requesting provincial autonomy."[138] The federal government, under Prime Minister Sir Wilfred Laurier, "delayed [action], allegedly because of Roman Catholic clerical influence at Ottawa."[139] One of the most contentious issues was the question of separate schools. In early 1905, Laurier "introduced an autonomy bill for the territories that could have restored the dual confessional separate school conditions of 1875."[140] Johnson describes the situation as follows:

> the demands of the growing population for provincial status were answered by Laurier in 1905 when he introduced the autonomy bills to create two new provinces, Alberta and Saskatchewan. The original draft of the bills had included a clause re-establishing dual school systems as before the Ordinance of 1892. Laurier was apparently attempting to restore some of his popularity among Roman Catholics who felt he had deserted them on the Manitoba Schools dispute.[141]

This bill was drawn up by Charles Fitzpatrick, a devout Catholic who was serving as Minister of Justice. The proposed legislation was strongly supported by the Roman Catholic Church; however, there was also intense opposition. Sir Clifford Sifton, a Manitoba member of the federal cabinet

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136 *Ibid.*
137 Above, note 112 at 3.
138 Above, note 8 at 321.
139 *Ibid.*
140 *Ibid.*
141 Above, note 28 at 98.

who had been instrumental in resolving the Manitoba School question in the 1890s, "had been away ill during the negotiations between Laurier, Fitzpatrick and the apostolic delegate to Canada. . .[and opposed] state support of church controlled schools."[142] In March of 1905, Sifton resigned his cabinet position "unable to believe 'that it would not be better that the Legislature of the North-West Territories should be free' and as unwilling that there be any 'taint of what I call ecclesiasticism in schools. . .unless the people of the North-West choose to have it.'"[143] Fierce opposition to the bill was also spurred on by Haultain, a proponent of 'national' schools, who had hoped to have the North-West Territories enter the union as a single province with him as the premier of this large and powerful area.

Sifton worked to keep "the house in session night after night, once until three in the morning, for five months. . ..The debate over the *Alberta* [and *Saskatchewan*] *Act*[*s*] was the longest in the Canadian parliament up to that time, and remains one of the three longest debates in Canadian parliamentary history."[144] Compromise was eventually reached by an amendment to the bill that "made Section 93 of the *British North America Act* apply to Saskatchewan and Alberta in such a way as to perpetuate separate schools as organized under the ordinance of 1901."[145] Separate school status would remain. This meant that

> in all school districts the first school had to be a public (i.e. majority) school, with the minority thereafter free to establish a separate school in the district. All schools could share in the public funds available as long as they observed the state regulations pertaining to curriculum, inspection, and textbooks, apart from the half-hour of religious instruction at the end of the school day.[146]

Even this settlement was controversial and was attacked "in Ontario for sanctioning the separate school principle in the constitutions of the two new provinces, and in Quebec for denying the Catholics denominational schools."[147] Tensions heated up when a delegation from Manitoba approached Haultain and the territorial government about extending Manitoba's boundary to include parts of the Territories and, in effect, alter the school situation that existed in that province. The controversy of this

142 Above, note 31 at 281.
143 Above, note 8 at 321.
144 T. Byfield, "The Birth of the Province, 1900 to 1910. Review" (1993) 8 *Western Report 8*(8) 38.
145 Above, note 8 at 321.
146 Above, note 31 at 281.
147 *Ibid.*

divisive issue and the negotiations involved in getting the *Saskatchewan Act*, 1905 passed are described by Phillips:

> Throughout these processes there were expressions of strong feelings not only in the west but throughout Canada. From one point of view traditional rights of the church were threatened; from the other, new world democracy was fettered and the universality of the public school endangered.[148]

(d) Minority Faith Education in Saskatchewan (post-1905)

After much politicking and debate, the existence of separate schools was guaranteed in Section 17 of the *Saskatchewan Act*. This section "mirrored the provisions under Section 93 of the *British North America Act* in ascribing responsibility for education to the Province and placing specific limitations relating to separate schools and religious instruction on the autonomy granted to the Province.[149] However, even without this controversial section, minority faith schooling would have existed in some form within the province. The existence of separate schools prior to 1905, as described in section 11 of the *North-West Territories Act* of 1875 and with the rights added through legislation over the next thirty years, guaranteed their continued existence after joining the Dominion of Canada. Section 17 simply "confirmed the right that the religious minority had achieved, under the Ordinance of 1901, to form separate schools."[150]

With the guaranteed existence of separate schools, the debate shifted focus in order to determine the extent to which these schools should be able to operate. This question partially decided the first provincial election. In the December, 1905 election the "school question was again a bitter issue"[151] and "confirmed that religion and separate schools were to remain important issues on the Saskatchewan political scene."[152] The campaign between "F.W.G. Haultain, the former Territorial premier and leader of the Provincial Rights Party, and Walter Scott of the Liberals was a determined one."[153]

Haultain's Provincial Rights party wanted to establish national schools and hoped to pass "immediate legislation to test the constitutionality of Sifton's clause."[154] These policies annoyed Archbishop Langevin

148 Above, note 8 at 321.
149 Above, note 95 at 5.
150 *Ibid.*
151 Above, note 31 at 281.
152 Above, note 32 at 25.
153 *Ibid.* at 24.
154 Above, note 31 at 281.

of St. Bonifice, "the most influential Catholic leader in the Northwest."[155] Langevin circulated a letter among the Catholic clergy denouncing Haultain's stand on separate schools and "issued a memorandum supporting the Liberals as the lesser of two evils."[156] For his part, Scott pledged, "As long as we remain in power no regulation will be altered nor anything done which will in any degree tend to destroy or modify the purely national character of our schools, separate or public."[157]

The Liberals under Scott won sixteen of twenty-five seats in the 1905 election, Scott became the first premier of Saskatchewan, and the idea of national schools went underground. Appleblatt writes that "the lasting consequence of this election was that the Liberal party became identified in the minds of many protestants with the Catholic and 'foreign speaking' communities while the Conservative party, the heir of the Provincial Rights party, became identified with the Anglo-Protestants."[158]

(e) Tax Support for Separate Schools

One matter about which the two newest provinces agreed was ratepayer choice in determining school system support through residential taxation. Johnson explains that

> [w]here both Alberta and Saskatchewan differed from the Ontario separate school laws was in their requirement that where a Roman Catholic separate school district existed, all Roman Catholic taxpayers must pay their taxes to the separate school board. In Ontario they had a choice of contributing to public or separate schools.[159]

This mandatory support for a separate school board also extended into those few areas where Protestant separate schools existed; all Protestant taxpayers in the district were required to pay taxes to that separate board. In effect, this legislation meant that if the majority of the minority decided to open a separate school, the entire minority group must support the school. This differs from Ontario which allowed ratepayers to have the choice of which school system to support; this difference would have significant future repercussions in Saskatchewan. In 1909, the taxation rights of property owners were put to the courts in a province-wide debate regarding separate schools. Noonan explains the situation:

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155 Above, note 32 at 24.
156 Above, note 31 at 281.
157 "Scott's Education Pledge," *Regina Leader*, 1905, November 21 at 1.
158 A. A. Appleblatt, *Saskatchewan and the Ku Klux* Klan, 1993 at 2. Retrieved June 16, 2007 from http://www.usask.ca/education/ideas/tplan/sslp/kkk.htm
159 Above, note 28 at 100.

> A separate school had been established at Vonda, and two years later at a Court of Revision several Catholic ratepayers asked to have their taxes paid to the public school. When [the judge] allowed the change, the Separate School District appealed, protesting that this would mean financial hardship and arguing in principle it was against the spirit of minority school legislation. The appeal was successful but the decision stimulated debate on the pros and cons of free choice in the allocation of property taxes. The effect of the Vonda taxation case determined that, in the future, assessment of taxes was to be based on the religious faith of the ratepayer not on personal preference. To separate school supporters this was an affirmation of the intent of Section 11 of the *North-West Territories Act*; to opponents it was an infringement of individual rights. The phrase 'faith-test' became a rallying cry for those who opposed separate schools on the grounds of religious faith. Nonetheless, the principle of designating property tax support on the basis of parents' religion is still in effect where both separate and public schools exist.[160]

The Vonda case was not the last time that the issue of residential property owners' support for either a public or separate school district was dealt with in the courts. The 1916 case of *Regina (City) v. McCarthy* went through the Court of Revision, the Local Government Board, the Saskatchewan Supreme Court, and the Judicial Committee of the Privy Council. The Privy Council affirmed the decisions of the lower tribunal and courts, stating that "it is the criterion of religious faith which forms what may be called the subordinate constituency, and here again the majority compels the minority, either establishing or refusing to establish a separate school. If the school is established, all must be rated."[161]

In fact, conflicts about corporate school taxation were nationwide. Taxes paid by Quebec's corporations were "allotted to Protestant and Roman Catholic schools in proportion to the number of pupils enrolled, or, in Montreal and Quebec City, to the school population;"[162] whereas Ontario "corporations were permitted to require that the whole or any part of their property be assessed for the support of separate schools."[163] The situation in Ontario was consistent with the "principle applying in Ontario

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160 Above, note 32 at 25.

161 *Regina (City) v. McCarthy*, 1918 CarswellSask 140, [1918] 3 W.W.R. 302, 43 D.L.R. 112 at para. 5, (Saskatchewan P.C.).

162 Above, note 8 at 321.

163 *Ibid.* It should be noted, however, that a distinction should be drawn between publicly traded corporations, on the one hand, and private corporations and partnerships, on the other; whereas the latter were entitled to a proportionate assignment of taxation between public and private boards (according to the religious makeup of the shareholders or partners as the case may be), the former were not—their taxes were required to be assigned to public school boards.

alone that any individual, and presumably any taxpayer, might contribute to either type of schools entirely at his own discretion."[164]

By comparison, a 1913 Saskatchewan amendment

> stipulated that a company might specify that money paid in taxes be distributed to public and separate schools according to the proportion of its non-Catholic and Roman Catholic shareholders, and that otherwise revenue from taxes so paid would be divided according to the proportion of the taxes paid by persons who were public and separate school supporters. In Saskatchewan this issue was a subject of acrimonious dispute and litigation.[165]

This amendment allowed "denominational schools to solicit the notice of religious affiliation from the corporation and thus force a showdown in the interests of receiving its ratio of tax support under law."[166] These taxation issues and controversies meant that these early separate school districts often faced financial issues. Noonan describes these as follows:

> Financial matters were the most common problems facing separate schools, and collecting taxes was the foremost of these problems. For example, most separate school districts were established without regard to the fact that once tax rolls were set for a year they could not be altered. Consequently a district would be established only to discover they had no tax money to operate the school that year.[167]

The issue of separate school support from property assessment resurfaced as recently as 1999. After a Saskatoon Public School Board decision to build "a large multi-million-dollar edifice"[168] for the new board office, a furor of public opinion resulted and "an unprecedented 500 persons. . .switched their tax support [from the public school board] to the Catholic system in protest."[169] The high number of such applications, combined with the legal wrangling that was happening concurrently in Englefeld regarding the establishing of a Protestant Separate School on the heels of a school closure, caused the Saskatchewan government to re-evaluate the School Tax Declaration Form. While arguing for the desired changes of wording in the Saskatchewan Legislature, the Honourable Clay Serby, then Minister of Education, explained,

> These provisions based in the Constitution make it clear that the allocation of taxes is based exclusively on the faith of the property owner. It is not a matter

164 *Ibid.*
165 *Ibid.*
166 Above, note 92 at 38.
167 Above, note 32 at 25.
168 S. Gibb, L. MacPherson, S. Peiris, and L. Thoner, "'Public' taken out of schools," *Star-Phoenix*, 1999, May 12 at A10.
169 Ibid.

> of personal choice or preference, nor is it affected by the school that the students attend. Mr. Speaker, although the legal requirements are already clear, we do not have an effective process for ensuring the property owners know the rules for ensuring that they are a designate. . .where they may designate their taxes to the correct school divisions.
>
> Owners are often asked simply to indicate whether they are supporters of the public or the separate school division. Parents might well consider themselves to be supporters of the school division where their children attend school and designate their taxes in that way without realizing the designation may be contrary to the [*Education*] *Act.*[170]

Serby continued by stating that the bill would "replace the ambiguous term, supporter, with the more accurate term, taxpayer."[171] The amended forms set a more explicit test of faith and require property owners to indicate whether they are members of the minority religious faith that established the separate school division. Prior to this change, "each year, some 30 or 40 taxpayers [applied] to switch their tax support from one school board to the other"[172] for reasons other than religious affiliation. This change in the wording on the tax declaration form also impacted the Englefeld situation. Before the changes to the declaration form were made, taxpayers could declare themselves to be supporters of the Protestant separate school without any indication of their faith. Subsequently, if the local residents wished to have their property tax dollars go to support their local Protestant Separate School, they had to declare themselves as non-Catholics.

(f) Funding for Non-Minority Faith Students in Minority Faith Schools

With the guaranteed existence of separate school systems having been acknowledged, "the challenges have become more concerned with structural issues, namely, the financing of the system."[173] The issues dealt with in Saskatchewan, such as separate high schools and taxation choice, are primarily matters of funding. Should funding be given to separate school systems for educating students beyond elementary school? Can ratepayers decide which system to support with their property assessment? In an era of rapidly declining rural enrolment, no funding issue will impact public

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170 Legislative Assembly of Saskatchewan: Twenty-third Legislature, *Saskatchewan Hansard*, April 26, 1999 at 759–760.

171 *Ibid*. at 760.

172 Above, note 168.

173 G. Dickinson and W. R. Dolmage, "Education, Religion, and the Courts in Ontario" (1996) 21 *Canadian Journal of Education* 363 at 364.

school divisions more than the question of whether the province should provide public funding for students who are not of the appropriate minority faith to attend a specific separate school.

The current provincial funding model is based on a per-student grant for both public and separate schools. In order to properly address the issue of a change in the Saskatchewan Government policy of non-minority faith students attending minority faith schools, several questions must be considered. The discussion will be framed through the answers to questions similar to the three questions which Wilson J. addressed in *Reference re Bill 30*.[174] The answers to these questions will be supported through arguments arising from various separate school- related court cases and through an investigation of the funding regime in place before 1905. Finally, we will argue that there is no legal rationale for separate schools to receive funding on any basis other than for those students of the appropriate minority faith attending that school.

(i) Question 1 – Would a change in the funding policy relative to non-minority students attending religious schools be a valid exercise of provincial power in relation to education?

Because the only difference between sections of the *Constitution Act, 1867*, and the *Saskatchewan Act, 1905*, lies in paragraph (1), the focus of this question can properly be placed on the applicable clauses of the former. The wording of the preamble to section 93 and of sub-section 93(3) of the *Constitution Act, 1867* is 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:
>
> (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.

In answering a similar question in *Reference re Bill 30*, Wilson J. was debating whether the sections of the *Constitution Act, 1867* allowed a provincial government "to be able to grant new rights and privileges to denominational schools after Union in response to new conditions."[175] Through a series of arguments that incorporated decisions made by the

174 [1984] 1 S.C.R. 1148 (S.C.C.).
175 *Ibid.* at para. 29.

Privy Council regarding the cases that had brought about the Manitoba School Question of the 1890s and a brief history of the importance of section 93 in making Confederation possible, Wilson J. concluded that Bill 30 fell within the power of the Ontario government. In contrast, an argument might be attempted that changing the funding regime in Saskatchewan to fund separate schools only for those students who are of the same minority faith does not involve the granting of new rights, but rather the restriction of the rights that currently exist. The question must then be asked whether the arguments put forward by Wilson J. apply in this situation. The answer to this question appear to be found in the following paragraph:

> On their face these provisions would appear to support the view that Bill 30 is a valid exercise of legislative power by the provincial legislature. The opening words of s. 93 vest an exclusive plenary power over education in the Province "subject and according to" the provisions that follow. Section 93(3) does not appear to derogate in any way from that power. It seems rather to contemplate its exercise where a province has a separate or dissentient school system by law at the time of Union or establishes one at any time after Union. In either of these circumstances it provides that "any Act or Decision of any Provincial Authority" affecting the rights or privileges of the province's Protestant or Roman Catholic minority shall be subject to appeal to the Governor General in Council. The enactment of legislation would seem to be an "Act or Decision" and "Provincial Authority" has been interpreted by the Privy Council as including a provincial legislature: see Brophy v. Attorney-General of Manitoba, [1895] A.C. 202, at pp. 220-21, and see also the Privy Council's judgement in Tiny at p. 371. Section 93(3) would appear, therefore, to provide in express terms for an appeal to the Governor General in Council from legislation passed by a provincial legislature which affects the rights and privileges of denominational minorities.[176]

While these words are written in reference to one specific bill, the conclusion seems valid for any provincial legislation regarding minority faith educational rights. While many have argued that "on the heated political question of the place of religion in public schools, the constitution was supposed to 'freeze' certain practices,"[177] Wilson J. found that "it would be strange, indeed, if the system of separate schools in existence at Confederation were intended to be frozen in an 1867 mold."[178] As further explained by O'Leary J. in *Jacobi v. Newell No. 4 (County)*,

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176 *Ibid*. at para. 21.

177 R. W. Bauman and D. Schneiderman, "The Constitutional Context of Religious Practices in Saskatchewan Public Schools: God was in the Details" (1996) 60 *Saskatchewan Law Review* 265 at 266.

178 Above, note 174 at para. 23.

> although the right of religious minorities to denominational schools crystallized at the time of Confederation, legislatures have the power to change the forms of educational institutions without impairing that right, and the nature of the separate school which a religious minority has the right to establish was not frozen as at 1905.[179]

Therefore, one can conclude that it is within the plenary power of the Saskatchewan legislature to pass legislation relating to separate school funding; however, caution should be exercised because it is also within the rights of minority faith adherents to appeal such legislation to the Governor General in Council. As explained by Arricale, "it is nevertheless a fact now that once a province grants rights to a denomination the attempt to rescind such rights can bring about the intervention of the Federal Government."[180] Such a challenge would be successful against this change in funding if it could be shown that, by making the change, the provincial government was infringing on or removing rights from separate school supporters that existed prior to 1905 and were therefore guaranteed under section 93 of the *Constitution Act, 1867*. It should be noted that, following the Manitoba School Question in the 1890s, the federal government has proven to be very reluctant to exercise its authority as given by section 93 of the *Constitution Act, 1867*.

(ii) Question 2 – Would the revision to the funding policy be an invalid exercise of provincial powers because it would remove from minority religious school supporters rights which were constitutionally guaranteed?

In attempting to determine whether this funding change would remove constitutionally guaranteed rights from separate school supporters and, therefore, be challengeable under paragraph 93(3), there are two separate issues that need to be addressed. First, what is the nature of the rights that are constitutionally protected? And, secondly, what are the specific privileges that were in place prior to Confederation? Once these two questions have been answered, it will be possible to determine whether public funding for non-minority faith students attending separate schools is a constitutionally protected right.

In examining the nature of the protected rights, it is important to note that "section 93 is restricted to such authority as is necessary to provide

179 *Jacobi v. Newell No. 4 (County)* 1994 CarswellAlta 28 at para 1.
180 Above, note 92 at 36.

for the denominational aspects of schools."[181] The oft-quoted words of the Privy Council in *Brophy v. Manitoba (Attorney General)* state,

> 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 teaching 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 influences and guidance of the authorities of their Church.[182]

This statement indicates that, for Roman Catholic parents, the essential nature of the separate school is that the education of their Roman Catholic children occurs in schools under the authority of the Roman Catholic Church. O'Leary J. used this rationale to conclude that "in order for a Roman Catholic separate school district to qualify as a 'separate school' within the meaning of s. 41 of the *1901 School Ordinances*, and thus be protected by the *Constitution*, it must have some degree of denominational character."[183] Similarly, in order for a right to be protected under s. 93 of the *Constitution Act, 1867*, there must be something of a denominational character to that right. In *O.E.C.T.A. v. Ontario (Attorney General)*, the Supreme Court of Canada found that any legislative change that "affects only secular aspects of education, and does not prejudicially affect denominational aspects of education or any non-denominational aspects required to deliver the protected denominational elements. . .is constitutional."[184]

As the first subsection of s. 93 of the *Constitution Act, 1867*, refers to a situation different from that referred to in s. 17 of the *Saskatchewan Act, 1905*, it is necessary to investigate this question twice — once to determine what minority faith education rights existed in Ontario prior to Confederation, and once to determine the separate school rights in the Northwest Territories prior to Saskatchewan's and Alberta's joining the Dominion of Canada. The applicable section of the *Constitution Act, 1867,* reads as follows:

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181 W. F. Foster and W. J. Smith, "Religion and Education in Canada: Part II—An Alternative Framework for the Debate" (2000-01) 11 Educ. & L.J. 1 at 5.

182 *Brophy v. Manitoba (Attorney General)* 1895 CarswellMan 2, para. 9 (Man. C.A.) [italics added.].

183 Above, note 179 at para. 1.

184 *O.E.C.T.A. v. Ontario (Attorney General)* [2001] S.C.C. 15, 2001 CarswellOnt 580 at para. 43.

> 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.

While the intent of this clause was not to freeze minority faith rights as they existed in 1867, it is generally agreed that "in order to claim the protection of s. 93, it must be shown that there was a right or privilege with respect to denominational schooling which was enjoyed by a class of persons, by law, at the time of union."[185] To quote Wilson J. from *Reference re Bill 30*, "our task therefore is to examine the laws in force prior to Confederation to see what rights or privileges they gave."[186]

The law in force that Ontario carried into Confederation was the *Law of 1863 Relating to Roman Catholic Separate Schools in Upper Canada*, better known as the *Scott Act*. As mentioned earlier, the distribution of public funding for both public and separate schools was based on the schools' submission of "half yearly returns" to Egerton Ryerson, the Chief Superintendent of Education in Upper Canada from 1844 until Confederation and in Ontario from 1867 until 1876. This form was to be "a correct return of the names of the children attending such school, together with the average attendance during the six next preceding months."[187] However, there was a specific clause for separate schools stating that the form was not to be merely a list of all of the children attending the separate school: "no children attending such School shall be included in the return, hereafter required to be made to the Chief Superintendent of Education, unless they are Roman Catholics."[188]

A further issue arises from the fact that Ontario ratepayers are given the choice as to which system to support. This option existed at the time of Confederation and it exists today. As outlined by Iacobucci J. in *Adler v. Ontario*,

> At the time of Confederation, Roman Catholic parents could choose to support either the local separate schools or the local common schools. Section 14 of the

185 *Adler v. Ontario* 1996 CarswellOnt 3989 at para. 42.

186 Above, note 174 at para. 32.

187 *Scott Act* (also known as *An Act to Restore to Roman Catholics in Upper Canada Certain Rights in Respect to Separate Schools*), 1863, p. 12. Retrieved September 27, 2007 from http://www.canadiana.org.libproxy.uregina.ca:2048/ECO/PageView/23099/0013?id=354536496ad36684

188 *Scott Act* (also known as *An Act to Restore to Roman Catholics in Upper Canada Certain Rights in Respect to Separate Schools*), 1863, p. 9. Retrieved September 27, 2007 from http://www.canadiana.org.libproxy.uregina.ca:2048/ECO/PageView/?id=bf01430db59206f2&display=23099+0010

> Scott Act lays out the registration procedure to be followed. If a parent chose to register as a separate school supporter, then his or her child would be eligible to attend only the local separate school. In other words, Roman Catholic parents could choose between two publicly funded educational systems — one Roman Catholic, the other non-denominational. Section 93 gives constitutional protection to this publicly funded choice. Therefore, the public school system is an integral part of the Confederation compromise and, consequently, receives a protection against constitutional or Charter attack.[189]

Iacobucci J. used this argument to show the integral nature of the public school system in the discussions leading up to Confederation. However, while Roman Catholic parents had the option of sending their children to either the publicly funded separate or common school, non-Roman Catholic parents did not have the same freedom to choose. These parents were given only one publicly funded option. There was no "mirror equality" in terms of minority faith education rights. As stated in *Public School Boards' Association (Alberta) v. Alberta (Attorney General)*, "had the drafters of the provision [section 17 of the *Alberta Act*] intended to grant public schools the same rights they granted to separate schools, they would have said so."[190]

While it is clear from the *Scott Act* that Ontario provided no funding for non-Roman Catholic students who attended Roman Catholic separate schools at the time of Confederation, the situation in Saskatchewan is more ambiguous. Section 17 of the *Saskatchewan Act, 1905* entrenches minority faith education rights in the province:

> 17. Section 93 of the Constitution 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.[191]

Chapter 30 of the 1901 *Ordinances of the North-west Territories* relates solely to assessment and property taxation in school districts. While there is a great deal of information regarding the funding rights and privileges of separate schools, the focus is on the money raised by

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189 Above, note 185 at para. 46.

190 *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General)* 1998 CarswellAlta 26 at para. 124.

191 *Saskatchewan Act*, 1905, 4-5 Edw. VII, c. 42 (Can.), s17.

the school district and not the money given by the province. The ways in which the provincial government provided grants to schools is outlined in Chapter 31, *An Ordinance to Regulate Public Aid to Schools*, of the 1901 *Ordinances*. These regulations provide the amount of money given to each school for each day it was open, for each teacher in its employ, and for the average attendance of students (by percentage). The constitutional protections granted to minority faith education meant that "money granted by the central government for education was given to public and separate schools on the same basis."[192] However, these "rights respecting financing are not 'denominational aspects' of schools, as religious teaching would be, but are considered 'non-denominational aspects' which are necessary to ensure the delivery or continuance of the denominational aspects of the school."[193] "Maybank argues that "the interpretation of rights and privileges protected by section 93 of the *Constitution Act*, 1867 must not be done in such a way that would prevent provincial legislatures from exercising effectively their jurisdiction over education".[194] Restricting funding mechanisms for schools to those that existed in 1905 would, in fact, limit the Saskatchewan legislature's authority over education and would be contrary to the intent of section 93 of the *Constitution Act*, 1867 and section 17 of the *Saskatchewan Act*, 1905.

The main source for information regarding what funding was provided to non-minority faith students in a separate school will be found in Chapter 29, "*An Ordinance Respecting Schools*" (1901). This Ordinance was passed following several years of amendments that were made to the school system and that changed the model for separate schools from one that originally resembled Quebec's dual denominational system to one that was very similar to the minority faith schools of Ontario. Hiemstra writes that "Haultain described the increasing control of the state over Catholic schools that culminated in the 1901 Ordinance as: the [Territorial] Assembly 'administered the separateness out of the separate schools' (Child 293)".[195]

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192 Above, note 94 at 49.

193 R. C. Maybank, "Have Constitutionally Protected Denominational Guarantees Inhibited the Modernization of Educational Governance Structures?" (1996-98) 8 Educ. & L.J. 315 at 328–329.

194 *Ibid.* at 327.

195 Above, note 112 at 10. The "Child" reference is to A. H. Child, "The Ryerson Tradition in Western Canada, 1871-1906." In N. McDonald and A. Chaiton (Eds.), *Egerton Ryerson and His Times* (Toronto: Macmillan, 1978), who argues that "the dominant influence on western Canadian school development was the 'Ryerson tradition' that had been firmly established in Ontario in 1871." Above, note 112 at 17.

Based on Haultain's desire to implement a single national school system and the legislated amendments that modelled the Territorial separate school system after the one developed through the influence of Ryerson in Ontario, one might have expected that the clause in the *Scott Act* regarding non-minority faith students would have transferred into these Ordinances. Instead, a reading of the sections in the 1901 *School Ordinances* dealing with the education of non-resident children might lead one to believe that funding was provided for non-minority faith students to attend separate schools. These sections read as follows:

> 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.
>
> Provided always that the board may demand that the application for the admission of any non-resident 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.
>
> 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.
>
> 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.[196]

In the 1976 decision of the Alberta Supreme Court (Appellate Division) in *Schmidt v. Calgary (City) Board of Education*, Moir J.A. stated,

> It is sufficient to say that the charging of fees to non-residents has been a feature of the education ordinances and statutes of what is now the province of Alberta for almost 100 years. The effect of the separate school legislation is to provide that residence is determined by religion where the boundaries of the two school districts — the public and the separate — are identical. That is the situation in Calgary. . ..Indeed the whole scheme of the public and separate school systems depends upon such a distinction.[197]

Justice Moir is correct in that tuition fees charged to certain students had been a long-standing feature of Alberta's education system. In fact, the *School Ordinances* of 1884, the first school legislation introduced in the Northwest Territories, included the following passage: "a rate not

196 *Ordinance respecting schools (Chapter 29 of the Ordinances of the North-West Territories), 1901* at 33–34. Retrieved August 7, 2007 from http://www.public-schools.ab.ca/Public/law/chapter29.pdf

197 *Schmidt v. Calgary (City) Board of Education* 1976 CarswellAlta 134 at para. 18.

exceeding five cents per day, payable in advance, may be charged on any children resident outside the limits of such district, whose parents or guardians are not ratepayers of such district."[198] Arguments could be made that this clause, which allowed for tuition to be charged on children of non-ratepayers could justify the inclusion of non-minority faith students in a separate school; however, the term "ratepayer" must be clarified. In 1884, "ratepayer" was much more synonymous with "land-owner," as illustrated in the following clause which stated that rental property would be assessed according to the religion of the property's owner:

> When property owned by a Protestant is occupied by a Roman Catholic and vice versa, the tenant in such cases shall only be assessed for the amount of property he owns, whether real or personal, but the school taxes on such rental or leased property shall in all cases, and whether or not the same has been or is stipulated in any deed, contract or lease whatever, be paid to the trustees of the district to which belongs the owner of the property so leased or rented and to no other.[199]

The *School Ordinances* of 1901 defined a ratepayer as "any person of the full age of twenty-one years whose name appears on the last revised assessment roll of the district."[200] In the accompanying *School Assessment Ordinances* (1901), the assessment roll is explained as follows:

> . . .the assessor of the district shall assess every person the owner or occupant of land in the district and shall prepare an assessment roll in which shall be set out as accurately as may be:
>
> (a) Each lot or parcel of land owned or occupied in the district and the number of acres it contains;
>
> (b) The name of either the owner or occupant or both.[201]
>
> Land and personal property shall be assessed to the person in occupation or possession thereof unless in the case of a non-resident owner such owner shall in writing require the assessor to assess him alone for such property.[202]

Given these clarifications, it should be evident that section 163 of the *School Ordinances* of 1901 referred, not to students of a minority faith, but rather to children of non-ratepayers or, synonymously, to children of non-landowners or tenants. It is implausible that Haultain, the advocate of a single public school system, would have allowed this clause to be

198 *Ordinance providing for the organization of schools in the North-West Territories* (1884), s. 87.
199 *Ibid*. at s. 98.
200 Above, note 196 at s. 9.
201 *Ordinance respecting assessment and taxation in school districts (Chapter 30 of the Ordinances of the North-West Territories), 1901* at s. 6.
202 *Ibid*. at s. 29.

used to justify providing funding to schools on the basis of school choice for children of Protestant parents to attend Roman Catholic separate schools or vice versa.

Assuming, therefore, that the School *Ordinances* of 1901 provided no funding for children of non-minority faith adherents to attend minority faith schools, the question must be asked whether the arguments used by the Ontario Court of Appeal in *Reference re Bill 30* to determine that "once such support was extended, it would, thereafter, be guaranteed under the *Charter*"[203] would also apply to the current funding situation in Saskatchewan. As illustrated earlier, this funding has been established both in legislation through section 145 of the *Education Act, 1995*, which provides parents of high school students the right to choose either the public or the separate system, and in practice as shown through the provincial foundation operating grant model.

If this funding were to become constitutionally protected, the right to school choice on the part of non-minority faith parents would need to hold "under the plenary power conferred on the province in relation to education by the opening words of s. 93 [s. 17 of the *Saskatchewan Act, 1905*] or because the legislation returned to separate school supporters rights and privileges constitutionally guaranteed to them by s. 93(1) [s. 17(1)]."[204] Dealing with the second part of the question first, there is no constitutional guarantee for current funding arrangements to continue. In order for that to be the case this funding would have to have been included in Chapter 29 of the *School Ordinances* of 1901, and it was not. In regards to the first part of the question, in order for the funding of school choice for non-minority faith parents to fall under the plenary power of the province, it would have to be the case that the funding issue affects the denominational rights of minority faith adherents.

It seems inconceivable that providing school choice for non-minority faith parents somehow affects the denominational rights of minority faith adherents; therefore, it must be concluded that the proposed changes to the funding policy would not remove any constitutionally guaranteed rights of minority-religious school supporters. As explained by Smith and Foster, "any advantage or authority enjoyed in practice (*de facto*) but not provided for by law (*de jure*) at Confederation is not protected and any legal rights provided *after* 1867 can be withdrawn by the government at

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203 D. K. MacLellan, "The Legal Question of Extending Public Funds to Private Schools in Ontario: *Adler* v. *Ontario*" (1995-96) 7 Educ. & L.J. 61 at 64.

204 Above, note 174 at para. 7.

will."[205] Therefore, a policy change denying provincial grants to non-minority religious students attending separate schools would *not* be an invalid exercise of provincial powers; "what the province gives pursuant to its plenary power the province can take away."[206]

(iii) Question 3 – Is the Constitution Act, 1982 and, in particular, the Canadian Charter of Rights and Freedoms applicable to these proposed changes to the funding policy? If so, to what extent and with what effect?

In her decision in *Reference re Bill 30*, Wilson J. spent considerable time considering the ways in which the relevant sections of the *Canadian Charter of Rights and Freedoms*[207] apply to the discussion of *Bill 30*. The difficulty of using the applicable sections of the *Charter* to decide the constitutionality of any issue regarding separate schools is explained by the Ontario Court of Appeal as follows:

> These educational rights, granted specifically to the Protestants in Quebec and the 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. . ..The incorporation of the *Charter* into the *Constitution Act*, 1982, does not change the original Confederation bargain.[208]

The three sections of the *Canadian Charter of Rights and Freedoms* that give rise to this inherent contradiction 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.

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205 W.J. Smith and W.F. Foster, "Religion and Education in Canada: Part I: The Traditional Framework" (1999-2000) 10 Educ. & L.J. 393 at 411.

206 Above, note 174 at para. 63.

207 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11.

208 *Reference re Roman Catholic Separate High Schools Funding* 1986 CarswellOnt 928 at para. 171.

If funding of non-minority faith students attending separate schools is constitutionally guaranteed, section 29 renders it immune from *Charter* review. This immunity is embedded within Wilson J.'s statement that "it was never intended, in my opinion, that the *Charter* could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise."[209] Many authors have argued against the propriety of this immunity, as illustrated by Shapiro's (1986) comment that "on legal/constitutional as well as on moral grounds, the special status of the Roman Catholic schools is discriminatory."[210]

Funding or not funding non-minority faith students who choose to attend a separate school does not raise a minority faith protection issue. The current per student funding that follows a student to a particular separate school system cannot be classified as a denominational right that is protected under section 93 of the *Constitution Act, 1867*. Therefore, although sections 2(a) and 15 can and do apply to minority religious education rights, they are not relevant to this question.

The decision made in *Adler v. Ontario*[211] is applicable in this situation. In *Adler*, the appellants claimed that the "education funding scheme in the Province of Ontario [violated their] religious and equality rights as guaranteed by ss. 2(a) and 15 of the *Canadian Charter of Rights* and Freedoms"[212] and hoped to have the courts force the Ontario government to extend the same funding to private religious schools as was given to minority faith separate schools. As summarized by Dickinson & Dolmage:

> the applicants maintained that the violation was created by the Ontario government's failure to provide public funding for private religious schools in the province. Further, the applicants claimed that because parents who wished to send their children to the public schools or to the Roman Catholic separate schools received a substantial benefit by not having to pay tuition, there was also a violation of the applicants' section 15(1) rights to equal benefit of the law, since they were required personally to finance their children's education. For reasons of conscience, they argued, they could not send their children to public or separate schools which taught, at least implicitly, beliefs or moral values incompatible with those taught in the home.[213]

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209 Above, note 174 at para. 62. Wilson J. made it clear that s. 29 was not even required to insulate denominational rights from a *Charter* challenge. Section 93 was such a fundamental part of the political compromise that made Confederation possible, that it would be inappropriate to apply the *Charter* so as to unwind it.

210 B. J. Shapiro, "Education in Canada and the *Charter of Rights and Freedoms*" (1986) 11 *Canadian Journal of Education* 264 at p. 269.

211 Above, note 174.

212 Above, note 174 at para. 1.

213 Above, note 173 at 370.

The Ontario Court of Appeal and the Supreme Court of Canada found that there was no reason to extend the funding to private religious schools and that the Ontario government's education funding system did not violate any *Charter* rights. The reasons given by the Court of Appeal are of particular interest in the present context: "the court found that what was being complained of was state 'inaction' (i.e. not funding private religious schools) rather than state 'action,' and that state 'inaction' cannot be subject to a Charter challenge."[214]

Funding non-Roman Catholic students who are attending a Roman Catholic separate school (or funding a non-Protestant student to attend a Protestant separate school) is government action. The government is therefore providing a benefit (publicly funded religious education) to people who are not of the minority faith. Fahmy argues that "in the context of religious school funding, [in Ontario] all non-Roman Catholic religious schools stand on equal footing"[215] because none of these private religious schools receive funding. However, not all non-Roman Catholic students stand on equal footing when it comes to religious school funding. This benefit is extended more to people of Christian religious faiths who have some agreement with the tenets of Roman Catholicism than it is to people of non-Christian faiths who are likely to feel that Catholic beliefs or moral values are incompatible with those taught in their homes.

In the case of *Bal v. Ontario*,[216] Winkler J. decided "that although the state cannot deny or limit the citizen's exercise of religious freedom, it is not required to support the exercise of that freedom through public funding for religious schools either inside or outside the public school system."[217] However, because the provinces of Ontario and Saskatchewan are required to fund denominational schools (whether Roman Catholic or Protestant) and each province has chosen to fund non-minority faith students who attend these publicly funded denominational schools, they are discriminating against parents and families who would choose religious schooling for their children but who are not of a compatible faith.

As highlighted in the discussion above about provincial legislation requirements regarding non-minority faith students in separate schools (in particular, section 145 of the Saskatchewan *Education Act*), non-

214 *Ibid.* at 371.

215 M. Fahmy, "The Private School Funding Debate: A Second Look Through *Charter* First Principles" (2003-04) 13 Educ. & L.J. 397 at 402.

216 (1994), 121 D.L.R. (4th) 96, 21 O.R. (2d) 681 (Gen. Div.), affirmed (1997), 151 D.L.R. (4th) 761, 34 O.R. (3d) 484 (C.A.), leave to appeal refused (1998), 113 O.A.C. 199 (note) (S.C.C.).

217 Above, note 173 at 370.

Catholic parents can choose to send their children to a Catholic high school providing the parents agree that these children will abide by all policies of the Catholic board of education, including any policies relating to religious instruction, religious activities, and other school programs. By permitting non-Catholic students to attend a Catholic school as long as they abide by the Catholic school division's policies, and publicly funding this choice, the Saskatchewan government is discriminating against those families who feel that "their only choice is to send their children to religious schools as their accounting before God partly depends on how they have raised their children".[218] This discrimination is especially strong against those who "due to their religious beliefs. . .feel that they cannot allow their children to be educated within the public school system"[219] and consider "a separate school [as] really a special kind of public school."[220]

Therefore, funding non-minority faith students who are enrolled in minority faith separate schools may be contrary to sections 2(a) and 15 of the *Canadian Charter of Rights and Freedoms*. This would suggest that not only is it within the power of the provincial government to make these changes to its funding policy, but that a failure to make these changes may leave the province open to a *Charter* challenge.

10. CONCLUSION

The right of minority faith adherents to form dissentient or separate schools is entrenched within the Constitution of Canada. Unfortunately, as rural depopulation in Saskatchewan has continued unabated, two rural communities have utilized these constitutional provisions to avoid the closure of their local schools; it would appear that other communities facing school closures are also seriously considering this option. This is clearly a perversion of constitutional minority faith rights that were intended to protect the education of children who are members of particular minority faith communities. As Bargen concluded, "as the final authority the Privy Council has established that 'denominational' rights are determined by religion only...."[221] In addition, this practice thwarts attempts by rural school divisions to provide greater equality of educational op-

218 Above, note 215 at 421.
219 *Ibid*. at 400.
220 Above, note 94 at 49.
221 P. F. Bargen, *The Legal Status of the Canadian Public School Pupil* (Toronto: The MacMillan Company of Canada Limited, 1960) at 17.

portunity across the geographical regions they serve. It is unlikely, therefore, that public school divisions in Saskatchewan will continue to tolerate this tactic.

The current funding policy of the Government of Saskatchewan could be reconsidered so that funding, both in the form of government grants and local property tax revenue, available to minority religious schools is limited to supporting only children belonging to the minority faith; however, in the current context, this seems unlikely. For much of Canada's history, the parameters within which separate schools have operated have been defined primarily by changes to legislation in each province. Questions arising from the interpretation of these Acts were have been clarified through amendments to the legislation and through public debate. These highly charged political issues have caused and decided elections at the local, provincial, and federal levels; however, contemporary legislators are unlikely to risk the political consequences of decisive action.

This reluctance on the part of legislators has been predicted by Stephens: "given the delicate political nature of denominational rights. . .change is unlikely" and "without the intervention of the courts, where public opinion goes, politicians' views are sure to follow."[222] This abdication of political responsibility is not new; it began over 150 years ago, when a "blind eye" policy evolved relating to separate schools in Nova Scotia as their government became "unwilling to touch the contentious issue."[223] In New Brunswick, "the political strategy on the school question was to make changes with as little legislative debate and administrative fuss as possible."[224] The responsibility of the political systems was further compromised when the Laurier-Sifton (Laurier-Greenway) agreement was reached in order to end the Manitoba School Question through "negotiation and 'sunny ways.'"[225] This sensitivity to public opinion on issues relating to religious education funding has reached the point of becoming public policy, as Dolmage describes:

> The public funding of parochial schools would appear to be another sensitive issue politicians would rather avoid. It is interesting to note in this regard that Dirks, in his report on the public funding of private schools in Saskatchewan, advised that, "until such time as the courts rule on the constitutionality of present

222 A. Stephens, "Privilege for Few – Equality for None: Constitutional Protection of Roman Catholic Separate School Funding in Ontario" (1999-00) 10 Educ. & L.J. 179 at 207.

223 W. B. Hamilton, "Society and Schools in Nova Scotia." In J. D. Wilson, R. M. Stamp, and L.-P. Audet (Eds.), *Canadian Education – A History* (86 – 105) (Scarborough, ON: Prentice-Hall, 1970) at104.

224 Above, note 31 at 273.

225 Above, note 28 at 95.

> funding arrangements, in the opinion of this review it would not be prudent to proceed with a major public funding initiative for private [religious] schools." In other words, the government should do nothing until the courts require it to act.[226]

The probable outcome of the current circumstances described in this article seems inevitable, as Dirks implies; when the issues are as volatile as school closure and minority religious education, politicians will be "prudent." In our case, being "prudent" will mean that it will fall to the courts to determine whether minority religion education rights can be used to create and maintain schools populated by children who are not members of a minority these constitutional provisions were intended to protect. The courts are not likely to appreciate being burdened with this responsibility; Dolmage has pointed to the "growing number of Canadian jurists who are tactfully expressing their concern with the legislatures' apparent abdication of political responsibility which has, with increasing frequency, confronted the courts with choices which properly belong in the hands of politicians."[227] This frustration was expressed succinctly by Anderson J. in his Ontario Court of Justice decision in *Adler*:

> I am much in sympathy with the position of the applicants. There are few things which touch a concerned parent more closely than the appropriate education of children. To feel oneself at a disadvantage in giving effect to the concern produces a very real sense of grievance. Notwithstanding my sympathy with the position of the applicants and with their sense of grievance, *I am in doubt that the court is the appropriate forum for relief*.[228]

The judiciary's perspective notwithstanding, it appears that separate schools of convenience will continue to be created as long as this remains a viable method of keeping small rural schools from being closed. It is equally clear that rural school divisions will not permit this to continue. The irresistible force will meet the immovable object, beginning in a Saskatchewan courtroom. It will probably not end there.

Whatever the result, there will be appeals, because this issue has broader and very significant implications. It is unlikely that Saskatchewan's public school division caucus will accept a decision that favours the creation and maintenance of separate schools of convenience. On the other hand, should the court decide that funding of minority religious schools can be limited to supporting only students who belong to the

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226 W. R. Dolmage, "A Case for the "Political Question" Doctrine? Adler v. Ontario [1992]" ((1994) 16 *Dalhousie L. J.* 471 at 479.

227 *Ibid.* at 477.

228 *Adler v. Ontario* 1992 CarswellOnt 837 at para. 80 [emphasis added].

minority faith, this could have serious consequences, particularly for urban minority religious school systems. In some of these systems as many as one-third of the students are not of the minority religious faith. If these students do not attract government per pupil grants and property tax revenues, these systems will be in serious difficulty. It is unlikely, therefore, that separate school divisions will accept such a decision.