



May 24, 2017 - Overview of the Public Catholic Mandate Issue

The Public Section: Profile

The Public Section is a group of school boards within the Saskatchewan School Boards Association. It is comprised of 15 of 18 public school boards across Saskatchewan responsible for the education of approximately 125,000 students. The Section is committed to the advancement of public education in Saskatchewan.

Engagement with the Mandate Issue

For almost 25 years, Public Section School Boards have voiced concerns with Roman Catholic separate school divisions recruiting non-Catholic students. The practice has resulted in public boards losing students and resources, and has undermined the ability of Public Boards to provide cost effective education to their students.

The Public Section is of the view that Catholic schools are for the education of the children of Roman Catholic parents. When Saskatchewan joined Canada, section 93 of the Constitution Act, 1867 and section 17 of the Saskatchewan Act granted the Protestant or Catholic minority in any public school division the right to separate and establish a separate school for the children of the particular minority. The Public Section respects Catholic school divisions and their right to serve members of the minority faith. However, the Section differs with its separate school colleagues with respect to the funding of non-Catholic students in Catholic schools.

The Public Section is of the further view that without the denominational education provisions of the Constitution, the exclusive full funding of Roman Catholic schools would be a violation of the *Charter*. The *Charter* prohibits discrimination on the basis of religion and the provision of full public funding to the schools of one religious group would obviously discriminate against members of all other groups. The denominational education 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.

Attempts to Resolve the Mandate Issue: a Constitutional Reference

Over the years, Public boards have attempted to have this situation addressed without a trial. There have been discussions involving public and separate boards, the SSBA and the Government.

In 2003 the existing concerns grew after a second “separate school of convenience” was established in the province by local Catholics and non-Catholics in Theodore, Saskatchewan, to avoid the closure of the Theodore Public School by the local public

board. All students moved over to the “separate school”, which had a large majority of non-Catholics.

The Government of the day authorized the establishing and funding of the school, but agreed with the Public Section that legal guidance was required on the scope of Catholic school rights vis-à-vis the admission and funding of non-Catholics. There followed a lengthy process, involving the Public and Catholic Boards as well as the Government, with the intention of finalizing a referral (or Constitutional Reference) of the mandate issue to the Saskatchewan Court of Appeal for adjudication. The questions for the Reference were finalized in May 2005, following Cabinet approval in July 2004.

This development was broadly applauded by public school divisions across the province because the Government appeared focused on securing guidance on an important matter of education policy and fundamental freedoms. However the optimism was short lived when Premier Calvert and Cabinet cancelled the Reference as a result of a lobbying campaign against the Reference organized by Roman Catholic school boards and organizations.

The Public Section urged Premier Calvert to proceed with the Constitutional Reference but was advised that the matter was too “divisive”, and that a Court of Queen's Bench trial was seen by the Government as a viable option for securing legal guidance.

As a result, it was necessary for the Public Section to proceed with the current lawsuit, which had been held in abeyance during the negotiation of the Reference.

In February 2008, following the election of the Saskatchewan Party in November 2007, the Public Section's members met with Minister Krawetz to urge the Government to reinstitute the Constitutional Reference. The same request was made, but to no avail, of subsequent Ministers of Education since 2008. That was because the Public Section regarded the Reference as a faster, cheaper and less adversarial process compared to a trial.

Attempts to Resolve the Mandate Issue: Mediation

In February 2008, Minister Krawetz requested the affected parties to engage in mediation. From November 2008 to October 2011 representatives of the Public Section, Catholic Section, Government of Saskatchewan and the SSBA participated in 40 full-day meetings spanning approximately 3 years. Despite good faith efforts made by the Public Section, a resolution could not be secured and the mediation process was called off by the Catholic Section in October 2011.

Defendants' Efforts to Avoid Adjudication of the Mandate Issue

It should be noted that on five occasions the matter of “standing” has come before the court in the form of legal applications by the Defendants, and was a matter reviewed

during the trial. In law, **standing** is the term for the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case.

In September 2008 before Justice Pritchard and then again in August 2012 before Justice Mills, Good Spirit S.D. and the Public Section were challenged on the matter of “standing”. In 2008 Justice Pritchard stated, “The core issue (in the lawsuit) appears to be whether the Theodore School is in fact and law a separate school to the extent that it admits students who are not of the minority Catholic faith and educates them on Catholic doctrine.” She found that the proposed amendment should not be disallowed on the basis of a lack of standing to sustain the action.

In 2012, Justice Mills dismissed the Catholic Section's and Christ the Teacher's application that Good Spirit and the Public Section did not have standing to raise the issue and stated, “at its simplest, this case involves the ability of the Government of Saskatchewan to fund non-denominational students attending denominational schools.” He found that a “serious legal question had been raised since the provision of funding non-Catholic students to attend a Catholic school where that denomination's religious beliefs are advanced as part of its operational structure, could be said to favour that particular religious belief.”

An application by Christ the Teacher and the Catholic Section seeking to appeal the decision of Justice Mills was dismissed by Justice Cameron of the Court of Appeal in November 2012.

Justice Cameron found that the Separate Division had failed to demonstrate that the proposed appeal was of sufficient merit to warrant a full review by the Court of Appeal. He found that Justice Mills had properly concluded that the Defendants had failed to show that the Plaintiff did not have standing. However, he clarified that the issue of standing may be raised again at trial, with the benefit of a full evidentiary record.

Standing was also a motivation for an application brought forward by the Defendants in May of 2015. The application to the court argued for the splitting of the trial into two separate trials. The first trial was to focus on the issue of standing. The second trial to focus on the substantive merits of the plaintiff's claim. Justice Layh ruled in favour of Good Spirit advising that facts relevant to “standing” should not be compartmentalized and separated from the facts relevant to the “merits” of the constitutional challenge. He also had reservations regarding the additional time and costs that dividing the trial would potentially take.

Outcome at Trial

The trial commenced on November 9, 2015 and concluded with closing arguments on July 13, 14 and 15, 2016. The court was in session for 51 days and heard the evidence of

16 witnesses. The judgement of Justice Layh of the Court of Queen's Bench was released on April 20, 2017.

Justice Layh ruled that Good Spirit SD has requisite standing to seek judicial review of the Government's action in funding non-minority faith students in separate schools in Saskatchewan. The decision of Justice Layh has provided the government with the following guidance:

“the purpose of the constitutional protection for Catholic schools was to permit minority Catholics to separate from the non-Catholic public school, and indoctrinate Catholic children in the tenets of the Catholic faith. The purpose was not to give Saskatchewan a second public school system grounded exclusively in the tenets of the Catholic faith”;

“the state has violated its duty of religious neutrality under s. 2(a) of the *Charter* by conferring a benefit upon one religion the funding of Catholic schools respecting the attendance of non-Catholic students, but not upon other religions”;

“the state has discriminated against and has unequally treated adherents of other religions”; and

it was unacceptable for the State "at public expense ... to promote the interest of the Catholic faith by enabling it to disseminate its teachings to non-Catholic students in a manner denied to any other religious group".

Next Steps

Both defendants to the case, Christ the Teacher RCSSD and the Government of Saskatchewan filed Notice of Appeal on May 19, 2017.

In closing, it is important to emphasize that Public Boards respect their separate school division counterparts and value the relationships and cooperation that exists among public school divisions and Roman Catholic separate school divisions. This initiative should be regarded as a good faith effort to clarify basic legal issues in the interests of the educational system as a whole.

Bert de Gooijer, Chair and Larry Huber, Executive Director - Public Section, SSBA