Court of Appeal for Saskatchewan

Dockets: CACV3075, CACV3076, CACV3201, and CACV3205

Citation: *Saskatchewan v Good Spirit School Division No. 204*, 2020 SKCA 34
Date: 2020-03-25

Dockets: CACV3075 and CACV3076
Between:

The Government of Saskatchewan and Christ the Teacher Roman Catholic Separate School Division No. 212

Appellants (Defendants)

And

Good Spirit School Division No. 204

Respondent (Plaintiff)

And

Ontario English Catholic Teachers' Association, Alberta Catholic School Trustees' Association, Ontario Catholic School Trustees' Association, Association franco-ontarienne des conseils scolaires catholiques, and Public School Boards' Association of Alberta

Intervenors

Dockets: CACV3201 and CACV3205
Between:

The Government of Saskatchewan and Christ the Teacher Roman Catholic Separate School Division No. 212

Appellants (Defendants)

And

Good Spirit School Division No. 204

Respondent (Plaintiff)

Before:	Jackson, Ottenbreit, Caldwell, Whitmore and Schwann JJ.A.
Disposition:	Applications granted; appeal allowed
Written reasons by:	The Court

On Appeal From:	2017 SKQB 109 and 2018 SKQB 30, Yorkton
Appeal Heard:	March 12 and 13, 2019
Counsel:	Sharon Pratchler, Q.C., Tom Irvine, Q.C., and Theodore Litowski for the Government of Saskatchewan Collin Hirschfeld, Q.C., and Curtis Onishenko for the Christ the Teacher Roman Catholic Separate School Division Khurrum Awan, Roger Lepage and Brian Lunde for the Good Spirit School Division Paul Cavalluzzo and Adrienne Telford for the Ontario English Catholic Teachers' Association Simon Elzen-Hoskyn and Cristina Wendel for the Alberta Catholic School Trustees' Association Daniel Santoro and Zahra Shariff for the Ontario Catholic School Trustees' Association Jennifer Klinck and Audrey Mayrand for the Association franco-ontarienne des conseils scolaires catholiques Kirk Lambrecht, Q.C., for the Public School Boards' Association of Alberta

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The Court

I. Introduction

[1] In the village of Theodore, Saskatchewan, there is one publicly funded elementary school. Up until the summer of 2003, the school was under the jurisdiction of the public school division. It was attended by a majority of non-Catholic students and a minority of Catholic students. For budgetary reasons, the public school division decided to close the school and bus the students to a neighbouring town's elementary school. To keep a school in their community, parents banded together to request that a Catholic school be created to take the place of the soon to be closed school. In the fall of 2003, St. Theodore School opened under the jurisdiction of the separate school division, with almost the same enrolment and almost the same ratio of Catholic and non-Catholic students as the prior school. St. Theodore School continues to operate as a fully functioning separate school funded by the Saskatchewan Government [Government] in the same way as the prior school, which is based largely on student enrollment.

[2] Following the opening of St. Theodore School, the Good Spirit School Division No. 204 [Good Spirit or GSSD], which is the public school division that serves the community of Theodore, brought an action against the Government, as represented by the Attorney General for Saskatchewan [Attorney General], and Christ the Teacher Roman Catholic Separate School Division No. 212 [Christ the Teacher or CTT], which is the separate school division that also serves the Theodore district. Good Spirit sought a declaration that St. Theodore School is not a valid, separate school. Good Spirit also sought a declaration that the Government's funding of non-Catholic students to attend Catholic schools breaches s. 2(a) and s. 15 of the *Charter* and is unconstitutional.

[3] The trial judge declared St. Theodore School a valid, separate school. However, he also declared that the applicable legislation and the Government action that provides funding for non-Catholic students to attend Catholic schools contravenes s. 2(a) and s. 15 of the *Charter* and is therefore unconstitutional: *Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212*, 2017 SKQB 109, [2017] 9 WWR 673 [*Trial Decision*]. He held that the challenged legislation could not be saved under s. 1 of the *Charter*,

which permits courts to conclude that legislation found to infringe the *Charter* can nonetheless remain in effect if that legislation can be demonstrably justified in a free and democratic society.

[4] In a second decision, the trial judge ordered that the Government and Christ the Teacher pay significant costs to Good Spirit: see *Good Spirit School Division No. 204 v Christ The Teacher Roman Catholic Separate School Division No. 212*, 2018 SKQB 30, [2018] 2 WWR 778 [*Costs Decision*].

[5] The Government and Christ the Teacher appeal the *Trial Decision* (i.e., the general declaration of unconstitutionality) and the *Costs Decision*. Good Spirit did not cross-appeal the trial judge's declaration that St. Theodore School is a valid, separate school.

[6] With much respect, we approach the issues in this case differently than did the trial judge. In fairness to him, the issues have become more refined in this Court and the constitutional arguments more exact. By way of broad overview of these reasons, we find the trial judge made three fundamental errors of law that permeate the principal issues that had to be resolved at trial.

[7] First, contrary to the approach that Good Spirit advocated before the trial judge, this case is not about the constitutionality of "funding non-Catholics in Catholic schools". To define the case so narrowly overstates what is at stake and understates the interconnectivity of the constitutional protection afforded to separate schools and the legislative scheme at play. *The Education Act, 1995*, SS 1995, c E-0.2 [*Education Act*], and *The Education Funding Regulations*, RRS c E-0.2 Reg 20 [*Regulations*] [together, the Legislative Framework], confer a right on *any* child resident in *any* school division to attend *any* publicly funded school within that division. A school division may be a *public* school division (which is secular in nature) or a *separate* school division (which is largely Roman Catholic in this province). The Legislative Framework allows parents to choose which of these two *publicly funded* education systems they wish their children to attend. It is an *effect* of this parallel public system of education that non-Catholic students may attend public, separate schools, but it is also an *effect* that Catholic students may attend public, secular schools. The Government fully funds the attendance of all students in both of its public education systems. This parallelism underpins the province's approach to education and must be considered in its entirety to determine whether the Legislative Framework offends the *Charter.*

[8] Second, Good Spirit sought to construct a case for religious discrimination on the foundational fact that *private* religious schools receive partial funding from the Government and if they accept non-adherent students those students will also be funded partially only. This is not a proper application of the *Charter* right of religious freedom. There was no evidence presented to the trial judge or to this Court that private religious schools receive partial funding – for children of their faith *or* for the children of other faiths – because of discrimination, stereotyping or prejudice in breach of the *Charter* protection of freedom of religion. Moreover, the Supreme Court has held that private religious schools, as a matter of law, cannot mount a claim under the *Charter* on the basis of a comparison to the public school systems, whether secular or separate, for full funding (see *Adler v Ontario*, [1996] 3 SCR 609 [*Adler*]). In any event, Good Spirit is not seeking full funding for the private religious schools or full funding for non-adherents to attend such schools, as such remedies would be contrary to the aim of its action, which was to increase funding for the public, secular school system only.

[9] Third, s. 93 of the of *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*], and s. 17(2) of *The Saskatchewan Act*, SC 1905, c 42, reprinted in RSC 1985, App II, No 21 [*Saskatchewan Act*], and the protections they afford to separate schools in this province, do not create inequality under the *Charter* – entrenched or otherwise – as the trial judge held (see *Trial Decision* at paras 424, 426, 444 and 467). The constitutional protection granted to separate schools in Saskatchewan is as much a part of the Constitution of Canada as is the *Charter*. As noted by Wilson J., one part of the constitution cannot be used to invalidate another part of the constitution: "It was never intended, in my opinion, that the *Charter* should 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" (*Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 SCR 1148 at 1197 [*Reference re Bill 30*]; see also *Adler* at para 38). This does not mean that separate schools are *Charter*-free zones, but it does mean the funding of them is *not* inherently discriminatory – contrary to the comment that "the funding of Catholic Schools in Saskatchewan … is inherently discriminatory" (*Trial Decision* at para 397) and that "separate school rights are inherently discriminatory even when protected by s. 93" (at para 426).

[10] In the result, we would allow the appeal and set aside the trial judge's declaration of constitutional invalidity. It follows that the *Costs Decision* must also be set aside. We would, however, not make any order of costs in this Court or in the Court of Queen's Bench.

II. Legislation

A. *Constitution Act, 1867* and the *Saskatchewan Act*

[11] This appeal engages the following constitutional legislation pertaining to denominational, separate or dissentient schools:

Constitution Act, 1867	***Loi constitutionnelle de 1867***
Education **Legislation respecting Education** **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: … (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:	**Éducation** **Législation au sujet de l'éducation** **93.** Dans chaque province, la législature pourra exclusivement décréter des lois relatives à l'éducation, sujettes et conformes aux dispositions suivantes: (1) Rien dans ces lois ne devra préjudicier à aucun droit ou privilège conféré, lors de l'union, par la loi à aucune classe particulière de personnes dans la province, relativement aux écoles séparées (*denominational*); … (3) Dans toute province où un système d'écoles séparées ou dissidentes existera par la loi, lors de l'union, ou sera subséquemment établi par la législature de la province – il pourra être interjeté appel au gouverneur-général en conseil de toute loi ou décision d'aucune autorité provinciale affectant aucun des droits ou privilèges de la minorité protestante ou catholique romaine des sujets de Sa Majesté relativement à l'éducation;

(4.) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.	(4) Dans le cas où il ne serait pas décrété telle loi provinciale que, de temps à autre, le gouverneur-général en conseil jugera nécessaire pour donner suite et exécution aux dispositions du présent article, – ou dans le cas où quelque décision du gouverneur-général en conseil, sur appel interjeté en vertu du présent article, ne serait pas mise à exécution par l'autorité provinciale compétente – alors et en tout tel cas, et en tant seulement que les circonstances de chaque cas l'exigeront, le parlement du Canada pourra décréter des lois propres à y remédier pour donner suite et exécution aux dispositions du présent article, ainsi qu'à toute décision rendue par le gouverneur-général en conseil sous l'autorité de ce même article.

and

***Saskatchewan Act* (1905)**	***Loi concernant la Saskatchewan* (1905)**
Education **17.** Section 93 of *The British North America Act, 1867*, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph: –	**Éducation** **17.**(1) L'article 93 *de la Loi de 1867 sur l'Amérique du Nord britannique* s'applique à la province, le paragraphe (1) de cet article étant remplacé par ce qui suit :
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".	1. « Elle ne peut, par une disposition législative adoptée en cette matière, porter atteinte aux droits ou privilèges appartenant lors de l'adoption de la présente loi, selon les chapitres 29 et 30 (année 1901) *des ordonnances des Territoires du Nord-Ouest*, à une catégorie de personnes relativement aux écoles séparées, ou relativement à l'instruction religieuse dispensée dans les écoles publiques ou séparées conformément à ces ordonnances. »
2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.	2. Les écoles des catégories visées au chapitre 29 mentionné ci-dessus ne peuvent faire l'objet de mesures discriminatoires lors de l'affectation par la législature de la province, ou de la répartition par son gouvernement, des crédits destinés aux écoles organisées et tenues conformément à ce chapitre ou à toute loi qui le modifie ou s'y substitue.

***Saskatchewan Act* (1905)**	***Loi concernant la Saskatchewan* (1905)**
3. Where the expression "by law" is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30; and where the expression "at the Union" is employed, in the said paragraph (3), it shall be held to mean the date at which this Act comes into force.	3. Par les expressions « lors de l'union » et « de droit » qui figurent au paragraphe (3) du même article 93, il faut entendre respectivement la date d'entrée en vigueur de la présente loi et les règles de droit énoncées aux chapitres 29 et 30.

[12] For the purposes of these reasons, and for ease of reference, the following short forms will be used:

Short Form	**Refers to …**
s. 17(1)	s. 17(1) of the *Saskatchewan Act*
s. 17(2)	s. 17(2) of the *Saskatchewan Act*, which has no equivalent in the *Constitution Act, 1867*
s. 93(1), or for emphasis, paragraph (1) of s. 93	s. 93(1) of the *Constitution Act, 1867*, as replaced by s. 17(1) of the *Saskatchewan Act* (unless referring to jurisprudence emanating from Ontario or Québec, when the same reference pertains to the unamended *Constitution Act, 1867*)
s. 93(3), or for emphasis, paragraph (3) of s. 93	s. 93(3) of the *Constitution Act, 1867*, as amended by s. 17(3) of the *Saskatchewan Act* (unless referring to jurisprudence emanating from Ontario or Québec, when the same reference pertains to the unamended *Constitution Act, 1867*)

B. The *1901 Ordinances*

[13] As will be seen from the text of s. 17(1), no law passed by the province "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 …". This provision incorporates, by way of reference, *The School Ordinance*, NWT Ord 1901, c 29 [*1901 School Ordinance*], and *An Ordinance respecting Assessment and Taxation in School Districts*, NWT Ord 1901, c 30 [together, the *1901 Ordinances*], as of the date of passing, i.e., July 20, 1905. The *1901 Ordinances* are voluminous statutes that concern all aspects of education with respect to both public and separate schools.

[14] Of particular significance to this appeal are the sections of the *1901 School Ordinance* pertaining to separate schools and education:

INTERPRETATION

Interpretation

2 In this Ordinance except the context otherwise requires:

District

5. The expression **"district"** means any school district erected or constituted as such at the date of the coming into force of this Ordinance and any school district hereafter erected or constituted under the provisions hereof …

…

DEPARTMENT OF EDUCATION

Functions

4 The department shall have the control and management of all kindergarten schools, public and separate schools, normal schools, teachers' institutes and the education of deaf, deaf mute and blind persons.

…

SEPARATE SCHOOLS

Separate Schools/Assessments

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

Petition for erection

42 The petition for the erection of a separate school district shall be signed by three resident ratepayers of the religious faith indicated in the name of the proposed district; and shall be in the form prescribed by the commissioner.

Qualification of voters

43 The persons qualified to vote for or against the erection of a separate school district shall be the ratepayers in the district of the same religious faith Protestant or Roman Catholic as the petitioners.

Notice of ratepayers' meetings / Subsequent proceedings

44 The notice calling a meeting of the ratepayers for the purpose of taking their votes on the petition for the erection of a separate school district shall be in the form prescribed by the commissioner and the proceedings subsequent to the posting of such notice shall be the same as prescribed in the formation of public school districts.

Rights and liabilities of separate school districts

45 After the establishment of a separate school district under the provisions of this Ordinance such separate school district and the board thereof shall possess and exercise all rights, powers, privileges and be subject to the same liabilities and method of government as is herein provided in respect of public school districts.

(2) Any person who is legally assessed or assessable for a public school shall not be liable to assessment for any separate school established therein.

…

Attendance not compulsory during religious exercise

138 Any child shall have the privilege of leaving the school room at the time at which religious instruction is commenced as provided for in the next preceding section or on remaining without taking part in any religious instruction that may be given if the parents or guardians do desire.

C. The Legislative Framework

[15] As will be noted later in these reasons, Good Spirit asked for a declaration that ss. 53, 85, 87 and 310 of the *Education Act* and ss. 3 and 4 of the *Regulations* are unconstitutional to the extent they provide funding to educate non-minority faith students attending a denominational separate school.

[16] By the time of trial, and since the time of the creation of St. Theodore School, the *Education Act* had been amended many times.[1] The trial proceeded on the basis that the constitutionality of the *Education Act* would be determined in accordance with that Act as it existed at the time of trial.[2] The salient provisions of the *Education Act* for this appeal are as follows:

Definitions

2 In this Act: …

"board of education" means the board of education of a school division …

…

"division" or **"school division"** means a school division designated pursuant to section 40 and includes a public school division and a separate school division … .

1995, c. E-0.2, s. 2; 1996, c. 45, s. 3; 1998, c. 21, s. 3; 2000, c. 10, s. 4; 2005, c. 11, s. 3; 2006. c. 18, s. 3; 2008, c. 11, s. 3; 2009, c. 13, s. 3; 2009, c. 15, s. 3; 2012, c. 10, s. 3; 2013, c. 9, s. 3; 2015, c. 18, s. 2.

…

Powers and duties of separate school divisions

53(1) On the establishment of a separate school division pursuant to this Act, that division and the board of education of the division shall possess and exercise the same rights and powers and be subject to the same liabilities and method of government as other school divisions continued or established pursuant to this Act.

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[1] *The Education Act, 1995*, SS 1995, c E-0.2, as amended by SS 1996, c. 45; 1997, c. 35; 1998, c. 21; 1999, c. 16; 2000, cc. 10, 42 and 70; 2001, c. 13; 2002, cc. 27 and 29; 2004, cc. 16 and 67; 2005, cc. 10, 11 and 21; 2006, cc. 18, 38 and 42; 2008, c. 11; 2009, cc. 13, 14 and 15; 2010, cc. 10, 22 and 25; 2012, cc. 10; 2013, cc. P-38.01 and 9; 2014, cc. 11 and 28; and 2015, cc. 3, 6, 18 and 22.

[2] Appendix 1 to the *Trial Decision* reproduced the impugned provisions of the *Education Act* as of the time of trial. However, the reference to "*The Education Act, 1975*" should read *The Education Act, 1995*.

(2) Where, the minority religious faith, whether Protestant or Roman Catholic, has established a separate school division, a property owner is to be assessed with respect to his or her property:

(a) in the case of a member of the minority religious faith, as a taxpayer of the separate school division;

(b) in any other case, as a taxpayer of the public school division.

1995, c. E-0.2, s. 53; 1999, c. 16, s .3.

…

Right to attend school at cost of school division

142(1) Subject to the other provisions of this Act, every person who has attained the age of six years but has not yet attained the age of 22 years has the right:

(a) to attend school in the school division where that person or that person's parents or guardians reside; and

(b) to receive instruction appropriate to that person's age and level of educational achievement.

(2) A person's right to receive instruction mentioned in clause (1)(b) is the right to instruction in courses of instruction approved by the board of education:

(a) in the schools of the school division; or

(b) subject to the stated policies, requirements and conditions of the board of education, in any schools or institutions outside the school division with which the board of education has made arrangements to provide certain services to pupils of the school division.

(3) Except as otherwise provided in this Act, the educational services provided pursuant to this section are to be provided at the cost of the school division, and no fees for tuition, transportation or any other expenses with respect to attendance at school are to be charged with respect to a pupil who is resident in the school division or whose parent or guardian is a resident in the school division.

(4) Notwithstanding subsection (3), the board of education may require payment in whole or in part of costs incurred with respect to transportation pertaining to special projects or special equipment or supplies not ordinarily furnished to pupils under the policies of the board of education.

(5) Subject to the regulations, when a pupil who is resident in one school division is accepted by a board of education to attend a school in another school division, no fees for tuition are to be charged with respect to the pupil's attendance at the school in the other school division.

(6) Subject to the regulations, if a pupil mentioned in subsection (5) attends school in another school division, the board of education for that school division is not required to provide the pupil with school transportation services or to pay for school transportation services for the pupil.

1995, c. E-0.2, s. 142; 1998, c. 21, s. 58; 2013, c. 9, s. 11.

…

Operating grants to boards of education

310(1) Subject to subsection (2), the regulations and any directive of the minister, the minister shall pay to each board of education an operating grant for the period commencing on April 1 in one year and ending on March 31 of the following year.

(2) The minister may deduct from any annual operating grant payable to a board of education the amount of the fees for membership in an association recognized and approved for the purposes of clause 87(1)(u) unless:

(a) on or before December 1 in any year, the board of education requests the minister, in writing, not to make the deduction; and

(b) the minister approves the request mentioned in clause (a).

2012, c. 10, s. 22.

…

Information required re grants

312(1) For the proper administration of sections 310 and 311, the minister may require, in the form and at the times that the minister may direct:

(a) any returns, statements, reports and information that the minister considers necessary from each school division; and

(b) a certified statement setting forth information with respect to the taxable assessment of a school division from any municipality within which the whole or any part of that school division is situated.

(2) The minister may apply any capital or operating grant due to a school division in repayment of any indebtedness of the school division to the ministry or to the Minister of Finance.

(3) All grants provided for by this Act that may be paid to a board of education are payable subject to the condition that the school division and the schools in it are organized, operated and maintained in accordance with this Act, the regulations and every minister's directive that relates to the grant.

2009, c. 15, s. 17.

…

Regulations

370(1) The Lieutenant Governor in Council may make regulations:

…

(s) respecting the purpose of carrying out the provisions of this Act with respect to the payment of grants;

…

(cc.1) respecting the application of subsections 142(5) and (6) with respect to boards of education and subsections 143(4) and (5) with respect to the conseil scolaire;

…

(ii.2) respecting operating grants to be paid pursuant to section 310, including: (i) prescribing and requiring compliance with any terms and conditions that may be imposed on a grant, including authorizing the minister to impose additional terms

and conditions on a grant; (ii) respecting the manner of calculating the local expenditures of a school division and the school division's revenues and the amount of any grant, including authorizing the minister to determine the manner in which local expenditures and revenue may be calculated; and (iii) prescribing the minimum or maximum amount of any operating grant to be paid pursuant to section 310 to a school division … .

…

(2) A regulation made pursuant to clause (1)(s) or (ii.2) may be made retroactive to a day not earlier than the first day of the period with respect to which the grant contemplated by the regulation is to be paid.

1995, c. E-0.2, s. 370; 1997, c. 35, s. 23; 1998, c. 21, s. 126; 1999, c. 16, s. 14; 2000, c. 10, s. 18; 2002, c. 29, s. 3; 2006, c. 18, s. 32; 2006, c. 38, s. 9; 2008, c. 11, s. 13; 2009, c. 13, s. 45; 2012, c. 10, s. 45; 2013, c. 9, s. 38; 2015, c. 6, s. 10; 2015, c. 18, s. 2.

[17] The applicable *Regulations* provide as follows:

Application

3(1) These regulations apply to operating grants and capital grants payable for the period commencing on April 1, 2009 and ending on the date on which these regulations are repealed:

(a) to boards of education and the conseil scolaire pursuant to sections 310 to 315 of the Act; and

(b) to registered independent schools, including historical high schools, and to any other educational institution and organization pursuant to section 19 of *The Government Organization Act*.

(1.1) Pursuant to section 19 of *The Government Organization Act*, these regulations apply to operating grants payable to qualified independent schools for the period commencing on April 1, 2012 and ending on the date on which Part III of these regulations is repealed.

(2) The minister shall distribute operating grants pursuant to these regulations on a monthly basis or at any other intervals that the minister may determine.

27 Aug 2010 c E-0.2 Reg 20 s 3; 6 Jly 2012 SR 48/2012 s 4.

PART II

Boards of Education and the Conseil Scolaire

DIVISION 1

Operating Grants

Operating grants

4(1) In this section:

(a) "fiscal year" means:

(i) in clause (2)(a), the fiscal year of the board of education or conseils scolaire, being the period commencing on September 1 in one year and ending on August 31 of the following year; and

(ii) except in clause (2)(a), the fiscal year of the Government of Saskatchewan, being the period commencing on April 1 in one year and ending on March 31 of the following year;

(b) "separate school board" means the board of education of a separate school division.

(2) In calculating the operating grants payable to a board of education or the conseil scolaire for any fiscal year, the minister may take into account:

(a) the final approved budget of the board of education or conseil scolaire, as the case may be, for the relevant fiscal year of the board of education or conseil scolaire;

(b) the minister's estimates of revenues available to the board of education or conseil scolaire, as the case may be, for the relevant fiscal year of the Government of Saskatchewan, including:

(i) education property taxes;

(ii) grants in lieu of taxes;

(iii) in the case of a board of education, the board of education's percentage of licence fees charged by the municipality respecting trailers and mobile homes located within the school division;

(iv) tuition revenue and other fees;

(v) federal grants;

(vi) interest on investments and assets; and

(vii) such other revenue as the minister may determine;

(c) the minister's estimates of expenses incurred by the board of education or conseil scolaire, as the case may be, for the relevant fiscal year of the Government of Saskatchewan, including:

(i) the effects of inflation on expenses outlined in the final approved budget of the board of education or conseil scolaire for the government's previous fiscal year; and

(ii) teacher salary increases;

(d) financial information furnished by the board of education or conseils scolaire, as the case may be, in consultations with the minister or at the request of the minister; and

(e) such other matters as the minister determines may be relevant to the funding of educational programs for pupils, kindergarten children and children who are not yet eligible to be enrolled in kindergarten.

(3) Without restricting the generality of clause (2)(b), if a separate school board, pursuant to subsection 288(7) of the Act, determines mill rates for a particular taxation year that are higher than those determined by the Lieutenant Governor in Council for that taxation year, the minister, given the final approved budget of the separate school board, shall reduce the operating grant payable to the separate school board by the amount by which the tax revenue allocated to the separate school board based on the mill rates set by the separate school board for that taxation year exceeds the tax revenue that would otherwise have been

allocated to the separate school board based on the mill rates set by the Lieutenant Governor in Council for that taxation year.

(4) Without restricting the generality of clause (2)(b), if a separate school board, pursuant to subsection 288(7) of the Act, determines mill rates for a particular taxation year that are lower than those determined by the Lieutenant Governor in Council for that taxation year, the funding requirements of the separate school board shall be deemed to have decreased and the minister shall refrain from increasing the operating grant payable to the separate school board.

27 Aug 2010 c. E-0.2 Reg 20 s. 4.

D. The *Charter*

[18] The provisions of the *Charter* engaged by this appeal provide as follows (*Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*]):

Constitution Act, 1982	***Loi constitutionnelle de 1982***
Guarantee of Rights and Freedoms	**Garantie des droits et libertés**
Rights and freedoms in Canada **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	**Droits et libertés au Canada** **1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
Fundamental Freedoms	**Libertés fondamentales**
Fundamental freedoms **2.** Everyone has the following fundamental freedoms:	**Libertés fondamentales** **2.** Chacun a les libertés fondamentales suivantes :
(*a*) freedom of conscience and religion … .	*a*) liberté de conscience et de religion … .
Equality Rights	**Droits à l'égalité**
Equality before and under law and equal protection and benefit of law **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.	**Égalité devant la loi, égalité de bénéfice et protection égale de la loi** **15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Rights respecting certain schools preserved **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.	**Maintien des droits relatifs à certaines écoles** **29.** Les dispositions de la présente charte ne portent pas atteinte aux droits ou privilèges garantis en vertu de la Constitution du Canada concernant les écoles séparées et autres écoles confessionnelles.

III. Background

[19] As a result of amalgamations in both public and separate school divisions,[3] the parties to the dispute and this appeal are now Good Spirit and Christ the Teacher. The Government takes a legal position in support of Christ the Teacher and has offered its own submissions on all issues.

[20] As we have indicated, this particular dispute has as its genesis what happened in 2003 in relation to the school in Theodore, Saskatchewan, which at that time was being operated under a public school division, namely the York School Division No. 36 (the original plaintiff). As a result of declining enrolments, and therefore diminishing government funding, York School Division No. 36 passed a motion on December 16, 2002, requiring that it consider the closure of the Theodore Public School, and ultimately closed that school effective August 20, 2003.

[21] Meanwhile, by petition dated May 20, 2003, a group of Catholic electors from the Theodore area petitioned the Minister of Learning (now the Minister of Education), pursuant to s. 49(2) and s. 49(3) of the *Education Act*, to establish a Roman Catholic separate school division.[4] The validity of those provisions is not at issue in this appeal. By order dated July 2, 2003, the Minister of Learning established the Theodore Roman Catholic Separate School Division with boundaries, as requested by the electors, coincident with those that had applied to the former public

[3] The original dispute was between the York School Division No. 36 on the public side and the Theodore Roman Catholic Separate School Division No. 138 and the Yorkton Roman Catholic Separate School Division No. 86 on the separate side. Under a previous restructuring, the Yorkdale School Division No. 36 amalgamated with the Yorkton School Division No. 93, resulting in the formation of the York School Division No. 36. Christ the Teacher includes the former Theodore Roman Catholic Separate School Division and the former Yorkton Roman Catholic Separate School Division.

[4] **Establishment of separate school division [*Education Act* as of 2003]**

49(2) In accordance with this section and section 50, a minority of the electors in a school district, whether Protestant or Roman Catholic, may establish a separate school division, and in that case the electors establishing the school division shall be liable only to assessments of any rates as they may impose on themselves.

(3) Any three electors mentioned in section (2) may petition the minister for the establishment of a separate school division.

school division – thus bringing to a head a long-standing dispute between the public school divisions and the separate school divisions, principally regarding the provision of funding for non-Catholic students attending Catholic schools. Most of the students attending the Theodore Public School continued attending what would now be a Catholic separate school, with a composition of 13 Catholic students (31%) and 29 non-Catholic students (69%). The new Theodore separate school opened its doors in September of 2003. In December of 2003, it was named St. Theodore School.

[22] On March 23, 2005, Good Spirit brought an action against the predecessor to Christ the Teacher seeking relief. After a number of amendments, Good Spirit sought these declarations:

> (a) a declaration that St. Theodore School is not a separate school within the meaning of Section 17 of *The Saskatchewan Act* and section 93 of the *Constitution Act, 1867*;
>
> (b) a declaration that the establishment and provision for the operation of St. Theodore School pursuant to *The Education Act, 1995* offends sections 2(a) and 15 of the *Charter*, and cannot be justified pursuant to section 1 of the *Charter*;
>
> (c) a declaration that the Government had and has no authority to provide for the establishment and operation of St. Theodore School as a separate school to educate both Roman Catholic and non-Roman Catholic students, or in the alternative, to educate both Roman Catholic and non-Roman Catholic students whose education is funded by the Government without distinction based on their religion;
>
> (d) a declaration that Christ the Teacher Roman Catholic Separate School Division and its predecessors had and have no authority under *The Education Act, 1995* to establish and provide for the operation of St. Theodore School to educate both Roman Catholic and non-Roman Catholic students, or in the alternative, to educate both Roman Catholic and non-Roman Catholic students whose education is funded by the Government without distinction based on their religion;
>
> (e) a declaration that Christ the Teacher Roman Catholic Separate School Division and St. Theodore School do not have the constitutional right to accept non-Roman Catholic students to St. Theodore School;
>
> (e.1) a declaration that section 17 of *The Saskatchewan Act* does not confer a denominational right to admit Non-Minority Faith Students to denominational separate schools;
>
> (f) a declaration that the payment of the Continuing Grants to Christ the Teacher Roman Catholic Separate School Division in respect of non-Roman Catholic students attending St. Theodore School offends sections 2(a) and 15 of the *Charter*, and cannot be justified pursuant to section 1 of the *Charter*;
>
> (g) a declaration that the Government shall not pay the Continuing Grant to Christ the Teacher Roman Catholic Separate School Division, or otherwise fund Christ the Teacher Roman Catholic Separate School Division, in respect of non-Roman Catholic students attending St. Theodore School;

(h) a declaration that sections 53, 85, 87 and 310 of *The Education Act, 1995*, sections 3 and 4 of *The Education Funding Regulations*, and any legislative provisions that implement or authorize the Permanent Funding Formula, are unconstitutional to the extent they provide for the Continuing Grant: (i) for the establishment and operation of the School to educate both Roman Catholic and non-Roman Catholic Students, and (ii) to educate Non-Minority Faith Students attending a denominational separate school;

[23] Good Spirit substantiated its request for declaratory relief by asserting the following:

Illegality of Grant Payments

39.1 Government action and legislation in respect of denominational, separate schools, and the actions of separate school divisions and boards of education taken under legal authority, are sheltered from *Charter* scrutiny only to the extent that the Government action and legislation, and the actions of separate boards of education, are protected rights and privileges under the denominational education provisions of *The Saskatchewan Act* and the *Constitution Act, 1867*.

40. The denominational education provisions of *The Saskatchewan Act* and the *Constitution Act, 1887* do not require, provide or contemplate:

(a) that the Government is entitled to or will fund separate schools in respect of Non-Minority Faith Students; or

(b) that the Government is entitled to or will establish or provide for the operation of separate schools funded in whole or in part by the Government for the education of students who are Non-Minority Faith Students.

41. The denominational education provisions of *The Saskatchewan Act* and the *Constitution Act, 1867* do not require, provide or contemplate:

(a) that separate school divisions have the right to offer educational services to children that are Non-Minority Faith Students;

(b) that separate schools have the right to admit Non-Minority Faith Students; or

(c) that separate school divisions have the right to operate schools which are not separate schools within the meaning of section 17 of *The Saskatchewan Act*.

42. The admission of Non-Minority Faith Students, the provision of educational services to Non-Minority Faith Students and the establishment and operation of schools which admit and educate Non-Minority Faith Students:

(a) are not rights or privileges with respect to denominational schools within the meaning of section 17 of *The Saskatchewan Act* or section 93 of the *Constitution Act, 1867*; and

(b) do not relate to non-denominational aspects of denominational schools necessary to give effect to the rights and privileges guaranteed by the denominational education provisions of *The Saskatchewan Act* and the *Constitution Act, 1867*.

43. A school which has a majority of students who are Non-Minority Faith Students, or in the alterative, which has a student population which includes a significant number of Non-Minority Faith Students, is not a separate school within the meaning of section 17 of *The Saskatchewan Act.* Such schools cannot be established or operated as separate schools by separate school divisions.

> 44. The School is not a separate school within the meaning of section 17 of *The Saskatchewan Act*.
>
> 45. The payment of the Grants, the Interim Continuing Grants and the Continuing Grants to separate school divisions in respect of Non-Minority Faith Students ("Unauthorized Grants") offended and continues to offend both section 2(a) and section 15(1) of the *Charter*.
>
> 46. The payment of Unauthorized Grants, and the establishment and provision for the operation of the School to educate both Roman Catholic and non-Roman Catholic students, offend section 2(a) of the *Charter* because, through them, the Government subsidizes the operation of a school belonging to a particular religious group and supports the promotion of a particular religion and, in addition, thereby penalizes both the operation of public schools and schools belonging to other religious groups.
>
> 47. Section 15(1) of the *Charter* is offended by the payment of Unauthorized Grants because, through them, the Government provides funding to a particular religious group for its school and thereby discriminates on the basis of religion against persons who are members of other religious groups or who have no religious beliefs or affiliation.
>
> 48. Section 15(1) of the *Charter* is offended by the establishment and provision for the operation of the School because the Government thereby supports the promotion of a particular religion and thereby discriminates on the basis of religion against persons who are members of other religious groups or who have no religious beliefs or affiliation.
>
> …
>
> 57. Sections 53, 85, 87 and 310 of the *Act*, sections 3 and 4 of [*The Education Funding*] *Regulations*, and any legislative provisions that implement or authorize the Permanent Funding Formula, are therefore unconstitutional to the extent they provide for the Continuing Grant: (i) for the establishment and operation of the School to educate both Roman Catholic and non-Roman Catholic students, and (ii) to educate Non-Minority Faith Students attending a denominational separate school.

[24] As previously noted, the public school system's concerns about the funding of non-Catholic students in Catholic schools have been increasing for many years in this province. Increasing numbers of non-Catholic students attending Catholic schools and declining enrollments in some schools made the issues more acute. On several occasions over the last 15 years or so, the threatened and pending closure of a rural school has prompted Catholic and mostly Protestant rural electors to band together to create a *separate* school division, usually Catholic, and to seek the protection of the *Education Act* in order to keep a school within their community. While this action is in the name of Good Spirit, as plaintiff, and Christ the Teacher, as defendant, it is apparent from the record that the interests of each party are supported by other school divisions within the province. We do not doubt the sincerity of the positions of any of the parties.

IV. Decision of the trial judge

[25] The trial judge identified the issues as follows (*Trial Decision* at para 6):

> 1. Does GSSD have the requisite standing to bring this constitutional action seeking the remedies it requests? If "No", GSSD's action will be dismissed.
>
> 2. If "Yes", is St. Theodore Roman Catholic School a legitimate separate school? If "No", the result is apparent: students cannot attend and governments cannot fund an illegitimate school.
>
> 3. If "Yes", do ss. 93(1) and 93(3) of the *Constitution Act, 1867* constitutionally protect legislation and government action that funds non-Catholic students at St. Theodore Roman Catholic School? If "Yes", GSSD's claim must be dismissed.
>
> 4. If "No", does s. 17(2) of *The Saskatchewan Act*, which constitutionally guarantees no discrimination in the distribution of money among any class of school, protect legislation and government action that funds non-Catholic students at St. Theodore Roman Catholic School? If "Yes", GSSD's claim must be dismissed.
>
> 5. If "No", is the Government's funding of non-Catholic students at St. Theodore Roman Catholic School:
>
> a. a violation of s. 2(a) of the *Charter*; or
>
> b. a violation of s. 15 of the *Charter*?
>
> If "No", to both questions GSSD's claim must be dismissed.
>
> 6. If, "Yes", does s. 1 of the *Charter* justify the violation of the *Charter* as a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society? If "Yes", GSSD's claim must be dismissed.
>
> 7. If, "No", is GSSD entitled to the declarations it seeks?
>
> (Footnotes omitted)

[26] In summary form, the trial judge came to the following conclusions on the above seven issues:

> [474] I have determined the issues in this action as follows:
>
> 1. GSSD has requisite standing to seek judicial review of the Government's action in funding non-minority faith students in separate schools in Saskatchewan.
>
> 2. St. Theodore Roman Catholic School is a separate school, properly constituted within the meaning of *The Education Act, 1995*.
>
> 3. The *Constitution Act, 1867* does not provide a constitutional right to separate schools in Saskatchewan to receive provincial government funding respecting non-minority faith students because funding respecting non-minority faith students is not a denominational right of separate schools.
>
> 4. Section 17(2) of *The Saskatchewan Act*, which provides constitutional protection against discrimination in the distribution of moneys payable to any class of school, only protects separate schools to the extent they admit students of the minority faith.

> 5. Provincial government funding of non-minority faith students attending separate schools is a violation of the state's duty of religious neutrality under s. 2(a) of the *Charter*.
>
> 6. Provincial government funding of non-minority faith students attending separate schools is a violation of equality rights under s. 15(1) of the *Charter*.
>
> 7. The *Charter* violations, as found, are not reasonable limits as can be demonstrably justified in a free and democratic society.

He stated his overall conclusion in this way:

> [475] Having found that funding of non-minority faith students violates s. 2(a) and s. 15(1) of the *Charter* and cannot be justified under s. 1, I declare, pursuant to s. 52 of the *Constitution Act, 1982*, that those provisions of *The Education Act, 1995* and *The Education Funding Regulations*, to the extent that the Government of Saskatchewan has provided funding grants to separate schools respecting students not of the minority faith, are of no force and effect.

[27] The order that was taken out to give effect to the *Trial Decision* granted Good Spirit the following relief:

> a. A declaration pursuant to section 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11, that those provisions of *The Education Act, 1995*, SS 1995, c E-0.2 and *The Education Funding Regulations*, RRS c E-0.2 Reg 20, to the extent that the Government of Saskatchewan provides funding grants to separate schools respecting students not of the minority faith, violate sections 2(a) and 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, and cannot be justified pursuant to section 1 thereof, and therefore are of no force and effect.
>
> b. The above declaration of invalidity, made pursuant to section 52 of the *Constitution Act, 1982*, is stayed until June 30, 2018.

The June 30, 2018, date has been extended on successive occasions by order of this Court, according to an agreement between the parties.

[28] The appellants appeal from all aspects of the *Trial Decision*, except the trial judge's determination that St. Theodore School is "a separate school, properly constituted within the meaning of *The Education Act, 1995*" (at para 474) and apply to adduce fresh evidence pertaining to the record considered by the trial judge and to strike certain extracts from Good Spirit's sur-reply factum. The appellants also appeal the *Costs Decision*.

[29] In this Court, intervenor status was granted to the following:

(a) Alberta Catholic School Trustees' Association [ACSTA];

(b) Ontario Catholic School Trustees' Association [OCSTA];

(c) Ontario English Catholic Teachers' Association [OECTA];

(d) Association franco-ontarienne des conseils scolaires catholiques [AFOCSC]; and

(e) Public School Boards' Association of Alberta [PSBAA].

The first four intervenors provided written and oral submissions in favour of allowing the appeal, and will be referred to collectively as the "appellant–intervenors". The PSBAA provided written and oral submissions in favour of dismissing the appeal.

V. Public interest standing

A. Introduction

[30] The appellants applied to the trial judge, asking that the question of standing be heard and tried prior to the trial. The trial judge dismissed the application: *Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212* (6 August 6 2015) QB 118 of 2005, Yorkton (Sask QB). The question of standing was decided after the trial, based on all of the evidence and argument.

[31] In the result, and as part of the *Trial Decision*, the trial judge held that Good Spirit should be granted public interest standing. Applying *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37, [2012] 2 SCR 524 [*Eastside Sex Workers*], he found the following (*Trial Decision* at para 95):

(a) Good Spirit had raised a "serious justiciable issue";

(b) Good Spirit has a "real stake or a genuine interest" in the resolution of that issue; and

(c) the proposed suit was a "reasonable and effective way to bring the issue before the courts".

He found the serious justiciable issue to be tried was "whether or not government funding of non-minority faith students is a constitutionally protected right" (at para 121).

[32] It is appropriate to begin the analysis of the trial judge's reasons and conclusion with respect to public interest standing with an overview of s. 93 and s. 17(2) and of the Legislative Framework.

1. Understanding s. 93 and s. 17(2)

[33] In *Reference re Bill 30*, Wilson J. stated that "the Confederation compromise in relation to education is found in the whole of s. 93, not in its individual parts" (at 1198). When Saskatchewan (and Alberta) joined Confederation in 1905,[5] the compromise also included s. 17(2). The individual parts of these provisions are by necessity frequently examined individually and interpreted separately and are commonly referred to as "*s.* 93(1)", "*s.* 93(3)" and "*s.* 17(2)", and so on. However, this nomenclature implies that they are *subsections* of s. 93, when they are not. They do not stand apart from the opening words of s. 93. They are called paragraphs as that term is used in the *Constitution Act, 1867* but serve as clauses and, as such, they curtail, modify or confirm the extent of the plenary power that exists by virtue of the opening words of s. 93.

[34] For ease of reference, the following table indicates how the *Saskatchewan Act* amended s. 93 of the *Constitution Act, 1867*, as it pertains to Saskatchewan, and also provides some initial commentary regarding each individual component of s. 93 and s. 17(2) as it applies to this appeal:

Constitution Act, 1867 **(as of 1905)**	**Initial Commentary**
93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:	In *Reference re Bill 30*, Wilson J. stated, "The opening words of s. 93 vest an exclusive plenary power over education in the Province, 'subject and according to' the provisions that follow" (at 1169). This plenary power parallels the heads of power mentioned in s. 91 and s. 92 of the *Constitution Act, 1867*.

[5] Section 17 of *The Alberta Act*, SC 1905, c 3, reprinted in RSC 1985, App II, No 20 [*Alberta Act*], is identical to s. 17 of the *Saskatchewan Act*.

Constitution Act, 1867 **(as of 1905)**	**Initial Commentary**
(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.	This paragraph, enacted by s. 17(1) of the *Saskatchewan Act*, is a substitution for the comparable paragraph contained in the *Constitution Act, 1867*. As with s. 93(1) of that Act, this paragraph acts as a curtailment of the Legislature's plenary power as expressed under the opening words of s. 93. In other words, notwithstanding the Legislature's plenary power, it is prohibited by paragraph (1.) of s. 93 from *prejudicially affecting any right or privilege* with respect to separate schools that any class of persons had as of July 20, 1905 under the *1901 Ordinances*, or with respect to religious instruction in any public or separate school as provided for in the said ordinances. By virtue of s. 93(1), "denominational school rights and privileges created by ordinary legislation are raised to the status of constitutional norms" (*Adler* at para 44, quoting Pierre Carignan, "La raison d'être de l'article 93 de la Loi constitutionnelle de 1867 à la lumière de la législation préexistante en matière d'éducation" (1986) 20 RJT 375 a 451).

***Constitution Act, 1867* (as of 1905)**	**Initial Commentary**
(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: Note: The above is as the paragraph exists in the *Constitution Act, 1867*. Paragraph (3) of s. 17 of *The Saskatchewan Act* imports some modifications to the 1867 paragraph, but does not replace it: **17 (3.)** Where the expression "by law" is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30; and where the expression "at the Union" is employed, in the said paragraph (3), it shall be held to mean the date at which this Act comes into force.	Wilson J. in *Reference re Bill 30* described s. 93(3) in these terms: "s. 93(3) in no way limits the exercise of the province's plenary power. Rather, it expressly contemplates that after Confederation a provincial legislature may, pursuant to its plenary power, pass legislation which augments the rights or privileges of denominational school supporters" (at 1170). Unlike rights constitutionally guaranteed under s. 93(1), such rights may be modified or eliminated and the remedy does not lie with the courts. The remedy for such modification or elimination is to appeal to the Governor General in Council if a right or privilege once given to a separate school is *affected* (rather than *prejudicially affected* as under s. 93(1)). Under the *Saskatchewan Act*, s. 93(3) refers to the law set out in the *School Ordinances* as of the date of proclamation, i.e., September 1, 1905.
(4.) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.	This paragraph, which is not substantively engaged by this appeal, and is unchanged by the *Saskatchewan Act*, authorizes the Parliament of Canada to make remedial laws in relation to s. 93 or as a result of an appeal to the Governor General in Council. If invoked successfully, which has not occurred to-date, it too would act as a possible curtailment of the province's plenary power over education in relation to the protection of separate schools.

***Saskatchewan Act* (1905)**
17 Section 93 of *The British North America Act, 1867*, shall apply to the said province …

Constitution Act, 1867 **(as of 1905)**	**Initial Commentary**
2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.	This paragraph is not explicitly found in the *Constitution Act, 1867*. It is a direction to the Legislature regarding the *appropriation* or *distribution* of moneys for schools organized under the *1901 School Ordinance* "or any Act passed in amendment thereof or in substitution therefor" (emphasis added). In form, it is unique to Saskatchewan and Alberta. In *Public School Boards' Association of Alberta v Alberta (Attorney General)*, 2000 SCC 45, [2000] 2 SCR 409 [*Alberta Public Boards*], Major J. for the Court held the purpose of s. 17(2) "is clearly the achievement of an education system that distributes monies in support of education in a non-discriminatory manner" (at para 95).

2. Understanding the Legislative Framework

[35] From the language used in the *Trial Decision*, it is evident the trial judge accepted Good Spirit's characterization of the Legislative Framework. In this regard, he held that the Legislative Framework provides for the funding of non-minority faith students in separate schools. He repeated this phrase or a similar phrase numerous times in his reasons.

[36] The trial judge's understanding of the Legislative Framework, and what is at stake in this litigation, is also reflected in *Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212* (June 30, 2017) QB 118 of 2005, Yorkton (Sask QB) [*June 2017 Fiat*], issued after the reasons for judgment for the purpose of settling the judgment roll. The circumstances behind this fiat may be briefly stated.

[37] In preparing the draft judgment roll for presentation to the trial judge, Good Spirit served the appellants with a draft order seeking to encapsulate the *Trial Decision* by asking for the following declaration:

> A declaration pursuant to section 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11, that those provisions of *The Education Act, 1995*, SS 1995, c E-0.2, and *The Education Funding Regulations*, RRS c E-0.2 Reg 20, to the extent that the Government of Saskatchewan provides funding grants to separate schools respecting students not of the minority faith, violate sections 2(a) and 15(1) of the

> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, and cannot be justified pursuant to section 1 thereof, and therefore are of no force and effect.

[38] The appellants opposed this wording and applied to the trial judge to modify the proposed judgment roll to particularize those aspects of the Legislative Framework that would be affected by the declaration of invalidity. They asked the trial judge to specify that only s. 310 of the *Education Act* and s. 3 and s. 4 of the *Regulations* were affected. In dismissing the appellants' application, the trial judge wrote as follows (*June 2017 Fiat*):

> [16] … no specific part of the [*Education*] *Act* or *Regulations* directly states that the government has an obligation to fund non-minority faith students attending separate schools.
>
> [17] My continuing concern about the vagueness of the government's authority to fund non-minority faith students – whether anchored in the *Act* or in the *Regulations* or simply in government action – is repeatedly reflected in the reasons for judgment. In that regard, one will see reference to "government action" as opposed to a specific statutory or regulatory provision in several paragraphs of the judgment: 72, 350, 367, 382, 396, 404, 410, 415, 429, 433, 435, 463, 454 and 472.
>
> [18] Although the Government seeks to add specificity to para. 475, I quite intentionally did not intend such specificity. During the trial no party categorically referred to a single specific provision of the *Act* or *Regulations* to authoritatively anchor government funding of non-minority faith students. This lack of reference is understandable since there exists no specific legislation or regulation stating that the government will fund non-minority students at separate schools.

[39] The trial judge concluded that the proposed formal order was "an accurate reflection of what was intended in para. 475 of the judgment" (at para 19).

[40] In our respectful view, the operative units of the *Education Act* are the school divisions, which are defined to include public and separate school divisions (s. 2) and the board of education, which means the "board of education of a school division" (s. 2). The *Education Act* draws no distinction between public and separate school divisions and provides through its regulatory framework "operating grants" to boards of education for both divisions (s. 310 and the *Regulations*). (It should be noted, for clarity, that a distinction must be drawn here between Government funding under the *Education Act* and the municipal taxes that fund education. The municipal tax regime is not engaged in this appeal.)

[41] According to the testimony of Angela Chobanik, executive director of the Education Funding Branch of the Ministry of Education for the Government of Saskatchewan, in the

development or payment of its operating grants, it does not take into account religion in any way because, in part, "students who are a resident of Saskatchewan are entitled to a free education in the school division in which they live. Paraphrasing, but essentially, if -- wherever a resident student lives, they are entitled to go to school in that school division for no charge. That part of the Act does not say anything about religion. Just says wherever that student lives". At this point, Ms. Chobanik is referring to s. 142 of the *Education Act*, which provides as follows:

> **Right to attend school at cost of school division**
>
> **142**(1) Subject to the other provisions of this Act, every person who has attained the age of six years but has not yet attained the age of 22 years has the right:
>
> (a) to attend school in the school division where that person or that person's parents or guardians reside; and
>
> (b) to receive instruction appropriate to that person's age and level of educational achievement.
>
> (2) A person's right to receive instruction mentioned in clause (1)(b) is the right to instruction in courses of instruction approved by the board of education:
>
> (a) in the schools of the school division … .

[42] It is understood that the personal freedoms of the *Charter*, including s. 2(a) and s. 15, are concerned not just with the terms of any impugned Act, but also with the *effects* of any such Act. It is an effect of the Legislative Framework that separate school divisions receive funding for non-minority faith students (as do the public school divisions), but it is an error to state that the Legislative Framework provides for the "government funding of non-minority children" (*June 2017 Fiat* at para 18). Importantly, it is an error to take into account only one effect of the Legislative Framework in determining whether s. 93 and s. 17(2) shields the framework from *Charter* scrutiny.

B. It was an error to grant Good Spirit public interest standing to assert the Legislative Framework infringes s. 2(a) and s. 15(1)

[43] In our respectful view, and with the above provisions in mind, we conclude the trial judge committed three errors in granting public interest standing to Good Spirit for the purposes of arguing the Legislative Framework infringes s. 2(a) or s. 15 of the *Charter*. Having regard for the criteria set by *Eastside Sex Workers*, we state the errors in these terms:

(a) there may be a serious issue to be tried but it is not the issue upon which Good Spirit was granted public interest standing;

(b) Good Spirit had no real stake or genuine interest in the *Charter* issues that ultimately resulted in the declaration of invalidity; and

(c) there were others whose interests were better placed to make the *Charter* arguments, who chose not to come forward, and whose interests may be placed in jeopardy by Good Spirit's action.

1. Good Spirit's interests are not grounded in the *Charter*

[44] In our view, the question of public interest standing was required to be decided having regard for these constitutional issues:

(a) Is the Legislative Framework protected by the terms of s. 93 and s. 17(2) and thereby immune from *Charter* scrutiny?

(b) Does the Legislative Framework infringe s. 2(a) or s. 15(1) of the *Charter*?

[45] At this point, we are considering the question of public interest standing as it relates to (b) only. Having said that, in order to understand whether Good Spirit should have been granted public interest standing in relation to that issue, it must be observed that the trial judge accepted Good Spirit's assertion that this case was about "establishing boundaries" around denominational rights, and that a *Charter* violation would follow automatically from a determination that the Legislature had granted more rights or privileges than was minimally required to fulfill its mandate under s. 93 or s. 17(2).

[46] In that regard, it must be understood that the Legislative Framework is a constitutional exercise of the Legislature's plenary power as conferred on it by the opening words of s. 93. That is an unassailable given. As Wilson J. stated in *Reference re Bill 30*, "the province is master of its own house when it legislates under its plenary power in relation to denominational, separate or dissentient schools" (at 1198; see *Adler* at para 48). The only consequences for the Government of a declaration that it was funding separate schools *more* than what was minimally required under s. 93 or s. 17(2) might be political but not constitutional ones. However, this case was not a *reference* about those provisions. Rather, it was an action about whether *government funding of non-minority faith students in Catholic schools violates s. 2(a) and s. 15(1) of the Charter*.

[47] The trial judge ultimately granted a declaration that the "funding of non-minority faith students violates ss. 2(a) and 15(1) of the *Charter* and cannot be justified under s. 1" of the *Charter* (*Trial Decision* at para 475). He granted this remedy because he found that funding non-Catholic students in Catholic schools offends the principle of state neutrality and is discriminatory against *other faith groups* because, "at public expense, members of the Catholic faith can evangelize and promote good will toward Catholicism but other faith groups do not have an equal benefit to similarly evangelize and promote good will toward their faith" (at para 417). He also found that "such funding discriminates between parents who seek a faith-based education for their children and find a commonality with Catholic education and those parents who equally wish a faith-based education but do not find a commonality with Catholic education" (at para 417).

[48] Notwithstanding his ultimate conclusions, the trial judge did *not* grant public interest standing having regard for whether Good Spirit, as a matter of law, could assert an infringement of s. 2(a) and s. 15. As we have noted previously, for the trial judge, the serious justiciable issue was "whether or not government funding of non-minority faith students is a constitutionally protected right" (*Trial Decision* at para 121). He then clearly granted standing on the economic issue of the public school division's loss of revenue because of the Government's decision to fund the two divisions equally:

> [124] Specifically, GSSD cites government funding of non-Catholic students attending St. Theodore Roman Catholic School as harming GSSD's interests. Dwayne Reeve and Sherry Todosichuk, deputy director of corporate services with GSSD, explained that the loss of the Theodore students resulted in reduced efficiencies and educational opportunities that would have accompanied higher enrolments in Springside; loss of government funding respecting the Theodore students; the negative impact upon GSSD considering the closure of other rural schools because of the threat of creating a separate school to circumvent such plans; frustration of the need to accommodate shrinking enrolment in rural schools and sustain public education in the longer term; and creation of a competitive publicly funded separate school in contradiction to the government's drive for school division amalgamation which was initially voluntary and later mandatory.
>
> [125] At the core of this litigation is the issue of financing education in Saskatchewan and how the public purse should be spent within the reality of constitutionally guaranteed separate schools. I accept Dwayne Reeve's testimony that when school enrolment falls below certain numbers, numerous reasons support a decision to close the school. One reason is the lack of economic efficiency. When finite dollars allocated to education are spent inefficiently anywhere in Saskatchewan, everyone with an interest in education is adversely effected. Because St. Theodore Roman Catholic School remains open, Christ the Teacher Roman Catholic School Division continues to receive government funding for a school with an enrolment of 26 kindergarten to grade 8 students in 2014–2015 when the public school was slated for closure in 2003 with an enrolment of 42 students. St. Theodore

> Roman Catholic School remains open 14 years after Yorkdale considered it a non-viable school, following previous closures in the villages of MacNutt, Bredenbury, Ebenezer and Rhein.
>
> [126] Quantifying its loss, GSSD, in its cross-examination of Angela Chobanik, Executive Director of the Education Funding Branch of the Ministry of Education, solicited testimony that in 2016–2017, by virtue of St. Theodore Roman Catholic School remaining operative, the province would pay CTT approximately $220,370.58 in base instruction, $106,971.00 in instructional resources funding, $10,200.00 in administration funding and $3,960.00 in governance funding in addition to school operation and maintenance. If St. Theodore Roman Catholic School were not operative, these funds, GSSD states, would have been available to other public school divisions in Saskatchewan and spent more effectively and efficiently.
>
> (Emphasis added)

[49] In short, Good Spirit's *Charter* claim is a means to another end, which Good Spirit candidly described in the opening paragraph of its factum in this Court: "The critical issue underlying this action is whether the Constitution of Canada authorizes the Government of Saskatchewan … to fully fund separate schools to operate as a parallel public school system in order to provide a Catholic education to all children in Saskatchewan". Indeed, none of the arguments contained in Good Spirit's factum under the heading "Real stake or genuine interest in the issues" address the *Charter* issues.

[50] In our respectful view, the determination of whether public interest standing should have been granted to Good Spirit must be assessed having regard for whether the Legislative Framework offends s. 2(a) or s. 15(1) – and the law pertaining to that issue. In our view, the disconnect between the *Charter* issues and the economic or policy issue that was ultimately decided is fatal to Good Spirit's claim to standing. In short, there may be serious, justiciable issues under the *Charter*, but they are not the issues upon which Good Spirit was granted standing.

2. Good Spirit has no real stake or genuine interest in the resolution of the *Charter* issues

[51] It is quite clear that Good Spirit's *Charter* rights are not being infringed. Good Spirit's claim throughout has been that the separate boards were receiving monies they should not receive because the Government was interpreting the *Constitution Act, 1867* as impelling or at least permitting it not to distinguish between students of the minority faith and those not of that faith. Good Spirit could not – and did not – assert that any of its *Charter* rights were being infringed by such actions.

[52] Indeed, Good Spirit, as a form of local government, depends entirely on provincial law for its authority and is part of the government of this province. Both public and separate school boards are elected under *The Local Government Election Act, 2015*, SS 2015, c L-30.11. While Good Spirit is bound by the *Charter*, it does not have *Charter* rights. Thus, it needed to ground its claim in the rights of others.

[53] In order to provide the evidentiary foundation to illustrate the contravention of s. 2(a) or s. 15, Good Spirit requested that the witness list be expanded to include, among others, witnesses from non-Catholic minority faiths who have their own private religious school or who would like to establish a private religious school with full funding: i.e., Dr. Ayman Aboguddah, the president and acting treasurer of the Board of the Regina Huda School, and Rabbi Jeremy Parnes, on behalf of the Jewish community. The witness list was expanded to include these witnesses over the objection of the appellants, who had believed up until shortly before the trial that the only issue in play was the constitutionality of the Legislative Framework with respect to s. 93 and s. 17(2): See *Good Spirit School Division No. 204 v Christ The Teacher Roman Catholic Separate School Division No. 212*, 2016 SKQB 148.

[54] When the trial judge addressed the merits of Good Spirit's s. 2(a) and s. 15 arguments, he relied on the evidence of the above two witnesses who spoke about funding for private religious schools, Islam or Judaism – both of which faiths, according to the evidence, would like to receive full funding to teach their children and to teach non-adherents. Specifically, in that regard, he wrote as follows:

> [438] I have found that through its witnesses, GSSD has established a discriminatory impact. Sensibility tells me that since only Catholic schools receive full funding to admit non-adherents, Catholic schools are able to attract non-Catholic students while other faith-based schools that must charge tuition are less able to attract non-adherents. Associate schools like the Huda School receive only 80 percent of the provincial average per-student funding. If the Huda School wished to attract non-Muslim students (as Dr. Aboguddah said it would), it would not receive government funding for the attendance of non-adherent students as Catholic schools receive. The Huda school would have to charge its ordinary tuition of $2,500.00 for the first child and lesser amounts for more children, as well as $1,800.00 annual transportation fee.
>
> [439] GSSD also refers to the testimony of Dr. Aboguddah and Ms. Chobanik. They testified that independent and associate schools wishing to admit non-adherents must absorb all costs of funding infrastructure and capital funding (just as they constitutionally must accept when educating their own students). I accept Dr. Aboguddah's testimony that with 430 students in the Huda School using all available space, and with 100 students on its waiting list for the past four years, it is financially unable to accommodate non-Muslim

> students. Discriminatory impact is obvious in my view. If the Huda School received complete government funding for non-Muslim students as Catholic schools receive for non-Catholic students, the Huda School and non-Muslim parents would enjoy significant benefits, similar benefits the defendants argue now accrue to Catholic schools and non-Catholic parents: schools can leverage a greater source of funds to educate their adherents and Saskatchewan parents would have, in the words of the defendants, greater "parental choice", "parental autonomy", "freedom of religion", and "fairness". These benefits should be equally available to all religious schools and all parents, or to none.
>
> [440] I also accept Rabbi Parnes's testimony that certain advantages would accrue to the small Jewish school in Regina if it received complete government funding for non-Jewish students. Historically, approximately 22 students attend once-a-week classes. Rabbi Parnes testified that recently, six non-Jewish students have attended the religious classes offered in the synagogue. A ready comparison comes to mind. In Regina there exists a Jewish interest in creating a viable Jewish school that would welcome non-Jewish students; in Theodore there exists a Catholic interest in keeping open a Catholic school that accepts non-Catholic students. Fully funded non-adherents are admittedly necessary in either instance to make either school viable. Discrimination is obvious: Catholics in Theodore receive a constitutionally protected advantage to educate their children in the tenets of Catholic faith only because non-Catholic students are fully funded; Jews in Regina cannot avail themselves of the same benefits.
>
> [441] Again, since I find that the funding of Catholic schools for the attendance of non-Catholic students is discriminatory on its face, I will make rather cursory findings of further discriminatory impact. I accept, largely from the testimony of Dr. Aboguddah, that many religious faiths wish to advance societal acceptance and awareness of their faith traditions to the larger community. Allowing one faith – Catholics – the ability to inculcate Catholic values into a broader community at public expense but disallowing others, particularly smaller religious groups like Muslims and Hindus, implies a message that some faiths are more valued than others. Asking non-Catholic parents to accept the unequal treatment of the s. 93 guarantee is a constitutionally inescapable reality, but asking non-Catholic parents to accept yet further Catholic rights to educate non-adherents while they are denied those rights is further proof of a discriminatory impact.
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> (Emphasis added)

[55] There are various problems with granting standing to Good Spirit to pursue a declaration of invalidity based on a contravention of s. 2(a) and s. 15 derived from a failure to treat public separate schools and private religious schools differently.

[56] First, a party asserting public interest standing usually makes the *Charter* argument to benefit the persons whose rights are asserted, such as the individuals who benefitted from the needle exchange in *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134, or the sex workers in *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101. However, in addition to affecting funding for separate schools in this case, success for Good Spirit has the potential to bring an end to all funding for independent and associate schools – whose interests Good Spirit purports to assert and to protect.

[57] No one testified that the funding for non-Catholic students at a Catholic school infringed their religious beliefs or practices. Good Spirit's witnesses spoke primarily about educational service delivery, efficiencies in service delivery, and competition between school divisions but not about the exercise of a particular belief system or the impediment to the exercise of a particular belief system. Neither Dr. Aboguddah nor Rabbi Parnes supported reducing funding to separate schools. Rather, they each wanted funding on the same basis as the Catholic schools. Nothing in their testimony suggests that they viewed their own *Charter* rights as being in issue in this case.

[58] Second, Good Spirit was not seeking an augmentation of funding for all faith-affiliated schools. Good Spirit sought standing to pursue a claim under s. 2(a) based on a lack of state neutrality. In that regard, success for Good Spirit could have a negative effect on all education funding for minority faith schools, beyond what it sees as the core of separate school rights under s. 93 and s. 17. Its position is diametrically opposed to a remedy that all faith-based schools would want – i.e., full and equal funding. In essence, Good Spirit sought public interest standing on behalf of faith groups whose interests collide with its own.

[59] This is borne out by the trial judge's reasons. If the *Trial Decision* is sustained, only the core of what he considered to constitute Catholic or Protestant education in Saskatchewan as of 1905 would withstand *Charter* scrutiny. Indeed, the trial judge wrote, "I view the expansive power of s. 93(3) being restricted to the creation of separate Roman Catholic and Protestant schools, not any type of religious schools as the Government suggests" (at para 218). He ultimately found that s. 93(3), a provision that arguably supports the Government's funding of independent and associate schools shields "only those rights satisfying the denominational aspects of separate schools" (at para 208). As such, we find that public interest standing should not have been granted to allow Good Spirit to advance an argument purportedly grounded in the interests of non-Catholic faith-based schools that may, in the long run, diminish the rights of those schools.

[60] In *Eastside Sex Workers*, the Supreme Court cautioned against granting standing without considering the potential effect of the proceedings on the rights of others more directly affected by the *Charter* claim. Yet none of the independent and associate schools – or others like the Jewish community, who do not have a school – were made a party to the action so as to have their interests truly considered. It is trite law that a party asserting standing based on another person's *Charter*

rights has to demonstrate some basis to say the other person agrees with the assertion of such rights.

[61] Third, if this case were truly about achieving equality in education for all faiths, it would run afoul of such Supreme Court authority as *Adler*. In *Adler*, the plaintiffs, who were representatives of Jewish schools and independent Christian schools, wanted funding comparable to that of the Catholic school system. The Court dismissed the plaintiffs' appeal. Speaking for the majority, Iacobucci J. made it clear there could be *no basis* for such a claim within the constitutional makeup of s. 93 as it was understood at the time of Confederation. He did, however, leave open the possibility of governments' exercising their plenary power to provide the sought-after funding, with the implication being that such an action would not contravene the state's obligation of neutrality:

> [48] One thing should, however, be made clear. The province remains free to exercise its plenary power with regard to education in whatever way it sees fit, subject to the restrictions relating to separate schools imposed by s. 93(1). Section 93 grants to the province of Ontario the power to legislate with regard to public schools and separate schools. However, nothing in these reasons should be taken to mean that the province's legislative power is limited to these two school systems. In other words, the province could, if it so chose, pass legislation extending funding to denominational schools other than Roman Catholic schools without infringing the rights guaranteed to Roman Catholic separate schools under s. 93(1). See the words of Gonthier J., writing for the Court, in *Reference re Education Act (Que.), supra.*, at p. 551. However, an *ability* to pass such legislation does not amount to an *obligation* to do so. To emphasize, s. 93 defines the extent of the obligations of the province to set up and fund denominational schools when public schools are established. In this respect, it is a comprehensive code thereby excluding a different or broader obligation regarding denominational schools, while not restricting the plenary power of the province to establish and fund such other schools as it may decide.
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> (Italic emphasis in original, underline emphasis added)

[62] However, according to the *Trial Decision*, in order for the Government to continue funding non-Catholic students attending Catholic schools, it *must* also fund education for all faith-based schools equally; whereas *Adler* holds that provinces *cannot be compelled* to fund non-Catholic, faith-based education. In the alternative, the Government would be required to discontinue funding for all religious-based education outside of what the trial judge held to be the core of s. 93 and s. 17. And yet, the issues raised in *Adler* were not truly before the trial judge or this Court because Good Spirit was not asking for full funding for all faith-based schools or even for full funding for non-adherents attending those schools. It was arguing the opposite and using the non-Catholic faith-based schools' interests to their own potential detriment in that process.

[63] As the second point under *Eastside Sex Workers*, we find Good Spirit lacked a sufficient or genuine interest in the resolution of the *Charter* issues it had raised and, therefore, should not have been granted standing to advance those arguments.

3. Good Spirit is the wrong entity to assert the *Charter* issues

[64] The trial judge made the following points in support of a finding that Good Spirit's action is "a reasonable and effective way to bring the issue before the courts" (at para 95):

(a) "Most individuals would be daunted by the cost and time to see constitutional litigation to the end of trial and its expected appeals" (at para 129);

(b) Good Spirit "has expended the resources necessary for a 'well-developed factual setting'" (at para 134);

(c) Good Spirit "has demonstrated a long-standing interest to determine the mandate question, well before events in Theodore in 2003" (at para 138); and

(d) the Government had considered, and ultimately abandoned, a formal reference to this Court to resolve this issue as a result of pressure from the Catholic Section of the Saskatchewan School Board Association (SSBA) (at paras 140 to 147).

[65] The trial judge summed up his reasons regarding standing by writing, "To disallow standing on such a vital question with such broad importance to the province would be tantamount to leaving a legal lacuna respecting governmental action, alleged to be unconstitutional, without judicial review" (at para 147).

[66] In our view, however, given the impact of this decision on the funding for non-Catholic faith-based schools and since the *Charter* claim depended solely on the effect of the Legislative Framework on their rights, only adherents of a non-minority faith, e.g., Muslims, could assert those rights, which they have not done. Good Spirit cannot possibly claim to be an advocate for this group. Instead, Good Spirit's arguments were almost entirely financial in nature and focused on the impact that funding for non-minority faith students in the separate system has on the overall funding of the public secular schools system. Since the individuals most directly affected by the alleged *Charter* breaches have chosen not to take legal action, that militates against granting public interest standing.

4. Conclusion on public interest standing to assert a *Charter* breach

[67] The Supreme Court has established "a very liberal rule for public interest standing" (Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf (2019-Rel 1) 5th ed, vol 2 (Toronto: Thompson Reuters, 2019) at para 59.2(d) [*Hogg*]; see also all of paras 57–59)). Nonetheless, it remains critical to the analysis that a trial judge granting standing identify the true issue in the case and determine whose rights are truly being affected by its resolution.

[68] Thus, while we agree there may be serious justiciable issues to be tried, i.e., the *Charter* issues, these are not the issues for which Good Spirit was granted standing. As we have noted, Good Spirit has no real stake or genuine interest in the true issues nor is Good Spirit the entity to assert the *Charter* rights of those individuals truly affected by those issues. We therefore conclude that the trial judge erred by granting Good Spirit public interest standing to assert a breach of s. 2(a) or s. 15.

C. It was an error to grant Good Spirit standing, as a public school division, to contest the rights or privileges conferred on separate schools

[69] That brings us to the first issue identified above in paragraph 44 of these reasons: Is the Legislative Framework protected by the terms of s. 93 and s. 17(2), and thereby protected from *Charter* scrutiny?

[70] We recognize the issue could be stated other ways. In *Reference re Bill 30*, the constitutional question was, "Is Bill 30, An Act to amend the Education Act inconsistent with the provisions of the Constitution of Canada including the *Canadian Charter of Rights and Freedoms* and, if so, in what particular or particulars and in what respect?" (at 1157). In answering this question, both Wilson J. and Estey J. framed the question in terms of whether Bill 30 was a "valid exercise of the provincial power in relation to education" (at 1168 and 1199). In the result, Bill 30 was found to be consistent with the Constitution of Canada and the *Charter*. In *Adler*, the answer to the *Charter* challenge was resolved by determining, whether "the funding of Roman Catholic separate schools and public schools is within the contemplation of the terms of s. 93 and is, therefore, immune from *Charter* scrutiny" (at para 27). In this case, the matter was argued by casting the issue in terms of the *protection* offered by s. 93 and s. 17(2). For the trial judge, the

Legislative Framework was protected by s. 93 and s. 17(2) only to the extent it conferred a right or privilege that satisfied the denominational aspects test.

[71] It is this issue, however expressed, upon which the *Charter* claim turns; that is to say, a court does not reach the question of whether the Legislative Framework offends the *Charter* unless the framework falls outside of the legislative authority of s. 93 or s. 17(2). At this point of considering whether the trial judge erred by granting Good Spirit public interest standing, the question is whether Good Spirit, *as a public school division*, should have been granted standing to pursue the limits of separate school rights. This question, in turn, is linked to what rights *public school divisions* have in this province as a result of s. 93 and s. 17(2).

[72] By virtue of s. 93(1), the Constitution of Canada conferred on Catholics and Protestants in Saskatchewan the protection against a legislative exercise that would "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" (emphasis added, *Saskatchewan Act*, s 17(1)).

[73] Addressing s. 93(1) in *Adler*, Iacobucci J., for the majority, stated, "public school rights are not themselves constitutionally entrenched. It is the province's plenary power to legislate with regard to public schools, which are open to all members of society, without distinction, that is constitutionally entrenched" (at para 47). Justice Iacobucci made this statement having regard for what, if anything, is guaranteed to public schools by s. 93(1). Similarly, in *Alberta Public Boards*, Major J., speaking for a unanimous Court, confirmed "public school rights are not constitutionally entrenched under s. 93(1)" (at para 63). He went on to say, "separate school rights do not serve as a benchmark for public school rights" (at para 64).

[74] Based on this distinction between the two classes of schools, the appellants assert that Good Spirit, as a public school division, should not have been granted standing, public or otherwise, to challenge the Government's decision to grant what the division sees as a benefit to the separate schools. The appellants submit that Good Spirit could not bring an action against a separate school division and the Government to determine whether the latter has granted to that division a right or privilege that is not encompassed by s. 93 or s. 17(2). In other words, the appellants submit there is no right to which the public school division is entitled for which it can be granted standing.

[75] The appellants' argument in this regard is commonly referred to as the *rights holder* argument, which, in this case, means that only those who are the beneficiaries of separate school rights under the *Constitution Act, 1867* or the *Saskatchewan Act* are entitled to standing to uphold such rights. To be clear, this argument does not concern the rights of those whose *Charter* rights are infringed, but rather only the rights accorded to the separate schools by virtue of s. 93 and s. 17.

[76] In addressing the appellants' argument, the trial judge relied on *Protestant School Board of Greater Montreal v Minister of Education* (1976), 83 DLR (3d) 645 (Que Sup Ct) [*Montreal Board*]. In *Montreal Board*, Deschenes C.J.S.C. granted standing to the Protestant school boards to challenge the application of the *Official Language Act*, 1974 (Que), c 6. On the question of the boards' standing to make the challenge, Deschenes C.J.S.C. wrote as follows (at 649–650):

> Section 55 of the *Code of Civil Procedure*, 1965 (Que.), c. 80, states that "Whoever brings an action at law … must have a sufficient interest". It matters little at the outset whether or not they have a right to complain: the plaintiff School Boards are certainly affected by the *Official Language Act* and, if the *Act* is invalid, they have a "sufficient interest" to seek the judicial declaration of legislative ultra vires.
>
> Finally, during the last two years the Supreme Court of Canada has demonstrated a willingness to enlarge and facilitate access to the Courts, as in the cases of *Thorson v. A.-G. Can. et al. (No. 2)* (1974), 43 D.L.R. (3d) 1, [1975] 1 S.C.R. 138, 1 N.R. 225, and *Nova Scotia Board of Censors v. McNeil* (1975), 55 D.L.R. (3d) 632, [1976] 2 S.C.R. 265, 32 C.R.N.S., 376. As this Court said on March 9th:
>
> > The Court must establish that the plaintiff school boards are public oriented organisms whose members are elected by all citizens, within the limits of the right to vote given by the *Public Education Act*. The Court must establish that the school boards have a responsible role to play in our society. Some of them thought it was their duty to come to court regarding the validity of legislation which, they say, affects them. It is the opinion of the Court the public interest compels us to hear them entirely on this matter.
>
> For these reasons, it is therefore the opinion of the Court that the last issue of lack of standing, drawn from the alleged absence of interest of the plaintiffs in this case, must also be dismissed.
>
> (Emphasis added)

[77] In reliance on *Montreal Board*, the trial judge wrote as follows:

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

> holders of a constitutional right have standing. He distinctly accepted the court's earlier decision that the principle of "public interest" compelled the court to hear the Protestant school boards "entirely on the matter".
>
> (Emphasis added)

[78] In *Montreal Board*, however, the Attorney General of Québec did not argue that the Protestant school boards should be denied standing on the basis that they were not rights holders. Indeed, the Protestant school boards were beneficiaries of the rights under s. 93, being the *separate* schools in that province. Rather, the province of Québec asserted that the Protestant school boards were "not persons who are part of a 'class of persons' according to s. 93 of the Canadian Constitution; the expression 'class of persons' would only include physical persons and not corporate bodies" (at 647) and, further, "language, race and faith are attributes of individuals only, that only individuals can claim to form a 'class of persons' under s. 93 of the constitution and that school boards consequently have no *locus standi* before the Court" (at 648). This is a different argument than the one that the appellants made in this case.

[79] There are, however, other cases that could serve as a basis to assert a broad right for a public school division or board to challenge government legislation passed pursuant to its plenary education power under s. 93. For example, in *Moose Jaw School District No. 1 v Saskatchewan (Attorney General)* (1973), 41 DLR (3d) 732 (Sask QB) [*Moose Jaw*] (rev'd *Moose Jaw School District No. 1 v Saskatchewan (Attorney General)* (1975), 57 DLR (3d) 315 at 315 (Sask CA)), two boards of education and a separate board brought an action alleging that recently enacted collective bargaining legislation was ultra vires as it offended s. 17 of the *Saskatchewan Act*. In that case, the trial judge granted a motion brought by the Saskatchewan Teachers' Federation striking the claim of one of the public boards on the basis of the *rights holder* argument. This Court, however, permitted the public school board to be a party, along with the separate school board, saying that the issue was now governed by *Thorson v Canada (Attorney General)*, [1975] 1 SCR 138 [*Thorson*]. In *Thorson*, a majority of the Supreme Court granted an individual, as the representative plaintiff in a class action, the right to sue the Attorney General of Canada with respect to the constitutionality of the *Official Languages Act*, RSC 1970, c O-2, and related legislation.

[80] As well, in *Calgary Board of Education v Attorney General for Alberta* (1979), 106 DLR (3d) 415 (QB) [*Calgary Board*] (aff'd (1981), 122 DLR (3d) 249 (Alta CA) [*CA Calgary Board*],

leave to appeal to the SCC refused, [1981] 1 SCR vi), the Calgary Board of Education brought an application against the Government of Alberta to declare certain sections of the *School Act*, RSA 1970, c 329, and related legislation, invalid on the ground that the legislation infringed the constitutional protection afforded by s. 93. The challenged legislation, as detailed in *Calgary Board*, granted separate schools a more favourable tax status than public schools. The trial judge, Stevenson J. (as he then was), upheld the legislation, but, in doing so, noted the following (at 421):

> I come to the conclusion that subs. (1) is protective legislation. It guarantees certain rights to the minority residents and the boards established by them and it does not lie in the mouth of the public board to attack legislation on the basis that its rights are prejudiced. In my view, this conclusion accords with the logical construction and the historical background discussed by Stuart J. in the *Ulmer* [[1923] 1 DLR 304] decision and Newcombe J. in *Reference re S. 17 of the Alta. Act*, [1927] S.C.R. 364, [1927] 2 D.L.R. 993.
>
> (Emphasis added)

[81] On appeal, the Alberta Court of Appeal was in complete agreement with the decision of Stevenson J. on the question of the constitutionality of the legislation but then offered this comment with respect to standing: "Although I have stated that in my opinion the present scheme of dividing taxes between separate schools and public schools is fairer than the previous system, I do not wish to be critical of the Calgary Board of Education for raising the issue, for as trustees they have the duty to protect the interests of their electors" (emphasis added, *CA Calgary Board* at 253).

[82] Finally, in this group of cases, *Ontario Home Builders' Association v York Region Board of Education* (1994), 109 DLR (4th) 289 (Ont CA) [*CA Home Builders*] (aff'd [1996] 2 SCR 929 [*SCC Home Builders*]), figures prominently. The builders' association applied for judicial review of the York Region Board of Education bylaws, which imposed a development charge on new building permits to offset capital costs of new school construction, with the revenue generated thereby being distributed without distinction between public and separate schools. The association alleged that the bylaw infringed the constitutional rights of the separate school boards to receive a proportionate share of the revenues raised and that separate school supporters were exempt from paying assessments for public school purposes. The Ontario Court of Appeal found the lower court had erred by granting the builders' association standing. On appeal, the Supreme Court assumed, without deciding, that the appellants had standing "owing to the serious and complex nature of the issues before the Court" (*SCC Home Builders* at para 78).

[83] In the case at hand, the trial judge extrapolated from *CA Home Builders* to say the following (*Trial Decision*):

> [107] … The association members may have had an interest in not paying the charge, but they had no interest in proportional allocation of funds to separate schools and even less in the overall education funding model. At the Supreme Court [*SCC Home Builders*], standing was assumed without deciding the matter, apparently so the court could give a fulsome decision respecting the merits of the s. 93(1) argument. The Supreme Court held that the association failed to prove that s. 93 rights had been derogated, even accepting that it had standing.
>
> (Emphasis added)

[84] In short, the trial judge seems to have agreed with the Ontario Court of Appeal in *CA Home Builders* when it concluded that standing in that case should *not* have been granted (*Trial Decision*):

> [109] … The court correctly characterized their true interest as not paying the charge. The Association's concern about separate schools had a ring of disingenuousness. In fact, one of the parties opposing the Association was a separate school board which testified it suffered no prejudice under the allocation of the new charge.

[85] In applying *CA Home Builders* to the case before him, however, the trial judge distinguished it (*Trial Decision*):

> [110] … I see ready distinction between the association's feigned interests in separate school rights and GSSD's interests in this litigation. I accept GSSD's assertion of certain direct interests arising from non-Catholic students attending St. Theodore Roman Catholic School: the loss of the non-Catholic Theodore students and associated government funding; the loss in efficiencies and educational opportunities associated with the anticipated higher enrolment in Springside School; and the threat of other communities creating separate schools in face of sound reasons to close a rural public school. These are among the immediate and direct interests. But I also see GSSD's broader interests being affected as well, which I shall canvass later.
>
> (Emphasis added)[6]

[86] Good Spirit's interests are not akin to those of the Ontario builders' association. But, like that case, Good Spirit's action is not grounded in protecting separate school rights. Further, unlike most of the cases involving public schools challenging government action, Good Spirit is not seeking to build from separate school rights for its own constituents; rather, it seeks to interpret those rights so as to find a sphere open to a *Charter* challenge. It is, as the Attorney General says, a *market share* argument. It is significant that in the only case cited to this Court where a court has

[6] Those broader interests mentioned by the trial judge in paragraph 110 are outlined in paragraphs 124 to 126 of the *Trial Decision* and all pertain to the economic and administrative efficiencies of the public boards.

granted standing to a public school vis-à-vis a separate school, i.e., *CA Calgary Board*, the court was sustaining a decision where the separate school board had already been successful in preserving its rights.

[87] As the s. 93 and s. 17(2) jurisprudence from the Supreme Court demonstrates, the usual dispute is between a separate school board and a government, wherein the latter is seeking to reform some aspect of education. In that context, a separate school board would typically assert that the government is attempting to *prejudicially affect* a right or privilege guaranteed by s. 93(1) or s. 17(2). Other than in the reference cases, no case was cited to this Court where a public school board had been granted standing for the purposes of challenging the constitutionality of a denominational school's rights under s. 93 or s. 17(2). In the non-reference cases where a public school board is attempting to challenge a right that had been accorded to the separate school board, it has been for the purposes of ensuring the public school board would be treated proportionately and fairly having regard for the rights conferred upon the separate school board.

[88] Here, it is a public school division submitting that the government is *exceeding* the ambit of what is minimally guaranteed by the *Constitution Act, 1867* to the separate schools by granting more funding to those schools than is constitutionally required for the purpose of exposing that funding to *Charter* oversight.

[89] The Supreme Court in *Eastside Sex Workers* made it clear that standing cannot be granted or withheld based on too-close of an examination of what the ultimate outcome might be, but in this case, it must be remembered that standing was decided as part of the trial. We also appreciate that *Eastside Sex Workers* established a comprehensive approach to public interest standing whereby rights holder arguments could be considered a variation of either the second or third issues in that case (i.e., a real or genuine interest or "reasonable and effective way" to pursue the litigation (at para 37)). However, in the context of this case, we must be concerned not only with the rights of the person on whose behalf the litigation is ostensibly framed, i.e., private religious schools, but also the holders of separate school rights.

[90] To allow a public school board to assert that the Government is granting a separate school board funding to which it, the public school board, is already entitled is not a basis upon which public interest standing has been or, in our view, should be granted. It is an argument among the

public school boards and the separate school boards, as public institutions, and the Government about how the latter should distribute the envelope of money set aside for funding education in this province. Viewed in that context, a public school board has no more rights than any public institution to a defined share of the revenue. The solutions are political, not legal.

[91] In that regard, it must be reiterated that the Legislative Framework is a constitutional exercise of the Legislature's plenary power as conferred on it by the opening words of s. 93. The trial judge did not grant a declaration that the Legislative Framework is ultra vires the Legislature. Indeed, he could not have done so. He simply responded to the issues pertaining to s. 93 and s. 17(2) that he had found to be engaged by this case as follows (at para 474):

> 3. *The Constitution Act, 1867* does not provide a constitutional right to separate schools in Saskatchewan to receive provincial government funding respecting non-minority faith students because funding respecting non-minority faith students is not a denominational right of separate schools.
>
> 4. Section 17(2) of *The Saskatchewan Act*, which provides constitutional protection against discrimination in the distribution of moneys payable to any class of school, only protects separate schools to the extent they admit students of the minority faith.

However, these are not themselves declarations of unconstitutionality. They merely represent part of the trial judge's analysis leading ultimately to his declaration of unconstitutionality based on the *Charter*.

[92] Good Spirit should not have been granted public interest standing for the purposes of setting the boundaries of separate school rights under s. 93.

D. Overall Conclusion on Standing

[93] As the above reasons indicate, we find that the trial judge erred by granting standing to Good Spirit on two bases. Either basis would be sufficient to dispose of this appeal. Having said that, in our view, given the submissions made to the Court, it is incumbent on this Court to resolve all of the constitutional issues raised by the parties in this appeal.

VI. Fresh evidence application and application to strike part of Good Spirit's sur-reply factum

[94] The Government applied to adduce fresh evidence directed to the trial judge's reliance on outside sources of authority in support of factual findings made in the context of his s. 93(1) analysis and also applied to strike an appendix contained in Good Spirit's sur-reply factum on the basis that it augments the evidentiary record.

A. Fresh evidence application granted

[95] At paragraphs 292, 293 and 299 of his reasons, the trial judge referred to Professor Bill Waiser's book, *A World We Have Lost: Saskatchewan Before 1905*, (Markham, Ont: Fifth House, 2016). On appeal, the appellants applied to adduce an affidavit of Professor Waiser as fresh evidence. The fresh evidence is directed to the issue of whether the trial judge erred by relying upon Professor Waiser's text in coming to a conclusion regarding the "broader trend emerging in Saskatchewan's population … as it moved toward a secular and largely British view of society … in which the *1901 School Ordinances* should be interpreted" (*Trial Decision* at para 292). This finding contributed to the trial judge's opinion that s. 93 was "less a requested right or privilege, but more an obligation 'foisted on the region by Ottawa'" (at para 293). Further, the Attorney General argues the trial judge used the historical backdrop presented in Professor Waiser's book as evidence that the solemn pact assumed at Confederation (1867) had weakened by the time of the passing of the *Saskatchewan Act* (1905).

[96] In his affidavit, Professor Waiser attests to the following:

> 6. I authored a book titled *A World We Have Lost: Saskatchewan Before 1905*, which was published in 2016. The book is intended for general audiences. The book was not written for specialists in education legislation, nor was it intended to be used as evidence in any legal proceeding.
>
> 7. The section of the book that discussed education legislation is based on published secondary sources. It was not based on any detailed examination of primary sources, including the legislation setting out the separate school system in the North-West Territories or the Province of Saskatchewan.
>
> 8. I was not called as an expert witness at the trial in the case of *Good Sprit School Division v. Christ the Teacher Separate School Division and the Government of Saskatchewan*. I was surprised to see the book cited in the judgment; it was never intended for this purpose.

[97] Applying the criteria of *R v Palmer*, [1980] 1 SCR 759 at 775, we find the fresh evidence should be admitted. Since neither Professor Waiser's testimony nor his book were included in the evidence at trial, the Government could not have anticipated the need to provide the fresh evidence. It was only after the trial judge relied upon Professor Waiser's work in his judgment that the need arose to acquire and seek to adduce an affidavit from the author attesting to his opinion that he is not qualified to give expert testimony on the issue of the interpretation and application of the *1901 Ordinances*.

[98] This evidence is clearly relevant to determining whether the trial judge erred by relying on an excerpt of the book in question to determine the territorial government believed minority faith education was not a right or a privilege and the weight to apply to the perceived solemn pact between Canada and the representatives of the North-West Territories. Indeed, this evidence is decisive on the issue of whether the trial judge should have considered Professor Waiser's text. If the affidavit evidence now sought to be admitted had been admitted at trial, the trial judge would not have relied on the excerpt as he did. Thus, Professor Waiser's affidavit should be admitted.

[99] The impact of the admission of this evidence will be addressed after considering whether the trial judge erred by relying on other academic authorities not cited to him.

B. Application to strike material from the respondent's sur-reply factum is granted

[100] In an appendix to its sur-reply factum, Good Spirit included a complete chapter from Professor Waiser's book. Given our decision regarding the Government's fresh evidence application, this additional material must be considered as being struck from the record. Whether or not Professor Waiser would have been qualified as an expert, adding additional material from his text would exacerbate the problem identified by the appellants.

VII. Trial judge's reliance on extraneous texts

[101] In addition to Professor Waiser's text, the appellants assert that the trial judge erred by conducting independent research into Saskatchewan's history and that he relied on evidence not tendered by the parties at trial. Good Spirit submits that the trial judge did no more than take

judicial notice of notorious facts. In the *Trial Decision*, the trial judge referred to the following text and two articles that did not form part of the evidentiary base provided by the parties:

Trial Decision **Paragraphs**	**Extraneous Material**
269–270 and 395	J. Kent Donlevy, "Catholic Schools: The Inclusion of Non-Catholic Students" (2002) 27 Can J Education 27.1 at 101–118, online: Archives, Canadian Journal of Education (accessed January 2020) ["Inclusion of Non-Catholic Students"].
298	C. Cecil Lingard, *Territorial Government in Canada: The Autonomy Question in the Old North-West Territories*, (Toronto: University of Toronto, 1946) at 196–197, online: Internet Archive (accessed January 2020) [*Autonomy Question*]
321	John Hiemstra, "Domesticating Catholic Schools (1885–1905): The Assimilation Intent of Alberta's Separate School System", (unpublished paper given at the Canadian Political Science Association Annual Meetings, 30–31 May and 1 June 2003) ["Assimilation Intent"]

[102] With respect, we must agree with the appellants. In the course of interpreting s. 93(1) and s. 93(3), the trial judge was required to determine what the *1901 Ordinances* meant in a historical context. To assist him in that task, a massive evidentiary record was placed before him. It was upon that record that his decision had to rest.

[103] If the trial judge had advised the parties that he wished to consider any material not submitted by them, he would have been required to hear arguments as to whether the additional material could be considered.

[104] For example, in respect to Mr. Donlevy's article, the trial judge cites this Catholic scholar as expressing concern about whether Catholic schools have adequately addressed the effect of inclusion of non-Catholic students. In the paragraph immediately preceding the paragraph examined by the trial judge, Mr. Donlevy makes it clear that after Vatican II the Roman Catholic Church doctrinally embraced the admission of non-Catholics in Catholic schools. Indeed, as illustrative of this shift, Mr. Donlevy begins his article with the following epigraph (quoting *The Catholic School*, The Sacred Congregation for Catholic Education, (1977) at para 85):

> In the certainty that the Spirit is at work in every person, the Catholic School offers itself to all, non-Christians included, with all its distinctive aims and means, acknowledging, preserving and promoting the spiritual and moral qualities, the social and cultural values, which characterize different civilizations.

It is unknown what Mr. Donlevy would have opined in relation to what Vatican II stated as to the admission of non-Catholics to Catholic schools, if he had been qualified as an expert to opine on that issue as opposed to expressing the concerns of himself and others on the subject of the increasing inclusion of non-Catholics in Catholic schools.

[105] Equally, of Dr. Lingard's work, we know very little about the text or the authority of the author to opine as he did. However, in the segment referred to by the trial judge, the author cautions, "Such are the views of the writer, after reading the debates and correspondence relating to the constitutional question" (*Autonomy Question* at 197).

[106] The cover page of Dr. Hiemstra's article describes it as an unpublished paper marked "not for publication or citation without permission" and was presented at a conference only (arguably meaning that it had not been peer-reviewed). Again, what he would have testified to with respect to the issues pertinent to this appeal is unknown.

[107] Contrary to Good Spirit's arguments on this point, a judge is not entitled to take judicial notice of a *fact* unless it is (a) so notorious or generally accepted as not to be the subject of debate among reasonable persons, or (b) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: see *R v Find*, 2001 SCC 32 at paras 48–49, [2001] 1 SCR 863. It simply was not open to the trial judge to add to the record without allowing the parties an opportunity to make submissions or to call additional evidence. On this point, see *R v Bornyk*, 2015 BCCA 28 at para 11, 320 CCC (3d) 393, citing *R v Hamilton* (2004), 189 OAC 90 (CA) at paras 67, 68 and 71, in the affirmative.

[108] The question then is, what to make of the trial judge's decision to consult these additional sources? We agree with the appellants that, having regard for the decision as a whole, the trial judge relied on Professor Waiser's work plus the three additional authorities mentioned in this section to support a restrictive interpretation of the constitutional provisions in question. They argue for a new trial on this basis alone. In our view, however, as the central issues in this appeal are largely legal, and therefore assessed on a correctness standard, the better approach is to analyze the trial judge's interpretation of the applicable constitutional provisions without support from these additional sources. With that, we will turn to the trial judge's approach to interpretation, before considering his analysis of the constitutional provisions at issue in this appeal.

VIII. Constitutional interpretation

A. The trial judge's approach to constitutional interpretation

[109] Based on his review of *Ottawa Separate School Trustees v City of Ottawa* (1915), 24 DLR 497 (Ont SC) [*Ottawa Separate School Trustees*], and *Ontario English Catholic Teachers' Association v Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 SCR 470 [*English Catholic Teachers*], the trial judge stated his understanding of the law is that separate schools were intended to separate the minority faith students from the majority faith (*Trial Decision*):

> [261] From the outset, to create a separate or dissentient school has meant exactly that – a school in which students of a minority faith are separated and disunited from, or in dissent to, the students of the majority faith. This constitutional right was accorded Protestants and Catholics as early as 1840 and continued under s. 93 of the *Constitution Act, 1867* and 17(1) of *The Saskatchewan Act*. As Meredith C.J.C.P. stated in *Ottawa Separate School Trustees v City of Ottawa*, (1915), 24 DLR 497 (Ont SC) at 630, "The right and privilege [protected in Ontario] was and is a right to separation …". And, as Justice Iacobucci stated at para 54 in *English Catholic Teachers*, the purposed new funding arrangement introduced into Ontario did not prejudicially affect Catholic schools because it preserved "the 'separateness' of separate schools".
>
> (Emphasis added)

[110] The trial judge found support for his conclusion regarding separation as being the goal in the testimony of Good Spirit's expert witness, Dr. Dixon, who opined that "any legislative right to educate non-Catholic students would have conflicted with the practice of fostering community in a Roman Catholic school including assembling Catholic students in 'a segregated school building, sheltered originally from a predominantly Protestant, sometimes anti-Catholic, environment'" (at para 267). As mentioned, the trial judge also referenced Mr. Donlevy, who had opined on the increasing numbers of non-Catholic students attending Catholic schools post-Vatican II: see "Inclusion of Non-Catholic Students" at 101. From his review of this article, the trial judge said he was reinforced in his "conclusion that in 1905 admission of non-Catholic students was not a right that was in the minds of proponents of separate Catholic schools" (at para 270).

[111] From there, the trial judge set out eight interpretative principles that he found germane to the question of whether the funding of non-Catholics attending Catholic schools was protected by s. 93: "Evolution of the School Ordinances", "The 'Solemn Pact'", "Changing Societal Norms", "Balance between Adaptation and Amplification", "Implicit Rights", "Rights Anchored in Law, not Voluntary Practice", "Changing Religious Attitudes" and "The Essence of a Catholic School

and Denominational Rights". These are the essential tenets of the trial judge's interpretative principles (as summarized by Good Spirit in its factum):

(a) the basic purposes of separate schools under the *1901 Ordinances* was to permit the faith minority to separate their children from those of the majority and to educate them separate from the influences of the majority;

(b) the educational ordinances passed between 1884 and 1901 showed a distinct minimization by the territorial government of influence exerted by the Roman Catholic Church over Catholic schools and the exertion of state control;

(c) the notion of the *solemn pact* in relation to education may be losing some significance – given that, in a modern context, of the four original confederating provinces, only Ontario now retains separate schools;

(d) separate schools were introduced to the territories by way of federal legislation in 1875, not by way of a negotiated pact between provinces;

(e) the increased religious diversity of the province weighs against unnecessarily enlarging the constitutional protection of Catholic and Protestant rights;

(f) no new circumstances or needs had arisen since 1901 by virtue of which it could be suggested that funding non-Catholics in Catholic schools is a natural accommodation of separate schools within the intent of s. 93(1);

(g) the absence of a restriction on funding for non-Catholic students in Catholic schools under the *1901 Ordinances* does not create an implied, denominational right to such funding;

(h) since Vatican II in the 1960s, the Roman Catholic Church has become far more accepting of non-Catholics; but in 1905, this was not the case – which is to say, the claimed rights under the *Constitution Act, 1867* cannot shift with changes in Catholic theology; and

(i) s. 17(1) was intended to ensure that future generations of minority-faith children were not absorbed into the values of the majority by inculcating those children in their parents' religious beliefs.

B. Proper approach to constitutional interpretation

[112] The trial judge justified the establishment of his own interpretative principles by referring to Beetz J.'s comments in *Greater Montreal Protestant School Board v Québec (Attorney General)*, [1989] 1 SCR 377 [*Greater Montreal*]. Relying on *Greater Montreal*, the trial judge wrote as follows:

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

[113] We agree with the trial judge to this extent: earlier authorities did not always use the same language when describing how constitutional legislation protecting minority rights should be interpreted. Nonetheless, we interpret the remarks of Beetz J. in *Greater Montreal* differently. We see the Supreme Court's decision in *Greater Montreal* as an expression of the approach to follow in the context of a case where a legislature seeks to modify or take away rights thought by the separate schools to have been guaranteed under s. 93 or s. 17(2).

[114] As a factual pattern on point, in *Greater Montreal*, the provincial cabinet had adopted two regulations that established a uniform curriculum for non-denominational programs of study for all schools in Québec. The denominational schools submitted that the regulations were ultra vires because they violated a right protected under s. 93(1), which enabled the Protestant minority in Québec to manage and control its own schools and to regulate, subject to provincial rules of general application, the course of study to be followed in those schools. As an alternative, they argued that s. 93(2) of the *Constitution Act, 1867* extended the power or privilege to determine the exact

content of the curriculum enjoyed by trustees in Upper Canada to Québec Protestants. The Supreme Court did not accept these arguments.

[115] Justice Beetz wrote for himself and McIntyre, Lamer and La Forest JJ. He extensively addressed the question of what interpretative approach to follow. He began by noting the following (at 400):

> Much was made in argument as to the method of interpretation which is appropriate to s. 93(1) of the *Constitution Act, 1867*. Indeed although all three judges in the Court of Appeal agreed that the imposition by the province of the pedagogical regimes set forth in the Regulations did not prejudicially affect any right or privilege with respect to denominational schools guaranteed by s. 93(1), they disagreed as to the appropriate rule of interpretation which gives content to these protected rights and privileges.
>
> (Emphasis added)

[116] With respect to the lower court decision, Beetz J. commented that the reasons of the Québec Court of Appeal (written by Nichols J.A., with concurring reasons by L'Heureux-Dubé J.A. (as she then was) and by McCarthy J.A.) had determined the exclusive provincial power set forth in the opening words of s. 93 should be given a liberal interpretation, but the limitation on that power, found in the same section, should not be given the same liberal interpretation because those rights or privileges were frozen in time and must be interpreted with reference to the laws in force at the time of Confederation. In his concurring opinion, McCarthy J.A. found that both the plenary power and the content of the rights and privileges guaranteed by s. 93(1) should be treated purposefully and be given a large and liberal interpretation. Thus, the Court of Appeal was divided on the question of the appropriate approach to take to s. 93(1) – with the majority saying it was frozen in time and the dissenting judge saying it must be interpreted purposefully.

[117] In considering these two approaches to the interpretation of s. 93(1), Beetz J. found that the resolution of the problem would not be found in one approach or the other, but he clearly did not hold that denominational rights were fixed as of Confederation (at 401–403):

> I am of the view that in this case, the resolution to the problem is not to be found in one rule of interpretation as opposed to another. I note that McCarthy J.A. decided that even with a large and liberal interpretation of s. 93(1) rights and privileges, the adoption by the province of the pedagogical regime in the impugned Regulations did not prejudicially affect the rights or privileges guaranteed by s. 93(1). It is true, of course, that the fact that the guarantee is constitutionally entrenched is relevant to its interpretation. As a constitutional text, s. 93(1) may deserve a "purposive" interpretation but, in so doing, courts must not improperly amplify the provision's purpose. While it may be rooted in notions of tolerance and diversity, the exception in s. 93 is not a blanket affirmation of

freedom of religion or freedom of conscience. The entrenched right of specified classes of persons in a province to enjoy publicly sponsored denominational schools based on a fixed statutory bench-mark should not be construed as a *Charter* human right or freedom or, to use the expression of Professor Peter Hogg, a "small bill of rights for the protection of minority religious groups" (see Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at p. 824). As Professor Pierre Carignan explains in "La raison d'être de l'article 93 *de la Loi constitutionnelle de 1867* à la lumière de la législation préexistante en matière d'éducation" (l986), 20 R.J.T. 375, at p. 451:

> [TRANSLATION] In the case under consideration, the drafters in 1867 certainly did not see this as a fundamental right. If they had, it would have been given the same protection throughout Canada. The only effect of the provision is to prevent various legislatures from backing away from the legislation on denominational schooling in effect in 1867 in their respective territories. Accordingly, the extent of the constitutional protection varies from one province to another. By so doing, the drafters were demonstrating not so much a preference towards entrenchment as a desire to facilitate the creation of the proposed federation by disarming the opposition of those who, favouring denominational schools, might fear that a political reorganization would threaten already established legislative protection in this area.

This is not to say that we should ignore the plain purpose of s. 93(1) or ignore its constitutional context. Wilson J. explained in the [*Reference re Bill 30*], *supra*, at p. 1194, that "[s]ection 93(1) should … be interpreted in a way which implements its clear purpose which was to provide a firm protection for Roman Catholic education in the Province of Ontario and Protestant education in the Province of Québec". The exception to the provincial power does confer constitutional rights on specific groups in a specific manner, in keeping with what Wilson J. characterized as an "historically important compromise" struck at Confederation. It is true that the rights or privileges under ordinary law to which s. 93(1) refers have been frozen at Confederation. But just like the basic provincial power which, as Viscount Cave explained, was not "stereotyped" at the Union, the exception to that power has also matured over time through judicial interpretation. The approach courts have taken to the interpretation of the expression "with respect to Denominational Schools" in cases such as *Hull*, [[1984] 2 SCR 575], which I will discuss below, demonstrates that the law in force "at the Union" cannot on its own set the content of the constitutional right in s. 93(1).

While the text of s. 93(1) should of course be interpreted as a constitutional document, it must not be read in such a manner as to supplant or frustrate the operation of what Professor Carignan has called the "mécanisme de constitutionnalisation". The very text of s. 93(1) instructs courts as to the manner in which content should be given to the rights and privileges provided for in the exception. As Wilson J. observed, in the [*Reference re Bill 30*], *supra*, at pp. 1177–78, "It must be remembered … that s. 93(1) only protects rights and privileges guaranteed by law. Our task therefore is to examine the laws in force prior to Confederation to see what rights or privileges they gave". The interpretive task is inherently different from that with which courts are faced when called upon to give content to constitutional rights entrenched in a document such as the *Charter*. I am wary of deciding cases such as this one on the basis of one or another method of interpretation rather than the specific direction provided by the legislator in s. 93(1). Both the restrictive and liberal methods of interpretation, when misused, wrongly become rhetorical devices rather than rules of law.

> The text which sets out the exception is plain: the expressions "by Law" and "at the Union" limit the protection to rights and privileges established by statutes in force at the time of Confederation.
>
> (Emphasis added)

[118] Justice Beetz then proceeded to ask two separate questions, with the second dividing into a third (at 405):

> Before determining whether the impugned Regulations violate the constitutional guarantee found in s. 93(1), two preliminary questions must be answered. First, what was the extent of the school commissioners and trustees power over curriculum under the 1861 Statute? I will address this issue in the remaining part of this chapter. Second, in what measure is this 1861 power a "Right or Privilege with respect to Denominational Schools" which falls within the guarantee provided for in s. 93(1)? I will consider this in Part VI of these reasons. If, in answer to this second question, such a right and privilege has been constitutionally entrenched, do the impugned Regulations violate the constitutional norm so that they must be declared ultra vires?

[119] Far from saying that "judicial opinions vary respecting the court's inclination to provide expansive or restrictive interpretations of s. 93(1) rights" (*Trial Decision* at para 271) and then proceeding to develop new principles of interpretation, Beetz J. endorsed the traditional and prevailing view of interpretation of s. 93(1) rights. In a case where the minority faith challenges legislation enacted by the provincial government on the basis that it prejudicially affects a right or privilege granted to it under the *Constitution Act, 1867* (or, in this case, the *Saskatchewan Act*), the courts' task is to begin by determining precisely what had been granted by the existing legislation at the applicable time and then to determine whether such a right or privilege has been constitutionally entrenched – neither giving it a restrictive nor a liberal interpretation. The trial judge in this case, however, gave the opening words of s. 93 and the various paragraphs of s. 93 and s. 17(2) what must be considered a restrictive interpretation.

[120] As counsel for the appellants and appellant–intervenors submit, the trial judge took a narrow view of denominational school rights. In relation to the continuing significance of the solemn pact, he made these statements:

(a) Professor Waiser's text "is highly suggestive that the territorial government felt that minority faith education, largely championed by Catholic interests, was less a requested right or privilege, but more an obligation 'foisted on the region by Ottawa'" (emphasis added, *Trial Decision* at para 293).

(b) "Saskatchewan's introduction to separate schools was granted (some might say imposed) by federal legislation from the outset and not by constitutional compromise" (emphasis added, at para 296).

(c) "In my assessment of the *1901 Ordinances*, I might lessen the strictures of the 'solemn pact' principle insofar as interpreting s. 17(1) of *The Saskatchewan Act* in comparison to other courts' interpretation of s. 93 of the *Constitution Act, 1867*" (emphasis added, at para 301).

(d) "The continued protection of Saskatchewan's largest, most homogenous and historically growing minority from the influences of smaller minorities might, in the minds of many observers, show the apparent anachronism of constitutional protection of Roman Catholic and Protestant minority rights in Saskatchewan" (emphasis added, at para 308).

(e) "An interpretation of s. 17(1) must be sensitive to twenty-first century Saskatchewan realities. Accordingly, I am not apt to unnecessarily enlarge constitutional protection of Roman Catholic and Protestant rights in face of Saskatchewan's increasingly religiously diverse population" (emphasis added, at para 312).

[121] In our respectful view, these comments should not be used to determine what s. 93 or s. 17(2) guaranteed to the minority faiths as of 1905 or the present day. The constitutional deal made in 1905 is just that: a deal made by the majority to protect the minority that is enshrined and inviolable as part of the Constitution of Canada by virtue of the *Saskatchewan Act*. The only way to alter the deal is through constitutional amendment according to the protocols in place to do so (see Part V of the *Constitution Act, 1982*).

[122] Whether that compromise was imposed or foisted, the *Saskatchewan Act* was nonetheless enacted and must be interpreted as part of the Constitution of Canada. Nor is the compromise diminished in force because the Catholic population has continued to grow in the province. Much of the trial judge's discussion surrounding his eight principles is tied not to the question of determining what the *1901 Ordinances* meant or conferred moving forward in time but, rather, to confine rights or privileges granted when the province was created in 1905.

[123] Insofar as the *Charter* is a significant part of this appeal, the trial judge did not give effect to the principle that separate school rights are also a *Charter* right, recognized as being preserved by s. 29 of that instrument, which protects "rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools" (emphasis added). As the Attorney General submits in its factum, s. 29 of the *Charter* is a "clear constitutional directive that separate school rights continue to be a fundamental constitutional right in modern Canada" and, as such, "not open to the courts to rely on alleged changes in social attitudes to give a restricted interpretation to separate schools rights" (at para 79).

[124] In our view, the trial judge's approach to developing his own interpretative principles, rather than following the prevailing jurisprudence with respect to the interpretation of s. 93 and s. 17(2), is an error and resulted in error.

[125] In addition to developing his own principles, it would appear that the trial judge did not give effect to other decisions from the Supreme Court that focused on s. 93(1) and s. 93(3) namely *Reference re Bill 30* and *Adler*. He also did not give effect to the evolving jurisprudence from the Supreme Court with respect to the protection of minority rights: for example, *Mahé v Alberta*, [1990] 1 SCR 342 [*Mahé*]; *Reference re Secession of Québec*, [1998] 2 SCR 217 [*Secession Reference*]; and *R v Beaulac*, [1999] 1 SCR 768 [*Beaulac*].

[126] Our analysis on this point begins with the decision of Beetz J. in *Société des Acadiens v Association of Parents*, [1986] 1 SCR 549 [*Société des Acadiens*]. Justice Beetz addressed the difference between legal rights and rights arising as a result of political compromise. He found that language rights fall into the latter category, which justifies a different interpretative response (at 578):

> This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights.
>
> (Emphasis added)

[127] A year later, in *Reference re Bill 30*, Wilson J. agreed with this general principle, but she also found that acting with restraint did not "foreclose a purposive approach to s. 93" (at 1175).

Writing further on this point, she stated, “While due regard must be paid not to give a provision which reflects a political compromise too wide an interpretation, it must still be open to the Court to breathe life into a compromise that is clearly expressed” (at 1176). The result in *Reference re Bill 30* expanded Catholic school rights to include the funding of Catholic high schools in Ontario. The Supreme Court in *Reference re Bill 30* did so by construing the opening words of s. 93 coupled with paragraph (3) of s. 93.

[128] Then, in *Mahé*, the Supreme Court drew upon *Reference re Bill 30* to depart from what was found to be a too-narrow interpretation of language rights as had been articulated in 1986 in *Société des Acadiens*. Chief Justice Dickson noted the following (*Mahé* at 365):

> In [*Reference re Bill 30*], Wilson J. made the following comments in respect of the above quotation [re constraint]:
>
> > While due regard must be paid not to give a provision which reflects a political compromise too wide an interpretation, it must still be open to the Court to breathe life into a compromise that is clearly expressed.
>
> I agree. … Careful interpretation of such a section is wise: however, this does not mean that courts should not “breathe life” into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.

[129] In the *Secession Reference*, the Supreme Court referred to *Greater Montreal* and *Société des Acadiens* but carefully juxtaposed those decisions with references to *Adler* and *Mahé* and then offered these observations:

> [80] However, we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that <u>the protection of minority rights is itself an independent principle underlying our constitutional order</u>. The principle is clearly reflected in the *Charter*’s provisions for the protection of minority rights. See, e.g., *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, and *Mahé v. Alberta* [1990] 1 S.C.R. 342.
>
> (Emphasis added)

[130] The evolution of the interpretative approach to minority rights in *Mahé* continued in *Beaulac*, which was a language rights case that did not accept a restrictive, interpretative approach to rights reflecting a political compromise. Writing for the majority, Bastarache J. asserted the following:

> [24] … I agree that the existence of a political compromise is without consequence with regard to the scope of language rights. …

> [25] Language rights must *in all cases* be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada … . To the extent that *Société des Acadiens du Nouveau-Brunswick*, *supra*, at pp. 579–80, stands for a restrictive interpretation of language rights, it is to be rejected.
>
> (Italic emphasis in original)

The Attorney General submits that this analysis applies equally to separate school rights. We agree. It is this approach that must be followed in this case in order to interpret the various parts of s. 93 and s. 17(2).

IX. Interpretation and application of s. 93 and s. 17(2)

A. Introduction

[131] In light of the way the trial played out, and the declaration that the trial judge ultimately granted, the overarching issue in this case was whether the Legislative Framework contravenes s. 2(a) and s. 15 of the *Charter*. The trial judge concluded that the Government's approach to funding school divisions will not contravene the *Charter* if that approach is protected by s. 93 or s. 17(2).

B. Paragraph (2) of s. 17

1. Resolution of this part of the appeal begins with s. 17(2)

[132] For ease of reference, the opening words of s. 93 (i.e., the plenary power), s. 93(1) and s. 17(2) of the *Saskatchewan Act* read as follows:

Constitution Act, 1867 **(as of 1905)**	***Loi constitutionnelle de 1867*** **(à partir de 1905)**
Education **Legislation respecting Education** **93.** In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:	**Éducation** **Législation au sujet de l'éducation** **93.** Dans chaque province, la législature pourra exclusivement décréter des lois relatives à l'éducation, sujettes et conformes aux dispositions suivantes.

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.	1. Elle ne peut, par une disposition législative adoptée en cette matière, porter atteinte aux droits ou privilèges appartenant lors de l'adoption de la présente loi, selon les chapitres 29 et 30 (année 1901) *des ordonnances des Territoires du Nord-Ouest*, à une catégorie de personnes relativement aux écoles séparées, ou relativement à l'instruction religieuse dispensée dans les écoles publiques ou séparées conformément à ces ordonnances.

***Saskatchewan Act* (1905)**	***Loi concernant la Saskatchewan* (1905)**
Education **17**.2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.	**Éducation** **17**.2. Les écoles des catégories visées au chapitre 29 mentionné ci-dessus ne peuvent faire l'objet de mesures discriminatoires lors de l'affectation par la législature de la province, ou de la répartition par son gouvernement, des crédits destinés aux écoles organisées et tenues conformément à ce chapitre ou à toute loi qui le modifie ou s'y substitue.

[133] At this point, we are considering the order in which the judge approached his consideration of s. 93(1), s. 93(3) and s. 17(2).

[134] In that regard, the trial judge considered s. 93(3), and the application of the denominational aspects test to that provision, then s. 93(1) and finally, s. 17(2). In part four of his reasons, the trial judge focussed on s. 93(1) and s. 93(3) as distinct provisions standing apart from the opening words of s. 93. His opening question was, "Is funding of St. Theodore Roman Catholic School a protected constitutional right under ss. 93(1) and (3) of the *Constitution Act, 1867*?", and he began by interpreting s. 93(3), finding that it is subject to the denominational aspects test. He then considered s. 93(1), asking, "Is the funding of non-Catholic students a right found under the *1901 Ordinances* and, if so, does the right satisfy the denominational aspects test?". In part five, the trial judge considered s. 17(2) alone, asking, "Is funding of non-minority faith students at St. Theodore Roman Catholic School a constitutional right under s. 17(2) of *The Saskatchewan Act*?".

[135] In our respectful view, rather than beginning with s. 93, the trial judge should have begun his analysis with a consideration of s. 17(2) in order to determine whether the dispute could have been resolved without recourse to s. 93. This was the position of Christ the Teacher at trial and on appeal and, in our view, that is the correct path to follow.

[136] The approach to interpreting s. 17(2) is governed by *Alberta Public Boards*, which concerned legislation that treated the funding of public school boards differently than separate school boards. The legislation allowed separate school boards to opt-out of the standard funding scheme and, instead, raise funds directly from ratepayers – but the boards were then subject to a clawback provision. The public school boards could not opt-out of the funding scheme. They therefore argued that, if challenged by the separate boards, the opt-out scheme would be held unconstitutional as offending s. 93. The public school boards had wanted to springboard from a right they said was being taken from the separate school boards. They also submitted the legislation discriminated against them because they could not access the clawback scheme in the same manner as the separate school boards.

[137] The Supreme Court determined that whether separate school rights under s. 93(1) needed to be defined, in order to answer the public school boards' claim, depended upon the meaning of discrimination in s. 17(2). The Supreme Court ultimately held that it need not consider what effect the clawback would have, if any, upon the separate boards' ability to fulfill the denominational education rights of separate schools. This was so because it found that s. 17(2) permitted the provincial government to, in effect, discriminate between public school boards and separate school boards because the unequal treatment in the case was fair. On this point – of withholding review of s. 17(1) if the matter can be resolved under s. 17(2) – Justice Major, for the Court, wrote, "It follows that it is unnecessary to ascertain the scope of separate school rights under s. 17(1) in adjudicating whether the impugned funding scheme meets a standard of fairness under s. 17(2). Equally, the unique ability of separate schools to opt-out of the scheme cannot be a source of discrimination under s. 17(2)" (at para 49).

[138] Christ the Teacher submits this means that a court reviewing the constitutionality of a funding provision alleged to contravene s. 93 or s. 17(2) must begin with s. 17(2). We would not take *Alberta Public Boards* as going that far, but we do interpret the decision as holding that if a dispute can be resolved based on an analysis of s. 17(2) it is preferable to do so.

[139] Such an approach is consistent with the principle of restraint that guides courts generally and, as recent Supreme Court jurisprudence indicates, is of particular importance when considering

the rights of a religious minority. In *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*], the Supreme Court, in majority reasons, held as follows:

> [50] In my view, the state is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.
>
> (Emphasis added)

[140] Similarly, in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26, [2018] 1 SCR 750 [*Wall*], Rowe J., speaking for a unanimous Supreme Court, confirmed the above statement and added, "courts should not decide matters of religious dogma" and "courts have neither legitimacy nor institutional capacity to deal with such issues …" (at para 36).

[141] In the context of resolving disputes about denominational rights under the *Constitution Act, 1867*, it may not always be possible to avoid determining the content of such rights, but we take from the above authorities that, wherever possible, courts should strive to find a resolution that avoids judicial commentary about what is or is not part of the religion in question. If the dispute can be resolved without considering whether the right in question is denominational, it avoids the courts dictating to the minority religion what, in their opinion, constitutes a denominational right. With that, we turn to how the trial judge interpreted s. 17(2).

2. Analysis of the trial judge's reasons with respect to s. 17(2)

[142] The trial judge concluded that in order to determine whether the legislation in question contravened s. 17(2), he had to first ascertain whether separate schools had a right to receive funding for non-Catholic students attending such schools. In his view, this required the application of the denominational aspects test:

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

> [348] The result would be strange if, as the defendants suggest, s. 17(2) provided a simple and emphatic answer to the entirety of the constitutional questions this litigation poses. Such an answer would obviate the need to look at the rights accorded under the *1901 Ordinances*, would ignore applying the denominational aspects test and would render all judicial determinations on this issue in Canada of little relevance. In my view, s. 17(2) presupposes that separate schools are serving the purposes for which they were intended – the perpetuation and protection of the minority's faith through separate education. The words of s. 17(2) expressly state that in the distribution of money for the "support of schools organized and carried on in accordance with … chapter 29" separate schools are to receive equal funding. Schools not carried on in accordance with chapter 29 are not included in the guarantee of equal funding. Section 17(2) does not finesse the entire application of constitutional principles that have been the centre of this lawsuit since its inception.
>
> (Emphasis added)

[143] These paragraphs contain several misconceptions. First, s. 17(2) is as much a part of the protection of separate school rights as either s. 93(1) or s. 93(3). As the legislative evidence shows, s. 17(2) was added at the insistence of the Honourable Clifford Sifton, the Minister of Interior in the Laurier government. Mr. Sifton was opposed to separate schools, but nonetheless believed that, if they were to exist, they must have the same funding as secular schools. In the House of Commons he stated the following (*House of Commons Debates (Hansard)*, 10th Parl, 1st Sess, vol 2 (24 March 1905) at 3108–3109):

> **Mr. Sifton.** … But, if we are to have subsection 1 [of s. 17], if we are to have a provision which allows the separate schools to be established, then, surely, Mr. Speaker, we ought also to have a provision making it certain that the separate schools may have in them the possibility of being efficient schools. Why, Sir, it would be a crime against education to crystallize in the law of the Northwest Territories a provision that such and such people should have the right to organize such and such schools as public schools and not to protect them in the right to get the money which will make those schools efficient and enable them to advance and increase in efficiency in accordance with the desires of the persons in charge of them. … But, as I have said, it is an interference only to the extent of requiring that when a separate school absolutely and entirely complies with the law and then comes before the educational authorities and says: Having complied with the law, being, in every sense of the word a public school, but called a separate school only because we happen to be less in number than the people who organized the public school, we asked to be paid this money in proportion to the efficiency we can show we possess under the educational statutes which you have seen fit to pass – that, when that is shown, the money necessary to the efficiency of the schools shall be given. There is a theoretical – I imagine it would only prove to be a theoretical – interference with the control of the public funds to that extent; but that is the inevitable corollary of subsection 1; and I would object to subsection 1 establishing separate schools very much more if it were not accompanied with the provision that the schools established under subsection 1 should be entitled to receive their share of the legislative grant.
>
> (Emphasis added)

[144] Second, as *Alberta Public Boards* makes clear, issues that arise between public school divisions and the government can be resolved on the basis of s. 17(2), without recourse to s. 93(1) or a comparison to separate schools.

[145] Third, nothing in the jurisprudence supports the proposition that "one must first determine the rights of separate schools to receive funding" before concluding that "public and separate schools [are] entitled to the same level of funding without discrimination". Indeed, the whole thrust of the constitutional guarantee to separate schools suggests the contrary proposition is true.

[146] With much respect, we find the trial judge made other errors in his s. 17(2) analysis. In support of his conclusion that one must first determine a right to funding (i.e., that s. 17(2) does not mean what it says), he imported a denominational aspects test into its interpretation. He concluded that "any funding of Catholic schools is the protection of their right to remain *separate*" (emphasis in the original, *Trial Decision* at para 350) and separate schools "were created so that a minority faith could separate their children from the majority" (at para 357). He also imported aspects of a *Charter* infringement analysis by suggesting that "[n]on-Christian parents, for example, may not be too sympathetic to hear non-Catholic Christians complain if they are unable to receive government funding to educate their children with Christian values within a Catholic school" (at para 352) and "[t]he defendants must accept that 'unequal' and therefore 'unfair' treatment is inherent to separate school rights" (at para 356).

[147] The trial judge put forward a series of policy arguments in support of his conclusion that s. 17(2) guarantees funding for minority faith children only:

(a) "Section 17(2) could not have been intended, as the Government suggests, to create a second publicly funded school system to provide choice to parents" (at para 350);

(b) "The religious freedom of non-Catholic parents wishing to send their children to Catholic schools has not been infringed if funding is unavailable for them" (at para 351);

(c) "The defendants cannot advance a religious freedom argument on the testimony of non-Catholic parents whose children are currently attending Catholic schools" (at para 352);

(d) "Better choice to no one (aside from those constitutionally preferred), than choice to some based on the whims of geography and acceptance of Catholic doctrine" (at para 353); and

(e) "Effectively the defendants would give Saskatchewan two competing public school systems with little to legally distinguish them, certainly not government funding" (at para 354).

[148] Again, and with much respect, these arguments do not address how s. 17(2) should be interpreted and applied in this case. As will be seen from the wording of s. 17(2), there is no denominational aspect to it. It applies to "schools of any class". Further, as mentioned, the Supreme Court in *Alberta Public Boards* decided it important to consider s. 17(2) first, before considering s. 93(1), which has a denominational aspect component. This is an obvious indication that s. 17(2) does not require the courts to consider denominational rights in a comparison between secular and separate schools in the context of a case where the Legislature was not purporting to act to affect separate schools. Indeed, there could not be a denominational aspect to the rights in s. 17(2) in that context because public school divisions do not have such an aspect. To interpret s. 17(2) otherwise would entirely read out of s. 17(2) the constitutional entitlements possessed by the public school divisions to non-discriminatory funding. Importing the denominational aspects test to separate schools in such a case would give rise to the very discrimination that s. 17(2) expressly prohibits as it would affect rights in one school system and not the other. Finally, as part of the exercise of its plenary power, it is for the Legislature to determine whether it wants two publicly funded school systems.

[149] It is important to reiterate that both of what are referred to as public and separate schools are organized and carried out in accordance with the *1901 Ordinances*. However, s. 17(2) is even broader than that. It goes on to say "or any Act passed in amendment thereof or in substitution therefor". This makes it clear that the Government's obligation under s. 17(2) is not frozen in time, but rather extends to the present day and to the legislation that presently exists. The funding provided by the Government under the grant formula at the relevant time to this action is an "appropriation by the Legislature or distribution by the Government" under s. 17(2), which means

"there shall be no discrimination against any schools of any class described" in the *1901 School Ordinance*.

3. The appeal can be resolved on the basis of s. 17(2)

[150] In *Alberta Public Boards*, the Supreme Court determined that s. 17(2) is about fairness and proportionality:

> [45] The meaning of "discrimination" cannot be divorced from the broader purpose for which s. 17(2) was enacted. Fitzpatrick C.J., in his dissenting opinion in *Gratton*, [(1915), 50 SCR 589], commented on the purpose underlying s. 17(2) of *The Saskatchewan Act*, s. C. 1905, c. 42 (which is identical to s. 17(2) of the *Alberta Act*), at pp. 598–99:
>
> > It was also said and insisted upon at the time that the intention of Parliament was to secure to all the schools, whether public or separate, their fair share in the appropriation and distribution of any moneys for the support of schools, which in practice they had always received and which was necessary to place them in a position to play their necessary part in the general scheme of national education, and this explains why sub-section 2 was made a part of section 17.
> >
> > …
> >
> > The section, I repeat, makes provision for the equitable distribution of moneys levied for the support of schools and nothing more.
>
> [46] *Gratton*'s interpretation was applied to s. 17(2) of the *Alberta Act* in *Calgary Board of Education v. Attorney General for Alberta*, [1980] 1 W.W.R. 347 (Alta. Q.B.), aff'd [1981] 4 W.W.R 187 (Alta. C.A.), leave to appeal refused, [1981] 1 S.C.R. vi, where, at trial, Stevenson J. succinctly noted "subs. [17](2) is designed to ensure fairness" (p. 356).
>
> [47] In this sense, s. 17(2) carries forward a principle of proportionality which this Court has described as a constitutional right embodied in s. 93(1). In *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, this Court had the opportunity to describe the proportionality principle as applicable to s. 20 of *An Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools*, s. Prov. C. 1863, 26 Vict., c. 5 ("*Scott Act*"). See Iacobucci J., at para. 73:
>
> > In my view, when one reviews the history and purpose of s. 93(1), the principle of proportionality can be seen for what it really is, namely, the means to a constitutional end which is equality of educational opportunity … . While the notion of proportionality contained in s. 20 of the *Scott Act* is a constitutional right embodied in s. 93(1), the substantive purpose of this notion must be borne in mind: the achievement of an educational system that distributes provincial funds in a fair and non-discriminatory manner to common and separate schools alike. As the Court per Gonthier J. stated in *Reference re Education Act (Que.)*, [1993] 2 S.C.R. 511, at p. 567:
> >
> > > When we speak of equality, this must be understood in the sense of equivalence and not that of strict quantitative identity, as Chouinard J. noted in *Greater Hull*, [[1984] 2 SCR 575], at p. 591:

> Proportionality is more significant. Whether on the basis of total population or that of school attendance, the principle of a *fair and non-discriminatory* distribution is recognized [italic emphasis added by Gonthier J.].

> [48] Section 17(2) is equally intended to guarantee proportionality between the educational opportunities of separate and public school supporters. It does so by imposing a standard of fairness upon the distribution by the Government of monies for the support of schools. There are two significant limits, however, on the content of this notion of fairness. First, it does not prohibit all distinctions in funding, as it does not guarantee absolute or formalistic equality but rather a general concept of fairness. Second, it does not deal with distinctions in the distribution of rights, but only with a general fairness in the distribution of monies.
>
> (Underline emphasis added)

[151] Focussing on the limitations mentioned in paragraph 48 of *Alberta Public Boards*, it can be said with absolute confidence that the impugned provisions of the Legislative Framework do not draw a distinction as to how the Government provides funding to either the public or separate school divisions. Thus, the only question for the trial judge was whether the Legislative Framework is fair or proportional in its application to public and separate school divisions alike. As we indicated earlier in the context of standing, the Legislative Framework does not state "Funding shall be provided to non-Catholic students attending Catholic schools" or "Funding shall be provided for Catholic students attending public schools". Rather, the legislative terms draw no distinction between public school divisions and separate school divisions. And, according to the evidence, this has been the situation since the *Saskatchewan Act* came into force. Neither the Government nor the government of the North-West Territories (prior to 1905) made grant payments for education on the basis of the religious denomination of a student or their parents within either school system – except in so far as the separate school system existed and decided otherwise.

[152] As we explained earlier, in the specific facts of *Alberta Public Boards*, the funding formula permitted separate school boards to opt-out of the new standard funding system, but if they did so, the government could clawback funds in certain circumstances. In a future challenge under s. 93, this clawback could potentially be found to be unconstitutional – if challenged by the separate boards only. Notwithstanding this potential benefit to separate boards, the Supreme Court held that, vis-à-vis the public boards, there was no unfairness or discrimination:

> [50] Regardless, the constitutionality of applying the clawback to funds directly requisitioned by opted-out separate boards does not affect the public schools' s. 17(2) claim. If the clawback was unconstitutional in this sense, the scheme's formula for determining provincial grants could result in opted-out separate boards obtaining a global level of funding greater than that of public boards. Nevertheless, this would result only from the retention of directly requisitioned monies, monies not appropriated or distributed at any point by the Government.
>
> [51] It is clear that s. 17(2) does not apply to property assessment monies not appropriated by the Legislature or distributed by the Government. See *Calgary Board of Education*, [(1979), 106 DLR (3d) 415 (Alta QB)], at p. 359, per Stevenson J. Therefore, the property assessments of opted-out boards retained as a result of the clawback's unconstitutionality could not be scrutinized under s. 17(2)'s fairness standard. [Alberta School Foundation Fund] monies, which are collected by the Government, pooled and redistributed are, however, subject to a fair distribution.
>
> [52] Similarly, even if the Framework's spending conditions were inapplicable to the directly requisitioned funds of opted-out boards, a fairness standard would not be contravened. Equitable funding would continue. Only the allocation of funding amongst spending priorities would differ.
>
> (Emphasis added)

[153] Thus, the Supreme Court in *Alberta Public Boards* was focussed on fairness and equity and what constituted unreasonable discrimination as determined in the facts of the case before it – even though it could result in separate schools receiving greater funding than the public boards. Reasoning by analogy to this appeal, nothing could be fairer than funding on the exact same basis, i.e., without discrimination of any form, religious or otherwise, between the two classes of schools recognized under the *1901 Ordinances*. What the public board in this case desires is a disruption to a fair and neutral process. It wants to introduce a form of discrimination, i.e., one based on religion that would be a direct contradiction to the terms and spirit of s. 17(2). As the Attorney General submits in its factum, "the argument is to impose financial disabilities on a separate school to discourage non-minority faith children from attending the minority separate schools, and to encourage them to attend the majority public school instead. Creating an advantage for one type of school over another by means of provincial funding is exactly what s. 17(2) prohibits" (at para 183). We agree with that statement.

4. Conclusion with respect to paragraph (2) of s. 17

[154] The trial judge erred in relation to his interpretation and application of s. 17(2). This issue, which is whether the Legislative Framework is consistent with s. 17(2), should have been resolved in favour of the appellants, and thereby determined the result of Good Spirit's claim.

C. The opening words of s. 93 and s. 93(3)

[155] For ease of reference, the opening words of the plenary power in s. 93 and s. 93(3) of the *Constitution Act, 1867*, as amended by s. 17(3) of the *Saskatchewan Act*, read as follows:

Constitution Act, 1867 **(as of 1905)**	***Loi constitutionnelle de 1867*** **(à partir de 1905)**
Education **Legislation respecting Education** **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 [the law as set out in the said chapters 29 and 30 of the *Ordinances of the North-west Territories* at the date at which *The Saskatchewan Act* comes into force] 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 … .	**Éducation** **Législation au sujet de l'éducation** **93.** Dans chaque province, la législature pourra exclusivement décréter des lois relatives à l'éducation, sujettes et conformes aux dispositions suivantes: (3) Dans toute province où un système d'écoles séparées ou dissidentes existera par [la date d'entrée en vigueur de la présente loi et les règles de droit énoncées aux chapitres 29 et 30], ou sera subséquemment établi par la législature de la province – il pourra être interjeté appel au gouverneur-général en conseil de toute loi ou décision d'aucune autorité provinciale affectant aucun des droits ou privilèges de la minorité protestante ou catholique romaine des sujets de Sa Majesté relativement à l'éducation … .

1. The trial judge's reasons with respect to s. 93(3)

[156] The trial judge set out his understanding of s. 93(1) and s. 93(3) and how these provisions interact with the *Charter* as follows:

> [188] … I find that rights are constitutionally protected and no provincial legislation can derogate from such rights so long as:
>
> 1. They are found under the *1901 Ordinances*, concern a right or privilege affecting a denominational school and are enjoyed by a class of persons;
> 2. They meet the requirements of the denominational aspects test, i.e., the rights prejudicially affected relate to a denominational aspect of education or a non-denominational aspect of education necessary to give effect to denominational concerns (*Greater Montreal* and *Mahé*);
> 3. In addition to the inability of the legislature to derogate from such protected rights, they are also immune from *Charter* review because one constitutional document (the *Charter*) cannot override the provisions of another constitutional document (the *Constitution Act, 1867*); and

> 4. If constitutionally protected under s. 93(1), such rights cannot be subsequently abrogated by provincial legislation without exposing such diminishing legislation to appeal to the cabinet.
>
> [189] On the other hand, rights under s. 93(3) allow provincial legislation to augment existing rights or establish new denominational schools, post-union. These rights can be characterized as follows:
>
> > 1. Since newly enacted, they are not constitutionally "guaranteed" under the *Constitution Act, 1867* in the same way as s. 93(1) rights so that, unlike s. 93(1) rights, a province can remove or amend such rights and privileges as it sees fit (at 1197–98 of *Reference re Bill 30*);
> >
> > 2. Although subject to the province's right to amend or repeal such legislation, they are immune from *Charter* review, but not because such rights are constitutionally guaranteed under the *Constitution Act, 1867*, but because *Charter* immunity comes from "the guaranteed nature of the province's plenary power to enact that legislation", *so long as such rights are necessary to give effect to denominational aspects of education and to non-denominational aspects of education necessary to give effect to denominational concerns*.
> >
> > 3. Similar to s. 93(1) rights, if the provincial legislature abrogates rights under s. 93(3), an appeal lies to the cabinet and Parliament can enact remedial legislation.
> >
> > (Italic emphasis in original, underline emphasis added)

[157] The trial judge held that "legislation under ss. 93(1) and 93(3) can be *Charter*-immune but to gain this immunity the legislation must be equally subjected to the denominational aspects test" (at para 191). He gave four reasons for his conclusion (at para 191):

> 1. A review of the case law shows the denominational aspects test has been applied to both s. 93(1) and s. 93(3) powers.
>
> 2. Applying a denominational aspect test to pre-union legislation but not to post-union legislation augurs unreasonable results.
>
> 3. Allowing legislation, unprotected under the *1901 Ordinances* (and therefore exposed to *Charter* scrutiny), to gain legitimacy under s. 93(3) as post-union legislation (because it augments the rights of separate school) with the consequence that it is *Charter*-immune *without* any qualification of the denominational aspects test, gives the Government carte blanche to enact any legislation it chooses under s. 93(3) without *Charter* overview.
>
> 4. The defendants, having premised their case on evidence that funding of non-Catholic students was a right under the *1901 Ordinances*, have chosen to advance their case under s. 93(1) and cannot simultaneously advance their case under s. 93(3) which necessarily requires evidence that the impugned act or legislation arose after 1905.
>
> (Italic emphasis in original)

2. Analysis of the trial judge's reasons with respect to s. 93(3)

[158] In our respectful view, the trial judge approached the interpretation of s. 93 as though it were necessary to draw a line around separate school rights for the purpose of defining an area that

would be subject to *Charter* oversight. This was perhaps an inevitable consequence of allowing Good Spirit, as a public school division, to mount a *Charter* challenge to the Government's funding of separate schools. But, in our view, the trial judge's error goes beyond the standing issue, which, in the end, affected his analysis in relation to s. 93(3) and s. 93(1). At this point, we will address the trial judge's reasons for finding that the denominational aspects test applies to s. 93(3).

a. The jurisprudence does not hold that the denominational aspects test applies to the s. 93(3) power

[159] In coming to his conclusion that only those laws that meet the denominational aspects test are protected from *Charter* scrutiny, the trial judge relied on *Reference re Bill 30*, *Adler* and commentary contained in paragraphs 57 to 59 of *Hogg*. With respect to *Reference re Bill 30*, the trial judge found that Wilson J. did indeed recognize and allude to the application of the denominational aspects test (*Trial Decision*):

> [201] … Justice Wilson essentially provides an analysis of the legislation which models the denominational aspects test. She carefully reviewed Ontario's pre-union separate school legislation and concluded that funding was "fully consistent with the clear purpose of s. 93". She wrote at p 1196 a statement that, just as aptly as the statement of the learned authors or the formal denominational aspect test articulated by Justice Beetz, encapsulates the same principles:
>
> > [Separate schools in Ontario] were entitled to the proportionate funding provided for in s. 20 of the Scott Act. *This conclusion, it seems to me, is fully consistent with the clear purpose of s. 93, namely that the denominational minority's interest in a separate but suitable education for its children be protected into the future*. I would therefore conclude … that Bill 30, which returns rights constitutionally guaranteed to separate schools by s. 93(1) of the *Constitution Act, 1867*, is intra vires the Provincial Legislature.
>
> [202] This statement is essentially a formulation of the denominational aspects test. She finds that the proposed funding legislation was pivotal to sustain Catholic education – a finding paralleling the denominational aspects test. She then concludes that the legislation was *Charter*-immune under either the s. 93(1) protection or the s. 93(3) power. To say that Justice Wilson's analysis requires the denominational aspects test as a necessary pre-condition to determine *Charter* immunity under s. 93(1), but not s. 93(3), is a difficult distinction to sustain.
>
> [203] Further clarity can be gleaned from Justice Wilson's paraphrasing and quoting of the Court of Appeal's statement respecting *Charter* immunity and separate school legislation. She wrote at p 1164:
>
> > The majority added by way of caveat that its decision in this case did not mean that separate schools were completely immune from scrutiny under the *Charter*. *Not at all*. They were shielded from review only in their essential Catholicism. The majority stated at p. 576:

> Laws and the Constitution, particularly the *Charter*, are excluded from application to separate schools only to the extent they derogate from such schools as Catholic (or in Québec, Protestant) institutions. It is this essential Catholic nature which is preserved and protected by s. 93 of the *Constitution Act, 1867* and s. 29 of the *Charter*. The courts must strike a balance, on a case by case basis, between conduct essential to the proper functioning of a Catholic school and conduct which contravenes such *Charter* rights as those of equality in s. 15 or of conscience and religion in s. 2(a). Thus, the right of a Catholic school board to dismiss Catholic members of its teaching staff for marrying in a civil ceremony, or for marrying divorced persons, has been upheld as permissible conduct for a separate school board, but would the same protection be afforded a board which refused to hire women or discriminated on the basis of race, national or ethnic origin, age or disability?
>
> [204] Justice Wilson's comment, "Not at all" in response to the rhetorical question whether separate schools were completely immune from *Charter* scrutiny contradicts the defendants' assertion that post-union legislation is unshackled by the denominational aspects test.
>
> (Italic emphasis added by the trial judge, underline emphasis added)

[160] In our respectful view, the trial judge's analysis on this point does not correctly answer the question of whether it is necessary to invoke the denominational aspects test to determine whether legislation passed pursuant to the opening words of s. 93 and s. 93(3) is subject to *Charter* scrutiny. The quotation taken from the decision of Wilson J., found in paragraph 203 of the *Trial Decision*, is a summary of the majority reasons of the Ontario Court of Appeal – and she is referring specifically to *separate schools* rather than the legislature's power to fund such schools.

[161] In her own reasons, Wilson J. expressly declared that rights and privileges created under s. 93(3) are insulated from *Charter* attack (*Reference re Bill 30* at 1198–1199):

> To put it another way, s. 29 is there to render immune from *Charter* review rights or privileges which would otherwise, i.e., but for s. 29 be subject to such review. The question then becomes: <u>does s. 29 protect rights or privileges conferred by legislation passed under the province's plenary power</u> in relation to education under the opening words of s. 93? <u>In my view, it does although again I do not believe it is required for this purpose. The Confederation compromise in relation to education is found in the whole of s. 93, not in its individual parts</u>. The section 93(3) rights and privileges are not guaranteed in the sense that the s. 93(1) rights and privileges are guaranteed, i.e., in the sense that the legislature which gave them cannot later pass laws which prejudicially affect them. But <u>they are insulated from *Charter* attack as legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures</u> as part of the Confederation compromise. Their protection from *Charter* review lies not in the guaranteed nature of the rights and

> privileges conferred by the legislation but in the guaranteed nature of the province's plenary power to enact that legislation. What the province gives pursuant to its plenary power the province can take away, subject only to the right of appeal to the Governor General in Council. But the province is master of its own house when it legislates under its plenary power in relation to denominational, separate or dissentient schools. This was the agreement at Confederation and, in my view, it was not displaced by the enactment of the *Constitution Act, 1982*. As the majority of the Court of Appeal concluded at pp. 575–76:
>
> > These educational rights, granted specifically to the Protestants in Québec 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 in Ontario and Québec. The incorporation of the *Charter* into the *Constitution Act, 1982*, does not change the original Confederation bargain. A specific constitutional amendment would be required to accomplish that.
>
> I would conclude, therefore, that even if Bill 30 is supportable only under the province's plenary power and s. 93(3) it is insulated from *Charter* review.
>
> (Emphasis added)

[162] Notwithstanding the conclusion expressed at page 1199 of *Reference re Bill 30* (as cited above), the trial judge held that the denominational aspects test determines the application of the *Charter* to legislation passed pursuant to the plenary power and s. 93(3):

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

[163] In our respectful view, this is not how *Reference re Bill 30* is to be read. The courts developed the denominational aspects test to resolve disputes between, on the one hand, a government seeking to make changes to the educational system in the province, and on the other hand, a public or separate school board resisting that change on the basis that the government was

invading ground protected under s. 93(1). As OECTA points out in its factum, in *Greater Montreal* the test was formulated specifically in regard to the express words of s. 93(1), i.e., rights or privileges with respect to denominational schools. These words do not appear in s. 93(3), which protects rights or privileges "in relation to education". In that regard, in *English Catholic Teachers*, the Supreme Court stated the following: "The aspects approach to the guarantees of s. 93(1) therefore allows Ontario to manage its denominational education system as it sees fit, so long as it does not prejudicially affect a denominational right or privilege or a non-denominational right necessary to deliver the denominational elements of education" (at para 38).

[164] To date, the denominational aspects test has only been applied to s. 93(1) – because it is unnecessary to apply it to s. 93(3). Contrary to the trial judge's statement in para 189 (point 3), s. 93(3) rights are not "similar to s. 93(1) rights". Paragraph (1) of s. 93 acts as a *restraint* or *curtailment* of the government's plenary power that is granted by the opening words of s. 93; whereas, paragraph (3) of s. 93 is a recognition that a province can legislate to *add* to the rights of denominational schools and may also amend or repeal any such laws, subject to the appeal rights contained in s. 93(3) and s. 93(4). Since the legislature can repeal any law passed in accordance with s. 93(3), it is not necessary to resort to the denominational aspects doctrine to resolve any tension with separate schools.

[165] Thus, we see in *Reference re Bill 30* that Wilson J. gives full effect to the opening words of s. 93 and s. 93(3), with no mention of the denominational aspects test: (1170–1176):

> In my view, s. 93(3) in no way limits the exercise of the province's plenary power. Rather, it expressly contemplates that after Confederation a provincial legislature may, pursuant to its plenary power, pass legislation which augments the rights or privileges of denominational school supporters. It would be strange, indeed, if the system of separate schools in existence at Confederation were intended to be frozen in an 1867 mold.
>
> … But what was never questioned, either in argument or by their Lordships, was that the provincial legislature could, after the Union, validly pass legislation which augmented minority educational rights.
>
> …
>
> … The compromise or, as Duff C.J. in the *Reference Re Adoption Act*, [1938] S.C.R. 398 at p. 402, termed it, "the basic compact of Confederation", was that rights and privileges already acquired by law at the time of Confederation would be preserved and provincial legislatures could bestow additional new rights and privileges in response to changing conditions. As was said by Meredith C.J.C.P. in *Ottawa Separate School Trustees v. City of Ottawa* (1915), 34 O.L.R. 624 (reversed on other grounds), it was not intended that separate schools should be "left forever in the educational wilderness of the enactments in

> force in 1867" (p. 630). Instead, he said, "the machinery may be altered, the educational methods may be changed, from time to time, to keep pace with advanced educational systems". While these new rights and privileges could be legally repealed by the Legislature at a future date, a safeguard against their repeal as a result of local pressure insensitive to minority rights was provided by the inclusion of a right of appeal to the Governor General in Council under s. 93(3). This would appear to have also been the view of the Lord Chancellor in *Brophy* [*v Attorney-General of Manitoba*, [1895] AC 202 (PC)]. He clearly believed that the purpose of s. 93(3) was to protect minorities in both Ontario and Québec against the subsequent repeal of rights created after Confederation. …
>
> … The contextual background suggests that part of the compromise was that future legislation on the part of the province with respect to separate denominational schools was permissible. The province was to be able to grant new rights and privileges to denominational schools after Union in response to new conditions but that subsequent repeal of those post-Union rights or privileges would be subject to an appeal to the Governor General in Council. This is apparent from the very text of s. 93. I would therefore conclude, subject to the comments that follow concerning the applicability of the *Charter of Rights* to Bill 30, that Bill 30 is a valid exercise of the provincial power to add to the rights and privileges of Roman Catholic separate school supporters under the combined effect of the opening words of s. 93 and s. 93(3) of the *Constitution Act, 1867*.
>
> (Emphasis added)

[166] The trial judge explained the lack of reference to a denominational aspects test in *Reference re Bill 30* on the basis that it predated *Greater Montreal*, where Beetz J. held that s. 93(1) protects the denominational aspects of denominational schools necessary to give effect to denominational guarantees. However, the origins of the denominational aspects test predate *Greater Montreal*.

[167] Justice Iacobucci noted as much in *English Catholic Teachers* where he stated "the aspects approach is not new" (at para 33, relying on *Ottawa Separate School Trustees v MacKell*, [1917] AC 62 at 6 (PC)). The denominational aspects test was also applied in *Québec (Attorney General) v Greater Hull School Board*, [1984] 2 SCR 575 [*Hull*], in which Chouinard J. translated and quoted the arguments of the Québec government: "The provisions of s. 93(1) of the *Constitution Act, 1867* are concerned with denominational schools. Their object is to protect certain denominational schools against anything threatening their denominational status" (at 584). Justice Wilson was a member of the court that heard *Hull*. Thus, it cannot be said that Wilson J. would not have been aware of the test.

[168] It also should be noted that Wilson J. – on behalf of the majority in *Reference re Bill 30* – was joined on this point by Lamer J., writing for himself, and Estey J., writing for himself and Beetz J. Each set of reasons provides clear support for the proposition that the exercise of the s. 93(3) plenary power is *not* subject to the *Charter*: see pages 1199 to 1209 (Estey J.) and pages

1209 to 1210 (Lamer J.). As representative of these views, we highlight Estey J.'s concluding paragraph (at 1207):

> I therefore would conclude that s. 93(3) does indeed introduce a recognition of a legislative power granted in the opening words of s. 93 and surviving the operations of s. 93(1). This legislative power in the province is not subject to regulation by other parts of the Constitution in any way which would be tantamount to its repeal. The *Charter* would not be available to disallow the implementation of s. 93(1), or legislation for the protection of the rights embedded by s. 93(1), or legislation contemplated in s. 93(3).
>
> (Emphasis added)

This means that *Reference re Bill 30* cannot be used as authority for the proposition that the denominational aspects test applies to s. 93(3).

[169] On this point, useful reference may also be made to *Adler*:

> [47] This protection exists despite the fact that public school rights are not themselves constitutionally entrenched. It is the province's plenary power to legislate with regard to public schools, which are open to all members of society, without distinction, that is constitutionally entrenched. This is what creates the immunity from *Charter* scrutiny. To paraphrase Wilson J., in *Reference Re Bill 30*, *supra*, at p. 1198, funding for public schools is insulated from *Charter* attack as legislation enacted pursuant to the plenary education power granted to the provincial legislatures as part of the Confederation compromise. If the plenary power is so insulated, then so is the proper exercise of it.
>
> [48] One thing should, however, be made clear. The province remains free to exercise its plenary power with regard to education in whatever way it sees fit, subject to the restrictions relating to separate schools imposed by s. 93(1). Section 93 grants to the province of Ontario the power to legislate with regard to public schools and separate schools. However, nothing in these reasons should be taken to mean that the province's legislative power is limited to these two school systems. In other words, the province could, if it so chose, pass legislation extending funding to denominational schools other than Roman Catholic schools without infringing the rights guaranteed to Roman Catholic separate schools under s. 93(1). See the words of Gonthier J., writing for the Court, in *Reference re Education Act (Que.)*, supra, at p. 551. However, an ability to pass such legislation does not amount to an obligation to do so. To emphasize, s. 93 defines the extent of the obligations of the province to set up and fund denominational schools when public schools are established. In this respect, it is a comprehensive code thereby excluding a different or broader obligation regarding denominational schools, while not restricting the plenary power of the province to establish and fund such other schools as it may decide.
>
> [49] Furthermore, it should be pointed out that all of this is not to say that *no* legislation in respect of public schools is subject to *Charter* scrutiny, just as this court's ruling in *Reference Re Bill 30* did not hold that no legislation in respect of separate schools was subject to *Charter* scrutiny. Rather, it is merely the fact of their existence, the fact that the government funds schools which are, in the words of the Lord Chancellor, in *Brophy*, *supra*, at p. 214, "designed for all the members of the community alike, whatever their creed" that is immune from *Charter* challenge. Whenever the government decides to go beyond the confines of this special mandate, the *Charter* could be successfully invoked to strike down the legislation in question.

> [50] For these reasons, I find that the funding of public schools coupled with the non-funding of private religious schools is immune from *Charter* attack and therefore does not violate s. 15(1) of the *Charter*.
>
> (Italic emphasis in original, underline emphasis added)

[170] Good Spirit extrapolates from these words – in particular from paragraph 49 – that the majority in *Adler* was referring to the denominational aspects test as a means of determining whether the *Charter* applies to legislation seen to confer a benefit on the separate school system.

[171] In assessing this argument, it is important to understand two matters in relation to *Adler*. The first matter is that there were three minority opinions, all holding that legislation enacted under the plenary power under s. 93(3) is "no different from legislation under any of the heads of s. 92" (at para 138, per Sopinka J. with Major J. concurring), such that the *Charter* applies. Similar statements were found in the minority opinion, and in the dissenting opinion of L'Heureux-Dubé J. Nonetheless, apart from L'Heureux-Dubé J., none of the judges would have extended the benefits given to separate boards to non-Catholic or non-Protestant minorities on the basis of a *Charter* challenge under s. 2(a) or s. 15.

[172] The second matter is that, in paragraphs 47 to 50 of *Adler*, Iacobucci J. was considering the case of those parents and intervenors who wanted the *same* rights for non-Catholic and non-Protestant students as had been achieved by the *public school boards*. The argument went this way. Since public school boards have no constitutional protection under s. 93 (as compared to separate school boards), there should be no distinction between private religious schools and public school boards: i.e., neither would have constitutional protection. According to this argument, private religious schools should have the same full funding as public school boards. Parenthetically speaking, this is contrary to the argument that Good Spirit is making in this case, which attempts to *reduce* separate school funding by a comparison with the independent and associate schools.

[173] The point that Iacobucci J. was addressing, however, is a comparison between public schools, which have limited protection under s. 93(1), and private religious schools, which have no protection under s. 93(1) – but who were asserting a breach of the *Charter* by means of a comparison to public schools. His reference to *Brophy v Attorney-General of Manitoba*, [1895] AC 202 (PC) [*Brophy*], is a reference to public schools. The full quote from *Brophy* shows this to be so (at 214):

> There can be no doubt that the views of the Roman Catholic inhabitants of Québec 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 influence and guidance of the authorities of their Church.
>
> (Emphasis added)

[174] Thus, the only reference by Iacobucci J. to the interaction of a province's plenary power in relation to separate schools with the *Charter* is contained in this phrase: "this Court's ruling in *Reference re Bill 30* did not hold that no legislation in respect of separate schools was subject to *Charter* scrutiny" (at para 49). In that regard, Iacobucci J. is clearly correct. The majority in *Reference re Bill 30* did not make a statement to the contrary. But, nor did Iacobucci J. specify when government *legislation in respect of separate schools* would be subject to *Charter* scrutiny. Rather, Iacobucci J. is responding to the minority opinions that concluded there is a line between the rights conferred on minorities in s. 93 and the *Charter*, but he did not fix that line. He is saying there is room for the *Charter* when the government legislates "in respect of public schools" and "in respect of separate schools", but he does not indicate in what circumstances. Perhaps more importantly for this appeal, he is not providing a basis for a public school division to allege that legislation that provides *funding* on the same basis to its secular and separate school divisions must be subjected to the denominational aspects test. Like Wilson J., he is referring to the *schools* themselves.

[175] In addition to *Reference re Bill 30* and *Adler*, the trial judge also sought support for his conclusion that the denominational aspects test serves as a limit on the government's plenary power under s. 93(3) from *Hogg*:

> [207] The appropriate interpretation of *Reference re Bill 30* has been the subject of comment by Peter W. Hogg in *Constitutional Law of Canada*, loose-leaf (2016-Rel 1) 5th ed, vol 2 (Toronto: Carswell, 2016) at 57-9 [*Hogg* or *Constitutional Law*] affirming that s. 93(3) powers are *Charter*-protected, but only if they further the denominational aspect of separate schools. He wrote:
>
> > It does not follow from the *Ontario Separate School Funding Reference* [*Reference re Bill 30*] that the *Charter of Rights* has no application to a law establishing or extending a denominational school system of a kind contemplated by s. 93(3). On the contrary, all of the *Charter* guarantees, including the equality guarantee, apply to such a law, with just one exception. The exception is that the law may discriminate on the basis of

> religion to the extent necessary to give the school system its denominational character. The exception is what is decided by the *Ontario Separate School Funding Reference*. But a denominational school law could not authorize discrimination on the basis of race, or any other ground that was not necessary to the denominational character of the schools. Nor could the law provide for unreasonable search or seizure, or cruel and unusual punishment, or anything else prohibited by the *Charter*, unless the provision was necessary to the denominational character of the schools.
>
> (Emphasis added)

[176] Clearly, *Hogg* is of the view that the *Charter* applies to the exercise of a government's power to legislate under s. 93(3), and the author has drawn the line at what is "necessary to give the school system its denominational character" (now at para 57-3). We agree with the trial judge that there remains an issue with respect to the interaction of s. 93 and s. 17(2) with the *Charter*. And, like *Hogg*, we agree a court will, in all likelihood, conclude that separate school laws cannot authorize discrimination on the basis of race or provide for unreasonable search or seizure, or cruel and unusual punishment. In our view, however, the line of demarcation to determine whether the *Charter* applies will not depend upon whether the provision is necessary to preserve the denominational aspect of the schools in question. Such a test would either be too narrow or too broad to serve the ends of equality and justice that the *Charter* seeks to achieve. That, moreover, is not the crux of the matter before this Court.

[177] The question before this Court is very much like the issue considered in *Reference re Bill 30*. It is a *funding* question. With respect to that issue, *Hogg* reads, "[t]he exception is what is decided by" *Reference re Bill 30* (at para 57.3). In *Reference re Bill 30,* the Supreme Court decided that legislation, which provided full funding for a new system of Catholic separate high schools in Ontario, did not contravene the *Charter*. And, the Supreme Court did so without an examination of Catholic doctrine to determine whether funded high schools were part of that doctrine. All judges writing in *Reference re Bill 30* held conclusively that the *Charter* does not apply if the government legislates to augment a separate school right, i.e., provide additional funding to support a new initiative.

b. No dichotomy in applying a denominational aspect test to pre-union legislation but not to post-union legislation

[178] The trial judge gave this example to support his proposition that unreasonable results arise if the denominational aspects test is applicable to s. 93(1) but not to s. 93(3) rights:

> [216] … if after 1905 Saskatchewan created new denominational schools for Jews (the defendants suggest creation of new religious schools, not necessarily Protestant or Roman Catholic, is possible under s. 93(3)), the rights of the Jewish schools would not be subject to *Charter* review even if such rights did not meet the denominational aspects test because the legislation (in the words of s. 93(3)) was "thereafter established". On the other hand, Catholic schools with rights intact as of 1901 would only have *Charter* immunity against provincial encroachment to the extent that the denominational aspects test applied to protect such rights. So, furthering the example, the imagined and impugned provincial legislation might disallow discrimination on the grounds of race when hiring teachers. In face of a *Charter* challenge, if such discrimination failed the denominational aspects test of both the Catholic and Jewish schools, Catholic schools could no longer discriminate, but Jewish schools could discriminate because they were established post-1905. This result illustrates the many difficulties with the defendants' assertion of the *Charter*-free status of post 1905 separate school legislation. *Charter* infringement versus *Charter* immunity cannot be balanced on such a capricious difference.
>
> (Emphasis added)

[179] The trial judge put forward a hypothetical that the appellants do not support. The education systems of this province do not subsist in a *Charter*-free zone. If there is any issue in this appeal that may be considered discriminatory, it is that the Government does not fund all religious schools fully, not that it funds the two public systems equally – but the issue of equal funding among religious schools was truly not before the Court of Queen's Bench in this case. At this point in the analysis, this appeal concerns funding that has been provided to public and separate school divisions on the same basis, which avoids a discriminatory effect in the context of those two systems. It does not concern whether the Legislative Framework offends the *Charter*; rather, it is determining the consistency of the framework with s. 93 and s. 17(2). Therefore, the hypothetical is irrelevant.

c. The Government does not have carte blanche to enact any legislation without *Charter* overview

[180] The trial judge stated that the appellants' position "respecting s. 93(1) and 93(3) gives the impugned legislation an ever-present constitutional justification" (at para 219). He continued his comments on this point:

> [219] … If the plenary power over education is so assured of *Charter* immunity, an easy avenue to avoid *Charter* review presents itself whenever a right is not protected under s. 93(1) because it either was not found in the *Ordinances* or it was not a denominational right. One can simply assert that the right is found in the s. 93(3) power as post-union action or legislation enlarging separate school rights and cite *Reference re Bill 30* as giving blanket immunity from *Charter* review.

[181] The trial judge cited four cases where courts have held that the *Charter* does apply either to the exercise of a power under s. 93(3) or to a school board attempting to act contrary to the *Charter*:

(a) *Fancy v Saskatoon School Division No. 13* (1999), 35 CHRR 9 (CanLII) (Sask HRT) [*Fancy*] – The government of Saskatchewan passed legislation that permitted a public school board to increase religious education beyond that contemplated by the *1901 School Ordinance*. The Attorney General attempted to support the legislation under the s. 93(3) power, but was not successful in so doing. The board of inquiry appointed under *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, ordered that "the practice of Bible readings in public schools must cease" (*Fancy* at para 93).

(b) *Zylberberg v Sudbury Board of Education* (1988), 52 DLR (4th) 577 (Ont CA) [*Zylberberg*] – The government of Ontario passed a regulation providing for religious instruction in public schools with a curriculum of predominantly Christian teachings. The divisional court found the regulation did not offend s. 2 of the *Charter*. The Ontario Court of Appeal reversed that decision and found that a regulation requiring religious exercises for the opening and closing of each school day in public schools as being offensive to s. 2(a) of the *Charter*.

(c) *Canadian Civil Liberties Association v Ontario (Minister of Education)* (1990), 65 DLR (4th) 1 (Ont CA) [*Canadian Civil Liberties*] – This case follows *Zylberberg*. The Court held that the regulation offended s. 2(a) of the *Charter*.

(d) *Hall (Litigation Guardian) v Powers* (2002), 213 DLR (4th) 308 (Ont Sup Ct) [*Hall*] – A Catholic school board denied permission to a grade 12 student to bring his boyfriend to the school prom as such conduct "would be seen both as an endorsement and condonation of conduct … contrary to Catholic church teachings" (at para 4). The Ontario Superior Court of Justice granted an interlocutory injunction preventing the school board from prohibiting the student from bringing his boyfriend. It did so on the basis that the denominational aspects test did not

> confer upon the school board the power to, in essence, discriminate on the basis of sexual orientation.

[182] Measured against the result in these decisions, it would seem they do not support the trial judge's hypothesis that the denominational aspects test is necessary to prevent governments from passing *Charter*-offending laws regarding education funding and then thereafter justifying those laws under its plenary power. If anything, these cases demonstrate the contrary: in each case, the *Charter* was applied to annul the offending legislation or prohibit the offending action. However, we take the trial judge's point that, in the last three cases, the government did not rely on s. 93(3), and that the first case concerned a school board, not the government, which means the issue the trial judge addressed did not truly arise in the above cases. For the trial judge, the issue was whether, without the restraining influence of the denominational aspects doctrine, a government will be able to pass discriminatory laws by asserting its plenary power to bypass *Charter* oversight.

[183] Judges must be aware of the unintended consequences of their decisions, particularly in constitutional cases, but, as a general principle, extrapolating beyond the central issue by means of a hypothetical is an exercise that should be undertaken reluctantly and with great care. In order to address the trial judge's hypothetical scenario, one must be able to envision a Canadian legislature, a body that represents the majority, passing legislation that permits the *minority* separate schools to discriminate on the basis of race, gender or sexual orientation in the face of a *Charter* that prohibits such discrimination – and survive the opprobrium of the electorate.

[184] In that regard, it is useful to consider the practical approach taken to issues of this nature in *CA Calgary Board* (at 251–252):

> [9] … I have been unable to work out any practical situation where the majority of the Legislature being either Roman Catholic or Protestant or other denomination could so phrase legislation as to accomplish any of the objects set out in the examples. Any such legislation passed to give the minority advantages which did not meet with the approval of the majority of the electors would, at the appropriate time, result in the majority changing their elected representatives. It is possible for certain school districts to have separate schools composed of the same religious persuasion as the majority in the Legislature. I would doubt whether it would be possible for the Legislature to pass legislation applicable only to such districts taking away privileges from the majority and giving them to the separate schools composed of the same religious persuasion as the majority members of the Legislature. To contemplate such, the Legislature legislating such a state of affairs to my mind takes us from the realm of practical everyday affairs into that of sheer fantasy.

[185] Canada has been shaped by the *Charter*, with the above four cases being examples of that. Separate school boards, particularly boards that rely on government funding to support the attendance of non-Catholics, are also not immune from public sentiment influenced by the *Charter*. They, too, are political entities. Finally, the Courts too have a role to play.

[186] One thing is certain. This case does not present the issue suggested by the trial judge. It is not about government legislation that permits a school to discriminate on the basis of race or gender or sexual orientation. It is indeed the antithesis of that. The Legislative Framework, in particular s. 142, requires the Government *not* to use its funding power to discriminate on the basis of religion between its two publicly funded school systems: any child is entitled to free public education in any publicly funded school in the division where he or she resides.

[187] In any event, and as we have indicated, the denominational aspects test is not the means to determine what rights or privileges conferred under s. 93(3) with respect to funding separate schools are guaranteed under the *Charter*.

d. The appellants could rely on both s. 93(1) and s. 93(3) in the alternative

[188] The trial judge wrote as follows: "Having singularly mounted an evidentiary basis to establish that funding of non-Catholic students was a guaranteed right under the *1901 Ordinances*, the defendants cannot, at the same time, invoke s. 93(3) which is predicated on rights being established after 1905" (at para 227).

[189] In our respectful view, this is not a permissible basis for holding that the denominational aspects test applies to s. 93(3). There was nothing legally incorrect with the appellants' relying on s. 93(1) and s. 93(3) in the alternative.

[190] There are clearly different imperatives at play in mounting a case under either s. 93(1) or s. 93(3). For Christ the Teacher, at least, it was important to obtain a ruling that the Legislative Framework is *guaranteed* under s. 93(1), as this means any change to that framework is protected from future legislative modification. On the other hand, a finding that the Legislative Framework was a proper exercise of the Legislature's power under s. 93(3) will attract the seemingly lesser remedies provided by s. 93(3) and s. 93(4).

[191] The important point to be made, however, is that, if the right to funding for non-minority faith students did not exist prior to 1905, the only logical conclusion was that the right was granted after 1905. To put it another way, the right must have been granted either before or after 1905. Indeed, the trial judge's decision struck down legislation granting this right.

e. This aspect of the appeal can be resolved with or without the application of the denominational aspects test

[192] Since we have determined that the denominational aspects test does not apply to s. 93(3), the issue is whether the Legislative Framework is a valid exercise of the Government's plenary power or, in other words, is consistent with the guarantees granted to separate schools by s. 93 and s. 17(2).

[193] Later in these reasons, we address the trial judge's conclusion that the legislation confers a right not found in the *1901 School Ordinance* and is, therefore, not constitutionally protected by s. 93(1) from *Charter* scrutiny. Assuming the correctness of that decision for the moment, it is clear from the evidence that the Legislative Framework provides for funding to separate and public boards on the same footing, i.e., primarily on the basis of enrollment, without discrimination on the basis of religion. This approach permits the funding of non-Catholic students in separate schools and the converse.

[194] According to the evidence, funding separate and public boards on the same basis constitutes a right or, at least, a privilege accorded to separate school supporters in a number of tangible and intangible ways. Just like the legislation in question in Ontario, this legislation bestows "additional new rights and privileges in response to changing conditions" (*Reference re Bill 30* at 1174). It is significant that all three sets of reasons in *Reference re Bill 30* found the legislation to be a "valid exercise of the provincial power to add to the rights and privileges of Roman Catholic separate school supporters under the combined effect of the opening words of s. 93 and s. 93(3) of the *Constitution Act, 1867*" (at 1176, per Wilson J.), "Bill 30 is a valid exercise of a specific power to legislate under s. 93" (at para 86, per Estey J.) and "I would dismiss the appeal only on the basis of the opening words of s. 93 and s. 93(3) of the *Constitutional Act, 1867*, for the reasons given by Wilson J." (at para 88, per Lamer J.).

[195] Just like in *Reference re Bill 30*, the *Education Act* provisions in question were passed pursuant to either the plenary power under the opening words of s. 93 or under s. 93(3). As Wilson J. makes clear, either of these parts of s. 93 vest the Legislature with significant power over denominational schools (repeated here for clarity, *Reference re Bill 30* at 1169–1173):

> 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 my view, s. 93(3) in no way limits the exercise of the province's plenary power. Rather, it expressly contemplates that after Confederation a provincial legislature may, pursuant to its plenary power, pass legislation which augments the rights or privileges of denominational school supporters. It would be strange, indeed, if the system of separate schools in existence at Confederation were intended to be frozen in an 1867 mold.
>
> …
>
> … But what was never questioned, either in argument or by their Lordships, [in *City of Winnipeg v Barrett*, [1892] AC 445 (PC)] was that the provincial legislature could, after the Union, validly pass legislation which augmented minority educational rights.
>
> …
>
> … Given the importance of denominational educational rights at the time of Confederation, it seems unbelievable that the draftsmen of the section would not have made provision for future legislation conferring rights and privileges on religious minorities in response to new conditions.
>
> (Emphasis added)

[196] Having said that, if the denominational aspects test determines the application of the *Charter* to legislation passed pursuant to the opening words of s. 93 and s. 93(3), the Legislative Framework must be considered as conferring a denominational right or privilege. Indeed, Good Spirit's submissions admitted as much. The trial judge summarized those submissions:

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

[197] Given the trial judge's decision that the Government was not entitled to rely on s. 93(3), he did not specify his findings on the point. Nonetheless, speaking in the context of his seventh principle of interpretation, the trial judge made these observations:

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

[198] From the first underlined segment above, it must be taken that the trial judge accepted that modern-day Catholic doctrine embraces inclusion. However, it is difficult to know what to make of the second underlined statement in the context of this case. Clearly, the trial judge is making a statement about Catholic doctrine, but, in our respectful view, it does not address the issue under s. 93(3). The trial judge believes that Catholic doctrine does not include the dissemination of Catholic values to non-Catholic children, but the issue in relation to s. 93(3) is one of *admission of non-Catholic students to Catholic schools and the funding that ensues*, not the dissemination of faith.

[199] The trial judge appears to have linked the issues of attendance and funding and then asked whether *enrolment and funding* is a denominational right. With respect to the admission of non-Catholics to Catholic schools, according to the evidence, the Catholic belief system became more ecumenical after Vatican II. While we understand the trial judge's point, that without public funding it is probable that non-Catholic children will not attend Catholic schools, the ecumenism that results in admission is not linked to government funding.

[200] In that regard, in our respectful view, the trial judge appears to have overlooked that there are two public agencies at work in determining the validity of the Legislative Framework measured by the law pertaining to s. 93(3). The first agency is the Catholic school system that sets its own education policy in accordance with a Roman Catholic belief system (and the constraints imposed by regulatory systems) and the second agency is the Government that decides how its education

budget will be dispensed. If the denominational aspects test applies to s. 93(3), the only issue that would count in this circumstance is whether Catholic doctrine embraces the inclusion of non-Catholic students in Catholic schools. On that issue, the evidence appears to be conclusive. It does.

3. Conclusion with respect to the opening words of s. 93 and s. 93(3)

[201] Thus, we conclude that whether or not the denominational aspects test applies to the opening words of s. 93 and s. 93(3), the Legislative Framework is a valid exercise of the legislative authority conferred by those provisions and therefore is protected from *Charter* scrutiny.

D. Paragraph (1) of s. 93

[202] We come then to s. 93(1), which acts as a curtailment of the plenary power conferred by the opening words of s. 93, both of which are repeated for ease of reference:

Constitution Act, 1867 **(as of 1905)**	***Loi constitutionnelle de 1867*** **(à partir de 1905)**
Education **Legislation respecting Education** **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 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:	**Éducation** **Législation au sujet de l'éducation** **93.** Dans chaque province, la législature pourra exclusivement décréter des lois relatives à l'éducation, sujettes et conformes aux dispositions suivantes: (1) Elle ne peut, par une disposition législative adoptée en cette matière, porter atteinte aux droits ou privilèges appartenant lors de l'adoption de la présente loi, selon les chapitres 29 et 30 (année 1901) *des ordonnances des Territoires du Nord-Ouest*, à une catégorie de personnes relativement aux écoles séparées, ou relativement à l'instruction religieuse dispensée dans les écoles publiques ou séparées conformément à ces ordonnances.

1. Trial judge's reasons with respect to s. 93(1)

[203] The trial judge indicated that s. 93(1) required a two-step inquiry:

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

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

[204] After describing the parties' positions, the trial judge stated his conclusion as follows:

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

[205] He then described what he called a basic premise: "The reason for the existence of separate schools was to ensure that after the first public school was created in a school district, parents of the minority faith could separate their children from the majority's children to inculcate their children in the minority's faith, away and separate from the influences of the majority" (at para 259). From this, he drew the following conclusion: "If separating students was the essential reason for separate schools' existence, I fail to see why the minority would simultaneously seek a right to admit children of the majority faith from whom they took deliberate action to separate" (at para 259).

[206] As we have indicated, the trial judge developed the theme that a separate school is "a school in which students of a minority faith are separated and disunited from, or in dissent to, the students of the majority faith" (at para 261). After analyzing the positions of the Government and Christ the Teacher, the trial judge set out and applied the eight interpretative principles paraphrased earlier in these reasons.

2. Analysis of the trial judge's reasons on s. 93(1)

a. Preliminary point on the artificial nature of considering s. 93(1)

[207] As a preliminary point, we question whether s. 93(1) is truly engaged by the case or this appeal. We say this because the Legislative Framework draws no distinction between separate and public schools. That is to say, nothing in the Legislative Framework purports to "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" (paragraph (1) of s. 93). Thus, viewed within the context of *Greater Montreal* (where the Court had to decide whether legislative changes to the non-denominational curriculum of the minority school were constitutional), the *Education Act* is legislation validly enacted pursuant to the power contained in the opening words of s. 93: namely, "In and for each Province the Legislature may exclusively make Laws in relation to Education". That proposition is beyond contention. Therefore, paragraph (1) of s. 93 can play no role because no one is suggesting the Legislature is taking away any right or privilege guaranteed as of 1901.

[208] Since the Legislative Framework does not purport to prejudicially affect any right or privilege granted in 1905, engaging in an exercise to determine what rights were guaranteed as of then requires the Court to have in mind a scenario that does not exist. In this case, the issue of what the *Education Act* provides and whether it is consistent with the constitutional rights guaranteed by s. 93 can only be resolved under s. 93(3) or s. 17(2), because those provisions deal with post-union legislation and not the curtailment of a right guaranteed under s. 93(1).

[209] To further elucidate the point, the trial judge applied the denominational aspects test not to determine whether the Legislative Framework "violate(s) the constitutional guarantee found in s. 93(1)" (*Greater Montreal* at 405), but to drive to the core issue in the pleadings: whether the Legislative Framework contravenes s. 2(a) and s. 15 of the *Charter*. In our respectful view, this is *not* the issue that the denominational aspects test was intended to address. It was not intended to carve out an area for the operation of the *Charter* in this manner. The response to that issue (in this case) is that the Legislative Framework is a valid exercise of the plenary power under the opening words of s. 93 and s. 93(3) and s. 17(2) and, therefore, not subject to *Charter* scrutiny.

[210] Thus, answering the question of whether the Legislative Framework exceeds what is guaranteed by s. 93(1), in this case, appears to us to be an artificial exercise that would best be left for an occasion when it is necessary to resolve the tension between the Legislature's right to exercise its powers to modify separate school rights and an assertion that the rights in question were guaranteed as of 1905.

[211] Having said that, we take it from the trial judge's reasons he was persuaded that the parties had argued the interpretation of s. 93(1) on the footing that the denominational aspects doctrine determines the area of operation of the *Charter*. Thus, we will consider the pertinent issues on that basis.

b. The content of the *1901 Ordinances*

[212] For the trial judge, the issues were as follows:

(a) Did the *1901 Ordinances* include a right or privilege for Catholic schools to admit and receive funding for non-Catholic students?

(b) Was the right a denominational right or a non-denominational right necessary to give effect to denominational concerns?

[213] With these questions, not only did the trial judge link "admittance and funding" but he then went on to analyze the first question not in terms of what the *1901 Ordinances* provide, but by considering what Catholic doctrine, fixed as of 1905, required. In other words, he answered the first question by determining what the Catholic doctrine said about the admission of non-Catholic students – as of 1905. Thus, he concluded his analysis with respect to s. 93(1) by saying, "Catholic separate schools have no constitutional right to admit and receive funding for non-Catholic students" under the *1901 Ordinances*, or, if such a right is implicit, it is not "a denominational right" (at para 341). In our respectful view, this was not the correct approach.

[214] The analysis must begin with the construction of s. 45 of the *1901 School Ordinance* without regard for Catholic doctrine:

> **Rights and liabilities of separate school districts**
>
> **45** After the establishment of a separate school district under the provisions of this Ordinance such separate school district and the board thereof shall possess and exercise all rights, powers, privileges and be subject to the same liabilities and method of government as is herein provided in respect of public school districts.

The issue is whether s. 45, read in the context of rights guaranteed in 1905 by the *Saskatchewan Act*, conferred a right or privilege on separate schools to receive funding on the same basis as the public schools. Specifically, does s. 45 guarantee the right to receive funding for non-Catholic students who attended such schools, if public schools received funding for Catholic students?

[215] We answer this question affirmatively for essentially two reasons. First, on the question of funding, the interpretation of s. 45 must be influenced by s. 17(2): "In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29" (emphasis added).

[216] We have already concluded that s. 17(2) is a specific constitutional direction to fund public school boards and separate school boards without discrimination, which would extend to a formula based on enrollment. Unlike the *1901 Ordinances*, s. 17(2) is expressed in absolute terms and, arguably, it would not be possible for the Legislature to decide to discriminate on a funding basis between the two school divisions to the detriment of the separate divisions, notwithstanding the expansive nature of the plenary power. If this premise is accepted, we cannot see a basis to say that s. 45 would permit discrimination between the two boards with respect to funding.

[217] Second, the equivalent of s. 45 has been re-enacted in the Acts on education passed in this province since the *1901 School Ordinance.* Indeed, s. 45 presently appears in the *Education Act* as s. 53, with slight modifications to accommodate the terminology of the present day pertaining to *divisions*:

> **Powers and duties of separate school divisions**
>
> **53**(1) On the establishment of a separate school division pursuant to this Act, that division and the board of education of the division shall possess and exercise the same rights and powers and be subject to the same liabilities and method of government as other school divisions continued or established pursuant to this Act.

[218] According to the evidence, the Government has interpreted s. 53, and its predecessor provisions, as the cornerstone of how it treats its two public systems – and it treats them in the same manner. As the Attorney General submits, Good Spirit asks this Court to find a distinction between the two systems that no one has found for almost 115 years.

[219] Thus, we conclude that the Government's current approach accords with the guarantee given in 1905.

c. The admission of non-Catholic students is a denominational right

[220] The trial judge held that if there was an implicit right to receive funding it was not an entrenched right. That is to say, it was not a denominational or faith-based right. As we have indicated, the question has to be whether it was a denominational right to *admit* non-Catholic students.

[221] Good Spirit adduced a significant body of evidence at trial to the effect that the admission of non-Catholics to Catholic schools was not part of Roman Catholic doctrine as of 1905. Clearly, the trial judge found as a matter of fact that Catholic doctrine as of 1905 did not embrace the teaching of Catholics and non-Catholics in the same institution. On the palpable and overriding error standard, we agree with Good Spirit and PSBAA that this finding is unassailable (*Benhaim v St-Germain*, 2016 SCC 48 at paras 36 to 39, [2016] 2 SCR 352).

[222] The issue is whether the trial judge's finding in that regard ends the matter. Specifically, what happens to the nature of the guarantee in s. 93(1) if Roman Catholic doctrine evolves beyond 1905? In this case, it is clear that after Vatican II the doctrine did change to embrace the teaching of non-Catholics in Catholic schools.

[223] Admittedly, in *Greater Montreal*, Beetz J. stated, and we repeat (at 401–403):

> As a constitutional text, s. 93(1) may deserve a "purposive" interpretation but, in so doing, courts must not improperly amplify the provision's purpose. While it may be rooted in notions of tolerance and diversity, the exception in s. 93 is not a blanket affirmation of freedom of religion or freedom of conscience. The entrenched right of specified classes of persons in a province to enjoy publicly sponsored denominational schools based on a fixed statutory bench-mark should not be construed as a *Charter* human right or freedom or, to use the expression of Professor Peter Hogg, a "small bill of rights for the protection of minority religious groups" (see Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at p. 824).
>
> …
>
> While the text of s. 93(1) should of course be interpreted as a constitutional document, it must not be read in such a manner as to supplant or frustrate the operation of what Professor Carignan has called the "mécanisme de constitutionnalisation".
>
> …
>
> This is not to say that we should ignore the plain purpose of s. 93(1) or ignore its constitutional context. Wilson J. explained in the [*Reference re Bill 30*], *supra*, at p. 1194, that "[s]ection 93(1) should … be interpreted in a way which implements its clear purpose which was to provide a firm protection for Roman Catholic education in the Province of

> Ontario and Protestant education in the Province of Québec". The exception to the provincial power does confer constitutional rights on specific groups in a specific manner, in keeping with what Wilson J. characterized as an "historically important compromise" struck at Confederation. It is true that the rights or privileges under ordinary law to which s. 93(1) refers have been frozen at Confederation. But just like the basic provincial power which, as Viscount Cave explained, was not "stereotyped" at the Union, the exception to that power has also matured over time through judicial interpretation. The approach courts have taken to the interpretation of the expression "with respect to Denominational Schools" in cases such as *Hull*, [[1984] 2 SCR 575], which I will discuss below, demonstrates that the law in force "at the Union" cannot on its own set the content of the constitutional right in s. 93(1).
>
> (Emphasis added)

[224] Similarly, in *Mahé*, Dickson C.J.C. seems to impose a restriction tied to denominational rights enjoyed at the time of Confederation (at 381–382):

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

[225] The above paragraphs from *Greater Montreal* and *Mahé* highlight the dilemma in which the Court finds itself. The Court in this appeal is engaging in an exercise not to determine if the Legislature "has prejudicially affected" the rights or privileges conferred under the *1901 Ordinances* but in an exercise to determine the line between protected denominational rights and the *Charter*. If the Legislature were to attempt to pass laws purporting to offer funding to the separate schools on a different basis than public schools, the issue would be whether such a change prejudicially affected a right or privilege guaranteed under the *1901 Ordinances*. This is so because the nature of the exercise would be to determine to what extent the Legislature could interfere with rights conferred at the time when Saskatchewan became part of Confederation.

[226] In *Greater Montreal*, Beetz J. recognized the nature of this exercise fully. He directed courts not to frustrate the "mécanisme de constitutionnalisation" (at 403). He was concerned that "courts must not improperly amplify the provision's purpose" (at 401), but he was therein referring to *purpose* only. He continued by saying, "the rights or privileges under ordinary law to which s. 93(1) refers have been frozen at Confederation" (at 402). However, he then drew a comparison with "the basic provincial power" that "has also matured over time through judicial interpretation".

[227] It is at this point that we must look critically at the trial judge's eight interpretative principles. As we have indicated, the proper interpretative approach to s. 93(1) is as articulated in *Beaulac*, which requires courts to interpret separate school rights purposively and in a manner consistent with their preservation and development. In our respectful view, the trial judge's principles do not meet this standard. Instead, the trial judge's eight principles seek to restrict the ambit of s. 93(1).

[228] A purposive approach consistent with the preservation and development of minority rights conferred on separate schools would view the matter differently than the trial judge. In that regard, we find the submissions of AFOCSC particularly persuasive:

> 50. If changes in the religious beliefs of the minority are not considered, then s. 17(1) rights will become obsolete, entrenching outdated rights while failing to protect the minority's right to an education consistent with its current faith. This approach would undermine the purpose of s. 17(1), that is, to offer a "firm protection" for minority faith education, for the future. Like all minority rights, they require a purposive interpretation consistent with the underlying constitutional principle of the protection of minorities. Denominational schools must be allowed to adapt to modern circumstances.
>
> 51. To be clear, a change in religious beliefs cannot entrench rights not "permitted by law" at Union. However, changes in the religious significance of a practice that was permitted by law at Union should not result in a loss of rights. If a practice permitted by law at Union became more common after the Union due to a change in its religious significance, s. 17(1) protects the current scope of the practice's religious significance.
>
> (Emphasis added)

[229] To our mind, the view expressed by AFOCSC in the above paragraphs is the view that would in all likelihood be taken of s. 93(1) if the Legislature were to seek today to treat the funding of its two school divisions differently. In our view, assuming the denominational aspects doctrine is relevant in this context, the same principles apply to the exercise of determining the edges of where separate school rights end as of 1905 and the *Charter* begins.

3. Conclusion with respect to paragraph (1) of s. 93

[230] In so far as it is necessary to engage the interpretation and application of the opening words of s. 93 and s. 93(1) in this appeal, we would find that the Legislative Framework is consistent with the constitutional guarantees provided by those provisions.

X. No infringement under s. 2(a) or s. 15(1)

A. Introduction

[231] A finding that the Legislative Framework is a valid exercise of the legislative power conferred by s. 93 and s. 17(2) means that the framework is immune from *Charter* scrutiny. For the purposes of addressing Good Spirit's arguments, we assume the contrary and consider the issues raised by it in relation to s. 2(a) and s. 15(1).

B. Religious freedom under s. 2(a)

[232] Paragraph 2(a) of the *Charter* makes religious freedom a personal right tied to an individual's freedom of conscience and religion:

Constitution Act, 1982	***Loi constitutionnelle de 1982***
Fundamental freedoms	**Libertés fondamentales**
2. Everyone has the following fundamental freedoms:	**2.** Chacun a les libertés fondamentales suivantes :
(a) freedom of conscience and religion … .	*a*) liberté de conscience et de religion … .

[233] The trial judge concluded that it was not necessary to have an individual complainant bring forward a complaint because Good Spirit could assert a claim under s. 2(a) for essentially three reasons:

(a) the breach of s. 2(a) was axiomatic and therefore no proof was necessary;

(b) the Legislative Framework is not facially neutral; and

(c) when the issue is one of enforcing the state's duty of religious neutrality, legislation or government action can be struck down as being contrary to s. 2(a) without the benefit of an individual complainant whose freedom of religion or conscience has been affected.

In our respectful view, there is no support for these propositions. Further, the trial judge fell into error with respect to whether there was a breach of the state's obligation of neutrality and whether Good Spirit had proven a breach of s. 2(a). We will address each of these points.

1. The breach of s. 2(a) was not axiomatic

[234] In the minority reasons of Estey J., joined by Beetz J., in *Reference re Bill 30*, he wrote as follows: "It is axiomatic (and many counsel before this Court conceded the point) that if the *Charter* has any application to Bill 30, this Bill would be found discriminatory and in violation of s. 2(a) and s. 15 of the *Charter of Rights*" (at 1206).

[235] The trial judge gave significant weight to the words of Estey J, which he found were supported by comments made by Wilson J. for the majority in *Reference re Bill 30* and Iacobucci J. for the majority in *Adler*. On this point, the trial judge wrote as follows (*Trial Decision*):

> **A. Is *Charter* Breach Axiomatic?**
>
> [368] Some might suggest that Justice Estey's forceful statement, in *Reference re Bill 30*, is *obiter*. After all, he provides no detailed analysis of either s. 2(*a*) or s. 15 and instead states a conclusion absent reference to case law.
>
> [369] I am loath to qualify or dismiss Justice Estey's emphatic statement. It illustrates the starting point of his entire analysis, that "but for" the presence of a saving constitutional provision, proposed legislation granting funding to Catholic high schools, but no other religious schools, is contrary to the *Charter*. He states that Bill 30 would have violated the *Charter* unless shielded by separate school rights under s. 93 of the *Constitution Act, 1867*. Justice Estey's statement is not tentative; it is forceful. "Axiomatic" is not an equivocal word. "Axiomatic" is equivalent to "self-evident", "obvious", "clear", or "it goes without saying". Similarly, he used an equally charged phrase to describe that shy of constitutional protection, the impugned legislation "would be found discriminatory and in violation … of the *Charter*". He did not say, for example, "might be contrary to the *Charter*", "potentially is *Charter* offensive", or "arguably discriminatory". Nor was Justice Estey ambivalent about the specifics of *Charter* violation. He cited the violation of both freedom of religion and equality. He refers to both the *Constitution Act, 1867* and specifically to s. 2(a) and s. 15 of the *Charter*.
>
> [370] I cannot imagine a Supreme Court Justice casually or carelessly offering such a vital statement respecting the constitutional rights of separate schools on such a significant and often-litigated issue. Nor does Justice Estey's statement stand alone. In *Adler*, Justice Iacobucci offered a similar statement, starting from the opposite point of the constitutional analysis – that an equality argument failed only because s. 93 saved it. At paras. 26 and 27 he said:
>
> > [26] The appellants advance, in essence, two *Charter* arguments. The first is that s. 2(1)'s guarantee of freedom of religion requires the province of Ontario to provide public funding for independent religious schools. The second is that, by funding Roman Catholic separate and secular public schools at the same time as it denies funding to independent religious schools, the province is discriminating against the appellants on the basis of religion contrary to s. 15(1).
> >
> > [27] I propose to deal with these arguments in turn. As will be explained more fully below, it is my opinion that the s. 2(a) claim fails because any claim to public support for religious education must be grounded in

> s. 93(1) which is a "comprehensive code" of denominational school rights. With regard to the appellants' equality argument, this claim fails because the funding of Roman Catholic separate schools and public schools is within the contemplation of the terms of s. 93 and, therefore, immune from *Charter* scrutiny.

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

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

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

Then, indicative of her approval of the above statement, and in her own words, at p 1197, Justice Wilson stated, "special treatment guaranteed by the constitution to denominational, separate or dissentient schools [is protected] even if it sits uncomfortably with the concept of equality embodied in the *Charter* …". Admittedly, "sits uncomfortably" is not as emphatic as Justice Estey's statement that Bill 30 would be "in violation" of the *Charter.* Nevertheless, "sitting uncomfortably" connotes *Charter*-infringement, saved only by the constitutional guarantees under s. 93.

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

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

[374] The *Charter* itself implies that s. 93 separate school rights are offensive to freedoms guaranteed by the *Charter.* Hence the need for s. 29 of the *Charter* – that nothing in the *Charter* would abrogate any rights guaranteed by the Constitution of Canada respecting "denominational separate or dissentient schools". The necessary corollary of s. 29 is that those aspects of separate schools *not guaranteed* by the Constitution of Canada would be abrogation of *Charter* rights. The Ontario Court of Appeal, as quoted in *Reference [re] Bill 30* at p. 1164, said as much: "Section 29 of the *Charter* makes it clear that minority education rights … are not to be abrogated by ss. 2(a) or 15".

(Italic emphasis in original, emphasis added)

[236] Respectfully, we take a different view than that of the trial judge. We believe he has given undue weight to the use of the word *axiomatic* in the reasons of Estey J. The sentence where that word is used is part of a series of paragraphs where Estey J. found that full funding for

denominational high schools is constitutionally protected, *not because of s. 29* of the *Charter*, but because of the Confederation compromise. It is difficult to do justice to the whole of the reasoning of Estey J. without quoting large extracts from that decision, but the following reveals the essence of his conclusions (at 1205–1207):

> **2. Application of the *Charter of Rights***
>
> The appellants have argued that Bill 30 violates s. 2(*a*) and s. 15 of the *Charter* in that Bill 30 provides full funding for Roman Catholic secondary schools but not for other secondary schools, denominational or non-denominational, in the province. Section 2(*a*) and s. 15 of the *Charter* provide 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.
>
> It is axiomatic (and many counsel before this Court conceded the point) that if the *Charter* has any application to Bill 30, this Bill would be found discriminatory and in violation of s. 2(*a*) and s. 15 of the *Charter of Rights*. Notwithstanding this conclusion, the real contest in this appeal is clearly between the operation of the *Charter* in its entirety and the integrity of s. 93. By section 52 of the *Constitution Act, 1982*, s. 93 is a part of the Constitution of Canada. Section 93 is a fundamental constitutional provision because it is a part of the pattern of the sharing of sovereign power between the two plenary authorities created at Confederation. The importance of this provision is underlined by its separate existence outside the catalogue of powers in ss. 91 and 92.
>
> Once section 93 is examined as a grant of power to the province, similar to the heads of power found in s. 92, it is apparent that the purpose of this grant of power is to provide the province with the jurisdiction to legislate in a prima facie selective and distinguishing manner with respect to education whether or not some segments of the community might consider the result to be discriminatory. In this sense, s. 93 is a provincial counterpart of s. 91(24) (Indians, and lands reserved for Indians) which authorizes the Parliament of Canada to legislate for the benefit of the Indian population in a preferential, discriminatory, or distinctive fashion vis-à-vis others.
>
> The role of the *Charter* is not envisaged in our jurisprudence as providing for the automatic repeal of any provisions of the Constitution of Canada which includes all of the documents enumerated in s. 52 of the *Constitution Act, 1982*. Action taken under the *Constitution Act, 1867* is of course subject to *Charter* review. That is a far different thing from saying that a specific power to legislate as existing prior to April 1982 has been entirely removed by the simple advent of the *Charter*. It is one thing to supervise and on a proper occasion curtail the exercise of a power to legislate; it is quite another thing to say that an entire power to legislate has been removed from the Constitution by the introduction of this judicial power of supervision. The power to establish or add to a system of Roman Catholic separate schools found in s. 93(3) expressly contemplates that the province may legislate with respect to a religiously based school system funded from the public treasury. Although the *Charter* is intended to constrain the exercise of legislative power conferred under the *Constitution Act, 1867* where the delineated rights of individual members of the community

> are adversely affected, it cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the *Constitution Act, 1867*.
>
> I therefore would conclude that s. 93(3) does indeed introduce a recognition of a legislative power granted in the opening words of s. 93 and surviving the operations of s. 93(1). This legislative power in the province is not subject to regulation by other parts of the Constitution in any way which would be tantamount to its repeal. The *Charter* would not be available to disallow the implementation of s. 93(1), or legislation for the protection of the rights embedded by s. 93(1), or legislation contemplated in s. 93(3).
>
> This conclusion, that Bill 30 finds its validity in the exercise of provincial power under s. 93 and that the exercise of this power cannot be abolished or truncated by the *Charter*, is sufficient to dispose of this appeal.
>
> (Emphasis added)

[237] Justice Estey – like Wilson J., who was writing for the majority in the same decision – found that the courts need not have recourse to s. 29 of the *Charter*, even when a Legislature acts to augment separate school rights, because one part of the constitution cannot trump another part. In such circumstances, there can be no breach of the *Charter* and s. 29 is not engaged. Earlier in these reasons, we addressed the words of Iacobucci J. in *Adler* as they pertain to the application of the *Charter* to legislation relating to separate schools, concluding that the delineation between that instrument and s. 93 rights remains to be determined and need not be determined in this appeal.

[238] In our respectful view, it was an error of law to declare a breach of the *Charter* to be *axiomatic* on the basis of a single word found in *Reference re Bill 30*. There is no notion known to law of a *Charter* breach at large. It is still necessary to identify what constitutes the breach, which is an elusive matter in this case, and to determine, in turn, whether the breach has been proven according to law. Up until now in this appeal, the issue (as framed by Good Spirit) was whether the "funding of non-Catholic students in Catholic schools" is protected by s. 93 and s. 17(2). Assuming that such funding cannot be so classified, the breach must still be proven.

2. State's duty of religious neutrality does require proof of infringement

[239] When the trial judge began his analysis of s. 2(a), he wrote that since "the admission and funding of non-Catholic students in Catholic schools is not a protected right under *The Saskatchewan Act* … such funding is open to a potential challenge under the *Charter* as infringing s. 2(a) and s. 15" (emphasis added, at para 360). In his conclusion with respect to s. 2(a), he wrote, Good Spirit "has proved that the government's funding of Catholic schools respecting non-Catholic students is an infringement of s. 2(a) of the *Charter*" (at para 414). He reached this

conclusion notwithstanding that no individual testified that his or her rights under s. 2(a) were infringed.

[240] An assertion of a breach of religious freedom under s. 2(a) must be personal and proven, having regard for the person whose rights have been infringed. In *S.L. v Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 SCR 235 [*S.L.*], Deschamps J. affirmed that parents play a role in passing their personal beliefs on to their children; but to simply assert an infringement of their freedom of religion is not sufficient to make out a case under s. 2(a). A case is made out only when it is demonstrated that a religious practice or belief exists and has been infringed. As noted in *S.L.*, "the question is not whether the person sincerely believes that a religious practice or belief has been infringed, but whether a religious practice or belief exists that has been infringed" (at para 24). Or, to put it another way, the question is whether the government action in question actually infringed a religious practice or belief by imposing burdens on a particular religious belief or by favouring another religious belief.

[241] The trial judge believed that an individual complainant was not required because the Government's action was not neutral vis-à-vis other faiths. He observed that in *Amselem*, and in other decisions, it was necessary to rely on the claim of an individual plaintiff who could attest to and prove an infringement of s. 2(a) because the legislation in question was neutral on its face.

[242] In *Amselem*, Jewish purchasers of condominium units had not read the by-laws in the declaration of co-ownership that prohibited the building of any structures on the common property, which included balconies. As a practicing member of Judaism, Mr. Amselem erected a succah on his balcony, fulfilling a scripture-mandated obligation of the annual nine-day Jewish religious festival of Sukkot. The Supreme Court found that Mr. Amselem was sincere and honest in his religious beliefs and held that the impugned by-law had an impact that violated his freedom of religion.

[243] However, the trial judge distinguished *Amselem* because he found the Legislative Framework was not neutral:

> [404] Unlike *Amselem*, this action presents an obvious *Charter* infringement since the impugned government action countenanced by provisions of *The Education Act, 1995* and the *Education Funding Regulations* is not neutral. Rather, on its face, the government

> provides funding precisely on the basis of religion – to Catholic schools for the education and attendance of non-Catholic students.
>
> (Emphasis added)

[244] The trial judge found particular support for his view of the application of s. 2(a) to this case in *Big M*:

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

[245] The trial judge understood *Big M* dealt with a corporation faced with a penal offence, but he found that it was nonetheless applicable:

> [407] … Just as one cannot be convicted under an unconstitutional statute, one cannot receive government funding under an unconstitutional statute. More precisely, if a corporation cannot be convicted and fined under an unconstitutional enactment anchored in the Christian notion of a holy day of rest, nor can a Catholic school division receive government funding under an unconstitutional enactment based solely on the religious affiliation of the recipient. I see no legal difference between the two situations.
>
> (Emphasis added)

[246] He determined *Big M* closely paralleled the action before him:

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

[247] Again, and with much respect, we take a different view of the matter. Clearly, *Big M*, which was decided in 1985, remains good law. Indeed, when the Supreme Court has considered s. 2(a) in recent times, *Big M* is cited. However, it is also clear that the context of that case, being a criminal prosecution brought against a corporate accused, played a significant role in dictating the analysis. In other contexts, where a plaintiff seeks a remedy, including a declaration of invalidity of government legislation or action, an allegation of a s. 2(a) breach requires proof of a personal infringement. Further, on the question of needing an individual complainant to prove an

infringement, we would not draw a parallel between being convicted under an unconstitutional statute and receiving funding under such a statute. We have found no support for such an analogy.

[248] The most recent decision of the Supreme Court in relation to s. 2(a) is *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3 [*Mouvement laïque québécois*]. The trial judge relied on this decision for its statements of what constitutes state neutrality. But what is more significant about *Mouvement laïque québécois* for this appeal is that the complaint did not move forward *without* an individual complainant.

[249] In *Mouvement laïque québécois*, an organisation calling itself MLQ (Mouvement laïque québécois) and one Alain Simoneau applied to Québec's Human Rights Tribunal for an order compelling the City of Saguenay and its mayor to discontinue their practice of reciting a prayer at the start of council meetings. The MLQ advocates for the complete secularization of the state in Québec. Mr. Simoneau is a member of this non-profit organization. Upon attending City of Saguenay council meetings, he felt himself uncomfortable with the council's prayers and religious symbols and argued that his freedom of conscience and religion were being infringed.

[250] Justice Gascon, speaking for the Supreme Court, described the approach to take when assessing such a claim under s. 2(a):

> [83] In a case like this one in which a complaint of discrimination based on religion concerns a state practice, the alleged breach of the duty of neutrality must be established by proving that the state is professing, adopting or favouring one belief to the exclusion of all others (*S.L.*, at para. 32) and that the exclusion has resulted in interference with the complainant's freedom of conscience and religion (see *Boisbriand*, [2000 SCC 27] at para. 85; *Bergevin*, [[1994] 2 SCR 525] at p. 538; *Forget*, [[1988] 2 SCR 90] at p. 98).
>
> [84] First, because of the duty of religious neutrality with which it is required to comply, the state may not profess, adopt or favour one belief to the exclusion of all others. Obviously, the state itself cannot engage in a religious practice, so the practice would be one engaged in by one or more state officials, who would have to be acting in the performance of their functions. Where state officials, in the performance of their functions, profess, adopt or favour one belief to the exclusion of all others, the first two criteria for discrimination mentioned above, namely that there be an exclusion, distinction or preference and that it be based on religion, are met.
>
> [85] Second, the state practice must have the effect of interfering with the individual's freedom of conscience and religion, that is, impeding the individual's ability to act in accordance with his or her beliefs. …
>
> [86] In *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at paras. 56–59, the Court developed a test for determining whether freedom of conscience and religion has been infringed. …

…

> [120] The prayer recited by the municipal council in breach of the state's duty of neutrality resulted in a distinction, exclusion and preference based on religion – that is, based on Mr. Simoneau's atheism – which, in combination with the circumstances in which the prayer was recited, turned the meetings into a preferential space for people with theistic beliefs. The latter could participate in municipal democracy in an environment favourable to the expression of their beliefs. Although non-believers could also participate, the price for doing so was isolation, exclusion and stigmatization. This impaired Mr. Simoneau's right to exercise his freedom of conscience and religion.
>
> (Emphasis added)

[251] Thus, the Supreme Court, while never stepping away from *Big M*, has consistently held that, in a case such as the one before this Court, there must be an individual complainant with an individual infringement.

[252] Good Spirit argued at trial, and in this Court, that it had provided evidence that individuals, called as witnesses, had claimed a breach of s. 2(a). The trial judge described this evidence in the context of his analysis of s. 2(a):

> [397] … Dr. Aboguddah, the president of the Huda School … understood (and accepted within the framework of the constitution) that the funding of Catholic schools in Saskatchewan, although assured, is inherently discriminatory: the Huda School receives no capital funding and only 80 percent of the per pupil funding received by public and Catholic schools. However, moving beyond the constitutional rights of Catholic schools, and putting the Huda School on parallel grounds with Catholic schools (except for the latter's constitutionally guaranteed status to educate Catholic students) he asked why the Huda School cannot receive funding to educate non-Muslim students, just like Catholic schools receive funding to educate non-Catholic students. The Huda School does not discriminate against hiring non-Muslim teachers (unlike Catholic schools). The majority of its teaching staff is non-Muslim. Dr. Aboguddah testified that the Huda School would welcome non-Muslim students to its growing school of 430 students (in 2016) which would provide an opportunity to build bridges with the broader Canadian community to reduce the stereotyping and negative image affecting the Muslim community in light of recent world events.
>
> …
>
> [405] … I heard evidence (previously summarized) from Audrey Trembley and Bert Degooijer, both public school trustees and practicing Roman Catholics. They explained the adverse consequences their public school boards have experienced because of government funding of non-Catholic students in Catholic schools.
>
> (Emphasis added)

[253] At this point, it is useful to consider the opinion of Sopinka J. in *Adler*. In assessing the evidence of the complainants in that case, he considered s. 2(a) at some length, concluding, "The statute does not compel the appellants to act in any way that infringes their freedom of religion.

Nothing in the *Education Act* relating to mandatory education per se involves a breach of the appellants' rights under s. 2(a) of the *Charter*" (at para 171).

[254] Similarly, in this case, the Legislature's funding model does not compel any of the witnesses that Good Spirit put forward to act in any way that infringes their freedom of religion. To paraphrase the words of Gascon J. in *Mouvement laïque Québecoise*, no witness testified that the Government's action interfered with his or her freedom of conscience and religion or impeded the individual's ability to act in accordance with his or her beliefs.

[255] Rather, Good Spirit's witnesses want a different funding model. For Dr. Aboguddah, he wants what s. 93 grants separate schools, full funding not only for Muslim students but for all students who wish to attend the Huda School – in essence, a third, parallel public school division. Audrey Trembley and Bert Degooijer are advocates for a system that would keep Catholic schools for Catholics based on a denominational test of some form and maintain a secular system with no allegiance test. In short, this evidence does not meet the requirement of proof of infringement under s. 2(a).

3. In any event, the Legislative Framework is neutral

[256] The trial judge understood the Legislative Framework was silent on the question of funding non-Catholic students in Catholic schools, but for him, it was the Government's *action* that was not neutral – a theme repeated in the *Trial Decision* and at several points in the transcript. In that regard, it must be noted that no one had suggested that the Government had *interpreted* the Legislative Framework incorrectly. That is to say, the Government funds all public school divisions in the province, including separate school divisions, without a denominational measure. In none of these schools does the Government calculate or distribute government funding on the basis of the religion of an individual student. The Government's authority to fund, and the manner in which it exercises its funding authority, is derived from the Legislative Framework. In our view, the Legislative Framework *is neutral* on its face because the Government funds all of its public school divisions established under the *1901 Ordinances* on the same basis. Since this legislation is neutral on its face, it was necessary for Good Spirit to bring itself within Supreme Court authority pertaining to s. 2(a) that requires an individual complainant, evidence of a breach and proof of a personal infringement.

4. No breach of the state's obligation to remain religiously neutral in this case

[257] After referring with approval to the comments of LeBel J. in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650, – who dissented in the result, but provided an opinion not addressed in the majority reasons – Gascon J. described the obligation for the state to remain religiously neutral in these terms (*Mouvement laïque québécois*):

> [72] As LeBel J. noted, the evolution of Canadian society has given rise to a concept of neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard. This neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief (*S.L.*, at para. 32). It requires that the state abstain from taking any position and thus avoid adhering to a particular belief.
>
> …
>
> [74] By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. I note that a neutral public space does not mean the homogenization of private players in that space. Neutrality is required of institutions and the state, not individuals (see *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 31 and 50–51). On the contrary, a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity. The neutrality of the public space therefore helps preserve and promote the multicultural nature of Canadian society enshrined in s. 27 of the *Canadian Charter*. Section 27 requires that the state's duty of neutrality be interpreted not only in a manner consistent with the protective objectives of the *Canadian Charter*, but also with a view to promoting and enhancing diversity (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 95; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 757; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 758; *Big M*, at pp. 337–38; see also J.E. Magnet, "Multiculturalism and Collective Rights", in G.-A. Beaudoin and E. Mendes, eds., *Canadian Charter of Rights and Freedoms* (4th ed. 2005), 1259, at p. 1265).
>
> [75] … This pursuit requires the state to encourage everyone to participate freely in public life regardless of their beliefs (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136; *Big M*, at p. 346; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 27; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at pp. 179 and 181–82; *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 326). The state may not act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice versa.
>
> [76] When all is said and done, the state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others. It is prohibited from adhering to one religion to the exclusion of all others. …
>
> …

> [78] With respect, what is in issue here is not complete secularity, but true neutrality on the state's part and the discrimination that results from a violation of that neutrality. In this regard, contrary to what the Court of Appeal suggested, I do not think that the state's duty to remain neutral on questions relating to religion can be reconciled with a benevolence that would allow it to adhere to a religious belief. State neutrality means – and the Court of Appeal in fact agreed with this (at paras. 76 and 78) – that the state must neither encourage nor discourage any form of religious conviction whatsoever. If the state adheres to a form of religious expression under the guise of cultural or historical reality or heritage, it breaches its duty of neutrality. If that religious expression also creates a distinction, exclusion or preference that has the effect of nullifying or impairing the right to full and equal recognition and exercise of freedom of conscience and religion, there is discrimination.
>
> (Emphasis added)

[258] As we have indicated, the Legislative Framework is on its face religiously neutral. It reflects a political decision taken by the Legislature to fund two public systems of schools, one that is secular and one that is chiefly Roman Catholic. If staunch Catholic parents choose to send their child to the secular school across the street, notwithstanding their payment of taxes to the separate school division, what matters in the calculation of the operational grant is the number of students only. The same result pertains if fundamentalist Christian parents or Sikh parents choose to send their children to the Catholic school.

[259] Admittedly, this means that the effect of the Government's interpretation of the Legislative Framework is that Catholic schools receive funding based on the numbers of students at those schools that include non-Catholic students, but, importantly, the converse is also true: secular schools receive funding based on their non-Catholic and Catholic students. All of the province's public schools receive the same proportion of funding based, as we have indicated, largely on student enrollment.

[260] Good Spirit advocates the Government adopt a system that would preclude funding of non-Catholic students within the Catholic system yet continue to allow the secular school system to accept Catholic students, plus receive the enrollment funding that comes with them. Neither the present model nor the proposed model is completely *religiously neutral*, but the question is whether the present system meets the litmus test provided by the Supreme Court: does it reflect true neutrality or does it encourage or discourage any form of religious conviction?

[261] The trial judge made a finding of fact: "At the heart of Catholic schools is a theistic Catholic view, understandably and correctly fostered in Catholic schools" (at para 394). From this finding

of fact, the trial judge concluded that such a theology was "offensive to the state's duty of neutrality when state-promoted beyond constitutional protection" (at para 394). The latter, of course, is a legal conclusion reviewable on a standard of correctness.

[262] In our view, funding the two public school systems equally and on the same basis is the antithesis of state-promoted religion or secularity. Instead, the Legislature has chosen, at the present time, to manage its plenary power in a manner that is as neutral as such matters can be. It draws no distinction between the way it provides funding to the secular public system and the separate public system.

[263] We understand that the trial judge was also concerned about religious neutrality – not from the perspective of a comparison between the secular and separate systems, but from a comparison between the separate system and private religious schools. This, of course, is a different argument than finding the evangelization of non-Catholics in Catholic schools to constitute the breach of s. 2(a). This is an argument that would in effect support the evangelization of non-adherents in private religious schools. The problem with this argument is there is no evidence from anyone that the failure to fund non-adherents in private religious schools is a breach of any person's religious freedom. Such a comparison, moreover, runs directly against *Adler*.

5. Conclusion with respect to s. 2(a) of the *Charter*

[264] Our overarching conclusion is that the Legislative Framework is a valid exercise of power conferred on the Legislature by s. 93 and s. 17(2) and cannot be the subject of a *Charter* attack. For the sake of completeness, we have addressed Good Spirit's arguments as if the Legislative Framework were not *Charter* immune. Nonetheless, we find the Legislative Framework respects the state's duty of religious neutrality and there is no evidence of a breach of any individual's rights under s. 2(a).

C. Infringement under s. 15(1)

[265] Subsection 15(1) of the *Charter* provides as follows:

Constitution Act, 1982	***Loi constitutionnelle de 1982***
Equality Rights	**Droits à l'égalité**
Equality before and under law and equal protection and benefit of law	**Égalité devant la loi, égalité de bénéfice et protection égale de la loi**
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.	**15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

1. Trial judge's reasons with respect to s. 15(1)

[266] Building on his interpretation of the words of Wilson J. and of Estey J. in *Reference re Bill 30*, and of Iacobucci J. in *Adler*, the trial judge reiterated his conclusion that s. 93 creates "an entrenched inequality" that becomes exposed to s. 15(1) if s. 93 rights are exceeded (see paras 424 and 425). He summarized his observations in that regard:

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

[267] Applying the first part of the two-part test from *Law Society of British Columbia v Andrews*, [1989] 1 SCR 143 at 170 [*Andrews*], the trial judge found that the law created a distinction that is based on an enumerated ground, being that of religion: "the government action of funding Catholic schools for the attendance of non-Catholic students, while no other religion receives such treatment, creates a distinction based on the enumerated ground of religion" (*Trial Decision* at para 429).

[268] The second part of the *Andrews* test requires proof of a discriminatory impact on an individual or group. In relation to this aspect of *Andrews*, the trial judge repeated his finding made in relation to s. 2(a) that the Legislative Framework is not neutral such that evidence of individual or group discriminatory impact is unnecessary:

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

[269] However, he also went on to refer to the evidence of Dr. Aboguddah and Rabbi Parnes and held that, through these witnesses, Good Spirit "has established a discriminatory impact" (at para 438). He found a discriminatory impact to be obvious because other faith-based schools did not receive full funding so as to be able to attract non-adherents.

[270] The trial judge also found another group of parents who suffered a discriminatory impact, being those parents "who are not comfortable with Catholic doctrine and cannot avail themselves" of a faith-based, government-funded education (at para 442).

2. Analysis of the trial judge's s. 15(1) reasons

[271] Respectfully, we find that the trial judge did not give due effect to the prevailing Supreme Court jurisprudence under s. 15 of the *Charter*, which in our view constitutes error.

[272] In *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 [*Withler*], the Supreme Court refined and clarified the *Andrews* two-part test, making it clear that a claim of a s. 15(1) breach requires proof of a distinction that "creates a disadvantage by perpetuating prejudice or stereotyping":

> [30] The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (See *Kapp*, [2008 SCC 41] at para. 17.)
>
> [31] The two steps reflect the fact that not all distinctions are, in and of themselves, contrary to s. 15(1) of the *Charter* (*Andrews*; *Law* [[1999] 1 SCR 497]; *Ermineskin Indian Band*, [[2009] 1 SCR 222] at para. 188). Equality is not about sameness and s. 15(1) does not protect a right to identical treatment. Rather, it protects every person's equal right to be free from discrimination. Accordingly, in order to establish a violation of s. 15(1), a person "must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is

> discriminatory" (*Andrews*, at p. 182; *Ermineskin Indian Band*, at para. 188; *Kapp*, at para. 28).
>
> (Emphasis added)

[273] Chief Justice McLachlin and Abella J., writing for the Supreme Court in *Withler*, indicated that discriminatory impact is not enough. Rather, "it must be shown that the law has a discriminatory impact in terms of prejudicing or stereotyping in the sense expressed in *Andrews*" (at para 34). They described the analysis required in order to determine whether any given government action is discriminatory:

> [38] Without attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered. Where the claim is that a law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances. Where the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis.
>
> [39] Both the inquiries into perpetuation of disadvantage and stereotyping are directed to ascertaining whether the law violates the requirement of substantive equality. Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.
>
> (Emphasis added)

[274] The Supreme Court in *Withler* also addressed the role of comparison under s. 15:

> [40] It follows that a formal analysis based on comparison between the claimant group and a "similarly situated" group, does not assure a result that captures the wrong to which s. 15(1) is directed – the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.
>
> [41] As McIntyre J. explained in *Andrews*, equality is a comparative concept, the condition of which may "only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises" (p. 164). However, McIntyre J. went on to state that formal comparison based on the logic of treating likes alike is not the goal of s. 15(1). What s. 15(1) requires is substantive, not formal equality.

> [42] Comparison, he explained, must be approached with caution; not all differences in treatment entail inequality, and identical treatment may produce "serious inequality" (p. 164). For that reason, McIntyre J. rejected a formalistic "treat likes alike" approach to equality under s. 15(1), contrasting substantive equality with formal equality.
>
> (Emphasis added)

[275] After reviewing the jurisprudence that showed a move away from an emphasis on mirror comparator groups, the Supreme Court put forward the proper approach to comparison:

> [62] The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).
>
> …
>
> [65] The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances. At this step, comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping. The probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances. (See Andrea Wright, "Formulaic Comparisons: Stopping the *Charter* at the Statutory Human Rights Gate", in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006), 409, at p. 432; Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006), 5 *J.L. & Equality* 81; *Pothier*.)
>
> (Emphasis added)

[276] In this case, the trial judge identified what Good Spirit had suggested as constituting two violations of s. 15 (at para 417):

(a) "members of the Catholic faith can evangelize and promote good will toward Catholicism but other faith groups do not have an equal benefit to similarly evangelize and promote good will toward their faith"; and

(b) "parents who seek a faith-based education for their children and find a commonality with Catholic education and those parents who equally wish a faith-based education but do not find a commonality with Catholic education".

[277] The witnesses testifying with respect to these categories were, as previously mentioned, Dr. Aboguddah and Rabbi Parnes. They did not testify that the funding of non-Catholics in Catholic schools perpetuated disadvantage or prejudice against the religious groups they represent.

More importantly, they did not want separate schools to lose funding under the present model – rather, they wanted the same funding. *If they had been the plaintiffs*, they would not have sought the remedy Good Spirit sought and obtained, i.e., an end to the funding for non-faith students in Catholic schools.

[278] While previously quoted, it is useful to repeat what the trial judge wrote about the discriminatory impact on the Muslim schools:

> [439] I accept Dr. Aboguddah's testimony that with 430 students in the Huda School using all available space, and with 100 students on its waiting list for the past four years, it is financially unable to accommodate non-Muslim students. Discriminatory impact is obvious in my view. If the Huda School received complete government funding for non-Muslim students as Catholic schools receive for non-Catholic students, the Huda School and non-Muslim parents would enjoy significant benefits, similar benefits the defendants argue now accrue to Catholic schools and non-Catholic parents: schools can leverage a greater source of funds to educate their adherents and Saskatchewan parents would have, in the words of the defendants, greater "parental choice", "parental autonomy", "freedom of religion", and "fairness". These benefits should be equally available to all religious schools and all parents, or to none.
>
> (Emphasis added)

[279] The trial judge's statement that the ability to fund non-adherents fully in faith-based schools should be available to all schools does not answer the second question mandated by *Withler*. The question that must be answered is whether the funding of non-Catholics in Catholic schools – and not in other faith-based schools – perpetuates disadvantage or prejudice to the claimant group or stereotypes the group? But, on that point, too, there was simply no evidence because the testimony of Dr. Aboguddah and Rabbi Parnes was not directed to those issues. Their evidence was directed to receiving full funding for their own schools, which is anathematic to the case that Good Spirit put forward.

[280] When considering substantive inequality, *Withler* requires a court to consider all relevant contextual factors. A "central consideration is the purpose of the impugned provision" (at para 71). Here, there is a two-fold purpose: (a) to fulfill the mandate imposed on the Legislature by virtue of s. 93 and s. 17(2), and (b) to provide as much choice as is possible to parents without making a public entity the arbiter of who is a Catholic and who is not. The backdrop is the compromise leading to Saskatchewan joining Confederation, i.e., the deal struck to provide benefits to the minority religions of the day.

[281] In the context of the pension scheme under consideration in *Withler*, the Supreme Court commented as follows:

> [71] … It is in the nature of a pension benefit scheme that it is designed to benefit a number of groups in different circumstances and with different interests. The question is whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme. Perfect correspondence is not required. Allocation of resources and legislative policy goals may be matters to consider. The question is whether, having regard to these and any other relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping the group.
>
> (Emphasis added)

[282] At paragraph 73 of *Withler*, the Supreme Court continued by noting with approval the comments of Ryan J.A., writing in the Court of Appeal, regarding the need to avoid isolating one aspect of a comprehensive insurance scheme (*Withler v Canada (Attorney General)*, 2008 BCCA 539, 302 DLR (4th) 193):

> [181] This case demonstrates the difficulty that arises when one attempts to isolate for criticism a single aspect of a comprehensive insurance and pension package designed to benefit an employee's different needs over the course of his or her working life. … The comprehensive plan, while not a perfect fit for each individual, did not meet the hallmarks of discrimination given that it was a broad-based scheme meant to cover the competing interests of the various age groups covered by the plan.
>
> (Emphasis added)

[283] In this case, Good Spirit has attempted to isolate one aspect of the funding of schools in Saskatchewan, i.e., the funding of non-Catholics in Catholic schools. As the evidence shows, the funding provided by the Government to faith-based schools is about far more than this isolated aspect. Unlike some other provinces in Canada, the Government provides funding for private religious schools, arguably under its plenary power found in the opening words of s. 93 or s. 93(3). It is partial funding – based, in part, on the number of pupils enrolled and, according to the evidence, is grounded in a per student amount expressed as a percentage of the per student cost for the public secular and public separate school divisions. In none of these systems – public or private religious schools – does the Government dictate who can attend or who contributes to the funding. Using the words of *Withler*, the question is "whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme?" (at para 71).

[284] In answering this question, it must be remembered that this Court is not asked to determine whether a different allocation of resources could be made and could also withstand a *Charter* challenge. Hence, the question is readily answered because, having proper regard for how the Government funds secular public schools and the constitutional compromise, there is no proof that the funding of non-Catholic students in Catholic schools in the system as we have described perpetuates prejudice or disadvantage or negatively stereotypes individuals or groups.

3. Conclusion with respect to infringement under s. 15(1)

[285] Our overarching conclusion is that the Legislative Framework is consistent with s. 93 and s. 17(2), being a valid exercise of the authority conferred on the Legislature by those provisions, and, therefore, does not infringe the *Charter*. For the sake of completeness, we have addressed Good Spirit's arguments as if the contrary had been proven. In that regard, we nonetheless find the Legislative Framework does not infringe s. 15(1).

XI. Section 1 analysis

[286] Section 1 of the *Charter* reads as follows:

Constitution Act, 1982	***Loi constitutionnelle de 1982***
Rights and freedoms in Canada **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	**Droits et libertés au Canada** **1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

A. Section 1 test

[287] In *Frank v Canada (Attorney General)*, 2019 SCC 1, [2019] 1 SCR 3 [*Frank*], the Supreme Court determined first that the impugned provisions of the *Canada Elections Act*, SC 2000, c 9, were prescribed by law. Speaking for the majority, Wagner C.J.C. summarized the law to apply to determine if a limit on a right can be justified under s. 1 of the *Charter*:

> [38] Two central criteria must be met for a limit on a *Charter* right to be justified under s. 1. First, the objective of the measure must be pressing and substantial in order to justify a limit on a *Charter* right. This is a threshold requirement, which is analyzed without

> considering the scope of the infringement, the means employed or the effects of the measure (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 61). Second, the means by which the objective is furthered must be proportionate. The proportionality inquiry comprises three components: (i) rational connection to the objective, (ii) minimal impairment of the right and (iii) proportionality between the effects of the measure (including a balancing of its salutary and deleterious effects) and the stated legislative objective (*Oakes*, [[1986] 1 SCR 103] at pp. 138–39; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at para. 139; *K.R.J.*, at para. 58). The proportionality inquiry is both normative and contextual, and requires that courts balance the interests of society with those of individuals and groups (*K.R.J.*, at para. 58; *Oakes*, at p. 139).
>
> (Emphasis added)

B. Trial judge's reasons on s. 1

1. The trial judge's pressing and substantial criterion analysis

[288] There was evidence presented at trial highlighting the legislative objectives put forward by Christ the Teacher:

> (a) to provide each student in the province of Saskatchewan an equitable opportunity to education regardless of where they live; and
>
> (b) to provide the largest number of parents with a choice in terms of how their children should be educated in publicly funded systems.

[289] The trial judge did not accept that either objective was pressing and substantial in a free and democratic society. He discounted the first objective because other provinces without separate schools are able to fulfill the same objective:

> [452] I see nothing in the objective of equitable educational opportunity that is linked to funding non-Catholic students in Saskatchewan's Catholic schools. This objective – to provide opportunity for education regardless where students live – must be an objective of all Canadian provinces, including provinces without separate schools. These provinces seemingly meet this objective without separate schools. I fail to see that if a province has separate schools, funding non-minority students within those schools is necessary to provide students with an education "regardless of where they live". Nor do I find assistance is afforded CTT in its s. 1 justification by offering that the province has an interest in educating children for "socioeconomic reasons". This vague and general statement provides no justification for funding non-Catholic students in Catholic schools.
>
> (Emphasis added)

[290] With respect to the second objective, he found that an objective could not be pressing and substantial if it constitutes a *Charter* violation:

> [454] CTT's asserted objective of providing parental choice is also problematic. In suggesting that a pressing objective for funding non-minority faith students is to give "a substantial number of parents a choice as to the education of their children", CTT acknowledges what I have already found violative of *Charter* rights: choice given to some parents based on religious beliefs, but not to others, is a breach of the state's duty of religious neutrality. Government action that I have found to be *Charter*-infringing cannot become *Charter*-justifying.
>
> (Emphasis added)

2. The trial judge's proportionality inquiry

a. Rational connection

[291] Since the trial judge determined that the impugned action was the funding of non-Catholic students attending Catholic schools, he could not see a rational connection between the impugned action (i.e., funding) and Christ the Teacher's objectives:

> [458] … I fail to see a rational connection between this alleged objective and the funding of non-Catholic students at Catholic schools. In my view, quite the contrary: the public system of education in Saskatchewan ensures that all students, regardless of creed or religion, are admitted and funded. Public schools are legislatively obligated to educate all students. On the other hand, I heard no evidence from any of the defendants' witnesses that Catholic schools are prepared to accept enrolment of all students to ensure educational opportunity "regardless of creed or religion". For example, if a student is a vocal advocate of rights contrary to Catholic doctrine such as abortion rights or same-sex marriage, will she be permitted to enrol in a Catholic school? These students, though, regardless of their personal beliefs, and whether Catholic or non-Catholic, must be accepted in public schools. Accordingly, I see no rational connection between CTT's asserted objective that the Government must ensure that there is "a sufficient level of funding … present for all schools, regardless of creed or religion" and the funding of non-Catholic students in Catholic schools.

b. Minimal impairment

[292] The trial judge found that the legislative objectives might only be met if the Government confined itself to what he had found was the core of s. 93:

> [459] … In my view, the best (and perhaps only) way that the government can minimally offend its duty to remain religiously neutral is to accept s. 93 of the *Constitution Act, 1867*, which the Supreme Court has said makes equal treatment of religions impossible, and not augment or complement these unbalanced religious rights with further empowering rights. I cannot see how the "special or unequal educational rights" (*Reference re Bill 30* at 1199) already given to Catholics do not become even more "special" and more "unequal" when additional rights are given to them to receive funding to educate non-Catholic students.
>
> (Emphasis added)

c. Proportionality between the effects of the measure and the stated legislative objective

[293] The trial judge found no benefits from funding non-Catholic students in Catholic schools. He found only harm falling into these two categories:

(a) "the thwarting of public school boards' decisions to close rural schools which have experienced diminished enrolments" (at para 460); and

(b) "Saskatchewan needs to be sensitive to lingering notions of traditional Christian privileges" (at para 464).

[294] He also endorsed the statements offered by McLachlin J. (as she then was) dissenting in part in *Adler*. When describing applicable principles of proportionality under s. 1, she identified the need for "encouragement of a more tolerant harmonious multicultural society" (at para 215), stating the goal of a free and democratic country is "fostering multiracial and multicultural harmony" (at para 224). But the trial judge found those goals could not be served here because the legislative objectives did not "include parental choice" for all (at para 465).

[295] He found that s. 27 of the *Charter* was relevant:

> [466] I also find that the directive of s. 27 of the *Charter* has specific application in a case involving religious guarantees of religious neutrality, specifically in a s. 1 analysis. It states:
>
> > 27. This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

[296] Finally, the trial judge found support for his proportionality analysis by returning to the words of Iacobucci J. in *Adler*, regarding entrenched inequality: "Government action advancing these principles may survive a *Charter* challenge in a free and democratic society, but not government action further expanding constitutionally unprotected separate school rights, rights which Justice Iacobucci at para [32] in *Adler* has called 'entrenched inequality'" (at para 467).

C. Errors of principle in the trial judge's s. 1 reasons

[297] In our respectful view, the trial judge made errors of principle in conducting his s. 1 analysis that justify this Court approaching the analysis anew.

[298] First, the trial judge stated the s. 1 inquiry required him to answer this question: “Is providing funding to Catholic schools respecting non-Catholic students a reasonable limit on *Charter* rights and demonstrably justifiable in a free and democratic society?” (at para 448). The trial judge then determined that, to overcome the burden upon the appellants, they were required to “show that the funding has an objective of pressing and substantial concern in a free and democratic society and the objective is proportionate to and not outweighed by the effect of the infringing action” (at para 448).

[299] This is a repetition of the error previously identified and it is woven throughout the trial judge’s s. 1 analysis. All of the propositions made by the trial judge are tied to an action, which the trial judge found to be problematic – namely, the funding of non-Catholics attending Catholic schools. He found this to be the *impugned action* and also to be the legislative objective.

[300] To reiterate, the Legislative Framework does not contain any *specific* words authorizing the Government to provide funding for non-Catholic students to attend Catholic schools, but the absence of such words is not relevant to the analysis. The important point is that the Legislative Framework provides funding to both public school systems on the same basis, without asking for proof of religion in either system. It is an effect of that Legislative Framework that funding is provided to public separate school divisions on the numbers of students, Catholic and non-Catholic, with the converse effect applying to the public secular system. The Legislative Framework also provides for partial funding for associate and independent schools, but these schools are not subject to the same legislative control as the two publicly funded school divisions, nor do individual students have the same constitutional right to attend those schools as students attending the public secular and public separate schools. Associate and independent schools, as the Attorney General submits, “are simply not within the framework” of s. 93(1) or s. 17(2). And, further, the “public status of separate schools means that separate schools cannot be treated for constitutional purposes as if they are a variant of associate or independent schools” (at para 262). Assuming for the sake of argument that this contravenes s. 2(a) and s. 15 of the *Charter*, it is to this *equal* effect between the two public school systems as contrasted with the unequal effect upon the associate and independent schools that the s. 1 analysis must be applied.

[301] Second, the trial judge approached the s. 1 analysis as though the constitutional compromise is not to be embraced but, rather, is something to be contained. He saw no benefit from the way in which the present system operates, notwithstanding the large number of witnesses from all faiths who valued the choice offered by two, fully funded public school systems.

[302] Third, he rejected the objectives put forward by Christ the Teacher, not by assessing them on their merits but by repeating that they contravene the *Charter*: "Government action that I have found to be *Charter*-infringing cannot become *Charter*-justifying" (at para 454). In the same vein, he found that the only acceptable minimal impairment would be for the Government to stop providing funds to non-Catholic students attending Catholic schools. On this basis, no action that infringed the *Charter* could be saved under s. 1. For an analysis on this point, see Michelle Biddulph, "We Don't Need No (Catholic) Education – But Why Can't it Be Saved by Section 1? A Comment on Good Spirit School Division No. 204" (2017) 80 Sask L Rev 359 at 375, citing *Mouvement laïque québécois*.

[303] Fourth, the trial judge did not address what happens to the associate and independent schools by virtue of a declaration that "those provisions of *The Education Act, 1995* and *The Education Funding Regulations*, to the extent that the Government of Saskatchewan has provided funding grants to separate schools respecting students not of the minority faith, are of no force and effect" (para 475).

[304] Thus, the trial judge's s. 1 analysis must be set aside.

D. Proper approach to the s. 1 analysis

1. The limit on the *Charter* right is prescribed by law

[305] As the Attorney General correctly observed, for an infringement to be justifiable under s. 1, the limit on the *Charter* right must be prescribed by law (e.g., see *Hogg* at para 38-11). In *R v Orbanski; R v Elias*, 2005 SCC 37, [2005] 2 SCR 3, Charron J. stated the following:

> [36] It is settled law that a prescribed limit may be implied from the operating requirements of a statute. In *Therens* [[1985] 1 SCR 613], Le Dain J. described the meaning of the words "prescribed by law" as follows (at p. 645):
>
> > Section 1 requires that the limit be prescribed by law, that it be reasonable, and that it be demonstrably justified in a free and democratic society. The

> requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. *The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements*. The limit may also result from the application of a common law rule [emphasis added by Charron J.].

See also *R v Seed*, 2011 SKCA 75 at para 18, 272 CCC (3d) 352 (leave to appeal to the SCC refused, 2012 CanLII 18855).

[306] While the trial judge did not make a specific finding that the "funding of non-Catholic students in Catholic schools" was prescribed by law, no party has challenged his lack of finding in that regard. In any event, the operating grants to public and separate school divisions that lead to such funding are authorized by the *Regulations*, which, in turn, derive their authority from the *Education Act*.

2. The legislative objective is pressing and substantial

[307] In fairness to the trial judge, the legislative objectives put forward by the appellants, particularly by the Government, have become more refined in this Court. The Government's objective, as stated in its factum, is "to provide equitable funding to all students attending schools protected by s. 93(1), without tying it in any way to their religion" (at para 279). As the Supreme Court indicated in *Frank*, the process of refining the legislative objective for the purposes of s. 1 can, in certain cases, continue as the issues become more refined during the appellate process (see paras 20, 47, and 54).

[308] In our view, the Government's objective is a better formulation than what Christ the Teacher had placed before the trial judge. The Government is required to fulfill its obligation under s. 93, but it does not want to be in the business of determining who is of the minority faith for the purposes of attending separate schools or for either of the publicly funded school systems in the province to have such an obligation themselves. Indeed, there was evidence indicating the difficulty in making such a determination. Similarly, the Government does not want to run a public system of education where only Catholics have choice. Christ the Teacher's objectives are better classified as benefits to be considered as part of the proportionality analysis.

[309] The trial judge looked for an objective that was pressing and substantial, as though such had to be determined in absolute terms. As Wagner C.J.C. indicated in *Frank* (for the majority), the determination is a qualitative one that requires a court to weigh the sufficiency of the objective:

> [55] I am willing to accept that maintaining the fairness of the electoral system to resident Canadians is a sufficiently important legislative objective to ground the s. 1 analysis. This Court has in the past accepted that variations on promoting electoral fairness and maintaining the integrity of the electoral process are pressing and substantial objectives in the election law context (see *Bryan*, [2007 SCC 12] at paras. 17–19; *Harper*, [2004 SCC 33] at paras. 91–92; *Harvey*, [[1996] 2 SCR 876] at para. 38). While I am aware that the purpose of the impugned provisions is to promote greater electoral fairness for only *some* Canadians – as opposed to enhancing the health of the electoral system in general – I accept that maintaining the integrity and fairness of the electoral system can be a pressing and substantial concern even if the measures taken to achieve that objective impair the democratic rights of other citizens (*Harper*, at para. 91; *Harvey*, at para. 38; *Bryan*, at paras. 33–34).
>
> (Italic emphasis in original, underline emphasis added)

[310] As in *Frank*, maintaining an education system that provides choice for all parents *within the context of s. 93* without a public body inquiring into any parent's religious affiliation is a sufficiently important legislative objective to ground the analysis. It is general in terms, but it conforms to the scope of other objectives found by the Supreme Court to be pressing and substantial:

(a) "maintain and enhance the integrity of the electoral process" (*Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876 at para 38);

(b) "protect children from sexual violence perpetrated by recidivists" (*R v K.R.J.*, 2016 SCC 31 at para 61, [2016] 1 SCR 906 [*K.R.J.*]); or

(c) "maintaining the fairness of the electoral system to resident Canadians" (*Frank* at para 55).

3. Proportionality inquiry

a. There is a rational connection

[311] The next step is to determine whether there is a rational connection between the legislative objective and the action taken. The test to be applied at this step was also recently summarized in *Frank*:

> [59] The question at the first step of the proportionality inquiry is whether the measure that has been adopted is rationally connected to the objective it was designed to achieve. The rational connection step requires that the measure not be "arbitrary, unfair, or based on irrational considerations" (*Oakes*, at p. 139). Essentially, the government must show that there is a causal connection between the limit and the intended purpose (*RJR-MacDonald*, at para. 153). In cases in which a causal connection is not scientifically measurable, one can be made out on the basis of reason or logic, as opposed to concrete proof (*RJR-MacDonald*, [[1995] 3 SCR 199] at para. 154; *Toronto Star*, at para. 25).

[312] With all of the objectives put forward by the appellants, and in particular the one now identified by the Attorney General, there is a rational connection between the objective and the action taken. Given the constitutional context, the Legislature has chosen a way to address its obligations in a way that is not arbitrary and therefore is logically and rationally connected to the objective of maintaining an education system that provides choice to all parents. It respects the obligations of proportionality between the secular and separate school divisions. For the same reason, it is fair and based on rational considerations.

b. Minimal impairment is achieved through the funding model

[313] In *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331, the Supreme Court described the approach to take in assessing minimal impairment:

> [102] At this stage of the analysis, the question is whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goal" (*Hutterian Brethren*, [2009 SCC 37] at para. 53). The burden is on the government to show the absence of less drastic means of achieving the objective "in a real and substantial manner" (*ibid.*, at para. 55). The analysis at this stage is meant to ensure that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's object.

[314] The question is whether there are less harmful means of infringing the state's obligation of religious neutrality under s. 2(a) or discriminating between faith-based schools under s. 15(1). In specific terms, the question in this case comes down to whether full funding of non-Catholic students in Catholic schools is the least drastic means of achieving the legislative objective of providing equitable funding to all students attending schools protected by s. 93(1), without tying it in any way to their religion. For the trial judge, the least harmful way would be for the Government to restrict itself to funding Catholic students attending Catholic schools, but the correct question to be asked is whether the Government has met its obligation to show there are no less harmful means of achieving the objective in a real and substantial manner.

[315] Here, of course, since not all of the issues were in play, and the Court did not have a true plaintiff, the evidence in relation to the breach is lacking in several respects. In particular, since Good Spirit sought to prove a breach of s. 2(a) and s. 15(1) using the testimony of Dr. Aboguddah and Rabbi Parnes only, little is shown in the evidence about the Legislature's approach to funding the private religious schools. The evidence shows that the Huda School receives approximately 80% of its funding and some private schools receive 50%. The evidence also alludes to the existence of historic schools that receive 70% funding.

[316] If the breach under s. 2(a) is a breach of state neutrality based on the evangelization of non-Catholic students in Catholic schools, a claim that is not found in the pleadings and of which there is clearly no evidence, the options are the present system or providing no funding for non-Catholic students attending Catholic schools, with the potential consequence this might have on all funding for private religious schools.

[317] If the claim under s. 2(a) is based on a claim of discrimination among the faith-based schools, meaning the separate divisions and the private religious schools, such a claim and the claim under s. 15(1) stand together. In that case, the options to be considered are these:

(a) fund non-Catholics in Catholic schools at an 80% level;

(b) fund non-adherents in private religious schools at a 100% level, even though adherents receive 80%, 70 % or 50%, depending on the nature of the school; or

(c) fund all private religious schools at a 100% level.

[318] All three options raise significant issues. The first option would draw public entities into a religious test for the separate school system, but not with its secular school system. It would settle the controversy between the secular school system and the Catholic school system – only to move it into each individual school division with the potential consequence of contributing to individual acts of discrimination on the basis of religion. Determining who and who is not a Catholic would be fraught with controversy that would draw the Government and both public school systems into assessing the religious belief of individuals (see *Wall*). The possibility of further actions over breaches of the guarantee of freedom of religion would loom large. It raises the spectre of

distinctions being drawn between children within the same school on the basis of religion. It would also provide choice for Catholic parents only.

[319] The second option would move the interference with individual claims of conscience from the separate school system to the private religious schools. It would also require a system to determine who is a faith student and who is not, for each faith-based school, and would create inequities between students at the same school and between students who have been assessed as being adherents and those who are not and those who are attending the public school system. For all of the reasons mentioned in relation to the first option, it is not a realistic option.

[320] The third option runs squarely against *Adler*, which held that a legislature cannot be compelled on the basis of s. 2(a) or s. 15 to fund private religious schools. Moreover, this option is clearly not supported by Good Spirit.

[321] In short, in our view, the Government has shown the absence of less drastic means of achieving its legislative objective than the method of funding that the Legislature has chosen.

c. Proportionality is achieved between the effects of the measure and the stated legislative objective

i. Salutary effects

[322] Turning to the current funding model, the most obvious benefit is that the Government fulfills its obligations under s. 93 without having to create a system of determining who is a Catholic and who is not. While this confirms the objective of neutrally treating the secular and separate divisions, it is also only one of its benefits. As pointed out in the Government's factum, two other objectives are also achieved with the present system (at para 263):

(a) providing "each student in Saskatchewan an equitable opportunity to education regardless of where they live"; and

(b) providing "parents with a choice in terms of how they best feel their children should be educated".

These, of course, are the objectives cited by Christ the Teacher, but as the Government notes, they can also be classified as benefits.

[323] It is also not an inconsiderable benefit that the present system is grounded in s. 93 and, as such, continues the promise made to minorities in 1867 and 1905. Further, the present system of permitting choice to all children in the province to attend one of two publicly funded school systems has been in place at least since the 1970s. Continuing it will avoid disruption to the education of many students in the province. The Government's approach also avoids state intrusion into determining who is a Catholic and being required to create an administrative structure around that issue. As the Government asserts in its written material, the current Legislative Framework eliminates the "societal message that would be sent if the Government were required to deny funding: that public funding in Saskatchewan can be denied solely based on the religion of the individual" (at para 292).

[324] The Government cites other benefits that are appropriate to weigh against the deleterious effects:

(a) "Tolerance and understanding flow from broad encounters" (at para 296); and

(b) "One other significant benefit of the funding system is that it allows for student mobility between the school systems, as well as fitting in with the Ministry of Education's policy of having a public education sector, rather than individual schools, individual divisions, individual silos, all with their own independent plans. One major example is that if a student is having a serious issue in one school system, for example, being bullied, the opportunity to transfer to a nearby school in the other division can be a great advantage, to help the student" (footnotes omitted, at para 297).

We accept these as being additional benefits.

ii. Deleterious effects

[325] In its factum, Good Spirit notes these harmful effects flowing from the current Legislative Framework (at para 520):

(a) "the serious violation of constitutional rights";

(b) "undermining the public school system of the collective citizenry";

(c) "undermining the ability of public school boards to close educationally and economically unviable schools";

(d) "undermining the viability of rural public schools";

(e) "establishing an alternative faith-based public school system"; and

(f) "encouraging an unhealthy competition for students between public and separate school boards".

[326] As Christ the Teacher submits, none of these effects address the *Charter* infringement of freedom of religion as such. The first is a normative description about the extent of the violation, i.e., it is not an effect of providing equal funding for non-Catholics and Catholic students within a Catholic school. Rather, it is an opinion about the seriousness of the violation and can only be considered during the weighing process.

[327] The next three are economic arguments and do not pertain to a breach of s. 2(a) or s. 15(1). The fifth and sixth are policy or political arguments but also do not address a breach of s. 2(a) or s. 15(1). As such, we are compelled to conclude that Good Spirit has not advanced any relevant deleterious effect of the Legislative Framework.

iii. Balancing

[328] In *K.R.J.*, Karakatsanis J., for the majority, summarized the law pertaining to the process a court should follow when weighing the benefits and harms associated with a *Charter*-infringing law:

> [77] At this final stage of the proportionality analysis, the Court must "weig[h] the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good" (Carter, at para. 122). …
>
> …
>
> [79] … While the minimal impairment test has come to dominate much of the s. 1 discourse in Canada, this final step permits courts to address the essence of the proportionality enquiry at the heart of s. 1. It is only at this final stage that courts can transcend the law's purpose and engage in a robust examination of the law's impact on Canada's free and democratic society "in direct and explicit terms" (J. Cameron, "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997), 35 *Osgoode Hall L.J.* 1, at p. 66). In other words, this final step allows courts to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society. Although this examination entails difficult value judgments, it is preferable to make these

> judgments explicit, as doing so enhances the transparency and intelligibility of the ultimate decision. Further, as mentioned, proceeding to this final stage permits appropriate deference to Parliament's choice of means, as well as its full legislative objective.
>
> (Footnotes omitted, emphasis added)

[329] At this point of the exercise, it is appropriate to consider Good Spirit's submission to the effect that the funding of non-Catholic students attending Catholic schools is a *serious violation* of freedom of religion. Good Spirit states this is a serious violation because it breaches the state's obligation of religious neutrality and because of the funding evidence of Dr. Aboguddah and Rabbi Parnes (i.e., their faith-based schools are not fully funded in the same manner as public separate schools). Based on that evidence, it is suggested the violation of religious neutrality is that the Legislative Framework provides 100% funding for non-Catholic students in Catholic schools, but only 80% or less for other private religious schools who wish to attract non-adherents.

[330] Assuming the seriousness of this violation, it must be weighed against the benefits of the law and the potential harm that would be derived from the proposed solution, which would bring an end to the practice of non-Catholics attending Catholic schools. The Attorney General outlined that harm in written submissions:

(a) the Government would have to "ensure that funding for separate schools is based on the religion of the students, as only students of the minority faith will be eligible for funding to attend separate schools" (at para 48);

(b) the Government would "likely have to enact legislation which compels separate schools to require proof of religious beliefs from their potential students and parents" (at para 48);

(c) "Children of the minority faith will have the right to attend public schools or separate schools and receive full funding at either type of school, regardless of their religion" but, "children who are not of the minority faith will only have one option: the public schools. If they wish to attend a separate school, public funding will be denied to them, solely because of their religion, unlike children of the minority faith" (at para 49);

(d) the Government would be required to interpose itself in the discussion of who is entitled to attend a separate school and, in any given case, be required to "deny funding, based on the religious belief of students or their parents" (at para 53);

(e) the result of the decision would be to "entrench a constitutional requirement that the Government not provide funding for the education of certain students, based on their religion" (at para 9), which it submits is truly a breach of its obligations regarding religious neutrality; and

(f) the upshot of all of this would be to "impose religious segregation" (at para 1) on the minority faith school with all of the attendant potential for unrest that accompanies such status.

[331] Christ the Teacher would add the following:

> [273] … [The trial judge's] finding would also remove a legitimate choice for education from a significant portion of the population including those nonminority faith parents who see separate schools as a viable option. Finally, because of the obligations of the province under s. 17(2) to ensure equal educational opportunities, the resultant financial impact on denominational school rights could very well lead to a corresponding increase in funding per student to ensure the Government met its general constitutional obligations to separate schools.

[332] In our view, the appellants raise significant concerns that act as a counterweight to the claim of a serious violation of the *Charter* right of freedom of religion.

[333] It is also important to return again to the Legislative Framework. According to the Attorney General's submissions, the Legislative Framework is a response to the Legislature's obligations under s. 93. Unlike other provinces, Saskatchewan Legislatures of all political stripes have accepted the concept of two publicly funded school systems operating under s. 93. Far from it being an unexpected consequence of s. 93 to have a faith-based public school system and a secular school system, all Legislatures in this province going back over 50 years must be taken to have intended to have two such systems.

[334] This, of course, does not mean that the Government could not act to make changes to these systems, but no such legislation is before this Court, which brings us to the school that is at the heart of this litigation: St. Theodore School. Clearly, the trial judge was particularly concerned about the policy that led to its creation:

> [460] A further element of the proportionality test requires that the benefits of the impugned government action must outweigh the harm suffered by the infringing law. I see such harm, a harm that drives this litigation, in the thwarting of public school boards' decisions to close rural schools which have experienced diminished enrolments. …
>
> …

> [463] These examples illustrate to me that a constitutional provision originally meant to protect minority religious rights in education have been harnessed for a different purpose. I see the impugned government action not only unrelated to the defendants' alleged objective of equality in education and parental choice (objectives I have found neither pressing nor substantial), but I see the impugned legislation as creating a result that undermines the reasonable and statute-authorized decisions of school boards to close rural schools to fulfil their mandate of effective education and accountability to taxpayers. I accept that the planned closure of a rural school is invariably met with some local opposition. From the testimony of several trustees of rural public school boards, I accept as well that looming in these decisions is the threat that the local religious minority, be it Protestant or Catholic, will use the constitutional guarantee of a separate school to thwart a reasoned decision to close rural schools when enrolment numbers merit their closing. These results of the impugned government action have occasioned harm and are unrelated to the objectives CTT has attempted to assert.
>
> (Emphasis added)

[335] In support of the trial judge's analysis on this point, Good Spirit stressed these harms:

(a) the Legislative Framework undermines the ability of public school boards to close educationally and economically unviable schools; and

(b) the Legislative Framework undermines the viability of rural public schools.

[336] The response to this is that the Court has not been asked to consider whether the Legislature *could* pass legislation that would prevent a rural community from asking for a separate school when a secular school division decides in good faith to close a rural school. If the Legislature were to pass legislation intended to curb the practice that led to the creation of St. Theodore School, it would be an entirely different case that would truly engage s. 93(1). By making this statement, we do not comment on the constitutionality of any such legislation, but the point is that the Legislature has *chosen* a system that affords rural communities a means to keep a school in their community. As such, "undermining the viability of rural public schools" cannot be a harm that goes into the mix to determine the proportionality analysis of a breach of s. 2(a) or s. 15(1) under the s. 1 analysis. Not only does it not pertain to the *Charter* harm of breaching the freedom of religion of any individual, it is a consequence of a legislative choice that we must take the Legislature as having consciously adopted.

[337] A similar analysis applies to Good Spirit's claim that funding non-Catholic students attending Catholic schools "encourages an unhealthy competition for students between public and separate school boards". This may be true, but it also does not pertain to the claim of a breach of s. 2(a) or s. 15(1). In its written submissions, the Government maintains that funding "non-

Catholic students at a separate school does not take funding away from non-Catholic students at public schools. Nor does it take funding away from Catholics at a public school" (at para 290). Not commenting on the Government's assertion, it must be noted that the present funding model has been in place since the 1970s. This would seem to satisfy the "least harmful means of infringing the state's obligation of religious neutrality" criterion.

[338] There is a final point to be made in this context and it is a matter alluded to earlier, which is the potential unintended consequence of the trial judge's declaration that the Legislative Framework, in so far as it permits the funding of non-Catholic students attending Catholic schools, infringes the *Charter*. The unintended ramification is the potential effect on private religious schools. Held up by Good Spirit to support its *Charter* challenge, these schools could face their own litigation if the trial judge's decision is upheld. This is so because the core of the trial judge's reasoning is that s. 93 and s. 17(2) should be confined to rights that existed as of 1905. Christ the Teacher alludes to this issue in its factum: "The Trial Judge also does not consider the potential serious adverse effect on associate schools and independent schools" (at para 273). If the issue is more funding for public schools, no minority-faith school could be funded because every dollar that goes to a faith school diminishes funds for the public schools. Today the issue is funding beyond what Good Spirit sees as the core of s. 93, but tomorrow, it could be all faith-based funding. Yet, the broader interests of these parties were not truly represented in this action. Further, if the Legislative Framework were not saved by s. 1, one could be left with the only faith-based schools to receive Government funding being those at the core of s. 93 at 1905, i.e., Catholics or Protestants, which has the potential of further exacerbating the problem that Good Spirit perceives with only funding private religious schools partially.

4. Conclusion in relation to s. 1

[339] Applying the approach set out in *K.R.J.*, we find the benefits of the Government's approach to funding students in separate schools outweighs the harms caused by the infringement and the potential harm caused by any of the options outlined above, including bringing an end to the present funding model. To be clear, our overall conclusion is that the Legislative Framework does not infringe either s. 2(a) or s. 15. However, if we are in error in that regard, we would nonetheless uphold the Legislative Framework as a reasonable limit on religious freedom and one that is demonstrably justified in a free and democratic society.

XII. Conclusion

[340] The Government's fresh evidence application and the application to strike extracts from the Good Spirit's sur-reply factum are granted. The appeal from the *Trial Decision* is allowed. The trial judge's declaration of constitutional invalidity is set aside and Good Spirit's action against the Government and Christ the Teacher is dismissed. As a consequence, we also allow the appeal from the *Costs Decision*. Given that the fundamental source of funding for all parties – Good Spirit, Christ the Teacher and the Government – comes from the taxpayers of this province, we would make no order as to costs either for or against any party in either Court with respect to the applications and the appeal.

[341] We had the benefit of full and able arguments by all counsel who were involved in this appeal. We thank them for this assistance.

"Jackson J.A."

Jackson J.A.

"Ottenbreit J.A."

Ottenbreit J.A.

"Caldwell J.A."

Caldwell J.A.

"Whitmore J.A."

Whitmore J.A.

"Schwann J.A."

Schwann J.A.