



Ontario Catholic School Trustees' Association



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March 25, 2020

MEMORANDUM

TO: Chairpersons and Directors of Education
- All Catholic District School Boards
OCSTA Board of Directors

FROM: Nick Milanetti, Executive Director

SUBJECT: **Saskatchewan Appeal Court Decision: Theodore Case**

On Wednesday March 25, 2020 the Court of Appeal of Saskatchewan released its' decision regarding Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212 and The Government of Saskatchewan ("Theodore").

Decision Summary

The Appeal Court ruled in favour of the government of Saskatchewan and the supporting Catholic Association intervenors arguing that the trial judge made three key errors in his ruling. As the Appeal Court states:

*we find the trial judge made **three** fundamental errors of law that permeate the principal issues that had to be resolved at trial. 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.*

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.

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.

In the result, we would allow the appeal and set aside the trial judge's declaration of constitutional invalidity (p. 2-4).

For a detailed summary of the decision, see the attachment from OCSTA's legal counsel.

Background

As you know, OCSTA applied for and was granted intervenor status in the appeal. Our legal counsel presented our submission on March 12 and 13th 2019 to the court. The proceedings were live streamed on CBC and gained local media attention.

The legal process on the Theodore case has been ongoing for over a decade. By decision on April 20, 2017, the trial judge held that government funding of non-Catholics to attend public Catholic schools was an unconstitutional violation of state neutrality, protected as part of the freedom of religion guarantee enshrined in s. 2(a) of the *Charter of Rights and Freedoms*.

The Premier of Saskatchewan shortly thereafter indicated his intention to invoke the constitutional override clause (also known as the notwithstanding clause, s. 33 of the *Charter*) which would have the effect of overriding the judgment and permitting the continued funding of non-Catholics in public Catholic schools. The Court of Appeal issued a temporary stay of the trial judge's decision, which therefore rendered invoking the notwithstanding clause unnecessary. The temporary stay remained in force until the decision was released on March 25, 2020.

Implications of Decision

The decision of the Saskatchewan Court of Appeal will not be binding in Ontario; however, it will be considered persuasive by judges in Ontario.

It is possible that with this decision, the public school board and its' association may seek leave to appeal the decision to the Supreme Court of Canada. According to OCSTA's counsel, while the chances in general of obtaining leave to appeal to the Supreme Court of Canada are low, they are higher in section. 93 denominational school cases, and in a case such as this, there is a reasonable chance leave would be granted. Whether leave is granted depends on whether the Supreme Court sees an issue of national importance which arises from the decision of the Court of Appeal, and as such, is dependent to a great extent on the Court of Appeal's analysis of the legal issues involved.

Next Steps for OCSTA

We will review the decision carefully in consultation with our constitutional legal counsel and consider the potential for OCSTA to intervene in any Supreme Court of Canada appeal process. Given the significance of this issue for the continued public funding of Catholic education in Ontario, and the potential costs of such a legal process, we will consult with the OCSTA board and members prior to any decisions about proceeding with such legal action.

Please do not hesitate to contact me or Steve Andrews (sandrews@ocsta.on.ca) if you have any questions or concerns.