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Edward (Ted) R. Lewis

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# A SCHOOL DIVIDED: A HISTORICIST LEGAL ANALYSIS OF GOOD SPIRIT SCHOOL DIVISION NO 204 V CHRIST THE TEACHER ROMAN CATHOLIC SEPARATE SCHOOL DIVISION NO 212

Edward R (Ted) Lewis\*

## ABSTRACT

On the cusp of a judgment by the Saskatchewan Court of Appeal, this article examines the 2017 Saskatchewan Court of Queen's Bench decision in *Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212*. In this case, the SKQB ruled that non-Catholic students attending a publicly funded Catholic school were not entitled to per-student funding grants administered by the provincial government. This article reviews the case using a historicist lens informed by the philosophy of Edmund Burke, which the author suggests is appropriate in the Canadian constitutional context. Through this constitutional lens, the author examines the constitutional history of separate school funding in Saskatchewan and other Canadian jurisdictions. The author suggests that this history reveals the premium on educational choice that has informed educational policy in Canada. With this history in mind, the article turns to the SKQB judgment. It suggests that the application of several of the key interpretive tools was flawed in light of this history, the development of Charter jurisprudence, and a richer understanding of "state neutrality" in the Canadian context.

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\* Edward R Lewis completed his JD at the Schulich School of Law at Dalhousie University in 2019. He also holds a Bachelor of Arts from Trinity Western University. He would like to thank Professors Diana Ginn and James Barry for their invaluable assistance in developing this paper. He also wishes to thank Dr. Janet Epp-Buckingham for kindling his interest in this subject, and for her own invaluable scholarship on religious education and institutions in Canada.

## INTRODUCTION

In April 2017, the courthouse in Yorkton, Saskatchewan, became a battleground for one of the most contentious provisions of the Canadian constitution.<sup>1</sup> In his judgment in *Good Spirit School Division No 204 v Christ the Teacher Roman Catholic School Division No 212*, Judge Donald Layh of the Saskatchewan Court of Queen's Bench (SKQB) ruled that non-Catholic students attending publicly-funded Catholic schools in Saskatchewan were not entitled to per-student grant funding administered by the province.<sup>2</sup> The ruling provoked swift and critical reaction from parents, religious groups, and First Nations.<sup>3</sup> The Government of Saskatchewan eventually invoked the notwithstanding clause in order to protect its educational funding regime.<sup>4</sup> An appeal was also heard by the Saskatchewan Court of Appeal (SKCA) in March 2019.

In advance of the impending appeal judgment, this paper examines the reasons for judgment in this very complicated case, and offers criticisms of these reasons. To these ends, the paper is broken down into two components. The first component deals with the critical methodology employed – a Burkean historicist approach – as well as relevant constitutional history leading up to the case. The constitutional history includes case studies of the legislative approach to public denominational education in select provinces. Finally, this part addresses relevant modern interpretive tools – most notably the denominational aspects test for s 93 protections articulated by the Supreme Court of Canada.

In the second part of the paper, the primary issues identified by Layh J, and his reasons for judgment in each, are examined.<sup>5</sup> Criticism through the Burkean historicist lens is then undertaken. While not optimistic of concurrence at the appellate level, the paper suggests that there are problems with the application of the denominational aspects test in Layh J's reasons. These include the problem of distinction between denominational aspects and non-denominational aspects that give effect to them, the

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<sup>1</sup> Cf. Janet Epp-Buckingham, *Fighting over God: A Legal and Political History of Religious Freedom in Canada* (Montreal & Kingston: McGill-Queen University Press, 2014) at 32.

<sup>2</sup> 2017 SKQB 109 [*Good Spirit*].

<sup>3</sup> "Parents, Indigenous leaders dread practical reality of Catholic school ruling" *CBC News* (26 April 2017), online: <<http://www.cbc.ca/news/canada/saskatoon/parents-indigenous-leader-catholic-school-ruling-1.4087739>>.

<sup>4</sup> Bill 89, *An Act to amend the Education Act, 1995*, 2nd Sess, 28th Leg, Saskatchewan, 2017 (assented to 30 May 2018).

<sup>5</sup> Not all of the issues from the trial are considered in this analysis. See footnote 86.

use of historically static interpretive principles, and the potential for judicial manipulation the test. The paper also argues that Layh J's conclusions do not sit comfortably with a rich understanding of Canada's unique conception of state neutrality. Finally, it suggests that Layh J's findings of violations of the *Charter of Rights and Freedoms* could (and arguably should) be saved under s 1.<sup>6</sup>

## PART I: HISTORICAL AND ANALYTICAL FRAMEWORK

### Establishing a Burkean Historicist Framework

As set out in the introduction, this paper intends to offer a historicist legal analysis of Layh J's reasons in the *Good Spirit* decision. However, as the concept of historicism can be broad and somewhat elusive, it is necessary to set out its general nature and the specific branch that will be implemented in this analysis.

In its most basic sense, historicism can be defined as a "mode of thinking in which the basic significance of specific social context [to social development] - e.g. time, place, local conditions - is central."<sup>7</sup> The thoughtful reader will, however, observe that such a definition fails to incorporate singularity. If historical and social context is at the root of human social development, it can be axiomatically presumed that there could be as many historicist interpretive methods as there are distinct societies - not all of which might be appropriate. The "looseness" of the definition of historicism is evident in the breadth of philosophers who incorporated and critiqued it.<sup>8</sup>

Hegel, widely recognized as a foundational historicist philosopher, viewed history as the means of synthesizing the competitive principles of binding, universal morality and the "emancipation of the passions [of self-interested individuals] and their satisfaction."<sup>9</sup> Hegel's foundational historicism suggests that the essence of any human social project, including a constitution, "can be sought only through

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<sup>6</sup> *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 [*Charter*].

<sup>7</sup> "Historicism" *Faversham Stoa* (blog), online: <<https://www.stoa.org.uk/topics/history/Historicism.pdf>> ["Historicism"].

<sup>8</sup> *Ibid.*

<sup>9</sup> Pierre Hassner, "George WF Hegel", translated by Allan Bloom, in Leo Strauss and Joseph Cropsey, eds, *History of Political Philosophy* (Chicago: University of Chicago Press, 1987), 732 at 739.

understanding that.”<sup>10</sup> The breadth of this mode of social understanding is evident in the divergent positions of interpreters ranging from the Right Hegelians, who seized upon the organicism of Hegel’s thought as “a justification of the unique destiny of national groups,” to Karl Marx, whose theory of alienation is founded upon the disruption of the historical relationship between workers and their labour.<sup>11</sup> Based on such philosophical company, a historicist framework must be defined with great care.

Of the many philosophers who have incorporated elements of historicism into their work, the one most appropriate for the purposes of this analysis is Edmund Burke (b. 1729 - d. 1797). For most of his adult life, Burke served as a member of the British House of Commons. During his career, he amassed a wealth of written and oratory works that warned, in some of the most florid language imaginable, against the dangers that he perceived in the “revolutionary” philosophies of his day: “If there is one recurrent theme in Burke’s letters, speeches, and writings, it is emphasis on the moral and political evils that follow upon the intrusion of theory into political practice. It is theory as such that he rejects.”<sup>12</sup>

Unlike Hegel or Marx, Burke’s historicist approach to social affairs is not theoretically established or primarily prescriptive in nature.<sup>13</sup> Instead, his primary assertion is that the “direction of human affairs belongs to prudence; and instead of establishing what might be the best or legitimate state, he celebrates the genius of the British constitution. Burke’s political philosophy emerges from the elaboration of...two things, prudence and the British constitution.”<sup>14</sup> This prudence, Burke emphasizes, is a “public and enlarged prudence” that is sovereign over all theoretical rights or metaphysical first principles.<sup>15</sup> Thus, for Burke, any positive social or constitutional development is to be effected always through a prudential, cautious approach:

By a slow but well-sustained progress, the effect of each step is watched; the good or ill success of the first gives light to us in the second; and so, from light to light, we are conducted with

<sup>10</sup> “Historicism”, *supra* note 7.

<sup>11</sup> *Ibid.*

<sup>12</sup> Harvey Mansfield, Jr, “Edmund Burke” in Leo Strauss and Joseph Cropsey, eds, *History of Political Philosophy* (Chicago: University of Chicago Press, 1987) 687 at 689 [Mansfield].

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.* at 692.

<sup>15</sup> *Ibid.* at 693.

safety through the whole series. We see that the parts or the system do not clash. The evils latent in the most promising contrivances are provided for as they arise. One advantage is as little as possible sacrificed to another. *We compensate, we reconcile, we balance.* We are enabled to unite into a consistent whole the various anomalies and contending principles that are found in the minds and affairs of men.<sup>16</sup>

For Burke, “slow but well-sustained” progress, and the essential unity of various social anomalies into a consistent whole, was the hallmark of the British constitutional order. Largely unwritten, this constitution

does not have a lasting form... rather, it has order that is of no particular kind because its parts have variety and diversity. The parts represent interest that combine or oppose one another in that action and counter-action, which..., from the reciprocal struggle of discordant powers, draws out the harmony of the universe.<sup>17</sup>

Burke’s constitutional philosophy, then, (as distinguished from positivist theories), is one in which a society achieves order through an organic struggle, through the achievement of compromise over protracted discordance.

As a final note, it must be remembered that, given his socially contextual view of constitutional development, Burke emphasized the importance of history in creating excellent constitutions, informed by precepts extant throughout history: “we must regard the constitution as an inheritance, which means...*not inherited from founders* but as if it has come to us from no beginning.”<sup>18</sup>

### **Burke’s Constitutional Philosophy Directly Translates to Canada**

With attention to the unique constitutional history of Canada, it may be suggested that Burke’s philosophy, which is linked to the organic nature of the British constitution, also lies at the heart of the great Canadian experiment.<sup>19</sup> The preamble

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<sup>16</sup> Edmund Burke, “Reflections on the Revolution in France” in *The Harvard Classics* at para 280, online: <<http://www.bartleby.com/24/3/12.html>>. Emphasis added.

<sup>17</sup> Mansfield, *supra* note 12 at para 698-99.

<sup>18</sup> *Ibid* at 700.

<sup>19</sup> Or at least the first round of Canada’s constitutional documents.

to the *Constitution Act, 1867*, confirms this reality with its recognition of the desire of the four original Canadian provinces to be federally united “into One Dominion...with a Constitution similar in Principle to that of the United Kingdom.”<sup>20</sup> Observations of our constitutional practices today reveal the continued operation of this principle in the recognition of the importance of the unwritten sources - those sources beyond lasting form - in our Constitution to this day.

The SCC affirmed the importance of unwritten sources in two important cases in the 1990s. In *Reference re Remuneration of Judges*, the court was called to consider “whether and how the guarantee of judicial independence of s. 11(d) [of the *Charter*] restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of provincial court judges.”<sup>21</sup> In his reasons for the majority, Lamer CJ found that “judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*. The existence of that principle...is recognized and affirmed by the preamble to the *Constitution Act, 1867*.”<sup>22</sup> Further, in the *Reference re Secession of Quebec*, the court, while noting that “unwritten norms” could not be taken as an “invitation to dispense with the written text of the Constitution,” they were nonetheless “powerful normative force[s]...binding upon both courts and governments.”<sup>23</sup> In its reasons, the court noted that Canada’s federal system is considerably informed by unwritten values.<sup>24</sup>

These cases demonstrate the integral position that a Burkean analysis could occupy within conversations on Canadian constitutional interpretation today. In examining any constitutional provisions – including those at issue here – one must be attentive to unwritten constitutional norms, and informed by historical developments under which they arose.

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<sup>20</sup> *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 at Preamble [*Constitution Act, 1867*].

<sup>21</sup> *Reference re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3, [1997] SCJ No 75 at para. 1.

<sup>22</sup> *Ibid* at para 83.

<sup>23</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para. 54, [1998] SCJ No 61.

<sup>24</sup> *Cf. Ibid.* at para 55-60.

## A HISTORICIST ANALYSIS ON THE HISTORICAL IMPLEMENTATION OF S 93 REVEALS THE IMPORTANCE OF CHOICE

Having established the importance of history in Canadian constitutional development and analyses, it is appropriate to offer a brief examination of the approach taken by the federal government and select provinces with respect to the provincial plenary power over education and its denominational exceptions under s 93. An analysis reveals that while the broad objective of public morality weighed heavily in the development of schools, the element of choice was a concession won (primarily) by Canada's Roman Catholics. This right of choice, for reasons that will be elucidated further, was improperly dismissed by Layh J in his judgement.

### **Background: The Confederation Compromise**

The inclusion of the limitations on the provinces' plenary powers with respect to education was a crucial part of Confederation arrangements. Dubbed the "confederation compromise" by Wilson J in *Reference Re Bill 30*, these limitations were placed on the plenary power as a remedy to "early conflict over religion...between Roman Catholic and Protestant education."<sup>25</sup> This conflict, a byproduct of the intensive involvement of churches in all aspects of schooling at that time, had led to a host of legislative restrictions being placed (generally) on Catholic education by Protestant majorities.<sup>26</sup>

In the lead-up to Confederation, spurred by the concerns of the Catholic minority in Upper Canada (now Ontario) and the Protestant minority in Lower Canada (now Quebec), several of the Fathers of Confederation made assurances that protection for educational rights would be included as part of any constitutional arrangements.<sup>27</sup> The Fathers' attention to the need for choice was aptly summarized by Alexander Galt in an address to supporters: "There could be no greater injustice to a population than to compel them to have their children educated in a manner

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<sup>25</sup> *Reference Re Bill 30, an Act to amend the Education Act (Ontario)*, [1987] 1 SCR 1148 at para 64, [1987] SCJ No 44 [*Reference Re Bill 30*]; Epp-Buckingham, *supra* note 1 at 36.

<sup>26</sup> *Cf.* Epp-Buckingham, *supra* note 1 at 36.

<sup>27</sup> Franklin A Walker, *Catholic Education and Politics in Upper Canada* (Toronto: JM Dent & Sons (Canada) Ltd, 1955) at 292-293 [Walker].



contrary to their own religious belief...[such an injustice] could not be done...without sowing the seeds of discord in the community.”<sup>28</sup>

The compromise envisioned by Galt and others was given its constitutional form primarily in ss 93(1) and 93(3) of the *Constitution Act, 1867*.<sup>29</sup> S 93(1) that no provincial laws with respect to education “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.”<sup>30</sup> Simply put, this provision guaranteed the rights of minority denominational schools in each province at such time as they entered into Confederation, which in turn created a patchwork of denominational rights across the country. S 93(3), meanwhile, guaranteed that where any separate (or, for our purposes, “denominational”) school system exists or is “thereafter established...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.”<sup>31</sup>

Choice in religious education, then, was viewed by many of Canada’s founders as an imperative part of the Confederation arrangement. However, in light of the plenary power granted to the provinces with respect to education under s 93, the incorporation of such choice on the ground took different forms in different provinces.

### **Nova Scotia: A Restrictive Approach**

Of the original parties to Confederation, Nova Scotia illustrates a more restrictive approach to the public funding of denominational schools - and, indeed, to denominational schools generally. In 1766, the Nova Scotia General Assembly banned the establishment of Roman Catholic schools, in an attempt to eliminate “popish religion” in the province.<sup>32</sup> While this draconian measure did not persist indefinitely, the Nova Scotian approach to denominational education was less accommodating than that of other provinces. This was primarily due to the fact that, unlike jurisdictions in which a clear religious majority and minority existed

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<sup>28</sup> Alexander Tilloch Galt, Speech Published in *The Leader* (28 November 1864), quoted in *Ibid.* at 293-294.

<sup>29</sup> *Supra* note 20.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.* Emphasis added.

<sup>32</sup> Epp Buckingham, *supra* note 1 at 36.

(specifically, Ontario and Quebec), Nova Scotia was home to “five dominant views of Christianity and a strong Jewish community.”<sup>33</sup> It was for this reason that “in the 1860s the government of Premier Charles Tupper rejected legislative guarantees for confessional schools...in favour of a single public school system where religion could be taught after hours.”<sup>34</sup> Thus, Nova Scotia entered Confederation without an established school system, effectively opting out of s 93(1) in favour of a more unified approach in support to education that emphasized a “common morality and common nationality.”<sup>35</sup>

Notwithstanding this approach, Catholic schools were, in the nineteenth century and beyond, permitted to operate in the province – a freedom that was jealously guarded by Catholic authorities against government encroachment.<sup>36</sup> Furthermore, the element of educational choice continued to manifest itself in the political realm. For some time after Confederation, for instance, “some public schools operate as Catholic schools under ‘informal agreements’ with the public-school board. The Catholic Church would build a school and make it available to the public-school board on the condition that Catholic children could attend these schools and that the schools would be staffed by Catholic teachers.”<sup>37</sup>

While the province’s informal arrangements with the Catholic Church did not ultimately persist, the anomaly indicates that the element of choice continued to rear its head in even the unlikeliest jurisdictions. Any uncertainty in this matter is dispelled with reference to the words of Sir Charles Tupper when he eventually became Prime Minister, speaking with reference to his provincial work in a debate on the Manitoba Schools Question: “I may say that the smooth working of the Education Act in Nova Scotia is due to the reason that...it has yet practically met the wishes of both Catholics and Protestants in Nova Scotia.”<sup>38</sup> While the province’s political choice was unitary

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<sup>33</sup> David Michels & David Blaikie, “Matters of Faith and Conscience: A Turning Point in the Taking of Oaths in Canada” in Derocher et al, eds, *L’Etat canadien et la diversité culturelle et religieuse* (Quebec: Presses de l’université du Québec, 2009) 49 at 63.

<sup>34</sup> *Ibid.*

<sup>35</sup> Robert Bedard, “Moral Education in Nova Scotia, 1880-1920” (1984) 14:1 *Acadiensis* 49 at 50.

<sup>36</sup> Michels and Blaikie, *supra* note 33 at 64.

<sup>37</sup> Anne Bayefsky and Arieh Waldman, *State Support of Religious Education: Canada vs the United Nations* (Boston: Martinus Nijhoff Publishers, 2007) at 11.

<sup>38</sup> Sir Charles Tupper, “Speech before the House of Commons” (14 April 1896), online: <<https://www.collectionscanada.gc.ca/primeministers/h4-4057-e.html>>. Emphasis added.

in nature, its success rested on the choice of both sides to compromise in regard to education.

### **Ontario: An Evolutionary Approach**

The legal development of education for the Catholic minority in Ontario mirrored the tension between common morality and choice as in Nova Scotia, but under different demographic circumstances and with different results. In the early nineteenth century, Ontario's population was majority Protestant and minority Catholic. The *Common School Act* of 1841 prevented the inclusion of Roman Catholic schools into a unified public school system.<sup>39</sup> However, s. 11 of the act allowed that "any number of inhabitants of a different faith from the majority in such township or parish might choose their own trustees" and "establish and maintain one or more common schools" that would be eligible for the same government support as other common schools.<sup>40</sup> An assortment of legislative provisions were passed throughout the 1840s and 50s, refining the rights of Roman Catholics and Protestants to receive instruction from teachers of their own "persuasion" and addressing assorted administrative matters.<sup>41</sup> In the midst of these developments, in 1844, Egerton Ryerson was appointed Deputy Superintendent of Education for Canada West (now Ontario) in 1844. Ryerson was "determined to establish a free, publicly financed educational programme in the province, and "disliked the notion of separate schools."<sup>42</sup> His preferences aside, however, "as long as [such schools] were on the statute books he gave them the full benefit of the letter of the law."<sup>43</sup>

In the wake of these developments, and on the cusp of Confederation, the *Scott Act* was passed, forming "the basis of today's separate schools" in Ontario.<sup>44</sup> The last act on this matter passed prior to Confederation (and the consequent basis of existing rights under s 93(1)), the act guaranteed minority educational rights and "made permanent all the advantages granted to separate schools."<sup>45</sup> Such advantages

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<sup>39</sup> Epp Buckingham, *supra* note 1 at 36.

<sup>40</sup> Robert M Stamp, *The Historical Background to Separate Schools in Ontario* (Toronto: Queen's Printer for Ontario, 1985) at 1.

<sup>41</sup> *Ibid* at 2-4.

<sup>42</sup> Walker, *supra* note 27 at 57-58.

<sup>43</sup> *Ibid.* 59.

<sup>44</sup> Stamp, *supra* note 40 at 5.

<sup>45</sup> *Ibid.*

included their ability to be administered and funded like their common school counterparts - both of which, at that time, were concerned with elementary education alone.<sup>46</sup>

Notwithstanding the *Scott Act*, Roman Catholics in Ontario had to guard the continued existence of their school system against a several legislative attacks, including such remedies as proposed constitutional amendments to eliminate their protections and, in 1890, legislation requiring that all school fees collected would be directed to the common system.<sup>47</sup> A blow was also struck in 1928 in the judgment of the Judicial Committee of the Privy Council (JCPC) in *The King v Tiny Township Separate School Trustees*.<sup>48</sup> On appeal from the SCC, the JCPC held that Roman Catholics were not entitled to operate public denominational secondary schools, and were not exempt from municipal taxation for secondary schools other than their own.<sup>49</sup> This was based on the JCPC's view that secondary schools, which were a novel development in education at that time, were not part of the extant rights entrenched at Confederation by s 93(1).<sup>50</sup> However, in its judgment on the matter, the SCC had upheld the applications of the Tiny Roman Catholic board, saying that "to hold otherwise would be to render illusory in a most material particular the substantial protection to religious minority rights in regard to education which the Imperial legislation of 1867 was designed to assure."<sup>51</sup> The ruling left in its wake a system in which, for decades, Roman Catholic separate schools continued to operate at a financial disadvantage.<sup>52</sup> It is interesting to note that this was not the first case in which the JCPC overturned a domestic ruling on government funding of Roman Catholic separate schools.<sup>53</sup>

However, by the 1960s, bolstered by a "new climate of tolerance" and in the wake of new increases in enrollment, the scales began to tilt in favour of funding for Roman Catholic schools.<sup>54</sup> The culmination of this shift came in 1984, with the case

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<sup>46</sup> *Ibid.*

<sup>47</sup> Epp Buckingham, *supra* note 1 at 39.

<sup>48</sup> [1928] AC 363, 3 DLR 753 [*Tiny* JCPC].

<sup>49</sup> Stamp, *supra* note 40 at 12.

<sup>50</sup> *Tiny* JCPC, *supra* note 48 at pages 768-771.

<sup>51</sup> *Tiny Separate School Trustees v The King*, [1927] SCR 637, 4 DLR 857 at page 683.

<sup>52</sup> Stamp, *supra* note 40 at 31.

<sup>53</sup> *Cf City of Winnipeg v Barrett*, [1892] AC 445 (PC) [*Barrett* JCPC]. More on this under the Manitoba Schools Question, below.

<sup>54</sup> *Cf* Stamp, *supra* note 40 at 32.

of *Reference Re Bill 30*, in which SCC overturned the JCPC's decision in *Tiny*.<sup>55</sup> As noted previously in general terms, the ruling determined that the subject bill, which would extend full funding to Roman Catholic separate secondary schools, was constitutional under both s 93(1) and s 93(3). In her reasons for the majority, Justice Wilson adopted a purposive approach to Ontario's legislative history, which allowed for the growth of the denominational school system into the current age:

By section 7 of the Scott Act separate school trustees were given the same powers and duties as common school trustees...They also had a broad power...to determine the courses to be taught and to prescribe the level of education required to meet the needs of the local community. As Anglin C.J. [of the SCC] pointed out in *Tiny* this was not a mere practice tolerated by the educational authorities but was permitted by law. I believe the Privy Council was in error in holding that the existence of the Council's general regulatory power...nullified the trustees' power to provide a secondary level of instruction in their schools if they deemed it appropriate. *It is clear that if the foregoing right was to be meaningful an adequate level of funding was required to support it.*<sup>56</sup>

Justice Wilson also found that public funding was protected under s 93(3). She supported this judgment with reference to the provinces' plenary power over education.<sup>57</sup> She further noted that, while the JCPC ultimately ruled in *Barrett* that the withdrawal of funding for Catholic schools in Manitoba was permissible, it had "never questioned the ability of the Manitoba Legislature to add to the educational rights and privileges of denominational school supporters if it saw fit to do so."<sup>58</sup> The effect of these statements is the strong suggestion that it was open not only to Ontario to

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<sup>55</sup> *Reference Re Bill 30*, supra note 25; *Tiny* 1928, supra note 48.

<sup>56</sup> *Reference Re Bill 30*, supra note 25 at para. 59-60; *Barrett* JCPC, supra note 53.

<sup>57</sup> *Reference Re Bill 30*, supra note 25 at para 21. It is interesting to note that Estey J, whose statements on the "axiomatic" nature of a *Charter* violation absent s 93 was central to Layh J's analysis, issued his minority decision using s. 93(3) alone: "It would in my view be quite incorrect to conclude that the words "thereafter established" in s 93(3), and the appeal process found therein, only apply to provinces that at the time of Union had no publicly funded separate school system. There is no compelling reason to interpret so restrictively the words in s 93(3). In my respectful view, the plain meaning of the words "thereafter established" necessarily includes additional rights or privileges, such as full funding for secondary education in Ontario, that have been granted subsequent to Confederation and in addition to the minimum rights and privileges guaranteed in s 93(1). I conclude therefore that this post-Confederation legislative power of the province to legislate with respect to education includes the establishment of separate schools providing education at the secondary school level." *Ibid* at para 69-70.

<sup>58</sup> *Ibid.* at para 25. *Cf Brophy v Attorney General of Manitoba*, [1895] AC 202 (PC) [*Brophy*].

extend denominational school funding post-Confederation, but to other provinces as well - and with a fair degree of discretion.

In the decades following *Reference Re Bill 30*, Ontario has continued to maintain the most generous of Canada's remaining publicly funded separate school systems.<sup>59</sup> The compendium of historical evidence that has been presented here indicates that, in spite of many attempts to limit such rights, the value of choice with regard to separate schools has been strongly affirmed by the SCC over time - and reflected in increases in enrollment in Ontario Catholic high schools that have been sustained.<sup>60</sup>

### **The Manitoba Schools Question: A Question of Relevance to Saskatchewan**

In concluding the comparative historical analysis of this paper, it must be noted that the institution of publicly funded denominational students in Saskatchewan was directly informed by the Manitoba Schools Question, which dominated the Canadian federal election of 1896, and ultimately led to the defeat of Sir Charles Tupper's Conservative government for its failure to address the situation in a timely way.<sup>61</sup>

The controversy, which had been bubbling for some time in Manitoba with the rise of the Anglophone Protestant population and the decrease of the Francophone Catholic population, erupted in the wake of the provincial government's decision to eliminate public funding for Catholic schools, and enforce general collection of revenue for public schools.<sup>62</sup> Catholic Canadians were enraged by the decision, and litigation came before the courts in the cases of *Barrett v City of Winnipeg* and *Brophy v The Attorney General of Manitoba*.<sup>63</sup> In the former case, a ratepayer refused to pay taxes in support of Manitoba common schools, and was taken to court. The latter case concerned an appeal by the minority with regard to the legislation by right under s 93(3).

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<sup>59</sup> Cf. Bayefsky, *supra* note 37 at 9; *Reference Re Bill 30*, *supra* note 25.

<sup>60</sup> Stamp, *supra* note 40 at 32; Deani Neven Van Pelt et al, *Where our Students are Educated: Measuring Student Enrollment in Canada* (Fraser Institute, 2015), online: <<https://www.fraserinstitute.org/sites/default/files/where-our-students-are-educated-measuring-student-enrolment-in-canada.pdf>> [Fraser Institute].

<sup>61</sup> Stephen Azzi, "Election of 1896" in *Canadian Encyclopedia*, online: <<http://www.thecanadianencyclopedia.ca/en/article/election-1896-feature/>>.

<sup>62</sup> Michel Verrette, "The Manitoba Schools Question" in *Canadian Encyclopedia*, online: <<http://www.thecanadianencyclopedia.ca/en/article/manitoba-schools-question/>>.

<sup>63</sup> *Barrett* JCPC, *supra* note 53; *Brophy*, *supra* note 58.

Both cases reached the SCC, and were appealed to the JCPC. In *Barrett*, the JCPC held that the impugned provisions of the 1890 Act were *intra vires*, observing that “it is not the law that is at fault. It is owing to religious convictions which everybody must respect, and to the teaching of their Church, that Roman Catholics and members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.”<sup>64</sup> This decision was characterized as a “surprise” by one commentator, particularly when it was followed by the *Brophy* ruling in which a right of appeal was held to exist for the Manitoba Catholic minority – forcing the inert Conservative government to act on the issue.<sup>65</sup>

Of particular interest here is the fact that the JCPC overturned a unanimous SCC ruling in *Barrett*, in which the choice of parents was held to be an integral part of Canadian education:

The wishes of parents are entitled to the first consideration. This is the opinion of the Royal Commission on education appointed in England in 1886...This is an act which prejudicially affects this class of persons, as to their conscientious convictions, as to their pockets, in their relation to their church, in the most important matter of secular and religious education of their young. *It is in most marked contradiction to the spirit of conciliation displayed in the act which dealt with these rights and to the wise spirit of toleration which is displayed in the enactment that was in force for 20 years, and offends against the spirit and the letter of the act.*<sup>66</sup>

The strength of this statement, within a historicist analysis denominational school funding rights in Saskatchewan, should not be unduly diminished. While the decision was ultimately overruled, it demonstrates that, in 1891 as in 1984 at *Reference Re Bill 30*, the value of educational choice, while historically often the subject of legislative limitation, was an important value that informed denominational school rights in Canada.<sup>67</sup> Under a Burkean historicist framework, this value must continue to form part of today’s debates on the issue.

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<sup>64</sup> *Barrett* JCPC, *supra* note 53.

<sup>65</sup> Claude Belanger, “Barrett v The City of Winnipeg” (23 August 2000) *Quebec History* (blog), online: <<http://faculty.marianopolis.edu/c.belanger/quebechistory/docs/manitoba/1892-1.htm>>.

<sup>66</sup> *Barrett v The City of Winnipeg*, (1891) 19 SCR 374, 1891 CanLII 61 (SCC) at 381. Emphasis added.

<sup>67</sup> *Reference Re Bill 30*, *supra* note 25.

## MODERN INTERPRETIVE TOOLS

At the outset of this section, it should be noted that, notwithstanding its seemingly anachronistic content, s 93 continues to operate by virtue of s 29 of the *Charter*, which states that “[n]othing 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” – a further demonstration of the continuing recognition of the Confederation compromise by the drafters of the *Constitution Act, 1982*.<sup>68</sup> Of course, interpretation of the continuing operation of the section has evolved over time, and given rise to modern methods of interpretation.

Central among these methods is the “denominational aspects test,” which was articulated by Beetz J. in *Protestant School Board of Greater Montreal*.<sup>69</sup> In that case, which challenged the implementation of a uniform curriculum for non-religious instruction in Quebec, the SCC held that s 93(1) protected “powers over denominational aspects of education and those non-denominational aspects that are related to denominational concerns which were enjoyed at the time of Confederation.”<sup>70</sup> This test, under which the Protestant school board’s challenge was ultimately dismissed, forms an integral part of Layh J’s analysis and the critique offered in this essay.

Having now examined the critical framework, relevant history, and interpretive principles, we may now turn to the *Good Spirit* case itself – and the questions that Layh J’s reasons have raised.

## PART II: ANALYSIS AND CRITICISM

### ***Good Spirit School Division v Christ the Teacher: A Summary***

#### ***Facts***

In 2003, the Yorkdale School Division decided to close the elementary public school that it operated in Theodore, a town of about 400 residents in southeastern

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<sup>68</sup> *Charter*, *supra* note 6 at s 29. *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

<sup>69</sup> *Protestant School Board of Greater Montreal v Quebec (Attorney General)*, [1989] 1 SCR 377, [1989] SCJ No 19 [*Protestant School Board*]. Summarized by Dickson J in *Mabe v Alberta*, [1990] 1 SCR 342 at para 73, [1990] SCJ No 19 [*Mabe*].

<sup>70</sup> *Protestant School Board*, *supra* note 69.



Saskatchewan. At that time, the school had 42 students enrolled. The school division determined that it would be best to bus these students to its school in Springside, a village 17 kilometres away. Unsurprisingly, many of the parents whose children had attended the Theodore Public School were unhappy with the decision. After lobbying at community meetings failed to reverse the decision,<sup>71</sup> concerned parents of Theodore, who had banded together under the community “Save our School Committee,” decided to exercise the “last resort” of petitioning the provincial Minister of Education to create a Catholic School division in Theodore. They were ultimately successful in doing so and, after what Layh J described as “protracted negotiations,” the Theodore Roman Catholic School Division was established. It then purchased the former public school building and opened the St Theodore Roman Catholic School.<sup>72</sup> While the school operated as a Catholic school, possessing “the attributes...and offer[ing] a program that accorded with the usual operation of a Roman Catholic separate school,” its student population was never majority Catholic.<sup>73</sup> Layh J noted that, when the school was established, 13 of its 42 students (or 31 percent) were Catholic, and that this proportion had ranged over time from “a high of 39 percent to a low of 23 percent.”<sup>74</sup>

The establishment of this school was significant to the Yorkdale School Division, which was eventually succeeded by Good Spirit School Division No. 204 (GSSD), the amended applicant in the case. Under the *Education Act, 1995* and the accompanying regulations, the Government of Saskatchewan maintains a funding system that, while complicated, can be summarized for the purposes of this paper by noting that “the largest component of government funding is tied to student enrolment [in public and/or separate schools]. Simply stated, the more students, the more government funding.”<sup>75</sup> Subsequent government amendments to the act in 2009 “set and capped province-wide mill rates [that is, the method of calculating property taxes] for education taxes respecting public school divisions.”<sup>76</sup> While public schools were bound to this arrangement, public separate schools were able to set their own

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<sup>71</sup> *Good Spirit*, *supra* note 2 at para 134.

<sup>72</sup> *Ibid* at para 1.

<sup>73</sup> *Ibid* at para 2.

<sup>74</sup> *Ibid*.

<sup>75</sup> *Ibid* at para 16. *Education Act*, SS 1995, c E-o.2 [*Education Act, 1995*], *Education Funding Regulations*, RRS c. E-02.

The impugned provisions are as follows: *Education Act*, s 53, s 85, s 87, and s 310; *Education Funding Regulations* s 3 and s 4.

<sup>76</sup> *Ibid* at para 14.

mill rates and levy their own taxes.<sup>77</sup> Simply put, the St. Theodore Catholic School had an additional means of gathering the necessary financial resources, while GSSD lost the funding that it would normally have received had Theodore's non-Catholic students been transferred to the nearest local elementary school. As in so many cases, the application in this case was ultimately related to finances.

In 2005, based on this loss of funding, GSSD commenced an action against Christ the Teacher School Board (the successor to the Theodore Catholic School Board) (CTT), as well as the Government of Saskatchewan. For a remedy, GSSD sought a declaration that the relevant sections of the *Education Act, 1995* and the pursuant regulations are unconstitutional "to the extent that they provide funding to educate non-Catholic students attending separate schools."<sup>78</sup> CTT and the government defended the action on the basis that the government's funding model was protected under s 93 of the *Constitution Act, 1867* – and, in the alternative, that there was not *Charter* violation, and further that, if a violation was found, it could be justified under s. 1.<sup>79</sup>

### ***Relevant Constitutional and Legislative Provisions***

GSSD's application attracted a *Charter* analysis of the relevant *Education Act* provisions under s. 2(a), which guarantees to individuals the "fundamental...freedom of conscience and religion," and s. 15(1), which states that "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...religion."<sup>80</sup>

In light of the province-specific protections designated by ss 93(1), Saskatchewan's public denominational schools are also subject to the protections for such schools that existed at the time of its entry into Confederation. A relatively late entrant into the union, Saskatchewan was carved out of the vast area that formerly constituted the North-West Territories under the *Saskatchewan Act, 1905*.<sup>81</sup> With respect to education, this bill applied an amended version of s 93 to the province,

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<sup>77</sup> *Ibid* at para 15.

<sup>78</sup> *Ibid* at para. 10. *Education Act, 1995*, *supra* note 75.

<sup>79</sup> *Constitution Act, 1867*, *supra* note 20; *Charter*, *supra* note 6, s 1.

<sup>80</sup> *Charter*, *supra* note 6 at s 2(a) and s 15(1). Emphasis added.

<sup>81</sup> *Saskatchewan Act, 1905*, 4-5 Edw VII, c 42 [*Saskatchewan Act*].

which affirmed the application of the denominational exceptions under s 93 as well as chapters 29 and 30 of the *Ordinances of the Northwest Territories*.<sup>82</sup> Of particular application among these ordinances was *The School Ordinances, 1901*, which provided *inter alia* a process by which educational ratepayers of the minority denomination of any given district in the province (be they Catholic or Protestant) to petition the government for the establishment of their own denominational school district.<sup>83</sup> Such districts would possess “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” and ratepayers funding such districts would be relieved of obligations to pay taxes in support of public schools in their area.

The effect of s 17 of the *Saskatchewan Act* was to entrench the *School Ordinance* among the constitutional documents relevant to the consideration of s 93 in Saskatchewan.<sup>84</sup> The ordinance therefore forms a key additional component of Layh J’s analysis, to which we may at last turn.

### **Issues**

Based on the applicable constitutional and legislative provisions, Layh J had to consider several discrete issues. Each issue examined in this essay is reproduced below, along with a summary of the judge’s reasons on each.<sup>85</sup>

*Issue 1: Do ss 93(1) and 93(3) of the Constitution Act, 1867 protect government action that funds non-Catholic students at St. Theodore Catholic School from Charter scrutiny?*

On the issue of the application of these sections, Layh J observed that both parties “seemingly agree that s 93(1) freezes and entrenches separate school rights so long as such rights fall with the doctrine called the ‘denominational aspects’ test.”<sup>86</sup> However, while the parties ostensibly agreed on the use of the test for s 93(1), they disagreed on its application to s 93(3) in light of statements made by Wilson J in *Reference Re Bill 30*.<sup>87</sup> In that case, the Supreme Court of Canada (SCC) considered the

<sup>82</sup> *Ibid*, s 17. The School Ordinances, 1901, ONWT 1901, c 29 [School Ordinance].

<sup>83</sup> *Ibid* s 41-45.

<sup>84</sup> Saskatchewan Act, *supra* note 81; School Ordinance, *supra* note 82.

<sup>85</sup> In addition to the issues considered below, Layh J also ruled on whether GSSD was entitled to standing in the application, whether the St. Theodore School was a separate school for the purposes of the application, and whether the impugned provisions violated s. 15 of the *Charter*. This essay does not review these issues – though there may be grounds upon which they too may be criticized.

<sup>86</sup> *Good Spirit*, *supra* note 2 at para 167. Refer to Part 1 for the introduction of this test.

<sup>87</sup> *Reference Re Bill 30*, *supra* note 25.

constitutionality of full public funding for Catholic high schools in Ontario. In finding that such funding was constitutional under both sections, Justice Wilson observed that

s 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 they are insulated from Charter attack as legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise.*<sup>88</sup>

Layh J ultimately sided with the applicant's position that the denominational aspects test applied to both sections on the basis that either nascent or complete iterations of the test had been applied to both sections in previous cases. He noted that Wilson J had tacitly affirmed the test by observing that, although separate schools enjoyed some immunity from *Charter* scrutiny, their position was not absolute.<sup>89</sup> This position was, he believed, buttressed by the court's subsequent statements in *Adler*, in which the court found that, pursuant to ss 93(1) and (3), there was no *Charter* violation in the Government of Ontario's decision to fund only Catholic schools to the exclusion of all other religious denominations.<sup>90</sup>

Layh J further observed that unreasonable results would be yielded if the denominational aspects test were applied only to existing separate school rights under s. 91(1), but not to s 93(3). Specifically, the government could, pursuant to the plenary power of education and s 93(3), create *any* system of separate schools without concern for the application of the *Charter*.<sup>91</sup> Building on this observation, he noted that case law suggested that the government could not use s 93(3) as a *carte blanche* mechanism to avoid *Charter* scrutiny - and that there had been "no similar attempt in other jurisdictions to support post-union legislation in the face of a *Charter* challenge."<sup>92</sup>

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<sup>88</sup> *Ibid* at para 64. Emphasis added.

<sup>89</sup> *Good Spirit*, *supra* note 2 at para. 203.

<sup>90</sup> "...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...scrutiny": *Adler v Ontario*, [1996] 3 SCR 609 at para 49, [1996] SCJ No 110 [*Adler*].

<sup>91</sup> *Good Spirit*, *supra* note 2 at para 216-218.

<sup>92</sup> *Ibid* at para 221.

Finally, he held that the historical evidence presented by the defendants, having been used to establish that “funding for non-Catholic students was a guaranteed right under the 1901 ordinances,” could not be converted into support for the application of ss 93(3) on post-Confederation rather than pre-Confederation rights.<sup>93</sup>

*Issue 1A: Is the funding of non-Catholic students a right found under the 1901 Ordinances?*

Layh J found that a right to funding for non-Catholic students in Catholic schools was not protected under the Ordinances.<sup>94</sup> His finding began with the basic premise that “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.”<sup>95</sup> This, he said, was the true intention behind the Ordinances.<sup>96</sup>

To support this premise, Layh J relied on several legislative and social developments. These included the movement through subsequent ordinances towards greater state control of schools;<sup>97</sup> the fact that the “solemn pact” made at Confederation to protect minority religious education was (in his opinion) limited to the four original provinces;<sup>98</sup> changing social norms and religious positions;<sup>99</sup> the need to avoid amplifying the right;<sup>100</sup> the fact that implicit rights “in law” could not be read in absent explicit language;<sup>101</sup> that, with reference to non-minority students’ choice to attend, s 93 rights were to be anchored in law rather than voluntary practice;<sup>102</sup> the fact that Catholic teaching at the relevant time was far less inclusive of other students (though not totally exclusive);<sup>103</sup> and that the essence of s 93 rights concerns the need to separate and immerse a child in the given minority faith.<sup>104</sup>

*Issue 2: Is the funding of non-minority faith students at St. Theodore Catholic School a constitutional right under s 17(2) of the Saskatchewan Act?*

<sup>93</sup> *Ibid* at para 227.

<sup>94</sup> *Ibid* at para 258.

<sup>95</sup> *Ibid* at para 259.

<sup>96</sup> *Ibid*

<sup>97</sup> *Ibid* at para 281.

<sup>98</sup> *Ibid* at para 295.

<sup>99</sup> *Ibid* at para 312.

<sup>100</sup> *Ibid* at para 316.

<sup>101</sup> *Ibid.* at para 317.

<sup>102</sup> *Ibid* at para 335.

<sup>103</sup> *Ibid* at para 335.

<sup>104</sup> *Ibid* at para339.

Under this issue, Layh J rejected the government's arguments the lawsuit could be dismissed on the "non-discriminatory" provision under the *Saskatchewan Act, 1905*, at s. 17(2). He believed that it could not have been intended "to create a second public funded school system to provide choice to parents."<sup>105</sup> He dismissed the notion that the religious freedom of non-Catholic parents was violated in the absence of funding on the basis of *Adler*, referencing Sopinka J's statement that "nothing in the...Act prevents [the parents] from exercising this aspect of their freedom of religion."<sup>106</sup> He disagreed with the leveraging of freedom of religion arguments in support of a provision that, in his estimation was concerned primarily with inequality.<sup>107</sup> "Separate schools," he ultimately found, "were not created to give rights or choice to the majority. They were created so that a minority faith could separate their children from the majority."<sup>108</sup>

*Issue 3: Does government funding violates s 2(a) of the Charter?*

Having found that a non-minority right to funding was not protected under any of the applicable statutory or constitutional provisions, Layh J then found that the contested provisions of the *Education Act* violated s. 2(a) of the *Charter*. His finding was founded on a statement in Estey J's minority judgment in *Reference re Bill 30*, in which the justice observed that, if the *Charter* had any applicability to the bill in question, a breach would be "axiomatic" - that is, self-evident.<sup>109</sup> Moving beyond the ostensibly self-evident violation of s. 2(a), Layh J engaged in a discussion of the obligation of state neutrality within the context of this issue. He cited the seminal case of *Big M Drug Mart*, affirming Dickson CJ's statement that "[t]he protection of one religion and the concomitant non-protection of others imports a disparate impact destructive of the religious freedom of society."<sup>110</sup> For more recent authority, he relied heavily on Gascon J's judgment in *Mouvement laïque quebécois v Saguenay (City)*, and specifically his observation that "the evolution of Canadian society has given rise to a concept of neutrality according to which the state must not interfere in religion and

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<sup>105</sup> *Ibid* at para 350.

<sup>106</sup> *Adler*, *supra* note 90 at para 171.

<sup>107</sup> *Good Spirit*, *supra* note 2 at para 355.

<sup>108</sup> *Ibid.* at para 357.

<sup>109</sup> *Reference Re Bill 30*, *supra* note 25 at para 79; *Ibid* at para 369.

<sup>110</sup> *R v Big M Drug Mart*, [1985] 1 SCR 295 at para 98, [1985] SCJ No 17 [*Big M*], quoted in *Good Spirit*, *supra* note 2 at para 381.

beliefs. The state must remain neutral in this regard.”<sup>111</sup> On the question of whether a school division (rather than an individual) could make a claim for religious freedom, Layh J drew a distinction from the *Amselem* case, which dealt with a *prima facie* neutral law, and the overtly partial provisions of the *Education Act*.<sup>112</sup> He also referenced *Big M*, in which a corporation was able to obtain relief under the *Charter*.<sup>113</sup>

*Issue 4: Does s 1 of the Charter justify a violation?*

In the final (and surprisingly brief) portion of his *Charter* analysis, Layh J ruled that the impugned provisions of the *Education Act* were not saved by s. 1 of the *Charter*: “[The *Charter*] 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.”<sup>114</sup> Pursuant to a long line of jurisprudence, the judge applied the test from *R v Oakes*.<sup>115</sup> In his reasons, Layh J summarizes the steps as follows: (1) a sufficiently important objective to justify the limitation, (2) a rational connection between the law and the objective, (3) the law must impair the right by the “least drastic means,” and (4) the law must not have a disproportionately severe effect on the persons to whom it applies.<sup>116</sup> The burden of proof for a s. 1 application rested upon the defendants.

In the first step, Layh J was unconvinced by the government’s stated objectives of “equitable educational opportunity” and the provision of choice.<sup>117</sup> On the former issue, he observed (without explicit reference to evidence) that other provinces “seemingly meet this objective [of opportunity for education regardless of where students live] without separate schools.”<sup>118</sup> In the latter case, he made the perplexing remark that the advancement of this argument “[acknowledged] 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.”<sup>119</sup>

<sup>111</sup> *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 72, Gascon J [*Saguenay*].

<sup>112</sup> *Ibid.* at para 403-404. *Syndicat Northcrest v Amselem*, 2004 SCC 47 at paras 46-47, Iacobucci J [*Amselem*].

<sup>113</sup> *Ibid.* at para 407-410; *Big M*, *supra* note 110.

<sup>114</sup> *Charter*, *supra* note 6 at s. 1.

<sup>115</sup> [1986] 1 SCR 103, [1986] SCJ No 7, Dickson CJ [*Oakes*].

<sup>116</sup> *Good Spirit*, *supra* note 2 at para 449.

<sup>117</sup> *Good Spirit*, *supra* note 2 at para 451-454.

<sup>118</sup> *Ibid.* at para 452.

<sup>119</sup> *Ibid.* at para 54.

Layh J then bundled the remaining steps under the umbrella of “proportionality.”<sup>120</sup> He found no rational connection between the stated objective that the Government must ensure sufficient funding for all schools, regardless of creed or religion and the funding of non-Catholic in Catholic schools.<sup>121</sup> He determined that the “the best (and perhaps only) way that the government can minimally offend its duty to remain religiously neutral is to accept s 93 without augmentation.”<sup>122</sup> Finally, he found harm in “the thwarting of public school boards’ decisions to close rural schools that have experienced diminishing enrolments.”<sup>123</sup> In concluding remarks, he endorsed McLachlin CJ’s observation that “proportionality under s. 1...[needs to encourage] ‘a more tolerant harmonious multicultural society’...These goals might justify otherwise *Charter*-infringing legislation, not the defendants’ assertion that legitimate goals include parental choice.”<sup>124</sup>

### ***Remedies and Aftermath***

Having found *Charter* violations that were not saved under s. 1, Layh J declared, pursuant to s. 52(1) of the *Constitution Act, 1982*, that the relevant portions of the *Education Act, 1995*, and the *Education Regulations* were unconstitutional “to the extent that the Government of Saskatchewan has provided funding grants to separate schools respecting students not of the minority faith,” and that they were of no force and effect.<sup>125</sup> With a view to the “significant repercussions” of the decision on Saskatchewan’s educational system, he stayed the declaration to June 30, 2018.<sup>126</sup> In the aftermath of the decision, as noted, the provincial government invoked s 33 of the *Charter* (the “notwithstanding clause”) in order to carry on the effect of the provisions, and the SKCA granted leave for and heard the appeal.<sup>127</sup>

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<sup>120</sup> *Cf ibid* at para 457-467.

<sup>121</sup> *Ibid* at para 458

<sup>122</sup> *Ibid* at para 459.

<sup>123</sup> *Ibid* at para 460.

<sup>124</sup> *Ibid* at para 465.

<sup>125</sup> *Ibid* at para 475; *Constitution Act, 1982*, *supra* note 68, s 52(1): “The Constitution is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” *Education Act* and *Education Regulations*, *supra* note 75.

<sup>126</sup> *Good Spirit*, *supra* note 2 at para 476.

<sup>127</sup> *Charter*, *supra* note 6, s 33.



## Analyzing the Decision

At this point in the analysis, it should be recalled that Layh J ruled that protections to the impugned funding regime in Saskatchewan could only be protected by s 93(1) or 93(3), or the *Ordinances*, so long as they fell within the denominational aspects test. As part of his analysis, he joined the right to funding for denominational schools with the historical purpose that “parents of the minority faith could separate their children from the majority’s children to inculcate their children in the minority’s faith.”<sup>128</sup> On this basis, he was ultimately dismissive of the government’s arguments that the provisions effect educational choice for parents.<sup>129</sup> Layh J also seriously questioned the applicability of the “solemn pact” of Confederation to Saskatchewan.<sup>130</sup>

On the latter point, it is difficult to accept that there could be no basis for the application of the Confederation compromise to Saskatchewan in light of the preamble to the *Constitution Act, 1867*.<sup>131</sup> The final line of the preamble, which states with foresight that “Provision be made for the eventual Admission into the Union of other Parts of British North America,” seems to confirm the opposite - a fact that Layh J seems to have overlooked.<sup>132</sup>

On the former issue, a survey of applicable case law and legislative history does not provide for the easy resolution of the tension between legislative remedy and choice. However, it does confirm that the element of choice has continuously informed the debate. Rather than dismissing such considerations on the basis of the most current legal interpretations, it may behoove judicial authorities to consider these rights as informed by this ever-present yet evolving factor, and not simply in relation to the system at the time of implementation. A Burkean perspective expects the possibility of a workable solution that transcends the immediate temporal constitutional context, and would help to properly give effect to the right in light of these norms.

### *The Denominational Aspects Test: Application and Flaws*

<sup>128</sup> *Good Spirit*, *supra* note 2 at para. 259.

<sup>129</sup> *Ibid* at para 451-454.

<sup>130</sup> *Ibid* at para 295.

<sup>131</sup> Constitution Act, 1867, *supra* note 20.

<sup>132</sup> *Ibid*, Preamble.

In support of his decision that the right to funding of non-Catholic students was not protected from *Charter* scrutiny, Layh J asserted that funding could not be considered a denominational aspect or a non-denominational aspect necessary to give effect to denominational concerns at the time of confederation.<sup>133</sup> However, the application of this test raises three problems: (1) the trouble with drawing the distinction between a denominational right and the non-denominational means of effecting it, (2) the logical problem that results in freezing a denominational right in view of freedom of religion, and (3) the evident manipulability of “denominational” categories by the judiciary.

*The distinction between denominational and non-denominational aspects is not well-drawn in the context of school funding*

This point has been dealt with to a certain extent in the foregoing analysis, but it bears repeating that the SCC has ruled on multiple occasions that the extension of funding to denominational schools **can** be protected under the denominational aspects test.<sup>134</sup> Layh J imputed the test to Wilson J’s analysis in *Reference Re Bill 30*, in which such funding was ultimately protected.<sup>135</sup> Furthermore, the very case from which the test is ultimately drawn approvingly cited the appellate judge in his observation that financing constitutes a non-denominational aspect necessary to give effect to denominational guarantees.<sup>136</sup> While the court has maintained that there is a distinction between the two categories, these cases seem to indicate a possible problem with the absolute distinction between funding for denominational schools (as a non-denominational aspect) and the execution of the aspects that fall within their denominational core - a possibly false dichotomy that is evocative of Tarnopolsky’s observations on the sterility of a right for which there are no means of efficacy (ancillary protections, funding, etc.).<sup>137</sup>

*Fixing denominational rights to a point at history demonstrates logical inconsistency in the denominational aspects test*

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<sup>133</sup> *Mabe*, *supra* note 69; *Good Spirit*, *supra* note 2 at para 198.

<sup>134</sup> *Reference Re Bill 30*, *supra* note 25; *Protestant School Board*, *supra* note 69.

<sup>135</sup> *Good Spirit*, *supra* note 2 at 198.

<sup>136</sup> *Protestant School Board*, *supra* note 69 at para 56.

<sup>137</sup> *Cf.* WS Tarnopolsky, “The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada” (1968) 46 *Can Bar Rev* 565 (excerpt).

Layh J correctly observed that, at the time of the enactment of both the *Constitution Act, 1867* and the *Ordinances*, the Catholic Church was anxious to insulate its student population from what it perceived to be the harmful influences of society.<sup>138</sup> The church's views on education at the time was summarized 1897 by Pope Leo XIII:

[I]t is necessary that [children] should be formed on those principles which, deeply engravers on their consciences, they ought to follow and obey, because they naturally spring from their faith and religion. Without religion there can be no moral education...For the Catholic there is only one true religion, the Catholic religion; and, therefore, when it is a question of the teaching of morality or religion, he can neither accept nor recognize any which is not drawn from Catholic doctrine.<sup>139</sup>

Over time, however, the educational views of the Catholic Church changed (a fact also acknowledged by Layh J).<sup>140</sup> The Vatican adopted a growing emphasis on ecumenism, which promotes increasing dialogue with other religions. The adoption of the principle in Catholic education is on full display in Pope Paul VI's encyclical *Gravissimum educationis*: "Cooperation is the order of the day...every means should be employed to foster suitable cooperation between Catholic schools, and between these and other schools that collaboration should be developed which the good of all mankind requires."<sup>141</sup>

By asserting that the right to funding for public Catholic schools is tied to the church's nineteenth century conception of educational policy, Layh J's analysis leads one to consider a possible outcome of his line of reasoning: if the distinction between a denominational and a non-denominational aspect is difficult to draw, and the non-denominational aspect is protected only insofar as it was at Confederation, does it also protect only the denominational aspects of the denomination as they existed at that point? If such were true, it would run contrary to the court's articulation of

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<sup>138</sup> *Good Spirit*, *supra* note 2 at para 257.

<sup>139</sup> Pope Leo XIII, "Affari vos: Encyclical on the Manitoba Schools Question" (18 December 1897), *Libreria Editrice Vaticana*, online: <[http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_08121897\\_affari-vos.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_08121897_affari-vos.html)>.

<sup>140</sup> *Good Spirit*, *supra* note 2 at para 392.

<sup>141</sup> Pope Paul VI, "Gravissimum Educationis: Declaration on Christian Education" (28 October 1965), *Libreria Editrice Vaticana*, online: <[http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651028\\_gravissimum-educationis\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html)>.

freedom of religion, which the SCC described as follows in *Syndicat Northcrest v Amselem*:

freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials...

But, at the same time, this freedom encompasses objective as well as personal notions of religious belief, "obligation", precept, "commandment", custom or ritual.<sup>142</sup>

This definition offers a strong endorsement of the wide right of an individual (or group) to determine the content of their denomination. Notwithstanding legal limitations that have been imputed to s 93,<sup>143</sup> affixing the denominational aspects test to a particular point in history clashes with the ability to determine the content of one's religion - clashing with the "purposive" interpretation of *Charter* rights applied by the SCC since its introduction.<sup>144</sup>

*The denominational aspects test can be manipulated*

The foregoing analysis is not meant to indicate that Layh J was suggesting interference in the dogmatic aspects of Catholic education. It is meant, however, to demonstrate the difficulty in drawing the lines between denominational aspects and non-denominational aspects necessary to give them effect, and the difficulty with Layh J's decision to index the latter to the operation of Catholic schools at a particular point in time. These difficulties suggest that the denominational aspects test may ultimately be inappropriate for the purposes of s 93 analyses, given the manipulability of the test by the judiciary.

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<sup>142</sup> *Amselem*, *supra* note 112.

<sup>143</sup> *Protestant School Board*, *supra* note 69 at para 35: "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."

<sup>144</sup> *Cf. Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 SCR 145, SCJ No 36.

An extreme example (and an admitted outlier) demonstrating the potential for manipulation is the case of *Hall v Powers*, in which it was determined that a Catholic school could not prohibit the attendance at prom of a gay student and his boyfriend.<sup>145</sup> In his consideration of “denominational aspects” with relation to s 93, MacKinnon J of the ONSC observed that it is “obvious that the educational system of [Ontario] is not frozen in time...educational methods change...It is difficult to imagine how the legislature of Ontario can effectively exercise [its] power [under s 93] unless it has a large measure of freedom to meet new circumstances.”<sup>146</sup> Following this statement, MacKinnon proceeded to find that denying Hall’s ability to attend the prom with his boyfriend based (in part) on “evidence [of] a diversity of opinion within the Catholic community on pastoral care regarding homosexuality.” It is not clear whether he reached this conclusion with or without evidence of the Catholic Church’s catechism provision condemning homosexual behaviour.<sup>147</sup>

It should be acknowledged here that *Hall*, as an interim decision, is not a concrete authority that by itself suggests malleability in the test. However, one may find strands of possible judicial manipulation in other cases. Indeed, in *Amselem* (its flagship case on the scope of s 2(a) of the *Charter*), the SCC acknowledged that the determination of religious belief involves an “objective” component – begging the question of who ultimately adjudicates what qualifies as a legitimate belief attracting the protection of section.<sup>148</sup> Recently, the SCC considered whether certain Aboriginal spiritual beliefs attracted *Charter* protection in *Ktunaxa v British Columbia*.<sup>149</sup> The court ultimately held that the Ktunaxa’s beliefs in Q’atmuk, the Grizzly Bear Spirit, were not within the scope of s 2(a) because their freedom to hold and manifest their beliefs was not infringed by government actions in favour of a proposed development that would drive the spirit permanently from Jumbo Valley.<sup>150</sup> The case is suggestive of the fact that the SCC is willing to circumscribe certain religious rights. Regardless of rationale or indeed necessity, the fact that judges can effectively rule on the legal

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<sup>145</sup> *George Smitherman in his capacity as litigation guardian of Marc Hall v. Powers et al.; Canadian Foundation for Children, Youth and the Law, Intervenor* [Indexed as: *Hall (Litigation guardian of) v. Powers*], 59 O.R. (3d) 423, [2002] O.J. No. 1803, MacKinnon J.

<sup>146</sup> *Ibid* at para 42.

<sup>147</sup> *Catechism of the Catholic Church*, Entry 2357 (Vatican City: *Libreria Editrice Vaticana*, 1993), online: <[http://www.vatican.va/archive/ENG0015/\\_\\_\\_P85.HTM](http://www.vatican.va/archive/ENG0015/___P85.HTM)>.

<sup>148</sup> *Amselem*, supra note 112.

<sup>149</sup> 2017 SCC 54.

<sup>150</sup> *Ibid*.

legitimacy of certain beliefs means that no interpretation of what is “denominational” can be taken as fixed.

Lest this devolve into a debate into the merits of particular doctrines or overall religious legitimacy, which is not the point of this analysis, let us reinforce the point of this brief discussion: these cases raise questions about the efficacy of how “denominational aspects” are determined under this test. The SCC has stated in absolute terms that “courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement.”<sup>151</sup> While it is not suggested that this analysis is totally determinative in the *Good Spirit* decision, it raises questions with regard to the application in this case. Ultimately, this author is of the view that the “determination of what constitutes a Catholic school is reasonably best left to the Catholic Church, which welcomes non-Catholic students into its schools.”<sup>152</sup>

### ***The Finding of a Violation of s 2(a) in this Case Sits Uncomfortably with the Unique Nature of “State Neutrality” in Canada***

As with his s 93 analysis, Layh J’s finding that s. 2(a) was violated on an axiomatic basis given “the Government’s duty of religious neutrality owed to the collective citizenry” deserves further scrutiny through the Burkean lens.<sup>153</sup> Specifically, his analysis begs consideration of the extent to which state neutrality applies in Canadian law.

In *Mouvement laïque québécois v Saguenay*, Gascon J observed that “the Canadian Charter [does not] expressly impose a duty of religious neutrality on the state.”<sup>154</sup> The *Charter* itself recognizes in its preamble the “supremacy of God,” which was found in the *Zylberberg* dissent to “lend credence to the view that a strict separation of church and state is not contemplated by the Charter.”<sup>155</sup> In the case of *McBurney v the Queen*, it was observed that “it is not stretching matters to say that even in the modern, secular

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<sup>151</sup> *Amsalem*, *supra* note 112 at para 50.

<sup>152</sup> JK Donlevy et al, “Money, Law, and Religion: Non-Catholic Students in Saskatchewan’s Catholic Separate Schools: The Theodore Case” (2011) 22:2 *EAF Journal* 61 at 71.

<sup>153</sup> *Good Spirit*, *supra* note 2 at para 379.

<sup>154</sup> *Saguenay*, *supra* note 111 at para. 71.

<sup>155</sup> *Zylberberg et al and Director of Education of Sudbury Board of Education; League for Human Rights of B’Nai Brith Canada et al, Intervenors* [Indexed as: *Zylberberg v Sudbury Board of Education (Director)*] (Ont CA), 65 OR (2d) 641, [1988] OJ No 1488, Lacourciere J [*Zylberberg*].

age the advancement of religion is rooted in our law and in our Constitution.”<sup>156</sup> In the context of separate schools, MH Ogilvie postulated that the position afforded the Catholic Church in the wake of *Reference Re Bill 30* is that of a “quasi-established” state church.<sup>157</sup> While ultimately not determinative,<sup>158</sup> these observations do cast doubt on the suggestion of absolute religious neutrality in Canada, in comparison with jurisdictions like the United States, which constitutionally guarantees the separation of Church and state.<sup>159</sup>

The softer approach to religious neutrality demonstrated in this vein of case law presents an interesting factor in another (and often overlooked) social reality in Canada. It is trite to observe that there has been a decline in religious beliefs and practices in Canada. Census data from the 1970s on has shown a general trending increase in Canadians who identify no religion.<sup>160</sup> However, this may not be tell the whole story. Sociologist Reginald Bibby, for instance, has challenged the assumption that declining attendance at religious services indicates that Canadians are no longer religious.<sup>161</sup> “Canadians,” says Janet Epp-Buckingham, “are still asking spiritual questions and seeking answers even though they may not find them in institutional settings.”<sup>162</sup>

Like the case law above, these observations are not determinative in Canadian law. Indeed, the fact that state neutrality is not a written norm means that the duty results from an “evolving interpretation of freedom of conscience and religion” – a development that could be acceptable from a Burkean perspective.<sup>163</sup> The purpose in

<sup>156</sup> *Lyle McBurney (Plaintiff) v Her Majesty the Queen (Defendant)*, 84 DTC 6494 at 6496.

<sup>157</sup> MH Ogilvie, “What is a Church by Law Established?” (1990) 28:1 Osgoode Hall LJ 179 at 235. *Reference Re Bill 30*, *supra* note 25.

<sup>158</sup> The SCC has, with the exception of clear-cut exemptions under s 93, endorsed an increasingly stronger division between church and state on issues ranging from Sunday shopping legislation to prayer in schools and at city council meetings. *Cf. Big M*, *supra* note 110, *Saguenay*, *supra* note 111; *Zylberberg*, *supra* note 155.

<sup>159</sup> US Const amend I, § 1: “Congress shall make no law respecting an establishment of religion...”

<sup>160</sup> Statistics Canada, *2011 National Household Survey* (Ottawa, Statistics Canada, 08 May 2013), online: <<http://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/dt-td/Rp-eng.cfm?TABID=2&LANG=E&A=R&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=01&GL=-1&GID=1118296&GK=1&GRP=1&O=D&PID=105399&PRID=0&PTYPE=105277&S=0&SHOWALL=0&SUB=0&Temporal=2013&THEME=95&VID=0&VNAMEE=&VNAMEF=&D1=0&D2=0&D3=0&D4=0&D5=0&D6=0>>.

<sup>161</sup> Reginald Bibby, *Restless Gods: The Renaissance of Religion in Canada* (Toronto: Stoddart, 2002), quoted in Epp Buckingham, *supra* note 1 at 19.

<sup>162</sup> Epp Buckingham, *supra* note 1 at 19.

<sup>163</sup> *Saguenay*, *supra* note 111 at 71. The acceptability of this development of the “unwritten” norm of state neutrality to a Burkean would also be contingent on the absence of positivist intervention. However, the SCC’s more aggressive approach to state neutrality in cases like *Saguenay* would likely be at odds with this.

examining these realities, however, is to further inform a historicist critique of Layh J's judgment with the fact that there are still competing observations at play within the concept. There are profound difficulties that arise with judicial intervention on religious interpretation and state neutrality within the unique Canadian context. And these matters, while not determinative of the violative nature of a law under the comparatively recent and prescriptive *Charter*, should (from a Burkean perspective) at the very least form part of an assessment of an analysis under s. 1.

### ***A Historicist and Legal Analysis Reveals Flaws with the s 1 Analysis***

As noted, the test for the justification of a *Charter* violation under s. 1 is drawn from *R v Oakes*.<sup>164</sup> In establishing the test, Dickson CJ made several observations. First, "any s. 1 inquiry must be premised on the understanding that the impugned limit violates...rights and freedoms that are part of the supreme law of Canada."<sup>165</sup> Second, while the court must guide the values inherent to Canada's "free and democratic" society, such rights are not absolute: "It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance."<sup>166</sup> The steps under which Dickson stated that the violation of a right could be justified under s. 1 are twofold: (1) an objective of "sufficient importance to warrant overriding a constitutionally protected freedom" i.e., pressing and substantial, beyond trivial; and (2) the establishment of a reasonable and demonstrable justification under the proportionality test - which, as Dickson noted, will "*vary depending on the circumstances*."<sup>167</sup> However, it includes the necessary components of a rational connection between the legislation and the objective, a minimal impairment of the right or freedom in question, and proportionality between the effects of the measure and the objective.<sup>168</sup>

The court has had occasion to apply and refine the Oakes test in countless cases since 1986. For a recent refinement of the test, one may look to the case of *R v J(KR)*. In this case, the SCC considered provisions adopted between the commission of sexual offences by the accused and the trial, which led to an order banning the accused

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<sup>164</sup> *Oakes*, *supra* note 115.

<sup>165</sup> *Ibid* at para 63.

<sup>166</sup> *Ibid.* at para 65.

<sup>167</sup> *Ibid.* at para 69-70.

<sup>168</sup> *Ibid.* at para 70.



from using the internet. The court ultimately found that the resulting violation of s. 11(i) of the *Charter* was justifiable.<sup>169</sup> Statements by Karakatsanis J in the majority judgment are particularly illustrative of the court's approach to the final step of the proportionality analysis:

It is...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.” 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...<sup>170</sup>

The normative approach described by Karakatsanis J in this case is echoed in the court's statements in other cases. In *Thomson Newspapers*, the court noted that the third stage of the proportionality test “provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects.”<sup>171</sup> Similarly, in *Hutterian Brethren v Alberta*, the court approvingly cited (but admitted they did not always follow) the assessment of this step offered by Aharon Barak: “the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right. ... It requires placing colliding values and interests side by side and balancing them according to their weight.”<sup>172</sup>

It is within this background that flaws in Layh J's s 1 analysis become clear. First, in assessing the pressing and substantial objective of parental choice, Layh J notes that “in suggesting that a pressing objective for funding non-minority faith students is to give a ‘substantial number 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, but not to others, is a breach of the state's duty of religious neutrality.”<sup>173</sup> The effect of this finding, as Michelle Biddulph observes, is to seemingly incorporate the

<sup>169</sup> *R v J(KR)*, 2016 SCC 31, Karakatsanis J.

<sup>170</sup> *Ibid* at para 79. Emphasis added.

<sup>171</sup> *Thomson Newspapers Co v Canada (Attorney General)*, 1 SCR 877, 159 DLR (4<sup>th</sup>) 385 at para 125.

<sup>172</sup> *Hutterian Brethren of Wilson Colony v Alberta*, 2009 SCC 37 at para 76.

<sup>173</sup> *Good Spirit*, *supra* note 2 at para 454.

proportionality analysis, or the harms of the violation, into the threshold portion of the Oakes test.<sup>174</sup> Biddulph goes on to note that Layh J's reasoning in this vein suggests

that the 'choice' here enures only to Catholic parents, i.e. that only Catholic parents may choose to send their child to Catholic or public school. This assumption begs the question. It presupposes the outcome of the s. 1 analysis by implicitly assuming that only Catholic parents may send Catholic children to Catholic schools, and therefore, only Catholic parents have a choice between two publicly-funded school systems.<sup>175</sup>

Ultimately, Layh J's presentation of the issue in this part of the judgment seems to use his ultimate conclusion as his reasons - only Catholic students are entitled to per-student public funding for Catholic separate schools.<sup>176</sup>

With regard to minimal impairment, Biddulph notes a further apparent error in Layh J's application of the test by suggesting that he creates an impossible standard for the government to demonstrate such minimization. In his reasons, he stated that

the Government must also demonstrate through evidence that the funding of non-Catholic students only minimally interferes with the state's obligation to remain religiously neutral. 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*...and not augment or complement these unbalanced religious rights with further empowering rights.<sup>177</sup>

This method, Biddulph observes, endorses an all or nothing approach that suggests that there are no circumstances in which the government could ever demonstrate a reasonable limitation in this area. But this line, of course, is not reflective of reality: "the standard is *minimal* impairment, not no impairment."<sup>178</sup>

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<sup>174</sup> 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 372 [Biddulph].

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> *Good Spirit*, *supra* note 2 at para 459.

<sup>178</sup> Biddulph, *supra* note 174 at 378.

Finally, against the foregoing contextualization of the final step of the proportionality analysis, Layh J ultimately endorses his preferred value-laden approach, backed (it must be admitted) by extensive historical analysis assembled by counsel on both sides: the harm, he says, is summarized ultimately in “the thwarting of public school boards’ decisions to close rural schools which have experienced diminished enrollments.”<sup>179</sup> Layh J seems ultimately to endorse, on the basis of state neutrality, the paramountcy of public education alone, with the current provisions causing only harms (and no listed benefits). And it is on the basis of this one-sided analysis that the compendium of historical and normative evidence compiled herein is introduced.

As demonstrated, the value of choice, while it has ebbed and flowed historically in relation to the level of sectarian conflict in Canada, has remained a constant in the sphere of denominational education - a fact that should be given due weight when it is proposed as a salutary effect at the final stage of the proportionality analysis. The impugned measures, while they protect it within a specific denominational context, offer at least an option for spiritual education - which could well be considered a salutary effect since it ultimately provides a spiritual educational option for the many Canadians who are highly spiritual, if not strictly religious. While state neutrality is at this point an overarching principle in Canadian society, “absolute neutrality,” as Justice Deschamps once noted, “does not exist...[and] absolutes hardly have any place in the law.”<sup>180</sup> Perhaps most importantly, the practical future of the 21.9% of students in Saskatchewan’s publicly funded Catholic schools (or roughly 10,000) weighs against Layh J’s decision.<sup>181</sup> Honouring the choices of Theodore’s families irrespective of airtight religious compartments – and indeed those of the many other Saskatchewan and Canadian non-Catholic families who have chosen public Catholic schools for various reasons – is perhaps the most significant salutary effect. Indeed, it was primarily on this basis that the Government of Saskatchewan, in the face of the “significant repercussions” of the decision, decided to invoke the notwithstanding clause.<sup>182</sup> The government’s choice is more reflective of the practical reality for the many non-Catholic students affected by Layh J’s decision - and which is simply not

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<sup>179</sup> *Good Spirit*, *supra* note 2 at para 460.

<sup>180</sup> *SL v Commission scolaire des Chenes*, 2012 SCC 7 at para 35, Deschamps J.

<sup>181</sup> Fraser Institute, *supra* note 60.

<sup>182</sup> *Good Spirit*, *supra* note 2 at para 476.

well addressed by his more rigidly categorical approach, which rests uncomfortably on Burke's more organic school of thought.<sup>183</sup>

## CONCLUSION

In offering a conclusion to this paper, it may be best to start with what it does *not* conclude. First, the research shows that, while funding has been protected in many cases up to this point, the issue framed in this way, i.e., between the absolute division between Catholic and non-Catholic students, has not been directly considered up to this point by higher courts. However, it should be noted that, with regard to the *admission* of non-denominational students, the SCC has appeared to use lines of reasoning similar to Layh J's in this case, opening the question of what appellate decisions on this case might yield, should leave to appeal be granted.<sup>184</sup>

The historical analysis should also not be taken as a complete contradiction of the extensive historical content upon which Layh J based his decision. While it was not possible to review it all here, it is enough to say that Layh J's historical analysis as presented does not appear to yield outright falsehoods.<sup>185</sup>

Instead, this paper, using a Burkean historicist lens, has attempted to articulate an alternative constitutional perspective through which the issue may be considered. It has used a comparative historical analysis of select Canadian jurisdictions to establish that the value of choice in education, while it has faced obstacles, could be considered historically applicable Canada as a nation. It has attempted to highlight issues with one of the main interpretive tools put to use, the denominational aspects test, by demonstrating its clash with freedom of religion, and its general manipulability and inconsistent outcomes. It has attempted to show that the principle of state neutrality, upon which a *Charter* violation was ultimately founded, is not so absolute as we might think. Throughout each of these steps, it has also (hopefully) given the

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<sup>183</sup> Cf. Mansfield, *supra* note 12 at 698.

<sup>184</sup> Cf. *Reference re Education Act (Que)*, [1993] 2 SCR 511 at para 134, 105 DLR (4th) 266.

<sup>185</sup> For example, it is clear that the approach to educational administration under successive revisions to the *Ordinances*, culminating in the 1901 document, was increasingly restrictive of educational choice, based (as in Manitoba) on the rise of Anglophone Protestants and other immigrants, and the decline of French Catholics in the region. Much as in the Nova Scotian case study, however, while religious instruction in common schools was restricted, a publicly-funded alternative continued to be available under the *Ordinances*. Cf. *Good Spirit*, *supra* note 2 at para 272-293.

reader a sense of the fact that Catholic education has evolved with Canada, and that its structures are embedded in the provinces that retain public funding for them – a practical reality that cannot be easily dismissed.

Beyond the case commentary discussed herein, there has been little additional work located in the period following Layh J’s judgment. As noted, the Saskatchewan government has since invoked the notwithstanding cause, while an appeal was heard by the SKCA in March 2019. Commentators in the legal community are few – possibly due to the complications and relatively specific nature of the applicable law in this case. Additional commentary has focused more on the government’s use of the notwithstanding clause than historical or philosophical examinations. Leonid Sirota, for instance, has criticized the failure of the government to justify its use of the clause: “The government doesn’t say that it disagrees with Layh J’s views about the scope of religious liberty...It is content to state the objective of ‘school choice’...as if the end justifies the means, and it is permissible to disregard *Charter* rights as soon as one has a worthwhile reason for doing so.”<sup>186</sup> This criticism has been echoed by media commentators such as Andrew Coyne.<sup>187</sup> Perhaps all interested parties, having offered initial reactions, are awaiting the results of the appeal.

In advance of these results, this paper concludes that, taken at their sum, historical and practical realities are not likely to save the impugned provisions of the *Education Act* from a *Charter* violation. The preponderance of case law promoting a more aggressive approach to state neutrality post-*Charter* is far too significant to be dismissed.<sup>188</sup> However, in light of the SCC’s elaboration of the *Oakes* test, these realities could and should be given further consideration under the broader normative considerations of s. 1 – perhaps saving the law from suspension. The presence of these norms throughout the constitutional history of Canada, and the incredible complexity of the constitutional provisions themselves when viewed in context, demand a most prudential approach to judicial developments in this area – an approach that, to paraphrase Canadian philosopher George Grant, is reflective of what was, at least once, the “inchoate [Canadian] desire...[for] a society with a sense

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<sup>186</sup>Leonid Sirota, “Not Withstanding Scrutiny” (4 May 2017), *Double Aspect* [blog], online: <<https://doubleaspect.blog/2017/05/04/not-withstanding-scrutiny/>>.

<sup>187</sup> “Notwithstanding clause is a bottle labelled ‘drink me’ that cheapens the *Charter*”, *National Post* (3 May 2017), online: <<https://nationalpost.com/opinion/andrew-coyne-notwithstanding-clause-is-a-bottled-labelled-drink-me-that-cheapens-the-charter>>.

<sup>188</sup> *Big M Drug Mart*, *supra* note 110; *Saguénay*, *supra* note 111; *Zylberberg*, *supra* note 155, among many others.

of order and restraint.”<sup>189</sup> The outcome of the appeal, and the potential government response, will suggest whether Canada’s courts and elected representatives agree.

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<sup>189</sup> George Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Ottawa: Carleton UP, 1995) at 82. It must be admitted that Grant, a Hegelian throughout much of his life, despaired of the prospect of his hope for a more “conservative” Canada in line with Burkean principles. However, the poesy of his vision for Canada remains evocative today.

