

The Legal and Practical Ramifications of Theodore

Prepared for: Legal Education Society of Alberta

Canada 150 – Constitutional Law Symposium

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For presentation in:

Edmonton, Alberta – October 27, 2017

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Around 1893, Danish immigrants enticed by the offer of “160 acres of wooded farmland for the sum of \$10.00” (Regehr & Yarhi, 2006, n.p.) settled in the southwest part of the Northwest Territories, which is today Saskatchewan, and created the village of Theodore.¹ They opened a school, at first a small lean-to wooden structure with eight pupils, that offered classes only for six months during warm weather. In 1901, Theodore Public School was incorporated. The original wooden structure was replaced in 1919 with a brick schoolhouse, which by 1965 had classes from K–12 for 358 students. In 2003, school enrollment had dropped to 49 students (Donlevy, Gereluk, Brandon, & Patterson, 2012).

Theodore School was part of the Yorkdale School Division, which itself had suffered a 50 percent reduction in enrollment from 1993 to 2003. Therefore, it should have come as no surprise to the residents of Theodore that Yorkdale was considering closing their village school and bussing the school’s 49 students to another Yorkdale school. After much public debate, the decision to close Theodore’s school was made on April 28, 2003, to take effect as of August 20, 2003. Nine days after that motion was passed, on May 7, 2003, three Catholic electors filed a Notice of Intention to establish a Roman Catholic separate school in Theodore. On July 2, 2003, the Minister of Education granted the creation of the Theodore Roman Catholic School Division, comprising one school (York School Division No. 36, Theodore Roman Catholic School Division No. 138, & Government of Saskatchewan, 2005, para. 15). St. Theodore Roman Catholic School. The ostensible reason proffered for its creation was that Yorkdale had discriminated against Catholics in the past, and a Catholic separate school was necessary to end such discrimination. Yorkdale claimed, among other things, that the real motivating factor for the creation of the Catholic separate school was that Theodore’s parents did not want their children bussed out of the village. The lines had been drawn.

In 2005, Yorkdale, which had gone through a legal metamorphosis to become Good Spirit School Division No. 204 (GSSD), issued a Statement of Claim against the Theodore Roman Catholic School Division, later to become part of the Christ the Teacher (CTT) Roman Catholic School Division No. 212 (*Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212* [GSSD v. CTT], 2017). In its Amended Statement of Claim, GSSD claimed that the Catholic Division had “actively sought to recruit families who are not Roman Catholics to send their children to Theodore’s Catholic School” (Good Spirit School Division No. 204, Christ the Teacher Roman Catholic Separate School Division No. 212, & Government of Saskatchewan, 2008, para. 22).

¹ Please note that the citation style used in this paper is the American Psychological Association -Version 6.

GSSD went on to claim that most of the Theodore students were non-Catholic and that the provincial funds attached to them was a financial loss to GSSD. On April 20, 2017, Justice Layh at the Court of Queen’s Bench held in favour of GSSD. The Government of Saskatchewan (2017) reacted with dismay at the judgment and promised to invoke Section 33 of the Charter (Government of Saskatchewan, 2017, May 1).

The constitutional and legal issues surrounding the Theodore case involve money, politics, law, and religion—an incendiary mixture to be sure. This paper is presented in two parts. Part 1 speaks to the legal issues and the reasons for the Court’s decision. Part 2 looks at the legal and practical ramifications of the decision.

PART 1: ISSUES AND DECISIONS

The fundamental issue in this case was whether the Saskatchewan government could constitutionally fund non-Catholic students attending Catholic separate schools under Sections 93(1) or (3) of the Constitution Act 1867 (Department of Justice Canada, 2013, p. 31), or under Section 17 of the Saskatchewan Act (1905), so as to be shielded from a Charter challenge under Sections 2(a) and 15 of the Charter. And, if that was not the case, was a breach of the Charter saved by Section 1? The preliminary issue was whether the plaintiff, GSSD, had standing. Part 1 looks at the preliminary issue of standing and then moves quickly to the above matters as seen by the Court.

Did GSSD Have Standing to Bring the Action?

The preliminary issue raised by the defendant was that GSSD did not have standing. The Court, however, held that the issue was a “serious justiciable issue” (*GSSD v. CTT*, 2017, para. 119): GSSD had a financial interest in the decision due to the loss of students to the defendant, CTT, and the lawsuit was an effective way to bring forward this important issue. “To disallow standing on such a vital question with such broad importance to the province would be tantamount to leaving an legal lacuna respecting governmental action, alleged to be unconstitutional, without judicial review” (*GSSD v. CTT*, 2017, para. 147). In other words, the Court applied the public interest test (*GSSD v. CTT*, 2017, para. 118) in accepting that the GSSD had standing to bring the action.

Was the Catholic School in Theodore a Separate School?

GSSD argued that St. Theodore Roman Catholic School was in effect a community school opened not for denominational reasons but for convenience (*GSSD v. CTT*, 2017, para. 148). The Court found that be that as it may, the correct provincial process under the Education Act (1995) had been followed (*GSSD v. CTT*, 2017, para. 166) and that the school “has honoured its Catholic mandate”