

## Standing Committee on Human Services

**Attention: Dan D'Autremont, Chair**  
[cannington.mla@sasktel.net](mailto:cannington.mla@sasktel.net)

**From: The Saskatchewan Catholic School Boards Association**

Thank you for the opportunity to provide a written submission on a very important matter.

First of all, we need to point out that Mr. Justice Layh's decision of April 20, 2017 in the Theodore case was stayed until June 30, 2018. Unless the decision is further stayed, it will be in effect after June 30 this year. An application has been filed with the Saskatchewan Court of Appeal requesting an extension of that stay, but the application has not yet been heard. If an extension is not granted, the government will be bound by the decision even though an appeal of that decision has been filed.

When the original decision was released on April 20, 2017, there was a great deal of concern expressed by parents with many calls to school divisions and MLAs. Premier Wall's announcement on May 1, 2017 that the government would bring forward legislation to invoke the "notwithstanding clause" calmed parents' immediate fears about the education of their children. Parents understood maintenance of the status quo for five (5) years and, as a matter of fact, many think that the legislation has already passed. In general, a judicial stay is not perceived as providing the same level of comfort or security as the "notwithstanding clause".

There are clearly mixed opinions about the government's use of the "notwithstanding clause", but with respect those that criticize its use miss the original purpose behind the "notwithstanding clause" and its usefulness today. The "notwithstanding clause" was a compromise that led to the passing of the Charter of Rights and Freedoms in 1982. The compromise was proposed by Allan Blakeney from Saskatchewan and Peter Lougheed from Alberta, premiers from parties on both ends of the political spectrum. The "notwithstanding clause" is a tool in the hands of the legislature. It was designed to reserve power to a legislature to address situations such as the situation we have before us today. Legislatures and courts have distinct roles and each has knowledge peculiar to themselves.

The use of the "notwithstanding clause" in the circumstances of the Theodore case makes sense and is justifiable. First, it makes sense to maintain the current system until appeals are completed. The Appeal to the Saskatchewan Court of Appeal won't be heard until March 12-13, 2019. After a judgment from the Court of Appeal it is very likely that the case will be further appealed to the Supreme Court of Canada. This is a complicated case and it takes time to make its way through the courts. We believe we have a good case which will overturn the Queen's Bench decision. If Mr. Justice Layh's decision is allowed to take effect after June 30, 2018, there will significant disruption to

our school systems if not chaos. Arguably, this will result in irreparable harm as it will be extremely difficult to return to the current system if the appeal is successful. It is therefore not only perfectly reasonable, but arguably a necessity for a legislature to maintain the status quo until a final decision is rendered on appeal.

And finally, the usual concern relating to the use of the “notwithstanding clause” is that a government could be imposing the will of the majority against a minority. Exactly the opposite is true in this case. Here the government is not only protecting a minority, but it is also giving voice to a significant constituency who strongly favour parental choice in the education of their children.

We would respectfully ask that Bill 89, The School Choice Protection Act, be passed into law and proclaimed before the end of the school year to give parents peace of mind as they enter into the summer holidays.

Thank you.

Tom Fortosky  
Executive Director of the Saskatchewan Catholic School Boards Association

If anyone wishes more background information about the “notwithstanding clause” I have attached an article by Dwight Newman entitled “Canada’s Notwithstanding Clause, Dialogue, and Constitutional Identities”, a near-final version of a piece forthcoming in Geoffrey Sigalet, Gregoire Webber, and Rosalind Dixon, eds., *Constitutional Dialogue: Democracy, Rights, Institutions* (Cambridge University Press), especially pages 15-16. As well, I have provided a link to an article entitled “Saskatchewan’s Brad Wall and the rehabilitation of the Charter” by Joanna Baron and Geoffrey Sigalet:  
<http://policyoptions.irpp.org/magazines/may-brad-wall-rehabilitation-charter/>