



STANDING COMMITTEE ON HUMAN SERVICES

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STANDING COMMITTEE ON HUMAN SERVICES

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Mr. Warren Steinley
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Hon. Nadine Wilson
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[The committee met at 09:00.]

The Chair: — Good morning, everyone. Welcome to the Human Services Committee meeting, May 23rd, 2018. I'm Dan D'Autremont, MLA [Member of the Legislative Assembly] for Cannington, and Chair. With us today as well is MLA Larry Doke, MLA Todd Goudy, MLA Warren Steinley, the Hon. Nadine Wilson, and substituting for MLA Danielle Chartier is MLA Carla Beck.

Before we begin today, I received some documents I wish to table: HUS 43-28, Saskatchewan Catholic School Boards Association's submission regarding Bill 89, as well as we received some general correspondence which will be distributed.

**Bill No. 89 — *The School Choice Protection Act*
*Loi sur la protection du choix d'école***

Clause 1

The Chair: — This morning we will be considering Bill 89, *The School Choice Protection Act*, clause 1, short title. Mr. Minister Wyant is here with his officials. Minister, please introduce your officials and make your opening comments.

Hon. Mr. Wyant: — Well thank you, Mr. Chair. It's a great pleasure to be here this morning. I have with me the following officials from the Ministry of Education and the Ministry of Justice: to my left, Clint Repski, assistant deputy minister from the Ministry of Education; Sara Hawryluk, director of legislative services and privacy from the Ministry of Education is here; to my right, Tom Irvine, senior Crown counsel, constitutional law branch, Ministry of Justice; and sitting behind me, Darcy McGovern, director of legislative services from the Ministry of Justice.

Mr. Chair, committee, today we have before the committee *The School Choice Protection Act* which proposes several amendments to *The Education Act, 1995* in order to provide certainty to families that the government will be able to continue funding students who attend Catholic separate schools regardless of their religious affiliation.

The amendments are in response to the April 2017 Court of Queen's Bench decision on the legal challenge brought forth by the Good Spirit School Division, known as the Theodore court case. The decision found the funding of non-Catholics to attend Catholic schools to be unconstitutional. While non-Catholic students could be admitted to Catholic schools, government funding for the attendance of those students violates section 2(a) and 15 of the Charter as it violates the state's duty of religious neutrality.

These amendments will allow the Government of Saskatchewan to invoke section 33 of the Charter, commonly known as the notwithstanding clause, and override sections 2(a) and 15 of the Charter. Similarly, section 44 of the Human Rights Code will be declared to operate notwithstanding sections 4, 12, and 13 of the Human Rights Code.

Invoking the notwithstanding clause ensures that the

government can continue to fund school divisions based on the status quo funding model, which takes into account how many students are in the division, but does not distinguish based on religious affiliation. School divisions will continue to be responsible for determining their attendance and admittance policies.

Both the Government of Saskatchewan and Christ the Teacher Roman Catholic Separate School Division have filed appeals on this ruling. The appeal is ongoing and we are anticipating it will be heard in late February or early March of 2019.

Mr. Chair, we made a commitment to parents and students that the status quo funding model will continue, and these amendments are necessary, prior to June 30, 2018, coming into force date of the court decision, to ensure students can continue to be funded if they attend a Catholic separate school. If the Court of Queen's Bench decision were to stand, there would be a significant shift in funding between the public and Catholic school divisions, which would cause significant disruption to students, parents, and the entire education sector.

Mr. Chair, these amendments also ensure that independent schools would not be affected, as many operate on a faith-based model and they receive funding under *The Independent Schools Regulations*. This includes registered independent schools, historical high schools, and associate schools.

Mr. Chair, we will also be moving a House amendment with regard to the coming into force of the legislation on proclamation, as opposed to assent, recognizing the application for a stay of the decision of Justice Layh was filed by the appellant yesterday in the Court of Queen's Bench. So thank you, Mr. Chair. I'd welcome any questions from the committee members at this time.

The Chair: — Thank you, Mr. Minister. As the minister has mentioned, this issue continues before the Saskatchewan Court of Appeal. I would caution members on their statements that the minister may be constrained because of the court case on some of his answers, and further, that comments made before this committee may be used in a court of law.

So we will proceed with consideration of Bill No. 89, *The School Choice Protection Act*, clause 1, short title. Are there any questions? I recognize Ms. Beck.

Ms. Beck: — Thank you, Mr. Chair. Thank you, Minister, and to your officials here today. Before we start, I just wanted to welcome and recognize some guests who are with us today in the room. With us we have Vicky Bonnell and Tom Fortosky with the Saskatchewan Catholic School Boards Association, and we have Norm Dray and Bert de Gooijer with the public section of the Saskatchewan School Boards Association. So welcome to those guests and thank them for their submissions to this committee. I was also expecting that we might see John Whyte here today, who has also presented committee with some remarks, but I don't see him yet in the room here.

So as you stated in your opening remarks, Minister, this bill came following the ruling of Justice Layh on the matter of Theodore School. Can you explain what caused this bill to be

drafted and presented into the Assembly?

Hon. Mr. Wyant: — Well the government had made a commitment, after the decision had come down from Justice Layh, that we were going to ensure that parents' choice with respect to where they wanted to send their children was going to be protected. And so in order to do that, we felt it necessary to bring forward this particular piece of legislation, having regard to the fact that the matter had been decided by Justice Layh.

Certainly the appeals which will continue in the court, we weren't confident that the . . . And that was the reason for the House amendment today, was to ensure that there was the protection for parents, to ensure that they could continue to send their children, non-Catholic children, to Catholic schools if they so chose to do so. So that was the reason that the legislation was tabled in the House.

Ms. Beck: — Thank you. Can you explain the concept of parent choice and how you're defining it here?

Hon. Mr. Wyant: — Well currently, under the current funding model, parents within Saskatchewan have a choice as to where they want to send their children, whether to a public school, whether to a Catholic school. And under the existing regime prior to the decision of Justice Layh, the government would fund those children, notwithstanding their religious affiliation, to attend a school of their choice.

And so it was on that basis that the government decided to move forward with this piece of legislation, to ensure that parents continue to have a choice as to where they wanted to send their children, whether they want, whether non-Catholic parents wanted to continue to send their children to Catholic schools and have government funding for those children attending those schools.

Ms. Beck: — Does that concept as you're using it, parental choice, does that extend beyond the right or the practice of non-Catholic students attending Catholic schools? You did mention in your opening comments independent schools, historical schools. Are there other implications of that term, parental choice?

Hon. Mr. Wyant: — Well if I understand your question correctly, the parental choice with respect to . . . This legislation is directed in terms of where parents decide that they are going to send their children. So it has no implications outside the parameters of the legislation which has been tabled, if that's your question.

Ms. Beck: — Perhaps I'll explore this a different way. Can you tell us who was consulted prior to this bill being presented in the Legislative Assembly?

Hon. Mr. Wyant: — I'm not aware of any formal consultation that took place with respect to the decision to move forward with the legislation, save for the obvious comments that we had received from the two . . . from the applicant and the respondent in the court case, because we knew what their positions were. But apart from that, I'm not aware of any formal consultations that took place with respect to the bill.

Ms. Beck: — How are you defining "formal"?

Hon. Mr. Wyant: — Well we didn't have formal consultations with respect to the bill. Like, you'd be aware that we've . . . oftentimes have formal consultations where we go out and solicit opinions from different parties in terms of moving forward with the development of public policy. There was no formal consultation, but I can tell you that we certainly are aware of the positions that the applicants and the respondents have taken in this particular piece of litigation.

Ms. Beck: — Did the Ministry of Education or Justice reach out in an informal way to any groups for consultation prior to this bill?

Hon. Mr. Wyant: — Well certainly there is a lot of conversations that took place in the approximate 10 years while this matter has been under consideration, both in terms of arbitration provision or negotiations that had taken place between the two sections prior to the litigation being advanced, and then since then. But certainly we heard very clearly from parents about their desire to ensure that they continued to have a choice in terms of where they wanted to send their children.

Ms. Beck: — Can you speak to the appeal process on the Theodore matter, on Justice Layh's decision? You noted that it's likely to commence in early spring of next year.

Hon. Mr. Wyant: — We understand that there's . . . We understand that the timing for the hearing of the appeal before the Court of Appeal will be in the spring of next year. There's a number of things that can affect that, timing of the court and court schedules and things like that, but that's the tentative dates that we have been given with respect to the hearing of the appeal.

Ms. Beck: — And the makeup of the panel that will be hearing, is that established?

Hon. Mr. Wyant: — I'm not aware that the panel's been established. Certainly that'll be a decision that the Chief Justice of Saskatchewan will make and presumably will make that at some point. So there will be a decision by the court in terms of what the panel will look like.

Ms. Beck: — Okay. Has an application been made by the government for a stay of that judgment? I know you mentioned that there has been . . . that the SCSBA [Saskatchewan Catholic School Boards Association] has filed application. Has the government done so as well?

Hon. Mr. Wyant: — The government's not party to the application for the stay, but I can tell you that the government has consented to the order. I believe all the parties have consented to the order, so there'll be a consent order filed with the court. The question is whether the court will issue that consent order, but that's the order that's been before the court to stay. And that's really the reason why we have agreed to move forward with the House amendment, because if the matter is stayed there'd be no need to have this legislation effective on assent, that it would become effective on proclamation, presumably at some point in the future if the government chose to proclaim the legislation.

Ms. Beck: — When would have been the earliest opportunity to make that application for a stay?

Hon. Mr. Wyant: — Presumably the earliest point that they could've applied for a stay was immediately after the judgment, but for whatever reason that application hadn't been made until recently.

Ms. Beck: — Do you have a list of all of those who've applied for intervener status with regard to the appeal?

[09:15]

Hon. Mr. Wyant: — We've had a formal application by the Alberta public schools section, if that's what it's called, and some expressions of interest from a number of other parties, none of whom have formally moved to intervene.

Ms. Beck: — Who were the expressions of interest from?

Hon. Mr. Wyant: — We don't have . . . These expressions of interest were made to us quite informally, so I'm not convinced that I'll be able to tell you publicly who has that expression of interest. But I will have a conversation with the Ministry of Justice to determine whether we can give you those names or not. But certainly if we can, we'll provide those to you.

Ms. Beck: — I appreciate that. Thank you. So the stay of judgment, the application is for that stay to be in place until such time as the Court of Appeal renders a decision. Is that correct?

Hon. Mr. Wyant: — That would be correct.

Ms. Beck: — Okay. And what is the expected timeline? I know this is a bit of a guessing game, but what is the expected timeline when we might see, maybe a window of the earliest and latest we might see a judgment?

Hon. Mr. Wyant: — That's very hard to say. In terms of when the Court of Appeal may issue a judgment, it'll depend on a lot of things in terms of the context of the appeal, the number of intervenors. So it would be very difficult to give you a timeline, and certainly we've got no indication from the court.

Ms. Beck: — So no window of, you know, less than a year, more than a year?

Hon. Mr. Wyant: — It's hard to say.

Ms. Beck: — More than two? But some time. And that stay of judgment would be in place until that time and thus keeping the status quo?

Hon. Mr. Wyant: — Yes, I could be . . . The stay would be in place, the status quo would be in place until such time as the Court of Appeal rendered its decision, and again subject to a further appeal from the Court of Appeal to the Supreme Court if the parties were intending on taking that step.

I should just say that the status of the stay will depend on what the Court of Appeal decides. So whether an additional stay would need to be requested from the Supreme Court while that

was under appeal, those are all mechanics that we'll have to work through at the time.

Ms. Beck: — I'm sorry. Can you walk me through that? So were it to be heard at the Supreme Court, is that what you mean by the Supreme Court entering into it?

Hon. Mr. Wyant: — I think it's fair to say that there's no guarantee that a decision from the Court of Appeal would be automatically stayed pending an appeal to the Supreme Court. So it could very well be that another application would need to be made for a stay of proceedings based on what the Court of Appeal has to say. So yes. I mean the point . . . There's no guarantee that this stay will be in effect until the Supreme Court makes its decision. It may very well be that we will need to make another application to the Supreme Court for a stay, or if the parties would need to make a stay depending on what the Court of Appeal says.

Ms. Beck: — Is it the expectation of the government then that the decision of the Court of Appeal will make its way to the Supreme Court?

Hon. Mr. Wyant: — Well you know, the parties are going to have to make those decisions at the time that the Court of Appeal makes its decision, but I think I'll just say this. I mean, the question that's been put to the Court of Appeal is certainly a significant question on the rights of individuals under the constitution, and the constitution being the bedrock of our democracy. And so it seems to me that there's a very likely case that this would be, given the significance of the case, that the decision of the Court of Appeal would likely be appealed to the Supreme Court, given the significance of it — not just the significance for Saskatchewan, but the significance for any intervenors. And so I think it's fair to say that the decision would likely demand the scrutiny of the Supreme Court.

Ms. Beck: — Thank you. And as you alluded to, the implications of this case at the Supreme Court would not only impact Saskatchewan, it would also impact Alberta and Ontario. Is that correct?

Hon. Mr. Wyant: — Well at least those two provinces.

Ms. Beck: — You say at least. What might be the broader implications?

Hon. Mr. Wyant: — The territories also have separate schools as well.

Ms. Beck: — Okay, thank you. Is there — I'll try it again — the expectation for this from today or from the time that the appeal would commence to a Supreme Court decision, what is that window that we're looking at? A broad window would be fine.

Hon. Mr. Wyant: — You know again, it's very difficult to say. Once the Court of Appeal hears the decision . . . You know we've seen some decisions from our Court of Appeal that have been on reserve for two years before a decision is finally issued. Then there's the application for leave to the Supreme Court and how long that will take, depending on the timing of that court. So it's very difficult to give you any indication in terms of

when the issue will be formally or finally decided by the Supreme Court if it does get there. So that's a very difficult question.

Ms. Beck: — I certainly understand the difficulty of the question. Is it possible that it could take longer than five years?

Hon. Mr. Wyant: — Well that's possible. It's possible. Again it's hard to say. Anything's possible when it comes to the courts.

Ms. Beck: — Are there any expectations of costs for each party associated with these appeals?

Hon. Mr. Wyant: — There is . . . I hope this answers your question. There is a cost order. That's part of the appeal before the Court of Appeal. The question in terms of the costs, I don't have those numbers in front of me. From the government's perspective of course this matter is all being handled internally by the Ministry of Justice. So in terms of external costs, there is none.

Ms. Beck: — Do you have an estimation of costs for legal fees for each of the parties to this appeal?

Hon. Mr. Wyant: — Are you asking the costs incurred to date by the parties?

Ms. Beck: — I would like to ask that, yes, and also if there is any estimation of costs both of the appeal and for the Supreme Court reference, legal fees.

Hon. Mr. Wyant: — I'll ask Mr. Irvine just to kind of answer that.

Mr. Irvine: — Thank you. As part of the costs order which was given by the trial decision — I don't have the exact figure; it's around \$900,000 — the trial judge ordered that that be split. And that's payable to Good Spirit. The trial judge ordered that that be split 70 per cent, 30 per cent. The government is responsible for 70 per cent of that amount, and Christ the Teacher is responsible for 30 per cent of that amount. That would include some of their legal fees. It's not a full indemnity cost order, so that means that you get . . . you can claim some of your legal fees but not all of them, and that was part of the claim, also things like disbursements, expert witness fees, and so on. So I can certainly provide that exact breakdown if you would like that.

Ms. Beck: — Thank you. There will be legal fees associated with the appeal. I'm just wondering about how those fees will be funded for each of the two bodies.

Hon. Mr. Wyant: — Certainly the funding of the legal challenges will be up to each party as they see fit, and so we leave that responsibility to each of the . . . the applicant and the respondent in the litigation.

Ms. Beck: — Minister, what are the funding avenues available to school boards for raising funds?

Hon. Mr. Wyant: — Well the applicants and the respondents can certainly use whatever fundraising . . . We understand that

the Catholic section is doing some private fundraising from private donors to help fund the litigation. I can also tell you that the grant that is provided by the government to the school divisions is unconditional and so whether they choose to use some of that funding to fund the litigation is up to them.

Ms. Beck: — So do they have other avenues available to them? Would the government consider funding the legal costs?

Hon. Mr. Wyant: — We haven't given that any consideration at this point in time.

Ms. Beck: — No consideration?

Hon. Mr. Wyant: — No. As I say, the order . . . There's currently a cost order against the government that's under appeal, and so ultimately that would be the government's responsibility should that piece of the appeal be sustained against the government. And so in terms of fundraising, the school divisions certainly have the ability to privately fundraise, however they want to raise additional funds to help fund the litigation. So there's no restrictions on their ability to do that.

Ms. Beck: — What forms the basis for the appeal?

Hon. Mr. Wyant: — Well I want to be very careful about this because the matter is currently before the court and the basis for the appeal is set out in the documents that have been filed with the court. So I want to be very careful about this simply because of the fact of the matter is still before the court and under consideration ultimately by the Court of Appeal.

Ms. Beck: — If you could just summarize it — which is a public document when the appeal was filed — the government's basis for the appeal?

Hon. Mr. Wyant: — Again I want to be very cautious about this, but the basic tenor of the appeal was that Justice Layher erred in fact and in law and so that's the basis of the appeal.

Ms. Beck: — And just to be clear, I'm not asking for anything that isn't public, that wasn't filed with the Court of Appeal.

Have any other parties filed a response to the appeal?

[09:30]

Hon. Mr. Wyant: — The only additional document is the formal notice of intervention from Alberta, which has been filed. The factums by the appellants, by the parties to the action, are all due by the end of June, so that's when the formal factums will be filed with the court.

Ms. Beck: — With regard to intervenors, is there a separate process for them to be recognized in the appeal process? And how does that work?

Hon. Mr. Wyant: — There's a deadline this fall for filing formal notices of intervention. Once those are filed, the court will make a determination as to whether or not intervenor status will be granted to any particular intervenor.

The Chair: — Do you have more questions, Ms. Beck?

Ms. Beck: — I do, yes.

Hon. Mr. Wyant: — I just want to confirm that in terms of interventions, the only party that has an absolute right to intervene is the federal government, so all other applications will be considered by the Court of Appeal in terms of whether they'll be granted that status. But to the extent that the federal government may choose to intervene, they would have an absolute right to do that.

Ms. Beck: — What would determine the basis of standing?

Hon. Mr. Wyant: — Well the determination as to who will be granted legal status to intervene will be based on, first of all, they have to have an interest and an argument. And so that will be considered by the Court of Appeal in terms of whether or not any particular intervenor meets the standard that's set by the Court of Appeal to intervene. But it will be their decision as to who gets that opportunity.

Ms. Beck: — As you mentioned, Minister Wyant, one of what is proposed in this bill is to invoke section 33 of the Charter. In your opinion, is the setting aside of Charter rights and human rights as prescribed in the Act a measure that should be entered into with caution?

Hon. Mr. Wyant: — Well I think that any time a government acts pursuant to this, using this particular clause, I think that you need to act with some measure of caution, noting that, in my personal opinion, section 33 should be used as a shield and it shouldn't be a sword. So in terms of using it to protect the rights of individuals, I think it's a fair use of the clause. But from that perspective, I think that any time that you're using that particular clause, I think you want to be very cautious and very careful about that.

Ms. Beck: — Just the particular sections of the Charter that this bill operates notwithstanding of are sections 2 and 15. So 2 is fundamental freedoms, that:

Everyone has the following fundamental freedoms:

freedom of conscience and religion;

freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

freedom of peaceful assembly; and

freedom of association.

And the equality rights under section 15 ensures:

Equality before [the law] and under . . . equal protection and benefit of law

Every individual is equal before [the law] and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

So those are the sections of the Charter that are being set aside or made notwithstanding with this bill. And again I just highlight that. And I think you stated that this was a section or a power of legislatures to be used as a shield and not a sword. So I'm just saying that these are very serious matters that we're anticipating with this bill.

Hon. Mr. Wyant: — We don't enter into this . . . We don't table this legislation lightly.

Ms. Beck: — It was interesting, following the decision, that the premier talked about the notwithstanding clause before consideration of appeal. Can you speak to that?

Hon. Mr. Wyant: — Well I think that the comments that the former premier had made were intended to provide a comfort to families who may be adversely affected, who would be adversely affected by the decision. And so notwithstanding the niceties of appeal, I think it was a very . . . It's a bold statement to say to address the significant concerns that were being expressed by parents whose children were non-Catholic children who were attending Catholic schools. Because we had heard a number of comments from parents in terms of, well where are my kids going to go to school next year? Do I have to start thinking about new schools?

And so the intent of the comment was simply intended to provide some comfort, and I would suggest some significant comfort to those families, to make sure that there would be status quo in terms of the educational opportunities that were being provided to their children.

Ms. Beck: — And I certainly can understand the concern of parents. And it was a very heightened time, a time of heightened concern. There were many calls that were going around. Would it not have been possible to provide some comfort stating that entering into appeal would be likely to result in a stay of that judgment?

Hon. Mr. Wyant: — Well the reason . . . Certainly the fact that this was a declaratory judgment by Justice Layh doesn't automatically stay the decision. So while we had the comfort of a one-year delay that was provided for in Justice Layh's order, the appeal doesn't necessarily in and of itself stay the judgment and hence the application for the stay which has been filed with the courts.

So certainly the reason for expressing an interest in using the notwithstanding clause at that time was simply to deal with that matter, that the appeal doesn't automatically stay the decision. Notwithstanding the fact that we had a year, it doesn't automatically stay the decision. And so I think it was important, and it was a kind of a nicety of the law, right? And it's probably a subtlety that's lost on a lot of people, but the fact that a bold statement is made in terms of protecting the rights of non-Catholic parents if they send their non-Catholic kids to Catholic schools was an important statement to make.

Ms. Beck: — The declaration of willingness to put forward the notwithstanding clause or putting forward this bill is not an immediate measure though. It still has to follow the legislative process, which has taken now more than a year. What I'm asking is if there were other avenues available to rightly calm

the fears of parents.

Hon. Mr. Wyant: — I hope this answers your question, and if it doesn't, you can tell me, which I'm sure you will. The legislative agenda in terms of the introduction of legislation, the passing of legislation, that that legislative agenda and that legislative timetable provided us with the opportunity of ensuring that we had legislation in the House that would pass prior to the expiry of the one-year time limit that was placed in Justice Layh's, that was in Justice Layh's decision.

I'm not sure if that answers your question. I mean in terms of other avenues that were available, certainly it's not my . . . I don't believe that there was any other legislative opportunities, given the fact that this was a judgment of the Court of Queen's Bench. So from a legislative opportunity this was, in our estimation, the only opportunity that was available to us.

Ms. Beck: — Minister Wyant, with the appeal process going forward, what are the potential implications of also having the notwithstanding clause in place? Are there implications for the appeal process?

Hon. Mr. Wyant: — It's not my view, it's not the view of the government that the presentation and the passing of this legislation will have any effect on the litigation that's currently before the court. Now there may be arguments that might be made about that in the court process, and we'll let those arguments be made and we'll let the court make those decisions. That's not our perspective. So this was kind of a two-track process: one on litigation side, and one on the legislative side. So while there may be some arguments that people may make about that, we will leave those arguments to be made by parties. But our position is that it doesn't.

Ms. Beck: — Has it been the case in I believe the 36-year history that there has been a parallel notwithstanding clause and appeal process undertaken?

[09:45]

Mr. Irvine: — The minister has asked me to address that. It has happened once. It was this legislature. In the 1980s the government passed back-to-work legislation for the dairy workers, and the Court of Appeal found that that infringed right to strike. That was on appeal to the Supreme Court. While the dairy workers' case was on appeal to the Supreme Court, the SGEU [Saskatchewan Government and General Employees' Union] went on strike and the government of the day passed back-to-work legislation for SGEU. And they used the notwithstanding clause because, based on the Court of Appeal decision, it would otherwise infringe the right to strike.

So that is an example of legislation being used under section 33 pending an appeal to the Supreme Court to determine the merits of the constitutional issue. It wasn't quite the same as this in that it was two separate bills, but it's the same idea, that the legislature can use section 33 on an interim basis pending an appeal to the Supreme Court.

Ms. Beck: — Thank you. Now one of the questions, or something that I wanted to explore a little bit, was just how infrequently section 33 has been . . . the notwithstanding clause

has been invoked. Can you speak to the history where it's been used again looking at, back 36 years?

Mr. Irvine: — Certainly. The main, one of the main uses right at the beginning was the Government of Quebec used the notwithstanding clause on all of their legislation as a political protest. However they've also, Quebec has also used it several times in relation to pension cases and also with respect to some education cases that raise religious issues. Those uses have not been given a great deal of attention, but they did occur.

Yukon used it very early on after the Charter came into force. I don't think that bill was ever proclaimed in force.

Alberta has attempted to use it twice, on one occasion because of popular response to the bill which was attempting to shield, cap amount of money that could be paid to people who had been sterilized against their will. The government withdrew that or did not go forward with that bill. The other one was a bill, an amendment to the *Marriage Act* during the same-sex marriage debate. That clause did pass.

And then there was also the . . . I referred to in the SGEU back-to-work legislation. So I think that's my understanding of it. So Quebec, Alberta, Yukon, and Saskatchewan are the jurisdictions which have used it.

Ms. Beck: — And as you noted in the case of the Yukon, it was passed but not proclaimed.

Mr. Irvine: — That's my understanding, yes.

Ms. Beck: — So very infrequently in 36 years that the notwithstanding clause has been invoked. Also associated with the notwithstanding clause is a five-year sunset clause that renders the legislation null and void . . . has to be renewed after five years. Has that notwithstanding clause ever been renewed in the history of the country?

Hon. Mr. Wyant: — A number of Quebec situations that they've renewed the legislation.

Ms. Beck: — In the case of the language laws it was not renewed. There were prior instances where it was renewed?

Mr. Irvine: — There was the omnibus Quebec bill which applied to all of them. And then subsequent bills were passed and they added it in each of their legislation during the period when the Parti Québécois was in force. So that's what I mean by it was being renewed, in that as they passed new legislation they tended to include a use of the notwithstanding clause in their new legislation. However once the Liberal government of Monsieur Bourassa came into force, they stopped doing that. And so those clauses gradually ceased to apply.

Ms. Beck: — Okay. Outside of Quebec, who had their own issues with the Charter, has it ever been renewed?

Mr. Irvine: — I don't believe so, no. Because in the Saskatchewan case the Supreme Court gave a decision . . . The back-to-work legislation of course, that's very time sensitive. It was for that one situation. And then after that bill was passed the Supreme Court gave a decision allowing the government's

appeal on the dairy workers' case and setting aside the Court of Appeal decision.

Ms. Beck: — Okay, thank you. The second part of . . . regarding operation of principles governing education funding. Not only is Bill 89 notwithstanding of 2 and 15 of the Charter, also notwithstanding the Human Rights Code, particularly sections 4, which speaks to the right of freedom of conscience; section 12, discrimination prohibited in spaces in which the public is admitted; and 13, the right to education. So those sections of the Human Rights Code are proposed to be set aside, if that's the right term. Is that usual? Does that usually accompany a section 33 invocation of the notwithstanding clause?

Mr. Irvine: — We only have the SGEU example, but it was done in the SGEU example as well, is my understanding. The reason for this is *The Saskatchewan Human Rights Code* has the provision that says the government can make express derogations from the Human Rights Code. That provision actually was part of the inspiration for section 33.

And the purpose here is that these three sections are the equivalent of sections 2 and 15 of the Charter. Section 12, you mentioned it as a place which public is admitted. It's been given a much broader interpretation than that. And section 12 is the general provision of access to services, including government services.

So the purpose of this is simply to parallel that if this law operates notwithstanding those . . . The funding provisions will operate notwithstanding the Charter. It also will operate notwithstanding those provisions of the code. But again it is restricted to the funding provisions. It's not making *The Education Act* as a whole immune from the Charter or the code. It's just the funding provision.

Ms. Beck: — The funding provisions. The section 33 has, as we've talked about, the associated sunset clauses associated with it. Is there a sunset clause associated with making this bill notwithstanding the Human Rights Code?

Hon. Mr. Wyant: — There is not. That would require a legislative amendment, so no, it doesn't sunset. It stays in perpetuity as long as the legislation continues to be on the books of the government.

Ms. Beck: — So even though there would be a sunset period for making this bill notwithstanding section 2 and 15, the second clause would remain in effect until such time as it was changed by legislation. Is that correct?

Hon. Mr. Wyant: — That's correct.

Ms. Beck: — Is there a reason for that? Is there a reason that that was not paralleled?

Hon. Mr. Wyant: — Well I can't speak to the original drafting of this particular clause in the Human Rights Code, but there is no provision in the code for sunseting a decision to notwithstand under the Human Rights Code. So I'm not sure that answers your question but there's just no provision for it to happen that way.

Ms. Beck: — Is that concerning?

Hon. Mr. Wyant: — Well it's not concerning as long as section 33 continues to be the operative provision with respect to, you know, what we're trying to accomplish. At some point in time if section 33 . . . if this legislation is not renewed, or if the section 33 is not renewed, then it would be somewhat problematic, I would say, at that point in time and another legislature's going to have to have a look at that.

Ms. Beck: — Has there been consideration of amending that to parallel a sunset clause with regard to the notwithstanding sections of the Human Rights Code?

Hon. Mr. Wyant: — I'm not aware of any consideration or discussion with respect to paralleling it. You mean paralleling it in this particular piece of legislation?

Ms. Beck: — I mean paralleling with regard to having the same sunset clause associated with it.

Hon. Mr. Wyant: — I'm not aware that there's been any consideration or discussion about that.

Ms. Beck: — Okay. I wanted to get back to measures that might have been explored by this government other than the notwithstanding clause as remedy to the situation. Were there any other options that were explored?

Hon. Mr. Wyant: — You may be aware that there was, you know, there was some mediation that happened between the parties in an effort to get to a resolution, which ultimately proved to be unsuccessful. And there was certainly some mediation that happens within the court pursuant to the litigation, which ultimately proved to be unsuccessful as well.

Ms. Beck: — I guess I'm speaking more specifically post-judgment.

Minister Wyant, I believe in your opening statements you made reference to a disruption or a potential threat to funding for independent historical high schools and associate schools related to this judgment. Can you describe the threat to funding for those schools as with regard to this judgment?

Mr. Irvine: — With respect to that question, I think we have to be very careful when something is still in front of the courts, so I don't want to comment very much about Justice Layh's decision. The decision does mention the independent and associate schools. We think there is some uncertainty as to where it . . . how far the decision goes with that respect. So I don't want to say anything more than that. There is some uncertainty about that.

You'll notice that in the proposed subsection 2.1(4), this requirement for funding that is put forward is not meant to apply as well to the independent and associate schools. The legislation draws a very sharp distinction between the public and separate schools, which have been part of our school system since territorial period, and the independent associate historical schools. So it's meant to draw that distinction between them and it will, it will depend in part on how the court process works. But we have to be so cautious about matters

sub judice so I'm reluctant to speak more to that.

[10:00]

Ms. Beck: — I certainly understand your caution. Speaking to the minister, there certainly had been talk by the previous minister and by the premier in particular, the previous premier in particular about threat to funding for independent and historical high schools and associate schools associated with this judgment. I have read the judgment. I'm not a lawyer, but that is not readily clear to me, that threat in this judgment.

It was also, in my view, those fears were inflamed when we saw those groups invited to the gallery to view Bill 63. And there was some concern about the pretence under which those bodies were, those groups — who were rightfully concerned — were brought here. I'm just wondering if there is any clarity that you can bring to the threat with this decision, with regard to the funding for independent and historical high schools and associate schools.

Hon. Mr. Wyant: — Well I think in your own words you said it's not readily clear. I've read the judgment as well, and I think that's precisely the point of why the legislation's prepared that way. So I want to be very, very cautious about this in terms of the comments that we make, but I think that's precisely the point, to make sure that we understand with some clarity what the implications of the judgment are. That's why the legislation was drafted in the way it was.

Ms. Beck: — I would, I would just point to the need or the hope not to inflame fears in this case unnecessarily, and express I guess some frustration that that was done by the premier after this decision was rendered, with regard to that threat. But I guess I understand your point, that it is before the courts.

So as you've noted, with the appeal and with the application for a stay of judgment, should that be accepted by the Court of Appeal, that the status quo funding model will remain in place until such time as there's a decision at the Court of Appeal.

Hon. Mr. Wyant: — That's correct.

Ms. Beck: — So there will be no impact to either the public school system, the separate school system, or any of those other bodies — the independent historical high schools or the associate schools?

Hon. Mr. Wyant: — The legislation, or the appeal will maintain the status quo, and then subject to proclamation of this legislation would continue the status quo.

Ms. Beck: — And likely then if this matter were heard at the Supreme Court, that there would be an associated stay of judgment until such time as a decision was rendered by the Supreme Court?

Hon. Mr. Wyant: — There's a lot of options here, I guess. The Court of Appeal could include the stay in their judgment. If they didn't, there would need to be an application of the Supreme Court for a stay of proceedings. And then the backstop of course would be the proclamation of this legislation.

Ms. Beck: — So something to be used in absence of any of those other options that would maintain the status quo?

Hon. Mr. Wyant: — That's right. And that's the reason for the House amendment that's going to be introduced today.

Ms. Beck: — If it were passed, does this legislation impact the ability of any of the parties to restrict admission on the basis of protected Charter grounds?

Hon. Mr. Wyant: — Certainly, and I made this in my earlier comments, it's up to, you know, individual school boards to determine admittance policies. So this legislation does not change that.

Ms. Beck: — Are those admission policies subject to those sections of the Charter currently? And would they not be subject to them were this to pass?

Mr. Irvine: — There's a historical difference between the public schools and the separate schools. The public schools are considered to accept, required to accept everybody. They're directly subject to the Charter. The separate schools are subject to the Charter subject to what their separate school rights are. And one of those rights traditionally has been admission restrictions based on religion of the students, the parents, the guardians.

I understand, just from what I've . . . through the process of the legislation, that there has been a gradual expansion by the separate schools and they're much more willing to accept students that are not of their particular religious faith. And the issue has never really been litigated but it's always been assumed that part of their separate school rights includes some aspect of control over admission based on religious values.

And this legislation doesn't address that, in response to your question, because you'll see that it is only section 2.1 that is subject to the notwithstanding clause. And that's only about funding from the provincial government. It doesn't speak to the powers of either the public or separate schools.

Ms. Beck: — So it also does not then similarly impact the admissions policies of independent schools, historical high schools, or associate schools?

Mr. Irvine: — This provision is aimed at funding by the provincial government.

Ms. Beck: — Okay.

The Chair: — Ms. Beck, if you wish to consult with your colleague, I do have another member who has a question.

Ms. Beck: — Certainly.

The Chair: — I recognize Mr. Goudy.

Mr. Goudy: — Sorry, just for clarification I was going to ask, it's been a lot about the Catholic schools but historically could you give us a little bit of insight into the public and separate which has been the discussion but . . . Or the minority faith aspect of the Catholic? Because we also have a Protestant

school in our province. So could you clarify the majority faith, minority faith history of Saskatchewan just so that we can understand it's not a Catholic-only situation? Because in Englefeld we have a Protestant school.

Mr. Irvine: — Yes. In the territorial period, there was a lot of legislation back and forth trying to settle on how to deal with religious schools and separate schools. The compromise that was established in 1901 — and bear in mind this is still when settlement is ongoing — was that each school district was established, and then the religious minority, whether Protestant or Catholic, could establish a separate school. And it was done district by district because they didn't know how the settlement patterns would emerge. And so it was done very much on a local basis.

As time has gone on, we have had some Protestant school separate schools at various times. At the moment we only have the one. If a Protestant school . . . The Protestant and Catholic separate schools, if they are the minority, they have exactly the same rights. So it's . . . We tend to use the phrase "separate Catholic schools" as the shorthand for separate schools, but the constitutional provisions provide either for Protestant separate schools where there's a majority Roman Catholic, or Catholic separate schools where there's a majority Protestant.

Now of course those arrangements don't match as well in today's demographics because . . . But at that time it was assumed that it would be either Protestant or Catholic. But if a Protestant separate school like Englefeld is established, it has exactly the same powers as a Catholic separate school. And both of those in turn have the same powers as the public schools have, subject of course to issues like admissions and so on.

Mr. Goudy: — Can I ask a second question?

The Chair: — Yes.

Mr. Goudy: — So before, like let's say the Catholics would start their separate school in a community. Like let's take my community for an example. We don't have a Catholic school. We don't have a separate school because the Catholics were fine sending their children to the majority faith school, I guess that would be. So in reality, when kids . . . The parents of the children were fine sending their minority faith kids to the majority school or the public school. It's okay back then for someone to send their kids to the opposite faith school. And basically that's what this would allow, is people to send their children to an opposite faith school. Like if mine is a Protestant, and I want to send him to the Catholic school, I can. Because before there is a separate school, everyone's sending their children to the majority faith school. Is that the historical background behind all this?

Mr. Irvine: — That's the historical background. As time has gone on, the public schools are . . . We don't tend to think of them as majority faith schools anymore. We tend to think of them as secular.

However, technically the public schools also have the right to provide religious education. They have the right to use the Lord's Prayer. This was school litigation that was 20 years ago in Saskatoon. And although in that particular case it was found

that the use of the Lord's Prayer wasn't consistent with the requirements of *The Education Act*, the Human Rights board of inquiry found that yes, public schools can provide religious instruction and can provide the Lord's Prayer. So it's not a very clean, clear-cut division because of our historical background, but I think the basic point is that the public schools can accept anybody. There is a question about how far the separate schools can refuse to accept, but that is not affected by the legislation proposed.

Mr. Goudy: — Thanks.

The Chair: — I recognize Ms. Beck.

Ms. Beck: — Thank you. As was noted by the Chair, and I believe I noted in my opening statements as well, there have been submissions to this committee, and I wanted to thank those who have made submission and wanted to take some time to read some of those concerns and perhaps ask for some responses from the minister.

Reading first from the SCSBA submission, Mr. Fortosky notes that with regard to Justice Layh's decision, part of that decision was a stay until June 30th of this year, and I quote, "Unless the decision is further stayed, it will be in effect after June 30th of this year, and if an extension is not granted, the government is bound by the decision even though an appeal of the decision has been filed."

Certainly were that decision to come into force June 30th of this year, there would be a great deal of disruption. I think that that is something that everyone can agree to. What is the likelihood that that will come into force on June 30th? Is it likely to be the case that the stay will be granted?

[10:15]

Hon. Mr. Wyant: — Well I guess I'd venture to say that there is no likelihood. I mean at the end of the day, if the appeal or if the stay of the appeal is not granted, it is the intention of the government to proclaim this legislation prior to June 30th. So it's simply from . . . We are not expecting nor would we allow any disruption in the system pending this appeal and that's precisely why the legislation is here before us today.

Ms. Beck: — I guess what I'm . . . I understand your point. What I'm asking, and I should have been more clear, is the likelihood that that stay won't be granted.

Hon. Mr. Wyant: — Well all I'll say on that . . . I mean that's within the discretion of the court to determine whether or not they will issue the order. I can tell you that the parties to the litigation have all consented to the order. And the practice would be, at least by my experience in the court, is when a consent order is filed with the court it would be very unusual for the court not to issue that order. But that's certainly still within the purview of the court to do that if they so choose. But as I say my experience . . . it's not my experience. I don't think it's the experience of Mr. Irvine either. So I guess at the end of the day in the event, in the unlikely event that the court didn't issue, chose not to issue the order, we would proclaim this legislation.

Ms. Beck: — Okay. Mr. Fortosky also talks about the notwithstanding clause as being a tool and certainly that is something that the opposition is on the record as being in agreement with, that this is a tool, a tool not . . . I believe the minister stated, to be used as a shield, not a sword, something certainly not to be entered into lightly. If this legislation were passed but not proclaimed, what would be the process, say after June 30th or a time in the future when the protection of the status quo through the courts was not granted, what would be the process to proclaim it?

Hon. Mr. Wyant: — Well the simple process is that there would . . . we would have to convene a meeting of the cabinet to have a decision to proclaim it. So it would be a decision of cabinet. So it's a fairly simple process. We would just convene a cabinet meeting and proclaim the legislation.

Ms. Beck: — Okay.

Hon. Mr. Wyant: — And then the Lieutenant Governor of course would sign off on that, issue the proclamation.

Ms. Beck: — So it's something that could be done in a day if you could gather cabinet together.

Hon. Mr. Wyant: — Yes.

Ms. Beck: — Okay. And certainly in this presentation or this submission by the SCSBA, it talks about the concerns of parents, the perhaps confusion and concerns about the message that, you know, as of the end of this year their children would have to move to other schools. Is there any plan to communicate out to parents, out to school boards, the court case or the status quo nature? I guess what I'm getting at, if that is a concern and a legitimate concern for parents, is there an interest of the ministry to ensure that parents understand the process and what is going on with regard to the case?

Hon. Mr. Wyant: — It is the intention of the Ministry of Education to communicate this quite broadly. So in terms of how that's going to be communicated, we're working on that protocol now, but it certainly would be our intention to ensure that the broader public are aware of the decision that's been made by the government and the legislation which has been passed.

Ms. Beck: — Yes, there are certainly ways to communicate that can increase tension and concern and ways that can quell and calm. I assume or I hope we're talking about the latter.

Hon. Mr. Wyant: — Yes, we are. We'll certainly be working with our officials in Education who have some great experience when it comes to this, in dealing with situations. We'll be very careful.

Ms. Beck: — I'm going to read now from the submission from the public section. One of the things that has been talked about a lot with regard to Justice Layh's decision, the appeal, the notwithstanding clause, has been around the issue of certainty and clarity. There is a statement here that the notwithstanding clause must be renewed after five years, so it is not a final solution and places a burden on future governments with the need to revisit the question on an ongoing basis. Can you speak

to your thoughts around the extent to which the notwithstanding clause provides certainty to parents or school systems with regard to the issue of school funding going forward?

Hon. Mr. Wyant: — Well certainly the comments that have been made by the public section is true. I mean the fact of the matter is that there is a five-year sunset on this provision.

One would hope, and it's my hope and I've said this publicly, that the decision of Justice Layh and the fact that we brought this legislation forward does create an element of immediacy or certainly more immediacy now than was presented to the parties prior to the decision of the judge. So one would hope that this would kind of encourage, and I would encourage an ongoing conversation between the parties in terms of what this looks like at the end of the day, once the Supreme Court has come up with a final decision, noting that the notwithstanding clause is only a five-year term, and it would be left to a future government to make a decision as to how this would work.

But it does create a little bit of an opportunity, I think, for the parties to start giving some fairly serious thought to what this all looks like at the end of the day, and whether there are other tools that can be implemented. And I'm not prepared to talk about what those tools are because I haven't given a whole bunch of thought to them, but are there other tools that can be used? So I think that that's part of the conversation that has to happen. And the public section is absolutely correct that there is no final solution here in terms of the protection that we're seeking by using this clause.

So I think it demands a conversation. It's something that's more immediate now than it was prior to the decision of the judge, when there was some mediation that happened and some mediation that happened during the court process. But now, and I've made this comment publicly a few times that there's more immediacy now. And so how does that feed into a future conversation between the parties to the litigation? And I would encourage that conversation. But you're right.

Ms. Beck: — Will the ministry be involved in actively encouraging those conversations and those solutions or that path?

Hon. Mr. Wyant: — Well I think that . . . I've made the comment that I want to see that happen. Now in terms of an official government position on that, I can't speak to that. We haven't had that conversation. But it would be my hope that the ministry would be involved in that conversation. Certainly as the major funder, the only funder of education in this province, we are a significant stakeholder in the future of public education, and so I think of necessity we would need to be part of that conversation.

Ms. Beck: — Thank you. One of the comments . . . I think the final comment here on the public school section is an interesting comment around the extent of which this notion of parental choice applies in rural Saskatchewan as opposed to in urban centres. Is this notion of parental choice something that more impacts cities as opposed to rural schools?

Hon. Mr. Wyant: — Certainly the legislation has general application across the whole province. It wasn't necessarily

intended to differentiate between rural and urban communities. So it's legislation that has, you know, broad application across the province and certainly was not, as I said, not intended to differentiate between rural and urban. I assume that those are arguments that may well be put forward by the public section in terms of the arguments that they will make to the Court of Appeal. So I will, I'll leave them to do that.

Ms. Beck: — And I just wanted to draw attention to the submission by Mr. John Whyte. I think it's there for committee members to read. It talks about the renewal, the sunset clause, which we've already spoken to. One point, just in terms of a prediction, in terms of an appeal — assuming an appeal to the Supreme Court — he puts forth potentially fall or winter of '20, as late as 2023, so certainly within that or outside of that five-year time period.

I do think I have been able to ask the questions that I came with. I hope I've been able to provide the diligence to this bill that I think is certainly required. And I guess just wanted to say in terms of, with regard to the amendment, that was something that we saw as potentially a way to hold the notwithstanding clause as a tool, but not proclaim it unnecessarily and potentially opening the education system up to that five-year period falling before this case was heard at the Supreme Court, which I think is the expectation of most people, if not everyone, in this room.

With the goal to — and I'm glad to hear the minister say this — to encouraging relationships and co-operation within the sector and acknowledging the very important role that education plays in this province, the role of . . . both sections play in this role. So I do feel that I have had the opportunity to say what I wanted to say, to ask what I wanted to ask. So with that I think I will conclude my questions.

[10:30]

The Chair: — Okay, thank you, Ms. Beck. Are there any more questions or comments by committee members? If not, we will proceed with the voting on Bill No. 89, *An Act to amend The Education Act, 1995*. Clause 1, short title, is that agreed?

Some Hon. Members: — Agreed.

The Chair: — Carried.

[Clause 1 agreed to.]

[Clauses 2 to 7 inclusive agreed to.]

Clause 8

The Chair: — I recognize Mr. Steinley.

Mr. Steinley: — Thank you, Mr. Chair. I'd move that:

Amend Clause 8 of the printed Bill, by striking out “on assent” and substituting “on proclamation”.

The Chair: — It has been moved by Mr. Steinley:

Amend Clause 8 of the printed bill, by striking out “on

assent” and substituting “on proclamation”.

Is that agreed?

Some Hon. Members: — Agreed.

The Chair: — Carried.

[Clause 8 as amended agreed to.]

The Chair: — Her Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows: *The School Choice Protection Act*.

I would ask a member to move that we report Bill No. 89, *The School Choice Protection Act* with amendment. Mr. Fiaz. It's been moved by Mr. Fiaz. Is that agreed?

Some Hon. Members: — Agreed.

The Chair: — Carried. Ms. Beck, do you have any final comments you wish to make?

Ms. Beck: — I sort of used my last question as my final comments; I got carried away. But I did want to sincerely thank the minister and the officials here with us today, as well as those guests who are here with us. Certainly this has been and is a very significant bill in what is arguably one of the most significant sectors in our province, and that is our education system.

So I am encouraged by the minister's comments around the need for relationships and, well I don't want to paraphrase the minister, but the need for a clear vision, a clear path forward for education in this province, to ensure that it meets its goals — and that is the education of all students in this province to the highest degree to which we can afford to provide that education. And I thank you for your time and for your answers to the questions, and thank you to all of the committee members here, all of those who make it happen. I appreciate the time. Thank you.

The Chair: — Mr. Minister, do you have any closing comments?

Hon. Mr. Wyant: — Well thank you, Mr. Chair. First of all I'd like to thank you and the committee for your attendance here today. I wanted to thank the individuals and the groups that had provided submissions to us; the officials that are with me today for all their support; Ms. Beck for your respectful questions; and Mr. Goudy for your question as well, thanks for that; and to our guests that took the time to be here today. As Ms. Beck indicated, this is an important, important issue for the future of public education in Saskatchewan.

And finally to Hansard, thank you very much for your help too, as well today. Thank you, Mr. Chair.

The Chair: — Thank you, Mr. Minister. I too would like to thank the minister and his officials for being here and for my legislative colleagues for their questions and for the submissions from the general public, for their interest in this.

At this time I would ask a member to move adjournment. Mr. Steinley has so moved. All agreed?

Some Hon. Members: — Agreed.

The Chair: — Carried. This committee stands adjourned to 3 p.m. this afternoon.

[The committee adjourned at 10:35.]