

Indexed as:
Jacobi v. Newell (County No. 4)

Between Ken Jacobi, Mary Jacobi and Wyatt Jacobi, Marshall Jacobi, Lindsay Jacobi, Clinton Jacobi and Lesley Jacobi, infants, by their next friend Ken Jacobi, Plaintiffs, and The County of Newell No. 4, The County of Newell No. 4 Board of Education, The Aqueduct Roman Catholic Separate School District No. 374 and The Board of Trustees of The Aqueduct Roman Catholic Separate School District No. 374, Defendants

[1994] A.J. No. 125

112 D.L.R. (4th) 229

[1994] 5 W.W.R. 93

16 Alta. L.R. (3d) 373

150 A.R. 34

45 A.C.W.S. (3d) 1045

No. 9308-00122

Alberta Court of Queen's Bench Judicial District of Medicine Hat

O'Leary J.

Judgment: January 31, 1994. Filed: February 3, 1994.

(45 pp.)

STATUTES, REGULATIONS AND RULES CITED:

Alberta Act, S.C. 1905, c. 3, s. 17.

Alberta Bill of Rights, R.S.A. 1980, c. A-16, ss. 1(b), 1(c).

Canadian Charter of Rights and Freedoms, 1982, ss. 1, 2(a), 15(1), 52(1).

Constitution Act, 1867, ss. 93(1), 93(2), 93(3), 93(4).

Constitution Act, 1982, s. 52(2). County Act, R.S.A. 1980, c. C-27. Judicature Act, R.S.A. 1980, c. J-1.

School Act, R.S.A. 1980, c. S-3.1, ss. 27, 28, 31, 32, 34, 35, 36, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 94, 96, 97, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147,

148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 206, 207, 208, 210, 212. School Ordinance, Ord. N.W.T. 1901, c. 29, ss. 41, 42, 43, 44, 45, 95. School Assessment Ordinance, Ord. N.W.T. 1901, c. 30, s. 26.

Constitutional law -- Division of powers -- Constitutionality of the School Act -- Civil Rights -- Education law --

Practice – Mootness – Standing – Trustees.

Action challenging the legitimacy of a separate school district and its trustees' right to exercise the powers conferred on school boards by the School Act. In particular, they questioned the constitutional validity of sections 27, 28, 31, 32, 34 to 36, 43 to 58, 94, 96, 97, 131 to 187 and 207 of the Schools Act. The dispute concerned non-resident tuition fees. The defendants had moved unsuccessfully to strike out the statement of claim on the grounds of mootness and lack of standing. The plaintiffs argued state support of denominational schools violated sections 2(a) and 15(l) of the Canadian Charter of Rights and Freedoms and subsections I (b) and I (c) of the Alberta Bill of Rights absent a constitutional right and guarantee for such schools. They also argued the guarantee did not protect a separate school district which provided a public school education and did not purport to protect religious values.

HELD: To the extent the impugned provisions of the Schools Act permitted the establishment and operation of separate school districts which did not offer resident students a denominational education, they were inconsistent with sections 2 (a) and 15(l) of the Charter and subsections I (b) and I (c) of the Alberta Bill of Rights. The defendants had no right to exercise any of the powers or receive any of the benefits to which separate school boards were entitled under the School Act. The plaintiffs were not obliged to direct their property taxes to the support of the separate school district, bound to send their children to schools directed by the defendants or to pay non-resident fees to the county.

T.W. Wakeling and G.D. Chipeur, for the Plaintiffs.

K.W. Lutes, for the Defendants The Aqueduct Roman Catholic Separate School District No. 374 and Aqueduct Board of Trustees.

M. Unsworth, for the Attorney-General for Alberta.

R.J. Shaw, for the Defendants The County of Newell No. 4 and the County of Newell No. 4 Board of Education.

REASONS FOR JUDGMENT

O'LEARY J.:--

I INTRODUCTION

1 The Plaintiffs are a Roman Catholic family who, at the material times, resided near the Town of Rolling Hills in the County of Newell in the Province of Alberta. The primary Defendants are The Aqueduct Roman Catholic Separate School District No. 374 and The Board of Trustees of the Aqueduct Roman Catholic Separate School District No. 374 ("the Aqueduct Separate School District" and "the Aqueduct Trustees" respectively; collectively "the Aqueduct Defendants"). The Aqueduct Separate School District was established in February, 1991 pursuant to the School Act, R.S.A. 1980, c. S-3. 1. The adult Plaintiffs, as Roman Catholics, became residents of the new school district and were directed by the Aqueduct Trustees to send their children to the public school in the Town of Brooks rather than to the Rolling Hills Public School which they had been attending. The Plaintiffs are aggrieved and have brought this action to challenge the legitimacy of the Aqueduct Separate School District and the right of the Aqueduct Trustees to exercise the powers conferred on school boards by the School Act.

2 The Aqueduct Defendants do not own or lease school premises or employ teachers. The Aqueduct Trustees have entered into an agreement with the Brooks public school district under which the latter accepts

the children of residents of the Aqueduct Separate School District and is paid tuition fees and transportation and other costs by the Aqueduct Trustees.

3 The Plaintiffs question the constitutional validity of certain provisions of the School Act, viz. ss. 27, 28, 31, 32, 34-36, 43-58, 94, 96, 97, 131-187 and 207, and Forms I and 2 ("the impugned provisions") [note 1] to the extent that they permit the establishment and operation of a Protestant or Roman Catholic separate school district which does not offer its resident students a "denominational" program of education, either directly or by arrangement with another Protestant or Roman Catholic separate school district but, rather, directs its students to attend a public school. Are the Aqueduct Defendants entitled to exercise rights and powers and receive benefits under the impugned provisions when they do not operate a Roman Catholic separate school or direct any resident students to another Roman Catholic school?

[Note 1: It is not necessary to set out the precise wording of the impugned provisions. Some key sections will be referred to in the body of the judgment. The impugned provisions provide for the establishment of separate school districts by Protestant and Roman Catholic minorities, their management and operation by boards of trustees, and grants separate school districts the power to assess and tax property owned by members of the minority for school purposes.]

4 It is argued that the constitutional right of Roman Catholics in the Province of Alberta to establish separate school districts is not absolute. A separate school district must operate a "separate school" which offers a uniquely Roman Catholic program of education through its own facilities or by directing its resident students to attend a school operated by another Roman Catholic school district. To the extent that the impugned provisions permit the establishment and operation of Roman Catholic separate school districts which provide a program of education with no religious context, they are inconsistent with ss. 2(a) and 15(1) of the Canadian Charter of Rights and Freedoms ("the Charter") and Clauses I (b) and (c) of the Alberta Bill of Rights. The Plaintiffs seek a declaration that the impugned provisions are of no force or effect or, alternatively, that they must be interpreted in a manner consistent with the Charter and the Alberta Bill of Rights.

5 Counsel for the Defendants other than the Aqueduct Defendants appeared at the hearing but took no part in the proceedings. The Attorney-General for Canada and the Attorney-General for Alberta were given notice as required by s. 25 of the Judicature Act, R. S.A. 1980, c. 3- 1. Counsel for the Attorney-General for Alberta made oral and written submissions supporting the validity of the impugned provisions.

11 FACTS

6 The following facts are not in dispute:

7 1. The Defendant The County of Newell No. 4 ("the County of Newell") is a county under the County Act, R. S.A. 1980, c. C-27 and the Defendant The County of Newell No. 4 Board of Education ("the Newell Board of Education") is a board of education under the School Act.'

8 2. The Plaintiffs, Ken Jacobi and Mary Jacobi, are husband and wife and are the parents of the infant Plaintiffs Wyatt Jacobi, Marshall Jacobi, Lindsay Jacobi, Clinton Jacobi and Lesley Jacobi ("the Jacobi children").

9 3. In 1985 the Plaintiffs became residents of the County of Newell near the Town of Rolling Hills. At the commencement of this action the Jacobi children were all under the age of 15 years.

10 4. The County of Newell and the Newell Board of Education operate the Rolling Hills public school and other schools under the authority of the School Act. The Rolling Hills public school offers an educational program for grades one through nine. There is no high school in Rolling Hills.

11 5. Many of the children of residents of the County of Newell who live in the general area of Rolling Hills attend the Rolling Hills public school. Since becoming residents of the Rolling Hills area one or more of the Jacobi children has attended the Rolling Hills public school every school year from 1985 to the end of the 1991-92 school year. None of the Jacobi children were enrolled in any other school between 1985 and June, 1992.

12 6. The Brooks School District No. 2092 ("Brooks School District") operates public schools in the Town of Brooks, Alberta under authority of the School Act. The Brooks School District is not a separate school district under the School Act.

13 7. Many residents of the County of Newell living in the vicinity of Rolling Hills send their high-school age children to the high school in the Town of Brooks operated by the Brooks School District. This is pursuant to the direction of the Newell Board of Education made in accordance with s. 28(1)(b)(1) of the School Act:

"28(1) A board shall provide to each of its resident students an education program consistent with the requirements of this Act and the regulations and, for the purposes of providing the education program to the student, the board shall

(a) enrol the student in a school operated by the board, or

(b) direct the student to attend

(i) a school operated by another board or the Government,

(ii) a school operated by a school board in or a government of another jurisdiction,

(iii) a private school accredited under section 22, or

(iv) a school or institution approved by the Minister

and pay the fees of and costs consequent to the student's attending that school or institution."

14 8. For some period of time the Brooks School District, having sufficient facilities and resources to accommodate non-resident students, accepted for enrolment the elementary school children of a number of residents of the County of Newell pursuant to an agreement with the County of Newell made under s. 46(1)(b) of the School Act:

"46(1) A board may, without the approval of the Minister,

(a) enter into an agreement with

(i) a person, or

(ii) a joint committee established under section 47, respecting the provision of educational, managerial or other services with respect to the operation of schools;

(b) with respect to its resident students, enter into an agreement with another board or person to provide educational programs;

(c) Enter into an agreement with a municipality concerning the promotion and development of recreational and community services."

15 9. The County of Newell paid tuition fees and transportation costs to the Brooks School District for the placing of students in schools operated by the Brooks School District. This arrangement was made pursuant to s. 28(2) of the school Act:

"28(2) Where

- (a) a board is willing to provide an education program to a resident student as required under subsection (1), and
- (b) the parent of that student wishes to send the student to a school other than a school
 - (i) operated by the board, or
 - (ii) that the board directed the student to attend under subsection (1)(b),

the board may, subject to subsection (7), provide all, part or none of the funds necessary for placing the student in a school chosen by the parent."

16 10. On May 28, 1990 the Newell Board of Education passed the following resolution:

"... that we direct County resident students, who are residing outside the Brooks School District boundaries, to County schools."

Effective January 1, 1992 the County of Newell terminated its policy of funding the attendance of its resident elementary school students at schools operated by the Brooks School District. That decision precipitated the series of events which led to these proceedings. Many residents of the County of Newell wished to continue sending their children to school in Brooks without cost. The change in policy did not affect the adult Plaintiffs who had been sending their children to a school operated by the Newell Board of Education and were content to continue doing so.

17 11. On February 7, 1991 the Minister of Education, pursuant to ss. 206 and 207 of the School Act, established the Aqueduct Separate School District. Section 206(1) is as follows:

"Where the majority of the separate school electors present at the meeting at which a quorum is present vote in favour of the establishment of a separate school district, the Minister shall by order establish the separate school district with the same boundaries as those of the public school district."

Section 207(6) says:

"Subject to Part 6, Division 2, after a separate school district is established, a person residing within the boundaries of the separate school district who is of the same faith as those who established that district, whether Protestant or Roman Catholic, is a resident of the separate school district and is not a resident of the public school district."

18 12. On May 10, 1991 the Minister of Education, pursuant to ss. 206 and 207 of the School Act, established the East Rolling Hills Roman Catholic Separate School District No. 386 ("East Rolling Hills Separate School District").

19 13. On August 18, 1991 the Minister of Education, pursuant to ss. 208, 210 and 212 of the School Act, made the "Aqueduct Roman Catholic Separate School District Boundary Adjustment Order" ("August 18, 1991 Order").

20 14. The effect of the August 18, 1991 Order was to dissolve fifteen Roman Catholic separate school districts, including the East Rolling Hills Separate School District, and to add the lands contained in the dissolved districts to those of the Aqueduct Separate School District.

21 15. On September 9, 1991 the Aqueduct Trustees appointed Duncan Gillespie as the Superintendent of the Aqueduct Separate School District and Bernie Hanson as the Secretary-Treasurer of the Aqueduct Separate School District. At that time, Duncan Gillespie and Bernie Hanson were also the Superintendents and Secretary-Treasurer, respectively, of the Brooks School District. Bemle Hanson ceased to be the Secretary-Treasurer of the Aqueduct Separate school District on October 20, 1992 and was replaced by Linda Hajash. The Aqueduct separate School District and the Brooks school District maintain offices in the same building at 408- 1 st Street West, Brooks, Alberta.

22 16. After the August 18, 1991 Order, the residence of the Plaintiffs, for the purposes of the School Act, came within the boundaries of the Aqueduct Separate school District. It had been within the boundaries of the East Rolling Hills Separate School District before it was dissolved.

23 17. The Aqueduct Separate School District does not have a school building within its geographic boundaries or elsewhere, nor does it employ teachers. Pursuant to s. 46(1) of the School Act it entered into an agreement dated July 13, 1992 with the Brooks School District ("the Provision of Services Agreement") [note 2]. Under the Provision of Services Agreement, which is still in effect, the Brooks School District allows residents of the Aqueduct Separate School District to enrol their children in public schools operated by the Brooks school District, and the former agrees to pay the tuition fees and costs charged by the Brooks School District. The Brooks School District assumes full responsibility for providing a program of education for students of the Aqueduct Separate School District, including transportation to and from Brooks. No special courses or programs are offered to students from the Aqueduct Separate School District. The Brooks School District is also responsible for almost all of the administrative functions incidental to the operation of the Aqueduct Separate School District. There is no evidence that the present arrangement is merely an interim measure until the new district can develop its own education program and facilities.

[Note 2: The full text of the Provision of Services Agreement is appended to this judgment as Appendix "A".]

24 18. The effect of the formation of the Aqueduct Separate school District and the Provision of Services Agreement was to enable many Roman Catholic residents of the County of Newell to continue sending their children to the public school in Brooks without payment of non-resident tuition fees and other costs. In the 1992-93 school year 163 students from the Aqueduct Separate School District attended at schools operated by the Brooks School District.

25 19. The Plaintiffs Ken Jacobi and Mary Jacobi, as Roman Catholics and, by virtue of s. 207(6) of the School Act, became residents of the Aqueduct Separate School District upon its formation and thereupon ceased to be residents of the Newell public school district. For the purpose of education taxes they became property owners claimed by the Aqueduct Separate School District. They were subsequently advised by the County of Newell of the claim of residency made by the Aqueduct Separate School District.

26 20. The Plaintiffs Ken Jacobi and Mary Jacobi wished to continue sending the Jacobi children to the Rolling Hills public school. They did not wish to have their property liable for assessment for the support of the Aqueduct Separate School District. On August 6, 1991 the Plaintiffs Ken Jacobi and Mary Jacobi wrote the following letter to the Secretary-Treasurer of the County of Newell:

"We, Ken and Mary Jacobi of Rolling Hills, request that all of our tax dollars remain with the County of Newell No. 4, and further that our five children continue to attend the Rolling Hills School.

We are all of the Roman Catholic faith, but do not support the newly formed Roman Catholic Separate School Board."

27 21. By letter dated November 12, 1991, the County of Newell advised the Plaintiffs Ken Jacobi and Mary Jacobi that it was "unable to comply with your request of August 6, 1991. "

28 22. At no time did any of the Plaintiffs request that the Jacobi children be directed to or permitted to attend a school operated by any other Roman Catholic school board.

29 23. The Jacobi children continued to attend the Rolling Hills public school and the County of Newell presented the Plaintiffs Ken Jacobi and Mary Jacobi with monthly statements of account charging them monthly non-resident tuition fees of \$259.99 for each of the children, commencing with the month of January, 1992. The annual non-resident fees totalled \$2,599.90 per child.

30 24. By letter dated January 10, 1992, the Aqueduct Separate School District advised the Plaintiffs Ken Jacobi and Mary Jacobi that:

... the Board agrees to support tuition fees for your children to the same level of support as we pay to educate those Aqueduct students who have been directed to attend the Brooks School District schools. "

31 25. By letters dated March 3 and March 31, 1992, the Aqueduct Separate School District advised the Plaintiffs Ken Jacobi and Mary Jacobi that it would, on proof of payment, reimburse them for tuition fees in the amount of \$1,538.55 per annum per student, plus the net average cost per student (\$114.00) for transporting each student to Brooks. The maximum annual amount payable per student would therefore have been \$1,652.55, or \$947.35 per child less than the amount charged by the County of Newell.

32 26. The Plaintiffs Ken Jacobi and Mary Jacobi sold their house and property near Rolling Hills in May, 1992, before the commencement of this action and before any taxes were levied against their property for the calendar year 1992. The Plaintiffs moved to the Province of Saskatchewan on or about June 30, 1992 and have continued to reside in the Province of Saskatchewan to the present.

33 27. On January 5, 1993 the County of Newell cancelled all non-resident tuition fees, including those previously billed to the Plaintiffs Ken Jacobi and Mary Jacobi for the attendance of the Jacobi children at the Rolling Hills public school.

III MOOTNESS AND STANDING

34 On July 7, 1992 the Aqueduct Defendants moved for an Order striking out the Statement of Claim on the grounds, inter alia, that the issues raised were moot and that the Plaintiffs had no standing to maintain the action.

35 The application was based on the fact that the adult Plaintiffs had disposed of their land in the County of Newell and the family had moved permanently to the Province of Saskatchewan. The motion was heard by Montgomery, J. on October 29, 1992. He found that the Plaintiffs had not, by virtue of selling their land and moving from the Province of Alberta, lost their standing to prosecute the claim nor had the issues raised become moot for that reason. That ruling was not appealed.

36 Subsequent to dismissal of the motion the County of Newell and the Newell Board of Education abandoned their claim for non-resident tuition fees in respect of the Jacobi children for the period January 1 -

June 30, 1992. At the time of the motion to dismiss the claim was outstanding, however, efforts at collection had been suspended pending the outcome of the action. Montgomery, J.'s rulings on each issue were based in part upon the fact that the claim remained outstanding.

37 The claim for fees no longer exists. If it were the sole basis for Montgomery, J.'s ruling I would be free to reconsider the issues of standing and mootness. He relied on other grounds as well. His ruling was not appealed and it is not now open to me to re-consider these issues.

38 I am bound to assume that the Plaintiffs continue to have standing to maintain the action and that the issues raised are not moot.

IV LEGISLATION

(i) The British North America Act, 1867.

39 At Confederation the exclusive right to legislate in the field of education was given to the provinces. That exclusive power was, however, expressly made subject to an important limitation - no province may legislate in a manner which prejudicially affects the rights of the Roman Catholic and Protestant minorities to establish their own separate schools as those rights existed in 1867. Section 93 of the British North America Act, 1867 (now the Constitution Act, 1867) states:

"93. In and for each Province the Legislature may exclusively make laws in relation to Education, subject and according to the following Provisions:

- (1) Nothing in any such Law 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:
- (2) All the Powers, Privileges, and Duties at the Union by Law Conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:
- (3) Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, 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:
- (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section."

(ii) The Alberta Act.

40 When the Province of Alberta was created in 1905, s. 93, as it applies to Alberta, was amended by s. 17 of the Alberta Act, S.C. 1905, c. 3. Section 17 is as follows:

“17. Section 93 of The British North America Act, 1867, shall apply to the said province [Alberta],

with the substitution for paragraph (1) of the said section 93, of the following paragraph:

- I. Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act [September 1, 1905], under the terms of chapters 29 and 30 of the ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.'
2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution there for, there shall be no discrimination against schools of any class described in the said chapter 29.
3. Where the expression 'by law' is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression at the Union is employed, in the said paragraph 3, it shall be held to mean the date at which this Act comes into force."

41 Section 17 is part of the Constitution of Canada by virtue of s. 52(2) of the Constitution Act, 1982 which says:

"(2) The Constitution of Canada includes

- (a) The Canada Act, 1982, including this Act;
- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b)."

The Alberta Act is listed in the Schedule.

42 In the result, the Legislature of the Province of Alberta has the exclusive right to pass laws in the field of education, subject to the limitation imposed by the rights accorded to Protestant and Roman Catholic minorities by Chapters 29 (the School Ordinance) and 30 (the School Assessment Ordinance) of the Ordinances of the North West Territories as they existed at September 1, 1905. The rights and privileges with respect to separate-schools contained in Chapters 29 and 30 when the Province was created are therefore protected by the Constitution. Those rights and privileges are insulated from Charter review even though they might be inconsistent with its provisions. Section 29 of the charter confirms this immunity:

"29. Nothing 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."

(iii) The School Ordinance of the North-West Territories.

43 Sections 41 of the School Ordinance, Ord. N.W.T. 1901, c. 29 guarantees the Protestant or Roman Catholic minority in a district the right to establish a separate school and to assess and tax their property for school purposes:

"41. The minority of the ratepayers in any district whether Protestant or Roman Catholic may establish a separate school therein; and in such case the ratepayers establishing such Protestant or Roman Catholic separate school shall be liable only to assessments of such rates as they impose upon themselves in respect thereof."

44 Sections 42, 43, and 44 set out the procedure to be followed to establish a separate school district:

"42. The petition for the erection of a separate school district shall be signed by three resident ratepayers of the religious faith indicated in the name of the proposed district; and shall be in the form prescribed by the commissioner.

43. The persons qualified to vote for or against the erection of a separate school district shall be the ratepayers in the district of the same religious faith Protestant or Roman Catholic as the petitioners.

44. The notice calling a meeting of the ratepayers for the purpose of taking their votes on the petition for the erection of a separate school district shall be in the form prescribed by the commissioner and the proceedings subsequent to the posting of such notice shall be the same as prescribed in the formation of public school districts."

45 Section 45 made it clear that separate school districts and their boards of trustees had all the rights, powers and privileges and were subject to the same liabilities and method of government as public schools:

"45. After the establishment of a separate school district under the provisions of this Ordinance such separate school district and the board thereof shall possess and exercise 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."

46 Subsection (2) of s. 45 exempts those liable to assessment in respect of public schools from assessment in support of separate schools:

"(2) Any person who is legally assessed or assessable for a public school shall not be liable to assessment for any separate school established therein."

47 The duties and powers of all school boards were prescribed by s. 95 which read in part as follows:

"95. It shall be the duty of the board of every district and it shall have power:

7. To provide adequate school accommodation for the purposes of the district;

8. To purchase or rent school sites or premises, and to build, repair, furnish and keep in order the school house or houses, furniture, fences and all other school property;

17. To engage a teacher or teachers duly qualified under the regulations of the department to teach in the school or schools in its charge on such terms as it may deem expedient; the contract where for shall be in writing and may be in form prescribed by the commissioner and a certified copy of such contract shall forthwith be transmitted to the department;"

(iv) The School Assessment Ordinance of the North-West Territories.

48 Section 26 of the School Assessment Ordinance, Ord. N.W.T. 1901, c. 30 generally made all real and personal property in a district liable to assessment and taxation for school purposes:

"26. All property real and personal in any village district not herein declared exempt from taxation shall be subject to assessment and taxation for school purposes."

(v) The Canadian Charter of Rights and Freedoms.

49 Sections 1, 2(a), 15(1) and 52(1) of the Canadian Charter of Rights and Freedoms are as follows:

- "1. The Canadian Charter of Rights and Freedoms 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.
2. Everyone has the following fundamental freedoms:
 - (a) freedom of conscience and religion." ...

"15. (1) 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 race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

"52. (1) The Constitution of Canada 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."

(vi) The Alberta Bill of Rights.

50 Clauses 1(b) and (c) of the Alberta Bill of Rights, R.S.A. 1980, c. A-16 state:

- "I. It is hereby recognized and declared that in Alberta there exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely:
 - ...
 - (b) the right of the individual to equality before the law and the protection of the law;
 - (c) freedom of religion."

v DISCUSSION

51 The Plaintiffs advance the following propositions:

1. In the absence of the right to separate schools guaranteed by the Constitution, state support of denominational schools is unlawful as a violation of ss. 2(a) and 15(1) of the Charter and of Clauses I (b) and (c) of the Alberta Bill of Rights.

2. The constitutional protection accorded to separate denominational schools does not protect a separate school district which provides a public school education and does not purport to protect religious values.

3. To the extent that the impugned provisions authorize state support of the Aqueduct Separate School District, they are invalid and of no force or effect as being inconsistent with ss. 2(a) and 15(1) of the Charter and Clauses I (b) and (c) of the Alberta Bill of Rights.

4. In the alternative, the impugned provisions must be interpreted in a manner consistent with the Charter and the Alberta Bill of Rights. They do not authorize the formation and operation of a Roman Catholic school district unless it provides a program of education which, at least to some degree, promotes the tenets of the Roman Catholic faith.

52 It is conceded that the formation of the Aqueduct Separate School District complied with the formalities of the School Act, and that the steps taken by the Aqueduct Trustees have been in accordance with the powers granted to school boards by the impugned provisions. A majority of separate school electors voted to establish a separate school district. The Minister of Education was bound to comply with their wish. The Aqueduct Trustees are given power under the school Act to assess and tax the property of the adult Plaintiffs for school purposes, even though they did not vote in favour of establishing the separate school district. The Aqueduct Trustees also have the right to direct their resident students to attend schools operated by other school districts, public or separate. The school Act contemplates agreements between school districts such as the Provision of Services Agreement. In short, it is not alleged that there has been a contravention of, or a failure to comply with, any of the provisions of the school Act.

53 I accept the Plaintiffs' submission that, in the absence of the constitutional guarantee with respect to minority separate schools, state support for Protestant or Roman Catholic separate schools would be unlawful as a violation of either or both of ss. 2(a) and 15 (1) of the Charter, and either or both of Clauses I (b) and (c) of the Alberta Bill of Rights. If the impugned provisions authorize support of Protestant or Roman Catholic separate schools beyond the scope of the protection given by the Constitution, then, to that extent, the impugned provisions are invalid.

54 It is now well established that the "freedom of conscience and religion" guaranteed by s. 2(a) of the Charter precludes Parliament or the Legislatures from passing laws which have as their purpose or effect the benefit of one religion or religious belief in a manner not shared by the entire population: *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, *R. v. W.H. Smith*, [1983] 5 W.W.R. 235 (Alta. P.C.), *Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, *Zylberberg v. Director of Education of Sudbury*, (1988), 65 O.R. (2d) 641 (C.A.), *Canadian Civil Liberties Association v. Ontario*, (1990), 65 D.L.R. (4th) I (Ont. C.A.), *Adler v. Ontario*, (1992), 9 O.R. (3d) 676, (Ont. C.J.).

55 I am also of the view that, without the protection of the constitutional guarantee, legislation providing for financial support of separate denominational schools would be inconsistent with s. 15(1) of the Charter. Such legislation would clearly be contrary to the guarantee to every individual of "equal benefit of the law without discrimination and, in particular, without discrimination based on ...religion ..." The School Act confers benefits on the Protestant and Roman Catholic minorities which are not available to citizens who do not adhere to either religion.

56 Clauses I (b) and (c) of the Alberta Bill of Rights recognize and declare the right to equality before the law and the right to freedom of religion. These provisions should be interpreted consistently with the similar rights and freedoms guaranteed by the Charter. In the absence of the constitutional guarantee the special treatment extended to Protestant and Roman Catholic minorities under the school Act would violate the Alberta Bill of Rights.

57 Before proceeding further I will deal with the suggestion that the formation of the Aqueduct Separate School District was merely a subterfuge to allow some Roman Catholic parents living in the County of Newell who were previously sending their children to school in Brooks without charge to continue doing so. There is no direct evidence of the motive of the majority of Roman Catholic electors who voted to form the new district. I do not consider it open to me to draw an inference of bad faith. There is no evidence other than the undisputed facts referred to above on which to base such an inference. Those facts are equivocal and it would be unwarranted speculation to base a finding of indirect or improper motive on them. In these

circumstances it must be assumed that the majority of the Roman Catholic electors who voted in favour of forming the Aqueduct Separate School District did so bona fide pursuant to their guaranteed rights and privileges.

58 The critical issue is the scope of the rights and privileges guaranteed to the Protestant and Roman Catholic minorities in the Province of Alberta to form and operate their own school districts. Its resolution requires a consideration of the Constitution, in particular Chapters 29 and 30 of the Ordinances of the North-West Territories, 1901. The Province has exclusive plenary jurisdiction to legislate in the field of education, subject to the limiting condition that it cannot legislate so as to prejudicially affect the right of the Protestant or Roman Catholic minorities to form separate schools. The Constitution protects any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act [i.e., the Alberta Act, September 1, 1905] under the terms of chapters 29 and 30 of the ordinances of the North-West Territories Section 41 of the School Ordinance gave the Protestant and Roman Catholic minorities in a district the right to establish separate schools. I repeat s. 41:

"41. The minority of the ratepayers in any district whether Protestant or Roman Catholic may establish a separate school therein; and in such case the ratepayers establishing such Protestant or Roman Catholic separate school shall be liable only to assessments of such rates as they impose upon themselves in respect thereof."

59 The minority ratepayers, be they Protestant or Roman Catholic, in any district are guaranteed the right to "establish a separate school therein" and in such case the members of the minority establishing the separate school district are thereafter liable only to assessment and taxation of their property in support of the separate school. Subject to this limitation, the Province's exclusive authority to legislate in the field of education is not restricted by the School Ordinance.

60 The terms "denominational schools" used in s. 93 of the Constitutional Act, 1867 and "separate schools" in the Alberta Act are interchangeable and the authorities relating to the interpretation of s. 93 are relevant to the meaning of s. 17: *Mathe v. Alberta* (1987) Alta. L.R. (2d) 212 (S.C.C.).

61 The present scheme, as set out in the School Act, is substantially the same as existed in 1905. Moir, J.A. said in *Schmidt v. Calgary Board of Education*, [1976] 6 W.W.R. 717 (Alta. A.D.) at page 72 1:

"The scheme of public and separate schools as it existed in 1901 - protected as it is by s. 17 of the Alberta Act - is the separate and public school system we have today. The existence of two systems is guaranteed to the minority. The majority of the minority have the right to compel the entire minority to join the separate school division. That is the situation as it was in 1901 and in 1905, and the way it is in Calgary today."

62 In *St. Walburg Roman Catholic Separate School District No. 25 v. Calgary Board of Education of Turtleford School Division No. 65* [1987] 2 W.W.R. 638 (Sask. C.A.) Tallis, J.A. considered the School Ordinance and the nature of the right of the Protestant or Roman Catholic minority to establish separate schools. He said at p. 713.

"We observe that ss. 41-45 of the School Ordinance of the North West Territories do not protect or guarantee any specific institutional structures for school education. The 'protected right' is the general right to establish and maintain a school board like those provided in respect of public school districts. It does not guarantee a particular kind of board or educational arrangement in perpetuity. This point was emphasised in *R. v. Ulmer*, 19 Alta. L.R. 12, [1923] 1 W.W.R. 1, 38 C.C.C. 207, [1923] 1 D.L.R. 304 at 321 (C.A.), where Stuart J.A., speaking for the court said:

"It is only the rights and privileges in respect to separate schools as given by the ordinances of 1901, chs. 29 and 30 whatever they were, which are protected and preserved. A reference to secs. 41 et seq., of the former ordinance shews clearly that the right or privilege was the privilege of the minority in a district whether Protestant or Roman Catholic to establish by law a separate school, to levy rates and assessments upon themselves for the maintenance thereof, and to be subject to ordinary governmental control and inspection."

(Emphasis added)

63 Tallis, J.A. referred with approval to the judgment of the Privy Council in *Hirsch v. Montreal Protestant Bd. Of Sch. Comm.*, [1928] A.C. 200 at 215, [1928] 1 D.L.R. 1041. In that case, Viscount Cave, L.C. said at p. D.L.R. 1052:

"While s. 93 of the Act of 1867 protects every right or privilege with respect to denominational schools which any class of persons may have had by law at the Union, it does not purport to stereotype the educational system of the Province as then existing. On the contrary, it expressly authorizes the provincial Legislature to make laws in regard to education subject only to the provisions of the section; and it is difficult to see how the Legislature can effectively exercise the power so intrusted to it less it is to have a large measure of freedom to meet new circumstances and needs as they arise."

64 In *Reference Re Education Act (Quebec)*, [1993] 2 S.C.R. 511, Gonthier, J. recognized that, although the right of religious minorities to denominational schools was crystallized as at the time of Confederation, Legislatures nevertheless have the power to make changes in the forms of educational institutions without impairing that right. He said at p. 539:

"Section 93 of, the Constitution crystallizes the rights and privileges pertaining to denominational schools under the law in effect at the time of Confederation. It is in a sense a snapshot of the legislative situation in 1867."

He added at p. 542:

"The framers of the Constitution were wise enough not to determine finally the form of institutions, as it is those very institutions which must be capable of change in order to adapt to the varying social and economic conditions of society."

65 By the same process of reasoning, the nature of the "separate school" which a religious minority in Alberta has the right to establish is not frozen as at 1905. As Tallis, J.A. said in *St. Walburg*, the right guaranteed is not of "any specific institutional structures" but is, rather, "the general right to establish and maintain a school board like those provided in respect of public school districts".

66 A separate school district does not compromise its protection under the Constitution because it does not own or lease a building or place within the district or elsewhere devoted to the education of its students. The Legislature may validly alter the institutional structures of the education system. The School Act anticipates that the trustees of a separate school district may find it convenient or necessary to contract with another school district for the use of school facilities. That is, in my view, a valid provision. Likewise, it is not necessary that a separate school district employ a teacher or teachers. The School Act permits separate school districts to contract with another school district for the provision of pedagogical services. Agreements such as the Provision of Services Agreement between the Aqueduct Separate School District and the Brooks

School District are contemplated by the School Act. In my view, the provisions permitting such agreements are valid and are not inconsistent with the operation of a "separate school".

67 The School Act does not require a school district to own or lease a building or other place or to employ teachers. A "school" is defined in s. I (l)(q) as follows:

"school' means a structured learning environment through which an education program is offered to a student by

- (i) a board,
- (ii) an operator of a private school,
- (iii) an early childhood services program private operator,
- (iv) a parent giving a home education program, or
- (v) the Minister;"

This rather abstract definition applies to both public and separate schools. The schools which public and separate school boards are required to establish and maintain need not involve the ownership or leasing of buildings or other places or the employment of teachers. School boards must provide to their resident students a "structured learning environment through which an education program is offered". The School Act permits considerable latitude in the manner in which this obligation may be discharged.

68 To the extent that the impugned provisions allow the establishment and operation of a separate school district which does not own or lease school premises or employ its own teachers they do not go beyond the protection afforded to separate schools by the Constitution, that is, they do not give the Protestant and Roman Catholic minorities something to which they are not entitled under the constitutional guarantee.

69 It is clear that the right to denominational schools protected by the Constitution is based on religious considerations. In Reference Re Bill 30, [1991] 1 S.C.R. 1148, Wilson, J. quoted with approval, at p. 1174, the following passage from the judgment of the Privy Council in Brophy v. Manitoba, [1895] A.C. 202, at p. 214:

"There can be no doubt that the views of the Roman Catholic inhabitants of Quebec and Ontario with regard to education were shared by the members of the same communion in the territory which afterwards became the Province of Manitoba. They regarded it as essential that the education of their children should be in accordance with the teachings of their Church, and considered that such an education could not be obtained in public schools designed for all the members of the community alike, whatever their creed, but could be secured in schools conducted under the influence and guidance of the authorities of their Church." [Emphasis added by Wilson, J.]

70 In my view, in order for a Roman Catholic separate school district to qualify as a "separate school" within the meaning of s. 41 of the School Ordinance, and thus be protected by the Constitution, it must have some degree of denominational character. It cannot simply operate a public school by another name. There must be something distinctive in the program offered or in the manner in which it is presented.

71 The Aqueduct Defendants do not, in my opinion, operate a "separate school". There is nothing of a denominational nature in the program of education offered to its resident students. No formal religious education is provided and no means of promoting or preserving Roman Catholic beliefs and values have been instituted. There is no indication of any plan to develop a distinct program in the near future or, indeed, at all. Whatever motives inspired the majority of Roman Catholic electors to form the Aqueduct Separate

School District, the effect has been to merely substitute one public school education program for another, while at the same time depriving the County of Newell of a portion of its school tax base.

72 It is not necessary for me to consider what minimal denominational characteristics are necessary to legitimize the formation and existence of a separate school district under the School Act. The Aqueduct Separate School District has no such characteristics and could not meet the most meagre requirements. As little as a value-based dissatisfaction with the manner in which the curriculum is being taught by the public, school or schools in the district may be sufficient. Were the present situation a temporary one while the Aqueduct Defendants moved toward developing their own program, the necessary minimum denominational character may have been present. The Aqueduct Separate School District has no objective or subjective characteristics which distinguish it from a public school district.

VI CONCLUSION

73 To the extent that the impugned provisions of the School Act permit the establishment and operation of separate school districts which do not offer resident students a denominational education, either through its own facilities and staff or by arrangement with another school district, they are inconsistent with s. 2(a) and s. 15(l) of the Charter and Clauses I (b) and (c) of the Alberta Bill of Rights.

74 I need not make a declaration that the impugned provisions are of no force or effect. The rule of interpretation stated in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1078 should be applied here:

"As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation so as to make it inconsistent with the Charter and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed."

75 The impugned provisions of the School Act do not permit the establishment of a separate school district which does not provide its resident students a denominational education to some minimum standard. Further, they do not give such a separate school district the right to exercise any of the powers or receive any of the benefits accorded to separate school districts by the School Act so long as it does not operate a "separate school".

76 The effect of this ruling is to deprive the Aqueduct Defendants of status. They have no right to exercise any of the powers or receive any of the benefits to which separate school boards are entitled under the School Act.

77 It follows that the adult Plaintiffs are not obliged to direct their property taxes to the support of the Aqueduct Separate School District, nor are they bound to send their children to the school directed by the Aqueduct Defendants or to pay non-resident fees to the County of Newell. All of these matters are now academic.

78 In order to avoid unnecessary disruption and to give the Aqueduct Defendants a reasonable opportunity to establish a separate school, I suspend the operation of this judgment until September 1, 1994.

79 The parties may speak to costs and to any incidental or supplementary Orders which may be necessary.

O'LEARY J.

APPENDIX "A"

PROVISION OF SERVICES AGREEMENT

THIS AGREEMENT MADE THIS 13 DAY OF JULY, 1992

BETWEEN The Board of Trustees of the Brooks School No. 2092 (hereinafter called "the District")

PARTY OF THE FIRST PART

AND

The Board of Trustees of the Aqueduct Roman Catholic Separate School District No. 374 (hereinafter called "the Separate School District")

PARTY OF THE SECOND PART

WHEREAS the District operates a public school system within its boundaries and

WHEREAS the Separate School District wishes to contract with the District for the provision of certain services for its students

NOW THEREFORE THIS AGREEMENT WITNESSETH THAT in consideration of the mutual covenants [sic] and agreements hereinafter set forth, the parties hereto covenant and agree as follows:

1. Educational Services and Tuition Fees

- (a) The District agrees to provide full educational services to the Separate School District students in accordance with the provisions of The School act and regulations thereunder.
- (b) The Separate School District agrees that their students shall be governed by District Board policy and regulations and procedures.
- (c) The Separate School District agrees to pay a tuition fee per student for the provision of educational services, such fee to be calculated annually by the District based on the formula described in Schedule "A" attached to this agreement.
- (d) The District agrees to provide a list of Separate School District students, based on September 30 enrolments, to the Separate School District by October 31 each year for verification purposes. The final verified and agreed upon list will be used in conjunction with the calculation of the tuition fee referred to in (c) above.
- (e) The Separate School District agrees to pay tuition fee costs to the District when billed. The District agrees to submit semi-annual billings as of December 31 and June 30 each year.

2. Transportation Services

(a) The District will provide Supervision/Administrative services to the Separate School District in regards to busing of Separate School District Students, in accordance with the School Act and the Regulations passed thereunder.

(i) the District will

- provide a list of bus students to the Separate School District, for verification by the Separate School District, as at September 30 each year.

- complete the necessary Transportation Grant Claim forms for submission to the Department of Education.

- in consultation with the Separate School District, design the bus routes and hire bus drivers as necessary.

- supervise and give direction to bus drivers and students in accordance with District rules, regulations and policies.

- arrange for the leasing of the necessary buses for the Separate School District's busing requirements.

- provide detailed calculations of the costs of the provision of transportation services to the Separate School District, annually, in accordance with Schedule "B".

(ii) The Separate School District will:

verify the list of their bus students provided by the District as September 30 each year and to notify the District of any changes to the list from time to time.

agree that all their students who receive transportation services pursuant to this agreement shall be subject to District rules, regulations and policies.

provide consultation services to the District in the designing of bus routes and the hiring of bus drivers and the leasing of buses.

- pay the District the cost of transportation services as calculated in accordance with Schedule "B".

3. Administration Services

(a) The District agrees to arrange for the services of an Auditor, in order to fulfill the requirements of the School Act.

(b) The District agrees to provide, through its Administration Offices, Superintendent and/or Secretary-Treasurer services as outlined in Schedule "C" attached.

(c) The Separate School District agrees to pay for such services referred to in (b) above and for such administrative costs incurred by the District upon the submission of a detailed statement to be approved by the Separate School District.

4. Indemnification

(a) The District shall, at all times, well and sufficiently indemnify and keep indemnified the Separate School District from and against all actions, proceedings, claims, costs, expenses and demands of any nature in consequence of-

- (i) bodily injury, sickness, disease or death sustained by students of the Separate School District while riding in, boarding or alighting from any vehicle provided by the District, and
- (ii) damage to, destruction of, or loss of property where such property was damaged, destroyed or lost while situate in any vehicle provided by the District as aforesaid, after having been brought upon such vehicle by students of the Separate School District.

5. Continuation, Amendments, Termination

- (a) This Agreement shall come into force on September 1, 1991 and shall continue in effect through to August 31, 1992.
- (b) This Agreement may be amended from time to time by mutual consent of both parties in writing, subject to the approval of the Minister of Education.
- (c) This Agreement may be terminated by either party by giving written notice to the other party on or before the 31st day of December. This Agreement then terminates on the last day of August the following year.
- (d) Both parties agree that if any differences arise out of the interpretation, application, administration or alleged violation of this Agreement, a committee made up of one (1) member from each party shall attempt to settle the difference. Should they be unable to agree, a third party, mutually appointed, shall review the grievance and make a ruling which shall be binding on both parties.

IN WITNESS WHEREOF the parties hereto have executed this agreement on the day and year first above written.

BROOKS SCHOOL DISTRICT NO. 2092

AQUEDUCT ROMAN CATHOLIC 2902
SCHOOL DISTRICT NO. 374

(signature)
CHAIRMAN

(signature)
CHAIRMAN

(signature)
SECRETARY-TREASURER

(signature)
VICE-CHAIRMAN

SCHEDULE "A"

CALCULATION FORMULA FOR TUITION COSTS

The tuition fee per pupil will be calculated by dividing the District's Supplementary Requisition less the net busing costs, by the number of resident students of the District.

Brooks District - Net Busing Costs
----- =
Brooks District Resident Student

Tuition Fee Per
Pupil

SCHEDULE "B"

CALCULATION OF TRANSPORTATION SERVICES COSTS

The calculation of transportation services cost would include the following:

- Salaries and benefits of bus drivers
- Bus leasing costs
- Gas, oil, repairs and service
- Licensing fees
- Insurance costs
- Supervision/Administration costs specific to the busing/transportation operation for the Separate School District, as calculated by the District.
- other such related cost which may occur from time to time and as itemized by the District.

SCHEDULE "C"

Services Being Provided By
Brooks School District No. 2092
To Aqueduct R.C.S.S. District No. 374

Superintendent

- all specified services which are required in the provision of the Superintendency function

Secretary-Treasurer

- all specified services which are required in the provision of the Secretary-Treasurer function. includes payroll, purchasing, accounts payable, accounts receivable, secretarial services and financial administration, budget forms, Audited Financial Statements, grant claim forms, and such other forms or information that may be required from time to time by the Department of Education.

Associated Costs

Audit Fees