

What You Can Do – Help Fund Our Legal Case

A legal application has been brought by two plaintiffs who are members of OPEN (One Public Education Now) asking for a declaration that the current funding of separate schools violates the *Charter of Rights* s.15(1) guarantee of equality on account of religion as well as the s.2(a) guarantee of freedom of religion. The Application was filed in Ontario Superior Court and served on the Ontario government by lawyers Adair Goldberg Bieber.

The Application asks the Supreme Court to re-examine their 1987 *Reference re Bill 30* decision which said the *Charter of Rights* did not apply to the funding of separate schools.¹ The Application states that only those rights protected by s.93(1) are immune from challenge under the *Charter of Rights* and therefore asks for a declaration that:

- a) The public funding of non-Catholic students at separate school boards and
- b) The public funding of Grades 11 and 12 at separate school boards are contrary to the *Charter of Rights*.

Summary of Background:

Section 93 of *Constitution Act, 1867* (formerly known as *British North America Act, 1867*) gives the provinces control over education with the exceptions listed in s.93(1) to s.93(4). Section 93(1) says no provincial law can remove whatever rights separate schools had in Ontario or Quebec at Confederation (July 1, 1867).

In 1985, the Ontario provincial government extended funding to separate schools to the end of high school (then Grade 13). Unsurprisingly, various groups objected. In the 1987 *Reference re Bill 30* decision, the Supreme Court said the *Charter of Rights and Freedoms* which guaranteed equal protection and benefit of the law without discrimination on the basis of religion **did not apply** to the funding of Ontario Catholic separate schools or their right to teach Catholicism.

They also ruled that in 1867, separate schools had taught the equivalent of high school, which overturned the long-standing *Tiny Separate-School Trustees v. The King* [aff'd [1928] A.C. 363].

Why We Think The Supreme Court could overturn its decision

In 1997, at the unanimous request of the Quebec Provincial Parliament, the *Constitutional Amendment, Quebec*, section 93A of the *Constitution Act, 1867*, was passed which stated s.93(1) to s.93(4) did not apply to Quebec. Quebec now has only one secular two-language public school system.

The *Constitution Act* the Supreme Court of Canada considered in 1987 is not the same as today's. Moreover, the 1987 Supreme Court decision placed great emphasis on what they called the "great compromise" of s.93. The other main party to that compromise, Quebec, has now withdrawn.

The Application argues that the change to the Constitution, the withdrawal of Quebec from the "great compromise", the development of academic research since 1867 on Ontario education in 1867, and the greater use of social science evidence in Charter cases since 1867 should enable the courts to rule that public funding of non-Catholic students and the funding of Grades 11 and 12 at separate schools violates s.15(1) and s.2(a) of the *Charter of Rights*.

A previous case failed because the judge ruled the applicant did not have standing; the judge did not rule on the merits of the case. Our plaintiffs, a teacher and a parent, should get standing.

¹ *Reference re Bill 30*, [1987] 1 S.C.R. 1148