CITATION: Kandaharian (Litigation Guardian of) v. York Catholic District School Board, 2022 ONSC 4969
DIVISIONAL COURT FILE NO.: 715/21
DATE: 20221006

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

D. L. Corbett, Lederer, Nishikawa JJ.

BETWEEN:	
DARIA KANDAHARIAN by her Litigation Guardian ANDRANIK KANDAHARIAN Applicant	*Jonathan Silver, Henry Federer* and *Allison Williams*, for the Applicant
– and –	
YORK CATHOLIC DISTRICT SCHOOL BOARD Respondent	*Nadya Tymochenko* and *Gillian Tuck Kutarna*, for the Respondent
	HEARD: by video July 5, 2022

Lederer J.

Introduction

[1] Daria Kandaharian is a grade 12 student at St. Maximilian Kolbe Catholic High School, a school that is operated under the auspices of the York Catholic District School Board. As a grade 10 student she sought to be a candidate for the position of student trustee for the two-year term of September 2020 to June 2022. She was selected by the principal, vice principals and guidance counsellors to be the candidate from her school. Two days before the election, the selection of Daria Kandaharian as the candidate, was rescinded. The policy of the York Catholic District School Board requires that student trustees be baptized Roman Catholics. Daria Kandaharian is Orthodox Christian. By this application she challenges the validity of that policy.

Background

[2] The York Catholic District School Board is a statutory corporation. All schools it operates, both elementary and secondary, are governed by its Board of Trustees, composed of ten members, all of whom must be Roman Catholic. They are municipally elected by rate payers who are also

all Roman Catholic. There are two student trustees. They are elected by the student council presidents of the Board's secondary schools.

[3] The position of student trustee was created through an amendment to the *Education Act* made during 1997.[1] Section 55 of the *Education Act* governs student trustees and applies to all school boards, not just Catholic (separate) school boards. Among other things it prescribes:

- the nature of the position ("a student trustee is not a member of the board" and "is not entitled to exercise a binding vote on any matter before the board or any of its committees."),
- the extent of the involvement of the student trustee in the proceedings of the Board of Trustees ("a student trustee is entitled to require that a matter before the board or one of its committees on which the student trustee sits be put a recorded vote" in which case there shall be two votes, a non-binding vote that includes the vote of the student trustee and a binding vote that does not include that vote),
- certain limits on the role of student trustee ("a student trustee is not entitled to move a motion, but is entitled to suggest a motion" and where the motion is not moved by a member of the board to have "the record show the suggested motion")
- limits as to meetings a student trustee can attend (there are certain meetings that are closed to the public and which student trustees are not entitled to be present at), and
- privileges available to student trustees that are generally available to members of the Board of Trustees ("a student trustee has the same status as a board member with respect to access to board resources and opportunities for training")

[4] Student Trustees are not paid as are members of the Board of Trustees are but they may, pursuant to regulation, and, in this case, they do receive an honorarium (see: *Education Act* s. 55(8))

[5] Pursuant to authority provided in section 55 of the *Education Act* (see: s. 55(1) and 55(9)), O. Reg.7/07 (Student Trustees) has been promulgated. It provides further direction as to:

- the honorarium (see: O. Reg. 7/07, s. 9),
- the term of office for student trustees ("it may be one year or two years", in this case it is two years),
- the method of election (either: directly, by the students of the board or indirectly by student representative bodies such as student councils)

[1] R.S.O. 1990, c E. 2 and *Education Statute Law Amendment Act (Student Performance), 2006,* S.O. 2006, c. 10-Bill 78

- the timing of the election (where, as here, it is for a two-year term the election shall be no later than April 30 in each year)

- the relationship of the terms of the student trustees where there are two or more of them (their terms are to be staggered)

[6] Most importantly for this case, section 5 of the regulation provides what qualifies a student to be (or seek to be) elected as a student trustee:

- on the first day of school after the term of office begins, the student must be enrolled in the senior division of a school of the board,

- be a full-time student,

- an exceptional pupil in a special education program for whom the board has reduced the length of the instructional program on each school day made under the applicable regulation where the student would otherwise be a full-time student.

[7] The *Education Act* authorizes the Minister of Education to establish policies and guidelines for the development of board policies dealing with the representation on the boards of the interests of students, and require boards to comply with those policies and guidelines.[2] No reference was made to, nor do there appear to be any policies or guidelines issued by the Minister with respect to student trustees. There is no requirement in the legislation, the regulation or any guideline, that is to say in any emanation of the provincial government, that requires a student trustee of a separate school board (or any other denominational school) to be a member of the religion associated with the school or the board.

[8] For that, one needs to turn to the policy of the York Catholic District School Board. O. Reg 7/07 directs that boards of education are to develop and implement policies related to student trustees and that the policy is to be in accordance with the regulation and any policies or guidelines established by the Minister of Education.[3] In furtherance of this directive the York Catholic District School Board adopted policy 107 titled "Student Trustees". The stated purpose of this policy is:

> The position of student trustee serves to uphold Catholic values, and as such is a valuable and important function allowing the student perspective to be heard through their participation at Board meetings. The purpose of this policy is to outline, in keeping with legislative direction, the guidelines and expectations for student trustees.
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> [Emphasis added]

[9] Speaking generally, the policy repeats, confirms and to a lesser degree augments the directions found in the *Education Act* and *O. Reg. 7/07*. It augments by adding to the qualifications

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[2] *Ibid* at s. 8(1) para. 3.5
[3] *O. Reg. 7/07* at s. 2

outlined in the *Education Act*, s. 5 quoted above by requiring, among other things, that a student trustee must:

> (a) be a Roman Catholic (see: policy 3.6),
>
> (b) reside in a household designated as an English – Separate School supporter/elector (see: policy 3.6),
>
> (c) be enrolled in education courses (see policy 3.6),
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> (d) have the support of their principal and parental consent (see policy 3.8), and
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> (e) be able to demonstrate that they can complete the duties of a student trustee without jeopardizing their academic standing (see policy 3.7).

[10] The only one of these qualifications being questioned is the first one, the requirement that a student trustee be Roman Catholic. It is this restriction that Daria Kandaharian seeks to quash. No submissions were made questioning the validity of the requirement that the household of the prospective student trustee be designated as an English – Separate School supporter/elector or that the student trustee be enrolled in religion education courses. It was not suggested that Daria Kandaharian did not comply with both of these criteria. It is apparent that she did have the consent of her principal, at least until that consent was withdrawn because Daria Kandaharian was not Roman Catholic. It was not suggested that her parents had not consented or that there was any question about her ability to maintain her academic standing while carrying out the responsibilities of a student trustee.

The historical foundation for the issue at hand

[11] Canada has a history. An understanding of that history has relevance to this case. It stands at the foundation of Canada as a separate nation. The Canadian federation (the Dominion of Canada) originates with the passage, on July 1, 1867, by the British Parliament, of what was then the *British North America Act*, now the *Constitution Act*. Section 93(1) of that legislation protected and protects the rights of Roman Catholics in Ontario[4] to a separate system of education to the extent that such a system existed at the time the legislation was enacted:

> **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;

[4] And conversely protestants in Quebec

[12] The protection of minority religious rights was a major preoccupation during the negotiations that led to Confederation. This reflected the concern that religious minorities in both Canada East and Canada West would, otherwise, be at the mercy of overwhelming majorities[5]:

> ...the object of the clause [s. 93] is to secure to the religious minority of one province the same rights, privileges and protection which the religious minority of another Province may enjoy. The Roman Catholic minority of Upper Canada, the Protestant minority of Lower Canada and the Roman Catholic minority of the Maritime Provinces, will thus stand on a footing of entire equality.[6]

[13] As it stood at the time, the protection for these minorities, throughout Canada, included what they regarded 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 only be secured in schools conducted under the influence and guidance of the authorities of their Church.[7]
>
> [Emphasis added by the Supreme Court of Canada]

[14] This was accomplished through a compromise:

> "The basic compact of Confederation" was that rights and privileges already acquired by law at the time of Confederation would be preserved and provincial legislatures could bestow additional new rights and privileges in response to changing conditions.[8]

[15] From this, the introductory words of s. 93 have been said to vest an exclusive plenary power to legislate with respect to education in the provinces[9] while para. 1, which follows, provides the stated protection.

Caselaw that assists in understanding the issue

[16] In the years since, from time-to-time cases, have come before the courts which have considered the extent and parameters of the rights and protections s. 93 provides. The case of *Tiny Separate School Trustees v. The King*[10] reviewed the rights and privileges referred to in s. 93(1), i.e., those held by separate school supporters in Ontario, by law, at the time of Confederation. The

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[5] *Reference re Bill 30, An Act to Amend the Education Act (Ont.),* [1987] 1 S.C.R. 1148 at para. 27
[6] *Ibid* quoting Lord Carnarvon in his address to the British Parliament in which he proposed the second reading of the *British North America Act* see: *U.K., Parliamentary Debates,* 3rd ser., vol. 185, col. 557 at p. 565, February 19, 1867.
[7] *Ibid* at para. 28 quoting *Brophy v. Attorney-General of Manitoba*, [1895] A.C. 202 at p. 214
[8] *Ibid* referring to Duff C.J. in the *Reference Re Adoption Act*, 1938 CanLII 2 (SCC), [1938] S.C.R. 398 at p. 402,
[9] *Ibid* at para. 21
[10] [1927 S.C.R. 637, aff'd 1928 CanLII 355 (UK JCPC), [1928] A.C. 363.

Supreme Court of Canada made plain that s. 93(1) provided constitutional protection to separate school boards:

> Unless the legislatures of Ontario and Quebec are debarred from prejudicially affecting the rights and privileges of the respective religious minorities in regard to maintenance and support which their denominational schools enjoyed at Confederation under legislation of the former Province of Canada, the protection of such rights and privileges afforded by sub-s. 1 of s. 93 becomes illusory and the purpose of the Imperial legislation is subverted.[11]

[17] This was accepted on further appeal to the Judicial Committee of the Privy Council.[12] The case raised the prospect that where a particular power or regulation did not apply at Confederation, it would not be protected by s. 93. At each level, up to and including the Privy Council, the decision made relied on the understanding that, at the time of Confederation the Council of Public Instruction had a broad regulatory authority sufficient to prevent separate schools from providing secondary education. The power had never been used, but its existence meant that secondary school education fell outside the protection provided by s. 93(1). It should be noted that the appeal to the Supreme Court of Canada was dismissed because the justices were evenly divided. In subsequent cases, the finding that secondary school education was not subject to the protection provided by s. 93 was set aside. The courts in *Tiny Separate School Trustees v. The King* had asked the wrong question. The judgments of Anglin C.J. and Mignault J. at the Supreme Court of Canada were relied on in coming to this conclusion. Be that as it may, it remains the case that to obtain the protection of s. 93(1) the right or privilege relied on must have been one present "…by law, at the time of union."

[18] This is not to say that there could be no change or widening of the understanding of what rights and privileges were held by separate schools at the time of Confederation. In *Ottawa Separate School Trustees v. City of Ottawa*[13] the trustees of the Ottawa Separate School Board had been removed. The question at hand was whether the removal and replacement of the trustees who fail or refuse to perform the duties of their office as prescribed by relevant regulation was within the legislative power of the province. In explaining the narrow issue put to it, the court quoted s. 93(1) of the *British North America Act:*

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[11] *Reference re Bill 30, An Act to Amend the Education Act (Ont.), supra* (fn. 2) at para. 47 quoting *Ibid* (SCR) at p. 657

[12] *Ibid (Bill 30 reference)* at para. 47 quoting *Ibid* (JCPC) at pp. 373-374

[13] (1915) 24 D.L.R. 497, 34 O.L.R. 624 (referred to and relied on by the Supreme Court of Canada in *Reference re Bill 30, An Act to Amend the Education Act (Ont.), supra* (fn. 2) at para. 28. I note this because *Ottawa Separate School Trustees v. City of Ottawa* was considered by the Court of Appeal at (1916) D.L.R. 770. The appeals were dismissed. The Court of Appeal identified the regulations being challenged "made by the Minister as to the teaching of French (see: p. 771), reviewed the history of separate schools within Ontario and whether the regulations in question offended the protection provided by s. 93 of the *Constitution Act.* The Court of Appeal found that they did not and considered that the members of the board were refusing to adhere to the direction the regulations provided and whether their removal was too drastic a remedy.

> Whether such legislation "prejudicially affects any right or privilege with respect to denominational schools" which Roman Catholics had in Upper Canada, at the time of the passing of the B.N.A. Act, 1867.[14]

[19] The court noted that the protection provided reflected, not on the trustees of a single board, but "in favour of the whole class, a class which comprises all the adherents of the Church of Rome throughout this province".[15] In the absence of any prejudicial affect on that class the court determined that the action must fail. Even so, given the manner in which the matter had been argued, the court concluded that more than a nonsuit was called for and so it examined the issue more broadly. The court acknowledged the separation of schooling was provided for Roman Catholics in the Ontario but went on to say that "such separation in no wise affects the public purposes of the schools, or makes the one, any more than the other, the less a public school".[16] The public purpose was described:

> The creation of the office of the Minister of Education, and the enactment of all the elaborate legislative provisions of this province, respecting education—covering over 250 pages of its statute books—were not for the mere benefit of parent and child; the paramount purpose, the dominant intention, was the public interests of the province, the making of true and efficient subjects of all its children –loyal and efficient subjects and citizens, the best assets of every state.[17]

[20] The court went on to put the separate school system into the context of education, generally, in Ontario:

> The public school system of Ontario is not one of separate independent schools in all the school sections province each one of which may be "a law unto itself," or as careless as it pleases; but is one comprehensive and symmetrical system embracing everyone, from the Minister of Education to the youngest infant in the kindergarten, whether in the common or the separate school…[18]

[21] It was in this broader context that the court recognized that within the protection provided to separate schools through s. 93 of the *British North America Act* was the understanding that there would be changes to education system applicable to them and to other public schools:

> The machinery may be altered, the education methods may be changed, from time to time, to keep pace with advanced educational systems. It was never meant that the separate schools, or any other schools, should be left for ever in the educational wilderness of the enactments in force in 1867.[19]

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[14] *Ibid* at p. 498 (D.L.R.)
[15] *Ibid* at p. 499 (D.L.R.)
[16] *Ibid* at p. 500 (D.L.R.)
[17] *Ibid* at pp. 499-500 (D.L.R.)
[18] *Ibid* at p. 501
[19] *Ibid* at pp. 501-502 (D.L.R.)

[22] In *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*[20] the Supreme Court of Canada considered an amendment made to the *Education Act* which provided for full funding for Roman Catholic Separate High Schools. The issue raised was whether Bill 30 was "inconsistent with the provisions of the Constitution of Canada including the *Canadian Charter of Rights and Freedoms*".[21] The Supreme Court of Canada considered the history of "separate schools" in Ontario and, in particular, the protection provided to them through s. 93. The Court accepted that over time the requirements of any system of education would change and that the plenary power given the legislature in the introductory words of s. 93 of the *Constitution Act* allowed that the rights and privileges of separate schools (in Ontario, Roman Catholic schools) could, through provincial legislation, be extended, presumably to meet some of those changes. Section 93(1) demonstrated that the protections provided to separate schools would extend over and apply to any legislation so enacted. The Court noted that, of course, just as a legislature could pass such statutes, it could also repeal them, taking away the privileges they offered. The Court observed that in such circumstances the *Constitution Act* provided recourse, being an appeal to the Governor General in Council. Section 93(3) states:

> Where in any Province a System of Separate or Dissentient 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.

[23] The Supreme Court of Canada went on to consider that the circumstances did not require a reliance on Bill 30 as delivering new rights and privileges. The Court reviewed the history of what is now referred to as "secondary school education", the authority to determine curriculum and funding. From this analysis it concluded that Bill 30 returned rights that were constitutionally guaranteed to separate schools by s. 93(1) of the *Constitution Act, 1867*,[22] that is to say it returned to Roman Catholic separate school supporters, rights and privileges they held, by law, "at the time of Union" (at the time of Confederation).[23]

[24] This left the Court to consider the application of the *Charter of Rights and Freedoms* to Bill 30, either as bringing forward new rights or as the return of privileges present at the time of Confederation. Section 29 of the *Charter* states:

> 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.

[25] Obviously, rights and privileges available to Roman Catholic separate schools, in Ontario, present at the time of Confederation are fully protected as part of the Canadian Constitution. The *Charter* cannot be used to as a foundation to remove or limit those rights, even if they, in some

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[20] Supra (fn. 5)
[21] *Ibid* at para. 1
[22] *Ibid* at paras. 8 and 59
[23] *Ibid* at para. 16

way, run counter to what the *Charter* directs. The court found the consideration of the impact of the *Charter* on rights obtained by separate school boards through legislation enacted subsequent to Confederation was conceptually different. It noted that the right to repeal statutes and, by that means, to remove privileges obtained through legislation runs counter to the protection provided by s. 93. The protection provided to the modification or removal for rights acquired through legislation passed subsequent to Confederation is the appeal under s. 93(3). (It is a political rather than a legal path.) Nonetheless, the Court found that Bill 30, even if taken as providing a new right rather than a right or privilege present at the time of Confederation, was insulated from attack under the *Charter*, not as a result of section 29, but as a result of the "guaranteed nature of the province's power to enact the legislation".[24] As the Court noted:

> What the province gives pursuant to its plenary power the province can take away, subject only to the right of appeal to the Governor General in Council. But the province is master of its own house when it legislates under its plenary power in relation to denominational, separate or dissentient schools. This was the agreement at Confederation and, in my view, it was not displaced by the enactment of the *Constitution Act, 1982*. [25]

[26] In *Daly et al. v. Attorney General of Ontario*[26] the Court of Appeal considered s. 136 of the *Education Act* and whether it infringed the denominational guarantee in s. 93(1) of the *Constitution Act, 1867*. The section prohibited a Roman Catholic school board from taking the religion of a teacher into consideration in making employment decisions in circumstances where a teacher agrees to respect the philosophy of a separate school. The *Act to Restore to Roman Catholics in Upper Canada Certain Rights in Respect to Separate Schools*[27] (commonly referred to as the *Scott Act*) was the last statute respecting separate schools passed prior to Confederation. As such it demonstrated the rights and privileges of separate schools in Ontario at the time of Confederation. Section 7 of the *Scott Act* gave trustees of Roman Catholic separate schools all the powers possessed by trustees of Common Schools. Section 27 of the *Common Schools Act*,[28] gave trustees the right to "contract with and employ teachers" and, under s. 79(8)(b), the right, "to determine… the terms of employing them". It was submitted that a "right or privilege" that is protected from legislative interference under s. 93(1) must be one that is expressly found in a statutory provision in existence at the time of Confederation. There was no express provision allowing that all teachers employed by separate boards of education could be required to be Roman Catholic. The motion judge found, and the Court of Appeal agreed (both relying on the reference concerning Bill 30 at p. 1183), that a right capable of attracting the protection of s. 93(1) may be "implicit" in broadly defined statutory powers:

> In the light of this statutory framework and the climate of religious animosity that prevailed in pre-Confederation Canada, it is my view that by conferring the power on separate school trustees to select and employ teachers, the colonial legislature

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[24] *Ibid* at para. 63
[25] *Ibid*
[26] 1999 CanLII 3715 (ON CA), [1999] OJ No 1383 (QL), 120 OAC 212, 172 DLR (4th) 241, 44 OR (3d) 349
[27] 26 Vict., c. 5
[28] 22 Vict., c. 64,

> contemplated that such power could be exercised preferentially in favour of Roman Catholics. As already noted, an implicit power does qualify for protection under s. 93(1).[29]

[27] The implied authority to restrict teachers to those of the Roman Catholic faith arose from a purposive analysis of the *Scott Act*:

> The purpose of granting to Roman Catholics the right to funding for separate schools and the right to elect trustees to manage their own schools was to enable the teachings of the Roman Catholic faith to be transmitted to the children of Roman Catholics while educating them in secular subjects.[30]… At the time of Confederation, when the one-room schoolhouse with only one teacher was not uncommon, it would have been unthinkable that anyone but a Roman Catholic could impart the Roman Catholic faith to students. Although custom is not protected by s. 93(1), the history and purpose of s. 93(1) cannot be ignored. To disallow consideration of religion when hiring a teacher would have defeated the purpose of the Scott Act.[31]

[28] The Court went on to establish why the requirement that teachers be Roman Catholic was an appropriate inference to be made:

> The evidence establishes that the aim of Catholic education is not merely the transmission of knowledge and development of skills, but rather the integral formation of the whole person according to a vision of life that is revealed in the Catholic tradition. Religious faith on the part of the teachers is a valid consideration if the aim of the school to create a community of believers with a distinct sense of the Catholic culture is to be achieved.[32]

[29] In *Hall (Litigation guardian of) v. Powers*[33] the Ontario Superior Court of Justice considered an application for an interlocutory injunction brought by a gay student in a Catholic school seeking to restrain the principal of his school and the applicable separate school board from preventing him from attending the prom with his boyfriend. The defendants relied on s. 93 to argue that the board held "an implicit or inherent right to regulate those who can attend school dances based on denominational concerns under the generic umbrella of school management." The Court

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[29] *Daly et al. v. Attorney General of Ontario, supra* (fn. 25) referring to the decision of the motion judge at 1997 CanLII 12210 (ON SC), 38 O.R. (3d) 37, 154 D.L.R. (4th) 464 (Gen. Div.) at para.52

[30] In making this statement the court relied on *Brophy v. Manitoba (Attorney General),* [1895] A.C. 202 (J.C.P.C.), per the Lord Chancellor at p. 214; the dissenting reasons of Anglin J. in *Tiny Separate School Trustees v. R.* , 1927 CanLII 9 (SCC), [1927] S.C.R. 637 at p. 656, adopted by this court in *Reference re Education Act (Ontario) and Minority Language Education Rights (1984),* 1984 CanLII 1832 (ON CA), 47 O.R. (2d) 1 at pp. 55-56, 10 D.L.R. (4th) 491; *Caldwell v. Stuart*, 1984 CanLII 128 (SCC), [1984] 2 S.C.R. 603 at pp. 608, 618-19, 624, 15 D.L.R. (4th) 1; and *Canadian Civil Liberties Assn. v. Ontario (Ministry of Education)* (1990), 1990 CanLII 6881 (ON CA), 71 O.R. (2d) 341 at pp. 363, 367, 65 D.L.R. (4th) 1 (C.A.)

[31] *Daly et al. v. Attorney General of Ontario, supra* (fn. 25)

[32] *Ibid*

[33] 2002 CanLII 49475 (ON SC), [2002] OJ No 1803 (QL), 94 CRR (2d) 1, 213 DLR (4th) 308, 59 OR (3d) 423

noted that "'[m]anagement' in its ordinary sense is broad enough to encompass absolutely anything and everything that happens in a school system" and concluded that, "[i]f the Board's view was correct, then s. 93 would mean that Catholic schools had unfettered authority to do whatever they like on any matter. The Court observed "[t]hat is not the law". While acknowledging that for the purposes of applying s. 93 the education system is not frozen to where it stood in 1867, there are limits to the protection the section provides in respect of legislation passed to meet new needs and circumstances that arise. The "courts must be cautious not to allow so much breadth [in such legislation] so as to create ambiguity which can distort the true meaning of the constitutional section. It is clear that the purposive approach to statutory interpretation is not to be used to expand the original purpose of the protecting section. The proper approach is to look at the rights as they existed in 1867 but then to apply 2002 common sense."[34]

[30] The question that the court asked itself was: Does allowing this gay student to attend this Catholic high school prom with a same-sex boyfriend prejudicially affect rights with respect to denominational schools under s. 93(1) of the Constitution Act, 1867?[35] The answer was that it did not. Moreover, "the decision was not justified under s. 93, both because the specific right in question was not in effect at the time of Union in 1867 and because, objectively viewed, it cannot be said that the conduct in question in this case goes to the essential denominational nature of the school."[36]

What the cases teach us

[31] What is it that can be extracted from these cases to assist in the analysis and determination of this one? The right of Roman Catholics to a separate school system is part of our history. This right and the accompanying privileges exist so that the students of these schools will be instructed within an environment directed by Catholic values. The right does not detract from the understanding that those schools are "public schools." They are publicly funded and the overarching purpose of those separate schools, like "common schools", is to educate their students in preparation for them becoming responsible citizens.

[32] Section 93(1) provides constitutional protection to Roman Catholic separate schools in Ontario to the extent of the rights they had at the time of Confederation. The rights and privileges to which the protection applies need not be specified; they can be implied. It may be that as time passes there will be (there have been) changes to the process or "machinery" of education. To receive the protection of section 93(1) such changes must be referrable back to rights present at the time of Confederation. Care needs to be taken. Section 93(1) cannot be used to increase the rights it protects so as to include or add rights not present at Confederation.

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[34] *Ibid* at para. 42 and 43, I point out that at a first reading it may seem that this rejection of the purposive approach is at odds with the reliance on it in *Daly et al. v. Attorney General of Ontario*. It isn't. In *Daly* the court was concerned with the purpose of s 93(1) as things stood at the time of Confederation. In *Hall* the rejection of this approach is directed to its use in expanding that initial purpose.
[35] *Ibid* at para. 44
[36] *Ibid* at para. 465

[33] The introductory words of s. 93 provide a plenary power to the provincial legislature allowing it to pass legislation in respect of education thus allowing the legislature to extend the rights and privileges provided to separate school boards. Any rights provided through legislation enacted after Confederation can through further act of the provincial legislature be repealed. In such circumstances the recourse is not to the courts but to the Governor General in Council. This is a political not a legal response.

[34] The rights and privileges provided to separate schools are protected from arguments that they do not comply with the *Charter of Rights and Freedoms.* This is plainly so with respect to those rights and privileges in place at Confederation. They are immune to attack under the *Charter* as a result of their inclusion in the *Constitution Act.* One part of the constitution (the *Charter*) cannot be used to set aside what another part of the constitution (s. 93) specifically provides. This is made clear by s. 29 of the *Charter*. Those rights provided through legislation passed subsequent to Confederation are also insulated from attack under the *Charter* but on a different foundation. This protection is based on the constitutional guarantee found in the introductory words of s. 93 allowing for the passage of legislation governing education which may extend the provision of additional rights to separate schools.

[35] The right of separate school boards to hire teachers existed at the time of Confederation. The *Scott Act* gave separate school trustees the same rights as "common school" trustees. This included the hiring of teachers. The circumstances of Roman Catholics at the time of Confederation was such that the right of separate school boards to insist that teachers be baptized as Roman Catholic can be, and has been applied. Teachers, after all, bear a significant, it could be suggested, the primary responsibility to instill Catholic values into the education that separate schools provide.

[36] Students are not teachers. They do not deliver the Catholic part of the education being provided. Generally, they are the recipients; the individuals into whom those values are being inculcated. In considering the role student trustees play, we should ask:

- Have those involved been careful not to extend the protection to rights that did not exist at the time of Confederation?

- Can it be said that the conduct in question goes to the essential denominational nature of the school?

[37] To answer these questions a return to the words of s. 93(1) which outline the protection in issue is called for. In the context of this case would the presence of a student trustee who was not a Roman Catholic "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."

Applying the cases to the case at hand

[38] Any application of the principles, forthcoming from an understanding of the history, the legislation and the case law to the particular facts must begin with a consideration of whether the

right being relied on was present at the time of Confederation. The *Scott Act*, the legislation that set out the authority given to Roman Catholic schools in 1863, and in place in 1867, at s. 12 notes:

> The Trustees of Separate Schools may allow children from other School Sections, whose parents or lawful guardians are Roman Catholics, to be received into any Separate School under their management, at the request of such parents or guardians; and no children attending such School shall be included in the return hereafter required to be made to the Chief Superintendent of Education, unless they are Roman Catholics.
>
> [Emphasis added]

[39] Accordingly, there were no non-Catholic students attending separate schools who were or could have been available to be student trustees, if such a thing existed at the time. Nor were there such students until the enactment of Bill 30, in 1986, which implemented the full funding of Roman Catholic separate high schools. The government agreed to provide this additional funding but only subject to certain conditions, one of which was to open Catholic high schools to students of all faiths. The Conference of Catholic Bishops agreed.[37] At the time, the Conference of Bishops released a statement expressing the view that the admission of non-Catholic students could be made without endangering the Catholic character of their schools. In fact, their view, expressed at the time, was that it would be consistent with the Church's mission to evangelize to accept non-Catholic students.[38] Even then, there would have been no provision for student trustees. There was no such thing until the amendment to the *Education Act* that put in place what is now s. 55 of that statute. Accordingly, at the time of Confederation there was no right or privilege extended to separate schools, or for that matter any other public schools, allowing for there to be student trustees. This being so the protection offered by s. 93 of the *Constitution Act* would not be available in respect of the treatment of student trustees by the York Catholic District School Board.

[40] The Board demurs. It says that the *Scott Act* dealt with the formation of what has become school boards, made up of trustees, authorized to manage or govern Roman Catholic separate schools. That among the changes that have taken place respecting governance is the addition of student trustees so that under the rubric of "governance" the limitation that all school trustees at this separate board must be Roman Catholic is protected by s. 93(1) of the *Constitution Act.*

[41] I do not agree. The student trustees at this and, pursuant to s. 55 of the *Education Act*, all separate and other public school boards (at the time of Confederation boards governing "common schools") do not take part in governance. It is the boards of education that govern. The *Education Act* does not refer to trustees except in relation to "student trustees." Pursuant to the *Education Act*, boards do not have "trustees"; they have "members". Section 55 is clear, "a student trustee is not a member of the board". They don't vote "on any matter before the board or any of its

[37] Cross-Examination of Robert Dixon at qq. 75-77 (Caselines A2570-A2571)
[38] *Ibid* at questions 84, 98-99 (Caselines A2573 and A2574)

committees"[39] and so do not take part in the making of any decision. A student trustee does not count towards a quorum at meetings of the board.[40]

[42] What is it these young people do in furtherance of "governance" that, if undertaken by a student who was not Roman Catholic, would "prejudicially affect any right or privilege with respect to separate schools"? Affidavits were provided by students who have acted as student trustees. They do not agree with each other. Benjamin Smith, a former student trustee of the York Catholic District School Board (the respondent herein), deposes that student trustees are "an integral part of the governance of the board."[41] Kirsten Kelly does not agree. Kirsten Kelly held the position of student trustee, representing Burlington, on the Halton Catholic District School Board, is "religiously Catholic…raised in a Catholic household" and notes:

- Like any member of the public who registers to speak at a board meeting, I was able to attend and voice opinions on issues raised at board meetings as a student trustee. However, I was unable to cast a vote that would count toward the outcome of any board resolution.

- Although the Trustees generally made me feel as though they valued my contributions and opinions voiced at meetings, Trustees could, and at times did dismiss my opinions expressed at meetings.

- Student trustees can only bring motions at a board meeting with a Trustee sponsor. Although Trustees sponsored motions that I sought to raise, gaining a sponsor was not automatic or guaranteed. Thus, I had no independent ability to raise a motion to influence board policy.

[43] Contrary to the view expressed by Benjamin Smith, Kirsten Kelly concludes that the student trustee role is not a governance role but rather, it is a representational and student leadership role. The student trustee's job is to voice opinions on behalf of students at board meetings, to inform the trustees of the student perspective. This understanding is consistent with the purpose of the position of student trustee as referred to in policy 107 (Student Trustees) of the York Catholic District School Board (quoted above but which, for ease of reference, I repeat here):

> The position of Student Trustee serves to uphold Catholic values, and as such is a valuable and important function allowing the student perspective to be heard through their participation at Board meetings.[42]

[44] Benjamin Smith refers to this direction from policy 107 and to the ways in which he participated (fulfilling the representational role) and what he learned from doing so. Patrick Daly has been a Hamilton-Wentworth Catholic District School Board trustee since 1985. He has served (and may still be serving) three terms as president of the Ontario Catholic School Trustees'

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[39] *Education Act*, *supra* (fn. 1) at s. 55(2)
[40] York Catholic District School Board Policy 107 (Student Trustees) at s. 3.11 (Caselines B667)
[41] *Affidavit of Benjamin Smith* sworn December 15, 2021 at para. 12 (Caselines B1177)
[42] *York Catholic District School Board Policy 107 (Student Trustees)* at Policy 1 (Purpose) (Caselines B666)

Association which he describes as supportive of Catholic Student Trustees, who he deposes "are an important voice for students in policy development" (the representational role) and are "student leaders" whose activities "strongly support student engagement" (the leadership role). Representing the student perspective, providing leadership to students, and learning from the experience may demonstrate the value of a student trustee program but it is not governance.

[45] The line that separates "governance" from other activities (say for example lobbying, cajoling or persuading as opposed to deciding) may sometimes be difficult to locate but not in this case. I return to *Hall (Litigation guardian of) v. Powers*. In that case the determination disallowing the boyfriend to accompany the applicant to the dance was argued to be management and, on that basis, reflective of authority held by separate boards of education at the time of Confederation. The submission was rejected. The court determined that there are limits to the protection s. 93 delivers. Not every change can be subsumed by a general understanding of the rights and privileges present in 1867. There are 5,000 students who attend secondary schools operated by the York Catholic District School Board who are not Roman Catholic. There were none in 1867. There are now such students only because, in exchange for funding, the Ontario Conference Catholic Bishops agreed there would be. There were no student trustees in 1867. There were none until the adoption of what is now s. 55 of the *Education Act* in 2006 (or to put it differently 119 years later). It is plain there is disagreement about whether student trustees take part in governance or as put in *Hall* there is "ambiguity" as to the understanding of the role student trustees play. Quite apart from the affidavits to which I have referred, the court was advised that there are Catholic separate school boards that do not forbid students that are not Catholic from acting as student trustees. The caution in *Hall* is apposite. To extend the protection found in s. 93 of the *Constitution Act* to apply to student trustees as part of governance is to "distort the true meaning of the Constitutional section".[43]

[46] Even if I am wrong in this, does it mean that the protection provided by s. 93 applies to the policy that dictates that student trustees must be Catholic. Put differently, if a student trustee was not Roman Catholic would it "prejudicially affect any right or privilege with respect to separate schools." The supposed privilege being relied on is taking part in governance. If a student trustee cannot vote, how can he or she prejudicially affect governance. Their views, however out of step or irresponsible, will never be realized. If, as is the case, a student trustee does not count towards the presence or absence of a quorum, he or she does not have any impact as to when a vote is or is not taken. The proposition appears to be that a student who is not Roman Catholic may say something in a meeting of the board, or one of its committees, that is so qualitatively different from what would be said by a Catholic student that it would in some way prejudice the governance of the schools for which the board is responsible. There is no evidence that this is so. The statement of the Ontario Conference of Bishops made in conjunction with the arrival of full funding suggests the opposite. I repeat, that statement demonstrated assurance that the admission of non-Catholic students could be made without endangering the Catholic character of the schools.

[47] One circumstance, referred to by counsel for the respondent Board of Education, involved the recognition of Pride Month, a celebration of the Gay Community. The idea was said to have

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[43] *Hall (Litigation guardian of) v. Powers, supra* (fn. 33) at para. 42

been brought forward by a student trustee.[44] At first it did not succeed; the idea was rejected, but the continued efforts of the student trustee ultimately led to success. This was referred to as an example of the positive impact a student trustee can have. What is not clear is why this kind of positive contribution would not be made by a student trustee who was not Roman Catholic. With respect to the particular issue, as *Hall (Litigation guardian of) v. Powers* suggests, the recognition of Gay rights remains doctrinally difficult for some Roman Catholics. It seems as likely, if not more likely, that this issue would have been brought forward by a student who did not carry that concern.

[48] There is another side to this problem. This school board has accepted public funding for its secondary schools. The understanding was that with the provision of funding, non-Catholic students would be admitted to its schools. They have been, but the 5,000 students who are not Catholics are being treated as something less than full members of the school community:

- Raghad Barakat is a grade 12 student at Catholic secondary school within the Halton Catholic District School Board. He is a Muslim. He is active in student affairs at his school and accepting of the religious aspects of attending a Catholic school. He wanted to run to be a student trustee but was told that this was only available to students who were Roman Catholic. It has been difficult for him to accept not being "good enough" to become a student trustee. He tried but has been unable to rationalize the Catholic requirement. He "felt a deep sense of unfairness". The experience caused him to make a significant effort to have the policy changed but has failed.

- Rushan Jeyakumar is a grade 11 student at a Catholic secondary school within the Toronto Catholic District School Board. He is Hindu. He is active in his school. He has enjoyed his school experience but acknowledges that some of the "Catholic aspects" made him feel uncomfortable. He has learned that "most Catholic values are human values" and that "[t]hese values are consistent with [his] own faith". He wanted to run to be a student trustee but was told he could not because he was not Roman Catholic. He was frustrated by this and felt it to be unfair. At his instigation and with the assistance of others a motion was brought to the board proposing to change the applicable policy. It was defeated. As a result, he feels "the Board does not care about [him] and the other non-Catholic students." He feels "judged, discarded, and discriminated against…" and "inferior to the Catholic students in the board".

- Daria Kandaharian is the applicant and a grade 12 student at a Catholic secondary school within the York Catholic District School Board. She is an Orthodox Christian. She is an honour roll student and an active member of her school's community. She "generally enjoyed Catholic class in grade 9 and 10 and enjoyed learning about the Catholic religion, but [she] would have preferred if she could

[44] The student trustee was not identified by counsel but it may have been Kirsten Kelly whose affidavit refers to the issue at paras. 6 and 14 (Caselines A1240 and A1242)

> have taken a class on Orthodox Christianity." She "loves [her] school and love[s] attending it, but the Catholic rituals which are mandatory parts of [her] school experience have left [her] with some feelings of discomfort". She applied to run for student trustee. The school principal advised her that he, the Vice-Principals, and the Guidance Counsellors were in unanimous support of her application. She received instructions as to the steps to be followed, she prepared and submitted a 2-minute election video, she was interviewed by the York Secondary Catholic School President's Council and the current trustees. Forty-eight hours before the election her application was rescinded because she was not Roman Catholic. As a result, her feelings concerning her school have changed. After being "rejected as a student trustee…she felt like a second-class citizen…she felt her religion made [her] less worthy of inclusion in the school…being denied the opportunity as a result of [her] religion felt like an affront to [her] dignity". She also made efforts to have the policy changed.

[49] In the absence of a comprehensive understanding of the arrangement made between the provincial government and the Ontario Conference of Bishops one has to wonder, whatever agreement was made, whether the spirit of what was intended was to create a situation where as many as 5,000 students were susceptible to the sort of disorientation these three students describe. Kirsten Kelly makes the point there is nothing required of a student trustee, including "upholding Catholic values" and being "fully supportive of the mission, vision, and responsibilities of Catholic Schools" that cannot be realized through a student who is not Catholic.[45]

[50] I find that the protection provided by s. 93(1) of the *Constitution Act* does not apply. The role of student trustee bears no relationship to any right or privilege held by Catholic separate schools at the time of Confederation and the prospect of students who are not Catholic representing a Catholic school as a student trustee would have no prejudicial affect on such a right or privilege even if it existed at that time.

Does the Policy breach the Charter of Rights and Freedoms?

[51] In the absence of the protection provide by s. 93, Policy 107 which includes as s. 3.6, the section requiring that student trustees be Roman Catholic is not immune from challenge for breach of the *Charter of Rights and Freedoms.* On behalf of Daria Kandaharian, it is alleged that the policy breaches both s. 15(1) and s. 2(a) of the *Charter.*

[52] This application questions the constitutionality of what is, in effect, subdelegated legislation that has implications for all students who attend all schools that are operated by the York Catholic District School Board. Under *Canada (Minister of Citizenship and Immigration) v. Vavilov*[46] such questions attract a standard of review of correctness.[47]

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[45] *Affidavit of Kirsten Kelly* sworn January 27, 2022 at paras.19-25
[46] 2019 SCC 65 (CanLII), [2019] 4 SCR 653, 59 Admin LR (6th) 1, 312 ACWS (3d) 460, 441 DLR (4th) 1
[47] *Ibid* at paras. 17, 53 and 55: The standard of review of correctness will be applied to "certain categories of questions, *namely constitutional questions,* general questions of law of central importance to the legal system as a

[53] This case is not, as counsel for the York Catholic District School Board, would have it, the result of an administrative decision as in *Doré v. Barreau du Québec*.[48] In that case a lawyer was disciplined for breaching the applicable *Code of ethics of advocates* in that a letter he wrote to a judge failed to demonstrate the moderation and dignity required of a lawyer. On appeal the lawyer had withdrawn his attack on the constitutionality of the section of the *Code* that imposed the behavioural requirement and argued instead that it was the sanction imposed as discipline that violated his freedom of expression. The Supreme Court of Canada determined that an issue as to whether an administrative decision-maker has exercised its statutory discretion in accordance with the *Charter* should be reviewed in accordance with an administrative law approach. The standard of review would be reasonableness. That is not the case here. Daria Kandaharian attacks, not the decision that she cannot run to be a student trustee, but the constitutionality of the policy that forbids her from running. The policy was promulgated by the York Catholic District School Board under authority of O. Reg 7/07 which directs that the Board is to develop and implement a policy "relating to student trustees".[49]

[54] Under s. 15(1) we all have the right to equal protection and to equal benefit of the law, without discrimination, in this case discrimination on the specified ground of religion:

> 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.
>
> [Emphasis added]

[55] At it simplest "to discriminate" is to treat someone differently than others. Section 15(1) prevents such differing treatment to be based on any of the grounds it refers to or to "analogous grounds" that have been, or may be, identified by the courts. The Supreme Court of Canada has described discrimination as "a distinction …based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society…"[50]

[56] This understanding sets in place a two-step process for assessing an alleged violation of s. 15(1) of the *Charter*

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whole and questions related to the jurisdictional boundaries between two or more administrative bodies. (para.17) [Emphasis added].

[48] 2012 SCC 12 (CanLII), [2012] 1 SCR 395, 34 Admin LR (5th) 1, 211 ACWS (3d) 852, 343 DLR (4th) 193, 428 NR 146

[49] O. Reg. 7/07 s. 2(1): The board shall develop and implement a policy providing for matters relating to student trustees and to the payment of honoraria for student trustees

[50] *Withler v. Canada (Attorney General)* 2011 S.C.C. 12 at paras. 29 and 31 quoting *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at pp. 174-175

1. The court considers if the law creates a distinction based on an enumerated or analogous ground.

2. The court considers if the law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage.[51]

[57] The answer to the first of the two questions is straight forward. Section 3.6 of Policy 107 creates a distinction based on a ground specified in s. 15(1) of the *Charter of Rights and Freedoms* being religion. Students who are not Roman Catholic are disqualified from becoming student trustees because they are not Roman Catholic.

[58] To my mind the answer to the second question is similarly clear. There are 5,000 secondary students who are unable to exercise the benefit, advantage, experience and education gained from being selected as a student trustee. The experience and response of each of the three students whose affidavits I have referred to demonstrates the effect the rejection by the schools they attend has had on each of them. As described by them, they each carry a burden from the disorientation that has followed the information that they did not qualify to be student trustees because they were not Catholic. They are not as happy or comfortable in school or with the education they have received. This is especially so for the applicant, Daria Kandaharian who was not only recommended by the staff of her school, but went through the process of preparing the required video and being interviewed by other student leaders before being told she did not qualify. The 5,000 students that are not Catholic constitute a significant group that are not treated as complete members of the student body or the school community.

[59] The response of the York Catholic District School Board is to note that secondary school students have the right to attend either a publicly funded secondary school or a publicly funded Catholic secondary school regardless of religion, to be provided the means and opportunity to graduate and to take part in the extra-curricular activities at school which "the Applicant and each of her affiants" did.[52] The York District Catholic School Board submits that the right to an education must be distinguished from the duties of a school trustee. As the latter they are entrusted with the responsibility to protect Catholic education as part of their participation in school governance.[53]

[60] These submissions do not assist the Board in suggesting that the students who are not Catholic do not lose an advantage (the opportunity to learn and experience as a student trustee) or do not, as a result of not being Catholic in its schools, carry a burden (the discomfort and disorientation that accompanies rejection). The fact that these students chose to attend Catholic Schools rather than attend other public schools does not relieve the school board of its obligation to treat its student without discrimination. The submissions made ignore the change in sense of place felt by these students when each of Daria Kandaharian, Rushan Jeyakumar and Raghad Barakat learned that they were to be treated differently by their school because they were not Catholic. Students do not change character when they become student trustees or when they attend

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[51] *Fraser v. Canada (Attorney General)*, 2020 S.C.C. 28 at paras. 27
[52] *Factum of the Respondent* at para. 87 and 88.
[53] *Ibid* at para. 89

meetings of a board of education. They remain students; they are after all *student* trustees. The responsibilities of the board to them, as students, remain.

[61] I find that s. 3.6 of Policy 107 is in breach of s. 15(1) of the *Charter of Rights and Freedoms.* This finding requires a consideration of s. 1 of the *Charter*:

> 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.

[62] Is the requirement that students who are not Roman Catholic cannot be student trustees a limitation that can be justified in a free and democratic society? The means by which this issue is to be examined is the Oakes test initially described in the case that bears that name.[54] In that case the Supreme Court of Canada created a two-step balancing test to determine whether a government can justify a law which limits a *Charter* right, as follows:

> 1. The government (in this case the School Board) must establish that the law under review has a goal that is both **"**pressing and substantial."
>
> 2. The court then conducts a proportionality analysis using three sub-tests.
>
> a. The government must first establish that the provision of the law which limits a *Charter* right is rationally connected to the law's purpose.
>
> b. Secondly, a provision must minimally impair the violated *Charter* right.
>
> c. Finally, the court examines the law's proportionate effects. Even if the government can satisfy the above steps, the effect of the provision on *Charter* rights may be too high a price to pay for the advantage the provision would provide in advancing the law's purpose.

[63] In this case the burden of justifying the infringement of the *Charter of Rights and Freedoms* is on the York Catholic District School Board. For her part, on behalf of Daria Kandaharian, it is conceded that the objective of s. 3.6 of Policy 107 is to maintain the Catholicity of the board and that this objective is pressing and substantial.[55] As for the proportionality analysis, the school board says only that the qualification is "rationally connected to the objective as student trustees have a governance role and [presumably in that role] are expected to promote and protect the Catholic faith through Catholic education".[56] I repeat student trustees are not part of governance (they are not "members" of the board; they do not vote; they do not, themselves, introduce motions and do not contribute to the presence of a quorum). Because student trustees have no authority to affect the actions of the board, refusing to allow students who are not Catholic to be student trustees does

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[54] *R. v. Oakes* {1986] 1 S.C.R. 103, 1986 CanLII 46
[55] *Factum of the Applicant* at para. 80
[56] *Factum of the Respondent* at para. 91

not further the goal that the board strive to maintain the Catholic aspect of its schools. The role of student trustee is as students, as representatives of students and as student leaders.

[64] The minimal impairment is said to be demonstrated by the fact that only one student trustee is elected each year. To my mind the impairment is not measured against the student that is elected, that person is a student trustee and, pursuant to the policy is Roman Catholic. The measure of impairment is in the students who cannot be elected. There are 5,000 of them, all of whom by this policy are defined as something less than full members of the school community. The nature of the impairment is demonstrated in the hurt and sense of disengagement felt by the three students who were told they could not apply to be student trustees because they are not Roman Catholic. If the impairment is to be measured as the impact on the one or two of these students who are refused the ability to seek the position of student trustee, the impact could be minimized by obtaining the commitment of non-Catholics to accept this as a fundamental premise of these schools and the education they offer. I accept the evidence of Kirsten Kelly that the function could be appropriately carried out by students who are not Catholic and note again that the court was advised that there are separate Catholic school boards in Ontario that do not have a policy imposing the limitation that its student trustees be Roman Catholic

[65] In the absence of any substantive connection of the student trustees to governance, with an understanding that the impact of the policy on the individuals directly effected is real and substantial and that the true nature of the impact is directed at a significant number of students, there is no need to undertake a balancing to see if the effect, on the board, of Daria Kandaharian's reliance on her rights under the *Charter* is so high that the policy should be left in place. There is nothing that would, in these circumstances, justify such a finding.

[66] It is alleged that s. 3.6 of Policy 107 also breaches s. 2(a) of the *Charter of Rights and Freedoms*:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;

[67] In the face of the determination made that the policy stands in breach of s. 15(1) of the *Charter*, there is no need to proceed on and consider this question. It is a different issue and one best dealt with when the need to do so is clear.

[68] For the reasons reviewed herein the application is granted. Section 3.6 of Policy 107 of the York Catholic District School Board is quashed.

Is s. 3.6 of Policy 107 (Student Trustees) ultra vires (outside the jurisdiction) of the board?

[69] To this point these reasons have considered only the constitutional validity of the impugned policy. It was also submitted that Section 3.6 of Policy 107 was *ultra vires* the School Board. I accept this. It is another basis on which the application should succeed.

[70] Section 55 of the *Education Act* sets out the parameters for the position of student trustee. It authorizes the Minister of Education to make regulations with regard to student trustees, in

particular to "specify qualifications for student trustees and the consequences for becoming disqualified".[57] The Minister has done this through the making of *O. Reg. 7/07* which provides at s. 5(1) and which I repeat here:

> A person is qualified to act as a student trustee if, on the first day of school after the term of office begins, he or she is enrolled in the senior division of a school of the board and is,
>
> (a) a full-time pupil; or
>
> (b) an exceptional pupil in a special education program for whom the board has reduced the length of the instructional program on each school day under subsection 3 (3) of Regulation 298 of the Revised Regulations of Ontario, 1990 (Operation of Schools — General) made under the Act, so long as the pupil would be a full-time pupil if the program had not been reduced.

[71] What this makes clear is that all students fully committed to being students qualify to apply to be student trustees. The only exception (which does not apply in this case) is when a student "is serving a sentence of imprisonment in a penal or correctional institution."[58]

[72] The regulation does require that school boards develop a policy "providing for matters relating to student trustees…"[59] However the authority to put a policy in place is not open ended; there is a limitation:

> The policy shall be in accordance with this Regulation and with any policies and guidelines established by the Minister under paragraph 3.5 of subsection 8(1) of the Act.[60]

[73] A qualification which rules out, as student trustees, 5,000 students who are committed as the regulation requires is inconsistent with, and not in accord with the parameters set by the regulation. The regulation makes no attempt to limit students who are fully dedicated to their education and participation in the school community. This is especially so where s. 93 does not apply and the qualification being asserted is with respect to the religion of the students involved. In effect, the validation of a policy that requires that student trustees be Roman Catholic proposes that the regulation allows the school board to discriminate against its students that are not Roman Catholic.

[74] In the normal course this would be determinative of the application. This court exercises restraint in adjudicating constitutional issues. Where the court concludes an impugned instrument is *ultra vires*, the court will not go on to decide whether the measure is constitutional. I have exercised my discretion and dealt with the constitutional issue. This concern was the focus of the

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[57] *Education Act*, *supra* (fn.1), s 55(1) and (9c)
[58] *O. Reg. 7/07* s. 5(2)
[59] *Ibid* at s. 2(1)
[60] *Ibid* at s. 2(2)

submissions that were made. The issue was of primary importance to the parties. By failing to address the constitutional standing of the policy, the court would not have provided a full understanding of the issues we were asked to decide.

[75] I repeat what has already been said. Student trustees are not members of the Board. They are representatives *to* the Board. The policy foundation for their participation is as openly selected representatives of the student population. To restrict this representation on the basis that student trustees must be Roman Catholic is a condition that has been introduced by the School Board; it is not part of the regulatory scheme put in place by the province. To my mind this is contrary to the policy that scheme is intended to implement. The Board is not permitted to promulgate a policy that, based on religious faith, restricts the representation provided for by s.55 of the *Education Act* and s.5(1) of the Regulation. Such a policy is *ultra vires* the York Catholic District School Board.

[76] I find that the s. 3.16 of Policy 107 (Student Trustees) is outside the jurisdiction of the York Catholic District School Board. It is *ultra vires* and I would quash it on that account.

Conclusion

[77] The application is granted.

Costs

[78] As agreed by the parties, there will be no order as to costs.

_____
Lederer, J.

I agree _____
D. L. Corbett, J.

I agree _____
Nishikawa, J.

Released: October 6, 2022

CITATION: Kandaharian (Litigation Guardian of) v. York Catholic District School Board, 2022 ONSC 4969
DIVISIONAL COURT FILE NO.: 715/21
DATE: 20221096

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

D. L. Corbett, Lederer, Nishikawa JJ

BETWEEN:

DARIA KANDAHARIAN by her Litigation Guardian ANDRANIK KANDAHARIAN

Applicant

– and –

YORK CATHOLIC DISTRICT SCHOOL BOARD

Respondent

REASONS FOR JUDGMENT

Lederer, J.

Released: October 6, 2022