

19 OCT 1956

INSTITUTE OF ADVANCED  
LEGAL STUDIES

In the Privy Council.  
(No. 21 of 1894.)

ON APPEAL FROM THE SUPREME COURT  
OF CANADA.

IN THE MATTER OF CERTAIN STATUTES OF THE PROVINCE OF  
MANITOBA RELATING TO EDUCATION.

GERALD F. BROPHY and NOE CHEVRIER and HENRY  
NAPOLEON BOIRE and ROGER GOULET and PATRICK  
O'CONNOR and FRANCIS McPHILLIPS and FRANK I.  
CLARKE and JOSEPH LECOMTE and MICHAEL HUGHES  
and HENRY BROWNRIGG and FRANK BROWNRIGG and  
THEOPHILUS TESSIER and L. ARTHUR LEVEQUE and  
EDMOND TRUDEL and JOSEPH HONORÉ OCTAVIEN  
LAMBERT and JEAN BAPTISTE POIRIER and GEORGE  
COUTURE and J. ERNEST CYR and FRANÇOIS JEAN and  
DAVID DUSSAULT and CHARLES EDOUARD MASSE and  
FRANÇOIS HARDIS and JOSEPH BURON and LOUIS  
FOURNIER and PHILEÁS TRUDEAU and EDOUARD  
GUILBAULT and ROMUALD GUILBAULT and ALPHONSE  
PHANEUF and W. CLEOPHAS GERMAN and EDWARD R.  
LLOYD and LOUIS LAVENTURE and LOUIS J. COLLIN,  
all of the Province of Manitoba in the Dominion of Canada, on  
behalf of themselves and of all other persons forming the Roman  
Catholic minority of the Queen's Subjects in the Province - - *Appellants*

AND

THE HONORABLE THE ATTORNEY-GENERAL OF MANITOBA, *Respondent*.

**Case of the Appellants.**

1. This is an appeal from the Judgment of the Supreme Court of Canada Rec. p. 163.  
rendered on the 20th February 1894, upon a Case referred by the Governor-  
General in Council to the Supreme Court of Canada for hearing and consideration  
pursuant to the provisions of the Act respecting the Supreme and Exchequer  
Courts (Revised Statutes of Canada Chapter 135), as amended by an Act of  
Canada passed in 1891 (54 and 55 Vic., cap. 25, sec. 4).

2. The questions involved turn upon the construction of certain sections  
of the British North America Act and of the Manitoba Act and upon the effect  
of certain Statutes of the Province of Manitoba.

3. In the year 1890 certain Acts were passed by the Legislature of  
Manitoba, viz.:—Chapters 37 and 38 of 53 Victoria entitled respectively  
[30903]

“*An Act respecting the Department of Education*” and “*An Act respecting Public Schools*” which affected very injuriously certain rights and privileges of the Roman Catholic minority of the Queen’s subjects in that Province in relation to education acquired by them under various prior Statutes of the Legislative Assembly of Manitoba, as well as rights and privileges possessed by them before the creation of Manitoba as one of the Provinces of Canada.

4. Manitoba was created a Province by the Act of Canada commonly known as “The Manitoba Act 1870” (33 Vic. cap. 3). This Act was confirmed and declared to be valid and effectual by a Statute of the United Kingdom (34 Vic., cap. 28). The second section of the Manitoba Act 1870 provides that from and after a day named “the provisions of the British North America Act 1867, shall, except those parts thereof which are in terms made, or by reasonable intendment, may be held to be specially applicable to, or only to affect one or more, but not the whole of the Provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba, in the same way, and to the like extent as they apply to the several Provinces of Canada, and as if the Province of ~~Manitoba~~ had been one of the Provinces originally united by the said Act.”

5. Provisions are made by the 93rd Section of the British North America Act, 1867, and the 22nd Section of the Manitoba Act, 1870, for an appeal to the Governor-General in Council from Acts of the Legislative Assembly affecting the rights and privileges aforesaid.

6. Section 93 of the British North America Act, 1867, provides as follows:—

“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.”

7. Section 22 of the Manitoba Act, 1870, provides as follows:—

“ In and for the Province, the said 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 or practice in the Province at the  
 “ Union.”

(2) “ An Appeal shall lie to the Governor-General in Council  
 “ from any Act or decision of the Legislature of the Province, or 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.”

(3) “ 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 pro-  
 “ visions of this section, and of any decision of the Governor-General  
 “ in Council under this section.”

8. Memorials and Petitions were presented to the Governor-General of Canada in Council and among the rest one by the Appellants and by many other Roman Catholic inhabitants of the Province and on behalf of the Roman Catholic Minority of the Queen's subjects in the Province by way of appeal from the two Acts of Manitoba of 1890 before referred to, which petition prayed as follows:—

(1) “ That Your Excellency the Governor-General in Council Rec. p. 30.  
 “ may entertain the said Appeal and may consider the same, and may  
 “ make such provision and give such directions for the hearing and  
 “ consideration of the said Appeal as may be thought proper.

(2) “ That it may be declared that the said Acts (53 Vic., Chaps.  
 “ 37 & 38) do prejudicially affect the rights and privileges with regard  
 “ to denominational schools which Roman Catholics had by Law or  
 “ practice in the Province at the Union.

(3) “ That it may be declared that the said last mentioned Acts “ do affect the rights and privileges of the Roman Catholic minority “ of the Queen’s subjects in relation to education.”

(4) “ That it may be declared that to Your Excellency the “ Governor-General in Council, it seems requisite that the provisions “ of the Statutes in force in the Province of Manitoba prior to the “ passage of the said Acts, should be re-enacted in so far at least as “ may be necessary to secure to the Roman Catholics in the said “ Province the right to build, maintain, equip, manage conduct and “ support these schools in the manner provided for by the said “ Statutes, to secure to them their proportionate share of any grant “ made out of the public funds for the purposes of education and to “ relieve such members of the Roman Catholic Church as contribute “ to such Roman Catholic Schools from all payment or contribution to “ the support of any other schools, or that the said Acts of 1890 “ should be so modified or amended as to effect such purposes.

(5) “ And that such further or other declaration or order may “ be made as to Your Excellency the Governor-General in Council “ shall, under the circumstances, seem proper, and that such direc- “ tions may be given, provisions made and all things done in the “ premises for the purpose of affording relief to the said Roman “ Catholic Minority in the said Province as to Your Excellency in “ Council may seem to meet.”

9. Thereafter the Case hereinbefore mentioned was referred to the Supreme Court of Canada, by which Case various questions were submitted for the opinion of the Court. These were as follows :—

Rec. p. 7.

(1.) “ Is the Appeal referred to in the said Memorials and Peti- “ tions and asserted thereby, such an Appeal as is admissable by “ sub-section 3 of section 93 of the British North America Act 1867, “ or by sub-section 2 of section 22 of the Manitoba Act, 33 Vic. (1870) “ chapter 3, Canada ?”

(2.) “ Are the grounds set forth in the Petitions and Memorials “ such as may be the subject of appeal under the authority of the sub- “ sections above referred to, or either of them ?”

(3.) “ Does the decision of the Judicial Committee of the Privy “ Council in the cases of *Barrett v. the City of Winnipeg*, and *Logan v. “ the City of Winnipeg*, dispose of or conclude the application for “ redress based on the contention that the rights of the Roman Catholic “ minority which accrued to them after the Union under the Statutes “ of the Province have been interfered with by the two Statutes of “ 1890, complained of in the said Petitions and Memorials ?”

(4.) “ Does sub-section 3 of section 93 of the British North “ America Act 1867, apply to Manitoba ?”

(5.) “ Has His Excellency the Governor-General in Council “ power to make the declaration or remedial orders which are asked for

“ in the said Memorials and Petitions, assuming the material facts to be  
 “ as stated therein, or has His Excellency the Governor-General in  
 “ Council any other jurisdiction in the premises ? ”

(6.) “ Did the Acts of Manitoba relating to Education, passed  
 “ prior to the session of 1890, confer on or continue to the minority  
 “ a ‘ right or privilege in relation to education ’ within the meaning of  
 “ sub-section 2 of section 22 of the Manitoba Act, or establish a system  
 “ of separate or dissentient schools within the meaning of sub-section  
 “ 3 of section 93 of the British North America Act 1867, if said section  
 “ 93 be found to be applicable to Manitoba : and if so, did the two Acts  
 “ of 1890 complained of, or either of them, affect any right or privilege  
 “ of the minority in such manner that an appeal will lie thereunder to  
 “ the Governor-General in Council ? ”

10. Counsel for the Appellants and other Roman Catholics as aforesaid and for the Province of Manitoba appeared before the Supreme Court as did also the Solicitor-General for Canada who appeared to submit the Case on behalf of the Crown. The counsel of Manitoba not desiring to be heard, the Supreme Court pursuant to section 4 of the Canadian Act of 1891 before referred to, requested a counsel to argue the Case as to the interest of Manitoba, and such last mentioned counsel thereupon appeared and argued the Case for Manitoba as did also counsel for the Appellants and other Roman Catholics as aforesaid, but the Solicitor-General did not desire to be heard. Rec. p. 164.

11. Afterwards written Judgments were delivered by the five judges who heard the arguments. The result was to show a majority of three judges out of five for a negative answer to all of the questions.

The Chief Justice answered all the questions in the negative. Rec. p. 165.

Mr. Justice Fournier answered the third question in the negative and all the others in the affirmative : Rec. p. 172.

Mr. Justice Taschereau answered the third question in the affirmative and all the others in the negative : Rec. p. 179.

Mr. Justice Gwynne answered the first, second, fourth and fifth questions in the negative, the third in the affirmative, and the sixth as follows:—“ The Acts of 1890 do not nor does either of them affect any right or privilege of a minority in relation to education within the meaning of sub-section 2 of section 22 of the Manitoba Act in such manner that an appeal will lie thereunder to the Governor-General in Council. The residue of the question is answered by the answer to question No. 4.” Rec. p. 184.

And Mr. Justice King answered all the questions except the third and fourth in the affirmative, the third in the negative and to the fourth he replied : “ Yes, to the extent as explained by the above reasons for my opinion.” Rec. p. 194.

12. The Appellants submit that the answers of the majority of the Supreme Court are wrong, save as to question 3 ; and that the answers to all the questions, save question 3, should be in the affirmative ; and that the

judgment should be varied and it should be declared accordingly, for the following among other

### REASONS.

(1.) Because there are several marked distinctions, of the same character, between the language of the first and that of the second sub-section of the clause of the Manitoba Act, and between the language of the first and that of the third sub-section of the clause of the British North America Act, shewing that the first sub-section of each clause relates to a different class of cases and to a different condition from that dealt with by the later sub-section.

For example, sub-section 1 of the Manitoba Act refers to a right or privilege with respect to denominational schools; sub-section 2 to a right or privilege in relation to education.

Sub-section 1 refers to a right or privilege of any class of persons, whether such class constitutes a majority of the population or not; sub-section 2 to a right or privilege of the Protestant or Roman Catholic Minority.

Sub-section 1 relates to any right or privilege existing by law or practice at the Union; sub-section 2 to any right or privilege existent at the date of the Provincial Act or decision complained of, although created after the Union.

Sub-section 1 is limited to cases in which the right or privilege is prejudicially affected; sub-section 2 is not so restricted, and would thus extend to a case in which the relative status was altered by an improvement in the position, even though that of the minority was not in itself changed for the worse.

(2.) Because an attempted law in violation of the earlier sub-sections of each clause would be *ultra vires* and absolutely void, and any attempt to enforce it could be successfully resisted in the Courts by any person aggrieved. These sub-sections are thus complete in themselves, and no appeal to the Governor-in-Council, nor any decision or legislation by either Legislature, would be requisite, appropriate or useful. But the classes of cases dealt with by the later sub-sections are those in which the legislative action is not *ultra vires* or absolutely void, and in which an appeal and decision or legislation might be requisite, appropriate and useful.

(3.) Because the Manitoba Education Acts passed prior to 1890 did ~~confine~~ or continue to the minority a right or privilege in relation to education within the meaning of sub-section 2 of the Manitoba clause, and did establish a system of separate or dissentient schools within the meaning of sub-section 2 of the British North America clause; and the Manitoba Acts of 1890 did affect a right and privilege of the minority in such sort that an appeal lies to the Governor in Council.

- or on

(4.) Because the appeal is admissible under the law; the grounds set forth in the petitions and memorials are such as may be the subject of an appeal; the decision in *Barrett v. Winnipeg* does not dispose of or conclude the contention of the minority; sub-section 3 of the British North America clause does apply to Manitoba, and His Excellency the Governor-General in Council has power to make the declaration or order prayed for, or to give other appropriate relief, if it shall seem expedient to him so to do.

EDWARD BLAKE.

JOHN S. EWART.

In the Privy Council.

No. 21 of 1894.

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ON APPEAL FROM THE SUPREME  
COURT OF CANADA.

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IN THE MATTER OF CERTAIN STATUTES OF  
THE PROVINCE OF MANITOBA RELATING  
TO EDUCATION.

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BROPHY AND OTHERS - - - - *Appellants.*

*v.*

ATTORNEY - GENERAL OF  
MANITOBA - - - - - *Respondent.*

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**Case of the Appellants.**

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BOMPAS, BISCHOFF, DODGSON, COXE & BOMPAS,

4, GREAT WINCHESTER STREET, E.C.