



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.

BETWEEN GERALD F. BROPHY and NOE CHEVRIER and HENRY NAPOLEAN BOIRE and ROGER GOULET and PATRICK O'CONNOR and FRANCIS McPHILLIPS and FRANK J. 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 PHILEAS 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 RESPONDENT.

1. This is an Appeal by special leave of Her Majesty in Council from the Opinion of the Supreme Court of Canada, dated the 20th February 1894, on a certain case referred by the Governor-General to the said Court for hearing and consideration. By the case various questions were submitted for the opinion of the Court, but the substantial questions at issue were, whether either under

RECORD.
Pp. 163-204.
Pp. 7-161.
Pp. 7-8.

Respondent's Case.

RECORD.

(1)* } subsection 3 of section 93 of the British North America Act 1867, or under
 (2)* } subsection 2 of section 22 of the Manitoba Act, 33 Vic., chapter 3 (Dominion
 Statute) any appeal lay to the Governor-General in Council from two Statutes
 passed by the Legislature of Manitoba in the year 1890, whereby a general
system of nonsectarian public education was established in the place of the
denominational system that had previously existed, and whether the Governor-
 General in Council had power to make the declarations or remedial orders
 which were asked for in certain memorials that had been presented to His
 Excellency in Council, complaining of those Statutes.

P. 7.

2. The case was stated and referred by the Governor-General in Council 10
 to the Supreme Court of Canada, pursuant to "The Supreme and Exchequer
 " Courts Act," Revised Statutes of Canada, chapter 135, as amended by 54 and
 55 Vic., chapter 25, section 4 (Dominion Statute), in consequence of the
 above-mentioned memorials, which had been presented by or on behalf of the
 Roman Catholic minority in Manitoba. The memorialists complained that
 their rights and privileges in relation to education had been affected by the two
 Statutes before-mentioned, and asked for a declaration that such rights and
 privileges had been prejudicially affected by the said Statutes, and that the
 Governor-General in Council should give such directions and make such
 remedial orders for the relief of the Roman Catholics of the Province of 20
 Manitoba as to His Excellency in Council might seem fit.

p. 165-172,
 179-184,
 184-194.

3. The Supreme Court of Canada, consisting of Strong, C. J., Fournier,
 Taschereau, Gwynne, and King, J. J., after argument decided by a majority
 that no such appeal lay from the said Statutes, and Strong, C. J., and
 Taschereau and Gwynne, J. J., held that no appeal lay and that the Governor-
 General in Council had not the power to make the orders asked for: Fournier
 and King, J. J., were of the contrary opinion.

4. Manitoba joined the Union in 1870 upon the terms of the Manitoba
 Act, 33 Vic., chapter 3 (Dominion Statute), which Act was declared valid
 and effectual by the British North America Act 1871, 34 and 35 Vic., chapter 30
 28, section 5. The questions submitted for the opinion of the Supreme Court
 turned upon the construction of sections 2 and 22 of the Manitoba Act and
 section 93 of the British North America Act 1867.

5. It is enacted by section 2 of the Manitoba Act as follows:—

" 2. On and after the said day on which the order of the Queen in
 " Council shall take effect as aforesaid, the provisions of the British
 " North America Act 1867 shall, except those parts 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 40
 " varied by this Act, be applicable to the Province of Manitoba in the
 " same way and to the same 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."

And it is enacted by section 22 of the Manitoba Act and by section 93 of the
 British North America Act 1867 as follows:—

The Manitoba Act.

“ 22. In and for the Province (*i.e.*,
of Manitoba) the said Legislature
(*i.e.*, the Provincial 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
10 “ privilege with respect to denomina-
tional 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
10 “ 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
30 “ 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
40 “ under this section.”

The British North America Act 1867.

“ 93. In and for each Province the
Legislature (*i.e.*, the Provincial Legis-
lature) 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 denomina-
tional 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
dissentient schools of the Queen’s
Protestant and Roman Catholic
subjects in Quebec.

“ (3) 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.

“ (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
50 “ section.”

RECORD.
Pp. 35-125,
131-151.

6. The Governor-General in Council, in submitting the case to the Supreme Court, set forth the evidence in two cases, called Barrett's case and Logan's case, as the evidence on which the case was to be decided. The proceedings in those two cases were initiated in the Court of Queen's Bench for Manitoba, and the matter came on appeal before the Judicial Committee of the Privy Council. The question at issue was, whether the Public Schools Act 1890 (Manitoba Statute), which is one of the Statutes complained of by the memorialists, was void as offending against subsection 1 of section 22 of the Manitoba Act, whereby the Legislature of Manitoba is prohibited from passing any law prejudicially affecting any right or privilege with respect to denominational schools which any class of persons had by law or practice at the Union. The two cases were heard together, and it was decided by the Judicial Committee that the Public Schools Act 1890 did not prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law or practice in the Province at the Union, and was consequently intra vires and constitutional. The whole of these proceedings, and the said evidence, and the judgment delivered by Lord Macnaghten on behalf of the Judicial Committee, are to be found in the Record (pp. 35-158).

Pp. 152-158.

Pp. 35-158.

7. The effect of the evidence was fully stated in the judgment of the Privy Council, and the following is a short summary thereof:—

Pp. 154, 155-156.

At the time when Manitoba was admitted to the Union there was no law or regulation or ordinance with respect to education in force. There were no public schools in the sense of State schools, but there existed throughout the Province a number of denominational schools maintained by school fees or voluntary contributions, and conducted according to the tenets of the religious body to which they might belong. These schools were neither supported by grants from the public funds, nor were any of them in any way regulated or controlled by any public officials. In 1871, however, the year after the admission of Manitoba to the Union, a law was passed which established throughout the Province a system of denominational education in the common schools, as they were then called. A Board of Education was formed, which was to be divided into two sections—Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Each of the twenty-four electoral divisions into which the Province had by the Manitoba Act been divided was constituted a school district in the first instance, and there was to be a school in each district. Twelve electoral divisions "comprising mainly a Protestant population" were to be considered Protestant school districts; twelve "comprising mainly a Roman Catholic population" were to be considered Roman Catholic school districts. These schools, none of which could properly be called "separate or dissentient schools," were to be maintained by grants from the public funds, to be divided equally between the Protestant and Roman Catholic schools, and contributions from the people of each school district. Such contributions might be raised by an assessment on the property of the school district, which must have involved in some cases at any rate an assessment on Roman Catholics for the support of a Protestant school, and an assessment on Protestants for the support of a Roman Catholic school.

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See S 27 act 9/71 providing conditionally for the case

The laws relating to education were modified from time to time. From the year 1876 to 1890 enactments were in force declaring that in no case should a Protestant ratepayer be obliged to pay for a Roman Catholic school, or a Roman Catholic ratepayer for a Protestant school, and by an Act passed in 1881 it was provided that the legislative grant should no longer be divided equally between Protestant and Roman Catholic schools, but should be divided between the Protestant and Roman Catholic section of the Board in proportion to the number of children between the ages of 5 and 15 residing in the various Protestant and Roman Catholic school districts.

10 The system of denominational education was maintained in full vigour until 1890, when the Statutes complained of by the memorialists, viz., 53 Vic., chapter 37, and the Public Schools Act 1890 (Manitoba Statutes), were passed. The former established in the place of the Board of Education a Department of Education, and a Board consisting of seven members, known as the "Advisory Board."

20 The Public Schools Act 1890 repealed all previous legislation relating to public education, and enacted that all Protestant and Roman Catholic school districts should be subject to the provisions of the Act, and that all public schools should be free schools. At the option of the school trustees for each district, religious exercises conducted according to the regulations of the Advisory Board and at the times prescribed by the Act were to be held in the public schools. The religious services were to be entirely nonsectarian, and any pupil whose parent or guardian should so wish was to be dismissed from school before the religious exercises should take place.

30 The Act then provided for the formation, alteration, and union of school districts, for the election of school trustees, and for levying a rate on the taxable property in each school district for school purposes. A portion of the legislative grant for educational purposes was allotted to public schools, but no school was to participate in the grant unless it were conducted according to all the provisions of the Act and the regulations of the Department of Education and of the Advisory Board.

8. After the decision in Barrett's and Logan's cases had been given by the Judicial Committee, the memorials before-mentioned were presented to the Governor-General in Council by or on behalf of the Roman Catholic minority in Manitoba, alleging that—

Pp. 16-31.

40 (1) The Statutes complained of had deprived the Roman Catholic minority of the rights or privileges of a separate condition as regards education, and of organising their schools under the system of public education in the Province which they had previously enjoyed by the Education Acts passed since the Union.

(2) That their schools had been merged with those of Protestant denominations.

(3) That they are required to contribute through taxation to the support of schools which are called public schools, but are in substance a continuation of the old Protestant schools.

(4) That the religious exercises in the public schools are not acceptable to them, and praying that the Governor-General in Council would, pursuant to

RECORD.

the British North America Act 1867, section 93, subsection 3, and the Manitoba Act, section 22, subsection 2, hear and entertain the memorialists' appeal from the Statutes complained of.

9. The memorialists' contention was:—

(1) That the Statutes complained of had prejudicially affected rights and privileges in relation to education which they had acquired since the Union.

(2) That by subsection 2 of section 22 of the Manitoba Act an appeal would lie to the Governor-General in Council from any Act of the Provincial Legislature affecting such rights and privileges, even though the Act were 10
intra vires and constitutional.

(3) That, by virtue of section 2 of the Manitoba Act, subsection 3 of section 93 of the British North America Act 1867 applied to Manitoba, and that a similar right of appeal was provided by that section.

10. Thereupon the Governor-General in Council, pursuant to the authority of the Statutes above-mentioned, referred the matter to the Supreme Court of Canada for hearing and consideration, and desired the Court to certify to him in Council their opinion on the following questions:—

(1) Is the appeal referred to in the said memorials and petitions and asserted thereby such an appeal as is admissible by subsection 3 of section 93 of 20
the British North America Act 1867, or by subsection 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 subsections above referred to, or either of them?

(3) Does the decision of the Judicial Committee of the Privy Council in the cases of *Barrett vs. the City of Winnipeg* and *Logan vs. 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 30
with by the two Statutes of 1890 complained of in the said petitions and memorials?

(4) Does subsection 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 declarations 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 40
Session of 1890 confer on or continue to the minority a "right or privilege in relation to education" within the meaning of subsection 2 of section 22 of the Manitoba Act, or establish a system of separate or dissentient schools within the meaning of subsection 3 of section 93 of the British North America Act 1867, if the 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 a manner that an appeal will lie thereunder to the Governor-General in Council?

11. The case was argued before the Supreme Court on the 17th October 1893 by counsel on behalf of the Appellants and other Roman Catholic inhabitants of Manitoba. Counsel for Manitoba appeared but did not desire to address the Court, and at the request of the Court Mr. Robinson, Q.C., argued the case as to the interest of Manitoba. RECORD.
P. 166.

12. After such hearing and consideration the said Judges certified to the Governor-General in Council, for his information, their opinion on the questions so referred to the Court, with their reasons therefor. Pp. 163-204.

To the first question: Strong, C. J., Taschereau, J., and Gwynne, J., gave a negative answer; and Fournier, J., and King, J., gave an affirmative answer. Pp. 172, 184, 194,
178, 203.

To the second question: Strong, C. J., Taschereau, J., and Gwynne, J., gave a negative answer; and Fournier, J., and King, J., gave an affirmative answer. Pp. 172, 184, 194,
178, 203.

To the third question: Strong, C. J., Fournier, J., and King, J., gave a negative answer; and Taschereau, J., and Gwynne, J., gave an affirmative answer. Pp. 172, 178, 203,
184, 194.

To the fourth question: Strong, C. J., Taschereau, J., and Gwynne, J., gave a negative answer; and Fournier, J., and King, J., gave an affirmative answer. Pp. 172, 184, 194,
178, 203.

To the fifth question: Strong, C. J., Taschereau, J., and Gwynne, J., gave a negative answer; and Fournier, J., and King, J., gave an affirmative answer. Pp. 172, 184, 194,
178, 203.

To the sixth question: Strong, C. J., and Taschereau, J., gave a negative answer; and Fournier, J., and King, J., gave an affirmative answer: and Gwynne, J., answered—"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 subsection 2 of section 22 of the Manitoba Act in such manner that an appeal will lie thereunder to the Governor-General in Council."

The majority of the Court were therefore of opinion that no appeal would lie to the Governor-General in Council from the Statutes complained of.

13. The Appellants thereupon, on behalf of themselves and the rest of the Roman Catholic minority in Manitoba, presented a petition to the Queen in Council for special leave to appeal from this decision of the Supreme Court, and such special leave was granted upon terms which have been complied with.

14. The Respondent submits that the opinions which the majority of the Judges of the Supreme Court gave upon the questions submitted to them are correct for the following, amongst other

REASONS.

1. Because the provisions of section 22 of the Manitoba Act were intended to define completely the power of the Legislature of the Province to make laws in relation to education, and the provisions of section 93 of the British North America Act do not in any way limit, or extend, or affect the power of the Legislature of the Province in that behalf.

2. Because the provisions of subsection 3 of section 93 of the British North America Act 1867 are varied by the provisions of subsection 2 of section 22 of the Manitoba Act, and are not therefore by virtue of section 2 of the Manitoba Act applicable to Manitoba.
3. Because, assuming all the provisions of subsection 3 of section 93 of the British North America Act to apply to Manitoba, no appeal lies under that subsection from the Statutes complained of, the only appeal being from an "Act or decision of any Provincial authority," and a Statute passed by the Legislature of the Province is not an Act or decision of any Provincial authority within the meaning of that section. 10
4. Because, assuming all the provisions of subsection 3 of section 93 of the British North America Act to apply to Manitoba, there is not and never has been a system of separate or dissentient schools established by law in Manitoba.
5. Because, under the provisions of section 22 of the Manitoba Act, an appeal to the Governor-General in Council can lie only when rights or privileges existing by law or practice at the Union have been affected—and the decision in Barrett's and Logan's cases precludes the Appellants from saying that any such rights or privileges have been affected by the Statutes complained of. 20
6. Because, even if the rights and privileges mentioned in section 22 included rights and privileges created since the Union, the Statutes complained of have not affected any right or privilege of the Roman Catholic minority in relation to education established by law or practice since that time.
7. Because, if the appeal contended for by the Appellants lies, the Legislature of Manitoba would be deprived of the right, inherent in all Legislatures, of repealing its own laws, and the Legislature, having once passed a Statute giving a right or privilege to any denomination, could never repeal or alter that Statute. 30
8. Because the Appellants' contention ascribes to the Governor-General in Council, and the Parliament of Canada, a peculiar and arbitrary jurisdiction to review and rescind, according to their discretion, and without any reference to, the constitutional rights of the Province of Manitoba, intra vires and constitutional laws passed by the Legislature of Manitoba. 40
9. Because the Appellants' contention reduces the exclusive right of the Legislature of Manitoba to make laws in relation to education in and for the Province of Manitoba, conferred on it by positive enactment, to a nullity.

HERBERT H. COZENS-HARDY,
R. M. BRAY.

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