

*Appeal No 51, 1894*  
In the Privy Council.

~~Re Manitoba~~  
Judgment  
[1] 1895

# ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of certain Statutes of the Province of Manitoba  
relating to Education.

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## Judgment

Of the Supreme Court of Canada, dated 20th February, 1894,

AND

## Judges' Opinions.

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# In the Supreme Court of Canada.

TUESDAY the 20th day of FEBRUARY, A.D, 1894.

Present :—

The Honorable SIR HENRY STRONG, KNIGHT, Chief Justice.  
The Honorable MR. JUSTICE FOURNIER,  
The Honorable MR. JUSTICE TASCHEREAU,  
The Honorable MR. JUSTICE GWYNNE,  
The Honorable MR. JUSTICE KING.

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

The Governor in Council, by Order in Council bearing date the Thirty-first day of July, One thousand eight hundred and ninety-three, numbered 2,103, and passed pursuant to the provisions of "An Act respecting the Supreme and Exchequer Courts," Revised Statutes of Canada, Chapter 135, as amended by 54-55 Victoria, Chapter 25, Section 4, having referred to the Supreme Court of Canada for hearing and consideration a Case touching certain Statutes of the Province of Manitoba relating to Education, and the memorials of certain persons complaining thereof, the questions so referred for hearing and consideration being as follows :—

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date 20th  
Feb., 1894.

20 (1) Is the Appeal referred to in the said memorials and petitions, and asserted thereby, such an Appeal as is admissible 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 Victoria (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 ?

30 (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 declarations or remedial orders which are asked for in the said

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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 10 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 ?

And the said Case having come before this Court on the Fourth day of October, in the year of our Lord One thousand eight hundred and ninety-three, the Honorable J. J. Curran, Q.C., Her Majesty's Solicitor-General for the Dominion of Canada, appeared to submit the said Case on behalf of the Crown, Mr. Ewart, Q.C., appeared to argue the said Case on behalf of the said petitioners and memorialists, and Mr. Wade, Q.C., appeared on behalf of the Province of Manitoba, but not to argue the said Case in the interest of the said 20 Province, whereupon this Court directed the hearing of the said Case to stand over, and in the exercise of the powers conferred by 54-55 Victoria, chapter 25, Section 4, substituted for the Revised Statutes of Canada, chapter 135, Section 37, appointed Mr. Christopher Robinson, Q.C., to argue the said Case in the interest of the said Province of Manitoba, and the said Case coming on for hearing before this Court on the Seventeenth day of October, in the year of our Lord One thousand eight hundred and ninety-three, in the presence of Counsel aforesaid, whereupon, and upon hearing Mr. Ewart, Q.C., for the said petitioners and memorialists, and Mr. Robinson, Q.C., who appeared pursuant to the direction of the Court in the interest of the said Province of Manitoba, the 30 Honorable the Solicitor-General and Mr. Wade, Q.C., not desiring to be heard, this Court was pleased to direct that the said Case should stand over for consideration, and the same having come before this Court this day, this Court did state its opinion on the said questions so submitted as aforesaid, and the opinion of the said Court, and the answers to the said questions, and the reasons therefor, will appear from the Judgments delivered by their Lordships, a true copy of which said Judgments is hereunto annexed.

All which is respectfully certified under the Seal of the Supreme Court of Canada.

IN THE MATTER of certain Statutes of the Province of Manitoba  
relating to Education.

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The CHIEF JUSTICE: This case has been referred to the Court for its opinion by His Excellency the Governor-General in Council, pursuant to the provisions of "An Act respecting the Supreme and Exchequer Courts." Revised Statutes of Canada, chapter 135, as amended by 54 and 55 Vic., chap. 25, section 4. Opinion of  
Chief Justice.

Six questions are propounded, which are as follows:—

- 10           1. Is the Appeal referred to in the said memorials and petitions (referring to certain petitions and memorials presented to the Governor-General in Council) and asserted thereby, such an appeal as is admissible 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) chap. 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?
- 20           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?
- 30           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?
- 40           6. Did the Acts of Manitoba 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, effect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor-General in Council?

To put it in a concise form, the questions which we are called upon to answer are whether an appeal lies to the Governor-General in Council, either under the British North America Act, 1867, or under the Dominion Act establishing the Province of Manitoba, against an Act or Acts of the legislature of Manitoba passed in 1890, whereby certain Acts or parts of Acts of the same legislature previously passed, which had conferred certain rights on the Roman Catholic minority in Manitoba in respect of separate or denominational schools were repealed.

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The matter was brought before the Court by the Solicitor-General on behalf of the Crown, but was not argued by him. On behalf of the Petitioners and Memorialists who had sought the intervention of the Governor-General, Mr. Ewart, Q.C., appeared. Mr. Wade, Q.C. appeared as Counsel on behalf of the Province of Manitoba when the matter first came on, but declined to argue the case, and the Court then in exercise of the powers conferred by 54 and 55 Vic., chap. 25, section 4, substituted for the Revised Statutes of Canada, chapter 135, section 37, requested Mr. Christopher Robinson, Q.C., the senior member of the Bar practising before this Court, to argue the case in the interest of the Province of Manitoba, and on a subsequent day the matter was fully and 10 ably argued by Mr. Ewart and Mr. Robinson.

The proper answers to be given to the questions propounded depend principally on the meaning to be attached to the words "any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education," in Sub-section 2 of Section 22 of the Manitoba Act. Do these words include rights and privileges in relation to education which did not exist at the Union, but (in the words of section 93 subsection 3 of the British North America) have been "thereafter established by the legislature of the Province" or is the right or privilege mentioned in sub-section 2 of section 22 of the Manitoba Act the same right or privilege which is previously referred to in 20 sub-section 1 of section 22 of the Manitoba Act, viz: one which any class of persons had by law or practice in the Province at the Union, or a right or privilege other than one which the legislature of Manitoba itself created?

Section 93 sub-section 3 of the British North America Act 1867, is as follows:—"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." 30

It is important to contrast these two clauses of the Acts in question, inasmuch as there is intrinsic evidence in the later Act, that it was generally modelled on the Imperial Statute, the original Confederation Act; and the divergence in the language of the two Statutes is therefore significant of an intention to make some change as regards Manitoba by the provisions of the later Act.

It will be observed that the British North America Act, section 93, sub-section 3, contains the words, "or is thereafter established by the legislature of the Province," which words are entirely omitted in the corresponding section (section 22. sub-section 2) of the Manitoba Act. Again the same sub-section of the Manitoba Act gives a right of appeal to the Governor-General in Council from the legislature of the Province, as well as from any provincial authority, whilst by the British North America Act the right of appeal to the Governor-General is only to be from the act or decision of a provincial authority. I can refer this difference of expression in the two Acts to nothing but to a deliberate intention to make some change in the operation of the respective clauses. I do not see why there should have been any departure in the Manitoba Act from the language of the British North America Act, unless it was intended that the meaning should be different. On the one hand, it may well be urged, 40

*yes, but only as part of a whole omitted sentence.*

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that there was no reason why the Provinces admitted to confederation should have been treated differently; why a different rule should prevail as regards Manitoba from that which, by express words, applied to the other provinces. On the other hand there is, it seems to me, much force in the consideration that whilst it was reasonable that the organic law should preserve vested rights existing at the Union from spoliation or interference, yet every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted. No doubt this right may be controlled by a written constitution which confers legislative powers and which may restrict

10 those powers and make them subject to any condition which the constituent legislators may think fit to impose. A notable instance of this is, as my brother King has pointed out, afforded by the constitution of the United States, according to the construction which the Supreme Court in the well-known "Dartmouth College Case" put upon the provision prohibiting State legislatures from passing laws impairing the obligation of contracts. It was there held, with a result which has been found most inconvenient, that a legislature which had created a private corporation could not repeal its own enactment granting the franchise, the reason assigned being that the grant of the right of franchise of a corporation was a contract. This has in practice been got over by inserting in

20 such Acts an express reservation of the right of the legislature to repeal its own act. But, as it is a *prima facie* presumption that every legislative enactment is subject to repeal by the same body which enacts it, every Statute may be said to contain an implied provision that it may be revoked by the authority which has passed it, unless the right of repeal is taken away by the fundamental law, the over-riding institution which has created the legislature itself. The point is a new one, but having regard to the strength and universality of the presumption that every legislative body has power to repeal its own laws, and that this power is almost indispensable to the useful exercise of legislative authority, since a great deal of legislation is of necessity tentative and experimental, would it be

30 arbitrary or unreasonable, or altogether unsupported by analogy to hold as a canon of constitutional construction that such an inherent right to repeal its own acts cannot be deemed to be withheld from a legislative body having its origin in a written constitution unless the constitution itself by express words takes away the right. I am of opinion that in construing the Manitoba Act we ought to proceed upon this principle and hold the legislature of that Province to have absolute powers over its own legislature, untrammelled by any appeal to federal authority, unless we find some restriction of its rights in this respect in express terms in the Constitutional Act.

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Then, keeping the rule of construction just adverted to in view, is there

40 anything in the terms of Sub-section 2 of Section 22 of the Manitoba Act by which the right of appeal is enlarged and an appeal from the legislature is expressly added to that from any provincial authority, whilst in the British North America Act, Section 93 Sub-section 3, the appeal is confined to one from a provincial authority only which expressly or necessarily implies that it was the intention of those who framed the constitution of Manitoba to impose upon its legislature any disability to exercise the ordinary powers of a legislature to repeal its own enactments. I cannot see that it does, and I will endeavour to demonstrate the correctness of this opinion. It might well have been considered by the Parliament of the Dominion in passing the Manitoba Act that

50 the words "any provincial authority" did not include the legislature. Then,

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assuming it to have been intended to conserve all vested rights "rights or privileges existing by law or practice at the time of the union," and to exclude or subject to federal control, even legislative interference with such pre-existent rights or privileges, this prohibition or control would be provided for by making any act or decision of the legislature so interfering the subject of appeal to the Governor-General in Council.

If however the words of Section 93, Sub-section 3, "or is thereafter established by the legislature" had been repeated in section 22, the legislature would have been in express and unequivocal terms restrained from repealing laws of the kind in question which they had themselves enacted, except upon the conditions of a right to appeal to the Governor-General. If it was intended not to do this, but only to restrain the legislature of Manitoba from interfering with "rights and privileges" of the kind in question existing at the Union, this end would have been attained, by just omitting altogether from the clause the words "or shall have been thereafter established by the legislature of the Province." This was done. 10

Next, it is clear, that in interpreting the Manitoba Act the words "any provincial Authority" do not include the legislature, for that expression is there used as an alternative to the "legislature of the Province."

It is not to be presumed that Manitoba was intended to be admitted to the Union upon any different terms from the other provinces or with rights of any greater or lesser degree than the other provinces. Some difference may have been inevitable owing to the differences in the pre-existing conditions of the several provinces. It would be reasonable to attribute any difference in the terms of union and in the rights of the province as far as possible to this, and by interpretation to confine any variation in legislative powers and other matters to such requirements as were rendered necessary by the circumstances and condition of Manitoba at the time of Union. 20

Now let us see what would be the effect of the construction which I have suggested of both Acts—the British North America Act, section 93, and the Manitoba Act, section 22—in their practical application to the different provinces as regards the right of provincial legislatures to interfere with separate or denominational schools to the prejudice of a Roman Catholic or Protestant minority. 30

First then let us consider the the cases of Ontario and Quebec, the two provinces which had by law denominational schools at the Union. In these provinces any law passed by a provincial legislature impairing any right or privilege in respect of such denominational schools, would by force of the prohibition contained in sub-section 3 of section 93 of the British North America Act, be *ultra vires* of the legislature and of no constitutional validity. 40

Should the legislatures of these Provinces (Ontario and Quebec) after confederation have conferred increased rights or privileges in relation to education or minorities, I see nothing to hinder them from repealing such acts to the extent of doing away with the additional rights and privileges so conferred by their own legislation without being subject to any condition of appeal to federal authority.

What is meant by the term "provincial authority"? The Parliament of the Dominion, as shown by the Manitoba Act, hold that it does not include the



legislature, for in sub-section 2 of section 22 they use it as an alternative expression and so expressly distinguish it from the legislature. It is true the British North America Act did not emanate from the Dominion Parliament, but nevertheless the construction which that Parliament has put on the British North America Act, if not binding on judicial interpreters is at least entitled to the highest respect and consideration. Secondly, the words "provincial authority" are not apt words to describe the legislature, and in order that a provincial legislature should be subject to an appeal, when it merely attempts to recall its own acts, the terms used should be apt, clear and unambiguous. To

10 return then to the case of Ontario and Quebec, should any "provincial authority" not including in these words the legislature, but interpreting the expression as restricted to administrative authorities (without at present going so far as to say it included Courts of Justice) by any Act or decision affect any right or privilege whether derived under a law or practice existing at the time of confederation or conferred by a provincial Statute since the Union, still remaining unrepealed and in force, that would be subject to an appeal to the Governor-General.

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Secondly, as regards the Provinces of Nova Scotia and New Brunswick, those Provinces not having had any denominational schools at the time of the

20 Union, there is nothing in their case for sub-section 1 of section 93 to operate upon. Should either of these Provinces by after-confederation legislation create rights and privileges in favour of Protestant or Catholic minorities in relation to education, then so long as these Statutes remain unrepealed and in force, an appeal would lie to the Governor-General from any act or decision of a provincial authority affecting any of such rights or privileges of a minority, but there would be nothing to prevent the legislature of the provinces now under consideration from repealing any law which they had themselves enacted conferring such rights and privileges, nor would any Act so repealing their own enactments be subject to appeal to the Governor-General in Council.

30 Thirdly, we have the case of the Province of Manitoba; here applying the construction before mentioned, the provincial powers in relation to education would be not further restricted but somewhat enlarged in comparison with those of the other provinces.

Acting upon the presumption that in the absence of express words the Act of the Dominion Parliament which embodies the constitution of the Province, withholding from the legislature of the Province the normal right of altering or repealing its own Acts, we must hold that it was not the intention of Parliament so to limit the legislature by the organic law of the Province. What then is the result of the legislation of the Dominion as regards Manitoba? What effect is

40 to be given to Section 22 of the Manitoba Act? By the first sub-section any law of the Province prejudicing any right or privilege with respect to denominational schools in the Province existing at the Union, is *ultra vires* and void. This clause was the subject, and the only subject of interpretation in *Barrett v. Winnipeg*, and the point there decided was, that there was no such right or privilege as was claimed in that case existing at the time of the admission of the Province into the Union. Had any such right or privilege been found to exist, there is nothing in the judgment of the Privy Council against the inference that legislation impairing it would have been unconstitutional and void. That decision has, in my opinion, but a very remote application to the present case.

50 The second sub-section of Section 22 of the Manitoba Act is as follows:—"An

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appeal shall be 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."

I put aside as entirely irrelevant here the question whether it was not intended by this sub-section 2 to confer on the Privy Council of the Dominion appellate jurisdiction, from the provincial judiciary, a question, the decision of which, I may say in passing, might well be influenced by the consideration that the power given to Parliament by the British North America Act to create federal courts had not at the time of the passage of the Manitoba Act been exercised. 10

The first subject of appeal is, then, any Act or decision of the legislature of the Province affecting any right or privilege of the minority in respect of the matters in question. Now if we are to hold, as I am of opinion we must hold, that it was not the intention of Parliament by these words so to circumscribe the legislative rights conferred by them on Manitoba, as to incapacitate that legislature from absolutely, and without any subjection to federal control, repealing its own enactments, and thus taking away rights which it had itself conferred, the right of appeal to the Governor-General against legislative Acts must be limited to a particular class of such Acts, viz.—to such as might prejudice rights and privileges not conferred by the legislature itself, but rights and privileges 20 which could only have arisen before confederation, being those described in the first sub-section of Section 22. That we must assume, in absence of express words, that it was not the intention of Parliament to impose upon the Manitoba legislature a disability so anomalous as an incapacity to repeal its own enactments, except subject to an appeal to the Governor-General in Council, and possibly the intervention of the Dominion Parliament as a paramount legislature, is a proposition, I have before stated.

Therefore, the right of appeal to the Governor-General in Council must be confined to acts of the legislature affecting such rights and privileges as are mentioned in the first sub-section, viz., those existing at the Union when 30 belonging to a minority, either Protestant or Catholic. Then there would also be the right of appeal from any provincial authority. I will assume that the description "provincial authority" does not apply to the Courts of Justice. Then these words "provincial authority" could not, as used in this sub-section 2 of section 22 of the Manitoba Act, have been intended to include the provincial legislature, for it is expressly distinguished from it, being mentioned alternately with "the legislature." An appeal shall lie from any act or decision of the legislature or of any "provincial authority," is the language of the section. It must then apply to the provincial, executive or administrative authorities. No doubt an appeal would lie from their acts or decisions upon the ground that 40 some right or privilege existing at the date of the admission of the Province to the federal union was thereby prejudiced. In this respect Manitoba would be in the same position as Ontario and Quebec. Unlike the cases of those provinces, and also unlike the case of the two maritime provinces Nova Scotia and New Brunswick, there would not, however, in the case of Manitoba, be an appeal to the Governor-General in Council from the act or decision of any "provincial authority," upon the ground that some right or privilege not existent at the time of union, but conferred subsequently by legislation, had been violated. This construction must necessarily result from the right of appeal 50 against acts or decisions of provincial authorities, and against acts or decisions

of the legislature, being limited to such as prejudiced the same class of rights or privileges. The wording of this sub-section 2 shows clearly that only one class of rights or privileges could have been meant, and that the right of appeal was therefore to arise upon an invasion of these, either by the legislature or by a provincial authority. Then, as the impossibility of holding that it could have been intended to impose fetters on the legislature or to incapacitate it from repealing its own acts, requires us to limit the appeal against its enactments to acts affecting rights and privileges existing at the Union, it must follow that the right of appeal must be in like manner limited as regards acts or decisions of provincial authorities. This, however, although it makes a difference between Manitoba and the other provinces is not a very material one. The provincial authorities would of course be under the control of the Courts; they could therefore be compelled by the exercise of judicial authority to conform themselves to the law. Much greater would have been the difference between Manitoba and the other provinces if we were to hold that, whilst as regards the provinces of Nova Scotia and New Brunswick their legislature could enact a separate school law one session and repeal it the next, without having their repealing legislation called in question by appeal, and whilst as regards Ontario and Quebec, although rights and privileges existing at confederation were made intangible by their legislatures, yet any increase or addition to such rights and privileges which these legislatures might grant could be withdrawn by them at their own pleasure subject to no federal revision, yet that the legislation of Manitoba on the same subject should be only revocable subject to the revisory power of the Governor-General in Council.

I have thus endeavoured to show that the construction I adopt has the effect of placing all the provinces virtually in the same position, with an immaterial exception in favor of Manitoba, and it is for the purpose of demonstrating this, that I have referred to appeals from the acts and decisions of provincial authorities which are not otherwise in question in the case before us.

That the words "provincial authority" in the third sub-section of Section 93 of the British North America Act do not include the legislature, is a conclusion which I have reached not without difficulty. In interpreting the Manitoba Act however, what we have to do is to ascertain in what sense the Dominion Parliament in adopting the same expression in the Manitoba Act, understood it to have been used in the British North America Act.

That they understood these words not to include the provincial legislatures is apparent from Section 22 of the Manitoba Act, wherein the two expressions "provincial authority" and "legislature of the Province" are used in the alternative, thus indicating that in the intendment of Parliament they meant different subjects of appeal.

Again, why were the words contained in the third sub-section of Section 93 of the British North America Act "or is thereafter established by the legislature of the Province" omitted, when that section was in other respects transcribed in the Manitoba Act? The reason it appears to me is plain. So long as these words stood with the context they had in the British North America Act, they did not in any way tie the hands of the legislatures as regards the undoing, alteration or amendment of their own work, for the words "any provincial authority" did not include the legislature. But when in the Manitoba Act the Dominion Parliament thought it advisable for the better protection of vested

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rights—rights and privileges—existing at the Union, to give a right of appeal from the legislature to the Governor-General in Council, it omitted the words “or is thereafter established by the legislature of the Province,” with the intent to avoid placing the provincial legislature under any disability, or subjecting it to any appeal as regards the repeal of its own legislation, which would have been the effect if the third sub-section of Section 93 of the British North America Act had been literally re-enacted in the Manitoba Act with the words “of the legislature of the Province” interpolated as we now find them in sub-section 2 of the latter Act. This seems to me to show conclusively that the words “rights or privileges” in sub-section 2 of Section 22, were not intended to include rights and privileges originating under provincial legislation since the Union, and that the legislature of Manitoba is not debarred from exercising the common legislative right of abrogating laws which it has itself passed relating to denominational or separate schools or educational privileges, nor is such repealing legislation made subject to any appeal to the Governor-General in Council. 10

In my opinion all the questions propounded for our opinion must be answered in the negative.

Certified true copy,

G. DUVAL, 20  
Reporter, S.C.C.

Opinion of  
Fournier, J.

FOURNIER, J.:—By the Statute 33 Vic. ch. 3 sec. 2 (D) the Manitoba Act the provisions of the British North America Act except so far as the same may be varied by the said Act are made 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 united by the British North America Act. This Act was Imperialized so to speak by 34 Vic. ch. 38 Imp. which declares that 32 & 33 Vic. ch. 3 (D) shall be deemed to have been valid and effectual for all purposes whatsoever.

If we are now called upon to construe certain provisions of this Statute, it seems to me that the same considerations will apply as if the provisions appeared in the British North America Act itself under the heading “Manitoba” and therefore, as stated by the late Chief Justice of this Court, Sir W. Richards, in the case of *Severn v. the Queen* [2 Can. S. C. R. 70] “in deciding important questions arising under the Act passed by the Imperial Parliament for federally uniting the Provinces of Canada, Nova Scotia and New Brunswick, we must consider the circumstances under which that Statute was passed, the condition of the different provinces, their relations to one another, as well as the system of government which prevailed in those provinces and countries.” For convenience therefore I will place in parallel columns the sections of the Manitoba Act and the corresponding sections of the British North America Act in relation to education upon which we are required to give an answer. 40

British North America Act, sec. 93 :

In and for the 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 powers, privileges and duties at the Union by law conferred and imposed by Upper Canada on the separate schools and school trustees of

(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 any provisions of this section and of any decision of the Governor-General in Council under this section.

Manitoba Act, sec. 22 :

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 provisions of this section and of any decision of the Governor-General in Council under this section.

Opinion of Fournier, J.

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*act of Leg. Council of Prov. authority*

What was the existing state of things in the territory then being formed into the Province of Manitoba? Rebellion, as I have already stated in the case of Barrett v. Winnipeg, had thrown the people into a strong and fierce agitation, inflamed religious and national passions caused the greatest disorder, which rendered necessary the intervention of the Federal Government, and, as matters

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Fournier, J.

then stood on the 2nd March, 1870, the Government of Assinibora in order to pacify the inhabitants appointed Rev. W. Ritchot and Messrs. Black and Scott as joint delegates to confer with the Government of Ottawa, and negotiate the terms and conditions upon which the inhabitants of Assinbora would consent to enter confederation with the Province of Canada.

Mr. Ritchot was instructed to immediately leave with Messrs. Black and Scott for Ottawa, in view of opening negotiations on the subjects of their mission with the Government at Ottawa.

When they arrived at Ottawa, the three delegates, Messrs. Ritchot, Black and Scott, received on the 25th April, 1870, from the Hon. Mr. Howe, the then Secretary of State for the Dominion of Canada, a letter informing them that the Hon. Sir John A. Macdonald and Sir George Cartier had been authorised by the Government of Canada to confer with them on the subject of their mission, and that they were ready to meet them. 10

The Rev. Mr. Ritchot was the bearer of the conditions upon which they were authorised to consent for the inhabitants of Assinbora to enter confederation as a separate province.

These facts appear in Exhibit L., Sessional papers of Canada, 1893, 33 D., and in Exhibit N. of the same Sessional paper we see that the following conditions, Articles 5 and 7 read as follows:— 20

“ 5. That all properties, all rights and privileges possessed be respected, and the establishing and settlement of the customs, usages and privileges be left for the sole decision of the local legislature.”

“ 7. That the schools shall be separate, and that the monies for schools shall be divided between the several denominations *pro rata* of their respective populations.”

Now, after negotiations had been going on, and despatches and instructions from the Imperial Government of Canada on the subject of the entrance of the Province of Manitoba into the Confederation had been received, the Manitoba Constitutional Act was prepared and section 22 inserted as a satisfactory 30 guarantee for their rights and privileges in relation to matters of education as claimed by the above articles 5 and 7. And until 1890 the inhabitants of the Province of Manitoba enjoyed these rights and privileges under the authority of this section and local statutes passed in conformity therewith.

However, it seems by the decision of the judicial Committee of the Privy Council in the case of *Barrett v. Winnipeg*, that the delegates of the North-West and the Parliament of Canada although believing that the inhabitants of Assinbora had before the union “by law or by practice, certain rights and privileges with respect to denominational schools”—for the words used in sub-section 1 of this section 22 are “which any class have by law or practice in the province at the union”—had in point no such right or privilege by law or practice with respect to denominational schools, and therefore that sub-section 1 is, so to speak, wiped out of the Constitutional Act of Manitoba, having nothing to operate upon. 40

But if the parties agreeing to these terms of union, were in error in supposing they had by law or practice, prior to the union, certain rights or privileges, they certainly were not in error in trusting that the provincial

legislature as the Legislature of Quebec did *after* confederation for the Protestant minority which was being created would forthwith settle and establish their usages and privileges and secure by law and in accordance with articles 5 and 7 of the bill of rights, separate schools for the Catholics of Manitoba, and would make provision so that the moneys would be divided between the Protestant and Catholic denominations *pro rata* to their respective populations. Then once established and secured by their own local legislature in accordance with the terms of the union, is not the minority perfectly within the spirit and the words of the Constitutional Act in contending that rights and privileges so secured by an Act of the Legislature are at least in the same position as rights secured to minorities in the Provinces of Quebec and Ontario under section 93 of the British North America Act and that sub-sections 2 and 3 were inserted in the Act so that they might be protected by the Governor-General against any subsequent legislation by either a Protestant or Catholic majority in after years.

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In the present reference being again called upon to construe this same Section 22, but as if Sub-section 1 was repealed or wiped out by judicial authority, we must, I think, take into consideration the historical fact that the Manitoba Act of 1870 was the result of the negotiations with parties who agreed to join and form part of the Confederation as if they were inhabitants of one of the Provinces originally united by the British North America Act, and we must credit the Parliament of Canada with having intended that the words "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" (which are also the words used in the 93rd Section of the British North America Act) should have some effect. The only meaning and effect I can give them is that they were intended as an additional guarantee or protection to the minority, either Protestant or Catholic, whichever it might happen to be, that the Laws which they knew would be enacted immediately after the Union, by their own Legislature in reference to education, would be in accordance with the terms and conditions upon which they were entering the Union, this guarantee was given so as to prevent later on, interference with their rights and privileges by subsequent legislation without being subject to an appeal to the Governor-General in Council should such subsequent Act of the Legislature affect any right or privilege thus secured to the Protestant or Catholic minority by their own Legislature.

In my opinion the words used in Sub-section 2 "an appeal shall lie from any Act of the Legislature" necessarily mean an appeal from any Statute which the Legislature has power to pass in relation to education, if *at the time* of the passing of such Statute there exists by law any right or privilege enjoyed by the minority. There is no necessity of appealing from Statutes which are *ultra vires* for the assumption of any unauthorised power by any local Legislature under our system of Government is not remedied by appeal to the Governor-General in Council, but by Courts of Justice.

Then, as to the words "right or privilege" in this Sub-section, they refer to some right or privilege in relation to education to be created by the Legislature which was being brought into existence, and which, once established, might thereafter be interfered with at the hand of a Local majority so as to affect the Protestant or Catholic minority in relation to education. It is clear, therefore,

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that the Governor-General in Council has the right of entertaining an appeal by the British North America Act as well as by Sub-section 2 of Section 22 of the Manitoba Act. He has also the power of considering the application upon the merits. When the application has been considered by him upon its merits if the Local Legislature refuses to execute any decision to which the Governor-General has arrived in the premises, the Dominion Government may then under Sub-section 3 of Section 22 of the Manitoba Act pass remedial legislation for the execution of his decision.

In construing, as I have done, the words of Sub-section 2 of the 22nd Section of the Manitoba Constitutional Act, which is as regards an appeal to the Governor-General in Council, but a reproduction of Sub-section 3 of Section 93 of the British North America Act, except that the clear unequivocal and comprehensive words "from any act or decision of the Legislature of the Province" are added, I am pleased to see that I am but concurring in the view expressed by Lord Carnavon in the House of Lords on the 19th February 1867 when speaking of this right of appeal to be granted to minorities when a Local Act might affect rights or privileges in matters of education, as the following extract from Hansard's Parliamentary Debates, 3rd Series, February 19, 1867, shows:—"Lord Carnavon.—Lastly, in the 93rd Clause, which contains the exceptional provisions to which I referred, your Lordships will observe some rather complicated arrangements in reference to education. I need hardly say that the great question gives rise to nearly as much earnestness and division of opinion on that as on this side of the Atlantic. This clause has been framed after long and anxious controversy in which all parties have been represented, and on conditions to which all have given their consent. It is an understanding which, as it only concerns the local interests affected, is not one that Parliament would be willing to disturb, even if in the opinion of Parliament it were susceptible of amendment, but I am bound to add, as the expression of my own opinion, that the terms of the agreement appear to me to be equitable and judicious. For the object of the clause is to secure to the religious minority of one Province the same rights and privileges and protection which the religious minority of another Province may enjoy. The Roman Catholic minority of Upper Canada, the Protestant minority of the Maritime Province, will thus stand on a footing of entire equality. But in the event of any wrong at the hand of the local majority, the minority have a right of appeal to the Governor-General in Council, and may claim the application of any remedial laws that may be necessary from the central Parliament of Confederation."

This being so, the next point of enquiry is whether the Acts of 1890 of Manitoba affect any right or privilege secured to the Catholic minority in matters of education after the Union, for we have nothing to do with the enquiry whether the Catholic minority had at the time of the Union, any right by law or practice that point as I have already stated having been decided adversely to their contention by the decision of the Privy Council in the case of "Barrett v. Winnipeg." By referring to the legislation from the date of the Union till 1890, it is evident that the Catholics enjoyed the immunity of being taxed for other schools than their own, the right of organization, the right of self government in this school matter, the right of taxation of their own people, the right of sharing in Government grants for education and many other rights under the statute of a most material kind. All these rights were swept away by the Acts of 1890, as well as the properties they had acquired



under these Acts with their taxes and their share of the public grants for education. Could the prejudice caused by the Acts of 1890 be greater than it has been? The scheme that runs through the Acts of 1871 and 1881 up to 1890, as Lord Watson of the Privy Council is reported to have so concisely stated on the argument of the case of "Barrett v. Winnipeg" (which is printed in the sessional papers of Canada, 1893) appears to have been that "no ratepayer shall be taxed for contribution towards any school except one of his own denomination"; and I will add that this scheme is clearly pointed out in Articles 5 and 7 of the Conditions of Union above already referred to which  
 10 were the basis of the Constitutional Act.

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Now is this a legal right or privilege enjoyed by a class of persons? In this case the immunity from contributing to any schools other than one of its own denomination was acquired by the Catholic minority *qui* Catholics by statute, and Catholics certainly at the time the legislation was passed represented a class of persons comprising at least one-third of the inhabitants of the Province of Manitoba. It is unnecessary I think, after reading the able judgments delivered in the case of "Barrett v. Winnipeg" to show by authority that the right so acquired by the Catholic minority after the Union by the Act of 1871 was a legal right, and that if it is shown by subsequent legislation  
 20 enacted by the Legislature of the Province of Manitoba that there has been any interference with such right, then I am of opinion that such interference would come within the very words of this Section 22 of the Manitoba Constitutional Act, which gives a right of appeal to the Governor-General in Council from "any act of the Legislature (words which are not in Section 93 of the British North America Act but are in Sub-section 2 of Section 22 of the Manitoba Act) affecting a right acquired by the Roman Catholic minority of the Queen's subjects in relation to education."

The only other question submitted to us I need refer to is the 4th question.

Does Sub-section 3 of Section 93 of the British North America Act 1867, apply to Manitoba? The answer to this question is to be found in the second section of the Manitoba Act, 32 and 33 Vic., cap. 3 which says "from and after the said date the provisions of the British North America Act shall apply, 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 comprising the Dominion and except so far as the same may be varied by this Act and 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." The Manitoba Act has not varied the British  
 30 North America Act, though Sub-section 2 of Section 22 has a somewhat more comprehensive wording than Sub-section 3 of Section 93 of the British North America Act in relation to appeals in educational matters. A Statute does not vary or alter if it merely makes further provision, it is simply an addition to it. The Second Sub-section is wider but does not vary at all from the Third Sub-section of the 93 Section of the British North America Act, save in this that there is an addition to it, that it includes it and goes beyond it by adding the words "and from any Act of the Legislature." The Third Sub-section of the British North America Act provides that in two cases there is to be an Appeal. There is nothing inconsistent in the Manitoba Act which says that in *all* cases

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there shall be an Appeal, it goes beyond the British North America Act, it does not vary it, it leaves it as it is and adds to it.

We see by the opinion expressed by some of the Lords of the Privy Council how far the right of Appeal extends under Section 2 of the Manitoba Act, for in the argument on that question before the Privy Council (Sessional papers 18 No. 33a, 33b, 1893) we read at page 134, that when Mr. Ram, Counsel, was arguing on behalf of Mr. Logan in the case of "Winnipeg v. Logan" he said "I venture to think that under Sub-section 2 what was contemplated was this, that apart from any question *ultra vires* or not, if a minority said 'I am oppressed' that was the party who had to come under that Sub-section 2 and appeal to the 10 Government."

"Lord Hannen: It has a right to appeal against *any* Act of the Legislature."

"Lord Shand: Even <sup>infra</sup> ~~ultra~~ *vires*."

This being also my opinion, I will only add that, having already stated that I think that we should read the Manitoba Constitutional Act in the light of the British North America Act, and that it was intended as regards all civil rights in educational matters to place the Province of Manitoba on the same footing as the Provinces of Quebec and Ontario, and that Sub-section 1 of Section 22 having been enacted for the purpose of protecting rights held by law or practice prior to the Union, but which have been declared not to exist. I am of opinion 20 that Sub-section 2 of Section 22 of the Manitoba Constitutional Act provides for an Appeal to the Governor-General in Council by memorial or otherwise, on the part of the Roman Catholic minority, contending that the two Acts of the Legislative Assembly of Manitoba passed in 1890 on the subject of education, are subversive of the rights and privileges of the Roman Catholic ratepayers not to be taxed for contribution towards Schools, except one of their own denomination, and that such right has been acquired by Statute subsequent to the Union.

For the above reasons I answer the questions submitted by His Excellency, the Governor-General in Council, as follows:—

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(1.) Is the appeal referred to in the said memorials and petitions and asserted thereby, such an appeal as is admissible by Sub-section 3 of Section 93 of the British North America 1867, or by Sub-section 2 of Section 22 of Manitoba Act 33, Vic. (1870) cap. 3, Canada? Yes.

(2.) Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of Sub-sections above referred to, or either of them? Yes.

(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 40 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? No.

(4.) Does Sub-section 3 of Section 93 of the British North America Act 1867, apply to Manitoba? Yes.

(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? Yes. Opinion of Fournier, J.

10 (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 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? Yes.

Certified true Copy.

G. DUVAL,  
Reporter, S.C.C.

20 TASCHEREAU, J.—I doubt our jurisdiction on this reference or consultation. Is section 4, of 54 & 55 Vic., ch. 25, which purports to authorize such a reference to this Court for hearing "or" consideration *ultra vires* of Parliament? By which section of the British North America Act is Parliament  
30 empowered to confer on this Statutory Court any other jurisdiction than that of a Court of Appeal under section 101 thereof? This Court is evidently made, in the matter, a Court of First Instance, or rather I should say, an Advisory Board of the Federal Executive substituted *pro hac vice* for the law officers of the Crown and not performing any of the usual functions of a Court of Appeal, nay, of any Court of Justice whatever. However, I need not, at present, further investigate this point. It has not been raised, and a similar enactment to the same import has already been acted upon. That is not conclusive, it is true: but our answers to the questions submitted will bind no one, not even those who put them, nay, not even those who give them, no Court of Justice, not  
40 even this Court. We give no judgment, we determine nothing, we end no controversy: and whatever our answers may be, should it be deemed expedient, at any time by the Manitoba Executive, to impugn the constitutionality of any measure that might hereafter be taken by the Federal authorities against the provincial legislation, whether such measure is in accordance with or in opposition to the answers to this consultation, the recourse, in the usual way, to the Courts of the country remains open to them. That is, I presume, the consideration and a very legitimate one, I should say, upon which the Manitoba Executive acted by refraining to take part in the argument on the reference, a course that I would not have been surprised to see followed by the Petitioners  
40 unless indeed they are assured of the interference of the Federal authorities, should it eventually result from this reference that constitutionally, the power to interfere with the provincial legislation as prayed for exists. For if as a matter of policy, in the public interest, no action is to be taken upon the Petitioners' application, even if the Appeal lies, the futility of these proceedings is apparent.

Assuming, then, that we have jurisdiction, I will try to give as concisely as possible the reason upon which I have based my answers to the questions submitted. In the view I take of the application made to His Excellency, the Governor-General in Council, by the Catholics of Manitoba, I think it better

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to invert the order of the questions put to us, and to answer first the fourth of these questions, that is, whether sub-section 3 of section 93 of the British North America Act applies to Manitoba. To that question the answer, in my opinion, must be in the negative. That section of the British North America Act applies to every one of the Provinces of the Dominion, with the exception, however, of Manitoba, for the reason, that for Manitoba, in its special charter, the subject is specifically provided for by section 22 thereof. The maxims *lex posterior derogat priori* and *specialia generalibus derogant* have both here it seems to me their application. If it had been intended to purely and simply extend the operations of that section 93 of the British North America Act to Manitoba, section 22 of its charter would not have been enacted. The course since pursued for British Columbia and Prince Edward Island would have been followed. But where we see a different course pursued we have to assume that a difference in the law was intended. I cannot see any other reason for it and none has been suggested. True it is that words "or practice" in sub-section 1 of section 22 are an addition in the Manitoba Charter which the Dominion Parliament desired to specially make to the analogous provision of the British North America Act, but that was no reason to word sub-section 2 thereof so differently as it is from sub-section 3 of section 93 of the British North America Act. Then this difference may be easily explained, though its consequences may not have been foreseen. I speak cautiously and mindful that I am not here allowed to controvert or even doubt, anything that has been said on the subject by the Privy Council. It is evident, to my mind, that it was simply because it was assumed by the Dominion Parliament that separate or denominational schools had previously been in that region, and were then, at the Union, the basis and principle of the educational system; and with the intention of adapting such system to the new Province, or rather of continuing it as found to exist, that in the Union Act of 1870 the words of sub-section 3 of section 93 of the British North America Act: "Where in any Province a system of separate or dissentient schools exist by law, at the Union, or is thereafter established by the Legislature of the Province"—were stricken out as unnecessary and inapplicable to the new Province. And I do not understand that the Privy Council denies to the Petitioners their right to separate schools. However, the reason of this difference between the constitution of the Province and the British North America Act cannot, in my view of the question, bring much assistance in the present investigation; the fact remains—whatever may have been the reason for it—that no appeal is given to the minority in Manitoba in relation to the rights and privileges conceded to them since the Union as distinguished from those in existence at the Union. They have no rights but what is left to them by the judgment in the Barrett case; and, if I do not misunderstand that judgment, the appeal they now claim to is not, as a logical inference, thereby left to them.

And in vain now, to support their appeal, would they urge that the statute so construed is unreasonable, unjust, inconsistent, and contrary to the intentions of the law-giver; uselessly would they contend that to force them to contribute pecuniarily to the maintenance of the public non-Catholic schools is to so shackle the exercise of their rights as to render them illusory and fruitless; or that to tax not only the property of each and every of them individually but even their school buildings for the support of the public schools is almost ironical; uselessly would they demonstrate the utter impossibility for them to efficaciously provide for the organization, maintenance and management of

separate schools, and essential requirements of a separate school system without statutory powers and the necessary legal machinery; ineffectively would they argue that to concede their right to separate schools and withal deprive them of the means to exercise that right is virtually to abolish it, or to leave them nothing of it but a barren theory. With all these and kindred considerations, we here, in answering this consultation, are not concerned. The law has been authoritatively declared to be so, and with its consequences we have nothing to do. *Dura lex, sed lex, judex non constituitur ad leges reformandas. Non licet iudicibus de legibus iudicare, sed secundum ipsas.* The Manitoba legislation is constitutional, therefore it has not affected any of the rights or privileges of the minority: therefore the minority has no appeal to the federal authority. The Manitoba legislature had the right and power to pass that legislation, therefore any interference with that legislation by the federal authority would be *ultra vires* and unconstitutional.

By an express provision of the British North America Act of 1871 it must not be lost sight of, the Dominion Parliament has not the power to in any way alter the Manitoba Union Act of 1870.

For these reasons, I would answer negatively the fourth of the questions submitted, and say that, in my opinion, sub-section 3 of section 93 of the British North America Act does not apply to Manitoba.

I take up now the first of these questions. Does the right of appeal claimed by the Petitioners exist under section 22 of the Manitoba Act? And here again, in my opinion, the answer must be in the negative, for the reason that it is conclusively determined by the Judgment of the Privy Council, that the Manitoba legislation does not prejudicially affect any right or privilege that the Catholics had by law or practice at the union, and if their rights and privileges are not affected, there is no appeal. The rights and privileges mentioned in sub-section 2 of section 22 are the same rights and privileges that are mentioned in sub-section 1 that is to say, those existing at the Union upon which sub-section 3 provides for the interference in certain cases of His Excellency the Governor-General in Council, and it is as to such rights and privileges only that an appeal is given. The appeal given in the other Provinces by section 93 of the British North America Act as to the rights and privileges conferred on a minority after the Union is, as I have remarked, left out of the Manitoba Constitution. Assuming, however, that the Manitoba Constitution is wide enough to cover an appeal by the minority, upon the infringement of any of their rights or privileges created since the Union, or assuming that section 93 of the British North America Act sub-section 3 applies to Manitoba. I would be inclined to think that, by the *ratio decidendi* of the Privy Council there are no rights or privileges of the Catholic minority that are infringed by the Manitoba legislation so as to allow of the exercise of the powers of the Governor-in-Council in the matter as the Manitoba Statutes must now be taken not to prejudicially affect any right or privilege whatever enjoyed by the Catholic community. It would seem, no doubt, by the language of both section 93 of the British North America Act and of section 22 of the Manitoba Charter, that there may be provincial legislation which though, *intra vires*, yet might affect the rights or privileges of the minority so as to give them the right to appeal to the Governor-in-Council. For it cannot be of *ultra vires* legislation that an appeal is given. And the Petitioners properly disclaiming any intention to base their application on the unconstitutionality of the Manitoba Statutes, even for infringement of rights

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conferred upon them since the Union, urge that though the Privy Council has determined that the legislation in question does not affect the rights existing at the Union so as to render it *ultra vires* yet that it does affect the rights conferred upon them by the Provincial legislature since the Union, so as to give them though *intra vires*, an appeal to the Governor-in-Council. I fail to see, however, how this ingenious distinction, for which I am free to admit both the British North America Act, and the Manitoba Special Charter give room, can help the Petitioners. I assume here that the Petitioners have an appeal upon the rights and privileges conferred upon them since the Union as contra distinguished from the rights previously in existence. The case is precisely the same as if the present appeal was as to their rights existing at the Union. They might argue that though the Privy Council has held this legislation to have been *intra vires*, yet their right to appeal subsists, and, in fact exists because it is *intra vires*. But what would be this ground of Appeal? Because the legislation affects the rights and privileges they had at the Union, And the answer would be one fatal to their appeal, as it was to their contentions in the Barrett case, that none of these rights and privileges have been illegally affected. Now, the rights and privileges they lay claim to under the provincial legislation anterior to 1890 are, with the additions rendered necessary by the political organization of the country to enable them to exercise these rights, the same in principle, that they had by practice at and before the Union, and which were held by the Privy Council not to be illegally affected by the legislation of 1890. And I am unable to see how, on the one hand, this legislation might be said to affect those rights so as to support an appeal, and on the other hand not to affect the same rights so as to render it *ultra vires*.

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The Petitioners, it seems to me, would virtually renew their impeachment of the constitutionality of the Manitoba legislation of 1890 upon another ground than the one taken in the Barrett case, namely upon the rights conferred upon them since the Union, whilst the controversy in the Barrett case was limited to their right as they existed at the Union. But that legislation, as I have said, is irrevocably held to have been *intra vires*, and it is not to the Petitioners to argue the contrary even upon a new ground. And if it is *intra vires* it cannot be that it has illegally affected any of the rights or privileges of the Catholic minority, though it may be prejudicial to such right. And if it has not illegally affected any of those rights or privileges they have no appeal to the Governor in Council.

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It has been earnestly urged, on the part of the Petitioners, in their attempt to distinguish the two cases, that in the Barrett case it was only their liability to assessment for the public schools that was in issue, and consequently that the decision of the Privy Council, binding though it be, does not preclude them from now taking on Appeal from the Provincial legislation of 1890, the ground that this legislation sweeps away the Statutory powers conceded to them under the previous Statutes, and without which their establishment and administration of a separate school system is impracticable. But here again it must necessarily be on the ground that these rights and privileges or some of their rights and privileges have been prejudicially affected that they have to rest their case, and from that ground they are irrevocably ousted by the Judgment of the Privy Council, where not only the Assessment Clauses thereof more directly in issue, but each and every one of the enactments of the Statutes impugned, were as I read that Judgment, held to have been and to be *intra vires*.

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Were it otherwise, and could the question be treated as *res integra* it might have been possible for the Petitioners to establish that they are entitled to the Appeal claimed on that ground, namely, that the Statutes of 1890, by taking away the rights and privileges of a Corporate body vested with the powers essential to the organization and maintenance of a school system that has been granted to them by the previous Statutes are subversive of those rights and privileges and prejudicially affect them.

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They might cogently urge in support of that proposition, and might perhaps have succeeded to convince me, that to take away a right, to cancel a grant, to  
10 repeal the grant of a right, to revoke a privilege, prejudicially affects that grant, prejudicially injuriously affects that privilege. They might also perhaps have been able to convince me that the license to own real estate, the authorisation to issue debentures, to levy assessments, the powers of a Corporation that had been granted to them, constituted for them rights and privileges. And to the objection that no appeal lies under Section 22 of the Manitoba Charter, but upon rights existing at the Union, they might perhaps have successfully answered, either that Section 93 of the British North America Act extends to  
20 Manitoba, or, if not, that the legislation of Manitoba in the matter, since the Union, prior to 1890, should be construed as declaratory of their right to separate schools, or a legislative admission of it, a legislation required merely to secure to them the means whereby to exercise that right and that consequently their appeal relates back to a right existing at the Union so as to bring it, if necessary, under the terms of section 22 of the Manitoba Union Act.

However, from these reasons the Petitioners are now precluded. If any of their rights and privileges had been prejudicially affected, this legislation would be *ultra vires*, and it is settled it is not *ultra vires*. And the argument against their contention is very strong, that it being determined that it would have been in the power of the Manitoba Legislature to establish in 1871, at the outset of  
30 the political organization of the Province, the system of schools that they adopted in 1890 by the Statutes which the Petitioners now complain of, it cannot be that by their adopting and regulating a system of separate schools, though not obliged to do so, they for ever bound the future generations of the Province to that policy, so that as long at least as there would be even only one Roman Catholic left in the Province, the Legislature should be, for all time to come, deprived of the power to alter it, though the constitution vests them with the jurisdiction over education in the Province. To deny to a legislative body the right to repeal its own laws it may be said is so to curtail its powers that an express article of its constitution must be shown to support the proposition, it is  
40 not one that can be deductively admitted. If this legislation of 1890, it may still be further argued against the Petitioners' contentions, had been adopted in 1871, it would, it must now be conceded, have been constitutional, and that being so, would the Catholic minority then, in 1871, have had a right of appeal to the Governor in Council? Certainly that is partly the same question in a different form. But it demonstrates, put in that shape, that the Petitioners have now no right of appeal. The answer to their claim would then have been that they had no appeal because none of their rights and privileges had been prejudicially affected. Now in my opinion they have no other rights and privileges in the construction that these would bear in the Manitoba Charter than the rights and privileges they had in 1870. And if they would have had  
50 no appeal, then on a legislation in 1871 similar to that of 1890, they have none now, if none of their rights and privileges have been prejudicially affected.

Handwritten notes and signatures on the right margin: "Reu", "Bah", "#7 Reu", "Bah".

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I will answer the first question in the negative. This conclusion determines my answers to the other questions submitted to the Court, and consequently as at present advised, I would answer the six of them as follows :—

To No. 1.—Is the Appeal referred to in the said Memorials and Petitions, and asserted thereby such an Appeal as is admissible 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), ch. 3, Canada?—I would answer—No.

To No. 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 10 referred to or either of them?—I would answer—No.

To No. 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 Statutes of the Province have been interfered with by the two Statutes of 1890, complained of in the said Petitions and Memorials?—I would answer—Yes.

To No. 4.—Does sub-section 3 of section 93 of The British North America Act, 1867, apply to Manitoba?—I would answer—No. 20

To No. 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?—I would answer—No.

To No. 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 a manner that an appeal will lie thereunder to the Governor-General in Council? I would answer, No. 30

Certified true copy.

G. DUVAL,  
Reporter, S.C.C.

Opinion of  
Gwynne, J.

GWYNNE, J.—The questions submitted in the case stated by the order of His Excellency the Governor-General-in-Council for the opinion of this Court are as follows :— 40

1. Is the Appeal referred to in the Memorials and Petitions stated in and made part of the case and asserted thereby such an Appeal as is admissible by sub-section 3 of section 93 of the British North America Act of 1867 or by sub-section 2 of section 22 of The Manitoba Act 33 Vic. (1870) c. 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? Opinion of Gwynne, J.

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  
10 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 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 Session of 1890, confer or continue 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 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.  
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The Memorials and Petitions referred to in and made part of the case were presented to His Excellency the Governor-General in Council in April 1890, and in September and October 1892, that of April 1890, was signed by His  
30 Grace the Archbishop of St. Boniface and 4,266 others, members of the Roman Catholic Church.

It is alleged:—

1. That prior to the creation of the Province of Manitoba there existed in the territory now constituting that Province a number of effective schools for children.

2. That these schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church and others by various Protestant denominations.

3. That the means necessary for the support of the Roman Catholic Schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools, and the rest was paid out of the funds of the Church contributed by its members.  
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4. That during the period referred to Roman Catholics had no interest in or control over the schools of the Protestant denominations and the Protestant denominations had no interest in or control over the schools of the Roman Catholics, there were no public schools in the sense of state schools. The members of the Roman Catholic Church supported the schools of their own Church for the benefit of the Roman Catholic children, and were not

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under obligation to and did not contribute to the support of any other schools.

5. That in the matter of education therefore, during the period referred to, Roman Catholics were as a matter of custom and practice separate from the rest of the community.

The Petition then set forth the 22nd section of the Manitoba Act (33 Vic., chap. 3) and proceeded as follows in paragraph 7 and following paragraphs:—

7. During the first session of the Legislative Assembly of the Province of Manitoba an Act was passed relating to Education, the effect of which was to continue to the Roman Catholics that separate condition with reference to 10 education which they had previous to the erection of the Province.

8. The effect of the Statute so far as Roman Catholics were concerned was merely to organize the efforts which Roman Catholics had previously voluntarily made for the education of their own children. It provided for the continuance of schools under the sole control and management of Roman Catholics and of the education of their children according to the methods by which alone they believed their children should be instructed.

9. Ever since the said legislation and until the last session of the Legislative Assembly no attempt was made to encroach upon the rights of the Roman Catholics so confirmed to them as above mentioned, but during said 20 session Statutes were passed, 53 Vic., chaps. 37 and 38, the effect of which was to deprive the Roman Catholics altogether of their separate condition in regard to education, to merge their schools with those of the Protestant denominations and to require all members of the community, whether Roman Catholics or Protestants, to contribute through taxation to the support of what was therein called public schools, but which are in reality a continuation of the Protestant schools.

10. There is a provision in the said Act for the appointment and election of an advisory board, and also for the election in each municipality of school trustees; there is also a provision that the said advisory board may prescribe 30 religious exercises for use in schools, and that the said school trustees may, if they think fit, direct such religious exercises to be adopted in the schools in their respective districts. No further or other provision is made with reference to religious exercises and there is none with reference to religious training.

11. Roman Catholics regard such schools as unfit for the purposes of education, and the children of Roman Catholic parents cannot, and will not, attend any such schools. Rather than countenance such schools Roman Catholics will revert to the ordinary system in operation previous to the Manitoba Act, and will at their own private expense establish, support and maintain 40 schools in accordance with their principles and their faith, although by so doing they will have in addition thereto to contribute to the expense of the so-called public schools.

12. Your Petitioners submit that the said Act of the Legislative Assembly of Manitoba is subversive of the rights of Roman Catholics guaranteed and confirmed to them by the statute creating the Province of Manitoba, and prejudicially affects the rights and privileges with respect to Roman Catholic schools which Roman Catholics had in the Province at the time of its union with the Dominion of Canada.

13. That Roman Catholics are in minority in said Province.

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14. That Roman Catholics of the Province of Manitoba therefore appeal from the said Act of the Legislative Assembly of Manitoba.

The Petitioners therefore prayed—

1. That his Excellency the Governor-General in Council may entertain the said Appeal, and may consider the same, and may make such provisions and give such directions for the hearing and consideration of the said Appeal as might be thought proper.

10 2. That it might be declared that such provincial law does 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 such directions might be given and provisions made for the relief of the Roman Catholics of the Province as to His Excellency in Council might seem fit.

20 A report of the Minister of Justice, dated the 21st March, 1891, upon the two Acts of the legislature of the Province of Manitoba, 53 Vic., ch. 37 and 38, has also been made part of the case submitted to us in which reference is made to the cases of *Barrett v. Winnipeg* and *Logan v. Winnipeg* then proceeding in Appeal to the Supreme Court of Canada and also to the said Petition of His Grace the Archbishop of St. Boniface, and others in the following terms:—

“If the appeal should be successful these Acts will be annulled by judicial decision. The Roman Catholic minority of Manitoba will receive protection and redress, the Acts purporting to be repealed will remain in operation, and those whose views have been represented by a majority of the legislature cannot but recognize that the matter had been disposed of with due regard to the constitutional rights of the Province.

30 “If the controversy should result in the decision of the Court of Queen’s Bench (of Manitoba) being sustained, the time will come for Your Excellency to consider the Petitions which have been presented by and on behalf of the Roman Catholics of Manitoba for redress under sub-sections 2 and 3 of Section 22 of the Manitoba Act.”

The petitions of September, 1892, were two, the one of T. A. Bernier representing himself to be Acting-President of the body called the National Congress and of eleven others members of the Executive Committee of the said body, and the other dated the 22nd September, 1892, was the Petition of His Grace the Archbishop of St. Boniface.

40 In the former the Petitioners set out at large the above Petition of April, 1890, and the report of the Minister of Justice from which the above extract is taken and concluded as follows:—

“That a recent decision of the judicial committee of the Privy Council in England having sustained the judgment of the Court of Queen’s Bench of Manitoba upholding the validity of the Act aforesaid, your petitioners most respectfully represent that as intimated in the said report of the Minister of Justice, the time has now come for your Excellency to consider the Petitions which have been presented by and on behalf of the Roman Catholics of Manitoba or redress under sub-sections 2 and 3 of Section 22 of the Manitoba Act.

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That your Petitioners, notwithstanding such decision of the judicial committee in England, still believe that their rights and privileges in relation to education have been prejudicially affected by said Acts of the Provincial legislature.

Therefore your Petitioners most respectfully and most earnestly pray that it may please Your Excellency in Council to take into consideration the Petitions above referred to and to grant the conclusions of said Petitions, and the relief and protection sought by the same.

The petition of His Grace the Archbishop of St. Boniface, sets forth the matter as alleged in the petition signed by him and others in the petition of April, 1890, and certain extracts from the said report of the Minister of Justice of March 1891, including that above extracted and concluded as follows:—

8. That the Judicial Committee of Her Majesty's Privy Council has sustained the decision of the Queen's Bench.

9. That your Petitioner believes that the time has now come for Your Excellency to consider the petitions which have been presented by and on behalf of the Roman Catholics of Manitoba for redress, under sub-sections 2 and 3 of section 22 of the Manitoba Act, as it has become necessary that the federal power should be resorted to for the protection of the Roman Catholic minority.

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And the petition prayed that His Excellency the Governor-General in Council might entertain the appeal of the Roman Catholics of Manitoba, and might consider the same, and might make such provisions and give such directions for the hearing and consideration of the said appeal as might be thought proper, and that such directions might be given and provisions made for the relief of the Roman Catholics of the Province of Manitoba as to His Excellency in Council might seem fit. These petitions are framed upon the contention and assumption that the facts as stated in the petitions as to the rights and privileges of Roman Catholics in Manitoba in relation to education at the time of the creation of the Province, entitled them to procure by appeals to His Excellency in Council, under section 22 of the Manitoba Act the annulment and repeal of Provincial Acts, 53 Vic., chaps. 37 and 38, notwithstanding that these Acts had been declared by the judgment of the Judicial Committee of the Privy Council in England to have been and to be Acts quite within the jurisdiction of the legislature of Manitoba to enact. The petition of October, 1892, is however framed with a further contention. It is signed by His Grace the Archbishop of St. Boniface, T. A. Bernier as President of the body called the National Congress, James E. P. Prendergast as Mayor of St. Boniface, J. Allard, O.M.I.V.G., John S. Ewart and 137 others. The petition sets out verbatim the matters alleged in the first twelve paragraphs of the above petition of April 1890, and it then proceeds:—

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13. Your Petitioners further submit that the said Acts of the Legislative Assembly of Manitoba are subversive of the rights and privileges of Roman Catholics provided for by the various statutes of the said Legislative Assembly prior to the passing of the said Acts, and affect the rights and privileges of the Roman Catholic minority of the Queen's subjects in the said Province in relation to education so provided for, as aforesaid, thereby offending both against the British North America Act and the Manitoba Act.

And the Petition prayed as follows :—  
Your Petitioners therefore pray

1. That Your Excellency the Governor-General in Council may entertain the said appeal, and may consider the same and make such provisions 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., chap. 37 and 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 and conduct 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 purpose.

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 directions 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 meet. And your Petitioners will ever pray, &c.

The pretension of the Petitioners therefore appears to be that the 22nd Section of the Manitoba Act entitled the Petitioners, notwithstanding the Judgment of the Privy Council in England in *Barrett v. Winnipeg* and *Logan v. Winnipeg* (1) (1892, A.C. 445) to invoke and to obtain the interference of His Excellency the Governor-General in Council to compel in effect a repeal by the Provincial Legislature of the said Acts of 53rd Vic., and the re-enactment of the Statutes in force in the Province in relation to Education at the time of the passing of the Acts 53rd Vic. upon the grounds following :—

1. That the Acts of 53 Vic. prejudicially affect the rights and privileges with regard to denominational schools which Roman Catholics had enjoyed previous to the erection of the Province; and

2. That the said Acts, 53 Vic., prejudicially affect the rights and privileges of Roman Catholics in the Province provided for by various Statutes of the Provincial Legislature enacted prior to the passing of the Acts of 53 Vic.

Under these circumstances the case which has been submitted to us has been framed in the shape in which it has been for the purpose of presenting to us purely abstract questions of law.

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The learned members of the Judicial Committee of the Privy Council who advised Her Majesty upon the Appeals in the cases of *Barrett v. Winnipeg* and *Logan v. Winnipeg*, adopting the evidence of the Archbishop of St. Boniface as to the rights and privileges in relation to denominational schools enjoyed by Roman Catholics before the passing of the Manitoba Act in the territory by that Act erected into the Province of Manitoba, say in their report:—"Now if the state of things which the Archbishop describes as existing before the Union had been a system established by law, what would have been the rights and privileges of the Roman Catholics with respect to denominational schools? They would have had by law the right to establish schools at their own expense, to maintain their 10 schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body which was engaged in a similiar work at the time of the Union would have had precisely the same right with respect to their denominational schools. Possibly the right, if it had been defined or recognised by positive enactment, might have had attached to it as a necessary or appropriate incident the right of exemption from any contribution under any circumstances to a school of a different denomination. But in their Lordship's opinion it would be going much too far to hold that the establishment of a national system of education upon a non-sectarian basis is so inconsistent with the right to set up and maintain 20 denominational schools, that the two things cannot exist together, or that the existence of one necessarily implies or involves immunity from taxation for the purpose of the other."

They then minutely review the provisions of the Provincial Statutes enacted prior to the passing of the Acts of 1890, and of the Acts of 1890 themselves, and proceed as follows:—

"Notwithstanding the Public School Acts, 1890, Roman Catholics and members of every other religious body in Manitoba are free to establish schools throughout the Province, they are free to maintain their schools by school fees or voluntary contributions, they are free to conduct their schools according to 30 their own religious tenets without molestation or interference. No child is compelled to attend a public school, no special advantage, other than the advantage of a free education in schools conducted under public management, is held out to those who do attend."

To this it may be added, that Roman Catholics are not excluded from the advisory board erected by the Acts. They are equally eligible as Protestants to such board, and as members thereof, can equally with Protestants, exert their influence upon the board with regard to religious exercises in the public schools, and in short Roman Catholics and Protestants of every denomination are in every respect placed by the Acts in precisely the same position. The judgment 40 of the Privy Council then proceeds as follows:—"But then it is said that it is impossible for Roman Catholics or for members of the Church of England (if their views are correctly represented by the Bishop of Rupert's Land, who has given evidence in Logan's case) to send their children to public schools where the education is not superintended and directed by the Authorities of their Church, and that therefore Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890; that may be so, but what right or privilege is violated or prejudicially affected by the 50

law? It is not the law that is in fault, it is owing to religious convictions which everybody must respect and to the teaching of their Church, that Roman Catholics and the members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.” Opinion of  
Gwynne, J.

The judgment then summarily rejects the contention that the public schools created by the Acts of 1890 are in reality Protestant Schools, and concludes in declaring and adjudging that those Acts do not prejudicially affect the rights and privileges enjoyed by Roman Catholics in the territory now constituting the Province of Manitoba, prior to the passing of the Manitoba Act, taking those  
10 rights and privileges to have been as represented by the Archbishop of St. Boniface, and even assuming them to have been secured or conferred by positive law, and so that they are not enacted in violation of Section 22 of the Manitoba Act, but are within the exclusive jurisdiction of the provincial legislature to enact.

Their Lordships of the Privy Council in *Barrett v. Winnipeg*, and *Logan v. Winnipeg* put a construction upon this Section 22, which independently is to my mind sufficiently apparent, but which I quote as a judicial enunciation of their Lordship’s opinion. They say:—

“ Their Lordships are convinced that it must have been the intention of the  
20 legislature to preserve every legal right or privilege with respect to denominational schools, which any class of persons practically enjoyed at the time of the Union.”

The language of the Section is, I think, sufficiently clear upon that point, and all its sub-sections are enacted for the purpose of securing the single object, namely, the preservation of existing rights.

The section enacts:—

“ 22. 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  
30 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 or any Appeal under this section is not duly  
40 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.”

If any law should be passed in violation of the qualification contained in the first sub-section upon the general jurisdiction conferred by the section to make laws in relation to education, that is to say in case any Act should be passed by the provincial legislature prejudicially affecting any right or privilege

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with respect to denominational schools which any class of persons had by law or practice in the Province at the Union, such an Act would be *ultra vires* of the provincial legislature to enact and would therefore have no force, and as it was to preserve these rights and privileges with respect to denominational schools whatsoever they were which existed at the time of the Union, that the 22nd section was enacted, it is obvious, I think, that it is against such an act of the legislature and against any decision of any provincial authority acting in an administrative capacity prejudicially affecting any such right that the Appeal is given by the second sub-section, and so likewise the remedies provided in the third sub-section relate to the same rights and privileges, and to the better securing the enjoyment of them. The second and third sub-sections are designed as means to redress any violation of the rights preserved by the section. To subject any act of the legislature to the Appeal provided in the second sub-section and to the remedies provided in the third sub-section it is obvious that such an Act must be passed in violation of the condition subject to which any jurisdiction is conferred upon the provincial legislature to make laws in relation to education, and must therefore be *ultra vires* of the provincial legislature, for the language of the section expressly excludes from the provincial legislature all jurisdiction to pass such an Act. The jurisdiction, whatever its extent may be, which the provincial legislature has over education being declared to be exclusive there can be no appeal to any other authority against an Act passed by the legislature under such jurisdiction and any Act of the legislature passed in violation of any of the provisions in section 22, subject to which the jurisdiction of the legislature is restricted is not within their jurisdiction and is therefore *ultra vires*. The appeal, therefore, which is given by the second sub-section must be only concurrent with the right of all persons injuriously affected by such an Act to raise in the ordinary Courts of Justice the question of its constitutionality. If any doubt could be entertained upon this point it is concluded in my opinion by their Lordships of the Privy Council in *Barrett v. Winnipeg and Logan v. Winnipeg* (1) in the following language:—

1892, A.C. 445.

At the commencement of the argument a doubt was suggested as to competency of the present appeal in consequence of the so-called appeal to the Governor-in-Council provided by the Act, but their Lordships are satisfied that the provisions of sub-sections 2 and 3 do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country.

If an Act of the provincial legislature which is impeached upon the suggestion of its prejudicially affecting such rights and privileges as aforesaid is not made by the 2nd section of the Manitoba Act, *ultra vires* of the provincial legislature, it cannot be open to appeal under sub-section 2 of that section. The section does not profess to confer upon the executive of the Dominion or the Dominion Parliament any power of interference whatever with any Act in relation to education passed by the provincial legislature of Manitoba which is not open to the objection of prejudicially affecting some right or privilege with respect to denominational schools, which some class of persons had by law or practice in province at the Union; All Acts of the provincial legislature not open to such objection are declared by the section to be within the exclusive jurisdiction of the provincial legislature, and as the Acts of 1890 are declared by their Lordships not to be open to such objection and to have therefore been within

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the jurisdiction of the provincial legislature to pass, those Acts cannot, nor can either of them, be open to any appeal under the 2nd sub-section of this section. Opinion of Gwynne, J.

It has been suggested, however, that the rights and privileges whether conferred or recognised by the Acts of the Legislature of Manitoba in force prior to and at the time of the passing of the Acts of 1890, and which were thereby repealed, were within the protection of the 22nd section and that this was a matter not under consideration in *Barrett v. Winnipeg* and *Logan v. Winnipeg*, and that therefore the right of appeal under sub-section 2 of the 22nd section against such repeal does not exist, notwithstanding the decision of the Privy Council in *Barrett v. Winnipeg* and *Logan v. Winnipeg*. This contention appears to have been first raised expressly in the Petition presented in October 1892, although it is impliedly comprehended in the paragraphs of the Petition of April 1890 which is repeated verbatim in that of October 1892, wherein the Act of the provincial legislature of 1871 is relied upon as having had the effect to continue to the Roman Catholics that separate condition with reference to education which they had enjoyed previous to the creation of the Province, and in so far as Roman Catholics were concerned merely to organize the efforts which the Roman Catholics had previously voluntarily made for the education of their own children and for the continuance of schools under the sole control and management of Roman Catholics and of the education of their children according to the methods by which alone they believe children should be instructed,

But this statute of 1871 and all the Statutes passed by the legislature of Manitoba in relation to education prior to 1890 were specially brought under the notice of their Lordships of the Privy Council and were fully considered by them in their judgment as already pointed out, and if the repeal by the Act of 1890 of the Acts of the Provincial Legislature then in force in relation to education, constituted a violation of the condition contained in section 22, subject to which alone the jurisdiction of the Provincial Legislature to make Laws in relation to education was restricted, it is inconceivable to my mind that their Lordships having all these Statutes before them could have pronounced the Acts of 1890 to be within the jurisdiction of the Provincial Legislature to pass. But, however, this may be there is nothing in my opinion in the Manitoba Act which imposed any obligation upon the Legislature of Manitoba to pass the Acts which are repealed by the Acts of 1890 or which placed those Acts, when passed, in any different position from that of all Acts of a Legislature which constitute the will of the Legislature for the time being, and only until repealed, and nothing which warrants the contention that the repeal of those Acts by the Acts of 1890 constituted a violation of the condition in the 22nd section, subject to which the jurisdiction of the Legislature was restricted; and nothing therefore which gives any appeal against such repeal.

Whether or not the 3rd sub-section of section 93 of the British North America Act of 1867 assuming that section to apply to the Province of Manitoba, would have the effect of restraining the powers of the Provincial Legislature in such manner as to deprive them of jurisdiction to repeal the said Acts, it is unnecessary to inquire for that section does not in my opinion apply to the Province of Manitoba. Special provision upon the subject of education being made by the 22nd section of the Manitoba Act.

For the above reasons, therefore, the questions submitted in the case must in my opinion be answered as follows:—

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Gwynne, J.

The 1st, 2nd, 4th and 5th in the negative ; the 3rd in the affirmative, and the 6th, which is a complex question, 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.

Certified true copy.

G. DUVAL,

*Reporter, S.C.C.*

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Opinion of  
King, J.

KING, J.—It may be convenient first to regard the constitutional provisions respecting education as they affect the original Provinces of the confederation. By Section 93 of the British North America Act it is provided that in, and for such Province the legislature may exclusively make laws in relation to education, subject and according to the provisions of four sub-sections. The first sub-section provides that nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law in the Province at the Union. The second sub-section extends to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec, all the powers, privileges and duties which were at the Union conferred and imposed by law in Upper Canada (Ontario) on the separate school trustees of the Queen's Roman Catholic subjects there. 20

The third sub-section gives to the Governor-General in Council the right on appeal to decide whether or not an Act or decision of any provincial authority affects any right or privilege of the Protestant or Roman Catholic minority in relation to education enjoyed by them under a system of separate or dissentient schools in the Province, whether such system of separate or dissentient schools shall have existed by law at the Union, or shall have been thereafter established by the legislature of the Province.

The fourth sub-section provides that if upon appeal the Governor-General in Council shall decide that the educational right or privilege of the Protestant or Roman Catholic minority has been so affected, and if the Provincial legislature shall not pass such laws as from time to time seem to the Governor-General in Council requisite for the due execution of the provisions of the section, or if the proper provincial authority shall not duly execute the decision of the Governor-General in Council on the appeal, then in every such case, but only so far as the circumstances of each case require, the Parliament of Canada may make remedial law for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under the section. In other words if the requisite remedy, either by Act of the legislature, or Act or decision of the Provincial authority in that behalf is not applied, then concurrent legislative authority to the requisite extent is given to the Dominion Parliament, and to this extent the legislative authority of the Provincial legislature ceases to be exclusive. 30 40

The terms "separate" and "dissentient" schools used in the above sub-sections, were derived from the school systems of Upper and Lower Canada. At the Union the two larger confederating Provinces, Upper Canada (Ontario)

and Lower Canada (Quebec) had each a system of separate or dissentient schools, the Canadian method of dealing with the question of religion (as between Protestants and Roman Catholics) in the public school system. Opinion of  
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In Upper Canada the Roman Catholics were in the minority, and in Lower Canada the Protestants were in a still smaller minority. In Upper Canada there was a non-denominational system, with a right in the Roman Catholics to a separate denominational system. In Lower Canada the general public system was markedly Roman Catholic, with a right to the Protestant minority to schools of their own. In Upper Canada the minority schools were called "separate" schools, in Lower Canada "dissentient" schools. It was because the powers and privileges of the Upper Canada minority in relation to their schools were greater than those of the Lower Canada minority that by the terms of Union these were agreed to be assimilated, by adopting for Quebec the more enlarged liberties of the Upper Canada Law, and this was given effect to by sub-section 2 of section 93 already cited.

In the case of the two other of the original confederating Provinces, Nova Scotia and New Brunswick, there was not in either a system of separate or dissentient schools. The bounds of the Dominion have since been enlarged. In 1870 by the admission of the North West Territory and Rupert's Land in 1871 by the admission of British Columbia, and in 1872 by the admission of Prince Edward Island. In the case of British Columbia and Prince Edward Island, (these being established and independent Provinces) the terms of Union were agreed upon by the Governments and legislatures of Canada and the Provinces respectively. In each case the above recited provisions of the British North America Act respecting education, were adopted and made applicable without change. In neither of these newly added Provinces was there a system of separate or dissentient schools. With regard to the North-west Territories and Rupert's Land, there was no established government and legislature representing the people, and after the acquisition of the North-west Territories and Rupert's Land, the Parliament of Canada after listening to representations of representative bodies of people, passed an Act for the creation and establishment of the New Province of Manitoba out of and over a portion of the newly acquired territory, and it is with regard to this Act (33 Vic. cap. 3) that the present questions arise. By section 2 it is declared that:—

The provisions of the British North America Act 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. The Act then deals specially with a number of matters, as for instance the constitution of the executive and legislative authority, the use of both the English and French languages in legislative and judicial proceedings, financial arrangements and territorial revenue, &c., and by section 22 makes the following provision respecting education:—

22. 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

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privilege with respect to denominational schools which any class of persons have by law or practice 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 10 by the proper provincial authority in that behalf, then and in every such case and as far 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. Sub-section 1 of section 22 of the Manitoba Act differs from sub-section 1 of section 93 of the British North America Act of 1867, in the addition of the words "or practice" after the words "which any class of persons have by law."

In *Winnipeg v. Barrett* (1) the Judicial Committee of the Privy Council 20 held that the Manitoba Education Act of 1890 did not pre- 1 1892 A.C. 445. judicially affect any right or privilege with respect to denominational schools which the Roman Catholics practically enjoyed at the time of the establishment of the province.

The 2nd sub-section of section 93, British North America Act has of course no counterpart in any of the sub-sections of section 22, Manitoba Act, because sub-section 2 section 93, British North America Act, is a clause specially applicable to and affecting only the Province of Quebec.

The 3rd sub-section of section 93, British North America Act, and the 2nd sub-section of section 22, Manitoba Act, deal with the like subject, viz.: the right of the religious minority to appeal to the Governor-General in Council in 30 case of their educational rights or privileges being affected, but here again there are differences. One difference is, that whereas by the clause in the British North America Act the appeal lies from an "act or decision of any provincial authority" affecting any right or privilege of the Protestant or Roman Catholic minority in relation to education, in the Manitoba Act the appeal lies from "any act or decision of the legislature of the province" as well as from that of any provincial authority. This was either an extension of the right of appeal or the getting rid of an ambiguity, according as the words "any provincial authority" as used in the British North America Act did not nor did extend to cover "acts 40 of the provincial legislature."

The addition in the 1st sub-section of the Manitoba Act of the words "or practice" and the addition in sub-section 2 of the words "of the legislature of the province," would (so far as the context of these words is concerned) seem to show an intention on the part of Parliament to extend the constitutional protection accorded to minorities by the British North America Act, or at all events to make no abatement therein.

Then there is another difference between the language of the 3rd sub-section of the British North America Act and that of the 2nd sub-section of the Manitoba Act. The former begins as follows:—"Where in any province a system of

separate and dissentient schools exists by law at the Union or is thereafter established by the legislature of the Province, an appeal shall lie," etc., while in the Manitoba Act the introductory part is omitted and the clause begins with the words "an appeal shall lie," etc., the two clauses being thereafter identical, with the exception that in the Manitoba Act (as already mentioned) the appeal in terms extends to complaints against the effect of Acts of the legislature as well as of Acts or decisions of any provincial authority.

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After this reference to points of distinction, I cite sub-section 2 of the Manitoba Act again in full for sake of clearness.

10 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.

On the one side it is contended that in order to give the appeal, the rights or privileges of the religious minority need to have been acquired and to have existed prior to and at the time of the passage of the Act. On the other side it is contended that it is sufficient if the rights and privileges exist at the time of their alleged violation irrespective of the time when they were acquired.

20 In the argument before the judicial committee, of *Winnipeg v. Barrett*, a shorthand report of which was submitted to Parliament last session, (No. 11 sessional papers) Sir Horace Davey, Counsel for the City of Winnipeg, argued that sub-section 2 does not relate to anything but what is *ultra vires* under sub-section 1. He says (p. 43) I cannot for myself frame the proposition which would lead to the inference that sub-section 2 was intended to deal with cases which were *intra vires*, and I beg leave to observe that it would be contrary to the whole scope and spirit of this legislation to provide for Parliament intervening not where the Provincial Parliament has acted beyond its powers, that I conceive, but to allow the Dominion Parliament to intervene, not to correct mistakes where the provincial legislature had gone wrong and exceeded their power.

30 In an interruption at this point by their lordship's, Lord MacNaghton asks:—

"Supposing some rights were created after the union and then legislation had taken those rights away"?

This question is not directly answered, but afterwards (p. 44) Sir Horace thus continues: "It all comes back to the same point, that the Protestant and Roman Catholic minority have a right to come with a grievance to the Governor-General. What is this grievance? Why, that they are deprived of some right or privilege which they ought to have and are entitled to enjoy. If they are not entitled by law to enjoy it they are not deprived of anything, and it would be  
40 an extraordinary system of legislation, having regard to the nature of this Act, to say that the Dominion Parliament has, in certain cases, to sit by way of a Court of Appeal from the Provincial Parliament, not to correct mistakes where the Provincial Parliament has erroneously legislated on matters not within its jurisdiction, but on matters of policy. If that be the effect to be given to these sub-sections, I venture to submit to your lordships that it will have rather startling consequences, and it will for the first time make the legislature of the Dominion Parliament a Court of Appeal, or give them an appeal from the exercise of the discretion of the Provincial Parliament, or, in other words, it

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will place the Provincial Parliament in the position that it will be liable to have its decisions overruled by the Dominion Parliament, and therefore in a position of inferiority."

I have quoted at great length because of the strong presentation by eminent counsel of that view, and to show that the attention of their lordships was powerfully drawn to the provisions of sub-section 2. The full report shows that all the sub-sections of the two sections of the two Acts were exhaustively discussed.

In the judgment, their Lordships say that: Sub-sections 1, 2 and 3 of section 22 of the Manitoba Act 1870 differ but slightly from the corresponding sections of section 93 of the British North America Act 1867. The only important difference is, that in the Manitoba Act in sub-section 1 the words "by law" are followed by the words "or practice," which do not occur in the corresponding passage in the British North America Act 1867. There would be a marked and very considerable difference between the corresponding clauses, if in the one case rights and privileges of the religious minority were recognized as subjects of protection whenever acquired, while in the other case they were not recognised as subjects of protection, unless they existed at the time of the passing of the Constitutional Act. Not wanting to put undue stress upon this, let us look at the clauses for ourselves. In sub-section 1, Manitoba Act, there is an express limitation as to time, the rights and privileges in denominational schools that are saved are such as existed, by law or practice, at the Union. But in sub-section 2 nothing is said about time at all, and the natural conclusion upon a reading of the two clauses together is, that with regard to the rights and privileges referred to in the latter clause the time of their origin is immaterial. Such also is the ordinary and natural meaning of sub-section 2 regarded by itself. Read by itself, it extends to cover rights and privileges existent at the time of the act or thing complained of. The existence of the right and not the time of its creation is the operative and material fact. And this agrees with the corresponding provisions of the British North America Act where sub-section 1 refers to rights &c. acquired before or at Union, while sub-section 3 in terms covers rights, &c. acquired at any time. In any other view there was clearly no necessity to add the words "or any act of the legislature" in the remedial provision of the Manitoba Act, for such act would be wholly null and void under sub-section 1.

There is indeed an undeniable objection to treating as an appealable thing the repeal by a legislature of an Act passed by itself. Ordinarily all rights and privileges given by Act of Parliament are to be enjoyed *sub modo*, and are subject to the implied right of the same legislature to appeal or alter if it chooses to do so. But the fundamental law may make it otherwise. An illustration of this is afforded by the constitution of the United States, which prohibits the States but not Congress, from passing any law impairing the obligation of contract, and this has been held to prevent the State legislatures from repealing or materially altering their own acts, conferring private rights when such rights have been accepted. It does not extend to Acts relating to Government, as for instance to public officers, municipal incorporations, etc., but it extends to private and other corporations, educational or otherwise, and also to Acts, exempting incorporated bodies, by special Act, from rates or taxes. These are irrevocable, and the constitutional provision has been found onerous.

It is certainly anomalous, under our system and theory of Parliamentary power, that a legislature may not repeal or alter in any way an Act passed by itself. Opinion of King, J.

10 Still, weighty as this consideration is, I can give no other reasonable interpretation to the Act in question than that, under the constitution of Manitoba, as under the constitution of the Dominion, the exercise by the Provincial legislature of its undoubted powers in a way so as to give rights and privileges by law to the minority in respect of education lets in the Dominion Parliament to concurrent legislative authority for the purpose of preserving and continuing such rights and privileges if it sees fit to do so.

By the British North America Act it was not clear whether the words "act or decision of any provincial authority" covered the case of an Act of the Provincial legislature, or was confined to administrative Acts, but in the Manitoba Act the words explicitly extend to an Act of that legislature.

Any ambiguity in sub-section 2 of the Manitoba Act is I conceive to be resolved in the light of the corresponding provisions of the British North America Act. As the provisions of the British North America Act are to be applicable unless varied I think it reasonable that ambiguous provisions in the special Act should be construed in conformity with the general Act.

20 Passing, however, from it as a matter of construction it does not seem reasonable that Parliament in forming in 1870 a constitution for Manitoba intended to disregard entirely constitutional limitations such as were three years before established as binding upon the original members of the Confederation. On the contrary by the addition of the words "or by practice" in 1st sub-section, and of the words "or any Act of the legislature" in the 2nd sub-section, and by the provision of section 23 providing for the use of the French and English languages in the courts and legislature there is manifested a greater tenderness for racial and denominational differences. Further unless sub-section 2 has the meaning suggested the entire series of limitations imposed  
30 by sub-sections 1, 2 and 3 are entirely inoperative. For the Judicial Committee has in effect declared that no right or privilege in respect of denominational schools existed prior to the union, either by law or practice, and therefore there was nothing on which sub-section 1 could practically operate and as there was clearly no system of separate or dissentient schools established in Manitoba by law prior to the Union, the provisions of sub-sections 2 and 3 are inoperative if the rights and privileges in relation to education are to be limited to rights and privileges before the Union. There is no doubt that this construction limits the powers of the legislature and restrains the exercise of its discretion, but the same thing may be said of the effect of an appeal against "any act or decision  
40 of any provincial authority" in Nova Scotia or New Brunswick, in case either of such provinces were to adopt a system of separate schools. The legislature might not choose to pass the remedial legislation necessary to execute the decision of the Governor-General in Council and the Dominion Parliament could then exercise its concurrent power of legislation, in effect overriding the legislative determination of the provincial legislature. The provision may be weak one sided as giving finality to a chance legislative vote in favour of separate schools inconsistent with a proper autonomy, and without elements of permanence, but if it is in the constitutional system it must receive recognition in a court of law.

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Assuming then that clause 2 covers rights and privileges whensoever acquired, the next question is as to the meaning of the words "rights and privileges of the Protestant or Roman Catholic minority in relation to education." Here again, I think, we are to go to clause 3 of section 93 British North America Act. I think that the reference is to minority rights under a system of separate schools, and that it is essential that the complaining minority should have had rights or privileges under a system of separate or dissentient schools existing by law at the union, or thereafter established by the legislature of the Province. The generality of the words under clause 2 of the Manitoba Act is to be explained by clause 3, section 93 British North America Act, and to have the same meaning as the corresponding words in it. The two remaining questions then are: Was a system of separate or dissentient schools established in Manitoba prior to the passage of the Manitoba Education Act of 1890? And have any rights or privileges of the Roman Catholic minority in relation thereto been prejudicially affected? One of the learned Judges of the Queen's Bench of Manitoba thus succinctly summarises the school legislation of Manitoba in force at the time of the passing of the Act of 1890. 10

Under the School Acts in force in the Province previous to the passing of the Public Schools Act of 1890 there were two distinct sets of public or common schools, the one set Protestant and the other Roman Catholic. The Board of Education which had the general management of the public schools was divided into two sections, one composed of the Protestant members and one of the Roman Catholic members, and each section had its own superintendent. The school districts were designated Protestant or Roman Catholic, as the case might be. The Protestant schools were under the immediate control of trustees elected by the Protestant ratepayers of the district and the Catholic schools in the same way were under the control of trustees elected by the Roman Catholic ratepayers, and it was provided that the ratepayers of a district should pay the assessments that were required to supplement the legislative grant to the schools of their own denomination, and that in no case should Protestant ratepayers be obliged to pay for a Roman Catholic school, or a Catholic ratepayer for a Protestant school. 20 30

I would only add that assessments were to be ordered by the ratepayers (Catholic or Protestant, as the case might be) of the school district, and that the trustees were empowered in many cases to collect the rates themselves instead of making use of the public collectors. The trustees were empowered to employ teachers exclusively who should hold certificates from the section of the Board of Education of their own faith. By the Act of 1871, the Board of Education was composed equally of Protestants and Roman Catholics, but by the Act of 1881 the proportion was 12 Protestants to 9 Roman Catholics. 40

Now, the system of education established by the Act of 1881 was not in terms and *eo nomine* a system of separate or dissentient schools, and if the constitutional provision requires that they should be such in order to come within the Act, then the minority did not have the requisite rights and privileges in respect of education. As to this, I have had doubts arising from the opinion that where rights and privileges have no other foundation than the legislative authority whose subsequent acts in affecting them is impeached, the restraint upon the general grant of legislative authority should be applied only where the case is brought closely within the limitation. At the same time, we are to give



a fair and reasonable construction to a remedial provision of the constitution, and are to regard the substance of the thing. Opinion of King, J.

Now, the Roman Catholics were in the minority in 1881, and are still, and a system of schools was established by law, under which they had the right to their own schools—Catholic in name and fact—under the control of trustees selected by themselves, taught by teachers of their own faith, and supported in part by an assessment ordered by themselves upon the persons and property of Roman Catholics, and imposed, levied and collected as a portion of the public rates; the persons and property liable to such rate being at the same time  
 10 exempt from contribution to the schools of the majority—*i.e.*, Protestant schools. This, although not such in name, seems to me to have been essentially a system of separate or dissentient schools, of the same general type as the separate school system of Ontario, and giving therefore to the minority rights and privileges in relation to education in the sense of sub-section 2, section 22, Manitoba Act, and sub-section 3, section 93, British North America Act.

It is true that the schools of the majority were Protestant schools, and that the majority had the same right as the minority; but I do not think that this renders the minority schools any the less essentially separate schools of the Roman Catholics. In Quebec the majority schools are distinctly denominational.

20 Then was the right and privilege of the Roman Catholic minority in this system of separate schools prejudicially affected by the Act of 1890? And if so to what extent.

In the judgment of the Judicial Committee in the *City of Winnipeg v. Barrett* speaking of the right there claimed on behalf of the Roman Catholics, that the act of 1890 had prejudicially affected the rights and privileges which they had by practice at the time of the Union, their Lordships say:—

Now if the state of things which the Archbishop describes as existing before the Union had been established by law, what would have been the rights and privileges of the Roman Catholics with respect to denominational  
 30 schools. They would have had by law the right to establish schools at their own expense to maintain their schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body which was engaged in a similar work at the time of the Union would have had precisely the same right with respect to their denominational schools. Possibly this right, if it had been defined or recognized by positive enactment, might have had attached to it, as a necessary or appropriate incident, the right of exemption from any contribution under any circumstances to schools of a different denomination. But in their Lordships' opinion it would be going much too far to hold that the establishment of a national  
 40 system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of one necessarily implies or involves immunity from taxation for the purpose of the other.

The rights and privileges of the denominational minority under the Act of 1881, and amending Acts, were different from the assumed rights in denominational schools, which the same class had by practice at the time of the Union. It could not be said to be merely "the right to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions, and

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to conduct them in accordance with their own religious tenets," it was a right as Roman Catholics by law, to establish schools and to maintain them through the exercise by them of the state power of taxation by the imposition, levying and collecting of rates upon the persons and property of all Roman Catholics, such persons and property being at the same time exempted from liability to be rated for the support of the public schools of the majority, then denominated and being Protestant schools. By the Act of 1890, the Protestant schools are abolished equally with the Roman Catholic schools, and a system of public schools set up which is neither Protestant nor Roman Catholic but unsectarian.

The question then is whether the language of their Lordships is applicable 10 to this state of things, and whether or not it can be said (changing their Lordships' language to suit the facts) that the establishment of the national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain, by the aid of public taxation upon the denominational minority, a system of denominational schools, that the two cannot co-exist, or that the existence of the system of denominational minority schools (supposing it still in existence) necessarily implies or involves immunity from taxation for the purpose of the other. It rather seems to me that no reasonable system of legislation could consistently seek to embrace these two things, viz. : the support of a system of denominational schools for the minority, maintainable through 20 compulsory rating of the persons and property of the minority, and, second, the support of a general system of unsectarian schools, through the compulsory rating of all persons and property, both of the majority and the minority. The effect of such a scheme would be to impose a double rate upon a part of the community for educational purposes.

The logical result of this view would be that by the establishment of a general non-sectarian system (as well as by the abrogation of the separate school system) the rights and privileges as previously given by law to the denominational minority in respect of education were necessarily affected. Of course the minority would obtain equality by giving up their schools, but the present enquiry at this point 30 is whether a right acquired by law to maintain a system of separate schools had been affected by an Act which takes away the legal organization and status of such schools and their means of maintenance, by the repeal of the law giving these things, and which subjects the persons and property of the denominational minority to an educational rate for general non-sectarian schools, instead of leaving them subjected to an educational rate for the support of the separate and denominational schools. It is true that by the Act of 1881 and amending Acts, the exemption was an exemption from contribution to the Protestant schools, and the schools under the Act of 1890 are not Protestant schools, but the substantial thing involved in the exemption under the Acts of 1881 and amending 40 Acts was, that the ratepayers to the support of the Catholic schools should not have to pay rates for the support of the schools established by the rest of the community, but should have their educational rates appropriated solely to the support of their own schools. This was an educational right or privilege accorded to them in relation to education under a system of separate schools established by law, which the legislature, if possessing absolute or exclusive authority to legislate on the subject of education without limitation or restraint, might very well withdraw, abrogate or materially alter, but which under the constitutional limitations of the Manitoba Act can be done only subject to the rights of the minority to seek the intervention of the Dominion Parliament, 50

through the exercise of the concurrent legislative authority that thereupon becomes vested in such Parliament upon resort being first had to the tribunal of the Governor-General in Council. Opinion of King, J.

Although there are points of difference between this case and what would have been the case if the prior legislation of Manitoba had established a system of separate schools following precisely the Ontario system. I cannot regard the differences as other than nominal, and treat this case as though the Act of 1881 and amending Acts distinctly established a system of separate schools, giving for the general public a system of undenominational public schools and to the  
 10 Catholic minority the right to a system of separate schools. In such case I do not see how the passing of such an Act as the Act of 1890 could fail to be said (by abolishing the separate schools) to affect the rights and privileges of the minority in respect of education. With some change of phraseology and some change of method, I think that what has been done in the case before us is essentially the same.

If the clauses of the Manitoba Act are to have any meaning at all, they must apply to save rights and privileges which have no other foundation originally than a statute of the Manitoba legislature.

The constitutional provision protects the separate educational status given  
 20 by an Act of the legislature to the denominational minority. The view that the effect of this is to restrain the proper exercise by the legislature of its power to alter its own legislation is met by the opposite view that there is no improper restraint if it is a constitutional provision, and that in establishing a system of separate schools the legislature may well have borne in mind the possibly irrevocable character of its legislation in thereby creating rights and privileges in relation to education. I, therefore, answer the questions of the case as follows:—

1. Is the appeal referred to in the said Memorials and Petitions and  
 30 : asserted thereby, such an appeal as is admissible 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?—Yes.

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?—Yes.

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  
 40 have been interfered with by the two Statutes of 1890 complained of in the said Petitions and Memorials?—No.

4. Does sub-section 3 of section 93 of the British North America Act 1867, apply to Manitoba?—Yes; to the extent as explained by the above reasons for my opinion.

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? Yes.

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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 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? Yes.

Certified true copy.

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G. DUVAL,

*Reporter, S.C.C.*