In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

IN THE MATTER of an Assessment Appeal,

BETWEEN:

THE BOARD OF EDUCATION FOR THE CITY OF WINDSOR,

Appellant,

—and—

FORD MOTOR COMPANY OF CANADA LIMITED and THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF WINDSOR,

Respondents.

Appellant's Factum

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BARTLET, AYLESWORTH & BRAID,	*Solicitors for the Respondent Ford Motor Company of Canada Limited.*
McNULTY, CHARLESON and ANGLIN,	*Ottawa Agents for the Respondent Ford Motor Company of Canada Limited.*
ARMAND RACINE, K.C.,	*Solicitor for the Respondent The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor.*
McNULTY, CHARLESON and ANGLIN,	*Ottawa Agents for the Respondent The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor.*

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PART I.

1. This is an appeal by the Board of Education for the City of Windsor, hereinafter referred to as the Board of Education, from the Judgment of the Court of Appeal for Ontario (Middleton, Masten and Fisher, JJ.A.) dated the 12th day of May, 1938, allowing appeals by Ford Motor Company of Canada Limited, hereinafter referred to as the Corporation, and the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor, hereinafter referred to as The Roman Catholic Separate School Board, from the Judgment of His Honour G. F. Mahon, a Judge of the County Court of the County of Essex, dated the 19th day of March, 1938, on questions of law and the construction of the Statutes, which questions were stated in the form of a special case for the said Court of Appeal by the said learned County Court Judge on the 19th day of March, 1938, pursuant to Section 85 of the Assessment Act.

R.S.O. (1937) Chapter 272. (Case pp. 2-10).

2. On the 27th day of July, 1937, the directors of the said Corporation passed a resolution, Exhibit 3 (Case p. 17) purporting to be pursuant to section 57 of the Statute Law Amendment Act (1937) 1 Geo. VI chapter 72 which amended the Separate Schools Act R.S.O. (1927) Chapter 328 by re-enacting what was section 65 of the said Separate Schools Act prior to the repeal of the said section by Section 42 of Chapter 55 of the Statutes of Ontario (1936). This resolution instructed the secretary of the Corporation to forward to the Clerk of the City of Windsor a notice in form B of the said Statute requesting that eighteen per cent of the Corporation's land, business and other assessments in the said municipality be entered, rated and assessed for separate school purposes. (Case p. 3, l. 25-29). Under date of July 29th, 1937, the said Secretary forwarded notice, form B, to the Clerk of the City of Windsor directing that eighteen per cent of the land, business and other assessments of the Corporation within the City of Windsor be entered, rated and assessed for Separate School purposes. (Case p. 3, l. 30-32). The Assessor made his assessment and apportioned eighteen per cent for Separate School purposes.

3. The Board of Education complained to the Court of Revision for the said City of Windsor against this apportionment and pursuant to Section 32 of the Assessment Act, R.S.O. (1927) chapter 238, gave notice thereof bearing date the 30th day of September, 1937, Exhibit 4 (Case p. 18) on the ground that the said Corporation had not complied with or conformed to said Section 65 of the Separate Schools Act.

4. The Appeal was heard by the said Court of Revision and Judgment reserved and on the 25th day of November, 1937, the decision of the said Court was delivered. Exhibit 6 (Case p. 19). The said Court by a majority allowed the appeal, it having been established by evidence before the said Court that not only was the amount of Roman Catholic holdings in the said Corporation not known but there had been no attempt made to ascertain their holdings. (Case p. 19, l. 22).

5. The Corporation and the Roman Catholic Separate Schools both appealed against this decision to a Judge of the County Court of the County of Essex pursuant to Section 75 of the Assessment Act, R.S.O. (1927) Chapter 238. The appeal was heard by his Honour G. F. Mahon, a Judge of the said Court and Judgment was reserved, and subsequently delivered with reasons therefor on the 19th day of March, 1938 (Case pp. 24-31). The said appeals of the Corporation and the Roman Catholic Separate School Board were dismissed, the decision of the Court of Revision sustained and the notice, form B. of the Corporation was set aside, vacated and declared null and void and of no effect.

6. The aggregate assessments of the said Corporation for the year 1938 were $5,973,360.00 and the proportion thereof purported to be assigned for the support of Separate Schools, namely eighteen per cent amounted to $1,075,200.00; the tax rate being over 10 mills or more than $10,000.00.

7. The learned County Court Judge made certain findings of fact upon the evidence adduced and no appeal was taken from his decision to the Ontario Municipal Board on his findings of fact, pursuant to section 84 of the Assessment Act, which thereby became final and conclusive.

8. At the commencement of the hearing of the appeal before the learned County Court Judge counsel for the Corporation, one of the appellants, called Mrs. Helen Weller of the City Clerk's Department of the City of Windsor who produced and identified certain exhibits. The said counsel then pointed out that in his opinion one of the main questions between the parties was as to where the burden rested as to proving compliance or non-compliance by the Corporation with the provisions of section 65 of the Separate Schools Act, and that, without waiving his position that the onus was on the respondent, the Board of Education, to prove affirmatively (notwithstanding that the Corporation was an appellant) that less than eighteen per cent of the shares of the Corporation were held by Roman Catholics, he was willing to bring out the facts on the point. To this procedure counsel for the Board of Education assented. (Case p. 4, l. 29-40).

9. Mr. Douglas B. Greig, secretary of the Corporation, was then called and was examined in chief by counsel for the Corporation and cross-examined by counsel for the Board of Education.

10. A great many facts were brought out in evidence before the said learned Judge in the manner aforesaid showing among other things a large number of shareholders and a wide distribution of such shareholders in point of residence. Many of these facts are set forth in the Special Case stated by the learned Judge. It was proved that the directors of the Corporation knew that shares were held by Roman Catholics and others but they did not know what percentage of the stock was held by Roman Catholics and in fact they did not enquire from their shareholders as to their religious faith. The directors reasoned from a number of angles and made assessment comparisons and population comparisons but many, if not most of them were made after the notice, form B, had been filed with the City Clerk. (Case p. 4, l. 44—p. 5, l. 43). The directors not knowing the percentage of stock held by Roman Catholics were unable to state that eighteen per cent did not bear a greater proportion to the whole of the assessments than the amount of stock held by Roman Catholics bore to the whole amount of the stock of the Corporation. (Case p. 27, l. 46—p. 28, l. 6). Upon all the evidence before the learned Judge he found as a fact that the apportionment made by the Directors was only a guess or an estimate. (Case p. 6, l. 1-3).

11. The learned Judge also found that the appeals of the Corporation and of Roman Catholic Separate School Board failed on the ground that they did not prove affirmatively that the portion of the Corporation's local assessment rated and assessed in support of separate schools pursuant to the resolution of the Corporation was no greater proportion to the whole of such assessments than the amount of the shares held by

Roman Catholics bore to the whole amount of the shares, and that conversely the onus was not upon the Board of Education, the Respondent, to prove affirmatively that the portion of the Corporation's local assessment rated and assessed in support of Separate Schools was a greater proportion to the whole of such assessments than the amount of the shares held by Roman Catholics bore to the whole amount of the shares. (Case p. 6, l. 4-25).

12. The Corporation and the Roman Catholic School Board appealed to the Court of Appeal for Ontario against the decision of the learned Judge on the questions of law and construction of Statutes aforesaid and the said Court of Appeal by Judgment delivered the 12th day of May, 1938, allowed the appeals and in the result declared that effect must be given to the Notice of the Corporation to the Clerk of the City of Windsor requiring eighteen per cent of the land, business and other assessments of the said Corporation to be entered, rated and assessed for the purposes of Separate Schools in the City of Windsor.

PART II.

1. It is submitted by the appellant that the Court of Appeal for Ontario erred in holding that the case of Regina vs Gratton (1915) 50 S.C.R. 589 was distinguishable in principle from the present case.

2. It is submitted the Court of Appeal erred in its interpretation of the purpose of the legislature in enacting section 65 of the Separate Schools Act.

3. It is also submitted that the Court of Appeal erred in not holding that the onus was upon the Respondents here to establish the fact that the Corporation had complied with the provisions of the Statute in ascertaining that the share or proportion of the Corporation's assessments as set out in the requisition bore no greater proportion to the whole of its assessments than the amount of stock or shares held by Roman Catholics bore to the whole amount of the stock or shares.

4. If any onus rested upon the Board of Education in this respect, which is not admitted, it was fully satisfied by the evidence adduced both before the Court of Revision and the learned County Judge.

PART III.

1. Every person or corporation is prima facie a supporter of the Public Schools. This is the basic or general law of Ontario. The Respondents admitted the same in the Court of Appeal and in all Courts below and all such Courts have so held. (Case p. 19, l. 25-27; p. 30, l. 12-13; p. 36, l. 15-18).

2. There are exceptions to this basic or general law. First: There is the case of individuals who, being Roman Catholics, under Section 54 of the Separate Schools Act in certain circumstances and subject to cer-

tain conditions and pre-requisite formalities, may be exempted from the payment of Public School rates and be assessed for the support of Separate Schools. Second: There is the case of a corporation having Roman Catholic shareholders which likewise upon compliance with certain conditions and statutory provisions may have the whole or a proportion of its assessments entered, rated and assessed for Separate School purposes and not for Public School purposes.

3. As regards individuals it has from early times been held that the onus is on the individual claiming to be rated for the support of Separate Schools to prove that he is eligible. See Manning on Assessment and Rating (1928) Edition p. 130, citing Harling v. Mayville (1871) 21 U.C.C.P. 499 and Trustees of Roman Catholic School of Arthur v. Arthur (1890) 21 O.R. 60.

In Harling v. Mayville, supra, at p. 511, the observations of Burns, J. in re Ridsdale and Brush 22 U.C.Q.B. 122 "that the legislature intended the provisions creating the common school system and for working and carrying that out, to be the rule, and that all the provisions for the Separate Schools were only exceptions to the rule, and carved out of it for the convenience of such separatists as availed themselves of the provisions in their favour", were approved and the principle enunciated that "it lies upon the plaintiff claiming exemption as a Separatist to aver and prove all those exceptional matters taking him out of the general rule and . . . . . I think that the party claiming exemption from the general rule and prima facie liability to common school rates should shew that the trustees of his Separate School have taken the steps pointed out by the law to procure for the Separatist the desired exemption."

Again, Maxwell on Interpretation of Statutes 7th Ed. page 316 says "A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power. Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred and it is therefore probable that such was the intention of the legislature."

4. As regards corporations desirous of exercising the privilege of having a portion of their assessments rated for the support of Separate Schools it is submitted that the principles applicable to Roman Catholic individuals apply to such corporations. The case of Regina vs Gratton, (1915) 50 S.C.R. 589 is in point and should have been followed by the Court of Appeal. An attempt was made to distinguish this case by the Court of Appeal in that by the Saskatchewan Statute it was required that the exact and precise proportions of the shareholding interests should be ascertained by the company before any effective notice could be given, while on the other hand the Ontario Act required merely "that the company shall state in its notice that the proportion of its Roman Catholic

shareholders *is not less* than the percentage named by it in the notice." The learned Justice of Appeal does not, it is submitted, accurately quote the section of the Act in this regard. Section, sub.sec. (1) reads as follows:—

> "Section 65—(1) A corporation by notice, Form B, to the Clerk of any municipality wherein a separate school exists may require the whole or any part of the land of which such corporation is either the owner and occupant, or not being the owner is a tenant, occupant or actual possessor, and the whole or any proportion of the business assessment or other assessments of such corporation made under The Assessment Act, to be entered, rated and assessed for the purpose of such separate school."

There is nothing, therefore, in the Act requiring the notice to state that the proportion of its Roman Catholic shareholders is not less than the percentage named by it in the notice, but sub. sec. 3 of Section 65 reads as follows:—

> "(3) Unless all the stock or shares are held by Roman Catholics the share or portion of such land and business or other assessments to be so rated and assessed shall not bear a greater proportion to the whole of such assessments than the amount of the stock or shares so held bears to the whole amount of the stock or shares."

showing, it is submitted, that it is a condition precedent to the giving of a valid notice that the share or portion of the assessment to be rated and assessed for separate school purposes shall not bear a greater proportion to the whole of such assessments than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares. In the present case there was a complete failure to show that the amount of eighteen per cent called for by the notice had any definite relation to the shareholdings of Roman Catholics as compared with the total shareholdings. If the learned Justice of Appeal is correct in his conclusions then a corporation can arbitrarily give a notice naming any given percentage and this must stand unless and until not merely challenged but until the challenger affirmatively shows that the stated percentage is wrong.

Up to 1913 the Ontario Statute which is to be found in R.S.O. (1897) Chap. 294 sec. 54, cannot, it is submitted, be distinguished from the Saskatchewan Statute. It contained the following proviso:

> "Provided always that the share or portion of the property of any company entered, rated or assessed in any municipality for Separate School purposes under the provisions of this section shall bear *the same ratio and proportion* to the whole property of the company assessable within the municipality as the amount or proportion of the shares or stock of the company, so far as the same are paid or partly paid up and are held and possessed by persons who are Roman Catholics, bears to the whole amount of such paid or partly paid up shares or stock of the company."

It is submitted that had the Ontario Statute remained in this form the interpretation placed by this Court upon a substantially identical proviso in the Saskatchewan Statute would have been equally applicable to the Ontario Statute.

In the revision of the Separate Schools Act in 1913 Chapter 71 what was formerly one subsection was practically divided into three subsections and the proviso quoted became the present subsection 3 of Section 65 of the Separate Schools Act with this change, namely, that the words "*shall bear the same ratio and proportion to the whole*" were amended to read "*shall not bear a greater proportion to the whole.*" It is submitted that this amendment can not have the effect of absolving the company of the duty or obligation of ascertaining the extent of its Roman Catholic shareholdings. It is submitted that this amendment was designed to meet a situation where it is impossible to determine the exact and precise proportion of stock held by Roman Catholics and therefore impossible for the Corporation to give any proportion of its assessment for the support of Separate Schools even though the directors do ascertain and know that a definite percentage at least of stock is held by Roman Catholics but do not know how much more might be so held. Under the present legislation if the directors ascertain and know that they have at least a certain percentage of Roman Catholic shareholding they may grant this percentage of the company's assessment for the support of Separate Schools and this would not have been possible under the previous legislation. In the present case there is no pretense that the Corporation ascertained or knew of any definite percentage of Roman Catholic shareholdings and could not therefore claim any privilege under the existing legislation.

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5. It is submitted that so far as onus is concerned there has been a misconception in the Court appealed from. In the view of the appellant the question of onus does not arise. The attack made by it was that the Statute had not been compiled with by the Respondent Corporation in that it had not ascertained its Roman Catholic shareholdings or ascertained there was eighteen percent of Roman Catholic shareholdings and that failing to do this it could not validly exercise the privilege given it, and consequently the notice to the Clerk was of no effect. It was a failure to comply with the provisions of the Statute that was attacked and no question can arise as to onus in this respect for the Respondent Corporation itself proved such failure, if the contention of the appellant as to its legal duty is sound. What purpose would there be in examining or cross-examining the officers of the Respondent Corporation as suggested by the learned Justice of Appeal? They could only reiterate what the Secretary of the Corporation had already testified, namely that it was impossible to ascertain who were or were not Roman Catholic shareholders: if the Corporation's officials with their superior knowledge could not do this, was it feasible for the appellant to do it?

no it was an appeal as an assessment alleging non compliance; the non compliance must be proved.

I. F. HELLMUTH,
N. L. SPENCER,
of Counsel for the Appellant.

If not, this is a difficulty of proof in making a case, not a ground for misreading the law so as to make proof of it more easier!