

Privy Council Appeals Nos. 62 and 63 of 1916.

**The Board of Trustees of the Roman Catholic
Separate Schools of the City of Ottawa and
others - - - - -** *Appellants,*

**The Corporation of the City of Ottawa and
others - - - - -** *Respondents*

Same - - - - - *Appellants.*

v.

The Quebec Bank and others - - - *Respondents*

Consolidated Appeals

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 2ND NOVEMBER, 1916.**

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.

[Delivered by THE LORD CHANCELLOR.]

The question raised in these consolidated appeals is whether section (3) of 5 George V, c. 45 (1915), Ontario, is valid and within the competency of the provincial legislature. The appellants contend that this section prejudicially affects certain rights and privileges with respect to denominational schools reserved under provision (1) of section 93 of "The British North America Act, 1867."

The preamble of the Act of 1915 recites that an action was then pending in the Supreme Courts of Ontario between

R. Mackell and others and the appellants. This action has now been finally decided adversely to the appellants. Their Lordships see no reason to anticipate that this judgment will not be accepted and obeyed. There is a further recital that the appellants have failed to open the schools under their charge at the time appointed by law, and to provide or pay qualified teachers for the said schools, and have threatened at different times to close the said schools and to dismiss the qualified teachers duly engaged for the same. So far as this appeal is concerned, the accuracy of these recitals was not questioned by the counsel for the appellants. Section (1) of the Act does not come into question in this appeal ; section (2) is a declaration of the duties of the appellants.

Section (3) is as follows :—

“ If, in the opinion of the Minister of Education, the said Board fails to comply with any of the provisions of this Act, he shall have power with the approval of the Lieutenant-Governor in Council—

“(a.) To appoint a commission of not less than three nor more than seven persons.

“(b.) To vest in and confer upon any commission so appointed all or any of the powers possessed by the Board under statute or otherwise, including the right to deal with and administer the rights, properties, and assets of the Board, and all such other powers as he may think proper and expedient to carry out the object and intent of this Act.

“(c.) To suspend or withdraw all or any part of the rights, powers, and privileges of the Board, and whenever he may think desirable to restore the whole or any part of the same, and to re-vest the same in the Board.

“(d.) To make such use or disposition of any legislative grant that would be payable to the said Board on the warrant of any inspector for the use of the said schools, or any of them, as the Minister may in writing direct.”

The Acting Minister of Education expressed the opinion that the trustees had failed, and were failing to comply with the provisions of the Act, and submitted the appointment of a Commission for the approval of the Lieutenant-Governor in Council. The respondent Commission was duly appointed under an Order in Council on the 25th July, 1915.

The powers conferred on the Minister of Education in sub-sections (b) and (c) of section 3 are expressed in very wide terms. At the instance of the Minister, with the approval of the Lieutenant-Governor in Council, all or any part of the rights, powers, and privileges of the appellant Board may be suspended or withdrawn without limitation in time, and only subject to restoration at the discretion of the Minister. The powers withdrawn from the appellant Board may be vested in and conferred upon an appointed Commission, a nominated body, in the selection of which the ratepaying supporters of the Roman Catholic Separate Schools have no voice. There is no exception to the universality of the extent to which all the rights, powers, and privileges of the appellant

Board may be suspended or withdrawn and vested in and conferred upon this nominated body. Is this legislation consistent with provision (1) of section 93 of "The British North America Act, 1867"? Section 93 enacts that in and for each province the Legislature may exclusively make laws in relation to education, subject and according to certain specified provisions. This section has been recently under the consideration of their Lordships in the case of the appellant Board and R. Mackell and others. The effect of the section and of sections 91 and 92 is to give an exclusive jurisdiction to the Legislature of each province to make laws in reference to education subject to the specified provisions. The Parliament of Canada has no jurisdiction in relation to education, except under the conditions in provision (4), which are not in question in this appeal. The rights or privileges reserved in provision (1) cannot be prejudicially affected without an Act of the Imperial Legislature.

There is no question that the impeached section of the Act of 1915 does authorise the Minister of Education to suspend or withdraw legal rights and privileges with respect to denominational schools. The case of the respondent Commission is that the appellant Board does not come within the category of "a class of person," and that no right or privilege with respect to denominational schools, which the appellant Board had by law in the province at the union, has been prejudicially affected. It was argued that the protection given by provision (1) related to rights or privileges possessed by all the adherents of the Roman Catholic schools in the province, and that the appellant Board only represented the minority of a larger class. The status of the appellant Board depends on the provisions contained in "The Separate Schools Act, 1863." Section (2) of that Act confers the right of electing trustees for the management of a separate school for Roman Catholics, not on all the adherents of Roman Catholic schools in the province, but on any number of persons, not less than five, being heads of families and freeholders, and householders, resident within any school section of any township, or corporate village, or town, or within any ward of any city or town, and being Roman Catholics. The right of electing managers is thus conferred on the supporters of a separate school or schools for Roman Catholics within one or other of the designated areas. In the present case the appellant Board are the elected trustees for the management of Roman Catholic Separate Schools within the city of Ottawa. They represent the supporters of the Roman Catholic Separate Schools within the area of the city, and as such elected trustees enjoy the right of management which was conferred under the Separate Schools Act, 1863. Apart therefore from any words of limitation or any implication to be drawn from the context, the appellant Board represent a section of the class of persons who are within the protection of provision (1). Their Lordships can find neither limiting words nor anything in the context which would imply that they are excluded from the

benefit of the provision. They are not the less within the provision that any other Board similarly constituted would have similar rights and privileges. They would be entitled to the protection of the provision, though they were the only Board of trustees in the province constituted under "The Separate Schools Act, 1863." But if the appellant Board represent people who come within the protection of provision (1), it is difficult to appreciate the argument that no legal right or privilege existing in the province at the union with respect to denominational schools has been prejudicially affected. It is possible that an interference with a legal right or privilege may not in all cases imply that such right or privilege has been prejudicially affected. It is not necessary to consider such a possibility, and this question does not arise for decision in the appeal. The case before their Lordships is not that of a mere interference with a right or privilege, but of a provision which enables it to be withdrawn *in toto* for an indefinite time. Their Lordships have no doubt that the power so given would be exercised with wisdom and moderation, but it is the creation of the power and not its exercise that is subject to objection, and the objection would not be removed even though the powers conferred were never exercised at all. To give authority to withdraw a right or privilege under these conditions necessarily operates to the prejudice of the class of person affected by the withdrawal. Whether or not a different policy might have been preferable, either in the opinion of the provincial Legislature, or in that of the Courts, is not a relevant consideration. It was argued that no evidence on behalf of the appellant Board had been called to prove that the withdrawal of their rights, powers, and privileges, operated to their prejudice. In the opinion of their Lordships no such evidence was necessary.

For the purpose of these appeals it is unnecessary to say more. The decision depends on a question of construction. During the argument the Counsel for the respondent Commission pressed on their Lordships the difficulty of providing any adequate alternative in order to ensure the proper education of the children of Roman Catholic parents in the city of Ottawa. Their Lordships realise the great importance of this consideration, and there is no doubt that considerable temporary inconvenience must be involved if the appellant Board, as representatives of the supporters of the Roman Catholic Separate Schools in Ottawa, fail to open the schools under their charge at the time appointed by law, and to provide and pay qualified teachers. It may be pointed out, however, that the decision in this appeal in no way affects the principle of compulsory free primary education in the province established under the School Law of 1850, and that if the appellant Board and their supporters fail to observe the duties incident to the rights and privileges created in their favour, the result is that the children of Roman Catholic parents are under obligation to attend the

common schools, and thus lose the privileges intended to be reserved in their favour under provision (1) of section 93 of "The British North America Act, 1867." The history of this question is thus accurately summarised in the judgment of Meredith, C.J.O. :—

"The ground upon which was based the claim of the Roman Catholics to separate schools was the injustice of compelling them to contribute to the support of schools to which, owing to the character of the instruction given in them, they could not for conscientious reasons send their children because in their view it was essential to the welfare and proper education of their children that religious instruction according to the tenets of the Roman Catholic Church should be imparted to them as part of their educational training.

"This injustice, it was claimed, was greatly aggravated when, by the School Law of 1850, a system of compulsory free primary education in schools supported partly by Government grants, but mainly by taxation, to which all ratepayers were liable, was established."

Their Lordships do not anticipate that the appellants will fail to obey the law now that it has been finally determined. They cannot, however, assent to the proposition that the appellant Board are not liable to process if they refuse to perform their statutory obligations, or that in this respect they are in a different position from other Boards or bodies of trustees entrusted with the performance of public duties which they fail or decline to perform.

From what has been said it appears that in their Lordships' view the Act as framed is *ultra vires*, and accordingly liberty will be reserved to the plaintiffs, should occasion arise, to apply to the Supreme Court of Ontario for relief in accordance with this declaration, but their Lordships do not anticipate that it will be necessary for the plaintiffs to avail themselves of this right.

Their Lordships will humbly advise His Majesty that the appeals be allowed with costs to be paid by the respondent Commission here and below, and the respondent Commission will pay the costs of the Corporation of the City of Ottawa and of the Quebec Bank.

In the Privy Council.

THE BOARD OF TRUSTEES OF THE
ROMAN CATHOLIC SEPARATE
SCHOOLS OF THE CITY OF OTTAWA
AND OTHERS

v.

THE CORPORATION OF THE CITY OF
OTTAWA AND OTHERS.

SAME

v.

THE QUEBEC BANK AND OTHERS.

DELIVERED BY
THE LORD CHANCELLOR.