

Privy Council Appeal No. 67 of 1926.

Michael Hirsch and another - - - - - *Appellants*

v.

The Protestant Board of School Commissioners of the City of
Montreal and others - - - - - *Respondents*

AND

The Protestant Committee of the Council of Public Instruction of
the Province of Quebec - - - - - *Interveners*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 2ND FEBRUARY, 1928.

Present at the Hearing :

THE LORD CHANCELLOR.

VISCOUNT HALDANE.

LORD BUCKMASTER.

LORD DARLING.

LORD WARRINGTON OF CLYFFE.

[*Delivered by* THE LORD CHANCELLOR.]

This appeal, which raises questions of great importance in relation to public education in the Province of Quebec, had its first origin in the decision of the Superior Court of Quebec in the case of *Pinsler v. The Protestant Board of School Commissioners of Montreal* (1903, 23 Q.L.R. 365). In that case Mr. Justice Davidson held, on the construction of the Quebec Education Act of 1899, that a person professing the Jewish faith, not being the owner of real estate inscribed on the Protestant panel for the purposes of the City school tax, could not compel the Protestant School Commissioners to admit his son as of right to a school under their control. In consequence of this decision the Legislature of the

Province passed in the year 1903 an Act (3 Ed. VII, c. 16) which provided as follows :—

“ 1. Any provision to the contrary notwithstanding, in all the municipalities of the Province, whether governed, as regards schools, by the Education Act or by special laws, or by the Education Act and by special laws, persons professing the Jewish religion shall, for school purposes, be treated in the same manner as Protestants, and, for the said purposes, shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter.

* * * *

“ 6. After the coming into force of this Act, the children of persons professing the Jewish religion shall have the same right to be educated in the public schools of the Province as Protestant children, and shall be treated in the same manner as Protestants for all school purposes.”

By the intervening sections (sections 2 to 5), provision was made for giving to the Protestant school authorities throughout the Province the benefit of school taxes and contributions paid by or in respect of persons professing the Jewish religion.

This statute was put in force for some years, but eventually—the number of Jewish children attending the Protestant schools in Montreal having greatly increased (it is said to have risen from 2,144 in 1903 to 11,974 in 1923)—it was found that the taxes and allowances received by the Protestant Board in respect of Jewish children were considerably less than the cost of educating those children, and a question was raised by the Board as to the validity of the Act of 1903. An Act passed by the Quebec Legislature in 1922 for increasing the subvention out of the school fund to the Protestant Board (12 Geo. V, c. 44) failed to put an end to the dispute, and on the 21st July, 1924, the Lieutenant-Governor appointed a Commission, upon which Roman Catholics, Protestants and Jews were equally represented, to enquire into (among other things) the question of the instruction of Jewish children in the Protestant or other schools. The Commission, being divided in opinion as to the validity of the statute of 1903 and other matters, recommended that the Governor of Quebec should submit to the Court of Appeal and (if necessary) to the Privy Council the questions of law which had been raised ; and, accordingly, on the 3rd February, 1925, the Lieutenant-Governor in Council submitted to the Court of King's Bench (Appeal Side) the following questions :—

“ 1. Is the Statute of Quebec of 1903, 3 Edward VII, c. 16, *ultra vires* ?

“ 2. Under the said statute—

- (a) can persons of Jewish religion be appointed to the Protestant Board of School Commissioners of the City of Montreal ?
- (b) is the Protestant Board of School Commissioners of the City of Montreal obliged to appoint Jewish teachers in their schools should they be attended by children professing the Jewish religion ?

“ 3. Can the Provincial Legislature pass legislation providing that persons professing the Jewish religion be appointed—

- (a) to the Protestant Board of School Commissioners of the city of Montreal ; or
- (b) to the Protestant Committee of Public Instruction ; or
- (c) as Advisory Members of these bodies ?

" 4. Can the Provincial Legislature pass legislation obliging the Board of School Commissioners of the city of Montreal to appoint teachers professing the Jewish religion in their schools should they be attended by children professing that religion ?

" 5. Can the Provincial Legislature pass legislation providing for the appointment of persons professing the Jewish religion on the proposed Metropolitan Financial Commission outlined in the project submitted by Messrs. Hirsch and Cohen ?

" 6. Can the Provincial Legislature pass legislation to establish separate schools for persons who are neither Catholics nor Protestants ?

" 7. Assuming the Act of 1903 to be unconstitutional, have the Protestants the right under the present state of the Quebec law to allow children professing the Jewish religion to attend the schools—

(a) as a matter of grace ;

(b) as of right ?

(c) Can the Province force the Protestants to accept children professing the Jewish religion under such conditions ? "

An Act passed by the Quebec Legislature on the 3rd April, 1925 (15 Geo. V, c. 19), authorised an appeal as to the matters so submitted from the Court of King's Bench to the Supreme Court of Canada, and from that Court (subject to leave being obtained) to His Majesty in Council.

The Court of King's Bench (Appeal Side), subject to certain reservations and dissents which it is not necessary to set out in detail, answered the above questions numbered 1, 2 (a), and 7 (a) and (b) in the affirmative, and the remaining questions in the negative ; but on appeal by the present appellants (being two of the Jewish members of the Commission above referred to) to the Supreme Court of Canada, that Court (consisting of Anglin, C.J., and Mignault, Newcombe, Rinfret and McLean, JJ.) agreed upon the following answers :—

" QUESTION NO. 1.—*Answer.* No, except in so far as it would confer the right of attendance at dissentient schools upon persons of a religious faith different from that of the dissentient minority.

" QUESTION NO. 2.—*Answers.* To part (a), No. To part (b), No.

" QUESTION NO. 3.—*Answers.* To part (a), No. To part (b). This Committee is the creature of post-Union legislation, and, therefore, its personnel is subject to provincial legislative control ; but, as it is presently constituted, only Protestants are eligible for appointment to it. To part (c). This question can be answered only when the powers and duties of such advisory members shall have been defined.

" QUESTION NO. 4.—*Answer.* No.

" QUESTION NO. 5.—*Answer.* No.

" QUESTION NO. 6.—*Answer.* Yes. Such legislation would not necessarily interfere prejudicially with rights and privileges enjoyed either by Roman Catholics or Protestants as a class at the Union. Such interference, of course, could not be allowed.

" QUESTION NO. 7.—*Answer.* It is impossible to answer this question categorically and difficult to answer it intelligently. We deal with it as follows :—

" We assume that the question is to be answered having regard to the law of the Province of Quebec bearing on educational matters, in so far as

such law is valid, exclusive of the Act of 1903, and that 'Protestants' in the question means the Protestant Board of School Commissioners of the City of Montreal and the Trustees of the Protestant dissentient schools in rural municipalities.

"To part (a) the answer is : Yes.

"To part (b). Further, assuming that the inquiry intended is whether Jewish children have the right to attend Protestant schools, with a correlative obligation on the part of the Boards of Protestant School Commissioners and Trustees to admit children professing the Jewish religion to the schools respectively under their control and to provide therein for their education, the answer is :—

In the City of Montreal : Yes.

In the rural municipalities : No.

"To part (c). The words 'Under such conditions' are quite unintelligible. It is impossible to discern what conditions are meant to be imparted. Eliminating them from the question, the answer is :—

In the City of Montreal : Yes.

In the rural municipalities : No."

The appellants have obtained special leave to appeal from this decision to His Majesty in Council.

The solution of the main question to be determined on this appeal, namely, the question whether the Quebec statute of 1903 above referred to is or is not *ultra vires*, depends upon the effect to be given to section 93 of the British North America Act of 1867, which provides as follows :—

"93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions :—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union ;

(2) All the powers, privileges and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec."

The succeeding two paragraphs of the section provide for an appeal 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 King's subjects in relation to education ; but it was not contended before this Board that these provisions—which were the subject of discussion in a Manitoba case (*Brophy v. The Attorney-General of Manitoba*, L.R. 1895, A.C. 202)—had the effect of ousting the jurisdiction of the Courts, and it is unnecessary to refer to them again.

In order to determine whether the restrictions imposed by section 93 of the Act of 1867 are infringed by the Quebec statute of 1903, it is necessary to consider, first, whether any and which of the schools referred to in that statute were denominational schools in which any class of persons had by law any right or privilege at the Union, and, secondly, whether and to what extent that statute prejudicially affects any such right or privilege. For

the purpose of this enquiry it is not necessary to recite the earlier statutes of Lower Canada dealing with public education, which are effectively summarised in the judgment of Flynn, J., in this case, and it will be sufficient to state shortly the provisions of the consolidating statute of 1861 (24 Vic., c. 15), which was in force at the date of the Union.

The effect of the statute of 1861 was to establish two somewhat different educational systems, namely, one system for Lower Canada outside the cities of Quebec and Montreal (which may be referred to as the "rural area") and another system for those two cities.

In the rural area there were set up two classes of school for the elementary instruction of youth, that is to say, (a) in each municipality, one or more common schools managed by School Commissioners elected by all the landholders and householders of the municipality other than the dissentient inhabitants to be hereafter referred to, and (b) in any municipality in which any number of inhabitants professing a religious faith different from that of the majority had signified such dissent, one or more schools managed by Trustees appointed by the dissentients. These schools were maintained partly by monthly school fees, partly by allowances out of the common school fund, and partly by a school rate levied by the School Commissioners, or, in the case of dissentients, by their Trustees. The teachers at each school were appointed by the Commissioners or Trustees in charge of the school, having first been examined by a Board of Examiners for the county, which might (if the Governor in Council so ordained) be organised in two divisions, one Roman Catholic and the other Protestant. The course of study to be followed in each school was regulated by the Commissioners or Trustees (as the case might be), but it was provided (by section 65 of the Act) that "the curé, priest or officiating minister shall have the exclusive right of selecting the books having reference to religion and morals for the use of the schools for children of his own religious faith." The schools in each municipality were to be visited periodically by Visitors consisting of the resident clergy and other official persons; but no priest, minister or ecclesiastic was to visit a school belonging to inhabitants not of his own persuasion except with the consent of the Commissioners or Trustees of the school (section 121). Children from 5 to 16 years of age residing in any school district were to have a right to attend "the school thereof" upon payment of the monthly fees (section 66); but this provision does not appear to have applied to the dissentient schools, which were reserved (except as a matter of favour) for children of the dissentient faith residing in the district and (if there was room) for children from other school districts "of the same faith as the dissentients for whom the school was established" (section 56). This reservation, though not clearly stated in the Act, appears to be deducible from its terms; and if there be any doubt upon the point, it is removed by paragraph 2 of section 93 of the British North America

Act, which extends to dissentient schools in Quebec all the powers and privileges by law conferred on the Roman Catholic schools of Upper Canada, including the provisions of the Upper Canada Act of 1863 (26 Vic., c. 5).

It is convenient at this stage to deal, as regards these schools in the rural area, with the first of the two questions above formulated, namely, whether any and which of them were denominational schools in which any class of persons had by law any right or privilege at the Union. That the dissentient schools in the rural area fall within that category can hardly be doubted. Where a school is founded by a body of Protestants and is maintained by their contributions and managed by Trustees appointed by them, where its teachers are chosen by those Trustees after examination by a Protestant Board of Examiners, where its religious books are selected by the Protestant minister and admission to the school is confined (except by favour) to the children of Protestant parents, it would be affectation to call that school anything but a denominational school; and the same is equally true of a like dissentient school under Roman Catholic control. It is plain also that the dissentient supporters of such a school, who are bound together by a common religious faith, form a "class of persons" having special rights and privileges with respect to the school, including the right to appoint the managing Trustees and through those Trustees to select the teachers at the school, to control the course of study and to exclude children of another faith. But the same cannot (their Lordships think) be said of a common school in the rural area not being a separate or dissentient school. Such a school, if in a single school district, is under the management of Commissioners appointed by the whole body of landholders and householders in the district without regard to their religious faith; and even in a district where a minority has established its own separate school, the electors who remain need not be all of the same religious persuasion. No doubt it is true, as stated by the Canadian Courts, that in most of the school districts in the rural area the majority of the landholders and householders are Roman Catholics, and, accordingly, that the common schools in those districts (other than the dissentient schools) are in fact controlled by members of that religious community; but, if so, the result is due to the circumstances of the particular school districts, and it is not a right or privilege to which any class of persons are "by law" entitled. In a New Brunswick case (*Maher v. The Town of Portland*, 1874, reported in Wheeler's Confederation Law of Canada, page 338 note, at page 367), Lord Justice James, who delivered the judgment of this Board, dealt with a similar contention as follows:—

"It has been contended on the part of the appellant that *de facto* they became denominational schools in this way—that is to say, that whereas the whole machinery was left local, that the ratepayers had the power of appointing the master, the ratepayers had the power of appointing the Trustees of the schools, but where the whole inhabitants of a district or

the great majority of a district belonged to the Roman Catholic faith or belonged to a Protestant sect, there they could so work the school practically as to give it a denominational character or a denominational hue ; that is to say, if all the children were Roman Catholics, Roman Catholic teaching would be found in that school. But the fact that that might be the accidental result of the mode of working the Act under the old system is not to give a legal right to that denomination, which was the right alone which was intended to be protected by the Federation Act of the Dominion of Canada. It is an accident which might have happened to-day, and might have been reversed to-morrow by a change of the inhabitants of the district or a change in their views ; and that is not a thing to which it is possible to give the colour of a legal right."

It appears to their Lordships that this reasoning, although relating to a different Statute, applies to the common schools (other than dissentient schools) in the rural area, and accordingly that as regards that area the separate or dissentient schools alone come within the protection of section 93 (1) of the Act of 1867.

Turning now to the cities of Quebec and Montreal, it appears that, while the public educational system established in those cities by the Act of 1867 was similar in many of its features to that of the rural area, there were important differences. It may be (as suggested by Rivard, J.) that it appeared to the Legislature that in these centres, where there was already a dense population and a mixture of religious beliefs, it was unnecessary to require a minority to declare its dissent, and that two kinds of school should at once be set up. But, however that may be, the statute, so far as it applied to the two cities, did not divide the schools into majority and minority schools, but into Roman Catholic and Protestant schools. Each city was to be considered for the purposes of the Act as one municipality, and each school was to be considered a school district. In each city the schools were to be managed by twelve School Commissioners appointed by the Corporation, of whom six were to be Roman Catholic and six Protestant ; and such Commissioners were to " form two separate and distinct corporations, the one for Roman Catholics and the other for Protestants " (section 130). No special school rate was to be levied, but payments were to be made by the City Treasurer to the respective Boards of Commissioners " in proportion to the population of the religious persuasion represented by such Boards respectively " (section 131). Each Board was to manage its own schools and appoint the teachers ; but such teachers were to be previously examined by a Board of Examiners appointed by the Governor in Council through the Superintendent of Education, one-half of such Board being Roman Catholics and the other half Protestants, and each of such halves acting separately from the other (section 103). The provisions of section 65 as to the choice of books having reference to religion and morals apparently applied to the City schools, so that the religious books for Roman Catholic schools would be chosen by the Roman Catholic curé or priest and the religious books for the Protestant schools by the Protestant priest or minister. Any school managed by either

Board could be attended by any child in the city of the specified age (sections 66, 128 and 129).

Then, were the common schools in the cities of Montreal and Quebec denominational schools in which any class of persons had by law a right or privilege at the Union? In their Lordships' opinion they were. Every common school in either city was under the management and control of a Board of Commissioners chosen from persons of a particular religious faith, and each of these Boards is referred to (in section 131) as "representing" a religious persuasion. The school fund contributed by the corporation was to be apportioned between the two Boards in proportion to the religious persuasions which they respectively represented, and therefore roughly (although not precisely) according to the religious faiths of those who contributed to the fund. The examination of teachers, the selection of religious books, and the right to visit the schools were based on a like separation of faiths. It is true that in the two cities a school belonging to either Board might before the date of Confederation be attended by children of a faith different from that represented by the Board; but it appears to their Lordships that the provisions for the management and control of the schools by persons of a particular religious persuasion set upon them a denominational stamp which could not be effaced by the attendance of a certain number of children of a divergent faith. The Roman Catholics in Montreal or Quebec formed a class of persons who had the right and privilege of having their schools controlled and managed by Commissioners of that religious persuasion and their teachers examined by Examiners of the same persuasion; and like privileges belonged to the Protestants of each city with regard to the schools controlled by the Protestant Board of Commissioners. This view is confirmed, not only by expressions contained in the judgments of this Board in the Manitoba cases (*City of Winnipeg v. Barrett*, L.R. 1892, A.C. 445, at pp. 453 to 456; *Brophy v. Attorney-General of Manitoba*, L.R. 1895, A.C. 202, at pp. 226 and 227), and in the Ottawa case (*Ottawa Separate School Trustees v. Mackell*, L.R. 1917, A.C. 62, at page 69), but also by the emphatic statements of the experienced judges who dealt with this matter in the Canadian Courts. Anglin, C.J., in delivering the unanimous judgment of the Supreme Court of Canada, said that "under the Act of 1861 there were no dissentient schools either in Montreal or Quebec, although no doubt the schools in those cities were denominational schools," and, again, that "nobody doubted that the Roman Catholic and Protestant separate schools of Quebec and Montreal were denominational schools or that the Protestants were a class of persons whose rights and interests were protected"; and similar expressions may be found in the judgments delivered in the Court of King's Bench. Their Lordships cannot but assent to the views so expressed.

It may be added that, in their Lordships' opinion, the contention, put forward by counsel for the appellants, that the word

“Protestant” in the statutes must be construed as meaning non-Catholic and so as including Jews, is quite untenable; and also that the Protestant community, although divided for some purposes into different denominations, is itself a denomination and capable of being regarded as a “class of persons” within the meaning of section 93 of the Act of 1867.

It appears that the boundaries of the cities of Montreal and Quebec have since the Union been extended, and that the Roman Catholic and Protestant Boards of Commissioners have carried their operations into the added areas. The Supreme Court refrained from pronouncing an opinion as to the effect of any such annexation on school rights in the annexed territories, and their Lordships accordingly do not deal with that question; but it is clear that no post-Union annexation of territory could deprive any class of person of the protection afforded to them by section 93 of the Act of 1867.

It is now possible to deal with the second of the questions formulated above, namely, whether and to what extent the Quebec statute of 1903 prejudicially affects any right or privilege to which any class of persons was by law entitled at the Union. Section 1 of the Act provides that “any provision to the contrary notwithstanding, in all the municipalities of the Province . . . persons professing the Jewish religion shall for school purposes be treated in the same manner as Protestants and for the said purposes shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter.” This is very wide and comprehensive language, and, notwithstanding the forcible reasoning of Anglin, C.J., to the contrary, their Lordships incline to the view that it would authorise the appointment of professing Jews to the Protestant Boards of Commissioners and Examiners in Montreal or Quebec, and might even justify a claim on the part of Jewish inhabitants in the rural area to join with Protestants in forming a dissentient school and appointing its Trustees. If so, the section plainly infringes the rights and privileges of Protestants in the Protestant schools in the city areas and in the dissentient schools elsewhere. Further, section 6 of the Act, so far as it purports to enable a professing Jew to send his children as of right to a Protestant dissentient school in the rural area, is an infringement of the rights belonging to Protestants at the Union and so goes beyond the legislative authority of the provincial Legislature. With regard to sections 2 to 5 of the Act, while they may no doubt require consideration by the Quebec Legislature in view of the decision in the present case, their Lordships agree with the view taken by the Supreme Court that they are not in themselves void as infringing section 93 of the Act of 1867.

For the above reasons their Lordships are of opinion that the answers to questions 1 and 2 (a) should be varied so as to run as follows:—

“QUESTION 1. No, except so far as it would enable persons professing the Jewish religion to be appointed to the Protestant Board of School Commissioners in the City of Quebec or Montreal or to any Protestant Board of

Examiners or to take part with Protestants in the establishment of a dissentient school outside those cities, and except so far as it would confer the right of attendance at dissentient schools outside the cities of Quebec and Montreal upon persons of religious faith different from that of the dissentient minority.

“QUESTION 2 (a). On the construction of the statute, yes.”

The above observations enable their Lordships to deal shortly with the questions numbered 2 (b), 3, 4, 5 and 7 ; and it is sufficient to say that they agree with the answers to those questions given by the Supreme Court.

There remains for consideration the sixth question, which asks whether the provincial Legislature can pass legislation to establish separate schools for persons who are neither Catholics nor Protestants. This question is framed in very general terms, and their Lordships have from time to time expressed their reluctance to give an opinion upon abstract and hypothetical questions which have not yet arisen in a concrete form ; but the question now under consideration bears so close a relation to those which have been already dealt with that it would be difficult to arrive at a conclusion as to those other questions without forming an opinion upon the subject matter of the sixth question, and their Lordships think it right to say that upon this question also they are in accord with the opinion expressed by the Supreme Court of Canada. While section 93 of the Act of 1867 protects every right or privilege with respect to denominational schools which any class of persons may have had by law at the Union, it does not purport to stereotype the educational system of the Province as then existing. On the contrary, it expressly authorises the provincial Legislature to make laws in regard to education subject only to the provisions of the section ; and it is difficult to see how the Legislature can effectively exercise the power so entrusted to it unless it is to have a large measure of freedom to meet new circumstances and needs as they arise. The statute protects the rights which at the Union belonged to the Roman Catholic population as a class, as well as those belonging to the Protestant population as a class ; but to treat members of both denominations, who substantially made up the whole population of the Province at the time of the Union, as forming together a “class of persons” with a right to object to the establishment of any school not under Christian control, would be to give a meaning to the statute which its words will not bear. It appears to their Lordships that it would be possible to frame legislation for establishing separate schools for non-Christians without infringing the rights of the two Christian communities in their denominational schools ; and they agree with the Supreme Court that legislation confined within those lines would be valid. It is hardly necessary to add that this Board, like the Supreme Court, have dealt with all the questions as questions of law and have in no way concerned themselves with any question of policy.

For the above reasons their Lordships are of the opinion that the decision of the Supreme Court of Canada should be affirmed

with the variations above set out, and they will humbly advise His Majesty accordingly. The appellants should pay the costs of the respondent Boards of School Commissioners and of the respondent Joseph Schubert of this appeal. The Protestant Committee of the Council of Public Instruction for Quebec, who obtained special leave to intervene before this Board, and the Attorney-General of Quebec should bear their own costs; but the sum of £150 deposited by the Protestant Committee should be returned to them.

In the Privy Council.

MICHAEL HIRSCH AND ANOTHER

vs.

THE PROTESTANT BOARD OF SCHOOL COM-
MISSIONERS OF THE CITY OF MONTREAL
AND OTHERS

AND

THE PROTESTANT COMMITTEE OF THE COUN-
CIL OF PUBLIC INSTRUCTION OF THE
PROVINCE OF QUEBEC.

DELIVERED BY THE LORD CHANCELLOR.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1928.