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UNIVERSITY OF LONDON
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-8 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

29, 1941

APPELLANT'S CASE

No. 28 of 1940.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF CANADA.

BETWEEN—

THE BOARD OF EDUCATION FOR THE CITY OF WINDSOR - - - *Appellant*

— AND —

FORD MOTOR COMPANY OF CANADA LIMITED THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF WINDSOR *Respondents.*

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CASE FOR THE APPELLANT.

RECORD.

1. This is an Appeal from a Judgment of the Supreme Court of Canada dated the 30th October 1939 affirming by a majority of three to two the Judgment of the Court of Appeal for Ontario dated the 12th May 1938 which had reversed the Judgment of the Judge of the County Court of the County of Essex, Ontario, dated the 19th March 1938.

pp. 50-51.
pp. 26-27.
pp. 6-8.

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2. The Appellant is a municipal Corporation by virtue of the provisions of the Boards of Education Act of the Province of Ontario. Revised Statutes of Ontario (1937) Chap. 361. The Respondent Ford Motor Company of Canada Limited (hereinafter referred to as "the Respondent Corporation") is a Corporation organized under the Companies Act of the Dominion of Canada and carrying on business in the Province of Ontario and elsewhere. The Respondent, the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor (hereinafter referred to as "the Respondent Board") is a municipal Corporation by virtue of the provisions of the Separate Schools Act of the Province of Ontario R.S.O. (1937) Chap. 362.

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pp. 73-74, 75.

3. The question which arises in this Appeal is whether the Respondent Corporation had complied with and conformed to the provisions of Section 65 of the Separate Schools Act of the Province (which is now Section 66 of the Revised Statutes of Ontario, 1937, and is hereinafter called "the said Section 65") so as to enable it to require that eighteen per centum of its assessments in the City of Windsor, Ontario, be assessed for the purposes of "Separate Schools" administered by the Respondent Board instead of for the purposes of the public schools administered by the Appellant.

p. 7, ll. 6-20.
p. 15, ll. 21-35.
p. 20, ll. 38-41.
p. 44, ll. 29-30.
p. 60, ll. 19-22.

4. The basic or general law of the Province in the matter of assess- 10 ments for school purposes is that such assessments shall be devoted to the support of the public schools, but provision is made by the said Section 65, in respect both of individuals and of corporations liable to assessment for school purposes, whereby all or part of the assessments may, under certain conditions and to a defined extent, be taken out of the general rule and devoted to the support of Separate Schools instead of that of the Public Schools.

5. The said Section 65 runs as follows :—

pp. 73-74, 75.

"65. (1) A Corporation by notice, Form B, to the clerk of any munici- "pality wherein a separate school exists may require the whole or any part of 20 "the land of which such corporation is either the owner and occupant, or not "being the owner is the 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 purposes of such separate school.

"(2) The Assessor shall thereupon enter the corporation as a separate "school supporter in the assessment roll in respect of the land and business "or other assessments designated in the notice, and the proper entries shall be "made in the prescribed column for separate school rates, and so much of the "land and business or other assessments so designated shall be assessed accord- 30 "ingly for the purposes of the separate school and not for public school "purposes, but all other land and the remainder, if any, of the business or other "assessments of the corporation shall be separately entered and assessed for "public school purposes.

"(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 assess- "ments than the amount of the stock or shares so held bears to the whole "amount of the stock or shares.

"(4) A notice given in pursuance of a resolution of the directors 40 "shall be sufficient and shall continue in force and be acted upon until it is "withdrawn, varied or cancelled by a notice subsequently given pursuant to "any resolution of the corporation or of its directors.

"(5) Every notice so given shall be kept by the clerk on file in his "office and shall at all convenient hours be open to inspection and examination "by any person entitled to examine or inspect an assessment roll.

"(6) The assessor shall in each year, before the return of the "assessment roll, search for and examine all notices which may be so on file "and shall follow and conform thereto and to the provisions of this Act."

6. The Respondent Corporation, knowing that some of its shareholders were Roman Catholics but not knowing how many shares they held, and in particular not knowing whether they held as much as 18% of the total shareholding, desired to take advantage of the provisions relating to separate schools in the said Section 65. Accordingly, on the 27th July 1937 its directors in purported pursuance of the said Section 65 passed a resolution instructing its secretary to forward to the Clerk of the City of Windsor a notice in form "B" of the said Statute requiring that eighteen per cent. of the Respondent Corporation's land, business and other assessments within the City of Windsor be entered, rated and assessed for Separate School purposes. Under date of the 29th July 1937, the said Secretary accordingly forwarded a Notice in the said form "B" to the Clerk of the City of Windsor requiring that eighteen per cent. of the land, business and other assessments of the Respondent Corporation within the City of Windsor be entered, rated and assessed for Separate School purposes. The assessor, as he was bound to do, apportioned his assessment in accordance with the said notice, applying eighteen per cent. of the assessment to Separate School purposes.

p. 58, ll. 1-15.

p. 58, ll. 21-32.

7. The Appellant pursuant to Section 32 of the Assessment Act then in force, R.S.O. (1927) Chap. 238, appealed by notice dated the 30th September 1937, to the Court of Revision for the said City of Windsor against this apportionment, on the ground that the Respondent Corporation had not complied with nor conformed to the provisions of the said Section 65.

pp. 58-59.
p. 59, ll. 1-4.
pp. 73-74, 75.

8. On the 25th November 1937, the Court of Revision gave its decision, allowing the appeal by a majority, on the ground that the evidence before it established that no effort had been made by the Respondent Corporation to ascertain the number of shares held by Roman Catholics and that the Respondent Corporation had no knowledge of the proportion of shares so held.

pp. 60-1.
p. 61, ll. 8-10.

9. The Respondents both appealed against this decision to a Judge of the County Court of the County of Essex, pursuant to Section 75 of the said Assessment Act, R.S.O. (1927) Chap. 238. The appeal was heard by His Honour G. F. Mahon who delivered his reserved judgment with reasons therefor on the 19th March 1938. By this judgment the said appeals were dismissed, the said decision of the Court of Revision sustained, and the said Notice in form "B" of the Respondent

pp. 61-63
pp. 1-8.
pp. 60-61.
p. 58.

Corporation set aside, vacated and declared null and void and of no effect.

10. The County Court Judge made certain findings of fact upon the evidence adduced, and no appeal having been taken by either of the Respondents from his decision on the facts to the Ontario Municipal Board pursuant to Section 84 of the Assessment Act R.S.O. (1937) Chap. 272, the said findings of fact became final and conclusive by virtue of Section 83 of the said Act.

p. 12, l. 45. **11.** None of the parties established before the said County Court Judge what proportion of the stock or shares in the Respondent Corporation was held by Roman Catholics, but it was established that the directors of the Respondent Corporation knew that some shares in the Respondent Corporation were held by Roman Catholics and others but they did not know what total percentage of the stock was held by Roman Catholics, and in fact did not inquire from their shareholders as to their religious faith; that they reasoned from a number of angles and made assessment comparisons and population comparisons but many, if not most of them, after the said notice in form "B" had been filed with the City Clerk; and finally, as expressly so found as a fact by the said County Court Judge, that the apportionment made by the directors was not based on actual knowledge and was only "a guess or an estimate".

p. 4, ll. 12-15. p. 12, ll. 22-26. p. 4, ll. 19-22. p. 12, ll. 35-38. p. 4, ll. 22-24. p. 12, ll. 42-44. p. 13, ll. 1-3.

12. The County Court Judge decided upon the true construction of the Statutes that the appeals of the now Respondents failed on the ground that they did not prove affirmatively that the portion of the Respondent Corporation's Local assessments rated and assessed in support of separate schools pursuant to the Resolution of the directors thereof aforesaid was no greater proportion of the whole of such assessments than that which the amount of the shares held by Roman Catholics bore to the whole amount of the shares, and that, the onus of proving this affirmatively was on the now Respondents; and on the further ground that conversely the onus was not upon the now Appellant to prove affirmatively that the portion of the Respondent Corporation's local assessments rated and assessed in support of Separate Schools pursuant to the Resolution of the directors thereof aforesaid was a greater proportion of the whole of such assessments than that which the amount of the shares held by Roman Catholics bore to the whole amount of the shares.

p. 13, ll. 10-25.

13. Section 85 of the said Assessment Act provides that an appeal from the County Court Judge shall lie to the Court of Appeal for Ontario "on a question of law or the construction of a statute", and the now Respondents pursuant thereto appealed to the Court of Appeal by Notice dated the 19th March 1938. On their request, and in conformity with the said section the County Court Judge on the said 19th March 1938 stated certain questions of law and of construction of statutes in the form

pp. 17-18. pp. 9-17.

of a Special Case for the said Court of Appeal, setting out therein his decision on the facts in evidence as well as his decision on the whole matter.

14. The Court of Appeal for Ontario, composed of, Middleton Masten and Fisher JJ.A. by Judgment delivered the 12th May 1938, allowed the appeals of the now Respondents with costs, holding that the said Section 65 ought if possible to be interpreted and applied so as to effectuate what was in the Court's view its manifest intention, viz. : to provide for an equitable apportionment of public and separate school taxes payable by companies having Roman Catholic shareholders who are supporters of separate schools; that the assessor is bound by the statute to apportion the assessment in accordance with any proper notice received by him from the Company; that the onus of displacing this apportionment rests on the attacking party; and that this onus had not been discharged by the now Appellant.

pp. 26-27.
pp. 18-26 ;
p. 26 ll. 1-16.

15. The Appellant by notice dated the 29th June 1938, appealed to the Supreme Court of Canada from this Judgment of the Court of Appeal. The appeal was argued on the 22nd and 23rd March 1939, before the Chief Justice, Sir Lyman Poore Duff, and Justices Rinfret, Crocket, Davis and Kerwin. On the 30th October 1939, reserved Judgment was delivered dismissing the appeal by a majority of three to two. The Chief Justice and Mr. Justice Davis dissented, and would have allowed the appeal and restored the Judgment of His Honour Judge Mahon.

pp. 28-29.
pp. 26-27.
pp. 50-51.
pp. 30-34.
pp. 34-44.

16. The Chief Justice held that sub-section 3 of the said Section 65 imposes a prohibition directed to the Respondent Corporation against designating for Separate School purposes a proportion of its land, business or other assessments greater than the proportion which the stock or shares held by Roman Catholics bears to the whole amount of its stock or shares; that the Respondent Corporation in so designating for Separate School purposes a proportion of its assessments is exercising a statutory authority bestowed upon it and is bound to act within the limits of the power conferred and conformably to the procedure laid down by the Statute; that the said section contemplates a notice given, and only given, after the ratepayer Corporation has ascertained as a fact that the proportion of its assessment directed to be applied for Separate School purposes is not greater than the proportion defined by the said sub-section 3; that unless that condition be fulfilled the Corporation cannot be said to be exercising the statutory power in conformity with the directions of the statute; and that in this case the statutory condition of a valid notice was not fulfilled.

p. 33, ll. 12-16.
p. 33, ll. 19-24.
p. 33, ll. 29-32.
p. 33, ll. 32-34.
p. 34, ll. 7-9.

17. Mr. Justice Davis held that the question of onus did not arise as all the available facts were frankly given to the tribunal of fact, the facts were found and there was no right to appeal thereon; and the

p. 37, ll. 14-17.

p. 37, ll. 22-24. County Court Judge was not, upon the whole evidence, judicially satisfied that eighteen per cent. was not a greater proportion than that permitted by the Statute and had indeed found as a fact that no one knew what the proportion was. He further held that if the question of onus, to which much of the argument had been addressed, were of importance, the onus would rest upon the party seeking the benefit of the special statutory provision.

p. 36, ll. 33-35. p. 37, ll. 12-14. p. 37, l. 37 p. 38, l. 21.

p. 38, ll. 22-38. He was unable to appreciate the contention that a company could by putting in an arbitrary figure without any actual knowledge of the facts cast upon those adversely affected thereby the burden of establishing the facts. 10

p. 39, l. 44 p. 40, l. 8. He also rejected the argument that the proportion of 18% selected by the Respondent Corporation was "a reasonable probability" put forward in good faith by the directors as a fair estimate, and that the statute should be so construed as to allow such a probability to stand as a satisfactory compliance with the Statute. He held that the language of the Statute is perfectly plain and that the Court cannot relieve itself of its duty to apply it; that there is nothing in the language that suggests a place for either an estimate or a guess; and that it is not for those seeking to take advantage of the special privilege of a Statute to say that they have given something just as satisfactory and reasonable as the exact conditions imposed by the Statute; they must clearly satisfy the conditions. He further expressed the view that to construe the Act, as the Court of Appeal had done, in the somewhat loose fashion of straining the words in order to achieve the intention of providing for an equitable apportionment in cases where the nature of the shareholding in a large corporation made it difficult to ascertain the religious beliefs of many of the shareholders, was inadmissible for this additional reason, that in the year 1936 the Ontario legislature, by Statute 1 Edw. VIII, Chaps. 4 and 42, had repealed the said Section 65 and enacted certain sections specially designed to provide for cases of complex shareholding of this and similar types, and had then in the following year (by Statute 1 Geo. VI, Chaps. 9 and 72) repealed the said special sections and re-enacted the said Section 65 in its original form.

p. 43, ll. 13-17. 20 p. 40, l. 30 p. 41, l. 40. p. 69, l. 20. p. 69, l. 24 p. 72, l. 36. 30 p. 72, l. 40 p. 74.

p. 43, l. 27 p. 44, l. 7. Mr. Justice Davis also dissented from the view of the Court of Appeal that adherence to the language of the Statute would render the Legislation ineffective, pointing out that a company, though it may not know all its Roman Catholic shareholders, can nevertheless to the extent that it ascertains them, take full advantage of the statutory authority. 40

p. 50, ll. 15-20. **18.** Mr. Justice Kerwin, with whom Mr. Justice Rinfret concurred, held that to give effect to what was, in his view, the legislative intention the proper construction of the Statute required the Court to hold that the Company's notice stands and is to be followed unless

displaced by evidence that the prohibition in sub-section (3) of the said Section 65 has been violated.

19. Mr. Justice Crocket, without giving separate reasons, expressed his agreement with the Court of Appeal for Ontario and with Mr. Justice Kerwin.

p. 34, ll. 21-24.

20. On the 9th May 1940, special leave was granted the Appellant by His Majesty in Council to appeal against the majority Judgment of the Supreme Court of Canada.

pp. 53-55.

21. The Appellant humbly submits that the respective Judgments 10 of the Court of Revision for the City of Windsor and of the County Court Judge and the views expressed by the Chief Justice and Mr. Justice Davis of the Supreme Court of Canada are correct, and that this appeal should be allowed for the following, amongst other

REASONS.

1. Because the Respondent Corporation cannot validly designate for Separate School purposes a greater proportion of its assessments than the proportion of its shares held by Roman Catholics.

2. Because there was no evidence that 18% was not greater 20 than the proportion of shares so held.

3. Because there is no reason to construe the Statute so as to substitute some other criterion for that expressly laid down thereby.

4. Because the onus lay upon the Respondent Corporation, which was seeking the benefit of a special statutory provision.

5. Because the onus cannot be shifted by the insertion in a notice of a figure selected by way of guess.

6. Because the onus was not discharged.

30 D. N. PRITT.

NORMAN L. SPENCER.

No. 28 of 1940.

In the Privy Council.

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— AND —

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Case for the Appellant.

LAWRENCE JONES & CO.,
Lloyd's Building,
Leadenhall Street, E.C.3.

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