29, 1941

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*).

FACTUM OF THE RESPONDENT, THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF WINDSOR

NORMAN L. SPENCER,	*Solicitor for the Appellant.*
GEORGE F. MACDONNELL, K.C.,	*Ottawa Agent for the Appellant.*
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.*

THE TRADERS PRINTING & STATIONERY COMPANY
9 Wellington Street West, Toronto, Canada

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(Appellant).

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NORMAN L. SPENCER,	*Solicitor for the Appellant.*
GEORGE F. MACDONNELL, K.C.,	*Ottawa Agent for the Appellant.*
BARTLET, AYLESWORTH & BRAID,	*Solicitors for the Respondent, Ford Motor Company of Canada Limited.*
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FACTUM OF THE RESPONDENT,
THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF WINDSOR

PART I.

This is an appeal by The Board of Education for the City of Windsor from the judgment of the Court of Appeal for Ontario, dated 12th day of May, 1938, allowing appeals by Ford Motor Company of Canada Limited and The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor from the judgment of His Honour G. F. Mahon, a judge of the County Court of the County of Essex, dated 19th day of March, 1938, on questions of law and the construction of Statutes which arose on appeals by the Ford Motor Company of Canada Limited and The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor to the said learned judge against the decision of the Court of Revision of the City of Windsor delivered 25th day of November, 1937, which questions of law and construction were stated in each of said appeals pursuant to Section 85 of The Assessment Act, Revised Statutes of Ontario (1937) Chapter 272, in the form of a special case for the said Court of Appeal, by His Honour G. F. Mahon, a judge of the County Court of the County of Essex, and dated 19th day of March, 1938. By the said judgment of the Court of Appeal for Ontario the judgment of the learned County Court Judge on the said questions of law and coustruction which

confirmed the decision of the said Court of Revision was reversed and the Court of Appeal answered all three questions in the negative, directing The Board of Education for the City of Windsor, the present Appellant, to pay the costs of the said Appellants. In the result it was declared that effect must be given to the notice given by Ford Motor Company of Canada Limited to the Clerk of the City of Windsor pursuant to Section 66 of The Separate Schools Act, Revised Statutes of Ontario (1937) Chapter 362 requiring 18% of the land, business and other assessments of the said corporation made under The Assessment Act, which for the year 1938 aggregated $5,973,360.00, to be entered, rated and assessed for the purposes of separate schools in the City of Windsor.

A resolution was passed by the Directors of Ford Motor Company of Canada Limited on 27th day of July, 1937 instructing its secretary to forward to the Clerk of the City of Windsor a Notice, Form B, requesting that 18% of its land, business and other assessments in the municipality be entered, rated and assessed for separate schools purposes. In pursuance of the said instructions the secretary of the Corporation did forward a notice, Form B, pursuant to Section 66 of The Separate Schools Act, Revised Statutes of Ontario (1937) Chapter 362, under date of 29th day of July, 1937, to the Clerk of the City of Windsor, attached to which was a certified copy of the said resolution of the Corporation's Board of Directors. (Exhibit 3, case p. 17). The Assessor made his assessment and apportioned the above mentioned percentage of the Corporation's assessment in support of the Separate Schools, entering the Corporation both as a Separate School supporter and a Public School supporter, in accordance with the notice.

By Notice of Appeal dated 30th day of September, 1937, which appears as Exhibit 4 (case p. 18), the present Appellant appealed to the Court of Revision for the City of Windsor against the assessment made by the Assessor in pursuance of the notice given by the Corporation. The Court of Revision allowed the appeal, and both the present Respondents, by separate Notices of Appeal, appealed therefrom to the County Court Judge. (Exhibits 1 and 2—case pp. 21 and 22). The County Court Judge dismissed both appeals but stated the hereinbefore mentioned case in each of the appeals for the Court of Appeal of Ontario upon which the present Respondents, by Notice of Appeal dated 19th day of March, 1938 (case p. 11) appealed accordingly, and their appeals were allowed with costs. (See judgment of Court of Appeal, case p. 32).

The important facts brought out in the evidence and as found in the stated case are as follows: The Corporation was incorporated under the Dominion Companies Act; has 1,658,960 shares of common stock and no preferred shares; that there were shares held by companies; that as of November 28th, 1936, the shares were held in 32 countries; that as of November 27th, 1937, the shares were held in 34 countries; that in Canada and the United States 1,500,000 shares are held; that the company cannot get the shareholders to reply to communications as to religion and school

taxes; that the company has difficulty in getting many of its dividend cheques into the hands of those entitled; that they lately had about 100 letters containing dividend cheques returned to them; that there is, on the average, about 20,000 different shareholders; that all the company's shares of stock are not voting shares; that voting shares are not as widely distributed; that, on the average, about 19% of proxies are returned, that voting shares are held in 16 different countries; that a number of outstanding shares are held in names of brokers; that between September 1936 and November 1937 the company's records indicate that the average number of shares held by brokers was 195,000; that the company has transfer agencies in Montreal, Toronto, Detroit and New York; that the number of shares changing ownership, according to records of stock exchanges, exceed by 9,500 monthly the number of shares presented for transfer on the books of the company; that in the year 1937 there were 665,874 shares of stock transferred on the books of the company; that the directors knew that all the stock of the company was not held by shareholders of the Roman Catholic faith and that shares were held by both Roman Catholics and others but did not know and could not ascertain what total percentage of the stock was held by Roman Catholics; that it was a practical impossibility to ascertain definitely what percentage of the shares were held by Roman Catholics and in fact the directors did not inquire from the shareholders as to their religious faith; that the Board consisted of five directors of whom one was a Roman Catholic which director was absent from the meeting adopting the resolution. The directors, in making the apportionment they did, acted in good faith and with every desire to be fair, and in adopting the resolution believed from such information as was available to them that the apportionment made to separate schools by the resolution they adopted was a percentage of the Corporation's local assessment no greater than the percentage of its shares held by Roman Catholics.

PART II.

The points in issue as raised by the present Appellant before all Courts below are:

1. The onus is upon the party assessed to prove affirmatively that the portion of its assessment assessed in support of Separate Schools does not bear a greater proportion to the whole of its assessment than the amount of its share held by Roman Catholics bears to the whole amount of its shares, therefore the onus of proving the alleged non-compliance with and non-conformity to the Statute was not on the party appealing against the assessment (The Board of Education for the City of Windsor).

The Respondent submits that the onus of proving its complaint against the assessment rested upon the Appellant. Pursuant to the Statute, the Assessor entered Ford Motor Company of Canada Limited as a Separate School supporter on the assessment roll; the roll was returned by him; the

apportionment of 18% of the assessment of Ford Motor Company of Canada Limited for school purposes to the Separate Schools was complete, and successfully to challenge the roll as returned the Appellant was required to establish that the percentage was erroneous.

The issue was one of fact, and to amend the roll and displace the taxpayer's prima facie right of apportionment of part of its assessment in support of Separate Schools, the Appellant was required to prove the fact it alleged, namely, that the proportion mentioned in the Statute, in fact, had been exceeded.

2. The Corporation (Ford Motor Company of Canada Limited) did not comply with or conform to the provisions of Section 66 of The Separate Schools Act, Revised Statutes of Ontario (1937) Chapter 322. (See Appellant's Notice of Appeal to the Court of Revision, Exhibit 4, case p. 18).

The Respondent submits that the resolution adopted by the Board of Directors of Ford Motor Company of Canada Limited was adopted bona fide with due care, and affords adequate prima facie evidence of the correctness and validity of the notice it gave to the Assessor pursuant thereto.

The Respondent, the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor, accepts the conclusions of law of the Court of Appeal, both as to the interpretation of the Statutes and as to the question of onus or burden of proof, and adopts the reasoning of the said Court in support of these conclusions.

PART III.

The history of legislation and the very wording of the section of The Separate Schools Act under review amply demonstrate the intention impelling its enactment. Previous to Confederation, legislation had existed in the Canadas affording machinery and protection for the separate education of religious minorities, both Protestant and Roman Catholic. By 1886 the increasingly popular form of business control known as Joint Stock Corporations had become an important tax source, and by 49 Victoria, Chapter 46, Section 53 of that year there was enacted in Ontario the antecedent of the present Section 66 of The Separate Schools Act. This enactment of 1886 for the first time provided, in substance, for the apportionment of the assessments of corporations for school purposes between public and separate schools. Its provisions differed from the present section in one important particular, namely, that the portion of assessments in support of separate schools should bear "the same ratio and proportion" to the whole of the corporation's assessments as the shares held by Roman Catholics bore to the whole of the shares of the corporation. By 4 Edward VII (1904) Chapter 24, Section 6, the section was changed so as to include the new assessment then introduced with respect to cor-

porations, namely—business assessment. In 1913 (3-4 George V, Chapter 71, Section 66) the section was given its modern form whereby the portion of assessments of a corporation, which by it might be allocated in support of separate schools, was stipulated as being "no greater than" (instead of the same as) the proportion which the shares of the corporation held by Roman Catholics bore to the whole of the corporation's shares. The Statute in this regard is identical with the present Statute.

Respondent submits that the purpose intended in this legislation throughout has been to provide for an equitable apportionment of the school taxes payable by corporations, where some of the shareholders are members of the Roman Catholic faith, each successive amendment clearly supporting that intention by bringing the legislation into conformity with changing conditions as they pertained to corporations. The interpretation to be given to the Statute ought, therefore, if possible, to be such as to render it effective to accomplish the purpose intended. To interpret the section as sought by the Appellant is effectively to prevent such accomplishment.

Regina v. Gratton (1915, 50 Supreme Court Reports p. 589) is not in conflict with but on the facts is distinguishable from the case at bar. In that case the Saskatchewan statute may have been modelled on the Ontario statute as it then was (prior to Ontario 3-4 George V, Chapter 71, Section 66). In any event, the Saskatchewan statute (Section 93) provided that the portion of school taxes to be rated in support of separate schools should be the identical proportion which the shares held by Roman Catholics bore to the total shares of the corporation. This is in contrast with the Ontario statute as amended in 1913 and as applicable to the case at bar. There was no proof before the Court in the Saskatchewan case that there were any Roman Catholic shareholders in the companies involved, nor was any question raised as to which party bore the onus or burden of proof.

On the facts in the case at bar a presumption is raised in favour of the regularity and propriety of the proceedings taken by the Respondent (Ford Motor Company of Canada Limited) and the Appellant has failed to show the course taken by the corporation to be unwarranted. Re: Goderich Roman Catholic School Trustees and the Town of Goderich (1922) 53, O.L.R. 79.

The Appellant in attacking the assessment of the Respondent corporation was and is in no different position from any other appellant in an assessment appeal. By statute, Appellant is subject to the identical procedure applying in other assessment appeals, and is subject to the general rule of evidence that "he who avers must prove." See Assessment Act, R.S.O. (1927) Chapter 238, Sections 32 and 77(2) (now R.S.O. 1937, Chapter 272, Sections 31 and 78(2)).

The only complaint with respect to the assessment attacked by the Appellant was that the assessment of the Respondent corporation in support of separate schools was greater than the proportion its shares held by

Roman Catholics bore to the whole of its shares. This was a question of fact, and without proof of the fact, Appellant was not entitled to succeed. The onus rested upon it and was not discharged. See Anderson Logging Company v. The King, 1925, Canada Law Reports, p. 45 at p. 50 (discussion of "onus" in assessment appeals).

ARMAND RACINE, K.C.,
Of Counsel for the Respondent,
The Board of Trustees of the
Roman Catholic Separate Schools
for the City of Windsor.

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