Privy Council Appeal No. 28 of 1940

The Board of Education for the City of Windsor - - *Appellant*

v.

Ford Motor Company of Canada Limited and others *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JULY, 1941

Present at the Hearing:

THE LORD CHANCELLOR
LORD ATKIN
LORD THANKERTON
LORD RUSSELL OF KILLOWEN
LORD ROMER

[*Delivered by* LORD ATKIN]

This is an appeal from a judgment of the Supreme Court of Canada who by a majority affirmed a unanimous decision of the Court of Appeal of Ontario reversing a decision of the judge of the County Court of the County of Essex, Ontario, dismissing an appeal from the Court of Revision of the City of Windsor on a complaint by the present appellant against an assessment of the respondent company for separate school purposes. The proceedings before the Court of Appeal arose on a case stated by the County Court Judge which raised specific questions of law. The learned Judge's findings of fact are final. The dispute between the parties arises upon the statutory provisions made in Ontario for the raising of revenue for the purposes of education. Individuals and corporations alike are liable to be assessed and rated on their property in a municipality for educational purposes. In the absence of some action taken by the persons so assessed they will be rated for public school purposes. But any individual liable to be assessed may claim to be assessed as a supporter of separate schools, which for the present purpose may be taken to mean Roman Catholic schools, in which case his property will be entered in a separate assessment roll, and he will then be rated by a Board of Trustees for such separate schools in accordance with the requirements of such Board. But it has been found desirable to extend this separation of assessments to the case of corporations who may include amongst their shareholders members who are Roman Catholics. The present statutory provision in this respect is found in Section 66 of the Separate Schools Act, R. S. Ont., 1937, c. 362.

> " 66.—(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 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 accordingly 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 assessments 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 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, 1937, c. 72, s. 57 (1), part."

The important question raised on the appeal is upon whom does the onus rest of proving that the part of the company's assessment allocated by the company's notice to separate schools does not bear a greater proportion to the whole of the assessment 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 as found in the case stated the Ford Motor Company of Canada on July 27, 1937, passed a resolution to give the statutory notice requiring that 18 per cent. of its assessment in the City of Windsor be entered, rated and assessed for separate school purposes. The assessor acted on the notice and the company were accordingly assessed in the roll of separate school supporters for 18 per cent. of their total assessment, viz. $1,075,200 out of a total of $5,933,360. On September 30, 1937, the Board of Education for the City of Windsor (the present appellant) appealed to the Court of Revision for the City against the assessments for separate school purposes of 23 companies of whom the respondent company are one. The Court of Revision by a majority allowed the appeal, holding that not only was no effort made by the company to ascertain the number of shares held by Roman Catholics but the corporation had no knowledge of the proportion of shares held by Roman Catholics. The present respondents appealed to the County Court Judge. He heard evidence on both sides: and in particular heard the evidence of Mr. Greig, the secretary of the company. It is unnecessary to repeat it. The Judge found as a fact that the directors in making the apportionment they did, acted in good faith and with every desire to be fair: but that the division they made was not based on actual knowledge but was only a guess or an estimate. There was ample evidence to sustain this finding of fact: but the substance of the Judge's decision was that the appeal should be dismissed on the ground that the appellants (i.e., the present respondents) had failed to prove before him affirmatively that the portion of the company's local assessment rated and assessed in support of separate schools pursuant to the resolution of the directors was no greater proportion of 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 the onus of proving this affirmatively was on those parties defending the assessment. In stating the special case the Judge propounded the following questions for the opinion of the court:—

" 1. Upon the facts above set out and upon the true construction of the Statutes as applied to the facts, was I right in holding that upon an appeal by a ratepayer affected by the Notice ' B,' given by

the Corporation and the assessment, rating and enrollment made thereunder, the onus is upon the Corporation to establish the fact that the share or proportion of its land, business or other assessments as set out in its requisition (Form B) does not bear a greater proportion to the whole of its assessments than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares.

" 2. Upon the facts above set out and upon the true construction of the Statutes as applied to the facts, was I right in holding that upon an appeal by a ratepayer affected by the Notice ' B ' given by the Corporation and the assessment, rating and enrollment made thereunder, the onus is not upon the ratepayer attacking the assessment to establish affirmatively the fact that the share or proportion of the Corporation's land, business or other assessments as set out in its requisition (Form B) bears a greater proportion to the whole of its assessments than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares.

" 3. Upon the facts above set out and upon the true construction of the statutes as applied to the facts so stated, was I right in holding that the Appeals of Ford Motor Company of Canada Limited and of the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor, should be dismissed, the decision of the Court of Revision sustained and the Notice, Form B, delivered by Ford Motor Company of Canada Limited set aside, vacated and declared null and void and of no effect and that all the assessments of the Company in the City of Windsor be assessed, enrolled and rated for Public School purposes, unless it was affirmatively proved before me that the share or proportion of the Corporation's land, business or other assessment as set out in its requisition (Form B) did not bear a greater proportion to the whole of its assessment than the amount of the stock or shares held by Roman Catholics bore to the whole amount of the stock or shares.

The Court of Appeal of Ontario answered all three questions in the negative and allowed the appeal. The Supreme Court by a majority Rinfret, Crocket and Kerwin JJ. dismissed the appeal to that court, agreeing that all three questions should be answered in the negative. Duff, C.J., and Davis J. thought it only necessary to deal with the third question which they would have answered in the affirmative, and as a consequence they would have allowed the appeal.

It is not in their Lordships' opinion possible to isolate the third question from the two preceding. Having formulated two general questions raising the issue of onus, the learned Judge propounds a further question the substance of which is whether assuming that he was right in answering the two first questions in the affirmative he was right in applying those answers to the present facts and holding that the company and the Board of Trustees had not affirmatively proved before him that the required apportionment was within the statute. Both the Chief Justice and Davis J. appear to decide that the onus is in fact on the company to support the validity of its notice: and if this is right there seems no good reason for not answering the first two questions in the same sense.

In dealing with the issues raised in the case their Lordships have not derived much assistance from previous decisions or statutes dealing with similar topics but making different provisions: nor have they found it necessary to take into account the previous legislation in Ontario on the subject, with the short-lived change that was made in 1936. It seems the right course in the circumstances to confine themselves to the construction of the actual statute before them.

Their Lordships have come to the conclusion that all three questions should be answered in the affirmative. It is common ground in all the judgments that the normal course of assessment and rating for educational purposes is that the ratepayer is rated for public schools purposes. A statutory exception is made in favour of separate schools: but in order to avail themselves of the statutory protection consisting of immunity from the ordinary liability and subjection to the extraordinary, the supporters of separate schools must establish their right to the statutory privilege. This appears the more obvious because difficult as it may

be to establish the facts defining the privilege, the facts such as they are are entirely within the knowledge or means of knowledge of those claiming the privilege and not at all within the knowledge or means of knowledge of those responsible for the public schools. But the difficulties such as they are, are not as great as stated by the Court of Appeal and the majority of the Supreme Court, consideration of which seems to have influenced their final decision. Before 1913 a company in the statutory provisions corresponding to section 66 could only give a notice of apportionment which corresponded exactly to, " bore the same ratio " as the number of shares held by Roman Catholics bore to the whole amount of shares in the company. This clearly involved ascertaining at some time the precise number of shares held by Roman Catholics: and in the case of large companies whose shares are held throughout the world, must have involved an impossible task. The present provision as it has been since 1913 is that the required apportionment to separate schools must not be of a greater proportion than Roman Catholic shares bear to the total share capital. It is true that the statutory apportionment has still to be measured by a given ratio and that the smaller figure must be ascertained in order to ensure that the statutory apportionment is no greater than it. But under the present code the smaller figure need by no means represent the exact figure of Roman Catholic shareholders. The total may be ~~made~~ much larger: all that is required is proof that at least the smaller figure represents accurately a Roman Catholic shareholding. The company is not bound to apportion up to even a well-ascertained figure. They may decide to give less than the ascertained figure: and without knowing what the precise numbers are they may be able to know and, if called on, to prove that the minimum figure is at least x: and that their apportionment in favour of separate schools is no greater than x. There need be no difficulty in ascertaining this minimum figure. Some holdings may be known to be of Roman Catholics: these at least form a measure of the desired ratio. There may also be facts from which the reasonable inference is that some holdings in excess of those actually known would be of Roman Catholics; e.g., having ascertained 5 per cent. it may be easy to support an inference that at any rate there are say 2 per cent. more. In this connection it must be remembered that we are within the realm of legal proof, which does not require certainty but such a measure of probability derived from ascertained facts as to entitle the judicial mind reasonably to infer the fact in issue. With respect therefore it was inaccurate as in the judgment of the Court of Appeal to suggest that the contention of the Board of Education assumed that it was a *sine qua non* that the companies should state positively and absolutely the exact percentage of their shareholders who are Roman Catholics: and as in the judgment of Kerwin J. to say that the construction of the statute suggested on behalf of the then appellants required the company to do the very same thing as in the legislation prior to 1913 viz. ascertain the precise ratio of the holdings of Roman Catholics. As has been pointed out all that is required is that the Company should prove at least a minimum figure of Roman Catholic holdings, and that the ratio required by the notice does not exceed the proportion of holdings measured by that figure. Two other matters raised in the excellent argument of Mr. Gahan for the respondents require short notice. It was urged that the provisions of ss. 4 of section 66 have the effect of making the directors' notice valid unless at least it is proved to be invalid. But this construction of the subsection would lead to impossible results. The notice, says the subsection, is sufficient and remains in force until withdrawn, varied or cancelled by another notice of the Company. If this were literally construed no appeal against an invalid notice would be of any avail until the directors chose to correct their mistake. But the right of appeal is conceded with the consequence that the notice may be found to be invalid for requiring too great a proportion. Subsection 4 will not avail. The subsection can only affect the notice until challenged on appeal: and it appears to have no bearing on the question of onus on such appeal, which is determined by the considerations already stated.

The other question raised in argument was whether there existed any powers of amending an assessment by reference to the true ratio when ascertained. The answer would appear to be that the apportionment must be the result of the company's own determination as provided by subsection 1. It by no means follows that if for instance the company decided upon a 15 per cent. apportionment on the footing that 15 per cent. was the proportion of Roman Catholic shareholders that they would make an apportionment of 10 per cent. if that were discovered to be the true figure. They might or they might not: but it would be for them to decide. The appeal tribunals could not make the necessary apportionment. The company would have to make a fresh apportionment and give a fresh notice. Whether this could be done in time to make an effective apportionment for the year of assessment in dispute was not discussed: and is not therefore considered.

The Chief Justice struck at the notice at an earlier stage than would appear to have been under discussion before the County Court Judge. He considered that the statute contemplated a notice only given after the company has ascertained as a fact that the apportionment is not greater than the proportion defined by the statute: and that in the present case the company had not before them any substantial foundation for the conclusion of fact which was the essential condition of a valid notice. This makes the ascertainment by the company of the statutory proportion a condition precedent to the validity of their notice. It is an attractive proposition and like all opinions expressed by the Chief Justice demands careful consideration. It appears however to be weakened by the apparent concession at the end of the judgment that it would still be open to the company before the ~~Revenue~~ Court to establish that the statutory conditions did in fact exist, which brings us back again to the question of onus. On the whole their Lordships feel bound to decide the case solely by reference to the question put in the special case. They will humbly advise His Majesty that the appeal be allowed: that the orders of the Court of Appeal be set aside and that it be ordered that the answers to questions 1, 2 and 3 should be in the affirmative. The respondents must pay the costs of the appeals to the Court of Appeal, and to the Supreme Court. As regards, however, the costs of the appeal to His Majesty in Council, in accordance with the terms of the Order in Council granting special leave to appeal one set of the respondents' costs must be paid by the appellant.

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In the Privy Council

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DELIVERED BY

LORD ATKIN

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