No. 158 of 1928.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF CANADA

IN THE MATTER OF A PETITION OF RIGHT.

BETWEEN:

THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR SCHOOL SECTION NUMBER TWO IN THE TOWNSHIP OF TINY AND THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF PETERBOROUGH ON BEHALF OF THEMSELVES AND ALL OTHER BOARDS OF TRUSTEES OF ROMAN CATHOLIC SEPARATE SCHOOLS OF THE PROVINCE OF ONTARIO.

(*Suppliants*) Appellants.

—AND—

HIS MAJESTY THE KING

(*Respondent*) Respondent.

CASE FOR THE RESPONDENT

1. This is an appeal by leave from a judgment of the Supreme Court of Canada pronounced on October 10, 1927, affirming the judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario dated December 23, 1926, which affirmed the judgment after trial of the Honourable Mr. Justice Rose pronounced on May 13, 1926, dismissing the appellants Petition of Right.

2. The questions involved in the Petition are whether the appellants or any class of persons they represent had by law at Confederation in 1867, rights and privileges with respect to their denominational schools which render invalid (by virtue of subsection 1 of section 93 of the British North America Act), certain Ontario Statutes and regulations in relation to education.

3. Section 93 of the British North America Act is 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 person 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.

3. Where in any Province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie 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 Queen's subjects in relation to education.

4. In case any such Provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section."

4. This section has been considered by the Judicial Committee in the following cases:

Maher v. Portland (1874), Wheeler's Confederation Law of Canada, 338, 367;

City of Winnipeg v. Barrett, 1892, A.C. 445;
Brophy v. A. G. of Manitoba, 1895, A.C. 202, 216-218;
Ottawa Separate Schools v. Mackell, 1917, A.C. 62, 69, 71, 74;
Ottawa Separate School Trustees v. Ottawa Corporation, 1917, A.C. 76.
Ottawa Separate School Trustees v. Quebec Bank, 1920, A.C. 230.

5. The rights which the appellants claim by their petition to be secured to them by provision one of section 93 and to be prejudicially affected by the statutes and regulations which they allege are *ultra vires* are briefly:

(a) A right of the trustees of every separate school board in their uncontrollable discretion to give such instruction and maintain such courses of study and grades of education in the Roman Catholic Separate Schools under their charge, including if desired the courses of study and grades of education now conducted in the Continuation schools, High Schools and Collegiate Institutes of the Province.

(b) A right of the supporters of separate schools to exemption from all rates imposed for the support of common schools, which the appellants contend include all rates imposed for the support of Continuation Schools, High Schools and Collegiate Institutes in the Province not conducted by themselves.

(c) A right of each separate school to an arithmetical share of all legislative grants for the support of common schools or for common school purposes (including all grants for the support or purposes of the secondary schools aforesaid) on the basis of the average attendance of pupils at such separate school as compared with the whole average number of pupils attending school in the same municipality.

6. The first suppliant, being a rural board, also asks for judgment for the difference between the amount awarded to it under the legislative grant for the year 1922 and the amount it claims it would have received under the statutes in force at Confederation. The details are given in paragraphs 16 to 23 of the petition. No similar claim is made by the suppliants, the urban separate school Board of the City of Peterboro.

7. The school law in force in Upper Canada at Confederation relating to Roman Catholic separate schools was contained in an Act of the Parliament of Canada passed in 1863 (26 Vict. cap. 5) and entitled "An Act to restore to Roman Catholics in Upper Canada certain rights in respect of separate schools," and in an Act of the said Parliament entitled "The Upper Canada Common School Act" (C.S.U.C. cap. 64) and in any regulations of the Council of Public Instruction for Upper Canada made pursuant to these enactments and applicable to separate schools. The law relating to Grammar Schools in Upper Canada was contained in an Act respecting Grammar Schools (C.S.U.C. cap. 63) as amended by an Act of the Parliament of Canada passed in 1865 (29 Vict. cap. 23) and in regulations made by the Council as thereby provided. Appendix of Statutes, p. 120. p. 80. p. 71. p. 125.

8. The Separate Schools Act of 1863 (26 Vict. cap. 5) hereinafter referred to as the Act of 1863 which recites that "it is just and proper to bring the provisions of the law respecting separate schools more in harmony with the provisions of the law respecting common schools" repealed all the sections of the Consolidated Act respecting separate schools (C.S.U.C. 1859 cap. 65) which related to separate schools for Roman Catholics (secs. 18 to 36 inc.), which had been consolidated from the provisions of an Act relating to separate schools for Roman Catholics passed in 1855 (18 Vict. cap. 131) and commonly known as The Taché Act. The important differences between the Act of 1863 and the consolidated statute are pointed out in the judgment of the Hon. Mr. Justice Rose. p. 114 p. 67. Record, p.192 l. 15 et. seq.

9. The material provisions of the Act of 1863 are contained in sections 7, 9, 13, 14, 20, 22, 23 and 26.

10. Section 20 on which the appellants found their claim to a share of all legislative grants for common school purposes reads:

"Every Separate School shall be entitled to a share in the fund annually granted by the Legislature of this Province for the support of Common Schools, and shall be entitled also to a share in all other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the Province or the Municipal authorities, according to the average number of pupils attending such

school during the twelve preceding months, or during the number of months which may have elapsed from the establishment of a new Separate School, as compared with the whole average number of pupils attending School in the same City, Town, Village or Township."

11. The duty of the Chief Superintendent with respect to the apportionment of all legislative grants for the support of common schools is defined by section 106 (1) as follows:

"106. It shall be the dutyof the Chief Superintendent of Education, and he is hereby empowered,—

1. To apportion annually, on or before the first day of May, all moneys granted or provided by the Legislature for the support of Common Schools in Upper Canada, and not otherwise appropriated by law to the several Counties, Townships, Cities, Towns and Incorporated Villages according to the ratio of population in each, as compared with the whole population of Upper Canada; but when the census or returns upon which such an apportionment is to be made, are so far defective in respect of any County, Township, City, Town or Village as to render it impracticable for the Chief Superintendent to ascertain therefrom the share of school moneys which ought to be so apportioned, he shall make the apportionment according to the ratio in which by the best evidence in his power, the same can be most fairly and equitably made: 13, 14, V. c. 48, s. 35, No. 1."

12. Section 26 of the Act of 1863 enacts as follows:

"26. The Roman Catholic Separate Schools (with their Registers), shall be subject to such inspection as may be directed from time to time by the Chief Superintendent of Education, and shall be subject also, to such regulations, as may be imposed, from time to time, by the Council of Public Instruction for Upper Canada."

Appendix of Statutes, p. 84:96.

13. The most important powers and duties of trustees of common schools at Confederation will be found in sections 27 and 79 of the Common Schools Act of Upper Canada (C.S.U.C. 1859 cap. 64); the duties of the local Superintendent in section 91; and the principal duties and powers of the Chief Superintendent of Education for Upper Canada are defined by section 106 of that Act. The local superintendent of the County, with the Grammar School trustees, constituted the County Board of Instruction (ib. secs. 94 and 95) who examined and gave certificates of qualification to the teachers of common schools in the County (ib. sec. 98 (4)).

p. 100.

p. 104.

p. 102.

p. 131, 132.

14. The name "Common school" was changed to "Public school" in 1871 and the name "Grammar school" to "High school" (34 Vic. cap. 33, ss. 1 and 34). The High schools of Ontario have taken the place of the Grammar schools of the late Province of Upper Canada as the schools of secondary education in the higher branches intermediate between the subjects taught in the public schools and the work of the universities.

15. Continuation schools are new secondary schools created by the Legislature to do some of the secondary work of the old grammar schools. They were established in order that pupils in rural and in small urban districts might conveniently obtain two or more years of high school training in their own locality.

16. The supreme authority over education in Upper Canada at Confederation was the Council of Public Instruction, consisting of nine persons appointed by the Governor (sec. 114), of which the Chief Superintendent was a permanent member. The Council, which was established by the Common Schools Act of 1850 (13-14 Vic. cap. 48, sec. 36) was empowered by section 119 (4) of the Act of 1859 p. 107.

> "to make such regulations from time to time, as it deems expedient, for the organization, government and discipline of Common Schools, for the classification of Schools and Teachers, and for School Libraries throughout Upper Canada."

17. In 1876 all the powers and duties of the Council of Public Instruction were transferred to a department of the Prov ncial Government called the Department of Education; and all powers, duties and functions of the Chief Superintendent of Education were transferred to the Minister of Education for the Province. (39 Vic. cap. 16, sec. 1.) p. 135.

18. Compulsory school attendance was introduced into Ontario in 1871, (34 Vic. cap. 33, sec. 3) but it was not obligatory to attend a Common School or a Separate School. It was sufficient if the child attended some school or was "otherwise educated." The law is still to the same effect. The School Attendance Act, 1919, (cap. 77) provides that it is sufficient if the child is under efficient instruction. The legislation and regulations in question in this proceeding affect only the schools that are supported by public taxation supplemented by legislative grants; and do not affect private or other voluntary schools. p. 132.

19. The Petition was heard at Toronto before the Honourable Mr. Justice Rose, and was dismissed. Mr. Justice Rose carefully traced the course of legislation in respect to Common Schools, Separate Schools, and Grammar Schools, from the year 1816, and he referred to the more important official reports, circulars, instructions and regulations. He was of opinion that the right of Separate School Trustees under Section 20 of the Act of 1863 was to share in any unappropriated grants for Common School purposes which fell to be apportioned under Section 106 of the Common Schools Act, 1859; that the grants in question were "appropriated by law" within the meaning of Section 106; that there was no proof that the impeached Legislation prejudicially effected the alleged rights under Section 20; and that the Section in any event applied only to grants made by the late Province of Canada. Record, p. 178-193. p. 193-199.

The learned trial Judge was also of the opinion that the Trustees of Separate Schools had at Confederation no right by law to teach the courses of study now maintained in High Schoo s, Collegiate Institutes, and Continuation Schools, but were bound to obey any regulations with reference to instruction in the schools that the Council of Public In truction might pass. The mere

fact that pupils of 21 years of age were allowed to attend rural common schools did not give the trustees a right by law to give whatever instruction persons of that age might happen to require, nor did the power vested in urban trustees to determine the "kind and description" of schools under section 79, (8), of the Common Schools Act, 1859, give them the right to impart such instruction as they might determine. He held that the educational system of Upper Canada was established at Confederation by Statutes, regulations, and official programmes of studies, the Grammar Schools being Intermediate Schools; and that the present system of Secondary Schools fills the place of the former Grammar Schools, and are not "Common Schools" as understood at Confederation.

p. 226. 20. The suppliants appealed to the Appellate Division. The appeal was heard by Mulock, C.J.O., Magee, J.A., Hodgins, J.A., Ferguson, J.A., and Grant, J.A., who unanimously dismissed the appeal.

The Chief Justice of Ontario was of opinion that the annual grants referred to in section 20 of the Act of 1863 were grants for division among all common schools generally and not grants of a specific character and that the general and special grants in question were "appropriated by law" and could only be shared in by Separate Schools if they complied with prescribed conditions applicable to Public and Separate Schools alike.

The learned Chief Justice of Ontario was also of opinion that trustees of common schools did not have at Confederation—an uncontrollable right to determine the courses of instruction, but were bound to conduct education in the schools in accordance with prescribed regulations and that the like duty rested on trustees of Separate Schools. He held that Continuation Schools, High Schools and Collegiate Institutes as now established are not "Common Schools" as such schools existed at the Union. He pointed out that there were fundamental differences in Upper Canada between Common Schools and Grammar Schools, e.g., in the appointment of trustees, the territorial limits of their trustees' jurisdiction and the education to be given. He reached the conclusion that trustees of Common and Separate Schools did not at Confederation have the legal right to conduct the courses of study now given in the Secondary Schools of Ontario.

pp. 232, 241 Mr. Justice Magee and Mr. Justice Ferguson expressed their concurrence in the reasoning and findings of the learned trial judge.

p. 232. Mr. Justice Hodgins also expressed concurrence in the reasoning and conclusions of Mr. Justice Rose, but he added some further observations pointing out that it was never intended to permit Separate Schools to cut loose from the system of elementary education or to set up a new kind of school. Separate Schools were to be part of the Common School system and were to advance or recede uniformly with Common Schools with respect to the education to be given therein. He held that the rights in respect of denominational schools generally speaking were the establishment and conduct of them by and under the immediate supervision of the Church which desired them, either in Quebec

or Ontario, subject to regulations made pursuant to statute law. Rights and privileges in such schools, so far as they were "in relation to education" (as carried on by them) if affected were to be dealt with by the legislatures of the provinces subject to appeal, not to the Courts, but to the Federal authority, which was to correct any infringement of these rights and privileges. These belonged not to a denomination as the creator and guardian of Separate Schools but to the schools themselves as part of a system of education. He said he could not imagine "a more chaotic system of education" than would result if the suppliants' claims were allowed.

10 Mr. Justice Grant reached the same conclusion as the other members of the Court. He was of opinion that the rights or privileges respecting "Denominational Schools" were to have the schools managed by their own trustees with their children being taught together by qualified teachers of their own faith, using only authorized text books and being subject to the central regulating power; and to have denominationl teaching. In their teaching and management, atmosphere and environment the schools were denominational but the education would be what the legislature or the central authority might from time to time determine. p. 241.

The appellants further appealed to the Supreme Court of Canada. The 20 Chief Justice of Canada and Mr. Justice Rinfret concurred in a judgment to allow the appeal upon conclusions favourable to the appellants on all the questions involved. Mr. Justice Mignault accepted the judgment of the Chief Justice as to the claims to give in separate schools the education now given in the secondary schools and to exemption from taxation for the support of such schools; but he was unable to agree in the opinion that the Act of 1863 applies to special grants or grants for particular purposes of the province.

Mr. Justice Duff and Mr. Justice Newcombe and Mr. Justice Lamont delivered judgments dismissing all the claims of the Appellants and affirming the judgments of the Ontario Courts. Their several conclusions may be briefly indicated as follows:

30 Chief Justice Anglin (Rinfret J. concurring) was of opinion that the legislation at Confederation conferred on all Separate School Trustees as an incident to the management and control of the schools, the right to determine the subjects of instruction in and the grading of the schools; that the Council of Public Instruction was not empowered to curtail courses of study, or to determine the extent of education; that in the selection of text books the discretion of the Trustees was untramelled by Section 26 of the Act of 1863; that Grammar Schools were select classical schools; and that the High Schools took over the work done in the more advanced pre-Confederation Common Schools which had the right by law to provide the secondary education requisite to enable 40 pupils to matriculate and enter the study of the learned professions; that "Common Schools" as used under Section 14 of the Act of 1863 conferring exemption from taxation includes these Secondary Schools; and that the expression "The Province" as used in Section 20 is not limited to the late Province of Canada. He further held that to exclude the suppliants from a pp. 378-403.

right to share on the basis conferred by Section 20 in any grants made to particular schools, and in grants made subject to conditions, would defeat the intention of the legislation of 1863 to put Separate Schools on a footing of absolute equality with Common Schools in regard to all grants legislative or municipal. He was of opinion that the words "not otherwise appropriated by law" presented no difficulty because the Act of 1863 was subsequent legislation, and therefore prevailed over Section 106 of the Act of 1859.

)p. 419-423. Mr. Justice Mignault while accepting the judgment of the Chief Justice on the two questions above mentioned, was of opinion that the legislative grant from which the Chief Superintendent paid the separate school was a general grant for the support of common schools; and that a special grant would be "otherwise appropriated by law," and would not be dealt with in his apportionment.

)p. 403-419. Mr. Justice Duff would dismiss the Appeal. His conclusions were that the Council of Public Instruction was empowered by Section 119 of the Common Schools Act of 1859, and Section 26 of the Act of 1863 to regulate in Separate Schools the branches of instruction to be given and the text books to be used; that this authority was not restricted by other enactments such as those relied on by the Appellants; that in the light of clause 16 of Section 79, clause 8 of that Section, and clause 4 of Section 119 are not conflicting but are complementary enactments; that School Trustees in performing their duty under Clause 8 were subordinate to the paramount jurisdiction of the Council; and that the suppliants contention, moreover, is to the effect that clause 8 leaves no authority to regulate instruction in rural schools. He held that the official programmes and regulations describing the qualification of teachers, and in particularly the list of recommended text books, establish that it was not intended to provide anything but elementary instruction in the Common Schools; that the position of the Grammar Schools in the system under the Acts of 1853 and the circulars of 1865 finally marked the distinction between the two classes of schools; and that the Secondary Schools of to-day are the descendants of the Grammar School, and the Public Schools of to-day are the descendants of the Common Schools. As to legislative and municipal grants he held that the Appellant's contention failed. To ascertain the fund appropriated for Common Schools generally, resort must be had to the Act of 1859 and Section 106 of that Act did not compel the legislature to apportion all moneys voted for Common Schools according to a fixed arithmetical ratio; that special appropriation on a different principle would involve no departure from Section 106 of the Act of 1859 or Section 20 of the Act of 1863; that there was no right by law to require the legislature to refrain from granting appropriations for special purposes for schools reaching a prescribed standard of excellence or of school sections conforming to a certain standard of local expenditure; and to none of the appropriations to which the Appellants object could a claim have been made under the law at Confederation. He was of opinion that there was no evidence of prejudice affecting Roman Catholics as a whole or affecting the suppliants as Separate Schools were placed upon a

footing of equality with Public Schools the grants being shared by all schools alike upon identical conditions.

Mr. Justice Newcombe agreed that the appeal should be dismissed and with the reasons given by Duff J. In his opinion the trustees of separate schools were not "at large" at Confederation but were subject to powers of regulation at the Union and the provisions of which the appellants now complain could have been prescribed by the Council of Public Instruction. As to grants he said that the court cannot take the place of the legislature and make a grant. There was at Confederation no present legal right to share in a future legislative grant and especially in a grant which by its terms was not sharable or capable of distribution in the manner claimed. It would require the authority of the legislature to direct that a grant made to schools which comply with a condition should be shared in by schools which do not so comply. pp. 423-425.

Mr. Justice Lamont agreed in the conclusions of Mr. Justice Duff. The history of the legislation as to control of courses of study and the practice of the Council establish the Council's authority to make regulations for the common schools including separate schools prescribing the studies to be taught. Common schools had a distinct and definite place in the system of education of Upper Canada to furnish the elementary instruction for the pupils of their respective school districts; while the grammar schools were to furnish instruction in the higher branches as provided by statute. As far as secular education was concerned the separate schools were merely common schools under denominational management to furnish elementary instruction. pp. 425-434.

Public grants for common school purposes under section 20 were limited to general grants in which all schools were to share and did not include grants for a specific purpose or conditional upon their being earned. The grants in question were "otherwise appropriated by law."

The Respondent submits that this Appeal should be dismissed for the following amongst other

REASONS

1. Because the legislation and regulations complained of do not prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law at the Union.

2. Because at Confederation two distinct systems of schools receiving public aid had been established, the common school system designed to afford elementary education locally and the Grammar School system affording more advanced education in larger areas and being schools midway between the Common Schools and the University.

3. Because Roman Catholic Separate Schools were at Confederation Common Schools and part of the Common School system.

4. Because prior to Confederation local control of the courses of study in common schools including separate schools had been replaced by central departmental control, through the Council of Public Instruction.

5. Because all the regulations as to grades of education and courses of study are such as the Council could have made and enforced prior to Confederation.

6. Because sec. 26 of the Act of 1863 expressly subjected Roman Catholic Separate Schools to regulations imposed by the Council and to inspection as directed by the Chief Superintendent.

7. Because the prescribed courses of study affect secular education rather than the denominational character of the school.

8. Because ss. (1) and (3) of sec. 93 are mutually exclusive and if the case is within sec. 93 it falls under ss. (3) rather than ss. (1).

9. Because a practice in a few schools to permit certain pupils to pursue more advanced studies did not confer any uncontrollable right by law on Trustees of each Separate School to prescribe the courses of study in the school.

10. Because at Confederation the Trustees of Roman Catholic Separate Schools had no right by law to school grants apportionable on the basis of average attendance, and such a right, if it existed, would not be protected under sec. 93, ss. 1.

11. Because sec. 20 of the Act of 1863 dealt only with grants by the late Province of Canada and the interpretation of the word "Province" in the section is not affected by anything in the B.N.A. Act.

12. Because the object of sec. 20 to put separate schools in the same position as other common schools with regard to school grants, is maintained.

13. Because nothing in the B.N.A. Act or other legislation in force at Confederation compels the legislature to make a general grant for common school purposes or precludes a grant for specific purposes or a grant to be paid on prescribed conditions designed to secure increased efficiency in the schools.

14. Because section 20 dealt with legislative grants apportioned amongst Municipalities under section 106 of the Act of 1859, and that section apportioned only the moneys "not otherwise appropriated by law."

15. Because the judgments favourable to the Respondent in the Courts below are right for the reasons therein stated.

W. N. TILLEY,
McGREGOR YOUNG

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CASE FOR THE RESPONDENT.

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17, Victoria Street,
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