1925
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IN THE MATTER OF A REFERENCE BY HIS HONOUR THE LIEUTENANT GOVERNOR OF THE PROVINCE OF QUEBEC IN COUNCIL TO THE COURT OF KING'S BENCH (APPEAL SIDE), OF CERTAIN QUESTIONS RELATIVE TO THE EDUCATIONAL SYSTEM IN THE ISLAND OF MONTREAL.

MICHAEL HIRSCH AND ANOTHER.....APPELLANTS;

AND

THE PROTESTANT BOARD OF SCHOOL COMMISSIONERS OF MONTREAL,

AND

THE CATHOLIC BOARD OF SCHOOL COMMISSIONERS OF MONTREAL,

AND

JOSEPH SCHUBERT,

AND

THE ATTORNEY GENERAL FOR QUEBEC } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Constitutional law—Quebec educational system—Rights of persons professing Jewish religion—Common and dissentient schools—"Protestants"—Education Act as to Jews (Q) 1903, 3 Edw. VII, c. 16—Ultra vires—Reference—Jurisdiction—Education Appeals Act, (Q) 1925, 15 Geo. V, c. 19—Public Education Act, Cons. S. of L.C., 1861, 24 Vict., c. 15—B.N.A. Act, 1867, ss. 93 (1), 93 (2)—Supreme Court Act, R.S.C. (1906), c. 139, s. 42a.

The Quebec Legislature in 1903 (3 Edw. VII, c. 16) passed "an Act to amend the law concerning education, with respect to persons professing the Jewish religion." Section 1 provides that "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." Sections 2, 3, 4 and 5 deal with school revenues and taxation and, speaking generally, provide that such taxation payable by persons professing the Jewish religion and revenue for school purposes derived from them, or from their properties, shall go to the support

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe and Rinfret JJ. and Maclean J. *ad hoc*.

of the Protestant schools, where they exist. Section 6, so far as is material, reads as follows: "* * * children of persons professing the Jewish faith 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."

Held that, inasmuch as c. 19 of 1925 (Q), providing for the right of appeal presently exercised, is within the literal terms of s. 42a of the supreme Court Act, jurisdiction to entertain this appeal should not be declined; but *semble* that, Parliament in enacting s. 42a did not contemplate enabling a provincial legislature to single out a particular reference and to make the opinion already pronounced upon it by the provincial court appealable to this court.

Held, also, that provincial legislation repugnant to subs. 2 of s. 93 of the B.N.A. Act, equally with legislation in conflict with subs. 1, is "absolutely void and inoperative" and is not appealable under subs. 3 to the Governor in Council;

Held, further, that in the *Public Education Act* of 1861 the term "Protestants" is not synonymous with non-Catholics in that it excludes non-Christians; and of Christians it includes only such as accept what are generally regarded as the principles and doctrines of the Reformation of the sixteenth century;

Held, also, that, at Confederation, the entire population of the province of Quebec was, for purposes of legislation upon educational matters, divided into two great religious denominations—the one Roman Catholic and the other Protestant—and non-Catholics and non-Protestants were ignored; that all the schools of the cities of Montreal and Quebec, although denominational (Roman Catholic and Protestant respectively), were "common schools," any one of which every child in each of those cities was entitled to attend; that "dissentient schools" of a religious minority existed only in "rural" municipalities and that the privilege of excluding therefrom adherents of another religious faith (then enjoyed by the Roman Catholic minority in Ontario in regard to their separate schools), was extended by s. 93 (2) of the B.N.A. Act to such "dissentient schools" in Quebec. In "rural" municipalities Jewish children could attend as of right only the common denominational schools of the religious majority.

Held, also, that although, *ex facie,* s. 1 of the Act of 1903 (c. 16) standing alone would confer upon adherents of the Jewish religion all rights regarding educational matters possessed by Protestants, including the establishment of separate schools controlled by Jewish commissioners or trustees, its intent, when taken with the context, is that whatever rights its confers should be enjoyed in connection with the Protestant schools; and that, while legislation infringing the right of Protestants to exclusive control of their schools would be *ultra vires* the Act of 1903 (c. 16) merely declares the right of Jewish children to education as Protestants, making consequent equitable provisions as to taxation and revenue;

Held, further, that, 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, the Act of 1903 is *ultra vires;*

Held, further, that, legislation providing for the appointment of Jews to the Protestant Committee of Public Instruction would be competent and that legislation providing for the establishment of separate schools

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

for persons who are neither Roman Catholics nor Protestants, if so framed as not to affect prejudicially any right or privilege with regard to education enjoyed by either Roman Catholics or Protestants at Confederation, might be validly enacted.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, to which were referred, for hearing and consideration, a series of questions relating to the educational system in the island of Montreal. The Quebec legislature, in 1903 (3 Edw. VII, c. 16) passed an "Act to amend the law concerning education with respect to persons professing the Jewish religion." The immediate occasion for that legislation, as indicated in its recital, was the refusal of the Protestant Board of School Commissioners of the city of Montreal to recognize the right claimed by persons professing the Jewish religion to have their children received and educated at the schools under the control of the School Corporations established by law, to which Jewish parents had theretofore sent their children almost exclusively. The recitals continued—and the validity of such pretension (of the Protestant School Board) has been judicially established. By order in council of the 3rd of February, 1925, a series of questions relating to the educational system in the Island of Montreal were referred to the Court of King's Bench for hearing and consideration. The conclusions of the various questions submitted at which the Court of King's Bench arrived are summarized as follows:

Question 1: Is the statute of Quebec of 1903, 3 Edw. VII, c. 16, *ultra vires?*

Answer (unanimous): Yes.

Question 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 Montreal obliged to appoint Jewish teachers in their schools should they be attended by children professing the Jewish religion?

Answer (unanimous): (*a*) Yes. (*b*) No.

Question 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 Protest-

ant Committee of Public Instruction; or (*c*) As advisory members of these bodies?

Answer (unanimous): (*a*) No; (*b*) No; (*c*) No.

Question 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?

Answer (unanimous): No.

Question 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?

Answer (unanimous): No.

Question 6: Can the provincial legislature pass legislation to establish separate schools for persons who are neither Catholic nor Protestants?

Answer (Judges Greenshields, Rivard and Letourneau): No. (Judges Flynn and Tellier): Yes.

Question 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?

Answer: (*a*) (unanimous) Yes. (*b*) Judges Greenshields, Rivard and Letourneau: Yes (save the distinctions and reserves indicated in the notes of Judges Rivard and Letourneau). Judges Flynn and Tellier: No. (*c*) Judges Flynn, Tellier & Rivard: No. Judges Greenshields & Letourneau: Yes.

The Quebec statute, c. 19 of 1925, declared that the opinion or view of the Court of King's Bench shall be deemed to be a final judgment delivered by the highest court of final resort of the province of Quebec, and that an appeal shall lie therefrom to the Supreme Court of Canada in conformity with section 42a of the *Supreme Court Act*.

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

The validity of the impugned statute was challenged before this court on the main ground that its provisions either prejudicially affect some right or privilege with respect to denominational schools which (some) class of persons (had) by law in the province at the Union (B.N.A. Act, s. 93 (1)), or derogate from " powers, privileges and duties " then by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects, which are, by provision 2 of s. 93 of the B.N.A. Act, extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

Nesbitt K.C. and *St. Laurent K.C.* for the appellants.

Laurendeau K.C., Campbell K.C. and *Creelman K.C.* for the Protestant Board of School Commissioners.

A. Perrault K.C. for the Catholic Board of School Commissioners.

L. Fitch K.C. for the respondent Schubert.

Lanctot K.C. and *Geoffrion K.C.* for the Attorney General of Quebec.

The judgment of the court was delivered by

ANGLIN C.J.C.—By order in council of the 3rd of February, 1925, the Lieutenant-Governor of the province of Quebec, under art. 579 of the Revised Statutes of Quebec, 1909, referred to the Court of King's Bench (Appeal Side), for hearing and consideration, a series of

questions relating to the educational system in the Island of Montreal.

The Quebec statute, c. 19 of 1925, assented to on the 3rd of April, declares that the opinion or view of the Court of King's Bench (Appeal Side), expressed upon these questions on the 11th of March, 1925,

shall be deemed to be a final judgment delivered by the highest court of final resort of the province of Quebec,

and that

an appeal shall lie therefrom to the Supreme Court of Canada in conformity with section 42a of the *Supreme Court Act.*

Section 42a of the *Supreme Court Act,* enacted in 1922, (12-13 Geo. V, c. 48), reads as follows:

42a. An appeal shall lie to the Supreme Court from an opinion pronounced by the highest court of final resort in any province on any matter referred to it for hearing and consideration by the Lieutenant-Governor of such province whenever it has been by the statutes of the said province declared that such opinion is to be deemed a judgment of the said highest

court of final resort, and that an appeal shall lie therefrom as from a judgment in an action.

This provision seems to contemplate the enactment of provincial legislation applicable generally to references made to the highest court of final resort in the province by the Lieutenant Governor in Council. Such statutes have been enacted by six of the other provinces. Cameron, Supreme Court Practice, 3rd edition, p. 179. It would seem improbable that Parliament contemplated enabling a provincial legislature to single out a particular reference and to make the opinion pronounced upon it by the provincial court appealable to this court—still less that a specific judgment already rendered and not appealable when given should, as in this instance, become the subject of such legislation. The Quebec statute of 1925, would, however, appear to be within the letter of s. 42a and it does not seem sufficiently clear that it lies without its intendment to warrant our declining jurisdiction to entertain the present appeal.

The reference now before us chiefly concerns the validity and interpretation of the Quebec statute of 1903, c. 16, entituled "An Act to amend the law concerning education with respect to persons professing the Jewish religion." The present appeal is brought from the judgment of the Court of King's Bench by two of the Jewish members of a special commission of education appointed by the Provincial Government, who had been represented before that court. The respondents are the Protestant and Catholic Boards of School Commissioners of the city of Montreal, the third Jewish member of the special commission, and the Attorney General of Quebec, all of whom had likewise taken part in the hearing of the reference.

The Court of King's Bench unanimously held the statute of 1903, c. 16, to be *ultra vires*. But differences of opinion developed in the individual views of the several members of the court upon some of the other questions propounded by the order in council.

The validity of the impugned statute is challenged on the ground that its provisions either

prejudicially affect some right or privilege with respect to denominational schools which (some) class of persons (had) by law in the province at the Union (B.N.A. Act, s. 93 (1)),

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

or derogate from "powers, privileges and duties" then

by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects,

which are, by provision 2 of s. 93 of the B.N.A. Act,

extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

Legislation of the Quebec legislature repugnant to either of these provisions of the B.N.A. Act is

to the extent of such repugnancy * * * absolutely void and inoperative. (Colonial Laws Validity Act, 1865, (Imp.), c. 63, s. 2.)

The remedy of persons aggrieved by such legislation is to "invoke the jurisdiction of the ordinary courts of the country." The right of appeal to the Governor General in Council given by provision 3 of s. 93 of the *British North America Act* does not apply to such a case. *Brophy* v. *Attorney General of Manitoba* (1). In this decision of the ultimate appellate tribunal it is also pointed out (pp. 222-3) that the "absolute" power of provincial legislatures in relation to subjects specified in s. 92 of the *British North America Act*, and not falling within those set forth in s. 91, does not extend to the matter of education

which is specially dealt with and has its own code . . . in the *British North America Act* (s. 93),

the "provisions" whereof

define the conditions under which alone the provincial legislature may legislate in relation to education, and indicate the limitations imposed on, and the exceptions from, their power of exclusive legislation. It would require an Act of the Imperial Legislature prejudicially to affect any right or privilege reserved under provision 1 (s. 93). *Ottawa Separate Schools Trustees* v. *Mackell* (2);

and this is equally true of any

powers, privileges and duties * * * extended to the dissentient schools * * * in Quebec

by provision 2. Provincial legislation affecting them is incompetent.

It is authoritatively established that

the class of persons to whom the right or privilege is reserved (under provision 1 of s. 93) must * * * be a class of persons determined according to religious belief and not according to race or language. In relation to denominational teaching Roman Catholics (in Ontario) together form, within the meaning of the section, a class of persons, and that class cannot be subdivided into other classes by considerations of the language of the people by whom that faith is held. *Ottawa Separate School Trustees* v. *Mackell* (2).

(1) [1895] A.C. 202, at pp. 216, 219.

(2) [1917] A.C. 62, at p. 69.

It is contended that, for the purpose of s. 93 (1), Roman Catholics in Quebec form such a class, and that Protestants in that province, as a whole—and taken together, form another like class not susceptible of subdivision according to their diversities of religious belief. That the latter are so regarded for the purposes of s. 93 (2) would seem to be clear. Section 93 (1), however, deals only with rights and privileges in regard to denominational schools which a class of persons, determined according to religious belief, had by law at Confederation. On this aspect of the case, therefore, we are presently concerned to ascertain what were the classes of persons who had by law in the province of Quebec at Confederation rights and privileges with respect to denominational schools, and in what such rights and privileges consisted; and, in addition, we must take account of any enlargement of, or accession to, such rights and privileges effected by provision 2 of s. 93. The pertinent inquiry will then be whether, and to what extent, the legislation of 1903 would, if valid, prejudicially affect any such right or privilege.

It was common ground at bar that the rights and privileges in regard to denominational schools enjoyed at Confederation by any class of persons in Quebec are to be found in the legislation consolidated in caps. 15 and 16 of the *Consolidated Statutes of Lower Canada, 1861*. The powers, privileges and duties of the Roman Catholic Separate schools and separate school trustees in Upper Canada at the Union were those conferred by the *Separate Schools Act* of 1863 (26 Vic., c. 5). These statutes must now be considered.

Chapter 16 of the *Lower Canada Consolidated Statutes* deals with *Fabrique* schools and is in no wise affected by the legislation of 1903.

Chapter 15, which deals with "Education—and Normal and Common Schools," requires careful study and analysis. Its most striking features affecting the matter presently before us appear to be the following:

A. It gave to every child between the ages of five and sixteen years resident in any school district an equal right to attend the school thereof (s. 66); and, in each of the cities of Montreal and Quebec, such children from any

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

part of the city might attend any school established by, or under the control of, the Commissioners (s. 129). The statute, therefore, conferred on every child resident in any school district in the province the right to education in some public school established under its provisions in such district. It is perhaps unnecessary to observe that this was not a right enjoyed by a class of persons with respect to denominational schools; it pertained to the individual as a citizen. Accordingly it did not fall within the protection of s. 93 (1). But the correlative obligation of Boards of School Commissioners and Trustees may have been limitative of some right or privilege claimed for Quebec denominational schools.

B. Chapter 15 of the *Consolidated Statutes* of 1861 made distinct provisions, quite different in their scope and character, for the cities of Montreal and Quebec, on the one hand, and for the other municipalities in the province (which we shall, for convenience, call "rural municipalities"), on the other (*a*). The present reference has to do with the educational system of the Island of Montreal, which comprises, in addition to the city of Montreal, municipalities falling within the category which we designate rural. Both divisions of the statute must, therefore, be considered. The signal difference presently material is that the provisions for "dissentient schools" (which were likewise "common schools" for many purposes of the statute (s. 138) but were in other respects clearly distinguished from them) applied only to the rural municipalities. These schools were governed by Board of "Trustees." All the schools of the cities of Montreal and Quebec were "common schools" under Boards of "Commissioners," each of these cities being considered one municipality not divided into school districts (s. 129). It being thus "otherwise provided," the provisions with regard to dissentient schools did not apply to them (s. 128). Under the Act of 1861 there were no "dissentient schools" either in Montreal or in Quebec, although, no doubt, the schools in these cities were "denominational schools." This situation

(*a*) The city of Three Rivers is expressly excluded from the rural municipalities (s. 28). It appears to have had special provisions for the organization, control and management of its schools. *Vide* 9 Vic., c. 27, s. 2, and c. 78; 23 Vic., (1860 c. 74; 1 Edw. VII, (1901), c. 44, s. 222 *et seq.*

has continued down to the present day and with it we must deal.

C. A third noteworthy feature of the Act of 1861 is that it appears to divide the population for school purposes into two great classes, the one Roman Catholic, the other Protestant. In this view all the learned judges of the Court of King's Bench agree. As used in this statute and throughout the educational laws of the province of Quebec, the meaning of the term "Roman Catholics" admits of no doubt; nor does the connotation of the term "Protestants" present any difficulty. It is not synonymous with non-Catholic, in that it excludes all persons who do not profess to be Christians; and of these it includes only such as accept what are generally regarded as the principles and doctrines of the Reformation of the 16th century. For present purposes, either of the following definitions of "Protestant" may be accepted:

> A member or adherent of any of the Christian churches or bodies which repudiated the papal authority, and separated, or were severed from the Roman communion in the Reformation of the 16th century, and, generally, of any of the bodies of Christians descended from them; hence, in general language, applied to any Western Christian or member of a Christian Church without the Roman communion. (Murray's New English Dictionary.) A member or an adherent of those Christian bodies which are descended from the Reformation of the 16th century; in general language opposed to Roman Catholic and Greek. (Century Dictionary).

In the fasciculus of sections of the Act of 1861 specially affecting the cities of Montreal and Quebec (ss. 128-134) the classification is unmistakable. The twelve school commissioners for each of these cities, appointed by the respective municipal councils, formed two separate and distinct corporations, one for the Roman Catholics and the other for the Protestants (s. 130), each having exclusive control and management of the schools of the denomination it represented and of the funds apportioned for their support (s. 131).

In the general provisions of the Act affecting rural municipalities the denominational division between Roman Catholics and Protestants is perhaps not quite so obvious; but the indications of it appear to be sufficient. Two classes of schools were provided for: one, common schools for the majority in the district, carried on by Commissioners; the other, dissentient schools for a minority professing a re-

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

ligious faith different from that of the majority, carried on by trustees (ss. 27, 55). Dissentients with a religious faith common at least in some distinctive characteristics were contemplated. Thus children from other districts might attend one of these schools only if

of the same faith as the dissentients for whom the school was established (s. 56 (2)).

The *curé*, priest or officiating minister had

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 (s. 65 (2)).

Boards of Examiners in Montreal and Quebec were (s. 103 (2)), and in other districts might be, if the Governor in Council so ordered (s. 108), organized in two divisions, Roman Catholic and Protestant respectively. No priest, minister or ecclesiastic might visit any school belonging to inhabitants not of his own persuasion, except with the consent of the Commissioners or Trustees of such school (s. 131). While the terms " religious majority " and " religious minority," were not defined until 1869 (32 Vic., c. 16, s. 37) to mean

the Roman Catholic or Protestant majority or minority as the case may be,

and this definition, although declaratory in form, must therefore, for present purposes be disregarded, the various provisions of the Act of 1861 alluded to seem to be inconsistent with any other classification of the inhabitants of Lower Canada for educational purposes having been intended by the legislation embodied in that statute. Indeed such a division had persisted in the several earlier school Acts of 1841 (4-5 Vic., c. 18), 1845 (8 Vic., c. 16), 1846 (9 Vic., c. 27), 1849 (12 Vic., c. 50), 1853 (16 Vic., c. 1208), 1856 (19 Vic., c. 14), and 1859 (22 Vic., c. 52). As. Mr. Justice Davidson said in *Pinsler v. Protestant Board of School Commissioners* (1),

these cleavages on religious lines in regard to the schools in the country parts and their management have so existed since 1841 * * * It is certain that the division between the two classes of schools is not one of mere administration; the cleavage is religious and denominational as well.

Everybody in the least familiar with the history of education in the province of Quebec knows that in 1867 in " rural municipalities " the " common schools " were in fact the

(1) Q.R. 23 S.C. 365, at pp. 371, 377.

schools of the majority, and the "dissentient schools" in fact the schools of the minority, Catholic or Protestant as the case might be. It cannot be seriously disputed that prior to 1867 the non-Catholic non-Protestant elements of the population of Lower Canada were numerically negligible and were so treated in legislation respecting educational matters. The dissentient schools were almost universally Protestant. But common schools and dissentient schools were alike frankly denominational and Christian. This was their character recognized and provided for by law; and the present case is thus clearly distinguished from *Maher* v. *Portland,* Wheeler's Confederation Law of Canada, at p. 367 (1). The dissentient school came into existence only because the religious minority of a school municipality found the regulations and arrangements for the conduct of the common school of the religious majority not agreeable to it. The law so provided (s. 55 (1)).

The Trustees of the dissentient schools, when established, had the same rights, powers and duties of management and control over them as the Commissioners had in regard to common schools (s. 55 (2)): the appointment of teachers, the regulation of courses of study, the erection, maintenance and repair of school houses, the control of school property, the making of general rules for the management of the schools, the fixing of public examinations—all these matters, with their incidents—were in their hands (s. 65); and, what is perhaps most important, the moneys for the support of the schools derived from taxes, fees and Government grants were exclusively at their disposal.

Although under the Act of 1861 neither the Commissioners of common schools nor the Trustees of dissentient schools would appear to have had the right to exclude any child from the schools under their control on religious grounds (s. 66), in the case of dissentient schools of the religious minority the right of excluding non-Protestants or non-Catholics, as the case might be, would seem to have been conferred by provision 2 of s. 93 of the B.N.A. Act of 1867. An analysis of the *Separate Schools Act of Upper Canada* of 1853, c. 5, makes it reasonably clear that in that province only Roman Catholics had the right of privilege

(1) [1873] 14 N.B. Rep. 251.

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

of sending their children to Catholic Separate Schools, although non-Catholic children might be admitted to them as a matter of grace (s. 12). The separate school could be established only by Roman Catholics (ss. 2-3) and "for Roman Catholics" (s. 2): only Roman Catholics could become separate school supporters (s. 14) or withdraw their support (s. 18): only Roman Catholics who were separate school supporters were exempted from the payment of public school taxes (s. 14): only Roman Catholic pupils might be taken account of in the apportionment of the legislative grant for common schools (ss. 12, 20, 22). As a privilege

> at the Union by law conferred in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects,

the power of excluding the adherents of other religious faiths was by s. 93 (2) extended to the "dissentient schools," but not to the "common schools" of the province of Quebec. The latter remained subject to the provisions of ss. 66 and 129 of the Act of 1861.

As already pointed out, in 1867, only common schools were provided for in the cities of Montreal and Quebec; dissentient schools were confined to the rural municipalities. It cannot be supposed that this state of the law was not present either to the minds of the Canadian public men who negotiated and settled the terms of Confederation, or to the mind of the Imperial Parliament when it enacted the *British North America Act*. It follows that in the city of Montreal every child between the ages of five and sixteen years resident within the municipality retained after 1867 the right conferred by the Act of 1861 to attend any school under the control of the Commissioners, whether Catholic or Protestant; and the correlative obligation to receive and provide for them incumbent upon both bodies of Commissioners likewise remained unimpaired.

In this connection it is important to bear in mind that since 1867 much territory, constituting or comprised in several suburban municipalities, has been annexed to the city of Montreal and now forms part of it for municipal purposes. There was no discussion at bar as to the effect of such annexation on school rights in the annexed territory. In regard to the dissentient school rights a question

may arise as to the effect on them of such annexation. But this aspect of the case was not adverted to in argument and we express no opinion upon it. It must therefore be understood that, in the several answers to questions submitted in the present reference, when we speak of the city of Montreal we mean that city as it was as the date of Confederation, and by rural municipalities we mean municipalities which are still without the city limits. Only as to these are definite answers given. As to territory now included in the municipality of the city of Montreal by virtue of annexations made since 1867, the application of the answers to questions no. 1 and (*b*) and (*c*) of no. 7 would appear to depend upon how far dissentient schools rights in such territory may persist notwithstanding its incorporation in the city for municipal purposes.

The only further observation upon the Act of 1861 which it seems important to make is that it provided for a Council of Public Instruction to consist of not more than fifteen and not less than eleven members to be appointed by the Governor (s. 18). Nothing is said as to religious qualifications of the appointees. It was not until 1869 (c. 16, s. 1) that the personnel of the Council was fixed at

> twenty-one persons, fourteen of whom shall be Roman Catholics and seven Protestants.

Moreover, by subs. 4 of s. 21 of the Act of 1861 it was provided that the power of selecting books to be used in the schools of the province, conferred on the Council of Public Instruction, should not extend to books having reference to religion and morals, the selection of such books for each school being given to "the *curé*, priest or officiating minister (s. 65 (2)." It is, however, contended that the spirit of the Act of 1861 required that membership of the Council of Public Instruction should be confined to Roman Catholics and Protestants. That view prevailed in the Court of King's Bench. We are, with respect, not prepared to attribute such an unexpressed intention to the legislature. The safeguarding provision as to the selection of books having reference to religion and morals would seem rather to be indicative of the absence of such an intent. Moreover, the proportion of members of each faith was not fixed, and, for aught that was provided to the contrary, the Council might be wholly Catholic or wholly Pro-

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

testant. The Christian community (Roman Catholic and Protestant) as a whole was nowhere treated as a "class of persons" which had, within the purview of s. 93 (1), any right or privilege with respect of denominational schools. The Act of 1861 did not recognize or provide for such a right or privilege in regard to the personnel of the Council of Public Instruction.

We may now consider the provisions of the statute of 1903 (c. 16). The immediate occasion for that legislation, as indicated in its recital, was the refusal of the Protestant Board of School Commissioners of the city of Montreal to recognize the right claimed by persons professing the Jewish religion

to have their children received and educated at the schools under the control of the School Corporations established by law,

or

to acknowledge any obligation to receive in the schools under their control children of the Jewish faith whose parents are not proprietors of immovable property subject to taxation for the benefit of the said schools,

to which Jewish parents had theretofore sent their children almost exclusively. The recital continued—

and the validity of such pretension (of the Protestant School Board) has been judicially established.

It was further recited that

the Protestant Board of School Commissioners of the city of Montreal have by resolution expressed their consent that the above mentioned difference be settled in the manner set forth in the following provisions,

and, finally, that

it was expedient to prevent similar differences arising in other localities in the province.

The enacting sections of the statute open with a provision (s. 1) framed in very general terms, as to the construction and scope of which there was not a little discussion at bar. This is followed by five sections (ss. 2-6) which deal with particular matters which are the *specialia* of the statute. It will be most convenient first to consider the latter sections.

Section 6, so far as is material, reads as follows:

After the coming into force of this Act, children of persons professing the Jewish faith 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.

Jewish children in common with all other children in the city of Montreal had, under the Act of 1861, the right to attend any school under the control of the Commission-

ers. Section 6, in its application to the Protestant common schools of that city, therefore, does not appear to transcend the legislative power conferred on the provincial legislature by s. 93 of the B.N.A. Act: it is not repugnant either to provision 1 or to provision 2. But as to the Protestant dissentient schools in the rural municipalities, s. 6 disregards and derogates from a privilege conferred on them, as already explained, by provision 2 of s. 93 of the B.N.A. Act and is, in its application to those schools, *ultra vires*.

Sections 2, 3, 4 and 5 deal with school revenues and taxation and, speaking generally, provide that such taxation payable by persons professing the Jewish religion and revenue for school purposes derived from them, or from their properties, shall go to the support of the Protestant schools, where they exist, and that, in arriving at the basis of the division for school purposes of moneys derived from school taxes and of revenue payable in proportion to population, persons professing the Jewish religion shall be counted amongst Protestants.

We do not find in these provisions, in so far as they apply to the city of Montreal, anything which necessarily exceeds the legislative power conferred in the provincial legislature by s. 93 of the B.N.A. Act. They are in reality complementary of, or consequent upon, section 6. It is not *ex facie* apparent, and it has not been shewn by evidence or otherwise, that any right or privilege enjoyed by any class of persons in regard to denominational schools at the Union is prejudicially affected by them. No increased burden is imposed on the Protestant schools and school commissioners; they were already bound in 1867 to receive Jewish pupils, and, as the statute recites, the Jews took full advantage of this privilege. On the contrary, the Protestant schools derive a distinct financial benefit from the provision that persons professing the Jewish faith shall be considered Protestants in regard to the matters dealt with by ss. 2-5. While the Catholic schools lose a portion of their former revenue, the formal declaration of the obligation of the Protestant schools and their Commissioners to provide for the education of Jewish children, having regard to what appears as to the cost of making such provision, may well afford more than adequate compensation.

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

No grievance on the part of the Catholic schools or school Commissioners in the city of Montreal has been suggested in this connection and on the case now before us we cannot say that their rights and privileges in regard to their denominational schools were prejudicially affected by the provisions of these four sections.

In the rural municipalities, however, the situation is entirely different. There the common schools of the majority alone were open as of right to Jewish children, at all events after 1867, owing to the privilege of exclusion then conferred on the dissentient schools by s. 93 (2) of the B.N.A. Act. These common schools were all Roman Catholic and distinctly denominational. A right or privilege of the Roman Catholic majorities in the rural municipalities in regard to revenues available for the support of their denominational common schools, which they enjoyed as a class of persons at the Union, would be prejudicially affected by ss. 2-5 of the Act of 1903.

Upon the foregoing premises the decision of the Judicial Committee of the Privy Council in *Attorney General for Canada* v. *Attorney General for Ontario et al* (1), and s. 2 of the *Colonial Laws Validity Act* (Imp., 1865, c. 63) warrant a judgment upholding the validity of ss. 2-6 of the Act of 1903 in so far as they apply to the cities of Montreal and Quebec, although they should be regarded as *ultra vires* in so far as they affect rural municipalities, to the extent which will be indicated in the answer to question no. 1.

Section 1 of the statute of 1903 reads as follows:

> 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.

This section contains the *generalia* of the statute. If it stood alone and entirely divorced from its context, its *ex facie* construction would be that it conferred upon persons professing the Jewish religion in Quebec all the rights regarding educational matters possessed by Protestants, in-

(1) [1898] A.C. 700, at p. 714.

cluding the right to establish and maintain separate schools —"common" in the cities of Montreal and Quebec and "dissentient" in the rural municipalities,—controlled by Jewish Commissioners or Trustees. Not as Protestants, but as Jews, persons professing the Jewish religion, would, upon the natural and literal interpretation of s. 1, have the like educational obligations, rights and privileges as Protestants, including the enactment in their behalf of school laws the same as those relating to Protestants, as nearly as the latter could be adapted to the case.

But it requires only a momentary glance at the context to make it clear that this was not the intent of s. 1. It is obvious from the whole Act that whatever rights it was designed to confer on persons professing the Jewish religion were to be enjoyed in connection with the schools under the control of the Protestant school corporations. In order to reconcile the various provisions, including the preamble, an intention must be attributed to s. 1, though ill-expressed, not to provide for the establishment of separate Jewish schools, but that the Jews shall, for the school purposes to which the statute relates, be included and considered as Protestants, or as belonging to the Protestant denomination, and subject to the obligations and entitled to the rights and privileges which appertain to Protestants; or, conversely, that Protestants shall be deemed for such purposes to include persons professing the Jewish religion. These purposes are defined not otherwise than as "school purposes" except in s. 6 where the expression is "all school purposes." In other words s. 1 serves as a limited definition section.

There is, therefore, here a case for the application of Art. 12 of the Civil Code of Quebec which provides that:

> 12. When a law is doubtful or ambiguous, it is to be interpreted so as to fulfil the intention of the legislature, and to attain the object for which it is passed. The preamble which forms part of the act, assists in explaining it.

One must, of course, have regard to the subject matter with which the legislature was dealing. The occasion for the Act of 1903, as already stated, was the rejection by the Protestant Board of School Commissioners of the city of Montreal of the claims of persons professing the Jewish religion to have their children received and educated

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

in the Protestant Separate Schools which they had theretofore attended; the purpose of the statute was to give legal sanction to agreed terms on which the Jewish pupils were to be accepted; but the reconstitution of the governing body of these schools, or the admission of the Jews to a voice in their government or regulation, was not a subject of the agreement as recited, or of the legislation by which it was sanctioned.

Section 1 of the Act of 1903 is, no doubt, expressed in the most general terms. It was admitted on all sides at the hearing that the statute was intended to establish the right of Jewish children to be admitted to the Protestant schools, but it was argued that s. 1 went so far as also to sanction the eligibility of persons professing the Jewish religion for appointment to the Boards of Protestant School Commissioners, and therefore to declare that Jews should be considered as Protestants for the purposes of s. 130 of the Consolidated Act of 1861; the argument is founded upon the words:

> 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.

But, assuming that these words by themselves might be interpreted to authorize the admission of Jews to representation upon the Protestant School Board, that interpretation must, we think, be rejected, when, applying the principles enunciated by Lord Blackburn in *River Wear Commissioners* v. *Adamson* (1), the statute is considered as a whole. The provisions of the Act following upon s. 1, and already adverted to, are special or particular enactments, providing for and defining obligations, rights and privileges which seem to be generally comprehended under s. 1. Now by the tenth rule of Bacon's Maxims "*verba generalia restringuntur ad habilitatem rei vel personae*"; and he says

> all words, whether they be in deeds or statutes or, otherwise, if they be general, and not express or precise, shall be restrained unto the fitness of the matter or person.

In *Earl of Kintore* v. *Lord Inverury* (2), Lord Westbury said that:

(1) [1877] 2 A.C. 743, at pp. 763-765.

(2) [1865] 4 Macq. 520, at p. 522.

If to general words special words are added, the rule specialia derogant generalibus has been applied, and the general words have been limited to the things denoted by the special words of addition; and if, on the other hand, words of general comprehension are added to special words denoting particular things, the general words are confined in their extent and reduced to signify things ejusdem generis with those which are properly denoted by the special expressions.

In *Gunnestad* v. *Price* (1), Cleasby, B., said that

if the language is general, and so general that it appears inapplicable without some limitation, then we are entitled to see by the immediate context, or the subsequent matter to which they (the words) are intended to apply, what, if any, limitation ought to be put upon them.

He adds that "the maxim that general words are limited in their application is constantly acted upon." And he repeats the words of Bacon quoted above

Lord Halsbury in *Cox* v. *Hakes* (2), emphasized the difficulty of supposing that the legislature intended to abrogate or alter long established rights "by mere general words without any specific provision" as to them. He added that

it is impossible to contend that the mere fact of a general word being used in a statute precludes all inquiry into the object of the statute or the mischief which it was intended to remedy.

And he cited the great case of *Stradling* v. *Morgan* (3), in which, at p. 205a, occurs this passage:

The sages of the law heretofore have construed statutes quite contrary to the letter in some appearance; and those statutes which comprehend all things in the letter they have expounded to extend but to some things; and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only; which expositions have always been founded on the intent of the legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion.

See, too, *Heydon's Case* (4). Both these great authorities were quoted recently by Lord Atkinson in *Banbury* v. *Bank of Montreal* (5).

The rule is thus well established, and this seems to be a case where nothing is lacking to justify its application; and when the preamble of the statute is considered, it be-

(1) [1875] L.R. 10 Ex. 65, at p. 69.
(2) [1890] 15 A.C. 506, at p. 517.
(3) [1560] 1 Plowd. 199.
(4) [1584] 3 Co. Rep. 7b.
(5) [1918] A.C. 626, at p. 691.

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

comes reasonably certain that the school purposes referred to in the general provision of s. 1 were not intended to include purposes other than those which are the subject of, or ancillary to, the particular sections which follow.

In *Bradlaugh* v. *Clark* (1), Lord Blackburn said

> All statutes are to be construed by the courts so as to give effect to the intention which is expressed by the words used in the statute. But that is not to be discovered by considering those words in the abstract, but by inquiring what is the intention expressed by those words used in a statute with reference to the subject matter and for the object with which that statute was made; it being a question to be determined by the court and a very important one, what was the object for which it appears the statute was made.

He cited the passage in *Stradling* v. *Morgan* (2) to which Lord Halsbury referred in *Cox* v. *Hakes* (3) and he said he thought that in modern times more weight had been given to the natural meaning of words than was done in time of Elizabeth; but, he added, at p. 373,

> The Civil Code of Canada, article 12, well expressed what I think is the principle, and also the qualification which I think must now be put on the older authorities. "When a law is doubtful or ambiguous it is to be interpreted so as to fulfil the intention of the legislature, and to attain the object for which it was passed. The preamble, which forms part of the Act, assists in explaining it."

The last observation has additional force in this case which is concerned with the interpretation of a Quebec statute, and, therefore, governed directly by the rule which Lord Blackburn adopts.

In *Minet* v. *Leman* (4), Romilly M.R., stated as a principle of construction which he said could not, as a general proposition, be disputed, that:

> The general words of an Act are not to be construed so as to alter the previous policy of the law unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched.

This may be rather a broad expression, but it serves to show at least that an intention to change the law must be clearly expressed or necessarily implied. Maxwell, in his work on The Interpretation of Statutes (6th ed.), at p. 149, cites it as authority for the proposition that

> general words and phrases, however wide and comprehensive in their literal sense, must usually be construed as being restricted to the actual objects of the Act and as not altering the law beyond.

(1) [1883] 8 A.C. 354, at p. 372.
(2) 1 Plowd. 199.
(3) 15 A.C. 506.
(4) [1855] 20 Beav. 269, at p. 278.

It is true, as Lord Davey suggested in *Powell* v. *Kempton Park Racecourse Co.* (1), that one must not lose sight of the possibility that the legislature took the recited facts only as the occasion of the enactment and deliberately used large words to prevent the same kind of mischief in other forms; but, in the drafting of this statute, we see no satisfactory evidence of an intention to disturb the constitution of the controlling authority of the Protestant schools. Indeed it is apparent that the main purpose, if not the only purpose which at the time was considered of present consequence, was the admission of the Jewish children to the Protestant separate schools as they existed at Montreal, and, when we find that all the provisions in detail necessary for that purpose were specially enacted, it cannot be supposed that the design to transfer a right to participate in the government of the Protestant schools to the Jews, presumably to an extent proportionate to their numerical strength, with all the rights and incidents attendant upon such a change in the constitution of the governing board, would have escaped special mention had anything so important been within the contemplation of the legislature.

In *Reigate Rural District Council* v. *Sutton District Water Co.* (2), Channell J. said

> It is always necessary in construing a statute, and in dealing with the words you find in it, to consider the object with which the statute was passed, because it enables one to understand the meaning of the words introduced into the enactment. Where the meaning of the words is absolutely clear beyond any doubt the court has no right to go beyond them, because if they did they would be introducing new legislation. They would be improving upon the legislation which has in fact been passed, under the idea that they could do something better, and this would not be a legitimate thing to do. But when words are capable of one meaning and at the same time of a more extended meaning, whether they are to have the one meaning or the more extended meaning is to be dealt with according to what the court sees to be the object and policy of the Act.

The principle of interpretation thus expressed cannot, we think, be doubted, and we see nothing in the object or policy of the Act of 1903 which would justify the court in extending the school purposes referred to in s. 1 to include a declaration of eligibility on the part of those professing

(1) [1899] A.C. 143, at p. 185.

(2) [1908] 99 L.T.R. 168, at pp. 170-171.

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

the Jewish religion to become members of the Protestant Boards of School Commissioners at Quebec and Montreal.

There is another consideration which strengthens this view. It was well known to the legislature at Quebec in 1903 that its exclusive power to legislate for education was limited by the constitutional provisions subject to which it was conferred, and that the legislature was powerless prejudicially to affect any right or privilege with respect to denominational schools which any class of persons had by law at the Union. Nobody doubted that the Roman Catholic and Protestant separate schools at Quebec and Montreal were denominational schools, or that the Protestants were a class of persons whose rights and privileges were protected; and it could not then, we should think, have been within the region of uncertainty that the right of Protestants to manage and govern their separate schools, as provided by the Consolidated Act of 1861, was perhaps the most important of the rights assured to them, and, therefore, a right from which the legislature could not derogate. In these circumstances the court would, of course, be disposed to interpret legislation at Quebec as intended to operate within the constitutional powers of the legislature, and would seek to apply to any doubtful or ambiguous provision an interpretation according to which it might be upheld compatibly with constitutional limitations. "There are two modes of reading an instrument," said Lord Brougham in *Langston* v. *Langston* (1),

> where the one destroys and the other preserves, it is the rule of the law, and of equity, following the law in this respect (for it is a rule of common sense, which I trust is common to both sides of Westminster Hall), that you should rather lean towards that construction which preserves than towards that which destroys. *Ut res magis valeat quam pereat* is a rule of common law and common sense.

And *In re Florence Land and Public Works* (2), James L.J. said

> it is a cardinal rule of construction that all documents are to be construed *ut res valeat magis quam pereat.*

Moreover, as is pointed out in Craie's Statute Laws, 3rd ed., at p. 162, it is the settled policy of the Privy Council

(1) [1834] 2 Cl. & F. 194, at p. 243.

(2) [1878] 10 Ch. D. 530, at p. 534.

not to decide that Colonial Acts are *ultra vires* if it can avoid that conclusion, but rather to read general words as subject to some limitation. *Macleod* v. *Attorney General for New South Wales* (1); *Blackwood* v. *The Queen* (2). Therefore, upon the application of this principle of construction, there should be no unnecessary extension of the provisions of s. 1 of the Act of 1903 to formulate a legislative project by which persons professing the Jewish religion should be made eligible for appointment to the Boards of Protestant School Commissioners at Quebec and Montreal.

From what has been said it is apparent that we would regard legislation designed to impair the right of Protestants, as a class of persons in the province of Quebec, to the exclusive control, financial and pedagogic, of their schools, as *ultra vires* of the provincial legislature.

In our opinion, however, the purview of c. 16 of the Quebec statute of 1903 is confined to a declaration of the right of children of persons professing the Jewish religion to education in the public schools of the province as Protestant children, and to making consequential equitable provisions in regard to taxation and revenue.

We may now proceed to deal with the several questions submitted.

Question no. 1: Is the statute of Quebec, 1903, 3 Edw. VII, c. 16 *ultra vires?*

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: 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?

Answer to part (*a*): No.

to part (*b*): No.

Question no. 3: Con the provincial legislature pass legislation providing that persons professing the Jewish religion

(1) [1891] A.C. 455, at p. 458. (2) [1882] 8 A.C. 82, at p. 98.

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

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?

Answer to part (*a*): No.

Answer 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;

Answer 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: 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.

This question is not restricted in its application to the Protestant Board of School Commissioners of the City of Montreal, although, probably, that was intended. We answer it as put, however, treating it as applicable to both the Protestant and Roman Catholic Boards of the School Commissioners of the City of Montreal.

Answer: No.

Question no. 5: Can the provincial legislature pass legislation providing for the appointment of persons professing the Jewish religion on the proposed Metropolitan Finance Commission, outlined in the project submitted by Messrs. Hirsch and Cohen?

Answer: No.

Question no. 6: Can the provincial legislature pass legislation to establish separate schools for persons who are neither Catholics nor Protestants?

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. Mr. Justice Tellier deals with this aspect of the case succinctly and satisfactorily. There are some rights and privileges of the existing dissentient schools which it might not

be competent to the legislature to confer on separate schools so to be established.

This question relates solely to legislative power and we so deal with it. Considerations of policy in no wise concern us. This was the only question discussed by counsel representing the Catholic Board of School Commissioners.

Question no. 7: Assuming the Act of 1903 to be unconstitutional, have the Protestants the right, under the present state of the law, to allow children professing the Jewish religion to attend the schools:

(*a*) as a matter of grace;

(*b*) as a matter of right;

(*c*) can the province force the Protestants to accept children professing the Jewish religion under such conditions?

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 children 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 imported. Eliminating them from the question, the answer is:

In the city of Montreal, Yes;

In the rural municipalities, No.