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THE

LEGAL AND CONSTITUTIONAL ASPECTS

OF THE

MANITOBA SCHOOL QUESTION

The STATUTES, The PRIVY COUNCIL DECISIONS, The REMEDIAL ORDER, and The ANSWER of Manitoba, considered.

BY

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THE LEGAL AND CONSTITUTIONAL ASPECTS

OF

THE MANITOBA SCHOOL QUESTION

AND THE REMEDIAL ORDER.

My purpose is to consider briefly the legislation and decisions affecting the Manitoba School controversy —the rights of religious classes and denominations to have separate, dissentient, or denominational schools, under our constitution, the principles which must govern the consideration of these questions, and the *powers* and *duties* of the Dominion Government and Parliament in relation thereto.

So much has been written, that some may say, "We know all about it," others, "Nothing new can be said."

The prejudiced do not want their opinions disturbed. The interested fear to have their case weakened. The intolerant see only one side. Fanatics will not reason.

All great questions have many aspects; their discussion cannot be exhausted. We each see but a limited landscape. Our views are always from a definite standpoint. No one can observe a scene from every point of view. The same may be said of every great question. It may present a different aspect from every standpoint.

The political constitution of a country is a great question. The education of a people is a great question.

Religion is a great question. The Manitoba School question embraces all these, hence the Manitoba School question is a great question.

The majority of people have not time to read books on all questions, not even on great questions. They want the pith and substance only. The facts and observations must therefore be compressed.

Here lies the difficulty of the writer. He must compress, and at the same time he must be clear and accurate. He must keep the mental condition of the average reader in mind, and, at the same time, he must omit all details that do not necessarily affect the result.

I shall not say much about education in general, nor about what constitutes education.

The legal and constitutional aspects of the Manitoba School question, the Remedial Order, and the Answer of the Province, are my principal themes; and yet, the duties of the State with regard to education, and the merits and demerits of religious education will call for some incidental remarks.

A *Remedial decision* has been given by the *Dominion Cabinet*—the popular name for the committee constitutionally styled "The Queen's Privy Council for Canada," and "the Governor-General-in-Council." For brevity, we may call this committee the Dominion Government or simply the Council.

First, as to the nature of our political constitution. Much is being said and written about *Provincial Rights.* Many seem not to know, or to forget, that in Canada both Provincial rights and Dominion rights are limited.

The Dominion of Canada has a written constitution,

just as the United States has a written constitution. We have constitutional restrictions on Provincial rights, just as they have constitutional restrictions on State rights.

The courts are the interpreters of our constitution and of each of its provisions, just as the courts are the interpreters of the Federal constitution and of each of the State constitutions in the United States.

The validity of the Acts, both of the Dominion Parliament and of the Provincial Legislatures, may be questioned and determined in any of our courts, just as the validity of the Acts of Congress and of the State Legislatures may be questioned and determined in the courts of the United States.

In both countries, the courts may decide an Act to be *ultra vires* or unconstitutional. There is the power of disallowance by the Dominion Government, of provincial legislation; a power which is not possessed by the Federal Government over state legislation; but, in both countries, the courts alone can determine the constitutionality of any legislation. In this respect, the courts are above the Legislatures. In this respect, both countries differ from Great Britain. There, Parliament is supreme, and the validity of its acts cannot be questioned in any court.

Hence, where any conflict or difficulty in constitutional interpretation arises under our constitution, the courts must decide. The Judicial Committee of the Imperial Privy Council is the final Court of Appeal for the whole British Empire, on Colonial questions.

I should also add that, as our constitution has been created by Acts of the Imperial Parliament of Great Bri-

tain, it can only be changed, amended or added to (except to the extent to which the power to change or amend its provisions has been conferred on the Dominion Parliament and Provincial Legislatures respectively) by Imperial legislation. These preliminary observations will help to elucidate what follows.

The Confederation Act of 1867 united the four provinces of Upper and Lower Canada, Nova Scotia, and New Brunswick, and made provision for the subsequent admission of the other colonies and territories of British North America into the Canadian Confederation. It defined and limited the legislative and governing powers of the Dominion Parliament, and of the Provincial Legislatures respectively; and Section 93 assigned to the Provincial Legislatures the *exclusive* power to make laws "in relation to education," but with this restriction, viz.: that no Provincial Legislature shall pass any law prejudicially affecting any right or privilege with respect to *denominational* schools, which *any* class of persons had by law *at the union*.

It seems clear that this is a *limitation* on the exclusive power conferred, and that any provincial law violating this restriction would be *ultra vires* and void.

But there is a further provision, applicable only to "Protestant" and "Roman Catholic" minorities, in the provinces, and applicable only where any system of "separate" or "dissentient" school existed by law *at the union*, or is thereafter established by the Legislature of the Province. This provision gives a right of appeal to the Governor-General in Council from any Provincial Act or decision affecting any *right* or *privilege* of such minority in relation to education.

It is quite clear from this that any valid Provincial Act affecting any right or privilege possessed by a Protestant or Roman Catholic minority, in any province, in relation to education, no matter when acquired, may be appealed against.

This clause is not a limitation on the powers conferred on Provincial Legislatures. Its object is solely to give a right of appeal from the Provincial authority to the Federal authority, against Provincial educational laws that are *intra vires* and valid, but which may affect the rights or privileges of the minority.

The Confederation Act, therefore, creates,—*firstly*, a limitation on Provincial rights; and, *secondly*, gives a right of appeal against Provincial Acts,—in relation to education.

Now let us consider the Manitoba Act, (32 and 33 vic. cap. 3 sec. 22, Canada), and find wherein it differs, if at all, from the Confederation Act.

For convenience, I will place in parallel columns the sections of the Manitoba Act, and the corresponding sections of the British North America Act, in relation to education, omitting sub-section 2 of Sec. 93, as it does not affect the questions under consideration:—

British North America Act, Sec. 93.	Manitoba Act. Sec. 22.
In and for each province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions :—	In and for the province the said 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	(1). Nothing in any such law shall prejudicially affect any

right or privilege with respect to denominational schools which any class of persons have by law in the province at the union.

(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 Coun- 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.

right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union.

(2). An appeal shall lie to the Governor-General in Council from any Act or decision of the legislature of the province, or 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.

(3). 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.

The political condition of the North-West Territories

prior to the creation of the Province of Manitoba in 1870 need not be described; all are sufficiently familiar with the subject.

The general provisions of the Confederation Act of 1867 were, by the Manitoba Act, made applicable to that province. But, as one of the provisions of sec. 93 (subsec. 2, which I have omitted), relates and refers particularly to the educational conditions existing in the Provinces of Ontario and Quebec at the time of Confederation, the terms of that section were not appropriate to the new Province of Manitoba.

Hence, section 22 of the Manitoba Act was substituted for section 93 of the Confederation Act.

It will be observed that the *limitation* in relation to denominational schools, and the *provision giving the right of appeal* to the Governor-General in Council from Provincial legislation affecting any right or privilege of the Protestant or Roman Catholic minority, in relation to education, are embodied in section 22, in language almost identical with that used in section 93 of the Confederation Act. The intention in both Acts is no doubt identical.

It will also be observed that the language used in section 22 gives an appeal to the Governor-General in Council from *any* Provincial Act or decision affecting *any* right or privilege of the Protestant or Roman Catholic minority in relation to education.

All that I have said, therefore, with regard to the *limitations* and *restrictions* on Provincial legislative powers in relation to education, under the Confederation Act, applies to the Manitoba Legislature, under the Manitoba

Act. Its powers are not exclusive or absolute, but strictly limited, and in some respects subordinate to the Dominion Parliament.

After the creation of the Province, the Provincial Legislature, by an Act passed in 1871, called the Manitoba School Act, established a system of schools under the control of a Board of Education, one-half of whom were to be Protestants, and the other half Catholics; the two sections to meet separately; the Protestants to appoint a Protestant Superintendent, the Catholics a Catholic Superintendent; each Board to *select its own text books, relating to morals and religion.* In the sections where the Protestants predominated the schools were to be regarded as Protestant schools, and where the Catholics predominated, Catholic schools. Thus, a double system of public schools was, at the very beginning, created in the Province.

Acts amending this education law, in some respects, were passed in subsequent years, but it is not necessary to refer to them. The Manitoba School Act of 1881 repealed all prior acts, but it re-created and re-established the double system of Protestant and Roman Catholic schools on the same general lines as the Act of 1871, only that it made the distinction between the Protestant and Roman Catholic schools more marked, by providing that each section of the Board of Education should *select all books* to be used in the schools under its control, and gave a right to the minority, when sufficiently numerous, to establish a separate school in any section where the majority already possessed a school.

By virtue of this legislation, Protestant and Roman Catholic schools were created and built up in the pro-

vince, and the right or privilege of Roman Catholics to have and maintain schools under the direction and control of their church, was not only permitted but legalized. This educational condition continued in the province from 1870 until 1890. The children of 1870 had grown to maturity under its operation, and many had themselves become parents of families.

In the meantime, by reason of the influx of immigration, the population had vastly increased. The great majority of the immigrants being Protestants, an agitation for the abolition of Roman Catholic separate or demoninational schools was commenced and carried on for some time. This agitation was finally given effect to by the passage by the Manitoba Legislature in 1890, of two Acts relating to education. One of these created a Department of Education and an "Advisory Board." The Advisory Board was empowered to authorize text-books, and to prescribe the form of "religious exercises to be used in schools." The other Act, termed "The Public Schools' Act," purported to establish a system of public education entirely "non-sectarian," no religious exercises being allowed, except those conducted according to the regulations prescribed by the Advisory Board.

The effect of these acts was to do away with all separate and denominational schools as legal establishments, and to create one public school system for the whole province, under the control of a Minister and Department of Education and of an Advisory Board. The Roman Catholic minority were deprived of the legal right of collecting taxes from their own people to support their separate schools, and were compelled to pay taxes in support of the public schools created under the Act. Under

these circumstances, it became necessary for the minority to consider what course they would adopt. Three courses were open to them.

1st. They could ask the Dominion Government to disallow the Acts.

2nd. They could resist the operation of the Acts, and thus test their validity in the courts, or,

3rd. They could appeal by petition to the Dominion Government (the Governor-General in Council), under the constitution of the province, for some remedial order.

It must have been apparent from the first that the Dominion Government would not disallow the Acts in question, as their operation and effects were entirely local, and confined to the province, and did not interfere with or trench upon the rights or powers of the Federal Government.

If they were to adopt the third course, and appeal to the Dominion Government for a remedial order—what would the Dominion Government say? Naturally, they would say to the applicants—"The Acts you are appealing against may be *ultra vires* and void; we are not a tribunal constituted to determine such questions—that is the province of the courts. If the courts hold that the Acts are of no validity, you are not affected by them. They are only so much waste paper; the previous law is not repealed, and you have no grievance. If, on the other hand, the courts hold the Acts to be valid and constitutional, you can then come to us with your appeal, as provided in the Constitution of your province, and we will then hear your petition, and will make such remedial order as the facts and circumstances of the case and as

our powers and duties under the Constitution may require us to make."

Governed by these considerations, the aggrieved minority determined to test the validity of the Acts complained of in the courts. This could only be done by questioning their constitutionality, and resisting their operation on that ground.

The Public Schools Act of 1890, came into force on the 1st of May of that year. By virtue of its provisions, By-laws were made by the municipal corporation of the City of Winnipeg, under which a rate was to be levied upon Protestant and Roman Catholic ratepayers alike for public school purposes.

An application was thereupon made to the Court of Queen's Bench of Manitoba, on behalf of one Barrett, to *quash* these by-laws, on the ground that the Public Schools Act of 1890 was *ultra vires* of the Provincial Legislature, inasmuch as it prejudicially affected a right or privilege, with respect to denominational schools, which the Roman Catholics had by law or practice in the province *at the union*. The Court of Queen's Bench refused the application, being of opinion that the Act in question was *intra vires*, and, therefore, constitutional and valid. This decision was reversed by the Supreme Court of Canada, and an appeal was taken to the Judicial Committee of the Imperial Privy Council—the court of final resort on colonial question for the whole British Empire —where the judgment of the Supreme Court of Canada was reversed, and the judgment of the Manitoba Court of Queen's Bench restored. Thus the validity of the Manitoba School Acts of 1890 was finally established. The highest tribunal in the empire had declared them to

be *intra vires* and valid. These Acts were now indisputably part of the law of the province, and must be obeyed. The test case above referred to is Barrett *vs.* The City of Winnipeg, reported in Vol. 19 of the Canadian Supreme Court Reports, and in Vol. 1 of the Privy Council appeal cases for 1892.

The Roman Catholic minority had, therefore, most undeniably a grievance. The educational rights and privileges which they had legally acquired, and which had been exercised by them for nearly twenty years, had been taken away.

At great expense, they had established these facts. One would naturally have supposed that nothing now stood in the way of their appealing to the Governor-General in Council. It was the only legal recourse left to them. Consequently, they decided to appeal, and in November, 1892, presented their petition to the Dominion Government, praying for relief.

Sir John Thompson, the then Premier, with the wisdom and solidity of judgment, so characteristic of his political career, and with the judicial thoroughness and statesmanlike prudence which so admirably adapted him for the responsible office which he filled, knowing that the appeal would necessarily result in an interference by the Dominion Government or Dominion Parliament with legislation, which had been deliberately adopted by the Manitoba Legislature, knowing, too, that doubts were entertained and objections would be raised as to the right and power of the Dominion Government to interfere in the matter, and that prejudices and passions would be stirred up by fanatical, bigoted or unscrupulous agitators, if the appeal were entertained before all doubtful

and difficult questions had been fully discussed, carefully considered, and finally settled,—determined to submit every question involved in the controversy, affecting the *right* and *duty* of the Government to entertain the appeal in question, to the courts for determination. With this object in view, six questions, covering every possible doubt and difficulty which the most astute mind could suggest, were carefully prepared, and these questions, along with the complainant's petition, the material verifying it, and the statutes bearing upon the matter, were submitted to the Supreme Court of Canada for its consideration; the future action of the Government to be governed by the decision. Mr. Ewart, Q.C., ably represented the petitioners and supported their right of appeal. Mr. Christopher Robinson, Q.C., opposed the petition, contending that by reason of the decision in Barrett *vs.* Winnipeg, and under the circumstances of the case, no right of appeal to the Dominion Government existed; that the petitioners had no grievances, the Manitoba Legislature having a right to repeal the educational legislation which it had previously enacted; that every legislative enactment is subject to repeal by the same body which enacts it. This last was one of the principal points discussed by the respective counsel, and by Chief Justice Strong, in his judgment delivered 20th February, 1894. The Chief Justice, and Justices Gwynne and Taschereau, decided against the petitioners, and Justices Fournier and King in their favor. From this decision of the Supreme Court of Canada, the case was taken to the Judicial Committee of the Imperial Privy Council. On the hearing of the case before that tribunal, the Hon. Edward Blake supported the petition in a most elaborate and masterly argument, occupying two days, assisted by

Mr. Ewart. Mr. Cozens Hardy and Mr. Haldane, two of the most eminent members of the English Bar, opposed the appeal.

The arguments were concluded on the 13th December, 1894. Judgment was reserved.

On the 29th of January, 1895, the Judicial Committee delivered a most carefully considered and exhaustive judgment, dealing with every conceivable point involved in the controversy, unanimously sustaining the contentions made on behalf of the Roman Catholic minority, establishing their right of appeal to the Dominion Government for such remedial order as would meet the grievances of which they complained, and indicating the duty of the Government in reference to such appeal. This case entitled Brophy and Others *vs.* the Attorney-General of Manitoba, will be found reported in Vol. 1 of the Privy Council Appeal Cases for 1895, page 202.

All difficulties being now settled and every obstacle removed out of the way, fortified by this final decision of the tribunal of last resort, Mr. Ewart again presented the petition of the Roman Catholic minority to the Federal Government, which was argued from the 4th to the 7th of March, 1895, inclusive, by Mr. Ewart on behalf of the petitioners, and by Mr. D'Alton McCarthy, who was retained by the Manitoba Government to oppose the Petition and Appeal.

Before pursuing the narrative further, it will be necessary to pause and consider the last clause embodied in Section 93 of the Confederation Act, and in Section 22 of the Manitoba Act. The language of this clause is exactly the same in both sections.

It deals with the powers and duties of the Dominion

Government and of the Dominion Parliament, when such an appeal as this is presented.

The clause contemplates the arising of grievances from two different sources, the "Provincial Legislatures" being one of the sources, and some "Provincial authority" being the other source. Where the thing complained of is a Provincial law, it empowers the Governor-General-in-Council to direct or request the Provincial Legislature to pass a law remedying the grievance; and where the thing complained of is the Act or decision of some "Provincial authority" it empowers the Governor-General-in-Council to direct or request that provincial authority to do something or to refrain from doing something, so as to remedy the grievance. In either case, the action of the Dominion Government must take the form of a *remedial decision and request* to the Provincial Legislature, or to the proper provincial authority. I do not say that the Dominion Government is obliged to give a remedial decision, and to make a remedial order in every case presented. No doubt the Government may refuse the appeal, and may decide against the appellants, just as any court may decide against appellants and refuse an appeal. But just as it would be a monstrous thing for a court to refuse, or to dismiss an appeal where the appellant's case is clearly made out, so it would be an iniquitous thing for the Government to refuse an appeal of this kind where the appellants have made out a clear case entitling them to relief. There is this distinction between the position and powers of the government, under this part of the constitution, and the powers of an ordinary court. A court can enforce its judgments; the Dominion Government cannot enforce its decision. That power it does not

possess. The decision must have been passed upon by the parliament, and confirmed by, and embodied in, Dominion legislation, before the Federal Executive or the Courts can enforce it.

But the courts will enforce the law passed by the Dominion Parliament, just as they enforce any other law of the land.

The clause provides that in case the remedial decision or order is not obeyed by the Provincial Legislature or by the proper Provincial authority, the Parliament of Canada, may, as far as the circumstances of each case may require, make remedial laws for the due execution of the provisions of the section, to the extent of the remedies provided in the remedial decision, which has been disobeyed or ignored by the Provincial Legislature or Provincial authority, but only so far as may be necessary for the due execution of the provisions of the section. The Federal Government were placed in this position,—the validity of the acts complained of had been established The effects of these acts upon the Roman Catholic minority had also been established. The right of the complaining minority to petition for relief had been determined in their favor. The provisions of the Constitution requiring the Governor-General-in-Council to hear the appeal, under the circumstances, were, therefore, clear and indisputable.

What was to be the attitude of the Canadian Privy Council under these circumstances ? What were its *duties* and *functions* ? These are the important questions raised on the argument, more important than the appeal itself. Mr. McCarthy contended that the Council was not in any sense a court,—that its functions were not judical ; he

says: "My object is to show that you cannot be acting judicially. It is upon political considerations the matter must be determined. I am not going to say there is not a grievance, I am precluded from that by the judgment. I hope to show that you are to deal with it as a matter of policy. My argument is that they cannot re-establish seperate schools unless they are convinced that the separate school system is preferable to the public school system." These quotations are sufficient to indicate the line of argument pursued. But I think a fair and unbiased consideration of the law will lead to the conclusion that these arguments are incorrect. In the words of the constituting statute, the Governor-General-in-Council may, in case of an appeal against provincial school legislation, advise or request the Provincial Legislature to pass any such law as may seem requisite for the due execution of the section relating to education.

The Council had three things to consider and determine, viz.: (1). The right or privilege claimed, its nature and extent. (2). The interference, its nature and extent. (3). The remedy to be applied, its nature and extent.

The remedial decision must be such as shall seem necessary and appropriate to meet the circumstances of the case.

These functions are clearly and indisputably judicial functions. There is nothing in the statute indicating or suggesting that party or political considerations are to have any weight or influence with the Council, much less to govern its action in the matter. It is appointed to fulfil a constitutional duty. Like a court, it must hear and decide upon the evidence, and upon the law applicable to the case. Like a court, it must render a decision

on the law and the evidence. The decision can only take the form of a request, but it is none the less a decision or judgment. If the Provincial Legislature chooses to ignore the decision, and to disregard the request, the Council cannot enforce it—that matter remains entirely for Parliament.

Political considerations, no doubt, will influence the action of Parliament, should it become necessary for Parliament to deal with the matter.

If the Council were allowed to act upon political or party considerations, it would be freed from all constitutional restraints, and from all considerations of justice and equity. Surely this could not have been the intention of the framers of the constitution. Clearly the constitution intends that the Council shall assume a disinterested and judicial attitude in dealing with appeals of this kind.

There is, therefore, no distinction between its duties and functions, and those which devolve upon the ordinary courts of justice.

The other view pressed upon the Government during the argument was, that the members of the Council had the right to act upon their own views and opinions of the matter brought before them. If this view were correct, what would be the result? Protestants might petition against Provincial Legislation, and contend that their rights and privileges had been taken away or affected by it. The members of the Council might be all Roman Catholics. If allowed to act upon their own individual views and opinions, they might say to the petitioners, "In our view, the abolition of the rights and privileges claimed has been beneficial to the Province, and to the

nation, the Provincial Legislation complained of is right and salutary, we will, therefore, decline to grant any redress, we will refuse to make any remedial order."

Will any sane person contend that this is the meaning and intention of the constitution ? The members of the Government are not made judges of what education should be given to the people. They are not made judges of what constitutes education. They have no right to say what religious education shall be taught. They may think the religious education claimed by the minority entirely wrong, and even pernicious, but they have no right to allow their own individual views to influence their decision.

If it is established that the right or privilege claimed, legally existed, and that this right or privilege has been affected or taken away, or if it is established that the legislation gives undue or improper privileges to the minority, and the petitioners complain of this and establish their case, some remedial decision and order must be made—and it must be apparent to every unprejudiced mind that the decision and remedial order must be in the direction of restoring to the complaining minority the rights or privileges of which they have been deprived; or, in case the appeal is made on behalf of the majority —complaining that extraordinary or improper privileges have been granted to the minority—then the remedial decision and order must be in the direction of taking away or reducing the effect of these privileges within the previous limits. *The result is this*—Provincial Legislatures may grant separate educational privileges to any sect or class of Protestants or Catholics; and they may repeal all such Acts, and abolish the privileges so granted,

but the class or sect affected will then have the right to appeal to the Governor-General-in-Council, and on the facts being established, the Council must make a remedial decision of some nature, which, if disobeyed or ignored by the Provincial authority, may be legislated upon by the Dominion Parliament; and the Federal legislation will be enforced by the courts and by the Federal Executive.

This is not a question of *Provincial* rights. It is a question of *Minority* rights. It is not a question of the coercion of a Province by the Federal authority. It is a question of the attempted coercion of a weak *Minority* by the Legislature of a Province.—The question to be faced and grappled with is—may a Province disregard the constitutional decision of the Governor-General-in-Council ?—or must the Federal Parliament,—the guardian of the Constitution—maintain and enforce its educational provisions ?—is the Federal compact meaningless and valueless ?—Or must its terms be respected and obeyed ?—Is the Canadian Constitution a mere thing of paper and ink ?—Or is it a frame-work of steel—within which the political machinery of the Provinces and of the Dominion must perform their designated functions ?

The tyranny of the majority over the minority, is one of the things against which society needs protection.

John Stuart Mill, whose writings, both in diction and thought, will always be classics as long as English literature is read—in his essay on Liberty, has said—"There needs protection against the tyranny of the prevailing opinion and feeling."—"There is a limit to the legitimate interference of collective opinion with individual independence, to find that limit and maintain it against en-

croachment, is as indispensable to a good condition of human affairs, as protection against political despotism."

"Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest."

The lengthy and exhaustive arguments of Mr. McCarthy and Mr. Ewart, before the Canadian Privy Council, have been published. With deference to all concerned, I think that much of these arguments was entirely foreign to the real questions which the Council had to determine. The various Bills of Rights, for example, had no bearing on the question. The Council could not go behind the Statute, and the lengthy references to matters anterior to the Statute, were therefore useless.

After the argument, the Privy Council on the 21st of March, 1895, gave a decision, embodying a request, which is the *Remedial Order* about which so much has been said. This decision determined that the Minority had been deprived of three classes of rights or privileges which they had acquired by virtue of Provincial Legislation, passed subsequent to the Union, viz:

(1) The right to build, maintain and manage separate schools; (2) The right to share proportionately in any grant for educational purposes; and (3) The right of exemption from contribution to the support of other schools.

And it, in effect, requested the Manitoba Legislature to supplement the educational legislation of 1890 by such Act or Acts as might be necessary, to restore to the Roman Catholic minority the said rights and privileges.

This *Remedial Order* was forwarded to the Manitoba Legislature, on the 25th March, 1895, and that Legisla-

ture, after taking three months to consider the matter, (but without having complied with the request contained in the Order) returned an *Answer*—the terms of which must be considered.

1. The *Answer* begins by admitting that "the privileges the Legislature is commanded to restore, are substantially the same as the Roman Catholics enjoyed previous to 1890," but it alleges that the Roman Catholic Schools "did not possess the attributes of efficient modern Public Schools;"—"that their conduct, management, and regulation were defective,"—"that many people grew up in a state of illiteracy," and therefore, "that the expenditure of public money in their support, could not be justified." Now, we have no constitutional guide or criterion, as to what should be the "attributes of efficient modern Public Schools." What may be considered "education," and what may be considered "illiteracy," by any one class or sect, may not be so considered by another class or sect. There is no "*standard of education*" provided for in our Constitution, and the majority have no legal right to impose what they may consider the proper standard of education, on the minority, or on any class or sect. If the public money of a Province belongs to the people of that Province, the minority are entitled to the benefit of a proportionate part thereof.

2. "The Anglicans, the Mennonites, or the Icelanders, may possibly demand separate schools, if Roman Catholic schools are allowed to be established." Surely this no answer. The withholding of separate schools from Roman Catholics does not affect the rights of the other classes, if they have any. If these classes are entitled under the Constitution to have separate schools,

they have the right to demand them, and their rights (if any), cannot be forever refused or ignored. The inconveniences which might result concern the sects themselves.

3. The allegation that the Governor-General-in-Council did not possess "full and accurate information on the subject when the Remedial Order was made," taken in connection with the fact that the litigation had been in progress for nearly five years, that the questions involved all arise out of Statutes of the Province, and that the facts and law are fully discussed in all the arguments, and set out in the reports of the legal proceedings, looks like what lawyers call trifling or shuffling. The invitation to enter upon further investigations is equivalent to saying, "We have failed to make out a defence, but give us another chance, and we will try again."

Although the legal difficulties suggested seem so fanciful and unsubstantial as almost to provoke a smile, yet they are the Answer of a Province. Let us therefore consider them briefly *seriatim.*

1. "Dominion legislation will be irrevocable." Of course, irrevocable by the Provincial legislature. But if there is one principle more clearly established than another, it is the right of parliament to repeal or amend its own Acts. Need I affirm that the sovereignty of parliament over its own legislation is a fundamental principle of the British Constitution. The authorities, from Sir Edward Coke to the present, unanimously support this proposition.

The Imperial Statute which confirms the Manitoba Act, only prohibits the Dominion Parliament from amending or changing that particular Act, thus placing

Manitoba on the same secure constitutional footing as the other provinces.

2. "The power to collect taxes for educational purposes may rest upon sub-section 2 of section 92 of the B. N. A. Act, and may therefore be one of the exclusively provincial powers, and the Dominion Parliament may, therefore, be powerless to restore this privilege." This argument or objection was evidently inspired by the maxim, "That a poor excuse, and therefore a poor objection, is better than none."

The Constitution gives the Dominion Parliament power "to make remedial laws for the due execution of the decision of the Governor-General-in-Council," and therefore power to restore the privileges of which the minority have been deprived. If it be true that the greater includes the less, surely this language invests parliament with all the requisite power to pass an Act providing in every particular for the circumstances of the case, and for effectually restoring every privilege which the "Remedial order" declares has been taken away.

If sub.-sec. 3 of sec. 22 of the Manitoba Act is construed, according to the ordinary rules applicable to the construction of statutes; or according to the plain common-sense meaning of its language, only one interpretation can be given to it, which is this, when the circumstances warranting Dominion interference, (mentioned in the section) arise, any law passed by the Parliament of Canada within the limits of the Remedial order, must supersede and override any Provincial law with which it may conflict, otherwise the section is meaningless and useless.

3. "No part of the public funds of the province could be made available for the support of separate schools without the consent of the Provincial Legislature." The public funds of the province are not more absolutely under the control of the Legislature of the Province than education is under its control.

The public funds of the Province are composed of the Dominion Subsidy and Provincial Fees and Taxes. The inhabitants of the Province are supposed to have an equal *per capita* interest in these funds. Each of the minority is, therefore, interested in these funds to the same extent as each of the majority.

The Roman Catholic separate schools, if reestablished by Dominion legislation, could not be justly deprived of a proportionate part of any Provincial educational grant. The Dominion legislation would provide that the restored schools shall receive their proper proportion of any such grant, and such Dominion law would override any Provincial law to the contrary on the subject.

4. As a summing up of all the arguments, the "Answer" proceeds: "It would appear, therefore, that any action of the Parliament of Canada, looking to the restoring of educational priviliges to the Roman Catholic minority, must be supplemented by the voluntary action of the Provincial Legislature."

For the reasons given, this proposition cannot be conceded. The Constitution and the Decisions are against it, and the language of the last Judgment of the Privy Council conclusively establishes the completeness of the Federal authority.

This objection does not require an argumentative re-

futation, but a few words may make its untenableness more apparent.

The provinces have exclusive jurisdiction over "property and civil rights." The Dominion has jurisdiction over "Bankruptcy and Insolvency." Every Insolvent law deals with "property and civil rights," and conflicts in several ways, with provincial laws, for example in the discharge of debtors—but the insolvency laws do not require to be supplemented by Provincial laws to make them effective, much less with a Dominion Educational law, which the Parliament of Canada is expressly empowered to enact, require to be supplemented by Provincial legislation to make it effective.

5. The fact, stated at the conclusion of the "Answer," that the members of the present Legislature of Manitoba were elected before the last Privy Council Decision, and "had given pledges to their constituents" (to support the School Acts of 1890), "which they feel in honor bound loyally to fulfil," is the only objection in the "Answer" demanding serious consideration. This may be a valid reason against any hasty action being taken by the Dominion Parliament, and is of itself quite sufficient excuse for the delay by Parliament to legislate upon the question for a reasonable time to allow the members of the Legislature to confer with their Constituents, or a dissolution and new election to take place.

Such is a brief consideration of the statutes, the proceedings, the litigation, and the facts, bearing upon the legal and constitutional aspects of the Manitoba School Question.

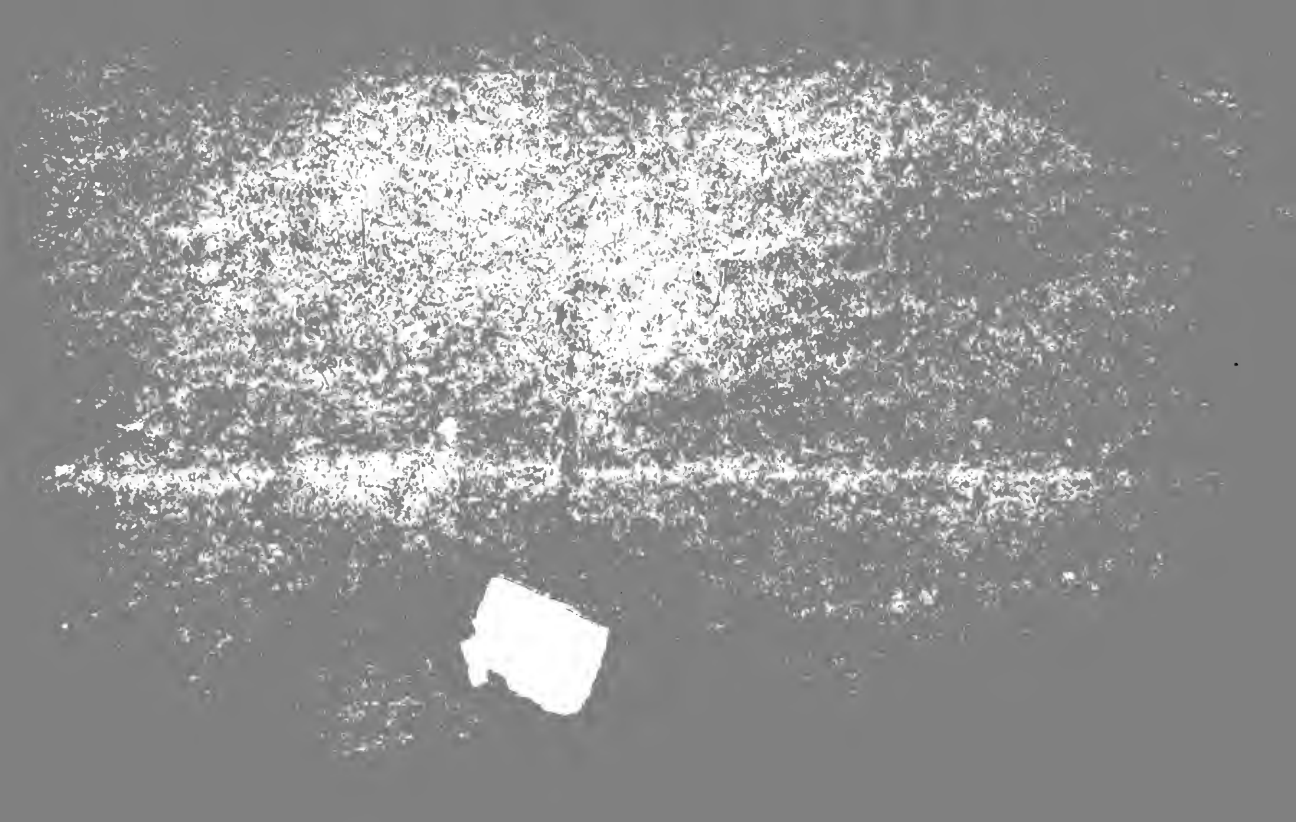
With regard to the duties of the state in relation to education, some contend that education should be com-

pulsory; others, that it should be voluntary. Some demand a high standard; others, that a knowledge of reading, writing, and arithmetic, is all that Government should provide or enforce. But the feeling is gaining ground with all classes and sects, that only those branches of useful knowledge, respecting which there are no reasonable differences of opinion, should be taught in the public schools which are under the control of the state, and which are supported to any extent by public money.

The value of religious teaching in schools, is a disputed question. The majority, however, still think that school education should, to some extent, embrace religious education. And the very wide differences between Protestants and Roman Catholics, as to what constitutes "religious education," had to be provided for, and gave rise to the special provisions in our constitution, in relation to it. These provisions may be right or wrong, wise or unwise. But they are there—they are the law—and the law must be obeyed. The machinery for settling all these disputes and differences, is quite adequate to meet every emergency. If wisely applied, it will adjust all difficulties in a fair and satisfactory manner. There should be no prejudices stirred up; no excitement, no fanaticism. This is a free constitutionally governed country. People should agree to differ. Each class should respect the opinions and religious beliefs of others. Changes can only be brought about with the consent of the governed. The attempted coercion of minorities, is worse than useless. There must be complete freedom and the widest possible toleration. The unreasonable prejudices, and hatred of any class towards the religion or language of any other class, should be discouraged and

discountenanced. Canada is now, and is evidently destined to continue, a nation of two languages at least. A nation with two such literatures as the French literature and the English Literature, is far richer, intellectually, than a nation with only the literature of one language. The suppression or loss of either the English language, or the French language, would be a calamity to civilization. It would be an advantage to the whole people, if both languages, were taught in all our public schools.

My observations have been brief and condensed, but I conclude by hoping that what I have said may help somewhat to elucidate the questions under consideration, and to allay unreasonable prejudices and passions.



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