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LAW, POLITICS AND THE MANITOBA SCHOOL QUESTION: SUPREME COURT AND PRIVY COUNCIL

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The 1896 election, ushering in the Laurier era, was profoundly influenced by two Manitoba School cases decided in directly conflicting ways by the Supreme Court of Canada and the Privy Council. The Supreme Court in the Barrett case gave a reasonable interpretation to the denominational school rights guaranteed by the constitution. However, the narrow interpretation by the Privy Council so trivialized the protection that it must be regarded as an amendment to our constitution. The author contends that this Privy Council case represents the most unfortunate of all judicial amendments because of its deleterious impact upon Canadian unity. The amendment nurtured the growth of political separatism in Quebec by causing French Canadians to believe that only within Quebec would their cultural rights be protected. Franco-Manitobans were so disillusioned that almost ninety years elapsed before Manitoba's Official Language Act of 1890, a clearly unconstitutional statute, was challenged in the Supreme Court. The Supreme Court itself was adversely affected and ceased to confront issues arising under section 93 of the Constitution Act, 1867 in the united way, initially exemplified by the Barrett case. The author occasionally uses biographical material in an attempt to understand the factors influencing the judicial decisions.

L'élection de 1896, qui inaugura l'ère de Laurier, a été profondément influencée par deux affaires concernant la question scolaire au Manitoba, affaires qui furent décidées de façon totalement différente par la Cour suprême du Canada et par le

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Conseil privé. La Cour suprême donna, dans l'affaire Barrett, une interprétation raisonnable des droits de l'école confessionnelle garantis par la constitution, mais le sens restreint que leur attribua le Conseil privé rendit leur protection si dérisoire que cette décision doit être considérée comme une modification de la constitution. Selon la thèse de l'auteur, cette décision du Conseil privé, par l'effet néfaste qu'elle eut sur l'unité nationale du Canada, représente la modification judiciaire la plus malheureuse qui ait jamais été faite. Cette modification a entretenu le développement du séparatisme politique au Québec en faisant croire aux Canadiens français que leurs droits culturels ne seraient protégés qu'à l'intérieur du Québec. La déception des Canadiens français du Manitoba fut si grande qu'il leur fallut près de quatre-vingt-dix ans pour contester devant la Cour suprême du Canada la loi sur les langues officielles du Manitoba, loi qui est manifestement inconstitutionnelle. La Cour suprême elle-même en subit la mauvaise influence et cessa de décider des questions concernant l'article 93 de la loi constitutionnelle de 1867 dans la ligne d'unification indiquée pour la première fois par l'affaire Barrett. L'auteur recourt parfois à des détails biographiques pour tenter de saisir les facteurs qui influencèrent les jugements.

Introduction

In the last decade of the nineteenth century, the Manitoba School Question became one of the most dominant and divisive issues ever to challenge the Canadian nation. The focus of this paper will be on two cases of great importance, *Barrett v. City of Winnipeg*¹ and *In Re Certain Statutes of the Province of Manitoba Relating to Education*,² which arose out of that controversy. Both cases involved the denominational educational rights of the Roman Catholic minority in Manitoba, but more was at issue than whether majority rule was to prevail over minority rights. At the heart of the controversy was a conflict about the essential nature of the Canadian nation. The Manitoba legislation of 1890 represented a concerted effort by the government to deny the cultural and linguistic duality of Canada outside Quebec by pursuing a policy of assimilation or forced conformity of the French Canadian. This rejection of the Confederation ideal of unity was to have unfortunate long-term repercussions in causing French Canadians to question the validity of Confederation itself — a questioning which continues to this day.

The adverse impact on Canadian unity caused by Manitoba's opting in 1890 for homogeneous nationalism would in itself make the two cases arising out of the legislation worthy of study. However, there are several additional reasons for considering these cases. One is that their combined effect was a significant factor in defeating the Conservative federal government in 1896 and in ushering in the Laurier era. We have become

¹ (1891), 19 S.C.R. 374, rev'd [1892] A.C. 445 (P.C.).

² (1894), 22 S.C.R. 577 rev'd *sub nom. Brophy v. Attorney-General of Manitoba*, [1895] A.C. 202 (P.C.).

accustomed to the importance attached to the *Patriation Reference*,³ but its political impact cannot be compared to the explosion set off by these two cases. The cases thus merit study because they show law and politics interacting in a very dramatic way.

The cases are also important in any attempt to reassess whether Canada was benefited or harmed by appeals to the Judicial Committee of the Privy Council. In the last two decades, a few scholars have looked more kindly upon the Privy Council's interpretation of our constitution. Alan C. Cairns has contended that the Privy Council exerted "a positive influence in the evolution of Canadian federalism" through "the injection of a decentralizing impulse into a constitutional structure too centralist for the diversity it had to contain".⁴ The thesis that the Privy Council's interpretation is to be approved simply because it responded to the forces of regionalism is not compelling. Regional diversity, including Quebec's cultural, linguistic and legal differences, could have been accommodated by recognizing a wide area of concurrent jurisdiction. Such judicial interpretation would have been more faithful to the constitution and would not have rendered the federal government impotent to cope with the Great Depression. There was no need to emasculate the federal general power and the trade and commerce power by construing "property and civil rights" to be a trump card. Furthermore, if the constitution had required amendment, it should have been initiated in the proper way in Canada rather than under the guise of patently manipulative interpretation.⁵

Although Cairns has noted that the members of the Privy Council were "policy makers without the necessary tools of understanding",⁶ he nevertheless speculated that "more favourable evaluations of the Judicial Committee will begin to appear".⁷ I doubt this, but, in any event, the scholarly criticism of Privy Council decisions by persons such as Bora Laskin and Frank Scott will remain important and valid. The major purpose of this article is to show that in the *Barrett* case, the Privy Council

³ [1981] 1 S.C.R. 754, (1981), 125 D.L.R. (3d) 1.

⁴ Alan C. Cairns, *The Judicial Committee and Its Critics* (1971), 4 Can. J. Pol. Sc. 301, at p. 323. G.P. Browne, *The Judicial Committee and The British North America Act* (1967) contended that the almost universal criticism of the Privy Council's construction of the B.N.A. Act was misconceived and argued that its construction was consistent and textually justifiable. The book's defence of the Privy Council generally received unfavourable review, e.g., E.R. Alexander (1967), 17 U.T.L.J. 371 and D. Gibson (1968), 46 Can. Bar Rev. 153. But see P. Blache (1968), 6 Alberta L. Rev. 146.

⁵ Bora Laskin, *Peace, Order and Good Government Re-Examined* (1947), 25 Can. Bar Rev. 1054, at p. 1086 said: "My examination of the cases dealing with the Dominion's general power does not indicate any inevitability in the making of particular decisions; if anything, it indicates conscious and deliberate choice of a policy which can only with difficulty be represented as ordinary judicial techniques".

⁶ *Loc. cit.*, footnote 4, at p. 330.

⁷ *Ibid.*, at p. 332.

rendered a great disservice to Canada. Had it not reversed the decision of the Supreme Court of Canada, Canada might today be a more united country. While the importance of a single decision should not be exaggerated, the modern conception of Canadian unity espoused by the Supreme Court might have provided a beacon to guide other courts and Canadians generally towards a better accommodation of our bilingual and bicultural roots.

My objective is not to criticize the Privy Council but to emphasize that there is real benefit to be gained by looking at certain Supreme Court of Canada decisions, including those which were reversed by the Privy Council. The Supreme Court of Canada, after being freed in 1949 from the domination of the Privy Council, has gradually unshackled itself from all binding precedent. Thus our Supreme Court can now prefer its own decisions to those of the Privy Council. This is an attitude which the Supreme Court should be encouraged to adopt. Yet counsel appear reluctant to cite Supreme Court decisions which were appealed, including even those affirmed by the Privy Council.⁸ Such reluctance indicates that lawyers become prisoners to constructs such as precedent and *stare decisis*. We have failed to adjust to the new situation. It is now permissible to cite as persuasive authority decisions of our Supreme Court which were overruled by the Privy Council. The overruling is a strike against the case but does not mean that the decision may not in the end prevail. There is a rich jurisprudence which should be carefully reassessed.

In an attempt to understand what caused a judge to render a particular decision, resort will occasionally be made to his background. This is admittedly speculative, but it is important to recognize the significance of the psychological make-up of the judge. We are all captives of our own particular biographies, and judges share this basic phenomenon with the rest of us. Most judges attempt to be impartial, but they can assess events only with their own intellect. Benjamin Cardozo said of judges:⁹

All their lives, forces which they do not recognize and cannot name, have been tugging at them — inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of the "total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice shall fall.

⁸ In *Reciprocal Tax Immunity in a Federation — Section 125 of the Constitution Act, 1867 and the Proposed Federal Tax on Exported Natural Gas* (1983), 61 Can. Bar Rev. 652, at p. 658, I argued that the majority judgments of the Supreme Court of Canada should have been used to clarify the ambiguous affirming judgment of the Privy Council in the *Johnny Walker* case. At p. 681, I stated: "Canadian courts should surely stop genuflecting to the Privy Council or, at least, if the affirming Privy Council opinion is ambiguous, the Supreme Court of Canada judgments should be consulted and the interpretation which is consistent with the majority decisions should be preferred".

⁹ Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921), p. 12.

Judges do operate within institutional and professional constraints. A judge takes an oath to uphold the law;¹⁰ thus, he is obliged to follow the dictates of the law in deciding between opposing litigants. He is also a product of professional training which stresses the importance of *stare decisis* and of sound reasoning in the determination of disputes. However, rules and principles provide wide scope for judicial discretion. There is an open texture to the law: analytical jurisprudence may solve some problems, but there are limits to legal logic. There may be two equally persuasive lines of common law authority or two equally reasonable interpretations of an ordinary statute or of the constitution. It is in these hard cases that background, training, life experience and basic individual philosophy will be of critical importance.

The need for a judiciary which is widely representative of informed Canadian opinion¹¹ has been enhanced by the Canadian Charter of Rights and Freedoms.¹² The rights and freedoms are necessarily enunciated in very general language and are not absolute because section 1 expressly permits such reasonable limits "as can be demonstrably justified in a free and democratic society". To determine the substance and permissible limitations of these guaranteed rights and freedoms will involve the courts in issues of a social, economic and political nature which will enhance the significance of the background of the judges and focus attention upon the importance of the judicial selection process. For similar reasons I believe it is useful to examine the backgrounds of the judges in the two Manitoba cases, for in these cases the courts were confronted with important social and political issues.

The Manitoba School cases graphically illustrate the deficiencies of the Privy Council's formalistic judgment style which was based on the idea that the true meaning of the constitution will emerge by simply applying sound canons of construction. This formalism gives judges a Promethean capacity to transform the law in accordance with their own design by picking and choosing among conflicting canons of constructions. By concealing policy decisions behind a façade of literalism, a judge reduces his public accountability. The cases thus show the need for functional judgments in which the judge states the competing issues, rules and principles, discusses their relative advantages and disadvantages, and gives a reasoned explanation of why one rule or principle is preferable to its competitors. There are two important advantages to the functional

¹⁰ Supreme Court Act, R.S.C. 1970, c.S-19, s.10, sets out the oath of office which a judge must take.

¹¹ S. Shetreet, *On Assessing the Role of Courts in Society* (1980), 10 *Manitoba L.J.* 355, at p. 391 says: "A similar problem of non-representative judiciary exists in Canada as well, but has not as yet been a subject of public debate nor of a significant academic analysis".

¹² Part I, Constitution Act, 1982, Schedule B, Canada Act 1982, 1982 c.11 (U.K.).

style of judgment. One is that it discloses more information about the decision-making process and thus permits and encourages more intelligent debate about the merits of the decision. Another is that a judge who conscientiously sets out the competing rules and issues and discusses their relative merits will be more likely to keep a closer rein on personal biases and prejudices.

There is one final reason why the Manitoba School cases warrant study at this time: they involve the only explicit protection for a fundamental freedom contained in the Constitution Act, 1867¹³ and the Manitoba Act, 1870¹⁴ aside from the language guarantee. It is important to see how majoritarianism can prevail over constitutionally protected minoritarianism even without the legislative override which is contained in section 33 of the Charter.¹⁵ In this time of constitutional renewal, we should heed Professor Lovell Clark's advice, given in 1968, that "English Canadians would do well to reflect upon the reasons for their past failure to live up to solemn commitments embodied in the existing constitution".¹⁶

I. *Historical Setting — Manitoba*

Confederation of 1867 stretched only from the Atlantic to Lake Superior, but the vision of a transcontinental nation was clearly enunciated in section 146 of the Constitution Act, 1867 in its provision for the admission of Newfoundland, Prince Edward Island, British Columbia, Rupert's Land and the North-western Territory into the union. The dream of a dominion stretching from sea to sea was threatened by the westward expansion of the United States and its purchase of Alaska from Russia in 1867, and Sir John A. Macdonald appreciated that continuing to haggle with the Hudson's Bay Company jeopardized the Canadian transcontinental dream. In 1869, George-Etienne Cartier and William McDougall, dispatched to London, purchased Rupert's Land for one and a half million dollars and gave a guarantee that five per cent of the land in the fertile belt would continue to belong to the Hudson's Bay Company.

The Canadian government failed to assure the local inhabitants that their rights would be respected. When surveyors sent to the Red River appeared to disregard completely the riverstrip holding of the Métis, Riel and a party of armed horsemen broke up the survey party. Riel then

¹³ 30-31 Vict., c.3 (U.K.), now called the Constitution Act, 1867.

¹⁴ An Act to amend and continue the Act 32 and 33 Victoria, chapter 3; and to establish and provide for the Government of the Province of Manitoba, 33 Vict., c.3 (Can.), now called the Manitoba Act, 1870.

¹⁵ *Supra*, footnote 12. The legislative override is applicable to fundamental freedoms, legal rights and equality rights.

¹⁶ Lovell Clark, *The Manitoba School Question: Majority Rule or Minority Rights?* (1968), p. 7.

organized the Métis, prevented Lieutenant-Governor-designate William McDougall from entering, seized Fort Garry and put down an attempted overthrow by Dr. John Schultz, the leader of the Canadians in the Red River. On December 29, 1869, Riel assumed the presidency of the provisional government. In February 1870 another bungled effort was made to unseat Riel, and Thomas Scott was captured. Scott was tried before a court-martial presided over by Ambrose Lepine, adjutant general in the provisional government, and a jury of six Métis; he was found guilty, and on March 4, 1870 was taken outside the walls of Fort Garry and shot by a firing squad. The execution of this Orangeman fuelled anti-Catholic feeling in Ontario.

Macdonald was appalled by the events because they revealed Canadian impotence to both Americans and Métis. The formal transfer of Rupert's Land to Canada was to have occurred on December 1, 1869; Macdonald now had the date postponed. As he was reluctant to seek permission to send troops through the United States, he had no alternative but to negotiate with Riel and await the spring. Donald A. Smith, the Hudson's Bay Commissioner in Montreal, travelled to the Red River in the winter of 1869-70. Smith persuaded Riel to state the demands of his provisional government and to choose delegates to send to Ottawa. Many of the Métis demands were agreed to by Macdonald and Cartier and were incorporated in the Manitoba Act. On July 15, 1870, the transfer of the whole northwest to Canada occurred and simultaneously Manitoba became a new province. On that day the new Lieutenant-Governor, Adams G. Archibald, left Port Arthur, accompanied by a force of 1,200 British and Canadian soldiers under Colonel Garnet Wolseley, who navigated the old voyageur route to Fort Garry. Canada's introduction to the West was thus marred by its association with military force.

A census taken in 1871 revealed that there were 5,720 French-speaking Half-breeds or Métis, 4,080 English-speaking Half-breeds or "country-born" and only 1,600 White settlers.¹⁷ Two provisions of the Manitoba Act reflect the approximately equal balance between French-speaking Roman Catholics and English-speaking Protestants. Section 22 of the Manitoba Act provided that the legislature might exclusively enact laws relating to education, subject to three provisions, of which the first was:

Nothing in any Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union.

Section 23 provided that either English or French could be used in the legislature or in any courts, and Acts of the legislature were to be printed and published in both languages. The religious compromise, in the form of the denominational educational guarantee upon which Canada was

¹⁷ Thomas R. Berger, *Fragile Freedoms* (1981), p. 34.

founded, was thus projected westward. It should, however, be emphasized that Manitoba was to be a province like Quebec, not one like Ontario, Nova Scotia and New Brunswick. The language guarantee of section 23 of the Manitoba Act was virtually identical to that contained in section 133 of the Constitution Act, 1867. Section 133 accorded equal status to English and French in Parliament and the federal courts, but then provided that such equal status would prevail only in Quebec and not in the other original provinces.¹⁸

In 1870, the only schools in Manitoba were denominational schools which were regulated and controlled by the Roman Catholic Church and by various Protestant denominations. They were financed partly through school fees paid by the parents and partly from the general funds of the church. In 1871, the legislature of the new province established a system of public schools controlled by one Board of Education, divided into a Protestant section and a Roman Catholic section. Originally there were twenty-four school districts, of which twelve were Protestant and twelve were Roman Catholic. The Protestant schools were under the control of the Protestant section of the Board, and the Roman Catholic schools under the Roman Catholic section of the Board. Taxes were levied for Protestant schools on the property of Protestants alone and for Roman Catholic schools on the property of Roman Catholics alone. An educational grant made annually by the legislature was apportioned between the two classes of schools. This segregated system of education was continued under various statutes up to 1890.

The linguistic and religious guarantees of the Manitoba Act were appropriate for a province which was almost equally balanced between Francophones and Anglophones and between Roman Catholics and Protestants. The subsequent demographic changes in Manitoba in the 1870s and 1880s were enormous. The population increased almost fourteen fold in twenty years. There had been a large influx of Protestant and English-speaking settlers, particularly from Ontario. The Manitoba of 1890 was therefore strikingly different in composition from the Manitoba of 1870. The census of 1891 revealed that Manitoba had a population of 152,500, of which only 20,571 or thirteen per cent were Roman Catholics, and only 9,949 or seven per cent were French Canadians.¹⁹

It is undoubtedly true that had French-Canadian and Roman Catholic immigration to Manitoba been greater there would have been no interference with their linguistic and educational rights. However, it does not

¹⁸ Berger notes that in 1867 no provision was made "for two official languages in New Brunswick, even though Acadians constituted as large, indeed, a larger, proportion of that province's population than Anglophones did of Quebec's population . . .", *ibid.*, p. 19.

¹⁹ Clark, *op. cit.*, footnote 16, p. 147.

follow that a small minority which lacks local political clout will inevitably suffer loss of rights unless, as Professor Lovell Clark has said, "one assumes that the words 'tyranny' and 'majority' are inseparable".²⁰ Thus the great demographic changes in Manitoba from 1870 to 1890 made an assault on the linguistic and educational rights of French Canadians politically feasible. But to understand why the assault was made and why it was successful, it is necessary to examine the religious and racial strife of the period.

II. *Racial and Religious Strife in Canada*

After the conquest, the French Canadian was subjected to alternating policies of suppression and liberal treatment of his language, law, religion and culture. The liberal treatment was accorded primarily when his support and loyalty was considered crucial to British interests. Following the Rebellion of 1837, the British government sent Lord Durham to investigate the causes. His report of 1839 was a liberal document to the extent that it recommended responsible government, but it was reactionary in that it recommended a return to the policy of assimilation. Reunion of Lower and Upper Canada was advocated to establish an English-speaking majority, and Lord Durham commented that "I have little doubt that the French, when once placed by the legitimate course of events and the working of natural causes, in a minority would abandon their vain hopes of nationality . . .".²¹ By granting equal representation to Canada West and Canada East when their respective populations were 400,000 and 600,000, English-speaking dominance was enhanced. The Act of Union of 1840²² provided that English was to be the only language of the Legislative Council and Legislative Assembly. Nevertheless, in 1847, Lord Elgin arrived in Canada as Governor-General, and at the opening of the legislature in January, 1849 he read the speech from the throne in both languages and announced that English and French would thereafter enjoy equal status in the legislature.

French Canadians still felt beleaguered at the time of Confederation. The English-speaking minority in Quebec must also have had a feeling of isolation in the local legislature after Confederation cut it off from the support of Canada West. Our interest is, however, in Manitoba's failure in 1890 to continue to accord fair treatment to a minority, particularly when that minority had received constitutional protection.

²⁰ *Ibid.*, p. 3.

²¹ J.M. Bliss (ed.), *Canadian History in Documents, 1763-1966* (1966), p. 61.

²² An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada, 3 & 4 Vict., c.35, s.XLI (U.K.). Section XLI was repealed by An Act to repeal so much of an Act of the Third and Fourth Years of Her present Majesty, to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada, as relates to the Use of the English Language in Instruments relating to the Legislative Council and Legislative Assembly of the Province of Canada, 11 & 12 Vict., c.56 (U.K.).

In Canada in the nineteenth century the religious and racial strife were inextricably interwoven. In the middle of the century, the Roman Catholic Church was becoming more absolutist and less tolerant in reaction to the revolutionary outbreaks in Europe in 1848 to 1850. In 1864, Pope Pius IX in the encyclical *Quanta Cura* and its appended Syllabus proclaimed himself the enemy of both liberal Catholicism and Catholic liberalism. The Syllabus listed eighty errors of the time, the final error being that "[t]he Roman Pontiff can, and ought to reconcile himself, and come to terms with progress, liberalism and modern civilization".²³ On the day of Canada's birth in 1867, Pope Pius IX announced to the bishops assembled in Rome that he would convene an ecumenical council for the first time in three centuries. This Council proclaimed on July 18, 1870, the dogma that the Pope, when he speaks *ex cathedra* defining a doctrine on faith or morals, is infallible. This claim of the Papacy to domination over the individual's conscience disturbed Protestants.

Bishop Bourget of Montreal faithfully reflected the growing opposition to liberal values, and the *Guibord* case bears witness to the more intransigent attitude of the Roman Catholic Church in Quebec. Joseph Guibord, a printer, was denied burial in consecrated ground by Bishop Bourget simply because he was a member of the Institut Canadien, which had some prohibited books in its library and which had also subscribed to the principle of religious toleration. Guibord died on November 18, 1869, but not until November 16, 1875, after an appeal to the Privy Council,²⁴ and with the aid of most of the Montreal Police force and many local militia, was he finally interred in Côte des Neiges cemetery.

The Catholic Programme emerged in 1871. In an attempt to create a Catholic political force in Quebec and to render the state subordinate to the Church, voters were instructed to cast their ballots only for candidates who promised to make Catholic doctrine the basis for their political action. The Church designated "the Conservative Party as the only one offering acceptable guarantees to religion",²⁵ but advised "Roman Catholics to support only those Conservative candidates who most nearly conformed to the principles of the Programme".²⁶ The Programme backfired: the Supreme Court of Canada in the *Charlevoix Election* case²⁷ declared the January 1876 election of Hector Louis Langevin void because of undue influence exerted by priests in sermons delivered from the pulpit on several Sundays immediately preceding the vote. This indicated to the clergy limits beyond which they were not to proceed in a liberal

²³ Lovell C. Clark, *The Guibord Affair* (1971), p. 3.

²⁴ *Brown v. Curé et Marguilliers De L'Oeuvre et Fabrique De Notre Dame De Montreal* (1874), 6 P.C. 157.

²⁵ Clark, *op. cit.*, footnote 23, p. 18.

²⁶ *Ibid.*

²⁷ *Brassard v. Langevin* (1877), 1 S.C.R. 145.

society. Nevertheless, the theocratic tendencies of the Roman Catholic Church continued to disturb Protestants throughout Canada.

On November 7, 1885, the last spike was driven into the Canadian Pacific Railway at Craigellachie in the Rockies. The formal act was arranged to symbolize Canadian unity, but nine days later, when Louis Riel was hanged at Regina, the precarious nature of Canadian unity was revealed. Riel at once became a French-Canadian and Catholic martyr. Honoré Mercier, able to mobilize the intense feeling of betrayal felt in Quebec, emerged as Premier in 1887. In 1888, the Jesuits' Estates Settlement Act²⁸ was passed by the Quebec legislature in order to settle a long-festering problem. In 1775, the Governor had ordered the suppression of the Society of Jesus and the confiscation of its property. In 1831, the British Crown relinquished its claim to the Jesuit Estates and confided the duty of division to the Colonial legislature. No agreement could be reached among the various claimants, and the matter was further complicated when the Jesuits returned to Canada in 1843. The income from the property had long been used to support education. To compensate the Protestants, the Act directed that sixty thousand dollars was to be paid to the Protestant Committee of the Council of Public Instruction,²⁹ representing a share proportionate to their population in Quebec. The sum of four hundred thousand dollars was to be paid to settle all Catholic claims.³⁰ The statute had only seven sections, but it was preceded by a twenty-two page preamble recording the extensive correspondence between the Premier, Rome and various clergy relating to the settlement. In one of the letters cited in the preamble, Premier Mercier stated that the distribution of the four hundred thousand dollars was to be made only if the agreement was "ratified by the Pope".³¹ The invoking of Papal authority was a skilful way of ensuring that the conflicting Catholic claims would finally be reconciled. This reasonable mode of resolving what had previously been an intractable problem was passed unanimously by both houses of the Quebec legislature.

²⁸ An Act respecting the settlement of the Jesuits' Estates, 51-52 Vict., c.13 (Que).

²⁹ *Ibid.*, s.4.

³⁰ *Ibid.*, s.2.

³¹ A letter dated May 1, 1888 from Premier Honoré Mercier to Reverend Father Turgeon, Procurator of the Jesuits at Montreal who was to negotiate the settlement, contained the following points:

7. That any agreement made between you and the Government of the Province will be binding only in so far as it shall be ratified by the Pope and the Legislature of this Province;

8. That the amount of the compensation fixed shall remain in the possession of the Government of the Province as a special deposit until the Pope has ratified the said settlement and made known his wishes respecting the distribution of such amount in this country;

Preamble to 51-52 Vict., c.13 (Que.), at p. 50.

The Jesuits' Estates Settlement Act provoked an impassioned outcry from some English-speaking Protestants. In Ontario it led to the formation of the Equal Rights Association³² which advocated disallowance of the Quebec statute because it invoked Papal authority. The Association believed in Equal Rights for all, but a corollary to this was that it opposed minority rights. The equal rights for which it stood were just those equal rights which the majority conferred on everyone. Accordingly, the Association led by D'Alton McCarthy launched an assault upon the rights of Francophones and Roman Catholic Canadians outside Quebec. Although the Association was to have but a short life, it had a profoundly disruptive impact upon national unity. Its influence stemmed from its appeal to English Canadian nationalism which, in spite of Confederation, was for many still rooted in the idea of a homogeneous language and culture. The Association was also able to exploit Protestant distrust of ultramontane Catholicism even though the tide had turned and more moderate elements now prevailed within that church.

III. *Abolition of the Roman Catholic Public Schools*

It is against this background that D'Alton McCarthy's visit to Manitoba must be considered. In a speech at Portage la Prairie on August 5, 1889, McCarthy attacked separate schools and French language rights. Also on the platform was Joseph Martin, Attorney-General in the Liberal Government of Manitoba, who echoed McCarthy's sentiments. This spark ignited a fire that soon consumed the linguistic and educational rights of Franco Manitobans.³³

In 1890, the Department of Education Act³⁴ was passed by the Manitoba Legislature. Section 18 provided that the existing Board of Education and Superintendents of Education were to cease to hold office and were to "deliver over to the Provincial Secretary all records, books, papers, documents and property of every kind belonging to said Boards". The Catholic section of the Board ceased to exist and its property was compulsorily acquired without compensation. The Public Schools Act³⁵ then provided for free non-sectarian education to be paid for by an assessment of all ratepayers, Protestant and Catholic, in each municipality. The

³² J.R. Miller, *Equal Rights* (1979).

³³ W.L. Morton, *Manitoba, A History* (2nd ed., 1967), pp. 240-250; Gerald Friesen, *The Canadian Prairies* (1984), pp. 215-219.

³⁴ An Act Respecting the Department of Education, 53 Vict., c.37 (Man.).

³⁵ The Public Schools Act, 53 Vict., c.38 (Man.). The statute was largely copied from The Public Schools Act of Ontario, complete with references to the revised Statutes of Ontario of 1887, but with the omission of the tax exemption for Roman Catholic separate school supporters and of any provision for compulsory attendance. The original bill had a clause making attendance compulsory but on the advice of D'Alton McCarthy it was struck out in committee.

Manitoba legislature at the same session also passed the Official Language Act,³⁶ which, in spite of section 23 of the Manitoba Act, 1890, made English the sole official language.

The Conservative government in Ottawa was faced with a dilemma. Having advised the Lieutenant-Governor not to withhold his consent, it had three means of dealing with the assault upon the denominational educational rights of the Roman Catholics in Manitoba: the Public Schools Act might be disallowed by the federal cabinet; the Act might be challenged in the courts to determine its constitutionality; finally, pursuant either to subsections 93(3) and (4) of the Constitution Act, 1867, or subsections 22(2) and (3) of the Manitoba Act, 1870, the federal cabinet might hear an appeal from the Roman Catholic minority of Manitoba. If the federal cabinet determined that a right or privilege in relation to education had been affected, it might issue a remedial order to the Manitoba legislature. Failure to comply would empower the federal parliament to enact remedial legislation so far as the circumstances required.

Archbishop Taché of St. Boniface pressed Macdonald to disallow the Acts. But Macdonald was reluctant to do so because of potentially disastrous political implications and also because of his recent refusal to disallow the Jesuits' Estates Settlement Act.

IV. Barrett v. City of Winnipeg in the Manitoba Courts

Mr. Barrett, a member of the Roman Catholic Church and a resident of Winnipeg, brought an application to quash a by-law of the city that levied a tax upon the total assessed value of all property in Winnipeg of each ratepayer for the new Public School System. Mr. Barrett was represented by J.S. Ewart, Q.C. and G.F. Brophy. One of the two counsel appearing for the city of Winnipeg was the Attorney-General for Manitoba, Joseph Martin. Mr. Barrett contended that the Public School Act was invalid because of the guarantee in section 22 of the Manitoba Act, 1870. It was argued on his behalf that, because Roman Catholics could not in good conscience send their children to the free public schools, the result was "that each Protestant will have to pay less than if he were assessed for Protestant schools alone, and each Roman Catholic would have to pay more than if he were assessed for Roman Catholic schools alone".³⁷ It was contended that, as the Public School Act prejudicially affected the rights or privileges of Roman Catholics to denominational schools, the statute was invalid and the by-law levying the tax to support the public schools should be quashed.

³⁶ An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba, 53 Vict., c.14 (Man.).

³⁷ *Barrett v. The City of Winnipeg* (1891), 7 Man. L. R. 273, at p. 275 (Man. Q.B.).

Barrett's lawyers filed an affidavit of Archbishop Taché of St. Boniface. In it the Archbishop stated:³⁸

The school, in the view of the Roman Catholics, is in large measure the 'children's church', and wholly incomplete and largely abortive if religious exercises be excluded from it. The Church has always insisted upon its children receiving their education in schools conducted under the supervision of the Church, and upon their being trained in the doctrines and faith of the Church.

The evidence established that the only schools existing in 1870 were denominational schools supported in part by fees and in part by their own church. These were not established by law but were in actual operation as a matter of practice. From 1870 until 1890, the system of Catholic Public School education had been maintained in full vigour. Roman Catholics were not obliged to pay for Protestant schools, nor were Protestants obliged to pay for Catholic schools.

At the trial level, Killam J. emphasized that the 1890 Act did not make attendance at public schools compulsory and did not prohibit the maintenance of, or attendance at, denominational schools.³⁹ But he did not deal satisfactorily with the basic issue, which was that a tax to support public education levied on all rate payers made it difficult if not impossible for those who desired denominational education for their children to finance it. The trial judge simply said that there was no explicit right of immunity from such taxation and that, if Parliament had intended that such an immunity be established, clearer language would have been used. On appeal, the Manitoba Queen's Bench affirmed Killam J.'s decision. Dubuc J. dissented.⁴⁰ He stated:⁴¹

The privilege of being taxed for the support of schools from which according to their conscience and to the principles of their faith, they could derive no benefit, and of taxing themselves besides for the only schools to which they could conscientiously send their children, would be a very strange privilege indeed.

It is pertinent to note that, of the four Manitoba judges who heard the case, the three who decided in favour of the validity of the Public Schools Act were Protestants. Dubuc J., the one who had held it to be unconstitutional, was a Roman Catholic. It is difficult to believe that religion and background had not influenced these judges in their interpretation of the guarantee in section 22 of the Manitoba Act. The Protestant judges were undoubtedly influenced by the fact that, with a scattered population, education could be more efficiently provided by one system of public schools; they may also have felt that religious strife would be avoided if all children were educated in the same schools. Another influential idea may have been that separate schools contravened the principle of reli-

³⁸ *Ibid.*, at p. 277.

³⁹ *Ibid.*, at p. 297.

⁴⁰ *Ibid.*, at pp. 330-364.

⁴¹ *Ibid.*, at p. 349.

gious equality. Separation of Church and State was the essence of the message propagated by D'Alton McCarthy's Equal Rights Association, and it was an idea with a distinct American flavour that was alien to Canadian practice. Yet another factor was the court's view of the appropriate role of the State, parents, and Church in education. Taylor C.J. stated that it was the duty of the State to see that children acquired at least elementary education and that it therefore followed that the State had the duty to provide the funds necessary for that purpose.⁴² He did not consider the alternative, a continuation of the dual system under which Protestants were taxed for Protestant schools and Roman Catholics for their own school system. This may possibly have reflected a view that the existing Roman Catholic schools were of lower quality. But what the Manitoba judges cannot have failed to know was that the majority of Manitobans favoured the one public school system;⁴³ so this decision may be an example in which a local judiciary was too responsive to the will of the local majority. Minority rights may have been narrowly construed by the bench in order to accommodate the local majority. Dubuc J.,⁴⁴ on the other hand, was undoubtedly influenced by his view of the central roles of the church and parents in the proper education of a Roman Catholic child. Thus, he alone among the Manitoba judges found the Public Schools Act to be *ultra vires*.

The Queen's Bench of Manitoba handed down its decision on February 2, 1891. As the Public Schools Act was not yet a year old, disallowance was still possible, and Roman Catholics pressed the Macdonald government to act. But a federal election had been called for March 5, 1891, and Macdonald had no desire to see the Manitoba school question become an electoral issue. On March 21, 1891, Sir John Thompson, the Minister of Justice, advised against disallowance. He noted that the case was being appealed to the Supreme Court of Canada and stated: "If the appeal should be successful, these Acts will be annulled by judicial decision; the Roman Catholic minority in Manitoba will receive protection and redress".⁴⁵ However, if the decision of the Manitoba Queen's Bench

⁴² *Ibid.*, at p. 329.

⁴³ Killam J. said, *ibid.*, at p. 300: "Counsel for the applicant forget that the question has two sides, and that there are many who deem it more for the interest of the State to encourage only one system of schools . . .".

⁴⁴ Joseph Dubuc was Louis Riel's best friend at the Collège de Montréal. In 1870, shortly after Dubuc had completed his legal training, he accepted Bishop Taché's invitation to come to the west; George F.G. Stanley, *Louis Riel* (1963), p. 154. He was elected to the first legislative assembly of Manitoba and in 1874 was for a short time Attorney-General in the Girard government. In 1878, he was elected as M.P. for Provencher and sat in the House of Commons as a Conservative until his appointment in 1879 as a judge of the Court of Queen's Bench. From 1903 to 1910, he was Chief Justice of Manitoba.

⁴⁵ Clark, *op. cit.*, footnote 16, p. 127.

were sustained, "the time will come . . . to consider the petitions . . ."
 " 46

V. *Barrett v. City of Winnipeg in the Supreme Court*

On May 27 and 29, 1891, the Supreme Court of Canada heard the appeal. During the night of May 27, 1891, Sir John A. Macdonald suffered a paralytic stroke. He died on June 6th. The Supreme Court of Canada on October 28, 1891, unanimously allowed the appeal and held the Public Schools Act to be *ultra vires*. It was a fitting tribute to Macdonald who had always been sympathetic towards French-Canadian aspirations and who regarded the Equal Rights Association as "one of those insane crazes".⁴⁷

In his judgment, Sir W.J. Ritchie C.J., commented that, in giving Manitoba a constitution, the Dominion Parliament must have known the deep interest and strong opinions held about separate schools and also the way in which schools in Manitoba operated in 1870.⁴⁸ To proceed on the assumption that the legislature would "have overlooked considerations of this kind is to impute to parliament a degree of short-sightedness and indifference which . . . cannot to my mind be for a moment entertained".⁴⁹ He therefore thought that great attention had to be paid to the words "or practice" in subsection 22(1). The sub-section reads:

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 or practice in the Province at the Union.

Ritchie C.J. contended that parliament was well aware that no class of persons had by law any rights or privileges in 1870 concerning denominational schools but that in fact denominational schools did exist and were supported by particular religions. He stated that by rejecting "the words 'or practice' as meaningless or inoperative we shall be practically expunging the whole of the restrictive clause from the statute".⁵⁰

Ritchie C.J. was careful to distinguish his decision in *Ex Parte Renaud*,⁵¹ rendered when he was Chief Justice of New Brunswick. Section 93(1) of the Constitution Act, 1867, protected only rights or privileges established by law. He said that in the *Renaud* case he held only that there were no legal rights in regard to denominational schools in New Brunswick at Confederation and therefore no rights protected by the

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, p. 3.

⁴⁸ *Barrett v. City of Winnipeg*, *supra*, footnote 1, at p. 383.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, at p. 384.

⁵¹ (1873), 14 N.B.R. 273 aff'd *sub nom. Maher v. Town of Portland* (1874, P.C.), first reported by Gerald John Wheeler, *Confederation Law of Canada* (1896) p. 366.

Constitution. In the Manitoba case, he said, it was necessary to look at the practice relating to denominational schools in 1870. He said that the denominational system was effectually wiped out by the Public Schools Act and that no vestige of denominational character would be retained in the school system. The Chief Justice then considered whether such prejudicial effect was prohibited by the Manitoba Act. He confidently concluded that it was and that the Public Schools Act was therefore *ultra vires*. He said:⁵²

Does it not prejudicially, that is to say injuriously, disadvantageously, which is the meaning of the word "prejudicially," affect them when they are taxed to support schools of the benefit of which, by their religious belief and the rules and principles of their church, they cannot conscientiously avail themselves, and at the same time by compelling them to find means to support schools to which they can conscientiously send their children, or in the event of their not being able to find sufficient means to do both to be compelled to allow their children to go without either religious or secular instruction?

Strong J. "entirely" concurred in both the conclusions and reasons given by the Chief Justice.

Fournier J. indicated that if a statute was capable of two constructions, of which one would work a manifest injustice, and the other would work no injustice, one should assume that the legislature intended that which would work no injustice. He regarded it as absurd to contend that "by practice" meant only that Catholics were at liberty to establish separate schools paid for by themselves while being required to pay taxes to support a school system which they could not in good conscience attend. He stated:⁵³

Il serait absurde de prétendre que le privilège garanti aux catholiques par les mots "by practice" doit s'entendre de celui d'avoir des écoles séparées comme écoles privées supportées par eux-mêmes. Ce privilège existant de droit commun ne requerrait aucune législation et les expressions "by practice" seraient alors tout à fait inutiles et sans aucune signification.

Fournier J. therefore had no difficulty in concluding that the inclusion of the words "by practice" had to confer meaningful protection and thus held the Manitoba legislation to be *ultra vires*.

Taschereau J. also concluded that the rights and privileges enjoyed by the Roman Catholics at the time of union had been adversely affected and therefore the legislation was invalid. He noted that all provincial grants and all taxes on the property of Catholics and even on Catholic schools would be used to support the non-sectarian public schools.⁵⁴

Patterson J. said that "by practice" should not receive a critical and pedantic treatment. The clause in his opinion meant that "rights actually exercised in practice at the time of the union, were not to be prejudicially

⁵² *Barrett v. City of Winnipeg*, *supra*, footnote 1, at p. 388.

⁵³ *Ibid.*; at p. 406.

⁵⁴ *Ibid.*; at p. 416.

affected by provincial legislation".⁵⁵ Patterson J. also took a realistic and functional approach to the issue:⁵⁶

It is the maintenance of a school that is of value to the community or class, rather than the abstract or theoretical right to maintain it. In other words the value of the right depends upon the practical use that can be made of it. Whatever throws an obstacle in the way of that practical use prejudicially affects the right.

The Manitoba school question was an issue which could easily have split the court. Ritchie C.J. and Strong J. were Anglicans, Fournier and Taschereau JJ. were Roman Catholics, and Patterson J. was a Presbyterian. If the response of the Manitoba judges was to be a guide, one would have expected the court to split three to two and dismiss the appeal. Instead, much to its great credit, four well-crafted functional judgments, grounded in knowledge of the state of affairs in Manitoba and Ottawa when the Manitoba Act was passed in 1870, unanimously reversed the Manitoba court. We see the Supreme Court judges playing the roles of judicial statesmen in protecting the rights of the minority to denominational schools. Here is a recognition that the constitutions of Canada and Manitoba are based upon a compromise between the two founding races to which it is necessary to remain faithful, even though this may stand in the way of implementing a more efficient educational system.

VI. *The Logan Intervention*

Shortly after the Supreme Court of Canada rendered its opinion in *Barrett*, Alexander Logan commenced an action, supported by an affidavit from the Right Reverend Robert Machray, Bishop of Rupert's Land, claiming that Anglican ratepayers could not be taxed to support public schools.⁵⁷ There is little doubt that the case was instigated by the new Attorney-General of Manitoba, Clifford Sifton, in an attempt to embarrass the Roman Catholic case. In answering a charge in the legislature that it was he who had inspired the litigation, Sifton replied that the suit was brought "with the consent and practical assistance of the government but not at its instance".⁵⁸ John W. Dafoe, his biographer, remarks that this explanation "may be rightly interpreted as a diplomatic explana-

⁵⁵ *Ibid.*, at p. 419.

⁵⁶ *Ibid.*, at p. 422.

⁵⁷ *Logan v. City of Winnipeg* (1891), 8 Man. L.R. 3 (Man. Q.B.).

⁵⁸ John W. Dafoe, *Clifford Sifton in Relation to His Times* (1931), p. 45. At pp. 44-45, Dafoe wrote: "This intervention on behalf of the Anglicans was regarded as inspired by the Attorney-General. The "purpose", said the Free Press "was, anticipating defeat before the Privy Council in the Barrett case, to create all the confusion possible in school matters in this province in the hope that the Catholics would be blamed for it". The affair, it declared "was the work of three conspirators, Sifton, Howell and Perdue" — the two latter, H.M. Howell and W.E. Purdue both future Chief Justices of the Province, being legal advisors to the government".

tion of an act, political in its inception and intention".⁵⁹ It is most unlikely that the Anglicans in fact felt any grievance. All school legislation up to 1889 recognized only Roman Catholic and Protestant schools, and as Professor Lovell Clark has said:⁶⁰

They could hardly contend that after 1890 there was too little religion in the public schools to suit them; because there was exactly the same amount as had prevailed in the Protestant schools prior to 1890, and which presumably had suited them.

The same three judges of the Manitoba Court of Queen's Bench, who had previously sat on the *Barrett* case, heard the *Logan* case. The case was argued on December 14, 1891 and their unanimous decisions were handed down the same day. The court, faithfully adhering to the Supreme Court's decision in *Barrett*, held that Anglicans were a class of persons who had at the time of union a right or privilege to denominational schools — a right which had been prejudicially affected by the Public Schools Act of 1890. Taylor C.J. considered that acquiescence in taxation to support schools common to all Protestants for a number of years could not have the effect of waiving a right because constitutional rights cannot be waived.⁶¹

VII. *Barrett & Logan Cases in the Privy Council*

A direct appeal was taken to the Privy Council in the *Logan* case, and the *Barrett* and *Logan* cases were bracketed for a common hearing and judgment by the Privy Council.⁶² The displeasure of Barrett's counsel at this linkage was acknowledged by the Privy Council. It noted that "Mr. Logan was content to rely on the arguments advanced on behalf of Mr. Barrett; while Mr. Barrett's advisers were not prepared to make common cause with Mr. Logan, and naturally would have been better pleased to stand alone".⁶³

On July 30, 1892, the Privy Council reversed the Supreme Court of Canada judgment in *Barrett*, and also reversed the judgment of the Manitoba Queen's Bench in *Logan*.⁶⁴ Lord Macnaghten delivered the opinion of the Board. There was a passing acknowledgment that a resolution of the controversy would be of serious moment to Manitoba and of deep interest throughout the Dominion. But a formalistic stance was quickly adopted. It was stated that the legal aspect lay in "a very narrow

⁵⁹ *Ibid.*

⁶⁰ *Op. cit.*, footnote 16, p. 99.

⁶¹ *Logan v. City of Winnipeg*, *supra*, footnote 57, at p. 15.

⁶² *City of Winnipeg v. Barrett; City of Winnipeg v. Logan*, [1892] A.C. 445 (P.C.).

⁶³ *Ibid.*, at p. 451.

⁶⁴ The *Logan* case was first heard by the Manitoba Court of Queen's Bench on Dec. 14, 1891 and the Privy Council decision was handed down on July 30, 1892, only seven and a half months later.

compass" and the duty of the court was to determine the "true construction" of the Manitoba Act and whether the provincial legislature had exceeded its powers.⁶⁵ Lord Macnaghten stated that the intention of the legislature in enacting the Manitoba Act, 1870 was "to preserve every legal right or privilege, and every benefit or advantage in the nature of a right or privilege, with respect to denominational schools, which any class of persons practically enjoyed at the time of the Union".⁶⁶ There were, however, no legal rights or privileges with respect to denominational schools. Thus, he considered what rights or privileges would have existed had the practice in 1870 been established by law. Persons would have had the right to establish denominational schools at their own expense, and he added that it was possible that "this right, if it had been defined or recognised by positive enactment, might have had attached to it as a necessary or appropriate incident the right of exemption from any contribution under any circumstances to schools of a different denomination".⁶⁷ However, the Privy Council thought it was going much too far to infer an immunity from taxation in connection with "a national system of education upon an unsectarian basis".⁶⁸ Since it is difficult to envisage the legislature taxing Roman Catholics in order to establish an Anglican school, this interpretation conferred no effective tax immunity. But it is only immunity from a tax levied to establish a public school system that can make denominational schools feasible in any practical and meaningful way. The Privy Council thus rendered almost totally nugatory the denominational school guarantee of the Manitoba Act by holding that only if Roman Catholic children were compelled by law to attend the public school system would their rights and privileges be prejudicially affected. The Privy Council asked what right or privilege was violated and answered:⁶⁹

It is not the law that is in fault. It is owing to religious convictions which everyone must respect, and to the teachings of their Church, that Roman Catholics and members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.

This strangely perverse logic has a distinctly Equal Rights Association ring about it. The denominational school guarantees had been placed in the Manitoba Act because Roman Catholics held strong convictions about the nature of education. Religious convictions cannot create the problem; the interpretation of the law by the Privy Council must be at fault.

⁶⁵ *City of Winnipeg v. Barrett; City of Winnipeg v. Logan, supra*, footnote 62, at p. 451.

⁶⁶ *Ibid.*, at p. 453.

⁶⁷ *Ibid.*, at p. 454.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, at p. 458.

The Privy Council acknowledged that weight should be given to a unanimous decision of the Supreme Court of Canada but expressed doubt about whether it was permissible "to refer to the course of legislation between 1871 and 1890, as a means of throwing light on the previous practice or on the construction of the saving clause in the Manitoba Act".⁷⁰ By taking this position the Council failed to recognize that the Manitoba Act embodied the terms of an agreement reached between delegates from Assiniboia and the federal government, and that at least the relatively contemporaneous acts of the parties were surely cogent evidence about the meaning which they attached to the agreement. The Privy Council criticized one judge of the Supreme Court for taking the view that public schools under the Act of 1890 were in reality Protestant schools, stating:⁷¹

They [their Lordships] cannot assent to the view . . . that public schools under the Act of 1890 are in reality protestant schools. The legislature has declared in so many words that "the public schools shall be entirely unsectarian" and that principle is carried out throughout the Act.

The Privy Council's view of reality was thus severely limited. It should have appreciated that when Joseph Martin proposed free secular schools, he met determined opposition from Anglicans, Presbyterians, and Roman Catholics alike. The compromise, satisfactory only to the Protestants, could be described as "Education: Not Secular Nor Sectarian, but Religious".⁷² The religious content was not perceptibly different in the non-sectarian public schools from that in the Protestant schools which had preceded them.

After downplaying its concern with the policy of the Public Schools Act 1890, the Privy Council said that if Barrett's contention was upheld it would be difficult "to provide for educational wants of the more sparsely inhabited districts",⁷³ and that the wide educational power would be limited to "making regulations for the sanitary conditions of school-houses, imposing rates for the support of denominational schools, enforcing the compulsory attendance of scholars and matters of that sort".⁷⁴ The first point, that one public school system would be more efficient in serving sparsely populated areas, appears irrefutable.⁷⁵ The second point,

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, at pp. 458-459.

⁷² This was the title of a lecture given by the Rev. Dr. J.M. King and quoted in Clark, *op. cit.*, footnote 16, p. 43. The Protestant majority through the Advisory Board was able to include the same amount of Protestant teaching in the new public school system as had been included in the former Protestant schools. Sections 6 to 8 of the Public Schools Act, *supra*, footnote 35 provided for religious exercises.

⁷³ *City of Winnipeg v. Barrett; City of Winnipeg v. Logan, supra*, footnote 62, at p. 459.

⁷⁴ *Ibid.*

⁷⁵ However, John S. Ewart, *Isms in the Schools* (1893), 1 *Can. Magazine* 356, at p. 365 stated:

that the wide educational power would be severely restricted were subsection 22(1) interpreted to prevent the establishment of free public education to be supported by both Protestants and Roman Catholics, does not bear scrutiny. If the guarantee for denominational schools had been held to prevent taxation of Roman Catholics for the support of public schools, the province would still have had an important role to play in determining an appropriate minimum secular curriculum and setting minimum standards.

On July 23, 1892, seven days prior to the Privy Council decision, the Greenway government of Manitoba had been re-elected.⁷⁶ There is no doubt that the Privy Council decision was popular among the majority of the citizens of Manitoba; however, the Roman Catholics, particularly the minority in Manitoba, felt betrayed. Criticism of the decision was not confined to Manitoba Catholics. The Conservative League of Montreal expressed the regret⁷⁷ that "in the name of 'Equal Rights,' liberty of conscience, justice and equality of rights have been denied by the school law of 1890 to a very large portion of the inhabitants of that province".⁷⁸ It stated that "the highest tribunal in England took into account neither the solemn treaty of 1870, nor the unequivocal interpretation of that treaty contained in the law of 1871".⁷⁹ Statesmen and public men were urged to "labour manfully and uncompromisingly"⁸⁰ until the Public Schools Act of 1890 was amended to recognize separate schools. The *Barrett* case represents one of the earliest occasions in which an influential group of Conservatives, angered by a decision of the Privy Council called for the abolition of Canadian appeals. The Conservative League of Montreal said:⁸¹

Another question arises out of this subject, and claims our earnest attention. The present crisis would have been avoided if the Privy Council in England had rendered a decision according to equity, and based on the true state of the case. Unfortunately in the present instance, as in every other where the interests of the Catholics of this country and of the French Canadians have been involved, that high tribunal has rendered an arbitrary judgment. Since unhappily this appears to be true, it is most

The Rev. Dr. Bryce, one of the bitterest opponents of the separate schools, has recently stated as follows: — "Out of 719 school districts in Manitoba, when the Act of 1890 was passed, 91 were Catholic. Of these all but a very small percentage are in localities almost entirely French". I may add that of the "very small percentage" there were only four school districts in which the population, although mixed, was not large enough to support a school of each kind.

⁷⁶ Both parties supported the new school legislation. One of the campaign issues was which party would offer the stoutest resistance should the federal government intervene; see Dafoe, *op. cit.*, footnote 58, pp. 61-65.

⁷⁷ The statement of the Conservative League of Montreal dated Nov. 3, 1892 is reproduced *In Re Certain Statutes of the Province of Manitoba Relating to Education*, *supra*, footnote 2, at pp. 618-620.

⁷⁸ *Ibid.*, at pp. 617-618.

⁷⁹ *Ibid.*, at p. 619.

⁸⁰ *Ibid.*, at p. 620.

⁸¹ *Ibid.*

opportune to consider whether indeed the Privy Council has jurisdiction in such matters and to have it taken away if it exists: for the time has gone by and is past when a country or a people can be made to suffer injustice indefinitely.

Senator R. W. Scott, a Liberal and Roman Catholic, assailed the decision as "manifestly unfair", "contrary to the facts", and "illogical".⁸² It was an unfortunate decision, for it badly bruised the spirit of French Canada and must be regarded as a contributing factor to the later growth of separatism in Quebec.

In fairness to the Privy Council, it should be mentioned that the case for the minority was mismanaged. John Ewart, although a Presbyterian, had been retained by the Catholic minority, and the Minister of Justice continued this retainer on the advice of Hugh John Macdonald, who said that Ewart was "by far the best man in Manitoba in every kind of legal proceeding",⁸³ even though he was a Grit. The federal government assisted the minority in arranging counsel and paying legal fees. For the appeal to the Privy Council, Ewart suggested retaining Sir Horace Davey and Edward Blake, the outstanding equity pleaders of Britain and Canada.⁸⁴ But the Minister of Justice refused to retain Edward Blake, the brilliant lawyer and former leader of the Liberal party, and, as a result of confused telegraphic communications, Sir Horace Davey was permitted to slip into a retainer for the Manitoba government. At the last minute, Sir Richard Webster was retained for the minority and conducted the case along with Samuel Blake. Sir Richard turned out to be a disastrous choice in that he was not attuned to the case and also was, as Attorney General, "too preoccupied with politics".⁸⁵ Ewart, who was retained to assist but not argue before the Privy Council, wrote that "it is one of the rights and privileges of the leaders of the Bar here to neglect a case as much as they like",⁸⁶ and that Webster "didn't look at the brief, knew nothing of the case and blundered from start to finish so that Sam Blake could say nothing without contradicting his senior".⁸⁷ The ineptitude in the presen-

⁸² Debates of the Senate, 1894, 119-134.

⁸³ Douglas Lowell Cole, *The Better Patriot: John S. Ewart and The Canadian Nation*, U. of Washington, History Ph.D. 1968, at p. 58, quoting H.J. Macdonald papers, Vol. 537, H.J. Macdonald to J.A. Macdonald, Aug. 4, 1890.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, p. 60.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* Although Richard Webster became Chief Justice of England in October 1900, the Dictionary of National Biography 1912-1931, vol. 24, at p. 562 states: "He was not a clever man, nor a learned lawyer, nor a good speaker — either in the courts or in parliament. His equipment as an advocate consisted mainly in a splendid physique, a forcible personality, and immense industry. As a judge he was dignified, and sitting with a jury was satisfactory, though not distinguished; but the reports will be searched in vain for judgments of his that are valuable as expositions of the law". His conduct on the Alaska Boundary Commission of 1903 unleashed a storm of protest in Canada and provided a tremendous stimulus to the movement for full self-government. See F.W.

tation of the case is a mitigating circumstance, but it can hardly condone the Privy Council's narrow formalistic opinion which reversed the decision of the Supreme Court and upheld the Public Schools Act of 1890.

VIII. *Groping Towards Remedial Legislation and the Reference Case in the Supreme Court*

With the Public Schools Act declared to be constitutional, "the poisoned chalice of the dreaded obligation to deal with the Manitoba School Question"⁸⁸ was returned to the federal government. A remedial order or remedial legislation was bound to set the Protestant and Roman Catholic supporters of the government at loggerheads. The Toronto Mail on March 2, 1892, declared that "the tribunal of last resort has pronounced Manitoba free; and free that Province shall be if the English population has any voice in the government of this country".⁸⁹ On the other hand, Premier Mercier in Montreal urged the people of Quebec to "put aside all divisions and hatreds of the past, and join in a fraternal union to place two millions of French Canadians against the oppression of the other Provinces".⁹⁰

The exact nature of the remedy had to be determined. A subcommittee of cabinet heard the appeals which had previously been presented, and John S. Ewart, Q.C. vigorously introduced the case for the petitioners. On January 6, 1893, the subcommittee reported to the full cabinet, recommending that the government of Manitoba should be given an opportunity to present its side of the issue. But the Manitoba government believed that the matter was closed and so declined to make any submission. The Report also indicated that, in view of the *Barrett* decision, there might be some doubt about the power of the cabinet to make a remedial order, or of Parliament to pass remedial legislation. As a consequence of this doubt, and to avoid making a final decision, it was decided that there should be a reference to the Supreme Court of Canada.

Six questions were referred to the Court. In essence the Court was asked to determine whether the Roman Catholic minority had a valid appeal to the federal cabinet because a right or privilege in relation to education had been affected by the 1890 legislation. The reference was heard by five judges. Sedgewick J. did not sit because he had assisted in the preparation of the case when he was Deputy Minister of Justice.⁹¹

In *Barrett*, the Supreme Court, properly appreciative of the crucial importance of the case for the preservation and growth of national unity

Gibson, *The Alaska Boundary Dispute* (1945), Canadian Historical Association Report, p. 25.

⁸⁸ Morton, *op. cit.*, footnote 33, p. 270.

⁸⁹ Quoted in J. Castell Hopkins, *Life and Work of the Right Hon. Sir John Thompson* (1895), p. 263.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, p. 264.

based on a bicultural conception, had unanimously taken a realistic and functional approach in construing subsection 22(1) of the Manitoba Act, 1870. However, after the Privy Council had, through a formalistic approach, virtually nullified the protection of subsection 22(1), some members of the Supreme Court then adopted a formalistic approach in the subsequent reference case. The result was a Supreme Court which split three to two. The majority held that the Manitoba Catholics had no right of appeal to the federal cabinet and that the federal Parliament lacked the power in this case to pass remedial educational legislation. Thus a statesman-like approach to the issue of the westward extension of the compromise of Confederation was replaced by a narrow technical construction. This is particularly exemplified in the decision of Strong C.J.

The Chief Justice's decision was largely determined by one assumption which he reiterated several times in the course of his judgment:⁹²

. . . every legislative enactment is subject to repeal by the same body which enacts it, every statute may be said to contain an implied provision that it may be revoked by the authority which has passed it, unless the right of repeal is taken away by the fundamental law, the overriding constitution which has created the legislature itself.

Later, he stated:⁹³

. . . we must assume in the absence of express words that it was not the intention of Parliament to impose upon the Manitoba legislature a disability so anomalous as an incapacity to repeal its own enactments, except subject to an appeal to the Governor General in Council and possibly the intervention of the Dominion Parliament as a paramount legislature. . . .

Starting from this strongly held view, that even educational legislation passed by Manitoba should be capable of repeal by Manitoba without any appeal to the Governor-General in Council, Strong C.J.'s interpretation of subsection 22(2) was a foregone conclusion. Subsection 22(2) reads:

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.

The major issue was whether "any right or privilege" of the minority referred to those at the date of Union or those which might subsequently come into existence. "Any right or privilege" is absolutely general and therefore could be taken as referring to a right or privilege created after 1870. However, such an interpretation conflicted with Strong C.J.'s firmly held belief in legislative supremacy. He noted that the words "or is thereafter established by the Legislature of the Province" contained in subsection 93(3) of the Constitution Act, 1867 are omitted from subsection 22(2) of the Manitoba Act, and concluded that this must have been deliberate.

⁹² *In Re Certain Statutes of the Province of Manitoba Relating to Education, supra*, footnote 2, at p. 655.

⁹³ *Ibid.*, at p. 661.

Subsection 93(3) has no direct relevance in deciding the time at which "any right or privilege" is to be determined. The subsection reads:

Where in any Province a system of Separate or Dissident Schools exists by law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie . . .

The words "or is thereafter established" refer to the time of creating a system of separate or dissentient schools. It does so because subsection 93(1) refers only to any "Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union". As Nova Scotia and New Brunswick did not have denominational schools established by law in 1867, there was no protection for them in subsection 93(1). There would be minority protection for the denominational schools in Nova Scotia and New Brunswick through a subsection 93(3) appeal to the federal cabinet were the separate schools to be established by law after 1867, provided that any right or privilege does not refer back to the date of union. If "any right or privilege" in subsection 93(3) were interpreted as referring to subsection 93(1) with its datum "by Law in the Province at the Union," the inclusion of the words "or is thereafter established by the Legislature of the Province" in subsection 93(3) would be rendered totally nugatory. Thus a consideration of subsection 93(3) indirectly assists in construing any right or privilege in subsection 22(2) as referring not only to those existing at union but also to those subsequently created. A full consideration of subsection 93(3) points to an inference directly contrary to the one which Strong C.J. drew from it. Again it is apparent that his desire to minimize encroachment upon legislative supremacy caused him to conclude that right or privilege must be determined as of the date of union:⁹⁴

. . . there is, it seems to me, much force in the consideration, that whilst it was reasonable that the organic law should preserve vested rights existing at the union from spoliation or interference, yet every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted.⁹⁴

⁹⁴ *Ibid.*, at p. 654. Strong C.J. also held that subsection 93(3) does not provide an appeal to the federal cabinet from an Act of the legislature but only from an act or decision of any provincial authority. This is another example of not only strained but wrong interpretation which flows from his unswerving commitment to the maxim of legislative supremacy. Subsection 93(3) provides that "an appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority". Since both Act and Decision are capitalized it is possible to interpret this as referring only to an act or decision of any provincial authority and exclude the legislature from the umbrella of a provincial authority. However, it is far more reasonable to conclude that Act means a law passed by the legislature because subsection 93(4) begins "In case any such Provincial law as from time to time seems to the Governor General in Council requisite . . .". There is no doubt that in subsection 22(2) of the Manitoba Act, 1870, the word Act means a law passed by the legislature for Act is capitalized and decision is not and the Legislature is specifically mentioned. Section 22(2) reads: "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 . . .".

Strong C.J.'s uncharacteristically poor interpretation contained in this case may have been prompted by his opinion that remedial action might be more injurious to national unity than no action at all. Samuel Henry Strong had been born in England in 1825 and at the age of eleven came to Quebec with his father, who was Anglican chaplain to the British forces at the citadel. Although he became thoroughly familiar with the French language, it is possible that he subscribed to the extreme Anglo-Saxon nationalism that had inspired the Public Schools Act. Another possibility is that this case was just a manifestation of the importance which he attached to provincial rights. Indeed, a study has shown he rendered judgments favourable to the provinces more consistently than any other early judge of the Supreme Court.⁹⁵ A further possibility is that he may have wished to avoid inflicting a serious political problem upon the Conservative government.

Strong was for many years associated with Sir John A. Macdonald. Macdonald called upon him to draft the first Supreme Court bill in 1869 and later that same year appointed him to the Court of Chancery of Ontario. In 1874 Strong was appointed to the Court of Error and Appeal and in 1875 to the Supreme Court of Canada. The 1874 and 1875 appointments were from a Liberal government, but it was the Conservative Prime Minister, John Thompson, who in 1892 made him Chief Justice. He maintained contact with Conservative politicians. He wrote a very laudatory letter to Sir C.H. Tupper praising his performance as Minister of Justice and later had to implore him not to make the letter public.⁹⁶ It is therefore possible that Strong C.J. wished to save the Conservative government from the dilemma of passing remedial legislation which would bitterly divide the party. It should be remembered that the Privy Council, through narrow formalistic interpretation, had almost totally gutted subsection 22(1) of the Manitoba Act, 1870 of any real protection. It had thus made inevitable the appeal to the federal cabinet under subsection 22(2) and had created the problem for the government. Strong C.J. may have felt it quite legitimate to engage in the same narrow formalism to save the government from the dilemma created by the Privy Council.

⁹⁵ F.M. Greenwood, *Lord Watson, Institutional Self-Interest, and the Decentralization of Canadian Federalism in the 1890's* (1974), 9 U.B.C.L. Rev. 244, at p. 267.

⁹⁶ James G. Snell, Frederick Vaughan, *The Supreme Court of Canada: A History of the Institution* (1985), p. 71, state:

In January 1896 in the midst of tense political negotiations in Ottawa, Strong had to plead with Tupper not to publish a letter in which the Chief Justice had lavishly praised the Minister's performance. Three months later Strong became closely involved in the restructuring of the Conservative Cabinet. Both through Hibbert Tupper and directly to prospective Cabinet members, the Chief Justice offered advice and support as to who should represent Ontario and as to what policy should be adopted regarding the contentious Manitoba schools question.

I wish to thank Professors Snell and Vaughan for making their manuscript available to me and for permission to quote this passage.

Fournier J., not cowed by the formalism adopted by the Privy Council in the *Barrett* case, insisted on looking at the history and substance of the controversy. He quoted from the conditions upon which the inhabitants of Assiniboia had entered confederation as a province. One of these conditions was:⁹⁷

That the schools shall be separate, and that the moneys for schools shall be divided between the several denominations *pro rata* of their respective populations.

Fournier J. was very critical of the Privy Council declaring that, because of *Barrett v. Winnipeg*, subsection 22(1) of the Manitoba Act was "wiped out".⁹⁸ In his opinion, even if the parties were in error in thinking they had certain rights and privileges by practice, they were right to trust the provincial legislature because it had established separate schools by law and it did provide *pro rata* funding for denominational schools in accordance with conditions of entry into Canada. Fournier J. stated that the words of subsection 22(2) of the Manitoba Act, 1870 "necessarily mean an appeal from any statute which the legislature has power to pass in relation to education if *at the time* of the passing of such statute there exists by law any right or privilege enjoyed by the minority".⁹⁹ If the statute was *ultra vires*, there would be no need for an appeal to the federal cabinet because it would be remedied by the courts.

Fournier J. also noted the similarity between subsections 93(3) and 22(2) and said that he was pleased to see that he was simply concurring in the view expressed by Lord Carnarvon speaking in the House of Lords on February 19, 1867. The last part of the quotation from Lord Carnarvon read:¹⁰⁰

But in the event of any wrong at the hand of the local majority, the minority have a right of appeal to the Governor General in Council, and may claim the application of any remedial laws that may be necessary from the central parliament of the Confederation.

Fournier J. turned to the issue of whether any right or privilege secured after union had been adversely affected by the 1890 legislation, conceding that the Privy Council in the *Barrett* case had decided that no right or privilege existing at the date of union had been adversely affected. He concluded:¹⁰¹

By referring to the legislation from the date of the union to 1890, it is evident that the Catholics enjoyed the immunity of being taxed for other schools than their own, the right of organization, the right of self government in this school matter, the right of taxation of their own people, the right of sharing in Government grants for education. . . . All these rights were swept away by the acts of 1890, as well as the

⁹⁷ *In Re Certain Statutes of the Province of Manitoba Relating to Education*, *supra*, footnote 2, at p. 668.

⁹⁸ *Ibid.*, at p. 669.

⁹⁹ *Ibid.*, at pp. 670-671.

¹⁰⁰ Quoted, *ibid.*, at p. 672.

¹⁰¹ *Ibid.*, at pp. 672-673.

properties they had acquired under these acts with their taxes and their share of the public grants for education. Could the prejudice caused by the acts of 1890 be greater than it has been?

Fournier J. thus held that there was a valid appeal to the federal cabinet, and that the cabinet could make a declaration or remedial order to Manitoba and, if this was not complied with, the Parliament of Canada could enact a remedial law. He did not become involved with the false issue of legislative supremacy and the power to repeal laws previously enacted; rather, he focussed upon the real issue of what denominational guarantee was provided by section 22 of the Manitoba Act, 1870 and section 93 of the Constitution Act, 1867.

Télesphore Fournier was, at least until his appointment to the Supreme Court of Canada in 1875, a very committed Liberal. His party commitment is attested to by the fact that he had been defeated many times before he was finally elected to the House of Commons at a by-election on August 15, 1870. During Alexander Mackenzie's government, he successively held three portfolios, Minister of Inland Revenue, Minister of Justice and Postmaster General. As Minister of Justice, he had introduced the bill to establish the Supreme Court of Canada. In doing so, he stated that the right of appeal to the Privy Council had been "considerably abused in the Province of Quebec by wealthy men and wealthy corporations to force suitors to compromise in cases in which they had succeeded in all the tribunals of the country".¹⁰² The amendment of Aemilius Irving of Hamilton purporting to prohibit appeals from the Supreme Court to the Privy Council was thus implicitly invited by Fournier and received his backing. The amendment making judgments of the Supreme Court final and conclusive was passed over the strenuous opposition of Sir John A. Macdonald.¹⁰³ But the concluding phrase of section 47, "saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative",¹⁰⁴ was subsequently accepted by the Canadian government to save even ordinary appeals to the Privy Council in order to forestall the threatened disallowance of the whole Act by the British government.¹⁰⁵ Thus, the section

¹⁰² House of Common Debates, Feb. 23, 1875, p. 286.

¹⁰³ House of Common Debates, March 30, 1875, pp. 980-981.

¹⁰⁴ Section 47 of the Supreme and Exchequer Courts Act, 38 Vict., c.11 stated:

The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard: Saving any right which Her Majesty may be graciously pleased to exercise by virtue of her Royal Prerogative.

¹⁰⁵ Frank H. Underhill, Edward Blake, *The Supreme Court Act, And The Appeal To The Privy Council, 1875-76* (1938), 19 Can. Hist. Rev. 245 tells the interesting background of section 47. On one small point, Underhill is in error. At p. 248, he stated: "The senators, in fact, divided evenly, 29 to 29, and the clause was only carried by the

achieved nothing. The incident revealed Fournier to be a strong Canadian nationalist who would not be overly deferential to the Privy Council. Also, as a committed Liberal, the embarrassing dilemma which the Conservative government would be placed in by his conclusion that an appeal to the federal cabinet was valid, might not have been a concern to him. He was a Roman Catholic and undoubtedly felt strongly about the unjust treatment accorded his co-religionists in Manitoba.

Taschereau J. commenced his judgment by doubting the court's jurisdiction to hear a reference case. Although Parliament had the right to establish a court of appeal under section 101 of the Constitution Act, 1867, he questioned its power to establish "an advisory board of the federal executive".¹⁰⁶ He did not investigate the point further but noted that "we give no judgment, we determine nothing, we end no controversy".¹⁰⁷ He also noted that the Manitoba executive may have refrained from participating for that reason,¹⁰⁸ with the result that Mr. Robinson, senior member of the Ontario bar, was appointed by the Court to represent Manitoba.¹⁰⁹ Taschereau J. concluded that subsection 93(3) was inapplicable because subsection 22(2) was more specific and therefore the protection of rights and privileges conferred on a minority after the union had been omitted. This interpretation is, I believe, dubious. He may have been unduly influenced by the legislative supremacy argument. He stated:¹¹⁰

. . . it cannot be that by their adopting and regulating a system of separate schools, though not obliged to do so, they, forever, bound the future generations of the province to that policy, so that, as long at least as there would be even only one Roman Catholic left in the province, the legislature should be, for all time to come, deprived of the power to alter it, though the constitution vests them with the jurisdiction over education in the province.

If the guarantee for denominational schools is to be effective, the obvious answer is that it must involve this kind of limitation.

Taschereau J. was obviously very opposed to the judgment of the Privy Council in *Barrett*, but he believed that the judgment in that case

speaker's casting vote". The Speaker in the Senate does not have a casting vote. The Constitution Act, 1867 provides in section 36, that: "Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative". Senator Allan had moved that the forty-seventh clause be struck and on this motion the vote was 29 to 29 with the Speaker, Senator Christie, using his deliberative vote against the motion. The Speaker then declared the motion to strike out clause 47 was lost. Senate Debates, April 6, 1875, p. 735.

¹⁰⁶ *In Re Certain Statutes of the Province of Manitoba Relating to Education, supra*, footnote 2, at p. 677.

¹⁰⁷ *Ibid.*, at p. 678.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, at p. 652.

¹¹⁰ *Ibid.*, at p. 686.

logically precluded the minority's claim for relief. At the time of union in 1870, there were by practice denominational schools, and Catholics supported only their own schools. The Privy Council held that subsection 22(1) protected any right or privilege which any class of persons practically enjoyed at the time of the Union. If the practice was clearly protected, as the Privy Council stated, there should be no greater protection if, as was the case, the practice was then translated into legislation. According to the *Barrett* case, the Catholics were not prejudicially affected provided that they were not compelled to attend the public schools and retained the theoretical but barren right to establish schools.

Henri Elzéar Taschereau's decision may simply reflect the professional restraint of *stare decisis*. He may have felt himself precluded by *Barrett* from thinking that there was any basis for a remedy under subsections 22(2) and (3). One can criticize him for not inventing some way around *Barrett* because the Manitoba legislation was so blatantly unjust to the minority. There should in this case have been a felt need to give real protection to the Roman Catholic minority in Manitoba. Conversely, perhaps he was a realist and was prepared to concede that, in spite of the constitutional guarantee, it was not possible in the 1890s for the Roman Catholic minority to expect to continue to enjoy the rights and privileges that they had practiced in 1870 when they constituted fifty per cent of the population.

Another explanation is that he was much more concerned about the rights of the French Canadians in Quebec. In 1865, Taschereau, while a member of Legislative Assembly for the constituency of Beauce, bolted the Conservative party and spoke against the Quebec confederation resolutions. His major reason for doing so was that the proposed Constitution did not offer sufficient guarantees to protect French-Canadian rights.¹¹¹ In speaking against the proposed Confederation in 1865, he referred several times to French-Canadian nationality, and near the conclusion of his address said that Confederation will be "the ruin of our nationality in Lower Canada",¹¹² and that it would deal a death-blow to it. It might therefore be argued that in sacrificing the rights of the Roman Catholic minority in Manitoba, he was strengthening provincial rights in Quebec from federal encroachment. In his judgment, the Manitoba legislature had the power to pass the legislation; "therefore any interference with the legislation by federal authority would be *ultra vires* and unconstitutional".¹¹³ His submission to *stare decisis* might also have arisen out of vestigial party loyalty although, as his response to Confederation indicates, he was

¹¹¹ Parliamentary Debates on Confederation of the British North American Provinces, 3rd Session, 8th Provincial Parliament of Canada (1865), pp. 894-897.

¹¹² *Ibid.*, p. 897.

¹¹³ *In Re Certain Statutes of the Province of Manitoba Relating to Education*, *supra*, footnote 2, at p. 681.

prepared to put principle before party. However, the government of Sir John A. Macdonald appointed him on January 12, 1871 to the Superior Court of Quebec. On October 7, 1878, he was appointed to the Supreme Court of Canada, nominally by the Liberal government of Alexander Mackenzie, but the appointment was made two days before that government left office and twenty days after it was defeated at the polls. Therefore, the appointment may have had the blessing of Sir John A. Macdonald and the Conservative party, and party loyalty may have influenced him to conclude that the petition to the federal cabinet was not competent. Another explanation may be that he appreciated that the strains that such a petition would place on any government were insupportable and would lead to a division of opinions so strong that they would threaten to rend the fabric of the nation.

Taschereau J. did conclude that the *Barrett* case deprived the petitioners of any remedy. However, it is wrong to regard him as submissive to the Privy Council. He said that he spoke "cautiously and mindful that I am not here allowed to controvert or even doubt anything that has been said on the subject by the Privy Council".¹¹⁴ Nevertheless, on the next page of his decision, he hurled scathing invective at the Privy Council. After noting that the Roman Catholics in Manitoba had no rights but those left to them by the Privy Council in the *Barrett* case, he stated:¹¹⁵

... if I do not misunderstand that judgment, the appeal they now lay claim to is not, as a logical inference, thereby left to them.

And in vain now, to support their appeal, would they urge that the statute so construed is unreasonable, unjust, inconsistent and contrary to the intentions of the law giver; uselessly would they contend that to force them to contribute pecuniarily to the maintenance of the public, non-catholic schools is to so shackle the exercise of their rights as to render them illusory and fruitless, or that to tax, not only the property of each and every one of them individually but even their school buildings for the support of the public schools is almost ironical; uselessly would they demonstrate the utter impossibility for them to efficaciously provide for the organization, maintenance and management of separate schools, and the essential requirements of a separate school system without statutory powers and the necessary legal machinery; ineffectively would they argue that to concede their right to separate schools, and withal, deprive them of the means to exercise that right, is virtually to abolish it, or to leave them nothing of it but a barren theory. With all these, and kindred considerations, we, here, in answering this consultation, are not concerned. The law has authoritatively been declared to be so, and with its consequences, we have nothing to do.

This very outspoken criticism of the Privy Council may have been extremely effective in subsequently convincing that body that a serious error had been made in the *Barrett* case in underestimating the importance placed on the protection of section 22 of the Manitoba Act, 1870.

Gwynne J. also concluded that the petition of the Roman Catholics under section 22(2) was precluded by the Privy Council decision in the

¹¹⁴ *Ibid.*, at p. 679.

¹¹⁵ *Ibid.*, at pp. 680-681.

Barrett case. He did not appear to come to this conclusion with any reluctance. In fact, he indicated that Roman Catholics were not excluded from the advisory board established by the 1890 legislation and said that as members they "can equally with Protestants exert their influence upon the board with regard to religious exercises in the public schools . . .".¹¹⁶ It is, however, ludicrous to think that the influence that a minority can exert could come close to producing the rights and privileges which the Roman Catholics had enjoyed between 1870 and 1890. Gwynne J. rejected the arguments that the rights and privileges referred to in subsection 22(2) comprehended those accorded by the Manitoba legislature between 1870 and 1890 and that the *Barrett* case decided only that no right or privilege existing at the date of union by practice had been infringed. Gwynne J. decided that the appeal given by subsection 22(2) to the federal cabinet must be concurrent with an appeal to the ordinary courts and quoted the Privy Council in the *Barrett* case in support. He stated that there was nothing in the Manitoba Act, 1870 which compelled the passing of certain education Acts in 1871 and 1881 or "which placed those acts when passed in any different position from that of all acts of a legislature, which constitute the will of the legislature for the time being, and only until repealed . . .".¹¹⁷

There are a number of possible reasons why Gwynne J. had no difficulty in concluding that section 22 of the Manitoba Act did not provide any remedy for the Manitoba Catholics. John Wellington Gwynne was born at Castleknock, in County Dublin in Ireland, to a Church of Ireland clergyman and was educated at Trinity College, Dublin. This background would be unlikely to cause him to strive to give a wide ambit to the denominational school guarantees for Roman Catholics and might predispose him to accept willingly the very restrictive scope accorded to them by the Privy Council in the *Barrett* case. The influence which his political views may have had is uncertain. In 1847, he unsuccessfully contested Huron County for the Legislative Assembly of the United Province of Canada as a Reformer. He then spent a number of years in Hamilton as solicitor for the Great Western Railway, followed by a corporate practice in Toronto, before being appointed to the Court of Common Pleas by Sir John A. Macdonald's government in 1867. On January 14, 1879, Macdonald, in his first formal appointment to the Supreme Court, named Gwynne. Either Gwynne's politics had changed,¹¹⁸ or in spite of his politics, the Conservatives twice sought him out for judicial preferment. It has been suggested that one basis for his appointment to the Supreme Court was his strongly centralist interpretation of the

¹¹⁶ *Ibid.*, at p. 696.

¹¹⁷ *Ibid.*, at pp. 701-702.

¹¹⁸ Gwynne J. may have been a moderate reformer and therefore not far from Macdonald in the political spectrum.

Constitution;¹¹⁹ however, the decision which he rendered in this case favoured provincial rights. His decision meant that the federal cabinet lacked jurisdiction to issue a remedial order to the Manitoba legislature. It is thus possible that, in this case, he may have been influenced to render a decision which would prevent a destructive dilemma from being imposed upon the federal government, either because of some loyalty to the Conservative government which had appointed him, or to avoid fanning the flames of dissension which an appeal to the federal cabinet would ignite.

The final opinion of the Supreme Court was rendered by King J. He commenced his judgment with an historical consideration of section 93 of the Constitution Act, 1867 and section 22 of the Manitoba Act, 1870. He noted that when British Columbia in 1871 and Prince Edward Island in 1872 were admitted as provinces, section 93 was made applicable without change and that neither province then had a system of separate or dissentient schools recognized by law. He drew attention to the fact that in the case of Manitoba specific language guarantees were given in section 23, and that more specific denominational school guarantees were made in subsection 22(1) through the inclusion of the words "or practice" and by addition of the words "of the legislature of the province" in subsection 22(2). King J. reasonably inferred that this would "seem to show an intention on the part of Parliament to extend the constitutional protection accorded to minorities . . . or at all events to make no abatement therein".¹²⁰ King J. then succinctly stated the issue: one side contended that the "rights or privileges" must have existed at the date of union, while the other maintained that the rights and privileges must simply have existed at the time of their alleged violation irrespective of the date of acquisition. King J. gave several reasons for deciding that subsection 22(2) referred to rights or privileges acquired at any time. He noted that the attention of the Privy Council was powerfully drawn to subsection 22(2) and that their Lordships said subsections 22(1), (2) and (3) "differ but slightly from the corresponding sections of section 93 of the British North America Act, 1867".¹²¹ King J. pointed out that there would be a very considerable difference if subsection 93(3) referred to rights and privileges whenever acquired, but subsection 22(2) referred only to those existing at the date of union. He then remarked that subsection 22(2) made no reference to time at all, that the natural inference is "that the time of their origin is

¹¹⁹ A study of the early decisions of the Supreme Court of Canada revealed that Gwynne J. consistently gave the most centralist interpretation to the constitution, with the exception of this reference case; see Greenwood, *loc. cit.*, footnote 95, at pp. 266-267.

¹²⁰ *In Re Certain Statutes of the Province of Manitoba Relating to Education*, *supra*, footnote 2, at p. 707.

¹²¹ *Ibid.*, at pp. 709-710.

immaterial",¹²² and that "[t]he existence of the right, and not the time of its creation, is the operative and material fact".¹²³

King J. did acknowledge that treating the repeal of a statute passed by the Manitoba legislature itself as giving rise to an appeal to the Governor General in Council imposed problems in regard to the concept of legislative supremacy. He said that ordinarily a legislature has the implied right to repeal a statute which it has passed, but "the fundamental law may make it otherwise".¹²⁴ He gave an American example illustrating that a constitution may deprive a legislature of power to repeal a statute previously enacted. The United States Constitution prohibits states "from passing any law impairing the obligation of contract, and this has been held to prevent the state legislatures from repealing or materially altering their own acts conferring private rights . . .".¹²⁵ King J. stated that "[I]f the clauses of the Manitoba Act are to have any meaning at all, they must apply to save rights and privileges which have no other foundation originally than a statute of the Manitoba legislature".¹²⁶ He then explained that "[t]he view that the effect of this is to restrain the proper exercise by the legislature of its power to alter its own legislation, is met by the opposite view that there is no improper restraint if it is a constitutional provision . . .".¹²⁷ Thus was the treatment of the issue of legislative supremacy deftly handled by King J.

The only part of his judgment which can be criticized is the holding that the legislation after 1870 did create "rights and privileges" which were different in nature from those that existed in 1870 by practice. He held that, unlike the practice in 1870, which according to the Privy Council merely created the right to establish schools at their own expense, the legislation of 1881 granted to Roman Catholics the right to maintain their schools by exercising the state power of taxation over Roman Catholics and the right of Roman Catholics to be exempted from taxation for the support of Protestant schools. Although there was no delegation of the state power of taxation, it can certainly be argued that in 1870 Roman Catholics by practice could only be called upon to support their own schools. The aridly conceptual approach of the Privy Council had produced a dilemma for the Supreme Court. If there was to be some real protection for the minority in regard to denominational schools, rather than just empty theoretical protection, King J. was compelled to decide the case as he did. As he noted, the Manitoba Act "manifested a

¹²² *Ibid.*, at p. 710.

¹²³ *Ibid.*

¹²⁴ *Ibid.*, at p. 711.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*, at p. 719.

¹²⁷ *Ibid.*

greater tenderness for racial and denominational differences",¹²⁸ and his skilful judgment managed to achieve this in spite of the roadblock which the Privy Council had needlessly erected in the *Barrett* case.

George Edwin King, the second son of a shipbuilder, was born at Saint John, New Brunswick on October 8, 1839. He was educated at Mount Allison College and at the Wesleyan University in Connecticut, receiving a B.A. in 1859 and an M.A. in 1862. He practiced law in Saint John, and from 1867 to 1878 he represented it in the House of Assembly of New Brunswick as a Conservative. In 1869 he became a minister without portfolio in the Wetmore administration, in 1870 Attorney-General, and in 1872 Premier of New Brunswick. It is said that the pre-eminent accomplishment of his administration was the passage of the Common Schools Act 1871, which replaced the voluntary principle with the assessment principle.¹²⁹ This was passed while Mr. George L. Hatheway was Premier, but King was the author and its foremost advocate. Roman Catholics bitterly denounced the schools created under the Act as "God-less" and demanded the right to have separate schools supported by the assessment of Roman Catholics. King successfully fought the contention that the Common Schools Act 1871 was unconstitutional under subsection 93(1), both in the New Brunswick Supreme Court and before the Privy Council. He had resigned from office in 1878 and had run unsuccessfully as a Conservative candidate in the 1878 election for the House of Commons in the Saint John constituency. In 1880, he was appointed to the Supreme Court of New Brunswick by the government of Sir John A. Macdonald and in 1893 he was appointed to the Supreme Court of Canada by the government of Sir John Thompson.¹³⁰

It is somewhat ironic that it should fall to King J. to take a strong stand in support of the rights of Roman Catholics to have separate schools in Manitoba. One would not have expected that he, a Methodist, would be a strong defender of the rights and privileges of Roman Catholics to denominational schools. As a former Conservative politician and as a person who obtained his two judicial appointments from Conservative governments, he might be expected to appreciate the unpleasant dilemma involved in holding the minority's petition to the federal cabinet to be competent. As a former Provincial Premier, he might not have been enamoured of the overriding power conferred upon the federal cabinet

¹²⁸ *Ibid.*, at p. 712.

¹²⁹ The Common Schools Act 1871, 34 Vict., c.21 (N.B.). Section 60 stated: "That all Schools conducted under the provisions of this Act shall be non-sectarian".

¹³⁰ James Hannay, *The Premiers of New Brunswick Since Confederation* (1897), 9 Can. Magazine 213, at p. 217 said that had Mr. King been elected to parliament in 1878 "it would not have been necessary for Sir John A. Macdonald to go to the bench of Nova Scotia to find a Minister of Justice and Sir John Thompson would never have been Premier of Canada".

and Parliament to protect minority educational rights from infringement by provincial legislatures. Most of all, one would have expected the architect of the Common Schools Act, 1871 of New Brunswick to be sympathetic towards the Public Schools Act 1890 of Manitoba because in essence the two statutes were similar.

It is, therefore, pertinent to ask why King J. felt obliged to hold that the Manitoba Roman Catholics had a valid petition to the federal cabinet that had not been effectively foreclosed by the Privy Council decision in *Barrett*. One possible reason is that, in retrospect, he regretted his lack of sympathy towards the wishes of the Roman Catholics when he drafted his Common Schools Act. His statute had failed to conciliate Roman Catholic opinion; in fact, Catholics were so incensed that a *mêlée* broke out in 1875 in the village of Caraque, in Gloucester County, and several lives were lost. Premier King was fully aware of the ugly situation at Caraque. In his capacity as Attorney-General, he had conducted the case for the prosecution.¹³¹ The following summer, his government granted several concessions to the Roman Catholics. Trustees could permit religious instruction after school hours and could allow children to attend any school in the district, thus facilitating segregation on a religious basis. These concessions were granted by the cabinet without any amendment to the legislation, perhaps because King realized that "rights and privileges" conferred by statute in relation to denominational education could not subsequently be revoked.¹³² But concessions had no such protection under subsection 93(3) of the Constitution Act, 1867.

An alternative explanation is that because of his intimate and deep knowledge about section 93 of the Constitution Act, 1867, King J. appreciated fully the importance of the additional words "or practice" in subsection 22(1), and that subsection 22(2) of the Manitoba Act, 1870 simply had to refer to legislation passed subsequent to the union in order to be comparable to subsection 93(3). Once it is acknowledged that legislation passed after union can give rise to "rights and privileges" which cannot later be prejudicially affected without the minority having a right to appeal, the issue of legislative supremacy comes onto the stage. It is possible that the reason King J. was able to cope with this issue so deftly actually stemmed from his exposure to and knowledge of the United States Constitution. He had studied at an American university and would have been well acquainted with ideas of entrenched rights.

¹³¹ C.B. Sissons, *Church & State in Canadian Education* (1959), p. 240; George F.G. Stanley, *The Caraque Riots of 1875* (1972), 2 *Acadiensis* 21.

¹³² In the *Reference* case, *supra*, footnote 2, at p. 719, King J. states that "in establishing a system of separate schools the legislature may well have borne in mind the possibly irrevocable character of its legislation . . .". This consideration may well have influenced him as Premier to grant extra statutory concessions rather than amend the legislation of New Brunswick.

Although King J. does not specifically cite the *Dartmouth College*¹³³ case in his judgment, we know that he gave this case as an example in which a state legislature had the power to confer rights but lacked the power subsequently to abrogate those rights. Strong C.J., after acknowledging that a written constitution might place limitations upon the exercise of conferred powers, stated:¹³⁴

A notable instance of this is, as my brother King has pointed out, afforded by the constitution of the United States, according to the construction which the Supreme Court in the well known "Dartmouth College case" put upon the provision prohibiting the state legislatures from passing laws impairing the obligation of contracts.

Once the concept of entrenched rights is acknowledged, the time datum for the determination of which rights are protected becomes simply a matter of construction. The rights protected may be those existing at the date of union, as in subsection 22(1) of the Manitoba Act, or those which may be created at any subsequent time, as in subsection 22(2). King J. persuasively answered the contention that every presumption must be made in favour of finding that a legislative body has power to repeal the laws it has previously enacted by recognizing that "there is no improper restraint if it is a constitutional provision...".¹³⁵ His American experience permitted him to accept with equanimity that supremacy resided in the Constitution in regard to the protection of denominational schools.

IX. *The Reference Case in the Privy Council*

After the Supreme Court of Canada decided in a three to two split that the Roman Catholic minority did not have a valid claim for remedial action, the minority appealed to the Privy Council. Although it is an appeal from a reference, the case is anomalously called *Brophy v. Attorney-General of Manitoba*.¹³⁶ Brophy was a prominent Roman Catholic lawyer who was initially instrumental in challenging the Manitoba legislation but who gradually deferred to John S. Ewart, a much more able counsel. The government of Manitoba had refused to argue the reference case before the Supreme Court of Canada,¹³⁷ but it was powerfully represented before

¹³³ *Dartmouth College v. Woodward*, 4 Wheat. 518 (U.S. Sup. Ct., 1819).

¹³⁴ *In Re Certain Statutes of the Province of Manitoba Relating to Education*, *supra*, footnote 2, at p. 655.

¹³⁵ *Ibid.*, at p. 719.

¹³⁶ [1895] A.C. 202 (P.C.).

¹³⁷ Dafoe, *op. cit.*, footnote 58, at p. 70 states:

The aloofness of the Manitoba Government to the legal proceedings having to do with determining the right of the Dominion Government to hear the appeal of the minority, disappeared when the judgment of the Supreme Court was taken in appeal to the judicial committee of the Privy Council.

No explanation is offered for this change in attitude. Taschereau J. contended that the reason that Manitoba did not appear before the Supreme Court was because it believed the

the Privy Council by Mr. H.H. Cozens-Hardy, Q.C., M.P., Mr. R.B. Haldane, Q.C., M.P., and Mr. Reginald Bray. This time the minority made certain there was no fiasco in retaining counsel. Edward Blake, now an Irish Nationalist member of the British Parliament, and John S. Ewart argued the case. The Privy Council consisted of the Lord Chancellor, Lord Herschell, and Lords Watson, Macnaghten and Shand. All but the Lord Chancellor had sat on the *Barrett* case.¹³⁸ The transcript of the argument before the Privy Council indicates that their Lordships adopted a favourable attitude to the case of the Roman Catholic minority from the beginning.¹³⁹

Lord Herschell wrote the opinion of the Privy Council. He noted that the decision in the *Barrett* case "seems to have given rise to some misapprehension".¹⁴⁰ He conceded that the interpretation placed upon subsection 22(1) "reduced within very narrow limits the protection afforded . . . in respect to denominational schools",¹⁴¹ and that the Roman Catholic community in Manitoba and the framers of the legislation may have thought the scope was wider, but this could not influence the interpretation of a statute. The unreasonable interpretation made in the *Barrett* case was excused in the *Brophy* case by saying that it was the inevitable result of the application of sound rules of construction. There was, of course, no acknowledgment that there are so many conflicting rules of construction that a selective application of them can produce a wide range of results.

The Privy Council held that there were not concurrent remedies under section 22. Subsection 22(1) conferred rights which can only be effectively vindicated by the ordinary courts. Subsection 22(2) was considered to be a "substantive enactment, and is not designed merely as a means of enforcing the provision which precedes it".¹⁴² Rights and privileges in subsection 22(2) were construed to embrace all rights and privileges in existence immediately prior to the passage of the Act which affects the right or privilege. The Privy Council thought that there was "no justification for putting a limitation on language thus unlimited".¹⁴³

The Privy Council discussed the argument that its interpretation of subsections 22(2) and (3) would be inconsistent with the power conferred

reference procedure to be unconstitutional. However, Manitoba did not challenge the reference procedure before the Privy Council.

¹³⁸ Lords Morris and Hannen and Sir Richard Couch who heard the *Barrett* case did not sit on the *Brophy* case. In *Barrett*, there were six judges and in *Brophy* only four.

¹³⁹ The Manitoba School Case, 1894, edited for the Canadian Government by the Appellants' Solicitors in London (1895).

¹⁴⁰ *Brophy v. Attorney-General of Manitoba*, *supra*, footnote 136, at p. 213.

¹⁴¹ *Ibid.*, at p. 215.

¹⁴² *Ibid.*, at p. 219.

¹⁴³ *Ibid.*

upon the Legislature to "exclusively make laws in relation to education". It stated that the argument was fallacious.¹⁴⁴ It noted that the power was limited and only exercisable "subject and according to the following provisions".¹⁴⁵ Moreover, it is not indeed exclusive because the Parliament of Canada is authorized to legislate within the confines of subsection 22(3).

The Privy Council criticized Strong C.J.'s maxim of constitutional construction, that a legislative body must be presumed to have power to repeal laws which it has itself enacted. The Council said that there is no presumption one way or the other because the legislative power in regard to education is "strictly limited".¹⁴⁶ It also criticized Taschereau J.'s contention that the legislation of 1890, having been held to be *intra vires* in the *Barrett* case, cannot have "illegally" affected any of the rights or privileges existing prior to 1890 of the Catholic minority".¹⁴⁷ It noted that an appeal is given in subsection 22(2) simply if rights are in fact affected.

The Privy Council found that the rights and privileges existing prior to 1890 of the Roman Catholic minority were affected. Lord Herschell stated:¹⁴⁸

Contrast the position of the Roman Catholics prior and subsequent to the Acts from which they appeal. Before these passed into law there existed denominational schools, of which the control and management were in the hands of Roman Catholics, who could select the books to be used and determine the character of the religious teaching. These schools received their proportionate share of the money contributed for school purposes out of the general taxation of the province, and the money raised for these purposes by local assessment was, so far as it fell upon Catholics, applied only towards the support of Catholic schools. What is the position of the Roman Catholic minority under the Acts of 1890? Schools of their own denomination, conducted according to their views, will receive no aid from the State. They must depend entirely for their support upon the contributions of the Roman Catholic community, while the taxes out of which State aid is granted to the schools provided for by the statute fall alike on Catholics and Protestants. Moreover, while the Catholic inhabitants remain liable to local assessment for school purposes, the proceeds of that assessment are no longer destined to any extent for the support of Catholic schools, but afford the means of maintaining schools which they regard as no more suitable for the education of Catholic children than if they were distinctively Protestant in their character.

The decision of the Privy Council in *Brophy v. Attorney-General of Manitoba* is in striking contrast to that in *Barrett v. City of Winnipeg*. Professor Schmeiser has categorized this change as an "amazing turnabout".¹⁴⁹ Thomas Berger contends that "[o]nce again, the opinion

¹⁴⁴ *Ibid.*, at p. 221.

¹⁴⁵ *Ibid.*, at pp. 221-222.

¹⁴⁶ *Ibid.*, at p. 222.

¹⁴⁷ *Ibid.*, at p. 227.

¹⁴⁸ *Ibid.*, at pp. 226-227.

¹⁴⁹ D.A. Schmeiser, *Civil Liberties in Canada* (1964), p. 163.

of the Privy Council made little sense, unless it is regarded as a belated acknowledgement by the peers of the wrongheadedness of their opinion in *Barrett v. City of Winnipeg*.¹⁵⁰ John S. Ewart, counsel for the minority, said that the Privy Council "did all it could to correct its previous error".¹⁵¹ The Privy Council contended that in each case it was simply determining the "true construction" of the language used in the Manitoba Act by applying sound rules of construction, but the results are so startlingly different that it shows that judges could generally find what they wanted to find. The two cases cannot in any meaningful sense be reconciled. In the *Barrett* case, the constitutional protection for denominational schools was trivialized: no right or privilege of Roman Catholics was held to be prejudicially affected as long as the right to establish denominational schools existed. The fact that the right was barren because it could not be exercised in any meaningful way was irrelevant. In the *Brophy* case, we see the Privy Council taking the denominational school guarantee seriously and construing it in a reasonable and robust way.

At a superficial level the cases can, however, be reconciled. In *Barrett*, it was only subsection 22(1) that was construed, and the rights and privileges of the 1890 legislation had to be compared with those which existed by practice in 1870 to determine any prejudicial affect. In *Brophy*, subsection 22(2) was the subject of interpretation, and the minority's rights and the privileges under the 1890 legislation were to be compared with those that existed immediately prior to the enactment of the 1890 legislation to determine whether they had been affected. My contention is that in 1870, Roman Catholics had in fact denominational schools which they themselves supported and they had no obligation to support any other schools. There was no justification for construing the rights and privileges enjoyed in practice in 1870 as narrowly as did the Privy Council in the *Barrett* case. I submit that the Privy Council totally misread the strength of feeling about the importance of denominational schools and the guarantee contained in section 22. The proposal by the Conservative League of Montreal in 1892 that appeals be abolished because "the highest tribunal in England took into account neither the solemn treaty of 1870, nor the unequivocal interpretation of that treaty contained in the law of 1871"¹⁵² probably had a very sobering influence on their Lordships in the Privy Council. The scathing invective used so effectively by Taschereau J. against the Privy Council in regard to the *Barrett* case must also have indicated very forcefully to them that section 22 had to be taken seriously.¹⁵³

¹⁵⁰ Berger, *op. cit.*, footnote 17, p. 71.

¹⁵¹ Cole, *op. cit.*, footnote 83, p. 70 quoting Ewart, XI University of Ottawa Rev. 3.

¹⁵² Cited in *In Re Certain Statutes of the Province of Manitoba Relating to Education*, *supra*, footnote 2, at p. 619.

¹⁵³ Edward Blake in his argument before the Privy Council quoted Taschereau J. This prompted the following exchange (*op. cit.*, footnote 139, p. 160):

The dramatic change between *Barrett* and *Brophy* would seem to provide some support for Professor Greenwood's hypothesis that in construing the Canadian constitution the Privy Council was motivated by institutional self-interest.¹⁵⁴ He believes that their judicial conduct was influenced by a desire to preserve appeals to the Privy Council and thus to maintain a strong legal connection between Britain and the dominions. This implies that, if a decision was so unpopular as to generate calls for the abolition of appeals, the appropriate remedy would be to diminish the scope of the opinion in subsequent cases. Another explanation is that the new Liberal Lord Chancellor, Lord Herschell, may have exercised great influence in the *Brophy* case. Lord Herschell, of Polish-Jewish descent, was brought up in a non-conformist Christian home and later became a high church Anglican.¹⁵⁵ With this background, he may well have viewed with displeasure the forceful majoritarian assimilation policy underlying the Manitoba legislation.

X. *The Political Impact of the Privy Council Decisions*

One can ask whether any substantial good resulted when the Privy Council finally did give a reasonable interpretation to section 22 at its second try. But irreparable harm had flown from the *Barrett* case which could not be rectified by the *Brophy* case. Had the Supreme Court of Canada decision in *Barrett* stood, the Public Schools Act of 1890 would have been *ultra vires* and the Roman Catholic denominational schools of Manitoba would have been saved. The decision favourable to the Roman Catholic minority in the *Brophy* case meant only that it could validly petition the federal cabinet which had power to act under subsection 22(3). Hence, the Privy Council decision in *Brophy* proved to be the second bombshell to hit the faltering Conservative government. On December 12, 1894, while the *Brophy* case was being argued in London, the Prime Minister, Sir John Thompson, dropped dead at a luncheon at Windsor Castle. The Privy Council handed down its decision in the *Brophy* case on January 29, 1895. The right to take remedial action on behalf of the Roman Catholic minority in Manitoba was not the kind of power that any Canadian government wanted in the 1890's. Canada was in the throes of religious conflict, and the exercise of or failure to exercise this declared right to take remedial action had the potential to destroy any government, however strong. Unfortunately Canada's new Prime Minister, Senator Mackenzie Bowell, an honest but mediocre man, lacked the wisdom and stature to meet the challenge. It is unlikely that even the able Thompson could have weathered the storm.

The Lord Chancellor. He did not like the decision of the Privy Council.
Mr. Blake. That is tolerably obvious.

The Lord Chancellor. And it may have looked blacker to him that it really was.

¹⁵⁴ *Loc. cit.*, footnote 95.

¹⁵⁵ R.F.V. Heuston, *Lives of the Lord Chancellors 1885-1940* (1964), pp. 85-129.

The political confrontation would have been much more manageable had the Privy Council held that the Manitoba Public Schools Act of 1890 was *ultra vires*. The Canadian people's ingrained respect for the law would have assisted the government. Although such a decision would undoubtedly have provoked strong demands for a constitutional amendment to enable Manitoba to have the kind of educational system it wished, the government could have taken refuge in the solemn compact under which Manitoba was created in 1870. The *Brophy* decision meant that the government had the power to pass remedial legislation - but to exercise the power would antagonize Protestants and to decline to do so would antagonize Roman Catholics. The Privy Council had unnecessarily handed the Canadian government a "no-win" option and was certainly responsible for administering the *coup de grâce* to an already faltering government.

On March 21, 1895, Bowell's government issued a remedial order instructing Manitoba to restore the educational rights of its Catholic citizens.¹⁵⁶ The Government and Legislature of Manitoba on June 25, 1895 replied that, because the separate Roman Catholic schools were inefficient, "we cannot accept the responsibility of carrying into effect the terms of the Remedial Order".¹⁵⁷ In July of 1895, three French Canadian ministers threatened to resign because of delay in introducing remedial legislation in Parliament, and one of the three, A.R. Angers, carried out this threat. Clarke Wallace, the Grand Master of the Orange Order, also resigned from the cabinet, after months of publicly advocating one non-

¹⁵⁶ The Remedial Order-in-Council of March 21, 1895 recited that the Department of Education Act and the Public Schools Act had deprived the Roman Catholic minority of the following rights and privileges:

- (a) The right to build, maintain, equip, manage, conduct and support Roman Catholic schools, in the manner provided for by the said Statutes which were repealed by the two Acts of 1890 aforesaid.
- (b) The right to share proportionately in any grant made out of the public funds for the purposes of education.
- (c) The right of [exemption] of such Roman Catholics, as contribute to Roman Catholic Schools, from all payment or contribution to the support of any other schools.

And made the following order:

And His Excellency the Governor General in Council was further pleased to declare and decide, and it is hereby declared that it seems requisite that the system of education embodied in the two Acts of 1890 aforesaid, shall be supplemented by a Provincial Act or Acts which will restore to the Roman Catholic minority the said rights and privileges of which such minority has been so deprived as aforesaid, and which will modify the said Acts of 1890, so far and so far only as may be necessary to give effect to the provisions restoring the rights and privileges in paragraphs (a), (b), (c), hereinbefore mentioned.

See Clark, *op. cit.*, footnote 16, pp. 166-167.

¹⁵⁷ Canada, Sessional Papers (No. 20C) (1895).

sectarian school system at a time when the government was committed to remedial legislation. In January of 1896, the government of Sir Mackenzie Bowell fell apart. Seven English-Canadian ministers resigned in an attempt to force Bowell to resign in favour of Sir Charles Tupper. After branding them a "nest of traitors", Bowell actually took them back into a reconstructed ministry, agreeing to resign at the end of the session. The session was taken up with the remedial bill, but "a group of Conservatives led by D'Alton McCarthy and Clarke Wallace and representing the Orange element in the Province of Ontario, entered, with the Liberals, on a deliberate course of obstruction".¹⁵⁸ This prevented the passage of the bill before the end of the session and the life of the parliament.

The Manitoba School question was a major issue in the 1896 election and was just as difficult and divisive for the Liberals as it was for the Conservatives. However, the Liberals had the great advantage of being in the opposition, and thus they were not compelled to take specific action. Laurier believed that a policy of coercion was unwise and dangerous and could not be successful. He advocated "the sunny way" and favoured further investigation and settlement by compromise and conciliation. This brought him into direct confrontation with the Quebec bishops who had long demanded the restoration of separate schools. The bishops issued a "mandement," to be read without comment by every parish priest, to instruct Catholics to support only those candidates pledged to support remedial legislation.¹⁵⁹ As the Mandement did not explicitly condemn support of the Liberals, many Liberal candidates in Quebec signed a declaration supporting remedial action. The Catholic bishops were not alone in taking a political stand. Protestant ministers also used the pulpit for political education. In Ontario, there was much suspicion of a party that was led by a French-Canadian Catholic. A Methodist minister in Western Ontario warned his congregation that a Liberal vote "would stare the voter in the face at the Judgment Day, and condemn him to eternal perdition".¹⁶⁰

It was a strangely contorted election campaign. Tupper, an English-speaking Protestant, cast himself as the rescuer of the French-speaking

¹⁵⁸ W. Stewart Wallace, *The Memoirs of the Rt. Hon. Sir George Foster* (1933), p. 96.

¹⁵⁹ Part of the Mandement read:

. . . all Catholics should give their votes only to candidates who formally and solemnly pledge themselves to vote in Parliament in favour of legislation restoring to the Catholic minority of Manitoba the school rights which have been recognized as belonging to it by the honourable Privy Council of England. This grave duty is imposed on every good Catholic, and you would not be justified, neither before your spiritual guides nor before God Himself, in failing in this obligation.

See Clark, *op. cit.*, footnote 16, p. 207.

¹⁶⁰ John T. Saywell (ed.), *The Canadian Journal of Lady Aberdeen 1893-98* (1960), Introduction, p. lxxvi.

Catholic minority in Manitoba, while Laurier, a French-Canadian Catholic, in striving not to alienate Anglo-Canadians came into conflict with the bishops of his Church. It was also an extraordinarily cynical election campaign. Israel Tarte was quoted as saying "Leave Quebec to Laurier and me", and, "Make the party policy suit the campaign in other provinces".¹⁶¹ In Ontario, Oliver Mowat had made "provincial rights" a popular cause, and Liberal candidates there trumpeted this with the added refrain of opposition to remedial legislation. In Quebec, Laurier contended that his sunny ways would provide the best protection for the Manitoba minority and that the Conservative government had so bungled the matter that it was quite powerless to provide a remedy.

The Conservatives outside Quebec often tried to convince the public that they were only performing a duty that the Privy Council had said that the federal cabinet possessed. The strength of this argument was, however, undermined by the Privy Council itself. After finding that an appeal to the federal cabinet was well founded, Lord Herschell said that the remedy selected would be up to the authorities and was sufficiently defined by subsection 22(3). However, not content with this, he went on to state:¹⁶²

It is certainly not essential that the statutes repealed by the Act of 1890 should be re-enacted, or that the precise provisions of these statutes should again be made law. The system of education embodied in the Acts of 1890 no doubt commends itself to, and adequately supplies the wants of the great majority of the inhabitants of the province. All legitimate ground of complaint would be removed if that system were supplemented by provisions which would remove the grievance upon which the appeal is founded, and were modified so far as might be necessary to give effect to these provisions.

This passage appeared to diminish the legal duty of the federal cabinet under subsection 22(3). It made it more difficult for Tupper to contend that the remedial legislation was simply fulfilling a constitutional, and court-defined, duty owed to the Roman Catholic minority in Manitoba. In parts of Ontario, where the Orange Order, the Equal Rights Association and the Protestant Protective Association were strong, many Conservative candidates openly, and with Tupper's permission, refused to support remedial legislation. In Quebec, the Conservatives proclaimed their support of minority rights and relied on the Catholic hierarchy to

¹⁶¹ Bruce Hutchison, *Mr. Prime Minister 1867-1964* (1964), p. 108.

¹⁶² *Brophy v. Attorney-General of Manitoba*, *supra*, footnote 136, at pp. 228-229. During the argument in the Privy Council on the *Brophy* case, Lord Watson said: "I am prepared to advise the Governor-General, and decide on the meaning of this clause, but I am not prepared to relieve him of the duty of considering how far he ought to interfere". He later stated: "I apprehend that the Appeal to the Governor is an Appeal to the Governor's discretion. It is a political administrative Appeal and not a judicial appeal in any proper sense of the term, and in the same way after he has decided the same latitude of discretion is given to the Dominion Parliament. They may legislate or not as they think fit" (*op. cit.*, footnote 139, pp. 121 and 193).

produce a favourable result. Quebec, however, despite antagonistic clerical influence, opted to vote for its native son, Laurier.¹⁶³

There have been few elections where one issue has assumed such a prominent role and in no election has a court decision had such a significant impact upon political affairs. Time was probably running out for a tired Conservative government, and it might have been defeated in 1896 even without the *Brophy* case. But the Privy Council decision sealed the government's fate.¹⁶⁴ Laurier's Liberal party emerged with a comfortable 118-88 margin over the Conservatives. Ironically, in Manitoba the Conservatives, the party of remedial legislation, increased their representation by two.

Laurier's first challenge was to arrive at an acceptable compromise with the Manitoba government. By mid-November 1896, a settlement had been reached with Premier Greenway which would permit religious instruction in any Christian faith to be given in the last half hour of the school day. Minorities could be instructed in their own language provided

¹⁶³ J. Murray Beck, *Pendulum of Power* (1968), pp. 72-86. A further explanation for the defeat of the Conservatives in 1896 has been given by Professor Lovell Clark, *The Conservative Party in the 1890's*, in Bruce Hodgins, Robert Page (eds.), *Canadian History Since Confederation, Essays and Interpretations* (1972), pp. 261-279. He contends that the success of the Conservative Party depended upon an alliance between a tolerant Ontario Toryism and a conservative Quebec and the first had ceased to exist. At p. 277, Clark says that "Quebec voted against the Conservative Party in 1896 because of the evident bigotry and the manifest insincerity of the Ontario Conservatives". He thus maintains that it was its former Ontario partners that Quebec repudiated in 1896. At p. 278, Clark states:

This becomes all the more apparent when one remembers the performance of the Conservative Party of Ontario under the leadership of William R. Meredith, in the Provincial elections of 1886, 1890, and 1894. By his continual attacks on the separate school system, and on the use of French in the schools of eastern Ontario, Meredith had earned the Conservative Party a reputation for bigotry and intolerance. By contrast, the Liberal Government of Sir Oliver Mowat, which had successfully resisted these attacks, emerged as a genuinely tolerant one and a suitable partner for Quebec in a political realignment.

¹⁶⁴ The transfer of power was stormy. Tupper wished to fill three senate vacancies before resigning. The Senate was composed of seventy-eight Conservative senators and five Liberal senators. Lord Aberdeen, the Governor-General, thought that the appointments to the Senate should not be made by a defeated government but be left to be filled by Laurier. Lord Aberdeen remained firm and Tupper resigned contending that the Governor-General had behaved unconstitutionally. The Tupper-Aberdeen controversy, like the later King-Byng controversy, was significant in defining the prerogatives of the Crown. Representation in the Senate was still important because Canadians in 1896 had not yet appreciated the absurdity of the executive appointing for life a legislative body which had virtually co-ordinate powers to those of the House of Commons. The importance of the Senate at this time was exemplified by the fact that two of the four Prime Ministers who followed Macdonald served throughout their term in the Senate with no criticism of the propriety of their doing so.

there were at least ten students.¹⁶⁵ As this was a far cry from the Catholic position in which the whole of the educational experience must be infused with the Christian faith, the Catholic bishops not unnaturally felt the settlement was totally unacceptable. Laurier had to appeal to Rome to seek a conciliatory influence. Abbé Proulx went to Rome, and carried with him a lengthy statement from Liberal members of Parliament that outlined the dilemma Catholics faced in a pluralistic and democratic society. The bishops sent four of their members as well. Furthermore, Laurier's Solicitor General, Charles Fitzpatrick, who had been counsel to Louis Riel in 1885 and was later to become Chief Justice of the Supreme Court of Canada, also made his way to Rome. His diplomacy was sufficiently effective that a Papal Emissary, Mgr. Merry del Val, was sent to Canada. Mgr. del Val must have appreciated the realities facing the Catholic minority in Manitoba, for the encyclical *Affari Vos* urged Catholics to accept the settlement as partially satisfactory and to work for improvements. A more peaceful era was thus ushered in. But the Roman Catholic minority must have felt frustration that their long legal and political battle had achieved so very little.

XI. *The Legal Impact of the Privy Council Decisions*

If the Roman Catholic minority, most of whom were French Canadians, had been successful in the *Barrett* case, there would doubtless have been a legal challenge to the Official Language Act of 1890.¹⁶⁶ Section 1 of this Act stated:

Any statute or law to the contrary notwithstanding, the English language only shall be used in the records and journals of the House of Assembly of the Province of Manitoba, and in any pleadings or process in or issuing from any court in the Province of Manitoba. The Acts of the Legislature of Manitoba need only be printed and published in the English language.

The Official Language Act 1890 was in clear violation of section 23 of the Manitoba Act. The Manitoba legislature itself in 1890 had great doubt about the constitutionality of its Official Language Act, for section 2 provided that the "Act applies only so far as the Legislature has jurisdiction to enact". The Manitoba legislature had no power to enact it, but it was not until 1979 that a case challenging the Official Language Act of 1890 reached the Supreme Court of Canada.¹⁶⁷ Had the Supreme Court of

¹⁶⁵ The fact that a language concession was sought and obtained is some indication that section 22 of the Manitoba Act, 1870 and section 93 of the Constitution Act, 1867 do not exclusively speak to denominational educational rights. The language concession was not made just for French but any language. In 1916, all such bilingual schools, including French were abolished.

¹⁶⁶ An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba, 53 Vict., c.14 (Man.).

¹⁶⁷ In *Attorney-General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032, (1979), 101 D.L.R. (3d) 385, [1980] 2 W.W.R. 758, the Supreme Court affirmed the decision of the

Canada decision in the *Barrett* case prevailed, it is not conceivable that almost ninety years would elapse before a statute so patently unconstitutional would finally have been challenged in the Supreme Court of Canada. Failure to challenge the Official Language Act of 1890 in any concerted way must thus be attributed to the Privy Council's overruling of the Supreme Court of Canada's decision in the *Barrett* case. The Privy Council, by interpreting the constitutional protection in subsection 22(1) of the Manitoba Act to be virtually meaningless, weakened confidence in the legal system as a protector of minority rights. The inadequacy of the settlement which followed the *Brophy* case, in which the Privy Council belatedly found some real substance in section 22, must have reinforced Franco-Manitobans' skepticism about the legal and political protection of their linguistic rights. The long delay between infringement of language rights and the legal challenge to that infringement has produced the legal problem that all legislation passed by Manitoba since 1890 solely in the

Manitoba Court of Appeal which granted a declaration that the Official Language Act of Manitoba is inoperative in so far as it abrogates rights, including the right to use the French language in the courts of Manitoba, because such rights are conferred by section 23 of the Manitoba Act, 1870 and cannot be amended by Manitoba.

M. Yalden, *The Language Cases in Some Historical Perspective* (1891), 2 Sup. Ct. L. Rev. 431, raises the question of why it took ninety years in the case of Manitoba as compared to two years in *Attorney-General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, (1979), 101 D.L.R. (3d) 394, (1979), 49 C.C.C. (2d) 359, for the courts to determine that a provincial legislature may not unilaterally abrogate language rights enshrined in the constitution. He notes that there have been various explanations offered (including physical intimidation and preoccupation with the school question) for the passive acceptance by the francophone minority of the illegal abrogation of their linguistic rights. In his opinion these can only be partial explanations and at p. 433 he states:

It has now been confirmed, however, that the validity of *The Official Language Act* of 1890 was in fact put in issue in 1909 in the then unreported case of *Bertrand v. Dussault and Lavoie*. Although that decision appears to have been ignored by the government of Manitoba, and the official court docket either lost or destroyed, the reasons for the decision have recently been reported for posterity in *Forest v. Registrar of Court of Appeal of Manitoba*.

The constitutional validity of *The Official Language Act* was also contested in another unreported case, *Dumas v. Baribault*, decided in 1916, which apparently reached the Court of Appeal of Manitoba but "was not proceeded with" to quote the words of the present Chief Justice of that Court. One is left to wonder how many other challenges to *The Official Language Act* were either "not proceeded with" or went unreported and ignored by the then government of Manitoba.

There is ample evidence, in any event, that the francophone minority in Manitoba at least attempted to mount a legal challenge to *The Official Language Act* at the turn of the century — but was frustrated for reasons that would appear to be a mixture of law and politics. As a non-practitioner, but nevertheless one who has been raised to believe in the rule of law and the independence of the judiciary from the legislative branch of government, I must admit to some puzzlement about the apparently murky circumstances that appear to surround the disposition of the *Bertrand* and *Dumas* cases.

English language is invalid.^{167a} Had the challenge been made promptly after 1890, Manitobans would have been compelled to recognize that the Canadian nation rests upon a respect for the French language. This may have had a very beneficial effect in promoting the idea that Canada should be a bilingual and bicultural nation. Instead, the Privy Council decision in *Barrett v. City of Winnipeg* must have had a chilling effect on Francophone Canadians exerting their linguistic rights in the courts. It also signaled to Anglophone Canadians in the West that they could ignore French language rights with impunity and that the assimilation of French Canadians was a feasible long-term goal.

XII. Responsibility for Constitutional Change

In the *Barrett* case, there was a conflict between majoritarianism and constitutionally protected minoritarian liberalism. The majority of Manitobans wanted one non-sectarian public school system infused with a basic amount of Protestant religion. The Roman Catholic minority insisted on their constitutional right to denominational schools. Although not explicitly addressed by any of the courts which heard the case, the basic issue was where the responsibility for instituting constitutional change resided. There was a great demographic transformation in Manitoba between 1870 and 1890. The approximately equal balance between English-speaking Protestants and French-speaking Roman Catholics of 1870 no longer prevailed, and by 1890 Manitoba had come to resemble Ontario in ethnic composition.

The denominational school guarantee of section 22 of the Manitoba Act meant most to Roman Catholics because they attached the greatest importance to the need for education to be infused with religion. If Roman Catholics had continued to comprise approximately half of the population, there would have been no need for constitutional guarantees. Their political clout would have been sufficient to ensure the continuance of their schools. A constitutional guarantee was required because of the possibility, or the probability, that Roman Catholics might become a minority — an eventuality which did in fact occur. The size of the population change made a constitutional guarantee that much more important to the Roman Catholics. To the Protestants, the change was so

^{167a} In *In Re Reference Concerning Certain Language Rights Under Section 23 of the Manitoba Act, 1870, and Section 133 of the Constitution Act, 1867*, unreported, June 13, 1985, the Supreme Court of Canada held, *inter alia*, (1) that by virtue of section 23 all statutes and regulations of Manitoba not enacted in both English and French are invalid; but that the invalid legislation would be deemed temporarily valid to allow time for its proper enactment; (2) that, even if properly enacted in English and French, sections 1 to 5 of An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, 1980 S.M., c.3 are invalid. See also *Bilodeau v. Attorney-General of Manitoba*, [1981] 5 W.W.R. 293 (Man. C.A.) and *Robin v. College de St.-Boniface* (1984), 15 D.L.R. (4th) 198 (Man. C.A.); *Bilodeau* is under appeal to the Supreme Court of Canada.

great that the constitution had to give way to the new reality. The issue which should have been addressed was whether this change should come about as a result of an explicit constitutional amendment, or whether judicial interpretation should purposefully diminish the constitutional protection for denominational schools so that it would not frustrate the wishes of the majority.

A written constitution eventually and inevitably involves a clash between the dead hands of its makers and the living people whose conduct it is supposed to regulate. Omniscience is not given even to makers of constitutions. In this case, however, the authors of the guarantee for denominational schools had obviously foreseen the necessity for section 22 should the religious composition of the province change. The envisioned change occurred, and the fact that it was perhaps greater than anyone might reasonably have anticipated provided little justification for the judiciary to diminish the protection accorded by section 22. The majority believed that nothing should stand in the way of introducing a more efficient educational system. Establishing such a system with limited resources in a sparsely populated country was a formidable task. Yet it was no more difficult in 1890 than it had been in 1870 when the denominational school guarantee was made. In addition, the Public Schools Act of 1890 did not merely manifest a desire for a more efficient school system; it represented a concerted attempt to assimilate the French Canadian. A contemporary and prevalent view among Anglo-Saxons was that Canada could become a nation only if differences, particularly language differences, were submerged. Goldwin Smith's influential and pessimistic book, *Canada and the Canadian Question*, published in 1891, revealed the racialism inherent in Anglo-Saxon nationalism.¹⁶⁸ He concluded that the English-speaking Protestants in Canada lacked the ability alone to assimilate the French Canadian. He therefore advocated union with the United States to achieve this.

By holding the Public Schools Act to be *ultra vires* in the *Barrett* case, the Supreme Court of Canada told the majority in Manitoba that the Constitution required them to be more tolerant towards the minority or to seek a constitutional amendment. It is true that neither a legislature nor a court can make people tolerant but they can make it more difficult for people to be intolerant. Had the Supreme Court's *Barrett* decision prevailed, Roman Catholic denominational schools in Manitoba could not have been abolished without a constitutional amendment.

¹⁶⁸ Goldwin Smith, *Canada and the Canadian Question* (1891), p. 275, advocated union with the United States because "it is perfectly clear that the forces of Canada alone are not sufficient to assimilate the French element or even to prevent the indefinite consolidation and growth of a French nation". He also wrote that "[t]here is no reason why Ontario should not be a nation if she were minded to be one . . . it is sufficiently homogeneous if she can only repress French encroachment on her eastern border"; *ibid.*, p. 256.

The Supreme Court of Canada in the *Barrett* case clearly enunciated that the bleak policy of assimilation was not constitutionally permissible. Had the Supreme Court prevailed, it seems likely that the slow tortuous path towards a general realization that our Canadian identity involves pride in the bicultural and bilingual background of our founding races might have been accelerated. Unfortunately, the Privy Council garbled this clear message by its vacillating response to the Manitoba school issue. Initially in *Barrett* the Privy Council took the view that it would assist the Manitoban majority in its policy of assimilation by so narrowly interpreting the constitutional guarantee that it became an empty right. Obviously the Privy Council, when doing so, denied that it was amending the Constitution and contended that it was merely enunciating the true meaning to the Manitoba Act by applying canons of construction to it. Any impartial and realistic observer has to say that this is nonsense. The Privy Council was clearly making a constitutional change. In so doing, it was short-circuiting the amendment process and removing it from the arena of politics. It is not, however, just a matter of proper procedure to be followed in obtaining an amendment: a formal amendment to section 22 which would have empowered Manitoba to abolish denominational schools was probably a political impossibility. Clifford Sifton, the Attorney-General of Manitoba, is reputed to have "treated with scorn the suggestion that an amendment to the constitution would or could be obtained".¹⁶⁹

If the Privy Council did not appreciate the political impossibility of a constitutional amendment, one can say that the decision is a bad one based on a profound ignorance of the Canadian scene. But if it did recognize the conundrum, the decision suggests other motivations. For instance, it is possible that the Privy Council thought it was securing a more dependable and compliant Canadian ally for Britain by permitting Manitoba to pursue its policy of assimilation. Conversely, the Privy Council may simply have believed that the majority view of Manitobans should prevail in spite of the constitution. Judges living in a unitary state were probably not concerned about the mode of amending a federal constitution.

Professor Schmeiser has written that "[t]he *Barrett* case is probably the most extreme example of judicial amendment to the Canadian Constitution".¹⁷⁰ However, as Canada in 1867 had obtained a very highly centralized constitution which the Privy Council managed to transform into a classical or co-ordinate federal constitution, it may be difficult to contend that the *Barrett* case is the most extreme example of judicial amendment. It can, I believe, be contended that the Privy Council decision in *Barrett* represents the most unfortunate judicial amendment to the constitution because of its deleterious impact upon Canadian unity. The

¹⁶⁹ Dafeo, *op. cit.*, footnote 58, p. 46.

¹⁷⁰ Schmeiser, *op. cit.*, footnote 149, p. 162.

Barrett case was more harmful than many other judicial amendments that diminished the federal power and enhanced the power of the provinces.¹⁷¹ When the basic division of powers is reinterpreted so as to enhance the power of the provinces, and this does not suit the wishes of a national majority, it is possible for this to be reversed by a constitutional amendment. When a minority loses educational rights through judicial interpretation, it has no power to reacquire those lost rights through constitutional amendment if it is both a local and a national minority. The failure of the Privy Council in the *Barrett* case to find a reasonable interpretation to the minority educational rights guaranteed in the Manitoba Act was indeed unfortunate. Thomas Berger, in referring to the *Barrett* case, stated:¹⁷²

The decision of the Privy Council was a setback to Canadian unity. A small group of peers in far-away Westminster had, without any personal knowledge of Canada and with little or no understanding of Canadian history, found themselves unsympathetic to the idea of state-supported separate schools. For no better reason, as far as we can judge from this opinion, they reversed the Supreme Court of Canada.

In the *Brophy* case, the Privy Council thrust the issue back into the political arena by giving some real content to subsection 22(2). However, there is a profound difference in result. If the Privy Council had agreed with the Supreme Court in the *Barrett* case, it would have been the Manitoba majority that would have sought positive action by the federal parliament to obtain an amendment to the Manitoba Act. This, I believe, would have ended in a stalemate with the Public Schools Act 1890 remaining unconstitutional because the political forces would have been relatively equally balanced. However, by holding the Public Schools Act valid and by saying in *Brophy* that it affected a right or privilege under subsection 22(2) giving rise to a valid appeal by the Roman Catholic minority in Manitoba to the federal cabinet, the stalemate occurred on the opposite side. The political forces were so nearly equally balanced that no adequate remedy could be made available to the Manitoba minority. The conflicting responses of the Privy Council to the Manitoba school legislation did, in the end, produce a major victory for the Manitoba majority and a defeat for minoritarian liberalism.

XIII. *Impact on the Supreme Court of Canada and on Subsequent Section 93 Litigation*

The two Privy Council decisions have had an adverse affect on the long-term goals of Canadian society and have also had a deleterious impact on

¹⁷¹ It is rather remarkable that the O'Connor Report failed to mention either the *Barrett* or *Brophy* cases. The Report concluded that the failure of the constitution to achieve the intent of its framers was caused "by demonstrable error in interpretation" by the Privy Council. In omitting *Barrett* it ignored perhaps the strongest case for such an indictment. Report Pursuant to Resolution of the Senate to the Honourable the Speaker by the Parliamentary Counsel Relating to the Enactment of the British North America Act, 1867, any lack of consonance between its terms and judicial construction of them and cognate matters (1939).

¹⁷² Berger, *op. cit.*, footnote 17, pp. 70-71.

the Supreme Court of Canada. In the *Barrett* case, the Supreme Court was firmly united in taking a strong stand in defending minority educational rights. It was a great credit to the court that on such a divisive issue it was able to speak in a unanimous way. In *Barrett*, the Supreme Court of Canada clearly indicated that it was a national court and would interpret constitutional guarantees in the national interest and not simply to suit a local majority in a province. In the subsequent reference case, the court was divided. This change does not reflect any discredit on the court, which had been placed in an exceedingly difficult position by the Privy Council's decision in the *Barrett* case. Precedent seemed to require that the Supreme Court should decide that the appeal by the Roman Catholic minority was precluded by that decision of the Privy Council, but this would have rendered all of section 22 virtually meaningless. This, at least, a minority of the court was reluctant to do. The strong united stand in *Barrett* disappeared in subsequent cases. I suggest that the narrow interpretation of the constitutional guarantees for Denominational Schools by the Privy Council was the major contributing factor. If the Supreme Court of Canada had had exclusive jurisdiction, the denominational school guarantees would probably have continued to receive a reasonable, broad and robust interpretation.

Unfortunately, the Supreme Court of Canada at the time of the *Barrett* decision was only an intermediate court of appeal and did not have final say. Moreover, being only an optional intermediate court, it could be bypassed and therefore deprived of even the ability of influencing the Privy Council through its own judgments. An important case in which the Supreme Court played no part was *Ottawa Separate School Trustees v. Mackell*.¹⁷³ The major issue in this case was the right of separate schools in Ontario to choose French as the language of instruction. In 1912, the Ontario Department of Education had issued a "Circular of Instructions" which virtually abolished the use of French as a language of instruction in both the public and the separate schools in Ontario. The Ottawa trustees of the separate schools, the majority of whom were French-speaking, refused to open the schools. The English-speaking supporters of the separate schools sought an order to compel the trustees to adhere to the regulations. The trustees alleged that the regulations were *ultra vires* because of their right to determine "the kind and description of schools to be established" and also their power to manage the schools and to select qualified teachers which was guaranteed to them by subsection 93(1) of the Constitution Act, 1867. The Separate Schools Act, 1863¹⁷⁴ in section 7 conferred on the trustees of separate schools the same powers as possessed by the trustees of the common schools under

¹⁷³ [1917] A.C. 62 (P.C.).

¹⁷⁴ An Act to restore to the Roman Catholics in Upper Canada certain rights in respect to Separate Schools, 26 Vict., c.5, s.7.

the Common Schools Act, 1859.¹⁷⁵ The Privy Council summarily dismissed the contention that the separate school trustees had the right to determine the language of instruction because they had the right to determine "the kind and description of schools to be established".¹⁷⁶ It said, "[t]he 'kind' of school . . . is, . . . the grade or character of school, for example, 'a girls' school', a boys' school' or 'an infants' school' and a 'kind' of school, within the meaning of that subsection, is not a school where any special language is in common use".¹⁷⁷ The Privy Council also concluded that the protection of subsection 93(1) — "Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Demoninational Schools which any Class of Persons have by Law in the Province at the Union" — only extended to a class determined by religious belief and not by race or language.¹⁷⁸

Undoubtedly, those rights did attach to the class of persons who use demoninational schools, but it was not clear that the rights and privileges which such a class enjoys were to be restricted to those relating solely to religious teaching. The Supreme Court could possibly have searched for a deeper significance in the pre-Confederation school legislation and might have found some linguistic protection. The bitterness felt by French Canadians towards Ontario's Regulation 17 certainly intensified the divisiveness of the Conscription issue in the First World War. Henri Bourassa and the French-Canadian Nationalists, with some justification, felt that their rights were more directly threatened by "the Prussians in Ontario" than in Europe.¹⁷⁹

In holding that the separate schools in Ontario had no right to use French as the language of instruction, the Privy Council stripped the Protestants in Quebec of any constitutional language protection arising from subsection 93(1), unless dissentient school boards had been given greater power in regard to language by pre-Confederation law.¹⁸⁰ This

¹⁷⁵ An Act respecting Common Schools in Upper Canada, C.S.U.C. 1859, c.64.

¹⁷⁶ *Ottawa Separate School Trustees v. Mackell*, *supra*, footnote 173, at p. 70.

¹⁷⁷ *Ibid.*, at p. 71.

¹⁷⁸ *Ibid.*, at p. 74.

¹⁷⁹ Margaret Prang, *Clerics, Politicians, and the Bilingual Schools Issue in Ontario, 1910-1917* (1960), 41 *Can. Hist. Rev.* 281. At p. 307, she states: "Bourassa and the Nationalists declared frequently that the defeat of 'the Prussians of Ontario' had a prior claim over the war in Europe".

¹⁸⁰ The rights of the Protestant schools in Quebec in relation to language arose in *Protestant School Board of Montreal v. Minister of Education* (1976), 83 D.L.R. (3d) 645 (Que. S.C.) as a result of the enactment of the Official Language Act, 1974. Deschênes C.J.S.C., at p. 673, concluded that "there were no essential differences in the powers of commissioners and trustees of schools of Lower and Upper Canada" at the time of Confederation and therefore the subsection 93 jurisprudence was fully applicable in Quebec. He held that section 93(1) protects only the denominational aspects of schools and not the language in which they function. At pp. 672-673, he made it clear that it was too

was an issue which judges of the Supreme Court of Canada would be more likely to recognize and would have militated in favour of a larger and more liberal interpretation of subsection 93(1).¹⁸¹

In *Tiny Separate School Trustees v. The King*,¹⁸² at issue was the validity of three claims of Roman Catholics with respect to education in Ontario. They were: (1) the right to conduct courses in separate schools comparable to courses in high schools; (2) the right to be exempt from taxation to support high schools not conducted by Roman Catholic boards of trustees; and (3) the right of separate schools to share in monies granted for common schools in accordance with their rights at confederation. The six judges of the Supreme Court of Canada bench which heard the case split three to three on the first two issues, this split occurring along religious lines. Anglin C.J.C., Mignault and Rinfret JJ., who were all Roman Catholics, supported the validity of the claims of the separate school trustees. The Protestants, Duff, Newcombe and Lamont JJ., all rejected the claims made by the separate school trustees. The issue of the rights relating to denominational schools did not split the court in the

late to search for a deeper meaning to subsection 93(1), at least where the Protestant minority was seeking this new meaning:

Also, even if the question is cruel and apt to revive old wounds, the argument of the Protestant School Boards makes it mandatory. When the constitutional text was similar, did anyone think of serving the French culture of the Catholic minority of Manitoba, when the language question was underlying the religious conflict which was jeopardizing its right to denominational schools? And when the constitutional text was identical did anyone think of saving the French culture of the Catholic minority of Ontario, when the language question was jeopardizing its system of denominational schools? . . . How and why then, should one suddenly find in the same constitutional text a new virtue, and, contrary to a constant judicial interpretation, hold in favour of the Protestant minority in Quebec an additional implicit protection which has been refused to the Catholic minorities in other parts of the country? It seems to the Court that the answer is evident.

Alexander Galt, a staunch defender of the Anglo-Saxon minority in Quebec and a father of confederation, who was largely instrumental in drafting section 93, would have been shocked to learn that it did not guarantee the use of the English language in the Dissident schools of the Protestants in Quebec. However, the jurisprudence under section 93 required Deschênes C.J.S.C. to hold that the Legislature had the power to determine the language of education. Any other response would have brought the law into disrepute.

¹⁸¹ The Anglophone minority in Quebec has as a result of the Canadian Charter of Rights and Freedoms obtained constitutional protection for its language. In *Attorney-General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, (1984), 10 D.L.R. (4th) 321, the Supreme Court of Canada has held that section 23 of the Charter of Rights and Freedoms confers upon Canadian citizens who are members of the English-speaking minority in Quebec the right to have their children receive primary and secondary school instruction in English provided they received their primary school instruction in English anywhere in Canada. Thus parts of sections 72 and 73 of the Charter of the French Language, R.S.Q. 1977, c.C-11 (Bill 101) are of no force or effect to the extent of the inconsistency with the Charter of Rights and Freedoms.

¹⁸² [1927] S.C.R. 637, [1927] 4 D.L.R. 857.

Barrett case, but in the *Tiny Separate School Trustees* case, the Court divided in the least desirable way. I would again suggest that this result was caused by the approach taken by the Privy Council. The message conveyed by the Privy Council decisions was that the constitutional protection accorded by section 93 should be read in the most restrictive way which could be justified in order that the wishes of the local majority might not be frustrated. This message was apparently accepted by the Protestant judges. It was a message which was not acceptable to Roman Catholic judges who appreciated the vital importance that their faith attached to the role of religion in education. Mignault and Rinfret JJ. must also have had in mind the generous treatment accorded to the dissentient Protestant schools in Quebec.

At the time of Confederation, although there were some Grammar Schools, it appears that Common and Separate schools were providing some secondary education to the matriculation level. The Common schools, and therefore the Separate schools, were subject to regulation by the Council of Public Instruction, which had power under subsection 119(4) "to make such regulations as from time to time, as it deems expedient, for the organization, government and discipline of Common schools, for the classification of Schools and Teachers . . .".¹⁸³ The case therefore focussed upon the scope to be given to the power of regulation. Did the power of regulation permit the Council of Public Instruction to withdraw courses of study from the Separate school so that it could offer solely primary education? Anglin C.J.C. said:¹⁸⁴

The statutes which entitled pupils up to the age of 21 years to attend the common and separate schools were certainly not designed to enable the Council of Public Instruction, under the guise of regulation, so to restrict the course of studies for which the trustees might provide that they would be suitable only for pupils up to the age, of say, 12, or even 16 years.

Mignault J. also adopted a realistic and functional approach to determine the extent of regulation. He stated:¹⁸⁵

It seems to me inconceivable that when it granted to the Roman Catholics of Upper Canada the privilege of having their own separate schools, the Legislature could

¹⁸³ An Act respecting Common Schools in Upper Canada, C.S.U.C. 1859, c.64, ss. 119(4). Section 7 of An Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools, 26 Vict., c.5 gave the trustees of the Separate Schools the same powers as those possessed by the trustees of the common schools.

¹⁸⁴ *Tiny Separate School Trustees v. The King*, *supra*, footnote 182, at pp. 671 (S.C.R.), 874 (D.L.R.).

¹⁸⁵ *Ibid.*, at pp. 707 (S.C.R.), 906-907 (D.L.R.). On June 12, 1984, Premier Davis announced in the Ontario Legislature that Roman Catholic School boards were to be fully funded for the complete range of secondary education. This is what the Tiny Township Separate School Trustees had unsuccessfully sought in 1926 and 1927. Premier Davis said: "if we are to serve the spirit and the realities of 1867, we should acknowledge that basic education was what was recognized then and, today, basic education requires a secondary, as well as an elementary, education".

have intended to render this privilege valueless by allowing the Council of Public Instruction of that Province to restrict by regulations, the scope of education to be given in these schools.

The Roman Catholic judges of the Supreme Court of Canada were not prepared to see the constitutional protection for denominational schools rendered illusory by giving a wide scope to regulation. The Protestant judges, accepting the tutelage of the Privy Council, were prepared to give that expansive meaning to regulation and thus facilitated the wishes of the majority in Ontario as reflected by its government. As the Supreme Court split three to three, the decision of the Appellate Division of the Supreme Court of Ontario dismissing the claim of the Roman Catholic trustees was affirmed. The trustees appealed to the Privy Council, but their appeal was dismissed. After giving a broad definition to regulation, Viscount Haldane said:¹⁸⁶

It is indeed true that power to regulate merely does not imply a power to abolish . . . But they are still left with separate schools, which are none the less actual because the liberty of giving secondary and higher education in them may be abridged by regulation. Such an abridgment may be in the usual course when a national system of education has attained a certain stage in its development, and it would be difficult to forego this power if the grading which may be essential is also to be possible.

If one is prepared to give such wide import to regulation, there appears to be little to prevent separate schools from being virtually regulated out of existence. In the hands of the Privy Council, the legal protection accorded to denominational schools by section 93 became frail and anaemic. Under the influence and supervisory control of the Privy Council, the Supreme Court of Canada ceased to give a united and robust protection to the constitutional guarantees relating to denominational schools. The Supreme Court became a divided court. The Protestant judges were prepared to accommodate local majorities whose religious and racial prejudices had been aroused. Only the Roman Catholic judges remained firm in their resolve to interpret the denominational school guarantees so as to provide reasonable rather than illusory protection.

Conclusion

The assault upon the education rights of the Roman Catholics of Manitoba in 1890 resulted from a combination of racial and religious bigotry, a desire for educational reform, and political opportunism. The local judiciary of Manitoba was too close and too responsive to the will of the local majority to provide meaningful protection for the minority. However, in the *Barrett* case, the Supreme Court of Canada rose magnificently to the challenge. It rendered a unanimous decision declaring the Manitoba legis-

¹⁸⁶ *Roman Catholic Separate School Trustees v. The King*, [1928] A.C. 363, at p. 389, [1928] 3 D.L.R. 753, at p. 772, [1928] 2 W.W.R. 641, at pp. 660-661 (P.C.).

lation, which compelled Roman Catholics to pay taxes to finance a school system, to which they could not conscientiously send their children, to be *ultra vires*. Professor Frank Scott wrote more than fifty years ago in reference to this case that "if ever the Protestant majority on the bench of the Canadian Supreme Court might be expected to show its religious and racial prejudices, this was the moment par excellence".¹⁸⁷ Then, after noting that the strong Protestant feeling prevailing in the country was completely set aside, he said: "By this decision the highest Canadian Court vindicated its right to be considered a truly impartial court of justice".¹⁸⁸

The *Barrett* case indicates that an appellate court must be fully conversant with social and political conditions. Without such knowledge it cannot hope to render a decision which will promote national unity in a matter as sensitive as minority educational rights. However, the judges must be sufficiently detached so that they behave as judicial statesmen in their policy-making role without being unduly influenced by inflamed public opinion. It is to be hoped that the Supreme Court of Canada, in interpreting the Canadian Charter of Rights and Freedoms, will draw inspiration from earlier Supreme Court decisions such as *Barrett*, even though the case was overruled by the Privy Council. We must draw on the wealth of American jurisprudence on entrenched rights, but let us not neglect our own.

In the *Barrett* case, the Supreme Court of Canada, recognizing that democracy has its own capacity for tyranny, firmly and unanimously told the Manitoba government that it must respect the freedom of conscience of its Roman Catholic citizens in respect to education. This rejection of the forceful assimilation policy of Manitoba, had it not been overruled by the Privy Council, might have done much to accelerate the development of respect for and pride in the bicultural and bilingual nature of the Canadian nation. The Privy Council in *Barrett* unfortunately approved Manitoba's melting-pot policy. This caused French Canadians to believe that only under the protection of the provincial rights of Quebec would their cultural rights be protected. This undoubtedly nurtured the growth of political separatism. Fortunately, greater tolerance and understanding now prevails. Positive steps have been taken to promote a bilingual and bicultural nation while respecting our cultural mosaic. Much still remains to be done.

¹⁸⁷ F.R. Scott, *The Privy Council and Minority Rights* (1930), 37 *Queen's Quarterly* 668, at p. 671. In this article Professor Scott clearly established that the Privy Council had safeguarded provincial rights and not minority rights. At p. 675, he states that he "is aware of no instance where an important point affecting minority claims or aspirations has been decided more favourably to French Canada in London than at Ottawa; and the reverse is true of the Manitoba School question viewed as a whole".

¹⁸⁸ *Ibid.*