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TITLE OF THESIS..... THE EVOLUTION OF THE FORMAL STRUCTURE OF SEPARATE SCHOOLS IN THE PRAIRIE PROVINCES

UNIVERSITY... OF ALBERTA

DEGREE.....Ph. D.....YEAR GRANTED...1968.....

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THE UNIVERSITY OF ALBERTA

THE EVOLUTION OF THE FORMAL STRUCTURE OF SEPARATE SCHOOLS IN THE PRAIRIE PROVINCES

by

© MILTON REINHOLD FENSKE

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

OF DOCTOR OF PHILOSOPHY

DEPARTMENT OF EDUCATIONAL ADMINISTRATION

EDMONTON, ALBERTA

AUGUST 1968

UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled "The Evolution of the Formal Structure of Separate Schools in the Prairie Provinces," submitted by Milton Reinhold Fenske in partial fulfilment of the requirements for the degree of Doctor of Philosophy.

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ABSTRACT

This study has been designed to examine the evolution of the formal structure of separate schools in the Prairie Provinces of Canada. Specifically, it sought to clarify the distinctiveness of the formal structure of separate schools, as compared to public schools, by examining the changing provisions for separate schools as found in statutes, common law and regulations of provincial authorities.

Provisions for the establishment of separate schools in Canada originated in Upper and Lower Canada during the 1841 to 1866 period. The population of Lower Canada (Quebec) was mainly French-speaking and Roman Catholic while that of Upper Canada (Ontario) was primarily English-speaking and Protestant. A public school system controlled by the majority and denominational in character was unacceptable to the minority in both provinces. A non-sectarian public school system was also unacceptable to the groups concerned. A state-sponsored public school system containing provisions for denominational influence, either Protestant or Roman Catholic, over education evolved during the 1841 to 1866 period. This system, providing the minority with the right to have denominational influence over education through dissentient or separate schools, proved acceptable to Protestants and Roman Catholics.

One of the conditions of Confederation was that the

provisions for denominational influence over education existing in Quebec and Ontario was to be preserved. Section 93 of the British North America Act, 1867 was the clause included to preserve the existing denominational rights. Section 93 went further, however, than the preservation of denominational rights for the minority in Quebec and Ontario. It also protected the right of the minority, Protestant or Roman Catholic, to maintain separate schools in a province where this right might be granted at a time subsequent to the union of the province with Canada.

What constitutes denominational rights for separate schools was not specified by sub-section 1 of section 93 of the British North America Act, 1867. Judicial decisions through the years have somewhat clarified this situation. The provincial privileges granted subsequent to Confederation for separate school education are protected by sub-section 3 and 4 of section 93. The appeal for interference in these privileges lies with the Governor-General in Council.

The initial public school systems established by Manitoba and the North-West Territories were of a dual nature. The dual system gave considerable denominational control over both the interna and externa of the schools. Manitoba, in 1890, replaced its dual system with a single non-sectarian public school system. After considerable

objection Manitoba made a few minor provisions for denominational influence in education. The North-West Territories replaced its dual system, in 1892, with a single public school system with a provision for separate schools within the system. The Provinces of Alberta and Saskatchewan, which were formed in 1905 from the southern portions of the North-West Territories, have not materially altered the structure for separate school education as established by the North-West Territories.

Over the years the formal structure of separate schools has become more like, rather than distinct from, the formal structure of public schools. At the present time the central state authority requires that an almost identical educational program be given in both separate and public schools. The distinctiveness of the formal structure of separate schools that exists at the present time arises primarily from the right of the minority to form and attend separate schools. It is the externa, not the interna, of separate schools that provides the basis for the distinctiveness of the existing formal structure of separate schools.

ACKNOWLEDGEMENTS

The writer wishes to acknowledge the assistance he received in conducting this study. The criticisms and suggestions of the Chairman and members of the thesis committee did much to contribute to any merits this study may possess.

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THE PROBLEM

Canadian education is undergoing change in response to social, economic and political pressures.[1] Similar pressures have existed since before Confederation and have been a factor in shaping the existing administrative structure[2] of Canadian education. An understanding of the administrative structure of Canadian education can be achieved by viewing it as it developed in response to changing social, economic and political conditions. Althouse, in the 1949 Quance Lectures in Canadian Education, strongly supported the view that the administrative structure of Canadian education is best understood when it is viewed as a growth rather than a building of a system.[3]

Growth rather than building is apparent when the administrative structure of separate schools, as an aspect of Canadian public education, is considered. Most democratic countries that have established a system of common tax supported schools have encountered the problem of

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[1]Canada, Dominion Bureau of Statistics, Canada One Hundred 1867-1967 (Ottawa: Queen's Printer, 1967), p. 361.

[2]Vide. p. 9 for a definition of administrative structure.

[3]J. G. Althouse, Structure and Aims of Canadian Education (Toronto: W.J.Gage and Company Limited, 1949), p. 19.

church and private groups that prefer to have their children educated in schools that reflect the ideology of their particular group. The administrative structure that develops is influenced, in varying degrees, by the pressures applied by these groups.

Various ways of meeting the demands of special interest groups are possible within the existing social, economic and political conditions. The pattern of adjustment that is adopted for the provision of educational services does not promote maximum satisfaction of all parties concerned but rather, hopefully, a minimum level of dissatisfaction of all parties.[4] Unless the pattern of adjustment keeps pace with the changing social, economic and political factors the level of dissatisfaction of certain groups may gradually increase.

I. FOCUS OF THE STUDY

Statutes, governmental regulations and common law prescribe organizational patterns for separate schools and form the formal structure of separate schools. This formal structure can be viewed as being composed of three

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[4]Manoly Robert Lupul, "Relations in Education Between the State and the Roman Catholic Church in the Canadian North-West with Special Reference to the Provisional District of Alberta from 1880 to 1905" (unpublished Doctor of Philosophy dissertation, Harvard University, 1963), p. 3.

general areas: (1) denominational rights guaranteed by constitutional statutes, (2) commonality with public schools, and (3) privileges granted to and limitations placed upon separate schools. The latter two areas arise from provincial legislation.

In examining the structure of separate schools, to discover the distinctive features, it is not particularly meaningful to examine aspects of commonality with public schools since it is accepted that, with certain exceptions, separate schools have the same rights, powers, privileges and obligations as public schools. It is the denominational rights guaranteed by constitutional statutes as well as the privileges and limitations placed upon separate schools by provincial legislation and common law that give the distinctive feature to separate schools. It is this distinctiveness -- denominational rights as well as privileges and limitations placed upon separate schools -- that is examined in this study.

II. THE PROBLEM

Statement of the Problem

The main purpose of the study was to examine the development of those aspects of the structure of separate schools which distinguish separate schools in the Prairie Provinces from their public school counterparts.

Statement of Sub-Problems

The study had two other purposes:

(1) To indicate the interprovincial influences, for the provision of separate schools, that may have existed during this period.

(2) To examine selected[5] changes in the structure of public schools in relation to changes in the structure of separate schools during the same period.

III. NEED FOR THE STUDY

Existing Studies

During the last one hundred years very few studies relating to the structure of separate schools have been undertaken. Those that have been completed have mostly focused upon the development of a provincial school system, with separate schools as a minor aspect, or upon specific issues of separate school education. A few studies have provided a general coverage of the development of a provincial separate school system. No study has systematically developed and defined the unique structure of separate schools.

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[5]The selection of changes in the structure to be considered were made by the investigator. The changes considered were confined to changes in units of administration and in freedom in program development.

Hodgins considered the Pre-Confederation and immediate Post-Confederation separate school legislation in Upper Canada.[6] Simms considered the development of public education in Manitoba from 1870 to 1890.[7] Sparby examined the development of the administrative structure of the Alberta school system to 1925.[8] This study included separate schools as one aspect of the study. Hochstein reviewed the beginning, problems and trends in the development of Roman Catholic public and separate schools in Alberta.[9] Langley completed a similar study for the Province of Saskatchewan.[10] Lupul conducted an in-depth study of Church-State relations in the Provisional District

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[6]J. George Hodgins, The Legislation and History of Separate Schools in Upper Canada (Toronto: William Briggs, 1897).

[7]Eldon Franklin Simms, "A History of Public Education in Manitoba from 1870 to 1890 Inclusive" (unpublished Master of Education thesis, University of Manitoba, 1944).

[8]Harry Theodore Sparby, "A History of the Alberta School System to 1925" (unpublished Doctor of Philosophy dissertation, Stanford University, 1958).

[9]Sister L. A. Hochstein, "Roman Catholic Separate and Public Schools in Alberta" (unpublished Master of Education thesis, University of Alberta, 1954).

[10]Gerald James Langley, "Saskatchewan's Separate School System: A Study of One Pattern of Adjustment to the Problem of Education in a Multi-Religion Democratic Society" (unpublished Doctor of Philosophy dissertation, Columbia University, 1951).

of Alberta for the 1880 to 1905 period,[11] while Weir considered the more controversial issues that occurred in separate school education to the early 1930's.[12] Bargen, as one aspect of his study, clarified the denominational rights of Canadian school pupils.[13] None of these studies, however, systematically developed and defined the structure of separate schools.

Pressures for Change

In the last one hundred years Canada has been involved in two major wars, a major economic depression, numerous periods of minor prosperity and depression and in recent years an unprecedented demand upon the schools for quantity and quality of education. Major changes in the administrative structure of public education have been made in order to meet changing conditions. Changes made have not always applied equally to separate and public schools.[14]

In recent years a dissatisfaction with existing provisions for separate schools has become apparent. The

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[11] Manoly Robert Lupul, op. cit.

[12] George M. Weir, The Separate School Question in Canada (Toronto: The Ryerson Press, 1934).

[13] Peter F. Bargen, The Legal Status of the Canadian School Pupil (Toronto: MacMillan Company of Canada, 1961).

[14] In Alberta, as an example, only public school districts may be used to form larger units of rural school administration.

adequacy of separate schools to provide the level of educational services desired, within the existing legal structure, is being questioned. The Legislative Committee investigating school centralization in Alberta indicated in its report that Roman Catholic concern was expressed over the lack of provision for the formation of larger units of administration for separate school purposes, provision of credits for religious courses and the rigidity of the time for religious instruction. The Legislative Committee Report noted that:

> Roman Catholic briefs stated that the Department of Education favours centralization of public schools, but prevents centralization of separate schools by restricting their boundaries to the original four mile by four mile limits. They requested that these limitations be removed, and that the boundaries be made flexible so that they could be adapted to the needs of the times. Other briefs suggested that the boundaries of the separate schools should be the same as that of the public school centralization, so that the same bussing services could be used, and once arrived at the centralization students could attend the school of their choice.
>
> * * *
>
> One Roman Catholic brief stated that the religious courses now offered include personal development, social adjustment, occupation, history, current events, ethics, etc. Since the purpose of these courses is to develop responsible citizens, it is thought that they should be recognized by the department and given credits.
>
> It was suggested at some of the hearings, that section 391(1) of The School Act, which limits the instruction of religious education to the last half hour of each day, is obsolete because it clashes with the time table of most schools. It was suggested that this section be changed to permit religious

> instruction for a maximum of 150 minutes per week. It was suggested that where it is necessary to integrate separate high schools with public high schools, that the religious and language rights of the catholic students be guaranteed by the school authorities.[15]

Previous to this, in 1959, a minority report, by the Roman Catholic member of the Royal Commission investigating education in Alberta, expressed concern with several aspects relating to the financing of separate schools[16] and provisions for instruction in French.[17] In recent years in Ontario there has been a sharp rise in the number of court cases pertaining to separate school legislation.[18] The same trend has not, as yet, developed in the Prairie Provinces. Indications are that dissatisfaction with existing provisions for separate school education is increasing. A period of adjustment to separate school legislation may be approaching.

Need for the Study

An understanding of the development of the present formal structure of separate schools may be useful in

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[15]Alberta, Report of the Special Committee (Edmonton: Queen's Printer, 1967), pp. 15-16.

[16]Alberta, Report of the Royal Commission on Education in Alberta (Edmonton: Queen's Printer, 1959), p. 442.

[17]Ibid., p. 425.

[18]Francis G. Carter, Judicial Decisions on Denominational Schools (Toronto: Ontario Separate Schools Trustees' Association, 1962).

clarifying the existing position of separate schools. Althouse has noted that "administrative structures have a past as well as a purpose" but that "like many pasts, this one may prove embarrassing. It may cause inconveniences which range all the way from ridiculous anachronisms to irritating barriers to progress."[19] A knowledge of the existing formal structure of separate schools, from the strengths to the anachronisms, places the need for change in the formal structure of separate schools in a broader perspective.

IV. DEFINITION OF TERMS

The terms which follow are used generally throughout the study and are defined here for convenience. Where the text deals with specialized terms, they are either defined formally at that point or their meanings are made clear from the context and development of the subject matter.

Separate school. As used in the study the term means the school of the religious minority, whether Roman Catholic or Protestant, supported by public funds in the form of government grants as well as by local taxation.

Public school. The term is used to mean the school established and supported by public funds in the form of

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[19] J. G. Althouse, op. cit., p. 19.

government grants as well as by local taxation. The term as used does not include a separate school.

Provincial school system. This term is used to designate those schools provincially supported by government grants as well as by revenue from local taxation. This, then, includes both separate and public schools but not private schools.

Administrative structure. This term means all the patterns of organization within a system prescribed by statutes, common law, governmental regulations, quasi-judicial decisions and internal system regulations.

Formal structure. As used in this study the term means the patterns of organization for a system prescribed by statutes, common law and governmental regulations.

V. SOURCES OF DATA

The data for the study were obtained from the sources usually drawn upon in historical and legal status research. The primary sources were statutes, law reports and government records. The statutes used most frequently were those of the Dominion of Canada, North-West Territories, Manitoba, Alberta and Saskatchewan. Law reports for the Provinces of Ontario, Manitoba, Saskatchewan and Alberta, and subsequent appeals to higher courts, constituted the main law cases considered. Main government records considered were the reports of education departments,

reports of debates in the Canadian House of Commons and Canadian census reports. Theses and books served as secondary sources of data to provide a historical background as well as the social, political and economic conditions prevalent during particular time periods.

VI. DELIMITATIONS

This study is not an attempt to be a legal treatise but rather a layman's level examination of pertinent statutes and litigation pertaining to separate schools. Court decisions are limited to those decisions pertaining specifically to separate school litigation. The study develops historically the evolution of the unique aspects of separate schools that make them distinct from public schools. The time period emphasized is 1867 to 1967. The study is further limited to separate schools in the Prairie Provinces although developments in other provinces are used to provide some background material. The development of denominational rights for separate schools is, however, based upon an examination of litigation on this point from Canada as a whole. Essentially, then, the study develops the privileges and limitations placed upon separate schools by the Prairie Provinces and the denominational rights for separate schools as defined by litigation in various Canadian Provinces.

VII. LIMITATIONS

This study is limited in its focus on the structure of separate schools. It only attempts to examine statutes, court decisions and available governmental regulations that apply primarily to separate schools. These aspects are considered as constituting the formal structure of separate schools.

A second limitation is that practice does at times precede statutory provision for the practice. This study considers what exists according to statutes, court decisions and governmental regulations rather than what might exist in practice.

VIII. METHODOLOGY FOR THE STUDY

The methodology used was similar to that used by other researchers in conducting studies of a historical or legal status nature. Historical studies on the administrative aspects of educational systems have emphasized the development and growth of these systems viewed within the existing political, economic and social conditions. Studies by Langley,[20] Hochstein,[21] Sparby[22]

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[20]Gerald J. Langley, op. cit.

[21]Sister L. A. Hochstein, op. cit.

[22]Harry Theodore Sparby, op. cit.

and Toombs[23] are typical of this approach. Legal status studies, such as those completed by Lamb,[24] Bargen[25] and Enns,[26] have stressed court decision and pertinent legislation. Since this study traced the development of the formal structure of separate schools the pertinent statutes and litigation were examined for specific time periods within the context of the social, political and economic conditions prevalent during the selected period. The methodology, then, was thematic and chronological. That aspect of the formal structure of separate schools which serves to distinguish separate schools from public schools was developed in a chronological manner. Statutes and case law were emphasized in this development. The early part of the development of the formal structure of separate schools was done primarily through the analysis of statutes. Case law was increasingly emphasized in the later stages of the

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[23]Morley Preston Toombs, "The Control and Support of Public Education in Rupert's Land and the North-West Territories to 1905 and in Saskatchewan to 1960" (unpublished Doctor of Philosophy dissertation, University of Minnesota, 1962).

[24]R. L. Lamb, Legal Liability of School Boards and Teachers for School Accidents (Ottawa: Canadian Teachers' Federation, 1959).

[25]Peter F. Bargen, op. cit.

[26]Frederick Enns, The Legal Status of the Canadian School Board (Toronto: MacMillan Company of Canada, 1963).

chronological development of the formal structure of separate schools. Case law was used primarily for decisions on precise questions of law. Limited use was made of *dicta* from litigation.

In considering case law it is obvious that no two cases coming before the Courts are exactly alike in all respects. Essentially the Courts provide interpretations of existing statutes or of common law. A general principle abstracted and generalized from that part of a case which possesses authority and is the rule of the law upon which the decision rests has general applicability to most provinces if it relates to constitutional statutes or common law. General principles abstracted and generalized from court decisions pertaining to provincial enactments are of specific importance to the province in question, however, such general principles may be useful in considering possible interpretations of similar statutes in other provinces. General principles derived from litigation based upon section 93 of the *British North America Act, 1867* were treated in this study as being of some relevance to all provinces. General principles derived from litigation relating to provincial enactments were used in this study primarily for the development of the formal structure of separate schools of a specific province. General principles abstracted and generalized from litigation on provincial enactments were viewed,

however, as being of some value in attempting possible interpretations of provisions of a similar nature in another province.

Specific time periods were used in the development of the formal structure of separate schools. The time periods were selected in consideration of major events in the political, social or economic life of the country. 1890 marked the end of the dual system of education in Manitoba. September, 1905 was the date on which Alberta and Saskatchewan became provinces. The major settlement of the agricultural areas of Alberta and Saskatchewan was completed by 1925. The year 1939 marked the end of peace-time conditions. 1967 was chosen as the terminating date for the study. On this basis the time periods selected were: 1867 to 1890; 1891 to August, 1905; September, 1905 to 1925; 1926 to 1939; and 1940 to 1967.

CHAPTER II

NATURE OF THE FORMAL STRUCTURE OF SEPARATE SCHOOLS

Due to the unique development of educational systems in Canada, legislation pertinent to separate school systems in Newfoundland, Quebec, Ontario, Saskatchewan, Alberta and, for a period of time, Manitoba can be found in the statutes of Great Britain, Canada and of the individual provinces. The statutes of Great Britain and Canada give rise to one aspect of denominational rights of separate schools. Provincial statutes give rise to the separate school's commonality with public schools as well as special privileges and limitations placed upon separate schools. Special privileges and limitations for separate schools, arising from provincial legislation, create the second aspect of denominational rights. Both constitutional statutes and provincial legislation are important in determining the formal structure of separate schools.

I. CONSTITUTIONAL STATUTES

Establishment of Denominational Rights

The Act of Union[1] established an elected Legislative

[1] Statutes of Great Britain, 4 Victoria, ch. 35 (1840).

Assembly for the two provinces of Upper and Lower Canada. The Common School Bill of 1841, which was passed by this Legislative Assembly, contained the following provision for dissentient schools to be formed:

> XI. Provided always, and be it enacted, That whenever any number of Inhabitants of any Township or Parish, professing a Religious Faith different from that of the majority of the Inhabitants of such Township, or Parish, shall dissent from the regulations, arrangements, or Proceedings, of the Common School Commissioners, with reference to any Common School in such Township, or Parish, it shall be lawful for the Inhabitants, so dissenting, collectively to signify such dissent in writing to the Clerk of the District Council, with the name or names of one or more persons elected by them, as their Trustee, or Trustees, for the purpose of this Act: and the said District Clerk shall forthwith furnish a certified copy thereof to the District Treasurer; and it shall be lawful for such dissenting inhabitants, by and through such Trustees, or authorities, and be subject to the obligations and liabilities hereinbefore assigned to, and imposed upon the Common School Commissioners, to establish and maintain one or more Common Schools in the manner and subject to the visitation, conditions, rules, and obligations in this Act provided, with reference to other Common Schools, and to receive from the District Treasurer monies appropriated by Law and raised by assessment for the support of Common Schools, in the School District, or Districts, in which the said Inhabitants reside, in the same manner as under such Trustee or Trustees, where established and maintained under the said Common School Commissioners, such monies to be paid by the District Treasurer upon the Warrant of the said Trustee or Trustees.[2]

This Bill made provision for the formation of dissentient schools without any religious restriction placed upon the

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[2] Statutes of Canada, 4 and 5 Victoria, ch. 18 (1841), S. 11.

dissenting group. The above Bill also considered the financing of dissentient schools.

The Legislative Assembly soon encountered difficulty in legislating common school law for both Upper and Lower Canada and so began to prepare legislation specifically for Upper or Lower Canada. A School Law for Upper Canada was passed in 1843 which made the following provision for the formation of separate schools:

> LV. And be it enacted, That in all cases wherein the Teacher of any Common School shall happen to be a Roman Catholic, the Protestant inhabitants shall be entitled to have a School with a Teacher of their own Religious Persuasion, upon the application of ten or more resident freeholders, or householders, of any School District, or within the limits assigned to any Town, or City, School; and, in like manner, when the Teacher of any such School shall happen to be a Protestant, the Roman Catholic inhabitants shall have a Separate School, with a Teacher of their own Religious Persuasion, upon a like application.[3]

This Act established the religion of the teacher and that of the dissenting group as the criteria for the formation of separate schools.

The Common School Act of 1850 contained the following provision for the formation of separate schools:

> XIX. It shall be the duty of the Municipal Council of any Township, and of the Board of School Trustees of any City, Town, or Incorporated Village, on the application, in

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[3] Statutes of Canada, 7 Victoria, ch. 29 (1843), S. 55.

> writing, of twelve or more resident heads of families, to authorize the establishment of one or more Separate Schools for Protestants, Roman Catholics, or Coloured People,...[4]

The Common School Act of 1850 contained the essential features for the creation of separate schools as later found in the provisions for separate schools contained in the British North America Act, 1867.

Basic to the guarantee of minority rights and consequently the legal structure of separate schools is section 93 of the British North America Act, 1867. Section 93 reads as follows:

> 93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:-
>
> (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which may class of Persons Have by Law in the Province at the Union:
>
> (2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic subjects in Quebec:
>
> (3) Where in any Province a System of Separate or Dissentient Schools exist by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

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[4] Statutes of Canada, 13 and 14 Victoria, ch. 48 (1850), S. 19.

> (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.[5]

The matter of denominational rights and provincial authority over separate schools was clarified in Tiny Separate School Trustees v. The King.[6] Judge Hodgins ruled that a province is forbidden from interfering with the denominational aspects of separate schools but that it did have authority to control the educational features of separate schools. This ruling made a distinction on a rather difficult point of law and thus established general limitations on rights claimed on a denominational basis.

Laws pertaining to education, as long as they do not violate denominational rights, can be made by provinces for separate schools. Since federal statutes give very little guidance as to what is considered denominational rights and provincial rights, clarification of this area has depended largely upon litigation.

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[5] Statutes of Great Britain, 30 and 31 Victoria, ch. 3 (1867), S. 93.

[6] Tiny Separate School Trustees v. The King, (1928), Dominion Law Reports 753, at p. 753.

Summary. The first provision for separate schools within a state system of schools appeared in 1841. Religion of the teacher -- Protestant or Roman Catholic -- became the criterion in 1843 for the formation of separate schools. In 1850 separate schools based upon religion of the minority -- Roman Catholic or Protestant -- or on Colour, made its appearance in school legislation for Upper Canada. The essential features of this legislation were incorporated into the British North America Act, 1867 which confirmed the denominational rights for separate schools.

II. PROVINCIAL DEVELOPMENT

Difficulties in administering the school legislation of 1841 led the authorities to the conclusion that Upper and Lower Canada should each have its own distinctive school system. Legislation was enacted specifically for Upper and Lower Canada. When the British North America Act, 1867 was drafted education was made, within limitations imposed by section 93, a provincial matter. Legislation enacted by provincial legislatures has given rise to several aspects of the legal structure of separate schools. These aspects are the matters of commonality with public schools and of special privileges or limitations placed upon separate schools.

Commonality with Public Schools

The British North America Act, 1867 declared education a provincial matter but contained a protective clause pertaining to separate schools. The provinces which by agreement at the time of Confederation guaranteed a separate school system or who by subsequent development established a separate school system had to prepare legislation pertaining to separate schools.

The provinces that have separate schools have incorporated a version of section 7 of the Separate Schools Act of 1863 for Ontario into provincial legislation. Section 7 of the 1863 Act reads:

> 7. The trustees of separate schools forming a body corporate under this act, shall have the power to impose, levy and collect school rates or subscriptions, on and from persons sending children to, or subscribing towards the support of such schools, and shall have all the powers in respect to separate schools, that the trustees of common schools have and possess under the provisions of the Act relating to common schools.[7]

Section 13 of The School Act for Alberta reads:

> 13. A separate school district and its board shall possess and exercise all the rights, powers and privileges of, and are subject to the same duties and liabilities and shall have the same method of government as, a public school district and its board.[8]

---

[7] Statutes of Canada, 26 Victoria, ch. 5 (1863), S. 7.

[8] The School Act, R.S.A., 1955, ch. 297, S. 13.

It is the application of sections as those quoted above that gives rise to the area of commonality between separate and public schools.

Special Privileges for Separate Schools

No act restricts provincial legislatures from legislating special privileges to separate schools. Provincial legislation pertaining to the formation of separate school districts, taxation, programs, etc. may be more generous than similar provisions for public schools. The more generous provisions would create special privileges for separate schools. Special privileges once granted, however, may be difficult to withdraw in view of sub-section 3 of section 93 of the British North America Act, 1867. Sub-section 1 protects denominational schools in existence at the Union while sub-section 3 provides protection for separate or dissentient schools established after Union. Sub-section 3 further specifies that interference of any right or privilege in relation to education -- an area in which a province may exclusively make laws -- is subject to appeal to the Governor General in Council. (supra, p. 19). Provinces are not limited in their enactments in relation to education as long as the enactments do not interfere in any right or privilege previously extended to separate or dissentient schools.

Limitations Placed on Separate Schools

Limitations, by the use of indirect means, can be placed upon separate schools. One such method is the creation of new units of public school administration. Special privileges can be given to these units without disturbing existing privileges for continuing public school districts.

In Alberta, as an example, section 13 of The School Act reads:

> 13. A separate school district and its board shall possess and exercise all the rights, powers and privileges of, and are subject to the same duties and liabilities and shall have the same method of government as, a public school district and its board.[9]

Section 23 of the same Act reads, in part:

> 23. (1) The Minister, by order, may constitute a division which may consist of any number of rural public school districts not being districts included in a consolidated district.[10]

The prerogative for the formation of a division rests with the Minister, not with the boards of the public school districts. Public school districts that continue to exist have no reduction in rights, powers and privileges. The new units of administration, however, can have special rights, powers and duties assigned to them. Indirectly,

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[9] The School Act, R.S.A., 1955, ch. 297, S. 13.

[10] Ibid., S. 23.

then, separate school districts can be denied privileges granted to new units of administration.

Summary

Provincial legislation gives rise to two aspects of the formal structure of separate schools -- commonality with public schools and privileges and limitations placed upon separate schools.

III. CHANGING FORMAL STRUCTURE

The formal structure of separate schools is determined by legislative acts of governmental bodies as well as common law principles established by litigation. Both legislation and litigation are, more or less, continuous processes hence the formal structure gradually changes over a period of time.

The process of change of the formal structure of separate schools is not a smoothly progressing event but rather one which can have periods of relatively minor changes and periods of major alterations. Periods of minor and major change can be examined in relation to existing social, economic and political factors prevalent at a particular time or during a particular time period.

Figure 1, viewed as a process taking place over a period of time, is used to illustrate the changing formal structure of separate schools.

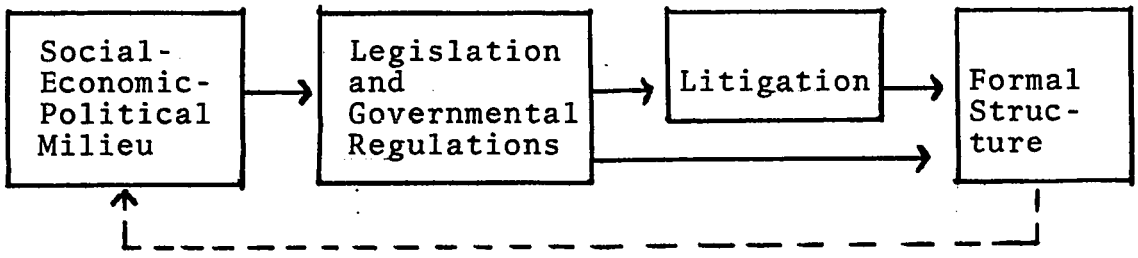

FIGURE 1

EVOLVING FORMAL STRUCTURE OF SEPARATE SCHOOLS

The original provisions for separate schools and the statutes and litigation modifying the original formal structure have been a feature of the Canadian scene for over one hundred years. The provincial patterns of adjustment in relation to separate schools have, in some cases, undergone considerable change during this period of time. This changing formal structure of separate schools has been explored on only a very limited basis.

CHAPTER III

A REVIEW OF CONDITIONS AND LEGISLATION LEADING TO THE PRE-CONFEDERATION ESTABLISHMENT OF SEPARATE SCHOOLS

The unique early features of the history of Canada, with later patterns of development, played an important part in the shaping of the administrative structures of the educational systems of the various provinces. The administrative structures existing today for separate schools have been shaped over a period of years partly in response to external pressures. This chapter very briefly examines educational trends in Europe, prior to 1760, and in the non-maritime regions of the area now known as Canada for the 1608 to 1867 period.

I. THE OLD WORLD

The Middle Ages saw the decay of ancient learning and the gradual rise of the Roman Catholic Church to a position of prominence in education.[1] The Roman Catholic Church was the only institution sufficiently organized and enlightened to carry on the work of education, which, as in the case of monastic and cathedral schools, was inseparable from sectarian instruction. The instruction provided was only a very embryonic form of elementary

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[1]Paul A. Freud and Robert Ulich, Religion and the Public Schools (Cambridge, Massachusetts: Harvard University Press, 1965), p. 29.

education as now known.

The early forms of elementary education appeared after the Protestant Reformation in the sixteenth century. Martin Luther's interpretation of salvation, justification by faith, involved a very close relationship between the individual and his Creator. No intermediary could exempt the individual from personal responsibility for his salvation. As the plan of salvation was contained in the Bible, it, therefore, in Luther's judgement, became necessary that everyone should be taught to read. This doctrine obviously involved compulsory education, which could be enforced only by the State.[2]

The Roman Catholic Church gradually increased its activities in the educational field in order to aid in the combat of Protestant heresies and to win back territory to Papal allegiance. Teachers who provided the educational services were largely members of religious orders and the few lay teachers present were closely watched by religious authorities.

A limited elementary education under the sponsorship and scrutiny of the Roman Catholic Church, then, was the educational background of the French population at the time of the settlement of the New World. The early

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[2]George M. Weir, op. cit., p. 4

French settlers of New France, being accustomed to the prominence of the Roman Catholic Church in education, harboured the idea that only a system of clerical schools was orthodox and expedient.[3]

II. CANADA

1608-1760

Education during the period of French settlement and control of Canada was primarily a work of charity and of the Church.[4] The Jesuits were instrumental in initiating and developing education during this period.[5] Their aim of education, which left a lasting impression on the educational life of Canada, was of a dual nature: missionary and educative. Lay teachers began to make their appearance during the latter part of this period but they were closely watched by civil and religious authorities.[6] This period, then, saw religious orders instrumental in establishing and maintaining a system of elementary education. Needless to say education was

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[3] Ibid., p. 5.

[4] Quebec, Report of the Royal Commission of Inquiry on Education in the Province of Quebec (Quebec: The Province of Quebec, 1963), p. 3.

[5] Abbe A. E. Gosselin, "Education in Canada Under the French Regine," in Adam Shortt and Arthur G. Doughty (eds.), Canada and Its Provinces (Toronto: Glasgow, Brook and Co., 1914), Vol. XVI, pp. 329-349.

[6] Ibid., p. 349.

very much of a sectarian nature and closely followed the philosophy of the Roman Catholic Church.

1760-1841

The British conquest of Canada in 1760 made the French, the inhabitants of Canada, a subject people. After New France was ceded to England, the British authorities allowed the Roman Catholic Church to continue to maintain its educational institutions, although the situation was far from secure.[7] Growing dissatisfaction in the thirteen American Colonies encouraged the Imperial Government in London in adopting a tolerant policy towards the language, religion and education of their new subjects along the St. Lawrence. These years of military government between 1763 and 1774 laid the base for the continuation of many features of the French-Canadian way of life, and confirmed the authority, leadership and influence of the Roman Catholic Church.[8]

Rebellion in the American Colonies resulted in the United Empire Loyalists augmenting the flow of British settlers to settlements along the St. Lawrence and along the north shore of Lake Ontario. The United Empire Loyalists

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[7]Quebec, op. cit., p. 4.

[8]Robert England, Contemporary Canada (Toronto: The Educational Book Company of Toronto, Limited, n.d.), p. 227.

were strongly partisan about British political institutions and thus created an increasing challenge to the French-Canadian way of life. The French Roman Catholic Church resisted any reduction in her influence on education for the French-Canadian population. After 1824 school legislation changed from attempts to centralize education to an emerging emphasis of state interest in education but with local control.[9] During the latter part of this period the principle of a public school system gradually began to become apparent.

1841-1867

In 1841 the two Canadas were united and granted responsible government. The new government represented two populations distinct in national culture, language and religion. The government had the responsibility for legislation pertaining to both provinces.

The Common School Bill of 1841[10] was introduced into the Legislature of the first session of parliament of united Canada. The fact that The Common School Bill, as it first appeared in the Legislature contained no reference to religion or religious instruction caused a

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[9]Quebec Government, op. cit., p. 6.

[10]Statutes of Canada, 4 and 5 Victoria, ch. 18 (1841).

great deal of concern. A deadlock ensued and the matter was referred to a select committee of the whole House.[11] The Bill contained the following clause when the committee returned the Bill to the Legislature.

> XI. Provided always, and be it enacted, That whenever any number of Inhabitants of any Township, or Parish, professing a Religious faith different from that of the majority of the Inhabitants of such Township, or Parish, shall dissent, from the regulations, arrangements, or proceedings, of the Common School Commissioners, with reference to any Common School in such Township, or Parish, it shall be lawful for the Inhabitants, so dissenting, collectively to signify such dissent in writing to the Clerk of the District Council, with the name or names of one or more persons elected by them, as their Trustee, or Trustees, for the purpose of this Act: and the said District Clerk shall forthwith furnish a certified copy thereof to the District Treasurer, and it shall be lawful for such dissenting Inhabitants, by and through such Trustees, or authorities, and be subject to the obligations and liabilities hereinbefore assigned to, and imposed upon the Common School Commissioners, to establish and maintain one or more Common Schools in the manner and subject to the visitation, conditions, rules, and obligations in this Act provided, with reference to other Common Schools, and to receive from the District Treasurer monies appropriated by Law and raised by assessment for the support of Common Schools, in the School District, or Districts, in which the said Inhabitants reside, in the same manner as under such Trustee or Trustees, where established and maintained under the said Common School Commissioners, such monies to be paid by the District Treasurer upon the Warrant of the said Trustee or Trustees.[12]

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[11] J. George Hodgins, op. cit., p. 15.

[12] Statutes of Canada, 4 and 5 Victoria, ch. 18 (1841), S. 11.

The Bill with the above clause was passed and became law. The term "separate school" was not mentioned in this Act but the Act contained the essential features of what was later to become separate school legislation. It should be further noted that any religious minority had the privilege of establishing its own school.

Difficulties in administering the school legislation of 1841 led the authorities to the conclusion that one school system was unable to serve adequately the two areas. The Legislative Assembly proceeded to enact school legislation specifically for each province.

All members of the Legislative Assembly voted on all school legislation, even though the legislation applied only to Upper or Lower Canada. In matters of dispute of minority rights the Protestant minority in Lower Canada could count upon Protestant support from Upper Canada and the Roman Catholic minority of Upper Canada could count upon Roman Catholic support from Lower Canada. Protestant and Roman Catholic representation to the Legislative Assembly was approximately the same.

Upper Canada (Ontario). A School Law for Upper Canada was passed in 1843. Section 55 from this Act for Upper Canada made the religion of the teacher, rather than the minority relationship, the criterion for

the establishment of a separate school.[13] The Common School Act, 1850 established that the minority right to establish a separate school was confined to Protestants, Roman Catholics or Coloured People.[14] The essential features found in future legislation for the establishment of separate schools are found in The Common School Act of 1850. This Act was changed slightly in 1855 by the passage of what is usually called the Taché Separate School Act.[15] A few more minor changes for the provision of separate school education occurred in 1863 with the passage of The Roman Catholic Separate Schools Act.[16] (Appendix A).

The legal provision for Roman Catholic Separate school education at the present time in Ontario is, in most essential aspects, the same as that in existence in Ontario prior to Confederation.

Lower Canada (Quebec). The first Act passed specifically for Lower Canada during the 1841-1867 period was in 1845 and was "An Act to make better Provision for Elementary Instruction in Lower Canada."[17] Further

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[13] Statutes of Canada, 7 Victoria, ch. 29 (1843) S. 55.

[14] Statutes of Canada, 13-14 Victoria, ch. 48 (1850) S. 19.

[15] Statutes of Canada, 18 Victoria, ch. 131 (1855).

[16] Statutes of Canada, 26 Victoria, ch. 5 (1863).

[17] Statutes of Canada, 8 Victoria, ch. 41 (1845).

provisions were made for separate school education in 1846[18] and provided that any minority could set up and manage separate schools, receiving a share of provincial aid proportionate to its numbers.[19] Special provisions were made for the cities of Montreal and Quebec, where schools were organized as Catholic and Protestant, rather than minority and majority.[20]

Some minor changes were made in separate school education in 1849.[21] Legislation passed in 1856 provided for a Council of Public Instruction[22] with fairly extensive powers. Although changes were made at later dates, nevertheless the essential rights and privileges with respect to denominational schools under the dual system established during this period of time remained, for many years, essentially the same as set out in Chapter 15 of the Consolidated Statutes of 1861.[23] (Appendix B).

Rupert's Land. Prior to the formation of the Dominion of Canada the area from which the Province of Manitoba was to be created was outside the boundaries of

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[18] Statutes of Canada, 9 Victoria, ch. 27 (1846).

[19] Ibid., S. 26.

[20] Ibid., Sections 40-45.

[21] Statutes of Canada, 12 Victoria, ch. 50 (1849).

[22] Statutes of Canada, 19 Victoria, ch. 14 (1856), S. 16.

[23] Statutes of Canada, 24 Victoria, ch. 15 (1861).

the new Dominion. At that time it was, as it had been for the past two centuries, merely a portion of the vast fur-trading lands of the Hudson's Bay Company. Most of the Non-Indian settlers were fur traders and Métis although a farming settlement was developing along the Red River Valley.

Schools that existed in this area, prior to the time of Union of Rupert's Land and Canada, were mission schools or ones resulting from private endeavour. The Roman Catholics established their first mission school in 1815,[24] while the Presbyterians established their first one in 1818.[25] The Hudson's Bay Company, at times, provided some financial assistance for the establishment and operation of schools.[26] No state system of education existed in this area at the time of Confederation.

North-West Territories. Prior to 1870 this area was outside the boundaries of the Dominion of Canada. Non-native settlements were confined almost exclusively to those associated with the fur-trade. Schools that

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[24]A.G. Morice, History of the Catholic Church in Western Canada (Toronto: The Musson Book Company, Ltd., 1910), Vol. I, p. 105.

[25]F.H. Schofield, The Story of Manitoba (Toronto: S.J. Clarke Company, 1906), Vol. I, p. 109.

[26]S.E. Long, "History of Education in Manitoba," in Adam Shortt and Arthur G. Doughty (eds.), op. cit., Vol. XX, p. 420.

existed were primarily mission schools established by the Roman Catholic missionaries[27] and Methodist missionaries.[28] The Hudson's Bay Company, although not particularly interested in the educational endeavours of the missionaries, recognized the value of missionary work -- inasfar as being of value to the fur trade -- and assisted and co-operated with the missionaries.[29] Educational endeavours in this area prior to 1870, then, were almost exclusively confined to and associated with missionary work.

III. PROVISIONS OF CONFEDERATION

The Dominion of Canada, which came into being on July 1, 1867, is governed by a Governor-General appointed by the Queen on the advice of her Canadian Ministers, an appointed Senate and an elected House of Commons. The Dominion Government, under section 91 of the British North America Act, 1867 has power:

> ... to make laws for the Peace, Order and Good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.[30]

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[27] Isidore Goresky, "The Beginning and Growth of The Alberta School System" (unpublished Master of Education thesis, University of Alberta, 1944), p. 5.

[28] Ibid., p. 10.

[29] Ibid., p. 7.

[30] Statutes of Great Britain, 30-31 Victoria, ch. 3 (1867), S. 91.

The residue of powers not given expressly to the provinces is reserved to the Dominion. The section goes on to enumerate twenty-nine classes of subjects illustrating the scope of the Dominion powers, such as defence, criminal law, the postal system, naturalization, currency and coinage, banking, trade and commerce, fisheries, unlimited powers of taxation, interprovincial and international transportation and communications.[31]

The provinces have Lieutenant-Governors, appointed by the Dominion Government, who act as the Queen's representatives; and the provincial legislatures under section 92 are given exclusive powers to make laws governing property and civil rights, prisons, hospitals, asylums, the administration of justice, education, local works and undertakings, and the power of direct taxation.[32] State systems of denominational schools that existed at the time of Confederation or which were established at a later date are, however, protected by section 93 of the British North Ameria Act, 1867.[33]

The division of powers between the federal and provincial governments was such as to leave certain key functions to the provinces, in recognition of strong regional feelings, as well as to create a strong central government.

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[31] Ibid., S. 91.

[32] Ibid., S. 92.

[33] Ibid., S. 93.

CHAPTER IV

IMMEDIATE POST-CONFEDERATION DEVELOPMENT OF SEPARATE SCHOOLS IN MANITOBA AND THE NORTH-WEST TERRITORIES

PART I

PROVINCIAL DEVELOPMENTS 1867-1890

I. MANITOBA

Rupert's Land

The territory held by the Hudson's Bay Company from 1670 to 1869 and comprising the drainage basin of the Hudson Bay formed the area known as Rupert's Land. It was from part of the southern section of Rupert's Land that the Province of Manitoba was created. The Province of Manitoba was initially composed of the Red River Settlement and the surrounding area.

During the Dominion's negotiations with the Hudson's Bay Company for annexation of Rupert's Land concern was expressed by some residents of the area, the Métis in particular, as to the apparent lack of planned protection for land rights of the existing residents of Rupert's Land. No particular effort was made by the Dominion Government to alleviate the concern of some of the residents. The Métis, led by Louis Riel, attempted to protect their interests through the use of force. This revolt, called the Red River Insurrection, developed after the start of

negotiations by the Dominion with the Hudson's Bay Company for the annexation of Rupert's Land.

During the Red River Insurrection some negotiations took place between the Dominion and various factions in the proposed Province of Manitoba as to the terms of admission. One of the points raised during these negotiations was in relation to the provision of separate schools. The official list of demands from the Red River Settlement did not contain a demand for separate schools.[1] A list of demands drawn up by Riel and his supporters and apparently used by Father Ritchot, one of the three members from the Red River Settlement negotiating with the Dominion Government for terms of admission to the Union, contained a request for separate schools.[2,3] The clause with respect to education read:

> That the schools be separate and that public money for schools be distributed among the different religious denominations in proportion to their respective populations, according to the system in the Province of Quebec.[4]

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[1]Edward Henry Oliver, The Canadian North-West: Its Early Development and Legislative Records (Ottawa: Government Printing Bureau, 1914), Vol. II, p. 925.

[2]Chester Martin, "The Red River Settlement," in Adam Shortt and Arthur G. Doughty (eds.), op. cit., Vol. XIX, p. 40.

[3]A discussion of the admission of Rupert's Land into the Union and the part played by the Red River Insurrection in the negotiations for terms of admittance of Manitoba into the Union is found in Appendix F.

[4]D.S. Woods, "The Two Races of Manitoba" (unpublished Master of Arts thesis, University of Manitoba, 1926), p. 16.

A decision was made by the Federal Government to include a separate school clause in The Manitoba Bill. Cartier, due to the illness of John A. Macdonald, piloted The Manitoba Bill through the House of Commons. The section pertaining to education read as follows:

> 22. In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:-
>
> (1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union:
>
> (2) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education:
>
> (3) In case any such Provincial Law, as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor General in Council or any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor General in Council under this section.[5]

The impression was created that separate schools had been requested by the people at Red River when such was not completely true.[6]

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[5] Statutes of Canada, 33 Victoria, ch. 3 (1870).

[6] Eldon Franklin Simms, op. cit., p. 35.

The Manitoba Act also provided for an Upper House called the Legislative Council.[7] Many considered the Upper House essential if minority rights were to be protected.[8] The Manitoba Act was passed on May 12, 1870.[9] On June 23 the Queen issued the proclamation admitting Rupert's Land and the North-West Territories to the Union.[10]

Shortly thereafter troops were sent to Fort Garry to secure "Her Majesty's sovereign authority."[11] The troops arrived at Fort Garry on August 24. Riel, O'Donoghue and Lepine, who had not been granted amnesty for their part in the insurrection and the death of Scott, hastily left Fort Garry.[12] Federal control and authority now prevailed.

Provincial Developments

The Province of Manitoba was divided into twenty-four electoral districts and the first election was held in late December. The population in twelve of the electoral

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[7] Statutes of Canada, 33 Victoria, ch. 3 (1870) Sections 9-13.

[8] Chester Martin, op. cit., p. 109.

[9] Statutes of Canada, 33 Victoria, ch. 3 (1870).

[10] Canada, "Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory into the Union," British North America Acts and Selected Statutes (Ottawa: King's Printer, 1948), p. 135.

[11] Alexander Begg, The Creation of Manitoba (Toronto: A. H. Hevey, 1871), p. 383.

[12] Ibid., p. 390.

districts was predominantly French and in the other twelve mostly of English origin. The first election resulted in a balanced representation between English and French in the Legislative Assembly.

The Manitoba Legislative Assembly, in 1871, passed an act to establish a public school system.[13] The school system established was similar to the one already functioning in Quebec. The main features of the system embodied a Board of Education composed of two Sections -- one Protestant and the other Roman Catholic.[14] Each Section was given authority to control schools under its jurisdiction with respect to management, discipline, curriculum, examinations, grading and licensing of teachers and choosing textbooks in religious and moral training.[15] The whole Board received jurisdiction in the academic fields over the choice of textbooks.[16]

The school districts were to coincide with the electoral districts of the province. Twelve Catholic and twelve Protestant districts were set up under the Act.[17]

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[13] Statutes of Manitoba, 34 Victoria, ch. 12 (1871).

[14] Ibid., S. 1.

[15] Ibid., Sections 10-12.

[16] Ibid., S. 7.

[17] Ibid., Sections 14-16.

Each Section of the Board of Education was to receive equal sums of money from public funds for the support of public schools under its jurisdiction.[18]

Legislative amendments that were made in the next twenty years are best understood when viewed within the context of population changes that took place during that period of time. Manitoba's population in 1871 was 25,228 with 6,767 of this number being Indian.[19] The exact number affiliated with various denominations was not given in this census, however, a census conducted in 1870, in order to establish electoral districts, revealed 4,841 heads of families who were Protestant and 5,452 heads of families who were Roman Catholic.[20] Table I provides information on the religious affiliation of the population for the years 1881, 1886 and 1891. By 1881 only 11,680 of the total provincial population of 62,260 were Roman Catholic. The following ten years the number of Roman Catholics almost doubled, however, the total provincial population more than doubled.

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[18] Ibid., S. 13.

[19] Canada, Statistical Record and Abstract, 1886 (Ottawa: MacLean, Rogerts & Co., 1887), p. 4.

[20] Canada, The Year Book and Almanac of Canada for 1876 (Ottawa: MacLean, Rogers & Co., 1876), p. 20.

TABLE I

MAJOR RELIGIOUS GROUPS IN MANITOBA 1881 TO 1891

Religious Group	1881*	1886**	1891*
Anglican	13,718	23,206	30,852
Methodist	9,382	18,648	28,437
Presbyterian	13,886	28,406	39,001
Roman Catholic	11,680	14,651	20,571
Other	13,594	23,729	33,645
Total	62,260	108,640	152,506

* Canada, Census of Canada, 1931, op. cit., p. 793.
** Canada, Statistical Record and Abstract, 1886, op. cit., pp. 14-15.

A significant amendment to the School Act of 1871 was made in 1873. The amendment read:

> 4. The sum appropriated by the Legislature for common school purposes shall be divided between the Protestant and Catholic Sections of the Board in the manner hereinafter provided in proportion to the number of children between the ages of 5 and 16 residing in the several and respective school districts of the Province - the number of such children in the Protestant and Catholic districts respectively being aggregated as regards each of said faiths.[21]

Previous to this monies had been equally divided between the Protestant and Catholic Sections.[22]

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[21] Statutes of Manitoba, 36 Victoria, ch. 22 (1873), S. 4.

[22] Statutes of Manitoba, 34 Victoria, ch. 12 (1871), S. 13.

Two other amendments served to clarify sections of the 1871 Act. One amendment prevented persons with a particular religious affiliation acting or attempting to act as a visitor to schools of the opposite religious persuasion.[23] The second permitted a parent to send his child to a school of his religious persuasion even if the school was outside of the district in which he resided and under these circumstances exempted him from the school rate in the district of his residence but made him liable for the school rate of the district in which his child attended school.[24]

Two significant amendments to the School Act were passed in 1875. The first made the Roman Catholics the minority group on the Board of Education. Section 1 stated:

> 1. Within six months after the passing of the Act, the Lieutenant-Governor in Council shall appoint, to form and constitute the Board of Education for the Province of Manitoba, not exceeding twenty-one perons, twelve of whom shall be Protestants and nine Roman Catholics, who shall hold office for three years, being however eligible for re-appointment, or if a lesser number be appointed the same relative proportion of Protestants and Catholics shall be observed, and until such appointment shall take place, the members of the present Board of Education shall continue in office, and any vacancy occurring in such Council from anytime shall be filled by the Lieutenant-Governor in Council.[25]

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[23] Statutes of Manitoba, 36 Victoria, ch. 22 (1873), S.50.

[24] Ibid., S. 27.

[25] Statutes of Manitoba, 38 Victoria, ch. 28 (1875), S. 1.

Previous to this amendment each Section of the Board of Education, Protestant and Catholic, was composed of the same number of appointees with the total number on the Board of Education being not less than ten nor more than fourteen members.[26]

The second amendment permitted each Section of the Board of Education to establish a school district in an existing school district.[27] Now a second district, established by the opposite Section of the Board of Education, could include territory, in whole or in part, of an existing school district.

There was an attempt in 1875 to legislate out of existence the Upper House or Legislative Council of Manitoba. A casting vote of the Chairman rejected this legislation.[28] The Upper House, which was considered as a safeguard for minority rights, was to be retained for another year. In 1876, however, under some pressure from the Legislative Assembly, the Legislative Council voted itself out of existence.[29]

During 1876 some agitation existed within the Protestant Section of the Board of Education for the

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[26] Statutes of Manitoba, 34 Victoria, ch. 12 (1871), S. 1.

[27] Statutes of Manitoba, 38 Victoria, ch. 28 (1875), S.17.

[28] Chester Martin, op. cit., p. 109.

[29] Ibid., p. 109.

establishment of a non-sectarian school system.[30] The key individuals advocating this change were residents of Winnipeg.[31] Legislation which was passed that year and which gave the City of Winnipeg virtual autonomy over its schools tended to stifle this movement.[32]

The general election of December 18, 1878 resulted in the French, for the first time, being in decided minority in the Legislative Assembly.[33] An attempt was made at the first session to introduce the "double majority"[34] principle but this was rejected by the Assembly.[35]

An amendment to the School Act in 1879 transferred supervisory work from the Clergy to Inspectors appointed by the Board of Education.[36] This was the last amendment

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[30]Alexander Begg, History of the North-West (Toronto: Hunter, Rose & Co., 1894), p. 201.

[31]Eldon Franklin Simms, op. cit., p. 50.

[32]Ibid., p. 90.

[33]Ibid., p. 50.

[34]The "double majority" principle developed in the Legislative Assembly of United Canada during the 1841-1867 period when a single government legislated for both Upper and Lower Canada. The "double majority' principle required that the government on questions of a local character had to secure not merely an absolute majority of the House, but also a majority of the representatives of that section of the province to which the measure under debate especially applied.

[35]Chester Martin, op. cit., p. 109.

[36]Statutes of Manitoba, 42 Victoria, ch. 2 (1879), S. 80.

to alter significantly but yet retain the dual structure of the educational system.

The next ten years saw no significant change in the structure of the Manitoba school system. During the late 1880's a movement to establish a non-sectarian public school system began to gain momentum. Up to this time, Simms noted:

> The newspapers of the period 1870 to 1890 were full of land problems and the railway question but seldom was education mentioned. The settlers were so busy establishing their homes that they had little time to interest themselves in education. They were content to leave educational matters in the hands of the church. An exception to this was the group which composed the Protestant Section of the Board of Education.... Later these men became the nucleus of the opposition to separate schools.
>
> It was not until the strength of the Protestant element became evident throughout the province that the issue of separate schools became practical politics.[37]

> The Provincial Government had been engrossed for many years in its disputes with the Federal Government and had largely ignored the movement for non-sectarian schools. With the defeat of Premier Norquay the Greenway administration found itself free from conflict over Federal issues, which were either resolved or shelved for the time being. It was able to turn its attention to the school question. With the support of the immigrants from Ontario and the Liberal Press which took up the question, the movement for educational reform became a strong one.[38]

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[37] Eldon Franklin Simms, op. cit., p. 90.

[38] Ibid., p. 97.

The school question -- the abolition of the dual system -- rose to prominence after the visit of D'Alton McCarthy to Manitoba in August, 1889.[39] The strong anti-Catholic and anti-separate school speech given by McCarthy to the Loyal Orange Association in August, 1889[40] and the sympathetic reception and endorsement of these views by Joseph Martin,[41] attorney-general for Manitoba, provided the impetus to accelerate the non-sectarian school movement.[42] The school question quickly became a subject of widespread and bitter controversy.[43]

The Greenway administration introduced a Public Schools Bill during the 1890 session. The Legislature passed this bill which specified that all public schools were to be free and non-sectarian,[44] that no religious exercises were to be allowed -- except at the option of the school trustees and according to the regulations of the Advisory Board[45] -- and that all ratepayers of each municipality were to be taxed for the support of the public

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[39] A. G. Morice, "The Roman Catholic Church West of the Great Lakes," in Adam Shortt and Arthur G. Doughty (eds.), op. cit., Vol. XI, p. 176.

[40] Alexander Begg, History of the North-West (Toronto: Hunter, Rose & Co., 1894), Vol. III, p. 326.

[41] A. G. Morice, op. cit., p. 176.

[42] Alexander Begg, op. cit., p. 326.

[43] Ibid., p. 330.

[44] Statutes of Manitoba, 53 Victoria, ch. 38 (1890), S. 8.

[45] Ibid., Sections 6-7.

schools. Denominational schools were not prevented from operating in a denominational manner but if they did so they had to operate as private schools without support of revenue from public funds.

The Board of Education was replaced by a Department of Education.[46] An Advisory Board of seven members served in an advisory capacity to the Department of Education.[47] Four of the seven members were appointed by the Department of Education,[48] two were elected by public and high school teachers of the province[49] and one was appointed by the University Council.[50]

The denominational public school system which had been in existence for almost twenty years was eliminated and replaced by a public non-sectarian school system. This action resulted in a provincial and national controversy which was not, more or less, resolved until 1896.

Summary. Manitoba established, in 1871, a dual system of education which was similar to that in operation in Quebec. During the next eighteen years this was slowly altered to decrease the power of Roman Catholic supporters

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[46] Statutes of Manitoba, 53 Victoria, ch. 37 (1890), S. 1.

[47] Ibid., S. 4.

[48] Ibid., S. 5.

[49] Ibid., Sections 7-11.

[50] Ibid., S. 12.

but not to alter the dual concept of the system. In 1890 the dual system was eliminated and replaced with a public non-sectarian school system.

II. NORTH-WEST TERRITORIES

Part of the area that is now Western Canada was not included in the area under charter to the Hudson's Bay Company. This area, beyond the boundaries of Rupert's Land, was treated as Indian territories and a policy of free trade existed in the area.[51] The North-West Company, Hudson's Bay Company as well as American fur traders were active in this area. The aggressive North-West Company, however, established a virtual monopoly in the area.[52] Legislation in 1803 provided for the administration of justice in the area. The courts of Upper and Lower Canada were given jurisdiction to try persons accused of crimes in the Indian territories to the north and west of the two Canadas.[53] The justices of the peace to be appointed were to be the factors and superior employees of the North-West Company.[54] Conflict between the Hudson's Bay Company and the North-West Company interfered in the trading

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[51] Adam Shortt, "General Economic History 1763-1841," in Adam Shortt and Arthur G. Doughty (eds.), op. cit., Vol. IV, p. 542.

[52] Ibid., p. 543.

[53] W. H. P. Clement, "History of the Judicial System," in Adam Shortt and Arthur G. Doughty (eds.), op. cit., Vol. XXII, p. 388.

[54] Ibid., p. 388.

activities of the two companies and in 1821 the two companies decided to amalgamate.[55] The name "Hudson's Bay Company" was continued in use after the amalgamation. In 1821 an Imperial Act was passed extending the jurisdiction of the courts of Upper Canada over British subjects in "other parts of America, not within the limits of either of the provinces of Upper or Lower Canada, or of any civil government of the United States."[56] The administration of justice was largely under control of officials of the Hudson's Bay Company.

Canada's negotiations to obtain full control over the North-West Territories and the subsequent admittance of the North-West Territories to the Union were concurrent with Canada's negotiations for the control of Rupert's Land and the admittance of Rupert's Land to the Union.

The first government of the North-West Territories consisted of a Lieutenant-Governor and a Council "not exceeding fifteen nor less than seven persons" to aid the Lieutenant-Governor in the administration of affairs.[57] This arrangement continued for six years. Edmund Oliver calls these six years "the period of personal rule," and describes them as follows:

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[55] Ibid., p. 388.

[56] James White, "Boundary Disputes and Treaties," in Adam Shortt and Arthur G. Doughty (eds.), op. cit., Vol. VIII, p. 930.

[57] Statutes of Canada, 32-33 Victoria, ch. 3 (1869), S.4.

> From 1870 to 1876 the Territories were governed by lieutenant governors who were at the same time lieutenant governors of Manitoba. They exercised an autocracy limited at first by directions from the secretary of state for the provinces, and, after 1873, from the minister of the Interior. A North-West Council, for the most part residents of Manitoba, was appointed by the Dominion government to assist in the administration of the territories.[58]

In 1875 the Canadian Government passed the North-West Territories Act.[59] This Act, although approved on April 8, 1875, did not come into force until it was proclaimed on October 7, 1876. This Act set up a government for the North-West Territories distinct from the government of the Province of Manitoba and also provided for a resident Lieutenant-Governor and Council.

The Beginning of the Public School System

The North-West Territories Act, 1875 contained the first statutory provision for education in the North-West Territories. Section 11 provided that:

> 11. When, and so soon as any system of taxation shall be adopted in any district or portion of the North-West Territories, the Lieutenant-Governor, by and with the consent of the Council or Assembly, as the case may be, shall pass all necessary ordinances in respect to education; but it shall therein be

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[58] Edmund H. Oliver, "Saskatchewan and Alberta: General History, 1870-1912," in Adam Shortt and Arthur G. Doughty (eds.), op. cit., Vol. XIX, p. 189.

[59] Statutes of Canada, 38 Victoria, ch. 49 (1875).

> always provided, that a majority of the rate-payers of any district or portion of the North-West Territories, or any lesser portion or sub-division thereof, by whatever name the same may be known, may establish such schools therein as they may think fit, and make the necessary assessment and collection of rates therefor; and further, that the minority of the rate-payers therein, whether Protestant or Roman Catholic, may establish separate schools therein, and that, in such latter case, the rate-payers establishing such Protestant or Roman Catholic separate schools shall be liable only to assessments of such rates as they may impose upon themselves in respect thereof.[60]

The above clause relating to separate schools was not in the North-West Territories Bill when it was presented in the House of Commons for first reading. The Hon. Mr. Blake[61] noted the absence of any provision for separate schools and stated that:

> He regarded it as essential ... in view of the deliberation during the last few days that a general principle should be laid down in the bill with respect to public instruction. He did believe that we ought not to introduce into that territory the heart burnings and difficulties with which certain other portions of the Dominion and other countries had been infested. It seemed to him, having regard to the fact that as far as we could expect at

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[60] Statutes of Canada, 38 Victoria, ch. 49 (1875), S. 11.

[61] The Hon. Mr. Blake held seats in both the Legislative Assembly of Ontario and the House of Commons from 1867 to 1872. From December 20, 1871 to October 23, 1872 he was Premier of Ontario. When dual representation was abolished by Ontario in 1872 he chose to retain his House of Commons seat. He was Minister of Justice from May 19, 1875 to June 8, 1877 in the Liberal Government of the Hon. Alexander MacKenzie. On April 28, 1880 he became Leader of the Liberal Opposition in the House of Commons.

> present, the general character of the population would be somewhat analogous to the population of Ontario, that there should be some provision in the constitution by which they should have conferred upon them the same rights and privileges in regard to religious instruction as those possessed by the people of the Province of Ontario.[62]

The deliberations of the last few days Blake referred to involved the controversy over the New Brunswick School Act of 1871. (infra, pp. 62-64).

In 1880 the North-West Territories Act, 1875 was amended and consolidated. Section 11 remained unchanged, although in the renumbering it became section 10.[63]

No public school system became a reality until 1885. Schools existing in the North-West Territories prior to 1885 were predominantly church sponsored mission schools. A few schools were sponsored by the Hudson's Bay Company. After 1873 a few community schools began to appear but they were under local initiative and control.[64]

School Ordinance of 1884

The first School Ordinance for the organization of a public school system in the North-West Territories was

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[62]Canada, House of Commons Debates, 1875, Vol. I, p. 658.

[63]Statutes of Canada, 43 Victoria, ch. 25 (1880), S. 10.

[64]John M. MacEachran, "History of Education in Alberta," in Adam Shortt and Arthur G. Doughty (eds.), op. cit., Vol. XX, pp. 477-481.

passed by the Territorial Council in 1884.[65] This was also the first year in which the number of elected members of the Territorial Council exceeded the number of appointed members.[66] Section one of this Ordinance provided for an appointed Board of Education containing not more than six Protestant and six Roman Catholic members.[67] Each group was to comprise a distinct Section of the Board of Education. The Board of Education as a whole had only very general powers; each Section of the Board of Education, sitting separately, had very extensive powers. Each Section had control over the management of its schools, the examination, grading and licensing of teachers, the textbooks and inspectors.[68]

Religious instruction in any school, under the jurisdiction of the Protestant Section or Roman Catholic Section, was prohibited between nine o'clock in the forenoon and three o'clock in the afternoon, after which time instruction could be given as permitted or desired by

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[65] Ordinances of the North-West Territories, No. 5 (1884).

[66] Edmund H. Oliver, "Saskatchewan and Alberta: General History, 1870-1912," in Adam Shortt and Arthur G. Doughty (eds.), op. cit., Vol. XIX, p. 204. In 1884 there were eight elected members and seven appointed members.

[67] Ordinances of the North-West Territories, No. 5 (1884), S. 1.

[68] Ibid., S. 5.

trustees.[69] A "conscience clause" was included permitting a child of a different religious faith to leave after three o'clock, if his parents so desired.[70] Section 131 stated that "in no case shall a Catholic be compelled to pay taxes to a Protestant school or a Protestant to a Catholic school."[71] These provisions were in accordance with the provisions of the North-West Territories Act of 1875.

The Ordinance contemplated the establishment of a school system similar to the dual system of Quebec. Within this system Protestants and Roman Catholics had extensive jurisdiction over the schools within their Section. For financial reasons, however, this Ordinance remained a dead letter.[72]

From January 1, 1881 up to and including 1884 the Governor-General in Council paid one-half of the salary of teachers in non-Indian schools.[73] Various regulations as to the necessary enrollment and length of operation applied. The subsidies for the support of education had to

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[69] Ibid., S. 84.

[70] Ibid., S. 86.

[71] Ibid., S. 131.

[72] Letter from the secretary to the Lieutenant-Governor to Archbishop Taché, quoted in Canada, Sessional Papers, 1894, Vol. XXVII, No. 17, 40C, p. 63.

[73] Canada, Sessional Papers, 1894, op. cit., p. 64.

be voted annually by the Federal Parliament.[74] In 1885 money was allotted in lump sum to the North-West Territories which gave the Territorial Government a freer hand in allotting funds for educational purposes.[75]

School Ordinance of 1885

The School Ordinance of 1885[76] was the first legislation to take effect in practice. The School Ordinance of 1885 was, in most respects, the same as that of 1884. One important change was the altering of the membership of the appointed Board of Education to five members -- two Protestants and two Roman Catholics under the presidency of the Lieutenant-Governor.[77] Each Section still retained the general administration of its schools. There was, however, a transfer of some powers to the whole Board of Education. The nomination of inspectors and examiners and the regulations for the examination, grading and licensing of teachers became a responsibility of the whole Board of Education.[78]

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[74] Ibid., p. 63.

[75] Ibid., p. 63.

[76] Ordinances of the North-West Territories, No. 3 (1885).

[77] Ibid., S. 1.

[78] Ibid., S. 131.

School Ordinance of 1886

A major change, relating to the formation of a school district for the minority, Protestant or Roman Catholic, was made in 1886. Section 31 of the School Ordinance of 1885 which read:

> 31. In accordance with the provisions of "The North-West Territories Act, 1880" providing for the establishment of separate schools, it shall be lawfull for any number of property holders resident within the limits of any public school district or within two or more adjoining public school districts or some of whom are within the limits of an organized school district and others on adjacent land not included within such limits, to be erected into a Separate School District by proclamation of the Lieutenant-Governor with the same rights, powers, privileges, liabilities and method of government throughout as hereinbefore provided in the case of public school districts.[79]

had the words "any number of property holders, resident ... with the same rights," struck out and the following words inserted in lieu:

> 12. "a number of the ratepayers, whether Protestant or Roman Catholic, the same being a minority of the ratepayers resident within the limits of an organized public school district to establish a separate school district therein, with the same rights."[80]

This legislation, which restricted the formation of a school district for the minority, to within an existing

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[79] Ibid., S. 31.

[80] Ordinances of the North-West Territories, No. 10 (1886), S. 12.

public school district, restricted the ease of formation of a school district by the Protestant or Roman Catholic minority in an area. A school district so formed, since it had to be within the limits of an existing public school district, was in a true sense "separate" from the public school district.

Section four of the same Ordinance made it no longer necessary to designate a school district as Protestant or Roman Catholic.[81] These new districts were placed under the control of the Board of Education as a whole rather than one Section or the other.[82] The creation of these "non-denominational" school districts under the Board of Education as a whole placed a new perspective in the public school system.

School Ordinances 1887 to 1890

The Ordinances of 1887 altered the composition of the appointed Board of Education from two Roman Catholics and two Protestants under the chairmanship of the Lieutenant-Governor, to five Protestants and three Roman Catholics with one of the eight elected as chairman.[83] Each Section retained its existing powers but the "non-

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[81] Ibid., S. 4.

[82] Ibid., Sections 5 and 6.

[83] Ordinances of the North-West Territories, No. 2 (1887), Sections 1 and 6.

denominational" school districts were now under the control of a group that reflected the preponderance of Protestants in the North-West Territories.

No significant changes were made in the school legislation during 1888, 1889 and 1890.

Summary

The governing body of the North-West Territories was required to include, when a public school system was established, provision for the formation of separate schools. The public school system that was established was of a dual nature. Amendments that were made to the School Ordinances up to 1890, although not disturbing the dual nature of the system, were in the direction of reducing the powers for each Section of the Board of Education and increasing the scope of jurisdiction of the Board as a whole.

PART II

DENOMINATIONAL RIGHTS 1867 - 1890

I. THE NEW BRUNSWICK CASE

Litigation over denominational rights first arose in the Province of New Brunswick. The Parish Schools Act of 1858[84] had established a system of public schools but these

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[84] Statutes of New Brunswick, 21 Victoria, ch. 9 (1854).

schools, in localities where the population belonged to the same religion, gradually became denominational in character. The Common Schools Act of 1871[85] did away with the sectarian nature of the schools by requiring that all schools be non-sectarian. It was held in Ex parte Renaud[86] that no right or privilege with respect to denominational schools in New Brunswick had been prejudicially affected, since

> ... the rights contemplated must have been legal rights: in other words, rights secured by law, or which they had under the law at the time of the Union. If any such existed, they must have been capable of being clearly and legally defined, and there must have existed legal means for their enforcement, or legal remedies for their infringement.[87]

This decision was subsequently upheld by the Privy Council.[88]

W.H.P. Clement commenting on the relevance of the Renaud decision to the provinces of Nova Scotia, Prince Edward Island and British Columbia stated:

> Only in the event of the future establishment of a system of separate or dissentient schools by any one of these provinces can their full autonomy in relation to educational

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[85] Statutes of New Brunswick, 34 Victoria, ch. 21 (1871).

[86] 14 N.B.R. 273.

[87] Ibid., p. 292.

[88] Maher v. Town of Portland, 1874. Wheeler's Confederation Law of Canada 338,367 as reported in Francis G. Carter, Judicial Decisions on Denominational Schools (Toronto: Ontario Separate School Trustees' Association, 1962), p. 44.

> matters be interfered with by the parliament of Canada. In none of these provinces could the claim to a 'right or privilege' existing at the time of the Union be more strongly supported than in New Brunswick; and, as to that province, it has been held by the Privy Council that no such right or privilege existed there.[89]

The above mentioned litigation and legal opinion firmly established that denominational rights could only be claimed in those provinces where these rights existed by statutory provision at the time of Union or were subsequently provided by statutory process by the province.

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[89] W.H.P. Clement, The Law of the Canadian Constitution (Toronto: The Carswell Company, 1916), pp. 782-3.

CHAPTER V

DEVELOPING STRUCTURE DURING THE IMMEDIATE PRE-PROVINCIAL PERIOD OF THE NORTH-WEST TERRITORIES

PART I

PROVINCIAL DEVELOPMENTS 1891 TO AUGUST, 1905

Separate school education became, during the 1891 to 1905 period, not only an issue at the provincial level in Manitoba and the North-West Territories but also a national issue in Canada. Manitoba's change, in 1890, from a dual system, with its considerable denominational control over education, to a non-sectarian system was strenously protested by Roman Catholics through appeals to the Courts as well as to the Governor-General in Council. The change in the North-West Territories, in 1892, from a dual system to a single public school system, with provision for separate schools within the system, was protested vigorously by Roman Catholics to the Governor-General in Council. The single public school system, with its provision for separate schools within the system, provided for considerable local school board control over the externa of schools but gave interna control of the schools to the central authority. The dual system that had existed before had permitted considerable denominational control over both the interna and externa of schools. In

both cases the issues were of some importance at the national as well as at the provincial level.

Manitoba, because it had no provision for separate schools after 1890, is not considered in the section on provincial developments. Litigation clarifying the validity of the action taken by Manitoba in 1890 is, however, considered in the section on denominational rights.[1]

I. NORTH-WEST TERRITORIES

The North-West Territories had no state system of schools when that area was made part of Canada. Federal Government legislation provided that when a state system of public education was established, the system established had to contain a provision for separate schools. The initial system of education established by the North-West Territories was a dual system which provided for considerable denominational control over the externa and interna of schools. The trend of the legislation from 1885 to 1890 was gradually to reduce denominational influence over education but yet retain the dual structure of public education.

Changes in the provisions for separate school

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[1]Litigation clarifying the validity of the action taken by Manitoba in 1890 is presented on pages 91-104.

education in the North-West Territories, during the 1891 to 1905 period, were made during the time when separate school education was becoming an issue of some importance provincially and nationally as well as during a time when the North-West Territories were struggling first for responsible government and latterly for provincial status. The struggle for responsible government took place between 1888 and 1897 which was then followed by the struggle to achieve provincial status.

The amendments of 1888 to the North-West Territories Act[2] made the Territorial Council a completely elected body. The Lieutenant-Governor, however, chose an Advisory Council of four from the elected members to advise him on financial matters.[3] Between 1888 and 1891 the Advisory Council chosen by the Lieutenant-Governor frequently lost the confidence of the House and was forced to resign.[4] After 1891 the Advisory Council was called the Executive Committee. Starting in 1892 the Executive Committee was selected by the House, rather than the Lieutenant-Governor, which aided in maintaining a more stable operation.[5]

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[2]Statutes of Canada, 51 Victoria, ch. 19 (1888), S. 2.

[3]Ibid., S. 13.

[4]Edmund H. Oliver, "Saskatchewan and Alberta: General History, 1870-1912," in Adam Shortt and Arthur G. Doughty (eds.), op. cit., Vol. XIX, pp. 222-239.

[5]Ibid., p. 239.

An amendment[6] to the North-West Territories Act in 1897 gave full responsible government to the North-West Territories. This marked the start of the autonomy struggle in the Territories. F.W.G. Haultain, Premier of the North-West Territories, was one of the key persons in this struggle. The Dominion's policy for immigration resulted in large numbers of new settlers in the North-West Territories.[7] Funds allotted to the Territories fell far short of the sums required to finance the various levels of government and to provide for essential services.[8] Natural resources were held by the Dominion, making the raising of funds required above the Dominion grant difficult if not impossible. Financial need became the dominant element in prompting agitation for full provincial status.[9]

School legislation during this period, which gradually reduced denominational control over schools, appeared to be the major factor in the reluctance of the Dominion to grant provincial status to the Territories.[10]

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[6]Statutes of Canada, 60-61 Victoria, ch. 28 (1897), S. 17.

[7]Edmund H. Oliver, op. cit., p. 248.

[8]Ibid., p. 248.

[9]Ibid., p. 256.

[10]Henry Borden (ed.), Robert Laird Borden: His Memoirs (Toronto: The MacMillan Company of Canada, Ltd., 1938), Vol. I, p. 142.

Granting of provincial status was delayed but the school situation did not resolve itself. Mounting pressure forced the consideration of provincial status[11] and the school question came to a head. Amid rising controversy a compromise was worked out and provincial status was granted on September 1, 1905.

School Ordinance of 1892

A major change in the structure for separate school education in the North-West Territories occurred with the passage of the School Ordinance of 1892.[12] This legislation removed central denominational control over the externa and interna of schools and gave almost complete control over the educational program within schools to the central state authority. It provided for considerable externa control of schools by means of local school boards.

The School Ordinance of 1892 abolished the Board of Education and replaced it with a Council of Public Instruction. The Council of Public Instruction consisted of the members of the Executive Committee[13] and four other

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[11] Edmund H. Oliver (ed.), The Canadian North-West: Its Early Development and Legislative Records (Ottawa: Government Printing Bureau, 1914), Vol. II, p. 1243.

[12] Ordinances of the North-West Territories, No. 22 (1892).

[13] The Executive Committee corresponded to the Cabinet in provincial governments. It acted as an advisory body to the Lieutenant-Governor of the North-West Territories.

individuals appointed by the Lieutenant-Governor.[14] Two Protestants and two Roman Catholics were to compose the group of four appointed by the Lieutenant-Governor.[15] The appointed members had no vote[16] in the Council of Public Instruction and acted only in an advisory capacity to the Council of Public Instruction. This retained some modicum of church influence in public education. The Ordinance, however, changed the state system of education from a denominationally controlled dual system to a state-controlled single system with provision for separate schools.[17]

The clauses defining the duties of the Council of Public Instruction contained no mention of a separate program of study or a separate set of textbooks for use in schools professing adherence to a particular religious faith, nor did the Ordinance imply that there should be more than one single set of regulations governing certification of teachers. The effect of the Ordinance was to vest the Council of Public Instruction with the powers previously held by each Section of the Board of Education and those of the Board of Education as a whole.

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[14] Ordinances of the North-West Territories, No. 22 (1892), S. 5.

[15] Ibid., S. 5.

[16] Ibid., S. 5.

[17] For a discussion of Roman Catholic raction to the 1892 legislation see Manoly Lupul, op. cit., pp. 326-629.

A religious minority, Roman Catholic or Protestant, within any organized school district, retained the right to establish a separate school. The minority was entitled to share in state grants for education on the same basis as any public school and were exempt from taxation in support of public schools. Religious instruction could still be given in any school but was limited to the last half-hour of the school day.

This legislation, following shortly after the Manitoba legislation (supra, pp. 50-51), resulted in a storm of protest. Within a year nineteen petitions were received by the Governor-General in Council, all requesting the disallowance of the Ordinance or the repeal of those sections which were claimed to have adversely affected the privileges of Roman Catholics.[18] Eighteen petitions were from trustees of separate schools and one was from Bishop Grandin but all were essentially the same.[19] The main points made in the complaints were as follows:

(1) The replacement of the Board of Education with its Protestant and Roman Catholic Sections and the transfer of the authority held by them to the Council of Public Instruction violated section 11 of the North-West

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[18]Canada, Sessional Papers, 1894, Vol. XXVII, No. 17, 40C, pp. 1-18.

[19]Ibid., p. 18.

Territories Act, 1875.

(2) Roman Catholics no longer could appoint inspectors for Roman Catholic schools.

(3) All prospective teachers, including members of religious orders, would have to attend a common Normal School. It was maintained that the religious orders gave adequate training to teachers coming from these orders.

(4) Textbooks prescribed by the Roman Catholic Section had been withdrawn and books offensive to Roman Catholics had been prescribed.

(5) The course of instruction was to be uniform for all schools.[20]

One petition stated:

> The effect of the said ordinance especially by means of the said regulations passed in persuance thereof, is to deprive the Catholic separate schools of that character which distinguishes them from public or Protestant schools, and to leave them Catholic schools in name only, and such, it is admitted, is its obviously necessary effect.[21]

Haultain's reply to the Lieutenant-Governor of the North-West Territories, Joseph Royal at Regina, carefully countered each argument presented. In emphasizing the stand taken by the North-West Territories Council he stated:

> The responsibility for the general management of our schools, for the educational policy of the Territories,

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[20] Ibid., pp. 1-4, 18-27.

[21] Ibid., p. 3.

> and for the expenditure of the school vote is above and beyond any sectarian difference. Expenditure and control are inseparable, and so long as schools continue to receive government grants, they must be subject to government control.[22]
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> . . .
>
> A careful comparison of our present system with the system in existence prior to the ordinance of 1892 will show no substantial change, or at least no changes involving grievance or wrong.[23]

The Governor-General in Council[24] considered the charges made in the petitions, the defense presented in relation to the charges as well as the Ordinance of 1892 and the Ordinances prior to this date. A decision rejecting the appeals for disallowance of the Ordinance of 1892 was given in 1894.[25] Some of the major points made in the decision were:

(1) The principal change was that, while the Ordinance of 1883 referred to and governed public schools only, and did not govern or affect separate schools, the Ordinance of 1892 refers to any school, and consequently governs separate as well as public schools.

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[22] Ibid., p. 14.

[23] Ibid., p. 15.

[24] The Governor-General in Council is, in effect, the Federal Cabinet.

[25] Canada, Sessional Papers, 1894, op. cit., p. 25.

(2) The provisions of Section 85, of Ordinance No. 59, of 1888, relating to the opening of schools by prayer, had been removed.

(3) The disallowance of the Ordinance in question would not meet the complaints alleged in the petitions other than by restoring the Board of Education which had control of the schools of the Territories before the Ordinance of 1892 was passed; because in other respects the law and regulations concerning education in the Territories were not materially different before the Ordinance of 1892 was passed from what they now are insofar as the points mentioned in the petition are concerned. Disallowance would not nullify any of the regulations complained of.[26]

The Governor-General in Council concluded their decision by stating that:

> The committee of the privy council regret that the change made in the ordinances relating to education should have been such as to cause, even unwittingly, dissatisfaction and alarm on the part of the petitioners, and they advise that communication be made to the lieutenant governor of the North-West Territories, urgently requesting that the complaints set forth by the petitioners be carefully enquired into, and the whole subject reviewed by the executive committee and the North-West assembly, in order that redress be given by such amending ordinances or amending regulations as may be found necessary to meet any grievances or any

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[26] Ibid., p. 26.

> well founded apprehensions which may be ascertained to exist.[27]

The stand taken by the opposition in the House of Commons to the question was summed up by Mr. Tarte:

> No one had the right to deprive the Catholics of the North-West Territories of their Separate Schools. The Hon. Mr. Haultain ... understood that pretty well. That is why he went in a roundabout way. He overhauled all the Ordinances relating to schools; and while the New Ordinance reaffirms the rights of Catholics to Separate Schools, it makes these dependent on such conditions that they are virtually suppressed. So that Mr. Haultain has done indirectly what he could not do directly.[28]

The decision of the Governor-General in Council did not meet with the approval of Roman Catholics in the North-West Territories. Archbishop Taché made a lengthy and detailed reply to the Governor-General in Council.[29] In the reply he summarized the viewpoint of Roman Catholics to the legislation and the decision. The Roman Catholics did not, however, challenge the legislation in court.

School Ordinances of 1894 and 1896

The 1894 session of the Territorial Council of the North-West Territories passed an amendment to the School Ordinance permitting schools to be opened with the Lord's

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[27] Ibid., p. 27.

[28] Hansard, Parliamentry Debates, 1894, col. 2042.

[29] Canada, Sessional Papers, 1894, Vol. XXVII, No. 17, 40C, pp. 28-67.

Prayer.[30]

An amendment to the School Ordinance in 1896 permitted a company holding property in an area where a separate school district existed to direct that part of its property be assessed in support of the separate school.[31] The assessment rated for separate school support was to bear the same ratio to the total assessment of the company as the value of the stock in the company held by people of the same religious faith as the separate school supporters bore to the total value of the stock of the company. The provision made by this amendment was almost identical in wording to the same provision made in Ontario in 1886.[32]

School Ordinance of 1901

No significant school legislation was passed, after 1896, until 1901 and the legislation of 1901 was not significant in that it altered the actual operation of separate schools but rather in that it became an issue in the autonomy bid by the North-West Territories.

Essentially the change made by the School Ordinance

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[30] Ordinances of the North-West Territories, No. 9 (1894), S. 7.

[31] Ordinances of the North-West Territories, No. 2 (1896), S. 125.

[32] Statutes of Ontario, 49 Victoria, ch. 46 (1886), S. 53.

of 1901[33] was to replace the Council of Public Instruction with a Department of Education. The Department of Education was headed by a member of the Executive Council and assumed all of the former duties performed by the Council of Public Instruction. Members appointed on a sectarian basis held membership on an Educational Council which acted in an advisory capacity to the Department of Education.[34]

At least two of the five persons composing the membership of the Educational Council were to be Roman Catholics.[35] Meetings of the Educational Council were to be held at such dates as determined by the Commissioner[36] but at least one meeting was to be held each year.[37] All general regulations respecting the inspection of schools; the examining, training, licensing and grading of teachers; courses of study; teachers' institutes; and text and reference books were, before being adopted or amended, to be referred to the Educational Council for its discussion and report.[38] The Educational Council could also consider

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[33] Ordinances of the North-West Territories, ch. 29 (1901).

[34] Ibid., S. 8.

[35] Ibid., S. 8.

[36] The Commissioner was the member of the Executive Council who was the head of the Department of Education.

[37] Ordinances of the North-West Territories, ch. 29 (1901), S. 9.

[38] Ibid., S. 10.

any question concerning the educational system of the Territories as it deemed fit and was to report on it to the Lieutenant-Governor in Council.[39]

The legislation that was passed did not alter the actual operation of separate schools but it did remove church representatives from the final decision-making body. Church representatives now could only exert their influence through the Educational Council on the Department of Education and not, as formerly, directly on the Council of Public Instruction at the meetings of that body.[40]

The Autonomy Bid and the Separate School Issue

The separate school situation began to develop into an issue in the autonomy bid of the North-West Territories.[41] The North-West Territories' bid for autonomy was based almost entirely on financial grounds[42] while Federal reluctance to grant provincial status was based, at least in part, on the separate school issue.[43] Evidence seems to indicate that the separate school problem was taken much more seriously outside the North-West Territories than

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[39] Ibid., S. 11.

[40] A brief discussion of the history of the Educational Council during the 1901 to 1967 period is contained in Appendix G.

[41] C. Cecil Lingard, Territorial Government in Canada (Toronto: The University of Toronto Press, 1946), p. 125.

[42] Edmund H. Oliver (ed.), The Canadian North-West: Its Early Development and Legislative Records (Ottawa: Government Printing Bureau, 1914), Vol. II, pp. 1158-1159.

[43] C. Cecil Lingard, op. cit., p. 104.

within the North-West Territories.[44]

Although some agitation had existed prior to 1900 for provincial status of the North-West Territories,[45] the first official request for provincial status was sent by the Legislative Assembly of the North-West Territories to the Dominion Government in May, 1900.[46] In March, 1901 Clifford Sifton, Minister of the Interior, sent a letter to Premier Haultain which included the comment: "I am prepared to say that the time has arrived when the question of organising (sic) the Territories on a Provincial basis ought to be the subject of full consideration."[47] Further communication took place and in December, 1901 the Executive Council of the North-West Territories submitted a Draft Bill for provincial status to Sir Wilfred Laurier.[48] No specific mention was made of separate schools but section 93 of the British North America Act, 1867 was to apply.[49] The Federal Government also prepared a Draft Bill for changing the North-West Territories into a province.[50]

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[44] Ibid., p. 149.

[45] Ibid., p. 21.

[46] Edmund H. Oliver, op. cit., Vol. II, pp. 1155-1157.

[47] Ibid., p. 1160.

[48] Ibid., pp. 1172-1195.

[49] Ibid., p. 1174.

[50] Ibid., pp. 1195-1200.

During March, 1902 the Hon. Clifford Sifton, Minister of the Interior, informed Premier Haultain that:

> It is the view of the Government that it will not be wise at the present time to pass legislation forming the North-West Territories into a Province or Provinces. Some of the reasons leading to this view may be found in the fact that the population of the Territories is yet sparse; that the rapid increase in the population now taking place will in a short time alter the conditions to be dealt with materially; and that there is a considerable divergence of opinion respecting the question whether there should be one province only or more than one province.[51]

All the reasons listed were valid reasons but due to the previous favourable reaction and in the light of the actual preparation already done towards granting provincial status, the strong probability exists that factors other than those cited may have been considered of a sufficiently critical nature to alter the desirability of provincial status at that time. The separate school question was not mentioned as the reason for the changed attitude, but the Hon. Robert Borden, leader of the opposition in the House of Commons during that period of time, later, expressed the view that it was probably because of apprehension regarding separate schools that for at least three years after conditions were favourable for the creation of the new provinces, the government refrained from taking

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[51] Ibid., p. 1202.

up the question.[52] Events that followed the first introduction of the Autonomy Bill into the House of Commons proved that there was cause for the government to fear public reaction to the education clauses it contained.

The North-West Territories continued to agitate for provincial status. The difficulty of functioning within the financial restrictions of a Territory, when tremendous growth was occurring, was cited again and again as the major reason for being given provincial status.[53]

Figure 2 presents data on the population changes in the North-West Territories from 1881 to 1901, the Provisional Districts of Alberta and Saskatchewan from 1901 to 1905 and the Provinces of Alberta and Saskatchewan from 1905 to 1911. A dramatic increase in the population occurred after 1901 with the population approximately doubling for each five year period.

The percentage of Roman Catholics in the North-West Territories in 1891 was approximately 22 per cent.[54] In 1901 nineteen per cent of Saskatchewan's population was

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[52]Henry Borden (ed.), Robert Laird Borden: His Memoirs (Toronto: The MacMillan Company of Canada, Ltd., 1938), Vol. I, p. 142.

[53]Edmund H. Oliver, op. cit., Vol. II, pp. 1203-1241.

[54]Canada, Census of Canada, 1931, Vol. I, pp. 239, 210.

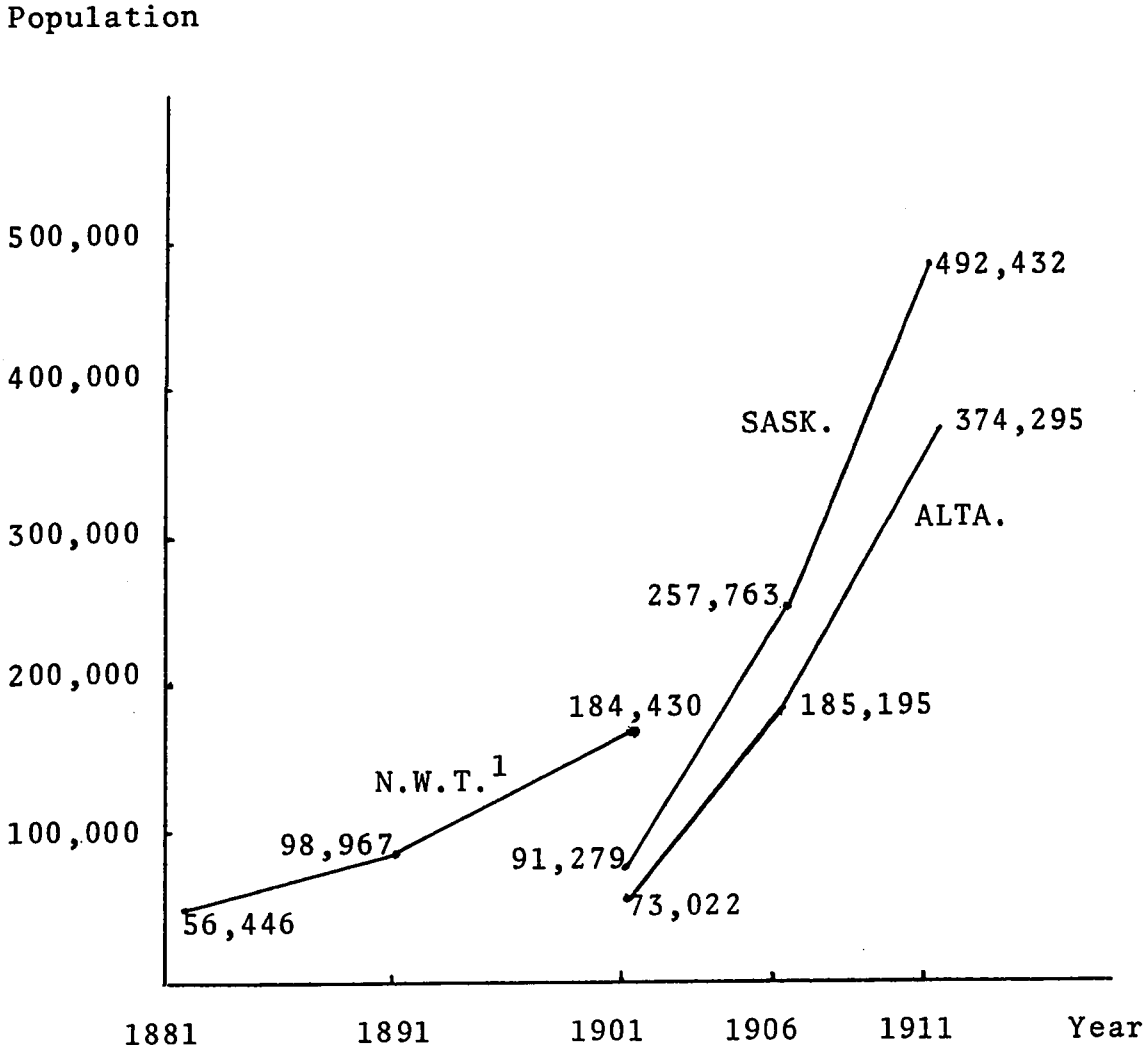

FIGURE 2

POPULATION OF THE NORTH-WEST TERRITORIES TO 1901 AND ALBERTA AND SASKATCHEWAN TO 1911

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[1]The population for the North-West Territories for the year 1901 includes the population of the Provisional Districts of Alberta and Saskatchewan.

Source: Census of Canada, 1931, Vol. I, pp. 239-240 for the years 1881, 1891, 1901 and 1911. The 1906 data is based on Census of Prairie Provinces, 1926, pp. 216, 518.

Roman Catholic[55] while 22 per cent of Alberta's population was Roman Catholic.[56]

Finally, in 1904, Sir Wilfred Laurier informed Premier Haultain that if the Liberals were sustained in the coming election, a Bill for provincial status for the North-West Territories would be introduced in the next session.[57] The Liberals were re-elected and in February, 1905 Bills for the creation of the Provinces of Alberta and Saskatchewan were introduced.[58]

Each Bill contained the following clause:

> 1. The provisions of Section 93 of the British North America Act, 1867, shall apply to the said Province as if, at the date upon which this Act comes into force, the territory comprised therein were already a Province, the expression "the Union" in the said section being taken to mean the said date (1905)..
>
> 2. Subject to the provisions of the said Section 93, and in continuance of the principles heretofor sanctioned under The North-West Territories Act, it is enacted that the Legislature of the said Province shall pass all necessary laws in respect of education and that it shall therein always be provided (a) that a majority of the ratepayers of any district or portion of the said Province or of any less portion or subdivision thereof by whatever name it is known, may establish such schools therein as they think fit, and make

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[55] Ibid., pp. 239, 240.

[56] Ibid., pp. 239, 240.

[57] Edmund H. Oliver, op. cit., Vol. II, p. 1243.

[58] Ibid., pp. 1244-1282.

> the necessary assessment and collection of rates therefor, and (b) that the minority of the ratepayers therein, whether Protestant or Roman Catholic, may establish separate schools therein, and make the necessary assessment and collection of rates therefor, and (c) that in such case the ratepayers establishing such Protestant or Roman Catholic separate schools shall be liable only to assessment of such rates as they impose upon themselves with respect thereto.
>
> 3. In the appropriation of public moneys by the Legislature in aid of education, and in the distribution of any moneys paid to the Government of the said Province arising from the School fund established by the Dominion Lands Act, there shall be no discrimination between the public schools and the separate schools, and such moneys shall be applied to the support of public and separate schools in equitable shares or proportion.[59]

The introduction of the clause as worded may have resulted from the fact that New Brunswick was found not to have denominational rights "by law" (supra, pp. 62-64) while Manitoba did not have certain denominational rights -- the right to state grants -- "by practice" (infra, pp. 95-96) at the time of the Union. Concern existed that this clause would return the educational system of the Territories back to the dual system rather than perpetuating the system in existence at that time.[60] In the ensuing

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[59]Public Archives, Ottawa. "Laurier Papers, North-West Autonomy," quoted in C. Cecil Lingard, op. cit., pp. 159-160.

[60]C. Cecil Lingard, op. cit., p. 162.

controversy[61] proposals ranged from the complete elimination of separate school to the re-introduction of the dual system. By May, 1905 an acceptable compromise was worked out which met most of the objections of the various groups. The educational clause now became:

> Section 93 of the British North American Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:-
>
> "(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-West Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances."
>
> 2. In the appropriation of the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.
>
> 3. Where the expression "by law" is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression "at the Union" is employed, in the said paragraph (3), it shall be held to mean the date at which this Act comes into force.[62]

The Provinces of Alberta and Saskatchewan thus

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[61] Consideration of the controversy is beyond the scope of this study. For a consideration of this aspect of the autonomy issue see C. Cecil Lingard, op. cit., pp. 162-184.

[62] Statutes of Canada, 4-5 Edward, ch. 42 (1905) S. 17 for Saskatchewan and ch. 3 (1905), S. 17 for Alberta.

started their existence with educational systems whose structure had been previously established by the Territorial Government of that area.

Summary

Legislation in the North-West Territories during the 1891 to August, 1905 period changed the dual structure of the educational system, with its considerable denominational control over the interna and externa of the schools, to a single system with provision for separate schools as part of the single system. In the single system the central state authority had almost complete control over the interna of the schools with the externa control largely delegated to local school boards. The central state authority prescribed one set of regulations, one program of studies, one series of textbooks, one system of teacher-training and one system of inspectors for public and separate schools.

The first stage in the change from a dual denominationally controlled public school system to a state controlled single school system, with provision for separate schools, was accomplished in 1892. Legislation in that year transferred control of the interna of schools from denominational bodies to a central authority. The central authority was the Executive Council of the Territorial Government and four denominational non-voting appointees. An appeal against this change, by Roman Catholics, to the Governor-General in

Council did not result in any change of significance to the newly established structure.

Legislation in 1901 made a Department of Education, headed by a Minister of Education, the central state authority controlling the interna, and to a minor extent, the externa of schools. Individuals appointed on a denominational basis served on an Educational Council which was an advisory body to the Department of Education.

Some controversy existed prior to the granting of provincial status to the Provisional Districts of Alberta and Saskatchewan as to the basic rights for separate school education applicable to these two areas. The minority in New Brunswick had been found not to have denominational rights to separate school education "by law" while the minority in Manitoba had been found not to have the right to public school grants "in practice" at the time of Union. It appeared that, if the minority rights were to be protected, it would be advisable to have written statutory provisions for these rights included in the provincial acts. The eventual decision was to perpetuate the minimum denominational rights to separate school education as established by the North-West Territorial Government in 1901.

II. ONTARIO LITIGATION OF INTEREST

Establishment of a Separate School District

In 1891 the trustees of the Roman Catholic Separate School Section No. 10 of the Township of Arthur brought an action against the Municipal Corporation of the Township of Arthur[63] for the recovery of certain school rates which the plaintiffs alleged that the defendants had received as trustees for them. The defendants held that since the provisions of section 22 of the Separate Schools Act had not been complied with therefore no corporation existed and no money could be collected. Section 22 of the Separate Schools Act was:

> 22. Any number of persons, not less than five, being heads of families and householders or freeholders resident within any school section of any township, incorporated village or town, or within any ward of any city or town, and being Roman Catholics may convene a public meeting of persons desiring to establish a separate school for Roman Catholics in such school section or ward for the election of trustees for the management of the same.[64]

This section had remained essentially the same since the provision for the formation of separate schools had been first made in 1855.[65]

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[63] Trustees of Roman Catholic Separate School, Section No. 10 of the Township of Arthur v. The Municipal Corporation of the Township of Arthur, (1891), 21 O.R. 60.

[64] Statutes of Ontario, 49 Victoria, ch. 46 (1886), S. 22.

[65] Statutes of Canada, 18 Victoria, ch. 131 (1855), S. 2.

During the hearing it was established that only three of the persons convening the meeting were residents of Section 10 of the Township of Arthur. Ferguson, J. held:

> The creation of corporation is a prerogative act, and when the power to make is delegated to private persons to be exercised in a certain way, any deviation therefrom is not an exercise of the power delegated; in such a case the form is of the substance and blunder in form means invalidity.[66]

The action brought was dismissed with costs.

Teacher Training for Members of a Religious Order

In 1904 the question arose as to whether members of a religious order had to comply with the same requirements for teaching certificates as public school teachers.[67] Grattan, the plaintiff, a ratepayer and supporter of separate schools in the City of Ottawa, brought an action to restrain the Ottawa Separate School Board from entering into a contract with the Brothers of the Christian Schools for the direction and supplying of teachers for a boy's separate school for the Parish of Notre Dame. Essentially it questioned the right of the defendants to employ as teachers in their schools individuals who had not passed the examinations and who did not hold certificates of qualification

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[66] 21 O.R. 60 at p. 70.

[67] Grattan v. Ottawa Separate School Trustees (1904), 8 O.L.R. 135.

according to section 36 of the Separate Schools Act.[68]

At one time provision was made for the majority of the trustees of a separate school in townships or villages or of the board of trustees in towns or cities to have power to grant certificates of qualification to teachers of separate schools under their management.[69] In the past some of the members of the Brothers of the Christian Schools had received certificates of qualification under this regulation.

The judges ruled that such certificates granted applied only to individuals, and although they could be honored by the province for the life of the individual, certificates of this type did not apply to a body of persons and could not therefore be construed as a perpetual right for such a body of persons to have teaching authority.[70] The injunction was allowed preventing the City of Ottawa Separate School Board from entering into an agreement for a bulk supply of teachers from the Brothers of the Christian Schools. On complying with the requirements for teaching certificates individual contracts with members of the Brothers of the Christian Schools could be entered into

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[68] R.S.O. (1897), ch. 294, S. 36.

[69] Statutes of Canada, 26 Victoria, ch. 28 (1863), S. 28.

[70] 8 O.L.R. 135, at p. 139.

for teaching service.

PART II

DENOMINATIONAL RIGHTS

I. THE MANITOBA SEPARATE SCHOOL ISSUE

Extensive litigation over denominational rights in Manitoba occurred between 1890 and 1896. The Manitoba Act, 1870,[71] which admitted Manitoba to the Union, contained the following section relating to education:

> 22. In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:-
>
> (1) Nothing in any such Law shall prejudically 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:
>
> (2) An appeal shall lie to the Governor-General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education:
>
> (3) In case any such Provincial Law, as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor-General in Council or any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then, and in every such case, and as far only as the circumstances of each case

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[71] Statutes of Canada, 33 Victoria, ch. 3 (1870).

> require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.[72]

The Manitoba Legislature passed an Act in 1871 establishing a state school system.[73] The system established was similar to the dual system in operation in Quebec. This system gave Protestants and Roman Catholics considerable control over their own schools. (supra, pp. 42-43). Various amendments were made to this Act but the essential features remained the same until 1890. In 1890 legislation was passed which replaced the dual system with a single non-sectarian public school system.[74] This action of the Manitoba Legislature led to a series of appeals to the courts, which included two hearings before the Judicial Committee of the Privy Council, as well as appeals to the Governor-General in Council for remedial legislation.

The first case, Barrett v. The City of Winnipeg[75] was an application by Barrett, a ratepayer of the City of Winnipeg and a Roman Catholic, to the Manitoba Court of Queen's Bench to quash two by-laws of the Winnipeg city council. These by-laws had been passed by the council in

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[72] Statutes of Canada, 33 Victoria, ch. 3 (1870), S. 22.

[73] Statutes of Manitoba, 34 Victoria, ch. 12 (1871).

[74] Statutes of Manitoba, 53 Victoria, ch. 38 (1890).

[75] Barrett v. The City of Winnipeg (1890) 7 M.L.R. 273.

order to levy an assessment upon the real and personal property in the city, for the year 1890, for municipal purposes and for the city schools. The question at issue was whether the Manitoba Public Schools Act offended against sub-section 1 of section 22 of The Manitoba Act. If the Act did offend this sub-section then it would make the Public Schools Act of Manitoba ultra vires of the Manitoba Legislature. Killam, J. of the Manitoba Court of Queen's Bench stated:

> I think that it was quite competent for the Legislature to abolish the system of separate schools which it had established, and leave parties to recur to their voluntary denominational schools if they saw fit.[76]

The case was appealed to the Full Court. The Full Court affirmed the decision of Killam, J. (Dubuc, J. dissenting) and held:

> 1. That the Public Schools Act was intra vires of the Legislature of Manitoba.
> 2. That the Parliament of Canada intended, by inserting the words "or practice" in the Manitoba Act, that whatever any class of persons was at the time of the Union, with the assent of, or at least without objection from, the other members of the community, in the habit or custom of doing in reference to denominational schools, should continue, and should not be affected by Provincial legislation.
> 3. That any right or privilege which the Roman Catholics had at the time of the Union, with respect to denominational schools, was

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[76] Ibid., at p. 303.

> not taken away or affected by the Act, and can be exercised as fully now as before the Act.
> 4. That the schools established by the Public Schools Act, are not denominational schools, but in the strictest sense public non-sectarian schools.[77]

An appeal was then taken to the Supreme Court of Canada which held:

> Reversing the judgement of the Court below, that this act 53 Vict. ch. 38, by depriving Catholics of the right to have their children taught according to the rules of their church, and by compelling them to contribute to the support of schools to which they could not conscientiously send their children, prejudicially affected rights and privileges with respect to their schools which they had by practice in the province at the union, and was ultra vires of the legislature of the province.[78]

The Supreme Court decision was followed by an application by Logan, a resident of Winnipeg and a member of the Church of England, to quash the assessment by-laws of the City of Winnipeg, inasfar as members of the Church of England were concerned.[79] If successful it would in effect establish denominational rights for members of the Church of England. The Manitoba Court of Queen's Bench, in view of the Supreme Court decision on Barrett v. The City of Winnipeg, held:

> That the members of the Church of England are a class of persons who had at the time of the Union of Manitoba with Canada a right or

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[77](1890) 7 M.L.R. 273, at p. 274.

[78](1892) S.C.R. 374, at p. 375.

[79]Logan v. The City of Winnipeg (1891) M.L.R. 4.

> privilege with respect to denominational schools by law or practice which has been prejudicially affected by the Public Schools Act and that they have equal rights to such schools with Roman Catholics.
>
> That the fact of the applicant having acquiesced for a number of years in a system of schools by which he with other members of the Church of England was taxed for schools common to all Protestants did not operate as a waiver of this right.
>
> That "The Public Schools Act" is ultra vires.[80]

Permission was granted to appeal the ruling of the Manitoba Court of Queen's Bench in Logan v. The City of Winnipeg directly to the Judicial Committee of the Privy Council, to be heard at the same time as the City of Winnipeg v. Barrett case which was an appeal from the Supreme Court ruling on Barrett v. The City of Winnipeg. The Judicial Committee of the Privy Council stated that:

> Their Lordships are convinced that it must have been the intention of the legislature to preserve every legal right or privilege and every benefit of 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.[81]
>
> . . .
>
> But, in their Lordship's opinion, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other.[82]
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> . . .

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[80] Ibid., at p. 4.

[81] (1892) A.C. 445, at p. 453.

[82] Ibid., at p. 454.

> Notwithstanding the Public Schools Act, 1890, Roman Catholics and members of every other religious body in Manitoba are free to maintain their schools by school fees or voluntary subscriptions; they are free to conduct their schools according to their own religious tenets without molestation or interference. No child is compelled to attend a public school. No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend.... But what right or privilege is violated or prejudicially affected by the law? It is not the law that is at fault. It is owing to religious convictions which everybody must respect, and to the teaching 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.[83]

The judgement allowed the appeal of the City of Winnipeg v. Barrett and reversed the decision of the Manitoba Court of Queen's Bench in Logan v. The City of Winnipeg. The Public Schools Act, 1890 was thus declared intra vires of the Manitoba Legislature. Since "in practice" or "by law" denominational schools were not supported by public taxation or government grants at the time of the Union the Public Schools Act, 1890 did not prejudicially affect denominational rights inasfar as sub-section 1 of section 22 of The Manitoba Act.

The Manitoba school question did not end with the intra vires ruling of the Judicial Committee of the Privy

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[83] Ibid., at p. 457.

Council.[84] Sub-sections 3 and 4 of section 93 of the British North America Act, 1867 provided for an appeal to the Governor-General in Council by the minority group if any right or privilege of the minority group, in relation to education, was prejudicially affected. (supra, pp. 19-20). Section 22 of The Manitoba Act also contained a similar provision for an appeal to the Governor-General in Council. (supra, p. 41). It contained, however, no specific provision for an appeal if the school system was established after the Union. Because of the difference in wording the Federal Government had doubts concerning its legal jurisdiction in attempting remedial legislation requested by the Roman Catholic minority. To clarify its position, the Governor-General in Council submitted six questions to the Supreme Court for legal decision. The six questions submitted were:

> 1. Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by sub-section 3 of section 93 of the British North America Act, 1867, or by sub-section 2 of section 22 of the Manitoba Act, 33 Vict., ch. 3, Canada?
>
> 2. Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the sub-sections above referred to, or either of them?

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[84] According to the structure of the study the appeal to the Governor-General in Council relates to provincial developments rather than denominational rights. However, to maintain continuity in the consideration of this issue the appeal to the Governor-General in Council is being considered under the section on denominational rights.

3. Does the decision of the Judicial Committee of the Privy Council in the cases of Barrett v. The City of Winnipeg and Logan v. The City of Winnipeg dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the Union under the statutes of the Province have been interfered with by the two statutes of 1890 complained of in the said petitions and memorials?

4. Does sub-section 3 of section 93 of the British North America Act, 1867, apply to Manitoba?

5. Has His Excellency the Governor-General in Council power to make the declarations or remedial orders which are asked for in the said memorial and petitions, assuming the material facts to be as stated therein, or has His Excellency the Governor-General in Council any other jurisdiction in the premises?

6. Did the Acts of Manitoba relating to education passed prior to the session of 1890, confer on or continue to the minority 'a right or privilege in relation to education' within the meaning of sub-section 2 of section 22 of the Manitoba Act, or establish a system of separate or dissentient schools (within the meaning of sub-section 3 of section 93 of the British North America Act, 1867), if said section 93 be found applicable to Manitoba; and if so, did the two Acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor-General in Council?[85]

The judges of the Supreme Court were divided in opinion upon each of the questions submitted. They were all, however, by a majority of three judges out of five, answered in the negative.[86]

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[85](1894) S.C.R. 22, at p. 581.

[86]Ibid., pp. 651-721.

The Supreme Court decision was appealed to the Judicial Committee of the Privy Council. The Judicial Committee of the Privy Council indicated that the substantial questions submitted in the case were:

> 1. Whether any appeal lay to the Governor-General in Council from two statutes passed by the Legislature of Manitoba in the year 1890, being 53 Victoria, ch. 37, and the Public Schools Act 1890, whereby a general system of non-sectarian public education was established in the place of the denominational system that had previously existed;
>
> 2. Whether the Governor-General in Council had power to make declarations or remedial orders which were asked for in certain memorials that had been presented to him.[87]

The Judicial Committee of the Privy Council gave an affirmative answer to both questions,[88] thus reversing the decision of the Supreme Court of Canada. Their Lordships stated:

> Their Lordships have decided that the Governor-General in Council has jurisdiction, and that the appeal is well founded; but the particular course to be pursued must be determined by the authorities to whom it has been committed by the statute. It is not for this tribunal to intimate the precise steps to be taken. Their general character is sufficiently defined by the 3rd sub-section of section 22 of the Manitoba Act. 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,

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[87](1895) A.C. 202, at p. 202.

[88]Ibid., at p. 228.

> 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.[89]

The decision now as how to resolve the Manitoba School Question was passed from the Courts to the Federal and Provincial Governments. Certain rights existed for the minority and it was now the responsibility of the Federal Government to act for the restoration of these rights so as to remove the grievances upon which the appeal was founded.

A committee heard submissions about the proper course to follow and then recommended that a remedial order be served on the Government of Manitoba.[90] The order was served and commanded Manitoba to restore to the Roman Catholic minority the rights and privileges of which they had been deprived, and to modify the Acts of 1890 so far, and so far only, as might be necessary to give effect to the provisions restoring: (a) the right to maintain Roman Catholic schools in the manner provided for by the statutes repealed in 1890; (b) the right to

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[89] Ibid., at p. 228.

[90] J. S. Willison, Sir Wilfred Laurier (Toronto: Morang, 1903), Vol. II, p. 211.

share proportionately in any grant made out of public funds for the purpose of education; and (c) the right of exemption of Catholics from all payment or contribution to the support of any other schools.[91]

The Manitoba Government replied that the remedial legislation would restore separate schools with no better guarantee of efficiency than existed before 1890 and that the division of resources would only increase the problems faced by education in the province.[92] The Manitoba Government further suggested that the remedial order was issued without full information and suggested further investigation.[93] The Federal Government replied that the matter would be dealt with by the Dominion Parliament in 1896, unless previously settled.[94]

Although considerable strife existed within the Conservative Party both in relation to the proposed remedial legislation and other issues[95] the Remedial Bill was introduced into Parliament on February 11, 1896. Liberal opposition to the Bill was so great that the Bill was finally withdrawn when it became apparent that the Bill would not be passed before Parliament expired by the effluxion

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[91] Ibid., pp. 211-212.

[92] John Lewis, "Four Premiers, 1891-1896," in Adam Shortt and Arthur G. Doughty (eds.), op. cit., Vol. VI, p. 125.

[93] Ibid., pp. 125-126.

[94] Ibid., p. 126.

[95] Ibid., p. 126.

of time. The educational issue was now a matter for the electorate.

The chief issues in the ensuing election were tariffs and the school question.[96] The Conservative Party, which has lost many of its ablest leaders through death and retirement, was defeated, but surprisingly, mainly by the Quebec vote. Quebec elected only seventeen Conservatives, a party which was proposing to restore the Catholic position in Manitoba. Manitoba, on the other hand, returned a Conservative majority. Partisan views on the school issue were not, apparently, the only consideration of the electorate.

The Liberal Party under Laurier formed the new Government and soon reached a compromise solution with the Manitoba Government.

The Manitoba Legislature passed amendments[97] to the Public Schools Act to provide for: (1) religious teaching in any public school if authorized by the majority of school trustees; (2) religious teaching if requested by a petition of parents of ten or more school children in a rural school district, or by the parents of at least twenty-five children in the case of a village, town or city district; (3) religious teaching to take place between 3:30 and 4:00 in the afternoon; (4) no religious instruction

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[96] Ibid., p. 127.

[97] Statutes of Manitoba, 60 Victoria, ch. 26 (1897).

for pupils unless the parents requested attendance; (5) where ten or more of the pupils spoke any language other than English as their native language, the teaching of such pupils was to be conducted in that language and English upon a bi-lingual basis; and (6) where the average attendance of Roman Catholics in a village, town or city was twenty-five or more, the trustees, if requested by a petition of the parents, were to employ at least one Roman Catholic teacher in such school. The same provisions applied to non-Roman Catholic children. Essentially these amendments provided for the possibility of limited "separate school education" within the public school system but did not provide for separate schools.

The Federal-Provincial agreement reached, often called the Laurier-Greenway Compromise, sealed the final avenue of appeal of the Roman Catholic minority in Manitoba. The guarantees given to the minority by provincial legislation in 1897, although much less than had been expected by the Roman Catholics, were, with considerable reluctance, accepted. Manitoba retained its non-sectarian public school system. Within this system no minority right existed for the establishment of and provision for some degree of direct control over schools established specifically for the minority. Separate schools, as part of the provincial school system, ceased to exist after 1890. For this reason the Manitoba

school system is not considered beyond this point in the study.

Summary

Litigation during the 1891 to August, 1905 period established that:

(1) The Courts interpret denominational rights as those rights which any class of persons practically enjoyed at the time of the Union.

(2) An appeal lies to the Governor-General in Council for interference with privileges extended to the minority, Protestant or Roman Catholic, after Union.

(3) Denominational rights do not exist specifically for members of the Church of England but do exist insofar as they are Protestants.

(4) Decisions relating to Manitoba's and the North-West Territories' change from dual educational systems to single state controlled systems, with some provision for minority rights, would suggest that denominational rights to separate schools does not include the right to have a dual system.

(5) Appeals to the Governor-General in Council, to a large extent, failed to provide the appellants the relief sought from the alleged subsequent interference of earlier granted provincial privileges.

CHAPTER VI

DEVELOPING FORMAL STRUCTURE IN THE IMMEDIATE POST-PROVINCIAL PERIOD

PART I

PROVINCIAL DEVELOPMENTS SEPTEMBER, 1905 TO 1925

The Provinces of Alberta and Saskatchewan came into being on the first of September, 1905. The Federal Government called upon A. C. Rutherford, in Alberta, and Walter Scott, in Saskatchewan, to form interim governments until elections could be held. Both election campaigns were warmly contested and the school issue was prominent in the campaigns in both Provinces.

Both Alberta and Saskatchewan inherited an almost complete set of laws from the North-West Territories. These laws were modified and augmented to meet the changing needs of rapidly developing areas. Both Provinces inherited fairly well established centrally controlled school systems and chose in the ensuing years not to alter greatly the basic structures of these systems. Many clauses of the Acts relating to education at the present time are very similar to, if not identical with, similar clauses of the School Ordinances of the North-West Territories.

Figure 3 presents population changes in Alberta and Saskatchewan from 1901 to 1926. The rapid increase in the

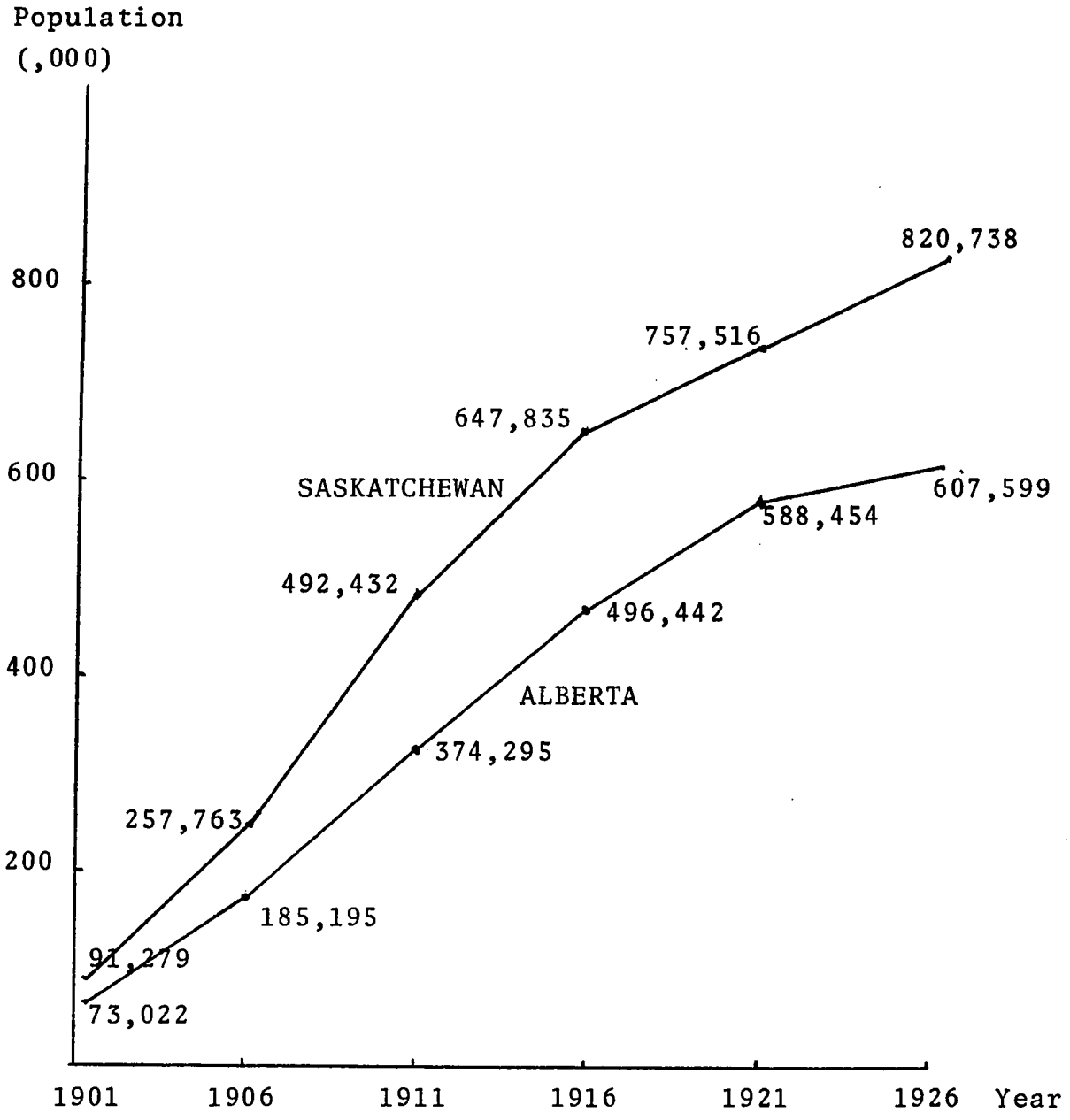

FIGURE 3

POPULATION OF ALBERTA AND SASKATCHEWAN
1901 TO 1926

Source: Census of Canada, 1931, Vol. I, pp. 239-240 for the years 1901, 1911 and 1921; Census of Prairie Provinces, 1936, Vol. I, p. 359.

population occurring after 1901 continued until 1921 when a trend developed towards a more stabilized total population.

The percentage of the population in Saskatchewan which was Roman Catholic remained at approximately nineteen per cent during the 1901 to 1926 period[1] while in Alberta, for this same period, the percentage of Roman Catholics declined from a high of twenty-two per cent in 1901 to just over seventeen per cent in 1926.[2]

I. ALBERTA

In Alberta A. C. Rutherford was called upon to form an interim government until the first election was held. During the election campaign the Liberals, under A.C. Rutherford, supported the Alberta Act while R. B. Bennet and the Conservatives attacked the Alberta Act claiming that Alberta did not have full control of its schools and land.[3] The election of November 9, 1905 resulted in an overwhelming majority for the Liberals.

Alberta inherited a set of laws from the North-West Territories and spent most of the first few years adapting

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[1]Canada, Census of Canada, 1931, Vol. I, pp. 239-240.

[2]Ibid., pp. 239-240.

[3]Edmund H. Oliver, "Saskatchewan and Alberta: General History, 1870-1912," in Adam Shortt and Arthur G. Doughty (eds.), op. cit., Vol. XIX, p. 275.

these laws to the requirements of a rapidly developing province. After the initial emphasis upon education in the first election, separate school education ceased to be a major issue; railways becoming the major political issue. Prohibition, women suffrage and redistribution of legislative seats developed into minor issues in the ensuing years.

Two legislative enactments passed in the 1905-1925 period have relevance to separate schools. These were for the more equitable sharing of company taxes and the provision for larger units of school administration.

Sharing of Company Taxes

Prior to 1910 a company could assign part of its assessment for separate school purposes provided that the ratio of the share assigned compared to the total assessment did not exceed the ratio of shares held by Roman Catholics as compared to the total shares of the company.[4] It became apparent that many companies either would not assign part of their assessment for separate school purposes or were unable to determine what proportion of shares were held by Roman Catholics. Legislation was passed in 1910 permitting a separate school board to claim part of the assessment of companies who had not chosen to assign part

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[4]Ordinances of the North-West Territories, No. 2 (1896), S. 125.

of their assessment to the separate school.[5] The amount that could be claimed was based on the ratio that the assessment of persons, other than companies, for separate school purposes bore to the assessment of persons, other than companies, for public school purposes.[6] This provision still remains in force. In practice, however, it has been modified by the School Foundation Program.

Consolidated School Districts

Legislation in 1913 permitted the establishment of larger units of administration, called consolidated school districts, by the union of two or more existing school districts.[7] Districts were to take the initiative in requesting the formation of a consolidated school district, but the approval for the actual formation of a consolidated school district was a discretionary power of the Minister of Education.[8] In 1919 consolidated school districts were regulated as to size, with the size established at no less than thirty square miles nor greater than eighty square miles.[9]

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[5] Statutes of Alberta, 1 George V, ch. 6 (1910), S. 55.

[6] Ibid., S. 55.

[7] Statutes of Alberta, 4 George V, ch. 19 (1913), S. 40a.

[8] Ibid., S. 40a.

[9] Statutes of Alberta, 4 George V, ch. 19 (1913), S. 40a.

Separate school districts were not excluded from this provision. Since by 1923 there were only twenty-six separate school districts,[10] with most of these being in cities, towns or villages, it was the geographic separation of separate school districts that made this provision not applicable inasfar as separate school districts were concerned.

Summary

(1) Provision for more equitable sharing of company taxes between public and separate school districts was introduced in 1910.

(2) Separate school districts were not excluded from the provision for the formation of consolidated school districts.

II. SASKATCHEWAN

The Provisional District of Saskatchewan became the Province of Saskatchewan on September 1, 1905. Although F. W. G. Haultain had been Premier of the North-West Territories for a number of years he was not asked to form an interim government pending the first election. Walter Scott, a Liberal, was asked by the Dominion Government to do so.

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[10] Alberta, Eighteenth Annual Report of the Department of Education of the Province of Alberta 1923 (Edmonton: King's Printer, 1924), p. 122.

Haultain formed a Provincial Rights Party and campaigned vigorously on the theme that Parliament had overstepped its authority in the matter of education, that there should be provincial control of the public domain and that the Canadian Pacific Railway should not be exempt from taxation.[11] The Liberals under Scott, accepted and supported the Saskatchewan Act.[12] Archbishop Langevin participated in the campaign by a letter to the electors asking them to elect Scott as Premier.[13] The campaign was lively and, at times, heated. The election gave Scott's Liberal Party a majority of eight which marked the start of a long period of Liberal domination of the Saskatchewan political scene -- a domination which continued until 1929.

Saskatchewan inherited a set of laws from the North-West Territories and spent most of the first few years adapting these laws to the requirements of a rapidly developing province. After the initial emphasis upon education in the first election, separate school education did not become a major political issue in future elections.

During the 1905 to 1925 period several enactments of the Provincial Legislative Assembly as well as a number

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[11] Edmund H. Oliver, op. cit., p. 271.

[12] Ibid., p. 271.

[13] Ibid., p. 271.

of court decisions had significance for the formation and clarification of the formal structure of separate schools in the Province.

Secondary Education

The Secondary Education Act was passed in 1907.[14] This Act contained no mention of separate schools and this was used as the basis for limiting separate school education to the elementary level, inasfar as the provincial school system was concerned.

The Secondary Education Act created in Saskatchewan a situation similar to that which already existed in Ontario. Legislation in Ontario in 1871[15] made provision for the replacement of grammar schools with high schools. No mention was made in this Act of the privilege of high school instruction being extended to separate schools. Legislation in Ontario in 1902 clarified the conditions under which a separate school could offer high school instruction. Section 2-(1) of the pertinent Act stated:

> 2-(1) The Separate School Board in any municipality or section in which there is no high school shall have power to establish in connection with the schools over which it has jurisdiction, such courses of study in addition to the courses already provided for the fifth form as may be approved by the regulations of the Education Department....[16]

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[14] Statutes of Saskatchewan, 7 Edward VII, ch. 25 (1907).

[15] Statutes of Ontario, 34 Victoria, ch. 33 (1871).

[16] Statutes of Ontario, 2 Edward VII, ch. 41 (1902), S. 2.

An appeal against this restriction took place in Ontario in 1927,[17] but the eventual ruling of the Judicial Committee of the Privy Council was that the legislation in question was *intra vires* of the Legislature of Ontario.[18] (*infra*, pp. 148-154). The Ontario ruling has some relevance to the Saskatchewan situation.

Definition of Separate School Supporters

The *School Ordinances* of the North-West Territories contained no provision for an individual of the same faith as the minority in a district, in which a separate school had been established, of declaring his support for the public school if he so desired. This situation continued in force after the creation of the Province of Saskatchewan. *The Town Act*, however, contained the following provision:

> The assessor shall accept the statement of any ratepayer, or a statement made on behalf of any ratepayer by his written authority that he is a supporter of Public Schools or Separate Schools as the case may be, and such statement shall be taken as *prima facie* evidence for entering opposite the name of such persons the letters PSS (public school supporter) or SSS (separate school supporter) as the case may be....[19]

This provision was similar to that appearing in *The Roman Catholic Separate Schools Act* of Upper Canada which permitted

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[17] *Roman Catholic Separate School Trustees for Tiny vs. Rex*, 59 O.L.R., 96.

[18] 1928 A.C. 363, at p. 364.

[19] *Revised Statutes of the Province of Saskatchewan*, 9 Edward VII, ch. 25 (1909), S. 293.

a Roman Catholic to declare support for either the public or separate school.[20]

In 1911 in the Town of Vonda, where a separate school district existed, a group of Roman Catholic ratepayers declared to the town assessor that they were public school supporters, and the assessor entered them as such on the assessment role. The Town of Vonda carried an appeal to the District Court, claiming that all ratepayers of the Roman Catholic faith within the district should be separate school supporters. Judge McLorg based his decision on the wording of The Town Act and ruled:

> ... this section appears to me to contemplate that the option of supporting either school rests with the ratepayer.... It would have been the easiest thing in the world had the legislature intended to make a provision that Roman Catholics should be assessed to the Separate Schools and Protestants to the Public Schools or vice versa. It could have been expressed in a few words and I think were I to give effect to the appellants contention I should be legislating and legislating in a most drastic manner....[21]

This dismissal of the appeal left the Roman Catholic ratepayers of Vonda free to support the public school if they so desired.

The School Act was amended in 1913 and made the

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[20] Statutes of Canada, 26 Victoria, ch. 5 (1863), S. 14.

[21] The full decision is quoted in C. M. Weir, op. cit., pp.274f.

following provision for separate school supporters:

> 3. Provided that in the case of any separate school district having heretofore been or hereafter being established within which a separate school is maintained in operation the ratepayers of the religious faith of the minority supporting it shall hereafter be assessable for separate school purposes only and the ratepayers of the religious faith of the majority constituting the public school district within which such separate school district is established shall be assessable for public school purposes only.[22]

The above amendment was, however, withdrawn in 1915.[23]

In Regina, in 1917, Bartz, a Roman Catholic, attempted to be placed on the assessment role as a public school supporter. There was a separate school district in Regina. Bartz contended that the Roman Catholic minority in Regina had petitioned and subsequently established a separate school in Regina, but since he had neither signed the petition nor voted in favor of the erection of the separate school district he should not have to support the separate school. Lamont, J. held:

> ... that in a district in which a separate school has been established by a minority, either Protestant or Roman Catholic, the ratepayers of the religious faith of that minority are under obligation to be rated as supporters of the separate school.[24]

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[22] Statutes of Saskatchewan, 3 George V, ch. 35 (1912-13), S. 3.

[23] Statutes of Saskatchewan, 5 George V, ch. 23 (1915), S. 237.

[24] McCarthy vs. the City of Regina and the Regina Board of P. S. Trustees (Bartz Case), 32 D.L.R. 741, at p. 753.

In the companion case heard by Judge Lamont at the time of the Bartz case, Neida, a Protestant, wished to support the separate school. Judge Lamont ruled:

> The admission that Neida is not a Roman Catholic, in my opinion, makes it perfectly clear that he cannot escape taxation as a public school supporter. He is not a member of the minority of the ratepayers in the Regina School District who established a separate school therein, and he is consequently not entitled to the immunity from taxation for general school purposes which is granted by Sec. 39 of the School Act to the members of that minority.[25]

The question relating to the right to support the separate school in Regina was carried to the Judicial Committee of the Privy Council in McCarthy vs. the City of Regina et al. Lord Dunedin stated:

> The case accordingly raises the straightforward issue, can a person of the faith of the minority, who have established a separate school district, demand that he should be entered as a public school supporter? The question depends entirely on the statutory provisions which are contained in the three Acts, The School Act, The Assessment Act, and The City Act (1915) (Sask. c. 16).... The scheme of the Acts seems to their Lordships to be this. There is a power given to the community after certain preliminary steps to erect a public school district. Whether there is to be such a district or not is decided by vote, and by the result of that vote the majority binds the minority. If the district is erected and nothing more is done, then all persons holding property in the district are assessable for school rates.... There is, however, a power given to the minority, which

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[25] Ibid., (Neida Case), at p. 755.

> means the members of the religious faith, be it Protestant or Catholic, who form the minority (for no other faiths have in this matter official recognition) to establish a separate school district with a separate school of their own religious complexion. In such a case the ratepayers establishing such a district are only liable for their self-imposed rate and not for public school rates.... It is impossible, their Lordships think, to read the words in S. 39 'ratepayers establishing a separate school' as applicable only to the majority of the minority.... For the minority constituency to come to a common sense determination as to whether they shall or shall not establish a separate school it is necessary that they shall calculate what assessments are available. If the religious test is taken, that is simple enough, but if the minority constituency is liable to be depleted by some of its members leaving its ranks and enrolling themselves as public school supporters, it is evident that all calculations would be upset.[26]

The status of members of the Greek Catholic Church was decided in the Pander vs. the Town of Melville case.[27] The town of Melville had denied W. Roschko the right to be classified as a public school supporter. In the suit brought by Pander the Court held:

> ... the Ruthenian Greek Catholic Church, as distinguished from the Greek Orthodox Church, which is admittedly not a branch of the Roman Catholic Church, is in communion with Rome and has its bishop and his successors in office appointed by the Pope of Rome, and that William Roschko is a member of such church, and therefore comes within the class of ratepayers of the Roman Catholic religious faith and should be assessed as a separate school supporter.[28]

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[26] 1918 A.C. 911, at pp. 911-914.

[27] 1922 3 W.W.R. 53.

[28] Ibid., at p. 58.

Sharing of Company Taxes

Legislation was passed in 1913 which permitted a separate school board to apply for and receive -- if the company failed to exercise its privilege of assigning part of its assessment to the separate school[29] -- a share of the assessment of a company.[30] The share of the assessment of the company was to be in proportion to the assessed value of property of individuals who were supporters of separate schools to that of the assessed value of property of individuals who were supporters of public schools.[31]

Prior to this legislation a company could allot part of its assessment for separate school purposes provided that the ratio of the share allotted to the total assessment did not exceed the ratio of the shares in the company held by Catholics to the total shares of the company.[32] It had become apparent that companies, for the most part, either could not or would not allot part of their assessment for separate school purposes.

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[29] Statutes of Saskatchewan, 4 George V, ch. 50 (1913), S. 93.

[30] Ibid., s. 93b.

[31] Ibid., s. 93b.

[32] Revised Statutes of the Province of Saskatchewan, 9 Edward VII, ch. 101 (1909), S. 93.

The enactment, providing for separate school boards requesting and receiving a share of company assessment, was challenged by the Regina Public School Board.[33] The Saskatchewan Supreme Court[34] and the Saskatchewan Court of Appeal[35] held that the Act was intra vires of the province. It was held that although the legislation was prejudicial to the majority, the constitutional prohibition was against legislation prejudicially affecting the minority and that beneficially affecting the minority was not grounds for declaring the Act ultra vires of provincial authorities.[36] The Supreme Court of Canada reversed the judgement,[37] declaring the legislation ultra vires of the province, but this decision was based upon the construction of the Act.[38] In 1915 the Saskatchewan Legislature rephrased the section,[39] to avoid the previous ambiguity, and the Act so altered was held to be intra vires of the province.[40]

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[33] Regina Public School District vs. Gratton Separate School District, (1914) 6 W.W.R. 1088.

[34] Ibid., at p. 1088.

[35] 1914 7 W.W.R. 7.

[36] Ibid., at p. 11.

[37] 50 S.C.R. 589.

[38] Ibid., at p. 607.

[39] Statutes of Saskatchewan, 6 George V, ch. 25 (1915) S. 43.

[40] 1919 3 W.W.R. 769.

Summary

(1) Provision for the more equitable sharing of company taxes took place during 1914-15.

(2) Religion is the determinant for separate school support. The individual has no option for declaring support.

(3) Members of the Greek Catholic Church are considered as Roman Catholics insofar as The School Act is concerned.

PART II

DENOMINATIONAL RIGHTS

I. THE OTTAWA SEPARATE SCHOOL BOARD CASE

Extensive litigation over denominational rights occurred in Ontario during the 1905 to 1925 period. The majority of cases were related to the refusal of the Ottawa Separate School Board to comply with a Regulation of the Department of Education.[41] The Regulation severely limited the use of French as the medium of instruction in all provincially supported schools. The now famous Circular of Instruction, No. 17 of 1913, issued

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[41]Litigation on this issue is categorized into three series of cases with one series having two aspects to it. One series of cases was not necessarily completed before another series of cases started, however, for the purposes of clarity each series will be considered in its entirety before the consideration of the following series.

by the Department of Education, was as follows:

ENGLISH-FRENCH AND SEPARATE SCHOOLS CIRCULAR
OF INSTRUCTIONS
(August, 1913)

1. There are only two classes of primary schools in Ontario -- public schools and separate schools; but, for convenience of reference, the term English-French is applied to those schools of each class annually designated by the Minister for inspection as provided in 5 below and in which French is a language of instruction and communication as limited in 3(1) below.

2. The Regulations and courses of study prescribed for the Public Schools, which are not inconsistent with the provisions of this circular, shall hereafter be in force in the English-French schools -- public and separate -- with the following modifications: the provisions for religious instruction and exercises in public schools shall not apply to Separate Schools, and Separate School Boards may substitute the Canadian Catholic readers for the Ontario Public School readers.

3. Subject, in the case of each school, to the direction and approval of the chief inspector, the following modifications shall also be made in the course of study of the public and separate schools:-

(1) Where necessary in the case of French-speaking pupils, French may be used as the language of instruction and communication; but such use of French shall not be continued beyond Form I, excepting that, on the approval of the Chief Inspector, it may also be used as the language of instruction and communication in the case of pupils beyond Form I who are unable to speak and understand the English language.

(2) In the case of French-speaking pupils who are unable to speak and understand the English language well enough for the purposes of instruction and communication, the following provision is hereby made:-

(a) As soon as the pupil enters the school he shall begin the study and use of the English language.

NOTE: A manual of method for use in teaching English to French-speaking pupils has been distributed amongst the schools by the Department of Education. This manual should be used in all schools. Where

necessary, copies may be procured on application to the Deputy-Minister.

(b) As soon as the pupil has acquired sufficient facility in the use of the English language, he shall take up in that language the course of study as prescribed for the Public and Separate Schools.

4. In schools where French has hitherto been a subject of study, the Public or Separate School Board, as the case may be, may provide, under the following conditions, for instruction in French reading, grammar, and composition in Forms I to IV [See also provision for Form V in Public School Regulation 14 (5)] in addition to the subjects prescribed for the public and separate schools:

(1) Such instruction in French may be taken only by pupils whose parents or guardians direct that they shall do so, and may, notwithstanding 3(1) above be given in the French language.

(2) Such instruction in French shall not interfere with the adequacy of the instruction in English, and the provision for such instruction in French in the time-table of the school shall be subject to the approval and direction of the chief inspector and shall not in any day exceed one hour in each class-room, except where the time is increased upon the order of the chief inspector.

(3) Where, as permitted above, French is a subject of study in a public or a separate school, the textbooks in use during the school year of 1911-1912, in French reading, grammar, and composition, remain authorized for use during the school year of 1913-1914.

5. For the purpose of inspection, the English-French schools shall be organized into divisions, each division being under the charge of two inspectors.

6. (1) In conducting the work of inspection, the inspectors of a division shall alternately visit each school therein, unless otherwise directed by the chief inspector.

(2) Each inspector shall pay at least 220 half-day visits during the year, in accordance with the provisions of Public School Regulation 20(2), and it shall be the duty of each inspector to pay as many more visits than the minimum as the circumstances may demand.

7. Each two inspectors of a division shall reside at such centre or centres as may be designated by the Minister.

8. Frequently during the year the two inspectors of a division shall meet together in order to discuss questions that may arise in their work and to standardize the system of inspection. For the same purposes all the inspectors shall meet at such times and places as may be designated by the Minister.

9. Each inspector shall report upon the general condition of all the classes, on the form prescribed by the Minister. This report shall be subject to the approval of the Minister upon the report of the chief inspector.

10. If either of the inspectors of a division finds that any Regulation or Instruction of the Department is not being properly carried out, he shall forthwith report specially on such cases to the Minister.

11. Each inspector shall forward a copy of his ordinary inspectional report on the prescribed official form to the Minister within one week after the visit.

12. The chief inspector of public and separate schools shall be the supervising inspector of the English-French schools.

13. (1) No teacher shall be granted a certificate to teach in English-French schools who does not possess a knowledge of the English language sufficient to teach the public and separate school course.

(2) No teacher shall remain in office or be appointed in any of said schools who does not possess a knowledge of the English language sufficient to teach the public and separate school course of study.

14. The legislative grants to the English-French schools shall be made on the same conditions as are the grants to the other public and separate schools.

15. On due application from the School Board and on the report of all the inspectors approved by the chief inspector, and English-French school which is

> unable to provide the salary necessary to secure a teacher with the aforesaid qualifications shall receive a special grant in order to assist it in doing so.
>
> Department of Education, August, 1913.[42]

The Ottawa Separate School Board failed to have its schools comply with the Regulation. R. Mackell -- an English-speaking Roman Catholic, supporter and trustee of the Ottawa Separate School Board -- representing the minority of trustees of the Ottawa Separate School Board and some other supporters of the separate schools started, on the 29th of April, 1914, an action against the Ottawa Separate School Board.[43] The action asked for an injunction which would prevent the Ottawa Separate School Board from continuing to function as long as they refused to comply with the Regulations of the Department of Education.[44] The action also asked for a mandatory order requiring the defendants to conform to and enforce in the schools under their jurisdiction the said Regulations.[45] An interim injunction was granted on April 29, 1914.[46]

The trial began on June 25, 1914 at which time the interim injunction was continued.[47] The judgement was

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[42] 32 O.L.R. 252, at pp. 252-254.

[43] Ibid., at p. 245.

[44] Ibid., at p. 246.

[45] Ibid., at p. 246.

[46] Ibid., at p. 247.

[47] Ibid., at p. 247.

given on September 11, 1914 and upheld the validity of the Department of Education Regulation.[48] Since the Ottawa Separate School Board had failed to comply with the injunction that had been issued and also failed to open the separate schools in Ottawa on September 1, 1914 a mandatory order was issued on September 11 which ordered:

> ... for schools to open not later than Wednesday the 16th September, 1914, with duly qualified teachers, and keep the schools open and properly equipped and conduct them according to law until the final determination of the action.[49]

The Board of the Ottawa Separate Schools refused to obey the mandatory order and appealed the judgement to the Supreme Court of Ontario, Appellate Division. The Judgement was given on the 12th of July, 1915 and affirmed the ruling of the lower court.[50]

The Ottawa Separate School Board then appealed the case to the Judicial Committee of the Privy Council.[51] The judgement of their Lordships was given on the 2nd of November, 1916. Some of the significant parts of the judgement were:

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[48] Ibid., at p. 251.

[49] Ibid., at p. 251.

[50] 34 O.L.R. 335.

[51] 1917 A.C. 62.

> Section 93 ... Provision 1 is in these terms: "Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union."[52]
>
> . . .
>
> There is no question that the English-French Roman Catholic separate schools in Ottawa are denominational schools to which the provision applies, and it has been decided by this Board that the right or privilege reserved in the provision is a legal right or privilege, and does not include any practice, instruction, or privilege of a voluntary character which at the date of the passing of the Act might be in operation: City of Winnipeg v. Barrett. Further the class of persons to whom the right or privilege is reserved must, in their Lordship's opinion, be a class of persons determined according to religious belief, and not according to race or language. In relation to denominational teaching, Roman Catholics together form within the meaning of the section a class of persons, and that class cannot be subdivided into other classes by consideration of the language of the people by whom that faith is held.[53]
>
> . . .
>
> The right to manage does not involve the right of determining the language to be used in the schools. Indeed, the right to manage must be subject to the regulations under which all of the schools must be carried on; and there is nothing in the Act to negative the view that those regulations might include the provisions to which the appellants object.[54]
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> . . .
>
> ..., their Lordships are of opinion that, on the construction of the Acts and documents before them, the regulations impeached were duly made

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[52] Ibid., at p. 68.

[53] Ibid., at p. 69.

[54] Ibid., at p. 74.

> and approved under the authority of the Department of Education and became binding according to the terms of those provisions on the appellants and the schools under their control, and they will humbly advise His Majesty to dismiss this appeal.[55]

On the failure of the Ottawa Separate School Board to open its schools in September, 1914 (supra, p.125) the Legislature of Ontario passed an Act[56] to make provision, pending a solution of the difficulty, for the schooling of the children affected by the controversy. The part of the Act authorizing the take-over of the schools was as follows:

> 3. If, in the opinion of the Minister of Education, the said Board fails to comply with any provisions of this Act, he shall have power, with the approval of the Lieutenant-Governor in Council -
>
> (a) To appoint a commission of not less than three nor more than seven persons;
>
> (b) To vest in and confer upon any commission so appointed, all or any of the powers possessed by the Board under statute or otherwise, including the right to deal with and administer the rights, properties and assets of the Board and all such other powers as he may think proper and expedient to carry out the object and intent of this Act;
>
> (c) To suspend or withdraw all or any part of the rights, powers and privileges of the Board, and whenever he may think desirable to restore the whole or any part of the same and to revest the same in the Board;
>
> (d) To make such use or disposition of any legislative grant that would be payable to the said Board on the warrant of any inspector for the use of said schools or any of them as the Minister may in writing direct.[57]

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[55] Ibid., at p. 75.

[56] Statutes of Ontario, 5 George V, ch. 45 (1915).

[57] Ibid., S. 3.

The Act was assented to on April 8, 1915. The Commission was appointed on July 20, 1915 and on July 23, 1915, acting under an order-in-council, began to exercise the rights of the Board.[58]

The Ottawa Separate School Board started an action on July 28, 1915 against the City of Ottawa and the Quebec Bank.[59] The action was aimed at having the Act, under which the Commission was appointed, declared ultra vires of the Legislature of Ontario. The judgement given on November 18, 1915 dismissed the action.[60]

An appeal was then carried to the Ontario Supreme Court, Appellate Division. The judgement dismissed the appeal and also declared the Act intra vires of the Legislature of Ontario.[61]

A further appeal was then taken directly to the Judicial Committee of the Privy Council.[62] The judgement, delivered on November 2, 1916, upheld the appeal and declared the Act in question ultra vires of the Province of Ontario. Some of the important points made in the judgement were:

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[58] 34 O.L.R. 624, at p. 625.

[59] 34 O.L.R. 624.

[60] Ibid., at p. 626.

[61] 36 O.L.R. 624.

[62] 1917 A.C. 76.

> It is possible that an interference with a legal right or privilege may not in all cases imply that such right or privilege has been prejudicially affected. It is not necessary to consider such a possibility, and this question does not arise for decision in the appeal. The case before their Lordships is not that of a mere interference with a right or privilege, but of a provision which enables it to be withdrawn *in toto* for an indefinite time. Their Lordships have no doubt that the power so given would be exercised with wisdom and moderation, but it is the creation of the power and not its exercise that is subject to objection, and the objection would not be removed even though the powers conferred were never exercised at all. To give authority to withdraw a right or privilege under these conditions necessarily operates to the prejudice of the class of persons affected by the withdrawal.[63]
>
> . . .
>
> Their Lordships do not anticipate that the appellants will fail to obey the law now that it has been finally determined. They cannot, however, assent to the proposition that the appellant board are not liable to process if they refuse to perform their statutory obligations, or that in this respect they are in a different position from other boards or bodies of trustees entrusted with the performance of public duties which they fail or decline to perform.
>
> From what has been said it appears that in their Lordship's view the Act as framed is *ultra vires*....[64]

The Commission handed back the schools to the Ottawa Separate School Board immediately after the decision of the Judicial Committee of the Privy Council was announced.

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[63] *Ibid.*, at pp. 81-82.

[64] *Ibid.*, at p. 83.

The Legislature of Ontario, in view of the dictum of the Judicial Committee of the Privy Council, passed two Acts in 1917 relating to the Ottawa Separate School problem. The first Act provided the means for "temporarily interfering with a privilege but not withdrawing the privilege," if the Ottawa Separate School Board failed to comply with the Regulations of the Department of Education.[65] The second Act gave validity to the expenditure of the Commission when it was in charge of the Ottawa Separate Schools.[66] The two Acts were assented to on April 12, 1917.

The first Act was submitted to the Supreme Court of Ontario, Appellate Division, by the Lieutenant-Governor in Council for a ruling.[67] The judgement, delivered on December 10, 1917, declared the legislation intra vires.[68] The key part of the judgement was:

> The Lord Chancellor said (1917) A.C. at pp. 81,82:- "The case before their Lordships is not that of a mere interference with a right or privilege, but of a provision which enables it to be withdrawn in toto for an indefinite time. Their Lordships have no doubt that the power so given would be exercised with wisdom and moderation, but it is the creation of the power and not its exercise that is subject to objection, and the objection would not be removed even though the powers conferred were never exercised at all. To give authority to withdraw a right or privilege

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[65] Statutes of Ontario, 7 George V, ch. 59 (1917).

[66] Statutes of Ontario, 7 George V, ch. 60 (1917).

[67] 41 O.L.R. 259.

[68] Ibid., at p. 275.

> under these conditions necessarily operates to the prejudice of the class of persons affected by the withdrawal."
>
> This I take to be the key-note of the judgement; and, if the objectionable feature of the legislation of 5 Geo. V. ch. 45, referred to by the Lord Chancellor, is not present in the Act now in question, in my opinion it is not ultra vires.
>
> The important differences between the two Acts are: that the Act of 1915 gave to the Minister of Education, if in his opinion there was a failure to comply with the provisions of the Act, having obtained the approval of the Lieutenant-Governor in Council, the power to appoint a Commission and to vest in it the powers of the School Board, including the right to deal with and administer its rights, properties, and assets, and to suspend or withdraw all or any of the rights, powers, and privileges of the Board, and whenever he might think it desirable to do so to restore them or any part of them and revest them in the Board; while the Act in question gives the right to appoint a commission only when the Board, in fact neglects or refuses to conduct the schools under its control according to law; and the provision as to the restoration to the Board of the conduct and management of the schools is, that they shall be restored by the Minister of Education whenever it shall appear that the schools will be conducted by the Board according to law.[69]
>
> . . .
>
> The provisions of the Act in question are not, in my opinion, open to the objection which was held fatal to the validity of the earlier Act, but are intra vires the Legislature by which they are enacted.[70]

The Ottawa Separate School Board did not challenge the above ruling.

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[69] 41 O.L.R. 259, at pp. 264-265.

[70] Ibid., at p. 266.

The Ottawa Separate School Board, however, then launched an action against the Quebec Bank to recover money spent, from the account of the Ottawa Separate School Board, by the Commission during the period when the Commission was in charge of the separate schools.[71] In order to be successful the Act passed giving validity to the expenditures of the Commission would have to be declared ultra vires. The judgement delivered on January 14, 1918 declared the Act to be intra vires.[72] An appeal carried to the Supreme Court of Ontario, Appellate Division, resulted in a similar ruling on October 24, 1918.[73]

The case was then appealed to the Judicial Committee of the Privy Council. The appeal was heard on July 28 and 29, 1919 and the judgement was delivered on the 23rd of October.[74] Their Lordships' judgement was, in part:

> The present case is what it is to be hoped is the last chapter of the history of the unfortunate disagreement between the Board of the Roman Catholic Schools and the educational authority of the City of Ottawa.[75]
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> . . .
>
> Their Lordships ... agree with the unanimous judgement of the Supreme Court that the statute is not ultra vires and that the actions fall to be dismissed. They fail to see that the right

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[71] 41 O.L.R. 594.

[72] Ibid., at p. 595.

[73] 43 O.L.R. 637, at p. 639.

[74] 1920 A.C. 230.

[75] Ibid., at p. 231.

> of the appellants has been in any way prejudicially affected by the statute. The only way in which they were prejudicially affected was by the action of the former statute, which extruded them from the management of the schools. Had they been left in management they would necessarily have spent this very money for the same purposes. It cannot be said to create a prejudice to affirm that the money was rightly spent for the purposes for what it was destined.[76]

The Ottawa Separate School Board continued its refusal to comply with Regulation 17 until 1927. No attempt was made to apply powers granted to the Minister of Education under 7 George V, ch. 59 (1917); instead no provincial grants, to which the Ottawa Separate School Board would have been entitled if it had complied with the Regulation, were given to the said Board. In 1927 arrangements were worked out to care for the issue involved.

II. THE MUNICIPAL BY-LAW ISSUE

The question raised by this issue was whether by-laws passed by the City Council of Toronto, restricting the use of land in a certain area to buildings for residential purposes, were enforceable in respect to school buildings erected by the Roman Catholic Separate School Board of Toronto. The Separate School Board had purchased, under its statutory powers, the restricted land for the

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[76] Ibid., at p. 238.

purpose of erecting school buildings.

The application by the Separate School Board of Toronto for a mandamus requiring the city architect to grant a permit for a school building was denied[77] and the validity of the by-laws were upheld.[78] The appeal to the Supreme Court of Ontario, Appellate Division, affirmed the lower Court's rulings.[79] The case was then carried to the Supreme Court of Canada which reversed the decision of the lower courts and declared that the by-laws were not enforceable in respect of the school buildings of the Separate School Board of Toronto.[80]

The City of Toronto Corporation then took an appeal to the Judicial Committee of the Privy Council.[81] Various arguments were presented as to why the by-laws should be unenforceable in respect to the Separate School Board of Toronto. The one germane to this study was founded on section 93 of the British North America Act, 1867 which enacts that a Provincial Legislature may exclusively make laws in relation to education, but provides -- among other things -- that "nothing in any such law shall prejudicially

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[77] 20 O.W.N. 27.

[78] 22 O.W.N. 518.

[79] 54 O.L.R. 224.

[80] 1924 3 D.L.R. 113.

[81] 1926 A.C. 81.

affect any right or privilege with respect to denominational schools which any class of persons had by law in the Province at the Union."[82] In ruling on this argument their Lordships stated:

> In their Lordships' opinion this provision has no application to the present case. It is a restriction upon the power of the Province to make laws in relation to education, but does not prevent the provisions of the Municipal Act with reference to building, and other matters relating to the health and convenience of the population from applying to denominational schools as well as to other buildings.[83]

The other arguments were also found to be such that the appeal was allowed making the by-laws in question enforceable by the City of Toronto.[84]

Summary

In all ten provinces the rights to sectarian education are protected by section 93 of the British North America Act, 1867, or by provisions very similar to those found in the above section. General principles abstracted from litigation relating to section 93 of the British North America Act, 1867 are relevant to provinces other than the one specifically named in the litigation.

Litigation in Ontario on denominational rights established:

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[82] Statutes of Great Britain, 30-31 Victoria, ch. 3 (1867), S. 93(1).

[83] 1925 3 D.L.R. 880, at p. 886.

[84] Ibid., at p. 885.

(1) "Class of persons" in sub-section 1 of section 93 of the British North America Act, 1867 refers to a class based on religion and this class cannot be further divided. French, as a medium of instruction, cannot be claimed as a denominational right of the minority.

(2) Denominational rights do not extend to exemption from regulations, relating to buildings, health and convenience of the population, passed by other governmental bodies.

(3) A provincial legislature has no authority to withdraw the administrative powers of a separate school board. A provincial legislature may, however, pass legislation for the "temporary interference" in the administrative powers of recalcitrant separate school boards who fail to comply with legitimately exercised powers of the provincial authorities. The provincial authorities have similar powers over both public and separate boards for the enforcement of legitimate provincial policies.

CHAPTER VII

DEVELOPING FORMAL STRUCTURE DURING THE 1926 TO 1939 PERIOD

PART I

PROVINCIAL DEVELOPMENTS 1926 TO 1939

The improvement of the economic situation, after the depression of 1920-21, continued until late 1929.[1] Towards the end of 1929 prosperity was common to nearly all, optimism was high and there was a high degree of speculative investments. The collapse of the stock market in October, 1929 marked the start of a major world-wide depression. The depression of the 1930's was not only unusually severe but also prolonged. In the depth of the depression the suitability of the economic policies practiced by countries began to be questioned.[2] A growing reluctance to accept as natural the cyclic periods of prosperity and depression developed in the country.

The small units of school administration encountered increasing financial difficulties as the

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[1] Roberta Briggs Kerr, A Historical Atlas of Canada (Toronto: Thomas Nelson and Sons (Canada) Limited, 1960), p. 92.

[2] The depression saw the rise of Keynsian Economics which suggested that depressions and inflationary trends could be controlled by strong central economic policies of countries.

depression continued and deepened. The abandonment of some small farms and a general inability of many to pay property taxation created serious problems for many units of school administration. The economic problems of the small units of school administration, particularly the small rural units, became a source of concern for provincial authorities.

The dramatic increase in the population of Alberta and Saskatchewan came to an end during the 1926 to 1939 period. During the latter part of this period the population of Saskatchewan actually declined. Figure 4 presents information on the population trends in Alberta and Saskatchewan for the 1926 to 1941 period.

I. ALBERTA

No litigation pertaining to the formal structure of separate schools occurred during the 1926 to 1939 period, neither was there any significant legislation, specifically for separate schools, passed during this period of time. Legislation was passed, however, for the formation of large units of rural school administration. These large units, called divisions, were to be formed from a number of rural public school districts. No provision was made for rural separate school districts to take advantage of this new unit of rural school administration.

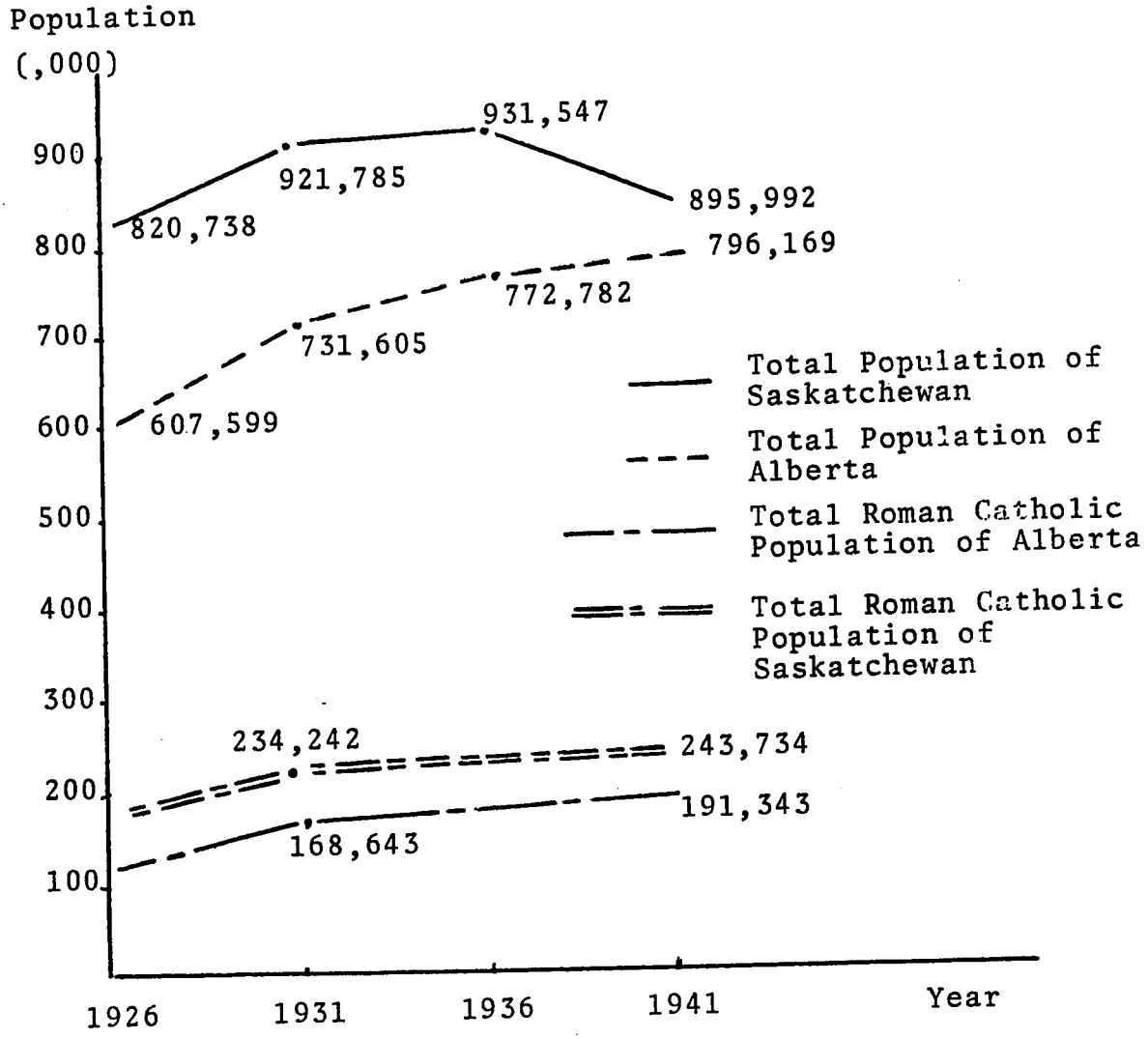

FIGURE 4

POPULATION OF ALBERTA AND SASKATCHEWAN 1926 TO 1941

Source: Census of Canada, 1961 Bulletin 1.2-6, p. 44 and Census of The Prairie Provinces, 1946, pp. 171, 395.

School Divisions

Pre-school division conditions. Drought conditions in the prairie region of Alberta and a seriously depressed world demand for primary products existed during the 1930's. Crop failures and low prices made the collection of taxes and the financing of local levels of government extremely difficult. Whereas in 1929 a surplus of over two million dollars existed for all school districts,[3] by the end of 1930 liabilities for teachers' salaries alone exceeded 125,000 dollars.[4] The Annual Report of the Department of Education for the year 1932 noted that "teachers have shared the burdens by accepting drastic salary reductions. In not a few cases salaries are months in arrears."[5]

The seriousness of the economic problems facing rural education was recognized and during 1934 a Legislative Committee, under the Minister of Education, was formed to study rural education.[6]

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[3]Alberta, Twenty-Fourth Annual Report of the Department of Education of the Province of Alberta 1929 (Edmonton: King's Printer, 1930), p. 93.

[4]Alberta, Twenty-Fifth Annual Report of the Department of Education of the Province of Alberta 1930 (Edmonton: King's Printer, 1931), p. 114.

[5]Alberta, Twenty-Eighth Annual Report of the Department of Education of the Province of Alberta 1933 (Edmonton: King's Printer, 1934), p. 33.

[6]Alberta, Twenty-Ninth Annual Report of the Department of Education of the Province of Alberta 1934 (Edmonton: King's Printer, 1935), p. 12.

During 1933 the first[7] experimental large unit of school administration had been formed in the Berry Creek area of Alberta.[8] The Berry Creek "School District" was composed of sixty-seven rural school districts.[9] This experimental district was in a sparsely populated and drought stricken prairie region of Alberta. Overall, this new unit of administration, from an economic viewpoint, was considered superior to rural school districts.[10]

The Legislative Committee filed its report in 1935.[11] One of the recommendations was for the formation of large units of school administration in the rural parts of the province.[12] No immediate action was taken to implement the recommendations.

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[7]The Turner Valley "School District" is considered by some to be the first experimental large unit of rural school administration. The Turner Valley "School District" was necessitated when the small rural public school districts were unable to provide educational services to a rapidly expanding population in an oil rich area. This "School District" covered an area of about eighty square miles and was about the maximum size permitted for a consolidated school district.

[8]Alberta, Department of Education, What Is and What Might Be in Rural Education in Alberta (Edmonton: King's Printer, 1935), p. 10.

[9]Ibid., p. 10.

[10]Ibid., p. 11.

[11]Alberta, Thirtieth Annual Report of the Department of Education of the Province of Alberta 1935 (Edmonton: King's Printer, 1936), p. 14.

[12]Alberta, Department of Education, What Is and What Might Be in Rural Education in Alberta (Edmonton: King's Printer, 1935), p. 11.

The United Farmers of Alberta Government called an election during 1935. The newly formed Social Credit Party campaigned on a platform of monetary reform and the placing of increased purchasing power in the hands of the people. The personal morality of some U.F.A. Cabinet Ministers was also an issue during the election campaign. The election resulted in an overwhelming majority for the Social Credit Party in the first provincial election contested by this party.

G. Fred McNally, Deputy Minister of Education, described his early work with Mr. W. Aberhart, Premier and Minister of Education, and the background to the legislation proposed by the Social Credit Government as follows:

> Within a week of his taking over the Department he sent for me. His opening remark was, "I want you to tell me what in your opinion most needs doing to improve education in this province." This was quite a large order to fill without any time for reflection. However, I said, "First, a reorganization of the rural school districts into large units of administration. Second, more money for teachers' salaries and some formula for the distribution of grants that would result in equalization of opportunity. Third, some plan to bring all teacher education under the jurisdiction of the university and so increase the prestige of the teaching profession." I threw the last in because I thought it would appeal to him. He said, "You know there isn't any money, so let's concentrate on the first." He then had me describe in detail Mr. Baker's attempt of a few years before, the changes advisable to make it more acceptable, and the desirable results one might expect from such a reorganization.[13]

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[13]H. T. Coutts and B. E. Walker, G. Fred (Don Mills, Ontario: J. M. Dent & Sons (Canada) Limited, 1964), p. 71.

> The next day he said to me, "The caucus of Social Credit members is to be held on Thursday and Friday of this week. I'd like you to tell the caucus your vision of what might happen in rural education if your plan were adopted." ... When I reached the door I was escorted to the Caucus Chamber and introduced by the Minister's remark, "The Deputy has a story he'd like to tell you." I launched into what I called "What Might be in Rural Education." This recital took about an hour. At its conclusion I was bombarded with questions from all corners of the room. Remember, many of these members had given years of service on rural school boards. I had sought to mollify them by pointing out that large-unit organization would give them greater scope for school board service and that I hoped if and when the new scheme came into being we could count on them for the same devotion to education that they had shown before.
>
> On the following Monday I had instructions from the Minister to proceed at once with the drafting of the necessary legislation.[14]

After draft copies of the Bill were available a delegation representing Roman Catholics met with the Minister. Mr. McNally described the meeting as follows:

> Leaders of the Roman Catholic Church were fearful that the large-unit organization might prejudice their rights in separate schools. They were particularly concerned lest the divisional boards might not respect the desire of predominantly Roman Catholic communities to employ teachers of their own faith. A large and important delegation came down to the Parliament Buildings to discuss this. They asked specifically that districts desiring to do so might stay out of the divisions. The Minister said this was a concession he could not grant: districts everywhere, for one reason or another, would be voting to stay out and so the whole purpose would be defeated. He said that rather than incorporate that proviso he

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[14] Ibid., pp. 71-72.

> would withdraw the bill; and this he did not propose to do. With that ultimatum he asked me to take over the chair and left the room. I suggested that we adjourn for a time and that the delegation name two people to confer with me in the hope that we might reach a compromise that would in no way affect the principle of the bill but would protect separate school interest. In the delegation was a lawyer, Mr. P. E. Poirier. We were able to agree on the addition of a couple of sections applicable to all districts, and this proved to be acceptable to the delegation. The Minister agreed to the inclusion, and so we had no more difficulty with the church authorities.[15]

Enabling legislation for the establishment of large units of administration, called divisions, in the rural areas of the province was passed in 1936.[16] It provided for the formation of divisions from any number of rural public school districts, other than those forming a consolidated school district, either by order of the Minister of Education or by request of the boards of rural school districts.[17] The Act provided for the minority, Protestant or Roman Catholic, in a rural school district to form a separate school district.

> 272. Nothing in this Part shall affect any right conferred by Part I of this Act upon any minority of electors in any district, whether Protestant or Roman Catholic, to establish a separate school therein.[18]

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[15] Ibid., pp. 72-73.

[16] Statutes of Alberta, I Edward VIII, ch. 85 (1936).

[17] Ibid., S. 231.

[18] Ibid., S. 272.

This Act also provided for a school district included in a division, under certain circumstances, to withdraw from the division and form a "separate school district". Section 270 of the Act stated:

> 270. In this section, -
> (a) "Protestant School District" means a school district included in a division in which district a majority of the electors are Protestants; and
> (b) "Roman Catholic School District" means a school district included in a division in which district a majority of the electors are Roman Catholic.
>
> In case the Board of Trustees of any Roman Catholic School District or Protestant School District in a division forwards to the Minister a certified copy of a resolution passed by that board requesting the exclusion of their school district from the division on account of dissatisfaction of the board with facilities for religious education, together with certified copies of resolutions passed by the boards of at least two other school districts in the same division approving the first mentioned resolution, the Minister shall by order direct the taking of a vote of the electors in that school district as to whether or not the district is to be excluded from the division.... If, as a result of the vote taken, there is a majority in favour of the exclusion of the district from the division, the Minister shall proceed, as soon as it may conveniently be done, to make an order for the exclusion of the district from the division....[19]

The above clause created a situation which permitted the majority, Roman Catholic or Protestant, in a rural school district to withdraw from a division and form a "separate school district".

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[19] Ibid., S. 270.

Summary

(1) Rural separate school districts were denied the right to form large units of school administration.

(2) Provisions for the withdrawal, under certain circumstances, of a school district from a division created the privilege of the majority in a rural school district forming a new type of separate school district.

II. SASKATCHEWAN

The stock market crash of 1929, drought conditions starting in the same year and the depression were the major features of the late 1920's and the 1930's. Grasshoppers and wheat rust plagued wheat production in the late 1930's. The general level of income in Saskatchewan dropped drastically during this period of time.

School operations reflected the economic depression. "Short Term Orders"[20] were given to some school districts, teachers' salaries declined and in many cases were unpaid[21] and the general inability of small school units adequately to finance school operations, under the existing conditions,

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[20]Saskatchewan, Annual Report of the Department of Education of the Province of Saskatchewan 1932 (Regina: King's Printer, 1933), p. 35. "Short Term Orders" permitted schools to operate for fewer than the normal ten months per year.

[21]Saskatchewan, Annual Report of the Department of Education of the Province of Saskatchewan 1933 (Regina: King's Printer, 1934), p. 8.

became evident and of concern to the provincial government.[22] Serious doubts as to the suitability of the existing rural units of administration began to appear.

During this period of time school operations seemed to mark time until better conditions returned. No legislation or litigation of significance to the formal structure of separate schools in Saskatchewan occurred in the 1926 to 1939 period.

III. ONTARIO LITIGATION OF INTEREST

Adopted Children

In 1926 the trustees of Separate School Section Six Russell attempted to deny school privileges to certain children on the grounds they were adopted and thus had no right to attend the separate school in question.[23] The guardians were separate school supporters of Separate School Section Six Russell and resided within the legally required three mile limit. Lennox, J., ruled:

> There is no equity in the position taken by the trustees. They absorb the taxes and would compel the supporters of their school to pay a second time -- to them or to another board of trustees. Adopted children are entitled to the benefit of the taxes which their guardians have paid.[24]

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[22] Saskatchewan, Annual Report of the Department of Education of the Province of Saskatchewan 1934 (Regina: King's Printer, 1935), p. 35.

[23] Re Primeau and Board of Trustees of Separate School Section Six Russell 29 O.W.N. 442.

[24] Ibid., at p. 443.

The Courts are not prepared to make a distinction between natural and adopted children inasfar as the right of attendance to the school supported by their guardians.

PART II

DENOMINATIONAL RIGHTS

Limited litigation over denominational rights occurred during the 1926 to 1939 period, but the litigation that did occur was of considerable significance. Litigation from Ontario established the validity of the limitation of separate school education in Ontario, as part of the provincial school system, to the elementary grades. The dictum of their Lordships indicated the applicability of the decision to other provinces. Litigation in relation to the validity of section 17 of the Alberta Act verified the validity of section 17 of the Act.

I. SEPARATE SCHOOLS AND SECONDARY EDUCATION

In the mid-1920's the Ontario Department of Education withdrew provincial grants for high school instruction in separate schools in areas where a public high school district had been established. In these public high school districts separate school supporters were taxed for the support of the public high school. Separate schools offering high school instruction could continue but on a private school basis.

The trustees of Tiny Separate School District, on behalf of themselves and other separate schools, appealed to the courts to have the legislation, under which the restriction on high school education in separate schools was taken, to be declared ultra vires. The Courts considered three claims of Roman Catholics in the Province of Ontario with respect to education. These were:

> (A) Their claim "to establish and conduct courses of study and grades of education in Catholic separate schools such as are now conducted in continuation schools, collegiate institutes and high schools"; and that "all regulations purporting to prohibit, limit or in any way prejudicially affect such right or privilege are invalid and ultra vires;"
> (B) Their claim to exemption from taxation for the support of continuation schools, collegiate institutes and high schools not conducted by their own boards of trustees;
> (C) Their claim to a share in public moneys granted by the Legislature of the province of Ontario "for common school purposes" computed in accordance with what they assert to have been their statutory rights at the date of confederation.[25]

The case was originally heard by Rose, J., who dismissed it.[26] An appeal to the Supreme Court of Ontario, Appellate Division, was unanimously dismissed.[27] The appeal to the Supreme Court of Canada failed when the learned Judges were equally divided on the issue.[28] The appeal to

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[25](1927) S.C.R. 637, at p. 653.

[26]Roman Catholic Separate School Trustees for Tiny vs. Rex, 59 O.L.R. 96.

[27]60 O.L.R. 15.

[28](1927) S.C.R. 637.

the Judicial Committee of the Privy Council provided not only a final decision on the issue but also a clarification of that Court's interpretation of the various subsections of section 93 of the British North America Act, 1867.

The Judges of the Privy Council noted that the judgement was of far-reaching importance to Canada as a whole.[29] Prior to a consideration of the issue itself their Lordships issued a dictum referring to the application of section 93 of the British North America Act, 1867. In referring to section 93 they stated:

> The separate section enacts that in and for each Province the legislature may exclusively make laws in relation to education, subject and according to certain provisions. These provisions were: (sub-s. 1) that nothing in such law should prejudicially affect any right or privilege with respect to denominational schools which any class of person had by law in the Province at the Union; (sub-s. 2) all the powers, privileges and duties at the Union, conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects are extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec (on this sub-section no question arises in the present appeal); and by sub-s. 3, as follows: "Where in any Province a system of separate of dissentient schools exists by law at the Union or is thereafter established by the legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." The fourth sub-section enacts that if a Provincial law which seems to the Governor-General in Council requisite to give

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[29](1928) A.C. 363, at p. 366.

effect of his decision is not made or the decision is not executed, then the Parliament of Canada may take the necessary remedial law.

It will be observed that sub-s. 3 goes further than sub-s. 1 in material respects. In the first place, it applies not merely to what exists at the time of Confederation, but also to separate or dissentient schools established afterwards by Provincial legislatures. In the second place, the word "prejudicially", in sub-s. 1, is dropped out from before the expression "affecting", in sub-s. 3. In the third place, the right or privilege is not confined to one in respect of denominational schools, but is given in respect of education. Their Lordships think that these changes in language are significant. They show that the protection given by sub-s. 1 was deemed, if taken by itself, to be insufficient. It was considered to be enough protection for the denominational schools to apply to them a restriction which only rendered ultra vires of the Provinces a law which took away what was an existing legal right or privilege at the time of Confederation in respect of denominational schools. Sub-s. 3 contemplates that within the powers of the Provincial legislature Acts might be passed which did affect rights and privileges of religious minorities in relation to education, and gives a different kind of remedy, which appears, as has already been pointed out, to have been devised subsequently to the Quebec resolutions of 1864, and before the bill of 1867 was agreed on. Whenever an Act or decision of a Provincial authority affecting any right or privilege of the minority, Protestant or Roman Catholic, in relation to education is challenged, an appeal is to lie to the Governor-General in Council, as distinguished from the Courts of law. No doubt if what is challenged is challenged on the ground of its being ultra vires, the right of appeal to a Court of law remains for both parties unimpaired. But there is a further right not based on the principle of ultra vires. That this is so is shown by the extension of the power to challenge, to any system of separate or dissentient schools established by law after Confederation, and which accordingly could not be confined to rights or privileges at the time of Confederation. The omission of the word "prejudicially" in sub-s. 3 tends to bear out the view that something wider than a mere question of

> legality was intended, and the language of sub-s. 4, enabling the Dominion Parliament to legislate remedially for giving effect, "so far only as the circumstances of each case require," to the decision of the Governor-General in Council, points to a similar interpretation.[30]

Their Lordships, then, proceeded on the basis that the appeal was one on purely a question of law, and thus not requiring a consideration of the nature and form of possible appeals under sub-sections 3 and 4,[31] stated that the crucial point of the appeal was:

> Did the trustees of the separate Roman Catholic schools secure at Confederation a right to maintain, free from control or regulation by the legislature of Ontario, as respects the scope of instruction, denominational schools which could embrace the subjects formerly taught in the separate schools on their higher sides, and afterwards taught in the undenominational high schools, collegiate institutes and continuation schools, as developed after Confederation, or analogous subjects taught in the Roman Catholic separate schools before Confederation, and to exemption from taxation for the support of such undenominational educative organizations? And did the trustees secure a title to receive a share of every grant by the legislature for common school purpose, construed as extending to the maintenance of education of the type given in post-Confederation secondary schools, as well as in those that were merely elementary, based on the number of pupils attending the separate schools, and independent of the subjects taught, or the textbooks used, every separate school being entitled to its share, calculated according to a statutory rate, however advanced, however rudimentary, the education and books might be? If these questions are answered in the affirmative

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[30] Ibid., at pp. 368-369.

[31] Ibid., at p. 375.

> then it was ultra vires of Ontario to take away the right either to regulate the schools in a manner inconsistent with this freedom, or to diminish the grants or to tax for the support of the undenominational schools, by legislation, or administratively, so far as control was concerned, by state regulation.[32]

Their Lordships then noted that:

> The Act of 1841 enabled, indeed, dissentient inhabitants to call for separate common schools and to appoint their own trustees, but that these schools were to be subject to the "visitation, conditions, rules, obligations and liabilities" of ordinary common schools. This provision was repeated in the Act relating to common schools of 1843 (S.56) and in the Act of 1846 (S.33). In the Act of 1850 it was expressly provided (S.19) that the separate schools are to be under the same regulations as to the persons for whom the school is permitted to be established as common schools generally, and by S. 9 of the Separate Schools Act of 1863 it is provided that the trustees of separate schools are to perform the same duties and be subject to the same penalties as the trustees of common schools. Sec. 26 subjects these schools to such inspection as the Chief Superintendent may direct, and also to such regulation as the Council of Public Instruction may impose.
>
> It is this principle and purpose which appear to their Lordships to be dominant through the statutes, and the language used in the sections just quoted has brought this Committee to the conclusion that the power of regulation must be interpreted in a wider sense than that given to it in the judgement of the Chief Justice of Canada. They are not at one with him in thinking that separate school trustees could give secondary education in their schools otherwise than by permission, express or implied, of the Council of Public Instruction. The separate school was only a special form of common school, and the Council could in the case of each determine the courses to be pursued and the extent of the education to be imparted.[33]

. . .

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[32] Ibid., at p. 375.

[33] Ibid., at pp. 386-387.

> In their Lordships' view, in the face of the provisions referred to, it is impossible to contend successfully that it was ultra vires after Confederation to make new appropriations out of the grants which would diminish what would otherwise have come to the appellants. Whether the case is looked at from the point of view of regulation, or whether it is regarded from that of discretion in power of appropriation, the result is the same. It is indeed that power to regulate merely does not imply a power to abolish. But the controversy with which this Board has to deal on the present occasion is a long way from abolition. It may be that the new laws will hamper the freedom of the Roman Catholics in their denominational schools. They may conceivably be or have been subjected to injustice of a kind that they can submit to the Governor-General in Council, and through him to the Parliament of Canada. 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.[34]

The right of Ontario to restrict separate school education to elementary grades was recognized, by the Judicial Committee of the Privy Council, as being intra vires of the Province of Ontario. No appeal was made by the separate school supporters to the Governor-General in Council for a change in the legislation or regulations of the Province of Ontario.

II. VALIDITY OF SECTION 17 OF THE ALBERTA ACT

In January, 1926, the Government of the Dominion and that of the Province of Alberta entered into an agree-

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[34] Ibid., at pp. 388-389.

ment providing for the transfer of the public lands within the province, from the control of the Dominion to the control of the Provincial Government. Later some further provisions were added to the agreement which included the transfer and administration of Alberta's share of the School Land Fund and certain school lands.

The question of the validity of section 17 of the Alberta Act was raised before the necessary legislation had been passed to give effect to the agreement. It was agreed not to proceed with the proposed legislation until the question of the validity of section 17 of the Alberta Act had been authoritatively answered.

The question "Is Section 17 of the Alberta Act, 1905, in whole or in part, ultra vires of the Parliament of Canada, and, if so, in what particular or particulars?" was submitted by order of the Governor-General in Council on June 24, 1926 to the Supreme Court of Canada for a hearing and decision.[35]

The decision of the Supreme Court as set out by the court reporter was:

> S. 17 of The Alberta Act (D., 1905, C.3), varying the provisions of S. 93 of the B.N.A. Act, 1867, in their application to the province of Alberta, and enacted to perpetuate under the Union the rights and privileges with respect to separate schools and with respect to religious

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[35](1927) S.C.R. 364, at p. 365.

> instruction in the public and separate schools, as provided under the terms of chapters 29 and 30 of the Ordinances of the North-West Territories passed in the year 1901, and to prevent discrimination in the appropriation and distribution of moneys for support of schools, was within the powers of the Dominion Parliament, and is wholly *intra vires*.[36]

Presumably section 17 of the *Saskatchewan Act*, since the wording of section 17 of the *Saskatchewan Act* is identical to that of section 17 of the *Alberta Act* and was passed at the same time and under similar circumstances as of the *Alberta Act*, was also *intra vires* of the Dominion Parliament.

III. SUMMARY

(1) Separate school education, as an aspect of the provincial school system, is normally limited to the elementary grades in Ontario. A *dictum* given by their Lordships in reaching the decision for Ontario indicated that that decision was of significance to Canada as a whole.

(2) The special privileges set down in section 17 of the *Alberta Act* and section 17 of the *Saskatchewan Act*, which provided basic guarantees for separate school education, were *intra vires* of the Dominion Parliament.

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[36] *Ibid.*, at p. 364.

CHAPTER VIII

DEVELOPING FORMAL STRUCTURE DURING THE 1940 TO 1967 PERIOD

PART I

PROVINCIAL DEVELOPMENTS 1940 TO 1967

The economic and political uncertainty of the 1930's gave way to the feverish war-time activities of the early 1940's. Canada's policy of no conscription for overseas fighting and memories of the indecisive and lengthy land battles of the first World War made war seem far away in 1939. The collapse of France in 1940 created a new urgency both for greater manpower abroad as well as for equipment. Japan's entry into the war in 1941 further spurred on the wartime effort and under this pressure the economic front developed rapidly. Britain's traditional source of food staples, Europe, was cut off and Canada, particularly Western Canada, expanded production to meet this need.

The very strong economic development during the war moderated and then entered a very mild recession in the immediate post war period, which was in marked contrast to the depression that followed World War I. A general uptrend in the economy, as indicated by the G.N.P. per capita (constant 1949 dollars), began in the early 1950's and this general trend has continued until the present time.[1]

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[1]Roberta Briggs Kerr, op. cit., p. 92.

The economy of the Province of Alberta has been on a steady upward trend during the 1940-1967 period. The impetus of wartime conditions was barely ending when the discovery of Imperial Leduc No. 1 marked the start of the development of major oil fields in the province. The influx of capital for exploration and development of the fields and the subsequent development of secondary industries has broadened the economic base of the province. The population of the province has expanded rapidly similar to that of the period of original settlement of the province, but the expansion has been primarily an urban expansion.

In Saskatchewan, Britain's wartime cut-off from European sources of food, particularly animal products, created a new demand for products which resulted in considerable amounts of Saskatchewan farm production being switched from traditional wheat production to the production of eggs, bacon, beef and butter. A buoyant farm economy resulted which, however, settled back under the more reduced demands of primary cereal products in the post war era.

The mining and petroleum developments in Canada in the post war years affected Saskatchewan only to a limited extent. Saskatchewan's economy, under the limited petroleum and mining developments as well as only a normal demand for farm products, did not expand at the same rate as Alberta's economy. The potash developments in Saskatchewan in the 1960's have given promise of providing a broader and more

stable economic base for the economy of the province.

Figure 5 presents information on the population trends in Alberta and Saskatchewan for the 1931 to 1961 period. The total population of Saskatchewan decreased during the 1936 to 1951 period and a similar decrease in the Roman Catholic population of Saskatchewan occurred during the 1941 to 1951 period. The total population of Alberta increased steadily during the 1931 to 1961 period, however, the Roman Catholic population in Alberta declined during the 1941 to 1951 period. The increase in the Roman Catholic population of Alberta during the 1951 to 1961 period was, however, similar to the rate of increase of the total population of Alberta.

Two of the major emphases in education in Alberta and Saskatchewan during the post war years have been on increased quality and quantity of education as well as for the provision of educational facilities. The demands for facilities as well as quantity and quality of educational services have been common to both public and separate schools. The ability of separate school districts, in the rural parts of the province, to provide the desired level of educational services has come under question. Roman Catholics have suggested that the small units of administration permitted for rural areas are too small adequately to provide the services desired.[2]

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[2]Alberta, Report of the Special Committee (Edmonton: Queen's Printer, 1967), p. 15.

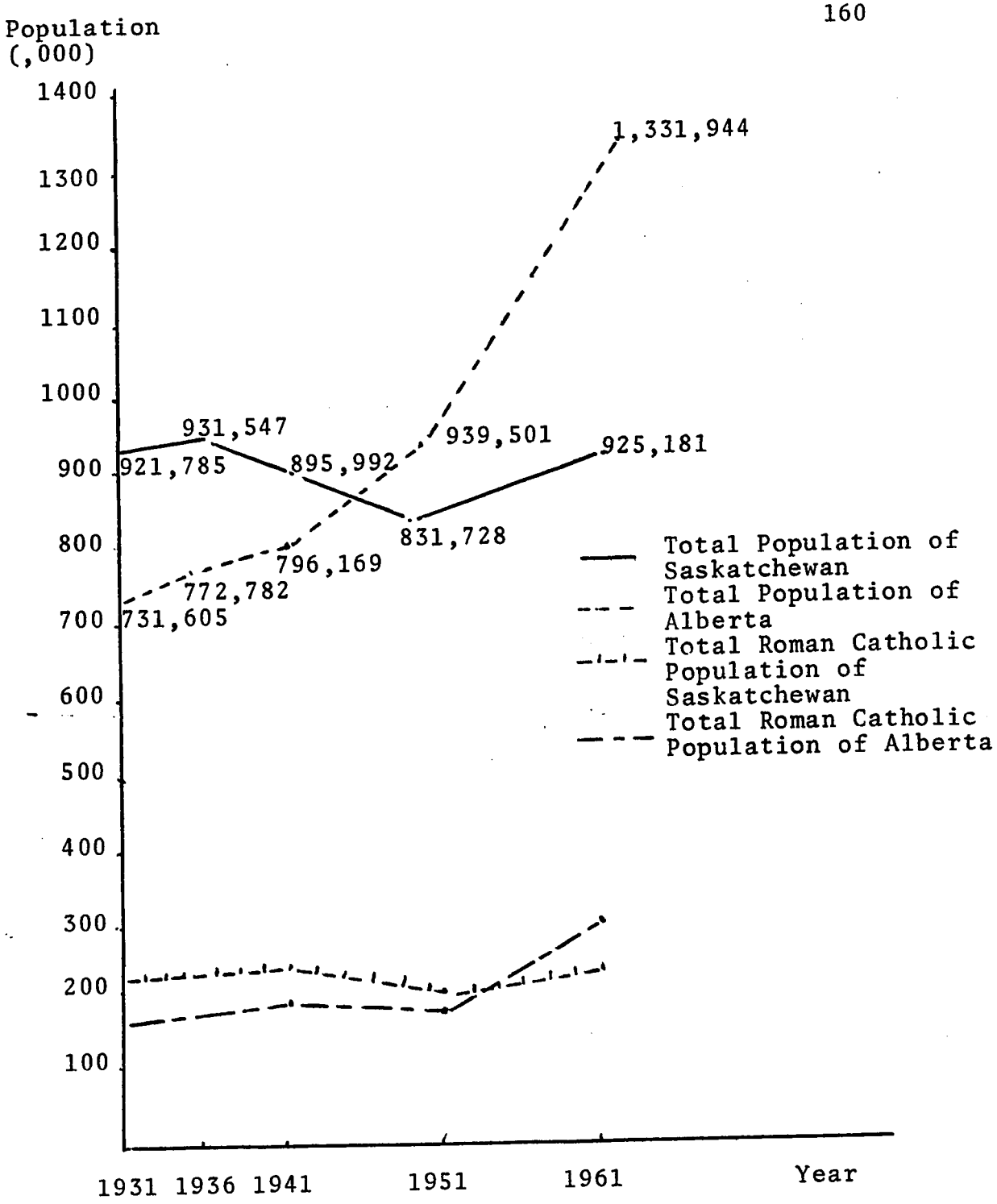

FIGURE 5

POPULATION OF ALBERTA AND SASKATCHEWAN
1931 TO 1961

Source: Census of Canada, 1961 Bulletin 1.2-6, p. 44 and Census of The Prairie Provinces, 1946, pp. 171,395.

I. ALBERTA

No litigation of significance to the formal structure of separate schools occurred during the 1940 to 1967 period. Some legislation of interest to separate schools was passed which had some effect on the structure of separate schools. The item of greatest interest to separate schools was, however, the introduction of the School Foundation Program method of educational finance. This method of finance proved particularly advantageous to school units with a low assessment per pupil.

The County Act

The County Act was passed in 1950.[3] Basically it provided that a single local governmental body would carry out the functions previously performed by a municipal council and a school division board. The elected county council was, at its first meeting each year, to appoint no less than three members of the council, one of whom was to be designated as committee chairman, to the municipal committee,[4] and was at the same first meeting to appoint no less than three members of the county council to the school committee.[5] Towns and villages in the county for

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[3] Statutes of Alberta, 14 George VI, ch. 15 (1950).

[4] Ibid., S. 15.

[5] Ibid., S. 16.

school purposes, but not for municipal purposes, had the right to appoint members to the school committee.[6] Normally the maximum number so appointed was three.[7]

The County Act did not apply to a separate school district unless it was already included in a division.[8] A separate school district could, however, be included by an inclusion agreement made between the county and separate school district.[9]

As the Act was worded in 1950 no prohibition existed as to a separate school supporter, if he was an elector of the county for municipal purposes, being elected as a county councillor and subsequently being appointed to the school committee. In effect it was possible for a separate school supporter to be a member of a school committee charged with the operations of the public schools of the area. In 1960 this situation was altered by the following amendment to The County Act:

> A person who is an elector of a separate school district is not eligible to be elected or appointed and shall not be appointed to the school committee unless the separate school district is included in the county for school purposes by way of agreement pursuant to The School Act.[10]

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[6] Ibid., S. 16.

[7] Ibid., S. 17 (5).

[8] Ibid., S. 5 (1).

[9] Ibid., S. 5 (2).

[10] Statutes of Alberta, 9 Elizabeth II, ch. 20 (1960), S. 16 (3).

The possibility of a separate school supporter becoming directly involved in public school matters was thus eliminated.

Choice of Attendance in Cases of Mixed Marriages

The pertinent sections of The School Act of Alberta are phrased in such a manner as to make the religion of the individual the determining factor in assigning the status of a resident of the public school district or of the separate school district. Prior to 1956 no legislation or litigation existed to clarify the right of attendance at public or separate schools insofar as children of mixed marriages were concerned. Legislation was passed in 1956 giving parents, in the case of mixed marriages, some choice in school attendance for their child. The amendment to The School Act was as follows:

> Where for the purposes of this Act one parent of a child is deemed to be a resident of a public school district and the other parent is deemed to be resident of a separate school district having the same boundaries, the parents may, over the signature of both of them, designate whether the child is to attend school within the public school district or the separate school district.[11]

School Foundation Program

Early in 1961 a new system of school finance was introduced in Alberta. The essential characteristics of

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[11] Statutes of Alberta, 5 Elizabeth II, ch. 49 (1956), S. 20.

the School Foundation Program were described as follows:

> 1. All real property, whether in a school district or not, will be taxed at a fixed rate, currently 32 mills, on an equalized assessment for school purposes.
>
> 2. From the proceeds of this school tax and from provincial revenues, school boards will be paid on an approved cost formula amounts which it is hoped will provide basic educational services.
>
> 3. Expenditures beyond approved costs must be met by other school system revenues, including, if necessary, a supplementary tax on the ratepayers of the school system.[12]

Separate school districts were exempted from compulsory inclusion in this program,[13] though a separate school district could, by resolution of the board, enter into an agreement for the inclusion of the district in the School Foundation Program.[14] A separate school district could also, by resolution of the board, withdraw from the School Foundation Program.[15]

The School Foundation Program is designed to provide proportionately greater provincial aid to districts having a low assessment per pupil. Table II presents data on the equalized assessment per pupil in public and separate

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[12]Alberta, Fifty-Seventh Annual Report of the Department of Education of the Province of Alberta 1962 (Edmonton: Queen's Printer, 1963), p. 110.

[13]Statutes of Alberta, 10 Elizabeth II, ch. 71 (1961), S. 20 (11) (a).

[14]Ibid., S. 20 (11).

[15]Ibid., S. 20 (12).

school districts in cities, towns, villages and rural areas. The data are for the first school fiscal year in which the program was in operation.

TABLE II

EQUALIZED ASSESSMENT PER PUPIL IN PUBLIC AND SEPARATE SCHOOL DISTRICTS OF ALBERTA FOR THE SCHOOL FISCAL YEAR 1962

Type of District	Equalized Assessment per Pupil	
	Public School Districts	Separate School Districts
City	6,550	3,846
Town	3,622	2,036
Village	3,502	2,088
Rural[1]	6,121	2,659

[1]Excluding Department of National Defense Schools and schools in the National Parks.

Source: Fifty-Seventh Annual Report of the Department of Education of the Province of Alberta 1962 (Edmonton: Queen's Printer, 1962), pp. 143, 153, 163, 181, 182).

During the 1962 fiscal school year only 5.4 per cent of the total revenue of all school districts was raised by means of supplementary requisitions.[16] Separate school districts during the 1962 fiscal year raised 4.3 per cent of their revenue by means of supplementary requisitions.[17] The School Foundation Program placed school

[16]Alberta, Fifty-Seventh Annual Report of the Department of Education of the Province of Alberta 1962 (Edmonton: Queen's Printer, 1962), p. 124.

[17]Ibid., pp. 140ff.

districts with a low equalized assessment per pupil on almost an equivalent financial position to that of school districts with a high equalized assessment per pupil.

Table III presents data on the number of separate school districts in existence for 1961, the year of the introduction of the School Foundation Program, and the two years before and two years after the establishment of the School Foundation Program.

TABLE III

NUMBER OF SEPARATE SCHOOL DISTRICTS IN EXISTENCE IN ALBERTA DURING THE 1959 TO 1963 PERIOD

Type of District	Year				
	1959	1960	1961	1962	1963
City	8	9	9	9	9
Town	21	25	26	27	31
Village	7	6	7	8	9
Rural	21	28	30	33	42
Total	57	68	72	77	91

Source: Annual Reports of the Department of Education, 1959-1963.

Summary

(1) Separate school supporters, under the county type of administration, are not permitted to be members of the school committee.

(2) Parents in a mixed marriage may designate whether their child is to attend a public or a separate school.

(3) The School Foundation Program largely eliminated equalized assessment per pupil as the major factor determining the revenue received by a local school unit. This proved of particular benefit to the separate school districts.

II. SASKATCHEWAN

Litigation and legislation of significance to the formal structure of separate schools occurred during the 1940 to 1967 period. Litigation established that the exclusion of a child of separate school supporters from attendance at a public school was not a violation of a civil right. Legislation introduced the large unit of school administration as well as extending secondary school privileges to separate schools.

Large Units of School Administration

Permissive legislation for the formation of school divisions was passed in 1940.[18] The Act did not give the

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[18] Statutes of Saskatchewan, 4 George VI, ch. 76 (1940).

Minister of Education the power to form divisions over the objections of the local residents. Rural public school districts were the basic unit from which the divisions were to be formed although provision was made for village, separate and consolidated school districts to join by means of an inclusion agreement.[19]

The School Divisions Act of 1940 provided that:

> 75. Nothing in this Act shall affect any right conferred by The School Act upon any minority of ratepayers in any district, whether Protestant or Roman Catholic, to establish a separate school therein.[20]

The Act did not, however, contain any provision whereby the majority of a district, whether Protestant or Roman Catholic, could withdraw from the division if dissatisfied with the provisions for religious education. Alberta had made such a provision within the structure of its school divisions.

The rural public school districts did not respond to the opportunity to form school divisions. In 1944 The Larger School Units Act was passed and empowered the Minister of Education to form these larger units.[21] The basic principles in The School Divisions Act of 1940 and The Larger School Units Act of 1944 were essentially the

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[19] Ibid., S. 49.

[20] Ibid., S. 75.

[21] Statutes of Saskatchewan, 8 George VI, ch. 41 (1944 2nd Session), S. 3.

same insofar as separate schools were concerned. The status of the separate school districts was not altered nor was the minority's right to form a separate school district changed.[22] The privilege of forming these larger units was, however, limited to public school districts.

Secondary Education in Separate Schools

The Secondary Education Act of 1907[23] authorized the establishment of a high school district within a municipality.[24] Once the high school district was established, a high school rate was assessed throughout the district on the same property as that upon which the general taxes for municipal purposes were assessed.[25] The Act, however, made no provision for the establishment of a separate high school district, nor did it provide for tax exemptions if a separate high school was in fact established. The wording of the Act permitted a separate school district to offer instruction at a secondary level and assess a rate against the property of its supporters, provided that no high school district existed. Once a high school district was established separate school

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[22] Ibid., S. 80.

[23] Statutes of Saskatchewan, 7 Edward VII, ch. 25 (1907).

[24] Ibid., S. 8.

[25] Ibid., S. 38.

supporters were liable for the rate established by the high school district.

The Secondary Education Act was amended in 1964 to permit the formation of separate high school districts.[26] The amendment provided, however, that residents of the same faith as that of the separate school could, if they wished, declare support for the public high school. This same privilege of declaring support for the public high school district or the separate high school district was extended also to residents who would be considered as public school supporters for elementary school purposes. The section relating to the declaration of support reads as follows:

> (13). Upon the establishment of a separate high school district, a resident ratepayer may by declaration filed with the assessor or other responsible officer have recorded opposite his name in the list of qualified voters for the appropriate municipality that he is a supporter of either the high school district or the separate high school district, as the case may be, and the declaration shall be prima facie proof that the person is a supporter of either the high school district or the separate high school district, as the case may be, and sufficient authority for entering opposite the name of that person in the assessment roll the letters "HSS" or SHSS", as the case may require, but a resident ratepayer who is a public school supporter shall be recorded as a high school district supporter and a resident ratepayer who is a separate school district supporter shall be recorded as a separate high school district supporter, until a declaration to the contrary is

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[26] Statutes of Saskatchewan, 13 Elizabeth II, ch. 18 (1964), S. 3.

filed under this subsection.[27]

The privilege of all residents of a municipality having both a high school district and a separate high school district, of declaring support for one or the other introduced a quite radical change in separate school support in the Province of Saskatchewan.

Right of Attendance and Civil Rights

During May, 1965 Bintner, a Roman Catholic, attempted to enrol his daughter in the fall kindergarten class of the Regina Public School District. The application was rejected on the grounds that the Bintners were Roman Catholic and did not, therefore, have the right to attend the public schools. Bintner's attempt to obtain an injunction against the Regina Public School Board failed. He then appealed to the Supreme Court of Saskatchewan.[28]

At the Supreme Court of Saskatchewan hearing it was established that it was undisputed that both parents were Roman Catholic and that they were raising their child as a Roman Catholic.[29] It was also undisputed that the child's admission to the public schools was rejected on the grounds that both parents were Roman Catholic.[30] The

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[27] Ibid., S. 13.

[28] Bintner v. Board of Trustees for the Regina Public School Trustees, 55 D.L.R. (2 d) 646.

[29] Ibid., at p. 647.

[30] Ibid., at p. 647.

hearing revealed that prior to 1963 the Public School Board admitted to its schools the children of all persons enrolled on the tax roll as public school supporters regardless of the faith of the taxpayer.[31] It was further established that at the time of application for admission Bintner was enrolled on the tax roll as a public school supporter.[32]

The plaintiff's case was based on the premise that denial of admission constituted discrimination under The Saskatchewan Bill of Rights Act,[33] section 13. Section 13 is as follows:

> 13.-(1) Every person and every class of persons shall enjoy the right to education in any school college, university or other institution or place of learning, vocational training or apprenticeship without discrimination because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons.
>
> (2) Nothing in subsection (1) shall prevent a school, college, university or other institution or place of learning which enrolls persons of a particular creed or religion exclusively, or which is conducted by a religious order or society, from continuing its policy with respect to such enrolment.[34]

The defendant opposed the plaintiff's claim:

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[31] Ibid., at p. 648.

[32] Ibid., at p. 648.

[33] Statutes of Saskatchewan, 11 George VI, ch. 35 (1947).

[34] Ibid., S. 13.

> ... on the basis that there was no discrimination in such refusal on any ground, religious or otherwise. Its contention is that the child is excluded from the public school system not because of her religion, as such, but because of the fact that those of her faith having withdrawn in accordance with the School Act, R.S.S. 1953, c. 169, as amended, to form their own school system, the public schools have no obligation to educate her.[35]

The Court ruled that the denial of admission to the public schools did not constitute a violation of civil rights.[36]

An application for leave to appeal to the Supreme Court of Canada was dismissed by the Supreme Court of Canada on February 8, 1966.[37]

Summary

(1) Formation of Larger School Units is restricted to public school districts.

(2) The right to form separate high school districts now exists for separate school supporters.

(3) Refusal of public schools to accept children of parents of the same faith as the separate school district is not a violation of civil rights as defined in The Saskatchewan Bill of Rights Act.

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[35] 55 D.L.R. (2d) 646, at p. 648.

[36] Ibid., at p. 654.

[37] Ibid., at p. 646.

III. ONTARIO CASES OF INTEREST

The Ontario litigation of interest and possible application to Saskatchewan relates to the provision for individual members of the minority group establishing a separate school to declare support for the public schools if they so desire. The Ontario provision relates to elementary schools only and the wording of the pertinent sections is somewhat different from that of the Saskatchewan legislation. The Saskatchewan legislation applies to secondary schools only and is somewhat broader in its provisions. General principles established by litigation in Ontario may, however, be of some value in attempting to interpret the Saskatchewan legislation.

Litigation on the Declaration of Support

Litigation considered in this section is not confined to the 1940 to 1967 period. Since legislation in Ontario on the declaration of support has remained basically the same since 1867, all litigation, on this point, that has occurred since 1867 may be considered of some relevance. The litigation considered on the declaration of support does not include all the cases that have occurred but does present the interpretation of various aspects of this provision.

Errors on Assessment Roll. A case was submitted to

the Courts by the Minister of Education on December 13, 1889 which sought clarification of the liability for assessment for the support of separate schools if an error was made by an assessor. The Court ruled:

> If the assessor is satisfied with the prima facie evidence of the statement made by or on behalf of any ratepayer that he is a Roman Catholic, and thereupon (seeking and having no further information) places such person upon the assessment roll as a Separate School supporter ... he being in the case supposed, assessed as a supporter of Roman Catholic Separate schools.
>
> ... A ratepayer, being Roman Catholic, and appearing in the assessment roll as a Roman Catholic and supporter of Separate Schools, who has not given the notice in writing of being such supporter ... is not estopped from claiming in the following or future year, that he should not be placed as a supporter of Separate Schools with reference to assessment of such year.[38]

Protestants erroneously placed upon the assessment roll were ruled to have the right of appeal and having established their status were to be placed on the proper roll.[39]

Changing Support after Original Declaration of Support. In 1901 the Minister of Education presented a case to the Divisional Court for a ruling to clarify the application of two sections of The Separate Schools Act.

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[38] In the Matter of Roman Catholic Separate Schools, (1889), 18 O.R. 606, at p. 618.

[39] Ibid., at p. 619.

Section 61 of the Act gave borrowing powers to the separate school boards[40] while section 47, a provision which had been in force many years, permitted a Roman Catholic to withdraw support, on giving notice, from a separate school.[41] The two questions posed were:

> Question 1: - Does property which was owned by a separate school supporter and so assessed remain liable for rates for the support of separate schools, or separate school libraries, or for the erection of any separate school-house, imposed under by-laws passed before the time at which the separate school supporter has withdrawn his support from the separate school?
>
> Question 2: - If the property does not remain liable in the case mentioned in the preceeding question, is the person who has withdrawn his support personally liable? [42]

The Judges were in agreement on these questions. Boyd, C. stated:

> Answer 1: Property which was owned by the separate school supporter and so assessed for rates imposed under by-laws passed before the time when the separate school supporter has withdrawn his support does not remain liable for such rates in the future, unless the property is still owned by him at the time of each assessment, and he resides in the section.
>
> Answer to 2: The attempt to withdraw from under sec. 61 is nugatory, and the ratepayer who was such when the loan was effected remains liable for future assessments to the extent of the rateable property he possesses, so long as he is resident with the school section.[43]

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[40] R.S.O. ch. 294 (1897), S. 61.

[41] Ibid., S. 47.

[42] Re Separate School Act (1901), O.L.R. 584, at p. 585.

[43] Ibid., at pp. 587-588.

This ruling prevented capricious changes on the part of separate school supporters in an attempt to take advantage of a more favorable tax assessment in a public school district.

Right of Attendance at a Separate School. Two interesting cases occurred during 1933 and 1934 relating to the right of children to attend a particular separate school when the father was a Roman Catholic and declared public school supporter and the mother also Roman Catholic but a supporter of the separate school in question.[44] The facts of the case were as follows: The applicant, Cora Renaud, was a Roman Catholic, the wife of a Roman Catholic, to whom she had borne five children. Formerly all these children attended the separate school of the part of the province in which they lived. These five children lived with their father and mother, their father being a separate school supporter and having property assessed in the section for separate school purposes. In 1928, a new school-house was built; Joseph Renaud, the husband of the appellant, wished it placed on a certain site, but he lost on a vote. He became displeased and consequently transferred his assessment to the public school. Then he agreed to sell

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[44] Renaud v. The Board of Trustees of the Roman Catholic Separate School for School Section No. 11 in the Township of Tilbury North. (1933) O.R. 565 and Renaud v. Roman Catholic School Section No. 11, Township of Tilbury North (1934) O.W.N. 218.

twelve-and-one-half acres of his land to his wife, the appellant; and did so, making a conveyance to her of the land agreed upon, it being in the district over which the respondents had jurisdiction, and for the children in which they would under ordinary circumstances have to provide. Thereupon, the appellant had her land assessed as that of a separate school supporter; and, afterwards tried to have two of her children admitted to the separate school; this the teacher refused to permit on the instructions of the respondents, the trustees of the school.[45]

The Judge noted that:

> While the sale and conveyance of the piece of land mentioned have every appearance of a scheme to have certain of the children of the parties admitted to the Separate School, I do not take that fact, if it is a fact, as having any bearing upon the questions to be considered here - we have no concern with motive or intention but only with legal right.[46]

The judgement of the Court delivered by Riddell, J. A., stated:

> I have carefully examined all the relevant legislation, not confining my researches to that to which we were referred on the argument; and I can find no other duty cast upon these Trustees as to admission of children than that imposed by The Separate Schools Act,Sec. 44 (d). It is not the ownership of property in the

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[45](1933) O.R. 565, at p. 569.

[46]Ibid., at p. 569.

> section by the parent or guardian of a child - it is not the assessment of such property and the entry of the owner as a Separate School Supporter - it is not the religion of the parent, guardian or child, that impose upon the Trustees the duty of providing for it "adequate accommodation and legally qualified teachers" - it is solely, the name of the child on the "annual enumeration" that imposes the duty, quoad that child.[47]

Since the children in question were not listed on the "annual enumeration" as being children of a separate school supporter they were denied the right to attend the separate school in question.

The following year Mrs. Renaud had herself listed on the "annual enumeration" as the parent of the two youngest school-age children. She then applied for a mandamus requiring the Board of Trustees of the Roman Catholic Separate School for School Section No. 11 of the Township of Tilbury North to permit the two children listed to attend the separate school. It was admitted that Mrs. Renaud's residence was in the same section, although not on her property, as the separate school and that she was a supporter of the separate school. The Judge ruled that although the two parents of the children lived together and that both were Roman Catholics there was nothing to prevent one parent, under these circumstances, being assessed as a public school supporter and parent of some

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[47] Ibid., at p. 571.

of the children and the other parent assessed as a separate school supporter and parent of the other children. The mandamus was granted.[48]

Continuing Liability for Public School Debenture Debt. The Public School Board in the Township of Calvert adopted a by-law in 1928 providing for the raising of $38,000, by way of loan upon the security of debentures of the municipality, for the use of the Public School Board in the erection of a new school house. At that time the property owned by the four appellants was all owned by public school supporters. The appellants, all of whom were separate school supporters, bought their properties at tax sales. The municipality continued to tax the appellants for their share of the debenture debt in each year, and it was from this taxation that the appeals were taken.[49]

Danis, D. C. J., stated:

> The main argument of the appellants is that the tax sale extinguished all liens from taxes to which their properties were subject. One appellant ingeniously argued that he had no notice that the parcel he purchased was subject to taxation for public school purposes, and that, having bought in good faith and for value, he was exempt from paying public school taxes. This is not so. A purchaser is not prevented at any time from examining the books of the municipal corporation, and a search would have revealed

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[48](1934) O.W.N 218, at pp. 219-220.

[49]Ethier v. The Township of Calvert, (1942) O.W.N. 324.

> that the previous owner was a public school supporter, and that a by-law was passed in 1928 for the purpose of raising money by debentures on the properties of public school supporters.[50]
>
> . . .
>
> A tax sale discharges the property sold from all previous liens for taxes unpaid to the date of the acquisition by the purchaser. The property, however, becomes subject to future taxes properly imposed when the owner is not the municipality....[51]
>
> . . .
>
> Moreover, the original purchasers of the debentures undoubtedly relied on the amount of the whole rateable property liable for public school taxes within the school section, as set out in by-law no. 155, as security for their investment. If the effect of a tax sale of property liable for public school taxes is the cancellation of its debenture liability, this would impair their security. Therefore, a tax sale of one-half or more of the properties would endanger the security of the investors, and the remaining properties would be burdened with the payment of a debenture indebtedness which would possibly be more than they could support. Again, by this method of tax sale, the investors could ultimately be deprived of all their security. I do not think this was the intention of the Legislature.[52]

The appeal was dismissed[53] which left the declared separate school supporters, who had purchased the land in question at a tax sale, liable for a rate to retire the debentures given as security by the public school district. The decision was not appealed.

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[50] Ibid., at pp. 324-325.

[51] Ibid., at p. 325.

[52] Ibid., at pp. 325-326.

[53] Ibid., at p. 326.

A case somewhat similar to the one discussed above was appealed to the Supreme Court of Canada, where the matter was given further consideration and resolved more equitably.[54] During a period from January 24, 1946 to September 28, 1954, the Township of Crowland authorized seven issues of debentures, totalling 1,014,000 dollars, for the purpose of constructing and equipping public schools in Public School Area No. 1. During this period Ferdinand Slevar was a public school supporter. Between 1954 and 1957 a Roman Catholic separate school was established. The respondent then became a separate school supporter. In the assessment roll prepared for the year 1958, upon which rates and taxes were levied in the year 1958, the respondent was properly entered and rated as a separate school supporter.[55]

In the year 1958 the municipal tax bill issued by the Township in respect of the respondent's property claimed for school purposes the appropriate separate school rate and, in addition, an amount which was the aggregate of the rates allegedly imposed on the respondent to raise the instalments of principal and interest falling due in the year 1958 upon the debentures issued pursuant to the by-laws passed before the establishment of the separate

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[54] The Municipal Corporation of the Township of Crowland vs. Ferdinand Slevar, 1960 S.C.R. 408.

[55] Ibid., at p. 409.

school.[56]

The respondent sued the appellant township for a declaration that he, as a separate school supporter, was exempt from the payment of all rates imposed for public school purposes, including levies imposed for the purpose of paying the annual instalments of principal and interest on certain debentures issued by the appellant before September 28, 1954.[57]

The trial judge held that:

> ... S. 3 of the Public Schools Act, R.S.O. 1950, c. 316, and s. 56, subs, (6) of The Separate Schools Act, R.S.O. 1950, c. 356, exempted the respondent from any further personal liability for public school taxes after he became a separate school supporter, but that the lands of the respondent remained charged with the amount required to pay off the debentures in question.[58]

This decision was appealed.[59] The Court of Appeal held that:

> ... the exemption from the payment of rates imposed for public school purposes provided for in subs. (1) of S. 56 of The Separate Schools Act was unrestricted save as to the rate imposed before the exemption became effective; that the relevant statutes do not create a liability at large upon separate school supporters to pay taxes to meet debenture payments upon debentures for public school purposes issued prior to the establishment of a separate school,

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[56] Ibid., at pp. 409-410.

[57] (1959) O.W.N. 126.

[58] 1960 S.C.R. 408, at p. 410.

[59] 1960 O.R. 9.

> but create only a liability to pay taxes according to rates actually imposed before the exemption becomes effective; and that the passing of a debenture by-law in itself does not impose such a rate, a rate being imposed only by some proceedings taken to fix and collect such rate after the actual rate has annually been determined.[60]

The Court of Appeal allowed the appeal.

The Township of Crowland then took an appeal to the Supreme Court of Canada. The learned Judges held that:

> ... the money which will be raised annually to pay the debentures must come, not from all ratepayers of the municipality but only from those who are supporters of the public schools and thus to ensure that no part of the money for the debentures shall be raised from separate school supporters.
>
> The Municipal Act, R.S.O. 1950, c. 243, s. 308, provides that a yearly rate be levied sufficient to pay all the debts payable within the year. When the council has taken the appropriate action to determine what the annual rate shall be, to cause it to be levied, and to turn the collection over to the collector, then only is there a rate which becomes chargeable against the property of the ratepayer.[61]

The appeal was dismissed by the Supreme Court of Canada. Money raised to pay interest and principal of a debenture debt of a public school district must come from a rate charged against existing public school assessments.

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[60] 1960 S.C.R. 408, at p. 410.

[61] Ibid., at p. 414.

PART II

DENOMINATIONAL RIGHTS

No legislation or litigation of significance, which was of the nature further to define and clarify basic denominational rights of the Protestant or Roman Catholic minority, occurred during the 1940 to 1967 period.

CHAPTER IX

SUMMARY AND IMPLICATIONS

The purpose of this chapter is to bring together some of the major findings of the study. These findings should not be read in isolation from the body of the study, for without supporting details and background they may be erroneously interpreted. The findings should also be considered in relation to pertinent statutes since provincial statutes differ, to some extent, in their provisions for separate schools. Judicial decisions applicable to one or more provinces may not be applicable to all provinces.

Statutes, common law and governmental regulations prescribe the formal structure of separate schools. The formal structure that exists at a specific time period is, in the normal process of events, subsequently modified by new legislative enactments, governmental regulations and judicial decisions. In this chapter the evolution of the formal structure of separate schools is briefly described.

The term "denominational rights", as used in this study, refers to those rights existing or claimed to exist by virtue of section 93 of the British North America Act, 1867 or equivalent sections in the Federal acts creating provinces. Denominational rights are those rights existing "at the Union" and protected by constitutional statutes. The term

"provincial privileges or limitations" refers to the privileges or limitations placed upon separate schools by provincial enactments. Once privileges are extended by a province some protection of the privileges is guaranteed by virtue of section 93 of the British North America Act, 1867 or equivalent section in the relevant provincial act.

I. DENOMINATIONAL RIGHTS

What constitutes denominational rights is poorly defined by the British North America Act, 1867. Section 93 makes provision that for each province "the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:-" and subsection 1 of section 93 states that "Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any class of Persons Have by Law in the Province at the Union:".[1] The British North America Act, 1867 does not define what these rights are. Litigation over the years has established some general boundaries for denominational rights. Some of the general boundaries that have been established to date are:

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[1] Statutes of Great Britain, 30-31 Victoria, ch. 3 (1867), S. 93.

(1) The denominational rights claimed must be legal rights: in other words, rights secured by law, or which existed under law at the time of the Union.

(2) The denominational rights are determined by religion and not by race or language.

(3) The class of persons enjoying denominational rights is the minority group -- either Protestant or Roman Catholic.

(4) For the purposes of education, all Christians who repudiate the authority of the Pope are classified as Protestants.

(5) The separate schools are an integral part of the public school system and are subject to the same central control in the "educational" aspect as are public schools. Independence exists only in the "denominational" aspect.

(6) A provincial legislature has no authority to withdraw the administrative powers of a separate school board. A provincial legislature may, however, pass legislation for the "temporary interference" in the administrative powers of recalcitrant separate school boards.

(7) Denominational rights do not extend to exemption from regulations, relating to buildings, health and convenience of the population, passed by other governmental bodies.

(8) Secondary education in separate schools is not

a denominational right existing from the time of Union. It is a privilege extended by provinces at a later date.

II. PROVINCIAL DEVELOPMENTS

Provincial legislatures "may exclusively make Laws in relation to Education" but that these laws are not to "prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons Have by Law in the Province at the Union:"[2] The Courts have ruled that violations of denominational rights in respect to the above are subject to judicial appeal.[3]

The Courts in considering the application of the various sub-sections of section 93 of the British North America Act, 1867 have stated:

> It will be observed that sub-s. 3 goes further than sub-s. 1 in material respects. In the first place, it applies not merely to what exists at the time of Confederation, but also to separate or dissentient schools established afterwards by Provincial legislatures. In the second place, the word "prejudicially", in sub-s. 1, is dropped out from before the expression "affecting", in sub-s. 3. In the third place, the right or privilege is not confined to one in respect of denominational schools, but is given in respect of education. Their Lordships think that these changes in language are significant. They show that the protection given by sub-s. 1 was deemed, if taken by itself, to be insufficient. It was considered to be enough protection for the denominational schools to apply to them a

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[2] Ibid., S. 93.

[3] (1928) A.C. at p. 368.

> restriction which only rendered ultra vires of the Provinces a law which took away what was an existing legal right or privilege at the time of Confederation in respect of denominational schools. Sub-s. 3 contemplates that within the powers of the Provincial legislature Acts might be passed which did affect rights and privileges of religious minorities in relation to education, and gives a different kind of remedy, which appears, as has already been pointed out, to have been devised subsequently to the Quebec resolutions of 1864, and before the bill of 1867 was agreed on. Whenever an Act or decision of a Provincial authority affecting any right or privilege of the minority, Protestant or Roman Catholic, in relation to education is challenged, an appeal is to lie to the Governor-General in Council, as distinguished from the Courts of law. No doubt if what is challenged is challenged on the ground of its being ultra vires, the right of appeal to a Court of law remains for both parties unimpaired. But there is a further right not based on the principle of ultra vires. That this is so is shown by the extension of the power to challenge, to any system of separate or dissentient schools established by law after Confederation, and which accordingly could not be confined to rights or privileges at the time of Confederation. The omission of the word "prejudicially" in sub-s. 3 tends to bear out the view that something wider than a mere question of legality was intended, and the language of sub-s. 4, enabling the Dominion Parliament to legislate remedially for giving effect, "so far only as the circumstances of each case require," to the decision of the Governor-General in Council, points to a similar interpretation.[4]

The intra vires enactments of a province creating special privileges or limitations for separate schools create a special type of "denominational right" for separate schools in that province. Some provincial enactments made "after the Union" may be found to be intra vires of a province but

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[4] Ibid., at p. 369.

of such a nature as to affect adversely the rights and privileges of the religious minority in relation to education. Under these circumstances an appeal lies to the Governor-General in Council. The entire area of provincial enactments, relating to separate schools, which are intra vires of a province is treated in this study as provincial privileges and limitations for separate schools. Some of the more important provincial enactments relating to separate schools are summarized in the following sections.

Manitoba

The entrance of Manitoba into the Union was accomplished under somewhat turbulent conditions. The Red River Insurrection and resulting negotiations for terms of entrance into the Union, to some extent, determined the structure of the school system. The decision was made that a provision for separate schools was to be included in The Manitoba Act. The wording of the clause was somewhat different from that of section 93 of the British North America Act, 1867. This difference was important in subsequent litigation.

The public school system established in 1871 was similar to the one already functioning in Quebec. The main feature of the system was a Board of Education composed of two Sections -- one Protestant and the other

Roman Catholic. Each Section was given authority to control schools under its jurisdiction with respect to management, discipline, curriculum, examinations, grading and licensing of teachers and choosing textbooks in religious and moral training. The whole Board of Education received jurisdiction in the academic fields over the choice of textbooks. The public school system was a dual system in that each Section had virtual control over both the interna and externa of the schools under its Section.

Legislation that was passed during the 1872 to 1889 period was of the nature gradually to reduce the power of each Section of the Board of Education but not to change the dual aspect of the system. Considerable denominational control over education remained until 1890.

Legislation in 1890 replaced the dual structure of the public school system, with its considerable denominational control over education, with a single non-sectarian public school system. After considerable litigation and controversy some provisions were made within this non-sectarian public school system for minority rights. However, the essential features of the system were retained. The public school system remained a single non-sectarian public school sytem with no legal provision for separate schools to be formed within the structure of the public school system.

North-West Territories

The North-West Territories Act, 1875 contained a provision that when a public school system was established in the North-West Territories, provision was to be made for the system to include separate schools. The system proposed by the North-West Territories Council in 1884 was of a dual nature. An appointed Board of Education, with an equal number of Protestants and Roman Catholics, was established. Protestants and Roman Catholics each formed a distinct Section of the Board of Education. The Board of Education as a whole had only very general powers; each Section of the Board of Education, sitting separately, had very extensive powers. Each Section had control over the management of its schools; the examination, grading and licensing of teachers; the textbooks; and appointment of inspectors. The externa and interna of schools were largely under denominational control.

The trend of the legislation to 1891 was slowly to reduce Roman Catholic representation on the Board of Education and to transfer some powers from the Sections to the Board of Education as a whole. The dual nature of the system was retained, however, the power that could be exerted by each Section was reduced.

Legislation during 1892 replaced the dual system of education with a single public school system with provision for separate schools within the system. Separate school

boards were given considerable control over the externa of their schools but very limited control over the educational program within the school -- other than the one-half hour of religious instruction permitted in all schools. Denominational interests in the new Council of Public Instruction served in only an advisory capacity with the voting members of the Council of Public Instruction being members of the Executive Committee.

Legislation during 1901 replaced the Council of Public Instruction with a Department of Education which was headed by a member of the Executive Committee. Individuals appointed on a denominational basis, to advise the Department of Education on educational matters, held membership in an Educational Council. The Educational Council acted in an advisory capacity to the Department of Education. The essential features of school operation remained the same. The system remained a single public school system with provision for separate schools within the system.

Alberta and Saskatchewan

The school system in existence in the North-West Territories, as of August, 1905, became the basis for the school system of Alberta and of Saskatchewan. The systems were single school systems with provision for separate schools as part of each system. The interna of the schools

was almost completely controlled by the central authority of the province. Almost identical educational programs existed in both public and separate schools. Separate school boards had, however, some control over the externa of their schools.

It was in the area of the externa that changes in the structure of separate schools occurred during the 1905-1967 period. The major changes of the existing structure during this period of time were:

(1) Saskatchewan, in 1907, limited the right to form high school districts to the public schools. Alberta had interpreted its School Ordinances as including secondary education as a normal part of separate school education.

(2) Alberta, in 1910, and Saskatchewan, in 1913, established more liberal provisions for the sharing of company assessments between public and separate school districts. The Saskatchewan legislation was challenged in court and amendments to make the original legislation operative, according to the original intent, were passed in 1915.

(3) Litigation in Saskatchewan during the 1911-1917 period established the following interpretation of existing provisions for separate schools:

(a) Christians who accept Papal authority are classified as Roman Catholics.

(b) Religion, Protestant or Roman Catholic,

is the determining factor in determining separate school support. The individual does not have an option in declaring support.

(c) Legislation that prejudicially affects the majority is not grounds for declaring the legislation ultra vires of the provincial legislature.

Since the Alberta legislation relating to the establishment and support of separate schools is almost identical to that of Saskatchewan, the above would presumably apply to Alberta.

(4) Alberta, in 1936, and Saskatchewan, in 1940 and 1944, made provisions for the formation of large units of rural school administration. In these cases the provisions were limited to public school districts. Both provinces protected the minority's right in school districts to form separate school districts. Alberta made a provision whereby the majority in a rural public school district could withdraw from the division if dissatisfied with the provisions in the division for religious education.

(5) Alberta made a provision in 1956 allowing a couple in a mixed marriage, over the signature of both parents, to send their child to either the public or separate school.

(6) Saskatchewan, in 1964, extended the right to

separate school districts to form separate high school districts. Individuals, who were of the same faith as the minority establishing the separate high school district, had the option of declaring support for the high school district or the separate high school district. The same legislation permitted individuals, who would normally be considered as public school supporters, to declare support for the separate high school district if they so desired.

III. DISTINCTIVENESS OF SEPARATE SCHOOLS

The dual system of education initially established by the central authorities in the Prairie Region provided considerable potential for the development of public and separate school education of quite a distinctive nature. Under the dual system each Section of the Board of Education was given very extensive powers to control schools under its jurisdiction with respect to management, discipline, curriculum, examinations, grading and licensing of teachers and choosing textbooks in religious and moral training. The very broad powers assigned to each Section of the Board of Education permitted distinctly different centrally established regulations for public and separate schools. The distinctiveness of the formal structure for public and separate schools arose not so much from statutes and common law as from regulations passed by each Section of the Board of Education.

The trend of provincial legislation over the years has been to decrease the general powers assigned to denominational interests and to increase the state's control over education. This trend was evident under the dual system of education but was largely accomplished when provincial authorities changed the dual system of education to a single system with, or in the case of Manitoba without, provision for separate schools as part of the single system. The establishment of a single central state body formulating regulations applicable to both public and separate schools greatly reduced the possibility for distinctively different regulations for public and separate schools. The tendency after the elimination of the dual system was not to establish distinctive formal structures for public and separate schools but rather to emphasize the commonality of public and separate schools.

Existing Conditions

The existing conditions discussed herein refer to Alberta and Saskatchewan. Manitoba has no provision for separate schools as such within its public school system.

Formation of School Districts. Separate school districts can only be formed within an existing public school district. The request to form a separate school district must come from three electors of the district who are of the same faith as the minority of the district.

No minimum pupil enrollment is required. Public school districts can be formed either by the Minister of Education or by request of three electors of the proposed district. A minimum enrollment as well as a minimum number of residents liable for assessment are required in the case of the formation of a public school district. Formation of large units of rural school administration in both Provinces is limited to public school districts.

Supporters of School Districts. Religious faith is the determining factor in assigning support to separate or public school districts in Alberta and in elementary education in Saskatchewan. All residents in a high school district in Saskatchewan, which has both a public and separate high school, may declare support for the school of their choice. Parents in a mixed marriage in Alberta may choose to send their child to either the public or separate school.

Financial Support. Powers of taxation and sharing of company assessments are on an equivalent basis for both public and separate school districts. Separate school districts may share in provincial assistance for education on the same basis as public school districts. In Alberta, the School Foundation Program of financing education is mandatory for public school districts but permissive for separate school districts.

Educational Program. Provincial authorities control the educational program in separate schools on the same basis as that of public schools.

Distinctiveness of Separate Schools

After a separate school district has been established the separate school district and its board possesses and exercises all the rights, powers and privileges and is subject to the same duties and liabilities and has the same method of government as a public school district and its board. The distinctiveness of separate schools is in the right of the minority to form and attend separate schools which are, however, under the same central control of the educational program as public schools. The only major provincial limitations placed upon separate schools, which differ from public schools, are in the formation of separate school districts and in not allowing large administrative units of rural separate school districts. Over the years the formal structure of separate schools has become more like, rather than distinct from, the formal structure of public schools.

IV. IMPLICATIONS

Several basic implications for the administrator arise out of this study.

(1) Administrators require a sound knowledge of the

existing structure for public and separate school education if they are adequately to meet the responsibilities imposed by a dynamic and industrial society for a continuing improvement of educational services. An inadequate knowledge of the existing formal structure prevents the most effective use of the available resources. Sound administrative knowledge of the known existing structure will aid administrators in coping with the problem of improving educational services for both public and separate schools within the existing structure imposed for providing these services.

(2) Clarification of the existing formal structure of public and separate schools may lead to an examination of the structure insofar as the existing structure may serve to hinder the achievement of perceived desirable educational objectives. The definition of areas of conflict may suggest the need to alter the goals of the system and/or the structure imposed upon the system.

V. IMPLICATIONS FOR FURTHER RESEARCH

A number of delimitations which were necessary in this study present problems for further research. The formal structure existing in other Canadian provinces for separate schools would be worthy of further consideration. Provinces that have no formal provision for separate schools, but which have provisions -- either legal or understood -- for minority groups to exercise some influence

over the educational process, might form another area for investigation. Studies in both of these areas would help to clarify the existing structure of public school education in Canada.

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Abbreviation	Report
A.C.	Canadian Reports, Appeal Cases
D.L.R.	Dominion Law Reports
M.L.R.	Manitoba Law Reports
N.B.R.	New Brunswick Reports

O.L.R.	Ontario Law Reports
O.R.	Ontario Reports
O.W.N.	Ontario Weekly Notes
S.C.R.	Canada Supreme Court Reports
W.W.R.	Western Weekly Reports

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Renaud v. Roman Catholic School Section No. 11, Township of Tilbury North, (1934) O.W.N. 218.

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Re Ottawa Separate Schools, (1917) O.L.R. 259.

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Re Separate Schools Act, (1901) O.L.R. 584.

Roman Catholic Separate School Trustees for Tiny v. Rex, (1928) A.C. 363, affirming (1927) S.C.R. 637, affirming on equal division (1927) 60 O.L.R. 15, affirming (1927) 59 O.L.R. 96.

Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Mackell, (1917) A.C. 62, affirming (1915) 34 O.L.R. 335, affirming (1914) 32 O.L.R. 252.

Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Ottawa Corporation, (1917) A.C. 76, reversing (1916) 36 O.L.R. 624, affirming (1915) 34 O.L.R. 624.

Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. The Quebec Bank, (1920) A.C. 230, affirming (1918) 43 O.L.R. 637, affirming (1918) 41 O.L.R. 594.

Trustees of Roman Catholic Separate School Section No. 10 of the Township of Arthur v. The Municipal Corporation of the Township of Arthur, (1891) 21 O.R. 60.

A P P E N D I C E S

APPENDIX A

THE ROMAN CATHOLIC SEPARATE SCHOOLS ACT OF 1863

26 Victoria, ch. 5 (1863).

Whereas it is just and proper to restore to Roman Catholics in Upper Canada certain rights which they formerly enjoyed in respect to Separate Schools, and to bring the provisions of the Law respecting Separate Schools more in harmony with the provisions of the Law respecting Common Schools: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:-

1. Sections eighteen to thirty-six, both inclusive, of Chapter sixty-five of the Consolidated Statutes for Upper Canada, intituled, "An Act respecting Separate Schools," are hereby repealed, and the following shall be substituted in lieu thereof, and be deemed to form part of the said Act.

2. Any number of persons, not less than five, being heads of families, and freeholders or householders, resident within any School Section of any Township, Incorporated Village, or Town, or within any Ward of any City, or Town, and being Roman Catholics, may convene a public meeting of persons desiring to establish a Separate School for Roman Catholics, in such School Section, or Ward, for the election of Trustees for the management of the same.

3. A majority of the persons present, being freeholders, or householders, and being Roman Catholics, and not candidates for election as Trustees, may, at any such meeting, elect three persons resident within such Section, or an adjoining Section, to act as Trustees for the management of such Separate School, and any person, being a British subject, not less than twenty-one years of age, may be elected as a Trustee, whether he be a freeholder, or householder, or not.

4. Notice in writing that such meeting has been held, and of such election of Trustees, shall be given by the parties present at such meeting to the Reeve, or head, of the Municipality, or to the Chairman of the Board of Common School Trustees, in the Township, Incorporated Village, Town, or City, in which such School is about to be established, designating by their names, professions and residences, the persons elected in the manner aforesaid, as

Trustees for the management thereof; and every such notice shall be delivered to the proper officer by one of the Trustees so elected, and it shall be the duty of the officer receiving the same to endorse thereon the date of the receipt thereof, and to deliver a copy of the same so endorsed, and duly certified by him, to such Trustee, and from the day of the delivery and receipt of every such notice, or in the event of the neglect or refusal of such officer to deliver a copy so endorsed and certified, then, from the day of the delivery of such notice, the Trustees therein named shall be a body corporate, under the name of "The Trustees of the Roman Catholic Separate School for the Section number , in the Township of , or for the Ward of , in the City, or Town, (as the case may be,) or for the Village of , in the County of ."

5. The Trustees of Separate Schools heretofore elected, or hereafter to be elected, according to the provisions of this Act, in the several Wards of any City, or Town, shall form one body Corporate, under the title of "The Board of Trustees of the Roman Catholic Separate Schools for the City (or Town) of ."

6. It shall be lawful for the majority of the rate-paying supporters of the Separate School, in each Separate School Section, whether the Sections be in the same or adjoining Municipalities, at a public meeting duly called by the Separate School Trustees of each such Section, to form such Sections into a Separate School Union Section, of which union of Sections the Trustees shall give notice within fifteen days to the Clerk, or Clerks, of the Municipality, or Municipalities, and the Chief Superintendent of Education; and each such Separate School Union Section thus formed, shall be deemed one School Section for all Roman Catholic Separate School purposes, and shall every year thereafter be represented by three Trustees, to be elected as in Common School Sections. And the said Trustees shall form a body corporate, under the title of "The Board of Trustees of the Roman Catholic United Separate Schools for the United Sections, Nos. , (as the case may be,) in the , (as the case may be.)"

7. The Trustees of Separate Schools, forming a body corporate under this Act, shall have the power to impose, levy, and collect, School rates, or subscriptions, upon and from persons sending children to, or subscribing towards the support of such Schools, and shall have all the powers in respect of Separate Schools, that the Trustees of Common Schools have and possess under the provisions of the Act relating to Common Schools.

8. The clerk, or other officer, of a Municipality within, or adjoining, which a Separate School is established, having possession of the Assessor's, or Collector's, roll of the said Municipality, shall allow any one of the said Trustees, or their authorized collector, to make a copy of such roll in so far as it relates to the persons supporting the Separate School under their charge.

9. The Trustees of Separate Schools shall take and subscribe the following declaration before any Justice of the Peace, Reeve, or Chairman of the Board of Common Schools:- "I, , will truly and faithfully, to the best of my judgement and ability, discharge the duties of the office of School Trustee, to which I have been elected:" - and they shall perform the same duties, and be subject to the same penalties as Trustees of Common Schools: and teachers of Separate Schools shall be liable to the same obligations and penalities as teachers of Common Schools.

10. The Trustees of Separate Schools shall remain respectively in office for the same periods of time that the Trustees for Common Schools do, and as is provided by the thirteenth Section and its sub-sections, for the Common School Act of the Consolidated Statutes for Upper Canada; but no Trustee shall be re-elected without his consent, unless after the expiration of four years from the time he went out of office; Provided always, that whenever in any City, or Town, divided into Wards, a united Board now exists, or shall be hereafter established, there shall be for every Ward two Trustees, each of whom, after the first election of Trustees, shall continue in office two years and until his successor has been elected, and one of such Trustees shall retire on the second Wednesday in January, yearly in rotation; and provided, also, that at the first meeting of the Trustees after the election on the second Wednesday in January next, it shall be determined by lot, which of the said Trustees, in each Ward, shall retire from office at the time appointed for the then next annual election, and the other shall continue in office for one year longer.

11. After the establishment of any Separate School, the Trustees thereof shall hold office for the same period and be elected at the same time in each year that the Trustees of Common Schools are, and all the provisions of the Common School Act relating to the mode and time of election, appointments and duties of Chairman and Secretary at the annual meetings, term of office and manner of filling up vacancies, shall be deemed and held to apply to this Act.

12. The Trustees of Separate Schools may allow children from other School Sections, whose parents, or lawful guardians, are Roman Catholics, to be received into any Separate School under their management, at the request of such parents, or guardians; and no children attending such School shall be included in the Return, hereafter required to be made to the Chief Superintendent of Education, unless they are Roman Catholics.

13. The Teachers of Separate Schools, under this Act, shall be subject to the same examinations, and receive their Certificates of qualification in the same manner as Common School Teachers generally; provided that persons qualified by law as Teachers, either in Upper or Lower Canada, shall be considered qualified Teachers for the purposes of this Act.

14. Every person paying rates, whether as proprietor or tenant, who, by himself, or his agent, on, or before, the first day of March, of the present year, has given to the Clerk of the Municipality, notice, in writing, that he is a Roman Catholic, and a supporter of a Separate School situated in the said Municipality, or in a Municipality contiguous thereto, shall be exempted from the payment of all rates imposed for the support of Common Schools, and of Common School Libraries, or for the purchase of land, or erection of buildings, for Common School purposes, within the City, Town, Incorporated Village, or Section, in which he resides, for the then current year, and every subsequent year thereafter, while he continues a supporter of a Separate School. And such notice shall not be required to be renewed annually; and it shall be the duty of the Trustees of every Separate School to transmit to the Clerk of the Municipality, or Clerks of Municipalities, (as the case may be,) on or before the first day of June in each year, a correct list of the names and residences of all persons supporting the Separate Schools under their management; and every ratepayer whose name shall not appear on such list shall be rated for the support of Common Schools.

15. Every Clerk of a Municipality, upon receiving any such notice, shall deliver a certificate to the person giving such notice, to the effect that the same has been given, and showing the date of such notice.

16. Any person who fraudently gives any such notice, or wilfully makes any false statement therein, shall not thereby secure any exemption from rates, and shall be liable to a penalty of forty dollars, recoverable, with costs, before any Justice of the Peace, at the suit of the Municipality interested.

17. Nothing in the last three preceding Sections contained, shall exempt any person from paying any rate for the support of Common Schools, or Common School Libraries, or for the erection of a School-house, or School-houses, imposed before the establishment of such Separate School.

18. Any Roman Catholic who may desire to withdraw his support from a Separate School, shall give notice in writing to the Clerk of the Municipality before the second Wednesday in January in any year, otherwise he shall be deemed a supporter of such School: Provided always, that any person who shall have withdrawn his support from any Roman Catholic Separate School, shall not be exempted from paying any rate for the support of Separate Schools, or Separate School Libraries, or for the erection of a Separate School-house, imposed before the time of his withdrawing such support from the Separate School.

19. No person shall be deemed a supporter of any Separate School unless he resides within three miles (in a direct line) of the site of the School-house.

20. Every Separate School shall be entitled to a share in the fund annually granted by the Legislature of this Province for the support of Common Schools, and shall be entitled also to a share in all other public grants, investments and allotments for Common School purposes now made, or hereafter be made, by the Province, or the Municipal authorities, according to the average number of pupils attending such School during the twelve next preceding months, or during the number of months which may have elapsed from the establishment of a new Separate School, as compared with the whole average number of pupils attending School in the same City, Town, Village, or Township.

21. Nothing herein contained shall entitle any such Separate School, within any City, Town, Incorporated Village, or Township, to any part, or portion, of School moneys arising, or accruing, from local assessment for Common School purposes within the City, Town, Village or Township, or the County, or Union of Counties, within which the City, Town, Village or Township is situate.

22. The Trustees of each Separate School shall, on or before the thirtieth day of June and the thirty-first day of December of every year, transmit to the Chief Superintendent of Education for Upper Canada, a correct return of the names of the children attending such School, together with the average attendance during the six next preceding months, or during the number of months which have elapsed

since the establishment thereof, and the number of months it has been kept open; and the Chief Superintendent shall thereupon determine the proportion which the Trustees of such Separate School are entitled to receive out of the Legislative grant, and shall pay over the amount thereof to such Trustees.

23. All Judges, Members of the Legislature, the heads of the Municipal bodies, in their respective localities, the Chief Superintendent and Local Superintendent of Common Schools, and Clergymen of the Roman Catholic Church, shall be Visitors of Separate Schools.

24. The election of Trustees for any Separate School shall become void, unless a Separate School be established under their management within three months from the election of such Trustees.

25. No person subscribing towards the support of a Separate School established as herein provided, or sending children thereto, shall be allowed to vote at the election of any Trustee for a Common School in the City, Town, Village, or Township, in which such Separate School is situate.

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

27. In the event of any disagreement between Trustees of Roman Catholic Separate Schools, and Local Superintendents of Common Schools, or other Municipal authorities, the case in dispute shall be referred to the equitable arbitrament of the Chief Superintendent of Education in Upper Canada; subject, nevertheless, to appeal to the Governor-in-Council, whose award shall be final in all cases.

28. This Act shall come into force, and take effect, from and after the thirty-first day of December next: But all contracts and engagements made, and rates imposed, and all corporations formed under the Separate School Law, hereby repealed, shall remain in force, as if made under the authority of this Act.

APPENDIX B

EXTRACTS FROM QUEBEC LEGISLATION

23 Victoria, ch. 15 (1861)

18. The Governor may appoint not more than fifteen and not less than eleven persons (of whom the Superintendent of Education of Lower Canada shall be one) to be a Council of Public Instruction for Lower Canada, and such persons shall hold their office during pleasure, and shall be subject to all lawful orders and directions in the exercise of their duties, which may from time to time be issued by the Governor in Council.

21. It shall be the duty of the said Council -

. . .

(3) To make from time to time, with the approval of the Governor in Council, such regulations as the Council deems expedient for the organization, government and discipline of Common Schools, and the classification of Schools and Teachers;

(4) To select or cause to be published, with such approval as aforesaid, books, maps and globes, to be used to the exclusion of others, in the Academies, Model and Elementary Schools under the control of School Commissioners or Trustees, due regard being had in such selection to Schools wherein tuition is given in French and to those wherein tuition is given in English; But this power shall not extend to the selection of books having reference to religion or morals, which selection shall be made as provided by the second sub-section of the sixty-fifth section of this Act concerning Common Schools;

65. It shall be the duty of the School Commissioners and Trustees:

. . .

(2) But the Cure, Priest or officiating Minister, shall have the exclusive right of selecting the books having reference to religion and morals, for the use of the Schools for children of his own religious faith.

32 Victoria, ch. 16 (1869)

1. Within four months after the passing of this Act the lieutenant-governor in council shall appoint, to form and constitute the council of public instruction for the province of Quebec, together with the minister of public instruction or superintendent of education for the province,

as the case may be, for the time being, twenty-one persons, fourteen of whom shall be roman catholics and seven protestants, and until such appointment shall take place the members of the present council of public instruction shall continue in office.

2. The said council, as soon as reorganized under this act shall resolve itself into two committees, the one consisting of the roman catholic and the other of the protestant members thereof, and the matters and things which by law belong to the said council shall be referred to the said committees respectively, insofar as they shall specially affect the interests of roman catholics and of protestant education respectively, and in such manner and form as the whole shall from time to time be determined by the lieutenant - governor in council on the report of the minister of public instruction, or of the superintendent of education. The minister of public instruction or superintendent of education, as the case may be, for the time being shall be a member ex-officio of each committee, but shall have right of voting only in the committee of the religious faith to which he shall belong.

5. If at any meeting of the council of public instruction, ten of the roman catholic, or five of the protestant members, appointed by the lieutenant-governor in council, do record their votes to the effect that it is advisable that the management of roman catholic and of protestant schools and institutions respectively should be distinct and separate, it shall be the duty of the president of the said council to call a special meeting of the council to take place within sixty and at least thirty days after the meeting at which such vote shall have been recorded, for the purpose of reconsidering the same.

6. If at the meeting thus called the said vote is confirmed by the same number of the said roman catholic or protestant members, as the case may be, the president of the said council shall transmit to the lieutenant-governor a copy of the minutes of the said meetings, and within three months the roman catholic and protestant members of the said council appointed by the lieutenant-governor in council shall be declared by order in council to form two separate councils of public instruction, with separate powers and jurisdictions in relation to protestant and catholic education respectively, as the whole shall be defined by such order in council.

APPENDIX C

AN ACT TO ESTABLISH A SYSTEM OF EDUCATION IN MANITOBA

34 Victoria, ch. 12 (1871)

Her MAJESTY, by and with the advice and consent of the Legislative Council and Legislative Assembly of Manitoba, enacts as follows:

1. The Lieutenant-Governor in Council may appoint not less than ten nor more than fourteen persons to be a Board of Education for the Province of Manitoba, of whom one-half shall be Protestants and the other half Catholics.

2. The Lieutenant-Governor in Council may appoint one of the Protestant members of the Board to be Superintendent of the Protestant Schools, and one of the Catholic members to be Superintendent of Catholic Schools, and the two Superintendents shall be joint secretaries of the Board.

3. The Board shall be first called together at a time and place to be named by the Lieutenant-Governor in Council, and shall be organized by the selection of one of the members to be Chairman of the Board.

4. The quorum of the Board shall not be less than seven.

5. The Board shall make regulations for the calling of meetings, from time to time, and prescribe the notices thereof to be given to members.

6. At any regularly called meeting, attended by a quorum, the members present, in the absence of the Chairman, may select a Chairman temporarily from those present, who shall preside for that meeting.

7. It shall be the duty of the Board:
First. To make, from time to time, such regulations as they may think fit for the general organization of the Common Schools.
Secondly. To select books, maps and globes to be used in the Common Schools, due regard being had in such selections to the choice of English books, maps and globes for the English Schools and for the French Schools; but the authority hereby given is not to extend to the selection of books having reference to religion or morals, the

selection of such books being regulated by a subsequent clause of this Act.
Thirdly. To alter and sub-divide, with the sanction of the Lieutenant-Governor in Council, any School District established by this Act.

8. Each Section of the Board may meet at any time after the organization of the whole Board, that may be indicated to the Secretary of the Section by any two members of the Section.

9. At the first meeting of each Section, they shall choose a Chairman. The Superintendent of Education of the Section shall be the Secretary.

10. Each Section shall have under its control and management, the discipline of the schools of the Section.

11. It shall make rules and regulations for the examination, grading and licensing of teachers, and for the withdrawal of licenses on sufficient cause.

12. It shall prescribe such of the books to be used in the schools of the Section as have reference to religion or morals.

13. From the sum appropriated by the Legislature for Common School education, there shall first be paid the incidental expenses of the Board and of the Sections, and such sum for the services of the Superintendents of Education, not exceeding $100. to each, as the Lieutenant-Governor in Council shall deem just, and the residue then remaining shall be appropriated to the support and maintenance of Common Schools, one moiety thereof to the support of Protestant Schools, the other moiety to the support of Catholic Schools.

14. Each Electoral Division, with the lines as fixed by the Lieutenant-Governor in Council, and as amended by any Act of the Session, shall in the first instance be considered a school district.

15. The following districts, comprising mainly a Protestant population, shall be considered Protestant School Districts: Nos. 2, 3, 4, 8, 10, 18, 19, 20, 21, 22, 23, 24.

16. The following districts, comprising mainly a Catholic population, shall be considered Catholic School Districts: Nos. 1, 5, 6, 7, 9, 11, 12, 13, 14, 15, 16, 17.

17. There shall not, without the special sanction of the Section, be more than one school in any school district, and no school shall derive from the public funds a sum more than three times what is contributed by the people of the district: not unless the average attendance at the school shall be fifteen scholars.

18. The monies at the disposal of the Section shall be appropriated among the schools of the Section as the members of the Section shall deem best for the promotion of education, having reference to the efficiency of the schools, the number of scholars in attendance and the capacity and services of the teachers.

19. In an exceptional case, where the people of the school district shall in the judgement of the members of the Section, be unable to contribute to the support of a school, the Section may declare the district a Poor-School District, and give such aid as the circumstances may seem to justify.

20. On the first Monday of February in each year after the passing of this Act, beginning with the year 1872, a meeting of the male inhabitants of each school district, of the age of twenty-one years and upwards, shall be called by the Superintendent of the Section to which the district belongs by notice posted by him in public places in the district.

21. For the present year the meeting shall be called, after the passing of the Act, on a day to be fixed by the Lieutenant-Governor in Council.

22. At such meeting the majority shall choose three persons to be Board Trustees for the district.

23. They shall also decide in what manner they shall raise their contributions towards the support of the school, which may be either by subscription, by the collection of a rate per scholar, or by assessment on the property of the school district, as the meeting may determine.

24. Such meeting, or any other meeting, called by the Secretary of the Section, may decide by a majority to erect a school-house and vote a sum of money therefor, which if the meeting so decide, shall be raised by assessment.

25. Any school-house erected under this Act must be upon a plan and dimensions to be approved by the Board of Education.

26. The trustees may engage a teacher for the school but they shall not be at liberty to engage any person who has not been examined and licensed by the Section to which the school belongs.

27. In case the father or guardian of a school child shall be a Protestant in a Catholic district or a Catholic in a Protestant school district, he may send the child to the school of the nearest district of the other Section, and in case he contributes to the school which the child shall attend, a sum equal to what he would have been bound to pay if he belonged to that district, he shall be exempt from payment to the school of the district to which he belongs.

APPENDIX D

EXTRACTS FROM NORTH-WEST TERRITORIES ORDINANCE NO. 3 OF 1885

1. The Lieutenant-Governor in Executive Council may appoint, and constitute a Board of Education for the North-West Territories, composed of five members, two of whom shall be Roman Catholics, and two shall be Protestants, and the Lieutenant-Governor, who shall be chairman.

5. It shall be the duty of the Board:-

. . .

(2) To appoint Inspectors, who shall hold office during the pleasure of the Board, and to remunerate them for their services;

(3) To appoint a Board or Boards of Examiners for the examination of teachers, whose qualifications shall from time to time be prescribed by the Board of Education;

. . .

(5) To arrange for the proper examination, grading, and licensing of teachers, and the granting of certificates; such certificates to be of three classes, viz., a first, second, and third class certificate and a provisional certificate;

. . .

(7) To make from time to time such regulations as they may think fit, for the general organization of schools;

. . .

(10) To determine all Appeals from the decisions of Inspectors of Schools, and to make such orders thereon as may be required;

6. The Board of Education shall resolve itself into two sections, the one consisting of the Protestant, and the other of the Roman Catholic members thereof, and it shall be the duty of each section:

(1) To have under its control and management the schools of its section, and to make from time to time such regulations as may be deemed fit for their general government, and discipline, and the carrying out of the provisions of this Ordinance;

(2) To cancel the certificate of a teacher upon sufficient cause;

(3) To select, adopt, and prescribe a uniform series of text books, to be used in the schools of the section.

9. A Protestant or Catholic, public or separate school district, shall at its erection comprise an area of not more than thirty-six square miles, its extreme limits being not more than nine miles apart and shall contain not less than four resident heads of families with a population of children of school age, that is to say, between the ages of five and sixteen, of not less than ten.

31. In accordance with the provisions of "The North-West Territories Act, 1880," providing for the establishment of separate schools, it shall be lawful for any number of property holders resident within the limits of any public school district or within two or more adjoining public school districts or some of whom are within the limits of an organized school district and others on adjacent land not included within such limits, to be erected into a Separate School District by proclamation of the Lieutenant-Governor with the same rights, powers, privileges, liabilities and method of government throughout as hereinbefore provided in the case of public school districts.

32. Such separate school district shall be erected on petition of all those desiring to have their land set aside as a separate school district.

33. The petition for the erection of a separate school district shall state in addition to the particulars mentioned in sub-sections 1 and 6 of section twelve of this Ordinance:-

(1) The description of the land held by each petitioner, its area, assessed value or probable assessable value, if outside the limits of a municipality, its situation in regard to present organized school districts as well as Dominion lands surveys and natural boundaries;

(2) The number of children of school age resident within and adjacent to the proposed district, of the religious faith of the petitioners, who would probably attend such school.

34. Each such petition shall be accompanied by an affidavit of some person competent to verify the signatures and facts therein set forth.

35. Upon the receipt of such petition, the Lieutenant-Governor shall if there be no impediment requiring the consideration of the Lieutenant-Governor in Council, issue a proclamation erecting such separate school

district and order the first election of Trustees, fixing the date thereof, and appoint a returning officer who shall conduct the election as is provided in sections 16, 17, 18, 19, 20, 22, 23, 24, 25, and 26, and the trustees elected shall proceed as provided in section 25.

36. The Lieutenant-Governor shall at the same time notify, in writing, the Board of Trustees of any public school district that may include the whole or any part of such separate school district within its limits, of the fact of the erection of such separate school district and of the lands of such separate school district having withdrawn from such public school district.

37. Any land and personal property therein set apart as a separate school district, shall be assessable by the public school district, within whose organized limits it is situated, for the purpose of paying off any debenture indebtedness that may have been incurred, during the time that such land was included as a part of such public school district in the same manner and time and at the same rates as the remaining portion of such public school district may be assessed to pay off such indebtedness, but for no other purpose whatever.

79. Any child attending any school whose parent or parents or guardian is or are of the religious faith different from that expressed in the name of such school district, shall have the privilege of leaving the school room at the hour of three o'clock in the afternoon, or of remaining without taking part in any religious instruction that may be given, if the parents or guardian so desire.

85. Every school district organized under this Ordinance shall receive aid from the school fund, ...

89. When property owned by a Protestant is occupied by a Roman Catholic and vice versa, the tenant in such cases shall only be assessed for the amount of property he owns, whether real or personal, but the school taxes on such rental or leased property shall in all cases, whether or not the same has been or is stipulated in any deed contract or lease, whatever, be paid to the trustees of the district of the religious faith to which belongs the owner of the property so leased or rented and to no other.

90. Whatever property is held jointly, as tenants, or tenants in common, by two or more persons, the holders of such property being Protestants and Roman Catholics, they shall be deemed and held accountable to the Board of Trustees for an amount of taxes in proportion to their interest in

the premises, tenancy or partnership, respectively, and such taxes shall be paid to the school of the denomination to which they respectively belong.

111. The tenant, occupant or owner of any real or personal property situated within the limits of any organized school district, may elect to pay the amount of taxes for which he is assessed on any property that he may have, to another school district, provided such school district is the religious faith, either Protestant or Catholic, different from the one in which the property of which he is the occupant or possessor, is situated, and of the religious faith to which such person claims to belong, at any time after the assessment is made and before the last sitting of the court of revision of the district; and he shall notify the assessor of the district in which he is assessed to that effect, and the assessor shall thereupon note in the assessment roll the fact of such notice having been received.

124. In no case shall a Roman Catholic be compelled to pay taxes to a Protestant school or a Protestant to a Roman Catholic school.

APPENDIX E

EXTRACTS FROM NORTH-WEST TERRITORIES ORDINANCE NO. 22 OF 1892

5. The members of the Executive Committee, and four persons, two of whom shall be Protestants and two Roman Catholics, appointed by the Lieutenant-Governor-in-Council, shall constitute a Council of Public Instruction, and one of the said Executive Committee, to be nominated by the Lieutenant-Governor-in-Council, shall be Chairman of the said Council of Public Instruction. The appointed members shall have no vote, and shall receive such remuneration as the Lieutenant-Governor-in-Council shall provide.

(1) The Executive Committee, or any sub-Committee thereof appointed for that purpose, shall constitute a quorum of the Council of Public Instruction.

6. It shall be lawful for the Lieutenant-Governor-in-Council to appoint a Superintendent of Education for the Territories, who shall also by Secretary of the Council of Public Instruction.

7. It shall be lawful for the Council of Public Instruction from time to time:-

(1) To appoint two or more Examiners at such remuneration as shall be thought proper, and who shall constitute a Board of Examiners to examine teachers and grant certificates of qualification.

(2) To make and establish rules and regulations for the conduct of Schools and Institutes and to prescribe the duties of teachers and their classification.

(3) To determine the subjects and percentages required for all classes and grades of certificates of teachers as well as to make and prescribe rules for the guidance of candidates for certificates of qualification as teachers.

(4) To select, adopt and prescribe the text-books to be used in the Public and Separate Schools of the Territories.

(5) To arrange for the proper training, examination, grading and licensing of teachers, and the granting of certificates, which shall be of seven classes namely:- High School; First Class, grade A & B; Second Class, grade A & B; Third Class and Provisional. Provided that, where Kindergarten Schools are authorized, the Superintendent of Education may allow trustees to engage any person who holds a certificate from any kindergarten training school, but such kindergarten certificate must

first have the approval of the Superintendent of Education.

(6) To determine all cases of appeal, disputes and complaints, arising from decisions of Trustees or Inspectors, and to make such orders thereon as may be required.

(7) To make any provisions, not inconsistent with this Ordinance, that may be necessary to meet exigencies occurring under its operation.

(8) To make and establish rules and regulations for the guidance of Inspectors.

9. Under the authority of the Council of Public Instruction, it shall be the duty of the Superintendent:-

(1) To see that text-books, adopted by the Council of Public Instruction, are used in all the Schools of the Territories.

(2) To see that the established rules and regulations for the conduct of all Schools are carried out.

(3) To make regulations for the registering and reporting of the daily attendance at all Schools.

(4) To see that all Schools are managed and conducted according to Law.

(5) To suspend, for cause, the certificate of qualification of any teacher until the Council of Public Instruction shall confirm or disallow his action in suspending such teacher after investigation. The cancellation or suspension of any teacher's certificate, when so confirmed by the Council of Public Instruction, shall release the School Trustees of the District, in which such teacher may be employed, from any obligation to continue to employ him as such teacher.

(6) To sign all certificates of qualification and to keep a register of all certificates.

(7) To prepare suitable forms, and to give instruction for marking all reports and conducting all proceedings under this Ordinance, and to cause the same, with such general regulations as may be approved of by the Council of Public Instruction, for the better organization and government of all Schools in the Territories, to be transmitted to the officers required to execute the provisions of this Ordinance.

(8) Upon the recommendation of an Inspector, the Superintendent may grant Provisional Certificates of qualification, which shall be valid till the next examination of teachers.

11. The Lieutenant-Governor-in-Council may appoint Inspectors of Schools in the Territories, and fix their salaries and travelling allowances, and such Inspectors shall severally hold office during pleasure and, in addition to the duties imposed upon them under Section 91

of this Ordinance, shall perform such other duties as may be imposed upon them from time to time by the Council of Public Instruction.

32. The minority of the ratepayers in any organized Public School District, whether Protestant or Roman Catholic, may establish a Separate School therein, and in such case, the ratepayers establishing such Protestant or Roman Catholic Separate Schools shall be liable only to assessments of such rates as they impose upon themselves in respect thereof.

33. The petition for the erection of a Separate School District shall be signed by three ratepayers, two of whom shall be resident heads of families, of the religious faith indicated in the name of the proposed district, and shall set forth:-

(1) The religious faith of the petitioners;

(2) The proposed name (stating whether Protestant or Roman Catholic) of the district;

(3) Its proposed limits, definite location and approximate area;

(4) The total number of heads of families and of children of school age of the religious faith of the petitioners residing within the limits of the proposed district;

(5) Together with the total assessed value of their real and personal property, according to the last revised assessment roll of the district.

34. The persons qualified to vote for or against a petition for the erection of a Separate School District, shall be the ratepayers resident therein being of the same religious faith as the petitioners.

35. The notice calling a meeting of the ratepayers for the purpose of taking their votes on the petition for the erection of a Separate School District shall be as in Form "D" in the Schedule annexed hereto; and the proceedings subsequent to the posting of such notice, including the issuing of the proclamation, shall be the same as in case of a Public School District.

36. After the establishment of a Separate School District under the provisions of this Ordinance, such Separate School District shall possess and exercise all rights, powers, privileges and be subject to the same liabilities and method of government as is herein provided in respect of Public School Districts.

83. All Schools shall be taught in the English language, and instructions may be given in the following branches, viz:- Reading, writing, orthography, arithmetic, geography, grammar, history of Britain and Canada, French and English literature, in accordance with the programme of studies prescribed by the Council of Public Instruction. Due attention shall be given during the entire School course to manners and morals, and the laws of health, and to such physical exercises for the pupils, as may be conducive to health and vigor of body as well as mind, and to the ventilation and temperature of School rooms.

(1) It shall be permissible for the Trustees of any School to cause a primary course to be taught in the French language.

85. No religious instruction, such as Bible reading or reciting, or reading or reciting prayers, (except as hereinbefore provided), or asking questions or giving answers from any catechism, shall be permitted in any School in the Territories, from the opening of such School at nine o'clock in the forenoon, until one half hour previous to the closing of such School in the afternoon, after which time any such instruction, permitted or desired by the Trustees, may be given.

86. Any child attending any School shall have the privilege of leaving the School room at the time at which religious instruction is commenced, as provided for in the preceding Section, or of remaining without taking part in any religious instruction that may be given, if the parents or guardians so desire.

98. In cases where Separate School Districts have been established, when property owned by a Protestant is occupied by a Roman Catholic and vice versa, the tenant in such cases shall only be assessed from the amount of property he owns, whether real or personal, but the School taxes on such property shall in all cases, whether or not the same has been or is stipulated to the contrary in any deed, contract, or lease whatever, be paid in the School District to which such owner is a ratepayer.

99. In cases where Separate School Districts have been established, whenever property is held jointly, as tenants, or tenants in common, by two or more persons, the holders of such property being Protestants and Roman Catholics, they shall be deemed and held accountable to the Board or Boards of Trustees for an amount of taxes in proportion to their interest in the premises, tenancy or partnership respectively, and such taxes shall be paid to the School District to which they respectively are ratepayers.

APPENDIX F

ADMISSION OF RUPERT'S LAND TO THE UNION AND THE RED RIVER INSURRECTION

I. ADMISSION OF RUPERT'S LAND TO THE UNION

The British North America Act, 1967 made provision for the admission of Rupert's Land into the Union. Section 146 made the following provisions:

> 146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the Northwestern Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.[1]

The Rupert's Land Act, 1968 was passed on July 31, 1968. It was "An Act for enabling Her Majesty to accept a Surrender upon Terms of the Lands, Privileges, and rights of 'The Governor and Company of Adventurers of England trading into Hudson's Bay,' and for admitting the same into the Dominion of Canada."[2] The terms of surrender of all

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[1] Statutes of Great Britain, 30-31 Victoria, ch. 3 (1867), S. 146.

[2] Statutes of Canada, 31-32 Victoria, ch. 105 (1868).

the rights held by the Hudson's Bay Company was to be negotiated between Her Majesty and the Governor and Company.[3] Provision was made for the continuance of the jurisdiction of existing Courts and Officers until otherwise enacted by the Parliament of Canada.[4]

After the passage of the Rupert's Land Bill, 1868 the Dominion of Canada sent Sir George Cartier and William McDougall to negotiate with the Hudson's Bay Company under the auspices of the Imperial Government.[5]

The International Financial Company had purchased the Hudson's Bay Company in 1863 and had purchased it in the knowledge that Canada questioned the validity of the charter and disputed the boundaries claimed by the Company.[6] The Canadian ministry, without relinquishing their legal claims, made it clear to the Company that the sum of £300,000 eventually agreed upon as the price of transfer represented merely the cost of legal proceedings necessary to recover possession.[7] The Colonial Office also, during

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[3] Ibid., S. 3.

[4] Ibid., S. 5.

[5] Chester Martin, "The Red River Settlement," in Adam Shortt and Arthur Doughty (eds.), Canada and Its Provinces (Toronto: Glasgow, Brook and Co., 1914), Vol. XIX, p. 61.

[6] Ibid., p. 61.

[7] Cartier and McDougall to Sir F. Rogers, February 9, 1869, Papers relating to Rupert's Land, p. 59 as quoted in Chester Martin, op. cit., p. 61.

the negotiations, pointedly suggested to the Company that the very foundations of the Company's title were not undisputed and that the lack of a recognized Government capable of enforcing the law and responsible to neighbouring countries for the performance of international obligations was not creditable to this country and was unjust to the inhabitants of that territory.[8]

The terms of transfer agreed to by the Hudson's Bay Company stipulated the surrender of Rupert's Land and the North-West Territories to the Imperial Government, the transfer within a month to Canada, the payment by Canada to the Company of £300,000, the confirmation of titles to land conferred by the Company, the reservation of land for the Company in the vicinity of their trading posts, and not exceeding one-twentieth part of each township settled within the fertile belt. The date of surrender was to be December 1, 1869.[9]

The agreement was drafted and approved on July 5, 1869 by the Governor General of Canada in accordance with a report from the Committee of the Queen's Privy Council for Canada.[10] The Hudson's Bay Company accepted the terms

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[8] Ibid., p. 40.

[9] Canada, "Order of Her Majesty in Council Admitting Rupert's Land and the Northwestern Territory into the Union," British North America Acts and Selected Statutes (Ottawa: King's Printer, 1948).

[10] Ibid., p. 135.

and signed the agreement on November 19, 1869.[11] On the 23rd of June, 1870 the Order admitting Rupert's Land and the North-West Territories into the Union on July 15, 1870 was made by Her Majesty in Council.[12]

II. THE RED RIVER INSURRECTION

The situation existing in the Red River Settlement at the time when Canada was negotiating for its union with Canada was summarized by John Lewis as follows:

> On the banks of the Red River, in what is now the Province of Manitoba, dwelt some twelve thousand settlers, ten thousand of whom were half-breeds or Metis, partly of Indian and partly of Scottish or French blood. They had been living under the government of the Hudson's Bay Company. The governing body was called the Council of Assiniboia. Its head was the governor of the company - at this time William McTavish. The people subsisted by fishing, hunting and a little farming. Their farms ran back from the river in long strips, such as may now be seen in the Province of Quebec. Fort Garry, the site of the present city of Winnipeg, was the centre of government.
>
> By a series of errors and misfortunes the settlement drifted into anarchy. The authority of the Hudson's Bay Company was passing away, that of Canada was not yet established. Canada had itself only recently emerged from the condition of a group of weak and distracted provinces. One of the sayings that touched the heart of the Red River Settlement was that it would not submit to be 'the colony of a colony.' Before attempting to take possession, there should have been a conference between representatives of Canada and representatives of the Red River Settlement. Unfortunately the inhabitants derived their first impressions of the

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[11] Ibid., p. 135.

[12] Ibid., p. 132.

new order from surveying parties and from newcomers spying out the land.

> 'A knowledge of the true state of the case and of the advantage they would derive from union with Canada had been carefully kept from them, and they were told to judge of Canada generally by the acts and bearing of some of the unreflective immigrants who had denounced them as cumberers of the ground, who must speedily make way for the superior race about to pour in upon them.' So wrote Donald A. Smith (afterwards Lord Strathcona) in reporting upon the mission to the Red River which he undertook in January 1870. He added that in various localities adventurers had marked off for themselves large and valuable tracts of land, impressing the existing inhabitants with the belief that they were about to be supplanted by the stranger. The settlers were fearful and perplexed, and, lacking other guidance and control, they fell under the influence of Louis Riel, a man of considerable ability and education, but vain, ambitious, and ill-balanced. He was the son of a half-breed miller who had some years before headed a successful revolt against the Hudson's Bay Company.[13]

Formal permission had been sought by the Canadian Government and granted by the Hudson's Bay directors for the immediate commencement of the survey of lands for settlement.[14] The survey was begun in the summer of 1869. Louis Riel called upon Colonel John Dennis, who was in charge of the federal survey, and asked him to explain the meaning of his operations. He was assured no injustice was intended, and he went away apparently satisfied.[15]

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[13]John Lewis, "The New Dominion, 1867-1873," in Adam Shortt and Arthur G. Doughty (eds.), op. cit., Vol. VI, pp. 32-33.

[14]Chester Martin, op. cit., p. 69.

[15]John Lewis, op. cit., p. 34.

Riel appeared before the Council of Assiniboia on October 25 and declared that the Métis were uneducated and only half civilized and that they felt that if a large immigration were to take place they would be crowded out.[16] In late October a party of eighteen French half-breeds headed by Riel stopped the survey by standing on the survey chain and using threats of violence.[17]

Sometime during mid-October the Comité National de Métis had been organized. John Bruce was president and Louis Riel secretary of this group. On October 21, 1869 the Comité National de Métis sent an order to William McDougall, who was to be the first governor, not to enter the Territory of the North-West without special permission of this Committee.[18] On November 1, the Comité National de Métis took over control of Fort Garry.[19] On November 3 a party of armed Métis compelled McDougall to leave the Hudson's Bay Post at Pembina and to retire to American territory.[20]

Riel issued, on November 6, a public notice calling

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[16]Chester Martin, op. cit., p. 71.

[17]Cartier and McDougall to Sir F. Rogers, February 9, 1869, op. cit., p. 15.

[18]Chester Martin, op. cit., p. 72.

[19]John Lewis, op. cit., p. 54.

[20]Chester Martin, op. cit., p. 72.

upon the inhabitants of Rupert's Land to send twelve representatives to a meeting at Fort Garry on November 16.[21] The English appeared at the meeting but declined to co-operate with the Comité National de Métis. Despite the refusal of the English to co-operate, Riel, on November 24, was elected president of an "English and Métis Provisional Government". Riel held that this was the only and lawful authority of the area.[22]

Canada declined on November 27 to accept transfer of Rupert's Land and the North-West Territories unless quiet possession could be given.[23] McDougall, unaware of this new situation, issued a proclamation on December 1 notifying of the assumption of control of Rupert's Land and the North-West Territories. When he discovered that Her Majesty had not taken the necessary action to transfer control of Rupert's Land and the North-West Territories to Canada he curtly informed Governor McTavish of the Hudson's Bay Company that the Hudson's Bay Company was still responsible for the preservation of peace and the maintenance of existing courts and law in Rupert's Land and the North-West Territories.[24] Riel, already in

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[21] Ibid., p. 73.

[22] Ibid., p. 74.

[23] Ibid., p. 75.

[24] Ibid., p. 76.

possession of Fort Garry and in the state of confusion that existed over the legally responsible authority within the area, had little difficulty in expanding control and de facto authority over the area.

The next major step was the appointment by the Canadian Government of three commissioners to visit the area. The three commissioners were: Vicar-General Thibault, who had spent more than thirty years in the North-West; Colonel de Salaberry; and Donald Smith, an old and experienced officer of the Hudson's Bay Company.[25] The commissioners arrived on the scene towards the end of December. Smith described the situation in these words:

> The state of affairs at this time in and around Fort Garry was truly humiliating. Upwards of sixty British subjects were held in close confinement as political prisoners. Security for persons or property there was none. The Fort, with its large supplies of ammunition, provisions and stores of all kinds, was in the possession of a few hundred French half-breeds, whose leaders had declared their determination to use every effort for the purpose of annexing the territory to the United States; and the governor and council of Assiniboia were powerless to enforce the law.[26]

Smith, on his arrival, had been requested to take an oath not to restore the Government of the Hudson's Bay Company. He refused and was kept virtually a prisoner within the fort.[27] He was permitted, however, to have

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[25]John Lewis, op. cit., p. 37.

[26]As quoted in John Lewis, op. cit., p. 37.

[27]Chester Martin, op. cit., p. 81.

frequent meetings with the most influential and reliable men in the settlement.[28] After considerable manouvering by the several factions within the settlement a decision was made to hold a public meeting to hear the proposed policy of the Imperial and Canadian Governments for the settlement.[29]

On January 19 Donald Smith placed the policy of the Imperial and Canadian Governments before the people. An agreement was reached to call a convention of forty, twenty French and twenty English, to decide what would be best for the welfare of the country.[30]

The convention was held from January 25th to February 11th. At the convention Commissioner Smith refused to discuss the French List of Rights drawn up in December, 1869.[31] A committee representing the settlement as a whole was appointed to draw up another list. This committee was composed of James Ross, Dr. Bird, Thomas Bunn, Louis Riel, Louis Schmidt and Charles Nolin.[32] Neither the French List of Rights nor the Second List drawn up by the committee of the convention contained a request for separate schools.[33]

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[28] Ibid., p. 82.

[29] Ibid., p. 82.

[30] Chester Martin, op. cit., p. 82.

[31] Ibid., p. 83.

[32] Ibid., p. 83.

[33] Edward Henry Oliver, The Canadian North-West: Its Early Development and Legislative Records (Ottawa: Government Printing Bureau, 1914), Vol. II, p. 925.

Also at the convention the English at last consented to the formation of the Provisional Government. The council was to consist of twenty-four members -- twelve from the English and twelve from the French-speaking population. A two-thirds vote was required to override the veto of the President of the Provisional Government. Louis Riel was chosen as President of the Provisional Government.[34]

The convention also appointed a committee of three to conduct further negotiations with the Dominion at Ottawa. Mr. Black, Mr. Scott and Father Ritchot were the members of this committee.[35] At least one of the delegation took with him a List Number Three,[36] signed by Mr. Bunn, secretary of the convention of French and English held at Upper Fort Garry. List Number Three differed from List Number Two in that it demanded provincial organization and amnesty for the insurrectionists.[37]

A publication by Bishop Taché in 1889 revealed the existence of a List Number Four. It was a list drawn up by Riel and his supporters and was apparently used by

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[34]Alexander Begg, History of the North-West (Toronto: Hunter, Rose and Company, 1894), Vol. I, p. 461-2.

[35]Chester Martin, op. cit., p. 86.

[36]D. S. Woods, The Two Races of Manitoba (Winnipeg: University of Manitoba, 1926), p. 15.

[37]Ibid., p. 15.

Father Ritchot in his part of the negotiations.[38] The list contained a demand for separate schools. The clause with respect to education read:

> That the schools be separate and that public money for schools be distributed among the different religious denominations in proportion to their respective populations, according to the system in the Province of Quebec.[39]

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[38] Chester Martin, op. cit., p. 40.

[39] D. S. Woods, op. cit., p. 16.

APPENDIX G

THE EDUCATIONAL COUNCIL

The Educational Council, as established by the legislation of 1901,[1] remained an active body during the remaining territorial period of the North-West Territories. The Provinces of Alberta and Saskatchewan, at their establishment in September, 1905, retained the provisions for Educational Councils.

I. ALBERTA

The Educational Council in Alberta remained an active body until 1912. The most influential member of the Educational Council was the Hon. N. D. Beck, Superior Court Justice and one of the Roman Catholic members.[2] He was, however, forced to retire due to illness in September, 1912.[3] The same year the other Roman Catholic member of the Council, E. H. Rouleau, died.[4] Bishop Legal's search for suitable replacements on the Council was apparently

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[1] Ordinances of the North-West Territories, ch. 29 (1901), Sections 8-11.

[2] Stephen T. Rusak, "Relations in Education Between Bishop Legal and the Alberta Liberal Government, 1905-1920." (unpublished Master's thesis, University of Alberta, 1966), p. 76.

[3] Ibid., p. 77.

[4] Ibid., p. 77.

unsuccessful.[5] After 1912 the Educational Council lapsed into inactivity and no mention is made of the Educational Council in the Annual Reports of the Department of Education after 1912.[6]

The provisions for the Educational Council were, however, still retained in the 1922 Revised Statutes of Alberta. The provisions were as follows:

> 13. (1) There shall be an Educational Council consisting of five persons (at least two of whom shall be Roman Catholics) to be appointed by the Lieutenant Governor in Council; and they shall receive such renumeration as the Lieutenant Governor in Council shall determine.
>
> (2) On the first constitution of the Council three of the members shall be appointed for three years and two for two years; and thereafter each member appointed shall hold office for two years.
>
> 14. Meetings of the Council shall be held at such times and places as may be determined by the Minister, but at least one meeting shall be held in each calendar year.
>
> 15. All general regulations respecting the inspection of schools, the examination, training, licensing, and grading of teachers, courses of study, teachers' institutes and text and reference books shall before being adopted or amended be referred to the Council for its discussion and report.
>
> 16. The Council shall consider such matters as may be referred to it as hereinbefore provided and any matter referred to it by the Minister and may also consider any question concerning the educational system of the Province of Alberta as

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[5] Ibid., p. 77.

[6] Harry Theodore Sparby, op. cit., p. 152.

> to it may seem fit and shall report thereon to the Lieutenant-Governor-in-Council.[7]

During the 1922 to 1942 period the above provisions were not repealed, however, the provisions for the Educational Council were not included in the 1942 Revised Statutes of Alberta.[8]

The Educational Council in Alberta has been inactive since 1912. Statutory provisions for the Educational Council were never repealed but they were omitted in the 1942 Revised Statutes of Alberta.

II. SASKATCHEWAN

The Educational Council in Saskatchewan has continued in existence to the present time. It has been listed in all the Annual Reports of the Department of Education. The 1965 Revised Statutes of Saskatchewan makes the following provisions:

> 8. There shall be an Educational Council appointed by the Lieutenant Governor in Council, consisting of at least five persons, two of whom shall be Roman Catholics; they shall receive such remuneration as the Lieutenant Governor in Council determines.
>
> 9. Meetings of the Council shall be held at such times and places as may be determined by the Minister, but at least one meeting shall be held in each calendar year.

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[7] The Department of Education Act, R.S.A., 1922, ch. 16, Sections 13-16.

[8] The Department of Education Act, R.S.A., 1942, ch. 10.

10. All general regulations respecting the inspection of schools, the examination, training, licensing and grading of teachers, courses of study, teachers' institutes and text and reference books shall, before being adopted or amended, be referred to the Council for its discussion and report.

11. The Council shall consider matters referred to it by the Minister and may also consider any question concerning the educational system of Saskatchewan as to it seems fit and report thereon to the Lieutenant Governor in Council.[9]

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[9] The School Act, R.S.S., 1965, ch. 184, Sections 8 - 11.