PERRON v. SCHOOL TRUSTEES OF THE SCHOOL MUNICIPALITY OF ROUYN†

CONSTITUTIONAL LAW — EDUCATION — JEHOVAH'S WITNESSES — DISSENTIENT SCHOOLS — SEC. 93 B.N.A. Act.

This case involves the educational rights of Jehovah's Witnesses in the rural areas of this province. The plaintiff, a resident of Rouyn, Que., left the Roman Catholic faith and chose to become a Witness of Jehovah. In so doing, he no longer wished his children to attend the common school, controlled by Roman Catholics, who form a majority of the population in this municipality. When the Trustees of the Protestant dissentient school refused to admit plaintiff's children, a writ of mandamus was taken to compel the Trustees to admit them. After a review of the various statutes and judicial decisions regarding the rights of dissentients, the court concluded that the Trustees could validly refuse admission because plaintiff belongs to a religious denomination which differs from the Protestant denomination. If plaintiff were to send his children to a public school in Rouyn, the Superior Court ruled that he must send them to the common school in that municipality.

The Education Act,[1] which regulates public education in Quebec, does not specifically answer the problem presented to the court, viz. whether the Protestant dissentient schools could validly refuse admission to members of Jehovah's Witnesses. Reference must be made: 1) to the B.N.A. Act, which protects the educational rights of certain classes of person; 2) to the educational system as it existed by law at Confederation, since the B.N.A. Act preserves certain rights which existed at that time; and 3) to judicial decisions which interpret the appropriate sections of the B.N.A. Act and define the rights of the classes of persons whose rights are protected.

In any examination of education in Quebec, one should bear in mind that, since 1841, the legislators have accepted the fact that the province is composed mainly of Roman Catholics and Protestants and have divided the educational system accordingly.[2]

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†Case unreported. This decision of the Superior Court was overruled by a judgment of the Court of Queen's Bench, handed down just prior to going to press.

[1](1941) R.S.Q. c.59.

[2]*Pinsler* v. *Protestant Board of School Commissioners* (1903), 23 S.C.R. at pp. 376-7. To illustrate this, we can cite, from among many examples, the fact that there is a Superintendent of Education who must be either a Roman Catholic or Protestant since he is, ex officio, a member of the committee of his religious belief on the Council of Education, which is divided into a Roman Catholic and Protestant committee, each looking after matters which affect their interests. No specific provision is made in the act of 1861 for other religious denominations, although the legislature, according to the B.N.A. Act, is not precluded from instituting schools for other religious denominations.

At Confederation, the existing educational organization was governed largely by the Act of 1861.[3] That Act divided provincial education into two systems; one for the rural areas and another for the cities of Montreal and Quebec.

In the rural areas, it was provided that in each municipality there was to be at least one common school, managed by school commissioners elected by all the landholders and householders, other than the dissentient inhabitants, of the municipality.[4]

The Act of 1861 also stated that a number of persons professing a religious belief different from that of the majority could signify their dissent to the commissioners of the common schools and establish their own dissentient school.[5] Therefore, if the Roman Catholics formed a majority in a particular municipality, the minority dissentient school would be Protestant, and vice versa. This is also the meaning given to "religious majority" and "religious minority" by the Education Act.[6]

In the cities of Montreal and Quebec, there were no such schools as "common" or "dissentient". The schools in these urban areas were not divided into "majority" and "minority" but into "Roman Catholic" and "Protestant",[7] with each denomination having its own regulatory Board of School Commissioners. We will see that different legal results ensue in the case of urban schools when children of other religious faiths seek admission to them.

This educational system, which existed by law in 1867, has remained virtually intact, due largely to the provisions of the B.N.A. Act.

Section 93 of the B.N.A. Act has been ealled the "Educational Bill of Rights";[8] for, without it, educational matters would be at the complete mercy of provincial legislatures. As it now stands, although the province is given exclusive jurisdiction over matters relating to education, yet certain legal rights which existed in 1867 are made permanent and irrevocable (unless the B.N.A. Act itself is amended). It will be our aim to ascertain what these rights were and to whom they applied, in order to find out if the defendants can validly exclude plaintiff's children from their school.

Section 93 of the B.N.A. Act reads, in part:

> "In and for each Province the Legislature may exclusively make laws in relation to Education, subject and according to the following provisions:
> 1) Nothing in any such law shall prejudicially affect any right or privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union."

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[3](1861) Consolidated Statutes of Lower Canada, c.15.
[4]*Ibid,* s.27.
[5]*Ibid,* s.55.
[6](1941) R.S.Q. c.59, s.2, subs. 25; also (1869), 32 Vict. 16, s.38.
[7](1861) Consolidated Statutes of Lower Canada c.15, ss.128-130.
[8]Weir, *The Separate School Question in Canada,* c.3.

It should be noted that while the province may make laws *in relation to education,* the rights which it cannot prejudicially affect by law are only those *with respect to denominational schools.*[9]

The "class of persons" to which this subsection refers is a class which must be determined according to its religious beliefs and not otherwise. This was pointed out in the case of *Ottawa Separate School Trustees* v. *Mackell,*[10] where the Privy Council held valid a provincial law prescribing the language (English) in which children attending any school in the province were to be taught. The right to the use of another language (French) was not a right with respect to denominational schools which a class of persons (the Roman Catholics) had by law at the Union. The English-speaking Roman Catholics were not affected by the law and did not oppose it. To divide the Roman Catholic denomination along a racial or linguistic line perhaps creates a class of persons held together by a common race or language, but certainly not a class of persons enjoying the protection of S.93(1).

If a provincial law transgresses this subsection, the remedy is to have the law declared *ultra vires* by the courts.[11]

Section 93(2) extends to the Roman Catholic and Protestant dissentient groups in Quebec the same rights which the Roman Catholic Separate schools enjoyed by law in Ontario at Confederation.

This subsection was necessary to safeguard the rights of the Protestant dissentient schools in Quebec. Until 1867, such schools had not a sufficiently permanent basis in law. The statutes which permitted their establishment[12] only refer to "persons professing a religious faith different from that of the majority" and do not give specific rights to the Protestant dissentient schools as such.

By determining which of the schools existing at Confederation have the protection of S.93 of the B.N.A. Act, or, to be more precise, which of the "class of persons" controlling these schools had such protection, we can ascertain the rights of the Protestant dissentient schools and justify the conclusions arrived at by the trial judge.

The schools in the cities of Montreal and Quebec, being denominational schools, enjoy the protection of the B.N.A. Act. However, in 1867, these schools could be attended by children of any faith. It was only in their man-

[9]S.93(3) would cover the situation where either a Roman Catholic or Protestant minority felt that a law affected its rights in relation to education. In such a case, even if the law were intra vires the provincial legislature, an appeal would lie to the Governor-General in Council, after which, remedial legislation could be passed by the Parliament of Canada for the execution of any decision of the Governor-General in Council. (S.93, subs. 4).

[10][1917] A.C. 62.

[11]To be distinguished from S.93(3) (note 9 *supra*), where the provincial law need not be ultra vires. Of course, the "class of persons" involved is not precluded from employing S.93(3), which is more of an administrative than a legal remedy.

[12]4-5 Vict. c.18, s.11; (1861) Consolidated Statutes of Lower Canada, s.55.

agement and control that they had special rights and privileges.[13] If plaintiff were seeking admission to a Protestant school in the cities of Montreal or Quebec, he could not be refused such admission.

The common schools in the rural areas are not formed by a class of persons professing one religious belief. They are non-denominational, in law, and have not the protection of S.93. As stated in *Hirsch* v. *Protestant School Commissioners of Montreal:*

> "Such a common school, if in a single district, is under the management of commissioners appointed by the whole body of landholders and householders in the district without regard to their religious faith; and even in a district where a minority has established its own separate school, the electors who remain need not be all of the same religious persuasion."[14]

This remains the case even though members of one religious denomination will in fact form a majority in a community and control the common school or schools in their municipality. It was precisely this type of school to which plaintiff no longer wished to send his children after he had abjured the Roman Catholic faith. This, however, does not, in law, change the fundamental characteristics of such a school, viz. a common school for all the inhabitants of a particular district, regardless of religious belief.

Unlike the common schools, the dissentients, founded and maintained by a body of persons professing one religious belief[15] and managed by their elected representatives, are denominational schools enjoying the protection of S.93. Moreover, according to S.93(2), the Protestant (and Roman Catholic) dissentient schools enjoy the same rights which the Roman Catholic separate schools had in Ontario in 1867. One of these rights is found in the Roman Catholic Separate School Act of 1863.[16] Section 12 of that act states:

> "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[17] required to be made to the Chief Superintendent of Education, unless they are Roman Catholics."

Applying this section to the Protestant dissentient schools, we can state that such schools need not admit any children who are not of the Protestant faith.

Therefore, the Roman Catholics and Protestants are each a class of persons which had rights in 1867 with respect to denominational schools; rights which continue to exist today according to the terms of the B.N.A. Act. For the purpose of this case we can also say that the Protestant dissentient schools

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[13] *Hirsch* v. *Protestant School Commissioners of Montreal* [1928] 1 D.L.R. 1041.

[14] *Ibid,* at p. 1047.

[15] The section of the act which permits their establishment states, inter alia, (s.55): "When in any municipality, the regulations and arrangements, made by the School Commissioners for the conduct of any School, are not agreeable to any number whatever of the inhabitants professing a religious faith different from that of the majority of the inhabitants of such Municipality . . . "

[16] 29 Vict. c.5.

[17] The "Return" is a list made by the Trustees of the names of the children attending the separate schools.

have the protection of sections 93(1) and 93(2), which preserve, inter alia, the right to exclude, from their schools, children of other religious faiths. Any person, or group of persons, who claims the same rights as are enjoyed by the Protestants must prove that he qualifies as a member of that denomination. The statement enunciated in *Harding* v. *Mayville* remains true today. The learned judge, in that case, stated:

> " . . . it lies on the plaintiff claiming exemption as a separatist (dissentient) to aver and prove all those exceptional matters, taking him out of the general rule."[18]

In attempting to qualify as a Protestant, the plaintiff alleged, firstly:

> "Jehovah's Witnesses are an organized religious denomination with their own beliefs, practices and modes of worship all of which are sufficient to bring them within the meaning of the Statute."

The Statute referred to is the Public Education Act,[19] which is essentially the same as the Act of 1861 and in which certain religious denominations are given special rights. Before plaintiff can proceed to show that he belongs to one of these privileged denominations (for example the Protestants), he must first of all show that the Witnesses are a denomination. The defendants had denied this.

Although they claim to be against all religions, the Jehovah's Witnesses, with their own Christian creed and interpretation of the Scriptures, must be regarded as a religious denomination. In the Saumur case,[20] it was held that the Witnesses came within the terms of the Freedom of Worship Act[21] and were entitled to the "free exercise and enjoyment [of their] religious Profession and Worship." Mr. Justice Bertrand, in the Queen's Bench decision stated:[22]

> "This separateness of organization, beliefs and practices and aloofness from participation in the affairs of any other religious organization plus the fact that there is a distinctive name (denomination) provides all the essentials required to establish, as a matter of law, that there is a religious denomination."

However, the mere fact that the Jehovah's Witnesses are a religious denomination does not, when taken alone, give them constitutional guarantees and the right to attend the Protestant dissentient schools in the Province. Plaintiff must show that the Witnesses are a religious denomination or "class of persons" which has the protection of S.93, i.e. that as a "class of persons" they fall within the category of either "Roman Catholic" or "Protestant".

Secondly, the plaintiff stated:

> "The term 'Protestant Denomination' within the meaning of the Education Act includes all Christian groups which are not Roman Catholics; this includes Jehovah's Witnesses even though they disagree with other Protestant denominations."

This contention is clearly inadmissible according to the various statutes relating to education, and their interpretation by the courts. The Education

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[18] 21 U.C.C.P. at p. 511.
[19] (1941) R.S.Q. c.59.
[20] [1953] 2 S.C.R. 299.
[21] (1941) R.S.Q. c.307.
[22] 104 C.C.C. 106.

Act does not define the terms "Protestant Denomination" and "dissentients." It speaks only of persons professing "*a* religious faith different from that of the majority." Moreover, the Privy Council, in the Hirsch case,[23] had decided that in view of the rights and privileges existing at Confederation and preserved by the B.N.A. Act, the Protestant dissentient schools could not be forced, by law, to admit children of a different religious faith. The court had to pass judgment on the validity of a provincial statute which purported to treat Jews as Protestants for school purposes. Such a statute was invalid because it would enable the Jews to claim a share in the establishment and management of Protestant schools and would thus prejudicially affect a right which the class of persons known as Protestants had by law at the Union; that is, the management and control of their own schools. In his allegation, plaintiff attempts to distinguish the Hirsch case by limiting non-Catholic groups to Christian sects. However, the terms of the Privy Council ruling do not admit of such a distinction. It was stated:[24]

> "It may be added that, in their Lordship's opinion, the contention . . . that the word 'Protestant' in the statutes must be construed as meaning non-Catholic and so as including Jews, is quite untenable; and also that the Protestant community, although divided for some purposes into different denominations is itself a denomination and capable of being regarded as a 'class of persons' within the meaning of S.93 of the Act of 1867."

It is clear that various religious denominations, even though they be Christian, cannot get together to form a "class of persons" within the meaning of the B.N.A. Act. The learned trial judge pointed out the inequitable situation which would result from such an interpretation:

> "Ainsi, si la théorie du demandeur était acceptée, les dissidents seraient tenus d'accepter tous les groupements qui se déclarent non-catholiques et former ainsi une agglomération de toute croyance qui pourrait réclamer des règles de son choix ou des exceptions particulières dans l'éducation des diverses catégories d'enfants."

To permit this would defeat the whole purpose of the statutes which established the dissentient schools and which preserved their rights against possible encroachment by provincial legislatures. It would also be quite pointless to allow the establishment of such schools and afterwards force them to accept all non-Catholic children. The Act of 1861 and the provisions with respect to education in the B.N.A. Act were not aimed primarily at giving rights to anti-Catholic religious sects.[25] They had a more positive aspect than that. The legislators were concerned with the securing of rights for the Protestant minority population at that time in Quebec. Following the Privy

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[23][1928] 1 D.L.R. 1041.

[24]*Ibid,* at p. 1050.

[25]This was the gist of Sir John Simon's argument before the Privy Council — that "Protestant" within the meaning of the act of 1861, meant "against Roman Catholics". This was rejected by the Privy Council. Pp. 9 ff. of the Transcript of the argument in the Privy Council in the Hirsch case.

Council decision in the Hirsch case, another Supreme Court ruling affirmed that "the dissentients themselves must be of a common religious faith."[26]

Plaintiff's third allegation is, perhaps, the most contentious one. It reads:

> "Plaintiff and his children are members of a dissentient denomination; they have fulfilled all the requisite formalities and are entitled to attend the dissentient school. a) Plaintiff has chosen to become one of Jehovah's Witnesses and to leave his former religious affiliation; he has a right to do this both for himself and for his children. Accordingly the family is no longer Roman Catholic but Protestant."

Since plaintiff professes a faith different from that of the majority, it may be said that he is a member of a dissentient group; perhaps he did fulfill all the formalities regarding the notice of dissent as required by sections 99 to 103 of the Education Act; moreover, no one questions his right to leave his former religious affiliation and become one of Jehovah's Witnesses; but does this make the plaintiff a Protestant with the right to attend the Protestant dissentient schools? Does the mere fact that a person no longer wishes to remain Roman Catholic make such a person Protestant? The Superior Court is of the opinion that it does not.

What criteria can the courts use in determining that the Witnesses are not a Protestant denomination? The defendants deny that they are a religious denomination. However, non-recognition by local officials is not proof of the non-religious character of the Jehovah's Witnesses.

The writings of the Witnesses are quoted by the trial judge showing that they attack both the Roman Catholics and Protestants and disassociate themselves from both these groups. The question cannot be decided by mere reference to such writings. The Witnesses attack all religion per se and to adopt only their opinions could lead to the conclusion that they are not a religious denomination at all. However, these writings, coupled with judicial decisions in which the Witnesses were involved, will afford us guidance in determining the religious character of this sect.

With regard to the writings of the Witnesses, it is interesting and informative to note the technique used by the courts in coming to the conclusions a) that the Witnesses are a religious denomination, and b) that they differ from both the Roman Catholic and Protestant denominations. In the former, the courts defined "religious denomination" and were able to place the Witnesses within the terms of such a definition, even though their writings preach against all religions. No such process was possible in the latter, where the Witnesses not only fail to identify themselves as Protestants, but also attack that denomination.[27]

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[26]*Les syndics d'écoles dissidents de St. Romuald* v. *Shannon* [1930] S.C.R. 599 at p. 601.

[27]A quotation, from one of the official tracts of the Witnesses, shows the nature of such criticism: "Today, Protestantism is dead. It no longer protests against the traffic of Rome. Protestant pastors, as well as rabbis, follow the directives of the Catholic Church, and orientate their activities in the same direction. They all practice the religion of which the Devil is the author." *Enemies,* P. 187 of the French language edition.

In two very important cases, affecting the rights of the Witnesses and their freedom to preach their religion, not one single judge treated the Witnesses as Protestants. On the contrary, those who expressed an opinion on the matter stated that the Witnesses differ from both the Roman Catholic and Protestant faiths. In *Boucher* v. *The King,* Mr. Justice Rand, speaking of a member of Jehovah's Witnesses, stated:[28]

> "The conduct of the accused appears to have been unexceptionable; so far as disclosed, he is an exemplary citizen who is at least sympathetic to doctrines of the Christian religion which are, evidently, *different from either the Protestant or the Roman Catholic versions.*"

In the Saumur case, Mr. Justice Bertrand, in the Queen's Bench decision[29] had this to say about the religious character of the Witnesses:

> "I believe also that the said Witnesses practice a Christian religion, although different from Catholicism and Protestantism."

According to the strict letter of the law, the Superior Court seems to be justified in holding that the defendants can refuse admission to plaintiff's children, since he is a member of a sect which differs from the Protestant denomination. The Hirsch case[30] recognized that the Protestants were a distinct "class of persons" and not merely all those who disapproved of the Catholic religion. Our own Queen's Bench and Supreme Court justices classify the Witnesses as different from both the Roman Catholic and Protestant religions. As Lord Buckmaster pointed out:[31] "the word 'Protestant' must have a special meaning, having regard to the meaning of the [Education] Act." If other new sects continue to emerge, and if they attack both the Roman Catholic and Protestant religions, are the courts to regard them as Protestants merely because they are a Christian sect? To do so would reduce greatly, and might even render ineffectual, the protection afforded by the B.N.A. Act to the "class of persons" known as "Protestants".

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[28]96 C.C.C. 48 at p. 74.
[29]104 C.C.C. 106 at p. 140.
[30][1928] 1 D.L.R. 1041.
[31]P. 44 of the Transcript of the argument in the Privy Council in the Hirsch Case.
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