THE ROLE OF JOHN S. EWART IN THE MANITOBA SCHOOL QUESTION

A Dissertation

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In Partial Fulfilment

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Master of Arts

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by

Wilfred Tarlton Shaw

October 1959

FRONTISPIECE

JOHN SKIRVING EWART

AFTER A PORTRAIT

BY

DOROTHY E. VICAJI

IN

THE PUBLIC ARCHIVES OF CANADA, OTTAWA

". . . We know that you found in Mr. Ewart, our learned counseller (sic), a precious help for proper information, as his valuable book testifies. . . "

--Archbishop Langevin to the Hon. Ed. Blake, Feb. 11, 1895, Archives of the Archbishopric of St. Boniface.

". . . Quand vous le verrez, veuillez offrir mes remerciments et félicitations à M. Ewart. Ca, c'est un homme! Aujourdhui, on cherche avec une lanterne des hommes comme lui, au caractère. . . noble et sincère . . . "

--Père Lacombe to Archbishop Langevin, Jan. 13, 1896, Archives of the Archbishopric of St. Boniface.

PREFACE

THE PROBLEM AND ORGANIZATION OF THE THESIS

The perennial problem of the relations of church and state in Canada, complicated as they are by the peculiar conditions of language and race, has troubled the peace of the country since long before Confederation-- and it would be a sanguine individual indeed who would maintain that the problem has reached any final solution today. The recent efforts of the Catholic[1] Archbishop of Winnipeg before the Royal Commission on Education lately established by the Government of Manitoba, as well as the dilemmas posed the administration of the Hon. Mr. Duplessis by the French-Canadian converts to the ranks of the Witnesses of Jehovah, would alone suffice to give pause to such temerity.[2]

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[1] Catholic. Unless otherwise stated, the term "Catholic" will be used in its common, if erroneous, denotation, i.e., as designating "Roman Catholic".

[2] The Winnipeg Tribune, 1957: Wed., Aug. 14, p.4; Thur., Aug. 15, p.3; Tues. Oct. 1, pp. 1,7; Wed., Oct. 2, p.6; Tues., Oct. 15, pp. 11,22; Wed. Nov. 13, pp. 1,8; Wed. Nov. 20, p.10; Mon., Nov. 25, pp. 7,17; Wed., Nov.27, pp. 1,5,11; Mon., Dec. 16, p.4; and 1958: Fri. Feb. 21, p.7; Thurs., Apr. 24, p.21. The Gazette (Montreal), Fri., Feb. 27, 1959, pp. 1,3. Also: Blair Fraser. "The Grave Inequalities in our Separate Schools." Maclean's Magazine, May 28, 1955, pp. 9 et seq.

Probably at no time, however, did the controversy reach such heights of furore and such depths of chicanery as during and immediately following the fateful years between the Manitoba School Acts of 1890 and the Laurier-Greenway Compromise of 1896.

During the above-mentioned period, the personage whose activities will provide the lion's share of the subject-matter of this thesis was noted for his unflinching efforts on behalf of the Catholic minority in their efforts to obtain what they still maintain-- at least to a very large extent-- to be only simple justice. As legal counsel for the minority, Mr. Ewart undoubtedly sympathized completely with the point of view of his clients and his activities were such as not only to demonstrate this to all concerned, but to enhance his reputation as a man of considerable personal integrity, activity, determination and capability. His performances before the courts of Canada and what was still unhesitatingly referred to in those days as "the Mother Country" went far towards not only establishing him as one of Canada's foremost legal counsel but also towards giving him that peculiar bent towards constitutional law and the furtherance of Canadian national sentiment which were such marked features of his later career.[3]

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[3] Vide infra. (Ewart's biography.)

This thesis will endeavour to prove the foregoing assertions, namely, that Mr. Ewart:

1. Demonstrated unflinching determination and effort on behalf of his clients, together with --

2. Complete sympathy with their fundamental point of view;

3. Enhanced his reputation for activity, integrity, and capability;

4. Partly as a result of his activities on the school question, commenced to become established as one of Canada's foremost legal counsel; and --

5. To a large extent, acquired his peculiar bent towards constitutional law and the furtherance of Canadian national sentiment.

Special attention will be paid to the fateful years 1890-96 and to Mr. Ewart's participation in the controversy, particularly in his role as legal counsel though also with respect to his numerous endeavours above and beyond the call of strictly professional obligation. His connection with the aftermath of the dispute will be touched on more briefly.

The presentation of educational and legal disputes has an unfortunate knack of taking on a "dry-as-dust" mien. Thus the examination of the controversy with primary attention to one of the leading participants in the drama should

not only shed new light on an unsettled question but should do so in a more lively and vivid manner.

The remainder of the thesis will commence with a brief biographical sketch of Mr. Ewart in which it will be endeavoured to link his attitude and character to his role in the school question, and incidentally to show how his experiences in this episode may well have been instrumental in determining many of his later actions and attitudes. Immediately following this discussion will be a cursory, but-- it is hoped-- accurate, exposition of the development of the schools question up to the time that our protagonist became engaged as legal counsel on behalf of the minority.

The bulk of the dissertation will involve an examination of the litigation involved in the two cases: Barrett vs. City of Winnipeg and Brophy et al. vs. Attorney-General of Manitoba. The author will attempt to reveal the key importance of Mr. Ewart in these legal proceedings, both in urging the process of law and in influencing the final decision. An examination of his surprisingly active participation during this period in the more extraneous aspects of the controversy will also be undertaken.

A section of the dissertation will then be devoted to an examination of Ewart's crucial part in the critical events during the remedial legislation crisis, the federal

elections of 1896 and the Laurier-Greenway arrangement. Next, a brief examination of his declining participation in the aftermath of the issue will be discussed. The concluding section of the dissertation will involve an estimate of Ewart's aims in the conflict, the extent of his success, and proof of the assertions made in the previous section.

ACKNOWLEDGEMENTS

The author wishes to express his sincere appreciation to all those who have assisted him in any way in the collection of information for this work. More especially, he wishes to thank Mr. Roy St. George Stubbs, L.L.B., of Winnipeg, for allowing him an interview and the loan of one of Mr. Ewart's works; Mr. Lee A Kelley, Q.C., of Ottawa -- a former partner of Mr. Ewart during the latter's career in Ottawa-- for his energetic assistance; and Mr. Isaac Pitblado, Q.C., of Winnipeg, who also was personally acquainted with Mr. Ewart, for his patient advice. Gratitude is due also to Professors Frank H. Underhill, Blair Neatby, and David Farr of Ottawa for their kindly consideration of his enquiries and more especially to the former for the loan of material, and to the latter for permission to refer to his recent lecture on Mr. Ewart (at Carleton University, Ottawa, on Jan. 31, 1959).

The very welcome assistance of Reverend Fathers Charles Desorcy and Paul Crunican at the Archives de l'Archevêché de Saint-Boniface proved invaluable, as did the permission of His Grace, Archbishop Badoux, to examine the data.

Thanks is hereby extended to Miss Ellen Gillies Cooke and to Mr. Robert E. Clague for permission to use their

theses, and to the latter for additional data and suggestions. Considerable appreciation is due also to the late Mr. Alan C. Ewart of Ottawa, until Mar. 4, 1959 the last surviving member of John S. Ewart's immediate family, for his very courteous assistance, and to Mr. Harvey N. Streight, Q.C., and the officials of the Manitoba Law Courts for allowing him access to their library at what was for them a somewhat inconvenient time. Thanks are also extended to Rev. Father A D'Eschambault and to Dr. Andrew Moore for their offers of assistance.

Acknowledgement is also due to the Canada Council and to the Committee on Grants from the John S. Ewart Memorial Fund (University of Manitoba) for their extremely helpful financial assistance, as well as to the Transcona School District, No. 39, in the Province of Manitoba, for its very helpful loan.

LIST OF ABBREVIATIONS

In order to lessen the amount of space devoted to footnotes, etc., the author has seen fit to make use of the following abbreviations:

A.A.S.B. --Archives de l'Archevêché de Saint-Boniface

B.N.A. --British North America Act, 1867

D.P.R.A. --Department of Public Records and Archives, Toronto

M.S.Q. --John S. Ewart. The Manitoba School Question, being a compilation of the legislation, the legal proceedings, the proceedings before the governor-general in Council; etc. (Toronto: The Copp, Clark Co. Ltd.,Publishers, 1894)

P.A.C. --Public Archives of Canada (Ottawa)

P.A.M. --Public Archives of Manitoba (Winnipeg)

It should also be understood that wherever the author employs the term "Privy Council", the Privy Council for Canada is intended. On the other hand, the words "Judicial Committee" shall be taken to refer to the Judicial Committee of the (Imperial) Privy Council. Unless, of course, explicit statement is given to the contrary.

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CHAPTER ONE

THE LIFE AND CHARACTER OF JOHN SKIRVING EWART[1]

John S. Ewart was born in Toronto on August 11, 1849, the son of Thomas Ewart, barrister (and partner of Oliver Mowat), and Catherine Seaton (née Skirving) Ewart. The early death of his father while on a sea voyage led to young John coming to a considerable extent under the guidance and pro-

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[1]The material for this exposition was derived largely from the Ewart Papers, Biggar's Sir Oliver Mowat, private sources, various biographies (although Ewart is listed in volume ten of the Americana, 1938 edition, he is not mentioned in the Britannica), two obituaries in the Canadian Bar Review (March and May 1933) and one in the Toronto Star (Feb. 21, 1933, W.L.Mackenzie King's tribute), as well as a recent account in The Ottawa Citizen (Saturday editions, p. 22, of Jan. 3, 10, 17, 1959).Two slight mentions in the Canadian Annual Review of 1904 together with the Report of the 1915 Lake Mohonk Conference in which Ewart took part with his friend Henri Bourassa - an association which might have begun as early as the latter's celebrated "journey of pacification" to Manitoba with J. Israel Tarte in 1896 - and two contributions by John W. Dafoe and Professor Underhill on Ewart (John W. Dafoe, "The Views of John S. Ewart" in C.H.R., June, 1933, vol. 14, no. 2, pp. 136-42, 141, and Frank H. Underhill, "The Political Ideas of John S. Ewart" in C.H.R. Report of the Annual) have proved instructive. Other impressions have been derived from Professor Farr's lecture (vide p. X.) and a perusal of the various works by Mr. Ewart listed in the bibliography (vide p. 452.). The Manitoba Biography (July 1930 to December, 1947), p. 36, contains the Winnipeg Tribune 22/2/33 obituary with but scant mention of his part in the school question, but with tributes to his abilities as a lawyer and authority on the constitution from Chief Justice Prendergast, Mr. Isaac Pitblado, K.C., and the Rt. Hon. Mackenzie King.

tection of his relatives, including his uncle, Oliver Mowat, the renowned advocate and statesman, who had married "the beautiful Miss Ewart" in 1846. Young John was only a child when his father expired of tuberculosis in Madeira, and this fact undoubtedly had some influence on his formative years.[2] It appears that he also came under the apparently beneficial influence of a certain James Michie-- a noted friend of many boys in Toronto. Indeed, the latter is credited by T.S. Ewart with directing John Skirving's energies away from sport and into the consideration of legal problems.[3]

Be that as it may, there is little doubt that the future leading member of the bar was anything but an ideal scholar in his early days. W. L. Scott states that:

> While at school he was the despair of his teachers and of his mother..... who could foresee no useful future for her son. In consequence, though he was put through Upper Canada College, he was not afforded the advantage of a University education .....[4]

The latter part of this declaration should, however, be taken with some reservation since correspondence exists which declares that the youthful John did not graduate from Upper

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[2]Charles Robert Webster Biggar. Sir Oliver Mowat, A Biographical Sketch, vol. 1, pp. 39,40,56.

[3]Ewart (T.S.) Papers, P.A.M., Correspondence 1909-1948, Letter from T.S. to the Rev. Father Athol Murray.

[4]W. L. Scott, K.C. "John Skirving Ewart, K.C., (An Appreciation)" in C.B.R., May, 1933, vol. XI, No. 5, p.333.

Canada College but, on the contrary, was expelled for a boyis prank.[5] In any case, there is little doubt that he hencefort preserved some mistrust of professional educators and their methods.[6] Perhaps his later sympathy for the under-dog dates from this and other memories of his youth!

But, in spite of this unpromising beginning, his entrance into that great Ontario law school, Osgoode Hall, saw him assume "...a leading role among his fellows and (become) one of the founders and the first president of the famous Osgoode Hall Legal and Literary Society..."[7]. So seriously did he take his studies that in 1880 he experienced a nervous breakdown.[8]

When called to the bar in 1871, Ewart-- for some inexplicable reason-- went to the Conservative stronghold of

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[5]Ewart (T.S.) Papers, P.A.M., 1909-1948 Correspondence "J.S. Ewart" Folder, Oct. 19, 1942, T.S. to L.M.Mackenzie, Acting Principal, Upper Canada College.

[6]Ibid., Dec. 7, 1942, T.S. Ewart to Upper Canada College Old Boys Association.

[7]W.L. Scott, op. cit., p. 333.

[8]Ewart (T.S.) Papers, P.A.M., 1909-1948 Correspondence "Sister Clotilde" Folder, Jan. 29, 1940, T.S. Ewart to Sister Clotilde, giving a biographical account of his father.

Kingston and for a short time to the law offices of no less a Tory than Sir John A. Macdonald, though his own antecedents were typically Scotch Presbyterian, i.e. Liberal, and his uncle Mowat was the leader of the Ontario Liberal party. Indeed, so far as can be ascertained, Ewart's inclinations always were liberal, if not always Liberal, though he never engaged to any extent in party politics.

However, he soon gave up this venture in the East and returned to Toronto, where he became a junior partner in his uncle's firm. His courtship of Miss Jessie Campbell, which romance had perhaps begun during some previous unprecedented pleasure expeditions into the then-unsettled Muskoka region,[9] was followed by marriage in 1873. His wife predeceased him, dying in 1929. By her, he had three sons (Thomas Seaton and Alan C., the former of whom followed to a considerable extent in his father's footsteps, and John Arnold, who died in infancy) and two daughters (Gladys, who became a brilliant pianist, and Kathleen, who died fairly young).[10]

For almost a decade after his marriage, Ewart successfully practised law in Toronto. Indeed, there is some

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[9] The Ottawa Citizen, loc. cit.

[10] Various sources, including personal.

indication of a falling out with his partners on this score. Mr. Ewart-- it is said-- decided to leave for the greener pastures further West, because of this altercation over his lack of recognition.[11] The imminent closing of the Mowat law firm due to the head aspiring to the premiership of Ontario might also be suspected as a possible reason, though W. L. Scott has, however, another and perhaps the sole explanation for Ewart's departure for Manitoba:

> Had it not been for the menace of tuberculosis, a disease to which his father had fallen a victim, Mr. Ewart would doubtless have spent the rest of his days in Toronto, but startled by the refusal of his application for life insurance, he thought it wise to seek the dryer and healthier climate of the West and accordingly removed in 1882 to Winnipeg, where he became eventually the senior partner in the firm of Ewart, Fisher and Wilson.
>
> He was made a Queen's Counsel in 1884 and it was not long thereafter until he became the acknowledged leader of the Western bar.[12]

Private sources have related that his rise to the position of "Q.C." was accompanied by a squabble between himself and the other two barristers "given the silk" at the same time, as to which had precedence in being called to

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[11] Vide Ewart (T.S.) Papers, P.A.M. loc. cit., "J. S. Ewart" Folder, Oct. 27, 1939, T.S. to Evelyn ----.

[12] W. L. Scott, loc. cit.

speak when in court-- a matter regarded as one of considerable prestige value in those days. The matter was even taken to court, but though Ewart lost, he had demonstrated a certain pugnacious determination which was to serve him in good stead throughout his career of controversy. However, his ability, if not his aggressiveness, appears to have earned him the offer of a judgeship, which he declined in order to preserve his independence,[13] and, from 1883-1890 he edited the Reports of Cases before the Manitoba Courts and in 1896 became Vice-President of the Canadian Bar Association. His complaint in the Reports of 1884 re the anomalous division of the Court of Queen's Bench into courts of Law and Equity later inspired Clifford Sifton's abolishment of the separation in the Queen's Bench Act of 1895.[14]

In September, 1885, Ewart's aggressive determination to champion the vanquished and down-trodden, regardless of the unpopularity of the cause espoused, was foreshadowed in his acting with Charles Fitzpatrick, Q.C., (later associated with him in the schools question) as counsel for the defence in the case The Queen vs. Riel in the Court of Queen's Bench,

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[13]Ewart (T.S.) Papers, P.A.M., op. cit., Oct. 27,1939, T.S. to Evelyn -------. (The same letter testifies to his taking sides in professional quarrels and not always being popular in Toronto.)

[14]John W. Dafoe. Clifford Sifton in relation to his times, pp. 56-57.

Winnipeg.[15] It is interesting to note that three other gentlemen who also took a prominent part in the later question also officiated at the trial: Justices Taylor and Killam, with Mr. Christopher Robinson, Q.C., for the Crown. It is almost as if the lines of battle were being drawn for an even more imposing struggle than occurred over this vain endeavour to have the verdict of the Regina court condemning Louis Riel to death nullified on the grounds that the said court was improperly constituted. The appeal failed and was, like the later school cases, carried to the Judicial Committee, with results that are known to all.

Perhaps another significant development in Winnipeg was the switch involved, according to a source which shall be nameless, in Ewart and his family going to the Anglican church, though his mother was a staunch, old-fashioned Presbyterian, as the Presbyterian Missionary Society and the exasperated Lady Ishbel Aberdeen could well testify.[16] Private sources have indicated that Ewart had early become interested in the Higher Criticism and though Canadian Men and Women of the Time (p.317) could still in 1898 term him a Presbyterian, a statement repeated by the Winnipeg Tribune at his death (Vide Manitoba Biography, loc. cit.), it is patent that

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[15]John S. Ewart. Reports of Cases argued and determined in the Court of Queen's Bench, Manitoba, with tables of cases and principal matters, pp. 322-45.

[16]Aberdeen Papers, P.A.C., vol.8, Lady Aberdeen's Journal, Sun., Feb. 19, 1894.
Ewart (T.S.) Papers, P.A.M., op cit., May 25, 1897.

his leanings were tending more and more towards the authoritarian, hierarchical, and sacramental forms of organized religion, i.e., towards Episcopalianism and the Church of Rome. By 1912, the same biography could state (p.381) that, though originally a Presbyterian, he no longer belonged to any particular church or party. Ewart might thus be summed up as a broad Christian with sacerdotal tendencies.[17] His library would seem to bear out these conclusions.[18]

Though his partner, James Fisher, M.P.P., was a prominent member of the Manitoba Liberal party and president of that Winnipeg Liberal Association which, in June, 1886, attempted to deprive the Hon. Thomas Greenway of the leadership of the party in favor of Fisher himself,[19] Ewart seems from all accounts to have remained aloof from party activities, though his sympathies, as has been stated, were generally Liberal. He certainly appears to have rejoiced in the

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[17]Ewart (J.S.) Papers, P.A.M., 1888-1925 Letter Book, n.d. 1888 and the 1926-1932 Letter Book, May 26, 1930.

[18]Vide Appendix A for discussion of Ewart's library.

[19]John W. Dafoe. Clifford Sifton in relation to his times, p. 17.

arrival to power of the Greenway administration, if his later expostulation with him on "playing politics" with the school question may be taken as indicative.[20] Definitely, the later continual dunning of the Hon. Thomas by Ewart, Fisher and Wilson would indicate that a fair amount of the Premier's legal affairs were handled, at least for a time, by Ewart's firm,[21] and an invitation from Ewart to play whist would indicate a certain degree of intimacy.[22]

Because this thesis deals extensively with the next episode in Mr. Ewart's career, the school question, we shall not at present examine this aspect save to remark that never before had a local lawyer carried a case all the way to the Judicial Committee. The publicity in connection with his activities in this regard apparently stood his reputation in good stead - to quote from The Canadian Men and Women of the Time:

> He was brought into special prominence in connection with the litigation over the Manitoba school question, he having been retained to argue the case for the Catholic minority both at Ottawa and in London, and it

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[20] Le Manitoba (Winnipeg), Jan. 7, 1892 (John S. Ewart) An open letter to the Hon. Thomas Greenway on the school question ....

[21] Greenway Papers, P.A.M., June 5, 1891 to Jul.18,1895 letters: 4408, 4700, 5049, 5051, 5096, 5114, 5212, 5334, 5891, 6955, 7319, 7367.

[22] Ibid., vol. I, Letter no. 988 (dated 1888).

> has been said of him by one who knows, that the labour involved was with him one not merely of duty but of love. In addition to his regular professional work he warmly championed the cause of separate schools with his pen in the reviews. In January, 1895, he published a work on the question, giving a history of the whole case up to that time.....[23]

His activities on behalf of the Catholic minority did not prevent him having a certain intimacy[24] with the ambitious Clifford Sifton, the Attorney-General of Manitoba throughout the most critical period of the controversy, who was regarded by Dafoe and others as the protagonist of the new school system.[25] Possibly a spur to the association was the fact that for Sifton's predecessor, ".....that rascal Martin....."[26] (the insouciant, truculent and violent Joseph Martin) he obviously had had little favor. If Ewart was indeed the intellectual side of early Manitoba Liberalism, as a party who shall be nameless has suggested, the advent of the ungracious Martin and the ushering in of the schools issue led to his practical dissociation from the Liberal group. Manitoba Liberalism was losing its original idealistic inclinations and hurtling into the thick of "practical politics."

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[23] 1898 edition, p.317.

[24] Vide Sifton Papers, P.A.C., Vol. 231, #687, Mar.28, 1899; Vol.235, #438, Feb.14, 1900; Vol. 236, #502, Dec.29, 1899; Vol. 247, #176, Jan. 20, 1902.

[25] Dafoe, op. cit., pp 30, 41, 46, et seq.

[26] Ewart (J.S.) Papers, P.A.M., 1888-1925 Letter Book, Apr. 1896 letter to Mowat. See also letter of same date to Laurier.

Perhaps Ewart's connection with Sifton had something to do with the latter's growing tendency towards compromise, especially his later efforts (under Laurier) to moderate the attitude of the Winnipeg Public School Board.[27] In any case, Ewart was undoubtedly instrumental in bringing about the 1895 reform of the Manitoba judicature.[28]

Such involvements did not prevent Mr. Ewart from carrying on an extensive (and intensive) legal practice[29] in, one assumes, more lucrative fields than that of defending minorities. In any case, by 1904, his practice before the Judicial Committee was so extensive as to merit a change of residence to Ottawa,[30] where he became senior partner in the firm Ewart, Wyld & Osler, which, with several subsequent changes of name (it is now Ewart, Kelley, Burke-Robertson, Urie and Butler, Barrs.) has continued to play a prominent

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[27] Vide pp. 447-48.

[28] John W. Dafoe. Clifford Sifton in relation to his times, pp. 56-57.

[29] Blake Papers, D.P.R.A., Legal Correspondence 1872-1907 and n.d. Letters between him and Ewart contain references to corporation litigation.

[30] W. L. Scott, op. cit., p. 334.

part in the nation's capital. It is significant that the name "Ewart" has continued to occupy an honoured position in the letterhead, though there is no living member of the firm to bear it. Evidently its prestige value is not to be denied. His determination to establish himself in Ottawa was aided by his having amassed a sufficiently comfortable fortune (private sources claim largely through prudent investments in Manitoba real estate), to occupy an imposing brick residence (now the Brazilian embassy) on Wilbrod Street, whose handsome grounds and architecture struck the author as being considerably more impressive than the nearby Laurier House. Henceforth, the renowned counsellor was to confine himself to cases before the Supreme Court and the Judicial Committee as more suited to his talents, and apparently he had more than enough to do.[31]

It also appears that by 1904 Mr. Ewart had become less and less interested in the school question, on which excitement had long been dying down, and more and more interested in the problem of Canada's relationship with the Mother Country--a subject which was to involve him in complex researches and costly publication, and often in heated controversy. It is tempting to conclude that the somewhat

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[31] Loc. cit. Vide also Caron Papers, vol. 35, #473, to Ewart, Fisher & Wilson concerning sale of certain lots in H.B.C. reserve.

surprising decisions of the Judicial Committee on the two school cases may have started him on this road. A private source maintains that he never felt that he had been treated fairly by their Lordships of the Judicial Committee. Certainly his later attitude to this august body was scarcely complimentary, and one is obliged to admit he has, as usual, strong arguments for his stand.[32]

Ewart, probably early inspired by the "Canada First" movement[33] (according to Professor Farr's lecture) and by John A. Macdonald's actions rather than the latter's election appeals,[34] was a Canadian nationalist par excellence. (Prof. Underhill told the author that Ewart was acquainted with W. A. Foster, the famous leader of "Canada First", as early as the 1870's.) Neither Ewart, Foster, nor Macdonald had much use for subservience and dependence upon either Britain or the United States. But Ewart was undoubtedly willing to go much further in attacks upon political association with any other country.[35] One suspects that his attempt to persuade Laurier to make him a Senator, in order to benefit the

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[32]Ewart Papers, P.A.M. "Miscellaneous" volume--J.S. Ewart's Paper on appeals to the Judicial Committee. Vide also his 1888-1925 Letter Book, the letters of Apr.10 & May 29,1919; Jan. 14, 17, 19, 21, 22, 25, 31, 1921; Mar.17, 1921; Mar.16 & 21, 1922; Feb. 18, 1925.

[33]Vide his Kingdom of Canada . . . (1908), pp. 76-77 for an estimate of the "Canada First" movement.

[34]Kingdom Paper no. 17, p. 200.

[35]Vide The Kingdom Papers and The Independence Papers, passim.

country and the Government with sound legal advice, was an attempt to gain a method of advancing his views in this regard and not just mere ambition.[36] In any case, the Prime Minister saw fit to evade the appointment--probably judging he was too controversial a figure, and perhaps too importunate a one.[37]

However, Laurier, to say nothing of other Canadians, could well afford to express confidence[38] in his involved, spirited and successful defence of Canada's rights vs. American assumptions as Chief Canadian Counsel in the 1910 North Atlantic Fisheries' Arbitration at The Hague. The long-vexed question of the claims of the United States to special rights was finally settled with an almost complete vindication of the Canadian position.

His publication of The Kingdom Papers (commencing in 1911), in which he advocated a Personal Union of the various self-governing colonies under the British King, with the denial of the last vestiges of colonial status, was followed

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[36]Laurier Papers, P.A. of C., vol. 617, Mar.4, 1910, Ewart to Laurier.

[37]Ibid., Mar. 16, 1910, Laurier to Ewart.

[38]Ibid.

by the appearance of The Independence Papers (from the end of the First World War to the Statute of Westminster) in which he, to a greater or lesser degree (depending on the heat of the moment), advocated that republican status he had first called for in 1917 in the last of The Kingdom Papers issued during the over-wrought circumstances of the conscription crisis of that year. There is no reason to believe that he ever abandoned the expection that Canada would become a completely-separated republic, though never again did he advocate it with so much exasperation and vociferation.[39] As early as 1904 he had advocated Canada's legislative independence,[40] and a study of his writings in sequence shows an ever-increasing insistence on complete withdrawal from all forms of dominance by, or even association with, the Mother Country.

Though received by Edward VII at Windsor in June, 1905[41]

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[39]Ewart (J.S.), P.A.M., 1926,1932 Letter Book, Dec. 27, 1927: ". . . I believe that Canada's destiny is that of a republic . . . " Vide also letters of Sept. 14, 1929 & April 17, 1930.

[40]Charles G. D. Roberts and Arthur L. Tunnell. A Standard Dictionary of Canadian Biography. . ., vol. I, p. 181.

[41]Canadian Men and Women of the Time (1912), p. 381.

Ewart had but scant respect for kings and the institution of monarchy, though he could speak with considerable respect of ". . . Good Queen Victoria, with her womanly virtues . . ." in "The Kingdom of Canada, Imperial Federation . . . (1908), p. 118. This, and other separatist attitudes,[42] did little to increase his popularity, though he always maintained that he was not anti-British and even protested against a scurrilous diatribe on "The Flag of England" by a Native Son of Canada, with whose organization he had become associated.[43] It is only just to state that most of his opponents had but little complaint on the score of his fairness, however much they might disagree with his argument.[44]

One suspects that his popularity in certain official circles was not increased by his outspoken condemnation, in September, 1903, of the appointment of Mr. Justice W. E. Perdue of Manitoba fame as puisne judge on the Court of the King's Bench of that Province. He loudly and publicly pro-

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[42]Ewart (J.S.), P.A.M., op. cit., April 1, 1932, to Andrew McMaster.

[43]Ibid., Oct. 2, 1932, to Gordon M. Weir. Vide also June 25, 1930, letter to James A Ross.

[44]Vide for instance Ewart (T.S.) Papers, 1909-1948 correspondence, "J.S. Ewart" folder, May 4, 1933, Dr. Chas. Morse, K.C., ed. of C.B.R. to Sir Robert Borden.

tested against this example of what he claimed was the all too prevalent ". . . employment and emolument extended to judges outside that attached to their offices . . ."[45]

Though he became solicitor for the Canadian Pacific Railway in 1908[46] (perhaps, it might be suspected, through his association with A. Ferguson, Q.C., and Edward Blake, Q.C., on the schools case)[47] it appears that his interests were turning to an increasing extent away from his practice. Doubtless, his opposition to theImperial Federation League -- in which his old Manitoba School Question opponent, D'Alton McCarthy, had taken so prominent a part-- as evinced in the publication of his highly critical and unfavourable analysis of the "British connection" entitled The Kingdom of Canada, Imperial Federation, The Colonial Conference, The Alaska Boundary, and other Essays (1908) was one evidence of this shift. Further indications were the issue of a brochure, Sir John Macdonald and the Canadian Flag (1910), advocating a development still unaccomplished, his becoming President of the newly-formed Canadian Club in 1904 (an organization he was long to encourage) and,amongst other activities,

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45 Who's Who in Canada (1927), p. 1024, and Canadian Men and Women of the Time, loc. cit.

46 Charles G.D. Roberts and Arthur L. Tunnell, loc. cit.

47 Vide pp. 331 et. seq.

his examination of the Imperial Conference of 1911, and his taking Governor General Lord Milner to task for engaging in imperialist propaganda. In the following year, he condemned Winston Churchill's naval policy, after previously regretting Canada's part in the Boer War -- the beginning of his denunciation of the vast majority of Britain's wars, and especially of any Canadian participation either past or future. The year 1911 also saw the first of his Kingdom Papers, which he discontinued on the outbreak of war in 1914 so as not to disrupt the war effort.[48] However, a rupture with Henri Bourassa,[49] with whom he had become associated,[50] was followed in 1917 by the last of the Kingdom Papers, which, as has already been stated,[51] was violently in favour of complete and immediate independence. This formed

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48 Vide his Kingdom and Independence Papers, passim.

49 Ewart (J.S.) Papers, P.A.M., 1908-1933 Letter Book, to Bourassa, Dec. 1, 1916. See also Jan. 7, 1918 and Bourassa's reply of Jan. 10, 1918.

50 Ibid., Letters to Bourassa of April 7, 1914; Sept. 25, 1915; Jan. 7, 1916; and April 12, 1916.

51 Vide p. 15.

a thunderous overture for his more moderate Independence Papers, which were issued between 1925 and 1932.[52]

In 1914 Mr. Ewart also discontinued his active practice at the bar in order ". . . to devote himself exclusively to literary pursuits. This intention he carried out strictly, despite the fact that for the ensuing year or two he had frequently to refuse pressing requests to make exceptions."[53]

Thus, in 1914, he began to devote all his time to a constitutional history of Canada, which he had commenced as far back as 1904. However, the work remained unfinished, thanks to his devoting a tremendous and unanticipated amount of time from 1918 to 1925 on an extensive and thorough analysis: The Roots and Causes of the War 1914-1918, which, like so many of Mr. Ewart's dry, overwhelmingly detailed and argumentative efforts, received excellent reviews but little attention from the reading public. Fortunately, the rough draft of his constitutional history was donated by him to the Public Archives of Canada shortly before his death.[54] The author has had the satisfaction of examining it and can

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[52] W. L. Scott, op. cit., p. 335.

[53] Ibid., p. 334.

[54] Ibid., pp. 336-337.

testify that it certainly bears out his reputation for being a good quoter.[55] Certain of his letters testify to the exasperation he must have experienced at finding himself "persona non grata" with some government officials because of his insistence on investigating the long-concealed documents of certain of the governing officials sent out by the Colonial Office, --"Mr. Mother Country" --in years past.[56]

It need hardly be said that one of the greatest satisfactions of Mr. Ewart's long life was the Statute of Westminster, passed in 1931, which he saluted with the last of his Independence Papers. He was, it seems, somewhat disconcerted by the lack of interest shown by the Canadian public and government of the time at this momentous development, whereby Canada had reached the pinnacle of practical independence.[57] Perhaps the Depression had something to do with the scant enthusiasm! Finally, on February 21st, 1933, the

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[55] Vide John W. Dafoe. "The Views of John S. Ewart" in C.H.R., June, 1933, vol. 14, No. 2, pp. 136-42, 141 for a discussion of Ewart's weaknesses.

[56] Ewart (J.S.) Papers, P.A.M., op. cit., 1908 letter to J.H. Aubreywilliam, Private Secretary to the Governor-General, and Oct. 7, 1912 to Co. H.C. Lowther, Military Secretary.

[57] Vide for instance, Ewart (J.S.) Papers, P.A.M., Letter Book 3, to Clive A. Thomson.

constitution which began with the Rebellion Losses Bill of 1849 and had seen the triumphant growth of Canada's constitution succumbed to the accumulated weight of eighty-five years. The Right Hon. W. L. Mackenzie King, among others, pronounced an obituary on the loss of ". . . one who truly loved his country . . ."[58]

It has already been stated that by all reports Mr. Ewart was not noted for any active participation in party politics, although there is private testimony to the effect that some of his literature was used as campaign material by the Dominion Liberals on at least one occasion and that he at times helped certain statesmen with their speeches. However, towards actual engagement on the hustings he always turned a deaf ear, though he was at least once offered the leadership of a minor party.[59] His distaste for the political arena may be deduced from this declaration to His Grace, the Archbishop of Regina:

> . . .remedial legislation by the Dominion parliament was abandoned by Sir Wilfrid Laurier with reference to the Manitoba School Question when he came into power. He recognized that the law might declare

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[58] The Toronto Star, Feb. 21, 1933. See also Toronto Globe of the same date.

[59] Ewart (J.S.) Papers, P.A.M. op. cit., two letters dated Aug. 15, 1925 declining suggestion.

> in one way but that when the administration of the law was placed in the hands of a government determined to ignore the law the Dominion government was powerless. . . .
>
> I regret extremely to speak in this way of my fellow Canadians. My experience in the Manitoba School Question may have left me with too pessimistic a value of the honor of Canadian politicians. I confess however, that I have little faith in them.[60]

His later career shows a certain association with such outstanding Liberals as John W. Dafoe, Sir Clifford Sifton,[61] Sir Wilfrid Laurier, and the Rt. Hon. W. L. Mackenzie King,[62] but also, to some degree, with Conservative leaders, especially the Rt. Hon. Arthur Meighen[63] --largely, it sppears, in order to maintain and uphold the righteous cause of Canadian nationalism. Indeed, Scott credits him with always being in the offing at various conferences, influencing Senators, Members of Parliament, and other dignitaries until ". . . the principles that he advocated were unanimously adopted and embodied in the Statute of Westminster and his life work was fully accomplished."[64]

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[60] Ibid., 1926-1932 Letter Book, July 16, 1931.

[61] Canadian Annual Review, 1904, pp. 34 & 232.

[62] Vide, for instance, Ewart (J.S.) Papers, P.A.M., 1908-1933 Letter Book, Sept. 19, 1924 et al. re Naval Agreements.

[63] Ewart Papers, P.A.M., 1873-1945, Notes, Papers, Articles, 1st Folder: "The Significance of John S.Ewart",pp.10-11.

[64] W.L. Scott, op. cit., p. 336.

Whatever effect such activities had on the final outcome, it seems patent that the writer of the article in the March, 1933, volume of the Canadian Bar Review (p.208) was at least partly correct in stating that Ewart's writings had played a scant part and that Ewart himself would have been the first to agree. Their circulation--though heavily subsidized by the author--was very limited and the style too pedantic to have much general influence. Much of the same might be said of his numerous speaking appearances. They were to limited audiences and their appeal was primarily to the reason rather than to the emotions. However, it is difficult to estimate how much Ewart's various attempts at affecting the actions of the influential--which appears to count as much as, if not more than, the influencing of the masses (even in a democracy) --actually counted. Probably a safe rule would be to assume that the nearer to the source of power such efforts were made, the greater the net effect would be. Thus we could reconcile the conclusions of both Scott and the other author on this score. In any case, there is little doubt that Ewart's contempt for the masses[65] would have prevented his attempting to achieve his ends by popular conversion.

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[65] Report of the Twenty-First Annual Lake Mohonk Conference on International Arbitration, 1915, p. 115.

After his celebrated connection with the Manitoba School Question, which led to his receiving an honorary LL.D. from the University of Ottawa in 1908,[66] Mr. Ewart continued his line of action by defending the right of Catholics to their position on the "ne temere" decree of 1907, though he was sceptical of papal infallibility.[67] Also, he apparently had something to do on behalf of the same group in the squabble over the separate schools in Alberta and Saskatchewan when the autonomy bills were in process of being passed in 1905.[68] However, he could be discouraging on occasion, as when he repudiated the claim of one member of the Church of Rome that said body had sole right to the designation "Holy Catholic Church."[69]

Besides the items already mentioned and his works on the Manitoba School Question, to be dealt with further on in this dissertation, Mr. Ewart was the author of several

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[66] Ewart (J.S.) Papers, P.A.M., 1888-1925 Letter Book, May 12, 1908 testimonial from Wm. J. Murphy, o,m.i., rector of the University of Ottawa.

[67] Ibid., June 6, 1921; June 1 & Oct. 25, 1911; Jan. 3, 5, 1912. See also Kingdom Paper, no. 5.

[68] Laurier Papers, P.A. of C., vol. 617, #209070-9074, "Tuesday" (Prob. 1905). Long and interesting letter from Ewart--pleased with principle of autonomy bill, provides local as well as provincial rights. Vide also Vol. 739, nos. 209081 & 209082.

[69] Ewart (J.S.) Papers, P.A.M., 1926-1932 Letter Book, Jan. 10, 1931 to R. H. Freemantle.

tomes on jurisprudence, some of which were entitled Manual of Costs, An Index to the Statutes and the Judicature Act of 1881 (in connection with Sir T. W. Taylor). In 1900 appeared An Exposition of the Principles of Estoppel by Misrepresentation, followed seven years later by a difficult and highly involved volume which achieved considerable influence in the United States, his Waiver Distributed among the Departments, Election, Estoppel, Contract, Release. ". . .He was, moreover, a frequent contributor to the Harvard Law Review and other legal periodicals. . ."[70] In addition, he sent articles to the Queen's Quarterly and other organs of public opinion.[71]

In his youth, Mr. Ewart, in spite (or perhaps because) of his tendency to tuberculosis, was an athlete of some note, and in Winnipeg he appears from private sources to have continued his activity in sports. He enjoyed swimming, tennis, lacrosse and other games and remained physically active almost to the end of his days. Even in comparative old age, he learned to enjoy driving his automobile in Ottawa. Some idea of the range of his social and athletic activities may be gained from a list of the associations with which he was connected in that city. Besides being a Life Director of the

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[70] W. L. Scott, op. cit., p. 336.

[71] Canadian Men and Women of the Time, (1912), p.381.

Protestant General Hospital, a Member of the Permanent Executive Committee of the Earl Grey Musical and Dramatic Trophy Competition (1910) and Vice-President of the Local Branch of the American Archaeological Institute (1900), he was a member of the following clubs: Rideau, Ottawa Hunt, Canadian, Royal Ottawa Golf, Rivermead Golf (President, 1910), Ottawa Country and the University.[72]

All authorities agree in crediting Mr. Ewart with a staunch devotion to legal and constitutional forms. He could not abide infringements of the law, no matter from whence they emanated. But he was capable of regarding the spirit of the law as well as the letter. His sympathy for the underdog, evidenced perhaps by his considerate assistance to students engaged in research,[73] is scarcely doubted (though it is true he was curiously blind to the social problems raised by economic conditions and inclined to focus his attention rather single-mindedly on the question of constitutional and legal status). It is apparent, however, that his respect for the law came ahead of sentiment.

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[72] Who's Who in Canada (1927), p. 1024. Vide also Ewart (T.S.) Papers, 1909-1948, correspondence, Jan. 29,1940, to Sister Clotilde.

[73] W. L. Scott, op. cit., pp. 337-338. Vide also Ewart (T.S.) Papers, loc. cit.

Even when the judicial decision was to him patently at variance with the law,[74] his respect for the law--as well as his deference to the courts--remained inviolate. Significantly, there is no indication that he ever defied a court in the manner of his more impulsive opponent, Mr. D'Alton McCarthy.[75]

Towards the court and in the presence of acquaintances, especially guests, he was invariably courteous, even punctiliously so (a trait which opponents probably found infuriating), and even genial--though he was often stubbornly argumentative[76] and, one suspects, could be "rough" on occasion. However, there is no evidence to show that he ever stooped to the violent insolence in which so many of his opponents engaged.[77] He was not afraid to champion unpopular causes belligerently and tenaciously, and he became quite

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[74]Ewart (J.S.) Papers, P.A.M., 1926-1932 Letter Book, Mar. 26, 1931, to the Archbishop of Regina.

[75]Blake Papers, D.P.R.A., Legal Correspondence, 1872-1907, #98, Mar. 4, 1897, from Aemilius Irving.

[76]Norman M. Rogers. "(Review of) Independence Papers" in C.H.R., vol. 13, Dec. 1932, pp. 439-40. Vide also Toronto Daily Star, Apr. 18, 1921 and Montreal Gazette, Feb. 23, 1933.

[77]Ewart (J.S.) Papers, P.A.M., 1908-1933 Letter Book, two undated scurrilous comments.

accustomed to being in the position of rowing counter to the current and to being subjected to abuse. There is little doubt that he achieved a species of perverse pleasure from this--it indicated he was right![78] However, he was modest enough to admit he had often been wrong[79] and could be man enough to change his stand. One of the main reasons for his detestation of party politics was the blind adherence to party so characteristic of his times, and perhaps even of our own. Another was his contention that Canadian political parties were simply off-shoots of the old Tory-Whig squabble. Ewart himself looked forward to the election of representatives chosen simply on personal merits.[80]

An examination of Mr. Ewart's library (See Appendix A) indicates that the dry, logical, argumentative, and somewhat pedantic style for which he became noted was not acquired accidentally. Though his son has stated[81] that he at one time had a few novels in his library, Ewart's attitude to this

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[78] Vide his article in the Ottawa Citizen, Oct. 4, 1927.

[79] Laurier Papers, P.A.C., vol. 230, Apr.17,1902, from Ewart.

[80] Ewart (J.S.) Papers, P.A.M., 1926-1932 Letter Book, March 1, 1928, to Matthews.

[81] Ewart (T.S.) Papers, P.A.M., 1909-1928 Correspondence, Jan. 29, 1940, "T.S." to Sister Clotilde.

type of literature was distinctly uncomplimentary.[82] Apparently there never were any volumes of poetry.

In appearance, Ewart was far from being unprepossessing. His portrait by Dorothy Vicaji[83] reveals a tall, spare, handsome and distinguished gentleman, with fresh complexion, blue eyes, an ample mane of white hair, and a challenging expression. Apparently he was always a quietly "natty" dresser; his clothing, as befitted his income and station, being of high quality and in conservative good taste.

He was famed for his studious attitude--a trait which he developed through sheer drive and maintained even when in his eighties.[84] In his investigations and expositions, he became noted for dignity, impatience, logic, persistence, precision, sound analysis, and insistence on facts.[85] His writings thus showed an exhaustive, pedantic and wearying

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[82] Loc. cit., Vide also Prof. David Farr's Lecture.

[83] Vide frontispiece.

[84] Ewart (T.S.) Papers, P.A.M., 1909-1928 Correspondence, Jan. 29, 1940, "T.S." to Sister Clotilde.

[85] Vide Prof. David Farr's Lecture, q.v. Also Ewart (J.S.) Papers, P.A.M., 1888-1925 Letter Book, Dec. 4, 1908, from James Cappon of Queen's refusing to publish his article on "Lord Milner's Imperialism" as "too sour", filled with "fierce, forensic logic", and tearing the "protecting bark" from youthful Canadian nationality.

tendency, once described somewhat disconcertingly as ". . . fit only for pedants and professors . . ."[86] His habit of restrained analysis[87] and calm mistrust of sentiment became second-nature to the man. Highly typical was his comment on a certain emotional plea for the retention of appeals to the Judicial Committee:

> What a fool a mere sentimentalist can make of himself. Upon the basis of reason Aylesworth has nothing to say.[88]

A perusal of his works leaves one with the impression that his surprise at his arguments being so often ungraciously received was perhaps a trifle naive. At first, he was inclined to blame it on an inability to explain clearly.[89] Later, he realized that, though proud of never being accused of mis-statements, he was objected to by those who longed for continued "connection" with Britain because these facts sustained his proposals for independence.[90] For many years,

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[86] Ottawa Journal, Feb. 23, 1933.

[87] Vide Farr's Lecture.

[88] Ewart (J.S.) Papers, P.A.M., Letter Book 1, Mar. 20, 1922, to W. E. Raney.

[89] Ibid., Mar. 5, 1908, to G.H. -------.

[90] Ibid., 1908-1933 Letter Book, June 25, 1930, to James A. Ross.

he thus appears to have had difficulty in realizing that stating "facts" and "using" them were two different things. He was always somewhat open to the challenge of being "partisan" and ". . . skilfully misleading . . .", through snatching at some data and ignoring other information.[91] The point of view is all-important. The more appealing the conclusions are, the more acceptable people find the argument--and vice versa. One man's "facts" are taken as another man's "bias".

With all his virtues, Mr. Ewart appears to have been rather evasive at times, to have indulged in considerable quibbling and legal hair-splitting, as in his exchange of letters with the Rev. Canon Kittson and with Gordon W. Macdonald, K.C., on the significance of the "ne temere" decree.[92] In the author's estimate, at least, he could also be needlessly obtuse, as in his inability to see W. L. Mackenzie King's proposed Canadian flag as one banner (and not two).[93]

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[91] Ibid., July 8, 1932, from Clive A. Thomson.

[92] Ibid., Letter Book 1, June 1, Oct. 25, 1911; Jan. 3 and 9, 1912. (A certain testiness and sarcasm emerged in the latter, Ewart's reply.)

[93] Ibid., July 28, 1925, to King.

A literal-minded individual, and apparently a stickler for good diction, he seemed exasperatingly incapable of perceiving that the meanings of such terms as "Dominion" and "Commonwealth" might take on a new significance.[94] He was, one fears, too precise a man, and perhaps too much in love with his own particular exposition of Canada's evolution, to see that something new was being developed. He was right on the emergence of a Personal Union so far as legalistic development was concerned, but underestimated the strength of those moral bonds indicated as far back as the time of the American Revolution by Edmund Burke.[95]

Consistency was also, it is to be feared, not always the jewel in Mr. Ewart's crown. Though his theories were strongly grounded on North American isolationism and community of interest, and on Canadian group spirit, his arguments and policies often showed a most curious variability. His attitude towards collective security, for example, seemed rather vacillating, to say the least, as did his attitude

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[94] Ibid., Dec. 30, 1920 to W. E. Raney. Vide also Letter Book 2, Feb. 7, 1931, to Miss Margery A. Hayes.

[95] Derived from Prof. David Farr's Lecture. Vide also Ewart (J.S.) Papers, P.A.M., Letter Book 1, May 9, 1925, to Henry Forster, indicating an inability to recognize a moral obligation on the rest of the world (including the U.S.A.) in the absence of a genuine legal guarantee of Belgian Neutrality.

towards Canadian participation in the Great War.[96] To Bourassa's expostulations, he could offer only the excuse that his views were "singular", as was he himself.[97]

His interest in current events,[98] as well as in the past, and his determination to reveal facts ". . . carefully excluded from our school books. . ."[99] as well as a certain pride in associating himself with what he maintained--and with considerable truth--was the policy of Macdonald and Laurier,[100] together with a certain ability to appreciate and evaluate praise[101] made him a formidable protagonist. So did a certain facility at dissimulation, as revealed in his advice for the conduct of independence propaganda during the First World War.[102]

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[96] Vide Ewart Papers, P.A.M., 1908-1933 Letter Book, Apr. 7, 1914 to Jan. 14, 1918 inclusive, correspondence with Henri Bourassa.

[97] Ibid., Jan. 14, 1918.

[98] Ibid., 1909-1948 Correspondence, "Adney-Flags" vol., undated letter to Dr. Grant.

[99] Independence Papers, I, no. 1, p. 24.

[100] Ottawa Citizen, Feb. 21, 1930, vide Ewart's article.

[101] Ewart (J.S.) Papers, P.A.M., Letter Book 2, Sept. 22, 1926.

[102] Ibid., Letter Book 1, April 10, 1916, to W.D.Gregory.

His seeming contradictions, or at least inconsistencies, could be quite startling at times, as in his rather specious attempt to deny that he had said Canada could get a seat on the Hague tribunal only by becoming independent. His original statement certainly had very bluntly implied it![103]

A final great weakness of Mr. Ewart would appear to be his rather primitive faith in nationalism as a goal in itself. He deplored the racial, religious and language divergences and hatreds of Canada, and wanted to see her become truly a united nation.[104] But outside of blaming the imperialists and the absence of outside pressure for the lack of national unity and the probability of civil war amongst what should be one people in this country,[105] he seemed remarkably vague about how it was to be positively achieved, what form it was to take, and what, if anything, it was to establish as its role in the world.

With the knotty problem as to how much Ewart's desire for complete dissociation from Great Britain was his original goal, and how much he developed as he went along, we shall not attempt to deal. Much of one's conclusion on this score

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103 Ibid., Dec. 4, 1916, to Prof. A. Berriedale Keith.

104 Ibid., April 10, 1916, to John Lewis.

105 Loc. cit.

would be open to the charge of being subjective.

But no one is perfect. With all charity let us now proceed to examine the unfolding of the remarkable drama in which this capable and devoted advocate, then in his prime and almost at the peak of his career in Manitoba, was to be so significantly involved.

CHAPTER TWO

THE DEVELOPMENT OF THE SCHOOL QUESTION

Before dealing with Mr. Ewart's participation in the Question, let us first pay some attention, not only to the genesis of the Question in Manitoba, but also--as necessarily involved in it--to the developments preceding it in the Eastern section of the country.

Mr. Ewart's manuscript The Political History of Canada[1] bears considerable testimony to the part played by the Churches in the field of education in British North America, and, more particularly, to the ultimately vain attempts by the "established" Church of England to gain a position of preference in this work and eventual control of that nineteenth century innovation, the public school system.[2] The final upshot of the struggle over public education in the Canadas occurred with the passage of the School Act of 1863, giving the Catholics of Upper Canada substantially what they wanted

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[1] John S. Ewart. The Political History of Canada (MSS), 1929, 13 vols. (Vide especially vols. 1,2,4,6 & 10).

[2] Public School. A public or common school (or system of schools) is one enjoying government recognition and support and is open to any students who care to attend. It may or may not be a Separate School.

as regards a separate elementary school system.[3] Thus, while the Protestant minority in Quebec had failed to obtain legal safeguards for their own schools, the Catholic minority had not only succeeded in defying the effort to assimilate them into a common system, but had obtained recognition in law for their own school organization.

In the Maritimes some attempt had been made prior to 1870 to establish a common schools system. Under this arrangement, the Catholics especially--in practice, though not in law--maintained a largely denominational[4] and semi-separate system. Little attention was paid to the situation in these Provinces during the Confederation debates. Not until after Confederation did the problem become acute in the Provinces by the sea.

In what was to become the Province of Manitoba, education had been left on a denominational basis--with schools being maintained by the Anglican Church, the Catholic clergy, and, ultimately, by the Presbyterians. By 1870, these three

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[3] Vide Robert Sellar. The Tragedy of Quebec. . ., pp. 64-65, 124-25, 130-31, 137-38, 188-193 for these developments. A Separate School or separate school system means one separate from that of the majority in any province and receiving state recognition and support. For further discussion see G.M.Weir, The Separate School Law in the Prairie Provinces; C.B.Sisson's Bi-Lingual Schools in Canada.

[4] A Denominational School is one that has a distinct and particular religious tone as regards control and teaching. Such tone may vary widely in degree. It may be either public or private. For the Maritimes situation, vide H.Marshall,ed. The Organization and Administration of Public Schools in Canada, Dominion Bureau of Statistics Reference Paper #31, pp.213-14, 232-33, 259-60.

denominations had been recognized by the Council of Assiniboia as engaged in public education, and occasional grants, based roughly on the number of schools operated, were made by this creation of the Hudson's Bay Company for their assistance, although no laws or regulations were made by it for the schools.[5] Ironically enough, in view of the later attempt to maintain that this system was dual, i.e., basically Catholic and Protestant, rather than plural,[6] the Catholic Father, Reverend Laflèche was instrumental in aiding Judge John Black in the formation of a Presbyterian system.[7]

The negotiations and debates leading up to the British North America Act revealed the almost complete abandonment of the old idea of a uniform public school system in the Canadas, either on Anglican lines or on those of the new

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[5]Alexander A. Taché. Une page de l'histoire des écoles . . ., pp. 13-16. Vide also George Bryce. A Romantic Settlement of Lord Selkirk's Colonists, p. 312 for mistaken claim that ". . . not a dollar had been given as aid by the old Government of Assiniboia. . . ."

[6]Taché. Une page . . ., pp. 17-19.

[7]Ibid., p. 17

"non-denominational"[8] model the Ontario Methodists had done so much to popularize. Thus it was that Oliver Mowat's motion, at the Quebec Conference on Oct. 24, 1864, to leave the matter of education strictly to the control of each province,[9] was amended by Thomas D'Arcy McGee on the 31st to the effect that such control should be limited to the extent of safeguarding the lawful rights of the Protestant or Catholic minority at the time of the Union.[10]

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[8] Non-denominational. While admittedly somewhat anomalous, the term will be used in the sense given it by the Manitoba Government during the struggle. It came into fashion to describe the type of schools at least purportedly established by the Acts of 1890, i.e., ". . . Not Secular nor Sectarian, but Religious", to use the terminology applied by the Rev. J. M. King, D.D., in a lecture delivered at the opening of the Theological Department of Manitoba College in Winnipeg, on Oct. 29, 1889 (M.S.Q., p. 179) or the more caustic terms applied by Mr. Ewart, to wit, ". . . secular (with a vestige) . . ." (M.S.Q., p. 227). One anomaly lies in the fact that the school is supposedly "Christian", and thus "denominational", particularly in the eyes of Jews, etc.; another, that it is admittedly closer to the Protestant, or at least so-called Protestant, idea of Christian instruction than it is to the Catholic pattern. Whether or not this makes the "non-denominational" school "Protestant" is, of course, a matter very difficult to determine objectively. Certainly, these two religious groups are on many points diametrically opposed.

[9] Charles R. W. Biggar. Sir Oliver Mowat . . ., vol. I, pp. 120-31 and vol. II, pp. 484-85.

[10] Loc. cit.

The Protestants of Quebec, enjoying few legal rights, were naturally alarmed by this proposal and their spokesman, the Hon. Alexander Tilloch Galt, placed himself at the head of a movement to secure protection for his followers.[11] Faced with such a situation, the Quebec Catholics offered to provide much the same system of independence for Protestants as a whole as the Catholic Church had already obtained in the realm of public education in Quebec, i.e., far more independence than was possessed by the Catholic schools of Ontario.[12]

Considerable manoeuvering ensued, which resulted in the British North America Act granting the Protestant minority of Quebec the same rights to separate schools as were possessed by law at the time of union by the Catholics of Ontario, and safeguarding both groups by an iron-clad guarantee.[13] The additional rights granted as per agreement by the Quebec Legislature soon after Confederation to the Protestant minority as a unit were under no such protection.[14]

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[11]Robert Sellar. The Tragedy of Quebec, p. 174.

[12]Ibid., pp. 189-90.

[13]Vide Appendix B.

[14]Vide Sellar. The Tragedy of Quebec, pp. 174-75, for a scathing denunciation of the advantage thereby given the Catholic Church.

The entry of the fledgling Province of Manitoba into Confederation naturally posed the problem of what was to be done with the question of education. The first of the Bills of Rights[15]--so famous in the Riel affair--contained no mention of schools at all; the second, referred only to a federal monetary grant for their assistance.

Riel's insistence on Provincial rather than Territorial status led to the drafting of a third Bill which, though never ratified by the representatives of the people, was posted up in the settlement as the one taken by the three delegates--Rev. Father Ritchot, Judge John Black, and Alfred H. Scott[16]--to Ottawa. However, even this Bill contained no demand for separate schools.[17]

What actually happened during these negotiations at Ottawa, and what use, if any was actually made of the highly

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[15] Vide Appendix C.

[16] Bryce. A Romantic Settlement . . ., pp. 296-97, claims the English population was dissatisfied with the American, Scott. His John Black . . ., p. 111, states that A. G. B. Bannatyne was the real choice but Scott was elected by an American mob.

[17] Vide Appendix C for both Bills.

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controversial ". . . fourth list inspired, it would seem, by Bishop Taché, which added a request for a Senate and for denominational schools. . . ."[18] is not definitely known. The Macdonald Government, indeed, gave every courtesy, save that of formal recognition, to the delegates[19] and the conversations appear to have taken place largely with the Rev. Father Ritchot.[20] As a result, the Manitoba Act contained the famous section 22 which practically ensured the establishment of the Quebec educational system in the new Province and certainly went far towards compelling its continuance, once it was established.[21]

Certainly, the Federal Members realized this

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18 William Lewis Morton. Manitoba, a History, p. 140. Vide also M.S.Q., pp. 364-65, and L-A. Prud'homme. Monseigneur Nöel-Joseph Ritchot, pp. 81-103. Note also Clause 1 of the 4th Bill in this latter work (p.84) is different than in Ewart's version-- M.S.Q., pp. 364-65 -- and so, therefore, are the arguments as to how the Province came to be called Manitoba (vide p. 86 in the former and p. 370 in M.S.Q.).

19 Vide M.S.Q., p. 374 for Macdonald's statement before the Commons committee, May,1874 and for Ewart's admission that the delegates were recognized as from the people rather than from the Provisional Government.

20 M.S.Q., pp. 370-71. Also Bryce. John Black. . ., pp. 106, 109, 113 for comments on the Judge's lack of enthusiasm.

21 Vide Appendix B.

latter fact, as was shown by the objections and counter-objections made regarding this section during the debates.[22]

It would appear likely that on the return of the delegates to Red River, no mention was made of this particular clause, though Father Ritchot, on his return to Fort Garry, made due report to the Assembly and was enthusiastically cheered.[23] In any case, the first educational Bill was speedily modified to provide for two separate systems, Protestant and Catholic.[24]

As immigration--largely Protestant and English-speaking--poured into the new Province after 1870,[25] dissatisfaction arose which led to several murmurings of resentment and attempts to end the separate system.[26] However, these efforts

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[22] Vide M.S.Q. p. 375. Also Hansard (1870) p. 1432, speech of the Hon. Mr. Chauveau.

[23] Vide M.S.Q., pp. 380-82, for discussion of Rev. Father Ritchot's report and his somewhat cryptic reply to the thanks of the Manitoba Assembly. Vide also Ewart's non-commital comment on pp. 380-81.

[24] Vide Taché. Une page . . ., p. 45; M.S.Q., p. 140; Martin Kavanaugh. The Assiniboine Basin, p. 198; Bryce. John Black . . ., p. 140. (Though not without some initial awkwardness.) Vide John W. Dafoe. Clifford Sifton in relation to his times, p. 71

[25] Morton. Manitoba. . ., p. 177. Also Kavanaugh. The Assiniboine Basin, p. 199

[26] For claims, counter-claims, and qualifications vide: National Schools for Manitoba, p. 1; Bryce. John Black . . ., pp. 140-41; Percy Victor Ibbetson. Decisions of the Judicial Committee . . ., p. 18; Chester Martin. "Political History of Manitoba" in Adam Shortt and Arthur Doughty. Canada and Its Provinces, vol. 19, p. 125; Oscar D. Skelton. Life and Letters of Sir Wilfrid Laurier, vol. 1, p. 444; and Taché. Denominational or Free Christian Schools in Manitoba, passim; also his Une page . . . pp. 40-59.

were met by continual (though perhaps somewhat laggard) financial and other concessions to the ever-growing "Ontario" majority, which, if anything, served only to emphasize the separateness of the educational set-up.[27] In spite of the unsettling developments of the New Brunswick School Question (with its striking revelation of the importance of the distinction between rights "by law" and rights "by practice"),[28] and the trends toward greater government control marked by the establishment of a Department of Education under a responsible Minister in Ontario (largely at the instrumentality of Sir Oliver Mowat),[29] the policy of gradual accommodation had not only preserved the "Quebec system" in Manitoba, but had even led to a dying-down of agitation.[30]

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[27] For indications vide: Dom Benoit. La vie de Monseigneur Taché, p. 640; Bryce. John Black . . ., p. 141; Skelton. Laurier, . . . vol. 1, p. 444; Taché. Denominational or Free Christian Schools . . ., pp. 23-26.

[28] Vide "ex parte Renaud," New Brunswick Law Reports, 1873, I Pugsley, pp. 273-288 (for the report of the local decision). Also Sessional Papers (1873), vol. vi, no. 7, Paper 44.

[29] Biggar. Sir Oliver Mowat, vol. 1, pp; 279-83.

[30] Vide for indications and qualifications: George Bryce. Manitoba, Its Infancy . . ., pp. 351, 354-55; M.S.Q., p. 143; Ibbetson. Decisions of the Judicial Committee . . ., p. 34; Chester Martin. "Political History of Manitoba" in Shortt & Doughty. Canada . . ., vol. 19, p. 125; Taché. Une page . . ., pp. 56-57; and S. E. Lang. "History of Education in Manitoba" in Shortt & Doughty. Canada . . ., vol. 20, p.429.

What undoubtedly started "the ball rolling" again--and to a swift climax--was the Riel execution and the resulting agitation in Quebec and Ontario coupled with the desire of the Greenway Government to acquire another "burning issue" to glamourize themselves before the Manitoba public, once their battle against Federal interference in the Province's policies on railway construction had ended in victory.

The execution of Louis Riel, and the raising of the "No-Popery" cry by the Ontario Conservative leader, William Meredith, in the December, 1886 elections,[31] marked the beginning of another of those grave crises in English-French and Catholic-Protestant relations, which the expedient of Confederation had sought to nullify. In Quebec, the Hon. Mr. Mercier swept into power on the strength of an anti-Orange appeal and proceeded to settle the vexed question of the moral claims of the Jesuit Order[32] and the Quebec bishops to certain estates confiscated by the British authorities after 1800, and afterwards devoted to the financing of education.

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[31]Biggar. Mowat, vol. 2, pp. 466-67.

[32]Vide Sellar. The Tragedy of Quebec. pp. 167-68 for an account of the subterfuge by which they had become re-incorporated in Canada.

Though the Jesuits' Estates Act (passed without opposition on the 3rd of July, 1888) itself was basically unimpeachable, its preamble (to say nothing of the preliminary correspondence) was so worded--in its extravagant adulation of His Holiness, the Pope--as to appear a deliberate provocation to Protestant susceptibilities, and to those of the detested "Yellow men" in particular.[33] A storm of protest arose in the excitable province of Ontario, and before long even the far more discreet and passive Protestants of Quebec became aroused.[34] Attempts were made to have the Bill disallowed by the Federal Government, but these failed as the legislation was adjudged by the Minister of Justice, Sir John Thompson, to be entirely within the jurisdiction of the province of Quebec and did not infringe any of the powers of the Federal Government.[35] An attempt, by a group of Quebec Protestants spurred on by an Ontario group, to take the question to the courts was averted by timely promises on the part of Mr. Mercier.[36] Fortunately for the Federal Government, which was thereby able to avoid the necessity of coming to grips

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[33] John Castell Hopkins. Life and Works of Sir John Thompson, pp. 118-20.

[34] Ibid., p. 120.

[35] Ibid., p. 142.

[36] Ibid., pp. 147-148.

with the problem of whether or not to provide the minority with the funds necessary to go to court, as it had done in the New Brunswick dispute.

Thwarted in its attempt to crush this provocative action of the infuriating Mr. Honoré Mercier, the Equal Rights Association, under the leadership of the maverick Conservative, D'Alton McCarthy, commenced an agitation against the separate schools of Ontario and the use of the French language in the North West Territories.[37] With deplorable lack of originality, they followed Mr. Mercier's precedent by using the preamble of their proposed Bill (to leave the language question up to the people of the North West) to fling down on the floor of the Federal House a gauntlet of defiance. The preamble--which is never taken into account in considering the validity of a statute--was so worded as to attack the official use of French, not only in the North West but anywhere in Canada, and, by implication, its unofficial use as well.[38] This succeeded in rousing the French-speaking Members, and the Province of Quebec, quite as successfully as

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[37] Ibid., p. 147.

[38] Ibid., pp. 155-56.

Mr. Mercier's "gentle rap on the knuckles" had stirred up the animosity of Protestants.[39] The Bill--introduced by McCarthy on Jan. 22, 1890--was finally passed, in a somewhat less severe form, by an overwhelming majority.[40] But, before this exhibition, the outspoken McCarthy had had a hand in Manitoba.

While these tremendous outbursts of strife had been taking place in the East, events in the Province of Manitoba had by no means been dull. The fall of John Norquay's Government in December, 1887, ended completely the Red River era in Manitoba politics.[41] Barely able to maintain himself in power against the Liberal rise in strength in the election of 1886, the Hon. John Norquay was finally forced to resign, along with his Provincial Treasurer, Hon. A. A. C. LaRivière, as a result of a financial scandal in connection with railway transactions in which his Government had engaged in an attempt to defy Ottawa's adamant opposition to any infringement of the C.P.R. monopoly.[42] He was succeeded by the Hon. D. H. Harrison, also a Conservative, but this administration lasted only two weeks. The unavoidable by-elections proved its coup de grace.[43] One of the necessary by-elec-

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[39] Ibid., pp. 156-60.

[40] Ibid., pp. 155 & 160.

[41] Morton. Manitoba, p. 229.

[42] Ibid., pp. 221-22.

[43] Ibid., p. 229.

tions, that at St. François Xavier, was to become notorious because of the promises later alleged to have been given there by the Hon. Joseph Martin (afterwards the presiding genius of the controversial School Acts of 1890), in the presence of Ewart's partner, James Fisher,[44] to the effect that the accusations that the Liberals were out to avenge themselves for the long-continued support of the Conservatives by the French Catholic population (by legislating against their separate schools and their language) were without foundation.[45]

The Liberal success in this and other by-elections saw their leader, the Hon. Thomas Greenway, called to form an administration on Jan. 18, 1888. He took into his administration the Hon. James E. P. Prendergast, the outstanding French Catholic in the Legislature,[46] after consultation with Archbishop Taché. At this consultation, it was later to be charged, Greenway made explicit promises to the Arch-

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[44]M.S.Q., pp. 396-97 gives Fisher's declaration before the Manitoba Legislature on Mar. 2, 1893.

[45]Vide Robert E. Clague. The Political Aspects of the Manitoba School Question . . ., p. 42, for his searching examination of the positive and negative arguments and his conclusion that support of the contention lies largely in the latter.

[46]Morton. Manitoba, pp. 229-30.

bishop, guaranteeing his administration would not infringe on the rights of the Catholic population to their separate schools and the rights of the French to the official use of their language, nor would they reduce the number of French electoral divisions.[47] There seems little reason to doubt that these conversations actually took place. At that time French support was needed to control the Legislature.[48] It was not yet time for "the Moor to go".

No sooner had Greenway taken office than he left for Ottawa, with Attorney-General Joseph Martin, where he succeeded in gaining a promise from the Macdonald Government to the effect that the Federal Government would no longer disallow railway charters issued by the Province of Manitoba for railroads within the boundaries of 1870 in the Province. This success was followed by a Resolution moved in the local House by Greenway himself, seconded by the formidable Martin, heartily approving the Resolutions of the Inter-Provincial Conference, held at Quebec in October of that year, advocating increased provincial autonomy.[49]

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[47] Vide affidavits of Rev. Father Allard and William Alloway in M.S.Q., pp. 398-400.

[48] Vide Morton. Manitoba, p. 230. Vide also Clague, op. cit., p.43 for his reasons for accepting the affidavits as true.

[49] Taché. Une page. . ., pp. 70-71.

Even before this gesture of defiant independence, the Greenway Government had insured its return to office by practically ending the old scheme of communal representation and, for the first time, gave the newly-settled areas of the Province adequate representation by the redistribution measure passed in March, 1888.[50] In the general elections three months later, the Liberals were overwhelmingly triumphant with thirty-five Government Members faced by an Opposition of only five. In the entire House there were only six members of French extraction.[51] "The Moor could now go." Realization that French and Catholic support had been bought at too humiliating a price may well have played a part in what was soon to follow--if the aforementioned allegations concerning verbal guarantees were indeed true.

As early as Aug. 25, 1888, Greenway may have mulled over a hint to take up the matter of separate schools.[52] Very soon, indeed, the Greenway Administration embarked on a new phase of that reforming zeal which had already characterized it.[53] As early as October, 1888, the energetic

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[50]Morton. Manitoba, pp. 231-32.

[51]Morton. Manitoba, p. 232.

[52]Greenway Papers, P.A.M., #1014, from W.B.Gilroy.

[53]Vide Morton. Manitoba, pp. 231-32.

Joseph Martin was corresponding with J. B. Somerset, the Superintendent of Education for the Protestant Section, with a view to a closer supervision of expenditures.[54] The two sessions of the 7th Legislature of Manitoba, from August to November, 1888, saw great activity, with ninety-five new measures assented to, including three to amend the School Acts on administrative details. The most significant of these changes was that, in future, the Government would constitute itself as paymaster instead of leaving such administration to the two Sections of the Board of Education.[55] Clearly, it was centralization with a mixture of truculence, but, since it did not overtly infringe the principle of separation, there was no opposition from the Catholic Section.[56] Such moves towards closer Government supervision would certainly seem to herald an attitude that would lead to increasing dissatisfaction with the arrangements so dear to the minority. However much the abolition of separate schools may have been dictated by other considerations, there is little doubt that the argument for efficient and economical instruction in secular studies was always present, wait-

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[54]Greenway Papers, P.A.M., #1099, Oct. 5 & 8, 1888.

[55]Taché. Une page . . ., pp. 67-68.

[56]Ibid., p. 68.

ing for an opportune moment to emerge. "He who pays the piper" always wishes, sooner or later, "to call the tune."

By January, 1889, Archbishop Taché appears to have become persona non grata with the Provincial Administration.[57] Shortly afterwards, the Hon. J. E. P. Prendergast, in his capacity as Provincial Secretary, requested the Catholic Section of the Board of Education to remit their carefully--and quite legally--acquired reserve fund to the Government, as purely an administrative procedure.[58] The Catholic Section, on July 22nd, 1888, accordingly did so, though hedging their compliance with three resolutions to the effect that the money was still the property of the Catholic Section. However, this sum was later turned in to the consolidated funds of the Province and counted as an economy.[59]

Also in 1889, the Manitoba Liberals found public confidence in them somewhat shaken by the activities of "Fighting Joe" Martin in the administration of the Northern Pacific and Manitoba Railway, which was being constructed

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[57] Ibid., p. 69.

[58] Ibid., pp. 72-73. Vide also James E.P.Prendergast. The Manitoba school question, speech delivered . . . in the Legislative Assembly of Manitoba, on the . . . 12th day of March, 1890.

[59] Ibid., p. 73.

under government charter as Manitoba's long-sought answer to the C.P.R. monopoly, and W. F. Luxton's furious charges of corruption. This was only partly compensated for by their success in having the obstructionist tactics of the C.P.R. nullified by a Supreme Court ruling in February, 1889.[60] A "new issue" to capture public attention would undoubtedly have appeared highly attractive.

Thus it was that when the "Equal Rights" agitation spread to the West, it fell on the fallow ground of the deep, though lately not publicly expressed, antagonism to the separate schools system and on the fruitful seeds of party expediencies.[61]

Thus, when those two arch-agitators, D'Alton McCarthy (full of Equal Rights zeal and making his visit under the auspices of the Imperial Federation League)[62] and Joseph Martin addressed a meeting at Portage la Prairie on Aug. 5, 1889, "the fat was soon in the fire." After a ferocious anti-Catholic address by McCarthy, the Hon. Joseph leapt to his feet and declared himself, and thus the Government,

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[60] Morton. Manitoba, pp. 235-38.

[61] Ibid., pp. 242-44, for a general indication of these tendencies.

[62] McCarthy Papers, P.A.C., #165, from F. H. Turnoch, Commissioner's Office, Department of the Interior, Winnipeg, July 17, 1889, and #166, from C. I. Machlin, Chairman of the Port Arthur Board, Imperial Federation League, July 29, 1889.

pledged to the abolition of the dual language and the separate schools. From this commitment, it was soon evident that there could be no turning back. It had caught the imagination of the Ontario-bred majority, troubled by the growing complexity of the racial and religious character of the new Province.[63]

Having embarked willy-nilly on the process of educational reform, the Manitoba Government was soon faced with the necessity of determining what form the new unitary system was to take. Were the new schools to be completely secular--as were the "godless institutions" of Madame la République Française--or were they to retain some sort of a "religious" i.e., "Christian" character? It was soon apparent that their Martin was no Luther:

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[63]Morton. Manitoba, pp. 244-45. Vide also Dom Benoit. La vie de Monseigneur Taché, for sneer at idea church and state separate in England. (Separation argument much used by Martin and later by Clifford Sifton--vide William L. Morton, op. cit., pp. 248-49 and R.D., Manitoba Legislature, Free Press (Winnipeg, Mar. 3-19, 1890,--also for Hon. Mr. Smart's arguments re economy.) The alleged inefficiency of Catholic schools received little or no immediate attention from the Government--perhaps because such arguments are difficult to prove, let alone define. It concentrated on the "inefficiency" in maintaining two systems before concentrating on the "inefficiency" in one. However, the public were not slow to take up the latter cry, which called forth Archbishop Taché's second letter to the Free Press, vide Une Page . . ., pp. 80-81. Dom. Benoit. op cit., p. 647 holds that no one cared to enter into polemics with the Archbishop and takes this as conclusive evidence that such accusations were incorrect.

> . . . Some further pronouncements of Attorney-General Martin . . . in favor of the principle of secular education, aroused the fears of the Protestant clergy. A ringing declaration against secular schools by Rev. Dr. J.M. King, Principal of Manitoba College, made the position of the Presbyterian ministry clear, and an outspoken protest by Bishop Robert Machray of the Church of England added the weight of the Anglican communion and of a leading educationalist to the opposition to purely secular schools. If the government ever had any intention of being bound by the declarations of the Attorney-General, it did not proceed with it. Religious exercises, it was announced, would be permitted in the schools, and so the stigma of godlessness was avoided and a possible source of opposition to the changing of the school system removed.[64]

As evidence of the perturbed state of political opinion at the Federal level, it should be noted that as early as Aug. 9, 1889, Richard Cartwright wrote to Wilfrid Laurier that trouble would arise over disallowance if the Province had the legal right to abolish the separate schools and the official use of French, and suggested the sending of an envoy to stop Greenway, adding that the Ontario men

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[64]Morton. Manitoba, p. 246. Vide also Education: Not Secular nor Sectarian, but Religious by Rev. J.M. King, Lecture at the opening of the Theological Department of Manitoba College (Presbyterian) on Oct. 29, 1889 (in M.S.Q., pp. 179-195); also Rev. Principal Grant's Letter to the Sun (Winnipeg) of Nov. 16, 1889 in favor of the Ontario system with recognition of the provincial right to abolish eventually separate schools (M.S.Q., pp. 196-97) and the Sermon by Rev. Dr. Duval of Knox Church, Winnipeg on Nov. 25, 1889, on much the same lines as that of King, up to lawyers to decide if one class is especially franchised, but if so, is an inequity (M.S.Q., pp. 198-205).

and some of the Maritimers would feel bound to support the Province if it were within its legal rights.[65]

On Aug. 14, 1889, Prendergast resigned from the Cabinet, whose semi-clandestine activities on the matter of schools had become unendurable, and Archbishop Taché announced his resolution to protect his flock.[66] Taché's letter to the Free Press, protesting the confiscation of the Catholic reserve fund and objecting to charges of undue secrecy in the administration of the Catholic public schools, was published a week later.[67] Anent these charges of secrecy, there is no doubt that in practice the Catholic Section had proved less eager to make reports and present statistics than had the Protestant.[68] The absence, for example, of a series of Reports by the Catholic Section corresponding with those produced by the Protestant Section from the earliest days of the public schools system does not, of course, excuse

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[65]Laurier Papers, P.A.C., vol. 3, #1010.

[66]Taché. Pastoral Letter of His Grace the Archbishop of St. Boniface, on the new school laws of Manitoba, 14 pp., (in P.A.M.)

[67]Benoit. Taché, p. 653.

[68]Vide Kavanaugh. The Assiniboine Basin, pp. 198-200 for an impression of the incompleteness of Catholic records as compared with those of the Protestant Section.

the Government of responsibility, but it does lend a certain credence to accusations against the extremely evident clerical control of the Catholic public institutions of learning.[69]

A substantial herald of things to come was the appearance, in September, 1889, of the first issue of the Manitoba Gazette to be printed in English alone.[70]

The tactics of resistance were gradually emerging, and acquiring much the same form as in the earlier New Brunswick altercation. In addition to meetings of protest, public and private entreaties, letters to the press, and other attempts to thwart the determination of the rampant "Ontario democracy",[71] strenuous efforts were made, particularly by Archbishop Taché, to ensure that the proposed Acts should be

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[69] Vide Bryce. John Black . . ., p. 140.

[70] Morton. Manitoba, p. 248.

[71] Vide Benoit, Taché, p. 649 for report of mass reception of Taché on his return from the East, p. 650 for the Archbishop's call to his flock, p. 655 for the Pastoral of Aug. 15, 1890, pp. 661-65 for first meeting of the newly-formed National Congress on June 24, 1890 and p. 780 for the second session on Aug. 15 & 16, 1892. Vide also Taché's Une page . . ., pp. 96-97 for report of mass meeting in St. Boniface on Oct. 31, 1889, etc. Vide also A.A.S.B., #265, Dec. 20, 1889, from Brophy re resolution at meeting in St. Mary's School House, Winnipeg.

disallowed. During his visit to the East in October, 1889, some Federal ministers and other friends assured him that there was no need to be alarmed, as the rights with which he was so concerned were protected by the constitution.[72] These assurances clearly foreshadowed the reluctance of the Federal Government to use the weapon of disallowance.

That the Federal Liberal leaders were by no means unconcerned with the drama is shown by a letter to Laurier advising it were best to allow Macdonald to disallow the impending legislation and to concur in his action as this would hurt the Conservatives most.[73] It was also indicated that if the "Old Chieftain" did not choose to disallow, the Liberals should take their stand on the right of the minority to appeal to the Judicial Committee. The letter also referred--somewhat suggestively--to Edward Blake's holding out, when the Manitoba Act was before the House, for conceding separate schools <u>on the same terms as in Ontario.</u>[74] So early were the lines of Liberal policy being formulated.

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[72] <u>Vide</u> Taché. <u>Une page</u> . . ., pp. 95-96. Also Macdonald Papers, P.A.C., vol. 248, #472, Oct. 24, 1889, to Joseph Pope refers to a meeting on the 29th between Taché and Macdonald.

[73] Laurier Papers, P.A.C., vol. 3, #1078, Oct. 4, 1889, from T. G. Jones, Halifax.

[74] Author's italics.

But His Grace the Archbishop was not the only interested party importuning the aged Sir John. During November, 1889, the Hon. Joseph Martin was also corresponding with him re the vital subject of the school lands of the Province. (What is the use of setting up a new school system if there is a lack of funds to keep it operating? Such a situation might be highly compromising to the initiator of wholesale reform.) From the adroit Sir John, he received merely a curt referral to the Minister of the Interior.[75] A few days later, Macdonald received a suggestion that the opinion of the law officers of the Crown should be sought on the question of Provincial authority before the proposed legislation were passed, and adding that His Grace agreed with the idea.[76] However, it would have been rather late to have carried such a request to England,[77] and very awkward for the Federal authorities to have done so.

By January, 1890, the Conservative determination to leave the matter to the courts had crystallized. In a letter to Lieutenant Governor Schultz,[78] Macdonald made it plain

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[75]Macdonald Papers, P.A.C., Letter Book 26, #289, Nov. 2, 1889 and #340, Dec. 10, 1889 to Martin.

[76]Macdonald Papers, P.A.C., vol. 481, #509, Jan.27, 1890, from Ernest J. Wood, M.P.P. (Cypress).

[77]Ibid., #513, telegram to E. J. Wood.

[78]Ibid., Letter Book 26, #373, Jan. 5, 1890.

that the minority should take legal action if the Province provided nothing in the estimates for separate schools. The same letter revealed that the resolution of the Greenway Government to have its own way, in spite of the Lieutenant-Governor or Ottawa, was as intransigent as ever. But Macdonald was confident Martin and Greenway would destroy themselves.

As proof that the politicos of the last century were as alive to the necessity of spontaneous demonstrations as are any of the leaders of today's masses, we might cite Macdonald's letter of Nov. 9, 1889 to John Christian Schultz,[79] advising that meetings should take place in the Catholic parishes to formulate resolutions and petitions to be forwarded to the Lieutenant-Governor, the local Legislature, the Governor-General, and the Federal Parliament. This probably at least partly explains some of the procedures previously alluded to.

On the 22nd of December, 1889, a letter was published in the Manitoba Free Press giving Archbishop Taché's explanation of the genesis of the significance of the clause in the Manitoba Act protecting French and Catholic schools. This was later translated and reproduced in the Jan. 22, 1890

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[79]Macdonald Papers, P.A.C., Letter Book 26, #297.

issue of Le Manitoba (Winnipeg). It immediately aroused a storm of denial.[80] For the first time, the existence of a fourth Bill of Rights was revealed to the general public, a Bill which included a distinct demand for separate schools.[81] This striking revelation was to have considerable influence on the course of the controversy. It appears to have strengthened the Catholic case legally and to have weakened it politically, for, while it gave strength to the idea of a treaty obligation between the Federal Government and the Province,[82] it undoubtedly caused considerable moral indignation amongst the general Protestant public as another indication of "Jesuitic manipulations."[83]

But pleadings and protests were to no avail. The Speech from the Throne before the assembled Provincial House on Jan. 30, 1890, announced the presentation of an Act to amend the Public Schools Act.[84] There could be little doubt

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[80] Vide Taché. Une page . . ., p. 96 for the Archbishop's reply to Messrs. Taylor and Hay.

[81] Vide Appendix C, pp. xii - xiii.

[82] Vide M.S.Q., pp. 364-375 for Ewart's discussion.

[83] Vide Letter of Mr. Taylor in Free Press (Winnipeg) Jan. 18, 1889. Vide also A.A.S.B., Nov. 22, 1892 for his considerable about-face on this matter.

[84] R.D., 3rd Session, 7th Legislature, Province of Manitoba, Free Press (Winnipeg), Jan. 31, 1890.

that the proposed Act was the one so forcibly objected to. Any doubt was soon ended by the first reading, on the 12th of February, of the two Bills drawn up by the Hon. Joseph Martin: "A Bill concerning the Department of Education" and "A Bill for the Public Schools".[85] The two contained a total of 227 clauses or articles: 171 borrowed from the Revised Statutes of Ontario, 31 from the previous Manitoba Acts, while 25 were new provisions. Numerous changes were found to be necessary, probably as a result of which the Bill was not read on Nov. 13th as scheduled, but on March 4th.[86] Taché's criticism, that the Bills had been drawn up hurriedly and carelessly, seems quite valid.[87] Certainly they required considerable alteration--a quality they shared with the later Federal Remedial Bill.[88]

Debate did not, in fact, wait for the second reading. Furious altercation arose in the House and continued until the Bill was finally passed on March 19th.[89] Besides ener-

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[85] Vide Bénoit. op. cit., p. 653.

[86] Bénoit, op. cit., p. 653.

[87] Vide Taché. Une page . . ., pp. 83-85.

[88] Vide pp. 413 et seq.

[89] R. D. 3rd Session, 7th Legislature, Province of Manitoba, Free Press and Tribune of Winnipeg, Feb. 4 to Mar. 20, 1890.

getic protests against the provisions of the Bills (and against the Bill abolishing completely the official use of French), attempts were made to stymie the action of the Government by proposals that:

1. An amendment to the constitution should first be sought, so that the Province might proceed untrammeled by litigation.[90] This would have effectively prevented action because amendment could come only from the British Parliament, and the opposition of Quebec would have been extremely potent. And, in the meantime, the highly popular measure would have been held in abeyance. Thus it was that the Hon. R. P. Roblin's suggestion got no more support than his accompanying plea that wholesale changes in the school system were unnecessary.[91] By February 5, the same day as Prendergast was practically repeating Roblin's previous remarks, the Hon. Mr. Roblin had moderated his tone considerably--objecting specifically only to the bringing of politics into education, implied by the proposal to set up a Department of Education,[92] a position he again maintained on March 5.[93]

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[90] Ibid., Feb. 4, Speech of R. P. Roblin on the 3rd.

[91] Ibid., Feb. 4, 1890, Speech of R.P.Roblin on the 3rd.

[92] Ibid., Feb. 6, 1890 issues.

[93] Ibid., Mar. 6, 1890 issues.

Thus the only Protestant Member to even imply disfavor of the abolition of separate schools had made haste to clarify his stand. A final effort to have a reference made to the Imperial Parliament was made by the Hon. Mr. Gillies on March 10th, but this also failed.[94]

2. Reference of the proposed legislation to the electorate was suggested by the Catholic Members as soon as Gillies' above-mentioned amendment was voted down. But this, too, got nowhere.[95] In view of the overwhelming public support behind the measure, it seems doubtful that this would have accomplished the desired end, even had the suggestion been followed. As a play for time--to get the Federal Government safely past the 1891 elections--it might, however, had had its uses.

3. A last-minute amendment by the Hon. Mr. Gelley that the Acts should not come into force until their constitutionality had been decided by the Supreme Court was also defeated.[96] It but foreshadowed the inevitable reference to the courts and was a suggestion for a rather irregular

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[94]Ibid., Mar. 11 & 12, 1890 issues.

[95]Loc. cit.

[96]Ibid., Mar. 19, 1890 issues. Speech on the 18th.

procedure, besides casting aspersions upon the much-touted sovereignty of the Province.

4. The motion for a six-month hoist by the Hon. Mr. Lagimodière met the same fate as Laurier's later action with respect to the Remedial Bill.[97]

All such opposition was fruitless. On March 12, 1890, the second reading of the School Bills received an overwhelming vote in their favour,[98] though with several Members (including many on the Government side--most of them apparently complacent of success) absent.[99] The third reading was carried on March 19, 1890 by a vote of twenty-five to eleven, the Protestant Conservative Members siding with the Catholics of both parties, and with Mr. Roblin.[100] On the same date, the second reading of a High School Act, leaving no provision for separate collegiate departments,

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[97] Ibid., Mar. 13, 1890 issues. Vide also Skelton, op. cit., p. 476 for Laurier's motion in 1896.

[98] Vide Morton. Manitoba, p. 249.

[99] R.D., 3rd Session, 7th Legislature, Province of Manitoba, Free Press and Tribune, (Winnipeg) Mar. 14, 1890.

[100] Ibid., Mar. 20, 1890 issues. Also vide Dom Benoit, Taché, p. 655 for list of Members voting.

was carried over Prendergast's objections.[101]

Once the Bills had been passed, the question of disallowance became acute. The veto, or at least the reservation, of the Bills by the Lieutenant-Governor was eagerly looked for by the minority. On the 27th of March, 1890, the six French Members presented His Excellency with a petition against the Bill preventing the official use of French, and, on the following day, with a memoir on the School Bills.[102] Previous to this, anxious communications had passed between the Lieutenant Governor and Sir John A. On the 24th of March, the Prime Minister wrote to Schultz:

> I have all your letters and bills for which many thanks. I think your plan is to assent to all bills presented to you unless specially instructed from here to reserve them.[103]

The reply was as follows:

> . . . My reading of your cypher is not intelligible and leaves me in doubt as to which Bills you assent to and which not. You will remember telling me in Ottawa to reserve the School Bill if it abolishes separate schools. This it does and amendments passed Saturday bears (sic) still harder on the Catholic minority. . . .[104]

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[101] R.D., 3rd Session, 7th Legislature, Province of Manitoba, Free Press and Tribune (Winnipeg) Mar. 20, 1890.

[102] Vide Taché. Une page . . ., p. 98.

[103] Macdonald Papers, P.A.C., Letter Book 26, #421.

[104] Ibid., vol. 264, Mar. 24, 1890.

Thus we see that Macdonald had intimated to Schultz that he was willing to disallow the legislation abolishing the system of separate schools. But, by the 24th, he was becoming evasive. And even before that date, he had been endeavouring to encourage an appeal to the courts. On the 25th of March, he wrote to Mr. N. Chevrier of the Catholic Section (in reply to a letter of the 12th) that he still believed (author's emphasis) that the best method of settlement would be by an appeal to the judiciary. They would be playing into the hands of Greenway and Martin by disallowing the Bill. In such a case, the two cronies would probably secure the Legislature again, re-pass the Bill then dissolve and go to the country. A Court decision, on the other hand, would dispose of the agitation and of the question.[105] Apparently a second telegram was then sent by Macdonald to Schultz advising him not to reserve the education and language Bills.[106]

So it was that Schultz sanctioned both Bills when the Legislature was prorogued on the 31st of March, 1890. By accident, the Acts 12 and 13 had been left at the bottom of the pile, and, for a moment, the representatives of the minority wildly hoped that their old antagonist of Riel days had

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[105] Ibid., Letter Book 26, #430.

[106] Ibid., vol. 264, Mar. 31, 1890--Schultz's reply.

decided not to give his assent. But they were soon disillusioned. Though the Lieutenant Governor reserved two Bills dealing with arrears of taxes, the vital ones were allowed to pass.[107] In fact, Schultz had not even bothered to forward the afore-mentioned petitions by the Catholic Members to Ottawa until the day of prorogation.[108] On the 31st, Schultz informed the Prime Minister of Greenway's concern about Martin's threats of resignation and also speculated on the prospective new Attorney-General, stating that Sifton, Campbell and Fisher were prospects, but that Greenway would never accept the latter, as he was elected mainly by Conservatives.[109]

In such a manner did the Bills become law, but there still remained the possibility of disallowance by the Federal Government, within the year legally allotted for that purpose, although, as we have seen, "the great John A." had already resolved to ignore this course.[110] Disallowance of Acts dear to the heart of Manitoba had already involved the Domin-

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[107] Vide Taché. Une page . . ., pp. 98-99.

[108] Macdonald Papers, P.A.C., vol. 264, Mar. 31, 1890.

[109] Vide Taché. Une page . . .,p. 98.

[110] Macdonald Papers, P.A.C., Letter Book 26, #430, Mar. 25, 1890, to N. Chevrier.

ion authorities in too much trouble.[111] And there was the additional complication of the approaching Federal elections of 1891, in which neither party wished to become involved with another issue of race and creed, such as those which had already disrupted the country and broken party lines.[112]

A certain hiatus became apparent throughout 1890, as the Federal parties did their best to look the other way and the Provincial Government, probably more than a little disappointed by the failure of the Federal Government to disallow the Acts,[113] and so give them that opportunity to launch a great popular campaign of defiance, hesitated to enforce the provisions of their own education legislation.[114]

However, the Catholics determined to try to persuade the Federal Government to proceed with disallowance. On the

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[111] Vide pp. 48 & 50.

[112] Vide p. 47.

[113] Vide Macdonald Papers, P.A.C., vol. 484, #100, April 4, 1890, from N. Chevrier.

[114] Ibid., vol. 264, Apr. 15, 1890, from Schultz and Macdonald's reply of May 3, 1890. Vide also A.A.S.B., #255, April 26, 1890, Taché to Greenway, declining post on Advisory Board until constitutionality decided and #269, May 2, 1890, from Joseph Martin, curtly dismissing Father Allard from the post of school inspector.

7th of April, 1890, the Catholic Section of the Board of Education sent a petition to the Governor-General in Council praying for disallowance,[115] and Bishop Laflèche added a similar plea on his account.[116] There was still ample time for Federal action when a petition for remedy ". . . in the most efficacious and just way . . ." from twenty-five of the Catholic hierarchy arrived in Ottawa.[117] But the Dominion Government saw fit to mark time until the critical election of March, 1891 was over. A memoir from Archbishop Taché, dated the 12th of April, to the Governor General, reminding him of His Grace's services during the Riel troubles and requesting advice but not asking specifically for disallowance, and another memoir of similar import--two days later--from eight members of the Provincial Assembly were unavailing.[118]

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[115] Vide Taché. Une page . . ., p. 99.

[116] Caron Papers, P.A.C., #14115 in General Correspondence, May 12, 1890 request from Bishop of Three Rivers and Caron's reply of May 21st repudiating disallowance as playing into Martin's hands.

[117] Vide Dafoe, Clifford Sifton . . ., p. 63. Also Macdonald Papers, P.A.C., vol. 275, #543, Mar. 26, 1890 and #545, Apr. 1, 1890, both from Thompson, and Thompson Papers, vol. 125, #15046 from Sedgewick--for flurry of excitement caused by fear that this petition requested disallowance and hasty assurances to Taché that the Government had to await a court decision before it could act in a judicial capacity.

[118] Vide Taché. Une page . . .,p. 99.

Both federal parties were anxious to keep the question out of the 1891 elections. Considerable pressure was put on Archbishop Taché not to press for disallowance.[119] On April 29, 1890, the Blake Resolution, declaring that Parliament should refer all cases (where it was a question of its appellate jurisdiction in educational matters) to the Supreme Court, before engaging itself to take up the appeals for redress,[120] effectively disposed of the question until after the election, since the Act embodying this Resolution would not become law until the critical period for disallowance was safely passed.[121]

In the meantime, the Government was to encourage the minority to go to the courts in order to have the troublesome incident nullified by a declaration that the Acts were ultra vires. The Opposition, naturally enough, were out to

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[119] A.A.S.B., Jan. 25, 1891, letter from Gerald Brophy; Jan. 31, 1891 from J. K. Barrett on Luxton's dread of disallowance; and Feb. 12, 1891, from Barrett. Vide also Une page . . . , pp. 104-106 for Taché's defence of his conduct in not insisting on disallowance when visited by a prominent Conservative in Montreal during the February 1891 election campaign.

[120] Vide Benoit. Taché, p. 679.

[121] Edgar Papers, D.P.R.A., Mar. 27, 1891, from Laurier, shrugging aside the school question and advising concentration on the trade issue.

make as much political capital out of this move as possible.[122]

That this procedure nullified the use of the power of disallowance, as regards this particular legislation, Archbishop Taché does not seem to have been completely aware,[123] though he soon became profoundly disturbed about the attitude of the Dominion Government, after his forbearance in not hurling "the apple of discord" into the election arena.[124]

In any case, it was no accident that the Resolution moved by Edward Blake, and seconded by his colleague, Mr. Laurier, for which they received the congratulations and thanks of no less a Tory than Sir John A. himself, was voted

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[122] Vide Laurier Papers, P.A.C., vol. 5, #1744, Mar. 25, 1891, from Charles Devlin, Jr., & Thompson Papers, vol. 126, #15138, Apr. 7, 1891, from Tarte, the latter bridling at Thompson's March 21st, 1891 Report (made public on Apr. 4, 1891) on the Aug. 1, 1890 petition from Archbishop Taché et al, requesting federal action. The two courses were implied in the petition (M.S.Q., pp. 28-30): Order-in-Council or disallowance. Thompson (M.S.Q., pp. 31-34) pointed out that if the case then before the Supreme Court was decided against the minority, then would be the time for the Federal Government to take action under the provisions of the B.N.A. Act and the Manitoba Act.

[123] Vide Taché, Une page . . ., p. 103, for admission he always remained hopeful of disallowmance.

[124] Thompson Papers, P.A.C., vol. 107, May 7, 1890, from Taché. Vide Ibid., vol. 243 (Letter Book), #398, May 17, 1890 (and A.A.S.B., #302 for the original) of Thompson's scarcely reassuring reply.

unanimously.[125] It got both parties out of the awkward position of having to revise their campaign literature on very short notice, when it was evidently expected that the courts could be safely relied upon to declare in favor of the minority and so get this "sword of Damocles" safely out of politics.

How dangerous such an issue could have been in 1891 was made plain by the excitement the action of the Manitoba Legislature was creating.[126] To the courts, then was the deadly issue to be shunted, while the Federal Government proceeded to engage in the reserving and disallowing of less explosive items of the legislation passed by the Manitoba Government.[127]

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[125] Vide Bénoit, Taché, pp. 679-80.

[126] Vide for instance Rev. Doctor (Principal) William Caven's Public Letter in favor of separate schools being under the same regulations as public schools, May 10, 1890--in the Toronto Public Library E.R.A. Collection of Pamphlets. Vide also Bowell Papers, P.A.C., vol. 103, May 19, 1890 letter re the racial, religious, and educational question in Ontario.

[127] Vide Thompson Papers, P.A.C., vol. 122, #14576, Feb. 11, 1891, Geo. M. Clarke, C.P.R. Solicitor, to Sedgewick; vol. 127, #15270, Apr. 18, 1891, from Schultz; and vol. 250, July 8, 1891 from City Clerk, Winnipeg. Vide also Macdonald Papers, vol. 264, #376, Apr. 11, 1891, and #379, Apr. 17, 1891, both from Schultz.

Thus, though Gerald Brophy, with whom Ewart was now forming a partnership,[128] could speak rather wistfully of disallowance in a letter to Taché dated March 7, 1891[129] and His Grace could still hint at disallowance as late as the 25th, when corresponding with Sir John Thompson,[130] the procedure, for all practical purposes, was out of the question.

The School Acts of 1890 provided for a single, non-denominational school system under the control of local Boards, under the Department of Education (headed by a responsible Minister). It had originally been planned to provide for compulsory education, but it had been pointed out that this would weaken the position the Province intended to take before the courts, namely, that the new legislation did not deprive the Catholics of any right they enjoyed at the time of the entry of the Province into Confederation, i.e., the right to support private schools by fees and donations. Thus, this provision was omitted, and left to cause disruption until 1916.[131] However, there is little

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[128] *Vide* Macdonald Papers, P.A.C., vol. 537, Aug.12, 1890 from Hugh John Macdonald.

[129] A.A.S.B., Mar. 7, 1891.

[130] Thompson Papers, P.A.C., vol. 125, #14969, Mar. 25, 1891, re petition of yesterday from the entire Catholic episcopate.

[131] *Vide* Morton. *Manitoba* . . .,p. 248.

doubt that its omission certainly influenced the final decision of the Judicial Committee in the Barrett Case.[132]

> . . . Religious exercises in the schools were permitted, though not required, under defined conditions. The minister was to be advised on scholastic matters by an Advisory Board, a pale vestige of the former School Board.[133]

Such provisions were to encourage charges that the schools were, in reality, nothing but "Protestant Schools",[134] a position which tended to side-track the issue away from the question of legal rights, though it proved highly successful in the skilled hands of Mr. Laurier.[135]

Another provision, which led to considerable altercation--and also tended to remove the question from the legal to the political arena, was that providing for the taking over (by the new school boards) of Catholic schools and assets within the area covered by Protestant districts.[136]

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[132] Vide pp. 258 et seq.

[133] Morton. Op. cit., p. 248.

[134] Vide Taché. Les écoles dites écoles publiques de Manitoba sont des écoles protestantes.

[135] Vide M.S.Q., p. 306 for Extract from Speech of Hon. Mr. Laurier. Winnipeg, Sept. 3, 1894.

[136] Vide Blake Papers, D.P.R.A., Part 2, vol. 2, #60, Nov. 29, 1894, from Ewart.

This soon led to charges that Catholic property was being misappropriated by Protestants,[137] though special provision had been made in the Act leaving Catholic ratepayers not responsible for the debts incurred by the previous Protestant school boards.[138] That the Protestant districts had generally incurred debts greater than their assets, and that the Catholics generally were in a better financial position seems, however, generally admitted.[139] Such were the provisions that the long-suffering judiciary were to be called upon to examine in the light of the B.N.A. and Manitoba Acts and the background of the racial and religious ferment of Canadian society.

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[137] *Vide* Taché. *Une page* . . ., pp. 76-77.

[138] *Vide* Public Schools Act, 1890 (53 Vic., ch. 37), Sects. 178 & 179.

[139] *Vide* *Sun* (Brandon), Aug. 8, 1889, commendation of Government action in appropriating Catholic Section's reserve fund.

CHAPTER THREE

THE ST. JOSEPH'S SCHOOL CASE

The manner in which Mr. Ewart first became involved as legal counsel for the minority has not been exactly ascertained, though Dom Bénoit describes him as the ". . .avocat choisi par la minorité pour poursuivre et plaider sa cause . . ."[1] However, it has been possible to determine that the Federal Government appears to have been largely instrumental in securing his services, rather than Archbishop Taché--who, as we have been,[2] was more anxious to obtain a promise of intervention from the Government than to go to court himself. As we shall soon see, at least a faction on the Catholic Board of Education of the City of Winnipeg was involved, partly as good Conservatives; and, before long, certain Catholic Liberals--James E. P. Prendergast, Dr. John M. Kelly Barrett, and Gerald F. Brophy[3]--also became associ-

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[1] Bénoit. La vie de Monseigneur Taché, p. 784.

[2] Vide p p. 86 et seq.

[3] Vide A.A.S.B., Feb. 21, 1891, Barrett to Taché,: ". . . Mr. Brophy informed me that the suit (in the Barrett Case) was brought at the instance of the Dept. of Justice and that they had agreed to pay all the costs . . . . He seems to think that he got this case independent of Your Grace and that he is only answerable to the Dept. who engaged him . . . "

ated with the carrying of the case into court. What role, if any, Ewart's partner, Fisher, played in having him engaged as counsel has not been determined. Hugh John Macdonald, son of the illustrious Sir John A., certainly had more than a little to do with it. Perhaps the Old Chieftain himself--remembering their days together in the law office at Kingston--suggested Ewart as counsel. If, on the other hand, he did not do so, there can be little doubt that the recollection of Ewart would have served as a spur to encourage his retention, at least on the basis of ability.

Doubtless it was in the interest of the minority to get the most able counsel possible, and Ewart was undoubtedly the most outstanding member of the bar in Winnipeg at that time.[4] He was one of that group who are, perhaps, seen most clearly through the eyes of a contemporary in a succinct description of the hectic, furiously-growing Winnipeg of 1882:

> "Lawyers are 'thick as leaves in Vallambrosa.' They do a large business, but with a commendable desire to protect the community from being utterly overrun, they require lawyers from other provinces or parts of the Empire to serve a year before being admitted to the privileges of the profession . . . ."[5]

It is not without significance that Ewart became a Q.C.

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[4] Vide pp. 5 & 108.

[5] Bryce. Manitoba, p. 325.

under such highly competitive circumstances within two years of his arrival in Manitoba.[6] It is noteworthy that in the same volume, the Reverend Doctor George Bryce compares the "Pure Justiciary" of Manitoba with that of the United States of America, very much to the disadvantage of the latter.[7]

At least as early as the 11th of February, 1890, when the Hon. J.E.P. Prendergast threatened an appeal to the foot of the throne and was answered by Joseph Martin's insistence on the right of a Province to amend its own constitution,[8] the subsequent submission of the question to the courts was publicly foreshadowed. On the tenth of March, 1890, N. Chevrier, of the Catholic Board of Education for the City of Winnipeg, sent a letter, probably to the Prime Minister, telling him that he had sent him copies of the School Bills to be passed that week so as to come into force on May 1, 1890--a most awkward time of the school year, it would seem--and adding:

> . . . I have seen His Grace, Bishop Taché, and brought about the question of testing the validity of the Act in our own Courts, but he would not give a definite answer, but from good authority I have

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[6]Vide p. 5.

[7]Ibid., pp. 357-58.

[8]Reports of Debates of the Manitoba Legislature, Feb. 11, 1890, as in the (Winnipeg) Free Press and Tribune, Feb. 12, 1890.

> just gathered that His Grace would favor an appeal to the Governor in Council, as provided in the Manitoba Act. Since my arrival here I find, that the situation is far more serious than I expected it, and it is hard to tell where it may end.[9]

Thus we see that His Grace was quite reluctant to take the matter to court--probably from fear of "the law's delay" and uncertainty[10]--and was inclined to build his hopes on the prospect of a direct appeal to the Government, for that body's intervention, presumably by disallowance, an order-in-council to the Manitoba Government, and/or legislation. But Chevrier obviously saw in this desire a wedge to be used to persuade the good Archbishop to submit the matter to the local courts. In the remainder of his letter, he stated that the Greenway Government was out to provoke the Federal Government into disallowance, or failing that, to give the Federal Liberals a chance to ask embarrassing questions, and went on to suggest that:

> In order to prevent anyone from pressing that appeal to the Governor General in Council, no time should be lost now, to prepare a case to test the

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[9]Thompson Papers, P.A.C., vol. 103, #11881, originally in Macdonald Papers, P.A.C., vol. 483, #123, marked "Copy sent Minister of Justice, 15 Mch 90".

[10]Alexander A. Taché. Une page . . ., p. 106.

> validity of the Act, so as to commence action immediately after this new Act comes into force. A contest of that kind will cost a large amount, but on the other hand, if it comes upon the floor of the House at Ottawa it may cost the country a larger amount, besides pleasing these radicals and giving them food and agitation for their general elections.[11]

What a wealth of party spirit was summed up in these lines! He then concluded:

> Sir John, I have given you the facts and there is not one day to lose, in order to be in time to meet and punish these radicals.
>
> I can assure you they are not slow, and they will never stop until we stop them by the courts.
>
> In reference to the funds necessary to carry the case, which will be a very large amount . . . I would make you a proposition as soon as you desire it.[12]

The impetuous Chevrier was not slow in following up this lead. The introduction to the above-quoted letter indicated he had already visited Ottawa in connection with the matter, and, on March 12th, he wrote a letter in which, after prophecying riot and bloodshed, following out of resistance by Catholics to school taxation; rebellion; annexation; agitation and cries for disallowance, he went on to indicate ". . .the only remedy . . .":

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[11] Thompson Papers, P.A.C., vol. 103, #11881.

[12] Loc. cit.

> . . .certain legal proceedings started the very first day, the new act comes into force, and those proceedings carried on so vigorously as to prevent the putting into force of this new infamous Act.[13]

On the reverse side of the above missive appeared this note, in Macdonald's hand (and followed by his signature) to:

> Dear Thompson
>
> I have told Chevrier that I adhere to the opinion that recourse must be had to the Courts.
>
> I suppose we had better offer to pay Expenses.[14]

In his above-mentioned reply to Chevrier,[15] Macdonald stated his strong conviction that the only way to stop Greenway and Martin was by going to court. Disallowance would simply give them a chance to re-enact their legislation and gain popular support. Macdonald had no doubt that the court decision would finally dispose of the matter. (Thus Macdonald seemed to have no doubt that the courts would find the School Acts ultra vires, since he would seem to have been too good a lawyer to believe that a decision in favor of the validity of the legislation would necessarily dispose of the question of an appeal to the Governor General in

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[13]Thompson Papers, P.A.C., vol. 103, #11896, to Macdonald.

[14]Loc. cit.

[15]Macdonald Papers, P.A.C., Letter Book 26, #430, Mar. 25, 1890.

Council as provided for in the 2nd sub-section of the Manitoba Act, to say nothing of the similar provision in the B.N.A. Act, vide Appendix B.)

On April 4, 1890, Chevrier sent another letter to Macdonald,[16] commenting on the disappointment of the local Government at the school legislation receiving the Lieutenant Governor's assent, and remarking that an appeal being projected to the Governor General in Council, i.e., the Federal Government, for immediate reference of the legislation to the Supreme Court for a decision as to its validity was:

> . . . not being directed by the warmest friends of your Government. In my humble opinion your Government might as well disallow the Bill at once, as to show your personal interference in the matter, by complying with that request. The parties oppressed, by that law, when it comes into force, are the only and proper parties who should go to Court themselves for redress, & begin proceedings the regular way in Manitoba. In order to satisfy the promoters of that appeal, which you will receive very soon, everything should be ready to take here, legal proceedings, the very first week in may. (sic)
>
> The question now, to consider, is the question of Costs, which will involve a very large outlay, before we get the final decision.
>
> I can use the name of the Secretary Treasurer of our Winnipeg separate schools in any proceedings, providing of course I furnish all the funds. I may have to go to Ottawa before the end of this month, but if you desire to see me personally in reference to the above, I would make it a point to try and be there

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[16]Macdonald Papers, P.A.C., vol. 484, #100

as soon as possible.[17]

Once it had been decided to follow the primrose path of litigation rather than the thorny track of blunt intervention, it was necessary for the Federal Conservatives to find suitable counsel. It appears that initially no less a member of the legal profession than the Minister of Justice himself--Sir John S. D. Thompson, Q.C., K.C.M.G. --was considered by the Prime Minister, and possibly others, for a letter dated April 28, 1890 and labelled "re Manitoba School legislation . . ." declined the offer as follows:

> Of course it is out of the question for me to accept a retainer. I think they should "go slow" as to that. Prendergast is now retaining Moss at Toronto. Probably Moss will suggest a counsel and we shall have quite enough of them.[18]

Which brings up the possibility that it was Moss who suggested Ewart as counsel!

Meanwhile, events were taking shape in Winnipeg which were to provide a specific issue to take to court. On the 28th of April, 1890, the Protestant School Board of the City of Winnipeg (the School Acts having made no provision to do away with the Catholic Board, which continued to function)[19] made requisition to the Winnipeg City Council

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[17]Macdonald Papers, P.A.C., vol. 484, #100, Apr. 4, 1890, from N. Chevrier.

[18]Macdonald Papers, P.A.C., vol. 275, #279, from Thompson.

[19]Benoit. La vie de . . . Taché, p. 683.

for school funds.[20] It was followed in this action by the Catholic School Board on the very next day.[21] The Winnipeg City Council was then faced with the necessity of levying rates for the support of the public schools, and, by the provisions of the Acts of 1890, had to make no distinction between Catholic and Protestant funds and ratepayers.[22] Therefore, on the 14th of July, 1890, it passed By-Law No. 480, levying one rate on taxpayers in order to supply the total needs of the public schools, and amended it with By-Law No. 483, providing for rates on ". . . certain corporations . . ." on the 28th.[23] (Dom Benoit claims this was done at Martin's instigation,[24] but it is difficult to see how the Council could do otherwise.)

Even before these inviting developments had occurred, considerable activity had got under way, on the part of the Catholic Board of Education for Winnipeg, to test the validity of these By-Laws, and, in the process, the constitutionality of the School Acts of 1890. During the month of April,

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[20] Supplementary Return . . ., 1891, p. 7.

[21] Ibid., p. 8.

[22] Vide p. 75.

[23] Supplementary Return . . ., 1891, p. 6.

[24] Benoit. Taché, p. 683.

1890, Ewart, in conjunction with his partner, Mr. Gerald F. Brophy (who, as early as Dec. 21, 1889, had made a resolution at St. Mary's School House, Winnipeg, in reference to the coming legislation[25]) made his first discoverable appearance in the case by sending a long letter (See Appendix D) to George E. Fortin, the Secretary-Treasurer of the Board of Catholic School Trustees, Winnipeg, setting forth a virtual brief of the case to be presented.

In this despatch, Ewart set forth his opinion that the Province undoubtedly had power to repeal its previous statutes,[26] but an appeal would lie even if the Government made no provision for any system to take the place of the one abolished. But, as the Government had in fact established a new system, the question arose as to whether the Manitoba Act conserved the minority their privileges with respect to: support of their schools, exemption from support of other schools, determining the qualifications of their teachers, and selecting the books to be used. In his opinion, these privileges were ... protected, as otherwise the provisions of the Manitoba Act would be meaningless and worthless. The

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[25]A.A.S.B., #265, Brophy to Archbishop Taché.

[26]This point was evidently raised before Justice Killam, vide pp. 120 - 21.

minority thus had a strong position, though:

> . . . We are not unaware however of the many arguments that may be urged upon the other side. . .[27]

They were also of the opinion that the new legislation would have been less objectionable if it had provided for schools having ". . . no regard to religion . . .", though it was not known what form the religious exercises might take. In their opinion, the provision for exemption from participation in religious exercises did not relieve the new statutes from objection. With regard to raising the question in court, they advised that the strongest points be raised at the start, i.e.:

> . . . whether the Legislative Assembly, (sic) has power to compel Roman Catholics supporting Roman Catholic voluntary schools, to pay as contributors to public schools, and second, whether the clause with reference to religious exercises are (sic) ultra vires (sic), and we would recommend that the other questions, namely, whether the Legislature has power to repeal previous legislation be left untouched.[28]

As it was difficult to see a course by which these questions could be raised, it was recommended that the Government be encouraged to take the course, which it would probably follow, of referring the question to the courts.

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[27] Vide Appendix D, p. XV.

[28] Vide Appendix D, p. XV.

Apparently it was the Manitoba Government that was referred to, for the letter went on to state that this body had declared that the Catholic School Board was to cease its functions on May 1st, for which there was no explicit warrant in the statutes, and, indeed, considerable reason to take the view that there was none at all. Another indication, it would appear, of the careless haste with which the statutes were drafted. (Vide p. 63.) They then concluded:

> For these reasons, we are of the opinion that the Catholic school trustees should not vacate office, but should continue as heretofore until the next election.[29]

The remainder of the letter dealt with certain legal subterfuges to enable the Catholic Board in Winnipeg to continue to operate its schools as Catholic schools under weekly leases from the Catholic ecclesiasts, who either owned the buildings or the land upon which they were built (and, in the latter case, upon which considerable rent was unpaid).

Possibly as a result of this letter, the importunate Chevrier notified Macdonald on the 21st of that month:

> I mail you today the "Free Press", where you can see, (sic) an interview of a prominent Catholic reported. That will give you an idea, pretty near right, of what the Catholic Board of Trustees of Winnipeg intends to do. As a member of that Board I did all I could since my return from Ottawa to induce the other members, to test the validity of the School Act, ourselves, and unless the Greenway, Martin Government shrinks from it, we shall soon

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[29] Ibid., p. XV.

> get a test case. I am doing all I can to get proceedings started, first week in May if possible, in order to prevent any discussion on that question before you prorogue the House.
>
> Sir John, before closing this letter, allow me to say that this young man, "Prendergast", is no friend of the party.[30]

Thus we see a premonition of the "Fabian tactics" by which the Greenway administration were to reap so much benefit during the school agitation, and also a foreshadowing of that political prejudice which was to keep Prendergast, to say nothing of the eminent Edward Blake, from directly participating as counsel in the Barrett Case. (Vide pp. 108+180.)

A tantalizing suspicion is afforded by a letter from N. Chevrier to Macdonald about this time concerning another case and mentioning "Ferguson" as one of their solicitors.[31] Perhaps it was through Chevrier that Ewart and A. Ferguson, Q.C., became connected anent the financial transactions involved in the prosecution of the later Brophy Case. (Vide p. 339.) An interesting side-light is thrown on Macdonald's own doubts as to the reliability of the Judicial Committee in deciding constitutional questions, by a letter of enquiry he addressed a few days later to Sir Charles Tupper (then High Commissioner in London, England) regarding the composition of that body.[32] In all probability, the far-sighted

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[30] Thompson Papers, P.A.C., vol.106, #12228, Apr.21, 1890.

[31] Thompson Papers, P.A.C., vol.106, #12338, May 2, 1890.

[32] Ibid., vol. 243, #354, May 13, 1890.

"Old Tomorrow" was already speculating on what would likely be the decision of the Judicial Committee in the not-improbable event that the constitutionality of the Manitoba School Acts came under its cognizance. If such were indeed the case, he did not appear so sanguine as in his former letter of March 25, 1890. (Vide p. 83.)

On the 15th of May, 1890, the anxious Chevrier, despatched a somewhat presumptuous and vainglorious missive to the Prime Minister stating that the Attorney-General (Martin) was resisting their efforts to take the question to court, counting on delay to force the Federal Government to disallow the Act. But he, Chevrier, ". . . after careful consideration with our lawyers . . .", had decided upon a scheme to force them into court.[33] (One wonders how much of the plan was Ewart's. Certainly his letter to Fortin had hinted at the plan that was to be followed first,[34] but it had also pointed out the line of action, subsequently followed in the Barrett Case, as much more hopeful.) At any rate, the pompous Chevrier did say that:

> The very points we want tested . . . will be brought out in this plan. As I told you before I have the best legal men in this Province advising me, and nothing will be spared to get the first decision here in our favor.[35]

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[33]Macdonald Papers, P.A.C.,vol.485, #324, May 15,1890.

[34]Vide p. 87.

[35]Macdonald Papers, P.A.C.,vol. 485, #324.

Which sounds very much as though he had been reading Ewart's letter of April, 1890 to Fortin (Vide Appendix D).

Certainly there was every indication that he expected the case to go on to the higher courts. The remainder of his letter was taken up with the necessity of starting two actions (and engaging two firms of lawyers) in order to leave Martin no chance to evade going to court; political considerations (i.e., thwarting Mercier in Quebec and keeping the Catholic Board of Trustees from learning that the Federal Government was financing the litigation, as the chairman was a strong Grit); and the urgent need to send an immediate draft by Express so as to keep the action going once the Bill of Complaint was filed next day.[36] Evidently the active Chevrier had been extremely busy both corresponding and travelling between Ottawa, Quebec and Winnipeg--or at least desired his patrons to think so--on behalf of Conservative interests, since the passage of the school acts.

At any rate, on May 16, 1890, he could telegraph Sir John A.: "Everything arranged bill in equity (sic). Be fyled tomorrow Writing"[37]. And, a week later, he could

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[36] Ibid.

[37] Macdonald Papers, P.A.C., vol. 485, #333.

write that Martin would soon be forced to intervene, but that if he did not, the proceedings would go on without him, as they could not afford to wait. Chevrier also stated that public sympathy was going against Martin, since he had chosen the Advisory Board of Education without a single Catholic on it,[38] a most curious revelation of mob psychology when it is realized that Archbishop Taché had already declined an invitation to serve on the aforesaid Board.[39] But doubtless the public was not yet aware of this. Perhaps even Chevrier did not know, though he knew how to put in a "plug" for himself:

> And again when we get that school law declared bad and unconstituional by all the Courts, you can depend that Mr. Martin & his party will have lost a great deal of their power in Manitoba.
>
> I am pushing and watching both cases, with the greatest possible care, and they require a great deal of attention, expecting to hear from you this week.[40]

Alas for Chevrier-- "The best laid plans of mice and men gang aft aglae."

Apparently application had been made to the Winnipeg Courts as early as the 11th of June, 1890, for, on that date,

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[38] Ibid., #493, May 23, 1890, to Sir John A.

[39] A.A.S.B., #255, Apr. 26, 1890, Taché to Greenway, declining the post until the constitutionality of the law was decided.

[40] Macdonald Papers, P.A.C., vol. 485, #493, to Sir John A.

Chevrier wrote to Macdonald that the arguments before Justice Bain had ended that night with judgement reserved.[41] Mr. Perdue, aided by another solicitor, on behalf of the local Government, had done everything to prevent arguments on the constitutionality of the Acts, but the judge had over-ruled them. The remainder of the letter dealt with his own good offices in expediting the case to time well with the Quebec elections, the hard work involved, and his hope that the promised funds ". . . necessary to pay these people . . ." would be sent within a week.

Concerning this despatch, Sir John Thompson, the Minister of Justice, wrote to Macdonald a week later that:

> . . . As I informed you a few days ago, Mr. Sedgewick has written to the solicitors, who are carrying on the suit, to establish an understanding with them as to the course of procedure.
>
> I am still somewhat uneasy in consequence of this being a mere sham proceeding, and fear that it may go off on that ground, but they have taken their own head about it and have gone so far before we had ascertained what they were doing that it was not advisable to urge them to abandon it and begin again, but it seems (sic) rather desirable that we should merely try to steer it as best we could. I doubt that Mr. Chevrier has done anything about it.
>
> When Mr. Prendergast was here we had all the necessary consultations with Mr. Moss and gave instructions that legal proceedings were to be started

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[41] Ibid., #495, from N. Chevrier.

> at once. All that I feared was that the plan of proceeding and the pleadings were adopted somewhat rashly, without being submitted to Moss or to us.[42]

Thompson then went on to discuss the problem of financial arrangements--a question which was to haunt the litigation to the very end--stating that Sedgewick, the Deputy Minister of Justice, was writing the solicitors to find out who had been paying, and that in the meantime the Government " . . . have retained and paid Mr. Moss and have given Mr. Prendergast an advance on account." The Minister of Justice also thought it wise to rid themselves of " . . . Chevrier's importunity . . ." and to assume sole charge of the exchequer: " . . . We do not want the School Board, the Archbishop, Mr. Chevrier and ourselves all to be paymasters."[43]

Incidentally, Archbishop Taché's claim of ignorance as to the source of inspiration of the test case[44] may well be acceptable, if for no other reason than that Rev. Father Cloutier might have been acting on his own in advising Thompson to have the Archbishop as paymaster.[45] At any rate, as late as July 26, 1890, Ewart was engaged in drafting a better-worded appeal to the Governor General in Council, on behalf

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[42]Macdonald Papers, P.A.C.,vol.485, #496, June 18,1890.

[43]Loc. cit.

[44]Taché. Une page . . ., pp. 106-107.

[45]Macdonald Papers, P.A.C.,vol.485, #496,June 18,1890.

of His Grace.[46]

Evidently, then, there was a Case proceeding under the initiative of the interested parties in Winnipeg (principally, it would appear, that of Mr. N. Chevrier) at the same time as Prendergast and Moss were being retained by the Federal Government! This proceeding was undoubtedly that abortive effort referred to by Archbishop Taché,[47] and hinted at (as a test case underway) in Chevrier's letter of May 15, 1890.[48]

Thus, we may, in the absence of any evidence to the contrary, assume that one of the two groups of lawyers referred to by Chevrier in this latter despatch was the firm of Ewart and Brophy, and the other case referred to (vide p. 92.) was that which was to hinge on the question of levying one rate on taxpayers, without distinction as to religious affiliation, i.e., the forthcoming Case of Barrett vs. The City of Winnipeg. (Vide pp. 114-262.)

It has been impossible to determine which lawyers formed the second group Chevrier claimed to have considered

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[46]A.A.S.B., #428, Ewart & Brophy to Ed. Lloyd.

[47]Taché. Une page . . ., p. 106.

[48]Macdonald Papers, P.A.C., vol. 485, #324. Vide p. 91.

engaging.[49] Possibly he meant that he was engaging Brophy and his partner and also, Ewart, Fisher & Wilson--Brophy was not to make the final break with his former partner until Aug. 12, 1890.[50] Perhaps Brophy's partner was reluctant to take the Case, or, more likely, Ewart thought it wise not to bring the firm of Ewart, Fisher & Wilson into the school litigation--to avoid political embarrassment to his partner, Fisher. (Vide p. 8.) Of course, it could have been a combination of the two factors.

Unless Chevrier meant that he was engaging Mr. Munson (Shaw's solicitor in the St. Joseph's School Case),[51] this theory would undoubtedly be the most acceptable. Also, Munson may not have been engaged by Chevrier, and, even if he were, he was not necessarily the one referred to by Chevrier in his letter to Macdonald.[52] Thus, we might reasonably assume that the first theory is the correct one. But it must also be recognized that Chevrier referred quite casually to Munson as " . . . Shaw's solicitor . . ." and implied that he played a secondary role to Mr. Perdue (who

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[49]Macdonald Papers, P.A.C., vol. 485, #324, May 15, 1890, from Chevrier. Vide pp. 91-92 for discussion.

[50]Ibid., vol. 537, from Hugh John Macdonald.

[51]Ibid., vol. 485, #495, June 11, 1890 from Chevrier.

[52]Ibid., vol. 485, #324, May 15, 1890.

appeared for Attorney-General Martin) in refuting the contentions of Ewart & Brophy in the St. Joseph's School Case.[53] It must also be mentioned that Thompson knew this Case was a " . . . sham proceeding . . ."[54] and the retention of Munson by Chevrier would certainly have lent strength to this description. Mr. Perdue also commented, in the course of the Case,[55] on the apparent harmony between the two sides. Munson's argument on a technicality[56] which probably discouraged proceeding with the Case, need hardly be taken as conclusive proof that he was not in Chevrier's employ. It would undoubtedly have been raised by Perdue. Thus, it is very difficult to decide which--if any--of these two theories is the correct one.

The St. Joseph's School Case was heard in Winnipeg before Justice Bain of the Queen's Bench on June 11, 1890.[57] The plaintiff, a Mr. Shaw, sought:

> . . . to constrain Lamarche, a teacher in the school, from continuing religious and sectarian

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[53]Macdonald Papers, P.A.C., vol.485, #495, June 11, 1890.

[54]Ibid., #496, June 18, 1890, Thompson to Macdonald.

[55]Free Press (Winnipeg), June 12, 1890, p. 5.

[56]Loc. cit.

[57]Free Press (Winnipeg) June 12, 1890, p. 5.

exercises in the school during school hours . . .[58]

Mr. Munson was counsel for the plaintiff. Ewart & Brophy undertook the defence. The former began the argument by maintaining that the trustees should be the defendants. Ewart and Brophy argued the bill did not allege that religious exercises were carried on with the permission of the trustees.

Mr. Perdue had been instructed to appear for the Attorney-General (Martin). He remarked that:

> . . . there seemed to have been some friendly understanding between the two parties, it was not a very hostile suit. The parties evidently intended to obtain the decision of the court on the question of the constitutionality of the school act which had been raised on the pleadings, but . . . there was no necessity for this point to be raised nor for an injunction to be granted by the courts.[59]

Thus Perdue seemed to maintain that Catholic religious exercises were permissible in a public school, for such he maintained it to be. The Advisory Board was empowered to certify the teacher and require him to conform to the Act, but the plaintiff should have lodged a complaint with the inspector or the trustees before filing for an injunction. He concluded that:

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[58] Loc. cit.

[59] Loc. cit.

> . . . The trustees should be before the court, as they were the proper parties to whom any complaint should be made.[60]

His Lordship then asked if the plaintiff were a Catholic and Munson answered in the affirmative, adding that it was not within the province of the Attorney-General or his representative ". . . to discuss matters of fact, only the constitutionality of the act."

Perdue answered that the constitutionality:

> . . . could not properly come up in the present case. The bill should have been filed on behalf of the plaintiff and all others interested. Mr. Ewart objected to the Attorney-General taking such technical objections. His Lordship had stated he would allow the bill to be amended . . .[61]

Mr. Perdue added that it was useless to act against the defendant. The teacher was merely the creature of the trustees. Also, there were no grounds as he could demonstrate that the school had not been brought under the public schools act. (This appears a change from his initial stand. Vide p. 99.) In reply to Justice Bain, he stated that the Attorney-General was ready to discuss the constitutionality of the Act when the question was properly raised. (Obviously, the local Government had no compunction about biding their time.)

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[60] Free Press (Winnipeg), June 12, 1890. p. 5.

[61] Loc. cit.

When Ewart asked whether constitutionality would be discussed if the trustees were made partners, Perdue stated he was not prepared to answer. His Lordship then interposed with the remark that both sides seemed to be of the opinion that the trustees were not proper parties. Therefore he would hear the arguments without giving an opinion at that time. Perdue then asked the judge to note that his arguments were not to be taken as referring to constitutionality.

The argument then proceeded. Munson described the position of the plaintiff. His child attended a school in which the defendant " . . . openly continued to act in violation of the statute . . . ."[62] He went on to use certain stock arguments in favor of the validity of the statute. The Legislature was within its rights as the Act was ". . . no interference with denominational schools . . . ."[63] The Manitoba Act gave no more protection than the B.N.A. Act and the reference to practice in the former Act gave no more security than in New Brunswick. The Girard College Case was cited to prove that the state was within its rights in establishing efficient elementary education. The State could not safely accept any church's view of what system was ". . . to be maintained by public funds or taxation . . . ."[64]

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[62] Free Press (Winnipeg), June 12, 1890, p. 5.

[63] Loc. cit.

[64] Free Press (Winnipeg), June 12, 1890, p. 5.

The freedom of denominational schools from competition was not protected. Such would establish a monopoly. The State was supreme and education was its responsibility. Central principles were common to all Christians and Catholics could avail themselves of the new schools. On these grounds he requested an injunction.

Mr. Ewart replied, holding that:

> . . . Although the provisions of the B.N.A. Act do not govern the question, yet as that statute is the basis of the Manitoba act a construction of its provisions will assist the construction of the other.[65]

Before Confederation, Catholics were separate by law from the rest of the community in the older provinces. After Confederation, Ontario could not pass an act leaving separate schools in full force and providing public schools to which Catholics had to subscribe. Their separate position would have been regarded as interfered with. He held that "privilege" includes ". . . immunity from a burden . . . ." In Ontario such a law would be ultra vires because " . . .by law . . ." Catholics were separate. In Manitoba such a law was also ultra vires since Catholics were separate ". . . by practice . . ."[66] If the Manitoba Act had given the Province the right to legislate on religion, but had prevented the prejudicial affectation of rights to denominational churches,

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[65] Loc. cit.

[66] Loc. cit.

the setting up of a state church and compelling subscription would have been held prejudicial. (This was perhaps a rather "prejudicial" analogy.) A number of cases were then referred to:

> . . . for the purpose of showing that a broad and liberal construction will be given to the statute (the Manitoba Act) . . . Something was intended to be enacted. It was either as we contend or the act meant nothing at all.[67]

Mr. Ewart's basic attitude was thus early formulated. The new School Acts were equivalent to setting up a state church and compelling all to support it, the B.N.A. Act must be used to enable a correct interpretation to be made of the Manitoba Act, and a broad interpretation must be taken of the protective clauses or else the Act was meaningless. Disregard of the B.N.A. Act and a narrow interpretation of the Manitoba Act would naturally appeal to the supporters of the new school laws.

The St. Joseph's School Case terminated with Brophy dealing with a few legal points and presenting the Catholic point of view in terms strongly reminiscent of Archbishop Taché's affidavit in the Barrett Case.[68] (Was it already being drawn up?) After Munson had replied, Ewart testified

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[67] Free Press (Winnipeg), June 12, 1890, p.5.

[68] Vide pp. 114-16.

that if His Lordship believed the trustees should be parties, he was authorized to say that they were willing, but not anxious, to appear. Justice Bain then reserved judgment.[69] The Case was soon afterwards withdrawn.[70]

The evasiveness of Mr. Perdue, the indefinite condition of religious instruction in a system still very much in a transitional stage (to say nothing of the status of the St. Joseph's School itself), plus the unwillingness of the Catholic trustees to appear in Court had all combined to defeat this attempt to base legal action on the inherent right of Catholics to their own peculiar brand of religious instruction in their own public schools. The fact that the Case had obviously been contrived and that it was based on the explosive and indefinite grounds of religious instruction undoubtedly would have aroused hostile feelings amongst many even of those who were not basically antagonistic to the Catholic Church. It was not surprising that Mr. Ewart saw fit to omit all mention of the affair from his future activities in the school question. A more concrete and less emotional issue had to be sought.

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[69] Free Press (Winnipeg) June 12, 1890, p. 5.

[70] Taché. Une page . . ., p. 106.

The ridiculous nature of this proceeding seems patent. It was certainly clear to Sir John Thompson, as we have already seen.[71] If the Catholic Board in Winnipeg were still operating its schools as Catholic schools, they would undoubtedly have been regarded, by the Courts, as private schools and no action could have been brought against the Catholic Board so long as they did not receive a share in the funds of the City (or of the Province), which would automatically have placed them under the Act. Special provision had, in fact, been made in the School Acts, in omitting compulsory attendance provisions, for the operation of such private schools, though naturally enough, no mention of this seems to have occurred before Justice Bain. Ewart and Brophy would scarcely be interested in advancing a proposition so prejudicial to the claims of their clients, while Mr. Perdue was obviously quite content to "hold fire". The Province could well afford to play a waiting game. It would seem perfectly obvious that the line of attack most likely to have brought the issue to a head would have been the right of such schools to share in the funds raised by taxation. This was the procedure strongly advocated by Ewart, as we have already seen, in his letter to Fortin (Vide Appendix D), although

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[71] Vide p. 94 for his letter of June 18, 1890 to Macdonald.

this latter had hinted quite obviously at the mode of action proceeded with in the St. Joseph's Case. But, as no attempt had been made by the Department of Education to take over the Catholic Schools in Winnipeg,[72] and, as Ewart's letter to Fortin had indicated a method by which this eventuality could be thwarted, this line of action should hardly have come seriously within Ewart's purview. On all counts, the legal right of Catholics to public support of their schools was the most obvious and clear-cut method of attacking the validity of the new legislation. There seems little doubt that the need for haste in order to prevent the disruption of the Catholic educational system, combined with the pressure of the anxieties of Chevrier et al and with the potent fact that the opportunity for litigation on the financial aspect of the question was not to come until the Winnipeg City Council passed By-Law No. 480 on the 14th of July, 1890[73] were all factors compelling the astute Mr. Ewart to proceed with a case whose strength he considered definitely second-rate, and which fully justified his misgivings.[74]

By this time, it was scarcely to be wondered that

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[72]Benoit. Vie de . . . Taché, p. 683.

[73]Supplementary Return . . ., 1891, p. 6.

[74]Vide Appendix D, his April, 1890 letter to Fortin.

Sir John A. was becoming somewhat doubtful of the way things were being handled in Winnipeg. A locally-retained group of solicitors had failed most wretchedly. Should they be given another chance or should the Case be placed in the hands of the group since retained by the Ministry of Justice?[75] His son would serve as a convenient source of information, established as he was as a member of the bar in Winnipeg. This, at least, would seem to have been the tenor of the letter of the 30th (presumably of July, 1890) to which Hugh John Macdonald sent reply on Aug. 4, 1890, in which he referred to frequent correspondence between the two.[76] He had heard it rumoured that Sedgewick was about to take the Case out of the hands of Ewart & Brophy and place it in Prendergast's hands. In Hugh John's opinion this would have been:

> . . . a fatal mistake as Prendergast did not possess a single quality requisite to enable him to conduct important legal proceedings . . . .[77]

Though he was reported to speak well in French, that would not help him before the Courts, and, in addition, his ability

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[75] Vide Macdonald Papers, P.A.C., vol. 275, #279, April 28, 1890, to Thompson re negotiations with Moss and Prendergast. Also Ibid., vol. 485, #496, June 18, 1890, from Thompson informing him both retained.

[76] Ibid., vol. 537, Aug. 4, 1890.

[77] Loc. cit.

and legal knowledge were scant. Also, he had never conducted a Case before the Supreme Court, and did little practice except before the County Courts in the French Parishes. Hugh John went on to state:

> . . . He is utterly incompetent to conduct any case or to draft any pleadings while Ewart is by far the best man in Manitoba in every kind of legal proceeding, when he does not come before a Jury. It is true that Ewart is a Grit, but so is Prendergast and what is worse he is a turn coat . . .[78]

In addition, Prendergast still supported the local Government on all other issues and had reportedly been in communication with Mercier after he had delivered the petition requesting disallowance.

The younger Macdonald then went on to presume that what was wanted was a declaration that the legislation was ultra vires:

> . . . and that no mistakes should be made, which might enable the Government [evidently the Manitoba Government] to draw a herring across the scent or turn the case off on a side issue. Personally my sympathies are in favour of the act and I do not care a rap about Ewart & Brophy. I think [?] Ewart is a decent fellow, but I am by no means intimate with him and his being a Grit deprives him of any claim to Government patronage and as for Brophy, I have the utmost contempt for him both as a man and as a lawyer, so you can see I am not influenced by personal feeling in suggesting that the arrangement of the School matters should be left in the hands of this firm . . . .[79]

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[78] Macdonald Papers, P.A.C., vol. 537, Aug. 4, 1890.

[79] Loc. cit.

There followed a lengthy bewailing of his previous allegedly sad experience with Gerald Brophy, as a friend and fellow-lawyer, and in Conservative politics, terminating with Brophy being repudiated by his former partner for ". . . incompetence and ignorance . . ."[80]

Thus we have a testimony for Mr. Ewart's high reputation as a member of the bar, and, to some extent, as a man of integrity, from no less a person than Hugh John Macdonald himself. It would seem from the way he spoke, however, that his father had not had much contact with Ewart during the latter's sojourn in the Macdonald law firm in Kingston[81] --or perhaps Hugh John was unaware of this episode.

At this point it might be convenient to speculate on the reason why Ewart had formed a partnership with the perhaps somewhat dubious Gerald F. Brophy, while at the same time retaining his partnership with James Fisher and C. P. Wilson. The most likely conclusion--it would seem--was that it was an attempt to discourage any accusations that he and Fisher were "playing politics" over the school question or that anything Fisher said in the Legislature or on the hustings against the school policy of the Greenway-Martin Govern-

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[80]Macdonald Papers, P.A.C., vol. 537, Aug. 4, 1890.

[81]Vide p. 4.

ment was dictated by his partner being the paid counsel of the Catholic minority.[82] Another consideration may have been that Brophy, as a prominent Catholic and lawyer, would be a convenient go-between between Ewart and the Catholic authorities[83] and would also serve as a symbol of reassurance to those Catholics doubtful of putting the Case in the hands of a Protestant.[84]

As an indication of the concern of the Deputy Minister of Justice, Robert Sedgewick, in the proceedings, we might quote his letter of Aug. 7, 1890 to Sir John A., about which the latter evidently saw the Minister of Justice himself (if a notation on the reverse is to be taken as proof):

> There has been some misunderstanding as to the legal proceedings in the Manitoba School Acts. Sir John Thompson was anxious that we should have nothing to do with Chevrier, and at an early stage we wrote to Mr. Prendergast and fully explained the matter to him. The only thing I want to know now is whether you, personally or by letter, authorized Chevrier to retain counsel in the matter, which (as I anticipated) has fallen through, and if he was authorized by you, -- as he alleges, --we will, of course, pay him.[85]

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[82] Vide Nor-Wester (Winnipeg), Feb. 28, 1895 for Fisher's protest against Sifton's accusations in the Legislature.

[83] Vide for example, A.A.S.B., Brophy's letters of Mar. 7 & 15, 1891, June 26, 1891. Vide also Barrett's letter of Dec. 1, 1891.

[84] Vide for example, A.A.S.B., Feb.12, 1891, Barrett to Taché.

[85] Macdonald Papers, P.A.C., vol. 487, #470.

That the political aspect was by no means completely neglected, however, James Fisher's letter to the electors of Russell in the following month may serve as an indication.[86] It was taken to mean almost certainly his entire separation from the local Government.[87] But Macdonald was far too busy --one assumes with the Federal elections and the litigation proceedings, to pay much heed to such trivialities.[88] By the 31st of October, he also found it necessary to announce the formation of a sub-committee of the Privy Council, composed of himself, Thompson, Sir Hector Langevin, Sir Charles Hibbert Tupper, and J. C. Abbott, to consider:

> . . . a petition from the Roman Catholics of Manitoba, headed by the Archbishop of St. Boniface, making an appeal to the Governor General . . .[89]

Such petitions had had a most significant proclivitity for becoming filed with the dormants.[90]

It is also significant, in view of the part that the

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[86] James Fisher. The school question in Manitoba. 45 p.

[87] Macdonald Papers, P.A.C., vol. 264, Oct. 8, 1890, from Schultz.

[88] Macdonald Papers, P.A.C., Letter Book 27 B, #123, Oct. 14, 1890, to Schultz.

[89] Ibid., #212, to Hon. J. C. Abbott.

[90] Privy Council of Canada Registers, 1890 vol., Nos. 982, 1155, 1312, 1339, 1340, 2238.

Case of Logan vs. The City of Winnipeg was to play in the carrying of the Barrett Case before the Judicial Committee (Vide p. 260.) that, on Oct. 31, 1890, the Most Reverend Robert Machray, the Bishop of Rupertsland, wrote to Archbishop Taché anent the position of the Church of England. Though he complained of having been somewhat misquoted, the Anglican Bishop maintained that he was not in favour of one Church being singled out for special favour, with every other denomination being lumped together for its convenience.[91]

He also maintained that under the old system:

> . . . The state had not the necessary securities for the secular education, it might think necessary. An unfair advantage was given to the Roman Catholic Church.

and His Grace added that:

> . . . The time may unfortunately come, when the Church of England may be driven to have Parish Schools of its own, as far as may be practicable, but, if the State allowed our Church Schools aid, I should expect, and wish the State to satisfy itself by its own officers of the extent and the efficiency of the secular education.[92]

Inasmuch as state inspection did not render the separate system out of the question, we may assume that the

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[91] A.A.S.B., Oct. 31, 1890. Vide also M.S.Q., (p.15) for his charge to the synod, which might be taken as an approach to this attitude.

[92] A.A.S.B., Oct. 31, 1890, Machray to Taché.

esteemed Bishop of Rupertsland was most concerned about the "unfair", by which he meant "unequal", advantage given the Catholic Church by such an arrangement. Although there was no doubt he also disliked the splendid independence it had been allowed.[93]

Thus it was that the minority, debarred from direct succour from the Federal Government by the reluctance of that body to interfere directly, repudiated by the head of the faith closest to them in doctrine, and harrassed by the delaying tactics of the local Government, found it necessary to gird up their loins for a much more serious effort in the Courts of Law.

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[93] Loc. cit.

CHAPTER FOUR

THE VERDICT OF JUSTICE KILLAM

The preliminary courtroom sparring having ended in a ridiculous fiasco, the 7th of October, 1890 saw the beginning of a more strenuous effort in the courts. On that date, Chief Justice T. W. Taylor, on application by Mr. J.K. Barrett to quash the By-Laws recently passed by the City of Winnipeg levying school rates without distinction as to religion (vide p. 106), issued a summons against the ". . . attorney for the City of Winnipeg . . ."[1]

During November, 1890, six affidavits were filed upon this application.[2] That of Archbishop Taché,[3] afterwards accepted by the Courts as an accurate and concise record of the history of the schools of Manitoba,[4] stated that prior to the passage of the Manitoba Act there were no public or State schools, but only private denominational schools supported by their adherents, with no obligation

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[1] Supplementary Return . . ., 1891, p. 11.

[2] Ibid., pp. 3-6 & 9-11. Vide also M.S.Q., pp. 6-11.

[3] M.S.Q., pp. 7-8.

[4] Vide, for example, Supplementary Return . . ., 1891, p. 18 --of Judge Killam's judgement.

upon others to contribute. During this period, Roman Catholics were:

> . . . as a matter of custom and practice, separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman Catholics . . .[5]

The Archbishop went on to emphasize the insistence of the Catholic Church on retaining control of the schools attended by its members, as regards religious exercises and instruction, teachers, and books, especially as regards ". . .history and philosophy." Clause 8 of the affidavit stated that the schools newly established under "The Public Schools Act" were "unfit" for Catholic children, and that sooner than submit, Catholics would revert to the system of pre-1870 days.[6] The succeeding clause indicated that Protestants were satisfied with the new system, the schools of which were:

> . . . similar in all respects to the schools maintained by the Protestants under the legislation in force immediately prior to the passage of the said Act . . . . .[7]

It is interesting that, like the efficiency argument used by the Manitoba Government (<u>vide</u> p.242), the charge

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[5]M.S.Q., p. 7, clause 1.

[6]M.S.Q., pp. 7 & 8, clauses 7-8.

[7]M.S.Q., p. 8, clause 9.

that the new schools were distinctly Protestant had a certain delayed appearance. It was definitely circumvented in the affidavit, perhaps on Ewart's insistence, (vide Appendix D) though admittedly, not nullified. The Archbishop then went on to indicate the financially adverse effect the new legislation would have on Catholics--taxing them to support the common schools while giving them nothing for their own--and added that he spoke ". . . not only for (himself) and the church in its corporate capacity, but for its members."[8]

With this sworn statement of his Archbishop, Dr. John Kelly Barrett stated his agreement in his own affidavit.[9] In it he also stated[10] that the corporation for the Winnipeg Catholic School District was still in operation and that the school to which he sent his children was still under its control and still operating as before. Clauses 5 to 12[11] dealt with certified copies of the Winnipeg By-Laws in question, with the requisitions of the Catholic and Protestant School Trustees of that City, and with the sums to be requi-

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[8] M.S.Q., p. 8, clauses 10-12.

[9] M.S.Q., pp. 6-7, vide especially p. 7, clause 14.

[10] M.S.Q., p. 6, clauses 2-4.

[11] M.S.Q., pp. 6-7.

sitioned, which sums, when totalled, formed the amount being levied by the City. Clause 13 was to form the basis of the litigation:

> The effect of the said by-laws is that one rate is levied upon all Protestants (sic) and Roman Catholic ratepayers in order to raise the amount mentioned . . . and the result to individual ratepayers is that each Protestant will have to pay less than if he were assessed for Protestant schools alone, and each Roman Catholic will have to pay more than if he were assessed for Roman Catholic schools alone.[12]

The affidavits of Messrs. Hespeler, Polson, and Sutherland,[13] the last two long-time residents of Manitoba, also supported the contentions of Archbishop Taché as regards the system in force prior to 1870 and also that between 1870 and 1890, though the two latter were filing against the motion[14]--at least they emphasized the lack of state support for education prior to 1870.

The affidavit of Rev. Dr. George Bryce, as might have been expected, was distinctly hostile to the Catholic position.[15] After setting forth his own activities and stating that Presbyterians had not insisted, after 1870, on

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[12]M.S.Q., pp. 7.

[13]M.S.Q., p. 10.

[14]Vide Supplementary Return . . . 1891, for comment of Justice Killam, p. 27 for that of Chief Justice Taylor, & p. 50 for that of Justice Bain.

[15]M.S.Q., pp. 8-9.

having their previous voluntarily-maintained church schools ". . . continued to them at cost to the general public."[16] He then went on (in clause 3) to point out that the Presbyterian Church had made some provision for elementary education under purely church auspices and without Government support even after Manitoba entered Confederation.[17]

In clause 5 the Reverend Doctor indicated that the Presbyterian synod, representing the largest denomination in Manitoba, had heartily approved the new legislation in May, 1890. In clause 6, he maintained that the Presbyterian Church was very anxious to see that its people remained religious, and, to that end, amongst other endeavours, maintained Sunday Schools. He then remarked that, as Presbyterians could unite with other Christians for secular education, he could not see why Catholics could not do the same.[18]

It was obvious that the peppery Doctor had been reading Archbishop Taché's affidavit, for in his last three clauses he was at considerable pains to direct a "slam" at various of Taché's remarks, and even quoted from him on occasion.[19] In clause 8, he refuted the Archbishop's con-

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[16] M.S.Q., pp. 8-9.

[17] M.S.Q., p. 9

[18] Loc. cit.

[19] Vide M.S.Q., pp. 8-10.

tention that everything should be laid at the door of the Almighty, and that the new system was conducive to faithlessness. He also maintained (clauses 7 & 8) that the new system should have:

> . . . many social and national advantages.
>
> . . . (and) that it will follow the current opinions of the settlers of Manitoba, a remarkably large number of whom are religious and intelligent.[20]

Clause 9 objected to the contention that the establishment of public schools " . . . in every part of Manitoba where the population is sufficient for a school . . ." as mentioned by Taché (perhaps in fear the Government would establish schools in strongly Catholic districts which would, perforce, remain empty, though paid for by Catholics), would be a detriment. On the contrary, such widespread provision of educational facilities would prevent the:

> . . . large numbers of Roman Catholic children scattered through the general population (which) have been able to get no education . . . growing up an illiterate class.[21]

The final clause of Bryce's affidavit[22] stated (in obvious contrast to Taché's position as absolute spokesman) that the Reverend Doctor spoke for himself, as was the privilege of

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[20] M.S.Q., p. 9

[21] Loc. cit.

[22] M.S.Q., p. 9, clause 10.

every Presbyterian, and held only that he believed the foregoing to be the opinion, not only of Presbyterians, but of Protestants generally.

On the 24th of November, 1890, the case of Barrett vs. The City of Winnipeg[23] came before Mr. Justice A. C. Killam and was dismissed after the following somewhat lengthy pronouncement had been made to an ". . . interested audience . . ."[24] After reviewing the summons, the Winnipeg By-Laws, and the School Acts from 1871 to 1890,[25] the judge pointed out that the contention of the applicant was that:

> . . . the old law is still in force, and that the amounts of these estimates should have been levied separately upon Protestant and Roman Catholic ratepayers . . . .

and that this claim was based on the contention that

> . . . the repeal of the former statutes was intended to operate only for the purpose of substituting the one system for the other . . .[26]

and that therefore the school acts of 1890 were unconstitu-

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[23]Reported in Supplementary Return . . ., 1891, pp. 11-22; and very briefly in M.S.Q., p. 11. Vide also Free Press (Winnipeg), Nov. 25, 1890, p. 6, for a short report. Also Manitoba Law Reports, vol. 7, p. 301. Vide also Winnipeg Daily Tribune, Mon., Nov. 24, 1890--"Attorney General Martin personally appeared before Justice Killam and argued the case for the province a few weeks ago. His argument was then admitted by those who heard it to be a most able and uncontrovertable one. He was assisted by Mr. J. S. Hough, of Hough & Campbell. Mr. J.S. Ewart, Q.C. and Mr. G.F. Brophy appeared on behalf of the applicants." (The Tribune seemed fond of the Attorney-General.)

[24]Free Press (Winnipeg) Tues.,Nov.25,1890, p.6

[25]Supplementary Return . . ., 1891, pp. 11-14.

[26]Ibid., p. 14.

tional. However, the judge saw fit to consider " . . . for the present purposes . . ." only whether the legislature was within its powers in establishing such a new school system and providing for its support in the manner to which objection had been made (and not whether the Province had power to repeal its own legislation, i.e., to abolish a system it had sanctioned.) He then cast doubt on the idea that the adoption of a prior system could limit the authority of the Provincial Legislature to alter the system.[27]

He then reviewed the pertinent clauses of the B.N.A. and Manitoba Acts[28] and indicated that it was only the sub-sections of the Manitoba Acts that cast doubt upon the competence of the Manitoba Legislature " . . . to enact such a statute as the public schools act. . . ." To understand these sub-sections, it was necessary to compare ". . . them with the corresponding sub-sections of the British North America Act, 1867 . . ." and to consider:

> . . . the laws of the four original provinces of the dominion, at the time of their union, as well as . . . of the law and practice with reference to education in this portion of British North America, at the time of its union with Canada. . . .[29]

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[27] Supplementary Return . . ., 1891, p.14.

[28] Ibid., pp. 14-15.

[29] Ibid., p. 15.

The distinguished occupant of the Bench then went on to point out that the B.N.A. Act was a compromise between Quebec and Ontario and that neither New Brunswick nor Nova Scotia had provision for the exemption of separate school supporters from taxation to support a general system.[30] (The judgment, thus, quite properly ignored any concessions that might have been made, in practice, in those provinces.)

With reference to Manitoba, on the other hand, they were confronted with the difficulty that at the time of union there was no public tax-supported school system. The existence of such a system in other provinces had been taken to indicate whether or not there was a right to exemption from such taxation. But in Manitoba there was no such indication. To prove this statement, he enunciated the points brought out in Archbishop Taché's affidavit,[31] and supported by two others (apparently those of Polson and Sutherland) filed in opposition.[32]

He then listed four ways in which the 22nd section of the Manitoba Act differed from the corresponding section of the B.N.A. Act, and went on to state that although the

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[30] Ibid., pp. 15-16.

[31] Vide Supplementary Return . . ., 1891, pp. 4-6.

[32] Ibid., pp. 17, 27 & 50.

history of the legislation and the significance of the B.N.A. Act were ". . . of the greatest importance in interpreting . . ." the Manitoba Act, he could not " . . . consider any portion of the 93rd section of the former to be incorporated into the second act."[33] (In other words, then, the education clauses of the B.N.A. Act would not apply to Manitoba. The legislation of the Manitoba Government, in the opinion of Justice Killam, would stand or fall simply and solely on the interpretation given the Manitoba Act alone. This view was to prevail.[34]

The first question was whether the new legislation created a sectarian school system or assumed " . . . to compel any class to support denominational schools other than their own . . . ." The judge was positive that the statute did not, at least on " . . . the face of it . . ." though the Archbishop's affidavit had seemed to " . . . lay a foundation for an argument . . ." that the new public schools were " . . . really schools of a Protestant denominational character . . ."[35] (Here Justice Killam may have been anticipating somewhat, though Ewart's letter to Fortin[36]

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[33] Ibid., p. 17

[34] Vide p. 357

[35] Supplementary Return . . . 1891, p. 17.

[36] Vide Appendix D.

might indicate counsel had used this argument.)

After setting forth His Grace's statements on the differences between Protestant and Catholic attitudes to education, he admitted that the Archbishop's attitude did not appear to have been contradicted by any data, but rather supported by that of Rev. Dr. Bryce. But he refused " . . . to be bound by, or confined to affidavit evidence. . . ." He held himself " . . . at liberty to take judicial notice of the circumstances with which (the statutes were) to be construed . . ."[37] He was not convinced that the difference between Catholics and Protestants was so great, in school matters:

> . . . as to constitute a mark of denominational division and to make what would ordinarily be termed non-denominational schools, really "denominational" within the meaning of the Manitoba Act as between Protestants and Roman Catholics.[38]

Justice Killam then referred to the 1886 Report of the Royal Commission in England and Wales--a document already quoted on the other side of the dispute[39]--to prove that many Protestants were as strong on religious instruction as

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[37] Supplementary Return - . ., 1891, p. 17.

[38] Supplementary Return . . ., 1891, p. 17.

[39] Vide M.S.Q., pp. 123-138, for Archbishop Taché's August, 1889 letter to the (Winnipeg) Free Press.

were Catholics. Difficulty arose in determining the nature, extent, and method of ensuring the satisfactory conducting of such instruction. Thus many, including " . . . most Roman Catholics and very many Protestants . . ." were sending their children to denominational schools. But he had no intention of expressing an opinion on the grave problem of how far the public schools were to be secular. Though he admitted that the non-sectarian system would tend to exclude religious instruction or make " . . . the religious exercises and training conform to the views of the majority in the state . . .", he believed that, if the school authorities acted improperly or injudiciously,:

> . . . religious exercises and training as offensive to many Protestants as to any Roman Catholics, [might] find their way into the schools.[40]

(This latter statement would seem to indicate that he expected the tendency would be to increase secularization. This has, in fact, been the case in most areas.) He then reiterated his stand that the controversy was the old:

> . . . one between denominational and non-denominational schools, and that those established under the public schools act [were] not denominational in the sense of that controversy, or of the Manitoba Act, or the British North America Act, 1867, which must be deemed to speak with reference to that controversy.[41]

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[40] Supplementary Return . . . 1891, p. 17.

[41] Supplementary Return . . . 1891, p. 17.

Though he had seen only a four-line reference to the judgement in the New Brunswick School Case (vide p. 44) before the Judicial Committee, he held that his views were supported by this verdict.[42] (The painstaking Ewart must have been maddened by this admission.)

Then, confining his attention only to the Manitoba Act, he held that the first sub-section (vide Appendix B) protected only the rights and privileges " . . . with respect to denominational schools which some class of persons had before the union." And though, " . . . in the old province of Canada . . .", the right of immunity from taxation for the support of common schools was such a privilege, it was not enjoyed by virtue of belief in the exclusive propriety of the denominational school, nor " . . . upon support of any but the state system of separate or dissentient schools . . . ."[43] (Here the diction grew rather tangled, but the implication was that the exemption in question depended upon provisions in law. Such, indeed, had been the verdict in the New Brunswick case, q.v.) Also, such immunity was dependent upon a sufficient attendance to keep up a denominational school. But since there was, before the union with Canada, no law in Manitoba requiring anyone to

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[42] Ibid., p. 18

[43] Ibid., p. 19

contribute toward the schools, therefore the right of immunity from taxation for the support of a state system of public schools was not connected in any way with denominational schools.

However, the question still remained as to whether the effect of the public schools act was such as to:

> . . . prejudicially [affect] any right or privilege in respect of [denominational] schools which these classes had at the union.[44]

Such was not the case, as the new legislation did not prohibit attendance at denominational schools, nor compel attendance at public schools.

Justice Killam then pointed out that it had been suggested--presumably he referred to Archbishop Taché's affidavit[45]--that denominational schools were placed at a disadvantage in competing with the new public school system and that they were deprived of funds. The first argument he deemed incorrect, as it was:

> . . . really a plea for the monopoly of educational privileges by certain institutions or bodies or by institutions or bodies of a certain character. To such a monopoly there was no recognized right or privilege, either by law or practice. . . . The circumstances existing in the older provinces and the general nature of the school systems in America, suggest at once that it must have been contemplated in the enactment of the Manitoba act that the legislature of Manitoba should be at liberty to establish

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[44]Supplementary Return . . . , 1891, p. 19.

> a system of free non-denominational public schools, and provide for their support . . .[46]

(The first part of this argument overlooked the fact that there had been a practical, though admittedly not a legal or even absolute, monopoly of the instruction of Catholics by the Catholic Church. The second part might have implied that the judge had been thinking more of the conditions in the United States of America than in the old provinces. Though it was certainly true that the Manitoba Act had been phrased so as to leave the new province the chance to establish " . . . a system of free non-denominational public schools . . ." at least at the very beginning, there had been apparently very little anticipation of this by the framers.[47]) He completed his refutation of this suggestion by noting that the Manitoba Act would be intended to encourage the Province to aid education rather than to restrict it. (Thus, he implied a "broad interpretation" of provincial authority.) Also, any competitive:

> . . . effect would be an indirect one, and . . . rather . . . upon the schools themselves and their supporters than upon any right or privilege with respect to such schools.[48]

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[46] Ibid., p. 19.

[47] Vide, for example, Hansard, 1870, p. 1546.

[48] Supplementary Return . . . , 1891, p. 20.

(This was by no means the only legal "hair-splitting" the Case was to encounter. Most people consider any attempt on the pocketbook as anything but"indirect"!)

With regard to the contention that the denominational schools were deprived of funds because their supporters had to contribute to the support of the new public schools, Justice Killam maintained that the Manitoba Act intended to allow the Legislature to pass laws against general ignorance and to levy taxes for the eradication of this condition. Because this rendered some individuals less capable or willing to support denominational schools, the law was not rendered prejudicial. Such an effect, he held, was too:

> . . . indirect and remote . . . to be within the act, and it [was] precisely the effect that would be produced by taxation for other purposes within the powers of the legislature.[49]

(However, the Catholics were not complaining about " . . . taxation for other purposes. . . ." The judge appears to be using the "efficiency argument" here--that Catholic schools were not removing public ignorance.)

He then went on to refute the argument--probably advanced by Ewart:

> . . . that even though the natural meaning of the language of the statutes would lead to such conclusions as these, the history of the controversy respecting separate or denominational schools in the

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[49]Ibid., p. 20.

> other provinces and elsewhere, and the mode in which it was settled for the other provinces by the original confederation act, and the changes made in the wording of the Manitoba Act, show that it was intended that a more enlarged view of the protected rights and privileges should be taken.[50]

But, maintained the Justice, the B.N.A. Act had not undertaken to settle the question throughout Canada. It had simply guarded rights and privileges already established in each province. The Question was still open in New Brunswick and Nova Scotia.

> . . . There was, then, no intention under the original act, that the question should be settled for Canada generally in favor of the immunity of any class from taxation for the support of non-denominational public schools, excepting so far as such immunity had existed by law.[51]

(As to this contention, there are, of course, wide differences of opinion. But the author is inclined to the view that the educational clauses were primarily a truce between Ontario and Quebec. How far the truce was intended to extend is problematical.)

Judge Killam then pointed out that no Manitoba legislature had considered the problem before 1871. It was difficult to assume that Parliament had wished to prohibit the Province from settling the question itself. It had been as important as in the case of Quebec for the Parliament of Canada " . . . to make the position clear if it was to be

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[50] Supplementary Return . . . 1891, p. 20.

[51] Ibid., p. 20. But Parliament had not passed special educational clauses for these two provinces.

as the applicant [contended] . . . .", especially in view of the absence of a pertinent law in what was to become the Province of Manitoba. Nevertheless, he attached:

> . . . very little importance to the words "or practice" as definitely showing any such intention. The position of affairs here before the union was anomalous. . . . Under such circumstances, the introduction of the words was quite natural and adding [nothing] to the ordinary sense of the whole enactment. . . .[52]

Ibbetson has correctly remarked:

> . . . This very decided opinion of the trial judge is worthy of note owing to the importance and weight placed upon these words by the Supreme Court of Canada. . . .[53]

To him, the change in language from the second sub-section of section 93 of the B. N. A. Act seemed:

> . . . infinitely more important. In the original act the appeal to the governor general in Council was given only in provinces in which there had existed, prior to the union, a system of separate or dissentient schools, or in which such should afterwards be established. In the case of Manitoba it was given absolutely which may be claimed to show that parliament contemplated that practically such a system had existed here before the union or was at any rate secured by the first sub-section in connection with any system of public schools which might be established by the legislature. It would be natural too, if this were the idea existing, that an appeal should have been given from an act of the legislature as well as from an act or decision of a provincial authority.[54]

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[52] Supplementary Return . . . 1891, p. 20.

[53] Ibbetson. Decisions of the Judicial Committee, p. 22.

[54] Supplementary Return . . . 1891, p. 20.

Though he confessed that he had not accounted to his own satisfaction for this change of language and that little attention had been paid in the argument to this subsection " . . . and no suggestion was distinctly made upon it . . .", he saw fit to suggest that the change came about for much the same considerations as the introduction of the words "'. . . or practice . . .'", i.e., in order to protect the right to simply denominational (rather than publicly-supported denominational) schools which right:

> . . . bigotry has frequently denied . . . [and one of] . . . infinitely greater importance than the liability to pay taxes for the benefit of free non-sectarian public schools for the benefit of those choosing to take advantage of them. Taking then, the language of the union acts in its natural sense . . .
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> . . . 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. That they will do so, his grace the archbiship [sic] states. In doing so, he practically admits that they are at liberty to revert to the system existing before the union, though he claims that they will do so under certain disadvantages. . . . [55]

Whatever the feelings aroused, and the diversity of policies elsewhere, the responsibility was held to be that of the legislature and not of the courts. The concluding section of his judgment contained a remark implying the Legislature was not to be constrained in its authority,[56] a point which was

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[55] Supplementary Return . . . 1891, p. 21.

[56] Loc. cit.

to strike the fancy of Their Lordships of the Judicial Committee.[57]

Thus ended the first appearance of the school Case in court. The responsibility was indeed to be that of the legislatures, if not of the one legislature.[58] But this was as yet in the future. The Barrett Case was still to be fought through to the Judicial Committee, and, after it, the Brophy Case was to travel the same "via dolorosa". The lack of clear intent (to preserve Catholic separate schools) in the language of the Manitoba Act and Justice Killam's similar conclusion with respect to the potency of the significant phrase "or practice" were to enter very largely into the later judicial proceedings.[59]

By way of summarizing the significance of Judge Killam's decision, we might attempt to answer the six questions afterwards submitted by the Acting Minister of Justice as the gist of the Brophy Case (vide Appendix E.)in the light of his pronouncement:

(1) No. --Though not completely certain on this point, Justice Killam had stated[60] that he believed that sub-sec-

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[57]Vide M.S.Q., p. 27, for comment of the Judicial Committee in the Barrett Case.

[58]Vide pp. 364 et seq.

[59]Vide pp. 140 et seq.

[60]Supplementary Return . . . 1891, p. 21.

tion 2 of section 22 of the Manitoba Act merely protected the right of Catholics to support their denominational schools and send their children to them.

(2) No. --Grounds for appeal were not set forth in the memorials and petitions, because the right to denominational schools was not violated.[61]

(3) Yes. --The decision (adverse to the minority) by the Judicial Committee in the Barrett and Logan Cases had disposed of the application for redress, because this verdict of the Judicial Committee followed much the same line of reasoning as that of Justice Killam.[62]

(4) No. --On this point Justice Killam was quite definite, no part of section 93 of the B.N.A. Act applied to Manitoba.[63]

(5) No. --The Governor General in Council had no jurisdiction because the right to denominational schools had been preserved.[64]

(6) No. --The School Acts of Manitoba prior to 1890 did not preserve rights to the minority, because section 93

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[61] Loc. cit.

[62] Vide Supplementary Return . . . 1891, pp.11-22, for Killam's decision and M.S.Q., pp.21-27, for that of the Judicial Committee.

[63] Supplementary Return . . . 1891, p. 17.

[64] Ibid., p. 21.

of the B.N.A. Act did not apply to Manitoba and sub-section 2 of section 22 of the Manitoba Act was merely an alternative method of protecting the right to denominational, voluntary schools--a right which had not been violated.[65] Thus we see that Justice Killam's verdict was not only a blow to the attempt to have the new school laws declared invalid, but by implication, a stumbling-block to any effort to bring about Federal action to restore the status quo ante 1890.

It was not long before proceedings were underway to take the Case to a higher court. As soon as Judge Killam declared his verdict, it was understood that no decision would be regarded as final until the Case had gone before the Judicial Committee. The first appeal would be to the Full Court of the Queen's Bench:

> . . . and by an understanding arrived at with the attorney-general before he left for California, the appeal [would] be heard this term upon his return, probably in three weeks.[66]

Application for hearing before the court in banc against Judge Killam's order of Nov. 24, 1890 was made on the 27th. On the 5th of December, 1890, Gerald F. Brophy, of Ewart & Brophy, Barristers & c., wrote to Archbishop Taché:

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[65] Ibid., pp. 17 & 21.

[66] Free Press (Winnipeg), Nov. 25, 1890, p. 6.

> Referring to my conversation with Your Grace of yesterday, I beg to say that I have since gone over carefully with Mr. Ewart the subjects of your suggestions as to Judge Killam's judgment herein & more particularly as to the negotiations of Rev. Père Ritchot at Ottawa in 1870. He reminded me that he had gone into this very matter with your Grace some time ago and that he designedly did not set out these facts in your affidavit. He will call upon Your Grace on Sunday afternoon & explain his reasons for doing so. I now enclose a copy of a letter sent to Mr. Prendergast today, which I trust will be satisfactory. From time to time during the progress of the suit, we will, as opportunities offer, avail ourselves of his services as often as possible.[67]

(The enclosed letter to Prendergast contained a copy of Justice Killam's judgment and asking him, in view of his close study of the school situation in Manitoba, to supply " . . . a written opinion on the subject, incidentally dealing with any points raised . . ."[68] It is not known if any reply were received.)

That political action was by no means being completely neglected, may be deduced from the message of T. Mayne Daly to Macdonald, in which the former agreed that a coalition ministry including (James) Fisher and (R.P.) Roblin would have been the best way to get rid of Greenway and Martin.[69] (However, it is a puzzle to decide just what

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[67] A.A.S.B., Dec. 5, 1890, Brophy to Taché.

[68] A.A.S.B., Dec. 5, 1890, Ewart & Brophy to Prendergast.

[69] Macdonald Papers, P.A.C., Letter Book 27, #339, Dec. 20, 1890.

effect such a coalition would have had on the school question. The school acts appear to have been highly popular with the vast majority of Manitoba voters, in spite of Fisher's opposition and Roblin's doubts.) But Daly was not at all certain that throwing over Howell (probably H. M. Howell, the solicitor for the Bishop of Rupertsland)[70] was a good idea:

> . . . If he is not a Conservative as you say, he must be a Liberal, and deposing him does not seem to be a wise step just before you propose coalescing with other liberals.[71]

In the meantime, the Winnipeg Catholics intended to proceed with the election of trustees on February 2, 1891. They were: " . . . most determined to treat Mr. Martin's act with indifference not-withstanding Mr. Justice Killam's opinion."[72]

In his letter of Jan. 25, 1891, against disallowance,[73] Brophy stated that he had that day been confidentially informed that the judgment of the Full Court--to be delivered on Monday, Feb. 2, 1891--would be against them, Justice Dubuc

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[70] Vide M.S.Q., p. 16.

[71] Macdonald Papers, P.A.C., Letter Book 27, #339, Dec. 20, 1890.

[72] A.A.S.B., Jan. 10, 1891, J.M.K.Barrett to Taché.

[73] Ibid., Jan. 25, 1891, Brophy to Taché, vide p. 72.

dissenting. (This was, in fact, the result. Vide p.172.) In such an event, disallowance would do them harm, in view of the heavy vote in the legislature in favor of the act, the court decisions, and the newspaper publicity (especially in the Eastern papers). Martin would simply re-enact the legislation and the local Government would have the financial advantage. If they lost the case, they still had the " . . . wiser & more efficacious . . ." course of appeal to the Governor General in Council.[74]

Brophy then added a rather strange postscript: "If, on the other hand, we succeed on Monday, it is possible that disallowance would not be harmful to us."[75] One might well wonder why it should be necessary to disallow legislation declared ultra vires! If, as it seemed probable, he were contemplating the nullification of any re-enactments which the Hon. Joseph might have seen fit to promulgate, it would appear that the safest and most effective policy would have been to leave the question to the courts again--in the almost 100% certainty that any attempt to end the separate system (at least in the financial aspect) would meet with failure. It might be objected that Brophy was thinking of the expense

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[74] Loc. cit.

[75] A.A.S.B., Jan. 25, 1891, Brophy to Taché.

to his co-religionists of such a procedure. But a decision in their favor, which would have been by far the most likely development, would have seen their costs awarded to them, and, in fact, the Department of Justice was apparently--in the last analysis--paying the court expenses, and was to continue to do so. Strangely enough, no suggestion of taking the case to the Supreme Court, in case of an adverse decision, appeared in the letter--nor did any hint of the possibility of the Manitoba Government's taking it to a higher court in the event of a decision in favor of the minority.[76] Perhaps he was afraid that the Archbishop would impatiently reject such a delay, coupled as it was with the expense of maintaining his schools in the interval.

But, at all events, after one abortive Case and one adverse decision in another, the School Question had been started fairly on its way to the Judicial Committee by the actions of the minority and their supporters. The Federal Government could breathe easily--at least for a time.

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[76] Loc. cit.

CHAPTER FIVE

THE CONFIRMATION BY THE FULL COURT

Before proceeding to the Supreme Court, the Barrett Case had still to hurdle the Full Court of the Queen's Bench for Manitoba. Though it had been believed that the Case would go before the Full Court within three weeks of Judge A. C. Killam's decision,[1] it was over two months before judgement was finally pronounced, on Feb. 2, 1891.[2] The Court in Banc, consisting of the Chief Justice (T. W. Taylor) and the Hon. Justices Dubuc, Killam and Bain, heard the case. Justice Killam took no part in the argument. A large attendance of lawyers and of the general public was on hand to hear the judgement.[3]

Counsel for the appellant, i.e., Ewart & Brophy, held that the previous school Act was still in force and reviewed its provisions, showing Protestant and Catholic schools had been separate on all points. The new public

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[1] Vide p. 135.

[2] Supplementary Return . . . , 1891, pp. 22-55. Vide also M.S.Q., p. 11, for a very brief statement and Free Press (Winnipeg), Tues., Feb. 3, 1891, pp. 1 & 3, for a review of the decision and a sketchy report of the arguments advanced by the appellant's solicitors.

[3] Free Press (Winnipeg), Tues. Feb. 3, 1891, p. 1.

school Act was held not within provincial authority, due to the limitations imposed on that authority by the Manitoba Act. It was pointed out that:

> A section similar in character is found in the British North America Act as section 93. There are differences between the two sections, and when Parliament in the Manitoba Act used different language it is contended that there was some definite intention in doing so.[4]

After setting out the differences between the two sections, counsel for the appellant:

> . . . contended that the questions raised in this case must be considered under section 22 . . . and the decision of it must be considered by the provisions of that section.[5]

This contention was supported by a quote from section 2 of the Manitoba Act, to the effect that the B. N. A. Act applied to Manitoba:

> . . . except those parts thereof which are in terms made or by reasonable intendment may be held to be specially applicable to or to affect only one or more, but not the whole of the provinces now composing the Dominion and except so far as the same may be varied by this Act.[6]

The Free Press summed up the argument presented by Ewart & Brophy:

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[4]Free Press (Winnipeg), Tues., Feb. 3, 1891, p. 1.

[5]Loc. cit.

[6]Loc. cit.

> The contention is that as section 93 does not profess to settle the question of education and of separate or denominational schools for the whole Dominion but only for the two provinces of Ontario and Quebec, and the question of education in the province of Manitoba is dealt with specially and in varied language, there could be no doubt that section 93 was not the one which must govern the decision in this case, though that section might afford some assistance in arriving at a true construction to be placed on section 22 of the Manitoba Act.[7]

Thus it is apparent that Ewart was following the same line of argument he had already used in the St. Joseph's School Case and before Justice Killam.[8] He maintained that though the B. N. A. Act did not apply in the question of education to Manitoba, it would afford assistance in arriving at the correct meaning of section 22 of the Manitoba Act.[9] In his view, this latter enactment was an attempt by Parliament to secure for the minority the same rights and privileges as were secured by the B. N. A. Act in Ontario and Quebec.[10]

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[7] Free Press (Winnipeg), Tues., Feb. 3, 1891, p. 1.

[8] Vide pp 79-139. Vide Supplementary Return . . . 1891, p. 49 for Justice Bain's summary.

[9] Quite probably Ewart phrased this argument more strongly than was indicated in the Free Press. It is noteworthy that, according to this report, Ewart specifically abandoned the idea that the B.N.A. Act was an attempt to settle the problem for all Canada.

[10] Supplementary Return . . . 1891, p. 26.

The judgement of Justice Bain[11] contained some specific references to the argument presented by the counsel for the appellant. Apparently Ewart (or Brophy)[12] had maintained that the right of exemption from taxation for the support of other schools was " . . . rather in the nature of a privilege than a right."[13] Therefore, it would appear that he maintained that the conditions of separation and freedom to " . . . compete on equal terms with other schools . . . " were "rights" rather than "privileges". Justice Bain also declared that, as regards the words "'. . . right or privilege in practice . . . '": " . . . no careful attention was given by any of the learned counsel to the consideration of the meaning of these somewhat vague and indefinite words . . ."[14] (Future arguments were to involve a great deal of attention to this problem.)[15]

In addition, he pointed out that:

> . . . the principal part of the persuasive argument of the counsel for the applicant was devoted to an endeavour to show that having regard to the history of the controversy with respect to denominational

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[11] Ibid., pp. 47-55.

[12] It may be taken for granted that Ewart determined by far the major part of the argument.

[13] Supplementary Return . . . 1891, p. 49.

[14] Supplementary Return . . . 1891, p. 49.

[15] Vide pp. 189 et seq.

> schools in the older provinces, parliament could have intended nothing else by the provisions of section 22 than to confirm to Roman Catholics in Manitoba the same rights and privileges in regard to separate schools that had been won for the minority in Upper Canada, and that were not only confirmed to Ontario, but were extended to Quebec, by the second sub-section of the 93rd section of the British North America act, and that the court should give effect to what we must thus assume, the intention and policy of parliament. It is urged, too, that if sub-section 1 is to have no more effect than to preserve the right to maintain denominational schools, it is useless and inoperative, and that parliament would never have thought it worthwhile to make enactments merely to preserve this right, as it cannot be supposed that any legislature would ever think of taking it away. . . .[16]

It is significant that thus early did Mr. Ewart set forth his position that the Catholics of Manitoba were entitled to the system that they had in Ontario--and not to that which they enjoyed in Quebec (and of which the previous Manitoba situation had been a replica). One wonders how far Archbishop Taché agreed with this point of view, to say nothing of his successor, Archbishop Langevin!

Justice Dubuc indicated that Ewart had argued that:

> . . . the words "or practice" were likely inserted in the Manitoba act to remedy the defect which caused the difficulties in New Brunswick, which point was answered by the attorney-general, that such could not be the case, because the New Brunswick common schools act was passed only in 1871, one year after the Manitoba act . . .[17]

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[16] Supplementary Return . . . 1891, p. 53.

[17] Supplementary Return . . . 1891, p. 38.

So it was that the general lines of Ewart's arguments had come into full flower:

(1) The new school acts were invalid because they infringed on the rights and privileges guaranteed to Catholics by the Manitoba Act.

(2) The basic right was that of being separate from the rest of the community in education.

(3) Concurrent with this right was the right of immunity from competition.

(4) A third right--which was, perhaps, more in the nature of a privilege--was that of immunity from taxation for the support of other schools.

(5) Said rights were protected by the Manitoba Act, the interpretation of which depended on the construction of the terminology of the education clauses in the B.N.A.Act.

(6) The intent of Parliament in passing the educational clauses of the Manitoba Act was of more importance than the phrasing of these clauses. Thus, the history of the schools controversy in the older provinces and of the genesis of the B.N.A. and Manitoba Acts must be taken into account. By the Manitoba Act, Parliament had intended the Ontario system for the Catholics of Manitoba if they became the minority.

(7) Finally, the words "or practice" must extend protection to the above " . . . rights and privileges . . ."

otherwise the Manitoba Act was meaningless. No one would dream of protecting simply the right to denominational schools.

Chief Justice Taylor delivered the first judgement. It was somewhat reminiscent of that of Justice Killam.[18] He first reviewed this latter decision, the by-laws and the ground of the summons.[19] He then stated that the new legislation was objected to as not within the power of the Province to pass, having regard to the limitations embodied in the Manitoba Act. After quoting the pertinent sections, he stated that:

> A section similar in character is found in the British North America act as section 93. There are differences between the two sections, and when parliament in the Manitoba act used different language, it must be assumed that there was some definite intention in doing so. . . .[20]

The differences between the two sections were then indicated, and the conclusion was reached that:

> Possibly, there is no practical difference in the effect of the changed language in sub-section 2, as to an appeal from an act or decision of the legislature as well as from an act or decision of any provincial authority. . . .[21]

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[18] In the same case, vide pp. 120-35.

[19] Supplementary Return . . . 1891, pp. 22-23.

[20] Supplementary Return . . . 1891, p. 23.

[21] Loc. cit.

A previous ruling was cited as leaning to this position.

The eminent Chief Justice apparently accepted Ewart's argument in favour of the relevancy of the B.N.A. Act:

> It is under section 22 of the Manitoba act that the question raised in the present case must be considered, and the decision of it must be governed by the provisions of that section. . . . As section 93 does not profess to settle the question of education, and of separate or denominational schools for the whole dominion, but only for the provinces of Ontario and Quebec, and the question of education in the newly formed province of Manitoba is dealt with specially and in somewhat varied language, there can be no doubt that section 93 is not the one which must govern the decision in this case. As, however, section 22 was undoubtedly based on section 93, the terms of the latter are material, but only insofar as they may afford assistance in arriving at the true construction to be placed on the section of the Manitoba act.[22]

Chief Justice Taylor then went on to discuss counsel for the applicant's contention:

> . . . that when considering the meaning of section 22, and applying its language, regard must be had to the condition of things existing in Upper Canada as to separate schools before confederation, and which led to section 93 finding a place in the British North America act. . . .[23]

and admitted that there was:

> . . . no doubt that the history of an act may be enquired into and considered by the court, where difficulty is found in construing it. The court must look not only at the words of the statute, but to the cause of making it, to ascertain the intent. . . .[24]

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[22] Ibid., pp. 23-24.

[23] Supplementary Return . . . 1891, p. 24.

[24] Loc. cit.

Numerous precedents were quoted in support of this latter contention.[25] But, he then went on to quote from page 462 of the Commentaries of the ". . . eminent American jurist Chancellor Kent . . ." the following qualification:

> 'The reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction and absurdity. . . . The true meaning of the statute is generally and properly to be sought from the body of the act itself.'[26]

and to embellish it with elaborations and precedents.

The Chief Justice then flatly contradicted Ewart's argument as to the relevancy of the history of the B.N.A. and Manitoba Acts. He held that though the former Act prevented Ontario from abolishing separate schools, such act did not apply to Manitoba as it did not purport to preserve separate schools throughout Canada, otherwise such provision would have been provided in law for New Brunswick and Nova Scotia.[27] As to the history of the Manitoba Act, in the light of the Ontario schools controversy, the Chief Justice could not:

> . . . see that parliament intended more than is expressed by the language used. . . . The intention of parliament is plain, no future provincial

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[25] Ibid., pp. 24-25.

[26] Ibid., p. 25.

[27] Supplementary Return . . . 1891, pp. 25-26.

> legislation is to prejudicially affect any right or privilege as to denominational schools, if any such right or privilege exists, and whatever it may be. . . .[28]

although he "hedged" to the extent of stating that:

> . . . What the parliament intended is not at all doubtful, although, perhaps, it is not so easy to say what exact meaning should be attached to the language used. . . .[29]

He added that if Parliament had intended to establish the Ontario or Quebec system in Manitoba, it would have done so, by incorporating a modification of the second sub-section of the B.N.A. Act.[30] The learned Chief Justice then asserted that Parliament intended to leave the people of the Province to settle the question for themselves.[31]

In order to justify this position, Chief Justice Taylor found it necessary to confront the somewhat disconcerting fact that the Manitoba Act contained clauses apparently drastically restricting the authority of the Province in matters of education. He commenced by regarding them as a mere generality--a natural provision in the incorporation of a new territory. While protecting ". . . existing rights

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[28] Ibid., p. 26.

[29] Loc. cit.

[30] Loc. cit.

[31] Ibid., p. 26. But one might ask why the Manitoba Act had not said so!

and privileges, whatever these might be . . .[32] the learned judge implied that the Dominion Government had had no thought of guaranteeing the preservation of separate schools forever.[33] He then quoted from the decision of the New Brunswick Court and the Judicial Committee in the Renaud Case to the effect that the words of sub-section I ". . . were not intended to distinguish between protestant (sic) and Roman catholics. . . .",[34] posed a rhetorical question disparaging the claims of the minority[35] and, with disturbing heartiness, accepted Archbishop Taché's affidavit as showing the true state of affairs at the union--upon which these claims were based--declaring those of Polson and Sutherland ". . . in no way inconsistent . . ."[36] Such apparent evasiveness must have proved considerably irritating to John S. Ewart.[37]

His conclusion, however, was that:

> . . . the utmost the Roman catholics can be said to have had, was what may be called a moral right. Had the words "right or privilege" stood alone in the act,

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[32] Supplementary Return . . . 1891, p. 26.

[33] Ibid. The tenor of his remarks is obvious.

[34] Ibid. Vide p. 188 for Chief Justice Ritchie's refutation.

[35] Ibid. p. 27.

[36] Ibid.

[37] Vide p. 26.

> it could not, I think, be said they had any, which is prejudicially affected by the public schools act.[38]

This ruling he supported by quoting from various authorities,[39] to the effect:

> . . . that rights and privileges as used in the statute must mean something special and peculiar, something not common to all the community. To be protected, they must be such as the class of persons seeking protection had, apart from the rest of the community, must be such as they possessed and others did not. . . .[40]

By implication, a change in the position of the rest of the community would lead to a corresponding change in the position of " . . . the class of persons seeking protection . . . ."[41] A later reference to the New Brunswick situation[42] supported this idea. Though he could still declare:

> . . . Parliament intended, in fact, 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 prejudicially affected by provincial legislation.[43]

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[38] Supplementary Return . . . 1891, p. 27.

[39] Ibid., pp. 27-29.

[40] Ibid., p. 28.

[41] Loc. cit.

[42] Ibid., pp. 30-31.

[43] Ibid., p. 28.

he held the words"by practice" referred only to "moral rights" and proceeded to explain such rights were with respect to denominational schools and such were unimpaired by the new legislation.[44]

After reviewing the situation at the time of union, he then proceeded to refute the Catholic contention that specific rights had been infringed. First of all:

> . . . as education was then carried on they had, in common with every other denomination, a right to establish and maintain schools, and in consequence of their doing so they were, in fact, separate from the rest of the community, but that was not because they had a positive right to be so--it was merely an incident to their right to have schools.[45]

Killam's judgement was then tacitly accepted--the right of Catholics to denominational schools was unimpaired. In fact, Justice Taylor openly referred to this judgement, and supported Killam's contention regarding taxation with:

> . . . The being free from taxation for schools was a right or privilege which they enjoyed only in common with everyone else in the province. It was not a right which they enjoyed adversely to the rest of the community, something which they enjoyed beyond the common advantage of other individuals. They are not now, under the public schools act, subjected to any exceptional tax. . . .[46]

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[44] Ibid., p. 29

[45] Supplementary Return . . . 1891, p. 29.

[46] Loc. cit.

The competition argument was then rejected because (1) before the union any organization could have provided competition to the Catholic schools and (2) relief from taxation for the purpose of supporting the new schools in order to allow more effective support of Catholic schools might " . . . be urged in connection with all taxation for provincial and municipal purposes. . . ." and (3) the new schools were not denominational but " . . . in the strictest sense public non-sectarian schools. . . ." Reference was made to the new Act in support of this last claim.[47]

Chief Justice Taylor then summed up his decision to the effect that:

> The only change in the situation is, that while at the union no one could be compelled to contribute for the support of schools--not for the support of public non-sectarian schools, for there were none in existence, nor for the denominational which did exist, for there was no law requiring them to be supported. Now, all the property owners in the province, protestants and Roman catholics alike, are compelled to contribute for the support of public non-sectarian schools.[48]

It was the duty of the state to provide " . . . at least an elementary education . . ." and thus to furnish the necessary funds, as provided in the B.N.A. Act.[49] Reference

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[47] Supplementary Return . . . 1891, p. 30.

[48] Ibid., p. 31.

[49] Loc. cit.

was made to Macdonald's opinion expressed in his report on the New Brunswick common schools act--that the provisions of the B. N. A. Act:

> . . . applied exclusively to the denominational, separate or dissentient schools, and did not in any way affect or lessen the powers of provincial legislatures to pass laws respecting the general educational system of the province. . . .[50]

and it was held that the Manitoba Act was to have the same construction. Since the public schools act did not deal with such types of schools, but with general education, it was valid. Chief Justice Taylor then dismissed the appeal with costs.[51]

Justice Bain supported the verdict of the Chief Justice in a remarkably similar statement.[52] In fact, at one point,[53] he admitted his assistance. The judgement, naturally enough, contained overtones of Justice Killam's pronouncements. Some light was thrown on the arguments advanced by Ewart (and Brophy).[54] This Justice tended to take an even stronger, or at least more outspoken, view than had the Chief Justice. For example, he held that with respect

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[50] Ibid., p. 32.

[51] Loc. cit.

[52] Supplementary Return . . . 1891, pp. 47-55.

[53] Ibid., p. 51.

[54] Vide pp. 140 - 46.

to the first sub-section of section 22 of the Manitoba Act protecting only "moral rights", " . . . A view of the meaning of the sub-section more favourable to the contention of the applicant cannot possibly be taken."[55] He also held that the right to operate a denominational school was no more impaired by competition than the right of a merchant was impaired by the opening of another store beside his.[56] He again went somewhat beyond the Chief Justice in holding that the litigation over the New Brunswick parish schools act had indicated that the words "'. . . prejudicially affect any right . . .'" did not mean that new legislation must specifically protect a right or privilege. It was sufficient if the complainants were not deprived of such by the enactment.[57] He also bluntly stated: ". . . The question for a court always is, not what parliament meant, but what its language means."[58] The Chief Justice had been much more cautious in arriving at the same conclusion.[59]

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[55]Supplementary Return . . . 1891, p. 51.

[56]Supplementary Return . . . 1891, p. 53.

[57]Loc. cit.

[58]Ibid., p. 54.

[59]Ibid., p. 26.

The majority verdict of the Court in Banc involved the rulings of Chief Justice Taylor and Justices Bain and Killam. Their main points were as follows:

(1) The provisions of the B.N.A. Act did not apply to Manitoba.

(2) The language of the Manitoba Act was sufficiently clear without taking into account the significance of the terms of the B.N.A. Act (from which it was derived) or the history of the B.N.A. and Manitoba Acts.

(3) Parliament had not intended to settle the question of separate schools for the entire country in the B.N.A. Act and the Manitoba Act had left the people (or the legislature) of Manitoba to settle the problem of separate schools.

(4) Sub-section one of section 22 of the Manitoba Act did not set up just two classes of persons--Catholic and Protestant.

(5) The first sub-section preserved only rights to denominational schools and not to separate schools.

(6) Such rights were not "prejudicially affected" by the School Acts of 1891. Therefore these Acts were <u>intra vires.</u>

(7) Recognition of immunity from taxation for school purposes prejudiced provincial and municipal authority in all taxation.

Before proceeding with the verdict of the remaining Justice of the Queen's Bench, it should be of interest to examine certain differences between the rulings of the other three:

(1) The pronouncements of Justices Taylor and Bain were practically identical. The only difference of any note was the practical neglect by Taylor of Killam's contention on the significance of the "or practice" clause and his substitution of the ingenious (and to many probably rather specious) argument that it referred only to "moral rights". Justice Bain used both contentions, and, in addition, tended to be more decided in certain of his utterances.

(2) Justice Killam explicitly doubted that the adoption of a prior system by the Manitoba Legislature was a limitation on the authority of the Legislature. Justices Taylor and Bain ignored this idea. In truth, it appears to have been little discussed at this time--probably because it undoubtedly applied more to the question of an appeal to the Governor General in Council.

(3) Justice Killam saw the anomalous situation at the time of union as a difficulty in arriving at a judicial decision. The others saw the general agreement on its nature as a cause for jubilation.[60]

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[60] Supplementary Return . . . 1891, pp. 16 & 27.

(4) Justices Taylor and Bain were somewhat stronger in their remarks concerning the impairment of the right of the province to tax that would follow from a recognition of the Catholic claim to exemption.

(5) While Justice Killam paid no attention to defining the terms "right" and "privilege", his two brethren expended considerable effort on this.

(6) Again, while Justice Killam simply paid no attention to the history of the controversy, Justices Bain and Taylor were at considerable pains to prove that this could have no bearing.

(7) Justices Taylor and Bain also apparently found it necessary to argue more elaborately than had Killam against the intention of Parliament contention.

(8) Finally, Killam considered the change of language in sub-section two of section 22 of the Manitoba Act highly enlightening, but his colleagues put their emphasis on the contention that the first sub-section in the pertinent clauses of both Acts were not intended to distinguish merely between Catholics and Protestants. These differences probably indicate a shift in the arguments presented by Ewart & Brophy.

Justice Dubuc dissented.[61] After reviewing the

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[61] Supplementary Return . . . 1891, pp. 32-47.

various preliminaries, questions and contentions at hand, he emphasized that the schools established in Manitoba before the union: ". . . although there was no law to give them legal sanction, were de facto, i.e., in practice, denominational schools."[62] and also maintained that: "The provisions of law in regard to schools, made applicable to Manitoba at the union, were the 93rd section of the British North America Act, and the 22nd section of the Manitoba act.[63]

He then saw fit to review the record of school legislation in Manitoba from 1871 up to and including the year 1890.[64] Some care was taken to highlight the provocative section 179 of the public schools act, c. 38, which section had lent colour to the charge that Catholic property was being confiscated for the benefit of Protestant schools.[65]

On pages 35 to 37 of his judgment, Justice Dubuc dealt with the significance of the words "or practice", holding (which was undoubtedly true) that "The whole question to be determined in this case turns upon the construction of the words 'or practice', added to the provisions of the

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[62] Ibid., pp. 32-33.

[63] Ibid., p. 33.

[64] Ibid., pp. 33-35. Afterwards incorporated into M.S.Q., pp. 2-4.

[65] Ibid., p. 35. No attention was paid, however, to the previous sections (178-180) for the protection of Catholics from losing assets and assuming debts contracted by the former Protestant districts.

Manitoba act."[66] While citing authorities to the effect that the Court was not at liberty ". . . to speculate on the intention of the legislature to construe an act according to its own notions of what ought to have been enacted. . . .",[67] he held that this was the case only " . . . where the language is precise and capable of but one construction."[68] Such was not, however, the situation with regard to the Manitoba Act as several different interpretations of the educational clauses had been advanced. Several previous Cases were then referred to in order to add force to the contention that the intention of the legislature must be taken into account, and that:

> In order to find out the exact and true meaning of certain words contained in a statute, it becomes sometimes important to go into the history of the matter and examine the external circumstances which led to the enactment in question.[69]

Justice Dubuc then went on to examine the reasons for the change from the wording of the first sub-section of section 93 of the B.N.A. Act involved in the insertion of the words "or practice" into the corresponding section of

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[66] Supplementary Return . . . 1891, p. 35.

[67] Ibid., p. 36.

[68] Loc. cit.

[69] Loc. cit.

the Manitoba Act.[70] After dealing with the situation in each of the four original provinces at the time of Confederation, incidentally "skimming over" the Quebec situation, he declared that the educational clauses of the B.N.A. Act were framed to end future agitation--to settle the question for new provinces as well as old.[71]

In New Brunswick, indicated Justice Dubuc, the Catholic opposition to the school act of 1871 had come to nothing in the courts because only their legal rights were protected by the B.N.A. Act and not their rights "by practice". He quoted from Chief Justice Ritchie's ruling in the Renaud Case to indicate ". . . that, if the Roman catholics of New Brunswick had had their right and privilege by practice equally secured, the judgement of the court might have been different."[72]

This distinguished occupant of the Bench then went on to uphold Ewart's argument that these words had been introduced into the Manitoba Act because of the situation in New Brunswick in 1870. The Attorney-General, he declared, was correct in stating that the New Brunswick Act had not

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[70] Vide Appendix B.

[71] Supplementary Return . . . 1891, pp. 37-38.

[72] Ibid., p. 38.

been passed until 1871, but two bills embodying the provisions had been introduced and discussed in the local House in 1869 and in 1870 before the Manitoba Act became law on May 12, 1870.[73] It could thus be presumed that the Federal Members had been cognizant of the proceedings, which must have been discussed in the press, and "Presumptions are constantly used in determining the real intent of meaning of statutes."[74]

It was then pointed out that if the B.N.A. Act had simply been left to apply in educational matters to Manitoba, it would have been a dead letter, as there was no educational system by law existing at the union. Justice Dubuc even went so far as to claim that the Catholics of Manitoba had been in an even worse position than those of New Brunswick, as under the parish schools act in the latter province they, by practice, were largely separate.[75] In any case,

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[73] Ibid., pp. 38-39.

[74] Supplementary Return . . . 1891, p. 39. However, the Hon. Justice did not offer any specific proof that the Members were aware that the insertion of "or practice" in the B.N.A. Act would have made the vital difference in New Brunswick.

[75] Loc. cit. Presumably if Catholics had had separate and not merely denominational schools by practice at the union, they would have been secure. This undoubtedly explains the effort they made to have it appear that the 1870 situation was that of duality rather than plurality of educational systems. The distinction made by Justices Taylor & Bain (Vide pp. 151 et seq.) would seem to be no hindrance to the claim of the minority if the duality argument could have been sustained. It is ironic that a Catholic priest had helped make it more plural than dual. (Vide Taché, Une page. . ., pp. 13-17.)

the words "or practice" were inserted into the Manitoba Act " . . . to protect in their right and privilege, as to denominational schools, the catholics or protestants who might in the future find themselves in the minority in the province."[76]

Moreover, at the time of union, the numbers of Catholics and Protestants were approximately equal. Also, ". . . Manitoba was the only province entering confederation after the original union for which the provisions of the 93rd section of the British North America act were departed from and modified. . . ."[77] and such a change was undoubtedly made in order " . . . to protect and insure permanently to any class of persons, either protestants or catholics, who might desire to continue in the enjoyment of (denominational schools) . . ."[78]

Before continuing with his examination of the meaning of "or practice", the Hon. Justice glanced at the signi-

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[76] Supplementary Return . . . 1891, p. 39.

[77] Loc. cit.

[78] Supplementary Return . . . 1891, p. 39. Considerable effort was made at this point to convey the impression that the only rights to be protected were those between Catholic and Protestant, and not between the three denominations who possessed schools at the time of the union. Would that staunch apostle, Judge John Black, have agreed? It would seem that the first sub-section of section 93 of the B.N.A. Act had been interpreted more widely. At any rate (vide p. 168.) Justice Dubuc found it necessary to qualify this contention.

ficance of the terms "right" and "privilege" and concluded that these two terms were " . . . technical words, having by themselves well defined legal meanings." On the other hand, "practice" was:

> . . . only an ordinary, popular word to be construed in its ordinary popular sense. It means custom or habit, use or usage. . . ."privilege by practice" becomes an ordinary popular expression to be interpreted in its popular sense.[79]

He then cited three precedents to indicate that this was so " . . . having always in sight the object which the legislature had in view . . ." Furthermore, the words "by law" and "by practice" were of dissimilar import. The addition of the latter words was held to indicate that the Federal Parliament intended to convey a new and additional significance to the limitation on the provincial legislature already imposed by the B. N. A. Act.[80]

These were words held by Justice Dubuc to be of great importance, as the school conditions at the time of the union were known by the delegates and must have been well talked over with the framers of the Manitoba Act. He then heaped scorn on the contention that the only privilege secured to Catholics was the right to continue their denomina-

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[79] Ibid., pp. 39-40.

[80] Loc. cit.

tional schools:

> . . . The privilege of being taxed for the support of schools from which according to their conscience and to the principles of their faith, they could derive no benefit, and of taxing themselves besides for the only schools to which they could conscientiously send their children, would be a very strange privilege indeed. . . ."
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> . . . it is never contemplated that in civilized modern countries a legislature would disregard and set at naught the well known principles of natural justice and equity. The right of any persons or class of persons to have and support private schools is a primordial right, as the right to breath (sic) air or eat bread. . . . Such a natural right does not want any legislation to protect it. . . .[81]

Therefore, the Manitoba Act must have been intended to protect something else than the right to denominational schools.[82] It was absurd to suppose otherwise. Precedents were cited to show that where language was ambiguous, the ridiculous contention was not to be adjudged the correct one.[83]

The learned Justice then advanced the proposition that though the local legislature was not debarred from

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[81] Supplementary Return . . . 1891, p. 41

[82] The Hon. Justice here implied that the new schools could have had compulsory attendance and the right to private schools would still have remained. Such schools could have been conducted outside public school hours. Such an argument might have come in useful to the supporters of compulsory attendance in 1916, if not earlier! However, the other contention was the one which was to influence the Judicial Committee (Vide p. 259).

[83] Supplementary Return . . . 1891, p. 41.

establishing a state church, with disabilities for Catholics, this was because such a development was deemed out of the question in the light of " . . . the broad and equitable principles prevailing in modern British and other civilized constitutional institutions. . . ."[84] With regard to schools, past experience had shown the necessity of protecting the new Province from the disharmony which had arisen elsewhere. As the words "or practice" could not have been incorporated in order to protect something which needed no protection, they must have been inserted to insure Catholics the continuance of " . . . the positive right of having their own denominational schools (and) the negative right, that is, the privilege of not being compelled to support other schools. . . ."[85]

Justice Dubuc then declared that:

> Besides considering the historical facts and circumstances bearing upon a statute to ascertain its real sense, another mode of determining its true meaning is to examine its different parts, and even parts of other acts on the same subject. . .,[86]

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[84] Loc. cit. This contention seems to have an affinity with one of Ewart's arguments in the St. Joseph's School Case (vide p. 103) and to be somewhat at variance with Archbishop Taché's arguments in M.S.Q., pp. 123-38, as well as to overlook the practical establishment of a state church in at least one portion of the country.

[85] Ibid., p. 42.

[86] Supplementary Return . . . 1891, p. 42.

and cited two previous Cases in support. He then proceeded to discuss the other sub-sections relating to education in both the B.N.A. and Manitoba Acts.[87] The eminent Justice held that, though the Court had nothing to do with the appeal to the Governor-General provided for in these sections, they were " . . . entitled to consider them if they can throw any light on the meaning of the first sub-section."[88] Following out his previous considerations on the significance of the "or practice" phrase and noting that the appeal to the Governor-General in Council was to be from the Catholic or Protestant minority, the Hon. Justice held that " . . . protestants as a class, and Roman catholics as a class . . ."[89] were to be protected in the rights to denominational schools which he had already set forth.

In the paragraph immediately following, he maintained that the objection that, if Catholics were entitled to have their denominational schools secure, the different Protestant denominations would be entitled to the same privilege, was not valid. It was only " . . . one aspect of the

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[87] Ibid., p. 43. The other Justices had concentrated largely on the first sub-section in the pertinent sections in both Acts, as, apparently, had counsel.

[88] Ibid., p. 43.

[89] Loc. cit. This seems intended as a refutation of Justice Killam's view, vide pp. 131-32.

question." --that if the first sub-section of the Manitoba Act were to be taken alone, all the various Protestant groups having denominational schools at the union would be entitled " . . . to keep and maintain them as such . . ."[90]

But another aspect was brought out by examining the other provisions of the two Acts. The traditional division of Christians into Catholics and Protestants was followed therein. Therefore the framers of the Manitoba Act " . . . in speaking of any class of persons in respect of denominational schools, intended to refer to the Roman catholics as a body, and to Protestants as a body . . ."[91] Thus, the Hon. Justice seemed to have implied a dual application of the first sub-section of section 22 of the Manitoba Act. On one interpretation, it protected the right of certain Protestant denominations to separate schools;[92] on the other interpretation, it protected the right of Protestants as a whole and of Catholics to be separate one from the other.

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[90] Supplementary Return . . . 1891, p. 43. This would indicate that both Anglicans and Presbyterians would be entitled to separate schools.

[91] Loc. cit.

[92] Unless Justice Dubuc intended to ignore his previous line of reasoning with respect to the right simply to private denominational schools being basic and needing no protection (vide p. 165).

Justice Dubuc also maintained that the claim that the only privilege guaranteed to Catholics was freedom from compulsory attendance at the public schools was false, because at the time of union there was no such thing and no altercation over it.[93]

The argument of Attorney-General Martin that the Provincial Legislature would be deprived of the power to levy school taxes effectively because--if Catholics were exempt from supporting any but their own schools--people without children would not have to pay school taxes (as they had been exempt from supporting schools at the union) was dismissed. It was held not to be a serious objection because:

> . . . The provision was made to protect the rights and privileges which any class of persons had with respect to denominational schools, not the claim or privilege of individuals who happen not to support any school.[94]

With respect to the Attorney-General's argument that the Dominion Parliament had not intended the Catholics of Manitoba to have their own schools as in Ontario and Quebec because it did not make special provision, Justice Dubuc

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[93] Supplementary Return . . . 1891, p. 43.

[94] Ibid., p. 44. This ruling would seem sound. Certainly Attorney-General Martin's argument in this respect did not strike the other two Justices forcefully. Neither of them incorporated it into their verdicts, at least not in this extreme version.

declared that the B.N.A. Act extended a situation existing by law in Ontario to the Province of Quebec. In Manitoba there had been no such system by law in 1870.[95] Secondly, if the Federal Parliament had not intended to secure the right of Catholics to separate schools, why had it inserted the educational clauses, borrowed (and adapted) from the B.N.A. Act, into the constitutional act of the new province?[96]

Justice Dubuc then saw fit to clinch his latter argument by referring to precedents to show that an elementary rule of courts of law was to give the most just and reasonable interpretation to a statute and that "In some cases, when the occasion justifies it, the court goes so far as to modify the language of the enactment, or add to it, in order to give it a reasonable construction".[97] However, he

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[95] Supplementary Return . . . 1891, p. 44. This would seem to indicate that the Hon. Justice admitted that the Catholics of Manitoba were entitled to the Ontario and not to the Quebec system. His refutation seems a bit weak. What the chief negotiator at Ottawa in 1870 had wanted was the Quebec system. Provision could have been made for the Province to adopt either of the two systems at will. Fear of Ontario resentment might well have dictated avoidance of the obvious by the politicos.

[96] Loc. cit. This argument seems much stronger. There is now little doubt that the Federal Parliament intended to secure separate schools, (vide pp. 42-43) though the other Justices tenaciously insisted it had not, or at any rate there was nothing in the express terms of the Manitoba Act to show that such was the case, and that it was scarcely necessary to go beyond these terms.

[97] Loc. cit.

held that such modification was not necessary in this case.

A narrow construction of the questioned provision would submit Catholics to disabilities, a broad construction would give Catholics " . . . nothing more than fair justice, and the non-catholics would suffer no injustice."[98] The Hon. Justice referred at length to Archbishop Taché's affidavit and to the differences in attitudes between Catholics and Protestants in support of this ruling, holding also that:

> . . . A man's conscience is a thing of such personal and idiosyncratic character that it cannot be measured by the particular feelings and dictations of any other man's conscience.[99]

In providing for the relief of popular ignorance, the state had no right to ignore the claims of conscience of a significant and virtuous portion of the population, especially when many Protestants also insist on religious instruction.[100] In connection with this latter point, he then quoted extensively from the June, 1888 Report of the commissioners who had been appointed to inquire into the workings of the elementary schools act in England and Wales.

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[98] Supplementary Return . . . 1891, p. 45.

[99] Ibid., p. 46. Perhaps a rather singular dictum for a judge.

[100] Loc. cit. No distinction, however, was drawn as to degree, time and place.

The same Report was quoted to the effect that state aid granted to schools carrying on religious instruction did not involve the endowment of such instruction.[101]

Before summing up and declaring the Schools Act of 1890 ultra vires, Justice Dubuc added that:

> . . . the views of the Roman catholics of this country on religious teaching in schools are not much different from those entertained by the mass, as well as by the cultured portion of the people of England, protestants as well as Roman catholics.[102]

Thus it may readily be seen that the judgement of Justice Dubuc was almost completely opposed to those of the other three Justices.[103] The determination of his three colleagues to pay as little attention as possible to the intention of Parliament was the fundamental cause of the divergence. This problem was to occupy much of Ewart's attention.

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[101] Ibid., pp. 46-47. However, the quotations referred only to compulsory education with respect to either wholly secular or denominational schools. There was little or no recognition of non-denominationalism.

[102] Supplementary Return . . . 1891, p. 47. This view was also maintained by Archbishop Taché. Vide M.S.Q., p.138.

[103] Vide A.A.S.B., Feb. 2, 1891, Barrett to Taché (at Montreal) for a bitter comment on the judgements of Taylor and Bain and also an expression of doubt as to whether the action should continue.

CHAPTER SIX

THE UNANIMOUS REVERSAL BY THE SUPREME COURT

The firm of Ewart & Brophy lost little time in carrying the Case to the Supreme Court of Canada, where, presumably, it would be out of the reach of what was termed " . . . the contaminating influence of Manitoba's Protestant bigotry and intolerance."[1] The result was fully to justify such expectations, though, no matter which side had won before the local Courts, there had been little doubt that the Case would have been carried to the higher tribunals.[2]

As early as Feb. 7, 1891,[3] Ewart & Brophy wrote to the solicitors for the City of Winnipeg reminding them that such a procedure had been understood from the start, and that by mutual arrangement the judgements of the local Justices were being printed for presentation as part of the Case. As ample time remained to prepare factums and because the Case was of great public importance, they earnestly suggested that, by consent, it be entered for the forthcoming

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[1] A.A.S.B., Feb. 2, 1891, Barrett to Taché. Vide also Bénoit's comment in Taché, pp. 684-85.

[2] Vide p. 135. Taché, and possibly Barrett, were not particularly enthusiastic, vide above letter.

[3] A.A.S.B., Taché's copy of letter from Ewart & Brophy to Hough & Campbell.

session, which commenced on Feb. 17.[4]

Four days later, Ewart himself wrote to His Grace,[5] expressing sympathy at his poor health and stating that he felt certain the set-back in the Case was only temporary. Having considered the judgments, he felt " . . . more confident than ever of final success. . . ." He had failed to find a reasonable statement of what the Manitoba Act meant and had no doubt of the outcome if it were admitted that the Act did mean something and search were made to discover its significance. All that the (adverse) judgments had declared was that " . . . it does <u>not</u> mean this and that but no affirmative answer at all. . . ."[6] The necessary steps to go before the Supreme Court, probably in May, had been taken. They were also in touch with (Edward) Blake, who was at work on the case, and the Archbishop was assured that every care would be taken.

The very next day, John Kelly Barrett wrote to his archbishop[7] agreeing that disallowance was unwise and that

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[4]About the same time Brophy wrote to Sedgewick asking if action should be taken in the local Courts against the Act abolishing the official use of French. <u>Vide</u> Macdonald Papers, P.A.C., vol. 495, #245, Feb.9, 1891, Sedgewick to Macdonald. No such action was taken.

[5]A.A.S.B.,dated Feb.11,1890, but undoubtedly should be 1891.

[6]<u>Loc. cit.</u> A trenchant and largely accurate comment.

[7]A.A.S.B., Feb. 12, 1891.

everything was being done to bring the Case before the Supreme Court as early as possible. He had visited Ewart and Brophy on several occasions and had learned that Attorney-General Martin had refused his consent to bring the Case before that body by the end of the month and that, therefore, it would not come up before May, and possibly not until June. In such an event, Brophy had informed him, judgement might be deferred until September, though he believed that the Court would give the Case precedence if the Department of Justice put in a request. He hoped they would not have to wait too long, as that would only keep up the strain. The remainder of Barrett's letter dealt with his hope that Macdonald would remain in power after the ensuing battle at the hustings, though with a small enough majority to be amenable, and revealed his mistrust of Protestants and his recent attack on Freemasons in the Northwest Review.

This communication was supported by a letter from Gerald Brophy[8] dealing with the technicalities involved in pursuing the appeal, chiefly with the need of getting the consent of both parties before appealing to the Supreme Court to have the Case given precedence. This Mr. Martin had refused to do, in view of the approaching elections.

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[8] A.A.S.B., Feb. 15, 1891, Brophy to Taché, enclosing a letter (presumably that of Feb. 7, 1891, vide p. 173) to Hough & Campbell.

Printing of the judgements was proceeding and double the usual number had been ordered--for distribution to their friends. The Deputy Minister of Justice had been kept informed and requested to arrange $800 security for the defendants, i.e., the City of Winnipeg, as a preliminary to setting down the appeal. Blake had been sent a synopsis of the judgements and other papers. The remainder of the letter referred to Brophy's engagements on the Conservative side in the forthcoming federal elections in Manitoba.[9]

It would appear that many of Brophy's activities may well have been engaged in without the knowledge or concurrence of his new partner. In any case, Ewart apparently found it necessary to cool his new-found partner's political ardour somewhat.[10]

A few days later, it became apparent that the excitable and suspicious Barrett felt that he could not place complete confidence in Gerald Brophy.[11] The latter had con-

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[9] Vide also A.A.S.B., Mar. 15, 1891 for Brophy's request to Taché for campaign funds to defeat Martin at Portage so as to kill his political career after his defeat at Selkirk.

[10] Vide A.A.S.B., June 26, 1891 for Brophy's refusal of Taché's invitation to run against Prendergast: ". . . Were I to present myself as a candidate . . . I could only do so at considerable financial loss to myself and in direct opposition to the strongly expressed wishes of my law partners in this regard." Perhaps Brophy included Fisher in this reference.

[11] A.A.S.B., Feb. 21, 1891, Barrett to Taché.

fidentially informed him that the Department of Justice was in no hurry to arrange the appeal[12] and, as they were footing the bill, they had a right to a say in the matter. According to Brophy, the Department of Justice had declared, in answer to his request for security, that bonds should be put up by the appellants, as was customary. Brophy had informed Barrett, when the latter entered the suit, that he would not have to pay the costs or put up security, and now he was indulging in this subterfuge. Though Brophy still maintained that he had no doubt that the Department would pay the costs of this suit,[13] which had been brought at its instance, Barrett was afraid that the Department was going to throw them over. He had told Brophy he would like to know, as, in such an event, the minority would act for themselves. In Barrett's opinion, Brophy was far too independent of His Grace and inclined to consider himself responsible only to the Department, which had engaged him. Barrett expressed great concern that the solicitors for the Department might withdraw the Case unless the appellant put up

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[12]This seems logical; the 1891 elections would be the main concern of every Department.

[13]Vide Thompson Papers, vol. 126, #15066, from Judge A. G. Taschereau, Supreme Court, regarding the ". . .jolly rumour . . ." Supreme Court justices to receive same salaries as ministers. Inflation was in the air!

bonds, and he could not guarantee the nearly $1000 required. He doubted that Brophy would appeal to the judges for extension of the thirty-day time limit on placing the requisite security,[14] and expressed great anxiety that His Grace make prompt contact with the Department of Justice.

The excitable Barrett soon had occasion for causing His Grace unnecessary distress. On March 2, 1891,[15] he stated that he had, that very day, signed the bonds necessary for the appeal. Where he obtained the necessary collateral did not appear, though another missive[16] revealed that Father Cherrier also had written His Grace concerning the bond. The same letter indicated that the Case would be argued in Ottawa in May (providing that the Act were not disallowed before then), that Blake was receiving everything to aid him in his argument, and that Luxton believed that the defeat of Martin and Campbell in the Federal elections heralded the defeat of the local administration. Evidently then, it was expected that Edward Blake would be the principal counsel for the appellant before the Supreme Court.

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[14]It would seem that Brophy might have been aiding in the Federal tactic of delay, in view of the elections. Barrett would seem less partisan, though he found it advisable to warn Taché against the reading of the old pre-election pastoral letter in Manitoba, vide A.A.S.B., Feb.26, 1891, telegram to Montreal.

[15]A.A.S.B.,Barrett to Taché,in reply to letter of Feb.26.

[16]A.A.S.B., Brophy to Taché (Montreal).

This latter expectation was not to be realized, though, on March 20, 1891, the Minister of Justice could assure His Grace that he need not be uneasy about the perfecting of the steps to carry the appeal to the Supreme Court and that he need have anxiety only for the result.[17] On the very next day, this same Minister of Justice could present his Report[18] on the petition of Aug. 1, 1890 to the Governor General in Council, in which he declared that such petitions need not be considered until the Case coming before the Supreme Court had been decided.[19] However, this recommendation was not officially adopted and made public until April 4, 1891.[20]

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[17]A.A.S.B., Mar. 20, 1891, Thompson to Taché (Montreal).

[18]Vide M.S.Q., pp. 31-34. Also A.A.S.B., Mar. 31, 1891, Rogers, Bishop of Chatham, N.S. to Taché, for the former's Francophobe reasons for not signing Taché's petitions.

[19]In connection with this announcement vide Thompson Papers, P.A.C., vol. 125, #15046, Mar. 30, 1891, from Sedgewick re his visit to Tache in which he endeavoured to persuade the latter that disallowance was out of the question as the Manitoba Act specified a different approach and as the time would expire by April 11. He also assured him that the minority was entitled to its share of the school lands and that the Governor General in Council was a judicial tribunal. Sedgewick's contentions would seem to be somewhat anomalous on the score of both disallowance and the judicial status of the Cabinet.

[20]M.S.Q., p. 31. The very day the Quebec press published the pastoral letter of Cardinal Taschereau calling on Catholics " . . . to pray and to work for justice. . . .", vide Hopkins. Thompson, p. 262.

That anticipation of the Case's being carried to the Judicial Committee was being entertained by counsel for the appellant is shown by a confidential letter, dated March 26, 1891,[21] from Edward Blake to Ewart and Brophy, in which was set out considerable advice with respect to the factum and the proposed argument before the Supreme Court and the Judicial Committee. The intellectual Blake[22] regarded the factum as giving away the Case, and was not overly impressed by the argument. The letter terminated on a note of doubt as to whether he would continue to be retained. Probably he was becoming conscious of the political prejudice of the Federal authorities against his taking part. Though it was perhaps not completely realized at the time, the advent of Clifford Sifton to the position of Attorney-General of Manitoba on May 4, 1891,[23] brought in a formidable antagonist to the desires of the minority at the very time when their would-be defender, Edward Blake, was being shunted aside.

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[21] Vide Appendix F.

[22] Vide Sir J. Willison, Sir Wilfrid Laurier and the Liberal Party, vol.2, p.232 for a tribute to Blake's ability.

[23] Kavanaugh. Assiniboine Basin, p. 201. Vide Dafoe. Sifton, p. 43 et seq. for a eulogy of Sifton's role as a defender of the school act.

Such was the situation when the appeal to the Supreme Court from the decision of the Full Court of the Queen's Bench in the Barrett Case was pleaded from May 27 to 29, 1891.[24] On the latter date, by one of those strange and eventful coincidences that were to mark this controversy, Sir John A. Macdonald suffered the stroke from which he expired a week later.[25] The accession of Sir John Abbott--an all too obvious figurehead for Sir John Thompson--followed on June 6, 1891.[26] There soon began a persistent attempt to enlist the aid of Meredith, the anti-Catholic Conservative leader in Ontario, in the Federal Cabinet,[27] in order, it may be assumed, to lend it an aura of respectability in Protestant eyes.

The hostility of the ruling party at Ottawa to the participation of their political arch-opponent, Edward Blake, in this Case became fully apparent when it was announced

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[24] Vide M.S.Q., p. 11 for a brief mention of the result.

[25] Skelton. Laurier, vol. 1, p. 424.

[26] M. R. Mackenzie et al. Guide to Canadian Ministries since Confederation, p. 17. Vide Tarte Papers, P.A.C., vol.4, #261, Oct. 4, 1891, M.J.F.Quinn to Hon.J.A.Chapleau for comments.

[27] Vide Thompson Papers, P.A.C., vol. 274, #83, June 24 - July 17, 1891--three letters involving Meredith's refusal and Thompson's somewhat surprisingly liberal ideas on education.

that S. H. Blake would appear with Ewart before the Supreme Court. An Ottawa barrister named Gormully was to assist Joseph Martin on behalf of the City of Winnipeg.[28]

The main pleadings took place on Wednesday, May 27, 1891 before Chief Justice W. J. Ritchie and Justices Strong, Fournier, Taschereau and Patterson.[29] Justice Gwynne was absent.[30]

The argument for the appellant was begun by S. H. Blake, of the firm of (Edward) Blake, Lash, & Cassells, who appears to have taken a somewhat stronger and more heated stand than Ewart.[31] He declared that the new schools were actually " . . . exclusively Protestant . . ."[32] and that compelling Catholics to submit to taxation for the support

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[28]Free Press (Winnipeg), Wed., May 27, 1891, p. 1.

[29]Vide Ibid., Thurs., May 28, 1891, p. 1 and "Return to the House of Commons, dated the 14th of March, 1892, for a copy of the judgment of the Supreme Court in the appeal case of Barrett vs. The City of Winnipeg, commonly known as the "Manitoba School case." in Sessional Papers, vol. xxv., No. 12, 1892, Paper 46.

[30]Vide Free Press (Winnipeg), Thurs., Oct. 29, 1891,p.2.

[31]Ibid., Thurs., May 28, 1891, p. 1. Vide p.184 for Ewart's argument.

[32]This contention does not seem to have been of much interest to the Hon. Justices, q.v.

of such public schools while receiving no assistance for the maintenance of their own schools would make their children " . . . skilled villains . . ." Separate schools had existed in the Province for forty-five years.[33] The Manitoba Act, he declared, preserved denominational schools and everything existing by law or practice prior to Confederation. "Contrary to the true reading of the statute, he held that those privileges were prejudicially affected . . ."[34] He concluded by maintaining that it was dangerous to give knowledge without religion " . . . as understood by the church." The best writing he had ever seen was that of a convicted forger. Even if the system were valid, it would still be unjust. The Manitoba Act had regard to the existing state of things in Manitoba at the time of union, and also to the situation in New Brunswick at that period. The Parliament of Canada intended to protect the status quo whether under law or only under practice. S. H. Blake ended by asking that the appeal be sustained.

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[33]Ewart specified only 19 years, i.e., from presumably 1871 - 1890, vide p.184 . This latter statement would, strictly speaking, be the more accurate.

[34]A perhaps rather puzzling statement, in view of the hostility of the Free Press to the new Acts and to the Hon. Joseph Martin. Many readers probably concluded that the reporter was antagonistic to Blake's contention!

This tornado of emotion was followed by Ewart's more restrained utterances. He argued that under the Hudson's Bay Company there was organized a sort of de facto government, though " . . . it might be contended de jure there was not."[35] At the time of union, there had been three separate denominational school systems[36] supported only by voluntary subscriptions. The Manitoba Catholics were not wealthy and would be unable to support their own schools while supporting the Protestant ones as well.[37] Ewart then quoted Alexander Mackenzie in the Confederation debates to the effect that the Canada West School Act of 1863 was the only possible solution to such a problem as had arisen in Manitoba by the Acts of 1890. New Brunswick had had to compromise. In addition, the Catholics of Manitoba had enjoyed separate schools for nineteen years.

Joseph Martin was first to reply. He held that the School Acts did not interfere with the guarantees of the Manitoba Act. The schools were not Protestant but non-sec-

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[35] Free Press (Winnipeg), Thurs., May 28, 1891, p. 1.

[36] According to the reporter, Ewart made no mention of the duality argument.

[37] It would thus seem that Ewart used the contention that the schools were Protestant. In his M.S.Q., pp. 139-59, he saw fit to include Archbishop Taché's argument on this score.

tarian; there were religious exercises but no religious training in them.[38] No right had been given by the Manitoba Act for relief from taxation for education any more than for any other Provincial purposes; otherwise, Manitoba could pass no effective education legislation. Though it was difficult to explain the "or practice" clause, the Dominion Parliament did not know the conditions at the time of union and had simply set out to protect what rights--if any--existed.[39]

The following information shows at least one reason why the Free Press could caption this report to the effect that it was generally expected that the Act would be declared ultra vires:

> The justices heard the contentions of Mr. Blake and Mr. Ewart without interruption, but from the very start of Mr. Martin's arguments it was plain that the court was against him, and especially Chief Justice Ritchie, who was outspoken in his remarks against the local act. . . .[40]

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[38] Vide M.S.Q., pp. 304-5 for his address before the Winnipeg Liberal Club, Feb. 20, 1894 in which he made apparent his estrangement from the local Government, reiterated his old stand in favour of secular schools and hinted that the Catholic stand was more honest than the Protestant one. Vide Une page . . . p.76 for Taché's comment.

[39] Vide the previous Cases for indications that Martin merely repeated the stock arguments.

[40] Free Press (Winnipeg), Thurs., May 28,1891, p. 1.

For example, when in answer to the charge that Catholic schools had been confiscated, Martin replied that the Protestant schools had also been appropriated, the Chief Justice retorted that two wrongs did not make a right.[41] Mr. Gormully took the same line as Martin, and met similar rebuffs from the distinguished occupants of the Bench. It was hardly difficult to deduce which way the judgements would tend.

The Court then adjourned until Friday (May 29) to hear Blake's reply close the Case. The Free Press concluded its report with the forecast that an appeal to the Judicial Committee would follow, no matter which side lost.[42] The illness of Sir John A. Macdonald took up most of this journal's space on the day the May 29, 1891 hearing was reported. All that appeared was a brief notice to the effect that Blake had replied and judgement was reserved.[43]

Not until Oct. 28, 1891 did the Supreme Court deliver its verdict. Chief Justice Ritchie declared that it was the duty of the Court to deliver judgement that morning, as the Case was one of public importance. All the judges

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[41] Ibid. Martin appears to have been off balance here. He could easily have made a less vulnerable reply. The Chief justice appears to have been incensed at his ruling in the Renaud Case being cited in defence of the Manitoba Act, vide p. 150

[42] Ibid.

[43] Ibid., Sat. May 30, 1891, p. 2.

except Justice Strong gave elaborate written opinions. The latter concurred in the notes of the Chief Justice.[44] All five concluded that the School Act was ultra vires, the by-laws were illegal, and the appeal should be allowed with costs.[45]

Chief Justice Ritchie delivered the first judgment. After setting forth the grounds of the application and the affidavit of Archbishop Taché,[46] he held that the Federal Parliament must have been cognizant of the situation at the time of union and the feelings on separate schools. Therefore, in drawing up the education clauses of the Manitoba Act, " . . . must we not conclude that the legislature well weighed its language, and intended that every word used should have force and effect?"[47] The Manitoba Act went " . . . much further . . ." than the B. N. A. Act. To allow the argument for the defence was " . . . to reject the words 'or practice' and construe the statute as if they had not been used, . . . as being inapplicable to the existing state of things in Manitoba at the union. . . ."[48] But the words

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[44]Free Press (Winnipeg), Thurs., Oct. 29, 1891, p. 2.

[45]Ibid. Vide also Return, 1892, pp. 7, 11, 20, 24.

[46]Return, 1892, pp. 2-3.

[47]Ibid., p. 3.

[48]Ibid., p. 4.

did apply and to reject them would make the clause meaningless. Every word must be considered significant if at all possible. In this case, their significance was quite plain. The Federal Parliament had sought to preserve de facto rights and privileges. He agreed with " . . . the learned chief justice of Manitoba as to the rules by which the act should be construed . . ."[49] The intent of Parliament, as well as the wording, must be considered. But he saw no absurdity, etc., in taking the "or practice" clause literally, especially as he could see no other possible significance, and other possible terms were only synonyms.

He also agreed:

> . . . that we should ascertain what the language of the legislature means, in other words, to suppose that parliament meant what parliament has clearly said.
>
> It cannot be said that the words used do not harmonize with the subject of the enactment, and the object which I think the legislature had in view. . . .[50]

The language and intent of the legislature was such as to set up protection for rights by usage at the union. His decision in ex parte Renaud had no application, for the situations were entirely different. In the New Brunswick

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[49]Return, 1892, p. 4.

[50]Ibid.

Case, only rights "by law" were protected and such had not existed. In the Case at hand, rights "by practice" were maintained. The Legislature of Manitoba had seemingly taken this view in the first School Act it had passed.[51] He then quoted from Justice Dubuc's Judgement as to the provisions of the school laws of 1871 to 1877,[52] and concluded that this school system " . . . was entirely based and carried on, on the denominational principle as divided between protestant and Roman catholic schools."

In his opinion, the only concern was whether the new legislation prejudicially affected " . . . the class of persons who, in practice, enjoyed the rights and privileges of the denominational schools at the time of the union . . .[53] He then quoted from the School Acts of 1890[54] to show that the Catholics were " . . . prejudicially, that is to say injuriously, disadvantageously . . ."[55] affected by being compelled to support schools to which they could not, in conscience, send their children, and, if unable to maintain

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[51] Ibid., p. 5.

[52] Return, 1892, pp. 5-6.

[53] Ibid., p. 6.

[54] Ibid., pp. 6-7.

[55] Ibid., p. 7.

two sets of schools, be forced to deprive their children of any kind of education. Their interests were directly affected, but even if only indirectly affected, the Legislature still had no power to practically deprive them of their denominational schools and compel them to support those acceptable only to Protestants.[56]

Two things stand out in this decision: (1) It was largely a tacit refutation of the judgements of Taylor and Bain, and (2) it made no distinction between rights to denominational schools and rights to separate schools.

Justice Patterson contented himself with an implied attack on some of the contentions of Taylor and Bain, in greater detail than had the Chief Justice.[57] He examined the differences in construction between the first sub-sections in the education clauses of the B. N. A. and Manitoba Acts, and the significance of the terms "law", "practice", and "injuriously affect". Thus, he pointed out that "law" meant "statute law" and, with reference to section 22, held that the introduction of the words "or practice" was necessary to give the statute " . . . something to operate on . . ." incidentally admitting that " . . . It is not an example of precise or very accurate drafting. . . ."[58]

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[56] Ibid., p. 8

[57] Return, 1892, pp. 8-11.

[58] Ibid., p. 8

He rejected the contention that the words "by practice" must mean something prescribed,[59] because the clause was not characterized by " . . . precision and accuracy . . ." The Federal Legislature must be credited with intending something by the words. The right to denominational schools was incidental to British freedom and not dependent on legislation. The Manitoba Act sought to preserve this right in favour of those classes exercising it at the union. He admitted that this construction might seem to violate the language of the enactment, but the Courts were not bound to be " . . . harsh and pedantic . . ." in such matters. Three precedents were cited to this effect.

He then maintained that:

> The rights and privileges preserved by the statute were only those peculiar to the schools as denominational schools, or which gave the schools that character. Chiefly, they were the education of their children, under the control and direction of the church, and the maintenance of their schools for that purpose.

However, he was:

> . . . not prepared to hold that the immunity enjoyed from liability to support schools of another denomination, at a time when taxation for school purposes was unknown in the territory, was a privilege in respect of denominational schools.[60]

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[59] Vide Justice Taylor's judgment, pp. 151-52.

[60] Return, 1892, p. 9. This latter contention would seem to second Ewart's admission that this was a privilege rather than a right--vide Justice Bain's references to the argument of counsel. p. 143.

It had been asserted that the Catholics would avail themselves of their own schools in preference to the non-denominational ones, and thus they, as well as the respondents, in effect held that the right or privilege to support and maintain denominational schools had not been done away with by the new legislation.[61] But, though the right still existed, there was little real doubt that it had been prejudicially affected. Taxation for public schools injured the ability of the minority to support denominational schools. The degree of infringement was immaterial. Municipal taxation had nothing to do with school legislation.[62]

Prejudicial affectation also involved the question of impairment of willingness to support denominational schools. Precedents were cited to indicate that rights were prejudiced if their enjoyment were rendered " . . . more difficult or less convenient . . ." But such had to be a " . . . direct effect of the law . . .", e.g., compelling payment of the public school tax.[63] Such indirect impair-

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[61] Ibid., His Chief Justice had avoided such a qualification.

[62] Return, 1892, p. 9.

[63] Ibid. But would the School Act be valid so long as the said taxes were not collected?

ments as competition by the public schools would not be forbidden by the Manitoba Act, though he was not quite certain what the Archbishop meant by this complaint.[64]

He concluded with a " . . . scarcely necessary . . ." remark to the effect that the Manitoba Legislature was not forbidden to make janitorial regulations for denominational schools, a comment which appears to have tickled the fancy of Their Lordships of the Judicial Committee.[65]

It is noteworthy that five significant admissions were made in this Judgment:

(1) Doubt was cast on the care with which the education clauses of the Manitoba Act had been drawn up.

(2) His opinion was based on an admittedly loose interpretation of the "by practice" clause.

(3) He was not prepared to admit that Catholics had a right to immunity from taxation from the support of other denominational schools, though they were not to be impaired in supporting their own.[66]

(4) Catholic schools had no right to freedom of competition from the public schools.

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[64] Return, 1892, pp. 9-10.

[65] Ibid., p. 10. vide p.261 for reaction of the Judicial Committee.

[66] The distinction seems rather subtle!

(5) He was not certain what Archbishop Taché meant by this latter complaint.

(6) The Manitoba Act did not protect from indirect effects of legislation.[67]

A certain inconsistency emerged in his claim that the right to denominational schools was one incidental to the freedom of the British subject and yet had been protected by the Manitoba Act only as regards those exercising it at the time of union.[68] In addition, unwillingness to support denominational schools as well as public schools might seem an indirect, rather than a direct, effect of the legislation. Justice Patterson does not seem to have presented so clear and unequivocal a stand as had the Chief Justice. In fact, his ruling was the weakest link in the Supreme Court's chain of unanimity, and undoubtedly furnished a vulnerable point of attack before the Judicial Committee.[69]

Justice Fournier set out the grounds of complaint and remarked that the appeal had been carried from the Judge -

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[67] Contrary to Chief Justice Ritchie, vide p. 190.

[68] This would seem a concomitant of the failure to distinguish between denominational and separate schools--a characteristic of all the Supreme Court rulings in the Barrett Case.

[69] Vide pp. 253-62.

ment of Justice Killam and that it was the verdict of the Full Court which was then under consideration. He then stated the necessity of referring to the circumstances of Manitoba's entry into Confederation:

> . . . after a rebellion which had thrown the people into a strong and fierce agitation, inflamed religious and national passions and caused the greatest disorder which rendered necessary the intervention of the federal government . . .[70]

and set out the provisions of the first sub-sections in both the B.N.A. and Manitoba Acts, as well as those of the School Acts from 1871 to 1876, passed under the authority of the Manitoba Act, which latter had been " . . . confirmed by an act of the imperial parliament . . ."[71]

The affidavits of Archbishop Taché and those filed in opposition did not contradict each other and gave an accurate picture of the situation at the time of union. The schools existing at that time " . . . were in fact and in practice separate schools (denominational schools). . . ."[72]

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[70] Return, 1892, p. 11. This remark would seem more applicable to the situation in Eastern Canada than to that in Red River.

[71] Ibid., p. 12.

[72] Return, 1892, p. 13. Like Ritchie, Justice Fournier made no distinction between separate and denominational schools, and in fact went farther in emphasizing this lack.

He then reviewed the provisions of the School Acts of 1890,[73] and maintained that:

> The system thus established is altogether opposed to the religious ideas of catholics and to the doctrines of the Roman catholic church and takes away from them the right recognized by the Manitoba Act to have separate schools.[74]

Solution of the problem of the constitutionality of the School Act rested on the significance of the "or practice" clause. (He again took pains to emphasize that denominational and separate schools were equivalent.) Precedents were quoted to the effect that Courts of Law were restricted in their freedom to interpret statutes, and it was admitted that these words lacked a technical significance. But the argument that they protected only the right to private schools was an extremely narrow construction and opposed to the terms of the education clause. The other contention--that they forbade only compulsory attendance at the public schools--was hardly " . . . liberal and sensible. . ."[75]

He then tacitly admitted that the term "or practice"

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[73] Ibid., pp. 13-15. On p. 14 he appeared to imply that the new public schools were actually Protestant schools.

[74] Ibid., p. 15.

[75] Ibid.

was capable of different interpretations but undertook to show that the intent of the legislature must be considered. Numerous precedents were referred to in this regard.[76] Justice Fournier then drew attention to the schools controversy prior to Confederation, and held that the B.N.A. Act was an attempt to protect the rights and privileges of minorities in education. And this protection was intended to apply also to provinces subsequently entering the union. With respect to the New Brunswick Case, he held that the decision of Sir W. J. Ritchie, afterwards affirmed by the Judicial Committee, made it plain that " . . . if the rights which the catholics had by practice had been especially mentioned, as well as those existing by law, the decision would have been different."[77]

Mention was then made as to the dispute between Mr. Ewart and the Attorney-General (Martin) over the influence of the New Brunswick controversy on the introduction of the "or practice" clause, and the contentions of Justice Dubuc[78] were practically repeated, and strongly affirmed.[79]. This

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[76] Return, 1892, pp. 15-16.

[77] Ibid., p. 17.

[78] Vide pp. 159-65.

[79] Return, 1892, pp. 17-18.

latter judge's other (and it might seem rather far-fetched) contention that the Catholics of Manitoba would have been under a worse position than those of New Brunswick, if they had been left only to the protection of the B.N.A. Act,[80] was also set down. The words "or practice" were necessary to make the statute applicable, and the Manitoba Legislature acted on the assumption that separate schools were preserved in the system it established for nineteen years.[81]

Though the words "or practice" had not a technical significance, they had under the circumstances " . . . a clear and precise meaning . . ." and were inserted purposely. He maintained that the delegates of 1870 knew of the de facto existence of separate schools and that doubtless the question was discussed thoroughly.[82]

It was absurd to contend that the clause was meant to protect only the right to private schools, since such existed by common law and needed no such protection. He again took cognizance of Justice Dubuc's Judgement[83] by incorporating the argument that when the language of a statute

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[80] Vide p. 162.

[81] Return, 1892, p. 18. However, this establishment and preservation had not been without altercation and reservations, vide p. 43 et seq.

[82] Ibid., pp. 18-19.

[83] Vide p. 165.

was capable of more than one interpretation, " . . . the reasonable and salutary . . ." should triumph.[84] Thus, rights to separate schools were protected from prejudicial affectation.

Justice Fournier also saw fit to include Justice Dubuc's contention that the other sub-sections of both the B. N. A. and Manitoba Acts were also intended " . . . to protect the exercise of the right to separate schools by the first section."[85] If they had no right to separate schools, it would be ridiculous to include an appeal to the Federal Government for the protection of such.[86]

The most outstanding characteristic of this Judgement was its heavy reliance on the contentions of Justice Dubuc[87] of the Queen's Bench, and its comparative freedom from the doubts and qualifications of Justice Patterson.[88]

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[84] Return, 1892, p. 19.

[85] Return, 1892, p. 19.

[86] Justice Fournier might have been contending that the B.N.A. Act applied to Manitoba, since the Manitoba Act did not specifically refer to separate schools. He at least would have held, with Ewart, that it must be taken into account in interpreting the Manitoba Act.

[87] Vide pp. 158-72.

[88] Vide pp. 193-94.

The final ruling was pronounced by Justice Taschereau.[89] He first set out the preliminaries and then obviously used the French version of the Manitoba Act that "by practice" meant "by custom".[90] The Attorney-General had not denied that such rights were protected by the Manitoba Act but had held only that the new School Acts did not infringe such rights.[91] Reference was made to Archbishop Taché's affidavit and to those of Polson and Sutherland, to show that before the union the Catholics of Manitoba had the right by custom to their schools and " . . . also, negatively and as a correlative and an essential part of such privilege, that of not being obliged to contribute to the support of any other system of education. . . ."[92] The right to private schools was guaranteed by common law and could not really be termed a privilege and it was an illusion to pretend that it needed the protection of the Manitoba Act. The

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[89] Return, 1892, pp. 20-24.

[90] Ibid., p. 20.

[91] Ibid., pp. 21-22.

[92] Return, 1892, p. 22.

maintenance of public schools by Catholics for the use of Protestants would be a privilege for the latter rather than the former.

The argument that the school law was valid because compulsory attendance was not prescribed and separate schools could still be established was " . . . entirely erroneous. . . ." He could not believe that " . . . it was seriously relied on, were it not that the provincial court has adopted it. . . ."[93]

Justice Taschereau then referred to the situation in 1870 and the provisions of section 22 to show that Protestants would have been entitled to the Quebec system " . . . in its entirely (sic) and without prejudice, that is with the exemption of being taxed for the catholic schools. . . ."[94] if they were in the minority. The Catholics claimed the same right, i.e., to schools on the Ontario system, " . . . or on the same principle . . ." This was the object of the insertion of the terms "or practice".

The respondent and the Attorney-General were willing to recognize the abstract right to separate schools but, in practice, wished to infringe it. Catholics contributed to the public funds for education but received no share. A

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[93] Ibid. This latter declaration was followed by a sardonic jibe at the unfairness of the non-Catholic majority, which remark overlooked the fact that this majority might find it difficult to believe they had disbarred Catholics from the public schools.

[94] Return, 1892, p. 23.

false interpretation had been put by certain parties on the archbishop's claim to freedom from competition. All His Grace wanted was for the schools to be equal before the law. But Catholics were assessed for the support of other schools, not only on their private property but also on their school property, and provision had been made to confiscate the latter.[95]

The argument of the respondent, that the right to levy municipal taxes would be infringed if the School Act was declared invalid, did not apply. Section 22 protected only educational rights and Catholics were not deprived of a share in the benefits of municipal taxation. It was otherwise with taxation for education under the new legislation. Such an enactment prejudiced the rights upheld by the Manitoba Act by interfering or obstructing their enjoyment.[96]

This latter Judgement was obviously a support to that of Justice Fournier, as the previous ruling of Justice Patterson had obviously been intended to act as a reinforcement to that of the Chief Justice.[97] However, it contained far fewer qualifications than did that of Justice Patterson.

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[95] Ibid., p. 24.

[96] Return, 1892, p. 24.

[97] Vide pp. 186-201.

Significantly, it followed Justice Dubuc in holding that the right of the Catholic minority was to the Ontario system rather than to the Quebec arrangement.

It is intriguing to note that while the verdicts of all five Justices supported, to a greater or lesser extent, the contentions advanced by Mr. Ewart,[98] and paid particular attention to the "or practice" clause,[99] a certain difference of emphasis emerged. Justices Ritchie and Patterson seemed primarily interested in refuting the contentions of the majority opinion of the Queen's Bench, while their two French-Canadian colleagues appeared principally concerned with upholding the position of Justice Dubuc. However monolithic the verdict of the Supreme Court might have appeared to the casual observer, a glance at the Judgements--especially that of Justice Patterson--would have proved rather disillusioning.

But such glances did not seem to have come very often. That the " . . . bitter agitation . . ." had been " . . . all for nothing . . ." seemed a foregone conclusion to the commentators of the Free Press. The general impression

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[98] Vide pp. 145-46, 184.

[99] Vide Ibbetson. Decisions . . ., p. 24 for elucidation.

appeared to be that the Province would not trouble to appeal the Case to the Judicial Committee. But this journal also announced that Joseph Martin had left for Toronto soon after the decision had been declared.[100] Perhaps it was then and there that the next step in the campaign of the local Government was concocted.

John S. Ewart might well have congratulated himself on his supposedly unqualified success before the Supreme Court. But the Case was not to stop there. He was soon to see it carried before a tribunal with which he was not familiar and into the field of action of the English bar, for which his lack of experience placed him at a disadvantage.[101] Ewart would have had quite enough with which to contend without another development looming up.

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[100] Free Press (Winnipeg), Thurs. Oct. 29,1891, p.2. Toronto was the headquarters of D'Alton McCarthy, with whom Martin had formed a connection and with whom Sifton also was to become a confederate.

[101] Dafoe. Sifton, p. 45. No local lawyer had ever before conducted an appeal from the Supreme Court to the Judicial Committee.

CHAPTER SEVEN

THE LOGAN CASE DIVERSION

Once the Supreme Court had declared itself so bluntly opposed to the position taken by the Provincial Government, their adversaries should have assumed that something more would have been attempted by that resourceful body than merely to appeal the Case of Barrett vs. City of Winnipeg to the Judicial Committee[1] and fight it out on the grounds that had already proved so ineffective before the highest court of appeal in the Dominion. A new argument was manifestly necessary, was soon discovered[2], and in the end proved highly effective and satisfactory--at least from the point of view of the local Government, though not necessarily from that of the ecclesiastic who became an unwitting party to this clever manoeuver to recoup the political fortunes of the Manitoba Liberals, by re-establishing the legal status

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[1] Vide Sifton Papers, P.A.C., vol. 291, #1-5, June 19, 1891, to Jos. Martin asking his opinion and estimate of the time to reach the Judicial Committee if pushed hard.

[2] Vide Sifton Papers, P.A.C., vol. 269, #1-81, Dec.16, 1891, to Jos. Martin, for evidence of the intention in instituting the Logan Case. Compare this with Reports of Debates in the Manitoba Legislature, Apr. 14, 1892, in Free Press, Apr. 15--Sifton held Case was brought about to discover the Government's rights through argument with other denominations.

of the School Acts of 1890 and the virtual independence of the Manitoba Legislature in matters of education within the Province.

However, until the Logan Case emerged in December, 1891, Archbishop Taché and his advisors were of the opinion that the Barrett Case would simply be appealed by the Province to the Judicial Committee. A letter dated Nov. 10, 1891 from His Grace to the Minister of Justice,[3] while expressing great satisfaction at the recent decision of the Supreme Court, did reveal some anxiety regarding the forthcoming appeal to England, on the grounds of a possible adverse ruling, the expense involved, and the political trouble to the Government consequent on an appeal to the Governor General in Council. (But this does not necessarily mean that he suspected a new manoeuver on the part of the Province.) He reminded Thompson of the debt of the Federal Government to him for his refusal to embarrass them politically and their assistance was requested with regard to financing the forthcoming appeal and also in the securing of " . . . the best English counsel. . . ." Also, His Grace considered " . . . the services of Canadian Counsel . . . indispensable. . . ." in order to refute objections on the score of local knowledge. He therefore recommended:

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[3]Thompson Papers, P.A.C., vol. 140, #17215.

> . . . that the Government would secure the services of the Hon. Edward Blake and Mr. Ewart of Winnipeg: the former has been closely connected with the passing of the British North America Acts and knows the minutest details of the School question both in Ontario and Quebec. Mr. Ewart is equally well posted with what has occurred in Manitoba and I cannot help thinking that both will largely contribute in the success of obtaining the dismissal of the appeal.[4]

This sanguine expectation was not to be realized.[5] On Nov. 25, His Grace found it necessary to go East concerning Counsel. Thompson, perhaps irritated by this new attempt to involve Blake in the Case, had sent no reply,[6] though he excused himself by explaining that he had been awaiting the arrival of (Gerald) Brophy.[7] That some arrangement had, however, been made with Father Cloutier as regards the appeal, particularly as regards financial terms, appeared from the gist of the same missive.[8]

But while these careful plans were being laid, the

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[4] Ibid.

[5] Vide p. 227.

[6] Thompson Papers, P.A.C., vol.141, #17368, telegram from Taché.

[7] Ibid., vol.252, Nov.28, 1891, to Taché. Final copy in A.A.S.B.

[8] Vide also A.A.S.B., Dec. 1, 1891, Barrett to Taché re Cloutier's interview with Abbott & Thompson and Barrett's hope that the Rev. Father had overcome ". . . Sir John's political scruples in selecting counsel. . . ." Was it Abbott or Thompson who opposed Blake's inclusion??

passage of a new " . . . by-law No. 514, of the city of Winnipeg, for levying and raising the (school) assessments for the year 1891 . . ."[9] had made necessary a new action before the local Courts in order to prevent Catholics being taxed by virtue of a by-law which had not come under the ban of the Supreme Court decision--since it had not been passed in time to be taken before the Supreme Court with the By-Laws of 1890, although put through prior to the verdict of the Supreme Court.[10] Incidentally, this occurrence served to illustrate the difficulty of enforcing a judicial decision in the teeth of hostile authorities.

On Nov. 30, 1891, application was made before Justice Bain to quash the aforementioned By-Law.[11] The Government was represented by three Q.C.'s: Howell, Perdue, and Campbell, and by a barrister named Cumberland. Joseph Martin was conspicuous by his absence. Howell attempted to have the motion refused on a technicality, but was overruled by the judge. He then asked for a postponement until the return

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[9]"Judgment of the Court of Queen's Bench" In the Supreme Court of Canada in the matter of Certain Statutes of the Province of Manitoba relating to education, CASE referred by the Governor General in Council to the Supreme Court of Canada . . . 1893, p. 146.

[10]Vide Free Press (Winnipeg) Tues. Dec. 8, 1891, p.5 for Montreal Star's interview with Taché.

[11]A.A.S.B., Dec. 1, 1891, Barrett to Taché.

of Archbishop Taché, to examine him on his affidavit, hinting that His Grace:

> . . . would be asked to produce documents that would materially alter the matter and shed new light on [the] manner in which the words "or practice" were introduced into the Manitoba Act. . . .[12]

They also wished to examine Barrett re his affidavit. Postponement was granted until Thursday, Dec. 17. Barrett could not see what they hoped to gain by this Fabian tactic.

What the local Government hoped to gain, however, soon became apparent. On the very same day Barrett notified His Grace of the postponement, Clifford Sifton was advising Isaac Campbell, Q.C., of the line of argument to assume before the courts.[13] The fact that there had been no freedom from compulsory attendance under the School Acts in force from 1871 to 1889 was to be stressed, in order to lend credence to the claim that the only privilege protected for the Catholics by the Manitoba Act was that of not being compelled to attend the new public schools. The letter certainly did not make any pretence of advocating any of the appurtenances of a separate system for Anglicans, though the affidavit of Bishop Machray,[14] presented only two days later,

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[12] Ibid.

[13] Sifton Papers, P.A.C., vol. 291, #1-67, re Rate By-Law 1891.

[14] M.S.Q., pp. 12-16.

as part of the forthcoming Logan Case, very strongly hinted at such a desire on the part of the author.[15]

On Saturday, Dec. 5, 1891, a motion was made by Mr. Perdue before the Chief Justice (Taylor) of the Queen's Bench to have By-Law 514 quashed on the grounds that it was illegal to assess members of the Church of England for the support of schools not under the control of that Church.[16] Three affidavits submitted by Messrs. Logan and Hayward and by Bishop Machray were discussed. That of Alexander Logan,[17] the applicant, after setting forth that he was a member of the Anglican Church, and dealing with the independent role played by his Church prior to the union and to some extent after it, claimed dissatisfaction with the religious exercises under the new Act, the right to have his children educated under the auspices of the Church of England and to be entitled to exemption from taxation for the support of schools not under its control, on the grounds that his rights and those of other Anglicans were prejudicially affected and their ability to support their own schools was infringed.[18]

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[15] M.S.Q., p. 15, clauses 22 & 23.

[16] Free Press, (Winnipeg) Mon., Dec. 7, 1891, p. 6.

[17] M.S.Q., pp. 11-12.

[18] An obvious reference to the Supreme Court ruling in the Barrett Case.

The affidavit of Robert Henry Hayward[19] maintained that the religious exercises under the new Act were not in conformity with the teachings of the Church of England (and set forth the regulations of the Advisory Board in support of this contention), and pointed out that, while compelled to pay a tax for the support of the public schools, he personally sent his son to a school under the control of his Church, and that other members of the Church of England were doing the same.

Bishop Machray's affidavit[20] first set forth the activities of the Church of England in education prior to the union, his hopes for religious education under the new School Act of 1871, his subsequent disappointment, and his even greater dissatisfaction with the provisions of the 1890 Act. He went further than Logan in stating that no only did the new legislation prejudice their rights to denominational schools held by practice and exercised at the time of the union and that members of the Church of England were therefore entitled to exemption from taxation for the support of public schools, but were also entitled to state aid for their denominational schools. Thus, the affidavit of the

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[19]M.S.Q., pp. 16-17.

[20]M.S.Q., pp. 12-16.

good Bishop was much more definitely a request for a separate system than was that of the initiator of the proceedings.[21]

By Thursday, Dec. 10, 1891, the Free Press had learned that the motion was to be argued before the Full Court with Perdue, Q.C., for Logan; Isaac Campbell, Q.C., for the City; and Howell, Q.C., on behalf of the local Government.[22] It also reported that Perdue had requested that the Case go immediately to the Full Court in order to avoid delay and that Campbell, on behalf of the respondent, had consented. The Chief Justice had agreed to this expedient. Howell had maintained that the local Government wished to know what powers it had to legislate for public schools and had announced that it intended to contest the Case all the way. He had also asked leave to file an affidavit on behalf

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[21] Vide Free Press (Winnipeg), Wed. Dec. 9, 1891, p.2, for evidence of the excitement aroused by this move. The Toronto Mail of Dec. 8 concluded that the Bishop was not asking for distribution of taxes but only for immunity--but saw even this as a threat to the public school system. A.A.S.B., Dec. 6, 1891, Barrett to Taché, indicates that the former had discussed this move with Luxton and their solicitors and the opinion was that it was a move by the local Government to prejudice the Catholic case. Luxton believed that the Bishop was simply being duped. It was suspected that the Presbyterians would launch a similar appeal. Barrett concluded with a caustic comment on the inconsistency and heresy of the Bishop and his Church.

[22] Free Press (Winnipeg), Thurs., Dec. 10, 1891, p.6. These same men had previously hindered Barrett's second application, p.208, and Perdue had appeared on behalf of the local Government in the St. Joseph's School Case, vide p.99. No wonder the caption stated that the Government was at the bottom!

of the Presbyterians.[23]

That the Bishop of Rupertsland was having misgivings about the wisdom of the course he had adopted soon became apparent. We have already seen that his course was basically consistent[24]--if he could not get his own separate schools, he was by no means willing to see another Church in sole and unrestricted possession of so advantageous a position. But supporting a motion to avert this latter calamity and supporting a move which might lead to the destruction of the right under the Manitoba Act to Church of England separate schools were manifestly two different matters. This, at any rate, we may assume was the reason--apart from any disinclination to become involved with politics--which motivated his Grace in attempting to dissociate

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[23]This was apparently the new affidavit by Rev. Dr. George Bryce, vide M.S.Q., pp. 18-19, which repeated the first six clauses of the affidavit he had presented in connection with the Barrett Case, vide M.S.Q., pp. 8-9, and then quoted from Rev. Principal King's defence of the proposed new system in October, 1889, vide M.S.Q., pp. 189-91.

[24]Vide p. 112. Also Une page . . ., p. 108, for Taché's view of the case--"a lawyer's trick to prejudice the Barrett Case. Authors did not take any account of the immense ridicule with which they covered the Lord Bishop of Rupert's Land in the eyes of those who knew his attitude on the Manitoba schools both under the old and new laws. The Manitoba Government, in reality both the applicant and respondent, lost and won the Logan Case." (Author's translation.)

himself from these proceedings.[25] By Dec. 14, 1891, the Free Press could maintain His Grace had authorized them to state that neither he nor the Church of England were parties to the inception or promotion of the application, and that his affidavit had no significance as an endorsement of the proceedings. It was simply a statement that could have been required from him by a Court of Law.[26] (His Grace was manifestly more interested than most of his flock in the preservation of the right to Anglican separate schools, however much he might fail to maintain them in practice.) The same report made great play over the Logan Case, originally accepted as a Church of England action, being an imposition by the local Government upon the Courts and the people in order

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[25] Vide Benoit. Taché . . ., p. 687, for praise of this reversal. Vide also Thompson Papers, vol. 211, #26558, June 8, 1894, from Brophy re His Grace's mistrust of local Government handling University land grants. But vide Dafoe, Sifton, p. 41--His Grace's Feb. 1895 letter to Premier Bowell stating that there was no properly Protestant instruction under the old system.

[26] Free Press (Winnipeg), Mon., Dec. 14, 1891, p. 4. ". . . The so-called Church of England case is a pretence, a farce, and a fraud." But the same report held both Anglicans andPresbyterians entitled in law to all that Catholics could get. Ewart would not have agreed; vide p.221. Vide also M.S.Q., p. 16 for H. M. Howell's letter of Dec. 18, 1891 to the Tribune (Winnipeg) which set out the same contention as had the Bishop. (His Grace did not explain why he had not waited for a subpoena.)

to prevent any possible settlement of the dispute before the elections, and so avoid an overwhelming defeat. It held that Logan had been indemnified against costs by the local Government[27] and heaped aspersions upon Perdue, Campbell, and Howell. It concluded by chiding Logan for being a dupe of the Government and for waiting twenty years to discover that his denominational rights had been infringed. W. F. Luxton was making things rather warm for his erstwhile comrades-in-arms!

On the same day, it was announced that Mr. Ewart, on behalf of Mr. Barrett, had withdrawn the application to quash the By-Law of 1891 and that the 1890 By-Law was being appealed to the Judicial Committee.[28] A letter dated Dec. 18, 1891, set out Ewart's reasons for this action:[29]

> . . . Mr. Howell . . . intended to put in a great many affidavits, and also to examine your Grace upon a variety of subjects. Amongst other things he wished to examine you with reference to the different petitions that were got up prior to the transfer, and

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[27]This recalls the similar assurances evidently given Barrett by the Federal Government.

[28]Free Press (Winnipeg), Mon.Dec.14,1891, p. 6.

[29]A.A.S.B., Ewart to Taché.

> as to the different bills that were drawn for submission to Parliament. As you are aware it is my opinion that these matters would rather mitigate against us than otherwise. He intended also to file a number of affidavits of Roman Catholics to the effect that the body was by no means unanimous in its demand for separate schools. I presume he could easily have got 20 or 25 of these in the Province. This, I think too, would furnish some argument against us,[30] and at all events would tend to cloud the distinct issue raised upon the case as it at present stands. Mr. Howell's plan was to get all this new material before the Court and then to appeal the second case with the other two, and in this way get the additional material before the Privy Council. I thought it extremely important to thwart this plan and for that purpose withdrew the application.
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> Father Cherrier did not at all like the idea of the withdrawal and I had a long interview with him upon the subject; I think however he left me convinced that while not pleasant to turn back, yet that it was much more important to leave our case unaffected than to score another victory which would turn into a defeat in case we were beaten in the first case.

Evidently Ewart considered Howell's sideline manoeuvres to be more of a threat to the Catholic position of the dual nature of Manitoba education than was the Logan Case per se.

According to a statement before a Free Press reporter on Friday, Dec. 18,[31] Archbishop Taché did not learn of this action by Ewart until Dec. 17. His Grace also declared that he had not gone East because of the school question and had not visited Ottawa. When he had learned of the postponement

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[30]It was evidently safer to concentrate on what had been accorded in 1870 rather than on how it had been accomplished.

[31]Ibid., Sat.,Dec. 19, 1891, p. 8.

of the hearing, until Dec. 17, he had hastened to return in order to be available to testify and greatly regretted not having been able to do so. The second Barrett Case had been withdrawn, declared His Grace, in order to save the City trouble and expense since the Logan Case would serve the same purpose, (i.e., to quash the By-Laws).

The Logan Case hearing had taken place three days ahead of schedule.[32] Two main grounds had been set forth by the counsel for the applicant: (1) The By-Law made no distinction between members of the Church of England and those of other denominations. (2) It was illegal to assess Anglicans for the support of schools not under the control of the Anglican Church and using religious exercises not prescribed by it.[33] Additional affidavits were set forth. That of George Bryce has already been mentioned. (Vide p.213.) That of Alexander Polson was practically a replica of the one he had already filed in opposition to the application of John Kelly Barrett against the By-Law of 1890.[34] The

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[32] Free Press (Winnipeg), Tues., Dec. 15, 1891, p.3. Report of the Dec. 14 verdicts. Note that M.S.Q., p. 21, gives the erroneous date of Dec. 19 in giving a brief statement of the gist of the ruling.

[33] Similarity to the Catholic grounds in the Barrett Case is obvious. Vide M.S.Q., pp. 6-8.

[34] Vide M.S.Q., pp. 10 & 17-18.

affidavit of Edmund M. Wood stated merely that the government-supported Manitoba Deaf and Dumb Institution was non-sectarian.[35] It was accompanied by one from Thomas Dickey Cumberland concerning census figures showing the relative strengths of the various denominations, with Catholics definitely in the minority.[36] Another affidavit was submitted by Hector Mansfield Howell. It indicated the scattered nature of the population and advanced the opinion that the granting of separate schools to both Anglicans and Catholics would lead to great difficulty in supporting education in the rural areas and to defective education.[37] It is illuminating to note that these two latter affidavits were filed by barristers who had opposed Barrett's second application.[38] All five of these affidavits were apparently in opposition to the motion.

Perdue, Q.C., remarked on behalf of the applicant[39] that this Case was so similar to the Barrett Case that unless there was a clear distinction the application was bound to succeed. It had been objected that the schools described

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[35] M.S.Q., pp. 19-20.

[36] M.S.Q., p. 20.

[37] Ibid.

[38] Vide p. 208.

[39] Free Press (Winnipeg), Tues., Dec.15, 1891, p. 3.

in the affidavits of Logan and Bishop Machray were only private schools, but they had been partially supported by the Church rather than by fees, and thus, in a sense, had been "free schools".[40] Perdue then declared the contention of the dual division of Christendom to be erroneous.[41] The Church of England had never called itself "Protestant" and in fact existed before the term emerged. It had always been Catholic.[42] No amount of acquiescence by the applicant could justify a bad law. He implied that no action had been taken in 1890 by the applicant because the Barrett Case then sufficed as an attack.[43]

Counsel for the applicant, in answer to the Court, stated that the applicant did not claim to represent his Church as a body nor to bind the authorities of that Church. He appeared merely on his own behalf and neither the Bishop

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[40]He would thus imply that they were to some extent public, since no student was turned away for inability to pay the fees.

[41]Vide p. 168 for the Judgement of Justice Dubuc.

[42]But it had become both and Dubuc had not maintained that Anglicans were not legally entitled to separate schools. In fact, he had implied that they were.

[43]The equivocal position of the Church of England people is evident. If they had really desired their own separate schools, surely their best move would have been to support this application.

nor anyone else could waive his rights.[44]

Howell, on behalf of the local Government,[45] stated that that body wished to facilitate the proceedings while resisting the application, in spite of the general impression that it was "A Put Up Job" to end Catholic separate schools.[46] He continued his discourse by indicating that it might be argued that the Manitoba Act protected school rights only within the original boundaries, to which Justice Dubuc objected that such was a very narrow construction. Howell also objected that in New Brunswick only the schools existing at the time of Confederation had been protected and that the choice of Bibles bore out the contention that the B.N.A. and Manitoba Acts dealt only with two bodies--Catholics and Protestants.[47] After a few other minor remarks, Isaac Camp-

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[44]This was presumably a refutation of the objection that Logan had no claim since his rights belonged to him by virtue of membership in a group whose distinct rights had been waived by their Bishop under the terms of the 1871 School Act. Ewart apparently agreed with this. Bishop Machray was certainly, however, no longer pressing the issue.

[45]Free Press (Winnipeg), Ibid.

[46]This would seem an accurate indication of the nature of the Case.

[47]This Chancellor of the diocese of Rupertsland had no reluctance in negating the desire of his Bishop for recognition of the legal right of the Anglican Church to a separate school system. Indeed, Howell took pains to point out that Taché's affidavit had made out that Catholic schools were part of the Church while Logan's application made out no such point on behalf of the English Church.

bell followed for the City. Perdue was not called upon to reply.

Judgement was delivered without leaving the Bench.[48] Chief Justice Taylor delivered the main ruling in which Justice Dubuc concurred. Justice Bain delivered a ruling which, like that in the Barrett Case[49] followed the contentions of the Chief Justice while expressing them in a more aggressive fashion.[50]

The Chief Justice[51] held that the By-Law be quashed. He reviewed the application and the Supreme Court Judgement which held rights to denominational schools at the union prejudiced and the School Act ultra vires. No attempt had been made to contradict the affidavits and the Case was no different from the Barrett Case. Both had been raised by an individual member of the Church concerned. Members of the Church of England were also " . . . a class of persons . . ." within the meaning of the Manitoba Act.[52] In the

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[48] Vide Sifton Papers, P.A.C., vol.269, #1-81, Dec. 16, 1891, to Martin.

[49] Vide pp. 154-55.

[50] Vide "Judgment of the Court of Queen's Bench" . . . 1893, pp. 144-46.

[51] Free Press (Winnipeg), Tues., Dec. 15, 1891, p. 3.

[52] A.A.S.B., Dec. 6, 1891, Barrett to Taché stated that Ewart was " . . . very positive that the Manitoba Act only recognizes two Classes of persons in Educational Matters viz. Catholic and Protestant and in support of this contention he quotes (sub-section 2 in section 22 of the Manitoba Act) . . ." (According to this, Ewart thus took a narrower view than Justice Dubuc.)

Renaud Case, the Chief Justice of the local Court had held that subsection 1 of section 93 did not apply only to just Catholics and Protestants.[53] The same construction must be put on the corresponding section in the Manitoba Act if such were the true reading of the B. N. A. Act. He therefore concluded that, under the Supreme Court ruling in the Barrett Case, Anglicans were entitled to rights which had been prejudicially affected by the Act of 1890 and that the previous acquiescence of the applicant did not inhibit him from contending for a public right.[54]

It is a curious coincidence that the same day--Dec. 18, 1891--saw the appearance of three representative opinions on the proceedings. On that day, Archbishop Taché stated in an interview[55] that he at first had considered the Logan Case brought by the Bishop of Rupertsland to be bona fide litigation. He had not suspected fraud though some parties in Montreal had intimated that there was an ulterior motive.

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[53]This was the second time this ruling by Chief Justice Ritchie had been used to prejudice the Catholic claims, vide pp. 126 & 150.

[54]A.A.S.B., Dec. 6, 1891, Barrett to Taché. Ewart held that the Anglicans had "prejudicially affected their rights, if they have any, by abandoning them at the time of Confederation . . ."

[55]Free Press (Winnipeg), Sat., Dec. 19, 1891, p. 8.

However, he did not see how it could affect the Case coming up before the Judicial Committee and many eminent men in the East had assured him that there was no danger of an adverse decision. In the meantime, he presumed Catholics would not pay their school taxes. Some had already refused.

Also on Dec. 18, H. M. Howell, in a curt letter to the Tribune of Winnipeg,[56] set forth the question which had to be taken before the Judicial Committee and which the Barrett Case alone could not settle:

> When our constitution makers gave the local legislature power to legislate as to schools, was that power made (1) subject to the rights of each of the above named three denominations to teach their peculiar religious doctrines in the schools, or was it simply limited (2) to Protestant as distinguished from Roman Catholic or (3) were there really no rights reserved to religious teachings in the public state-aided schools?

The letter made it quite apparent that the main idea in initiating the Logan Case was to prejudice the Catholic case by maintaining that rights guaranteed them would place the school system in jeopardy as both Anglicans and Presbyterians could in future quash school By-Laws passed for the support of other than their own schools. He concluded with a rhetorical

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[56] M.S.Q., p. 16; vide also Free Press (Winnipeg), Dec. 21, p. 2, letter from "Churchman" attacking Howell for betraying both the Bishop and the Conservative party and maintaining that the Bishop must state the policy of the Church or ask Logan to disclaim.

flourish exculpating the Bishop of Rupertsland from all prejudicial involvement, on the grounds of separation of hierarchy and parishioners.

Mr. Ewart made the most trenchant comment:

> . . . Mr. Logan's application was, I have no doubt, really instigated by the local Government, it is in no sense an application of the Bishop. The defence was something of a farce, and the judgment of the Chief Justice was evidently written before the argument took place. I have no doubt that the object of the application was to prejudice our case before the Privy Council [of England]. Both cases will probably be appealed together and it is hoped that the complication will aid the local Government's argument. For myself, I am not sure whether it will help us or hurt us. The Privy Council may possibly take the view that the Act is extremely unpopular with both Protestants and Catholics and that idea may help them to decide in our favor.[57]

It is noteworthy that both Archbishop Taché and John S. Ewart apparently had little fear of the effect of this new development upon Their Lordships of the Judicial Committee. Though fully realizing the intent of this intrusion, they both remained comparatively quite complacent in this regard. Their attention was to be concentrated more, it would appear, on the problem of getting capable counsel, in particular of again attempting to retain Edward Blake,

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[57]A.A.S.B., Dec. 18, 1891, Ewart to Taché. The letter was addressed to Montreal. Evidently Ewart did not know His Grace had returned to Winnipeg.

than on arguments to circumvent any possible threat from the Logan Case. Little did they realize that this manufactured proceeding--unlike their own "put up job", the St. Joseph's School Case[58]--was to have a much greater effect on the course of the litigation.

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[58]Vide pp. 254 to 260.

CHAPTER EIGHT

THE COLLAPSE OF THE BARRETT CASE BEFORE THE JUDICIAL COMMITTEE

Before examining the ramifications of the procedure in England, let us first summarize the reasons for the blasting of the minority's hopes. The Case of Barrett vs. The City of Winnipeg was decided adversely to the claims of the minority largely because of: (1) the non-participation of J. S. Ewart in the argument; (2) the failure to obtain the services of Edward Blake and Sir Horace Davey; (3) the intrusion of the Logan Case; (4) the carelessness of the English Counsel; (5) the ambiguous nature of Justice Patterson's ruling;[1] and (6) the lack of familiarity of the Judicial Committee with Canadian conditions. It might also be suspected that perhaps Their Lordships' tendency to reverse the Judgements of the Supreme Court was becoming well-nigh habitual.

In the previous chapter, we have been that arrangements were being made, concurrent with the institution of proceedings against the 1891 Winnipeg By-Law, to carry the Barrett Case before the Judicial Committee. In this respect,

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[1] Vide pp. 190 - 94.

the minority were especially concerned with the financing of their Counsel and with the retention of English Counsel and of Edward Blake. Suitable financial terms were early arrived at,[2] but the hostility of the Conservative Government finally prevented the employment of Blake. It would appear that this latter decision was arrived at during Brophy's visit to Ottawa. A letter from Ewart to Taché[3] conveyed these sad tidings and also intimated that Sifton had informed him that he had engaged (D'Alton) McCarthy on behalf of the local Government. Ewart considered it likely that Sifton would also take part, and urged that he should not learn that they were not employing Blake--for fear that the latter might be retained against the minority. Such would greatly impair their changes of success. To this end, he and Fisher were of the opinion that " . . . $250 or $500 would be well spent in keeping Mr. Blake at home. . . ."[4] His Grace was importuned to telegraph Thompson to have Blake engaged to keep silent. Thus, for a time, it appeared that

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[2]Vide p. 207.

[3]A.A.S.B., dated simply "Sunday" and refers to events prior to events in a letter dated Dec. 18, 1891.

[4]Ibid.

the minority might actually be faced with the formidable talents of Edward Blake ranged on behalf of the Province.

It must have been with great relief that Ewart was able to add in his Dec. 18, 1891, letter to Taché on the Logan Case that Blake had just informed him it was not necessary " . . . to take any steps with reference to retaining him as against appearing on the other side. . . ."[5] Blake would decline any invitation to do so and his heart was evidently with the Catholic cause. Ewart regretted even more that they would not have him in England, though he was glad they were sure of Sir Horace Davey.

This latter expectation had not, however, been reached without serious misgivings. As early as Dec. 11,1891, the Minister of Justice was sent two telegrams[6] anxiously questioning him as to whether the report from Winnipeg that Davey had been retained by the local Government rather than on their behalf were true. Ewart had so informed Archbishop Fabre, and possibly the other party.

Evidently, though the Federal Government had cabled

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[5]A.A.S.B., Dec. 18, 1891, vide p.224 Presumably His Grace had contacted Thompson, who then took up the matter with Blake as Ewart had suggested. Or perhaps Ewart had written Blake. The author has been unable to discover whether or not the Manitoba Government did make overtures to Blake.

[6]Thompson Papers, P.A.C., vol. 143, #17591, from Archbishop Fabre and #17595, from La Rivière.

its London solicitors for the retention of Sir Horace Davey as early as Nov. 19, 1891,[7] the despatch of Factums on the 25th had revealed to Bompas, Bischoff & Co. that the Government was not " . . . directly a party in the case. . . ." They had therefore retained Davey and had wired the Canadian Government to that effect on Nov. 20, while knowing that " . . . Strictly speaking the retainer should have been given on behalf of Barrett, the actual party in the proceedings."[8]

Such was the tenor of the letter the London solicitors sent in explanation of the cabled reply: "Our retainer Davey given first in date and before Manitoba."[9] which they had made to Sedgewick's undated wire: " . . . our Winnipeg solicitor state reported there Manitoba Government retained Davey. Please positively secure him for us. . . ."[10] Thus, even before Ewart had learned of the loss of Edward Blake, he was being disturbed by rumours of the Federal Government's failure to deal competently with the question of English Counsel.[11]

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[7] Vide A.A.S.B., Dec.10, 1891, Bompas, Bischoff & Co. to Sedgewick.

[8] Ibid.

[9] Vide A.A.S.B., Dec. 11, 1891 for the overly reassuring telegram this lulled Thompson into sending Taché.

[10] A.A.S.B., Dec. 10, 1891, Bompas et al. to Sedgewick. The solicitor was probably Ewart.

[11] A.A.S.B., Dec.10,1891,Bompas et al. to Sedgewick.

A visit to Davey by Thompson's solicitors had elicited the information that Freshfields & Williams, on behalf of the Manitoba Government, had given him a general retainer on Nov. 24 and another on Dec. 3, 1891, on behalf of the City of Winnipeg. However, Bompas, Bischoff & Co. asserted that they had retained Davey on Nov. 20. They had now shown his clerk the letter in which it was stated that the action was being " . . . brought at the instance of the Dominion Government . . ."[12] and the clerk had admitted that their retainer had precedence. However, they felt very doubtful of being able to make this contention stand, if the Appellant chose to contest. The decision rested with their Attorney-General in such matters. However, they had informed " . . . Messrs. Freshfield . . ." of the retainer and declared they would let Sedgewick know if any steps were taken.[13]

On Dec. 14, Thompson apparently despatched the above missive[14] to Taché with a letter of reassurance.[15] Though

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[12] Ibid.

[13] Ibid. Webster, the Attorney-General, was to take the place intended for Davey.

[14] A.A.S.B., Dec. 10, 1891, Bompas et al. to Sedgewick.

[15] A.A.S.B., Dec. 14, 1891, Thompson to Taché.

he admitted that:

> . . . by the etiquette of the English Bar, neither party can give a retainer in a case until the case shall be inscribed for argument, which had not happened when we telegraphed to retain Davy (sic) . . .,

he could not see that there should be any trouble as the suit had really been brought at the Government's instance.[16] This protestation obviously did not sound overly convincing to Archbishop Taché, though he expressed confidence in Thompson's good judgment.[17] He feared Davey's great ability might be used against them, and held that Ewart was very much inclined to secure Blake if Davey refused the retainer.

For a while, however, Thompson's solicitors seemed to be coming to the conclusion that the retainer would hold good. At least, if they could " . . . show that Barrett was the nominee as it were of the Dominion Government and not an independent litigant on his own account . . ."[18] But, however true in law this latter revelation might have been, it would have been rather compromising politically, although Ewart's missive of Dec. 18, 1891[19] indicated that he had

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[16]But technically it had not been properly inscribed.

[17]A.A.S.B., Dec. 29, 1891, Taché to Thompson. Also in Thompson Papers, P.A.C., vol. 144, #17824.

[18]A.A.S.B., Dec. 14, 1891, Bompas et al to Sedgewick.

[19]A.A.S.B., to Taché, Vide pp. 224 & 228.

found Thompson's assurances convincing.

As an indication of the extent to which Ewart was becoming publicly involved on behalf of his clients at this period, we could cite his "Open Letter . . . to the Hon. Mr. Greenway"[20] in which he took that worthy to task for basing the approaching elections on the school issue[21] and referred to the promises allegedly made at St. Francois Xavier and to Archbishop Taché.[22] He blamed Martin for most of the trouble[23] and held that Protestants had succeeded in preserving their own schools from his efforts at secularization, though the Catholics were too weak to do likewise.[24] Ewart held that he " . . . had hoped that were the Catholics successful in the Privy Council the agitation would have ceased and quiet again been restored."[25] He spoke out only

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[20]M.S.Q., pp. 219-30. (Published in Free Press, Winnipeg, Jan. 4, 1892, pp. 1-2 and in Le Manitoba, Winnipeg, Jan. 7, 1892.)

[21]M.S.Q., p. 219.

[22]M.S.Q., pp. 220-21.

[23]M.S.Q., p. 221.

[24]Ibid.

[25]Ibid. This would appear to indicate that he had hoped that the Judicial Committee decision would have come in time to end the agitation in favor of the minority. Evidently, the announcement by the Greenway Government (M.S.Q., p. 230) of their intent to continue the struggle and seek an amendment to the constitution was responsible for Ewart's outburst.

because he could no longer retain this hope. He then revealed little use for state regimentation in education and held that the enforcement of a uniform system of near-secular education in Manitoba was as unjust as would be the enforcement of a uniform Catholic system in Quebec. Both rested upon the undoubtedly erroneous principle of religious education. Catholics and Protestants did not agree on this question and perhaps never would. Such a system was not in force either in England or Ontario.[26]

Ewart then quoted from John Stuart Mill in support of parental liberty and the right to set up " . . . voluntary separate schools . . ." providing they met government standards of efficiency.[27] He also quoted from the "Sermon by the Rev. Dr. Duval"[28] to the effect that religious influence was desirable--but implied that this meant separate schools for Catholics, a conclusion that the good doctor had obviously not intended in his remarks against the Martin policy of complete secularization.[29] Ewart summed up his position as follows:

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[26]M.S.Q., pp. 222-23.

[27]M.S.Q., p. 223. But many people would balk at seeing this as justification for a separate system, vide for example "Article in the Week, 29th April, 1892" in M.S.Q., pp. 254-55

[28]Preached Nov. 25, 1889, vide M.S.Q., pp. 200 & 202.

[29]Vide M.S.Q., pp. 198-205, esp. p. 205 for the Sermon.

> . . . while the state may properly interfere with the natural right of the parent, so far as to protect itself from ignorance and consequent vice, it ought not to meddle with the religious aspect of the question. To declare that, in Manitoba, education is to be entirely secular, or that, in Quebec, it is to be Roman Catholic, would alike be, in my view, so to meddle with this religious aspect, and would be alike vicious and unwarranted.[30]

A critic might, however, point out that this remark would seem to have placed the question in too simple a light. Ewart's previous remarks had indicated that the schools were not " . . . entirely secular . . ."[31]

Without resolving this inconsistency, Ewart then pressed on to refute the charge that Catholic schools were not up to par. In any case, the education they afforded was sufficient " . . . to provide against absolute ignorance, and consequent vice . . ." Catholics made only the reasonable request that so long as they conducted their schools efficiently they should be left free to support them by their own taxation.[32]

The objection that allowing the Catholics separate schools would make public schools impossible because other

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[30] M.S.Q., p. 223.

[31] Vide especially M.S.Q., pp. 221-22.

[32] M.S.Q., p. 224.

denominations would demand the same privilege, Ewart held to be fallacious because Protestants would regard with contempt the Elizabethan attempt to make all schools similar. The 1890 proposal was the same, as both systems were intolerant interference " . . . with the liberty of the subject, and the natural rights of parents. . . ."[33]

Ewart also maintained that national or uniform schools were as heinous as the idea of a national church. It was impossible to " . . . successfully distinguish between a State selection of religious education, and a State suppression of religious education . . ."[34] Ewart then indicated that Protestants after 1870 had provided for a single system of Protestant education of their own choice.[35] Also, the Protestants could not thus complain of the new Act.[36]

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[33] Ibid. Opponents could point out, however, that the Elizabethan effort was an attempt to place the school definitely under the aegis of one particular denomination. The schools of Manitoba were directed to be under an advisory board representing all denominations.

[34] M.S.Q., p. 225. Protestants, especially Bishop Machray, appear to have experienced the accuracy of this remark. Vide footnote 36.

[35] M.S.Q., p. 225.

[36] M.S.Q., pp. 225-26. But the circumstances had changed. In 1871, the distinctive tenets of the various Protestant denominations were banned. The new legislation proposed to ban those of Protestantism, as well as of Catholicism. Ewart himself expressed sympathy with the plight of Protestants, vide M.S.Q., pp. 217 & 275 for examples.

He then added that the various Protestant denominations had failed to insist on their own separate schools, though admitting that the Bishop of Rupertsland was not quite satisfied with the way things had worked out. (His further discussion to the effect that the Bishop disliked the Act of 1890 but had no fault to find with the one of 1871 appears to have been something of an overstatement.[37]) The argument was concluded with a reference to Ontario, which Province allowed Protestants to establish separate schools but which possessed very few. (This statement led to an altercation between Ewart and the Rev. Dr. Laing, of Dundas, Ontario,[38] in which Ewart had to admit that this statement was not quite accurate, but in which he maintained that the disabilities under which Protestant separate schools and the Protestant clergy suffered were their own fault. Dr. Laing appears to have indulged in considerable wishful thinking on the score of Protestant unity being trammelled by truckling politicians and scheming priests. Ewart would seem to have developed a fulsome admiration of Catholic unity and discipline, and considerable contempt for Protestant disorganization and inability to

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[37] Vide p. 211.

[38] Vide M.S.Q., pp. 214-16, "The Rev. Dr. Laing's letter to Mr. Ewart, Mar. 22, 1892" and "Mr. Ewart's Reply to Rev. Dr. Laing, Mar. 29, 1892" on pp. 217-18.

fight, perhaps rather inconsistent with his remarks in favour of peace and no regimentation.[39]) But, at the time, Ewart emphasized his final remark with the comment that the distribution of population was such that Catholic separate schools imposed little inconvenience.[40]

Ewart then turned from arguments on principle to those of a practical nature. For all practical purposes there were only two bodies of persons in Manitoba--Catholics and Protestants. Attendance was desirable and parents could be persuaded to send their children to schools if only the schools were in line with their religious convictions. From this relatively sure ground, Ewart then turned to the debatable thesis that since Protestants were agreeable to give up their denominationalism for the sake of public schools, Catholics also should be willing, and made the somewhat startling remark that Protestants had given up nothing because they preferred common schools to denominational ones. The Ontario situation indicated that " . . . They give up nothing, but Catholics are asked to surrender what to them is sacred. . . ."[41]

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[39] Vide especially M.S.Q., pp. 222 & 228-30.

[40] M.S.Q., p. 226. But Protestants who were inconvenienced might not agree. And what if the distribution of population changed? Vide "Article in 'The Week'", Mar. 25, 1892, in M.S.Q., pp. 242-43.

[41] M.S.Q., p. 227. Would Bishop Machray, for one, have agreed?

He then waxed wroth with the idea of the Government seeking to create unity by practising intolerance. Coercion would fail to achieve uniformity as it always had in the past. The reason for mutual intolerance was mutual misunderstanding. He urged Protestants to read Newman and other Catholic authors.[42] The agitation in Upper Canada had proved only how little education had done for both sides. He then referred to the opinions of George Brown, Alexander Mackenzie and Rev. Principal Grant on this compromise and to the action of the House of Commons in the New Brunswick school matter to show that the manner of settlement in Ontario was completely satisfactory, and that there was no use for Greenway to open the question anew.[43]

Ewart concluded his harangue by accusing the unfortunate Greenway of violating pledges, renouncing principle, injuring the Federal Liberals and creating communal strife merely to remain in power.[44] He also heaped scorn on the

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[42]M.S.Q., p. 228. It might be feared, however, that this served only to convince many that he was at heart an apostate and renegade.

[43]M.S.Q., pp. 228-29. The question was not, however, being re-opened by the Manitoba Liberals--at least in Ontario and New Brunswick.

[44]M.S.Q., p. 229. Ewart would have been nearer the true mark if he had directed his shafts at Martin and Sifton.

announcement that the local Government would seek an amendment to the constitution giving it complete control of education. Both parties would vote against it in the Federal House. Manitoba had no particular grievance because it had the same authority in matters of education as had Quebec. Contempt was then heaped on the electorate for hearkening to Greenway as they had to Sir John A.[45] It was unreasonable to suggest that Catholics should be left to get along as best they might in education. Such an intolerant course would lead to weakness and inefficiency simply in order to try to keep Catholic children from being taught as Catholics. This election cry would bring nothing but eventual ruin to a Government which had done much good in Manitoba.[46]

As this article by Mr. Ewart could scarcely affect the forthcoming decision of the Judicial Committee and because he himself had indicated that the idea of an amendment to the constitution was not to be taken seriously,[47] we might

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[45] M.S.Q., p. 230. Such would hardly mollify faithful followers of the Greenway administration, accurate though it might well be.

[46] Ibid. This last expectation does not appear to have been fulfilled. Greenway remained in power until 1899, when the drift of former Conservatives--many temporarily won over to the Liberal ranks by the school issue--returned to the Tory ranks. (Morton. Manitoba, pp. 278-81). Of course, it could be argued that avoidance of the school question and concentration on other issues would have kept the Liberals in power longer, though it is difficult to see how in 1892 they could easily have dissociated themselves from the issue they had raised.

[47] Vide M.S.Q., p. 230.

well assume that its appearance was not motivated either by outraged indignation, a desire to help the political fortunes of his partner, and/or by some other factor. Possibly this latter was a desire to unsettle the easily-influenced Greenway to the point where he would be more subject to management during the interview between him, the Attorney-General (Sifton) and Archbishop Taché on the possibility of granting relief to the Winnipeg Catholic ratepayers.[48] At any rate, during this meeting, strained tempers gave way to some signs of concession on both sides. The Government insisted on the certification of teachers but would give the grants if the teachers were qualified.

Two days after the appearance of Ewart's impassioned article, Thompson informed His Grace that he was sending a letter from the London solicitors[49] containing full particulars on the Case. On Jan. 20, 1892, Bompas, Bischoff & Co. wrote Sedgewick that they felt certain of being able to establish priority in the retention of Sir Horace Davey,

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[48]Thompson Papers, P.A.C., vol. 172, #21544, Jan.7, 1892, Schultz to Thompson. Vide also #21510, Jan. 4 and A.A.S.B., "Statement of the Receipts and Expenditure of all School Money for the year ending on the twenty-ninth month of Jan. 1892, by the Board of School Trustees for the Catholic School District of Winnipeg", showing Government grant of $951.42 received on July 14, 1891 and a cheque from Taché on Jan. 20, 1892. Thus, in 1891, the Manitoba Government was still supporting Catholic schools.

[49]A.A.S.B., Jan. 4, 1892.

thanks to the information they had received on the connection of the Dominion Government in the Case. They would notify the other solicitors and suggest that they withdraw. The London solicitors also noted that they expected " . . . to receive some communication from Mr. Ewart, Q.C., of Winnipeg."[50]

On this same day, Ewart found it necessary to reply to criticisms of his recent letter to Thomas Greenway.[51] He denied that he had been paid as a lawyer to produce that article. It was written entirely by himself and of his own volition. He had not written a previous letter inconsistent with it, which the Free Press had refused to publish. This other article was at his home and might be read by anyone. Also, he had not deserted the Liberal party. He simply refused to be a tame follower of any change in the party line.[52] Ewart then divided the other arguments into six categories[53] and then displayed considerable logical power and virtuosity in demolishing them, quoting from John Locke,

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[50]A.A.S.B., Jan. 20, 1892. Vide p.247 for discussion of the eventual loss of Davey.

[51]"Mr. Ewart's Reply to Criticisms", written to the Editor of the Free Press (Winnipeg), Jan. 20, 1892--in M.S.Q., pp. 231-39.

[52]M.S.Q., p. 231.

[53]M.S.Q., pp. 231-32.

John Morley and Rev. Dr. Bryce, the doctrines of Catholic and Presbyterian Churches, Edmund Burke, the Rev. Principal King, and Thomas à Kempis to the effect that the state could not tell what was right and must tolerate all.[54] He pointed out the toleration of Protestants in Quebec, which Protestants had exhorted the Equal Rights Association to do nothing to nullify,[55] and developed a certain patronizing tone to the Protestant whom he purported to be addressing,[56] together with a high scorn for the idea of national schools.[57] The proposition was then advanced:

> . . . that if we cannot get along with one church, better have two than twenty; and if not with one kind of school, your purpose of economy and good-fellowship will be best subserved by taking the lowest practicable number.[58]

Ewart concluded by refuting the Brandon Sun's advocacy of uniformity by recalling Queen Elizabeth's ultimately unsuccessful efforts,[59] and by quoting a couple of doggerel

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[54]M.S.Q., pp. 232-36.

[55]M.S.Q., pp. 236-37.

[56]M.S.Q., p. 236, especially.

[57]M.S.Q., p. 237.

[58]M.S.Q., pp. 237-38. However, many apparently failed to see the matter as simply between two groups or to agree that the line of reasoning applicable to Churches was equally applicable to schools.

[59]M.S.Q., p. 238.

verses derisive of the strange way in which the Greenway administration had shown its affection for Catholics. Reference also was made to what he termed the confiscation of Catholic property.[60] Whatever had been Ewart's motives for entering the field of controversial journalism,[61] it would appear that he was finding it a congenial field and one from which it was not likely that he would speedily withdraw.

In the meantime, arrangements for the litigation proceeded. Feb. 1, 1892 saw the despatch of a letter from Thompson to Archbishop Taché[62] enclosing a copy of a despatch from their London agents. Four days later, Rev. Father Lacombe wrote from Montreal[63] that he had met Lt. Gov. Schultz and " . . . le fameux Greenway . . ." They had seen Prime Minister Abbott a few minutes before him. Schultz had privately informed him that Greenway was leaving for Toronto to consult with his friends and barristers " . . . sur l'appunité et les chances d'un appel au Conseil privé (Judicial Committee) . . ."(Apparently, then, the Federal Government had

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[60] M.S.Q., pp. 238-39.

[61] Vide pp. 239-40.

[62] Thompson Papers, P.A.C., vol.253, #422, also in A.A.S.B.

[63] A.A.S.B., Feb. 5, 1892, Lacombe to Taché. Vide also Thompson Papers, P.A.C., Feb. 5, 1892 from Taché for evidence of His Grace's anxiety over Davey's retention.

tried to dissuade Greenway from proceeding with the Case.) Lacombe hoped it would be dropped. At the same period, a chargé d'affaires was being appointed by the Catholic bishops to Ottawa.[64] It would seem that His Grace had little hope, however, that the Manitoba Government would not proceed with its appeal. Five days after hearing from Lacombe, he still expressed anxiety over Davey's retention.[65]

As evidence of the excitement which the school question was engendering in Manitoba politics, we might cite the Mar. 2, 1892 speech of Mr. James Fisher in the Manitoba Legislative Assembly[66] attacking D'Alton McCarthy's contentions with respect to the origins of the school clauses in the Manitoba Act. In this address, Ewart's partner pointed out the role Protestant demands had played in the insertion of the education clauses in the B.N.A. Act and indicated at great detail the arguments and manoeuverings that had taken place during the Confederation debates of 1865 and up to the passage of safeguarding legislation by Quebec after the union of 1867, concluding that Protestants were responsible for

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[64]A.A.S.B., Feb. 10, 1892, Taché to Rev. Père Lefebvre.

[65]Thompson Papers, P.A.C., vol. 148, #18300, Feb.5,1892.

[66]Vide M.S.Q., pp. 206-13.

the clauses in the B.N.A. Act, especially as Confederation was carried by the votes of Upper Canada Members.[67]

On the 23rd of the same month appeared Archbishop Taché's denial of Greenway's assertion, on the floor of the House,[68] that he had not made guarantees to Archbishop Taché.[69] Previous to the hurling of this bombshell, the Legislature had been the scene of angry charges against the Catholics and of defiance of the Dominion Government--for reviving the issue after the court defeats of 1891.[70] These outbursts led to counterattacks on the Government's school policy. R. P. Roblin, on Mar. 15, contended that the grants should have continued and the previous acts remained in force

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[67]However, he quite overlooked the initial attempt by Mowat to have the control of education left to the Provinces and its thwarting by D'Arcy McGee, vide Biggar. Mowat, vol. 1, pp. 129-130 & vol. 2, p. 484.

[68]Reports of Debates, Mar. 15, 1892 in Free Press (Winnipeg), Mar. 16, 1892.

[69]Vide Taché's "Open Letter to Mr. Greenway" in the Free Press (Winnipeg), Mar. 23, 1892 and Le Manitoba (Winnipeg) Mar. 30, 1892. His Grace held that he had not previously broken silence because his lips were sealed as were those of Father Allard but that Greenway's denial had absolved him of his promise. But His Grace said nothing about the lips of the banker, Alloway. Curiously enough, Ewart did not include this letter in his M.S.Q.

[70]Vide Reports of Debates,Mar. 14, 1892 in Free Press, (Winnipeg), Mar. 15, 1892, Speech of Hon. Mr. Cameron. Vide also Reports of Debates, Apr. 14, 1892 in Free Press(Winnipeg) Apr. 15, 1892.

until the legality of the new system had been established.[71] On the same day, the Government was charged with deliberately delaying the appeal.[72] Greenway replied that he saw no reason why a decision could not be reached before the elections of July 24, 1892. A few days later he found it necessary to shield himself behind a point of order when Roblin brought up the question of Archbishop Taché's open letter.[73] The issue came up again on Mar. 29, 1891 when A. F. Martin's resolution for a Committee of Inquiry into the promises allegedly made by Greenway to the Archbishop was defeated by 22 to 12, after Sifton declared the Government was afraid to trust the memory of certain individuals.[74] Clearly, the

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[71]Reports of Debates, Mar. 15, 1892 in Free Press (Winnipeg) Mar. 16. Vide also Reports of Debates, Mar. 20, 1892 in Free Press, Mar. 21 for repetition of this argument by Hon. Mr. Wood. (This would seem a reasonable enough contention.)

[72]This is borne out by Ewart's open letter to Greenway, vide p.232 and thus suggests that Ewart might well have been attempting to shame Greenway into either proceeding more speedily with the Case or dropping it altogether. A close reading of the missive does nothing to dispel this assumption.

[73]A.A.S.B., Mar. 25, 1892, Barrett to Taché.

[74]Reports of Debates, Mar. 29, 1892, in Free Press (Winnipeg), Mar. 30, 1892. Vide also M.S.Q., pp. 398-400 for solemn affidavits made by Rev. Father J. Allard and Mr. W. F. Alloway in support of Taché's accusation.

Manitoba Liberals were not having everything their own way.[75]

At this juncture, the long drawn out fussing over the engagement of Sir Horace Davey was coming to an abrupt climax. On Mar. 21, 1892, Thompson received the suggestion from Archbishop Taché that, if they had lost Davey, it would be well to secure Blake, as Ewart was very much of that opinion and thought there was no time to lose.[76]

Also during March, and continuing until the end of the following month, Mr. Ewart became engaged in a controversy with the editor of The Week.[77] A leading article, dated Mar. 25, in that magazine[78] dealt with Ewart's open letter to Greenway and his reply to criticisms and endeavored to refute Ewart's contention that the discarded system could be defended on its merits, while ignoring the charges of bad faith against the Liberals. It offered some pointed criticisms, and set up the main position that the struggle was not between Catholics and Protestants but between citizens and the pretensions of the Catholic clergy.[79] However, it left

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[75]Vide Sifton Papers, P.A.C., vol. 269, #250, Apr.22, 1892 to J.A. Smart asking him to see to the Brandon complaint that banks were refusing loans for school construction due to the uncertain status of the School Act.

[76]Thompson Papers, P.A.C.,vol. 151,#18763. Vide Ibid., vol.261,#321, to Bompas et al complaining of Davey and Webster being supposedly under the Government's general retainer but transpired not so " . . . unless in the most strict and technical manner the name of the Queen or that of the Government of Canada appeared on the record."

[77]Vide M.S.Q., pp. 240-55.

[78]Article in "The Week",Mar.25,1892 in M.S.Q.pp.240-43.

[79]M.S.Q., pp. 240-42.

its guard down in making comments about religion being indispensable to education, it being the duty of the state to provide reasonable facilities for religious instruction and its only duty to intervene being in connection with the prevention of ignorance and vice.[80]

Mr. Ewart immediately returned to the charge in a letter dated April 15, 1892.[81] He first pointed out that the contention that religion was indispensable to education was only partly true as Protestants were willing to dispense with it.[82] Catholics, however, were not. Therefore, to please both parties, there should be state schools for Protestants and state-aided schools for Catholics.[83] (Ewart was evidently finding The Week's argument against the alliance of the state with one religious denomination a somewhat telling one. He was now emphasizing that Catholics should not be interfered with, rather than that the Government should undertake special duties for their Church. In fact, he even intimated that it might be justifiable to stop the Provincial

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[80] M.S.Q., p. 242.

[81] "Mr. Ewart's Letter to "The Week" in M.S.Q.pp.243-47.

[82] M.S.Q., pp. 243-45.

[83] M.S.Q., pp. 245-47.

grant.[84]) His final remark,[85] to the effect that Protestants were terribly prodigal in supporting their various Churches and therefore should not object to Catholic separatism in the " . . . very much more important matter . . ." of education, probably impressed many of his readers as somewhat superfluous, if not gratuitously invidious. This altercation gradually petered out in a series of four articles and letters[86] which revealed considerable ability in casuistry on both sides, with the palm going on balance to Mr. Ewart--though with the Editor still unconvinced[87] after Ewart had decided to intrude no longer upon his columns.[88]

But while Provincial election fever filled the air during these months up to the decision of the Judicial Committee in July, with the Conservatives hoping against hope that the embarrassing school question would be ended by the

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[84]M.S.Q., p. 246. Archbishop Taché would scarcely have concurred. Vide Une page, p. 48 for his claim to 5/12 of the land since, in 1870, 5/12 of the Dominion population was Catholic.

[85]M.S.Q., p. 247.

[86]Vide M.S.Q., pp. 247-255 & p. 253 for unpublished letter by Ewart.

[87]Vide "Article in "The Week" Apr. 29, 1892, in M.S.Q., pp. 254-55.

[88]Vide "Mr. Ewart's Letter to 'The Week'", April 29, 1892, in M.S.Q., pp. 252-53.

withdrawal of the Case or by the defeat of the Manitoba Liberals[89] (though the local Conservatives were finding it necessary to pay at least lip-service to the new system[90]) and the local Government was delaying prosecution of the Case and soft-pedalling the school issue in fear of an adverse decision[91] while trumpeting defiance towards Ottawa,[92] the forces were marshalling for the appearance before Their Lordships. On April 13, 1892, Sifton wrote to D'Alton

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[89] Vide Robert E. Clague. The Political Aspect of the Manitoba School Question (Unpublished M.A. thesis, University of Manitoba, 1939) p. 35 for reference to the ending of the truce between the Manitoba Liberals and the Federal Government by the victory of the former in the July, 1892 elections. Vide also Tribune (Winnipeg), May 6, 1892, for report of the meeting at which Sifton declared separate schools would be fastened on forever if the law were repealed.

[90] Vide above report in Tribune for evidence local Conservatives were taking up the old Liberal cry of an amendment to the constitution--a project now scorned by Sifton--and supporting the new system before the electorate. Vide Free Press (Winnipeg) June 1,1892 for Opposition Platform.

[91] Vide May 6, 1892 report in Tribune for evidence Sifton paid but little attention to the school issue in his campaign speech. Vide also June 9 issue for similar report on Greenway. Also Free Press and Tribune editorials up to July 23, especially Tribune (Winnipeg) June 7, 1892 editorial indicating that Greenway was bluffing that election would not take place until fall, thus lulling the Opposition with the expectation that the Judicial Committee would make the anticipated decision in favor of minority before the elections.

[92] Vide Tribune (Winnipeg), May 6, 1892 for Sifton's defiance of the Supreme Court and the Judicial Committee at the May 4 meeting. Vide also June 9 issue for Greenway's declarations that public schools would be maintained even if the Province could not tax the supporters of separate schools and that Catholics would receive no Provincial grant even if the Judicial Committee declared in their favour.

McCarthy that he had instructed W. E. Perdue to meet him in Ottawa to consult on the school Case and that Perdue had authority to deal with the Logan Case. Campbell would be unable to attend as his health was poor.[93] A month later, Ewart informed Taché that the sittings would probably commence on June 15 and that he expected to leave for England on May 24.[94] By June 19, 1892, he was in London.[95] The Case was to be argued about the middle of July and Ewart expressed some apprehension as to the way the matter was being handled. Evidently, the London solicitors had assumed that the English Attorney-General and a Mr. Gore were to argue the Case. Though they had been ignorant of Mr. (S.H.) Blake's retainer, he had little doubt that Blake and the Attorney-General would be their defenders, since only two Counsel could take part. Ewart also expressed considerable bitterness and anxiety over the attitude of the English Counsel, particularly over the preoccupation of the Attorney-General (Sir Richard Webster) with the English elections. (Politics were proving as fatal a handicap as in Manitoba.)

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[93]Sifton Papers, P.A.C., vol. 269, #222.

[94]A.A.S.B., May 11, 1892.

[95]A.A.S.B., June 19, 1892, Ewart to Taché. By then, Davey was for the other side.

Ewart's chagrin and distress stands out in the following quotation from this letter:

> . . . Last Tuesday we held a short consultation--the Attorney-General, Mr. Gore, Mr. Dodgson (one of the solicitors) and I--at the Attorney General's rooms. The impression of all of them, I am sorry to say, is very much against our case. The Attorney opened the conversation by saying that as far as he could see the words "by practice" really meant nothing! If so we cannot escape from the New Brunswick decision and that case must govern ours. Mr. Gore said that the rights which we claimed were not "in respect of denominational schools" but in respect of public schools & these were not preserved by the Act! I was not able to remove these impressions & in fact was hardly permitted to express myself at all. The Attorney General was plainly too full of politics & his House work to listen & he closed up the interview in very short order. Mr. Dodgson does not give me any hope of better success at any subsequent interview & I believe it is one of the "rights & privileges" of the leaders of the Bar here to neglect a case as much as they like. I am determined nevertheless that Mr. Attorney is going to be without excuse if he does not thoroughly master the case. After a more lengthened talk with Mr. Gore and the Solicitor & ascertaining more clearly their views & objectives I have applied myself to the construction of a paper setting forth as clearly and as shortly as I can all the arguments I know of. These I have informed Your Grace will assume a somewhat different form from the arguments before the Canadian Courts. We must rely here more upon the history of Canadian legislation & the bearing of public policy as shown by such legislation than upon a merely literary examination of the language, although that too must not be neglected. When my paper is completed I have arranged to go over it carefully with Mr. Gore & the Solicitor & I am then going to have it printed in convenient form for perusal by His Highness the Attorney General. I will send your Grace a copy of it when it is struck off which will be I hope within a week. I am very glad that I came over as soon as I did. If there was no one here to worry Mr. Attorney with our case I am afraid that we should have little to hope for. After he has had my paper & after the elections I intend to ask for

> another consultation when I may have an opportunity of ascertaining if he has learned his lesson. We can of course count on Mr. Blake for a good argument but the Attorney will be the leader & if he fails to impress the court it will be almost impossible to do so in following.[96]

The remainder of this unencouraging missive dealt with a cipher to be used to inform His Grace of the decision of the Judicial Committee. A wide variety of possibilities was indicated, notably as to the legal position of the Episcopalians. Already defeat was being foreshadowed.

The two Cases of Barrett vs. The City of Winnipeg and Logan vs. the City of Winnipeg came up together and were argued before Lords Watson, Macnaghten, Morris, Hannen, Shand and Sir Richard Couch, on July 12, 13 and 14, 1892.[97] Sir Horace Davey, Q.C., (D'Alton) McCarthy, Q.C., and Campbell, for the appellant, held that the view taken by the majority of the Queen's Bench was correct, and set forth the nature of the new legislation.[98] They argued that at the

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[96]A.A.S.B., June 19, 1892, Ewart to Taché. Ewart's proposed paper has not been discovered and it is not definitely known if he succeeded in briefing the Attorney-General. If he did, it apparently had but little effect. Neglect of the points he wanted emphasized would appear to have been a main characteristic of the argument, in view of the decision of Their Lordships. However, Ewart's later hostility to the Judicial Committee would seem to indicate that his arguments were used, though perhaps only by S. H. Blake.

[97]"Winnipeg vs. Barrett, (1892) A.C. 445" in Edward Robert Cameron. The Canadian Constitution as interpreted by the Judicial Committee of the Privy Council . . ., 1915, vol.1, pp. 421-33. Vide also Great Britain, Privy Council, Judicial Committee Judgement in the Manitoba school case with factums and other documents . . . 1893, 46 p.

[98]Ibid., p. 423. Evidently Campbell had recovered from his ill health. Vide p. 251.

time of union the only law enforced was that of England in 1670 and thus no right or privilege existed by law with respect to denominational schools except as pertained to private schools; a right unaffected by the Act of 1890. Reference was made (once again) to ex parte Renaud, as well as to another Case.[99]

Logan's solicitors (Harrison & Powell) obviously took little part in the argument.[100] They were content, as Lord Macnaghten pointed out in delivering the Judgment:

> . . . to rely on the arguments advanced on behalf of Mr. Barrett while Mr. Barrett's advisers were not prepared to make common cause with Mr. Logan and naturally would have been better pleased to stand alone.[101]

The solicitors for the other respondent were Sir Richard Webster, A.G., (S.H.) Blake, Q.C., Ewart, Q.C., and Gore.[102] Apparently Ewart took no part in the argument. That was managed by the Attorney-General and Blake. According to Ewart, while Blake did well, Webster, although an

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[99] Ibid., p. 424.

[100] Ibid., pp. 424, 425 & 433.

[101] "Winnipeg vs. Barrett", p. 426. It is interesting that His Lordship referred to it as " . . . a case of the Church of England . . ." in view of the efforts to present it in Manitoba as simply a personal effort on the part of Logan, vide pp. 214, 219-24.

[102] Ibid., p. 424.

able man, antagonized the Court, and made him long for Davey's easy manner. Also, he had been too engrossed in politics to study the Case as it should have been studied.[103]

Barrett's solicitors maintained that the 1890 legislation prejudicially affected the rights of Catholics by law or practice by compelling them to support what were or might be Protestant schools and by depriving them of the means to support their own.[104] The system in practice at the union was set forth, together with the situation between 1871 and 1889.[105] The prejudicial elements of the 1890 legislation were indicated and it was contended that in the reference to ex parte Renaud by the Counsel for the Appellant, " . . . the heat-note (was) wrong . . ." and the other precedent cited had no bearing on the question. Two other Cases were referred to as having significance regarding " . . . the existence of rights and privileges . . ." A. J. Ram then spoke (briefly) for Logan and McCarthy replied.[106]

On July 14, 1892, Ewart notified Taché that the argument had just been finished and the result was doubtful.

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[103] A.A.S.B., July 14, 1892, Ewart to Taché.

[104] "Winnipeg vs. Barrett", p. 424.

[105] Ibid., pp. 424-25.

[106] "Winnipeg vs. Barrett", p. 425.

Watson and Morris appeared in their favour but Hannen and Shand seemed against them. The other two Judges had said very little and he could not tell which way they would incline. It was expected that the Judgement would " . . . be given very soon . . ." though the Judges had said nothing about the matter.[107] On the same day, a telegram was sent to Taché stating Judgement was reserved.[108]

Judgement was delivered on July 30, 1892 by Lord Macnaghten.[109] Their Lordships intimated from the start that they were taking a narrow view of the legal aspect of the Case--whether " . . . as a matter of law . . ." and with regard to " . . . the true construction of the Manitoba Act . . ." and the state of things at the union, the Province had exceeded its authority in passing the 1890 legislation. They also suggested that they might have been impressed by the argument advanced on behalf of the appellant to the effect that only the laws of 1670 applied. Attention was then paid to the Manitoba Act[110] and Their Lordships

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[107] A.A.S.B., July 14, 1892.

[108] A.A.S.B., July 14, 1892 (cipher).

[109] "Winnipeg vs. Barrett" pp. 426-33. Vide also M.S.Q., p. 11 and pp. 21-27.

[110] "Winnipeg vs. Barrett" pp. 426-27.

rejected the contention[111] that the appeal was not competent in view of " . . . the so-called appeal to the Governor-General in Council provided by the Act. . . ."[112] Such a provision did not withdraw the " . . . case from the jurisdiction of the ordinary tribunals of the country." It was declared that the Manitoba Act was framed to meet the peculiar needs of the new Province and that though it was difficult to define what was meant by "or practice" " . . . the object of the enactment (was) tolerably clear. . . ." It was not meant to protect only rights and privileges held by custom that had the force of law, but:

> . . . to preserve every legal right or privilege, and every benefit or advantage in the nature of a right or privilege, with respect to denominational schools, which any class of persons practically enjoyed at the time of the Union.[113]

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[111] Counsel for the respondent may have advanced this as a means of thwarting the appeal and turning the matter over to the Federal Government. This may have been urged by Ewart in view of his misgivings over the Attorney-General or by Webster on his own volition. On the other hand, it may well have been advanced by the counsel for the respondent. As they were primarily out to embarrass the Federal Government, and probably felt none too hopeful of success in the litigation, this latter view would seem the most probable.

[112] "Winnipeg vs. Barrett", p.427. This would suggest that Their Lordships did not place much stock in the Governor General in Council as a judicial tribunal, though its antecedents were much the same as that of the Judicial Committee.

[113] "Winnipeg vs. Barrett", p. 427.

Ewart must have plucked up hope at this juncture, but more was yet to come. The condition of affairs at the time of union was then examined in the light of Archbishop Taché's affidavit,[114] and the privileges of Catholics as though they had existed by law were set forth. It was also held that every other religious body thus engaged in education at the union would have had the same rights, possibly including the right of exemption from taxation for the support of the schools of another denomination:[115]

> . . . But, in their Lordships 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. . . .[116]

This last statement formed the gist of the ruling and must have come as a distinct shock to the listeners. Their Lordships next dealt with the contention that if rights

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[114] Vide pp. 114-16.

[115] "Winnipeg vs. Barrett", p. 428. Vide M.S.Q., p.294, for Ewart's caustic objection to Rev. Dr. Bryce's statement that he had strongly held before the Courts Episcopalians and Presbyterians had no such rights as Catholics. Ewart held he was only interpreting a statute and not justifying it and was not engaged in the Case (i.e., in England) where the question arose.

[116] "Winnipeg vs. Barrett", pp. 428-29.

with respect to denominational schools were to be limited merely to the right to maintain private schools without immunity from general taxation, such was a "natural right" which needed no legislative protection. In effect, the Judges maintained that if this were indeed the case, it merely indicated that the Manitoba Act afforded no protection, and declared:

> . . . It can hardly be contended that, in order to give a substantial operation and effect to a saving clause expressed in general terms, it is incumbent upon the Court to discover privileges which are not apparent of themselves, or to ascribe distinctive and peculiar features to rights which seem to be of such a common type as not to deserve special notice or require special protection.[117]

(Thus it was not only the Manitoba Courts that contended, in effect, that the education clauses of the Manitoba Act meant nothing, or all but nothing. Counsel for the respondents had evidently failed to persuade Their Lordships that the Act meant "something". One suspects Edward Blake and J. S. Ewart or Sir Horace Davey would have been more successful than Sir Richard Webster and S. H. Blake.)

To justify their verdict, the Judges then referred to the School Acts from 1871 to 1889,[118] the 1890 provisions[119]

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[117] Ibid., p. 429.

[118] "Winnipeg vs. Barrett", pp. 429-30.

[119] Ibid., pp. 430-31.

and the continuance of the right to maintain voluntary schools and send their children to them possessed by both Anglicans and Catholics.[120] In these passages, particular stress appeared to have been put by the Bench on the fact that the 1871 Act had not provided for exemption of payment to the schools of the other denomination,[121] the provisions for unsectarian instruction in the 1890 Law,[122] and the special exemptions for Catholics from the assumption of debts incurred by Protestant ratepayers under the old dual system.[123]

The infringement of conscientious convictions did not show the Law was 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.[124]

Their Lordships had been anxiously concerned at the unanimous ruling of the Supreme Court, but found themselves

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[120] Ibid., pp. 431-32.

[121] Ibid., p. 430.

[122] Ibid., p. 430-31.

[123] Ibid., p. 431.

[124] Ibid., p. 432. Some doubt was intimated as to whether the Bishop of Rupertsland had correctly portrayed the views of Anglicans.

unable to agree. They doubted that the course of legislation from 1871 to 1890 threw " . . . light on the previous practice or on the construction of the saving clause in the Manitoba Act. . . ." Also, they could not agree with the view seemingly indicated by one of the Justices of the Supreme Court,[125] that the new schools were really Protestant. The Act indicated otherwise.[126]

Before reversing the Judgements in both Cases, the Judicial Committee indulged in a bit of obiter dicta to the effect that while they had no concern with the policy of the new legislation, it would be extremely difficult for the Manitoba Legislature to deal adequately with the problem of education if its functions were merely janitorial.[127]

Thus, at one blow, the hopes of the minority and of the Conservative party were dashed to the ground, in a joint ruling curiously free from the involved arguments of

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[125]Apparently Ritchie, Vide pp. 189-90.

[126]"Winnipeg vs. Barrett", p. 432. Vide also Une page, p. 110 for Taché's eager seizing upon the laying of the corner-stone of a new school with Masonic ceremony to refute this.

[127]Ibid., pp. 432-33. Vide also D'Alton McCarthy, "The Manitoba Public School Law" in The Canadian Magazine, vol. 1, #1, pp. 3-8, March 1893--reprinted in M.S.Q., pp.256-262--for statement that the Committee were invited to this " . . . by the line of argument adopted by the counsel on behalf of the Dominion . . ."

the Queen's Bench and the Supreme Court. So crushed was Ewart, that his telegram to Taché contained only the one word " . . . Defeat . . ."[128] Their opponents, naturally enough, were jubilant. Immediately upon receiving the glad tidings, Sifton cabled his assistant and rival, Joseph Martin (at Freshfields, London): "Election decisive in favor of Government, delighted to hear result of school cases, forward copies of Judgements."[129] The Liberal star was indeed in the ascendent.[130] The crushing blow to the efforts at having their school legislation declared ultra vires was, for a time, to inhibit even any suggestion of an appeal to the Governor General in Council.[131]

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[128]A.A.S.B., July 30, 1892. There is no record of any letter. Cipher meant "Decision given against us."

[129]Sifton Papers, P.A.C., vol. 269, #326, July 30, 1892. Martin had gone over, but had not appeared as Counsel.

[130]Vide Globe (Toronto), Aug. 1, 1892, "The Result in Reality a Victory over the Dominion Government." Vide also Une page, p. 690 for Taché's comment that the decision was a surprise for everyone, diminished perhaps by a study of the way it had been pleaded. Also M.S.Q., p. 156 for Tribune (Winnipeg), Nov. 23, 1892, p.5, report of Bryce's statement that the 1889 declaration of the Presbyterian synod in favour of national schools had had an important effect on the decision. This latter report appears to have been sent to Thompson, vide Thompson Papers, P.A.C., vol. 167, #20928, Nov. 25, 1892, from Father Cloutier.

[131]Though the remarks of Watson and Shand had left a loop-hole, vide M.S.Q., pp. 56-57.

CHAPTER NINE

THE CHANGE OF BASIS--THE APPEAL TO THE GOVERNOR GENERAL IN COUNCIL

Hardly had the hopes of the minority for a declaration of the unconstitutionality of the School Act of 1890 been dashed to the ground by the verdict of the Judicial Committee, than a furious journalistic cry arose--supported by both Conservative and Liberal newspapers--that no appeal to the Governor General in Council under the provisions of the Manitoba Act could be contemplated, although the Mar. 21, 1891 Report of the Minister of Justice[1] had definitely indicated this course. Had not the highest Court in the Empire declared that Catholics had no complaint? How then could an appeal be supported?

Before the representatives of the minority could even give the Federal Government the opportunity to pass the "hot potato" back to the Courts, this initial hurdle had to be overcome, while, in the meantime, compromise entered the air[2] and efforts were initiated to set up a modus vivendi

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[1] Vide M.S.Q., pp. 33-34.

[2] Vide, for example, Mail (Toronto), Aug. 9, 1892 taking up a proposal from a Winnipeg correspondent for the New Brunswick modus vivendi. Vide also A.A.S.B., Aug. 29 & Sept. 5 for advocacy of this idea by John O'Donohue--the maverick Catholic and Freemason who later appeared on behalf of the local Government in the Brophy Case, vide pp. 381 et seq and Aug. 30 for Taché's non-committal reply.

that would remove the issue from the political arena--where it was a menace to both the political parties, though, inevitably, a far greater threat to the one in power.

As early as Aug. 6, 1892, the Toronto World could quote (J.G.) Bourinot to the effect that the ruling left " . . . no room for any other appeal or for remedial legislation, since in law and fact it is declared there is nothing to remedy." Little more than a week later,[3] the Halifax Herald indicated that if the Manitoba Act were intra vires, any remedial legislation passed under the assumption that it was not would be ultra vires. On the same date, the Toronto Empire declared that while the ending of the Judicial Committee's ruling was not strictly called for it would tell against any claim for interference by the Federal Power. The Halifax Herald, on Aug. 18, concurred with these views.

The ability of the Federal Government to enforce remedial legislation was laughed at by Joseph Martin on his arrival in New York on his way home from the victory in England (which he seemed to take as his personal triumph).[4]

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[3]Aug. 15, 1892.

[4]Globe (Toronto), Aug. 15, 1892.

He soon pointed out the difficulty the Federal authorities would have in applying pressure on the Province since it could not hold school lands separately for Catholics. He referred to an official report from the Department of Justice in support of this conclusion.[5] Little did the Hon. Joseph suspect how soon he would be left out of this Government's secrets, however much there was " . . . no holding that soaring spirit . . ."[6]

Letting the matter die was strongly championed by the Toronto Globe,[7] while the Toronto Mail assumed a bellicose tone:

> . . . the tribunal of last resort has pronounced Manitoba free; and free that Province shall be if the English population has any voice in the government of this country.[8]

Even Le Canada became pessimistic of the minority's chances.[9]

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[5] Empire (Toronto) Aug.17, 1892. But vide Thompson Papers, P.A.C., vol. 175, #21930, Feb.3, 1893 from Greenway revealing anxiety over funds for erection of a Normal School.

[6] Thompson Papers, vol. 163, #20331, Schultz to Thompson. Vide also vol. 162, #20196, Sept. 12, 1892, from T. Mayne Daly vs. creating Sifton a Q.C., because of his bigoted speeches.

[7] Vide esp. issues of Aug.4,5,6, 1892. Also Aug.13 & 15.

[8] Aug. 2, 1892, quoted in Hopkins. Thompson, p.263. But vide reply from D.A. O'Sullivan, Aug. 16, holding minority still had right to appeal and the language of the Judgement supported this contention.

[9] Le Canada (Ottawa), Aug. 2, 1892.

The embarrassment of the Conservative Government was extreme. By Aug. 5, 1892, A. W. Ross anticipated much trouble from the decision of the Judicial Committee,[10] forecasting that three Western Conservatives, including Hugh John Macdonald,[11] would vote against remedial legislation and that La Rivière must press the matter on the Government.[12] (A split in party ranks was obviously pending. To hear the appeal of the minority would be risky enough, but to dismiss their plea or to undertake legislation on their behalf would be fraught with grave consequences--as if the virtual defection of the McCarthy wing were not enough!)

But however willing the Conservative politicos might have been to see the question left in abeyance, there was little hope that the minority would oblige.[13] Whatever illusions may have been cherished were shattered by the second session of the National Congress, which met in St. Boniface on Aug. 15 and 16, 1892 to consider what action to take in

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[10] Vide Thompson Papers, P.A.C., vol. 160, #19980, Ross to Thompson. Also #19996, Aug. 8, 1892, from L. W. Coulter, Winnipeg.

[11] Vide also Thompson Papers, P.A.C., vol. 161, #20087, Aug. 21, 1892, Macdonald to Thompson.

[12] Ibid., P.A.C., vol. 57, #228, to La Rivière promising to take up the subject.

[13] Taché. Une page, p. 109 refuses to accept Barrett Case decision as final. Question not settled unless by equity and justice.

view of the decision of the Judicial Committee.[14] The result of these deliberations was the despatch of a petition to the Governor General in Council, on Sept. 20, 1892, declaring that the time had arrived:

> . . . to consider the petitions which had been presented by and on behalf of the Roman Catholics of Manitoba for redress under sub-sections 2 and 3 of section 22 of the "Manitoba Act".[15]

and stating that, in spite of the Judicial Committee's ruling, they still believed their rights affected prejudicially and begged for relief.

This memorial was followed by a personal appeal from Archbishop Taché two days later,[16] recalling in a general way the petitions addressed in 1890 and citing the text of the official declaration made by Thompson on March 21,1891. This latter appeal also stated that the new schools were really " . . . a continuation of the Protestant schools."[17]

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[14]Bénoit. Taché, pp. 780-85 under Senator Girard. Vide Thompson Papers, P.A.C., vol. 162, #20195, Sept. 12,1892 from Taché giving notice of Girard's death and recommending (T.A.) Bernier as successor. Vide also Le Manitoba (Winnipeg) Aug. 17, 24 and 31, 1892.

[15]Vide M.S.Q., p. 35 and pp. 28-30 for the petition of Aug. 1890 as the most significant.

[16]Vide M.S.Q., pp. 35-38.

[17]Vide M.S.Q., p. 35--an obvious attempt to refute the declaration of the Judicial Committee, vide p. Vide also Thompson Papers, vol. 165, #20566, Oct. 19,1892 from Father Cloutier enclosing documents purporting to show the new schools more Protestant than those of 1890.

However, both these petitions were very vague in their requests, asking only that the appeal be heard and that relief be granted, without specifying the nature or mode of the desired relief.[18] This, it may be assumed, was the reason why a more specific petition was drawn up[19]--apparently under Ewart's direction--and forwarded by him to the Secretary of State on Oct. 31, 1892, asking that it be regarded as supplementary to the other petitions and not as a substitute for them, and that the matter be taken up by His Excellency in Council as early as possible.[20] This petition set out the condition of education prior to 1870 and the provisions of the Manitoba Act,[21] and then proceeded to set forth the systems inaugurated in 1871 and 1890, in-

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[18] Vide M.S.Q., pp. 35 & 38.

[19] Vide M.S.Q., pp. 38-42.

[20] Partial Return to an Address of the House of Commons, dated Feb. 6, 1893; for a copy of all petitions, memorials, appeals, and any other documents addressed to His Excellency in Council, since the 15th of March, 1892, relating to the Manitoba School Acts of 1890, and to section 22 of the "Manitoba Act" and section 93 of the "British North America Act", also copy of all reports to and of all orders in council in reference to the same; also copies of all correspondence in connection therewith, 1893, p. 15.

[21] M.S.Q., pp. 38-39.

cluding therein the ambiguous but somewhat prejudicial statement (already used by Archbishop Taché) that the new schools were actually " . . . a continuation of the Protestant Schools."[22] The inadequate provisions for religious training under the new system were then pointed out together with the determination of Catholics to support their own.[23] Remedial measures were requested on grounds (1) that the new legislation subverted rights guaranteed to Catholics by the Manitoba Act and prejudiced rights and privileges re schools which the Catholics possessed at the time of the union;[24] (2) that it infringed rights and privileges provided by the education legislation between 1871 and 1889[25] and thus affected the rights and privileges of Catholics " . . . thereby offending both against the British North America Act and the Manitoba Act."[26]

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[22] M.S.Q., pp. 39-40.

[23] M.S.Q., p. 40.

[24] Ibid., This would seem to fly straight in the face of the late ruling of the Judicial Committee, vide p. 258.

[25] This legislation had been ignored by the Judicial Committee in its ultra vires deliberations, but would have great bearing on the appeal to the Governor General in Council, especially if it were held that the education provisions of the B.N.A.Act applied to Manitoba, vide Appendix B.

[26] M.S.Q., p. 41. This section of the petition would seem to have the closest bearing on justification of the appeal to the Governor General in Council, vide Appendix B.

The petitioners were held to pray not only--as in the two previous petitions[27]--for a hearing and relief, but also for definite provisions: (1) That the Governor General in Council declare the Acts of 1890 ". . . to prejudicially affect the rights and privileges with regard to denominational schools which Roman Catholics had by law or practice at the union."[28] (2) That the School Acts affected " . . . the rights and privileges of the Roman Catholic minority of the Queen's subjects in relation to education."[29]

That it was intended to imply that the provisions for an appeal to the Governor General in Council for remedial measures was in effect an alternative to the one for an appeal to the Courts for a declaration of unconstitutionality would seem to have been the purpose of this petition, for it then went on to request, not, it is true, that the School Acts of 1890 be nullified altogether, but (3) That the Acts previously in force be revived to the extent of securing:

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[27] Vide p. 267.

[28] M.S.Q., p. 41. Author's italics. But this would amount to a declaration that the Acts were ultra vires. The highest Court in the Empire had just finished declaring against this very contention. It is difficult to see how this request strengthened the Catholic case, although they undoubtedly hoped to accomplish through the Federal Government what they had failed to obtain from the Judicial Committee.

[29] M.S.Q., p. 41. This was obviously getting more in line with the basis of an appeal to His Excellency as set forth in the provisions of the Manitoba Act, vide Appendix B.

> . . . to the Roman Catholics in the said province the right to build, maintain, equip, manage, conduct and support these schools in the manner provided for by the said statutes, to secure to them their proportionate share of any grant made out of the public funds for the purposes of education, and to relieve such members of the Roman Catholic Church as contribute to such Roman Catholic schools from all payment or contribution to the support of any other schools; or that the said Acts of 1890 should be so modified or amended as to effect such purposes.[30]

This was to be accomplished by means of an Order-in-Council or some other method.[31]

This ingenious, but hazardous, attempt to circumvent the implications of the Judicial Committee rested on the assumption that the appeal to the Federal Government was an alternative method of relief following on a declaration that the Act complained of was constitutional and not simply a provision for an appeal to the Federal Government as an alternative to going to Court in the first place.[32] In the latter interpretation, sub-section 2 of the Manitoba Act would be regarded as accompanying and dependent on sub-section 1; in the former, sub-section 2 would be regarded as

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[30] Ibid.

[31] Ibid. The petition neither claimed nor disclaimed the services of municipal agencies in collecting taxes from Catholics for the support of their schools.

[32] Vide Appendix B. Note the difference between "prejudicially affect" in sub-section 1 of the Manitoba Act and the simple "affecting" of sub-section 2. Author's italics.

standing alone and having a force of its own. Obviously, if this appeal to the Federal Government convinced these worthies of the need to practically reverse the decision of the highest tribunal in the Empire,[33] the political future of the Conservative party would be extremely compromised unless litigation justified their stand. The difficulty of getting remedial legislation through Parliament under such conditions also undoubtedly influenced their decision to refer the matter of jurisdiction to the Courts.[34] The determination of the minority to "go the whole hog" in their demands and the corresponding calculated intransigence of the Provincial Government were already proving to be the Scylla and Charybdis of the Conservative party.

The petition was signed by Archbishop Taché, T.A. Bernier, James E. P. Prendergast, Father Allard " . . . and about 137 others. . . ." and countersigned by " . . . John S. Ewart, Counsel for the Roman Catholic minority in the Province of Manitoba."[35]

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[33]In such an event, the Privy Council would find its claim to be a judicial tribunal somewhat shaken.

[34]Vide pp. 400 et seq.

[35]M.S.Q., p. 42.

Prior to the presentation of this petition, the Minister of Justice had indicated to Archbishop Taché[36] the advisability of having an interview with his Counsel--if any had been instructed--before the Sub-Committee to whom the Memorial[37] for redress had been referred made its report. Preliminaries had to be discussed even before the date for a hearing was named. Thus, Thompson had decided to allow the hearing within a month of receiving the first petition. It soon became apparent that the Federal Government was nerving itself to take up what their opponents regarded as the distinctly political task of granting the requested leave,[38] and also to bring in remedial legislation.[39]

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[36] A.A.S.B., Oct. 10, 1892. Also in Thompson Papers, vol. 257, #424.

[37] Apparently that of Sept. 20, 1892.

[38] Vide Partial Return, 1893, pp. 17-18 for "Declaration on the Manitoba School Law by the Conservative League, Montreal, Nov. 3, 1892."

[39] Vide Thompson Papers, P.A.C., vol. 165, #20612, from A. F. Martin stating he had originally agreed with La Rivière's suggestion to Thompson for " . . . an act giving the right interpretation of the school clause of the Manitoba Act." But he now believed it was better to bring in a remedial bill enforcing complete secularization. This would lead to an outcry from the Protestants which would result in separate schools. (This scheme undoubtedly seemed rather foolhardy to Thompson.) Vide though M.S.Q., pp. 156 & 170-179 for Anglican opposition to local hints at secularization during the synod of Jan. 11, 1893.

Four days later, His Grace replied that Ewart had left for Ottawa and would meet with Thompson though his original purpose was not in connection with the schools.[40] (Obviously, Ewart was not forsaking the rest of his practice[41] while defending the minority.) The promptitude with which Ewart received a reply[42] to his letter of Oct. 31 despatching the petition drawn up on his return to Winnipeg and countersigned[43] by him (which reply promised it would " . . . receive attention."), lends colour to the inference that this petition was drawn up under the auspices of both Ewart and Thompson.[44] The wording would suggest that it had been decided to offer the minority the possibility of the

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[40]Thompson Papers, P.A.C., vol. 164, #20505, Oct. 14, 1892. Draft in A.A.S.B.

[41]Vide also A.A.S.B., Nov. 22, 1892, Ewart to Taché.

[42]Partial Return, 1893, p. 19, L.A. Catellier, Under Secretary of State to Ewart.

[43]Vide pp. 268-72.

[44]Vide also Report, Committee of Privy Council, 1892, in RE the Appeal of the Roman Catholic Minority in Manitoba, Hearing before the Sub-Committee on Sat. Nov. 26, 1892, p. 1 for Thompson's introductory remarks. (Vide p.277 in thesis.) It is perhaps significant that as late as Oct. 10 Thompson did not know if Ewart were still Counsel and Ewart had not set out for Ottawa in connection with the schools, vide p.273.

practical nullification of the effects of the decision of the Judicial Committee, while later events would indicate that the shunting of the question once more into the Courts in order to remove the obloquy of making a political decision in the matter from the shoulders of the Federal Government was already being contemplated.[45] That the whole question was of an extremely delicate nature for the Conservative party may be deduced from Thompson's warning that no Cabinet Minister should express his opinion " . . . until the Committee of the Privy Council had heard the case submitted by the Catholics of Manitoba . . ."[46] It is interesting that only two days later, Oliver Mowat was urging Thompson to take the vacant Chief Justiceship of the Supreme Court![47]

The two extremes in the controversy were to become apparent in this second attempt by the minority to obtain their demands. On one hand were those who held the decision of the Judicial Committee had nullified any possibility of

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[45] Vide pp. 277-84.

[46] Thompson Papers, P.A.C., vol. 167, #20837, Nov.16, 1892, to John Costigan. One wonders how much was intended by that word "case".

[47] Ibid., #20852. Vide also M.S.Q., pp. 154-56 for report of Nov. 22, 1892 Meeting of Presbyterian Synod advocating complete establishment of national schools.

relief through remedial action by the Federal Power.[48] On the other, were those who contended that the Federal Government could practically negate this Judgment. The difference was not long in coming to a head. On Nov. 22, Ewart notified Archbishop Taché that he had consented to be heard before the Sub-Committee of the Privy Council and was leaving that night. He had desired " . . .to be heard next Friday . . ." as he had to be back in time for the Term cases, which commenced the following Monday.[49] Two days later, the Conservative dilemma was highlighted by the resignation of Sir John Abbott from the Premiership on grounds of ill health. Deprived of his figurehead, Sir John Thompson saw fit to assume the position.[50] On Nov. 26, 1892, Ewart appeared before the Sub-Committee of the Privy Council for Canada and formally presented the petition. The meeting was presided over by Sir John Thompson with the Hon. Mr. Mackenzie Bowell and the Hon. Mr. Chapleau present as members of the Sub-Committee, and with the Hon. Mr. Ouimet present by invitation. At this

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[48] Vide, for example, Globe (Toronto), Nov. 2, 1892 for discussions of the doubt about the appeal and the interpretation of the statutes, together with mention of Ewart.

[49] A.A.S.B., Nov. 22, 1892.

[50] Mackenzie et al. Guide to Canadian Ministries, p. 19.

meeting, Mr. Ewart delivered the address he was to repeat " . . . in more extended form . . ." two months later before the full Committee.[51]

Thompson's introductory remarks indicated that the meeting had been arranged to suit Mr. Ewart's convenience and had followed out of an interview with Ewart in which the latter had led him to believe " . . . that it was his desire to present a further paper . . . and be heard before the Sub-Committee. . . ."[52] and therefore no action had been taken on Archbishop Taché's petition. The object of the meeting he stated to be " . . . not to hear the appeal itself . . ." but, before making recommendation to His Excellency, to hear " . . . Mr. Ewart on behalf of the petitioners as to the procedure which should be adopted and the grounds upon which he claims the intervention of His Excellency in Council. . . ."[53] As this was " . . . not a political inquiry. . .", it had been thought proper to admit the press.[54]

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[51] M.S.Q., p. 42 gives a very brief note of the proceedings.

[52] Report, Committee of Privy Council, 1892, p. 1.

[53] Ibid.

[54] The attempt to make the Hearing appear in the light of a judicial inquiry is obvious.

It would afford them " . . . great pleasure . . ." to hear Mr. Ewart, especially as the petitioners desired to " . . . invoke the exercise of a power claimed to be embodied but hitherto unused.[55]

Ewart first of all intimated that he intended only to give a summary of the arguments he intended to present before the full Committee. The decision of the Judicial Committee had ended the matter only so far as the first sub-section of section 22 was concerned. The other two sub-sections presented " . . . an alternative course, or rather a course for an alternative case . . ."[56]

Ewart then drew an hypothesis to illustrate the first sub-section dealt with the question of constitutionality, while the second and third dealt with cases where the law was intra vires. He again implied that this appeal was like that from one Court to another.[57]

Several remarks were made to support this conclusion: (1) If the Judicial Committee had declared the Act

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[55] Report, Committee of Privy Council, 1892, p. 1.

[56] Ibid., The quote is a significant part of the effort to make out the proceedings were of a judicial nature. Ewart seemed out to "kill two birds with one stone", to protect the Government and thus make sure of maximum relief to the minority.

[57] Report, Committee of Privy Council, 1892, pp. 1-2.

ultra vires, there would have been " . . . nothing to appeal from. . . ." Clearly then, there must be an appeal in intra vires cases, otherwise the sub-sections 2 and 3 would provide no appeal at all[58] (and would therefore be meaningless). (2) The provision for remedial legislation in sub-section 3 also indicated an appeal was contemplated in cases when the law was intra vires. No remedial legislation was necessary in the contrary case.[59] (3) The very term "appeal" itself indicated that there had to be something, i.e., a valid Act, to appeal from.[60] (4) Detailed examination of the wording of the sub-sections[61] indicated this distinction, as recognized by Lord Watson in the argument before the Judicial Committee.[62] Ewart specifically refuted the contention that sub-section 2 protected only rights held at the union. It also protected rights bestowed by an ordinary statute.[63] (This would give a full significance to the School Acts of 1871-1889--an effect which the Judicial Committee had refused to consider.)[64] He made it clear that

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[58] Ibid., p. 2.

[59] Report, Committee of Privy Council, 1892, p. 2.

[60] Ibid.

[61] Vide Appendix B.

[62] Report, Committee of Privy Council, 1892, pp.2-4.

[63] Ibid., p. 3.

[64] Vide p. 269, footnote 25.

the minority intended to base its claim on the contention that, while the Judicial Committee had declared rights respecting denominational schools granted prior to the union had not been prejudiced, they still had a very wide claim to rights respecting education granted after the union.[65]

Ewart then proceeded to suggest: (5) That perhaps sub-section 3 of section 93 of the B.N.A. Act applied to Manitoba. In such an event, there was a definite right to appeal, especially as the corresponding sub-section in the Manitoba Act was a much wider provision and would have protected the Catholic schools in New Brunswick if it had been in the B.N.A. Act.[66] (6) There was " . . . no interference with Provincial rights if the Province get (sic) what the constitution gives them. . . ." It was up to the Courts to say whether any remedial law were or were not valid.[67] (7) The Governor General in Council should follow the past policy of respect for Catholic rights followed by the Canadian Parliament and make a remedial order for that body's

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[65] Report, Committee of Privy Council, 1892, p. 3.

[66] Report, Committee of Privy Council, p. 4.

[67] Ibid. This would seem to militate against the idea that the Privy Council was a judicial body entitled to practically overrule the Judicial Committee. Evidently Ewart wanted legislation first and litigation after. One wonders if Thompson had agreed?

guidance, especially as it was publicly admitted that Parliament and the Home Government had intended to conserve Catholic rights by the Manitoba Act.[68]

Ewart concluded by suggesting:

> . . . a day should be appointed by the Privy Council for argument of the matter by counsel upon our side and on behalf also of the Manitoba Government; that for that purpose a day should be set far enough in advance to permit sufficient to be given to the Government of Manitoba and that on the return of it we should be heard. . . .[69]

The final form of the proposed remedial order could await the decision of the Privy Council as to whether it should be made.[70]

After having heard Ewart's address, Sir John contented himself with asking Ewart if he had any suggestion about the date for the hearing before the full Committee. Ewart replied:

> "As soon as possible. If a day is to be fixed, I thought of telegraphing the Attorney General of Manitoba to ask him what length of notice he would wish to have. If it is not very long, I would not return to Manitoba. If you think well, I will telegraph him and ascertain what his wishes would be with reference to that. I think his convenience ought to be consulted by me at all events.[71]

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[68] Ibid., pp. 4-5.

[69] Ibid., p. 5.

[70] Ibid., pp. 5-6.

[71] Report, Committee of Privy Council, 1892, p. 6.

Thompson remarked that the Council ought to send the invitation, but would be glad to hear Ewart's suggestions. Ewart then stated that he would telegraph the Attorney-General. It was then ascertained by Chapleau (from Ewart) that the local Government knew of the latest petition only from newspaper reports and Bowell elicited the information that Ewart believed, however, that they knew of his presence in Ottawa.[72]

Eight or ten newspaper reporters had been present at the hearing, and Ewart " . . . revised the copy for the Empire (sic)[73] and dictated a shorter summary for some of the other papers."[74] On the very day the hearing was concluded, Ewart wired Sifton " . . . to try and arrange a day for the argument before the full council & hope(d) that there (might) not be a long delay. . . ."[75] By Nov. 28, 1892, Sifton had replied to the effect that " . . . the Government

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[72]Ibid. This exchange appears to reveal some Conservative anxiety that they might be accused either of arrogantly demanding the appearance of Provincial representatives or of affording the Province no opportunity to be heard.

[73]Vide Empire (Toronto), Mon., Nov. 28, 1892. Also Globe (Toronto) of same date.

[74]A.A.S.B., Nov. 26, 1892, Ewart to Taché.

[75]Ibid.

would not consider the matter at all until formally served with the papers. . . ."[76] Ewart had therefore seen " . . . the new Premier & arranged that it should take place in about four weeks. . . ." Sir John thought the Province should have ample time to prepare. Ewart intended to return to Winnipeg and make a fuller report to His Grace.[77]

Evidently Ewart was back in Winnipeg by Dec. 6, 1892,[78] for, on that date, Archbishop Taché wrote to Sedgewick[79] that Ewart had asked him " . . . who would bear the expenses of the School Case as presented before the Privy Council . . ." and His Grace had not hesitated to state " . . . that the Ottawa Government had promised to defray all expenses connected with the School difficulties, and that that would include Mr. Ewart's fees and travelling to and from Ottawa. . . ."[80] Sedgewick denied any knowledge of such a promise and declared

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[76] A.A.S.B., Nov. 28, 1892, Ewart to Taché. Gazette (Montreal), Nov. 28, 1892 reported Ewart as saying that he had telegraphed on the night of the 27th and received a reply on the 28th.

[77] A.A.S.B., Nov. 28, 1892, Ewart to Taché.

[78] On this date, the Herald (Halifax) defended Ewart's contentions re the appeal to the courts.

[79] Vide A.A.S.B., Dec. 9, 1892, Sedgewick to Taché.

[80] Ibid.

that Thompson had also taken the stand that:

> . . . neither does he know of any such promise. The proceedings now pending before the Privy Council are altogether different from and independent of the litigation which was instituted at the instance of the Government for the purpose of testing the constitutionality of the Manitoba School legislation of 1890, the cost of that litigation being borne by the Dominion Government.[81]

(Obviously, the attempt to pass itself off as a Court of Law was causing the Federal Government some embarrassment.[82] This refusal would seem to indicate that they, as well as their opponents, had considerable doubt that the proceedings in question were really litigation.)

On Dec. 29, 1892, the Committee of the Privy Council concurred in the Report of the Sub-Committee on the above appeal and recommended that the hearing take place before the full Committee on Sat., Jan. 21, 1893.[83] This Report,[84]

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[81] Ibid.

[82] Vide Globe (Toronto), Dec. 10, 1892 for warning that Federal interference was useless and the Government was out only to trick the minority with complicated legal proceedings and indication that technically the petitioners were not appealing from the Judgment of the Judicial Committee but practically they were. The "may" in sub-section 3 of the Manitoba Act was only permissive. (This foreshadowed a later objection, vide p. 379.)

[83] Vide M.S.Q., p. 42 for Order in Council, Dec. 29, 1892.

[84] M.S.Q., pp. 43-50.

after setting forth the various memorials and petitions,[85] stated that the Sub-Committee was commenting only on the last as it summarized the others and was more specific, and definitely rejected the contention in this petition that His Excellency was called upon to hear an appeal based on the prejudicial affectation of rights to denominational schools possessed at the time of union, as all parties were bound by the terms of the ruling of the Judicial Committee.[86] The School Acts were within the power of the Manitoba Legislature but it was still to be decided whether the appeal should be heard and entertained:

> . . . as an appeal against statutes which are alleged to have encroached on rights and privileges with regard to denominational schools, which were acquired by any class of persons in Manitoba, not at the time of the union but after the union.[87]

The Report then implied that perhaps the B.N.A. Act applied to Manitoba and postulated that even if it did not, it was necessary to ascertain if the appeal re denominational or separate schools would stand by virtue of the Manitoba Act

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[85] M.S.Q., pp. 43-46.

[86] M.S.Q., p. 47. This refutation would seem to indicate that it was perhaps Taché who insisted on this request. But see the next footnote.

[87] M.S.Q., p. 47. The reference to " . . . denominational schools . . ." might seem to indicate an attempt to bring in the contention about prejudicial affectation after just rejecting it.

alone.[88] Ewart's argument that this appeal came as a natural consequence of the Judicial Committee's verdict was next examined.[89] The Sub-Committee did not feel it incumbent upon them to express an opinion on these questions and declared that no such application had ever before arisen. The Sub-Committee considered that the appeal should be heard but should not then be dealt with as of a political character or involving political action; it was to be dealt with without reference to the personal views of the Ministers on denominational schools and without their political action being considered pledged by virtue of the petitioners being heard. The inquiry was to be of a judicial rather than of a political nature. Such a procedure had already been followed by the Sub-Committee in allowing Counsel to be heard and the public to be present. The Sub-Committee advised that a date be fixed for a hearing before the full Committee and that the Manitoba Government be afforded opportunity to be represented.[90] The Report, signed by Thompson, Bowell, Chapleau,

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[88] M.S.Q., pp. 47-48.

[89] M.S.Q., pp. 48-49.

[90] M.S.Q., p. 49. The strong effort to give the proceedings a judicial cast and to avoid a commitment to remedial measures is glaringly obvious.

and Thomas Mayne Daly, established six preliminary questions for consideration " . . . with regard to the appeal. . .."[91]

While trouble was brewing for the Conservatives out of the mere allowing of the hearing,[92] proceedings went ahead to have the hearing before the Full Committee carried out, though, at the same time, efforts were made through Lt. Gov. Schultz to have the Manitoba Government settle the problem.[93] On Jan. 4, 1893, the Under Secretary of State communicated the Governor General's ordinance fixing Jan. 21 as the day for the hearing, and, on Jan. 7, Schultz notified him that he had that day transmitted the information to his Government.[94] On Jan. 13, 1893, Schultz informed Thompson that the local Government had done no more than acknowledge its receipt and he very much doubted that they would be represented, but would content themselves with refuting any misstatements which might be made by their opponents.[95] Also

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[91]M.S.Q., p. 50. Vide Appendix E for the questions.

[92]Vide, for example, Thompson Papers,P.A.C., vol.172, #21459, Jan. 1893 from Sam Hughes on McCarthy and the Liberals.

[93]Vide Thompson Papers, vol. 172, #21510, Jan. 4,1893 & #21544, Jan. 7, 1893, also vol. 173, #21646, Jan. 13, from Schultz. Vide also vol. 259, #185, Jan. 26, 1893 to Schultz showing Thompson was still hopeful that Schultz's good offices would lead to a more satisfactory settlement than could be made in Ottawa.

[94]Partial Return, 1893, p. 19.

[95]Thompson Papers, P.A.C., vol. 173, #21646.

on Jan. 13, Ewart informed Taché that the hearing was fixed for the 21st and requested his opinion of the draft of the proposed address to the full Committee.[96] Jan. 18, 1893 saw Schultz informing Catellier that his Government had decided not to be represented.[97]

On Jan. 21, 1893, the Governor General in Council heard the petition--the first appeal under section 93 of the B.N.A. Act. As in the proceedings before the Sub-Committee, the meeting was open to the public. Every Canadian newspaper of note had a representative. There were present about a dozen outsiders, including Father Lacombe, Mr. La Rivière, Senator Bernier, John Heney and Solicitor-General Curran. The Hon. Mr. W. B. Ives presided over the Committee made up of Sir A. P. Caron and the Hon. Messrs. Bowell, Costigan, Foster, Haggart, Patterson, Daly, Tupper, Ouimet, and Angers. The President stated that the meeting was being held to hear Ewart (accorded a convenient position at the round table) on the points raised by the Sub-Committee[98] (vide Appendix G.).

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[96] A.A.S.B., Jan. 13, 1893 (misdated 1892).

[97] Partial Return, 1893, p. 20.

[98] This account was taken from that in the Empire, Jan. 22, 1893, repeated in M.S.Q., p. 51, which Ewart called a ". . . very accurate account . . ." Probably he drew it up or corrected it himself as he had the previous report of the hearing before the Sub-Committee, vide p. 282. The emphasis that the hearing was called under the provisions of the B.N.A. rather than of the Manitoba Act seems indicative.

Ewart's address set forth much the same arguments that he had already used before the Sub-Committee, although at greater detail and with considerably greater use of emotional appeals.[99] It was also somewhat less clear and coherent than this previous address. In illustration of these remarks, it may be indicated that he utilized arguments on religious toleration,[100] the history of Canadian legislation in the matter of education,[101] and the refutation by the Judicial Committee of the contention of the Manitoba Act provided a limitation in the first sub-section and a remedy for infringement of this limitation in the second,[102] sar-

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[99] Vide Supplementary Return (33c) to an Address to His Excellency the Governor General, of the 6th February, 1893, on the subject of the Manitoba School Acts of 1890, with a certified copy of a Report of a Committee of the Honourable the Privy Council, on the 22nd of February, 1893, relative to a settlement of important questions of law concerning certain Statutes of the Province of Manitoba relating to Education, 1893. Also M.S.Q., pp. 52-67.

[100] M.S.Q., pp. 52-53.

[101] M.S.Q., pp. 53-55.

[102] M.S.Q., pp. 55-57. Ewart held that there were two limitations and apparently Justices Watson and Shand had supported this contention vs. Davey and McCarthy. (But there were six Justices and Shand had seemed against the minority in other respects, vide A.A.S.B., July 14, 1892, Ewart to Taché. How far the second limitation on the power of the Province might justify action on an Act the first limitation could not touch was, of course, problematical, especially as such action rested on the Federal Power, though everything was being done to present this course as a judicial one, and Ewart quoted Lord Watson's declaration--again made during the argument--to the effect that sub-section 2 applied to cases where the Act was intra-vires but did what the minority considered to be an injustice, vide M.S.Q., p. 67.)

casm concerning the argument (advanced even by the newspapers) that they could not appeal as the Act was intra vires, whereas they still could not appeal if the Act were ultra vires.[103] In the light of the hostility in Manitoba to the disallowance of railway charters, his citing of this as a precedent for Federal intervention[104] seems unduly provocative, and must have inspired some wry glances amongst his hearers. Ewart also referred to Federal control over agriculture, immigration, local railways, and insolvency as precedents for the validity of Federal jurisdiction--against the plea of provincial rights.[105]

He then argued that the Catholics had been given rights by statute after the union and such were protected by the Manitoba Act and the ruling of the Judicial Committee did not declare against this.[106] He held that the Catholics

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[103] M.S.Q., p. 57. This might be rather prejudicial if his opponents argued that the second sub-section contemplated simply a method of avoiding the expense and delay of a court action and was not intended to supplant a court decision if such were made. However, Davey and McCarthy appear to have definitely tried to make out this provision was made to be the remedy and the tribunals had no jurisdiction in such cases at all; vide arguments in M.S.Q., pp. 55-57 and declarations of the Judicial Committee against this contention, M.S.Q., p. 22.

[104] M.S.Q., p. 59.

[105] M.S.Q., pp. 59-60.

[106] M.S.Q., p. 60.

of Manitoba could not be regarded as being under less protection than the Catholics of other provinces.[107] Precedents were cited to show that the provisions of the Manitoba Act must apply to rights created by statute.[108] The rights granted Catholics by Provincial statutes had become vested rights.[109] Reference was made to the unfairness of the new legislation, which practically abolished the Catholic schools while retaining the Protestant ones. (Though he admitted the latter were " . . . almost purely secular . . .") and confiscating Catholic property. Though the Judicial Committee had assumed that there was no confiscation and that Catholics had special relief, there were few districts where this applied.[110] The Catholics suffered from " . . . wanton injury . . ." because in only four out of eighty Catholic school

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[107] M.S.Q., p. 61. (But did they have more than in the Maritimes?)

[108] M.S.Q., pp. 61-62.

[109] M.S.Q., pp. 62-63. On p. 63 Ewart maintained that there had been no " . . . well-founded complaint . . ." to the Catholic schools save that they " . . .were too Catholic."

[110] M.S.Q., p. 63. Here Ewart referred to some 70 districts where there were practically no Protestants. (But this would mean that the schools would be under the control of Catholic trustees who could hire and control teachers, providing such were certified, though it is true they were subject to the regulations of the Advisory Board on which their own Archbishop had refused to serve.) Ewart also held that this was only " . . . one of the errors which (with all due respect to them) the Judicial Committee . . . fell into."

districts was the population so sparse and mixed as to create difficulty in operating a separate system.[111]

Ewart also contended that the Governor General in Council not only had the power but also the " . . . bounden duty . . ." to hear the appeal and judge it on its merits, and held that the responsibility in the end would be that of Parliament.[112] Ewart then sought to encourage his listeners by recalling the sympathetic attitude of Parliament on the occasion of the New Brunswick school question[113] and to the recent vote on the North West Territories school matter.[114] He concluded by answering in effect "Yes" to all but the third of the questions under consideration.[115] (Vide Appendix E). The remedial order should be made and an early date appointed ". . . for the hearing of the appeal upon its merits. . . ."

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[111] M.S.Q., p. 63. Reference was also made to the ". . . good sense . . ." of the New Brunswick and Nova Scotia modus vivendi.

[112] M.S.Q., pp. 64-65. He would appear to be putting the Committee in the position of a Court of Law advising the Legislature of a course of action. Unfortunately for the vigor of such a position, the very men who constituted this "Court" also formed the Government and could scarcely be regarded as possessing that independence which is commonly regarded as one of the prerequisites of a judicial body.

[113] M.S.Q., pp. 65-66. But this sympathy had carefully "watered down" all possibility of action.

[114] M.S.Q., p. 66. But Archbishop Taché continued to complain; vide Thompson Papers, P.A.C., vol. 193, #24105, Dec. 6, 1893, from Taché, or the North West Ordinance, no. 22.

[115] M.S.Q., p. 67.

Hon. Mr. Ives then read a letter from the Provincial Secretary stating that Manitoba would not be represented, and, on no one offering to make any further remarks, requested the public to retire.[116]

No sooner had the meeting been completed than Ewart was able to declare jubilantly:

> We had a very full meeting of the Privy Council this morning, all the members but two being present. They all listened to me with great patience & attention & some of them were kind enough to express appreciation of the points taken in my address. No one appeared for the Manitoba Government but a letter was read from the Lieutenant Governor reciting a letter to him from the Hon. J. D. Cameron intimating that his government did not see that their interests would be in any [way] served by being represented by Counsel. None of the ministers said a word during the argument nor did anyone indicate the intention of the Government. For myself I am more impressed with the idea that the matter is to be referred to the

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[116] M.S.Q., pp. 67-68. Vide also M.S.Q., pp. 256-262 for D'Alton McCarthy's "The Manitoba Public School Law" (reprinted from The Canadian Magazine, March, 1893) castigating the Dominion Government for its Machiavellian masquerading as a Court of Law and disturbing the peace of the country with these proceedings calculated to subvert responsible government, while providing Ministers with the plea of judicial immunity from questioning. He particularly referred to the evasions of Daly and Ouimet and to Thompson's Toronto statement that the Government intended to stand by the constitution; vide pp. 260-61. He concluded with considerable sarcasm as to the immunity from blame such a procedure supposedly afforded, no matter which way the Government decided. But on p. 262 he admitted that the Government was often called upon to make decisions in which " . . . the consideration of legal questions may be involved. . . ." This was probably the reason why Ewart included this article in the M.S.Q. It may well have had some influence in determining the Federal Government to submit the matter to the Supreme Court as it was apparently written immediately after the Jan. 22 hearing, vide M.S.Q., p. 259.

> Supreme Court. Sir John Thompson in one of his recent Toronto addresses[117] said:- "We intend to be guided simply by the constitution as it will be expounded by the highest authority that can be got to expound it & not by the private opinion of any member of the government." This seems to me to settle the matter & our object now must be to get it done quickly. I will try & see Sir John before I leave & urge this upon him.[118]

Thus, Ewart could congratulate himself on what seemed to be a successful commencement of an attempt to effectually negate the set-back embodied in the final ruling in the Barrett Case by basing this second plea on the widest possible interpretation of the remaining sub-sections of the Manitoba Act, assisting the Governor General in Council to constitute itself as a judicial tribunal, and endeavouring to encourage and reassure the Government in every way possible to take up the task of granting relief, especially by lending as strong a judicial cast to the proceedings as possible.

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[117] Evidently that of Jan. 5, 1893 before the Toronto Board of Trade; vide Willison. Laurier, vol. 2, p. 209.

[118] A.A.S.B., Jan. 21, 1893, Ewart to Taché.

CHAPTER TEN

THE BROPHY CASE BEFORE THE SUPREME COURT

Before the question of relief through the agency of the Federal Government again plagued Conservative circles, it was found expedient to shift the field action from the semi-judicial atmosphere of the Privy Council to the wholly judicial one of the Courts. Such a procedure had indeed been foreshadowed in the way in which the Sub-Committee of the Privy Council had drawn up questions re the validity of the appeal,[1] and definitely foretold by Ewart's letter of Jan. 21, 1893, to Archbishop Taché.[2] No matter which way the Courts ruled, the party in power stood to benefit. If the Courts declared that no relief could or should be afforded, the Government could wash its hands of the affair. If the verdict favoured the claims of the minority, the Government could justify its course before its opponents by adopting an air of reluctant, but loyal, submission to the dictates of the highest tribunal in the Empire.

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[1] Vide Appendix E.

[2] Vide p. 293. Note also Privy Council Register 1892, #3245 Letter from John S. Ewart to the Governor General asking for a copy of the Bill of Rights brought in 1870 by the delegates--referred to the Secretary of State, Dec. 16, 1892. Evidently Ewart was preparing for the forthcoming argument.

But, instead of simply submitting the six questions postulated by the Sub-Committee to the Courts and adhering to this decision, the Federal Power was to show increasing favour for its transference into a test Case by the appellants--thus dissociating themselves to some extent from the movement. Conservative terror of losing their hold on the country would seem to have grown acute. Thus arose the famous Case of Brophy vs. City of Winnipeg, which was to be fought before the tribunals in the midst of furious political controversy, journalistic polemics, efforts at compromise with the shrewdly calculating Government of Manitoba, and the doubts, fears and hopes of the representatives of the minority--which were not, however, to rise to a crescendo until the final verdict had been declared. In the midst of this welter of activity, John S. Ewart was to play a noteworthy part.

Though Schultz was of the opinion that the Manitoba Government had made a mistake in not being represented at the Jan. 21 hearing,[3] this Power was to repeat its tactic of avoiding a tacit acknowledgement of the validity of the

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[3]Thompson Papers, P.A.C., vol. 175, #21975, also referred to a Feb. 8, 1893, petition being circulated amongst "Prodestants" to give tax relief to Catholics and possible concessions in the new School Act.

Federal attempt to constitute itself as a judicial body by boycotting even the hearing before the Supreme Court.[4] All was not going at all well for Conservative aims in Federal politics either. On Feb. 8, 1893, Ewart saw fit to write Thompson a confidential letter[5] suggesting a rebuttal of the attack D'Alton McCarthy proposed to make in the House. He enclosed a copy of McCarthy's speech before the Federal Parliament on the Jesuits Estates, which would indicate " . . . that circumstances alter not only cases but also constitutional statutes. . . ." (As a revelation that Ewart was well aware of the need of revision for publication, we may note his reference that the enclosed copy had been personally revised by McCarthy.) This letter also disclosed that Ewart had observed the Government had decided to seek the opinion of the Supreme Court on the question of jurisdiction.[6] He wished:

> . . . to prefer three requests in regard to such action:
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> 1. That the case should go to the next sittings of the Court;

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[4] Vide p. 317 et seq.

[5] Thompson Papers, P.A.C., vol. 175, #21976, Feb.8, 1893. Note that The Herald (Halifax), Mar. 13, 1893, drew attention to McCarthy's alleged misquotation from Bagehot on the separation of powers.

[6] Author's italics. Thus early Ewart knew the course the Government had determined to follow.

2. That he should be permitted to see the draft of the case;

3. That in forwarding it to the Court it might be suggested that the case was properly a Manitoba case & might therefore to (sic) be entered upon the list with appeals from that Province.[7]

(Obviously, the original Case for submission to the Supreme Court was envisaged as a Case drawn up by the Federal Government and not as a private action. At this juncture, Ewart seems to have contented himself with asking only that it be submitted to his perusal and taken to Court as soon as possible.)

That Thompson was busy with the preparation of the Case might be inferred from the fact that not until Feb. 25, 1893, did he reply, thanking Ewart for his letter and the pamphlet and promising: "The Case will be prepared almost immediately and when we are ready to take it up, you will, of course, be invited to take part in its preparation."[8]

Ewart thus knew of the Government's decision to refer the matter to the Supreme Court at least two weeks before the Order in Council of Feb. 22, 1893[9] declared, in pursuance of the Report of the Committee of the Privy Council of the same date,[10] that the questions submitted by the Sub-Com-

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[7]Thompson Papers, P.A.C., vol. 175, #21976, Feb. 8, 1893, from Ewart.

[8]Thompson Papers, P.A.C., vol. 260, #84.

[9]M.S.Q., p. 68.

[10]Vide Supplementary Return (33c), 1893.

mittee" . . . should be authoritatively settled before the appeal . . . be further proceeded with." To attain this end, a Case was advised to be prepared[11] and the Government of Manitoba and Mr. Ewart notified so as to be given an opportunity to present suggestions.

Threatened with this new move, Sifton stated that the Manitoba Government would remain passive until the Province's position was threatened.[12] This announcement was responsible, perhaps, for another bombshell in the Provincial House in the form of James Fisher's[13] announcement that he had been present at the meeting in St. François Xavier when Joseph Martin had given assurances to the French Catholics

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[11] According with the provisions of Act 54, 55 Vict., ch. 25 regulating appeals to the Supreme Court, vide M.S.Q., p.5, for sec. 4 and its wide and careful provisions for employment of Counsel--especially in case one party did not appear.

[12] Reports of Debates, Feb. 24, 1893, Free Press(Winnipeg) Feb. 25, 1893. Vide also Reports of Debates, Mar.8, 1893, Free Press, Mar. 9, 1893 for McFadden's condemnation of French Catholics for reviving the issue.

[13] Vide Thompson Papers, P.A.C., vol. 182, #22736, June 28, 1893 for Daly's testimony:". . . I have known Fisher from my youth, he is a born Grit, but a straight man . . . a staunch Presbyterian. I think the man is sincere in his views re Reciprocity. . . ." (McCarthy was a "dead duck".) Vide also Ibid.,vol. 193, #24083, Dec. 4, 1893, from Daly asking that A. E. Richards and T. E. Perdue be struck off the list of prospective Q.C.'s and the name of James Fisher inserted--which should have been included before. Vide also Daily Sun (St.John, N.B.) Feb. 26, 1894, for tribute to Fisher by Dr. J.H. Morrison, former inspector of Manitoba Protestant Schools before Junior League in a strong and informative political speech before the Supreme Court verdict of Feb. 20.

that the Liberals would not infringe their rights respecting language and education.[14] Now, however, that the nettle had been grasped, albeit somewhat gingerly, good Conservatives could be expected to rally to the party.[15]

Still another bombshell soon exploded in the Federal House. J. Israel Tarte, on Mar. 6, 1893, castigated the Government in a motion disapproving of the Government's handling of the Manitoba School Question and " . . . assuming to be possessed of judicial functions conflicting with their duties as constitutional advisers of the Crown." He claimed that Chapleau had made distinct and formal promises to Taché in December, 1890.[16] This resolution was seconded by Laurier.[17] It was followed by Thompson's denial, on Mar. 8, that the Government was out to veil its responsibility and by Laurier's plea for investigation, conciliation and compromise rather than coercion.[18] Thus early were the lines

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[14]Recorded in M.S.Q., pp. 396-97.

[15]Vide Une page, p. 77 for evidence of Hugh John Macdonald's change of tone on Mar. 6, 1893.

[16]Hopkins. Thompson, p. 265.

[17]Skelton. Laurier, vol. 1, p. 456. Vide Benoit. Taché, pp. 793-95 for public altercation between Taché and Tarte over allegations in "L'Electeur" of May 18, 1893.

[18]Hansard, Mar. 6, 1893, pp. 1987-1998.

being drawn for the 1895-96 battle.[19]

By April 5, 1893, Monseigneur Emard, Bishop of Valleyfield, on his visit to St. Boniface with Father Lacombe, was holding long conversations with Archbishop Taché and His Grace of St. Albert on a petition to be drawn up and signed by all the episcopate.[20] A few days later, Solicitor-General J. J. Curran could write that he had met with Angers, Ouimet and Caron and all agreed that Thompson's " . . . draft for submission to the Supreme Court on the Manitoba School Case could not be surpassed. . . ." He presumed Ouimet would immediately push the matter before the Privy Council.[21]

That Ouimet pushed hard or met very little resistance from the Privy Council is evident from the issue of a Report from the Acting Minister of Justice, on April 20, 1893 submitting a draft of a Case to be referred to the Supreme Court and the action of the Committee of the Privy Council

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[19] Vide Edgar Papers, D.P.R.A., Apr. 15, 1893, from Laurier--recent election success due far more to Conservative disorganization than to ". . . the Manitoba business . . ."

[20] Bénoit. Taché. p. 789.

[21] Thompson Papers, P.A.C., vol. 180, #22516. It was not yet the Brophy Case. One day later appeared Taché's pamphlet answering the question "Are the Public Schools of Manitoba the Continuation of the Protestant Schools of the Same Province?" in the affirmative and doing his best to emphasize the alleged Protestantism of both systems, vide M.S.Q., pp. 139-59.

in advising that copies of the draft be submitted to both the Manitoba Government and Mr. Ewart and inviting both to make ". . . suggestions or observations . . ." respecting the Case and the questions therein.[22]

May 4, 1893 saw Ewart submitting suggestions on the forthcoming Case to the Minister of Justice (Thompson). Unfortunately, the letter has not been discovered.[23] Soon after, Curran informed Thompson that the Case appeared to have been adopted by the Privy Council, and rejoiced at keeping the Liberals guessing.[24] Apparently, on June 14, Thompson had written E. L. Newcombe offering suggestions made by Ewart and himself which the Acting Minister of Justice had proceeded to incorporate into the " . . . Manitoba Schools Case . . ."[25]

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[22] Vide M.S.Q., pp. 68-69 for Order in Council, April 22, 1893.

[23] Mentioned in the Order in Council, July 8, 1893, vide M.S.Q., p. 69, which stated Thompson had considered Ewart's suggestions and made a few alterations. No word had been received from the Manitoba Government. The Minister recommended the amended Case be adopted and submitted to the litigants. Vide Thompson Papers, P.A.C., vol. 181, #22590, May 15, 1893 from Newcombe indicated Ewart's letter was sent with a brief of the Case to Thompson at Ewart's behest.

[24] Thompson Papers, P.A.C., vol. 181, #22626, May24,1893.

[25] Ibid., vol. 183, #22784, July 19, 1893 from Newcombe to Paris, France.

An intriguing side-light emerged at this point in Curran's claim that Thompson had suggested he (Curran) appear in the Case and that Ouimet was pleased with this and had stated that the Counsel for the minority had suggested him. Curran promised to look into the matter with Newcombe. The remainder of the letter, however, dealt with offering to examine possible changes in the Case and leaves one in some doubt as to whether the Solicitor-General had really been meant to be one of the Counsel. It seems doubtful, as his participation would have embarrassed the Government. In any event, he was not to appear, though he apparently aided in the drafting of the Case.[26]

About this time also, the harrassed Thompson found it necessary to write Bompas, Bischoff & Co.[27] complaining that a letter written by the Deputy Minister of Justice setting out the facts by which they thought they had a right to the services of Sir Horace Davey in the Barrett Case[28] had been delivered to Mr. McCarthy, who had read it in the House as the basis of his attack on the Government for its

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[26]Thompson Papers, P.A.C.,vol.182,#22663,June 7, 1893.

[27]Thompson Papers, P.A.C.,vol.261,#321, June 7, 1893.

[28]Vide A.A.S.B., Jan. 20, 1892, Bompas et al. to Sedgewick for mention of this missive.

share in that litigation. The same attack had been several times renewed elsewhere, and Thompson considered the transference of the document an extraordinary breach of professional etiquette. He concluded by stating that Sir Richard Webster (the Attorney-General) had assured him he was not a party to it, thus implying that it was the fault of Bompas, Bischoff & Co.

This virtual accusation called forth a lengthy reply from the aggrieved solicitors only three days later.[29] After thanking Thompson for the kind expression of confidence with which he closed his letter, especially as they much regretted the unfortunate results of several of the Judicial Committee's decisions re constitutional questions, they declared that it was their duty to keep a General Retainer alive and even to remind a client of its existence. But they then agreed with Thompson that the Case of Barrett vs. City of Winnipeg had set a precedent and implied that in future they would not seek to engage English Counsel without the express instruction of the Government.

Bompas, Bischoff & Co. then set out the record of their retention of English Counsel and concluded that Sir Richard Webster and Mr. Gore had been retained for the Federal

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[29]Thompson Papers, P.A.C., vol. 182, #22674, June 10, 1893.

Government for some time before the Barrett Case, but that no such retainer had been given Sir Horace Davey until he was given a General Retainer " . . . at the end of 1891 in the endeavour to secure him for the Case of Barrett v. the City of Winnipeg (sic) . . . on behalf of the Dominion Government . . ."[30] They advised that in future they be informed " . . . of the name of the litigant who represents the Government . . ." so that proper arrangements could be made. The notification from the Deputy Minister had not named the parties. When apprised of the true nature of the Case, they had informed Sir Horace that the proceedings were instanced by the Federal Government and claimed him on the strength of the General Retainer.

They had had no idea that the letter from Sedgewick informing them of the facts in the Case was in any way confidential and they had therefore communicated " . . . with these solicitors on the other side to induce them to relinquish their claim on Sir Horace Davey, and when this failed, in the Case laid before the Attorney General for his decision. . . ."[31] Bompas et al regretted that the Government

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[30]Thompson Papers, P.A.C., vol. 182, #22674, June 10 1893, Bompas et al to Thompson.

[31]Thompson Papers, P.A.C., vol. 182, #22674, June 10, 1893, Bompas et al to Thompson.

had been embarrassed by this procedure but were unable to see how they could have been expected to do otherwise, and expressly denied that they had delivered a copy of the letter to McCarthy. At the time, they had no knowledge of him at all in the Case and had no idea political capital could have been made out of the missive.

That this apology did not completely satisfy the outraged Thompson may be deduced from a letter advising Newcombe[32] to contact Bompas, Bischoff & Co. as there was still difficulty over the question of general retainer. However, by June 26, 1893,[33] the firm were back in his good graces. They were glad they had succeeded in removing Thompson's suspicions " . . . regarding Sir Horace Davey's connection with the McCarthy transaction." and observed his instructions re General Retainers.

While arrangements were going forward to carry the question of Federal intervention to the Supreme Court, in June, 1893, Ewart saw fit to engage in writing a somewhat intemperate polemic entitled "Isms in the Schools"[34] which

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[32] Ibid., #22706, June 20, 1893.

[33] Ibid., vol. 182, #22741, Bompas et al to Thompson.

[34] Vide M.S.Q., pp. 263-76. Published in The Canadian Magazine, July, 1893, vol. 1, No. 5, pp. 356-66.

spent several pages irately advancing the contention that Plato, pagans, Christians, Catholics " . . . Protestants, including Calvin, Knox, etc., etc. were wrong . . ." in proportion as they were intolerant of the beliefs of others. In like manner, Hobbes, Locke, Bishop Warburton, Rousseau, Voltaire, Blackstone, Burke, Paley were mistaken.[35] (The latter chiefly because he " . . . underrated, or rather misrated altogether, the function of ridicule in argument."[36] No one could accuse Ewart of such inadequacy!) He then made allusions to controversies over Free Trade and Protection and also to the inheritance of opinions to indicate:

> . . . that your opinions are not entitled to one whit greater deference or respect (even should they be concurred in by vast majorities) than are the opinions of others. . . . all opinions not harmful to society should be tolerated. . . .[37]

And the onus of proof that such opinions as, for example, atheism were detrimental rested on those who wished them suppressed.[38] He, unlike his readers, still saw much in-

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[35] M.S.Q., pp. 263-268.

[36] M.S.Q., p. 268.

[37] M.S.Q., p. 270. This would lead to the suspicion that Ewart was out to refute McCarthy's previous argument in the same magazine (vide M.S.Q., p. 256) that the school legislation met ". . . with the approval of a great majority of the people interested. . . ."

[38] M.S.Q., p. 269.

tolerance in the world. Education was more widely spread but intolerance commenced with knowledge and gave in only to culture. People were too cock-sure and he objected to the intrusion of this unpleasant tendency into the public schools. He wished " . . . to see impregnable walls opposed to the incursion of all proselytizers into the schools."[39] He then pleaded for liberty, and advanced the idea that such "isms" as Imperial Federation,[40] Militarism, Pietism, Sabbatarianism, Anti-Alcoholism, etc., should be taught in particular schools to the extent of the " . . . practical unanimity . . ." of the parents of the children attending that school. Such unanimity was " . . . not such as would make it necessary to include all mere eccentric or isolated opinion, of every ordinary or extraordinary sort. . . ."[41]

From his proposition:

> . . . that parents should not be required to subscribe to the school rates, and at the same time have their children taught some ism they abhor; and, on the

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[39]M.S.Q., p. 271. In fact, however, Ewart's later argument for the admission of isms seems inconsistent.

[40]M.S.Q., pp. 271-73. McCarthy's connection with the Imperial Federation League would seem significant.

[41]M.S.Q., p. 273.

> other hand, that where parents of all the children in any school desire that an ism should be taught, taught it should be. . . .[42]

and that liberty also required that children should not grow up " . . . entirely illiterate. . . ." he then immediately deduced the conclusion that:

> . . . reasonable facilities ought, if possible to be given for the combination of such children (i.e., those whose parents desired a particular ism) in separate schools. . . . in which it did not materially interfere with the efficiency of other schools.[43]

Ewart then referred to the Ontario system and advocated the granting of Catholic schools in regions of mixed population but heavy Catholic population and of sparse but entirely Catholic population. He then quoted Dr. Bryce's statement that all but a small number of the Catholic school districts were almost entirely French.[44] He advocated that Manitoba cease regarding " . . . the Catholic religion as something depraved . . ." and afford Catholics the opportu-

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[42] M.S.Q., p. 273. But what if one or only a few parents objected to having their children subjected to some "ism". Ewart's "all" seems rather awkward for the purposes of his argument. The parents would seem to have no advantage except withdrawal and non-subscription, no matter how much they desired to have their children protected from illiteracy.

[43] M.S.Q., p. 274.

[44] M.S.Q., p. 274. This probably provoked Bryce into his reply, vide p. 311.

nity to " . . . organize themselves together . . ." to teach their religion in schools to which no one went but members of their own faith.[45]

Having worked from his original proposal of toleration of all isms to support of Catholic separate schools, Ewart then offered some sympathy for the Churches and parsons who had been so intolerant that now they were faced with the greater intolerance of sceptics, both avowed and otherwise. He blamed the latter for being the most opposed to Catholic schools and maintained a great many Protestants would be most happy " . . . to accord liberty to the Catholics could they but get a little of it themselves. . . ."[46] Ewart concluded his discourse by quoting from Burke and Priestly against the intolerance of atheists and infidels and from John Morley against secularism, showing clearly his

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[45] M.S.Q., p. 275. But districts where absolutely none but Catholics attended would be hard to find. Ewart seems to have tried hard to convert Bryce's almost entirely into an absolute in the mind of the reader. Nothing was said about Government fulfilling the duty of collecting taxes for the support of Catholic schools. What was to be done with the as yet but four districts where the population was sparse but mixed he did not specify.

[46] M.S.Q., p. 275. This sympathy seems somewhat at variance with his earlier jibes at the Protestant clergy, vide pp. 237-38, 247.

utter lack of sympathy with the latter "ism".[47]

This provocative blast called forth two replies in The Canadian Magazine.[48] That of Dr. George Bryce,[49] written during Aug., 1893, engaged in considerable mockery of Ewart's own dogmatism, intolerance, and lack of recognition of a common standard of values. He was " . . . not condemning Mr. Ewart, who is a prominent and useful member of our Winnipeg community, but simply stating the inevitable drift of the opinions advanced by Mr. Ewart . . ."[50] The remainder of his somewhat patronizing, but on the whole restrained, discourse defended the right of the state to interfere and to establish a moderately non-sectarian system, maintaining that the whole issue was between State control and Church dictatorship--using many of Ewart's statements rather adroitly in the process.[51]

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[47]M.S.Q., p. 276. One fears that the advocacy of a system pleasing all would lead to a condition of utter chaos not, in fact, a system at all. However, Ewart was careful to indicate that "We can never expect to have theoretical protection in the application of even undoubted doctrines to all possible conditions and contingencies." (M.S.Q., p. 273.)

[48]George Bryce. "The Manitoba School Question" in Sept. 1893 vol. 1, #7, pp.511-16 issue and W.D. Le Sueur. "State Education and Isms" in Nov., 1893,(misdated Oct. in M.S.Q.,) vol. 11, no. 1, pp. 3-7 issue.

[49]M.S.Q., pp. 277-78.

[50]M.S.Q., pp. 278-79.

[51]M.S.Q., pp. 279-83. Vide also The Canadian Magazine, Nov. 1893, vol. 11, p. 96 for a slight correction by Bryce (not in M.S.Q.).

The other author, Mr. W. D. Le Sueur,[52] while professing to agree with Dr. Bryce, maintained that a further exposé of " . . . the fallacies which Mr. Ewart has offered . . ." was necessary. He first chided Ewart for his unnecessarily long preamble attempting to gain an admission of fallibility from his opponents, and then objected to the attempt by certain interests to capture the public school machinery for their own ends.[53] Ewart's scheme was simply a plea for utter chaos and the triumph of local majorities, but it was not advanced seriously. His chief aim was to attain advantages for the Catholic Church. Ewart's long argument about fallibility was not given to convince Catholics that they might be wrong, but quite the opposite.[54] While Protestants would admit fallibility, Catholics would not. Therefore, in self-defence, declared Mr. Le Sueur, Protestants would be entitled to meet them with the same attitude.[55]

But, he maintained, it would be sufficient to hold that " . . . the state should not be used to advance the

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[52] Vide M.S.Q., pp. 284-89.

[53] M.S.Q., pp. 284-86.

[54] M.S.Q., pp. 286

[55] M.S.Q., pp. 286-87.

religious opinions peculiar to one section of the population." Both Catholics and Protestants agreed that the State should see to instruction in secular knowledge, but it had no warrant to teach theology.[56] Local minorities should not be handed over to the care of local majorities without protection from " . . . the general law of the land . . ." for fear of " . . . political disintegration . . ." and " . . . local tyranny of the most odious kind. . . ."[57] Mr. Le Sueur held that local minorities did not want fads and that Ewart's argument would lead simply to the tyranny of their being compelled to put up with the isms of the local majority.[58]

However, Le Sueur went further than Bryce in advocating that those who did not wish to conform in the locality should be allowed to withdraw and not be compelled to pay taxes to the support of public schools, providing, of course, that mass ignorance would not result, which calamity he did not think would be the case.[59]

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[56] M.S.Q., p. 287.

[57] M.S.Q., p. 288. But this was what Ewart was ostensibly out to prevent, albeit on a different level. Vide also M.S.Q., p. 302 for Ewart's denial that he advocated the dominance of local majorities without restraint from the " . . . general law of the land . . ." However, this protection would seem of the same nature as that which Le Sueur envisaged.

[58] M.S.Q., pp. 288-89. It would seem more accurate to say the local minorities would be incapable of enforcing their fad--unless, of course, they were highly determined and the majority apathetic.

[59] M.S.Q., p. 289.

These two replies were responsible for a most irate and sarcastic rebuttal from Ewart[60]--at least as regards the remarks of Rev. Dr. Bryce--in which he revealed singularly little of that tolerance he had been so fervently advocating. In fact, at least three-quarters of this discourse was taken up with exceedingly scornful and somewhat ill-tempered attacks on Bryce's arguments, particularly as they involved specific criticisms of Ewart's own contentions. That this reply conveyed more heat than conviction may be seen from Ewart's denial that he was out to get special privileges for one denomination to teach their special doctrines under their control,[61] and his endeavour to make out that Church government in Bryce's college justified Church control in public schools. Ewart's contention that Protestants in Quebec enjoyed a special privilege which Bryce would not allow to the Catholics of Manitoba[62] also suffered from his carping about Bryce's alleged inconsistency in prohibiting state teaching of religion while advocating non-sectarian instruction, and

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[60] "The Manitoba School Question" in The Canadian Magazine, Dec. 1893, (Misdated Jan. 1892 in M.S.Q.) vol. II, No. 2, pp. 107-116.

[61] M.S.Q., p. 293. This might not have been Ewart's intention but his argument would seem to lead to this practical result.

[62] M.S.Q., pp. 293-94.

adding that while Bryce would not consent to having his children taught the Ten Commandments in Catholic form, he was out." . . . to require Roman Catholic children to take their ideas from Protestant teachers. . . ."[63]

Ewart was on safer ground in seizing on Bryce's admission, that Catholics should be allowed to avail themselves of private schools at their own expense, and advocating that there should be control by the people rather than the Church, state inspection and provision for attainment of the accepted standard, and, finally, the right to tax themselves for their support.[64] (Evidently Ewart meant exemption from the public school taxes and, quite possibly, the use of the municipal power to collect the taxes. He definitely contended for the Provincial grant.)[65] The remainder of his criticism of Bryce's argument was less defensible, as it involved considerable manipulating of the Church-State argument and overstatement of the restrictions on religious instruction under the new system.[66]

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[63]M.S.Q., p. 294. But Catholic teachers were not barred from the public schools and "catechism" and "ideas" do not appear exactly the same.

[64]M.S.Q., pp. 295-98.

[65]M.S.Q., p. 298.

[66]M.S.Q., pp. 299-300.

Ewart then contented himself with a brief, though rather patronizing examination of Le Sueur's contentions,[67] claiming that this worthy had misunderstood him and making some rather ingenious explanations of his real point of view.[68] He concluded by indicating that if, in addition to what Le Sueur was willing to concede, Catholic school districts were granted legal recognition and Catholic ratepayers compelled, as in Ontario, to support the public schools, unless they volunteered to support their own, they would then be close to a separate school system.[69] (However, Le Sueur had expressly indicated that such separatists should not enjoy the benefits of public schools.)[70]

Ewart's advocacy of the Ontario system is apparent. He was to make every endeavour to see that his clients obtained this measure of relief, though at the same time he considered the Quebec arrangement quite fair.[71] However, it may be doubted that Archbishop Taché was particularly

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[67] Vide M.S.Q., pp. 301-303.

[68] M.S.Q., pp. 301-302.

[69] M.S.Q., p. 303.

[70] M.S.Q., p. 298.

[71] Vide M.S.Q., p. 217.

taken with this idea, in whatever way it was advocated. Ewart's rationalism obviously suffered from a considerable degree of emotionalism and even of crankiness--at least at this juncture.

While these three worthies had been demonstrating their powers of erudition, arrangements continued for the appearance of the Government's Case before the highest tribunal in the land. On July 8, 1893, an Order in Council was issued stating that the draft Case, as amended by the Minister of Justice and John S. Ewart, had been recommended for approval. There had been no reply from the Manitoba Government.[72] At this juncture also, Liberal policy on the Federal level was being worked out.[73] If the Supreme Court declared against the minority, Laurier intended to regard the question as settled--for fear of McCarthyite retaliation. If the decision went the other way, he intended to insist on inquiry to determine the nature of the schools. Little sympathy was held for Archbishop Taché and his favouring of the Conservative policy.

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[72] Vide M.S.Q., p. 69. Also pp. 70-71 for the Case of July 7, 1893 containing the six questions, vide Appendix E.

[73] Vide Laurier Papers, P.A.C., vol. 7, #2650, July 13, 1893 from Oscar McDonnell (ed. of Le Canada, Ottawa) and #2562, July 14 reply. Vide also Thompson Papers, P.A.C., vol.184, #22869, Aug. 23, 1893 from Schultz stating His Grace satisfied Federal Government doing all it could at present.

Newcombe was soon in a position to inform Thompson that no reply had come from either the Manitoba Government or Ewart to the copies of the amended Case he had forwarded. But, he intended to refer the Case to the Supreme Court " . . . within a day or two. . . ." The sittings were set for the first Tuesday in October and thus " . . . there should be ample time for preparing the case for argument . . ."[74] The reference was officially made on July 20, 1893 and approved by Order in Council on July 31, 1893.[75]

But at this point, the financial problem, previously foreshadowed,[76] began again to emerge. On Sept. 4, 1893, Ewart wrote to Thompson[77] pointing out the burden of the expenses of the appeal to the Supreme Court on the far from wealthy local Catholics, who were additionally burdened with the support of the public schools. He indicated that the Statute governing appeals to the Supreme Court might provide a way out. It provided that when no Counsel appeared on behalf of one of the litigants, the Government might request a Counsel to argue the Case and undertake to pay the expenses.

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[74]Thompson Papers, P.A.C., vol. 183, #22784, Jul.19, 1893.

[75]Vide M.S.Q., p. 70. Also Benoit. Taché, p.788 and Une page, pp. 116-17 for reference to "M. John Stewart"(sic).

[76]Vide pp. 283-84.

[77]Thompson Papers, P.A.C., vol. 185, #23017.

This was probably what would happen in favour of the local Government and the minority would thus see Ottawa bearing the expenses of their opponents while they were compelled to pay their own Counsel. " . . . This would hardly be fair . . . ." Ewart also objected that he did not want to have to go to Ottawa while this arrangement was being made and then have to return later, after the appointed Counsel had been given a chance to prepare.

In order to avoid these developments, Ewart suggested that the Case be put at the top of the list, and that Mr. (illegible, but probably Curran) should appear " . . . & in the absence of all other Counsel suggest that the Court should appoint Counsel & that the argument should then be adjourned for two or three weeks. . . ."[78] It should be easy to make an arrangement with the Chief Justice to accomplish these designs. (The political embarrassment to the Conservatives in undertaking such a procedure seems obvious.)

This missive soon elicited a discouraging reply from the Prime Minister,[79] objecting to each of Ewart's conten-

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[78]Thompson Papers, P.A.C., vol.185, #23017, Ewart to Thompson.

[79]Ibid., vol. 262, #208, Sept. 8, 1893.

tions. He doubted very much that the Court would direct Counsel to argue a Case of such importance, involving as it did a Provincial Government that had declined to appear.[80] If Counsel did not appear on either side, the Supreme Court would refuse to take up the Case and it would remain in abeyance indefinitely. Such had occurred several times in Ontario. The absence of Counsel for even one side had been taken as reason enough to refuse a hearing. Thompson then made the rather evasive statement that:

> . . . If there is any good reason why we should pay the expenses of one side, we might perhaps consider that a justification for paying both, but the want of means makes the litigation burdensome to one party only, and that is the party most interested in going on.[81]

Attention was then called to the illness of the Chief Justice, who had asked for six months leave but might be persuaded to stay on if the Case were advanced sufficiently. (Evidently Thompson was doing his best to avoid any chance of political complications.)[82]

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[80] Evidently Thompson was thinking of the two Privy Council hearings and took it for granted the Province would repeat its abstention.

[81] Thompson Papers, P.A.C., vol. 262, #208, Sept. 8, 1893, to Ewart.

[82] Vide Benoit. Taché, p. 684 for Thompson's Sept. 12, 1893 public declaration at Montreal in which he admitted that the Barrett Case had been carried to Court by the Government, an admission already made in Parliament. Vide also A.A.S.B., Oct. 16, 1893, Thompson to Taché for a denial by Thompson that he appealed to religious prejudice and was out to compromise His Grace with Tarte; also in Thompson Papers, P.A.C., vol. 264, #15.

The initial proceedings before the Supreme Court in the Case of Brophy vs. City of Winnipeg[83] took place on Oct. 4, 1893. Fortunately, Mr. Ewart has left us a concise and graphic description:[84]

> The proceedings today in the Supreme Court were very short. The Chief Justice asked Mr. Wade[85] if he intended to argue the case & on being told that he did not announced that a majority of the judges had determined to appoint Mr. Christopher Robinson[86] to argue on behalf of the province & that the case should be adjourned to enable him to prepare. The case was placed at the head of the Ontario list of cases & will be reached probably about the end of next week. At first I thought of returning to Manitoba for a few days but after speaking to two of the Judges came to the conclusion that it would not be safe to do so. I shall therefore go to Toronto & remain there until the case is reached.

He added that Curran had handed him $250 to help defray the

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[83]It has not been ascertained at what point Brophy became the nominal litigant.

[84]A.A.S.B., Oct. 4, 1893, Ewart to Taché. It is interesting to note that at this period Sifton's correspondence with Laurier revealed far more concentration on electioneering and the tariff than on the school issue; vide Sifton Papers, P.A.C., vol. 269, nos. 451, 558, 621, 788, 796, 829, and 987.

[85]F. C. Wade, who appeared on behalf of the Province only out of respect for the Court, vide M.S.Q., pp. 72-73.

[86]Re C. Robinson, Q.C., vide R. W. Scott Papers, P.A.C., vol. 1, #49, "Dominion Government in account with Christopher Robinson, Q.C.", Oct. 17, 1893, re Manitoba Acts--set forth the record of preparation for proceedings from July until hearing on Oct. 4 & 17, 1893. Robinson's fees on argument--$500.

expense of the litigation and had promised to " . . . supply some further amount. . . ." Ewart regretted that they had to pay their own expenses while the Dominion would be paying those of the Province and considered that they should try to get on the same footing as Sifton when the estimates came up.

The same letter also disclosed that Ewart had examined " . . . with much pleasure and interest . . ." the Archbishop's manuscript of his article on the history of the Manitoba Schools. He considered many people would be surprised by the facts it contained and it would " . . . be of much interest to all . . ." He enclosed it as His Grace might wish to make use of it before he returned to Winnipeg.[87]

On Oct. 17, 1893, the Supreme Court heard the argument re the right of appeal to the Governor General in Council.[88] Ewart made the preliminary argument and was followed by Christopher Robinson, Q.C., for the respondent. Ewart then made an address in reply. Since the arguments followed quite closely what Ewart had already set out before the two

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[87]A.A.S.B., Oct. 4, 1893, Ewart to Taché.

[88]Special Case Referred by the Governor General in Council in RE Certain Statutes of the Province of Manitoba relating to Education, Report of the Decision of the Supreme Court of Canada, 1894, vol.XXII, Supreme Court of Canada, pp. 624-50.

Committees of the Privy Council and Robinson's rebuttal[89] was what one would have expected--based mainly on the inalienable right of a Province to repeal its own Acts--they shall not be repeated here.

As an indication of the climate in which this had taken place, we might refer to Schultz's letter to Thompson of Dec. 28, 1893,[90] in which he expressed the hope that the Supreme Court would make " . . . an early disposal of the School Case . . .", while looking toward concessions on the part of the local Government.[91] His optimistic comments on Father Langevin (later Archbishop Langevin) as one inclined to "expediency" to a greater extent than Archbishop Taché seems rather ironic in view of later developments.[92] Even more amusing was his advise on how to embarrass the cocky

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[89]Thompson Papers, P.A.C., vol. 192, #23981, Nov. 26 & #23988, Nov. 27, 1893, from Robinson declining offer of knighthood.

[90]Ibid., vol. 194, #24334.

[91]Vide Ibid., vol. 197, #24685, Jan. 19, 1894 from Schultz showing him still attempting to gain concessions--soothing the fears of the Manitoba Government of the Protestant Protective Association by urging them to use the precedent of Mennonite Normal Schools. This would be useful to soften the blow of an ". . . unfavourable (to them) decision of the Supreme Court . . ." However, Schultz hoped the latter would be delayed.

[92]Vide pp. 401 et seq.

Joseph Martin who was likely to go to Ottawa as a result of the recent mismanaged elections in which even His Grace had to admit Catholics voted for him. The ubiquitous John O'Donohue also found occasion to utter his thoughts in protesting the speech of a certain Reverend Father on the policy of the local Government on school funds.[93] A few days later, His Grace added his own protest to the proposed Act to amend the Public Schools Act.[94]

As early as Jan. 19, 1894, Tarte was forecasting a decision favourable to the minority[95] from the Supreme Court. Monseigneur Cameron, at Thompson's behest, had visited Taché to persuade him to accept the Government's policy,

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[93]Sifton Papers, P.A.C., vol. 2, #377, Jan. 28,1894. Vide also Thompson Papers, P.A.C., vol. 199, #24891, Feb. 6, 1894 complaint from Archbishop of Kingston of pro-P.P.A. policy of the Conservative Empire and Mail.

[94]A.A.S.B., Feb. 1 & 16, 1894, to Schultz. The Act referred to was 57 Vict., 1894, c. 28 and provided that no school would continue to receive the municipal grant if it failed to comply with regulations re religious instruction, passed Feb. 16, 1894; vide A.A.S.B. of that date to Schultz requesting reservation. Act obviously aimed at Winnipeg Catholic schools. Vide also Thompson Papers, vol. 200,#25070, Feb. 17, 1894 from Schultz stating amendments dropped when French Catholic Members realized other ways to get the money. Greenway still making promises. #25117, Feb.20, for Schultz doubts re reservation.

[95]Laurier Papers, P.A.C., vol. 8, #2803. It would appear that Tarte was indulging in wishful thinking that the Case would not go before the Judicial Committee.

after which the Government would request Manitoba to restore the former situation and on refusal take over the school lands to which Catholics had a proportionate right. By Feb. 17, 1894,[96] it was being confidently stated that the Supreme Court would judge that the Government had the right to acknowledge the appeal and that Thompson would be in a terrible dilemma.

Such was not, however, the result when the Supreme Court finally delivered its verdict on Feb. 20, 1894.[97] " . . . Every one of the five judges rendered a separate decision; the diversity of point of view and the hair-splitting refining of logic did not show the court at its best . . . ." undoubtedly because they were sorely troubled at the contrast between the Supreme Court ruling in the Barrett Case and that of the Judicial Committee. Even the Chief Justice, while disclaiming this case had anything to do with the matter at hand, seemed obviously disconcerted.[98]

The Chief Justice (King) and Justices Taschereau and

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[96] Ibid., #2890, from F. Langlier, Quebec barrister.

[97] Vide Special Case, 1894, vol. XXII, Supreme Court of Canada, pp. 651-721 for the Judgments. Vide also M.S.Q., pp. 72-111.

[98] Vide M.S.Q., pp. 77-78.

Gwynne declared against the contentions of the minority, while Justices Fournier and King dissented.[99] The Chief Justice answered "No" to each of the six questions,[100] basing his decision very strongly on the power of a legislature to amend its own laws.[101] In addition, his admission that the Barrett Case did not preclude the appeal was practically nullified by his contention that it had only " . . . a very remote application to the present case. . . ."[102]

The gist of the rulings of both Taschereau and Gwynne[103] was that the Governor General in Council was being asked to overrule the verdict of the Judicial Committee in the Barrett Case. They accordingly answered all the questions in the negative, except that having to do with the inhibiting effect

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[99]Justices in the Barrett Case were Ritchie (J.C.) Strong, Patterson, Fournier and Taschereau. Vide Hopkins. Thompson, p. 264 for comment that Justice Sedgewick had stepped down because as Deputy Minister of Justice he had assisted in preparing the Case and for comment that the rulings of King (who as Premier had helped abolish the New Brunswick separate schools) and of Taschereau illustrated ". . . the high character of the Canadian judiciary. . . ."

[100]Vide Appendix G.

[101]Vide M.S.Q., pp. 72-80.

[102]M.S.Q., p. 77.

[103]Vide M.S.Q., pp. 87-100

of the Barrett Case decision.[104]

Justices Fournier and King, while declaring in favour of Ewart's contentions, were as unanimous in the answers they supplied to the questions submitted as were Justices Gwynne and Taschereau--though the answers were exactly reversed. The main feature of Justice Fournier's ruling[105] (following considerable examination of the negotiations) was that the B.N.A. Act applied to Manitoba. That of the ruling of Justice King[106] was that the appeal to the Governor General in Council was not limited to rights at the time of union. Both indicated that the Provincial Legislature could not repeal an Act passed subsequent to the union conferring the rights and privileges contended for, without coming under Federal review.

Thus, it may easily be seen that while there was considerable consistency of view in the individual verdicts, the sum total of the rulings indicated practically nothing of unanimity except the fact that each of the six questions received three "Nays" and two "Ayes".

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[104] Vide Appendix G, question 3.

[105] Vide M.S.Q., pp. 80-87.

[106] M.S.Q., pp. 100-111.

The immediate reaction to this verdict in Winnipeg was an attempt on the part of Schultz[107] to persuade the vacillating Greenway that the time to make concessions was when the minority seemed beaten. But the Premier's mentor, Sifton, soon quashed any such notion in his speech to the Manitoba Legislature on Feb. 28, 1894. There was to be no compromise with uncompromising Rome.[108]

On the same date that Sifton uttered this bellicose declaration, Archbishop Taché sent a pathetic plea to Sir John Thompson[109] asking him if he would kindly inform him if the Federal Government intended to appeal to the Judicial Committee, and maintaining he was " . . . absolutely without information with regard to our actual position. . . ."

A telegram of March 4, 1894[110] in reply notified His Grace that the Motion for leave to appeal had to be made in England and by the Dominion Government, but on behalf of the minority. Particulars were being sent.

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[107]Thompson Papers, P.A.C., vol. 201, #25132, Feb.21, 1894, from Schultz.

[108]Dafoe. Sifton, p. 61.

[109]Thompson Papers, P.A.C., vol. 201, #25251, Feb.28, 1894. Draft in A.A.S.B.

[110]Ibid., vol. 274, #124, Thompson to Taché, vide also A.A.S.B.

Thus, not only had Ewart and his clients received a somewhat chilling dismissal from the highest tribunal in the Dominion, but they were receiving even worse treatment from the Manitoba Government and a considerable degree of luke-warmness from the Federal authorities. But the decisions of the Courts had been sufficiently conflicting, the involvement of the Federal Government so compromising, and the desperation and determination of the minority so great, that the matter was not to be left stranded in the limbo of inconclusive litigation.

CHAPTER ELEVEN

THE JUDICIAL COMMITTEE UNRAVELS A DILEMMA

The Supreme Court having pronounced against the minority, it was little wonder that Archbishop Taché, especially, became completely discouraged by the Courts. The Judicial Committee had once already declared against them. How could it be expected to be more favourable than the Supreme Court, which previously had declared itself so forcibly in their favour? Would it not be wiser to avoid the tribunal of last resort and take refuge in the plea that the verdict in this appeal was only a notice and that the Government still had the power, and indeed the duty, to acknowledge the request of the minority, and undertake to settle their grievances? How could a second rebuff, with its unavoidable delay, possibly help the minority to advance its claims or assist the Federal Government in carrying out remedial measures? His Grace need not have worried. He vastly underestimated the capacity of the Judicial Committee for reversing the decisions of the Court below, to say nothing of the ability and zeal of the two Counsel who were to fight the Case.

Thus it was that the first difficulty Ewart encountered in carrying the Case to a successful conclusion was

the opposition of his friend the Archbishop[1] to any further litigation. But there was little chance of the Government taking up remedial legislation until the Judicial Committee had declared its verdict. Such a course would have been almost certainly fatal politically, though the one finally adopted was in the end to prove no more beneficial. The risk that the Judicial Committee might declare against them thus had to be accepted by Ewart's clients. But anxious as the Conservatives were to keep the matter before the Courts, they nevertheless continued to avoid any official financial support of the litigation, thus posing another hindrance to Ewart's efforts.

Such was the situation when Ewart voyaged to England to make arrangements with the redoubtable Edward Blake[2] (whose activities were by then largely devoted to the British Isles) to institute an appeal to Their Lordships. On Mar. 17, 1894, Ewart wrote him from Hyde Park to the effect that he had received further instructions--that at present

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[1] Note M.S.Q., frontispiece, for affectionate dedication to His Grace (deceased). Note also Ewart's letters to Taché became increasingly intimate.

[2] Ewart intended to be in England at least until Mar. 23, vide Blake Papers, D.P.R.A., Part 2, vol. 2, #66, Mar. 17, 1894, from Ewart.

the application for leave should not be made. He had no doubt, however, that it would be made at the April Sittings.[3] It would appear that Archbishop Taché's obstreperousness was responsible for this delay, for only a week later Sir Adolphe Caron informed his leader[4] that discreet efforts were being made to keep Father Lacombe from persuading the hierarchy to intervene.

That the English Solicitors were busy on the Case--and apparently much more attentive than in the Barrett fiasco--would appear from Thompson's request to them on Mar. 26, 1894[5] respecting Sir Richard Webster's opinion of the six questions to be submitted to the Judicial Committee, which they answered to the effect that they had submitted the Case to Webster for his opinion and were transferring the same to Ottawa. As he had requested a Junior, they had accordingly engaged Mr. Gore to assist him.[6] (There was to be no possibility of insufficient Counsel this time!) Pre-

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[3] Ibid., A.A.S.B., May 1, 1894, Ouimet to Taché, stated that Ewart believed only resource was to appeal to the Judicial Committee, though all was lost if the appeal failed.

[4] Thompson Papers, P.A.C., vol.204, #25584, Mar.24, 1894.

[5] Mentioned in Thompson Papers, P.A.C., vol.206, #25948, Apr.19, 1894, from Bompas et al.

[6] Ibid., Letter of Apr. 19, 1894.

vious to this, they had despatched a cable[7] to the effect that they were sending a written opinion to the effect that the Government's position in the Appeal was " . . . extremely doubtful . . ." but that if the Catholic petition were granted, the Government could probably afterwards obtain leave to intervene.

While these anxious queries were on process, still others were being made in connection with an opinion allegedly made by Edward Blake. On Mar. 22, 1894, Hugh John Macdonald in Winnipeg wrote to the Minister of Justice[8] in answer to his note of the previous day. Macdonald had at once contacted Gerald F. Brophy, who had informed him that opinion was strongly against the claims of the minority, but that Brophy was unable to get hold of the copy because he had left law to become an insurance agent, and thus was no longer Ewart's partner and had no access to his papers. However, Brophy had promised to do what he could to secure those papers for Hugh John, though he had little hope of success

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[7]Cable of Apr. 14, 1894, mentioned in Thompson Papers, P.A.C., vol. 206, #25948, Apr. 19, 1894, from Bompas et al.

[8]Thompson Papers, P. A. C., vol. 204, #25567, Mar. 22, 1894.

since he doubted that Ewart, Fisher & Wilson[9] would consent to give it up without the Archbishop's permission, which would not be forthcoming since His Grace was very angry and tempted to support Laurier. Macdonald promised to write shortly and suggested that Thompson ask Daly if Fisher had indeed sent him a copy of this opinion.

Two days later, Hugh John again wrote to the Prime Minister,[10] informing him that Brophy had just told him that he had seen James Fisher, who had let him know that " . . . some months ago . . ." he had sent a copy of this opinion to Mr. Daly.[11] Brophy suggested that Thompson should send this opinion to him for his inspection, as he believed that Fisher, as a strong Grit, sent only part of the opinion. Hugh John declared he knew Fisher well and had every confidence in him, but thought it well to communicate these suspicions.

That this opinion by Edward Blake was not completely a figment of Brophy's imagination may be seen from a reply

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[9]All pretense that this firm was not involved would seem to have thus been cast aside.

[10]Thompson Papers, P.A.C., vol. 204, #25567, Mar. 24, 1894.

[11]The time factor would seem to eliminate the possibility that this "opinion" was a product of Ewart's recent activities in London.

sent by the Minister of Justice a week later.[12] Daly had sent him Fisher's letter on the subject. It conveyed only vague statements as to what Blake's opinion was " . . . in conversation." However, as Archbishop Taché had claimed that they should have retained Blake, he deemed it important to have a copy of this opinion. (It would seem that the much-discussed opinion was now taking on the complexion of an unofficial--and possibly somewhat unconsidered--estimate on the part of Blake. However, Ewart probably deserves at least some credit for converting this brilliant but erratic party to a different point of view.)

However, the intimation of the probably unofficial nature of this opinion did not end the search for an official document. On April 9, 1894, Macdonald again wrote Thompson.[13] He had told Brophy the " . . . true position of the case respecting Mr. Blake's opinion." But Brophy had remarked that if Thompson wrote Ewart asking for the opinion given by Edward Blake for which the Minister of Justice had paid $80.00, it would be sent immediately. The remainder of the letter was a resumé of Brophy's effusive protestations of his desire to be of service in spite of his admiration for Archbishop Taché.

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[12]Thompson Papers, P.A.C., vol. 267,#94,April 3,1894.

[13]Ibid., vol. 205, #25798.

Thompson was not long in following Brophy's advice, for on April 16, 1894 he thanked Macdonald for his trouble and declared that he intended writing Ewart about it that day.[14] This was done,[15] and on April 20 Ewart replied[16] that he was " . . . not aware that Mr. Edward Blake has ever given an opinion in connection with the Manitoba School case. . . ." If Blake had done so, he had not seen it and had no copy of it.

This blunt denial would appear to have ended the matter though Macdonald--in reply to Thompson's notification on April 23, 1894[17] that he had " . . . just had a note from Ewart alleging that he is not aware of any opinion having been given by Mr. Blake." --declared[18] that Brophy had maintained that " . . . if Mr. Ewart made any such statement he was at least a prevaricator as the Opinion was not only obtained but paid for, he promised to hunt up the opinion himself and send it on to you." Macdonald added on his own account " . . . that as the Government paid for this Opinion

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[14]Thompson Papers, P.A.C., vol. 267, #279.

[15]Ibid., #280, Apr. 16, 1894, Thompson to Ewart.

[16]Ibid., vol. 206, #25956, Apr. 20, 1894.

[17]Ibid., vol. 267, #382.

[18]Ibid., vol. 207, #26043, Apr. 27, 1894, H.J. Macdonald to Thompson.

there can be no earthly doubt as to your right to it."

Fisher's letter to the Minister of the Interior seems to leave one in no doubt that Blake had expressed an adverse opinion. But that this had taken the form of a written statement, i.e., an Opinion, would seem very doubtful both in view of Fisher's remarks about it being given " . . . in conversation . . ." and Ewart's express denial. Brophy may have been or heard of Fisher's letter to Daly and jumped to conclusions. One wonders who got the $80.00!

An interesting and lengthy letter from Bompas, Bischoff & Co. to Edward Blake on Apr. 24[19] revealed that while this sub-plot was taking place the main drama was by no means in abeyance. Before leaving England, Ewart had filed a Petition for Special Leave on behalf of the Archbishop of St. Boniface, representing the Catholic minority. But at the last minute Ewart had received a cable from Canada instructing him to do nothing. They had just now heard from Ewart in Ottawa requesting them to place the papers before Blake to make application in about a week.

It appears that the above-mentioned cable had been prompted by the Archbishop's preferring his name not be used. Mr. Ewart had therefore intimated to the London Solicitors

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[19]Blake Papers, D.P.R.A., Part 2, vol. 2, #49, April 24, 1894.

that he would soon supply them with the names to be used.[20]

Bompas, Bischoff & Co. forecast that probably the present petition would have to be withdrawn and replaced by another. Six documents on the Case were to be sent to Blake next day, including a " . . . Copy of Notes for your use, prepared by Mr. Ewart . . ."[21]

The attitude of His Grace to the London discussions may be summed up in his despatch to Ewart on May 14, 1894:[22]

> In pursuance of your request I beg to say that my name has thus far not appeared in any of the legal proceedings connected with the Man. School case (save as a deponent in an affidavit which I made at your request) and the non-appearance of my name in the petition for leave to appeal to the P.C. from the recent decision of the Supreme Court is merely the culmination of my attitude in the matter. I may add that I have not opposed the petition being presented by others.

Apparently this letter was sent by Ewart to Bompas, Bischoff & Co. on the same date.[23]

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[20]Blake Papers, D.P.R.A., Part 2, vol. 2, #49, Apr. 24, 1894. This would appear to be the point at which Brophy's name entered the Case.

[21]Ibid. On the 26th, Thompson found it necessary to defend the Government's action by stating in debate that his Report of Mar. 21 referred only to petitions of that time, vide Hopkins. Thompson, p. 263.

[22]A.A.S.B., May (14), 1894.

[23]Vide Blake Papers, D.P.R.A., Part 2, vol. 2, #31, June 5, 1894 from Bompas et al.

In the meantime, another problem was coming to the fore, a problem which was to dog the footsteps of the litigation to the very end. This was the already mentioned problem[24] of financing the appeal. Private subscription was seen as the best expedient. As early as May 2, 1894,[25] Caron wrote to A. Ferguson, Q.C., of Ottawa, that Ewart had written him and he had turned the letter over to Thompson. Caron promised to give Ferguson " . . . the guarantee . . ." (It would appear that Thompson had believed Parliament would reimburse those who privately supported the appeal, once the question was decided.[26])

By May 4, 1894, the Postmaster General had collected $3,100 for the School Fund, and by Nov. 23, 1894, Ferguson had given him receipts for an additional $3,400. (By Feb. 9, 1895, however, Caron had found it necessary to acquire another $325 " . . . further on amount of costs . . .")[27]

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[24]<u>Vide</u> p. *331*.

[25]Caron Papers, P.A.C., vol. 50, #50, May 2, 1894.

[26]<u>Ibid</u>., vol. 195, Apr. 5, 1895, Caron to H. A. Turcotte, Quebec, in reply to a query of Apr. 3 as to a rumour that Angers was the only one of the Ministers who had subscribed, and that the appeal had been his idea. (Also in vol. 53, #297, letter book.)

[27]<u>Ibid</u>., <u>vide</u> attached account from A. Ferguson.

None of the ministers had contributed,[28] as the subscriptions, including that from the Seminary of Montreal,[29] had been sufficient. (This sum total of $6,825 for both Ewart and Blake including expenses would hardly make it seem that their demands were exorbitant.)

A flurry of activity broke out from this period on, and continued up to the termination of the Hearing before the Judicial Committee in mid-December, 1894. The importance of supplying Their Lordships with printed copies of the Supreme Court Judgements was early recognized " . . . for use upon the Application for Special Leave. . . ." To this end, Bompas et al requested the loan of Blake's copy on May 7, 1894.[30] The same missive referred to a letter from Ewart,

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[28] Vide Thompson Papers, P.A.C., vol. 211, #26454, (June 1-10), 1894 for a signed agreement to pay costs. Signed by A.P.Caron, J.A.Ouimet, W.B.Ives, J.S.D.Thompson, A.R.Angers, ". . . twenty or more . . ." were to sign. Vide also A.A.S.B., Jan. 11, 1895, A.Audet to Allard, for a sneer at the Brophy Case as an attempt to define Federal powers and at the Ministers' furnishing the funds instead of having the Treasury paying the expenses of an affair of national interest.

[29] Vide Thompson Papers, P.A.C., vol. 242, 27880, Nov. 27, 1894, from Caron relating that he had had great success in acquiring the necessary amount to complete the sum from Mr. Colin, the Superior, who had contributed $1,000. Caron considered the amount less important than the tacit agreement of the Seminary with the course they had taken.

[30] Blake Papers, D.P.R.A., Part 2, vol. 2, #29. Vide also their letter, #19 of May 9.

received the previous day, containing, it would appear, a proof of the new petition.

That matters had finally come to a head on the Canadian side emerged from Ewart's urgent request to Ferguson on May 23,[31] to " . . . telegraph instruction to London without delay. . . ." On the same date, Ferguson notified Thompson that he presumed " . . . instructions have been already sent from your Department to your London agents in accordance with what you told me yesterday."[32] (Ewart was not leaving anything to chance at this stage.)

Only a week later, the London Solicitors notified Blake that the Sittings were to commence on Thursday, June 7, 1894, and the petitions would probably be taken on the ninth. The letter enclosed several documents in connection with the Case, and expressed the hope that they would soon be able to send him a memo on the attitude of the Dominion Government. As evidence that Blake was an extremely busy man, we might note that this missive also referred to two other Cases pending.[33] (Ewart had at least assisted in keeping Blake well supplied with information.) Word of these acti-

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[31] Thompson Papers, P.A.C., vol.210, #26328, May 23, 1894.

[32] Ibid., #26330.

[33] Blake Papers, D.P.R.A., Part 2, vol. 2, #48, June 2, 1894.

vities must have been becoming circulated, for at this time a certain Edward Barnard mentioned that another Solicitor was joining Ewart, and assumed him to have been appointed by the Government.[34] It would seem to have been by then taken for granted that Ewart was the advocate for the minority.

Evidence of Ewart's interest in the Case also emerged in his despatch of June 13, 1894,[35] thanking Thompson for his information on the Prince Edward Island School Case and agreeing that there was no evidence that it had been taken to England, although the Mail had used quotations from such an opinion. He added that he was:

> . . . arranging with Copp, Clark & Co. in Toronto to publish a good deal of the literature which has appeared in connection with the school case. I am printing the affidavits and the final judgments; the various orders-in-council and some of the controversial literature including articles written by the Archbishop of St. Boniface, the Bishop of Rupert's Land, the Rev. Principal King, Rev. Dr. Bryce and the Rev. Dr. Laing, Rev. Principal Grant, Mr. Le Sueur and one or two others. I think that such a volume

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[34]A.A.S.B., June 3, 1894, Barnard & Barnard, Solicitors, Montreal, to Taché.

[35]Thompson Papers, P.A.C., vol. 212, #26623.

> will be very useful as gathering together all the principal literature of the case.[36]

(Apparently Ewart was already preparing for the propaganda battle to be waged on behalf of remedial measures.)

The letter also included a typed declaration that:

> Mr. Ewart having at my request taken certain steps to appeal from the recent decision of the Supreme Court in the Manitoba School Case, and having procured certain persons to allow their names to be used upon such appeal, We hereby undertake to pay Mr. Ewart all his costs, charges and disbursements in connection with such appeal--past or future--he having full power to employ such additional Counsel as he may think proper and I undertake to hold harmless and indemnified the "certain persons" aforesaid and each and every one of them against all costs, charges and expenses which they or any of them may incur or be put to by any reason of such appeal.

(This was undoubtedly drawn up in connection with the assembling of the names "Brophy et al" upon the Petition for Leave, and would seem to indicate that Thompson had requested Ewart to take the Case to the Judicial Committee. The curious combination of singulars and plurals would seem to signify

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[36]This is undoubtedly the M.S.Q., which finally included an addition to the material previously designated--a Part on "The Manitoba Act as a Treaty--Protestant Promises", vide Ibbetson. Decisions of the Judicial Committee, p. 31, for an indignant comment on this latter idea. F. H. Gisborne. Confidential MEMORANDUM with reference to the Manitoba School Case, 1894, prepared for the Minister of Justice, pp. 4 & 5 in Bowell Papers, P.A.C., vol. 99 summarized the Case up to the second Judicial Committee ruling took pains to emphasize McCarthy's discomfiture, quoted McCarthy's article in The Canadian Magazine, March, 1893, from "Ewart's book".

that the declaration was for Thompson's signature and possibly for those of the other Ministers.)

The considerable latitude Ewart demanded in the matter of financing as well as in the employment of other Counsel perhaps struck Thompson as somewhat presumptuous, for his reply of June 20, 1894[37] merely stated that he was " . . . very glad . . ." to see he proposed " . . . to compile the documents in the Manitoba School question. . . ." The declaration of intention to pay the costs made by the Prime Minister and several otherCabinet Ministers about this time[38] would seem to have been the only other result of Ewart's request.

The discussion between Blake and the London Solicitors continued.[39] An amusing, though vaguely sinister, development occurred when Blake suffered the loss of Ewart's Notes and anxiously inquired if one of the Solicitors had removed it. In spite of extensive search, the Memo was not discovered and a fresh copy had to be despatched from the

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[37]Thompson Papers, P.A.C., vol. 269, #113, June 20,1894.

[38]Vide footnote 28.

[39]Blake Papers, D.P.R.A., Part 2, vol. 2, Nos. 95, 31, 46, 47, June 4-6, 1894.

firm. A delay in the Hearing of the Appeal for Special leave also emerged.

These minor set-backs were followed by the granting of Leave on June 23, 1894,[40] after Blake had delivered an involved but highly persuasive address before Lords Watson, Hobhouse, Macnaghten, Morris and Sir Richard Couch,[41] in which, though leave was eventually granted, Their Lordships plainly evinced little desire to resolve the quandary into which their previous decision in Barrett vs. City of Winnipeg would throw them and had strongly intimated that in any event the final responsibility in the matter rested with the Federal Government.

That the whole affair was viewed by the mortally ill Archbishop with grave anxiety and doubt may be seen from his letter of June 6, 1894[42] to the Minister of Public Works, complaining of the latter's stand, maintaining that the Blake Resolution had not precluded disallowance, despairing of the questions submitted to the Courts, and placing his confidence in the voice of the episcopate and its power on the Federal Government.

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[40]Thompson Papers, P.A.C., vol. 213, #26750, telegram from Bompas et al.

[41]A.A.S.B., Shorthand Notes of June 23, 1894 Hearing for Special Leave.

[42]A.A.S.B., Taché to Ouimet.

A few days after the death of Archbishop Taché,[43] Ewart turned his attention once more to Edward Blake,[44] after receiving a letter of the 15th which had followed him " . . . around to various places . . ." He had no further suggestions to offer and had not done any more work on the Case since preparing the Memorandum for Blake's use during his visit to London in March.[45] But he was wryly confident:

> I am indeed very glad to hear that in your opinion our prospects are very fair. I would almost dispair (sic) of my intellect did you not think we had a fairly good case. I have given so much attention to it that I have no doubt I am entirely biased, but the arguments to my mind, so biased, seem to be overwhelming.

For the first time in the correspondence, the School Case became the Brophy Case when, on Sept. 13, 1894, Blake wrote Ewart from Toronto[46] that he had received Ewart's letter and at the instance of the London Solicitors had

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[43]Thompson Papers, P.A.C., vol. 213, #26750, June 22, 1894, telegram from Father Allard announcing Taché's death that morning.

[44]Blake Papers, D.P.R.A., Part 2, vol. 2, #50, Aug. 29, 1894, from Ewart, Winnipeg.

[45]One reason was probably his engrossment in the preparation of the M.S.Q., for instance, he saw fit to include Laurier's evasive speech on Sept. 3, 1894 in Winnipeg. (Vide M.S.Q., p. 306.)

[46]Blake Papers, D.P.R.A., Part 2, vol. 2, #51, to Ewart, Winnipeg.

revised the Appellants' Case. (He enclosed his reasons for doing so, together with a copy of the amended draft.) Blake also declared he had signed the Case and transmitted it to Bompas et al with the request to add Ewart's signature and proceed. Blake also enclosed a memorandum of his fees ($1,750) and hoped for a draft.

The supreme position Blake was assuming in the litigation became apparent in his remark that he did not know whether Ewart intended to be present at the Argument. If Ewart so proposed, Blake desired him to be in London a few days before the Case came up in order to:

> . . . discuss fully the whole case, and particularly, certain points on which it is very important we should reach an understanding as to our line of argument. So much seems to depend upon this case . . . that the preparation should be of the fullest character.

This despatch soon received a reply.[47] Ewart declared that he entirely agreed with Blake's " . . . reasons for appeal. . . ." He was writing Bompas et al to affix his signature, and promised to be in London " . . . ten days or two weeks . . ." before the Case came on. Thanks were extended for Blake's memorandum on fees. He promised to obtain a cheque for him as soon as possible.

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[47]Blake Papers, D.P.R.A., Part 2, vol. 2, #53, Sept. 17, 1894, from Ewart, Winnipeg also thanked him for information on the Insolvency Case and on the constitution--useful in minor local Cases.

This was followed by Ewart receiving Blake's notification of his intention to sail for England on Oct. 27 and requesting his fees of $1,750 as he had financial arrangements to make.[48] Unfortunately, however, Ewart found it necessary to telegraph Blake:[49] "Party supplying funds has been absent sorry unable to send fee now write where to remit."

By the end of October, 1894, Ewart was making preparations to join Edward Blake in London. He accordingly wrote to A. Ferguson[50] that he had received a cable on Oct. 28 from their London agents to be there early in December as a Special Court was being arranged for the Case. He had written their agents about the exact date to leave, but he believed it would be some time in mid-November, as Blake wished to consult with him before the Argument came on. Ewart also indicated that he wanted " . . . another $1,000 . . ." as their charges already considerably exceeded that sum, " . . . including about $250 of disbursements. . . ."

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[48]Blake Papers, D.P.R.A., Part 2, vol. 2, #54, to Ewart, Winnipeg, Oct. 8, 1894.

[49]Ibid., #37, Oct. 25 (1894).

[50]Caron Papers, P.A.C., vol. 195, Oct. 29, 1894, from Winnipeg. Caron sent a copy of this letter to the authorities at St. Boniface. Vide A.A.S.B.

They had received his cheque for $2,000, but Ewart's fee would be, as he had already stated, $2,500,[51] if too much time were not taken up. Ewart wished to send Blake his fee at once,[52] if Ferguson would send him the money.

This despatch undoubtedly prompted Ferguson's letter to Sir Adolphe,[53] enclosing Ewart's letter and declaring that there was no time to lose, as the Argument was coming on in December. He required " . . . $1,500 for Blake and $1,000 for Ewart . . ."[54]

But at this point still another complication arose. As early as Oct. 31, 1894, Father Allard, the administrator at St. Boniface, prompted presumably by Senator Bernier,[55]

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[51]Ewart's fee was thus to be higher than that of Blake, $2,500 to $1,750.

[52]Blake Papers, D.P.R.A., Part 2, vol. 2, #32, Dec. 28, 1894, from Ferguson appears to indicate that Blake did not like to take Cases until his fee was paid.

[53]Caron Papers, P.A.C., vol. 195, apparently mis-dated Oct. 6, 1894, should be rather Nov. 6, 1894.

[54]This would appear to indicate that Blake had received $250 of his fees and Ewart $1,500. The previously supplied $2,000 would thus have included these two sums plus the disbursements of $250. It would appear that no provision was being made for other charges, probably because no figure had been specified by Ewart.

[55]Vide A.A.S.B., undated letter 1894 from Senator Bernier stating that he preferred to have a Catholic in close connection with Ewart.

wrote to the Postmaster General[56] that friends had agreed that the suggestion he had received was a good one and would meet with Ewart's approbation, namely, that though the late lamented Archbishop had not believed that the appeal to the Judicial Committee should be undertaken,

> The Honorable Senator Bernier would consent to go to England to accompany our defenders Messrs. "Les Avocats" Blake and J. S. Ewart, first as client, then as the soul of the defence and as source of information for the facts which are attached to the question of the Schools, as for the religious principles which the distinguished Senator possesses eminently. Alone his spirit would be a powerful help for our two defenders, who, Protestants themselves, would not be able to think and feel like we Catholics.[57]

Father Allard feared further disasters in England but had heard that Caron was attempting to ward off such a development. He therefore hoped that the Postmaster General would see fit to provide the Senator with perhaps $1,000, which they lacked, thanks to their heavy school burdens, and which sum (including honorarium) would content the Hon. Senator.

Caron soon replied that he would try to raise the money, but feared that $500 would be all he could find.[58]

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[56]Caron Papers, P.A.C., vol. 195, from J. Allard, administrator, St. Boniface.

[57]Ibid., Author's translation.

[58]Caron Papers, P.A.C., vol. 51, #379, Nov. 12, 1894 to Allard, also in A.A.S.B.

About this time, the Postmaster General found it necessary to prepare a letter appealing to a friend[59] (probably Turcotte),[60] on the eve of Ewart's departure for England, setting forth the situation and the necessity of raising an additional $3,000 to meet the expenses of the appeal. Upwards of $5,000 had been collected. Another copy of this letter was sent to "Charlebois"[61] with the additional information that if Bernier were to go, the cost would be $3,000, if not, it would be $2,500.

It would therefore seem that Caron considered the services of Senator Bernier a little dear at $1,000. This estimate is borne out by a letter to Thompson on Nov. 14, 1894[62] stating that he had collected $1,500 which he had paid over to Ferguson. He was in Montreal trying to get an additional $1,500 " . . . to complete the sum. . . ." It seemed to him that they were " . . . dealing with regular cormorants. . . ." Caron added that he had received a letter from the administrator (Allard) asking for $1,000 to send

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[59] Ibid., Nov. 12, 1894.

[60] Vide footnote 26.

[61] Caron Papers, P.A.C., vol. 51, #379, Nov. 12, 1894 to Father J. Allard. Also in A.A.S.B.

[62] Thompson Papers, P.A.C., vol. 224, #27879.

Bernier over. They attached great importance to this and he considered it " . . . important, in more ways than one. . . . " He had replied that he would try to find $500 if they found the other $500.

On the 26th, the Postmaster General asked Allard[63] if the Senator would go for $500 as it was impossible for him to furnish more. He had already raised nearly $7,000 and feared to approach his friends again. Allard replied that he would like thirty days to consider.[64] With this communication, the idea would appear to have come to an end. An undated letter from Senator Bernier indicated that worthy declined the idea[65] and there is no record of his having changed his mind. Certainly, neither Blake nor Ewart made any mention of his presence in England.

By Nov. 5, 1894, Blake was in England, and had notified Bompas et al of his safe arrival. The Solicitors replied[66] that the Canadian appeals might be expected to commence about the 22nd. Freshfields & Williams had appeared

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[63] Thompson Papers, P.A.C., vol. 51, #419, Nov. 26, 1894. Also in A.A.S.B.

[64] A.A.S.B., Nov. 30, 1894.

[65] A.A.S.B., (1894).

[66] Blake Papers, D.P.R.A., Part 2, vol. 2, #26, Nov. 6, 1894, from Bompas et al.

for the Attorney-General of Manitoba and were daily expected to lodge their printed Case. Bompas, Bischoff & Co. were sending various documents to be printed and would be glad of any suggestions from Blake. A Special Court was being set up and the date of the Hearing would be fixed as convenient to the interested parties. Mr. Ewart had been cabled[67] and it had been suggested that he arrive at the beginning of December. They proposed " . . . to await his arrival before taking any steps to arrange a date for the Argument." (What a contrast this affords to the behaviour of the London Solicitors in the Barrett Case!)

Also on Nov. 6, 1894, J. Hume Dodgson wrote[68] desiring an appointment with Blake and stating that the Registrar had declined to make an exception in another of their Cases " . . . as he did in the Manitoba School Case." This worthy again wrote to Blake in Dublin only four days later[69] that they had a cable from Ewart dated Oct. 29 in which he awaited notification to start for England. They were there-

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[67]Evidently on Oct. 28, 1894, vide p. 348.

[68]Blake Papers, D.P.R.A., Part 2, vol.2, #102, Nov.6, 1894.

[69]Ibid., #103, Nov. 10, 1894. The same date saw La Rivière warning Mgr. Begin was putting himself at the head of a mass movement, Caron Papers, P.A.C., vol. 195.

fore cabling him to come before the end of the month to " . . . give time enough for Consultations before the Argument, on the assumption that the School Case will be taken last."

Ewart arrived in England on Nov. 24, 1894. Bompas et al immediately notified Blake[70] and stated that they had also that day exchanged Cases with the Respondents[71] and enclosed a print. Ewart was with them and would call upon Blake shortly. They wished to know what date for the Hearing would be most convenient, as notice should be given as soon as possible. A day later, Ewart wrote Blake[72] asking for an appointment.

A little later, Ewart again wrote Blake[73] that one

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[70]Blake Papers, D.P.R.A., Part 2, vol. 2, #43, Nov. 24, 1894, from Bompas et al.

[71]Vide "Papers in Reference to the Manitoba School Case 1894, presented to Parliament during the Session of 1895" in Parliament of Canada, Sessional Papers, 1895, Nos. 20-20f, pp. 190-200.

[72]Blake Papers, D.P.R.A., Part 2, vol. 2, #58, Nov. 25, 1894.

[73]Ibid., #60, Nov. 29, 1894. Caron Papers, P.A.C., vol. 195, Dec. 13, 1894, copy of statement from Blake to Ewart refers to this consultation and another with Ewart on Dec. 5. Other consultations (probably with Ewart) were held on Dec. 8 & 9 & 12 together with Refreshers on Dec. 12 & 13. For these Blake asked that $325 be remitted. Vide Appendix G for Ewart's comments.

of the conclusions they had reached on the 28th was not:

> . . . quite sound. . . . unless a distinction can be drawn between affect & prejudicially affected or between denominational schools & education then an unnecessary appeal is given by sub-section 3 of the B.N.A. Act. . . . (and) prior rights are no more clearly pointed at than in the corresponding section of the Manitoba Act.

Another point which he believed had strongly influenced the Judicial Committee in the Barrett Case was that the provisions made for the more careful protection of Catholic property applied only " . . . to cases in which the boundaries of a Protestant & a R.C. school district were coterminous & there were no such cases! It had been thought that Winnipeg was so situated but it turned out otherwise."

By Dec. 1, 1894, Dodgson had informed Ewart that the Canadian Appeals would all be taken together, commencing on Dec. 4. Blake's desire for an interval between the Union Bank and the School Case would be met to the extent that another Case would come between.[74] Ewart declared that he had the desired material almost ready except for the Quebec statutes. He thanked Blake for the note about his fee being paid as he had been about to write Canada concerning it.

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[74]Blake Papers, D.P.R.A., Part 2, vol. 2, #104, Dec. 1, 1894, Ewart to Blake.

The Hearing before the Judicial Committee took place on Dec. 11, 12, and 13, 1894[75] before the Lord Chancellor (Herschell) and Lords Watson, Macnaghten and Shand.[76] Counsel for the Appellants were Blake and Ewart. (Significantly, no English Counsel appeared this time). Those for the Respondent were Messrs. Cozens-Hardy, Q.C.; Haldane, Q.C.; and R. M. Bray, all of the English Bar.

The bulk of the Argument was managed by the highly capable Edward Blake. The first two days and the last part of the third were taken by him in setting forth an extremely strong and able address which revealed at least some debt to Ewart, especially on the score of local knowledge.[77] On December 13, after the Lord Chancellor had expressed sorrow at the death of Sir John Thompson, Ewart desired " . . . to add a few words upon the principal points in the case. . . ." already set out by his " . . . learned friend . . ." A careful exposition of the contention that sub-section 2 of the Manitoba Act was not intended merely as a remedy for Cases within sub-section 1 was set forth. He did not think that

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[75] Sessional Papers, 1895, Nos. 20-20F, p. 201.

[76] The last three had presided in the Barrett Case.

[77] Sessional Papers, 1895, Nos. 20-20F, pp. 201-281 and 325-28.

"If the statute had been giving jurisdiction to a court instead of to a political body . . . there could be any doubt as to the construction."

There was only a " . . . superficial resemblance .. ." in the language of the two sub-sections.[78] Ewart then pointed out the differences. Upon being questioned by Lord Watson, he then admitted, in effect, that the B.N.A. Act did not apply to Manitoba and the Manitoba Act could not be construed from its provisions.[79] (Thus he based his Case on the alleged difference in significance between sub-sections 1 and 2 of the Manitoba Act.)

Ewart then experienced some difficulty with the fact, as indicated by Lord Watson,[80] that sub-section 3 could refer to both the preceding ones, but contended that " . . . in its application it is necessarily confined to the second, because we could only say it was affected by an intra vires statute."[81] The Constitutional Act of 1791 had provided a form of political appeal in which one Provincial House could nullify certain legislation of the other.

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[78] Sessional Papers, 1895, Nos. 20-20F, p. 282.

[79] Ibid., p. 283.

[80] Ibid., pp. 283-84.

[81] Ibid., p. 284.

After Lord Watson had gained the admission that the power of appeal to the Government and from this body to Parliament was " . . . wholly discretionary in both. . . .", Ewart proceeded to examine " . . . whether provincial authority does or does not include the legislature?" Lord Watson was disposed to favour his contention that it did.[82]

Ewart concluded his rather brief address by making four points in defence of the application of sub-section 2 to post-union rights. (This was the other great question.) He also declared that they were:

> . . . not asking for any declaration as to the extent of the relief to be given by the Governor General. We merely ask that it should be held that he has jurisdiction to hear our prayer, and to grant us some relief if he thinks proper to do so. . . .,

but added that possibly the Dominion authorities would not see fit to restore the system prior to 1890 (though it had been approved for nineteen years and still followed closely in Quebec). Perhaps they would prefer the greater state control of the Ontario system--or some intermediate step, especially in schools " . . . to which no Protestant child now goes . . ." In any case, they did not, indeed could not, ask to be under a better situation than before 1890, by being removed from ". . . state statutory control . . ."[83]

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[82] Sessional Papers, 1895, Nos. 20-20F, p. 285.

[83] Ibid., p. 286. Perhaps these latter remarks helped prompt Their Lordships' obiter dicta, vide p. 364.

Messrs. Cozens-Hardy and Haldane were then heard on behalf of the Attorney General of Manitoba. Their Lordships did not appear too favourably disposed to their contentions and indulged in frequent sharp cross-questioning.[84]

By December 14, Ewart was ready for other business. He informed Blake, in a letter thanking him for the great care he had taken in the School Case,[85] that he would at once contact Ferguson re Blake's (subsequent) fees[86] and that he had that day succeeded in persuading the London bondholders of a certain Manitoba railway to engage Blake as their Counsel. It would appear that he had no fear of the result in the Brophy Case, for Ferguson could soon declare to Blake[87] that "From what your Mr. Ewart say(s) there seems to be no doubt of the Manitoba School Appeal."

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[84] Sessional Papers, 1895, Nos. 20-20F, pp.286-325.

[85] Blake Papers, D.P.R.A., Part 2, vol. 2, Dec.14,1894.

[86] Vide footnote 27. Vide also Caron Papers, P.A.C., vol. 195, Jan. 4, 1894 (1895), from A. Ferguson enclosing ". . . copy of Blake's further charges . . ." which he presumed they would have to pay and asking for the amount as he had only enough to cover its office disbursements. Vol. 52, #156, Jan. 8, 1894 (1895) to Ferguson enclosed statement and cheque for balance of $77.77 (probably for Blake or for printing of the Arguments).

[87] Blake Papers, D.P.R.A., Part 2, vol. 2, #110, Dec. 28, 1894.

That the appeal to the Dominion Government was also being anticipated by Edward Blake (and probably also by Ewart) was borne out by a lengthy correspondence between him and the London Solicitors[88] concerning the correction and printing of the Arguments, for which purposes Bompas et al had taken the somewhat unusual step of engaging a shorthand writer. The political nature of the proceeding became apparent when the Canadian Government were persuaded to pay the cost of the printing. Blake's interest in the Case was manifested by the pulling of an extra number of copies for his own use.

Though the Judgement was not expected until shortly after January 22, 1895,[89] Ewart received a telegram on January 2, informing him of success in the Brophy Case.[90] He had contracted pneumonia aboard ship and had been stranded in New York for two weeks. He added:

> . . . I am wicked enough to have wished that Sir Mackenzie Bowell had heard of it on the 1st so as to complete his New Year felicitations. The question bothered a Catholic premier a good deal; it will be interesting to see what a less astute Orangeman makes of it.

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[88] Vide Blake Papers, Nos.40, 41, 42, 78, 32, 30, 14, 33, 38, 34, 37, 36; Dec. 14, 1894 to Feb. 13, 1895.

[89] Blake Papers, D.P.R.A., Part 2, vol. 2, #32, Jan. 5, 1895, from Bompas et al.

[90] Ibid., #59, Jan. 6, 1894 (1895) from Ewart, New York. He did not reveal who had sent it.

Evidently it was this same premature report which Sifton mentioned in his letter to Laurier two days later,[91] in which he declared the report incorrect but admitted his reading of the shorthand notes of the Argument and the Judges' remarks[92] made it plain that the decision would be, regrettably " . . . from the standpoint of Canadian politics generally. . . .", in favour of Federal intervention.

While soon after January 14, 1895,[93] the printing of the notes must have begun, a considerable number of copies of The Manitoba School Question must have been printed and sent to Ewart, for on January 26 Ewart received a letter from Caron[94] congratulating him on his recovery and stating that he would be delighted to assist in the distribution of the books amongst the Members, especially those of the Government. Ferguson had kept him informed and he had no doubt the Judgement would be as Ewart expected. Sir Adolphe added that he would also see how " . . . the other part of the work . . ." could be accomplished.

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[91]Sifton Papers, P.A.C., vol. 270, #320, Jan.4, 1895.

[92]Freshfields & Williams had a habit of supplying their clients with such copies, vide Blake Papers, #42, Dec.17, 1894, from Bompas et al.

[93]Blake Papers, D.P.R.A., Part 2, vol. 2, #31, Jan.14, 1895, from Bompas stated a considerable portion was in type.

[94]Caron Papers, P.A.C., vol. 52, #53. Vol. 195, Jan. 28, 1895, from Ewart in reply definitely referred to the M.S.Q. and to its anticipated analysis in La Minerve and Le Canadien.

Ewart apparently had advocated widespread analysis of The Manitoba School Question, for the very next day Caron wrote him[95] that he wanted to have the work analyzed for La Minerve and Le Canada.[96] To this end, he requested two more copies for himself--in addition to copies for various high Members of the Government. This was followed by another note[97] to Ewart stating that he had received the copies. Ewart had asked him about having Le Canadian also analyze the work, but it was now defunct. On the same date, Caron asked the Hon. Joseph Royal[98] to get Ewart's Argument from either the Gazette or the Star office. He was sending " . . . depositions filed by him of great importance . . ." to be published next day in La Minerve.[99]

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[95]Caron Papers, P.A.C., vol. 52, #276, Jan. 26, 1895, to Ewart, c/o J. H. Mason, Toronto.

[96]Vide premature reports of the Judicial Committee's verdict on p. 2 of Wed., Jan. 30, 1895 issues of both La Minerve (Montreal) and Le Canada (Ottawa). Vide also La Minerve, Wed. Feb. 13, p. 2 and Le Canada, Fri. Feb. 18, p. 3 for reports of the official decision. Diligent search of Jan.-June 1895 issues shows no reviews of the M.S.Q.

[97]Caron Papers, P.A.C., vol. 52, #315, Feb. 4, 1895.

[98]Ibid., #184, Feb. 4, 1895.

[99]Probably Feb. 6, 1895, p. 2 article.

On Jan. 23, 1895, Edward Blake received notice[100] to hear the Judgment of the Judicial Committee, to be delivered Tues., Jan. 29. The verdict of Their Lordships was delivered by the Lord Chancellor.[101] It definitely rejected the combined ruling of the Supreme Court. Ewart's attitude that a non-sectarian system was regarded by Catholics with as much distaste as Protestants regarded a Catholic system was accepted.[102] His contention that the Act applied to post-union legislation was upheld, while that which had strongly influenced the Supreme Court, the absolute power of a provincial legislature to repeal its own Acts, was rejected, as was the argument that it had the exclusive right to legislate for education.[103] The Judicial Committee accepted Ewart's main argument--that the sub-sections 2 and 3 of the Manitoba Act related to a different set of circumstances than did sub-section 1 and that they sufficed to entitle the

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[100]Blake Papers, D.P.R.A., Part 2, vol. 2, #35, from Bompas et al.

[101]Vide Sessional Papers, 1895, Nos. 20-20F, pp. 1-11. Also in Cameron. The Canadian Constitution, pp. 457-80.

[102]Sessional Papers, 1895, Nos. 20-20F, p. 6.

[103]Ibid., pp. 7-8.

minority to appeal to the Governor General in Council.[104] In effect, to the questions submitted, the Committee supplied "Yes" to all but the third and fourth.[105]

Thus it was that the "new tack" first steered by Ewart before the Privy Council and continued by Blake before the Judicial Committee was brought to a successful conclusion. Indeed. Their Lordships saw fit, before awarding the appeal without costs, to go beyond answering these questions, by declaring that, while it was up to the Government to decide what to do and how to accomplish it,[106] and that while the new system doubtless satisfied the majority:

> . . . all legitimate grounds 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.[107]

The dilemma of how to reconcile their decision in the Barrett Case while at the same time acknowledging the right to appeal had been resolved by the Judicial Committee

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[104] Ibid., pp. 5 & 6.

[105] Vide Ibid., pp. 3, 5, & 10 and Appendix E.

[106] Sessional Papers, 1895, Nos. 20-20F, p. 10.

[107] Sessional Papers, 1895, Nos. 20-20F, p. 11.

in favour of the minority. Ibbetson has indicated[108] that the two decisions were consistent " . . . if properly regarded. . . ." but the dilemma of how to accomplish the nullification of the main features of a system declared *intra vires* of the Provincial legislation was to wreck the Conservative Government.

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[108] *Decisions of the Judicial Committee*, p. 39.

CHAPTER TWELVE

THE POLITICAL PHASE

The decision of the Judicial Committee ended any further evasion of the problem. No longer could it be shunted into the Courts. But it did not end the Government's desperate attempts to give a judicial cast to their deliberations. Nor was it to end their endeavours to have the fatal problem settled in a manner which would not require them to exercise the politically dangerous expedient of tampering with the Province's system of education, even when bolstered by the inability of Their Lordships to confine themselves to the questions submitted to them.[1]

How to get past the troublesome business with the least difficulty and the maximum credit, was the main consideration, to judge from the remarks of Sir Charles Hibbert Tupper.[2] He declared that he and Dickey favoured a strong stand on remedial legislation, though willing to hear discussion on its form. The question had not yet been discussed

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[1]A.A.S.B., Feb. 7, 1895, Audet to Langevin, rejoices at this as it would save time. Ewart would not have to plead the merits of the case before the Privy Council and prove the facts related in Taché's petition! Vide letter of Feb. 16 for Audet's growing bewilderment about the Government's delay.

[2]C. Tupper Papers, P.A.C., vol. 18, #1461, Jan. 29, 1895.

by the Cabinet, but he expected opposition from Bowell and Foster, fearing they would desire a mandate from the country. Hibbert suggested two possible alternatives in the implementation of remedial legislation, but in either case, there would be an escape clause whereby the Manitoba Government could regain its freedom by reverting to the old system. No suggestion of a new appeal to the Courts for information as to the exact remedy to be provided emerged--clear indication that the question had passed its judicial phase and had entered its political one.

It is symptomatic of the approaching conflict that, on the same date, the Daily Sun of St. John, N.B.,[3] reviewed Ewart's The Manitoba School Question, giving a coherent discussion of its contents and lauding it as " . . . the only work which contains the complete record as far as the proceedings have come . . ." but adding:

> . . . Mr. Ewart will probably not convince anyone, not now convinced, that the dominion government and parliament ought to attempt the hopeless task of setting aside the deliberate purpose of the great bulk of the people of Manitoba to establish a public non-sectarian school system but the treatise will be useful to anyone who wants to know the whole story from the purchase of Rupert's land to the present date.

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[3]Jan. 29, 1895, " A Record of the Manitoba School Case."

All of which sounds very much like damning with faint praise! Ewart himself rated the work considerably higher. In his previously-mentioned letter to Caron,[4] after stating that the doctors were allowing him to proceed to Winnipeg next day, he declared:

> . . . that a perusal of part three of it should be sufficient for any honest man. The promises & assurances there referred to ought to bind all consciences not utterly given over to what Protestants call "Jesuitism".

It was no doubt heartening to Ewart at this time to learn that the Government's delay in paying the charges of the minority in the Barrett Case was finally coming to an end. On Jan. 21, 1895, the Minister of the Interior finally recommended payment of the plaintiff's liabilities ($3,535.70) in accordance with the agreement made at the time the action was begun.[5]

However, at this time, Ewart was finding some difficulty in justifying Blake's extra charges to the Government's unofficial paymaster.[6] A lengthy justification of Blake's

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[4]Chapter Two, vide footnote 94. Caron Papers, P.A.C., vol. 196, Jan. 28, 1895.

[5]Vide Privy Council Register, 1895, #220. (Confirmed Jan. 30, 1895).

[6]Caron Papers, P.A.C., vol. 195, Feb. 5, 1895, Ewart to A. Ferguson.

charges (at which Ewart admitted he was shocked), though giving Blake the highest praise for his conduct of the Case,[7] called forth only the laconic remark from Ferguson: "I have not read the enclosed from Ewart. I suppose I had better send the additional fee to Blake."[8]

In contrast to this grudging comment, there is no doubt that Archbishop Langevin considered Blake's feat worthy of the most fulsome compliments. Nor did he stint his praise of Ewart and Thompson and of Their Lordships of the Judicial Committee.[9]

Ewart himself also found occasion to write Blake a few days later. After thanking him for notifying him of the Judgement and stating that he had written Ferguson regarding Blake's subsequent fee of $26.25, Ewart declared:[10]

> . . . The judgement is extremely satisfactory (sic) much more so than we could have expected--several expressions in it will be of very much service to us. The Dominion Government is in much trouble. The orangemen (sic) have fulminated & given formal notice to the

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[7] Vide Appendix G.

[8] Caron Papers, P.A.C., Feb.2, 1895, Ferguson to Caron.

[9] Blake Papers, D.P.R.A., Part 2, vol. 2, #122, Feb. 11, 1895, from Langevin. Vide frontispiece.

[10] Blake Papers, D.P.R.A., Part 2, vol. 2, #171, Feb. 15, 1895. On the same date the Manitoba Speech from the Throne declared that the legislation would be upheld whether or not the Dominion Government demanded modification, vide Dafoe. Sifton, p. 74.

> Government. The Catholics on the other hand are very firm & it is said insist upon a session & declaration of policy prior to an election. The Ontario members want an election & suggest placating Quebec with promises which however Quebec refuses any longer to be satisfied with. Upon the whole I believe that Bowell will be driven much against his will to a session & afterwards to his death at the hustings.
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> I wish very much that you were here. I have told all my friends here of the great interest you took in the case & the very careful preparation which you gave it. All agree with me now that if we had had your services on the first occasion that there would have been no second.

Thus early did Ewart foretell disaster to the Conservative party. There was indeed to be no going to the country for a mandate prior to the initiation of remedial legislation, and the subsequent election was to end Conservative rule for fifteen years.

But however reassuring the decision of Their Lordships and the tone of the Imperial Order in Council[11] (giving the Judgement and commanding obedience to it) might be to a Government fearing for its position, no risks were to be taken. The cautious parade of judicial play-acting was once again to afford amusement to the cynical and awe to the credulous. As early as Feb. 4, 1895, Ewart wrote to the Clerk of the Privy Council requesting that a date be fixed for a Hearing.[12] On Feb. 16, the Privy Council decided to hear

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[11]Sessional Papers, 1895, #20, pp. 12-14.

[12]This might indicate that Hibbert Tupper and Dickey had agreed with him or insisted on this procedure, vide footnote 2.

Counsel on Feb. 26.[13] At the same time, a majority in the Cabinet favoured holding an election before calling Parliament.[14] Apparently the view of Hibbert Tupper and Dickey[15] was finding little favour.

In reporting this decision of the Privy Council to Mgr. Langevin,[16] the anxious Col. Audet feared that this ridiculous procedure harmed their cause but that they could not disavow Ewart because he had been hallowed by the decision of the English tribunal. But at the same time he held that Ewart should be advised to plead for the disallowance of the 1894 law enacted after the submission of the petition to the Judicial Committee. Senator Bernier, Father Allard and Mgr. Duhamel (the Archbishop of Ottawa) should aid and advise Ewart--whom he maintained was actually the Ministers' lawyer.

By Feb. 19, 1895, it was public knowledge that Ewart was to be heard once more at Ottawa. A Government organ held that the decisions of the Judicial Committee would require

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[13]Privy Council Register, 1895, #535.

[14]Aberdeen Papers, P.A.C., vol. 1, #124, Feb.17, 1895, from Bowell.

[15]Vide pp. 366-67.

[16]A.A.S.B., Feb. 17, 1895.

careful examination and therefore such a procedure was necessary.[17] The same date saw the Manitoba Minister of Public Works defiantly declare that any Dominion demand would be a political action and resistance to it neither an attack on the constitution nor rebellion. The same day and the following saw Ewart's partner attempting to differentiate between disallowance and a remedial order.[18]

The Hearing before the Privy Council commenced on Feb. 26, 1895, in the Railway Committee Room.[19] According to Archbishop Duhamel, both Father Cherrier and Senator Bernier presented the appeal with Ewart, and both were of the opinion that the Government must not have an election before completely settling the school question.[20] Audet declared

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[17] Mail and Empire (Toronto). On the 22nd, this Conservative organ, in a long attack on Liberals of all varieties mentioned Ewart's open letter to Greenway and termed him " . . . another Liberal."

[18] Reports of Debates of the Manitoba Legislature, Feb. 19, 1895, in Free Press (Winnipeg), Feb. 20, 1895. Ibid., also Feb. 20, 1895, in Free Press, Feb. 21, 1895, Speeches of Cameron and Fisher.

[19] "In Her Majesty's Privy Council for the Dominion of Canada, Argument RE Schools in Manitoba" in Sessional Papers, 1895, 20-20F, pp. 15-125.

[20] A.A.S.B., Feb. 26, 1895, to Archbishops of Montreal, Cyrène (Administrator, Quebec) and St. Boniface.

that the Cabinet was hearing Ewart and Bernier and they would let Mgr. Langevin know the facts, also that the bishops were masters of the situation because not only had the Queen in Council supported their rights but because the general elections were approaching.[21] There was complete agreement, it would seem, on the Government's precarious position.

Sir Mackenzie Bowell made it plain that the Hearing was a continuation of the previous one. He was followed by Mr. McCarthy--the Manitoba Government having by now decided that it could no longer afford to ignore the proceedings--who protested against the short notice that had been given the Attorney-General and requested additional time to enable the Manitoba Government to prepare an Argument.[22] Ewart was willing to allow a short postponement but not one past the session of the local House as that would delay remedial legislation for a year, following the hoped-for submission to them of " . . . some law which it is proposed they should pass. . ." He referred to the recent Speech from the Throne as evidence that the Province could not complain that they had not had time to consider their position. Upon its being ascertained that the Manitoba Government would probably soon

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[21] A.A.S.B., Feb. 26, 1895, Audet to Langevin.

[22] Sessional Papers, 1895, #20, p. 15.

prorogue, the Council decided that the Hearing would adjourn for six days[23]--and thus thwarted McCarthy's attempt to protect the Manitoba Liberals and embarrass the Federal Conservatives.

As an indication of the attitude of the Catholic representatives to this exchange, we might cite the letter of Father A. A. Cherrier to Mgr. Langevin, reporting Ewart's strong objection to the attempt to delay remedial measures. He feared new delays, but added that a conference with Ouimet, Royal, Bernier, Father Allard and the Archbishop of Ottawa had decided still to press for disallowance.[24] Such hopes were dying hard.

At this same time, Sifton was denying Ewart's claims to represent the Catholics of Manitoba and holding that a large number of Catholics preferred the government schools, while James Fisher was proposing the passage of remedial legislation by the Province.[25]

A day later, these two engaged in a sharp exchange over the integrity of Fisher's position as an M.P.P. while

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[23] Ibid., pp. 16-18.

[24] A.A.S.B., Feb.27, 1895. (Probably disallowance of the 1894 Act.)

[25] Reports of Debates, Feb. 27, 1895 in Free Press (Winnipeg), Feb. 28, 1895.

at the same time being the partner of the man engaged against the Government. This debate also saw Sifton refusing to answer Prendergast's query as to whether John O'Donohue was in Ottawa on behalf of the Manitoba Government, and the stymieing of Fisher's attempt to get the Province to meet. . " . . . all legitimate grounds of complaint . . ." by Sifton's amendment affirming interference contrary to the principles of provincial autonomy and declaring that the House would resist by all constitutional means within its power.[26]

Meanwhile, Ewart expressed every confidence that the Government would accept all the evidence presented and they had all that was necessary.[27]

The Hearing recommenced on the morning of Monday, March 4, 1895. Ewart began by pointing out the mismanagement that had accompanied the transfer of the North West to

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[26] Ibid., Feb. 28, 1895 in Free Press (Winnipeg, Mar.1, 1895. Vide Sifton Papers, P.A.C., vol. 270, #400, Mar. 2,1895, to Laurier for comment on this lack of good judgment by Fisher, who sincerely wished to help them in Dominion matters, forcing him (Sifton) to adopt a strong resolution against him. Sifton indicated that a Remedial Order would lose Ottawa almost all the Province and suggested measures to use in Quebec. Vide Blake Papers, D.P.R.A., Part 2, vol. 2, #57 from Fisher to his "old friend" Blake anent strong response in the Province for the local Government's appeal to ultra feeling and Sifton's ". . . absurd on the face of it . . ." amendment.

[27] A.A.S.B., Feb. 28, 1895, to N. Bawlf, Grain Merchant.

Canada and then claimed that the delegates in 1870 had taken a Bill of Rights requesting separate schools[28] (though Father Ritchot's affidavit had declared only that the bills of rights carried by the delegates were "similar".)[29] He also referred to Ritchot's notation on the draft of the Manitoba Act to the effect that separate schools were guaranteed to the widest extent, in conformity with the seventh article of his instructions.[30]

Ewart then presented four arguments at considerable length:[31]

> . . . founded upon agreements and promises:- First, the compact made by the Dominion of Canada; second, the promises made by the Protestants of Manitoba; third, the promises made by the Liberal party in Manitoba; and fourth, the promises made by the Greenway Government. All these agreements and promises have been violated . . .[32]

With considerable emotion and head-hanging, he expressed his mortification at this latter development and called upon the

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[28] Sessional Papers, 1895, #20, pp. 18-19.

[29] Vide Sessional Papers, 1895, #20f, p. 26, Exhibit A, clause 4.

[30] Ibid., #20, p. 19.

[31] Ibid., pp. 19-23.

[32] Ibid., p. 23.

" . . . Liberal party of Canada, the Protestants of Canada, and the people of Canada . . ." (not yet responsible for this shameful procedure) to render justice. These four points were supported with various affidavits,[33] to at least some of which McCarthy made tentative objection.[34]

Ewart then proceeded to maintain " . . . that even had we no agreements or promises to urge, yet that relief should be given to us. . . ." (Thus he was turning to arguments on the practical merits of separate schools.) In support of this contention, he advanced the proposition of " . . . individual liberty. . . .", maintaining that the quarrel was largely over the quantity (and not the quality) of religion in the schools, that such liberty should be extended as widely as possible, and in fact had been attained under the old system.[35]

Under this system, public money was not being " . . . used to propagate denominational teaching. . . ." and used

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[33] Vide Sessional Papers, 1895, #20f, pp. 126-43, Exhibits A to N.

[34] Ibid., #20, p. 23.

[35] Ibid., p. 24. Exception might be taken, however, to his contention that Protestants were simply people who wanted either purely secular education or education with a little religion.

several examples to illustrate this idea.[36] His opponents' principle was manufactured for the occasion--simply to keep their own religion in the school while excluding the Catholic. He also defended the efficiency of Catholic schools and held that even if others were forbidden to teach their religion in the schools, Catholics should not be prevented.[37] However, his sixth argument was that the schools were Protestant.[38] (Here he was apparently trying to convince his listeners that the regulations under the new system were sectarian and that a non-sectarian teacher could not possibly please both Catholics and Protestants. Thus, whether or not the schools were Protestant would make little difference. In actual fact, his own quoting demonstrated the regulations for religious instruction had been considerably diluted. Some of his assumptions at this point might seem rather unwarranted.)

Ewart concluded his address by referring to the situation in the other Provinces, by sneering at the contention that " . . . provincial wrongs may be made into

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[36] Ibid., pp. 24-25. Some seemed a bit far-fetched. Also, it might not be intended, in paying for one thing, to support religious training but the distinction would seem rather subtle.

[37] Sessional Papers, 1895, #20, p. 25.

[38] Ibid., pp. 25-28.

rights." and by calling upon His Excellency in Council to judge the appeal upon its merits.[39]

In the afternoon, before McCarthy commenced his argument, Ewart declared His Excellency in Council was bound not only to hear the appeal but also to exercise their powers. The "may" of the Act was not permissive, but obligatory,[40] and the Council should consider not only Catholics' feelings but also the deprivation of " . . . vested rights . . ." freely conferred upon Catholics by the Manitoba Legislature--and thus " . . . ought not to refuse to allow the matter to be taken before Parliament."[41]

Ewart then presented a draft of a statute[42] he proposed " . . . the Legislative Assembly of Manitoba should be asked to pass." He declared it was neither an amendment to the Act of 1890 nor a replacement and was " . . . drafted upon the lines of the Ontario statute. . . ."[43]

Ewart maintained that they had not gone beyond previous rights and privileges and had actually made the con-

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[39] Ibid., pp. 28-29.

[40] Vide Appendix B, Manitoba Act, Section 22, sub-section 3.

[41] Sessional Papers, 1895, #20, p. 30.

[42] Ibid., #20f, pp. 145-72, Exhibit P.

[43] Ibid., #20, p.30. Vide p. 384 of thesis for discussion.

cession of allowing the Province to retain a Department of Education with jurisdiction over Catholic schools to the extent exercised by the old joint Board of Education.[44] (His comment that Catholics would have no say in this Department seems a bit far-fetched.) He also demanded the restoration of Catholic money and property " . . . filched by Act of Parliament . . ." The decision of the Judicial Committee gave them the right to such " . . . supplement and modification . . ." of the Act of 1890. However, he claimed willingness to compromise but stated that they could not do so without the consent of the Manitoba Legislature as Dominion legislation embodying such concessions might be ultra vires.[45] Ewart terminated his discourse by blaming Ontario for the trouble and by referring to Dr. J. H. Morrison's fervent address in St. John, N.B., in favour of Conservative action.[46]

In answer to several questions, Ewart revealed an uncertain belief that the Governor General in Council, if

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[44]The Judicial Committee's decisions might well have been interpreted, however, to safeguard this.

[45]Sessional Papers, 1895, #20, p. 31. This latter statement might throw some doubt on his declaration that they had made concessions.

[46]Ibid., pp. 31-32.

they decided to act, were bound to submit a bill to the Manitoba Legislature. His proposed bill was merely suggestive rather than an injunction and, though not " . . . the widest measure of relief . . .", would satisfy his clients[47] --although they would not gain reimbursement of the grants they had missed nor compensation for their expenses over the previous four years.[48] The Federal Government had " . . . no power except to confer jurisdiction upon the Parliament of Canada." Also, the Judgment of the Judicial Committee obviated any necessity to produce evidence that acquired rights and privileges had been interfered with.[49]

The remainder of the Hearing for that day was partly taken up with an address by John O'Donohue, " . . . a public school trustee of the City of Winnipeg . . .",[50] presented as McCarthy's chief witness and claiming to represent a large number of Catholics.[51] Considerable cross-questioning rather

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[47] Possibly Father Allard, in his capacity as Administrator of the Diocese of St. Boniface, had declared it satisfactory.

[48] Ewart's language at this point seems to indicate a considerable identification with his clients.

[49] Sessional Papers, 1895, #20, p. 33.

[50] Ibid., p. 33, Vide also p.375 in thesis.

[51] Ibid., pp. 33-35.

damaging to his value as a witness ensued. Ewart, for instance, charged that O'Donohue was judging the efficiency of the French schools without being able to speak French and thus did not know what went on in them.[52]

Presumably in order to save his protégé further embarrassment, McCarthy interposed an objection to Ewart's failure to mention that he intended to use affidavits when giving formal notice to the Attorney-General. This conduct was a breach of professional ethics and Ewart had placed heavy reliance upon this evidence, while keeping them in his " . . . possession until the last moment, without a hint being given that they would be used . . ." He demanded an opportunity to answer them by filing others.[53] (He thus intended another delay, or, failing that, the withdrawal of the affidavits.)

Ewart hotly denied that McCarthy had previously objected, and declared that they had both followed the same procedure. Neither had told the other of what evidence they were going to use. Ewart claimed that he would have sent him copies of the affidavits had there been time, and denied

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[52] Ibid., pp. 35-37. Ewart's speech on p. 36.

[53] Sessional Papers, 1895, #20, p. 37.

that anything but courtesy was involved.[54] He declared that McCarthy's use of O'Donohue, whom he accused was engaged by the local Government, was on the same plane. However, (in order to avoid an adjournment) Ewart was content " . . . they should be regarded simply as statements and not as sworn documents."[55]

A tenacious attempt by Ouimet to persuade McCarthy to go on with his argument and file his affidavits later met with no success, but the Privy Council decided to follow this course and give Ewart an opportunity to answer at a later date any affidavits which McCarthy might file.[56]

However, Ewart saw that this would merely lead to another delay, postponing remedial legislation for a year and therefore offered to withdraw his affidavits. McCarthy and the Privy Council agreed.[57] The alacrity with which McCarthy accepted Ewart's offer might seem to indicate that he had little hope of answering the charges contained in the

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[54] Ibid. Ewart declared that he had not been able to complete the affidavits until he arrived in Ottawa. The dates of the affidavits--Feb. 19-26--three of which were filed in Ontario, would indicate that this was so. But this does not account for the time between the Hearing of Feb. 26 and that of Mar. 4, 1895.

[55] Sessional Papers, 1895, #20, p. 38.

[56] Ibid.

[57] Sessional Papers, 1895, #20, p. 39. Affidavits A to O were subsequently withdrawn, but the Government saw fit to print them as part of the proceedings! Vide Hansard, Tues., July 16, 1895, pp. 4616-4617.

affidavits. In this battle of wits, Ewart was sadly handicapped by his anxiety to see remedial measures instituted that year.

That this anxiety was fully appreciated by others may be concluded from Caron's message to Bowell on the urgent need to get official authority to translate the minutes of the meeting and Ewart's argument so as to have it ready for the press by next day.[58]

A brief examination of the provisions of Ewart's proposed bill[59] shows it provided for a Catholic Board of Education with very wide powers. Section 4 (f) established what were practically collegiate departments and section 20 provided for normal school departments, neither of which had actually been part of the previous separate school system. Scant provision was made for inspection and regulation by the Department of Education.[60] Although provision was made for the attendance of non-Catholic children,[61] no safe-

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[58]Caron Papers, P.A.C., vol. 53, #16,Mar.4, 1895.

[59]Sessional Papers, 1895, 20f, pp. 145-72, Exhibit P, "An Act respecting Separate Schools".

[60]Vide Section 55, also section 71. The wording of sections 76 & 77 would seem to tell against the contention that the other schools were Protestant!

[61]Section 38 (h). For instance, no non-Catholic clergyman could enter the school, no matter how many children of his faith might be in attendance, vide section 77.

guard was inserted for their protection from religious indoctrination. This wide attempt to provide satisfaction for his clients was intended to be put into operation by the Province. In this way, the thorny problems of how to enforce the legislation and at the same time save the Province with at least the appearance of continued jurisdiction in education were to be avoided.

On the morning of Tuesday, March 5, 1895, McCarthy, after delivering a defence of O'Donohue's contentions, casting aspersions on Ewart's claim to represent the minority, and cautioning the Privy Council not to rely wholly on statements made in his The Manitoba School Question,[62] devoted a considerable portion of the remainder of his argument to proving that the Privy Council was the Government and was not sitting in a judicial capacity but was making a political decision[63] --while also casting considerable doubt on the validity of the fourth Bill of Rights supposedly brought to Ottawa in 1870.[64] In the process he paid his

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[62] Sessional Papers, 1895, #20, pp. 39-40. McCarthy was glad that Ewart wished to argue the matter on its merits, p. 49. Ewart admitted that the Federal power was " . . . wholly discretionary . . .", p. 52.

[63] Ibid., pp. 40-48. He made great use of Taylor's Jan. 1890 letter to the Free Press, vide p.62.

[64] Ibid., pp. 41-43. On p. 45 he accepted Ewart's correction of one of his statements of fact.

opponent the supreme compliment of making frequent reference to his The Manitoba School Question. In defending his position that the Government were acting in a political capacity in determining their action on the appeal, McCarthy quoted from the remarks of Blake, Ewart and Lords Watson, Macnaghten and the Lord Chancellor during the recent Brophy Case,[65] and appears to have been goaded by Hibbert Tupper into overstating his case.[66]

He did not agree with Ewart that remedial measures had to take the form of an Act to be passed by the Province. A remedial order, leaving the Province to implement it as they saw fit, was all that was required. And even this involved ministerial responsibility.[67] (McCarthy was apparently out to "keep the pot boiling" by persuading the Government to adopt a vague policy instead of a specific one.)

The meeting resumed that afternoon. McCarthy first quoted from the speeches of Blake and Pelletier to prove that the Government were politically involved.[68] He then

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[65] Ibid., pp. 52-53.

[66] Sessional Papers, 1895, #20, p. 54.

[67] Ibid.

[68] Ibid., pp. 59-61.

proceeded to attempt to refute the argument that binding pledges had been made to Catholics[69] and warned that, once the Parliament of Canada passed remedial legislation, " . . . the authority passes away from the local (government) for all time . . ."[70]

McCarthy then held that Ewart's proposed bill definitely interfered with the School Act of 1890 and this showed " . . . how little the Lord Chancellor understood the question . . ."[71] Once this legislation was passed it could never be repealed.[72] (His claim that the new system had " . . . not been hastily adopted . . ." seems of very doubtful validity,[73] though doubtless it had been " . . . deliberately adopted and still more deliberately adhered to . . . .")[74]

McCarthy then declared that the Parliament of Canada should not interfere in a matter which in other Provinces was of local concern, and then entered into an altercation

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[69] Ibid., p. 62.

[70] Ibid., p. 63.

[71] Ibid., p. 64. McCarthy would appear to have had much the same opinion of the Judicial Committee as Ewart was developing!

[72] Ibid., p. 112 for Ewart's denial.

[73] Vide p. 63.

[74] Sessional Papers, 1895, #20, p. 64.

over the merits of separate versus state systems and of the political implications of a vote in favour of remedial legislation, quoting freely from Ewart's The Manitoba School Question in the process.[75]

McCarthy was obviously out to persuade the Government either to dismiss the appeal or to give a remedial order instead of submitting a bill for the Province to pass. In this latter aim, he was to be entirely successful.

The remaining two days of the Hearing[76] were taken up largely with an altercation between Ewart and McCarthy on the merits of separate schools, the origins of the conflict, and the practicability of remedial measures, in which both revealed some degree of pettiness and sarcasm, but, on the whole, considerable respect for each other's abilities--if not for each other's point of view. Ewart's reading of a mass resolution from Winnipeg Catholics denying O'Donohue represented any considerable number of Catholics,[77] his objections to the "no coercion" argument,[78] and his mockery

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[75] Sessional Papers, 1895, #20, pp. 64-76.

[76] Mar. 6 & 7, 1895, vide pp. 76-125 in Sessional Papers, 1895, #20. Vide Globe (Toronto), Mar. 6, 1895 for a lengthy criticism of Ewart as a partisan versus the Manitoba Liberals! Also its Mar. 8, 1895 sneer at Ewart for quoting from Jos. Pope.

[77] Sessional Papers, 1895, #20, pp. 104-105.

[78] Vide Dafoe. Sifton, p. 37 for an extreme claim that Ewart's testimony supported Greenway's denial that he had made pledges to Taché.

of McCarthy's changes of position from that which he assumed in the Jesuits Estates Question[79] were noteworthy features, as was his attempt to justify remedial measures other than on the merits of a separate system,[80] though protesting that such a system was the best. The difference in attitude seemed to be that McCarthy was willing to see the law "winked at" for the benefit of the minority, while Ewart feared it might " . . . be a long time between winks."[81] (Ewart's argument against interference with provincial finances, however, seems to have been a blunder.)[82]

The main points of Ewart's attitude to separate schools were clearly set forth.[83] Denominational schools did not violate the separation of church and state, nor was illiteracy connected with church government. Protestant countries were not superior in education because they were Protestant but only because they lay further north; Catholic ones were superior in manners and he wished he had been

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[79] Sessional Papers, 1895, #20, pp. 110-112.

[80] Sessional Papers, 1895, #20, p. 122.

[81] Ibid., p. 123.

[82] Ibid., p. 111.

[83] Ibid., pp. 113-115.

taught how to address dignitaries! Catholics were not the only people to have a proportion of untrained teachers and poor schools, nor were they alone in occasionally setting ridiculous examination questions. There was certainly no doubt of his position!

The Hearing closed without any declaration by the Privy Council as to what course they intended to adopt, although they ascertained from Ewart that he considered any remedial order should be based on the form used by the Judicial Committee.[84] That the Government was in somewhat of a quandary may be seen from Bowell's speculating with La Rivière on the form and significance of a remedial order[85] while attempting to urge the Manitoba Government (through Schultz) to make concessions.[86]

Even before the Federal Government issued a Remedial Order on Mar. 21, 1895, Sifton happily noted that Bowell had given the game away when he admitted that the legal

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[84] Sessional Papers, 1895, #20, p. 125.

[85] Bowell Papers, P.A.C., vol. 77, #62, Mar. 6, 1895 to La Rivière.

[86] Ibid., vol. 77, #91, Mar. 7, 1895, to Schultz.

aspect had vanished.[87] The Orangemen of Ontario were sore troubled and Grand Master Hughes found it necessary to refer to Ewart's testimonies in a vain attempt to prevent the Lodge from passing a resolution versus separate schools.[88]

After resolving to summon Parliament for April 18,[89] the Federal Government issued a Remedial Order[90] stating that it seemed requisite that Manitoba's school legislation should be supplemented by provisions giving Catholics:

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

Thus was Ewart's parting advice during the close of the Hearing[91] adhered to, though Bowell quickly assured Schultz:

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[87] Sifton Papers, P.A.C., vol. 270, #432, Mar. 11, 1895, to McCarthy.

[88] Globe (Toronto), Mar. 13, 1895, pp. 2 & 3.

[89] Aberdeen Papers, P.A.C., Journals, Thurs., Mar. 21, 1895.

[90] Sessional Papers, 1895, #20, pp. 188-89, quotation from p. 189.

[91] Vide pp 370 & 390.

"Any arrangement he (Greenway) can make will be acceptable."[92]

Shortly afterward, Audet, while cautioning Mgr. Langevin to be discreet and accommodating, declared that Ewart had weakened when in reply to McCarthy he had declared remedial legislation valid until repealed.[93]

On Mar. 28, 1895, Greenway declared that he saw no reason for his Government to change its position, though adjourning for six weeks to consider the question![94] Turmoil soon broke out in the Federal Cabinet's ranks over Hibbert Tupper's intent to resign,[95] while James Fisher wrote to Greenway suggesting better financial terms might be obtained for the Province if it agreed to compromise and warning of

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[92] Bowell Papers, P.A.C., vol. 77, #207, Mar. 21, 1895, to Schultz.

[93] A.A.S.B., Mar. 23, 1895. This seems a misinterpretation of Ewart's position, vide his remarks on p. 112 of Sessional Papers, 1895, #20.

[94] Reports of Debates, Mar. 28, 1895 in Free Press (Winnipeg), Mar. 29, 1895. Note A.A.S.B., Mar. 31, 1895, Audet to Langevin--Minister of Justice more worried about Greenway's adjournment than about Bourinot's opinion. The latter was sent to Schultz on April 17, 1895 and held that the Province ought to pass the order but was not legally compelled to, vide A.A.S.B.

[95] Aberdeen Papers, P.A.C., Journals, Friday, Mar. 29, 1895.

the difficulties it would face if it did not.[96]

That Ewart's book was proving highly useful may be seen from Caron's suggestion to Judge Routhier to make use of it in drawing up his articles on the school question for publication in La Minerve.[97] He also remarked in another letter[98] that Ewart had discharged the appeal before the Judicial Committee well and that Ewart, Ferguson and the cash book all testified to the facts (that the Montreal Seminary had contributed and none of the Ministers had found it necessary to do so). April 10 saw the indefatigable Postmaster General checking with Martin Griffin[99] as regards Bill No. 3 as shown in Ewart's The Manitoba School Question.[100] Griffin held the Governor General at the time had been mistaken in taking this as the bill brought by the delegates--

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[96]Greenway Papers, P.A.M., #7431, Mar. 30, 1895. He also wrote Bowell, vide Bowell Papers, P.A.C., vol. 77,#442, Apr. 23, acknowledging receipt of Fisher's letter of Apr.19, 1895.

[97]Caron Papers, P.A.C., vol. 53, #214, Mar. 30,1895. Also #342, Apr. 11, 1895 and vol. 195, Apr. 6, 1895. Vide La Minerve (Montreal), p. 2, Sat. Apr. 6; Wed. Apr. 10; Fri. Apr. 12; Mon. Apr. 15, 1895 for unsigned series: "Etude juridique et constitutionelle de la question des Ecoles" which bears some slight affinity to the M.S.Q.

[98]Ibid., vol. 195, Apr. 5, 1895, to H.A. Turcotte.

[99]Caron Papers, P.A.C., vol. 195, Apr. 10, 1895, from Griffin.

[100]Vide M.S.Q., pp. 368-70.

but admitted the Sessional Papers were imperfect.

What Ewart's position with Archbishop Langevin was at this time might well be speculated on, in view of Audet's comment: "Ce que vous dites de Ewart me surprend. Savez-vous ce qui a été fait ici? Je vais prendre de rensignements."[101]

The propaganda battle was by now once more in full swing. Sifton made his famous Haldimand address of defiance on April 18, 1895--at the same time as Catholic school commissioners were testifying that the local Government had granted them aid although their schools were conducted as Catholic ones.[102] About this time also, Bowell wrote to Fisher,[103] disparaging this speech and thanking Ewart's partner for his suggestions. Sifton had been sent to Haldimand to get legal advice (probably from McCarthy). Bowell hoped the decision would not be forced on the Dominion Government. Concessions on the lines suggested by Ewart before the Privy Council[104] should be acceptable. Sifton was wrong in

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[101] A.A.S.B., Apr. 18, 1895, Audet to Langevin.

[102] Vide A.A.S.B., Documents of Apr. 17 & 18 and May 3, 1895.

[103] Bowell Papers, P.A.C., vol. 77, #442, Apr. 23, 1895. On Apr. 26 he sent Fisher a copy of Bourinot's memo, Ibid., #456.

[104] These suggestions had been anything but concrete, vide Sessional Papers, 1895, #20, p. 31.

declaring that they wanted the 1890 system. (Already compromise was in the air!) Anxiety was also arising[105] over the fact that the Federal Parliament was to expire Jan. 30, 1896. Might it do so before passing remedial legislation? Bowell was also concerned over the indiscreet intransigence of Archbishop Langevin.[106]

April 29, 1895 saw Ewart engaged in delivering an address in the Congregational Church, Winnipeg--in answer to Rev. Pedley's opposition to separate schools.[107] In this discourse, he used many of the arguments he had already presented before the Privy Council--to the considerable discomfiture, it would appear,of the unfortunate minister. That this unaccustomed performance gave Ewart some satisfaction appears from a letter to Archbishop Langevin,[108] in which he also declared that he believed public opinion was coming to their side and that his sermon had converted a few to their point of view. This same missive conveyed the information

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[105] A.A.S.B., Apr. 29, 1895, Audet to Langevin.

[106] Bowell Papers, P.A.C., vol. 77, #456, Apr. 29, 1895, to H. J. Macdonald.

[107] Lecture by John S. Ewart on the Manitoba School Question in the Congregational Church, Winnipeg: (Winnipeg: Manitoba Free Press Print, 1895), 18 p.

[108] A.A.S.B., May 14, 1895.

that Ewart had gone to Ottawa " . . . somewhat unexpectedly to attend the Supreme Court . . ." and thought it well to let His Grace know he was there in case he might wish to contact him regarding the forthcoming meeting between Sifton, Greenway and the Governor General.[109]

That Ewart was by no means fighting a lone battle emerges from Audet's comment,[110] in expressing his irritation at the desire of the English Conservatives to have the minority make concessions, that there was a distressing lack of attention to Meek's article[111] and that of the Orangeman, Kribs[112] --both of whom had concluded that the Catholics had a moral right to gain relief. Caron was also interested in obtaining copies of Kribs' pamphlet.[113]

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[109]Aberdeen Papers, P.A.C., Journals, Tues., May 7,1895, indicates Langevin had expressed opposition to school inspectors to the Governor General. By Fri. May 24,1895, Lady Aberdeen was ". . . not unhopeful." On May 9, the Manitoba Government had reassembled and Greenway had proposed a further adjournment to June 13,1895 to settle the disagreement and avoid haste. This was carried despite A.F. Martin indicating it was superfluous since (Sifton) had stated the Government would not comply with the remedial order, vide Reports of Debates in Free Press (Winnipeg), May 10, 1895.

[110]A.A.S.B., May 18, 1895.

[111]Edward Meek. "The Manitoba School Question and the Remedial Order" in The Canadian Magazine (Toronto: The Ontario Publishing Co. Ltd., 1895) May, 1895; vol.5, #1,pp.90-98.

[112]Louis P. Kribs. The Manitoba School Question Considered Historically, Legally and Controversially (Toronto: The Murray Printing Co., 1895) 71 p.

[113]Caron Papers, P.A.C., vol. 53, #474, May 3, 1895, to Louis P. Kribs.

Ewart would seem by this time to have been becoming somewhat of a spectator so far as the main battle was concerned. A letter from Toronto[114] revealed that he was learning of the negotiations in Ottawa only through the newspapers. He too was apparently more inclined to compromise than was His Grace, trusting that:

> . . . some fair settlement may be arrived at--some arrangement which will leave to your people all the control that is necessary for the conservation of the schools as Catholic schools although of the National type, but yet which will be in some measure not altogether displeasing to the Protestant clergy. It will be dificult (sic) to arrive at such a solution but it ought not to be impossible.

(One wonders what McCarthy would have made of such an admission!) The remainder of the letter indicated that Ewart was <u>still</u>[115] awaiting instructions from His Grace and desired a telegram indicating if and when his services might be required. He would give the School Case precedence but wished to know when he might return to Winnipeg. (It might seem a certain estrangement was growing up between the two. Certain it is that Ewart never developed the friendship with

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[114]A.A.S.B., May 25, 1895, Ewart to Langevin.

[115]Author's italics. The Catholic <u>Daily Nor'Wester</u> (Winnipeg), June 17, 1895 quoted from Ewart's argument before the Privy Council to the effect that Catholics were willing to submit to state control. By Fri., June 21, it was using Ewart's arguments against Sifton's accusations that Catholic schools were inefficient.

Mgr. Langevin that he had with his predecessor.)

However, this development did not prevent Ewart from issuing an angry attack on Greenway as regards Manitoba's increasing defiance of the Remedial Order.[116] This called forth a sarcastic comment from the Toronto Globe[117] in which it was held that the contradictions of Ewart and Sifton merely indicated the need for an inquiry. However, this attack on the policy of the local Government was no more effective than those in the Manitoba Legislature. On June 19, 1895,[118] that body adopted a blunt but carefully-worded refusal to the Federal Remedial Order of Mar. 21, 1895.[119]

Thus the question had been handed back to an anxious and even frightened Federal Government. On June 18, 1895,

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[116] Vide Bowell Papers, P.A.C., vol. 128, Ottawa, June 16, 1895. Vide La Minerve (Montreal), June 27, 1895, p. 4 for notice that Ewart's letter was being translated for publication in the French journals.

[117] June 18, 1895.

[118] Reports of Debates, June 19, 1895 in Free Press (Winnipeg), June 20, 1895.

[119] Vide Sessional Papers, 1895, #20E, pp. 350-54. (Sent June 25, 1895.)

James Fisher wrote[120] that Ewart was returning home after consultation with the Ottawa authorities. Fisher still hoped that the latter would do something definite, though a telegram recently published suggested otherwise. However, he thought another session before the election was probable. The Federal Government was to hesitate long before doing something definite, and then was to find itself short of time in which to accomplish it.

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[120]A.A.S.B., June 18, 1895, to (probably) Langevin.

CHAPTER THIRTEEN

THE COLLAPSE OF REMEDIAL LEGISLATION

The Province having refused to undertake to furnish a remedy to the Conservative dilemma, the Federal Government found itself driven inexorably to undertake remedial legislation. In this hazardous venture, it was fatally handicapped by its own weakness, the ominous approach of the elections and the calculation of its opponents. In its desperate last-minute attempts at compromise and its frenzied efforts to frame and enact remedial legislation, Ewart was to play an active, if somewhat obscure role.

Assurances to Archbishop Langevin went hand in hand with the "great debate". The very day that Rev. George Bryce was attacking Ewart's assertion[1] that a covenant had been made guaranteeing separate schools, La Rivière informed his archbishop: "We will have remedial legislation this Session . . ."[2] On June 22, 1895, the Daily Spectator[3] uttered a very hostile statement versus Ewart's draft bill

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[1] Globe (Toronto), June 20, 1895, "Report on General Assembly of Presbyterians".

[2] A.A.S.B., June 20, 1895.

[3] Hamilton, June 22, 1895.

as representing extremist demands, while, on the day following, Archbishop Langevin was assured[4] that the Premier would calm Protestant fanatics and that dissolution would be remitted to next year, i.e., until after the " . . . Dear Question . . ." was settled.

At this juncture, Ewart despatched a confidential letter to Hibbert Tupper.[5] In compliance with his brother's request, Ewart sent him a draft of the proposed Bill (a modification of the one he had presented to the Privy Council)[6] together with a memorandum giving its main features. He had " . . . endeavoured in every way to make it reasonable and acceptable to all right-minded persons . . ." and trusted he had " . . . paid special attention to the removal of such features of the old system as really constituted difficulties and defects . . ." He had not as yet received His Grace's " . . . express sanction . . ." but had talked it over with him and was sending him a copy of it.

Archbishop Langevin's uncooperativeness was to prove a potent ally to Greenway and his associates. But Ewart

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[4]A.A.S.B., June 23, 1895, from Chapelleue.

[5]Caron Papers, P.A.C., vol. 195, June 23, 1895, Ewart to Tupper.

[6]A.A.S.B., June 24, 1895, Ewart to Langevin refers to the one presented to the Privy Council as the "old bill".

apparently was confident that he could persuade His Grace to adopt concessions, as appears from a letter to him[7] regarding the proposed Remedial Bill. He desired His Grace to assent to slight concessions regarding texts and endeavoured to reassure him with respect to the legal status of inspectors appointed by the Catholic Board. A hint of the difficulty to be encountered in framing a workable statute came, however, in Ewart's declaration that he feared that the Bill infringed on municipal law but could see no way around it.

Not until July 4, 1895, did Archbishop Langevin reply to this letter.[8] His Grace indicated that he agreed with Ewart's modifications, except as regards giving Catholics the freedom to support other public schools in districts where there was no separate school.[9] He submitted to:

> . . . most liberal concessions, viz. --the approbation of inspectors, the conditional legislative grant, the admission of other children with special regard to the wishes of protestant (sic) parents, etc.

but kept the essentials: the separate Board, and the control of the books and teachers. He sighed longingly for the Governor General in Council to be substituted for the Lieu-

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[7] A.A.S.B., June 24, 1895, Ewart to Langevin.

[8] A.A.S.B., July 4, 1895, Langevin to Ewart.

[9] Ewart's approach to the Ontario system is obvious.

tenant Governor in Council " . . . for certain powers . . ." and for the replacement of the legislative grant by one from the school lands fund (i.e., from Ottawa). His Grace concluded by remarking that there should be no objection as the Bill would place them under the control of the local Government[10] and that, though the Ontario system would not be at all satisfactory, it would be well to say that they had a good deal of it. (Already it was apparent that Ewart and Langevin were thinking along different lines, in spite of a certain measure of initial agreement.)

But this incipient divergence of views was as nothing to the furore which raged in the Federal Cabinet. Though Sir George E. Foster declared that if Manitoba did not remedy the grievances, the Federal Parliament would initiate a Remedial Law by the first Thursday in January, 1896,[11] three French Canadian Cabinet Ministers (Caron, Ouimet, and Angers) threatened to resign unless the Bill were proceeded with that Session.[12] Not until the Opposition had made capital out of this evidence of disunity did Caron and Ouimet

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[10] Such control seems rather illusory.

[11] Hansard, July 8, 1895, p. 3997. Vide Sifton Papers, P.A.C., vol. 270, #541, to McCarthy characterizing it as the most serious blunder the Conservatives had yet made.

[12] Aberdeen Papers, P.A.C., Journals, Sun., July 7, & Wed., July 10, 1895.

announce that they were satisfied with their colleagues' pledges that the six months' delay did not mean final obviation.[13]

That Caron soon had doubts of the wisdom of this escapade emerged in a plea made to Ewart shortly after.[14] He indicated that the Superior of the Montreal Seminary had agreed that he and Ouimet had done the right thing and desired that Ewart would send him a letter of approval in code if he concurred and to treat the suggestion as non-existent if he did not! (Ewart was certainly advancing in reputation--even Cabinet Ministers were now seeking his advice, and not merely on legal problems.)

The same despatch also made the somewhat mysterious comment that Caron and his colleagues could not at present do what Ewart wished about his book, but they were going to have a Session in January and he had spoken to the Premier about it. (Probably it was intended to have Ewart's The Manitoba School Question distributed amongst the Members of Parliament.)[15]

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[13] Ibid., Thurs. July 11, 1895.

[14] Caron Papers, P.A.C., vol. 54, #392, Jul.13,1895.

[15] Caron Papers, P.A.C., vol. 54, #445, July 25,1895 to Ewart mentioned that they were being distributed.

Ewart was not slow to write Archbishop Langevin,[16] enclosing a copy of Caron's letter and stating that he had replied that the only way his name had appeared was as solicitor for the minority. Therefore, he did not feel free to express his private opinion, but felt certain both Caron and Ouimet had acted according to their best judgment in the interests of the minority. He was undertaking to get a letter approving their conduct from the Archbishop of St. Boniface.[17] Ewart also informed His Grace that he had obtained: ". . . the opinions recently given to the Manitoba Government by Mr. Christopher Robinson and Mr. Dalton (sic) McCarthy . . ." and was forwarding them. He asked that they be kept in His Grace's possession as he " . . . was under obligation not to disclose them."

At this time, Ewart's name was cropping up with considerable frequency during the debates in the Federal House. On July 16, 1895, McCarthy attacked Ewart's case in the course of a long argument replied to by Hibbert Tupper, in which the latter made stinging reflections on McCarthy's position as the paid Counsel of the Manitoba Government,[18]

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[16]A.A.S.B., July 18, 1895.

[17]Vide p. 408 for the result.

[18]Hansard, Tues. July 16, 1895, pp. 4614 to 4682. Vide Aberdeen Papers, P.A.C., Journals, Tues., July 17 (16), 1895 for trenchant comments against McCarthy.

reminiscent of the charges made against James Fisher in the Provincial Legislature.[19] The next day saw McNeill quoting Ewart, Wallace scoffing at his statements and referring to his book, Davin referring to Ewart as his friend, and Costigan also mentioning him in the bitter debates on the question and on McCarthy's complaint that the withdrawn affidavits had been printed by the Government as part of the hearing and distributed.[20]

About the time the Federal Government, troubled by new dissensions, chose to make a new attempt to adjure the Province to settle the question--by issuing a second Remedial Order[21] (embodying a curious mixture of threat with an anxious willingness to compromise), Ewart was engaged in assisting the Federal Government's attempt to refute the widespread contention that the Catholic laity did not want separate schools. On July 23, 1895, Emerson Coatsworth, Jr., wrote to Bowell[22] on this matter and declared that it was plausible and its truth or incorrectness should be determined as it

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[19] Vide pp. 374-75.

[20] Hansard, July 18, 1895, pp. 4698 to 4822.

[21] July 27, 1895. Vide Skelton. Laurier, vol. 1, p.462.

[22] Caron Papers, P.A.C., vol. 195, July 23, 1895, from Solicitor, Toronto Public School Board.

might make remedial legislation more difficult.

The next day, Bowell sent this letter to the Postmaster General[23] with the remark that Coatsworth was with them on remedial legislation and suggested it might be well to work up a general demand for remedial legislation in Manitoba. Caron then sent Coatsworth's letter on to Ewart[24] and mentioned that they would appreciate his following the solicitor's suggestions if he thought it right to do so. La Rivière felt much the same way as Coatsworth.

Ewart soon replied,[25] returning the letter and stating that the petition upon which the Remedial Order had been based had been signed by close to one-quarter of the Catholic population in Manitoba, and that another petition with about the same number of signatures had been recently presented to the local Government.[26] He felt that these points would satisfy Coatsworth. (Ewart seems to have failed to comprehend that the problem was not to convince Coatsworth but to convince the public!)

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[23] Ibid., July 24, 1895, from Bowell.

[24] Ibid., vol. 54, #445, Jul.25, 1895, to Ewart.

[25] Caron Papers, P.A.C., vol. 195, July 30, 1895, Ewart to Caron.

[26] The next day, Ewart sent a copy of this petition. Ibid., July 31, 1895.

This same letter informed Caron that Archbishop Langevin felt sure that he, Angers, and Ouimet had acted in their best judgment[27] but found it difficult to commend their course. His Grace could not take it upon himself to reflect upon Angers' remaining outside the Government. Ewart added that he could not continue his discussion with the archbishop because of the letter detailing what he desired, but would write Caron again.

No information on the remainder of this exchange has come to light. It seems His Grace gave no such assurance as Caron desired. However, on August 13, 1895, the Postmaster General wrote Ewart: "Very many thanks for your letter . . . . It is just what I expected from you. I have had all your books distributed as you desire."[28]

However, Ewart's was not the only book being circulated. By Oct. 12, 1895, David Mills was strongly criticizing[29] a pamphlet issued by F. C. Wade,[30] a Winnipeg

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[27] Vide p. 405 for origins of this inquiry. It would be interesting to know to what extent Ewart determined His Grace's opinion.

[28] Caron Papers, P.A.C., vol. 55, #146.

[29] Laurier Papers, P.A.C., vol. 9, #3857, from Mills.

[30] The Manitoba School Question (Winnipeg: Manitoba Institution for the Deaf and Dumb, 1895) 122 p. and appendices A to D. Vide Reports of Debates, Mar. 5, 1896, in Free Press (Winnipeg), Mar. 6, 1896 for Sifton's justification of the Government's employing Wade to produce this pamphlet.

barrister, at the instance of the Manitoba Government. This somewhat perfervid article was largely devoted to a justification of the Province's stand and to arguments that the old system violated the principle of separation of church and state, that duality was impracticable and that Catholic schools were Church-dominated and inefficient. So widespread was the effect of this pamphlet that Ewart found it necessary to issue a rebuttal,[31] which, however, does not seem to have had the desired effect on lowering support for the local Government, though it offered a telling refutation of many of Wade's statistics, etc. Probably Ewart's work was not so industriously distributed. Nor did it have the appeal of that of Sifton's associate.

During this period, Ewart was also experiencing some difficulty in settling accounts with the Brophy Case paymaster. On Nov. 8, 1895, he wrote[32] that he had succeeded in getting Bompas, Bischoff & Co. to reduce their costs by

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[31] The Manitoba School Question, a Reply to Mr. Wade (Winnipeg: The Manitoba Free Press Company, 1895) 63 p. Vide Sifton Papers, P.A.C., vol. 270, #732, Nov. 27, 1895, to McCarthy, sending 500 copies of Wade's pamphlet. Ibid., vol.7, #3885, Apr. 7, 1896, from McCarthy stated confidence in obstruction of the Remedial Bill and good demand everywhere for Wade's pamphlet--more wanted.

[32] Caron Papers, P.A.C., vol. 195, copy of letter from Ewart to Ferguson.

$250 and thought it useless to attempt to gain any further concession. Ewart indicated that their bill (presumably that of Ewart and Blake)[33] had amounted to $4,094. He had received from Ferguson $2,500 and from the London solicitors $800, leaving a balance of $794. He did not feel that Ferguson should press his exceptions to some of the items in the bill as they had given the full benefit of Bompas, Bischoff's reduction, though perhaps entitled to a portion of it. Ewart pointed out that if Ferguson's wealthy sources did not pay,[34] the local Archbishop would have to, and he was at the end of his resources. Indeed Ewart and some of his Protestant friends had had to contribute " . . . very considerably towards the Winnipeg (presumably Catholic) schools. . . ."

This despatch was enclosed in a letter from Ferguson to Caron,[35] referring to Ewart's calling on him a few days ago and adding that he (Ferguson) had received a total contribution of $7,367.37 for the Brophy litigation and had disbursed $7,369.09 and was therefore " . . . out of pocket to a small extent. . . ." He himself had been paid nothing,

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[33] Vide p. 368. Perhaps Ewart had reduced his bill slightly.

[34] Probably Ewart referred to the Cabinet.

[35] Caron Papers, P.A.C., vol. 195, Dec. 7, 1895.

and was now asked to pay Ewart $794. He desired $1,000 to pay Ewart and leave something for his own services. On Dec. 7, 1895, Caron notified Ferguson[36] that he had to await the return of (Hibbert) Tupper and advised putting all the bills together and sending them to the Minister of Justice. He would do the same. The Postmaster General also informed Ewart[37] that he was seeing Tupper about the matter and would write him later.

However, as late as 1896, the matter was still not settled. In January, Caron wrote Ferguson[38] that he had collected all he could and was out of pocket himself. He desired Ferguson to go with him and explain matters to Dickey and endeavour to get him to see that the money should be found. A few days later, Ouimet declared[39] that he was attempting to get the appeal fund voted in the supplementary estimates. Ewart perhaps would have been comforted to know that Joseph Martin was experiencing even more difficulty.[40]

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[36] Ibid., vol. 56, #373.

[37] Ibid., #374, Dec. 7, 1895.

[38] Caron Papers, P.A.C., vol.57, #83,Jan.20, 1896.

[39] A.A.S.B., Apr. 8, 1896, Ouimet to Langevin.

[40] Sifton Papers, P.A.C., vol. 270, #719, to Martin regretting that he could not meet his claim for Counsel fees in the Barrett Case.

As early as Nov. 12, 1895, Ewart received an intimation of what was ahead. On that day, Hibbert Tupper warned him[41] that a settlement with the Province was better than Federal action and that, in view of the delay from their leader's hesitations, the growing Cabinet crisis, and the threat of Liberal obstruction, it would not be well to rely too much on the Federal Government. This was perhaps the reason why Bernier wrote his archbishop[42] that Ewart had informed them they must not delay by too much intransigence, and also the reason for Ewart's notification[43] that he had conferred with the Manitoba representatives in Ottawa but that Greenway's offers were not worth considering, though he feared that the Federal Ministers were badly divided.

By December, 1895, the situation of the Conservative party was becoming critical. On Dec. 12, N. Clarke Wallace resigned from the Ministry[44] and, on Dec. 21, the

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[41] H. Tupper Papers, P.A.C., M107, #1515, apparently he and Ewart had discussed it the previous evening.

[42] A.A.S.B., Nov. 17, 1895. But only a few days later, he hinted Ewart might have ideas on concessions regarding inspectors and examining boards for teachers. He did not accuse, but suggested being on guard--A.A.S.B.,Nov.28,1895.

[43] A.A.S.B., Nov. 18, 1895, to Langevin.

[44] Willison. Laurier, vol. 2, p. 220.

Manitoba Government replied to the July 26 request, saying that they saw no reason to alter the complained-of legislation, while proposing an inquiry, and suddenly dissolved the Legislature to go to the country.[45] About this time also, Sir Charles Tupper, in London, cabled Bowell[46] innocently suggesting that he should return to Ottawa. Dec. 20, 1895, saw Costigan complaining[47] that Catholics were voting against the Government.

When, on Jan. 4, 1896, A. R. Dickey moved the first reading of the Remedial Bill,[48] the Conservative Government was confronted by the resignations of seven Ministers.[49] Senator Bernier was soon commenting[50] on this disaster and on those of the recent Federal by-elections. He also pointed out difficulties in the Remedial Bill: suggestion of a delay clause, freedom of Catholics to choose the school they would support, and inability to force Protestant ratepayers to pay

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[45]Robert E. Clague. The Political Aspect, p. 27, vide also p. 28 for overwhelming Liberal victory in Manitoba elections, announced Jan. 15, 1896.

[46]Dec. 15, 1895, Skelton, Laurier, vol. 1, p. 465.

[47]Costigan Papers, P.A.C., #199, to Archbishop Walsh.

[48]Skelton, Laurier, vol. 1, p. 468.

[49]Mackenzie et al. Guide to Canadian Ministries, p. 21.

[50]A.A.S.B., Jan.(4?), 1896, to Langevin.

for Catholic schools. Hibbert Tupper soon replied[51] to a letter of Jan. 3 from Ewart, thanking him for a pamphlet[52] and stating that he still hoped for remedial legislation despite the ministerial crisis.

As evidence that Ewart had found a friend to replace Archbishop Taché, we might cite the letter from Father Lacombe to Archbishop Langevin,[53] in which, after relating the fall of Bowell from actual power and his dread of Sir Charles Tupper, he stated that he had sent friend Ewart Cobbett's History of the Reformation.

Anxiety over the nature of the Remedial Bill was soon rife in Catholic circles. On Jan. 17, 1896, Mgr. Begin expressed his confidence[54] that the Bill would give satisfaction if it followed the essential lines of Ewart's draft. Father Lacombe himself[55] expected and hoped that it would be the same as the one elaborated the previous year by Ewart,

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[51]H. Tupper Papers, P.A.C., M107, #1595, Jan.6,1896, to Ewart.

[52]Probably The Manitoba School Question, A Reply to Mr. Wade.

[53]A.A.S.B., Jan. 13(possibly 15), 1895. On Jan. 21, 1895, Lacombe wrote Langevin he had received". . .une jolie lettre. . ." from Ewart and asked if he had received Cobbett.

[54]A.A.S.B., Jan.17,1896, Archbishop of Cyrène to Lacombe. Three days later, Lacombe issued his famous ultimatum to Laurier, vide Skelton. Laurier, vol. 1, p. 470.

[55]A.A.S.B., Jan. 20, 1896, Lacombe to Langevin.

and expected it would pass. The next day, La Rivière, expecting a long debate, stated[56] that the Sub-Committee of the Privy Council had studied Ewart's Bill but he himself had not seen it, though the Minister of Justice had promised him a copy. On the same day, Bernier was expostulating[57] over the difficulty of maintaining a non possumus stand as regards the right of Catholic parents to send their children and pay taxes to other than separate schools.

Ewart himself found it necessary to write His Grace on this difficulty.[58] However, it was to declare that, while glad compromise had been agreed to, he thought Archbishop Langevin had gone too far in his concessions. He did not " . . . think it would be at all proper to exempt Roman Catholics from subscription to the separate schools unless there should be public schools covering the same district. . . ." Ewart, in addition, followed up this strengthening of the Catholic position by declaring that he had not made any special provision that such Catholic ratepayers would have

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[56]A.A.S.B., Jan. 21, 1896, La Rivière to Langevin. The same day, the World (Toronto) stated the Orange cry was ". . . hands off Manitoba."

[57]A.A.S.B., Jan. 21, 1896, Bernier to Langevin.

[58]A.A.S.B., Jan. 27, 1896, Ewart (Winnipeg) to Langevin respecting Father Cloutier's delivering His Grace's draft of changes.

to renew their support of other than separate schools every year, but he thought such was " . . . the effect of the language. To state it more plainly would only be to draw unnecessary adverse criticism upon the clause." He desired His Grace's assent in time to mail the draft promptly.

Father Lacombe was soon in considerable anxiety about the Bill--which was to be almost like Ewart's--and about rumours that Ewart was arriving on Jan. 30.[59] La Rivière announced his arrival on Feb. 1 and declared he was consulting with the Ministers. The Cabinet were to finish with the Bill that day. Lacombe had disrupted the Opposition and Ouimet had assured him that the Bill was acceptable. Everything depended on the election of Sir Charles Tupper.[60] At this time it would appear that Lacombe still had not seen the draft Bill.[61] By Feb. 2, 1896, Ewart was hurriedly returning to Winnipeg. While <u>en route</u> he pencilled a letter[62] to Dickey, referring to his interview with Hibbert Tupper

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[59]A.A.S.B., Jan. 28 & 30, 1896, to Langevin.

[60]A.A.S.B., Feb. 1, 1896, La Rivière to Langevin.

[61]A.A.S.B., Feb. 1, 1896, Bishop of Nicolet to Lacombe.

[62]Dickey Papers, P.A.C., Feb. 2, 1895 (obviously 1896, since it refers to section 110B. In the 1895 draft there was no such section. Section 10 of the 1896 Act would seem to have been the result, <u>vide Bill: The Remedial Act, Manitoba</u>, #58, 6th Session, 7th Parliament, 59 Victoria, 1896.)

the previous day and giving the draft of a proposed change in the Bill--to compel the setting up of separate schools in mixed areas where at least ten Catholic parents resided.

In spite of Tupper's success in the election,[63] clerical intervention had been compromisingly obvious and Bowell had approved Archbishop Walsh's conference idea. Lacombe did not think it would succeed. (This same period saw the Minister of Justice recommending payment of Ewart's account for attendance at Ottawa. It was referred to the Treasury Board and confirmed by it on July 8.)[64] Ewart was also contacting Foster in the Department of Finance, concerning--not his accounts--but the problem of teacher certification and his recent pamphlet.[65]

Ewart did not think " . . . it would be proper to provide that all teachers for the separate schools should hold certificates under the Public Schools Act. . . ." and set forth four reasons for his stand. His mistrust of the

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[63]A.A.S.B., Feb. 4, 1896, Lacombe to Langevin.

[64]Privy Council Register 1896, Nos. 607 & 2640. Latter approved Jul.8, 1896--$665 to be paid J.S.Ewart for consultations with Minister of Justice including expenses of $476 in preparing reports on various school laws, respecting Remedial Act.

[65]Foster Papers, P.A.C., Collection, "Separate Schools Systems, N.B., P.E.I., Ont.," Feb. 4, 1896. The pamphlet was probably The Manitoba School Question, a Reply to Mr. Wade.

local Government and anticipation of obstruction from it was clearly revealed. On the same day, Ewart sent His Grace[66] a copy of the Remedial Bill from the Minister of Justice, showing the changes from the old law, together with a memorandum of suggested amendments, and a map indicating the various districts. As he had the map in confidence, he requested its return.

By Feb. 8, 1896, the Ministers were finally finished with the Bill.[67] Bernier, La Rivière and Ouimet had had a long conference with Ewart on the previous day.[68] La Rivière held that the Bill had been drawn up in conformity with Ewart's suggestions and was perfect, although there was no provision for a Federal subsidy in case the Province refused to comply! The Ministers had also reassured Lacombe that all was in compliance with their wishes and with Ewart's suggestions. A day later, the good Father could announce[69] that Laurier had abandoned his inquiry plan but that he did not believe the Liberal leader would vote with them. An

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[66] A.A.S.B., Feb. 4, 1896, Ewart to Langevin.

[67] A.A.S.B., Feb. 8, 1896, La Rivière to Langevin.

[68] Either La Rivière was mistaken in his dates or Ewart made a hurried return to Ottawa.

[69] A.A.S.B., Feb. 9, 1896, Lacombe to Langevin.

instance of the high regard in which Ewart was held occurred when the highly capable Mgr. Begin, after noting that Ewart had returned to Winnipeg, remarked that he hoped soon to have his opinion on the Bill.[70]

La Rivière soon developed a change in attitude. By Feb. 12, 1896, he was relating[71] that Ouimet had assured him that the Bill was as drawn up by Ewart but that he himself did not like clause 74[72] (concerning the legislative grant). Ouimet had said it was at Ewart's instance that they had given up what they would have liked to see there. However, he believed it important to have Ewart in Ottawa when the Bill came up in Parliament. It would be well if Ewart could help obtain Prendergast's opinion--such would aid in silencing Tarte.

The same day saw the second reading of the Bill and Lacombe was soon writing Archbishop Langevin for his approval of it.[73] The tone of the letter apparently puzzled Senator

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[70] A.A.S.B., Feb. 11,1896,Archbishop of Cyrène to Langevin.

[71] A.A.S.B., La Rivière to Langevin.

[72] Vide p.418 for letter of Feb. 8, 1896 for what they wanted. Apparently Ewart feared charges Federal coercion would damage the chances of passage, and probably even more the inability of the Federal Government to enforce such a provision.

[73] A.A.S.B., Feb. 15, 1896, Lacombe to Langevin.

Bernier, for he wrote that His Grace sounded as though he had not seen the Bill, though Lacombe had told him that the Archbishop had officially authorized its acceptance.[74] Lacombe had indeed semi-officially accepted the Bill, though Laurier protested that it was not acceptable. Therefore the good Father wanted a declaration from His Grace, on behalf of the Catholics of Manitoba, that the Bill was acceptable.[75]

How desperately Archbishop Langevin's approval was needed--in order to silence Liberal criticism--soon emerged. La Rivière declared[76] that the Minister of Public Works had stated that it was useless to proceed without this statement. He would inform His Grace if it were possible to obtain concessions but warned him not to let it be known that he would not accept. La Rivière was <u>still</u>[77] of the opinion that Ewart should be there, for he had great weight with the English ministers.

Father Lacombe was obviously on the horns of a dilemma. If the clergy approved the Bill, they would have difficulty in getting the amendments they desired. If they

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[74]A.A.S.B., Feb. 15, 1896, Bernier to Langevin.

[75]A.A.S.B., Feb. 15, 1896, Lacombe to Langevin.

[76]A.A.S.B., Feb. 17, 1896, La Rivière to Langevin.

[77]Author's italics. It might seem that His Grace was discouraging Ewart's presence in Ottawa.

did not, the Opposition would capitalize on it and perhaps defeat the Bill. Thus he declared to Mgr. Begin[78] that they accepted the Bill only in principle.

Bernier soon experienced this very difficulty. He was worried about clause 74 though Ouimet persisted in saying that it was Ewart's clause and Father Lacombe's public testimony that the Bill was acceptable had made it difficult to get it changed.[79] Lacombe also was worried about this clause and gave a long sigh for Ewart's return, hoping that Langevin would speed him on his way.[80] La Rivière too found it advisable to warn His Grace[81] that it was best to accept the Bill even without modifications, as the last clause would give them the chance to exact necessary legislation in the future. If the Archbishop did not head the movement, they would lose the chance of passing the Bill.

These warnings were apparently stymied by a new development. On Feb. 21, 1896, Ewart wrote to His Grace[82]

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[78]A.A.S.B., Feb. 18, 1896, Lacombe to Langevin.

[79]A.A.S.B., Feb.19, 1896, Bernier to Langevin. The same day saw a move to set up voluntary systems by which provincial grant would be forfeited if supporters were exempted from support of other schools. Defeated. Vide Reports of Debates, Feb.19, 1896 (and Feb.26) in Free Press (Winnipeg), Feb.20 (and 27), 1896. The minority seemed to have been working at cross-purposes.

[80]A.A.S.B., Feb.19, 1896, Lacombe to Langevin.

[81]A.A.S.B., Feb. 20, 1896, La Rivière to Langevin.

[82]A.A.S.B., Feb. 21, 1896, from Winnipeg.

that the Bill should be amended! He was sending suggestions to the Minister of Justice and wanted others to study it also. Ewart was not confident that he could foresee everything in a practically new system, but he considered his draft fairly satisfactory save for the clause respecting (municipal) corporations.[83] On this same day, Caron was writing[84] that Archbishop Langevin accepted the Bill, such as it was, and that changes could be made in Committee.

But Father Lacombe did not share the complacency of the Postmaster General. An excited despatch to Archbishop Langevin[85] desperately enquired if Ewart were going to return and whether His Grace wanted all or nothing. (If he wanted all, they were finished. What Ewart would find if he were there! They had upset his plan!) At this time, La Rivière saw amendments would have to await the Committee of the Whole.[86] This resolve was borne out by Lacombe informing

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[83]There was no reference to clause 74. Ewart was on his old worry, vide p. 402.

[84]Caron Papers, P.A.C., vol. 57, #312, Feb. 21,1895, to Charlebois.

[85]A.A.S.B., Feb. 21 (or 22), 1896. On Feb. 22 Mulock, at Laurier's invitation, spoke against the use of "exceptional" Dominion power until investigation had proved gross wrong, vide D.P.R.A., Speech of Mr. Mulock at Massey Hall, Toronto, on "Remedial Legislation", n.p., 7 p.

[86]A.A.S.B., Feb.22, 1896, La Rivière to Langevin.

the other archbishops[87] that Archbishop Langevin had telegraphed his approval of the Bill. He added that any attempt to change clause 74 would be the downfall of the Government. The good Father transferred this warning to Langevin,[88] forecasting clause 74 would be the object of attack, and stating that he was in a great hurry to see Ewart.

Mgr. Begin's interest in the legislation continued. Laurier notified him[89] that the Bill had been drawn up by that same Scott who had drafted the separate school law in Ontario but that the relief it promised was illusory. Caron informed him[90] that the Bill was based on compliance by the Province and, with respect to his inquiry about clause 74, it would be necessary to change the Dominion Lands Act.

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[87]A.A.S.B., Feb.24, 1896, Printed Letters to Archbishops.

[88]A.A.S.B., Feb. 25, 1896, Lacombe to Langevin.

[89]Laurier Papers, P.A.C., vol.9,#4173,Feb. 24, 1896.

[90]Caron Papers, P.A.C., vol. 57, #313, Feb. 24, 1896, to Begin. The same date, Audet was attempting to get assurances from Hibbert Tupper and Costigan from Dickey that the Government would intervene in some way over the lands fund, vide A.A.S.B., Feb. 24, 1896, Audet to Langevin. He could find no way of regaining confiscated school buildings! On Feb. 25, Audet feared Greenway would offer concessions to Sir Donald (Smith). On Feb. 27, he sneered at Smith's report of Greenway's magnificent promises.

By Feb. 26, 1896, La Rivière was worried[91] about the effect of the recent Toronto meeting[92] and feared Liberal support would be necessary to get the Bill past the second reading. He hoped His Grace would be able to pass some time in Ottawa with Ewart in order to work together on assuring passage of the Bill, with the desired changes. But by Feb. 29, 1896,[93] the Ministers had not had time to busy themselves with the amendments Ewart had sent the Minister of Justice, as they were too absorbed in securing a Ministerial majority! This day also saw Lacombe in a great hurry to meet Ewart,[94] who was said to have arrived in Ottawa.

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[91]A.A.S.B., La Rivière to Langevin. Vide Reports of Debates, Feb. 26, 1896 in Free Press (Winnipeg), Feb. 27, 1896 for Cameron & Sifton warning Province would not accept proposed remedial law but would appeal to the courts. The same date and the following saw futile efforts by Prendergast and Fisher to point out the local Government's misinterpretation of the Remedial Order and its deliberate equating of remedial legislation with disallowance. But this did not prevent a resolution of qualified defiance passing. Vide Free Press, Dec. 28, 1896.

[92]Vide footnote 84.

[93]A.A.S.B., La Rivière to Langevin.

[94]A.A.S.B., Feb. 29, 1896, Lacombe to Langevin.

Soon His Grace was being advised[95] to have the lawyer authentically declare that his clients were and declared themselves satisfied.

By March 4, 1896, Liberal accusations that His Grace was not satisfied with the Bill had become so rife, that La Rivière was requesting a copy of Archbishop Langevin's telegram of acceptance[96] and Lacombe feared that the Session would close without a vote.[97] Vicar General Marois reminded Lacombe[98] that it seemed to have been understood that Ewart would speak officially so as to allow the Conservative papers to support themselves on his opinion in defending the Bill. Chapais especially relied on this. Apparently Ewart had returned to Winnipeg without making any such declaration,

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[95]A.A.S.B., Mar. 1, 1896, Bishop of Valleyfield to Langevin. This would have left Langevin a loophole to declare later that he was not completely satisfied with the law. On Mar. 3, during a bitter debate on the Bill, Laurier proposed a six month hoist, vide Hansard, pp. 2758-2759. Apparently Smith tried to get the Government to remit the second reading in order to make new overtures to Manitoba, vide A.A.S.B., Mar. 4, 1896, La Rivière to Langevin. On Mar. 5, Bowell drafted a telegram of invitation, vide Bowell Papers, P.A.C., vol. 15, #6496.

[96]A.A.S.B., Mar. 4, 1896, La Rivière to Lacombe.

[97]A.A.S.B., Mar. 4, 1896, Lacombe to Langevin.

[98]A.A.S.B., Mar. 5, 1896, Marois, Quebec, to Lacombe.

for, on Mar. 4, 1896, he wrote[99] that he had returned the other day after interviewing "Dickie" (sic) and the other Ministers and discussing the amendments and the preamble with Dickey and Newcombe. He believed that the second reading would carry, but feared the Government had delayed too long for the Bill to pass that Session.

Lacombe was rapidly becoming exhausted. Though he advised His Grace[100] not to come to Ottawa, above all with Greenway, as the Government was opposed to a conference, he hinted at his own return West, especially if Ewart were going before the General Committee! He was anxious for Ewart to arrive and was in communication with Mgr. Begin about it. (It would appear that Ewart was expected to declare his clients satisfied before the Committee of the Whole!)

However, only a day later, La Rivière could write[101] that, though Tupper held the Government would not invite Greenway, it was willing to meet him in Winnipeg. If this were done, Dickey would be sent. Probably Ewart would be

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[99]A.A.S.B., Mar. 5, 1896, Ewart to Langevin. There was no mention of any announcement of acceptance. Next day, Caron wrote Ewart he could not get him a copy of the English blue book "Return, Education, Religious Teaching in the Board Schools", Caron Papers, P.A.C., vol. 57, #369. A.A.S.B., Mar. 7, 1896, Ewart to Langevin shows Ewart engaged in suggesting modifications in what appears to be propaganda.

[100]A.A.S.B., Mar. 6, 1896, Lacombe to Langevin.

[101]A.A.S.B., Mar. 7, 1896, to Langevin.

invited to take part as representative of the minority. (Everyone seemed determined to get Ewart into the lime-light as representative at this juncture, in preference to a cleric.) It is little wonder that Lacombe complained[102] that on his return to Ottawa Ewart had seemed to avoid him: "Tout de même, si ma presence semble l'ennuyer il sera très facile de lui épargner la malaise. . . ." He also stated[103] that the Archbishop of Valleyfield would have liked Ewart, rather than Langevin, to have declared to the Government that they accepted. It would create difficulties later. Shortly afterwards, Lacombe was disturbed[104] by wild rumours about the Greenway meeting. The Government was disorganized and the clergy fooled by Bowell. He advised all savants (most likely including Ewart) be consulted.

Mar. 20, 1896 saw the Bill pass its second reading by a majority of 27, with 7 Liberals voting with the Government and 18 Conservatives against.[105] La Rivière expressed satisfaction[106] at this and stated that the Opposition was

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[102]A.A.S.B., Mar. 8, 1896, Lacombe to Langevin.

[103]A.A.S.B., Mar. 9, 1896, Lacombe to Langevin.

[104]A.A.S.B., Mar. 10, 1896, Lacombe to Langevin.

[105]Hansard, Mar. 20, 1896, p. 675.

[106]A.A.S.B., Mar. 21, 1896, La Rivière to Langevin.

attempting to obstruct it in Committee. McCarthy had suggested sending it to the Supreme Court (to destroy it). The departure of Smith, Desjardins and Dickey had been postponed until Monday.

Though La Rivière still held[107] that the Bill might get through that session and that he would propose the amendments suggested by Judge Prud'homme and Father Ritchot and had little hope for the Winnipeg conference, he expressed anxiety over the results of the latter. His Grace should stand firm for separate schools with a change of name.

On March 30, 1896, Sifton sent a memorandum to Dickey[108] in reply to his discouraging one of the previous day, and proposed a meeting that afternoon. La Rivière notified His Grace[109] that he was submitting too readily and that the Government was determined to push the Bill through in three sittings, as Liberal obstruction was weak-

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[107]A.A.S.B., Mar. 26, 1896, to Langevin. The same date Desjardins requested Langevin to accept the terms offered by the Lieutenant Governor. By Mar. 29 the Senator feared the negotiations would create more difficulties. Sifton expected such would be the result for the Federal Government, vide Sifton Papers, P.A.C., vol. 270, #962, Apr. 2, 1896, to McCarthy.

[108]Sifton Papers, P.A.C., vol. 270, #958, to Dickey, Winnipeg.

[109]A.A.S.B., Mar. 30, 1896, telegram and letter.

ening. A day later,[110] this worthy chortled his glee at the failure of Smith's mission and his desire to see Sir Donald's face.

That Ewart was by no means unconcerned with this abortive attempt may be seen from the remarks he made[111] on setting out on April 2, 1896 for Ottawa to aid in the passage of the Remedial Bill " . . . in every way possible." He indicated that the negotiatinns must have failed on Catholics having separate schools in cities and towns. Such would have been " . . . public schools in every sense of the word . . ." They would have been under elected trustees and their texts would have been supervised by the Advisory Board. The only limitation would have been for a few Catholics to have been on the Board. He did not hesitate to say that if the local Government had not made " . . . strong election statements . . ." it would have accepted what in effect was the practice in New Brunswick and Nova Scotia. He indicated that McCarthy himself had said that the Province would adopt such a system if left to itself.[112] In any case, the Conference had ended the arguments that the local Gov-

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[110]A.A.S.B., Mar. 31, 1896, La Rivière to Langevin.

[111]Free Press (Winnipeg) Fri., Apr. 3, 1896, p. 2. Also reported in Gazette (Montreal), Apr. 2, 1896.

[112]But McCarthy had not said such would be provided by law.

ernment would not negotiate with the Remedial Bill held over their heads and that a commission of investigation was necessary to ascertain the facts before negotiations could be held. He was leaving to show that the Bill was " . . . acceptable to his clients and that they are exceedingly anxious that it should be passed." James Fisher made similar remarks.[113] This report caused Sifton to declare: "Ewart's interview published this afternoon makes full publication of proceedings necessary."[114] On the same date, Ewart informed Langevin[115] that he doubted the Government would be able to pass the Bill--two weeks would not be enough. Shortly after, Langevin learned[116] that La Rivière had discussed clause 74 with Dickey, Dupont and Caron and felt certain the Government would amend it as desired. La Rivière added:

> J'ai vu Ewart ce matin, et nous avons causé un instant de notre affaire. Si, dit-il, l'obstruction que l'on fait empêche l'adoption du Bill, je n'ai rien à faire ici, mais je lui ai demandé de rester jusqu'à ce que nous ayons décidé les amendments à faire.

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[113] Ibid.

[114] Sifton Papers, P.A.C., vol. 270, #961, to Dickey on Great Northern train going south.

[115] A.A.S.B., Apr. 2, 1896, Ewart to Langevin.

[116] A.A.S.B., Apr. 6, 1896, La Rivière to Langevin.

(Ewart would thus seem rather reluctant to become involved.) He also declared that it would not be possible to use any part of the sum voted for school organization to cover the expenses of the appeal. However, their amendment to clause 74 would provide for it. Laurier had gone to Toronto to consult with Mowat.

Two days later, Ewart wrote His Grace:[117]

> I regret very much to have to say that no one now believes that there is any chance of the Bill being passed. The obstructionists are sufficiently strong & determined to talk until the end of the session. I am sorry also to have to say that the general impression is that the Government will most certainly be beaten at the coming elections. Their mismanagement of everything perhaps justly entitles them to defeat. I shall remain a few days longer as I am of some service during the debate. The members of the Government are almost helpless against McCarthy & his friends & stagger along in the most foolish fashion. Last night they allowed the clause as to books to be changed so that Catholics could use none but those authorized for the public schools in Manitoba. At one o'clock this morning I was conferring with Sir Charles & Mr. Dickey & trying to get the clause put right. It is most disheartening.

La Rivière also wrote[118] on this latter difficulty,

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[117] A.A.S.B., Apr. 8, 1896, Ewart to "My Dear Lord". A further letter in April referred to the Government's very determined efforts and the obstructionist tactics of McCarthy, Wallace, McNeill, O'Brien and other Conservatives. He very much doubted that two weeks would be enough. (His emphasis on the Conservatives seems significant. Were Ewart's hopes turning to the Liberals?)

[118] A.A.S.B., Apr. 8, 1896, La Rivière to Langevin.

and stated: "Je vois M. Ewart de temps à autres et il nous est d'une grande utilité." That Caron still implied that Ewart would take the responsibility of declaring the legislation satisfactory is also plain.[119]

By April 11, 1896, it was obvious to Sifton that the Bill would not pass.[120] On April 15, Sir Charles Tupper gave up the attempt to push through the Bill[121] and two days later Ewart was writing Laurier[122] concerning a confidential interview he had had with his uncle Mowat when in Toronto. They had discussed Sir Oliver's course in the coming elections in view of Laurier's suggestion that he enter the larger arena. Mowat was reluctant to do so for various reasons, including the difficulty of the school question. Ewart suggested several arguments--including offer of the Premiership and strong prospects of success--to win him over.

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[119]Caron Papers, P.A.C., vol. 58, #93, Apr. 8, 1896, to H. A. Turcotte.

[120]Sifton Papers, P.A.C., vol. 270, #990, to McCarthy.

[121]Skelton. Laurier, vol. 1, p. 480.

[122]Laurier Papers, P.A.C., vol. 10, #4223 A & B, Confidential, Apr. 17, 1896. Copy in Ewart Papers, P.A.M., Letter Book, 1888-1925. A day later, Barrett was violently advocating the suppression of the Protestant schools in Quebec, A.A.S.B., to Langevin.

This elicited the reply[123] that Laurier was willing to make any sacrifice to settle the school question so as to satisfy the minority. He would willingly give up the Premiership to Mowat and made other suggestions whereby his path to Ottawa might be smoothed.

Ewart thereupon declared[124] that Laurier's letter was too stiff. An approach by direct correspondence or interview with Mowat would be more effective, though the offer of the Premiership should be compelling. He had not meant to imply that Sir Oliver was hard up financially. His uncle simply did not wish to be separated from his family. Ewart added that he hoped (Joseph) Martin would lose to Hugh John Macdonald in Winnipeg, as Martin would be more trouble to Laurier than would the Conservative. But he feared that the latter would be badly beaten. On the same date, Ewart wrote his "Dear Uncle" concerning these matters.[125]

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[123] Ibid., #4223 C & D, Apr. 20, 1896, Laurier to Ewart, Winnipeg. Copy in Ewart Papers, P.A.M., Letter Book, 1888-1925.

[124] Laurier Papers, P.A.C., vol. 10, #42223 E, Apr.22, 1896, from Winnipeg to Laurier. In Ewart's hand--certified by T.S. Ewart. Copy in Ewart Papers, P.A.M., Letter Book, 1888-1925.

[125] Ewart Papers, P.A.M., Letter Book, 1888-1925, Apr. 22, 1896.

By April 27, Bowell had resigned as Prime Minister and Sir Charles Tupper had been invited to form a Ministry. On June 23, 1896, the Conservative Government was overwhelmingly defeated in the general election.[126] The attempt to bring relief to the minority by means of Remedial Legislation had proved abortive. But Ewart had "changed horses in midstream" in time to attach himself to the Liberal policy of--to paraphrase a later oracle--"Remedial legislation if necessary, but not necessarily remedial legislation." It remained for him to see what Laurier's "sunny ways" could accomplish.

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[126] Mackenzie et al. Guide to Canadian Ministries, pp. 21 & 25.

CHAPTER FOURTEEN

THE AFTERMATH OF THE SCHOOL QUESTION

The accession of the amiable and tolerant Laurier brought a new atmosphere of conciliation onto the scene. It was apparent from the start that negotiation would be attempted and would in all probability succeed--smoothed as it was by the shocking disaster to the party which had advocated coercion and by the fact that the two Governments concerned were now of the same political stripe. In these manoeuverings, Ewart was to play an involved though somewhat shadowy role.

Compromise was the immediate reaction to the Conservative defeat. As early as June 27, 1896, Charles Fitzpatrick notified his chief that Judge Routhier would see Archbishop Langevin and Greenway and endeavour to bring about a settlement on the lines of the New Brunswick modus vivendi.[1] George Bryce also saw fit to declare[2]--after congratulating Laurier on his victory--that he was willing to favour any reasonable concessions, short of separate schools. A meeting of minds was evidently foreshadowed.

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[1] Laurier Papers, P.A.C., vol. 12, #4843.

[2] Laurier Papers, P.A.C., vol. 12, #4816, June 27, 1896.

Ewart too congratulated Laurier,[3] but in a somewhat more caustic vein, especially with respect to the defeat of Joseph Martin:

> . . . Winnipeg especially has rid you of a supporter who would have caused you no end of trouble. Had he possessed one ounce of tact or popularity he would have made a good man for you & for Winnipeg, but as he is he would have worried you to death. The Manitoba vote must profoundly alter the appearance of the school question. It cannot longer be said that the Province is unitedly and unanimously opposed to separate schools. Already the Greenway organ is intimating that as Manitoba wants separate schools, there is no reason why she should not have them. . . . the result in Manitoba if not altogether gratifying must be of immense value to you in your dealing with the school question. The local government would now be justified in receding from its former attitude of non possumus (sic). The electorate gave them, they said (sic) their mandate & they must needs obey. They have now received another one.

It would seem that Ewart somewhat overrated Manitoba's supposed change of heart. Probably he was overly impressed by the chagrin of the Government newspaper and anxious to make as strong an impression on Laurier as possible.

The abrupt resignation of the "lame duck" Tupper Ministry[4] saw Ewart stating[5] that he would " . . . be glad

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[3]Laurier Papers, P.A.C., vol. 12, #4840, June 27, 1896.

[4]July 8, 1896. Vide Mackenzie et al. Guide to Canadian Ministries, p. 25.

[5]Laurier Papers, P.A.C., vol. 14, #5433, July 9, 1896, from Winnipeg.

to afford every assistance . . . towards the settlement of the school difficulty. . . ." He thought that their side would not be unreasonable and suggested that if a commission were issued " . . . possible complications might perhaps be avoided, & the proceeding rendered more agreeable to the minority . . ." were they " . . . given some (unofficial or informal) opportunity of commenting upon the draft. . . ." He disliked certain press suggestions and considered that Laurier felt the same way.

By July 27, 1896, Joseph Martin was acting as go-between in the informal negotiations between Sifton and Laurier--and offering to use his influence to swing provincial opinion in support of a compromise.[6] Laurier was soon telegraphing Sifton that he would be glad to meet him in Ottawa.[7] The private meeting[8] between Sifton, Cameron, Watson and a Sub-Committee of the Federal Cabinet brought forth

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[6]Laurier Papers, P.A.C., vol. 15, #5855. Vide also Sifton Papers, P.A.C., vol. 7, #29806, July 29, 1896, from McCarthy expressing bewilderment at Laurier's public promise to settle the matter in six months but suggesting that Laurier expected concessions and was purposely leaving the Ministry of the Interior vacant.

[7]Sifton Papers, P.A.C., vol. 6, #3346, Aug. 13, 1896.

[8]This was not entirely what Ewart had desired, vide supra, p. 437. But vide also infra, p. 443.

the lines of a tentative settlement,[9] at least fairly satisfactory to His Grace of Rupertsland.[10] However, it was not so with His Grace of St. Boniface. Tarte bluntly stated that Langevin would not accept the agreement. But Sifton was insisting that the agreement be made public as he wanted to have his election as soon as possible.[11] The strong tendency to disregard the clergy, especially Langevin, and confine the settlement to the politicians, was obvious. This despatch elicited a telegram from Laurier to Sifton stating that he was anxious to have the settlement made public and Sifton sworn in before the end of the week.[12] By Nov. 16, 1896, the agreement of settlement had been accepted by the Manitoba Government and signed by both Sifton and Laurier.[13]

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[9]Skelton, Laurier, vol. 2, pp. 13-14.

[10]Sifton Papers, P.A.C., vol. 6, #2938, Aug. 26, 1896, from H. M. Howell.

[11]Laurier Papers, P.A.C., vol. 25, #8627, Nov. 6, 1896, coded telegram from Tarte, Winnipeg.

[12]Sifton Papers, P.A.C., vol. 6, #3352, Nov. 9, (1896), in code.

[13]Laurier Papers, P.A.C., vol. 770, #219078, "Memorandum re Settlement of School Question." Vide Sifton Papers, P.A.C., vol. 271, #79, Nov. 13, 1896, from Stewart Mulvey and vol. 7, #3917, Nov.14, 1896, from McCarthy,approving settlement.

In view of the repercussions, it was soon decided to send a delegation to Rome. Ewart's express statement before the Judicial Committee in the Brophy Case, that Catholics did not expect full restoration, was apparently used as one of the arguments.[14]

It may well be that Ewart first met Henri Bourassa during the latter's famous autumn of 1896 journey to Winnipeg with Tarte, when those two performed the somewhat unaccustomed role of conciliators. At any rate, Tarte wired Laurier as early as Oct. 30, 1896:[15]

> Ewart's fees in the school (sic) are not paid. He claims them from the Archbishop. Government must be prepared to pay thirty if necessary. Draft of settlement not in Archbishop's hand. Must be kept private till I wire. Please answer about Ewart's claims. Please wire to Regina.

Only a day later, Tarte had ascertained that Ewart's claims against Langevin amounted to $8,000.[16] Ewart was evidently letting them off cheap--by $22,000.

However, even this moderation did not accomplish an overly prompt payment. As late as April 17, 1897, Father

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[14]Laurier Papers, P.A.C., vol. 30, #10014, "Private & Confidential Report to Lord Aberdeen, Dec.23, 1896," p.5.

[15]Laurier Papers, P.A.C., vol. 25, #8611, from Portage la Prairie, in code.

[16]Ibid., #8618, Oct. 31, 1896, from Tarte, Wolseley, N.W.T.

Cloutier wrote Ewart[17] that he considered the Dominion Government should follow the same course in paying the expenses of the litigation it had previously followed in the New Brunswick Case. Payment should include the $4,300 which the Archbishop had already paid out. Langevin was hard up. This letter, according to Fisher,[18] was sent by Ewart to Laurier two days later. Fisher referred to a conference with Laurier in Winnipeg two months previous anent the school question and Ewart's fees and also to a note from Laurier " . . . intimating that the financial matter could be arranged any time. . . ." A letter showing the amount due was being sent by Ewart. He hoped that the apt New Brunswick precedent would be followed in paying his partner and recouping the Archbishop. Both he and Ewart earnestly desired settlement of the unhappy school question, and he was:

> . . . much mistaken if the amount will not appear extremely moderate in view of the time and work and study devoted to the case ever since mid-summer of 1892 when the unexpected decision in the Barrett case (sic) drove the minority to make its appeal under the constitutional Act.

The letter last referred to by Fisher was evidently that of April 19 from Ewart to the Prime Minister,[19] en-

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[17] Ibid., vol. 43, #14037, Father Cloutier to Ewart.

[18] Laurier Papers, P.A.C., vol. 43, #14035, Apr. 20, 1897, from Fisher.

[19] Ibid., #14033, Apr. 19, 1897, from Winnipeg.

closing a statement from His Grace on the work done, not including any of the charges in connection with the Barrett Case.[20] Ewart considered enough details had been given to show the extent of the work. He also enclosed Father Cloutier's letter,[21] begged that this suggestion would be followed, and declared:

> Touching the amount of the bill, I have nothing to say further than to point to the very arduous and laborious investigations that were involved throughout the work. I need scarcely say that it has occupied my time to a very large extent for a number of years.

These entreaties were not without result, albeit a somewhat delayed one. On April 27, 1897, R. W. Scott received a note from the Clerk of the Privy Council, enclosing all the Orders in Council he could find concerning payments.[22] A year later, the Minister of Justice declared $10,607.03 be placed in the Supplementary Estimates.[23] The payment of $6,307.03 to Ewart and of $4,300 to the Archbishop of St. Boniface was confirmed on June 20, 1898.[24]

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[20]He had apparently already been paid, vide P.C. Register, 1895, #220, recommending payment of $3,535.70 costs of appeal to Judicial Committee, confirmed Jan. 30, 1895.

[21]Vide supra, p. 440.

[22]R. W. Scott Papers, P.A.C., vol.1, #44, from J.J.McGee, Clerk.

[23]Mar. 4, 1898. Vide Privy Council Register, 1898, #575.

[24]Privy Council Register, 1898, #1534.

However, this did not quite end the difficulty, for on Sept. 6, 1898, Fisher evidently wrote[25] concerning the Archbishop's not receiving the full amount due him and also requesting appropriations to compensate His Grace for losses sustained by being deprived of the Government grant after 1890. Fitzpatrick replied[26] that they were endeavouring to meet his wishes and perhaps they could readjust Ewart's bill; send the money to Ewart, Fisher & Wilson; and have them transfer it to the Archbishop. The Prime Minister was anxious that this should be done. With regard to refunding the losses sustained through the Act of 1890, the Prime Minister had intended to provide for them in the vote of $300,000 from the school lands fund. But the Senate had defeated it. However, if the vote came up again, the Prime Minister would " . . . adhere to his original intention of coming to the assistance of Catholics . . ."[27]

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[25]Mentioned in Laurier Papers, P.A.C., vol. 86, #26434, Sept. 16, 1898, C. Fitzpatrick to Fisher. A copy was sent to Laurier on the same date, #26433.

[26]Ibid., #26434.

[27]However, vide Fitzpatrick Papers, P.A.C., May 5, 1897, to C. H. Ritchie, Q.C., stating it impossible to aid the minority save through a change in the Dominion Lands Act but aid might be given some other way.

However, in the meantime all was not sweetness and light amongst the minority's protagonists. A secret meeting held in the Archbishop's Palace in St. Boniface may be seen through the eyes of one of the participants,[28] James E. P. Prendergast: Ewart and Judge Prud'homme were also present, together with about twelve priests, Archbishop Langevin presided, and read a memo of settlement[29] setting forth its pros and cons and stating that he would leave its acceptance up to the meeting. Prendergast went on:

> Ewart followed with the very strongest plea in favor of the settlement. A couple of others followed suit, although more mildly. When I was called upon to speak, I felt pretty mad especially at Ewart on account of his sudden change of front, which indicated to me that a good deal of machinations had been secretly going on and that I was merely brought there to assent to the same. I said in short . . . that all this was too sudden, was too much of a departure from procedure we had laid down, that the time allowed us for an answer was not long enough, in short that I adhered under the circumstances to the Remedial Bill of which you know, I have always been a supporter, with all its shortcomings.
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> Ewart kept silent after this. All the others with exception perhaps (in a degree at least) of Father Guillet--rallied to the same opinion, and I understand that both His Grace and Ewart informed the Commissioners of our decision.[30]

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[28]Fitzpatrick Papers, P.A.C., Dec. 24, 1896, from Prendergast.

[29]Probably that of Nov. 16, 1896, vide supra, p. 438. Evidently Langevin had been kept largely uninformed.

[30]Fitzpatrick Papers, P.A.C., Dec. 24, 1896, from Prendergast.

(However, Prendergast did not want this to become public.) Archbishop Langevin was not long in publicly protesting the Laurier Greenway Settlement.[31] Ewart was undoubtedly growing rather disgusted.

But this disappointment evidently did not stop the efforts of Ewart's partner to gain concessions for His Grace. During February, 1897, Fisher had a conversation with the Prime Minister on this subject, suggesting that amendments might be made when the Bill establishing the modified school system came up in the Manitoba Legislature.[32] Laurier had indicated to him[33] that such would only create more trouble and had written him on the matter.[34] But he seemed to be set on the idea[35] and Laurier hoped that Greenway could " . . . prevent the mischief." This rebuff did not, however, deter Ewart's partner from attempting to keep up Greenway's resolution--in spite of the trouble created by the Archbishop

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[31]Dec. 26, 1896, vide Sir R. L. Morant. The History of the Manitoba School System, pp. 676-78.

[32]Mentioned in Laurier Papers, P.A.C., vol. 48, #15345, Feb. 26, 1897, to Greenway.

[33]Ibid.

[34]Ibid., vol. 38, #12513, Feb. 26, 1897, to Fisher.

[35]Laurier Papers, P.A.C., vol. 49, #15763, Feb. 18, 1897, from Fisher, Ottawa.

with the school inspector.[36] In these exchanges, though, there was no mention of Ewart.

Not until May 27, 1898, does Ewart appear once more --when writing a lengthy despatch to Sifton,[37] informing him that he (Ewart) had seen Rev. Dr. Bryce and Rev. Fathers Cherrier and Drummond upon certain points (renewal of teachers' permits, language substitutions, assistant teachers in normal schools, and readers), which he had discussed with Sifton in Ottawa. He was of the opinion that there was no " . . . great divergence upon the points discussed, or anything that ought not to be overcome." (This was really getting down to the basics of any school question!)

It may be that Ewart also entered into the discussion upon the somewhat ludicrous prospect of obtaining relief by Imperial intervention. At least it was suggested that it be considered by the Manitoba friends of the minority.[38] At any rate, he was becoming rather intimate with Sifton,[39] though

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[36] Ibid., #18690, Dec. 7, 1897, Fisher (Winnipeg) to Fitzpatrick (Ottawa).

[37] Sifton Papers, P.A.C., vol. 42, #28102.

[38] Caron Papers, P.A.C., vol. 195, May 6, 1898, from J. A. Macdonnell.

[39] Sifton Papers, P.A.C., vol. 231, #687, Mar. 28, 1899, to Ewart, concerning his opinion on filling a vacancy on the Bench.

it would appear that he had become somewhat persona non grata with His Grace of St. Boniface. In a despatch to Fitzpatrick[40] Ewart declared that Langevin had protested to him that he had not intended to embarrass the Government by sending a memorial to the Governor General nor was he responsible for the motion for papers. Ewart added the somewhat weary remark: "I was unaware even of the memorial. I am not now usually consulted about such matters."

This rather pessimistic missive received the reply that the Prime Minister feared the memorial would become public and create trouble. Ewart was advised to make the danger plain to the Archbishop.[41] But Ewart declared that it was futile to argue with His Grace.[42] He was acting emotionally--refusing to accept anything but the pre-Martin situation. However, he hoped that his visit might have had some effect, especially as he had held out the attraction of a possible grant from the school lands fund.

Ewart's sympathy for the Catholic cause is shown by the fact that not even these unpleasant experiences deterred him from engaging to assist His Grace in obtaining a portion of the school lands money demanded by the local Government

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[40]Laurier Papers, P.A.C., vol.109, #32864, Apr.8, 1898.

[41]Ibid., #32862, Apr.14, 1899, Laurier to Ewart, Winnipeg.

[42]Ibid., #32859, Apr.22, 1899, from Ewart.

from Ottawa. As early as April 25, 1899, when Archbishop Langevin wrote him[43] on the subject, Ewart despatched a letter to Laurier[44] expressing his opinion that His Grace would prove exacting but stating that he would be happy to assist in whatever arrangement was made. At the same time, Ewart notified Langevin[45] that he had written Laurier and hoped he would accede to his suggestion.

From this time on, information on Ewart's activities becomes rather sketchy. In September, 1899, Langevin again appealed to Laurier for funds and cited Fisher to the effect that Manitoba had saved $300,000 at their expense.[46] Laurier contented himself with despatching money to aid him *via* Mgr. Bruchesi.[47] Two years later, Ewart had drawn up a plan whereby the Winnipeg Public School Board was to lease the Catholic schools in that city. The well-disposed Mr. Bole had received the plan from His Grace and a committee was to discuss it.[48] November of that same year saw Ewart being mentioned as one to whom Judge Prud'homme's suggestion

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[43]Laurier Papers, P.A.C., vol. 109, #32976, Copy, Langevin to Ewart.

[44]*Ibid*., #32975, Apr. 25, 1899, from Ewart.

[45]A.A.S.B., Apr. 25, 1899.

[46]Laurier Papers, P.A.C.,vol.124,#37148,Sept.2,1899.

[47]*Ibid*., #37153, Sept. 7, 1899, to Langevin.

[48]Laurier Papers, P.A.C., vol. 197, #56310, May 17, 1901, from Langevin.

that the School Amendment of 1897 legalized Catholic schools in mixed areas should be submitted.[49] All that is known of this last attempt is that McPherson of Winnipeg stated that such an interpretation was illegal.[50] It would be interesting to know if this McPherson was the one listed on the stationery of Ewart, Fisher & Wilson.

With the despatch of a letter to Fitzpatrick in March, 1903, enclosing two copies of an exhaustive report on the composition and attitude of the Winnipeg Public School Board, which he had drawn up for the Apostolic Delegate[51] and with a suggestion from the Delegate's Secretary that His Excellency would be delighted to discuss a dignified, practical, and acceptable solution if such could be proposed by Ewart and Fitzpatrick,[52] Ewart's part in the Question comes to an abrupt close. Suffice it to say that Ewart did not gain an allottment from the lands fund nor recognition of Catholic schools by the Winnipeg Public School Board, however much he was responsible for gaining other concessions. Effective as these concessions may be elsewhere, Catholics are still dissatisfied with the Winnipeg situation.

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[49]Fitzpatrick Papers, P.A.C., Nov.22, 1902, to Langevin. (C.Robertson, K.C., of Toronto, was the other.)

[50]Ibid., Aug. 28, 1902, from Langevin.

[51]Fitzpatrick Papers, P.A.C., Mar. 4, 1903, from Ewart asking him to send one copy to the Delegate as he did not have his address and dared not ask for it there,apparently in St. Boniface!

[52]Ibid., Feb. 24, 1904, from Sinnott.

CHAPTER FIFTEEN

CONCLUSION

So many of Ewart's activities have become obscured by the passage of time that it is embarrassingly difficult to assess the extent of his importance in the School Question. Certain it is that his activities in the St. Joseph's School Case and in the Barrett Case failed to thwart decisions adverse to his clients, though it is difficult to see how any significant portion of the blame can be attributed to him. His own testimony bears witness to the supreme role played by Edward Blake in the Brophy Case and it is strongly suspect that Sir John Thompson--rather than Ewart--was responsible for its initiation. Thus, so far as has been ascertained, Ewart's part in the litigation would appear to have been of a secondary, though by no means of a picayune, character.

The importance of his role in the propaganda battle is even more difficult to assess, and it is perhaps sufficient to state that his unflagging efforts in this unfamiliar field revealed, even more than his participation as Counsel, his complete sympathy with his clients' point of view. His mistrust of state regimentation, together with his sacerdotal leanings, sympathy for the underdog, and

detestation of Ontario excitability, all played a part in making him an extremely useful protagonist of the Catholic cause. Ability alone would hardly have sufficed.

His sympathy for the cause in which he was engaged led him into an intense display of activity, in which even his opponents had to admit, albeit at times very grudgingly, that his honesty and integrity had been unscathed. Even when condemning his conclusions they perforce accepted his data, as is seen, for instance, from the performance of his arch-opponent, D'Alton McCarthy.

There is no doubt that Ewart proved himself thoroughly capable. No evidence has come to light of any estrangement from the clerical authorities in that regard and there is no doubt that political men, both Conservative and Liberal, called upon him repeatedly for advice. It can scarcely be doubted that this close and continuous association with leading political figures, to say nothing of his connection with such eminent barristers as Blake and Ferguson, was of immense service to him in his later career.

This advantage, indeed, might be said to be the only material one he derived from his participation in the Question. It cannot seriously be maintained that he did it purely for the retainer. His activities went far beyond what was expected of a Counsel, and the remuneration he

received[1] was anything but exorbitant, especially in view of the delay involved in obtaining it.

However, when Ewart set out to establish his residence in Ottawa a few years later, there is no doubt that his mistrust of the Judicial Committee, of the general public, of state control (with its tendencies toward assimilation, centralization, organization into ever larger units, regimentation, and uniformity), and of politicians had all been stimulated, if not originated, by his experiences in this issue--together with his pro-Catholic and pro-French-Canadian sentiments, and his belief that these latter groups must be fully acknowledged in the cause of Canadian unity.

In his struggle to obtain, if not an "improved" Ontario system for the benefit of his clients, at least a copy of it, Ewart was unsuccessful. But his fervent struggle undoubtedly had an effective role in thwarting the attempt to create an exact copy of the American non-sectarian system in Manitoba. The "improved" American system now in vogue must owe something to his efforts.

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[1] A portion of what he received must have gone toward expenses. A maximum of $3,000 a year for the five years 1890-95 would still not justify the enormous amount of work involved. (Records admittedly incomplete.)

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A P P E N D I C E S

APPENDIX A

JOHN S. EWART'S LIBRARY

Ewart's early interest in physical activities became equated, even surpassed, by his obsession with intellectual pursuits. The author has examined his library (donated to the Provincial Library of Manitoba) and discovered not a single novel or book of poetry, and even surprisingly few legal works, amongst the approximately two thousand volumes. Evidently Ewart's tastes did not run to the lighter side, though he appears to have written some romantic poetry during his courting days.[1] The contention of one acquaintance that he used the local law libraries for his source material on laws and cases appears to be borne out by the contents, though there are several volumes on constitutional and international law, criminal law, estoppel, and a few other elements of jurisprudence.

However, the bulk of the collection is taken up with material such as volumes on war, neutrality, and treaties of peace, the British Empire and various colonies, Canadian and English history, works by Buckle and Guizot, as well as the Cambridge Histories, the Papers of Lord Elgin and Sir Francis Bond Head, the Diaries of Wilfrid Scawen Blunt, Lord Chesterfield's Letters, together with pamphlets and volumes on Imperial Unity and the Navy League. Other historical works include Lord Durham's Report; the Makers of Canada Series; Kingsford's Canadian histories; works on the Loyalists; the Reports of the Commission of Conservative Canada, volumes on the North Atlantic Coast Fisheries Arbitration of 1910; Chester Martin's Empire and Commonwealth; Morley's Life of Gladstone; biographies of Garibaldi, Cardinal Manning, Popes Leo XII and Pius IX, Rousseau, von Tirpitz; a scanty treatment of Russia (to some extent one of Ewart's blind spots); Gibbon's Decline and Fall; histories of Austria, the Balkans, Turkey, China, Egypt, and Japan; Jewish history; Prescott on the monarchs of Spain; the Journals of the Continental Congress; Lord Bryce's American Commonwealth; volumes on German Imperialism and

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[1]Ewart Papers, P.A.M., 1873-1945 Notes, Papers, Articles; contains samples.

world War I (especially its origins and atrocities, including the food problem towards its termination); and also Sidney Lee's Dictionary of National Biography (London, England).

Philosophical and sociological works include Plato's Dialogues; Spencer's Synthetic Philosophy; the rationalist works of Robert Ingersoll; Malthus on economics; works by various authors on human rights and the social contract and on such social problems as liquor, war and democracy (e.g. Veblen and Henry George); also several texts on Hegel, Aristotle and Bertrand Russell, logic, psychology, psychic phenomena, theology, ethics, religion (including extensive works on Christianity) and the "conflict" between religion and science. Many of these volumes bear out the contention that Ewart quite early became interested in the Higher Criticism.[2] There are also three interesting lectures against sabbatarianism delivered by Ewart in Winnipeg in 1902.[3] In this minor altercation, one is tempted to perceive Ewart's typically liberal love of decentralization. He favored autonomy carried to the nth degree. To him municipal rights were fully as important as provincial rights. He saw devolution of authority as the great movement of the times. We have seen[4] how this attitude was reconciled with his support of remedial legislation to coerce the sovereign Province of Manitoba in 1896.

Volumes on education include several on the school laws of England, Scotland, Ireland, Ontario and Upper Canada; copies of his own The Manitoba School Question, a three volume Report on the Commission on Education, 1888-1892, and the Report of the Department of Education (Manitoba, 1894).

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[2]Vide p. 7.

[3]John S. Ewart. The Sunday Question (delivered in St. George's Church, Winnipeg, Oct. 26, Nov. 9 and Nov. 23, 1902, at the invitation of the Rev. J. J. Roy, B.A.)

[4]Vide pp. 24 & 429.

APPENDIX B

THE EDUCATION CLAUSES

OF THE B.N.A. AND MANITOBA ACTS

(As in M.S.Q., pp. 1-2.)

British North America Act

(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.

(2) All 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 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.

(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, 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.

Manitoba Act

(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 on any appeal under this section is not duly executed by the proper Provincial authority in that behalf then, and in every such case, and as far only as the circumstances of each case may 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.

APPENDIX C

THE BILLS OF RIGHTS

Bill No. 1

(In Alexander Begg. The Creation of Manitoba, pp. 110-11 --formulated by the first Council in December, 1869.)

1. The right to elect our own legislature.

2. The legislature to have power to pass all laws, local to the territory, over the veto of the Executive by a two-third vote.

3. No Act of the Dominion Parliament (local to this Territory) to be binding on the people until sanctioned by their representatives.

4. All sheriffs, magistrates, constables, etc., to be elected by the people--a free homestead pre-emption law.

5. A portion of the public lands to be appropriated to the benefit of schools, the building of roads, bridges, and parish buildings.

6. A guarantee to connect Winnipeg by rail with the nearest line of railroad--the land grant for such road or roads to be subject to the legislature of the Territory.

7. For four years the public expenses of the Territory, civil, military, and municipal, to be paid out of the Dominion Treasury.

8. The military to be composed of the people now existing in the Territory.

9. The French and English language to be common in the Legislature and council, and all public documents and Acts of the Legislature to be published in both languages.

10. That the Judge of the Superior Court speak both French and English.

11. Treaties to be concluded and ratified between the Government and several tribes of Indians of this Territory, calculated to ensure peace in the future.

12. That all privileges, customs and usages existing at the time of the transfer be respected.

13. That these rights be guaranteed by Mr. McDougall before he be admitted into this Territory.

14. If he have not the power himself to grant them, he must get an Act of Parliament passed expressly securing us these rights; and until such Act be obtained he must stay out of the Territory.

15. That we have a full and fair representation in the Dominion Parliament.

Bill No. 2

(In Alexander Begg. The Creation of Manitoba, pp. 255-59 --drawn up by the Council of Forty in February, 1870.)

1. That in view of the present exceptional position of the North-West; duties upon goods imported into the country shall continue as at present (except in the case of spirituous liquors) for three years and for such further time as may elapse, until there be uninterrupted railroad communication between Red River Settlement and St. Paul, and also steam communication between Red River Settlement and Lake Superior.

2. As long as this country remains a territory in the Dominion of Canada, there shall be no direct taxation, except such as may be imposed by the Local Legislature for municipal or other local purposes.

3. That during the time this country shall remain in the position of a territory, in the Dominion of Canada, all military, civil and other public expenses in connection with the general government of the country, or that have hitherto been borne by the public funds of the settlement, beyond the receipt of the above-mentioned duties, shall be met by the Dominion of Canada.

4. That while the burden of public expense in this territory is borne by Canada, the country be governed by a Lieutenant Governor from Canada, and a Legislature, three members of whom being heads of Departments of the Government shall be nominated by the Governor General of Canada.

5. That after the expiration of this exceptional period, the country shall be governed, as regards its local affairs, as the Province of Ontario and Quebec are governed, by a legislature elected by the people and a ministry responsible to it, under a Lieutenant Governor appointed by the Governor General of Canada.

6. That there shall be no interference by the Dominion Parliament in the local affairs of this Territory, other than is allowed in the provinces, and that this territory shall have and enjoy in all respects, the same privileges, advantages and aids in meeting the public expenses of this territory as the provinces now have and enjoy.

7. That while the North-West remains a territory, the legislature have a right to pass all laws local to the territory over the veto of the Lieutenant Governor by a two-thirds vote.

8. A homestead and pre-emption law.

9. That while the North-West remains a Territory the sum of $25,000.00 a year be appropriated for schools, roads, and bridges.

10. That all the public buildings be at the expense of the Dominion Treasury.

11. That there shall be guaranteed uninterrupted steam communication to Lake Superior, within five years; and also the establishment by rail of a connection with the American Railway as soon as it reaches the international line.

12. That the military force required in this country be composed of natives of the country during four years. (Lost by a vote of 16 yeas to 23 nays and consequently struck out of list.)

13. That the English and French languages be common in the legislature and courts and that all public documents and Acts of the Legislature be published in both languages.

14. That the Judge of the Supreme Court speak the French and English languages.

15. That treaties be concluded between the Dominion and the several Indian Tribes of the country as soon as possible.

16. That until the population of the country entitles us to more, we have three representatives in the Canadian Parliament, one in the Senate and two in the Legislative Assembly.

17. That all the properties, rights and privileges as hitherto enjoyed by us be respected, and that the recognition and arrangement of local customs, usages and privileges be made under the control of the local legislature.

18. That the local legislature of this Territory have full control of all the lands inside a circumference having Upper Fort Garry as a centre and that the radius of this circumference be the number of miles that the American line is distant from Fort Garry.

19. That every man in the country (except uncivilized and unsettled Indians) who has attained the age of twenty-one years and every British subject, a stranger to the country, who has resided three years in this country and is a householder, shall have a right to vote at the election of a member to serve in the Legislature of the country, and in the Dominion Parliament; and every foreign subject, other than a British subject, who has resided the same length of time in the country and is a householder, shall have the same right to vote on condition of his taking the Oath of Allegiance, it being understood that this article be subject to amendment exclusively by the local Legislature.

20. That the North-West Territory shall never be held liable for any portion of the 300,000 Pounds Sterling paid to the Hudson's Bay Company or for any portion of the public debt of Canada, as it stands at the time of our entering Confederation; and if, thereafter, we be called upon to assume our share of said public debt, we consent only on condition that we first be allowed the amount for which we shall be held liable.

Bill No. 3

(In M.S.Q., pp. 364-69, given to the delegates and posted up in Red River.)

1. That the territories heretofore known as Rupert's Land and North-West shall not enter into the Confederation, except as a Province, to be styled and known as the Province of Assiniboia, and with all the rights and privileges common to the different Provinces of the Dominion.

2. That we have two representatives in the Senate, and four in the House of Commons of Canada, until such time as an increase of population entitles the province to a greater representation.

3. That the Province of Assiniboia shall not be held liable at any time for any portion of the public debt of the Dominion contracted before the date the said province shall have entered the Confederation, unless the said province shall have first received from the Dominion the full amount for which the said province is to be held liable.

4. That the sum of $80,000 be paid annually by the Dominion Government to the Legislature of the province.

5. That all properties, rights and privileges enjoyed by the people of this province up to the date of our entering into the Confederation be respected, and that the arrangement and confirmation of all customs, usages and privileges be left exclusively to the Local Legislature.

6. That during the term of five years the Province of Assiniboia shall not be subject to any direct taxation, except such as might be imposed by the Local Legislature for municipal or local purposes.

7. That a sum equal to eighty cents per head of the population of this province be paid annually by the Canadian Government to the Local Legislature of the said province, until such time as the said population shall have increased to 600,000.

8. That the Local Legislature shall have the right to determine the qualifications of members to represent this province in the Parliament of Canada, and in the Local Legislature.

9. That in this province, with the exception of uncivilized and unsettled Indians, every male native citizen who has attained the age of twenty-one years; and every foreigner being a British subject, who has attained the same, and who has resided three years in the Province, and is a householder; and every foreigner, other than a British subject, who has resided here during the same period, being a householder, and having taken the oath of allegiance shall be entitled to vote at the election of members for the Local Legislature and for the Canadian Parliament. It being understood that this article be subject to amendment exclusively by the Local Legislature.

10. That the bargain of the Hudson's Bay Company in respect to the transfer of the government of this country to the Dominion of Canada be annulled so far as it interferes with the people of Assiniboia, and so far as it would affect our future relations with Canada.

11. That the Local Legislature of the Province of Assiniboia shall have full control over all the public lands of the province, and the right to annul all acts or arrangements made or entered into with reference to the public lands of Rupert's Land and the North-West, now called the Province of Assiniboia.

12. That the Government of Canada appoint a commission of engineers to explore the various districts of the Province of Assiniboia, and to lay before the Local Legislature a report of the mineral wealth of the province within five years from the date of entering into confederation.

13. That treaties be concluded between Canada and the different Indian tribes of the Province of Assiniboia, by and with the advice and co-operation of the Local Legislature of the Province.

14. That an uninterrupted steam communication from Lake Superior to Fort Garry be guaranteed to be completed within the space of five years.

15. That all public buildings, bridges, roads, and other public works be at the cost of the Dominion Treasury.

16. That the English and French languages be common in the Legislature and in the courts, and that all public documents, as well as all Acts of the Legislature, be published in both languages.

17. That whereas the French and English-speaking people of Assiniboia are so equally divided in numbers, yet so united in their interests, and so connected by commerce, family connections, and other political and social relations, that it has happily been found impossible to bring them into hostile collision, although repeated attempts have been made by designing strangers, for reasons known to themselves, to bring about so ruinous and disastrous an event.

And whereas, after all the trouble and apparent dissensions of the past, the result of misunderstanding among themselves, they have, as soon as the evil agencies referred to above were removed, become as united and friendly as ever; therefore, as a means to strengthen this union and friendly feeling among all classes, we deem it expedient and advisable;

That the Lieutenant-Governor, who may be appointed for the Province of Assiniboia, should be familiar with both the English and French languages.

18. That the Judge of the Supreme Court speak the English and French languages.

19. That all debts contracted by the Provisional Government of the Territory of the North-West, now called Assiniboia, in consequence of the illegal and inconsiderate measures adopted by Canadian officials to bring about a civil war in our midst, be paid out of the Dominion Treasury, and that none of the members of the Provisional Government, or any of those acting under them, be in any way held liable, or responsible, with regard to the movement, or any of the actions which led to the present negotiations.

20. That in view of the present exceptional position of Assiniboia, duties upon goods imported into the province shall, except in the case of spirituous liquors, continue as at present for at least three years from the date of our entering confederation, and for such further time as may elapse until there be uninterrupted railroad communication between Winnipeg and St. Paul, and also steam communication between Winnipeg and Lake Superior.

Bill No. 4

(In M.S.Q., pp. 364-69, first published by Archbishop Taché in Free Press (Winnipeg), Dec. 13, 1889. It does not agree with the original filed at the trial of Lepine in 1874 in all points [especially in Clauses 1, 9, 10, 11, and 14], a copy of which was sent to Ottawa; vide Sessional Papers, 1895, No. 20 F, Exhibit B, pp. 128-29. Thus Ewart's argument in M.S.Q., pp. 369-71 loses some of its force.)

1. That the territory of the North-West enter into the Confederation of the Dominion of Canada as a province, with all the privileges common with all the different provinces in the Dominion.
That this province be governed:
(1) By a Lieut.-Governor, appointed by the Governor-General of Canada.
(2) By a Senate.
(3) By a Legislature chosen by the people with a responsible Ministry.

2. That until such time as the increase of population in this country entitles us to a greater number, we have two representatives in the Senate, and four in the House of Commons of Canada.

3. That in entering the Confederation, the Province of the North-West be completely free from the public debt of Canada; and if called upon to assume a part of the said debt of Canada, that it be only after having received from Canada the same amount for which the said Province of the North-West should be held responsible.

4. That the annual sum of $80,000 be allotted by the Dominion of Canada to the Legislature of the Provinces of the North-West.

5. That all properties, rights and privileges enjoyed by us up to this day be respected, and that the recognition and settlement of customs, usages and privileges be left exclusively to the decision of the Local Legislature.

6. That this country be submitted to no direct taxation except such as may be imposed by the Local Legislature for municipal or other local purposes.

7. That the schools be separate, and that the public money for schools be distributed among the different religious denominations in proportion to their respective population

according to the system of the Province of Quebec.

8. That the determination of the qualifications of members for the Parliament of the Province, or for the Parliament of Canada be left to the Local Legislature.

9. That in this province, with the exception of the Indians who are neither civilized, nor settled, every man having attained the age of twenty-one years, and every foreigner being a British subject, after having resided three years in this country, and being possessed of a house, be entitled to vote at the elections for the members of the Local Legislature, and of the Canadian Parliament, and that every foreigner other than a British subject, having resided here during the same period, and being proprietor of a house, be likewise entitled to vote on condition of taking the oath of allegiance.

10. That the bargain of the Hudson's Bay Company with respect to the transfer of government of this country to the Dominion of Canada, never have in any case an effect prejudicial to the rights of the North-West.

11. That the Local Legislature of this province have full control over all the lands of the North-West.

12. That a commission of engineers, appointed by Canada, explore the various districts of the North-West, and lay before the Local Legislature within the space of five years a report of the minerals of the country.

13. That treaties be concluded between Canada and the different Indian tribes of the North-West, at the request and with the co-operation of the Local Legislature.

14. That an uninterrupted steam communication from Lake Superior to Fort Garry be guaranteed to be completed within the space of five years, as well as the construction of a railroad connecting the American railway, as soon as the latter reaches the international boundary.

15. That all public buildings and constructions be at the cost of the Canadian exchequer.

16. That both the English and French languages be common in the Legislature, and in the courts; and that all public documents, as well as the Acts ofthe Legislature,

be published in both languages.

17, That the Lieutenant-Governor to be appointed for the Province of the North-West be familiar with both the English and French languages.

18. That the Judge of the Supreme Court speak the English and French languages.

19. The same. (As Bill No. 3)

20. The same. (Bill No. 3)

APPENDIX D

EWART AND BROPHY TO FORTIN

(A.A.S.B., No. 265, April, 1890.)

Winnipeg, Man.

Geo. E. Fortin, Esq.,
Secretary Treasurer,
Board of Catholic School Trustees,
Winnipeg.

Dear Sir:

Before proceeding to indicate what course you should adopt under the present circumstances relating to the School Law, we think it advisable to make some general statements as to the position which matters seem to have assumed and as to the law which we believe to be applicable under the circumstances.

The present system of Protestant and Catholic schools was established by the Legislative Assembly of Manitoba. There seems to have been no system established previous to the erection of the Province under any law of Assiniboia. The Statutes of last Session are aimed at the abolition of Protestant and Catholic Schools and the establishment of what are called national or public schools. The broadest question which is to be considered with reference to this new Act is: "Whether the Legislature has any power to abolish the Roman Catholic Schools?", and there (sic) two subsidiary questions, namely "Should it be held that the Legislature has power to abolish the separate schools; has it power to compel Roman Catholics to contribute to the maintenance of undenominational Schools?"; and "Whether it has Power to establish a certain set of religious exercises to be observed in these schools?"

As the case appears to us at the present time, we are of the opinion that the Legislature has power to repeal any (p.2) Act with reference to schools which it had the power to pass, and that as the Protestant and Catholic Schools were established by the Manitoba Legislature, the same Legislature has power to repeal those statutes.

You will observe that we have not stated that the Legislature has power to enact any new system in place of the old system, but merely that they have power to repeal the Acts which they themselves passed. For instance, if the effect of the legislation was (sic) merely to repeal the old Statutes, and to make no new provisions, this would have the effect of relegating all persons to the position in which they were at the time of the admission of Manitoba into the Dominion. This cannot be said to prejudicially affect any right or privileges which any class of persons had by law or practice at <u>that</u> time, and can not therefore be said to be objectionable on that ground. Even from such a statute, however, merely repealing the old system and making no new provisions, we think that an appeal would lie to the Governor-in-Council who might ride over the appeal (sic) of the old statutes, (sic) if he should think fit to do. We come therefore, to the conclusion that the 182nd section of the Statutes of last Session, entitled "An Act respecting Public Schools", which merely repeals all previous legislation, <u>is</u> within the power of the Legislative Assembly.

Upon the second question, as to whether the legislature has power to establish a new system, to provide that Roman Catholics must contribute to the maintenance of undenominational schools, there seems, on consideration, to be room for very great debate. There can be no doubt that it was intended by the "Manitoba Act" to preserve some right or privilege which denominations had previous to the Act, and the only privileges that we can think of as existing at that time are:-

1. The privilege which Roman Catholics had of supporting their own schools, and not being compelled to support the schools of others.

2. The privilege of conducting their own schools as they might think proper.

3. The privilege of determining the qualifications of teachers in their own schools.

4. The privilege of selecting books for their own schools.

Unless these privileges or some of them are those intended to be conserved by the Statutes, we know of none to which the Statutes can apply, and the Statutes must either mean to protect these privileges or some of them or else the

Statutes are wholly worthless. Now it is a well understood principle in the construction of statutes that meaning will be given to language if it be possible to do so, and that no part of a Statute will be left inoperative and without effect unless such is absolutely necessary.

We were not unaware however of the many arguments that may be urged upon the other side, but as your action is not to be determined by our opinion we can only say that we believe that your position in this respect is a very strong one, and that it should not be given up except upon compulsion.

It seems to us also, that much debate could take place upon the validity of the clauses of the statutes relating to the religious exercises. If the schools to be established under the new system were to be entirely irreligious (by that we mean, have no regard to religion) then more might be said for the Statutes, it appears to us, than can be said for it (sic), when it provides that religious exercises may at the discretion of the trustees be held in the schools. These religious exercises may partake of a Protestant or (p.4) Catholic character. It is at present a mere matter of speculation as to what the exercises will be: they may be short, perfunctory or elaborate and full of meaning. If there be any privilege which can be said to be conserved by the Manitoba Act surely at all events it is this one --that in the schools to be established, even if they be national schools, there must be no religious exercises which would be distasteful to any of the denominations in Manitoba before the Act, and we do not think that the Statute is relieved from this objection by the provision that the parents or guardians may withdraw their children from the religious exercises.

Now with regard to the method in which the matter should be brought before the Courts, we would suggest that the questions be so raised that the strongest points which we have to bring to the Courts may be raised first, and that we should if possible refrain from raising questions more doubtful, and particularly any, the decision of which may be against us.

For this purpose we would strongly recommend that the first question to be raised be confined to the second and third objections which we have to some extent discussed above (sic) namely, first, whether the Legislative Assembly has power to compel Roman Catholics supporting Roman Catholic voluntary schools, to pay taxes as contributors to public schools, and second, whether the clause with reference to

religious exercises are (sic) ultra vires, and we would recomment that the other questions, namely, whether the Legislature has power to repeal previous Legislation be left untouched.

It appears somewhat difficult to devise a course by which the questions we desire raised should be put forward and no others brought under discussion. The government has power, if it (p.5) chooses to do so, to refer to the Courts for decision and questions that it may think proper to refer, and we think it very probably that the Government would agree to refer for decision to the Courts the questions that we have suggested. We would recommend therefore that a strong effort be made to induce the Government to take this course, and perhaps it might not be necessary until that has failed to decide definitely upon what other course should be adopted.

We have observed that it stated in the newspapers that the Government has directed that the Catholic School Board in Winnipeg should cease its functions of 1st., May and that the Protestant trustees should assume the management of all the schools in Winnipeg. We think that there is no warrant in the Statutes for such a proceeding. The only section (sic) under which it could by any pretence be supported are the 178th and 179th in which provision is made for cases in which both the Protestant and Catholic districts are coterminus; they are however we are informed not coterminous in Winnipeg, and these sections therefore do not apply. Upon other grounds too we think that the attempted construction of the Statutes is erroneous. Under the sections just referred to, the Catholic school district ceases to exist, but by section 4 it is expressly provided that the term for which each school trustee holds office at the time the Act takes effect shall continue as if such term had been created by virtue of an election, under this Act. This is the only provision under which it can be pretended that the Protestant Trustees are to continue to act under the Statute, and the Catholic trustees are continued under the same section; and there is no more reason why the Protestant trustees should continue to be trustees of all the schools than the Catholic trustees should be trustees of all the schools. (p.6) The only solution we see to this section is that all the trustees would be trustees of all the Schools.

For these reasons, we are of opinion that the Catholic school trustees should not vacate office, but should continue as heretofore until the next election.

With reference to the disposition to be made of the property of the Catholic School Trustees, we are informed that of the four schools, two of them are held in buildings put up by the Pères Oblats, upon the land owned by the Fathers. In one of these cases, that of St. Mary's, there is a written lease which provides that the building is to be used for the purpose of Catholic schools only, and we understand that there was a similar verbal provision with reference to all the leases. We think that it would be quite in order for the school trustees to agree with the Fathers to surrender these leases, and as consideration for the surrender by the Fathers of all claim to rent for the past, to convey to the Fathers the school apparatus, furniture, etc., etc., which the school trustees now have on hand.

With reference to the other two schools, we understand that the land upon which St. Joseph's is built, belongs to His Grace, the Archbishop, and that (sic) there about $2500 of arrears of rent; and with reference to the Immaculate Conception school, that considerable rent is now in arrear, how much altogether, we are not informed. We think a similar arrangement can be made with reference to these leases, and the school furnishings.

Care must be taken, however, that the sanction of the Board of Education under 44 Vic., cap 4, sec. 39 and the consent and approval of the Superintendent of Education under 46 & 47 Vic. cap. 46 sec. 25 be obtained to these transactions, and that the deeds should be signed by the Chairman and Secretary Treasurer of your Board.

After the surrender of the leases, new leases should be taken creating tenancies from week to week with the express stipulation for forfeiture in case the buildings be used for any other purpose than Catholic Schools: This provision should be very carefully worded.

In view of the fact that there are now only two weeks more until the new Act comes into operation, it would be well for you to instruct us with as little delay as possible, whether we are to approach the Manitoban Government on the question of stating a case on the points involved, for the Courts here to decide upon.

Yours truly,

(Sgd) Ewart & Brophy

APPENDIX E

THE QUESTIONS FOR HEARING AND CONSIDERATION BY THE SUPREME COURT OF CANADA

(M.S.Q., p. 71 --Adapted from the Sub-Committee of the Privy Council's Report in December, 1892, vide M.S.Q.p.50.)

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 Victoria (1870), Chapter 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?

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 memorials 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 to be 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?

APPENDIX F

COPY OF A CONFIDENTIAL LETTER TO MESSRS. EWART & BROPHY, WINNIPEG, FROM EDWARD BLAKE, TORONTO

(Thompson Papers, P.A.C., vol. 125, #14974,Mar.26,1891.)

Re: Manitoba School Law

"Shortly after writing you with reference to this appeal I received your letter enclosing factum for my revision. From communication with leading Counsel practising before the Judicial Committee, I have come to the conclusion that their view is correct, namely; that it is a mistake to turn the factum into a precis of the full argument in the cause.

"The Judges of the Supreme Court or the Judicial Committee rarely look at, and never study, the argument of the factum, and the only result of elaborating it is to give the other side their opponent's Counsel's brief in advance. Acting on this view I have drafted the factum, stating, according to my conception of the case, with all necessary fullness the historical argument and the surrounding facts, and condensing very greatly the legal argument on the clause.

"I enclose the draft. You will notice that at two points notes are inserted requiring that brief statements of the relative authorities should be introduced. This I have left to you to do.

"With regard to the main argument, I must say to you that such cursory investigation as was necessary in order to the preparation of the factum has not led me to look favourably upon its soundness, and I may not have put it as high as you would desire. If, therefore, there be any additional proposition which you would like to insert, insert it leaving mine as alternative, but if you find it expedient to make any serious alteration do not append my name to the factum without further communication with me.

"The fact that my impressions are unfavourable adds strength to the suggestion which I made in my last letter as to the advisability of instructing other Counsel, and I renew that suggestion, though, of course, if my retainer continues, I will do the best I can in the case."

APPENDIX G

EWART TO A. FERGUSON

(Caron Papers, P.A.C., vol. 195, Feb. 5, 1895)

"I have received your letter of 29th Jany, and must say that I myself was somewhat unprepared for the additional fees which Blake has charged. At the same time I think it would be very ungrateful to make any hesitation in the payment. He did splendid work upon the case, and his whole action was so completely satisfactory to me, and I am sure to our clients, that I feel that although the fee is very large, it is not one we should object to pay. When it is remembered that Blake was probably the only man in the world who could do the work as well as he did it, the matter assumes a different light from that in which a counsel fee usually presents itself, namely that one counsel is just about as good as another for the particular case in hand. When I was in England upon the previous case, the Attorney General, who was the senior counsel, and should have been willing to take instructions from me, listened to me for perhaps three minutes prior to the commencement of the argument. At the same time he was utterly ignorant of the whole subject. Blake, on the other hand, although very well informed in a general way, held consultations with me extending over not less than 16 or 17 hours, during which we discussed fully and freely and with the greatest minuteness every point which could possibly arise upon the argument; and we not only arrived at satisfactory conclusions upon every such point, but Blake wrote down at great length with his own hand every conclusion arrived at with the reasons upon which it was based. It was the most satisfactory preparation that I ever saw given to a case during my whole experience. It was done in the most laborious and painstaking form and so far from objecting to any fee that Blake may think fit and proper to name, I would think that the Roman Catholics, if they knew as well as I do the great interest taken by Blake in the case, would have offered an additional couple of hundred pounds. I am quite aware of course, that it is impossible for the Roman Catholics in Canada to appreciate as I did the great value of Blakes (sic) services. To them it merely appears as work done in the usual fashion, and that Blake could have earned his named fee with one tenth of the work that he bestowed upon the case. I think this ought to be recognized, and I sincerely hope that I may be spared, what I should think to be (sic) after the profuse thanks that I gave Blake, the humiliation of questioning the amount of his charge."