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The Legal Dimensions of
Public Education & Modernity
An Analysis of Denominational Rights and Separate Schools
in late 19th & early 20th Century Ontario

by

Charles Taillefer B.A., B.Ed. (Laurentian)

A thesis submitted to
the Faculty of Graduate Studies
in partial fulfillment of
the requirements for the degree of

Master of Arts

Carleton University
Ottawa, Ontario
January 28, 1999
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**The Legal Dimension of Public Education & Modernity: An Analysis of
Denominational Rights and Separate Schools in late 19th & early 20th Century Ontario**

**submitted by Charles Taillefer, B.A Hons., B.Ed.
in partial fulfilment of the requirements for**

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Thesis Supervisor

Chair, Department of Law

**Carleton University
January 28, 1999**

ABSTRACT

This thesis examines how the development of the modern state in Ontario, and in particular, the emphasis on liberal utilitarian notions of public education, effectively limited cultural minorities such as francophones and Catholics from developing what they understood as “natural” rights protected under section 93 of the B.N.A Act of 1867. This study demonstrates the important role of law in legitimating such notions of progress. Working with concepts such as legal positivism, orthodox liberalism, modernity and state formation theory, as well as Foucaultian and postmodern insights in historical studies, the thesis rejects assumptions regarding the “progressive” nature of modernity. It presents a critical examination of the social and legal conflicts related to public education in Ontario during the late 19th and early 20th century. Specifically, it examines how, through the use of positivist interpretations, legal actors and court decisions reflected and helped to legitimate educational policies characteristic of the modern liberal state.

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Introduction

...a law setting up a compulsory education system has a very important indirect [and direct] role in regard to social change, by enabling the operation of educational institutions which play a direct role in social change.¹

Yehezkel Dror

In Ontario as well as Canada in general, the establishment of the public educational system² during the mid 19th century, was to a great extent structured by legal provisions such as those contained in the Day Act 1841³ and B.N.A. Act 1867⁴. Moreover, in the post-Confederation period (from 1867 until the 1930's), educational policy continued to be defined and redefined by various enactments, legal decisions and judicial interpretations. Law and the legal sphere had a significant role in defining Ontario's educational policies both directly and indirectly and thus helped shape the educational system. Furthermore, by defining the operation of the educational system,

¹ Yehezkel Dror, "Law and Social Change", in Vilhem Aubert (ed.) Sociology of Law, (Harmondsworth: Penguin, 1969) p.93.

² Public or Common schools: are schools "supported by all ratepayers on the same basis, and are open to all children without restriction as to race, religion, or economic status". Since the beginning of a public system of education in Ontario, "religion and morality, though not sectarianism" were accepted as a central principle in the system of education.

Separate or denominational schools: these schools are part of the public schools system, however they are denominational - Roman Catholic and Protestant and until 1891 included Coloured separate school (a division based on race & colour).

Report of the Royal Commission on Education in Ontario 1950, Baptist Johnston, Toronto 1950, p. 458.

³ An Act to make Further Provision for the Establishment of Common Schools Throughout the Province (Day Act), (1841) 4 & 5 Victoria, c. 18.

⁴ British North America Act (1867) 30 & 31 Victoria, c. 3.

law set social limits and boundaries that had a significant impact on certain cultural groups in Ontario society.

This thesis will examine whether legal decisions and judicial interpretations of the B.N.A. Act regarding denominational education in the context of the post-Confederation climate of modernization of education and the Canadian state, limited the ability of Catholics in Ontario, particularly the minority francophone population (who were predominantly Catholic), to establish and adequately develop their "cultural" heritage. It will trace the history of Ontario's educational policy and the legal conflicts arising from it in the first forty years of the twentieth century, focusing on constitutional issues and modern state initiatives. It will attempt to demonstrate that judges tended to resort to a narrow interpretation of the constitution which had the effect of legitimizing a "modernist" vision of Ontario and Canada's educational future. Legal formalism and positivism, which characterized this narrow interpretation, disguised an implicit policy which benefited those with socio-political power by ultimately favouring the majority liberal, modernist ideology. In this way, law was deployed both practically and ideologically in the social struggle between minority and majority groups in Ontario.

For the purposes of this thesis an "orthodox" or classic definition of liberalism will be used. Will Kymlicka states that:

...[orthodox] liberals... treat culture in the same way they treat religion- something which people should pursue in their private activities, but which is not the concern of the state. Just as certain forms of liberalism preclude the recognition of an official religion, so too there cannot be official cultures which have preferred status over other possible cultural allegiances.⁵

⁵ Will Kymlicka, Liberalism, Ethnicity and the Law, (Toronto: University of Toronto, Winter-Summer, 1988-89) p.5.

Therefore, such a liberal conception rejects the legal recognition of religious and cultural structures. Modern national citizenship, based on such an orthodox liberal ideology, tends to promote the assimilation of plural cultural identities. Liberal assumptions also inform the various discursive practices of the modern state including those of legal institutions. Such institutions promoted certain discursive practices over others. Legal formalism is the particular discursive practice increasingly adopted by judges in the 19th century. It posits that the resolution of disputes should involve "objective" technical doctrinal and expositional legal reasoning rather than "subjective" considerations of values or policy.⁶ Yet the judicial interpretation of constitutional law, perhaps more than any other branch of the law, entails an enormous range of subjective policy discretion. Such discretion is often disguised under doctrinal technicalities.

This legal discursive practice is often characterized in jurisprudential theory as legal positivism and is contrasted with natural law. The former "...is law enacted and adopted by proper authority for a government of an organized jural society" or "law set by political superiors to political inferiors."⁷ Legal positivism emphasizes the rule of law, as enacted by duly constituted authority, in contrast to powers justified by natural law as defined by pre-existing authority. The latter "...is set forth by "God" (or a higher metaphysical moral order) through human reason to conform man's human nature,

⁶ Constitution: "the construct of rules, regulations and laws -either written or unwritten- that establishes and orders the political, governmental, and legal structure of the state"- J. A. Yogis, Canadian Law Dictionary- Third Edition, (New York: Barron's, 1995) p.52.

⁷ J. A. Yogis, Canadian Law Dictionary- Third Edition, (New York: Barron's), 1995) p.175.

meaning his whole mental, moral, and physical constitution... Natural law exists regardless of whether it is enacted as positive law."⁸

The philosophical contrasts between natural law and legal positivism can obscure important political assumptions. Critics of natural law such as Jeremy Bentham viewed this type of legal reasoning as a "labyrinth of confusion based on moral prejudices, unprovable speculations about human nature".⁹ Also, according to Roger Cotterrell, the decline of natural law thinking that coincided with the rise of positivism in the nineteenth century could primarily be attributed to a "change in the nature of law itself."¹⁰ He states:

...law became seen as an instrument of state policy and in the utilitarian view an instrument of progress, if used with caution it was revealed as an amoral and infinitely plastic device of government. Insofar as it regulated increasingly complex and differentiated Western societies it could be seen as, above all, a means of controlling the interplay of conflicting interest.¹¹

In the historical context of Canada, legal positivism, because of its partial association with 19th century utilitarian principles of the day, had difficulty recognizing and engaging with minority groups' claims (linguistic and religious in particular). These were often associated with conceptions of natural law which appeal to general declarations of the "rights of man" as found in earlier 18th century constitutional conceptions.

Sociological approaches are helpful here. According to Weber's notion of "formal legal rationality", legal positivism can be described as the characteristic legal form of

⁸ Ibid., p.175.

⁹ Roger Cotterrell, The Politics of Jurisprudence- A Critical Introduction to Legal Philosophy, (London: Butterworths, 1989), p.122.

¹⁰ Ibid., p.123.

¹¹ Ibid., p.123.

"modernity," while natural law was characterized as a premodern form of legality.¹²

Weber states:

In consequence of both juridical rationalism and modern intellectual skepticism in general, the axioms of natural law have lost all capacity to provide fundamental bases of a legal system.¹³

In modern society, the ideological power of legal positivism is more formidable, emphasizing legal language and formal legal structures to disguise hierarchies of power and legitimate structures of authority. In the context of 20th century social theory, legal struggles for group rights and identity politics may be seen as either a throw-back to pre-modern natural law or a postmodern response to the limitations of formal legal rationality. What we shall see is that the historical actors struggling for francophone rights understood the legal issues in terms of natural rights or natural law. In current times, those sympathetic to such aspirations would understand them in terms of contemporary collective rights.¹⁴

Other concepts closely related to the terms described above are those of state formation and modernity. The thesis will use the term "state formation" in the context of institutional developments in the period before and after Confederation when social, political and legal initiatives were developed and organized for the purposes of social and

¹² Natural law theory although largely displaced by positive law theory has continued to challenge the principle of separation of law and morality. This was particularly significant in the post World War II period. Roger Cotterell, The Politics of Jurisprudence- A Critical Introduction to Legal Philosophy, (London: Butterworths, 1989), p.127.

¹³ Max Weber, Law in Economy and Society, (Cambridge: Havard University Press, 1954), p. 298.

¹⁴ There are important differences between these positions. For instance, natural law defers to established higher authority whereas advocates of collective rights tend to subscribe to social democratic values.

moral regulation and the moulding of social attitudes. The rebellions in both Upper and Lower Canada, large scale immigration, labour unrest on public works projects, industrialization and urbanization, all posed formidable challenges to the prevailing order, demanding new responses characteristic of the modern state. Modernism reflects these characteristics accommodating liberalism, secularization and legal and political systems of mass participation and rational citizenship as opposed to premodern characteristics of conservative social hierarchy, religious world views, rural cultures and identity with local community. Consequently, the modernization of the educational system implies a separation of church and state. That is to say, a public education system would become an increasingly secular, non-sectarian system along modernist/liberal lines. The terms raised in the introductory chapter will be discuss in greater detail in chapter 1.

Overview of the Legal Dimension of Educational Policy

Historically, policy decisions regarding Ontario's public educational system were a source of great social conflicts and dissenting views. Throughout the nineteenth century, of all the issues related to public policy and state formation, arguably none received greater attention from Canada's political actors as well as its citizens than the questions surrounding education. In 1840, under the United Provinces Act, the divided provinces of Upper (Ontario) and Lower (Québec) Canada were united and consequently efforts were made to combine their distinct educational systems. However, a united educational system could not be realized because of historical differences between the

majority franco-Catholic population of Québec and the majority anglo-Protestant population of Ontario.¹⁵

An attempt to accommodate these differences was reflected in the B.N.A. Act of 1867. Section 93¹⁶ of the Act, made permanent the rights of religious minorities to establish and receive support for denominational schools. This section was of particular importance for the future of education in Ontario and Canada.¹⁷ This initial compromise of Confederation was not a lasting agreement on educational policy. Mounting concern regarding the future structure of their educational system soon appeared in the provinces, although prefigured in pre-Confederation conflicts. Consequently, in the period following 1867, Ontario as well as other provinces, was fraught with intense conflicts regarding educational issues amongst the majority Protestant group who generally supported a uniform common school system and the minority Roman Catholics who desired to maintain a sectarian based separate school system. For the latter group in particular, education represented a fundamental element in preserving and promoting cultural identity.

In Ontario, legal struggles regarding denominational and public education centred around three basic issues. The first was the minority francophone right to receive

¹⁵ Robert Stamp, Historical Background to Separate Schools in Ontario, (Toronto: Ministry of Education, Queen's Printer, 1985) p.19.

¹⁶ Section 93: "In and for each Province the legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:
(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union".
British North America Act (1867), 30 & 31 Victoria, c. 3.

¹⁷ Stamp, *supra* note 15, p.6.

education in their language. The second concerned the place of denominational schools in secondary education and the third was the division of tax moneys between the denominational and the public school system.¹⁸ All three of these issues would be at the centre of educational and legal debate in Ontario in the early part of the 20th century. In order to examine the impact and the role of law in effecting or limiting social change for the Catholic and francophone populations, the thesis will concentrate on three judicial case studies in Ontario's educational history.

The first case is *Ottawa Separate Schools Trustees v. Mackell* (1917).¹⁹ At issue in this case, was whether denominational rights could be extended to encompass cultural and linguistic protection under section 93 of the B.N.A. Act. The case centred on the constitutionality of Regulation 17 (1912), a controversial piece of legislation which limited the teaching of French in Ontario's public schools. The second case was *Roman Catholic Separate School Trustees of Tiny Township v. the King*, (1928)²⁰. This case provides an example of how judicial interpretation limited the ability of Catholics (and indirectly francophones) to fully develop their cultural heritage. Once again the Catholics turned to section 93 of the B.N.A. Act claiming it provided the right to maintain their own denominational secondary schools, the right to receive government grants for these schools and the right to be exempt from municipal taxation which did not go to support a

¹⁸ Franklin Walker, Catholic Education and Politics in Ontario, Volume II, (Toronto: The Federation of Catholic Education Association of Ontario, 1976) p.322.

¹⁹ *Ottawa Separate Schools Trustees v. Mackell* (1917) A.C. 62 (P.C.).

²⁰ *Roman Catholic Separate School Trustees v. the King*, (1928) A.C. (1927-28) 363 (P.C.).

separate secondary system.²¹ The third case, *Ford Motor Company of Canada Ltd. v. Windsor Board of Education*, (1941)²² deals with the issue of equality in the division of tax revenues from utilities and corporations. The decisions in all three cases were detrimental to denominational education and in consequence to francophone culture.

Through an analysis of these cases, this thesis will attempt to demonstrate the important role which law and the legal system played in defining Ontario's educational policies, both directly and indirectly, and how it helped shape the school system along a particular ideological framework, that of "orthodox" liberalism. The importance and strong presence that legal questions had in determining Ontario's public education as well as its ideological structure are the central theme. The thesis will evaluate and assess the influence of the law on social institutions through a historical analysis. The subject of education presents an excellent example of a social institution in which political, legal, linguistic and religious factors are all involved. Thus, when considering these issues several subsidiary questions are raised. What factors influenced the narrow judicial interpretation of the Constitution in relation to denominational education as well as francophone culture in the early 20th century? Why was this a prejudicial approach for Catholics and especially franco-Catholics? Finally, how did this interpretation play a role in the dichotomized development of Ontario's public educational system?

²¹ C.B. Sissons, Church and State in Canadian Education, (Toronto: The Ryerson Press, 1959) p.97.

²² *Ford Motor Company of Canada Ltd. v. Windsor Board of Education*, (1941) A.C. (1941-1942), 453 (P.C.) .

Methodological Considerations and Existing Historiography

In the early 1970's, the Ontario government commissioned the Historical Studies series, which was a series of works destined to explore the "neglected areas of Ontario history."²³ In this series, Robert Stamp's The Schools of Ontario 1876-1976 was one of the first single volume works on Ontario's educational history spanning from the late 19th century to the present. It was one of the many contributions that Stamp has made to the field. His relatively short account of Ontario's educational history was mainly written from primary sources. It covers a great deal of educational history but only briefly touched on the important legal and social themes dealing with education's impact on social groups (i.e., Catholics, francophones etc...).

Another significant contribution to Ontario's educational history is Franklin Walker's three volume, Catholic Education and Politics²⁴. This work is one of the most substantial on the subject of denominational education in Ontario's history. He extensively examined Catholic educational issues and related political aspects. However, like Stamp, Walker's work did not relate to broader social issues surrounding education, nor did he thoroughly examine some of the key legal questions in Ontario's educational history. Like most educational historians, he concentrated on providing a clear account of details and events. Although the legal aspect of education was a major part of this history, it was very often of passing interest or simply mentioned as a fact with little additional insight.

²³ Robert Stamp, The Schools of Ontario, 1876-1976. (Toronto: University of Toronto Press, 1982), p.ix.

²⁴ Walker, *supra* note 18. (Volume I, 1955, Volume II, 1964, Volume III, 1986)

It is important to point out that the works of these two writers do not constitute the whole of the secondary literature on Ontario's educational history. Arthur Godbout²⁵, Albert Plante²⁶ and W.G. Fleming²⁷ are among the others who have significantly contributed to the study of educational history in a contemporary context. This brief overview does not consist of all the resources available, it nevertheless represents the most substantial works available to historians researching Ontario's educational history. None of these writers, who were the pioneers of a social history of Ontario's education, confronted or significantly elaborated the broader social themes such as the role of law within the history of education in Ontario.

Although these histories provide a solid ground for further research, the historians mentioned above make very little if any reference to the ideological or theoretical implications of their research. However, the recent work of Ronald Manzer serves as a good example of educational research that integrates political theory in its analysis of the Canadian educational system. Manzer's work, Public Schools & Political Ideas²⁸ is a multidimensional analysis of liberalism and communitarianism in educational policy and governance. These theoretical frameworks are related to his research on public schools as

²⁵ Godbout, Arthur, L'Origine des écoles française dans l'Ontario, (Ottawa: Les Éditions de L'Université d'Ottawa) 1972.

²⁶ Albert Plante, Les écoles bilingues d'Ontario, and Hurtubise, J-Raoul, Les bilingues d'Ontario, (Sudbury: Collège du Sacré-Coeur/ La Société Historique du Nouvel Ontario), 1954.

²⁷ W. G. Fleming, Education: Ontario's Preoccupation, (Toronto: University of Toronto Press, 1971).

²⁸ Ronald Manzer, Public Schools & Political Ideas: Canadian Educational Policy in Historical Perspective, (Toronto: University of Toronto Press) 1994.

"human communities and public instruments" as well as "political symbols".²⁹ Similarly, the work of Bruce Curtis, Building the Educational State: Canada West, 1836-1871,³⁰ presents a more critical approach to educational history. Throughout his study of educational state formation, Curtis draws insight from Michel Foucault's "analysis of power and subjectivity".³¹ The thesis will take up some of these concepts and relate them to legal conflicts involving separate schools.

Legal issues were of great importance to the development of public education in Ontario. Legislation, court decisions and judicial interpretation are a key theme of Ontario's educational history and previous work on the subject has, to a large degree, neglected this area. Furthermore, the more current literature discusses these issues primarily as part of a study of the impact of the Charter on education.³² Consequently, this thesis will attempt to fill a gap in the literature by providing a thorough examination of the earlier legal history related to denominational schools and public education in Ontario. Building upon the more sophisticated recent historical accounts of education informed by political and state formation theory (Manzer, Curtis), this thesis explores

²⁹ Ibid. p.3.

³⁰ Bruce Curtis, Building the Educational State: Canada West, 1836-1871, (London: The Althouse Press, 1988)

³¹ Ibid., p.19.

³² T., A., Sussel, Canada's Legal Revolution: Public Education, the Charter, and Human Rights, (Toronto: Emond Montgomery Publications Limited, 1995).

neglected legal and regional dimensions.³³

Interdisciplinary research entailing law, history and social theory can add new insights into the regulation of social struggles around issues such as education.

Traditional professional legal scholarship is confined to doctrinal sources derived from legislation and cases and as such serves practical purposes of setting out the rules of dispute resolution by lawyers and judges. Such narrowly drawn sources shed little light on more social scientific concerns related to how laws come into being, policies around their administration and how people experience the law. Historical research into a broader range of sources, particularly government records and archival records, provide insight into these broader issues when framed in interdisciplinary terms. What then does law offer to the historical research? As social historians such as Edward P. Thompson discovered, the records of the courts shed indirect light on the life of those who left few records of their own.³⁴ The administration of law also provides considerable insight into the exercise of power.

³³ Previous historical writing on law and education dealt almost exclusively with the Manitoba schools issue of the 1890's. The cases in Manitoba were not studied as regional issues but were looked on as implying a rupture between the franco-Catholic and anglo-Protestant groups in the country as a whole during the time of state formation. The symbolic historical importance of the Manitoba schools question has been echoed time and time again in historical accounts of this period. (Nonetheless, this thesis will not ignore these issues because of their historical importance and significance as a legal precedent.)

³⁴ Poster, Mark, Cultural History and Postmodernity - Disciplinary Readings and Challenges, Columbia University Press, New York, 1997, p.4.

As was mentioned earlier, the subject of education demands an interdisciplinary approach;³⁵ as such, historical legal studies lends itself nicely to this type of research because of its interdisciplinary methods and sources. By using a social historical approach, the legal researcher can begin by examining regionally based issues (such as those in Ontario's educational history) in order to gain insight into law's role in the social struggles surrounding the development of institutions in a broader context. This type of "bottom up" approach entails a vast array of sources and documentation. The topic of educational history, because of its link with social, political, religious and legal questions, produces an abundance of materials.³⁶

Although widely scattered, the primary sources available for educational research are quite extensive. This thesis draws on information collected from archival collections, Royal Commission reports, Ministry publications, Premier Papers, law reports, legislation and various interest group publications. Fortunately, O.I.S.E. (Ontario Institute for Studies in Education) has published an eight volume guide to sources relating to educational history in the Ontario Archives. This abundance of sources can be advantageous but it can also be a pitfall. Thankfully, reference to secondary sources, such as those mentioned previously, helps to build on the work that has already been produced.

This use of archival sources is more familiar to historians than traditional legal scholars, who again are oriented to narrow doctrinal issues arising out of the resolution of

³⁵ Carl Berger, Contemporary Approaches to Canadian History, (Toronto: Copp Clark Pitman, 1987) p.232.

³⁶ A smaller regional study provides a more manageable way to access the interdisciplinary nature of this problem as well as could possibly clarify or add depth to the broader research projects done in the field.

disputes. Although those sources must be mastered, they are insufficient to deal with broader questions of law's relationship to political and social processes. Although historians access a wider range of sources that shed light on these issues, it must also be acknowledged that written records provide only a partial picture and reflect a preponderance of official and privileged perspectives. In order to construct a coherent narrative, and critically interpret the existing evidence, recourse to theory is necessary.

Although this work is not primarily a work in theory, it will build on certain theoretical frameworks, some of which have been alluded to previously. For instance, the work of Yehezkel Dror on law and social change³⁷ suggests that "the use of law as a device of organized social action directed toward achieving social change seems to be one of the characteristics of modern society".³⁸ What Dror's theory lacks is an adequate analysis of power. This can be approached by drawing upon other theoretically informed analysis of education and state institutions, in particular the work of sociologist and historian Bruce Curtis. In the introduction to his book, Building the Educational State: Canada West, 1836-1871, Curtis lays out his approach to the establishment of the compulsory and state funded educational system. State schooling only "changed the form of resistance and conflict", it did not eliminate it, and "educational practice exerted its force upon and built its consensus within the population."³⁹ Curtis views the state educational system as being instrumental in creating an ideological framework for its own

³⁷ Dror, *supra* note 1, p.93.

³⁸ *Ibid.*, p.92.

³⁹ Curtis, *supra* note 30, p.17.

development and public support. For Curtis, the establishment of bureaucratic and administrative activities related to state education represented “a component part and an index of state formation”.⁴⁰ Curtis defines state formation as:

...the centralization and concentration of relations of economic and political power and authority in society. State formation typically involves the appearance or reorganization of monopolies over the means of violence, taxation, administration, and over symbolic systems. In mid-nineteenth-century Canada, state formation involved the extension of liberal political democracy, with their coincident bureaucratic forms of administration and policing.⁴¹

Following from this trajectory, but focussing on legal and cultural issues, this thesis will attempt to demonstrate that legislation, court decisions, and judicial interpretations facilitated and legitimated the development of the public educational system along modernist “orthodox” liberal lines. This not only ignored the social impact of these policies on minority Catholic and francophone cultures, it tended to render their cultural aspirations invisible. As we shall see, these legal practices were understood as violations of “natural” rights, thought to be guaranteed by the constitution under provisions such as denominational group rights under section 93 of the B.N.A. Act of 1867.⁴² The thesis will then substantiate this hypothesis with more concrete examples and historical case studies from education and law in 19th and early 20th century Canada.

⁴⁰ Bruce Curtis, True government by Choice Men?, (Toronto: University of Toronto Press, 1992), p.5.

⁴¹ Ibid., p.5-6.

⁴² It is important to note that the discussions and references related to natural law within this thesis, should not be interpreted as a defence or the advocacy of “natural law”. Rather, this thesis simply supports the aspirations which were understood by the historical actors as “natural rights”. In the present day, we can understand such aspirations in terms of collective rights and identity politics without reference to notions of “natural rights” or “natural law”.

In this line, an important caveat should be indicated at the outset. The historical interpretation and study of people, places and events are ultimately the product of a particular approach and methodology which produces a limited "social knowledge" based on certain relative truths. Foucault's approach reminds us to be skeptical about dealing with history and social life in specific causal terms.⁴³ Although the events described in this thesis will be presented in a chronological manner, it is important to acknowledge that social life and social conflicts do not conform to strictly linear and evolutionary models of progress and change. Whiggish historical assumptions which assert that history is a progressive realization of some teleological liberal utopia, must be problematized. This work regards historical "knowledge" as relative to various limits and biases in historical evidence, presentism⁴⁴ and perceptions of social life and social conflicts which are set in a particular time and place.⁴⁵ This study will attempt to incorporate such problematizing approaches in examining the influence of law within the development of public education as well as denominational schooling in Ontario's educational history.

Outline of Analysis

Chapter 1 of the thesis will elaborate on some of the theoretical issues raised in the introduction. More precisely, it will examine the theoretical considerations related to liberalism and modernity, state formation, power and authority, the formation of

⁴³ Alan Hunt and Gary Wickham, Foucault and Law - Toward a Sociology of Law as Governance, (London: Pluto Press, 1994) p.6.

⁴⁴ The term presentism refers to the tendency to draw on present day assumptions or current understandings of society and project them into the study of the past.

community and group rights which are the basis of the arguments in subsequent chapters. Chapter 2 will set out the historical context by first examining the rise of the notion of public education under Egerton Ryerson, who has been credited as the founder of Ontario's public educational system. It will also look at the British North America Act of 1867 as a social contract between minority and majority groups of Upper and Lower Canada respectively and explore the impact of legal formalism and positivism on the struggle to give meaning to denominational group rights within the context of state education. Through the Manitoba schools question of 1890, the thesis will introduce the extension of separate schools as an issue of cultural survival.

Chapters 3 to 5, will then expand on these issues through several empirical case studies in Ontario's educational history. They will focus on the role of the judiciary in limiting the extension of denominational education and consequently Catholic and francophone culture will be stressed. As previously mentioned, the first case, *Ottawa School Trustees v. Mackell (1917)* deals with minority language rights, the second case, *Roman Catholic Separate School Trustees of Tiny Township v. the King, (1928)* addresses separate schools and secondary education, and the third and final case, *Ford Motor Company of Canada Ltd. v. Windsor Board of Education, (1941)* examines the division of tax money between public and separate schools. In all the cases, the thesis will examine the judicial interpretations of both the Supreme Court of Canada and the Judicial Committee of the Privy Council in order to determine the judicial approach and ideology behind these decisions. Moreover, it will attempt to demonstrate that the predominantly

⁴⁵ Ibid., p.14.

positivist and formalist interpretations of certain judges had a social impact on the development of Catholic and francophone cultural groups. Furthermore, the thesis will attempt to demonstrate that the dichotomization of the school system increased as a result of having projected political and social issues of cultural survival into legal and constitutional discourse which influenced subsequent educational policies.

In summary, the thesis will study the shifting forms of conflicts in relation to the development of public education. It will begin by examining public education as a manifestation of state formation with cultural contradictions which were transformed into constitutional and legal questions. The subsequent positivist interpretations of the Constitution did not represent the social and cultural dimensions surrounding educational issues in Ontario. Furthermore, this technical, formalist, positivist approach of the courts prevented adequate recognition of these issues as being part of broader constitutional questions. In Ontario, the minority franco-Catholic population viewed the issue as one of natural law or fundamental "human rights" transcending legislative authority whereas the majority anglo-Protestant group who supported the liberal/ modernist orthodoxy viewed matters as a refusal to privilege cultural or religious groups over majority rights. A formalist legal approach to resolving the issues invariably favoured the latter group.

I

Public Education and Modernity

Clashes between the majority and minority groups over linguistic, religious and ethnic rights figured prominently throughout Ontario's history. As suggested in the introductory chapter, issues such as identity politics and cultural survival tend to be understood in the present day context of collective or group rights; however, from a historical perspective these issues were understood by historical actors themselves in terms of “natural rights” or “natural law”. For minority groups, these aspirations were particularly significant in the context of the establishment of social institutions such as public education. Throughout Ontario's educational history, liberal ideology, which tended to reflect the majority's views, held considerable power in the political and legal debates over education.¹ For historians, the rise of public education in Ontario, given its importance as a primary method of socialization, is a window on the tensions between liberalism and natural rights, as well as the related themes of power, social control and historical change. This chapter will explore the theoretical issues directly, in particular, by elaborating on concepts introduced in the previous chapter, including liberalism and its manifestation in law and legal positivism, as well as forces of modernity as they relate to state formation, including the maintenance of order, the reforming of community attachments, moral regulation and the utilitarian division of power and authority. It will also examine the notion of collective or group rights within the context of modern

¹ Ronald Manzer, Public Schools & Political Ideas: Canadian Educational Policy in Historical Perspective, (Toronto: University of Toronto Press, 1994) p.12.

citizenship. Chapter two will draw on these themes in an overview examination of the rise of public education in Ontario in the early 19th century and debates raised which continued to Confederation and beyond. Subsequent chapters will also attempt to integrate these themes in empirical case studies from the early part of this century.

Nineteenth Century Liberalism and Critical Understandings of Modernity

Particular legal and political assumptions have informed the establishment of new social institutions which attempt to meet the perceived requirements of the modern nation state and its citizenship. Since the post-rebellion period, orthodox liberal ideology has greatly influenced subsequent institutional developments.² Although modern (contemporary) liberals³ have sought to challenge “orthodox” assumptions about the necessity of liberalism's hostility toward culture and minority rights, 19th century “orthodox” liberal ideology was not as accommodating. In fact, liberal philosophers during this time often expressed hostility toward cultural and community attachments, as archaic impediments to development of a modern liberal state.

In the middle of the 19th century, liberalism as described by John Stuart Mill and T.H. Green, entailed the belief "that a free state must be a nation state, national minorities must be dealt with by coercive assimilation or redrawing of boundaries, not by minority rights."⁴ Moreover, orthodox liberal thought maintained that in order to have a strong

² Ibid., p.12.

³ Among others, Will Kymlicka has written a recent work in defence of a liberal theory of minority and cultural rights in the Canadian context. See: Will Kymlicka, Multicultural Citizenship, New York: Oxford University Press, 1995.

⁴ Will Kymlicka, Liberalism, Ethnicity and the Law, (Toronto: University of Toronto, Winter-Summer, 1988-89) p.52.

nation state, members of the state must share some form of common citizenship and allegiances.⁵ It asserted that communal or ethnic attachments must be replaced by civic attachment to the modern state which in return would protect individual rights.

Influenced by this conception of liberalism, the anglo-Protestant governing majority in 19th century Canada often adopted assimilationist policies directed toward the francophone and Catholic minorities in particular, in the hopes of forming a unified nation state.⁶ A good example of this is the Durham Report's recommendations for resolving the outstanding conflicts between the Lower Canada francophones and Upper Canada anglophones. Anglophone historiography tends to place emphasis on the Report's progressive proposal for responsible government. In his Report, Durham also advocated the aggressive assimilation of francophone culture in a unified English culture which would become the shared nationality of the new Canadian state. However, as Janet Ajzenstat claims, these recommendations were not born out of explicit racism but rather stem from Durham's vision of nationality and orthodox liberal reformism. She states: "It is exactly because Durham sees that nationality - the new form- is of, for, the individual, that he believes assimilation is inevitable."⁷ Ultimately, such liberal policies and their "conception of justice depended on notions of a self which was unencumbered by social attachments, whose freedom was exercised precisely by abstracting itself from its cultural

⁵ Ibid., p.52.

⁶ Aborigines were targeted through the Indian Act (1876) The Act consolidated previous legislation related to aborigines; defined Indian status; and gave the Superintendent General administrative powers of Indian affairs.

⁷ Janet Ajzenstat, The Political Thought of Lord Durham, (Montreal & Kingston: McGill-Queen's University Press, 1988), p.99.

situation."⁸ Consequently, policies and legal rules of the day were typically indifferent to the traditional ties that the francophone and Catholic minorities had to their particular culture and community.⁹ Moreover, cases in early 20th century Ontario regarding denominational education demonstrate the underlying teleological assumptions of the modern liberal state which presupposed the progressive nature of both citizenship and state structures. That is to say, it was assumed that part of the process of modern nation building involved the creation of a national universal citizenship based on solely non ethnic or cultural, civil attachments. Moreover, this process, although compromising more traditional community ties, was perceived as a social good and as a necessary aspect related to social "progress". Unlike orthodox liberals, who tend to regard such modernization in an unqualified positive light, critical theorists influenced by Marxist traditions tend to stress its more ominous implications.

Max Weber, although not thought of as a critical theorist, argued that in modern Western societies, formal legal rationality becomes the dominant form of authority. He contends that the development of the state, of law and also of a public administration guided along rational lines, influenced the development of modern capitalism. In addition, the ideological predominance of rationality, calculability and predictability are also linked to the development of modern Western societies.¹⁰ Weber also argued that aside from the development of the technical means of production, law and administration

⁸ Kymlicka, *supra* note 4, p.10.

⁹ *Ibid.*, p.9-10.

¹⁰ *Ibid.*, p.40.

were among the most important and influential of these rational structures.¹¹ That is to say, the existence of modern rational capitalism relies on the formalism and calculability which are inherent in rational legal and administrative systems. Although Weber does not acknowledge these issues as problematic, his analysis holds importance in terms of pointing the way for critical understandings of the role of law in modernity which will be explored in the next section.

The work of Corrigan and Sayer reflects more recent critical theoretical perspectives which are informed by postmodernist notions that challenge reductionist approaches to the study of modernity and its forms of social order. Although Corrigan and Sayer acknowledge the connection between state formation and the rise of capitalism, they consider more directly the relation between state formation and cultural revolution. Corrigan and Sayer contend that state formation, "this transformation of social geography- ultimately of social identities is itself cultural revolution."¹² Their work addresses, "the cultural content of state institutions and activities (and) the nature and extent of state regulation of cultural forms".¹³ That is, through various practices of state institutions such as schools and the court of law, the state produces "statements" which identify "acceptable forms and images of social activity and individual and collective identity (i.e. acceptable culture)."¹⁴ The rise of the modern state and its institutions promote a specific form of culture, one which is conducive to the structure of the modern

¹¹ Ibid., p.53

¹² Philip Corrigan and Derek Sayer, The Great Arch-English State Formation as Cultural Revolution, (New York: Basil Blackwell, 1985) p. 187.

¹³ Ibid., p. 2.

¹⁴ Ibid., p.3.

state. In this perspective, state formation is intimately linked with moral regulation, described as " a project of normalizing, rendering natural, taken for granted, in a word 'obvious' what are in fact ontological and epistemological premises of a particular and historical form of social order."¹⁵

In the context of this thesis and Canadian history, the development of a public education system in the 19th century would constitute a form of social order or, in Corrigan and Sayer's terms, a form of moral regulation. Public education was developed in such a way that it became second nature to those directly involved in the system as well as to those indirectly affected by it. According to Corrigan and Sayer, in an attempt to mask and ultimately eliminate traces of difference, the state, through the projects of moral regulation and state formation, imposes a particular and unitary "moral ethos". It creates an "illusionary community" known as the nation or nationality which groups together the multidimensional members and people of various communities into a singular unit. As a result, various cultural groups which differ in historical experiences, social circumstances, religious beliefs and other factors are totalized into a unitary social identity and loyalty.

Although Corrigan and Sayer present a new critical perspective, their state formation thesis has been described by some postmodernists as too mechanistic and state-centred. According to Mitchell Dean, there are many problems with the way they "construct their account of 'moral regulation'".¹⁶ Their "cultural and ideological analysis"

¹⁵ Ibid., p.4

¹⁶ Mitchell Dean, Critical and Effective Histories, (London: Routledge, 1994), p.150.

looks at moral regulation as "processes of meaning"¹⁷ and neglects Foucault's insight into forms of subjectivity.¹⁸ They also underplay the complexity of the various ways that government, governmental practices and agencies are involved in promoting, or guiding the direction and conduct of its people either as actors, clients, citizenship or subjects.¹⁹ As Steven Seidman explains:

[Foucault] imagined modern societies as fractured, lacking a social center that gives to them a unity and telos. Neither the state nor the economy is the social center; no one drama of social conflict, not class conflict nor gender, sexual, ethnic, or religious conflict, carries any obvious social or political primacy.²⁰

Thus, Corrigan and Sayer do not adequately account for these various forms of power which are exercised in, through and beyond the state.

Studies of educational structure and development provide a good example of disciplinary power which is characteristic of state formation. Notwithstanding Dean's powerful critique, such forms of subjectification of individuals by government and its agencies must also be taken into account. This thesis focuses primarily on law, a significant form of power within the modern state, although certainly not the only form. It is also acknowledged that moral regulation takes place in social terrains distanced from the state and its agencies.

¹⁷ Dean describes that "...the effectivity of state formation on moral regulation is limited to the ways in which identities are constructed in various forms of representation and the consequent meaning people attach to their activities, lives, careers, and relationships". Mitchell Dean, Critical and Effective Histories, (London: Routledge, 1994), p.150.

¹⁸ Dean, *supra* note 16, p.151.

¹⁹ *Ibid.*, p.151.

²⁰ Steven Seidman, Contested Knowledge-Social Theory in the Postmodern Era, (Cambridge: Blackwell, 1994) p.225.

Rights Theory and Citizenship

Despite discontinuities and complex tensions, the development of public education in Ontario ultimately reflected the dominant ideology present in the state and its legal structure. The educational struggles for collective rights by linguistic and religious minorities in 19th century Ontario were perceived by the historical actors as conflicts of cultural survival against the growth of liberalism and the modern Canadian state. These struggles, which were diverted from the political sphere and directed to the courts, became subject to the discursive channeling of legal formalism. These historical issues surrounding educational and minority rights can be related to the modern debates surrounding identity politics and demands for recognition by minority groups. The rise of a modern liberal state has brought about conflicting views on whether liberalism is necessarily hostile to group rights. As discussed earlier, in the historical context of Ontario's educational system, Catholic and francophone demands to maintain their cultural heritage were understood in pre-modern natural law terms. This conception was dismissed as archaic by liberals who emphasized individual rights, the notion of the private citizen loyal to the secular state above all other community attachments and majority rule through legislative authority. Consequently, francophone and Catholic minority groups in 19th and early 20th century Canada feared assimilation of their cultural identity under the pressures of the rise of individualism and secular nationalism of the modern Canadian state.

A number of contemporary critical theorists have embraced the importance of rights, noting that collective rights can be recognized in the late modern state and that a liberal emphasis on individual rights should not monopolize rights discourse. However,

Jurgen Habermas argues that group rights are unnecessary and dangerous when democratic individual rights are sufficiently protected. Habermas states:

If a well-functioning public sphere with open communication structures that permit and promote discussions oriented to self-understanding can develop in such multicultural societies against the background of a liberal culture and on the basis of voluntary associations, the democratic process of actualizing equal individual rights will also extend to guaranteeing different ethnic groups and their cultural forms of life equal rights to coexistence.²¹

However, Habermas does not appear to consider group specific or minority rights within a public sphere where communication structures are closed or obstructed, as was certainly the case in 19th and early 20th century Canada. On this reading of Habermas, individual rights are sufficient under ideal conditions. However, this suggests that Habermas underestimates the possibility of coercive cultures, competing nationalities or the pressures of assimilation within an actually existing, distorted public sphere. His account downplays the role of the state and its institutions as mechanisms of “cultural revolution” in Corrigan and Sayer’s terms. The public sphere in 19th century Canada was not marked by open forums of communication but was rather a structured social and political arena which limited the effective articulation of collective aspirations and did not adequately protect communal, cultural minority interests.

Social theorist Charles Taylor, a communitarian, recognizes that certain demands for recognition by minority groups are closely related to issues of cultural survival.²² Moreover, he argues that the commitment to preserving certain cultural goals must in a

²¹ Jurgen Habermas, "Struggles for Recognition in the Democratic Constitutional State" in Charles Taylor and Amy Gutmann eds. Multiculturalism and the Politics of Recognition (Princeton: Princeton U.P. 1994) p.128-129.

²² Charles Taylor, "The Politics of Recognition" in Charles Taylor and Amy Gutmann eds. Multiculturalism and the Politics of Recognition (Princeton: Princeton U.P., 1994) p.52.

way transcend the presentism of that cultural, linguistic or ethnic community; that is, it must go beyond the immediate concerns related to the particular culture, language or ethnic community. Thus, in Taylor's view, the politics of recognition should entail a protection of cultures in perpetuity.²³ Consequently, for Taylor, section 93 of the BNA Act of 1867, which provided legal protection of minority groups within Canada, could be fully justified as a measure to ensure the survival of a particular culture's future.

However, by placing the power to secure cultural survival under the authority of the state, Taylor seems to accept that constitutionalism is "supreme law" and that "power-law" resides in a single authoritative form within the state.²⁴ Again this type of analysis does not take into consideration the postmodern insight that power exists beyond the state. As Costas Douzinas points out:

...the politics of deconstruction in postmodernity emphasizes 'plurality over authoritative unity, a disposition to criticize rather than to obey, a rejection of the logic of power and domination in all their forms, an advocacy of difference against identity, and a questioning of state universalism'.²⁵

In this line, while section 93 was articulated at Confederation as a check or exception to the main priorities of modern nation building, as we shall see in subsequent chapters, minority linguistic and religious rights in regard to public education were not given this interpretation when disputes were litigated in the courts. This thesis will examine how modern law represented a form of power that in the context of Ontario

²³ Ibid., p. 58.

²⁴ C. Douzinas, R. Warrington & Shaun McVeigh, Postmodern Jurisprudence- The law of text in the texts of law, (London: Routledge, 1991) p.28.

²⁵ Ibid., p.28.

educational history was exercised through legal positivism along modern liberal lines.²⁶

The legal decisions of the day attempted to eliminate differences of culture and identity in the public sphere.

The emerging modern liberal state in the context of 19th and early 20th century Canada increasingly rejected the classical or (pre-modern) model of citizenship, which emphasized community and civic responsibilities and increasingly embraced modern liberal citizenship emphasizing a passive conception of formal equality of rights and entitlements for all citizens.²⁷ The focus here is on the issue of the powers inherent in the modern state which reinforce liberal notions of citizenship. From a historical perspective, minority groups such as Catholics and francophones in Ontario who attempted to preserve their cultural heritage, were confronted by the processes and structures of the modern state which denied minority social rights. As will be demonstrated, in 19th and early 20th century Canada, public policies consistently supported the assimilation and universalization of cultures. Canadian nation-building favoured orthodox liberal citizenship which implied that, ideally, individuals were to have the same or equal rights. As Corrigan and Sayer put it, "modern law and modern polity rest on the concept of the citizen, the autonomous free individual with specific rights and duties."²⁸ Notable anomalies of this period were the minority rights guarantees to French and Catholics as

²⁶ Ibid., p.26.

²⁷ Will Kymlicka and Wayne Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory", in Theorizing Citizenship, (Albany: State University of New York Press, 1995) p.283.

²⁸ Corrigan & Sayer, supra note 12, p.183.

well as the paternalism of the Indian Act.²⁹ As will be examined, francophone and Catholic rights were granted within particular historical circumstances. These rights, although providing certain concessions to the French and Catholic populations, were part of a process by which these minority groups were integrated and eventually assimilated into the modern liberal state. Thus, from the point of view of the minority groups at this time, the concessions granted at Confederation were part of a “compact”, an assurance that certain rights would be respected in the course of the development of the modern Canadian state. However, for liberal modernizers, such concessions were temporary, assisting in drawing reluctant minorities under the umbrella of the state and as such under its power structures and institutions.

Historically, cultural groups had not fared well under the liberal ideology which had come to dominate public policy by the mid-19th century. Moreover, social, educational and legal institutions espousing the “liberal myth” based on individual freedom rooted in the notion of citizenship in the liberal state did not attempt to accommodate a modernized conception of differentiated or collective rights. In particular, the legal system played a significant role in defining and redefining Canadian citizenship along modern liberal lines through the resolution of social conflict (although of course the legal state of Canadian citizenship did not come into being until 1947). The state conferred upon the legal system the power to determine, direct and control the form of

²⁹ Peter Kulchyski has argued that Aboriginal rights can be totalizing in the sense that these rights were part of a process by which aboriginals were “ordered in accordance to set principles conducive to the accumulation of capital and the logic of the commodity form.” Peter Kulchyski, Unjust Relations: Aboriginal Rights in Canadian Courts, (Toronto: Oxford University Press), 1994, p.1.

citizenship formation. Moreover, the law masked the cultural face of the state's policy toward minority groups within the public education system.

Liberalism and Legal Regulation

As will be shown, the orthodox liberal ideology which tended to inform legal decisions of this period were essentially policy decisions which were perceived as threats to the survival of cultural and minority groups in Ontario. This research on the law mirrors the work of other researchers who also question the "liberal myth"³⁰ and suggest that the rise of the modern state did not necessarily place government under control of its citizenship; instead, it resulted in a process by which citizens came under control of the modern state.³¹ However, the rise of the modern state is a continuation, albeit in a different form, of power structures which place limits on the "life choices" of both individuals and groups. Furthermore, law, and in particular legal positivism as part of the state structure reflected this process of modernization and legitimated the establishment of the liberal state.

As described in the introduction, legal positivism essentially insists on the "analytical separation" between law as created by human legislators and law as morally significant.³² In other terms, legal positivism can be understood as a discursive practice

³⁰ The "liberal myth" refers to the notion that the rise of the modern state is part of a progressive process that places government under the control of its citizens. In contrast, postmodernist and critical theorist assert that modernity and its social institutions were part of a process by which citizens came under the control of the state.

³¹ Allan Greer & Ian Radforth, Colonial Leviathan-State Formation in Mid-Nineteenth-Century Canada, (Toronto: University of Toronto Press, 1992) p.13.

³² Roger Cotterell, The Politics of Jurisprudence- A Critical Introduction to Legal Philosophy, (London: Butterworths, 1989), p. 120.

which translates disputes and social conflict into technical and formal legal language which in turn presents a portrayal of "reality" in ostensibly objective terms. In contrast, natural law explicitly embraces moral positions as an integral part of establishing legal authority which, in turn, inform the resolution of conflict.

Modern law involves a process by which legal language is legitimized and granted a special status of authority over other forms of discourse. However, unlike the whiggish claim that legal discourse evolves in a progressively rational manner; postmodern scholars emphasize the synchronic nature of discourse.³³ Thus, legal discourse is influenced by its social, political, cultural and historical context. From a Foucaultian perspective, "the social field" is viewed "as consisting of heterogeneous forces, institutional orders, processes and conflicts."³⁴ Thus, particular historical circumstances and social conflicts which are relative to a particular time and place, are of a critical importance to understanding the relation between power and the manipulation of "legal" discourse. Legal positivism creates a form of legal knowledge as authoritative "Truth" and this knowledge implies a power of domination. Similarly, forms of culture, language and other elements of group identity and attachment become subject to the modern legal discourse centred on creating new civil attachments. While resolving disputes, modern legal discourse, as we shall see, precludes certain social understandings

³³ David Rasmussen, Reading Habermas, (Oxford: Basil Blackwell, 1990), p.19.

"Certainly, pre-twentieth century linguistics could quite easily be correlated with the project of modernity because it conceived of itself diachronically. Hence, the historical study of language was associated with an evolutionary model which assumed language to evolve both in character and complexity. However, once it was discovered that language is universally complex regardless of occasion, i.e., an archaic language can be as complex as a modern one, and further, once it was discovered that getting behind language to a pre-linguistic level was pure conjecture, the evolutionary model for understanding language had to be abandoned on scientific grounds." p.19

³⁴ Seidman, *supra* note 20, p.225.

and promotes others under a veil of rational objectivity. This particular analysis of legal discourse will be applied in later chapters when addressing specific cases and legal interpretations.

We can now turn to a detailed examination of how Catholics and francophones became more accountable to the state through education policies. In this perspective, minority educational rights secured under the British North America Act were subject to the modernizing administration of the modern state in a decisive way through litigation and judicial review. The relative "anonymity" and "freedom of negotiation" by minority groups in regard to educational policy were now policed by a legal system of surveillance. For example, legal conflicts surrounding Catholics' rights to education often raised political questions about practices that, prior to Confederation, were non-issues. Moreover, denominational rights granted under section 93 were subjected to a legal analysis based on the positivism and formalism of the modern state. The legal questions surrounding these rights were of greater concern than merely education and culture; they raised contradictions that went to the heart of modern conceptions of the state and its citizenship. How could a modern state administer group rights while subscribing to secular individualism? Such questions were handed over to the courts; thus placing social, cultural and political conflicts in a legal language which appeared to authoritatively resolve them in an objective and rational fashion.

II

Legislative History of Public Education in Ontario

As suggested in the previous chapter, the orthodox liberal ideology of the 19th and early 20th century influenced the development of the central state institutions, including a public educational system. This form of liberalism, emphasizing cultural assimilation and universal citizenship, also informed the discursive practices of the law which in turn legitimated the resolution of conflicts along a modernist liberal line. It was also suggested that these modern institutional developments can be effectively understood in terms of state formation theory, where the promotion of universalized civic identity or modern citizenship relegates group rights as archaic holdovers. This chapter will be informed by this understanding of modern Canadian state formation and will set out a context for the place of public education in it. It provides an overview of relevant political developments and important legislative enactments concerning public and denominational education during the nineteenth century. This will form the historical context for subsequent chapters.

As part of this overview, the chapter will begin with a look at Egerton Ryerson's vision for Upper Canada's educational system and the place of the separate school within such a system. It will also survey the political and utilitarian reforms that flowed from the Durham Report and will look at the British North America Act of 1867 as a social contract between minority and majority groups in the provinces. Finally, through a focus on the Manitoba schools question of 1890, the chapter will underscore how the provision of separate schools was perceived by historical actors as an issue of cultural survival.

From this discussion of the Manitoba schools question, the chapter will introduce three main issues of importance in the separate school question, namely: minority language rights, secondary education, and division of tax money (funding).

The Rise of Public Education in Canada West

Public education has become an integral part of the socialization process in Canada as well as many other countries. This idea of "state" administered education seems so embedded in modern society that it is hard to image a period without such a system. However, in actuality, the public educational system of modern Canada, and more specifically Ontario, has had a relatively short history. It first came into existence through a series of legislative enactments in the mid nineteenth century around the same time Canada itself was being formed. In the early 19th century education in Upper Canada was based on an informal structure which depended on the voluntary efforts of the pioneers and their Churches more than on the state.¹

In fact, from a historical perspective, religion and education have always been closely related. As Franklin Walker states: "Education since the fall of Rome was tied to the church; the church was the progenitor of modern education: elementary, secondary and university."² In Canada, denominational education can be traced back as early as the 17th century with the arrival of Jesuit Missionaries who provided education to aboriginal as well as European children.³ Nonetheless, by the beginning of the 19th century, the

¹ C.B. Sisson, Church and State in Canadian Education, Toronto, The Ryerson Press, 1959, p.5.

² Franklin Walker, Catholic Education and Politics in Upper Canada, (Toronto: JM Dent & Sons Ltd., 1955) p.3.

³ Ibid. p.15.

traditional relation between religion and education was placed into question. With the burgeoning population and growth of commercial activity, manufacturing and other developing enterprises, many people, including churchmen and political thinkers, saw the need for establishing some form of public education. Thus, questions regarding the role of religion and the church within a publicly funded educational system were soon at the forefront of the debates regarding education. Opinions on this subject were divided.

As Ronald Manzer explains, the reformers, largely political liberals, initiated the movement for public education and saw the public school as an essential part to building a new political nationality and breaking down communities and cultural identities which were seen as antithetical to this. These liberal reformers desired a non-denominational, non-sectarian Christian system of education. The more vocal sectarian groups such as the Protestant Orange Lodge were allied to the liberal reformers, and also favoured an assimilationist policy in regard to cultural minorities. However, their opposition was mostly based on ethnic discrimination rather than on orthodox liberalism. In opposition, conservatives, led mostly by Roman Catholics and Anglicans, sought to maintain denominational or sectarian education as part of the new public educational system.⁴ These diverging views regarding the form of public education fuelled and were fuelled by the general political unrest which accompanied life in the British North American colonies during the early 19th century.

Early attempts by the colonial executive at gaining influence through professionalizing popular education were of little consequence. The School Act of 1816, which represented one of the first pieces of legislation seeking to influence education,

⁴ Ronald Manzer, Public Schools & Political Ideas: Canadian Educational Policy in Historical Perspective, (Toronto: University of Toronto Press) 1994, p.51.

empowered residents (proprietors) to assemble and select amongst its members three school trustees and hire a teacher.⁵ It is also significant to note that the Act required that the teachers be British subjects and swear allegiance to the Crown.⁶ Nonetheless, the real significance of the Act was that it established a District Board of Education to examine these teachers as well as provide them with guidelines for their activities in the schoolroom.⁷ However, as Bruce Curtis explains, these Boards seldom examined teachers and very few elementary schools fell under the scope of the Act.⁸ Moreover, in the 1820's, similar efforts were made to gain greater authority over the direction of educational organization. The legal recognition of a colony-wide General Board of Education, which would control the District Boards and the schools lands (larger areas set aside by the legislature in 1797 to support elementary education), was another example of attempt at greater state control over educational matters. However, because of several administrative problems, the colony-wide General Board was disbanded and District Boards were once again granted their autonomy. The problems with developing and

⁵ Bruce Curtis, Building the Educational State: Canada West, 1836-1871, (London: The Althouse Press, 1988), p.22.

⁶ Paul Axelrod, The Promise of Schooling-Education in Canada 1800-1914, (Toronto: University of Toronto Press, 1997), p.15.

⁷ Ibid., p.22.

⁸ Ibid., p.22.

professionalizing the “common schools”⁹ of Upper Canada continued well into the 1830’s and were not eliminated until the Rebellion of 1837-38.¹⁰

Nevertheless, the period from 1816 to 1841 saw many discussions over legislative projects relating to education. Little was done, or could be done, to realize them. As historian Arthur Godbout contends, several factors were at the root of the problem. Godbout cites the negligence of the legislative council as well as the general indifference of the population toward education as factors which contributed to the slow “progress” of the common schools of Upper Canada at this time.¹¹ Moreover, he emphasizes the constant struggles between the Legislative Assembly and the Executive Council as representing great obstacles to the “progress” of a public educational system.¹² During this period, the decisions brought forward by the elected representatives in the Legislative Assembly were constantly subjected to veto by the Executive Council, which was essentially the core of the governing class of Upper Canada, known as the Family Compact, which was oriented to loyalist, Church of England and mercantile interests.

At the time, the Family Compact dominated many aspects of political and social life and their influence was far-reaching, including wide powers over patronage and the administration of law. For instance, the Upper Canadian system of criminal justice was

⁹ The term “common school” was used to refer to the schools which were established by inhabitants of a township or parish and which received government support. The common schools were essentially the same as the public schools.

¹⁰ See Bruce Curtis, Building the Educational State: Canada West, 1836-1871, (London: The Althouse Press, 1988, p.22.)

¹¹ Arthur Godbout, L'Origine des écoles française dans l'Ontario, (Ottawa: Les Éditions de L'Université d'Ottawa, 1972), p.36.

¹² Arthur Godbout, Nos écoles Franco-Ontariennes-Histoires des écoles de langue française dans l'Ontario, (Ottawa: Éditions de l'Université d'Ottawa, 1980), p.37.

modeled after the English system which granted many discretionary powers to local magistrates, who along with other executively appointed officials, effectively constituted local government until the 1830's.¹³ Under the influence of British and American utilitarian and humanitarian thinking, the reform movement in Upper Canada pressed for a more modern administration of criminal law.¹⁴ As Barry Wright has argued, the Family Compact was reluctant initially to change the discretion-laden structure of the administration of criminal justice rooted in an 18th century English "Tory Image of Justice", as it complimented their hierarchical social pretensions and to some extent sustained and legitimated their authority.¹⁵

Although the Family Compact's resistance to political and social reforms continued into 1830's, as Wright explains, the governing elite became more and more concerned with the potential of social disorder, which resulted from development such as increased immigration of poor Irish and British labourers, and growing political tensions arising from the increasingly powerful reform movement.¹⁶ For example, John Beverly Robinson, a leading figure in the Family Compact, came to voice his support for reform in the area of criminal law by 1831. In an address to a grand jury, Robinson went so far as to echo the ideas of English utilitarian reformer Jeremy Bentham:

¹³ Barry Wright, "Harshness and Forbearance: The Politics of Pardons and the Upper Canada Rebellion", in C. Strange ed., Qualities of Mercy: Justice, Punishment and Discretion, (Vancouver: UBC Press, 1996), p.81.

¹⁴ Ibid., p.81.

¹⁵ Ibid., p.81.

¹⁶ Ibid., p.82.

The prevalence of good example, the effect of moral and religious instruction, and the CERTAINTY rather than the SEVERITY of punishment (through prompt and vigilant administration of justice) may so far repress outrages and disorder.¹⁷

With this embrace of a more utilitarian approach to criminal justice a “Whig Image of Justice”, resulted in consensus on a wide range of reforms to the criminal law including the development of professional policing, reduced powers to the local magistracy, reduction of capital offences and the role of discretionary pardons, and construction of the Kingston Penitentiary.

Although they failed to prevent the rebellion, these changes to the administration of criminal law were later echoed in other social institutional and policy initiatives such as schools and training institutions. Under such conditions the establishment and reconstruction of popular public education came to be perceived as an important aspect of maintaining social and political stability in Upper Canada and as an important attribute the building of a modern state. Throughout the 1830's, politicians attempted to confront many concerns related to the general structure of the state as well as its social institutions. These concerns were also reflected in the direction of the educational structure. As Bruce Curtis explains:

...the Tories sought a highly centralized state structure, in which the efforts of local property would be closely guided by a social elite, loyal more or less to the state, church and supportive of the colonial connection; whereas the Reformers championed local property and local electoral democracy (of and for male proprietors), but at the margin of the party a political space existed for much more radical view. Many Reformers adopted a Smithian liberalism in which social order and stability were seen to be products of small-scale capitalist development. The maintenance of class distinctions figured less centrally in Reform than in the Tory policy.¹⁸

¹⁷ Ibid., p.82.

¹⁸ Curtis, supra note 5, p.23.

However, in order to prevent a breakdown of authority and community, the "old Tories" were driven to a consensus with regard to various political and social reforms which otherwise might not have been part of their political agenda. The grievances which led to the Rebellion of 1837-38 were directed at the political structure itself which maintained the Family Compact's hegemony. A consensus on selected reforms such as those related to criminal justice would not be enough to maintain the social hierarchy, ultimately spelling the end of the Family Compact's hegemony.

Following the Rebellion of 1837, British imperial authorities concerned with these events continued to exert control over the colony, sent representatives to manage and "solve" the problems in the two Canadas. Lord Durham, as Governor-in-Chief, spent four months in the Canadas evaluating and preparing a report which would ultimately have a wide influence on British imperial policy. Responsible government was intended to overcome the executive domination of government by the elites in both provinces. However, there were more ominous implications concerning social and cultural matters. Prior to handing in his report, Durham sent a dispatch from Canada in which he emphasized the differences and bitter national struggles between two nations what he called "the Canadians and the British".¹⁹ For example, when discussing the Representative System of government established under the Constitution Act, Durham stated the following:

...they [the "Canadians or French Canadians"] have used Representative System for the single purpose of maintaining their nationality against the progressive intrusion of the British race. They have found the British pressing upon them at

¹⁹ It is interesting to note that in his dispatch Durham used the term "Canadians" as being synonymous with Reformers and the term British as those in the colony loyal to the Crown of England". (see Durham to Colonial Secretary, Castle of St. Lewis, August 9, 1838. Public Archives of Canada, Report, 1923, "Calendar of the Durham Papers," pp.316-321.

every turn, in the retail trade, in all kinds of industrious enterprise, in religion, in the whole administration of government and though they are a stagnant people, easily satisfied and disinclined to exertion, they have naturally resisted an invasion which was so offensive to their national pride.²⁰

Thus, what Durham identified as fragmented nationalism was viewed as an archaic obstacle to modernization to be overcome. Consequently, in his now famed *Report on the Affairs of British North America*, Durham recommended that an imperial bill could bring about the union of Upper and Lower Canada which would accelerate the assimilation of the "French Canadians". As historian and political theorist Janet Ajzenstat contends, this was not a policy motivated by "racist" sentiment. She states:

When we approach the Report as a text in modern thought, ... [Durham] is indeed one of those liberals who supposes that particular traditions and particular loyalties must be discarded if liberal beliefs are to be disseminated and liberal justice is to prevail.²¹

In other words, "archaic" communal or national allegiances must be overcome by the acceptance of modern citizenship if the Canadian "problem" were to be fully resolved.

Lord Sydenham, was appointed to oversee the implementation of the successful union of the Provinces and administrative developments which identifiably relate to modern state formation. Lord Sydenham was influenced by utilitarian thinking and favoured this philosophy when coordinating the union of the Canadas.²² From this perspective, Sydenham, after establishing himself as governor-general, instituted a

²⁰ Elizabeth Nish, Racism or Responsible Government: The French Canadian Dilemma of the 1840's, (Toronto: The Copp Clark Publishing Company, 1969) p.11.

²¹ Janet Ajzenstat, The Political Thought of Lord Durham, (Kingston: McGill-Queen's University Press, 1988) p.5.

²² Allan Greer & Ian Radforth, Colonial Leviathan- State Formation in Mid-Nineteenth-Century Canada, (Toronto: University of Toronto Press, 1992) p.68; the principle of utility contends that "...the expediency of any act of government must be judged solely by its consequences and not regarded as ruled out in advance by some metaphysical system of rights."p.75.

legislative council and an elected assembly for the new United province which clearly favoured the policy of assimilation suggested by Durham. Sydenham later implemented a centralized system of local government in which the governor could exercise a degree of control and manipulation in order to "advance Crown policies".²³ Thus, under Sydenham, the "old Tory" political structure had been transformed in favour of "utilitarian institutional reform" which adopted new administrative strategies resulting in new forms of authority based on the "Whig image of justice".²⁴ However, as Bruce Curtis states:

...[local] representative governmental institutions were to stand between 'the people' and 'the Government,' disciplining the former, habituating them to the limitation of their political power, to the containment of their talents in 'a narrow circle' situating the source of their potential complaints in their own activity.²⁵

Thus, from this perspective, social institutions such as the schools could also be perceived as utilitarian tools for the socialization of the colonial population to its political role within the rising liberal state.

Ryerson, Liberalism and Public Education

The political turmoil of the 1830's accelerated efforts to establish a liberal model of "public education" in Upper Canada (or Canada West). However, no consensus could be achieved on the form of governance for such a system. The debate was essentially between those who supported a centralized system and those who believed in local control over educational issues. In 1839, an Education Commission, appointed by

²³ Ibid., p. 83.

²⁴ Wright, *supra* note 13, p. 103.

²⁵ Greer & Radforth, *supra* note 22, p.83-84.

Lieutenant-Governor Arthur examined the state of elementary education and produced a "plan for the 'diffusion of Education in Upper Canada'".²⁶ The Commission reported that the common school system within the colonies was in less than perfect condition. Among other things, they lamented the inadequate assistance provided to schools, the poorly qualified teachers and non standardized textbooks. Nonetheless, the Commission highlighted that the present system's problems were essentially the result of a lack of central authority over educational organization. The Commission's recommendations clearly condemn local control over educational issues in favour of a more centralized organization. As Bruce Curtis states: "what was at issue in these debates over educational organization and management was precisely the larger question of the nature of the state."²⁷

By 1841, the public system of education gained a solid foothold in Upper Canada under the School Act of that year. The significance of this piece of legislation was that for the first time provisions were made for qualifying denominational schools, or, as they were referred to, "dissenting schools" for provincial grants and as such these schools were included under the umbrella of the public system. Although this Act legally recognized certain rights for denominational schools in terms of provincial grants; the centralized control over educational matters would ultimately result in the establishment of common schools based on the liberal model which supported a "common" Christian and ethical code as part of Upper Canada's educational system. Under Egerton Ryerson,

²⁶ Curtis, *supra* note 5, p. 46.

²⁷ *Ibid.*, p.23.

the founder of Upper Canada's educational system, a centralized administration promoting this form of liberalism in educational policy would begin to take shape.

Prior to 1841, the provinces of Upper (Ontario) and Lower (Québec) Canada developed their own distinct form of education under provision of the Constitution Act of 1791. Each had their own particular sectarian conflicts over education, reflecting their particular social structures. However, in consequence of political events and Lord Durham's report, by 1840, both provinces were united under the United Provinces Act and consequently efforts were made to fuse their educational systems. This change in education was linked to larger projects of institutional modernization and state formation. The School Act of 1841 (or Day Act) embodied this first attempt at creating a "national" system of education under the United Provinces of Canada.²⁸ However, historical differences between the majority franco-Catholic population of Québec and the majority anglo-Protestant population of Ontario made the formation a united educational system unworkable.²⁹ Therefore, in order to accommodate both parties, a provision was made allowing for the establishment of separate schools as part of the public school system. Section 11, as the clause became known, stated that:

...any number of inhabitants of a different faith from the majority in such township or parish might choose their own trustees and might establish and maintain one or more schools under the same conditions and receive the same government support as other common schools.³⁰

²⁸ The Day Act was repealed by the School Act of 1843. Unlike its predecessor, the School Act of 1843 which was specific to Upper Canada (or Canada West), defined "separate schools" as applying solely to Roman Catholics and Protestants as opposed to being open to various faiths. Robert Stamp, Historical Background to Separate Schools in Ontario, Toronto, Ministry of Education, Queen's Printer, 1985, p.21.

²⁹ Robert Stamp, Historical Background to Separate Schools in Ontario, Toronto, Ministry of Education, Queen's Printer, 1985, p.19.

³⁰ Ibid., p.1. (The 1843 Act would later specify that in all cases, wherein the teacher of any such school shall happen to be a Roman Catholic, the Protestant inhabitants shall be entitled to have a

It is significant to note that at this time, the most vocal demands for the denominational schools clause were not from Roman Catholics, but came from Protestants who envisioned a series of Church of England schools.³¹ In spite of their efforts, the splintered Protestant denominations could not be reconciled and this vision (ie Church of England) would never materialize. Nevertheless, this original clause would be at the root of the many conflicts that followed.

When Egerton Ryerson accepted the position of Chief Superintendent for Upper Canada in 1846, both denominational and nondenominational schools were legally enacted by these previous Acts. During his thirty year term as chief superintendent, Ryerson worked diligently to set out a clear vision for the educational future of the province. Ryerson confronted the task of establishing a public educational system that would appeal to and accommodate all citizens of the province. Schools and 'mass' education were not new concepts to Ontario; but the notion of publicly funded education according to the Ryersonian model was an innovation. Ryerson, who had traveled extensively in order to study various educational models, was himself a liberal thinker, which influenced his perception of the needs of a modern state. According to Ryerson, a state system of public education should be controlled by the state and subject to state law.³² As superintendent of Upper Canada, Ryerson argued that the autonomy of various

school with a teacher of their own religious persuasion, upon application of ten or more resident freeholders or householders of any school district, or within the limits assigned to any town or city school ...-This also applied if the situation were reversed.

³¹ George Hodgins, Historical and Other Papers and Documents -Illustrative of the Educational System of Ontario, 1792-1853, (Toronto: L.K. Cameron, 1911) p.134-135.

³² Axelrod, *supra* note 6, p.39.

administrative educational authorities found in previous legislation was detrimental to the establishment of a provincial system of "public" education.³³ As Bruce Curtis states:

In Ryerson's plan, all educational authorities were to be 'responsible': that is, they were to be informed by a central authority, and educational duties imposed upon them were to be enforced by definite legal penalties. At the same time, all subordinate educational authorities were to report to the centre about their activities. And the chief superintendent himself would be authorized to by-pass all intermediate channels to intervene directly in educational matters at the lowest level of the systems... This was a proposal for the saturation of civil society with procedures and practices of a regulatory nature.³⁴

Ryerson's School Act of 1846³⁵, embodied all of these ideas and presented radical changes to the educational organization of Canada West. Because of its emphasis on central authority, many people reacted negatively to the Act. They argued that the Act basically took the responsibility for education away from the 'people' and placed it in the hands of the 'executive'.³⁶ Nevertheless, even under mounting pressure, Ryerson did not back down from his vision of a centralized authority for education.

In the same perspective, Ryerson also demonstrated concern with regard to the potentially damaging effect that denominational education could have on the development of a public education system. Ryerson firmly believed that education as civil institution should not be biased by sectarian or party conflicts and consequently, he envisaged a division between sectarianism and the state in educational matters. Ryerson expressed tolerance of all Christian religious denominations and their representation in public education. However, he was somewhat reluctant to accept the presence of separate

³³ Curtis, *supra* note 5 p.113.

³⁴ *Ibid.*, p.114.

³⁵ An Act of the Better Establishment and Maintenance of Common Schools in Upper Canada, 9 Victoria, Chap.20.

schools as part of a public educational system. In a letter dated April 24, 1852, Ryerson states his position quite clearly:

I always thought the introduction of any provision for separate schools in a popular system of common education like that of Upper Canada, was to be regretted and inexpedient; but finding such a provision in existence, and that parties concerned attached great importance to it, I have advocated its continuance, leaving separate schools to die out, not by force of legislative enactment, but under the influence of increasingly enlightened and enlarged views of Christian relations, rights and duties between different classes of the community.³⁷

These words expressed by Ryerson portrayed a liberal modernist vision for the future of the educational system as well as Canada; one that saw Canada and its educational system founded on a united Christian ethos as opposed to any specific sectarian values.

Although Ryerson was himself a religious man who believed strongly in Christian principles, his vision, like that of most Canadians at this time, was not a universalist view of the modern state but one that centred around Christian values. As Ronald Manzer states:

The majority of nineteenth-century liberals rejected the solution of strictly secular public schools. They insisted on separation of the state from the church...but they also were committed to founding public institutions, including public education, on religious principles.³⁸

Consequently, education, as a civil institution, would reflect the Canadian population's values which at this time were predominantly Christian. In a document he wrote in 1846 entitled *Report on a System of Public Elementary Education for Upper Canada*, Ryerson

³⁶ Ibid., p.118-119.

³⁷ Sissons, *supra* note 1, p.20.

³⁸ Manzer, *supra* note 4, p.35

stated that "Christianity was the prevailing principle of Canadian life."³⁹ Therefore, even if Ryerson supported a non-sectarian educational system, he endorsed some form of instruction based on uniform Christian values.⁴⁰ Moreover, Ryerson saw a clear distinction between sectarian education and Christian education. Even if Ryerson tolerated denominational education, he was convinced of its future collapse under the pressure of a growing "enlightened" liberal state⁴¹. For Ryerson, a secular education system would necessarily take into consideration the general Christian values which many Canadians shared at that time.

Thus, during this period, the liberal modernist perspective was intermingled with a conservative attachment to general Christian values and was not totally structured around secular concerns. Moreover, Ryerson held that he would not refuse what the law had granted to separate schools. Ryerson stated in his 1847 report: "I was not prepared to condemn what had been unanimously sanctioned by two successive parliaments."⁴² He respected the letter of law, although it is not certain whether Ryerson would have accepted the improvements which Catholics demanded. As Albert Plante contends, although Ryerson respected the laws governing the establishment of separate school, he never quite understood the spirit of such laws.⁴³ Ryerson saw separate schools as a threat

³⁹ J. K. Mackay, "Religious Information and Moral Development", The Report of the Committee on Religious Education in the Public Schools of the Province of Ontario, Ontario Department of Education, February 3, 1969, p.6.

⁴⁰ Sissons, *supra* note, 1, p.20.

⁴¹ Ryerson believe that eventually Canadian citizens would accept a "enlightened" Christian view in regard to education and would no longer require sectarian schools.

⁴² Stamp, *supra* note 29, p.21.

⁴³ Albert Plante, Les Écoles séparées d'Ontario, Collection "Relations", No3, 1951, p.41.

to the establishment of a truly “public” educational system thus thought that fewer separate schools ultimately meant a better system.⁴⁴

Nevertheless, during his tenure as superintendent of Canada West, there continued to be significant legislative enactments which upheld minority denominational rights to establish schools. The first piece of legislation under Ryerson's administration as Chief superintendent of Education for Canada West was the Common School Act of 1846. Although the Act presented important changes as far as educational administration, few if any changes were made in the separate schools clauses.⁴⁵ In 1847, a more significant change occurred. An Act to Amend the Common School Act of Upper Canada, now granted the decision to establish a separate school in a city or town to the municipal council as opposed to the previous practice of allowing "ten or more freeholders or homeowners" to establish such a school on their own initiative. The problems resulting from such a legislative decision were made evident by subsequent acts. In 1850, undoubtedly due to pressure by Catholic religious minority groups, it was now mandatory for municipal councils to Act on a petition demanding a separate school. In drafting the Act of 1850, Ryerson began moving toward an electoral system of self-government in terms of school trustees.⁴⁶ Nevertheless, the underlying principles of the Act had not changed. Ryerson still maintained his emphasis on the benefits and needs of an educational system based on the centralization of authority and administration.

⁴⁴ Ibid., p.41.

⁴⁵ Ibid., p.3.

The changes were mostly in terminology- for example, the term "school section" was substituted for "school district".

⁴⁶ Ibid., p. 127.

However, problems would still be raised under this Act. In 1850, the Toronto City Council had refused the application of Roman Catholics for a second school in the municipality.⁴⁷ Bishop Armand-François-Marie de Charbonnel, a strong advocate of separate schools, took the matter to the Court of the Queen's Bench. The Court upheld the town council's decision that according to the letter and grammatical construction of the law a city or town constituted only one school district and that the council was under no legal obligation to grant their request. As Albert Plante states: "Even Ryerson understood that this was pushing legality too far"⁴⁸. In 1851, separate school supporters were granted the right to establish schools in each ward of a city or town.

Perhaps the most obvious indication of the problems with the 1850 Act was the introduction of the subsequent Taché Act of 1855⁴⁹. Under this act, separate school trustees now dealt directly with the Chief Superintendent of Upper Canada West when establishing a local separate school thus eliminating the delays by uncooperative municipal councils. Nonetheless, as Robert Stamp states "the significance of the act lay in how it was passed, rather than what it said".⁵⁰ Firstly, the act was introduced by Etienne Pascal Taché, a cabinet member from Lower Canada and secondly, its passing rested on the strength of votes from Lower Canada.⁵¹ The bill, when presented in the House, was adopted by a vote of 36 in favour to 11 opposed. It is significant to note that of those 36

⁴⁷ Ibid., p.4.

⁴⁸ Ibid., p.42.

⁴⁹ An Act to Amend the Laws Relating to Separate Schools in Upper Canada, (1855) 18 Victoria, Chap.131.

⁵⁰ Stamp, supra note 29, p.4.

⁵¹ Ibid., p.4.

in favour, only 8 were from Upper Canada and of the 11 opposed only 1 was from Lower Canada.⁵² Under these circumstances it is not surprising that the more militant Protestants of Upper Canada were embittered by its passing. A similar situation occurred when the Scott Act was introduced eight years later in 1863.

The Scott Act⁵³, was essentially introduced to remove obstructions to the administration of separate schools particularly in the establishment of rural schools and the obtaining of tax support and government grants.⁵⁴ During the debate over the Scott bill on May 1st, Hon. H. M. Foley, Postmaster General, from North Waterloo, foreshadowed the spirit of upcoming Confederation when he defended Catholic separate schools in Ontario. As Walker explains:

Foley maintained that the whole Roman Catholic body in Upper Canada backed the amendments to the school law, and that the facilities offered to Lower Canadian Protestants to have their own schools should influence Upper Canadian Protestants to be generous with Catholics.⁵⁵

Nonetheless, opposition to the bill was strong in Upper Canada and consequently the bill was amended several times. As with the Taché Act, the bill passed on the strength of Lower Canada votes even though the Act only applied to Upper Canada. The Scott Act was introduced by a vote of 76 to 31, with all the 31 votes against coming from members of Upper Canada and only 22 voting for the legislation.⁵⁶ Even with the bill's passing, the question of whether the Scott Act was to be a final settlement on the rights accorded to

⁵² Plante, supra note 43, p.49.

⁵³ An Act to Restore to Roman Catholics in Upper Canada Certain Rights in Respect to Separate Schools, (1863) 26 Victoria, Chap. 5.

⁵⁴ Walker, supra note 2, p. 251.

⁵⁵ Ibid., p.267.

⁵⁶ Ibid., p.282.

separate schools was unclear. As Franklin Walker commented, at that time, certain publications such as *The Mirror* expressed hope that "the bill would finally remove the separate school question from the area of political discussion."⁵⁷ However, Catholics could not be satisfied with a bill, the main objective of which was to correct the current state of denominational education. Under the bill, separate schools were now subject to provincial inspectors, the government retained control of the curriculum, textbooks and teacher training.⁵⁸ Moreover, Catholics were concerned that the Scott bill which had been considerably amended in order to accommodate various interests opposed to it, would be regarded as a final settlement.⁵⁹ As Bishop Lynch expressed in *The Canadian Freeman*, which was one of the more important Roman Catholic publications in Upper Canada:

We regard the slight concessions contained in Mr. Scott's bill only in the light of an installment of our legitimate demands...If we concede this, we cannot complain of any ill-usage we may be obliged to endure hereafter.⁶⁰

Although the Scott Act eliminated many of the problems with the recognition of separate schools, there remained the formidable challenge of expanding this system under an often politically hostile population of Upper Canada where ideological as well as sectarian differences were rife.

B.N.A. Act (1867) as a Social Contract

As previously stated, the Durham report and subsequent reforms represented changes that reflected the attributes of a modern state. Nonetheless, as Brian Young

⁵⁷ Ibid., p.284.

⁵⁸ Stamp, supra note 29, p.24

⁵⁹ Unlike the amended Scott bill which maintained the Chief Superintendent's authority over separate schools, the original Scott bill proposed that certain powers such as teacher qualification be extended to Roman Catholic trustees and that Roman Catholic clergymen would be ex-officio trustees of separate schools. (Walker, supra note 2, p.272.)

describes “In the years after the Conquest, British military and then civil administrators came to accept religious, ethnic, linguistic, landholding, and legal pluralism as the price of social peace.”⁶¹ This political reality obliged compromise as epitomized by the Quebec Act of 1774. The BNA Act represents a more multifaceted constitutional development than that which rose out of the Durham Report. The Compact theory of Confederation reflected a recognition that a modern single Canadian identity was elusive, that communal nationalism would continue to co-exist in defiance of Durham’s assimilationist agenda. However, the tensions between J. A. Macdonald’s National Policy and G.E. Cartier’s aspirations for French Canadians would remain unresolved.

The legislative history of denominational education in Upper Canada can be compared to a chain in which every new piece of legislation was some how linked to its predecessor. From this perspective, many parts of the B.N.A. Act were carried over from previous legislative enactments. The Scott act of 1863 was essentially the basis for section 93 of the B.N.A. Act which stated:

In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:
(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which Class of Persons have by Law in the Province at the Union.⁶²

Although section 93 of the Act was of particular importance for the future of education in Ontario and Canada, Robert Stamp explains, it caused little controversy at the time of

⁶⁰ Walker, *supra* note 2, p. 285.

⁶¹ Greer & Radforth, *supra* note 22, p.99.

⁶² British North America Act (1867), 30 & 31 Victoria, Chap. 3.

confederation.⁶³ In fact, many saw it as a necessary compromise to protect Québec's Protestant minority and Ontario's Roman Catholic minority.⁶⁴

From this perspective, it would seem that the B.N.A. Act could be, and was, perceived by many as a social contract between the two majority founding people of Canada. At the time of confederation, the Fathers of Confederation themselves repeatedly referred to the 1867 BNA Act as a pact or *entente*.⁶⁵ As such, for the historical actors, the BNA Act held the terms which reflected the spirit of this compromise. Nonetheless, it is important to note that the two major parties participating in this social contract were not on an equal footing. As G. F. G. Stanley has commented, Confederation was essentially a struggle between English Canadians for supremacy and French Canadians for survival.⁶⁶ Nonetheless, Confederation was an attempt to re-establish the fundamental principles of an understanding between the two historically dominant races in Canada, "equality of race, equality of religion, equality of language, equality of laws".⁶⁷ As we shall see, for both Catholics and francophones, the "spirit" of Confederation represented in the BNA Act was understood in terms of a system of "natural law" and "natural rights" rather than a positivist interpretation. Therefore, such clauses as section 93 presented a contradiction to the rising orthodox liberal state of late 19th and early 20th century. The social compact as outlined during Confederation would run into problems when approached in terms of legal formalism and positivism.

⁶³ Stamp, *supra* note 29, p.6.

⁶⁴ *Ibid.*, p.6.

⁶⁵ Ramsay Cook, Confederation, (Toronto: University of Toronto Press, 1967), p.106.

⁶⁶ *Ibid.*, p.94.

⁶⁷ *Ibid.*, p.105.

It is important to remember that national struggles between the dominant cultures were not resolved during Confederation but rather displaced to new levels. As alluded to in chapter 1, the authority to resolve conflicts became more centralized and subject to the rule of the majority. Law and the courts, which reflected the liberal majority perspective would play a significant role in “resolving” these issues. However, the legalization or institutionalization of conflicts did little to change the nature of the conflicts. Again they were brought to a different level, one which could more easily be manipulated by the majority. As a result, section 93 of the B.N.A. Act, which seemingly entrenched a compromise of religious and linguistic differences, proved to be the catalyst for many future conflicts regarding Catholic education.

By legally sanctioning both separate and common schools, the B.N.A. Act set the stage for future conflicts regarding education rather than constituting a lasting compromise agreement on educational policy. There continued to be mounting concern in the provinces regarding the future structure of the educational system. As Ronald Manzer explains, although pressure came from various ideological forces, sectarian differences between Protestant and Catholics were prominent. Consequently, in the period following 1867, Ontario as well as other provinces were fraught with intense social conflicts regarding educational issues between the majority liberal reformers allied with the sectarian Protestants who supported a common school system based on Christian values and the minority Roman Catholics who desired the maintenance of a separate school system. It is also important to keep in mind that the most vocal opponents of separate schools at this time were the extremist Protestant Orange Lodge which campaigned numerous times to have separate schools abolished. Education represented a fundamental

issue that related to identity, state citizenship and assimilation. The majority liberal modernizers rejected sectarianism in a public school system, whereas, the francophone and anglophone Catholic minority adopted a more conservative perspective which envisaged the continuation of a close relation between church and the future Canadian state.⁶⁸ Thus, Catholics saw religion as part of the educational system and therefore supported the idea of denominationalism as being an essential component to a national system of education.⁶⁹ Moreover, franco-Catholics in particular considered religion as an extension of their cultural and linguistic heritage, and as such looked at it as a natural right. However, in order to effect the transformation of a traditionalist sectarian society into a modern liberal state, Catholic's denominational rights to education would have to be abrogated and in the period following Confederation, the legal arena became a forum for redefining the vision of Canada's and Ontario's educational policy.

Maintaining Order and Building Community

As previously mentioned in chapter 1, an important aspect associated with the rise of the modern liberal state is the compromising of traditional community attachments and identity with that of a nationality which emphasizes individualism and citizenship. Following Confederation increased efforts were made to consolidate the newly-formed nation as well as its citizenship. Thus, schools were certainly part of this effort. As Paul Axelrod states:

Middle-class citizens, gradually rising to prominence in business and politics in pre-industrial Canada, believed that a prosperous and productive society required

⁶⁸ Walker, *supra* note 2, p.2.

⁶⁹ Manzer, *supra* note 4, p.51.

a population that was orderly, loyal, and respectful of the growing authority of the state. Playing the role of institutional missionaries, schools could serve society by cultivating appropriate attitudes among students. This was considered particularly vital in the case of immigrant working-class youth whose conspicuous presence affronted middle-class sensibilities.⁷⁰

Moreover, there was a common belief among many prominent educational and political figures that "an uneducated public was not only ripe for crime, it was ungovernable".⁷¹ Therefore, schools as social institutions of mass participation were a part of an array of new state initiatives designed to bring under control the "ungovernable" and criminal elements of society. During this period, an increasing level of juvenile crime occurred in growing urban centres. Although not directly related to the goal of reform or crime control, the decision to implement a publicly supported compulsory education system in 1871⁷² resulted in drawing certain segments of the population (namely child welfare and juvenile delinquents) under the control of the modern state. Such "systems of surveillance" were premised on the liberal "belief" in the correlation between delinquency and lack of education. Thus, an important factor in establishing the compulsory educational system was that education was perceived (or made to be perceived) as a key element for eliminating the major problems in society including pauperism, crime and unemployment.

In the Annual Report of the Ontario Teacher's Association in 1875, Archibald Macallum, a school teacher in Hamilton, commenting on the subject of compulsory

⁷⁰ Axelrod, *supra* note 6, p.124

⁷¹ S. E. Houston & A. Prentice, Schooling and Scholars in Nineteenth Century Ontario, (Toronto: University of Toronto Press), p.100.

⁷² In actuality compulsory attendance was not enforced until 1891 and preliminary attempts at enforcement met very little success.

education, stated that "as education increases, pauperism decreases... [and that]...an ignorant person, on an average, committed ten times the number of crimes that one not ignorant did..."⁷³. Macallum was basing his assessment on Ontario jail figures of 1870 which revealed that 1722 or 27% of the prisoners could not read nor write and 427 were under sixteen years of age.⁷⁴ Obviously, Macallum's figures were not conclusive and any conclusion drawn from them could not be sustained.

Although such figures were cited as reason for implementing the educational system, in reality there was a growing controversy surrounding the role that these schools would play in "salvaging and educating" juvenile delinquents and problem children.⁷⁵ Many were of the opinion that if the government required negligent parents to send their vagrant or delinquent children to these common schools, respectable working-class parents would be compelled to remove their children.⁷⁶ Thus, a conflicting view arose about compulsory education. How could the schools be expected to curb the problem of the new urban youth when the kids who were technically in need of this "education" were being excluded? In a letter to the editor of the *Globe* of August 26 1865, prior to the establishment of the common schools, Toronto school trustee, Charles R. Brooke stated:

The fact is,... the city schools are not adapted to the wants of that [vagrant] class; they are too respectable; these boys roam about the wharfs and streets, shoeless and unemployed, ready to commit petty crimes, would be out of their element in our decent schools; it requires an entirely different organization to reach them.⁷⁷

⁷³ Prentice & Houston, *supra* note 71, p.176-177.

⁷⁴ *Ibid.*, p.176.

⁷⁵ *Ibid.*, p.306.

⁷⁶ *Ibid.*, p. 307.

⁷⁷ *Ibid.*

The "entirely different organization" which would attempt to meet the needs of the "vagrant class" was to be the so-called "industrial schools"⁷⁸. Consequently, this institutional division in classes of youths did have a great significance as a means of social control and surveillance.

Manitoba School Question and the Extension of Rights

In the post Confederation period, the relation between denominational and public education would be recast, its foundation solidified through various Acts related to compulsory educational system and other forms of social control. As Paul Axelrod states: "The attempts by schools to reshape values and beliefs according to Anglo-Saxon traditions and norms were especially intense- and suspect, both in theory and in practice."⁷⁹ Moreover, Arthur Godbout argues, it is important to remember that until Confederation, in 1867, both anglophone and francophones enjoyed the same privileges and suffered the same setbacks under the educational system and thus developed at a relatively similar rate.⁸⁰ However, the rise of the liberal public education system after Confederation was now empowered with the control over the educational system. Furthermore, with separate schools as part of the public school system, the authorities which sought to promote a liberal notion of "a common school for a common citizenship"

⁷⁸ These institutions would "receive any vagrant, incorrigible, or refractory youngsters who might disrupt the common school classroom." Moreover, as opposed to reformatories, industrial schools were not necessarily only for youngster who broke the law, they also accepted children who were homeless, neglected, destitute or incorrigible rather than delinquent. S. E. Houston & A.L. Prentice, Schooling and Scholars in Nineteenth-Century Ontario, (Toronto: University of Toronto Press, 1988) p.306.

⁷⁹ Axelrod, *supra* note 6, p.124.

⁸⁰ Godbout, *supra* note 12, p.34.

were now in a position to place greater influence on how denominational schools would develop or would be limited.

As we have seen, denominational education rights, although formally open to other denominations, were predominantly a Catholic heritage understood to be legally and constitutionally protected under the section 93 of the B.N.A. Act.⁸¹ Moreover, these rights were closely linked to minority concerns in Quebec and Ontario. However, following Confederation, the first major legal conflict came out of the new province of Manitoba. The well-known Manitoba schools question of the 1890's provides a good example of how law reflected and legitimated the liberal assimilationist educational policy in Canada.⁸² However, before analyzing the legal decisions related to the Manitoba schools question, it is important to understand the demographic and political changes which paralleled the events in Manitoba.

In the early 1870's, the province of Manitoba was demographically balanced. The province contained an almost equal number of francophones as anglophones, and of Roman Catholics as Protestant.⁸³ From 1870's to 1890's, the province of Manitoba witnessed a dramatic demographic shift which saw the population increase almost fourteen-fold, mostly by Protestant anglophone settlers from Ontario. As the 1891 census revealed, out of a population of 152 500, the Manitoba population now consisted of only

⁸¹ Although there were some Protestant separate schools in existence, they were of little consequence. Both Robert Stamp and Franklin Walker who are considered the authorities on Ontario's educational make no serious reference to them in their major works.

⁸² Although, the thesis will deal almost exclusively with Ontario's educational history, the Manitoba schools question (1890) is of a significant historical and legal importance in order to understand subsequent cases in regard to the separate schools issue.

⁸³ Gordon Bale, Law, "Politics and the Manitoba School Question: Supreme Court and Privy Council", The Canadian Bar Review, Vol. 63, No. 3, September 1985, p.468.

20 571 Catholics (13%) and 9 949 (7%) francophones.⁸⁴ As Gordon Bale contends..."the great demographic changes in Manitoba from 1870 to 1890 made an assault on the linguistic and educational rights of French Canadians politically feasible."⁸⁵

In the late 1880's, Dalton McCarthy, a young Conservative member who was outraged by issues such as the Jesuits Estates Act and the Riel affair, mounted a campaign against what he perceived as unwarranted francophone and Catholic privileges. McCarthy campaigned as the leader of the Equal Rights Association, and although driven by Orange bigotry, he appropriated the discourse of liberal modernizers, stressing majority rule and democratic legislative authority. This campaign drew substantive support, first in Ontario then westward in Manitoba. He argued for a nation with a shared experience and language, although this ultimately meant on anglo-Protestant terms.⁸⁶

Speaking to an audience in Barrie, in 1887, McCarthy stated:

There is no feeling so strong - no feeling which all history proves so strong - as the feeling of race...Do (the French) mix with us, assimilate with us, intermarry with us? Do they read our literature or learn our laws? No, everything with them is conducted on a French model; and while we may admire members of that race as individuals, yet as members of the body politic I say that they are a great danger to the Confederacy.⁸⁷

McCarthy's message appealed to many anglo-Protestants who tended to be supportive of anti-Catholic and anti-francophone policies. Moreover, many liberal reformers would also be inclined to agree with some of his arguments. Thus, as support grew for McCarthy's message in the west, Manitoba's political leaders were pledging themselves

⁸⁴ Ibid., p.468.

⁸⁵ Ibid., p.469.

⁸⁶ W.L. Morton, Manitoba-A History, (Toronto: University of Toronto Press, 1957) p.242.

to abolish the dual system of education (Protestant and Catholic) as well as the official use of French in the province.⁸⁸

In 1890, the provincial Liberals of Thomas Greenway, secure in a majority government and under a wave of popular support for the liberal modernist notions, enacted the *Manitoba Public Schools Act* which replaced Manitoba's dual denominational system with a compulsory non-sectarian system. However, as George F. Stanley states :

The change, when it came, was not the result of any wide spread local agitation, but of religious bigotry aroused elsewhere by the North-West Rebellion of 1885, the execution of Louis Riel and the passage, in Québec, of a provincial Act compensating the Jesuits for the lands confiscated by the Imperial government after cession of Canada.⁸⁹

Franco-Catholics (as well as anglo-Catholics) assumed that their rights had been guaranteed by section 93 in a manner that transcended legislative authority.

The legislation was challenged under section 93 and when the case came before the Judicial Committee of the Privy Council, the question was centred on the division of power between provincial and federal governments over education. However, it was impossible to ignore the heavily charged social issues which lay behind the question. A decision had to be reached knowing the tremendous consequences on the country's future educational policy toward minorities both linguistic and religious. Its first decision in 1892 the *City of Winnipeg v. Barrett, Logan*⁹⁰, granted the power to the province to refuse

⁸⁷ Ramsey Cook, Craig Brown & Carl Berger, Minorities, Schools and Politics, (Toronto: University of Toronto Press, 1969) p.ix.

⁸⁸ Morton, *supra* note 86, p.244.

⁸⁹ George F. Stanley, A Short History of The Canadian Constitution, (Toronto: The Ryerson Press, 1969) p.129.

⁹⁰ *City of Winnipeg v. Barrett, Logan*, (1892) A.C. 445 (P.C.)

funds to any denominational schools which had not established claim to such funds prior to the entry of the province into Confederation.⁹¹ It is important to note that this judgement overturned the Supreme Court of Canada appeal in the case which found the *Manitoba Public Schools Act* to be *ultra vires*.⁹²

In a subsequent decision in 1895, *Brophy v. Attorney General of Manitoba*⁹³, the Privy Council contended that in such a case, if the aggrieved minority wished to correct the situation, they still had the right to appeal to the Governor General in Council who could request the Dominion government to pass remedial legislation.⁹⁴ However, the federal government was reluctant to override the province's authority on educational questions and consequently no such legislation was passed.⁹⁵ Thus the Privy Council set an ambiguous precedent. On the one hand, provinces were to be autonomous as far as educational questions were concerned but on the other hand minorities in provinces would have the right to take a federal political route to settle any outstanding grievances.

Nonetheless, the deeper significance of both cases was that they clearly demonstrated the conflicting ideologies which were locked in a struggle to assert their view in regards to education and to some extent the nature of the Canadian state. The request for effective protection of rights guaranteed by s.93 was portrayed by opponents as undemocratic denial of majority rights, as articulated through the elected legislature. Franco-Catholic appeals on the other hand were based in s. 93 and likely understood as

⁹¹ Stanley, supra note 89, p.130.

⁹² *Barret v. City of Winnipeg*, (1891) 19 S.C.R. 374 (S.C.C.)

⁹³ *Brophy v. Attorney General of Manitoba*, (1895) A.C. 202 (P.C.).

⁹⁴ Stanley, supra note 89, p.130.

⁹⁵ *Ibid.*, p.130.

deriving from a conception of natural law which transcended legislative authority, one which accommodated group rights.

The Manitoba cases also clearly demonstrate the arbitrary legal style which was used in arriving at these judgements. As Gordon Bale contends:

The Manitoba School cases graphically illustrate the deficiencies of the Privy Council's formalistic judgement style which was based on the idea that the true meaning of the construction will emerge by simply applying sound canons of construction. This formalism gives judges a Promethean capacity to transform the law in accordance with their own design by picking and choosing among conflicting canons of construction. By concealing policy decisions behind a façade of literalism, a judge reduces his public accountability.⁹⁶

This formalism which had its roots in positivism and liberalism contradicted the Roman Catholic minority appeals which perceived s.93 in terms of natural law or natural rights. As the Manitoba case also demonstrates, this liberalism was translated into a particular educational policy. The liberal modernist view saw education as utilitarian, secular and thus favoured the division of church and state in educational matters; whereas minority franco-Catholics (as well as anglo-Catholics) viewed religion as an essential element in order to maintain cultural survival and thus saw liberalism with its secularism and its emphasis on the autonomy of the individual as an obstacle to these goals.⁹⁷

The Manitoba schools question could be regarded as the first test of the "social contract" between the two majority founding nations of Canada. In Manitoba the issue had been arbitrarily settled in favour of a majority liberal perspective; however, in provinces like Ontario, the legal questions surrounding the extension and funding of separate schools had not yet been answered. The liberal modernist drive for nation

⁹⁶ Bale, *supra* note 83, p. 465.

⁹⁷ Lovell Clark, The Manitoba School Question: Majority Rule or Minority Rights?, (Toronto: The Copp Clark Publishing Company, 1968) p.76-77.

building combined with the social landscape of Ontario would make education a contentious issue.

As a result of the Manitoba Schools Question and other events, the late nineteenth and early twentieth century saw an intensification of the social conflicts between anglo-Protestants and francophone and anglophone Catholics groups. However, the issues raised in the Manitoba case, were going to be of great significance to the development of Ontario's education system. Consequently, if the courts were to be the arbitrators of these struggles, as had been the cases in Manitoba, important questions are raised. Whose interests were they representing? Whose vision of the Canadian society were they upholding and at who's expense? These questions will be further analyzed in the following chapters. More specifically, it will stress the role of the judiciary in limiting the extension of denominational education and consequently Catholic and francophone culture. Moreover, it will demonstrate that the positivism in legal decision making at various levels of the judiciary reflected and legitimated a liberal modernist direction in educational policy for Ontario.

III

Separate Schools & Minority Language Rights

For francophones living outside Manitoba, the events around the education crisis there were not only perceived as a blow to their language and culture, but represented a breach of a compact that was made at the time of Confederation. The Judicial Committee of the Privy Council's ruling against the maintenance of franco-Catholic schools in Manitoba had ensured that western Canada would develop under the cultural terms of liberal modernizers who largely represented the anglophone majority. Moreover, the more outspoken sectarian anglo-Protestant group which espoused policies of assimilation and nativism¹ based on racism rather than liberal utilitarianism, appropriated the language of the modernist to advance their racist agenda. Cartier and other francophone leaders had thought that expansion of the dominion westwards would strengthen the "francophone fact" in Canada. By not recognizing the "pact" which had been achieved at Confederation, the Privy Council legitimated the limits placed on the francophone minority's cultural aspirations, especially outside Québec. Moreover, the failure to acknowledge these aspirations in terms of the integral relation between language and religion in educational matters established a precedent that assured subsequent decisions would be subjected to the same narrow interpretation.

¹ Nativism refers to the policy of favouring the majority of established dominant inhabitants as opposed to minorities and immigrants. It includes groups such as the liberal modernizers and sectarian Protestants, in short, an informal coalition of interests. In the context of Canadian history, nativist attitude were reflected in the policies which sought to assimilate the immigrants, aboriginals and to some extent French Canadians to the dominant anglo-Protestant culture.

Within this context, this chapter will consider crucial events in late 19th century Ontario leading up to the controversial Regulation 17 and the subsequent *Ottawa Separate Schools Trustees v. Mackell* case of 1917. It will demonstrate that under the "progress" of the modern Canadian liberal state, separate schools were increasingly subjected to pressure of liberal ideology of a uniform public school system. As discussed in chapter I, the implementation of the public system generated forms of surveillance, control and regulation of the minority Catholics in Ontario and, in particular at the franco-Catholic population. As we shall see, these forms of surveillance were subsequently reflected and legitimated by the judiciary.

Historical Context of Early 20th Century Ontario

The post-Confederation period saw continued conflicts between Canada's two main cultural groups. Events such as Louis Riel's execution, the controversy over the Boer War, and the Manitoba Schools Question in the late 19th century increased tensions between the majority anglo-Protestant and the minority Catholics and francophones in Canada. As W.G. Fleming describes it, the situation in Ontario was further complicated by divisions among Catholics:

The main religious and linguistic minorities involved were to some extent overlapping, since an overwhelming percentage of franco-Ontarians were Roman Catholic. On the other hand, many English-speaking Roman Catholic (mostly Irish) Ontarians had no desire to promote French-language rights and were at times actively hostile toward them.²

Tensions between sectarian Catholics and Protestants, francophones and anglophones were at a high point at the turn of the century and although the conflicts centred on the

² W.G., Fleming, Education: Ontario's Preoccupation, (Toronto: University of Toronto Press, 1971) p.252.

traditional issues of religious and linguistic rights, changes in Canada's demographics combined with the modern drive toward rapid industrialization and nation building, generated new tensions. These gave rise to policy debates around matters such as immigration, the imperial relation, and stimulated renewed growth of French Canadian nationalism. These issues, although traditionally seen as mainly national questions, were also closely linked to regional debates and conflicts.

For minority groups such as French Canadians, this period of rapid growth presented a particular threat. Between 1896 and 1914, the arrival of 3,059,220 immigrants dramatically increased Canada's population. However, as Donald Avery points out "Both the goals and recruitment strategies of immigration were determined by English Canadians..."³ Consequently, between 1901 and 1911, only 2 percent of Canada's immigrant population was French speaking.⁴ Thus, for many French Canadians, this increase in population represented a reduction of their power and political voice.⁵ In 1910, historian Abbé Lionel Groulx cautioned French Canadians of the obstacles to come. He states:

Our apprehensions become much more lively, when we see forming in the vast Canadian northwest a new people, strangers to our beliefs, to our race, to our political ideal, a people which grows by the millions, and which we see will not respect the federal compact any more than is necessary. If for twenty years we have only ceded our rights, what will become of us, of the official rights of our language, of our provincial franchise, of our religious liberty, when instead of a third of the population of Canada, we have become only a thirtieth?⁶

³ Donald Avery, Reluctant Host: Canada's Response to Immigrant Workers, 1896-1994, (Toronto: McClelland & Stewart, 1995), p.11.

⁴ Craig Brown & Ramsey Cook, Canada 1896-1921, (Toronto: McClelland and Stewart, 1974) p.127.

⁵ Brown & Cook, *supra* note 4, p.127

⁶ *Ibid.*, p.127-128.

Although these comments were primarily directed at French Canadians within the Canada/Québec context, these words foreshadowed the political turmoil which was to take place in Ontario.

Nevertheless, the situation for francophones in Ontario was slightly different. Ontario's francophone population had actually benefited from the expansion. Between 1901 and 1911, Ontario's francophone population rose by roughly 28 to 56 percent depending on the source.⁷ Since the 1880's, francophones had been settling in the eastern portion of Ontario and by 1911 this section of the province was largely populated by French Canadians. Moreover, some French Canadians, prompted by the discovery of mineral deposits as well as lumbering activities, migrated from Quebec to the northern part of Ontario.⁸ As a result of this increased clout, some francophones in the province began to conceive plans for organizing and consolidating their strength. After all, with the western part of the country becoming increasingly populated by English speaking citizens, now more than ever, the francophones of Ontario had to assert their place within the nation. Nonetheless, the need for action was not apparent to all. Francophones of Ontario needed a broad issue which could spark interest and unite French Canadians to assert their rights. Denominational education and the bilingual schools in Ontario proved to be the main issue for French Canadians to reassert their rights and political strength.

⁷ Although the official Census of Canada, 1921 report states that the francophone population in 1911 stood at 202 457. In her article, "The Ontario Bilingual Schools Issues", Marilyn Barber points out that other sources of the period including ecclesiastical census and several newspapers cited the official number in 1911 as being 247 000. Regardless, the francophone population of Ontario increased quite significantly during this period.

⁸ Marilyn Barber, "The Ontario Bilingual Schools Issue: Sources of Conflict", in Craig Brown, Minorities, Schools, and Politics, (Toronto: University of Toronto Press, 1969), p. 65.

Bilingual Education in Ontario

Francophone intellectuals, religious and political leaders were increasingly concerned with the important role of education in the survival of their culture. The developing French nationalism collided with three main social groups. Firstly, the sectarian Irish Catholics who, although seeking to maintain denominational rights, considered the conflicts over francophone linguistic rights as a threat to separate schools. Secondly, the sectarian anglo-Protestants who attempted to reassert the Anglo-Saxon character of the province and finally, the liberal modernizers who sought to develop a modern state and citizenship along orthodox liberal lines.

Politically, in 1905, the thirty-two year dominance of Liberal governments in Ontario had come to an end and the Conservatives who in 1890 demanded "English only schools" were now at the helm of Ontario and its educational policy.⁹ Conservatives had traditionally received much of their support from Orangemen, a sectarian Protestant group who openly declared their contempt for Catholics as well as francophones. This change in the political landscape of Ontario was enough to place francophones on their guard. Ironically, the conflicts which francophones faced in the early part of the century were not from Protestants but from Irish-Catholics who were primarily anglophone.

In 1903, an agreement that had been reached in 1886 between anglophone and francophone Catholics to divide the administration and finances of the Ottawa separate schools along linguistic lines (English and French) ended and the board was reconstituted to form a single financial and administrative unit. In 1904, the francophone majority of the Board planned to erect a separate school for boys, with instruction being given

⁹ Ibid., p.65.

principally in French. In addition, the plans for the school also included a chapel, a dormitory, a kitchen as well as other rooms to accommodate the Christian Brothers, a religious order from Montreal charged with administrating the new school. This was the same order that, in 1895, had been criticized for poor teaching methods and qualifications by a governmental commission requested by the Ottawa Separate School Board to investigate educational problems in bilingual schools. The Brothers had been withdrawn from the school in 1895 by Brother Flamien, the superior of the Order, only to return a few years later to Ottawa following the request of ratepayers.¹⁰ However, their return would be short lived.

On July 4th, 1904, J. D. Grattan, an Irish Catholic, filed a court injunction to prevent the Ottawa separate school trustees (who consisted of a majority of francophones) from entering into a contract with the Catholic Brothers as teachers. According to the Separate School Act of 1863, a teacher's qualifications, whether obtained in Lower Canada or Upper Canada, were considered valid. This meant that teachers who were qualified in Quebec could teach in Ontario without any further certification.¹¹ Thus, members of religious orders who were not required to undergo examination in Quebec were able to teach in Ontario's state supported separate schools as qualified teachers. However, amendments to the act were added which seemingly

¹⁰ Franklin Walker, Catholic Education and Politics in Ontario, Volume II, (Toronto: The Federation of Catholic Education Association of Ontario, 1976) p.199.

¹¹ Barber, *supra* note 8, p. 67.

restricted this clause to those teachers who were considered "qualified" before Confederation.¹²

In July 1904 in Ontario's Provincial court, Judge MacMahon, who presided over the matter, ruled that firstly the trustees could not enter into contract with unqualified teachers and secondly that their mandate as trustees did not allow them to "expend school moneys in the erection of a residence for the teacher".¹³ The Hon. R.W. Scott who authored the original 1863 Separate School law contended that "the decision was against the intention of the legislators, and that if upheld it would represent a violation of the British North America Act".¹⁴ In the Court of Appeal, a similar judgement was handed down. When delivering his judgement, Chief Justice Moss emphasized the language and words used in the Separate School Act in order to explain his decision. He states:

...as in this enactment, there is found in unambiguous language a general declaration as to the qualification required, any restriction upon that declaration should not be extended beyond what the language construed in the ordinary and natural meaning of the words, and in light of the context, clearly calls for.¹⁵

Consistent with the pattern of previous appeals, the Judicial Committee of the Privy Council in November 1906, held that according to the law, the members of the Religious Order from Montreal were not considered qualified to teach in Ontario. Any member of the Christian Brothers who joined after 1867 would be required to pass the examination

¹² "The teachers of a separate schools under this Act shall be subject to the same examinations, and receive their certificates of qualification, in the same manner as public school teachers generally; but the persons qualified by law as teachers, either in the Province of Ontario, or, at the time of the passing of the British North America Act, 1867, in the Province of Quebec, shall be considered qualified teachers for the purpose of this Act." Ontario Separate Schools Act, R.S.O., 1897, c.294, s.36.

¹³ *Grattan v. Ottawa Separate School Trustees*, (1904) 8 O. L. R. 135.

¹⁴ Walker, *supra* note 10, p.203.

¹⁵ *Grattan v. Ottawa Separate School Trustees*, (1904) 9 O. L. R. 433.

in order to be qualified as a teacher in Ontario. The narrow interpretation of the law guiding these decisions ignored the broader social issues surrounding the access to linguistic education for the minority francophone population within Ontario. Moreover, the Privy Council chose to ignore that religious orders had been teaching for quite some time in the province without these restrictions and that this decision could potentially result in the removal of educators holding similar contracts, leaving French language schools in the province in a difficult predicament.¹⁶

Even if the francophone trustees had overstepped their bounds by contracting the Christian Brothers to teach in such an elaborate school, they did so to accommodate young francophones in Ontario. From this perspective, this case reflected a greater social problem for franco-Catholics in Ontario who were confronted by the modern tendency toward professionalization of teaching through examination, inspection and certification. These forms of surveillance, characteristic of the modern liberal state, ultimately favoured the majority anglophone population. The lack of qualified francophone teachers meant that students would have less opportunity to be educated in their mother tongue. Thus, fewer students educated in French ultimately meant that fewer francophones could become qualified teachers in the future. Ottawa public school inspector J.H. Putman argued that a major part of the problem with the unqualified francophone teacher was a result of limited access to secondary education. Putman argued: " Build a French language collegiate...and the problem of equality of opportunity for city young people and poorly prepared teachers for eastern Ontario bilingual schools would vanish."¹⁷

¹⁶ *Brothers of the Christian Schools v. The Minister of Education for Ontario*, (1907) A.C. 69.

¹⁷ Robert Stamp, The Schools of Ontario, 1876-1976, (Toronto: University of Toronto Press, 1982), p.86.

Nonetheless, the limits imposed by law on francophone education, although following the letter of the law, were in fact guiding the "life choices" of young francophones. This professionalization of education had an direct impact on the minority francophones in Ontario who were struggling to preserve and expand their schools in the midst of the dominant anglophone culture supportive of orthodox liberalism.

Francophones in Ontario reacted strongly to the potential threat to their school. In 1908 and 1909, they began planning a Congress dedicated to protecting French Canadian interests with special consideration accorded to educational issues. The ideal of a French Canadian Congress was well received by francophones in the province, who would be able to unit their efforts under a collective body. From January 18-20, 1910, the Congress of twelve hundred delegates representing the interests of "all the French Catholics of Ontario", discussed, among other things the state of bilingual schools in the province. From these discussions the French Canadian Educational Association was founded, under the presidency of Senator Napoleon A. Belcourt, who was defence counsel in the Grattan case.¹⁸ Moreover, a series of fourteen resolutions adopted by the Congress outlined their strong commitment to improving the "status" of the French language in the schools of Ontario. The Congress mostly sought certain concessions in schools where the majority of pupils were francophones. The Congress wished firstly, to have these schools declared English-French schools¹⁹, secondly, that greater emphasis be placed on instruction in the

¹⁸ PAO, Hearst Papers, Miscellaneous - Bilingual Schools, F6 MU1309, Env. #2.

¹⁹ Separate and public English-French primary schools, were effectively bilingual schools where both French and English were used as the languages of instruction. However, in certain districts, where the population was predominantly francophone, teachers would provide instruction exclusively in French, neglecting the requirements for English language instruction altogether. As Walker states: "...for convenience of reference, the term English-French was applied to schools in

French language, and improve access to French textbooks and readers.²⁰ For the first time, through the French Canadian Educational Association, francophones in Ontario were united into an organization dedicated to a specific issue: French language education.

Part of the French Canadian Congress' mandate was to publicly demonstrate the solidarity among francophones in Ontario as well as their strong commitment to improving the state of their language in the educational system.²¹ However, as Barber argues, this mass showing of solidarity among franco-Ontarians actually intensified the differences between anglophones and francophones of the province. After all, denominational schools were not on a firm footing and many Irish Catholics feared that the agitation brought on by francophones would lead to attacks by Protestant Orangemen on Catholic schools because of their strong link to francophone culture. Moreover, the vociferous francophone minority in Ontario contributed to reinforcing the dominant view that cultural minorities had to be assimilated whether from the point of view of sectarian or ethnic prejudice or from "progressive, liberal" reformers who aimed for a singular secular public education system and the elimination of archaic obstacles to the modern state. The anglo-Protestant paper, the *Sentinel*, put the matter succinctly: "It is this refusal to assimilate that makes the French Canadian so difficult to get along with."²² Although more extreme sectarian groups were outspoken about their views in regard to language and religious issues; the liberal reformers were the true force behind the modernization of

which French was the language of instruction. Franklin Walker, Catholic education and Politics in Ontario, Vol. II, p.267.

²⁰ Barber, *supra* note 8, p.76.

²¹ *Ibid.*, p.75

²² *Ibid.*, p.71

administrative structures and social institutions which directly effected minority groups such as Catholics and francophones. Nonetheless, hostilities amongst linguistic and sectarian groups resulted in intense social conflicts over the next few years.

Resolution 17 and the Ottawa School Trustees

Although, the French Canadian Congress held in Ottawa rallied the support of many franco-Ontarians, it also generated concern among the Anglo-Saxon and Irish population of the province. As Robert Stamp comments, "it was bad enough, complained some, that the French-speaking minority was approaching 10 per cent of the provincial population; worse it was behaving like an aggressive minority."²³ The demands put forward by the French Canadian Education Association presented a range of legal and political issues.

In strict legal terms, franco-Ontarians could not refer to any concrete legislation which outlined their claims to linguistic educational rights. In fact, between 1885 and 1890, the Department of Education, under Oliver Mowat's provincial Liberals, implemented and began enforcing several regulations which sought to make English the principal if not the only language of instruction in Ontario Public Schools.²⁴ This reflected the influence of liberal modernizers rather than sectarian Protestants. More specifically the 1890 regulations stated that the use of French was only permitted in cases where the student did not understand English. In addition, Public School Inspectors were now expected to report any cases where schools and teachers did not conform to these

²³ Stamp, *supra* note 17, p.85.

²⁴ John Robarts, Report of the Committee on French language Schools in Ontario, (Toronto: Ontario Department of Education, November 8, 1968) p.17.

regulations. This situation could have represented a significant change in educational policy in regard to French language instruction and franco-Ontarians control over "their schools". As the three member commission appointed to examine the English-French school at this time explained:

For many years, the French people were allowed to conduct their schools in their own way, no exception being taken either by the Education Department, or by the Public. Special provision was made to secure French teachers for them and French text-books were authorized for their schools...²⁵

For example, in 1912, out of 101 teachers who were qualified to teach in French-English schools in Ottawa, only 16 were qualified to teach in "regular separate schools".²⁶ Thus, the regulations ultimately attempted to curtail the relative freedom that francophones had enjoyed in regard to "French-English" schools within the provincial public education system.

From a political standpoint, the French Canadian Education Association demands were problematic. Throughout Ontario's history, social and religious groups such as the Orange Order, and more progressive liberal non sectarian groups campaigned for successive Ontario governments to eliminate separate schools as well as French instruction from the publicly supported system. Moreover, the growing Catholic and francophone population of Ontario represented a formidable political force which politicians could not easily afford to alienate. Governments of the day feared that any

²⁵ Report of the Royal Commission on Education in Ontario, (Toronto: Baptist Johnston, 1950) p.399.

²⁶ PAO, Hearst Papers, Miscellaneous - Bilingual Schools, F6 MU1309, Env. #2. Separate and public English-French schools had their own departmental "bilingual inspectors" whereas "regular" separate and public schools were supervised by a "regular" inspector. Judging from the demands by the French Canadian Education Association for bilingual inspectors, it is safe to assume that such inspectors were more sympathetic to the cause of bilingual or French language education. (Walker, Vol.II, p.255.)

move to one side or another would bring repercussions not only from the Catholic electorate but from the Protestant groups as well.

However, by early 1910, the relative unity among Catholics had started to crumble. The conflict and bitterness which surrounded the Christian Brother case of 1906 in Ottawa had escalated over a few years. French and Irish Catholics in Ottawa were now involved in an intense quarrel which centered on religious, linguistic and educational issues. The divisions mentioned earlier became intense as the anglo-Catholic trustees of the Ottawa Board were worried that the linguistic demands brought forward by their French counterparts would reflect negatively on the separate schools as a whole. Moreover, the trustees also expressed concern regarding the "insurrectionist plan of campaign" and "frenzied finance" of the bilingual trustees.²⁷ This led the anglo-Catholic trustees to demand a return to the previous arrangement where the board's administration and control was divided along linguistic lines. English speaking trustees attempted to make clear the distinction between "separate schools" and bilingual separate schools. The English committee of the Ottawa separate school trustees held that "The present forced partnership between separate schools proper and the bilingual separate schools is a violation of the natural right that English-speaking Catholics have to control their own schools..."²⁸ However, at this time, the Ontario government was certainly not going to acknowledge the difference between bilingual separate schools and separate schools when its educational policy clearly favoured building a single public system. In either

²⁷ Ibid.

²⁸ Ibid.

case, this lack of unity among Catholics politically weakened any demands for extending funding and the role of separate schools.

Under increased pressure to act on the bilingual schools issue, Whitney's government followed the steps of previous governments and appointed a committee to examine the situation. In 1910, under the direction of Dr. F. W. Merchant, a senior official in the Department of Education, the committee began its investigation into the state of public and separate English/French primary schools. In 1912, the Merchant Report was published. Essentially, the report concluded that the English-French schools suffered from several inefficiencies and that their teachers were poorly qualified and lacking experience. As a result, it recommended that French language instruction be permitted for the first five years (Form I and II) while progressively increasing instruction in English.²⁹ In order to improve the conditions within the bilingual schools, the Merchant report suggested that a more stringent and narrow supervision and inspection would be required.³⁰ Although, these recommendations represented a compromise approach to the bilingual schools issue, the intended outcome behind such recommendations was quite clear: French language instruction must be phased out of Ontario's public schools.

In April 1912, in what francophone historian Arthur Godbout called one of the worst mistakes made by an Ontario government, James Whitney's provincial Conservatives, introduced Regulation 17 which essentially made English the primary

²⁹ Robarts, *supra* note 24, p.19.

³⁰ Arthur Godbout, Nos écoles Franco-Ontariennes, (Ottawa: Éditions de l'université d'Ottawa, 1980) p.67

language of instruction in all public and separate schools in Ontario.³¹ The Regulation 17, although principally influenced by the Merchant Scott report, was not as compromising when it came to extending French language instruction in public and separate schools.³² Briefly, the Regulation stipulated that French, as a language of instruction and communication, was not to be used beyond Form I and its use would primarily be to assist francophone students not familiar with the English language integrate into the schools system. Moreover, teachers were now required to have a "sufficient knowledge of English" to be able to teach the Public School Course.³³ The Regulation did provide for some minimal instruction in French. Under the regulation, French as a subject could only be taught for a maximum of 1 hour per day and could in no way interfere with English language instruction. Although these provisions did not fully eliminate the use of French from the schools, Regulation 17 was detrimental to the continued use and expansion of the French language for instructional purposes. What made the Regulation so controversial and what embittered franco-Ontarians was the fact that the Regulation represented a dramatic change in the educational practices in the province.

Another troubling aspect concerning Regulation 17 was the direct involvement of anglo-Catholic Bishop Michael Fallon in its inception. In January 1912, Bishop Fallon, in a letter to Robert Pyne, the education Minister at this time, outlined what he believed would be the best policy for the government in regard to current educational issues.

Fallon was not in favour of continued French education and as Robert Stamp points out :

³¹ Robert Stamp, The Schools of Ontario, 1876-1976, (Toronto: University of Toronto Press, 1982) p.88-89.

³² In 1912, the Merchant Scott Report recommended the gradual replacement of French language instruction with English in all public and separate schools.

“The parallels between this letter and Regulation 17 are extremely close.”³⁴ As some historians have noted, Bishop Fallon's motivation for writing this letter might not have been solely for educational purposes. While working at the University of Ottawa, which at the time was a unilingual English institution, Bishop Fallon was confronted by a series of changes in the University's policy and administrative organisation which increasingly promoted it as a bilingual institution.³⁵ Fallon, who favoured an English-only institution, openly opposed the new direction of the University and as a result he was forced to leave. This incident influenced his decision to mount such an attack against French language instruction in all school in Ontario.³⁶ A broader political motive may have related to winning further funding for Catholic institutions by demonstrating opposition to francophones' specific demands.

Although at first glance the Regulation seemed simply a sectarian policy, a malicious discriminatory attempt at eliminating French from the school system, a brief examination of some of the historical correspondence points to other factors. It suggests that Regulation 17 was part of a long standing attempt at modernizing and bureaucratizing the system of education, and not simply an attempt to eliminate French from the schools. As Dr. John Waugh, Chief inspector of public and separate schools wrote in 1916:

...there is a lamentable ignorance among the people with regard to Regulation 17, and they are woefully misinformed. The prevalent idea is that it has been

³³ Report of the Royal Commission on Education in Ontario, supra note 24, p.423-424

³⁴ Stamp, supra note 31, p.89.

³⁵ Ibid., p.86-87.

³⁶ Ibid., p.87

especially framed to annihilate the French language. But there are many reasonable people to be met with.³⁷

Liberal modernizers did not regard the limitations placed on French language instruction as racist policies, but rather, viewed such measures as part of the process to develop a modern state and citizenship. Moreover, Ferguson stated in a "Private and Confidential" letter to Mr. Albert Carman of the Montreal Daily Star that:

The passing of Regulation 17 was originally regarded as a concession to the french-speaking people, and properly understood it really was so". He added " Personally, I have always thought that the formation of the regulation was unfortunate. It was of the "Thou shalt not " type, and that kind of declaration always breeds trouble. If those who framed the regulation had said " English shall be taught for a certain length of time. I do not think we would ever have had the situation created by the present form of regulation.³⁸

Nonetheless, given the history of assimilationist policies which franco-Catholics had struggled through, any regulation which limited the use of French could not be interpreted any other way.

As we have seen, francophone and French language instruction in the school system was part of franco-Ontarians heritage and had originally been administered by groups of concerned francophones without much interference from educational officials. Although French as a primary language of instruction was not officially recognized in legislation, educational officials in Ontario did very little to stop its use in various Ontario school districts with a significant francophone population. As Franklin Walker states:

³⁷ PAO, Ferguson (G.A.) Papers (Bi-lingual Matters) v. Bilingual Schools Box 51916 March - May, F8 MU 1021 .

³⁸ PAO, Fergusson (G.A.) Papers v. Bilingual Schools, 1916-1917 June 1916, F8 MV1021, Box 5.

The French Canadian leaders ...saw the use of their language as a natural right, guaranteed by the British North America Act and the law of God, as inviolable in its own way as religious freedom.”³⁹

Thus for many, Regulation 17 had violated both the BNA Act as well as an unwritten agreement which had provided francophone students with instruction in their mother tongue and control over the development of their schools which was synonymous with their cultural development.

Ottawa Separate School Trustees v. Mackell

Regulation 17 was certainly perceived by the French population of the province as a direct assault against their language and culture. Embittered by the implications of the Regulation, the Ottawa Separate School Board, led by trustee Sam Genest, launched a series of protests against the regulation. Genest first introduced a resolution on behalf of the Ottawa Separate School Board refusing to comply with the regulation and invited his co-religious, the Irish Catholics, to join him.⁴⁰ Also, other franco-Catholic boards followed this example and passed similar resolutions. In some places students walked out of the classroom in protest when the school inspectors arrived. In October 1913, as a result of the ongoing protest and unlawful actions of the board, the Ministry of Education cut off all grants to the Ottawa Separate School boards. Genest remained defiant and labeled the Ministry’s tactics as “mere blackmail”.⁴¹ These actions were not supported by the English school supporters and trustees who, frustrated by this situation as well as

³⁹ Walker, *supra* note 10, p.268.

⁴⁰ *Ibid.*, p.270.

⁴¹ *Ibid.*, p.281

financial concerns related to the Ottawa separate board, decided to take legal action. On April 29, 1914, R. Mackell and seven other English speaking trustees brought an action against the Separate School Board of Ottawa. They first filed and were granted an interim injunction restraining the Board “from employing or paying unqualified teachers and from passing or enacting any by-law or by-laws authorizing the borrowing of money by debentures or otherwise as therein set out”.⁴² The trial officially began on June 25, 1914 and upon request from the defence was adjourned that same day to provide time for further research of departmental records.

However, during this time, the Board voted on a resolution which granted M. Genest, the Chairman of the Board, the authority over the “discharge and engagement” of teachers. Following this resolution, M. Genest proceeded to discharge the entire teaching staff thus resulting in all the separate schools of Ottawa being closed. As he would later confess, part of the reason for this action was to compel the department to employ a significant number of Christian Brothers who were considered unqualified under the current law.⁴³ As a result, on September 11, 1914, pending the adjournment, the English trustees applied for a continuance and extension of the injunction. The trustees were naturally opposed to the resolution of the Board but were unable to prevent its actions of defiance. The trial judge, Justice Lennox, took a similar stance in regard to the protest. When deciding on whether to grant the extension of the injunction, he stated:

...the terms and aims of the (April) injunction, and the conditions necessarily implied upon adjournment, should, without more, have been sufficient guarantee that the efficiency of the schools would be preserved, the status quo honourably maintained pending the delay; but, had I known then that Mr. Genest

⁴² PAO, Ferguson (G.A) Papers v. Bilingual Schools (Cont’d) 1927, F8 MU1022, Box 6.

⁴³ *Mackell v. Ottawa Separate School Trustees*, (1914) 32 O.L.R. 248.

contemplated what has since been consummated ...there would have been no adjournment without such additional guarantees as would have rendered the present disgraceful and disastrous conditions impossible.⁴⁴

In their defence, the franco-Catholic school trustees argued that the rules of procedure which outlined their duties and functions granted them the power to dismiss teachers.

Also, they contended that the court had no jurisdiction to intervene in these matters and to do so would amount to the court usurping the role of the trustees.⁴⁵

The trustees felt that a remedy for this situation could not come from the court but was a matter for the board of trustees to resolve. Justice Lennox rejected these arguments by stating that “Rules of procedure are for the convenience of litigants and the Court, and the advancement of justice, and should not be invoked to perpetuate a wrong.”⁴⁶ Thus, by outlining that the defendants’ social actions constituted a “wrong”, Justice Lennox legitimized his decision and the court’s role in resolving these issues. In this manner the court was interfering with political issues but the conflict being waged by Catholic trustees outside the court was portrayed as not conforming to modern methods of conflict resolution based on the “rule of law” and legal discourse. This is an example of how political matters are converted into technical legal issues which can be resolved by “objective” technical principles. Lennox granted the injunction ordering the Ottawa Separate School Board (defendants) to open the schools and allow qualified teachers to

⁴⁴ Ibid., p.248.

⁴⁵ Ibid.

⁴⁶ Ibid., p.249.

return while the trial was pending.⁴⁷ In addition, Justice Lennox stated that this injunction would remain in effect until a judgement was rendered on the case.

As outlined in his ruling of November 28, 1914, Justice Lennox stated that the main question of the case was whether Regulation 17, which limited the use of French in separate schools, was a violation of franco-Catholic's right to determine "the kind and description" of denominational schools under section 93.⁴⁸ Also, franco-Catholic trustees contended that denying francophones the right to be educated in their mother tongue constituted a clear violation of a natural right which could not be supported by the court. In his judgement, Lennox began by dealing with the questions surrounding the validity of Regulation 17. Lennox stated that provincial authority and power over education and educational law can only be curtailed by the Governor General in Council and the Dominion Parliament under sub section 3 & 4 of section 93 of the BNA Act. Thus, Justice Lennox was not prepared to adopt a broad reading of section 93. He stated that:

these subsections in no way affect the issues in this case, for the manifest reason that the jurisdiction of the Dominion is supervisory or remedial only, and the powers conferred have not been exercised or even invoked; and until invoked and acted upon they in no way impair or encroach upon Provincial jurisdiction.⁴⁹

Moreover, Lennox reasoned that although francophone education was permitted or not actively opposed prior to Confederation, this "quasi-right, privilege or indulgence" was never secured by "any class of persons by any law".⁵⁰ Lennox concluded that the rights of the franco-Catholics had not been prejudicially affected under section 93. Having settled

⁴⁷ Ibid., p.248

⁴⁸ Peter H. Russell, Leading Constitutional Decisions- Third Edition, (Ottawa: Carleton University Press, 1982) p.453.

⁴⁹ *Mackell v. Ottawa Separate School Trustees*, supra note 43, p.255

this question in favour of the plaintiffs, Lennox proceeded to deal with some of the specific violations on the part the francophone trustees. Justice Lennox strongly opposed what he described as “...their unseemly, unnecessary and wholly unwarranted action in what amounted to a declaration of war.” He also added that the injunction restraining the Board of trustees from passing the by-law or hiring unqualified teachers “must be continued and made perpetual”.⁵¹ However, Lennox refused to hold the defendants personally liable for the action as was requested by the plaintiffs. The final judgement was settled on December 17, 1914.

Following this decision the separate school trustees sought an appeal in Appellate Division of the Ontario Supreme-Court. Justice Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. heard the case and delivered their judgement on July 12, 1915. The decision in the Appellate case closely resembled that of the lower court. Franco-Catholics were again arguing that their rights under section 93 had been violated. To francophones, language was part of the history of developing their separate schools and determining “the kind and description” of denominational schools under section 93 naturally implied language. However, the Justices again refused to provide a broad interpretation of the legislation. Section 93 would not be an umbrella for minority language rights as franco-Catholics had envisioned. When pronouncing their decision, the Justices appealed to the same reasoning and drew the same conclusions as judge Lennox. For example, Justice Meredith stated:

I am unable to find anything which supports the contention of the learned counsel for the appellants that the right to use the French language in the Separate Schools

⁵⁰ Ibid., p.256.

⁵¹ Ibid., p.258.

of the Province was guaranteed by treaty or otherwise to the french-speaking people, nor am I able to appreciate the contention that that is a natural right pertaining to them which the Legislature is powerless to impair or destroy.⁵²

The comments of the judge alluded to the positivist ideology which was informing his decision. This provides a concrete example of the theoretical assumptions made in chapter I in regard to the use of positivism as method of shielding judges from dealing directly with sensitive policy issues. Similarly, Justice Garrow, distancing his decision from policy issues or a concept of “natural law” which could question legislative authority, stated:

With questions of policy we have here nothing to do. Nor do we sit to determine cases based upon natural justice, to which the learned counsel appealed. This is a Court of law: and a right asserted and claimed before us, as before any other of our Courts of law, must shew for its supporting foundation something in the substantive law of the Province, or the claim must fail.⁵³

Such declaration legitimized the court’s role and the approach of the judges in deciding these issues. By claiming that the court of law was unbiased by policy implications or uninfluenced by “natural justice” considerations, the justices ultimately claimed that the processes of modern law produced an objective result that could not be contested and stood above political considerations. Though refusing to acknowledge the impact of their decision on educational policy and minority language rights, the justices alluded to it in their decision. For example, Justice Garrow stated:

...it is not to be ignored or forgotten that, while all (speaking of Germans, Italians and other foreign settlers) are tolerated , the official language of this Province, as of the Empire, is English, and that the official use of any other language is in the nature of a concession and not of a right.⁵⁴

⁵² *Mackell v. Ottawa Separate School Trustees*, (1915) 34 O.R.L. 341 (O.C.A.)

⁵³ *Ibid.*, 343.

⁵⁴ *Ibid.*, p.343.

Garrow went on to provide his interpretation of section 133 which guaranteed the equal use of English and French in the Houses of Parliament of Canada and the Houses of Legislature of Quebec. He asserted that outside Quebec, “English, the language of the Empire, would naturally be the official language of the Province”⁵⁵. Obviously, such comments implied a policy vision of the “Empire” as composed of universalistic citizenship. It also implied that francophones living outside Quebec had no “rights” to education in their mother tongue. More broadly, it implied that Confederation was not a Compact but a compromise which could be limited or dissolved. Again the decision of the Appellate Court concluded that the use of French in schools prior to Confederation and after did not establish “a right or privilege” for a class of persons under the law. This conclusion was supported with a brief reference to the *City of Winnipeg v. Barrett case* (1892). Maclaren, Magee and Hodgins concurred and the appeal was dismissed.

Having had their claims rejected by both provincial courts, the franco-Catholic trustees by-passed the Supreme Court of Canada and appealed their case to the Judicial Committee of the Privy Council. In November 2, 1916, the Privy Council again provided the narrowest possible interpretation to section 93 of the B.N.A. Act.⁵⁶ Following the previous judgements, the Privy Council, rejecting the appeal, reasoned that even if the majority of supporters of separate schools in Ottawa were of French origin, the terms in section 93 did not extend to the language but were limited to Religious denomination.⁵⁷

⁵⁵ Ibid., p.343-344.

⁵⁶ Russell, *supra* note 48, p.453.

⁵⁷ Ibid., p.458-459.

Lord Buckingham, who delivered the judgement, discussed the issue of education and language and made reference to a report which stated that:

...all classes of French people are not only willing but desirous that their children should learn the English language, they at the same time wish them to retain the use of their own language (however)...the use of the English language instead of their own, if such a change should ever take place, must be brought about by the operation of the same influences which are making it all over this continent the language of other nationalities as tenacious of their native tongue as the French. It is a change that cannot be forced. To attempt to deprive a people of the use of their native tongue would be as unwise as it would be unjust, even if it were possible.⁵⁸

The Privy Council, although seemingly recognizing the importance of preserving a people's mother tongue, was not prepared to intervene under the existing law. It would seem that the JCPC shared the assumption that the increased dominance of the use of English in the nation was part of a gradual process associated with the rise of the modern nation. The positive "objective" law was based on a policy which was informed by a liberal ideology, one which sought to reinforce a common civil identity over more traditional plural cultures. That this ultimately favoured the majority anglo-Protestant culture of Ontario and culturally threatened the francophone population was irrelevant in the JCPC ruling.

The Privy Council decision therefore implicitly supported a modernist project which did not take into consideration the cultural and linguistic ties which francophones had to their religion. As prominent Quebec historian and Conservative politician, Sir Thomas Chapais who commented on the situation stated:

...the bilingual school question is not a mere question of civil law, it is a wide and broad question of natural law, of general policy, of equity and freedom, a great political and national question.⁵⁹

⁵⁸ *Ottawa Separate School Trustees v. Mackell*, (1917) A.C. 72. (P.C.)

⁵⁹ Walker, *supra* note 10, p.275.

In either case, the franco-Catholics, in pressing their linguistic rights, were not directing their appeals at modern arguments and rules of procedure appropriate to the formal legal process; rather, they based them on arguments about traditional rights and archaic formal justifications. As such, the Ottawa separate school question provides an example of how law held a significant indirect role in effecting or, in this case, limiting social change through redefining educational policy. In turn, this was to have a direct impact on Ontario society.⁶⁰

The events of the early 20th century which paralleled the developments of this case further contribute to the "great divide" between francophones and anglophones. The First World War was regarded by many francophones as a British conflict..⁶¹ Moreover, as Carl Berger explains:

To French Canadians 1917 was the climax of a long history of defeat; once again a brutal and insensitive majority had violated the tolerant principles of Confederation and imposed its will upon a helpless minority.⁶²

The Conscription crisis of 1917 presented a formidable threat to achieving national unity or even mutual respect. In the midst of the national crisis, Ontario found itself burdened with an equally troublesome issue in regard to education. Like the conscription crisis, Regulation 17 and the subsequent Ottawa Separate Schools Trustees v. Mackell case of 1917 were a focus of linguistic prejudice, nativism and "national" rivalries.

⁶⁰ Yehezkel Dror, "Law and Social Change", in Vilhem Aubert (ed.) Sociology of Law, (Harmondsworth: Penguin, 1969) p. 93.

⁶¹ Carl Berger, Conscription 1917, (Toronto: University of Toronto Press, 1967), p. vii.

⁶² Ibid., p. viii.

IV

Separate Schools & Secondary Education

As the previous two chapters have suggested, questions related to separate schools, minority language rights and the structure of education within the provinces present before Confederation, remained unresolved in the late 19th and early 20th centuries. As the Ottawa and Manitoba cases demonstrate, the conflicts surrounding education were tied to broader ideological struggles which had an impact on the cultural, political and social identity of those groups involved. For the majority group, aside from sectarian extremists, these cases represented a chance to reaffirm and legitimate their modernist vision of the direction of Ontario's educational system, whereas for the minority Catholic population, of which a large number were francophone, the issue at stake was that of cultural survival and identity.

In general terms, this chapter will discuss the separate schools struggle to obtain funding for secondary education in Ontario. This will involve a review of the Tiny Township case of 1928 in which the court became the forum for resolving these issues. The case demonstrated the strong ideological differences between Catholic and Protestant groups as well as the legal implication of section 93 in the context of modern orthodox liberalism. Also, the Tiny Township case demonstrates how the courts were called upon to resolve policy issues which had an impact on social groups and institutions. From this perspective, this chapter will continue to reveal how legal positivism informed the legal decisions during this period. Moreover, the chapter will examine the important social issues pertaining to the case as well as elaborate on the theme of social conflict between

the modern orthodox liberal view of the state and the more traditional perspective regarding the future of education in the newly industrialized nation of Canada.

Social Historical Context of the Issues

The main piece of legislation related to secondary education was the Ryerson High School Act of 1871¹, which forms the legal basis of the questions addressed in the Tiny Township case (1926-1928). This act represented the integration of Grammar schools (which were the high schools of the day) into the publicly supported, locally controlled and provincially administered Common school educational system. According to this act, all local taxpayers regardless of religious denomination were required to contribute their taxes in support of these secondary schools.² Although this act established publicly supported secondary education, it failed to define the difference between elementary and secondary education, thus technically permitting both public and separate schools to offer Fifth book classes (which would correspond to the present grades of 9 and 10).³ Franklin Walker accurately points to the fact that the high schools of the 19th century were, in true Ryersonian spirit, intended to be open to both Catholics and Protestants and that to contend that this act accorded separate schools the right to establish full secondary education would be to distort its historical meaning.⁴

¹ An Act to Improve the Common and Grammar Schools of the Province of Ontario, 34 Victoria, Chap.33.

² Franklin, Walker, Catholic Education and Politics in Ontario, Volume II, (Toronto: The Federation of Catholic Education Association of Ontario, 1976) p.8.

³ Robert Stamp, Historical Background to Separate Schools in Ontario, (Toronto: Ministry of Education, Queen's Printer, 1985) p.7.

⁴ Walker, supra note 2, p.324.

Presumably, Ryerson believed that the separate system would not be extant in the future as modern state and civil society emerged and thus the question would never arise. Nonetheless, this oversight or avoidance of the issue on Ryerson's part, would come back to haunt both separate and public school supporters.

The problem of secondary schools was not of great concern until early in the 20th century. As Walker suggests, even if these questions of taxes and secondary education had been raised prior to Confederation, the absence of the issue in the late 19th century was "due to the fact that Catholics found it difficult enough to operate separate schools giving "common school" education".⁵ Other reasons for this lack of interest in the secondary school issue was that at the time secondary education was not a priority among the youth. As Robert Stamp points out, in the 1870's only 5 or 6 % of all pupils (let alone Catholics) who passed the entrance examination would continue on to high school.⁶ Fifty years later secondary school education was increasingly important for the technocratic and bureaucratic requirements of mature capitalism. As for Catholics, secondary education presented a host of other problems. Propaganda from Rome suggested that Catholics be banned from attending public schools when Catholic institutions existed. Archbishop John Joseph Lynch of Toronto, stated that such a ban was not possible because the Catholic schools had nothing equal to these high schools.⁷ Thus Catholics would struggle between loyalty to their faith and the desire for higher education.

⁵ Ibid., p.323.

⁶ Stamp, *supra* note 3, p.7.

⁷ Walker, *supra* note 2, p.324.

Despite these obstacles, at the turn of the century Catholic interest in secondary education began to grow. This new interest in secondary education was due to a growing consciousness on the part of bishops, priests and laymen of the importance of higher education as well as the development of "continuation classes" in both public and separate schools in 1896.⁸ These continuation classes were empowered to provide high school work to pupils in municipalities where high schools did not exist. The Catholics used these continuation classes as a "back door" to receive grants for fifth book classes (although Catholics only received grants at the elementary rate).⁹

From this perspective, advances in technology during the war and throughout the post war period reduced the need for unskilled labour and consequently the demand for education rose dramatically.¹⁰ Also, education gained a certain prestige that it did not have before the war. In 1919, Ontario's education minister, R.H. Grant declared that "the world today looks to the schools more than any other agency to heal and guard the past and to direct and stabilize progress in the future."¹¹ In addition, *The Toronto Mail and Empire* supported this view by stating that "education will play the greatest part in the rebirth of the world."¹² Furthermore, in 1921, the Adolescent School Attendance Act, which established sixteen as the minimum age for leaving school, was brought into force. Thus, with the increased role and importance of education, Catholics now more than ever

⁸ Ibid., p.325.

⁹ In order to obtain funding for fifth book classes, Catholics classified them under elementary grades thus receiving grant support for these classes at an elementary level.

¹⁰ Stamp, *supra* note 3, p.110.

¹¹ Robert Stamp, The Schools of Ontario, 1876-1976, Toronto, Toronto: University of Toronto Press, 1982, p.97.

¹² Ibid., p.97.

were determined to expand the separate school system to include full secondary education which could meet the growing demands of the modern world.

However, as stated earlier, the 1920 school tax structure provided only limited support for Catholic separate schools and consequently made expanding or improving their educational system impossible. Nevertheless, some people were of the opinion that public schools could simply provide a better education and that Catholic separate schools were no longer a reflection of the realities of modern Ontario. In *The Canadian Forum* of February 1923, Ernest Thomas commented that:

The new realization of the social meaning of education is working revolutionary changes. The educational work of the ordinary church when compared with that of the efficient high school or public school is felt to be an anachronism. The pupils are exposed to stimuli and discipline of one kind throughout the week and then are asked to undergo experiences in 'class' based on principles antagonistic to those of their other experiences.¹³

Thus, when Catholics voiced their demands for an increase in tax shares and funding for denominational secondary education, they were met with firm opposition by the growing modernist ideology which rejected religion as a necessary part of contemporary education. In laying claim to greater tax revenue and to access to denominational secondary education, Catholics essentially desired an expansion of the separation between the separate and public system. However, such a demand could not be reconciled with the modern orthodox liberal view of reducing the level of divergence in educational policy.

In the mid 1920's many Catholics were seriously concerned about the current state of their separate school system. However, inadequate funding of their separate schools

¹³ Ernest Thomas, "Insurgent Movements in the Church", The Canadian Forum, Vol.III, No. 29, February, 1923, p.142.

limited whatever progress or improvements they could make. As one priest commented, Catholic reliance on private subscription and Church funds for elementary education diverts money from higher education which is badly needed.¹⁴ As a result, Catholics desired a greater share of corporate taxes in order that the moneys of private contributions could go toward secondary education.¹⁵ Moreover, many Catholics felt that if they were to pay for public high schools, their money would be better served in support of Catholic secondary education.

Convinced of their legal rights under the B.N.A. Act, bishops and other Catholics became more vocal about these demands. In 1921, a group of Catholic Bishops headed by Bishop Fallon organized a legislative committee to request the recognition of Catholic high schools by the provincial government. In order to settle some of the legal issues, Premier E. C. Drury of United Farmers of Ontario, in March of 1922, suggested "that the bishops arrange a test case which could be fought up to the British Privy Council".¹⁶ Although Drury himself was hostile to the thought of extending the separate school system to the high school, he was nonetheless open to discussion. *The Evening Telegram* criticized Drury for letting the bishops "talk inaccurate nonsense about their ecclesiastical rights under the B.N.A. Act."¹⁷ However, Drury would not see the case materialize during his term in office and the question was passed on to Fergusson's Conservative government. Fergusson was equally reluctant about the separate high

¹⁴ The Separate Schools: for private use of priests only, Ontario: s.n., 191?, p1. (Note: this is the reference format used for this document at the National Library)

¹⁵ Walker, *supra* note 2, p.339.

¹⁶ *Ibid.*, p.337.

¹⁷ *Ibid.*, p.342.

school question and also sought to move this potentially explosive political question to the judicial arena where it could be defused.¹⁸ In a letter to Bishop Fallon on June 19, 1924, Ferguson stated: "I have always sought to remove from the field of controversy all our educational problems...The judicial determination is, to my mind, the one way of bringing this about."¹⁹ It was obvious that politicians wanted to wash their hands of the issue for fear of the possible repercussions from the Catholic electorate. Moreover, the courts were again enlisted in the process of converting the political dimensions of modernization into technical legal issues.

Legal Positivism & Formalism in the Tiny Township Case

Having established that the question would only be settled in the courts, the Township of Tiny was chosen as the test case that would present a petition of rights on behalf of all trustees of Roman Catholic Separate Schools. The trustees of Tiny Township claimed in their petition the right to establish and operate separate high schools and collegiate institutes, the right for Roman Catholic school supporters to be exempt from taxation for the maintenance of high schools and collegiates which were not conducted by their board of trustees as well as the right of separate schools to share in the public school grants on a basis of average attendance. Also, the Catholic trustees claimed that certain enactments of Ontario would, as a result of a successful claim, be declared *ultra vires*.²⁰

¹⁸ Stamp, *supra* note 11, p.152.

¹⁹ *Ibid.*, p.152.

²⁰ *Roman Catholic Separate School Trustees v. the King*, (1928), A.C. (1927-1928) 365 (P.C.)

In a Toronto courtroom in 1926, Judge Rose presided in the matter of *Tiny Separate-School trustees v. the King*. Justice Rose based his decision on trying to determine what rights Roman Catholics in Upper Canada had regarding denominational schools at the time of Confederation stating that the answer could not be found before 1867.²¹ He added that the decision was between two principal questions:

...was it a right to establish and conduct schools in which, at the discretion of the trustees, instruction might be given in all branches of education suitable for pupils between the ages of 5 to 21(subject to the limitation that the schools should not usurp the function of the universities...) or was it a right to establish...under denominational auspices, schools which at all times should correspond in the secular aspect with the undenominational (common) schools, and which go step by step with the general undenominational schools in the scheme of education, as the scheme existed or should develop with the growth of the country and the advances or changes that might be expected in educational methods?²²

In his judgment, Rose found that current statutes and regulations did not prejudicially affect any right or privilege of Roman Catholics at the time of Confederation. Moreover, he commented on how the history of separate schools was discussed extensively during the trial and in his elaborate ruling he restated much of the historical detail pertinent to the trial. He noted that he did so in the hope that it would be useful in appellate court as a source of reference instead of having to resort to the originals. By stating this, it was obvious that M. Rose realized the case was far from being decided conclusively.

Following an unsuccessful appeal in December 1926 in the Ontario Appeal Court, the case then moved to the Supreme Court of Canada. In 1927, six Justices of the Supreme Court of Canada were called upon to decide the issue and when all was done they were split evenly on the questions before them. In a ninety-eight page judgement

²¹ *Tiny Separate School Trustees v. the King*, (1926), 59 O. L. R., 137.

²² *Ibid.*, p.137-138.

describing their reasons, five out of the six who heard the case delivered separate judgments. As Gordon Bale points out, the judgment was divided along religious lines. The Catholics, who included Chief justice Anglin C.J.C., Rinfret J.J. and Mignault, ruled in favour of the appellants, whereas the Protestants, Newcombe, Duff and Lacombe JJ., rejected their claim.²³ Consequently, being equally divided, the appeal was dismissed. Ironically, Chief Justice Anglin, in his judgment described the ideological differences between the role of the "common" school as compared to that of the separate school. He stated:

Udenominational schools are based on the idea that separation of secular from religious education is advantageous. Supporters of denominational schools, on the other hand, maintain that religious instruction and influence should always accompany secular training.²⁴

This statement again represents the two conflicting views not only on the educational question but on the future direction of state education.

The division of the judges along religious lines is extremely significant in revealing the ideological differences at work in the conflict surrounding education. Gordon Bale suggests that the Privy Council's narrow decision in the Barrett case 1892 examined in chapter two, was of major consequence to how the Supreme Court of Canada would subsequently interpret constitutional decisions regarding the denominational schools under section 93 of the BNA Act. In addition, Bale attributes the

²³ Gordon, Bale, "Law, Politics and the Manitoba School Question: Supreme Court and Privy Council", The Canadian Bar Review, Vol. 63, No. 3, September 1985, p.515.

(Note: Mr. Justice Mignault supported two of the claims but differed on one of the issues of grants. He believed that the legislative grants of 1863 did not apply to special grants or grants for particular purposes.)

²⁴ *Tiny Separate School Trustees v. the King*, (1927) 4 D.L.R. 860 (S.C.C.)

Protestant judge's adherence to the Privy Council examples (like Barrett case and others) to legal formalistic grounds and the Catholic judge's rejection of the Privy Council's decisions to strong implicit views about the role of religion in education.²⁵ He argues that, "If the Supreme Court of Canada had had absolute jurisdiction, the denominational school guarantees would probably have continued to receive a reasonable, broad and robust interpretation".²⁶ Bale give the impression that a "broad" interpretation of denominational school guarantees would somehow eliminate the pressures placed on cultural minorities by the rise of modern liberal state. However, this does take into account other forms of authoritative power outside modern law which at that time favoured this orthodox liberal perspective. Moreover, Bale is suggesting here that Catholics were dictated by sectarian ideological consideration and that Protestants were narrowly focussed on a strict reading of the law. It seems more likely that ideology was predominant on both sides, and that a strict reading of the law was the more successful strategy within this ideological struggle and not merely a matter of deference to the precedents set by the Privy Council. Protestants justified their narrow reading with concrete examples similar to those presented by the Privy Council in the Barrett case. Again, this evidence also reflects the underlying struggle between minority traditionalist and the majority liberal modernist perspectives which seemingly paralleled these religious ideologies. This struggle was noted in the editorial of The Globe and Mail on June 12, 1928, the observer stated that :

...in the bitter conflict which is now being waged between fundamentalists and modernists, it is apparent that many of those who join the ranks of the latter have

²⁵ Bale, supra note 23, p.516.

²⁶ Ibid., p.513.

but little knowledge as to the real object of their leaders...(which) is to destroy belief in that glorious doctrine which is the mainstay of Christianity, the doctrine of Atonement.²⁷

The author went on to attack the growing influence of liberalism on "man's" thinking regarding religious belief. This theme of conflict between liberal modernist and traditionalist views was also present when the case went before the Judicial Committee of the Privy Council.

In numerous and wide-ranging decisions prior to the Tiny case, the Judicial Committee of the Privy Council had established a clear pattern of decisions in favour of granting power to the Provinces in order to promote their autonomy within the Canadian state.²⁸ On June 12, 1928, the Privy Council's decision in the Tiny Township case reaffirmed this view. The appellant's three major claims were rejected. The Privy Council essentially upheld the position of Justice Rose. Viscount Haldane, who was presiding over the case, held that the rights of Roman Catholics had not been prejudicially affected as stated in section 93 of the B.N.A. Act. According to Haldane, the Privy Council was of the opinion that the authorities of the Province did in fact have the power to manage the grant funds intended for common school purposes.²⁹ In addition, Haldane stated:

It is true that power to regulate merely does not imply a power to abolish. But the controversy with which this Board has to deal on the present occasion is a long way from abolition. It may be that the new laws will hamper the freedom of the Roman Catholics in their denominational schools...But they are still left with separate schools, which are none the less actual...³⁰

²⁷ "The Object of Modernist", The Globe and Mail, June 12, 1928, p.5.

²⁸ Coen G. Pierson, Canada and the Privy Council, London, Stevens & Sons Limited, 1960, p.30.

²⁹ *Roman Catholic Separate School Trustees v. the King*, supra note 20, 388.

³⁰ Ibid., p.389.

The Privy Council's decision reflected a vision that the denominational school privileges of Catholics at Confederation were not to evolve with the growing nation but were to disappear within it, thus reflecting orthodox liberalism.

In addition, in an attempt to mask this ideology and the policy considerations which stemmed from it, Viscount Haldane stressed that the case before the Judicial Committee of the Privy Council was being decided from a strictly legal perspective. He stated:

Their Lordships are fully aware that this appeal is among the most important that have come before them from Canada in recent years. It relates to the interpretation of the Constitution of Canada in regard to separate schools...So far as concerns the question brought before the Judicial Committee of the Privy Council, it will be found to be a question of pure law, turning on the interpretation and application of words in that Act.(B.N.A. Act)³¹

The Judicial Committee did recognize that the case was one of "far reaching magnitude" and although not explicitly stated, the case had consequences which extended much further than strictly education. In order to conceal the fact that their decision was basically setting a standard for future policy considerations regarding Ontario's educational system and thus jeopardizing the Catholic and franco-Catholic's cultural survival, the Privy Council used legal formalism as a shield for this purpose. During the deliberation of the decision, Viscount Haldane stressed that the question before them was one of "pure law". Moreover, he reiterated this fact during his judgment stating that the decision would be based on "pure legal interpretation, disregarding other considerations"³² and again that "The duty of the Judicial Committee is simply to

³¹ Ibid., p.366.

³² Ibid., p.366.

interpret the words used."³³ To have so emphatically stressed this point leaves the researcher to wonder if the Viscount himself was beginning to doubt his own sincerity. In all seriousness, the Privy Council was again placed in an extremely awkward position in having to make such crucial policy decisions with major repercussions on Canada's future. It seems likely that the strict reading of the act was a form of protection. The Council, in adopting a formalist legal approach, was consciously or unconsciously hiding the fact that their decision supported a modernist ideology expounded by the majority Protestant group.

Consequences of the Decision

It would seem that the traditionalist Catholic vision of an ever growing denominational system evolving to meet the needs of the future was being stopped in its tracks. For franco-Catholics, the growth of denominational education was synonymous with cultural survival. In supporting a modernist perspective, the Privy Council's decision jeopardized the cultural survival of franco-Catholics in the modern Canadian nation. In fact, in his judgment Haldane held that:

Such an abridgement (to denominational education) may be in the *usual* course when a national system of education has reached a certain stage in its development and it would be difficult to forego this power if the grading which may be essential is also to be possible.³⁴

From this statement, it seems likely that the Privy Council's decision was in line with Egerton Ryerson's vision of the gradual phasing out of denominational schools as an unavoidable process of the development of a modern educational system. Consequently,

³³ Ibid., p.387.

³⁴ Ibid., p.389.

such a system would not take into consideration the cultural heritage of the franco-Catholic population in Ontario regarding their denominational schools.

The Tiny Township case demonstrates how the courts of Ontario, Canada and the Privy Council dealt with the various social and legal issues pertaining to the denominational education question. The Supreme Court and the Privy Council are particularly representative of the ideological struggle between the liberal modernist view and the traditionalist Catholic perspective. Accordingly, the decision of the Privy Council granted the modernist liberal perspective the upper hand. Consequently, now more than ever, Catholics (and especially franco-Catholics) feared that if their denominational system could not develop then it would eventually be assimilated as part of the modern public educational system. Thus, legal decisions such as the Ottawa and Tiny Township case which sought to legitimate the apparent social and political realities of "modernity", left minority groups with little alternative in terms of what they understood to be their "natural" rights.

If the decision of the Privy Council seemed to close the door to Catholics as far as secondary education was concerned, it nevertheless left a window open. In their judgement, Viscount Haldane and the other members of the Privy Council suggested that Catholics "may conceivably be or have been subjected to injustice of a kind that they can submit to the Governor-General in Council, and through him to the Parliament of Canada."³⁵ However, as Franklin Walker states "the defeat of the Dominion Conservative government in 1896 after it had attempted remedial legislation in Manitoba precluded

³⁵ Ibid., p.389.

serious consideration to an application for remedial legislation in this case."³⁶ In essence, the Privy Council's decision implied that in modern developed nations, the separation of church and state was inevitable and thus educational policy was subject to the same fate. In order for the modern capitalist state to develop within its fullest potential, education was a priority, contributing to the creation of a modern citizenship based on an orthodox liberal conception which rejected the plurality of cultures, and traditional social solidarities in favour of a unified civic identity. By rejecting the Catholic claim to education, the courts defined government funded education as a secular institution. Following the *Tiny Township* case, the focus shifted from obtaining funding of denominational secondary education to simply acquiring enough funding to support the separate school system in Ontario. The following chapter will focus on the political and legal conflict resulting from Catholic efforts to have their rights to an equitable share of tax revenues recognized under law.

³⁶ Walker, *supra* note 2, p.338.

V

Separate Schools & Corporate Taxes

Previous chapters examined the cultural, religious and legal issues related to minority francophone language rights, access to secondary education for Catholics and francophones and in general terms the legal standing of denominational education following Confederation. Although these issues were a central aspect of the historical debates surrounding education in Ontario and the provinces, the issue of financing education was a underlying theme in all these cases. The question of whether funds were available or should be available to finance a denominational educational system within a publicly supported education system had been the cause of controversy among liberal minded reformers who supported the drive toward a modern state and cultural assimilation into unified citizenship. Legal decisions such as the Ottawa and Tiny Township cases had denied the attempts by francophones and Catholics to legitimize denominational and French language education within Ontario's public education system. From this perspective, access to public funds for denominational schools was a crucial issue; the level of accessibility to taxation revenue to support separate schools ultimately defined the way francophones and Catholics would be able to develop their cultural heritage.

This chapter will examine the legislation related to the issue of taxation and financing of Ontario's public and separate school systems up to the middle of this century. It will demonstrate how the continuing theme of the importance of law and the legal sphere in defining policies which limited Catholic's and franco-Catholic's

capabilities to maintain their educational system. This will involve examining the Ford Motor Company case of 1937, as well as other cases dealing with the division of tax revenues between public and separate schools in Ontario. In all cases, emphasis will be placed on how a positivist interpretation of the law was used to deny Catholic claims to an appropriate share of tax revenue to support their schools.

Legislative History of the Funding of Ontario's Educational System

As examined in previous chapters, the notion of publicly supported education was developed in the mid nineteenth century. In order to fully grasp the “funding crisis” of separate schools during the 1930's, it is essential to examine the legislative history which set the funding structure in place. In the period between 1841 and 1855 under the direction of the Chief Superintendent of schools Egerton Ryerson, numerous legislative enactments established the structure of Ontario's “public” educational system. A significant part of developing the educational system was determining how the public system of “Common schools” would be financed. Unlike the earlier private schools of the province which were supported by fees and voluntary subscription, a modern public educational system would require support be administered through a bureaucratic processes of revenue raising, distribution and accounting.¹ The introduction of the 1846 and 1847 school acts was the first significant attempt to modernize the funding structure for schools in the province. Prior to these acts, public schools were supported through provincial grants and rate bills (fees) levied by the school board from parents or guardians of the pupils. However, the 1846 & 1847 legislation proposed that boards

¹ Report of the Royal Commission on Education in Ontario 1950, (Toronto: Baptist Johnston, 1950) p.461.

would no longer have the right to levy rates against parents; common schools were to be “free”, supported solely by provincial government grants and local property taxes.² Under such a funding structure, the provincial government would effectively hold control over the purse strings of public education. As alluded to in earlier chapters, with such measures the state could more effectively regulate and exercise surveillance over all aspects of public education including separate schools. Power over funding implied a potential to control the school curriculum and the direction of the educational policy.

Strong opposition to this increased centralized control over the funding of public education resulted in the enactment of new legislation which granted some local autonomy in terms of financing common schools. Among other things, the School Act of 1850 reestablished the right to levy rate bills from parents; it also provided for an elected board of trustees which would have the power to determine how their local schools would be financed. If the trustees wished to make their schools “free”, they had the power to do so. They could decide to fund their school in part with monies that municipal councils levied on assessment of property, with a percentage of funds coming from rate bills provided by parents and with provincial grants which were now being determined by average attendance instead of average enrolment.³ For rural schools in Ontario, these decision rights were vested in the landholders and householders who elected the trustees.⁴ As far as denominational schools were concerned the School Act of 1850 stated that separate schools could share in the provincial “school fund” on a proportional basis to

² Susan, Houston, & Prentice, A.L., Schooling and Scholars in Nineteenth-Century Ontario, (Toronto: University of Toronto Press, 1988) p.120.

³ Ibid., p. 131.

⁴ Ibid.

average attendance of the common schools.⁵ However, as Ryerson stated in a circular to the school trustees dated August 12, 1850, unlike common schools, educational funding for separate schools could only cover teachers' salaries. Other expenses related to building, heating, and furnishing the schools were the responsibility of ratepayers.⁶ At this time, Catholic ratepayers were not exempt from local assessments or any other taxes related to supporting the common schools system. Therefore, Catholic ratepayers who wished to support denominational schools were subjected to a double taxation of which a significant amount was required to support separate schools as a result of limited provincial grants.

By 1853, largely due to the efforts of Catholic Bishop Armand de Chardonnel, an adamant supporter of denominational education, separate school supporters had gained the right to be exempt from supporting common schools provided that a local property tax scheme was in place within the separate school board. As a result of continued pressure, further concessions were granted to separate schools. Under the Taché Act of 1855, separate school trustees were placed on an equal footing with their common school counterparts. Thus, the trustees had the power to "impose, levy and collect school rates or subscriptions" upon and from separate school supporters.⁷ However, Catholic school supporters owned much less land than Protestants which made it difficult to obtain an adequate share of community taxation.⁸ The Act addressed this issue to a certain degree.

⁵ Franklin Walker, Catholic Education and Politics in Upper Canada, Volume I, (Toronto: J.M. Dent & Sons Limited, 1955) p.84.

⁶ Albert, Plante, "Les écoles séparées d'Ontario-II", Relations, October, 1951, p38.

⁷ Report of the Royal Commission on Education in Ontario 1950, supra note 1, p. 467.

⁸ Walker, supra note 5, p.153.

It qualified separate schools to receive directly from the Chief Superintendent a share of the fund annually granted by the legislature of Ontario for the support of common schools, according to the average attendance as compared to the whole average number of pupils attending school in the same city, town or village or township.⁹ Although these sections of the Act constituted some gains for Catholics, as bishop Charbonnel pointed out, the Taché Act excluded separate school supporters from the common municipal assessment and tax collection. It also limited Catholics from accessing any other fund than the legislative grant.¹⁰

In 1859, one of the first pieces of legislation was passed related to corporate tax revenue for schools. Section 22 of the Consolidated Common School Act of Upper Canada provided that lands and property of a company could be assessed in order to support common schools. Although the revenue from corporations would be of increased importance in the years following Confederation, as stated in the Hope Report, “At that time, the assessment of lands and property owned or held by bodies corporate, such as corporations, and co-operatives, may have held little significance.”¹¹ Evidence of this was that the Scott Act of 1863, which was a basis for the constitutional guarantees for minority denominational educational rights in the British North America Act of 1867, made no mention of such a provision for separate schools.¹² Although the BNA Act provided the minority Catholic population with legal rights to their educational system, it

⁹ Report of the Royal Commission on Education in Ontario 1950, supra note 1, p.467.

¹⁰ Walker, supra note 5, p.178.

¹¹ Report of the Royal Commission on Education in Ontario 1950, supra note 1, p. 479.

¹² Ibid., p. 480.

did little to resolve questions related to taxation and financial support for separate schools in the post-Confederation period.

By 1879, Roman Catholic landowners could support separate schools through assessment of unoccupied lands. Moreover, the Act also stated that municipal assessors who had personal knowledge that a person was a Roman Catholic could now assess that person as a separate school supporter. The previous practice required that separate school supporters write a letter to give notice that they desired to be assessed as separate school supporters.

Similarly, in 1886, the Act Respecting Separate Schools, provided for business corporations to apportion part of their municipal taxes to support separate schools according to the percentage of Catholic shareholders.¹³ In addition, the act permitted separate school trustees to use “municipal machinery” for the collection of taxes.¹⁴ Such modest concessions resulted in opposition from Conservative leaders and the news media who claimed that the Catholic citizen had lost the freedom to have his children educated in public schools. However, as Franklin Walker states:

The 1886 amendments were hardly unreasonable ...The permission to corporations to apply a proportion of their taxes to separate schools according to the property of their Roman Catholic shareholders was merely extending to personal property the same principle which always applied to real estate. The amendment which allowed separate school trustees to use municipal machinery for the collection of their school rates was only extending to separate schools trustees what was done for public trustees.¹⁵

¹³ Robert Stamp, Historical Background to Separate Schools in Ontario, (Toronto: Ministry of Education, Queen's Printer, 1985) p.8.

¹⁴ Franklin Walker, Catholic Education and Politics in Ontario, Volume II, (Toronto: The Federation of Catholic Education Association of Ontario, 1976) p.114.

¹⁵ Ibid.

Nonetheless, this legislation did not make this practice mandatory and as a result, separate schools received little if any of the tax revenue from corporations.

By 1890, the modest gains made by Catholics were curtailed. The Act of 1879 which removed the need for Catholics to provide written notice of their desire to support separate schools was repealed under pressure by Conservative leader William Meredith who sought to limit Catholic denominational education to the provisions of the Scott Act of 1863.¹⁶ With this Act repealed, every Ontario citizen was to be considered a public school supporter unless notice was provided to the contrary. Such measures could be attributed to the belief that by sharing public funds between both public and separate schools, the public school system, the characteristic model of education in a modern state, would be subverted. The popular opinion of the liberal modernists opposing separate schools, was expressed by the newspaper *The Mail*:

...British law ought not to lend itself to the task of compelling any man *nolens volens* to support sectarian institutions. The right to free will, which is the very essence of civil, and for that matter, of religious liberty, has been taken from the Roman Catholic population in this matter.¹⁷

Nonetheless, this opposition, based on the principles of individual freedom and the predominance of civil institutions along modernist lines, failed to recognize that without adequate support separate schools would disappear, effectively depriving Catholic citizens of the right to choose. By defining modern citizenship in terms of comprehensive civil institutions and liberal notions of progress, “modernists” were effectively limiting the choices available for Catholic citizens to participate in their cultural heritage (what

¹⁶ Stamp, *supra* note 13, p. 9.

¹⁷ Walker, *supra* note 14, p.113

they believed to be their “natural” rights). Judging from the poor state of separate schools during this period, Catholics appeared justified in such concerns.

The Church found that everywhere the more intelligent Catholics were sending their children to the Public schools, because the education afforded by the latter was superior to that given in the Separate schools...Perceiving that resistance to the will of these mutineers was hopeless in the existing state of the law...¹⁸

As was the case with previous legislation, the laws surrounding taxation made it difficult for Catholics to develop their school system under the pressure of an expanding public system which received adequate funding, full support from the state and was not required to petition for basic needs related to their schools.

Corporate Taxes, Separate Schools and Public Education

The next significant legislative change dealing with the issue of taxation and separate schools came in 1913. The Act Respecting Separate Schools¹⁹ simplified the process by which corporations provided their local property taxes to separate schools. Essentially, this Act removed the requirement which forced corporations to have a record of the exact number of Catholic shareholders in order to determine the proportion of tax money which would be provided to separate schools. The 1913 legislation simply stipulated that the tax money could not exceed the proportion of Catholic shareholders.²⁰ Nevertheless, as was the case with previous legislation regarding corporations, the present Act was not mandatory and did not provide separate schools with tax revenues

¹⁸ Ibid., p.116.

¹⁹ An Act Respecting Separate Schools, (1913) 3 & 4 George V, Chap. 71.

²⁰ Stamp, supra note 13, p. 12.

from public utilities.²¹ Despite these legislative changes separate schools were in dire straights and required remedial action to alleviate the higher tax burden imposed on Catholics. In 1914, Archbishop McNeil of Toronto had drafted a letter to Premier Hearst providing him with details on what issues were of concern to Catholics; namely a greater share of corporate taxes for denominational schools as well as a review of the grant structure.²² Throughout the 1920's, many separate schools fell into a financial crisis. For example, The Toronto Separate School Board had to reduce the salary of approximately three hundred teachers. Moreover, the Catholic Register asserted:

We (Catholics) are educating eleven percent of the children of the city (Toronto), and, although the Separate School rate is nearly fifty per cent higher than the rate paid by Public School supporters we received only six per cent of the school taxes paid in Toronto.²³

The higher tax rate levied from Catholic families made it difficult for many to continue to support the separate schools which were struggling when compared to the public schools of the province.

As seen in the previous chapter, during the mid 1920's, issues surrounding taxation were closely linked to the Catholic campaign to obtain funding for denominational secondary education. It is important to remember that at this time Catholics were still supporting the public "grammar" or high schools through their taxes. Many Catholics leaders believed that if separate schools received a greater share of corporate and utility taxes their longstanding financial hardships would be resolved. Moreover, if separate school supporters were exempt from paying the taxes to support the

²¹ Ibid.

²² Walker, *supra* note 14, p.341.

²³ Ibid., p.348.

public high schools, Catholics would be able to expand their schools to provide secondary education which was currently limited by law.

Following the disappointment of Tiny Township case, Catholics continued to focus some attention on the secondary school issue but became increasingly concerned with the “unjust” division of taxes between denominational and public school system. Catholic schools had been under-funded for quite some time and following the Judicial Committee of the Privy Council’s ruling no relief was in sight. If Catholics wanted to resolve the outstanding issues related to inadequate funding for their denominational school system, the solution was presumably outside the courtroom. As the *Canadian Freeman* affirmed, to ask the courts to rule on the issue of taxation would amount to asking them to decide whether separate schools should exist and given previous rulings this was not an option.²⁴

However, the economic climate of 1930's would further complicate Catholic demands for funding. Although Ontario’s educational system was not immediately affected by the stock market crash of 1929, the Depression which continued over 1930's had an impact on the schools. As Robert Stamp points out between 1930 and 1934, total annual expenditures on schooling in Ontario were reduced by one-third.²⁵ Cities and towns struggled to cut the municipal taxes and in many cases taxpayers were led to believe that education was the main source of their tax burden.²⁶ Despite these cutbacks

²⁴ Ibid.

²⁵ Robert Stamp, The Schools of Ontario, 1876-1976, (Toronto: University of Toronto Press, 1982), p.143

²⁶ Ibid.

many students and graduates returned to the schools to avoid unemployment.²⁷ Thus, in a time when education was of increased importance, denominational schools were struggling with financial issues. For example, during the 1930's in Ottawa, separate schools were educating children at a cost of \$32 per pupil at a tax rate of 14.8 mills, whereas public schools could afford \$84 per pupil at a rate of 7.9 mills.²⁸ Catholic ratepayers were beginning to resent the high tax rates which went to support what they considered to be "poor sometimes dangerous buildings, inadequate equipment (and) overcrowded classes."²⁹ From the point of view of many Catholics, separate schools were in a critical state.

In 1931, a movement called the Catholic Taxpayer's Association headed by Ottawa lawyer Martin J. Quinn and supported by anglo-Catholic bishops and other prominent Catholics, demanded a re-division of taxes and funding for a Roman Catholic secondary school system. In order to obtain, "grass roots" support, it encouraged clergy to openly express their concerns regarding Catholic education and school taxation during Masse.³⁰ In 1934, the Association was strengthened by the decision of the French Canadian Educational Congress to associate itself with the Taxpayer's Association. This symbolized a greater unity between French and English Catholics in their efforts to take action regarding the state of separate schools in Ontario. However, not all Catholics were behind this movement. As historian Joseph Schull stated:

²⁷ Ibid.

²⁸ Ibid., p.151.

²⁹ Walker, *supra* note 14, p.2.

³⁰ Ibid., p.357.

A good many of them, it was said, tired of the endless controversy and now skeptical of improvement in their own impoverished system, were hoping that the separate schools will peacefully die.”³¹

Evidence of this was acquired from numerous letters (mostly in 1933), found in the Henry Papers (Premier George S. Henry 1930-1934) which stated dissatisfaction with Catholic aims.³² It was apparent that Roman Catholics were beginning to tire of the struggle for the full recognition of their schools.

Robert Stamp stated that following the Tiny Township case, Catholics opted for a political rather legal approach.³³ However, the events in the 1930's in regard to separate schools suggest that the issues and methods of resolving long standing conflicts had not dramatically changed. Although political pressure was increasingly integrated into the Catholic strategy of resolving their grievances, the law and the intervention of the courts maintained an important role in determining the legitimacy of the Catholic claims. Throughout the 1930's politically oriented campaign were paralleled with appeals to the courts. Moreover, Catholics continued to appeal to a sense of “justice” based on a “natural” system of rights as opposed to the more formal legal interpretations which had denied their claims in the past.

In January 13, 1933, Martin Quinn along with Louis Cote, Conservative M.P.P. Ottawa East and C.A. Seguin Conservative M. P.P. of Russell, presented Premier Henry with a formal brief requesting that the Assessment Act be amended to provide a share of

³¹ Joseph Schull, Ontario Since 1867, (Toronto: McClelland and Stewart, 1978) p.293.

³² Walker, *supra* note 14, p.357.

³³ Stamp, *supra* note 13, p. 1.

corporate taxes and public utility taxation for separate schools.³⁴ More precisely, in this brief the Catholic Taxpayers' Association suggested that:

...the most equitable remedy for the existing intolerable condition is to enact appropriate legislation which will ensure that corporation and public utility school taxes be divided between the branches of the public schools so that each branch will receive a part thereof proportionate to the number of children whose education is provided by that branch.³⁵

In other words, Catholics desired to achieve equality in the level of education in terms of facilities, accommodations for all students regardless of whether they attended public or separate schools. The brief insisted that these rights were consistent with ...”the true *spirit* and *intention* of existing school laws and regulations”.³⁶ Also, it stated that the remedy was consistent with two main ideas which should be the foundation of public education: the first that “...The Province should assume the duty of providing *equal* educational facilities for the children of *all* its citizens”...and the second that “...the cost should be borne evenly by all taxable wealth within the Province.”³⁷ Catholics were asserting that Ontario’s public education system included separate schools and as such the province had a responsibility to ensure that all citizens regardless of which schools they attended were entitled to the same level of education. That is to say, separate school supporters as well as the children attending them, should not be regarded as “second class citizens” because of their desire to maintain a right which was protected under BNA Act of 1867.

³⁴ Walker, *supra* note 14, p. 371.

³⁵ *Ibid.*, p. 493.

³⁶ *Ibid.*, p.487.

³⁷ *Ibid.*

Although the brief presented strong arguments in favour of changing the legislation, Henry's Conservative government was under equal pressure from extremist Protestants as well as liberal modernists who supported a non-secular educational system. Many feared that further concessions to Catholics could be "injurious to the public school system".³⁸ Also, the issue of funds deriving from utilities and corporate taxation was particularly sensitive at this time. With the growing industrialization of the past few decades, large corporations and utilities now held a significant amount of wealth and consequently generated substantial tax revenues. At this time, Catholics had managed to obtain some of the corporate tax revenues but were not entitled to any of the public utility taxes. Ideally, the apportioned revenues from school supporters holding shares in a corporation would be proportionately divided between public and separate boards. However, in reality because of the rapid exchange of shares, there was no way of determining what was the exact proportion between separate and public school supporters.³⁹

As was the case with previous issues surrounding separate schools, Premier Henry, seeing that the legal rights being claimed by Catholics were not entirely clear, decided that in order to avoid lengthy litigation, a series of questions would be submitted to the "highest courts" to determine on which grounds a settlement could be reached in regard to the taxation issue.⁴⁰ Although the legal rights between public and separate schools supporters were divergent, both parties agreed that this tactic on behalf of the

³⁸ PAO, Education Separate Schools MS 1716, RG - 3-6-1430.

³⁹ W.G. Fleming, Education: Ontario's Preoccupation, Toronto, University of Toronto Press, 1972, p.256.

⁴⁰ Walker, *supra* note 14, p.386-387.

Premier was an attempt to avoid a political fall out from this issue. On April 24, 1934,

Quinn wrote to Ottawa Separate school trustee A.J.Brennan stating that:

We cannot afford to run any risk at all of being placed in a position, after a Court reference which is purely a matter of Government policy and expediency in connection with which we were never consulted, of having it said that we were in agreement with the plan. No matter what the results of Court proceedings might be, the facts will remain, and we must never by any act of ours close the doors to a continuance of our efforts to obtain Government action, to which we are absolutely entitled.⁴¹

Given the upcoming election, Premier Henry was in no hurry to settle the issue. On May 28th 1934, Henry wrote to Quinn stating:

...I am opposed to introducing the subject as an issue during a political campaign. The issue is essentially one for judicial interpretation, and should not form part of the controversies that arise at such time...⁴²

Premier Henry's inaction on the taxation issue would have direct political consequences.

On June 19, 1934, partly due to the efforts of the Taxpayer's Association that rallied against Henry and encouraged the Catholics to support Mitchell Hepburn, the Liberals won the election.⁴³ The *Catholic Register* declared that this empowered Catholics to defeat the longstanding obstructions to the rights that Catholic schools were entitled to "on grounds of natural justice, as well as by the spirit and intention of the Separate School Act of 1863 and the Pact of Confederation."⁴⁴ Hepburn now faced the difficult position of trying to deal with the Association's request. In April 1936, Hepburn introduced an amendment to the Assessment Act⁴⁵ in which he intended to define the

⁴¹ Ibid., p.391.

⁴² Ibid., p.396.

⁴³ Ibid., p.406.

⁴⁴ Ibid., p.403.

⁴⁵ An Act to amend the Assessment Act, (1936) 1 Edward VIII, Chap. 4.

issue on an economic rather than a political or religious level.⁴⁶ The bill stated that corporations with separate school supporters as shareholders were now obliged (rather than permitted) to submit the portion of assessment in accordance to the religion of these shareholders.⁴⁷ Although this represented an increase in financial support to separate schools, it did not fulfil most Roman Catholic's demands for assessment according to attendance and a share of utility taxes.⁴⁸ This new bill resulted in separate school supporters flooding Ontario's Court of Revision with appeals.

In January 1937, the Ontario Court of Appeal ruled on *Dillon v. Catelli Food Products Ltd.* (and twenty-two other appeals) in which the "regularity of assessment of companies was questioned".⁴⁹ In these cases, counsel for the public schools contended that the 1936 amendment to the Assessment Act only applied to separate school supporters who resided in the three mile radius of the given school, whereas the counsel for separate schools claimed that the act "created a new class of public school supporters."⁵⁰ However, Justice Rowell disagreed with both interpretations and determined that the section 33a of the 1936 Amendment to the Assessment Act "gave to existing separate school supporters a new right".⁵¹ The court held that in order for taxes to be divided the notices had to be provided by the company. The case also addressed

⁴⁶ Stamp, supra note 25, p. 153.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ PAO, Files Press Clippings 1937- Hepburn, File-General January -June 1, 1937 Education, Department of., RG 3-14, Box 369. Dillon and Catelli Food Products Ltd. (and twenty-two other appeals) (1937) O.R. 114 (C.A.)

⁵⁰ Ibid.

⁵¹ Ibid.

section 33b, which dealt with companies whose head office was outside Ontario and which had more than half their stock outside the Province and who by reason of their numerous shareholders would have trouble determining the number of Catholics who own stock.⁵² Justice Rowell stated the current act obligated corporations to make an inquiry into the religious affiliation of its shareholders. However, he also added that following such a inquiry, the board of directors may produce a resolution stating that because of business practices and methods of dealing with records, the religious character of their shareholders could not be determined. Rowell stated that providing a copy of such a resolution to the municipal clerk would effectively comply with the statute but would not provide funds to separate schools.

Another example of such cases, involved Bell Canada. The judge decided that given the complexity of the stock exchange, Bell was not considered “within the jurisdiction of the class of corporations of which investigation of shareholders is required.”⁵³ This type of interpretation, although legally sound, ignored the “spirit” under which the legislation was passed. The 1936 Act was a recognition of the inequality in the division of taxes between public and separate schools. Although the 1936 Amendment to the Assessment Act did result in many diverging views in terms of legal interpretations, the result was that a reasonable policy in regard to taxation could not be implemented. Numerous other cases were presented by both separate and public school boards with varying results. Both separate schools and public schools had a certain degree of success with these appeals. Nonetheless, under intense political pressure,

⁵² Ibid.

⁵³ PAO, Sudbury Star Feb.22, 1937, RG 3-14.

during the spring legislature in 1937, Hepburn joined the Conservatives to repeal his Assessment Act amendment. This did not resolve the issue which would resurface a few months later in one of the most important cases dealing with the issue of taxation and separate schools.

Ford Motor Company of Canada v. Windsor Board of Education

In 1937, in an attempt to provide a fair division of its tax revenues, the Board of Directors of the Ford Motor Company of Windsor had accorded 18% of its municipal taxes to the separate school board of the city.⁵⁴ As a result, another case regarding tax revenues appeared before the courts, although this time it was a public school board making the claim. The Windsor Board of Education held that because the exact proportion of shares could not be established, the Ford Motor Company was under the obligation to pay the full amount of its municipal taxes to the public board of education.

Again the case was fought through all levels of courts and the results were to the detriment of separate schools. The Windsor Board of Education had been successful in its initial claim in the Court of Revision in November 1937. Also, in March 1938, Justice Mahon of the County Court of the Essex County upheld the court of Revision's ruling in favour of the Windsor Board of Education. Justice Mahon gave particular attention to the testimony provided by Mr. Douglas B. Greig, secretary of the Ford Motor Company of Canada Limited. Mr Greig stated that the company had some 1 658960 shares of common stock, held in 32 countries which made it impossible to determine the exact

⁵⁴ *Ford Motor Company of Canada Ltd et al. v. The Board of Education for City of Windsor*, (1938) O.R. 306 (CA)

number of Catholics shareholders at any given time.⁵⁵ As a result, Justice Mahon stated that the company had provided an estimate and not actual knowledge of its proportion of Catholic shareholders and as a result all the taxes should go to the Windsor Board of Education.⁵⁶ However, when the case came before Ontario Court of Appeal in April 1938, the results were somewhat different. The case was heard by Justices Middleton, Masten and Fisher who provided a detailed analysis of the legal issues.

The main point of contention in this case was related to section 66 of the Revised Statutes of Ontario, 1937. In general, the statute outlined the procedure by which a corporation would give notice of its intention to contribute a proportion of its corporate taxes to separate schools. Of particular interest to the case was subsection (3) and (4) which stated:

(3) Unless all the stock or shares are held by Roman Catholics the share or portion of such land and business or to the assessments to be so rated and assessed shall not bear a greater proportion to the whole of such assessments than the amount of the stock or shares so held bears to the whole amount of the stock or shares.

(4) A notice given in pursuance of a resolution of the directors shall be sufficient and shall continue in force and be acted upon until it is withdrawn, varied or cancelled by a notice subsequently given pursuant to any resolution of the corporation or of its directors.⁵⁷

The counsel for the Windsor Board of Education, the respondent, held that “*prima facie*” all school supporters including corporations should be “rated and assessed” as public school supporters and that the granting of a proportion of corporate taxes to separate

⁵⁵ Ibid., p.306.

⁵⁶ Ibid., p.307.

⁵⁷ Ibid., p.314.

schools was a privilege which was limited to the conditions of section 66 of the Separate School Act. As such, the respondent maintained that:

The onus is upon any corporation claiming to be rated for the support of separate schools to prove affirmatively that it is entitled to be so rated. The provisions in the statute for the benefit of separate schools operate by way of exception to the general rule that individuals and corporations are to be rated for the support of public schools, and the onus is upon a corporation seeking to come within the exception to prove that it does in fact come within the exception..⁵⁸

The Ford Motor Company of Canada and the Board of Trustees of the Roman Catholic Schools, the appellants, asserted that because a notice was provided and in effect the Windsor Board was contesting the information that the onus should be on the respondents to disprove the information - "he who avers must prove".⁵⁹

As previously stated the Ford Motor Company's Board of Directors had provided the notice (Form B) outlining 18% percent as the figure of Roman Catholic shareholders. Among the contentions of the appellants was that this estimate was made in good faith with "due care" and afforded "adequate *prima facie* evidence of the correctness and validity of the notice."⁶⁰ Moreover, the appellants affirmed that the notice provided must remain as a "fact" until such time as the respondents can prove that the apportionment should be less than 18%. The judgement pronounced by the Court of Appeal generally agreed with these points. Quoting from the judgement in the case of *Re Goderich Roman Catholic Separate School Trustees v. Town of Goderich* (1923), J.A. Masten who read the decision stated:

⁵⁸ Ibid., p.302.

⁵⁹ Ibid., p.301-302.

⁶⁰ Ibid., p.315.

“There is no hint in the statute of any intention that the notice to be given should be supplemented by any proof. ... The notice once given, it becomes the duty of the assessor to act upon it”⁶¹

Moreover, the court unanimously ruled in favour of the Ford Motor Company concluding that in effect the statute should be interpreted in such a way as to allow the application of its intended purpose which was to grant an equitable division of corporate taxes between separate and public schools.⁶²

In 1939, the Windsor Board of Education appealed to the Supreme Court of Canada where the case was reviewed by Chief Justice Sir Lyman Poor Duff, Hon. Patrick Thibaudeau Rinfret, Hon. Oswald Smith Crocket, Hon. Henry Hague Davis and Hon. Patrick Kerwin. Again the case focussed on section 66 of the Separate School Act. Justices Rinfret, Crocket, and Kerwin upheld the Ontario Court of Appeal’s decision. In a statement similar to that of justice Masten of the Court of Appeal, Justice Kerwin affirmed:

...it is only from a consideration of the language used that we are justified in gauging the intention of the legislature. That intention was to free a company desirous of having part of its assessment apportioned to separate school purposes from the difficulty of ascertaining the precise ratio of the holdings of Roman Catholics in its capital stock.⁶³

Also, Kerwin stated that to require Catholics to produce the precise number of their shareholders in order to have a portion of corporate taxes granted to separate schools would amount to endorsing the same conditions which existed prior to the 1913 Act

⁶¹ Ibid., p.321.

⁶² Ibid., p.323.

⁶³ *Board of Education of Windsor v. Ford Motor Co.*, (1939) 4 D.L.R. 427 (S.C.C.)

which had effectively removed these requirements.⁶⁴ Chief Justice Duff and Davis dissenting provided a quite different interpretation of the case. In particular Justice Davis provided interesting comments. He stated:

The appeal raises nothing but a question of law. The facts found by the County Judge are not subject to any right of appeal; we are entirely bound by those facts. The only question open for determination upon the stated case under the Assessment Act, RSO 1937, c.272 is the question of pure law: whether the County Judge as a matter of law upon the facts as he found them, reached a proper conclusion.⁶⁵

Davis agreed with the County Court Judge's conclusion that because the 18% figure constituted an estimate that it could not be considered as an effective notice as outlined in section 66. Davis added "...the language itself is perfectly plain and the Court cannot relieve itself of its duty to apply it."⁶⁶ Consequently, the appellants brought their case before the Judicial Committee of the Privy Council in 1941.

In the *Ford Motor Company of Canada Ltd. v. Windsor Board of Education of 1941*, the Privy Council reversed both the Ontario Court of Appeal and Canadian Supreme Courts and confirmed the decision of the Court of Revision. The judgement delivered by Lord Atkin contended that their Lordships had:

...confined themselves to the construction of the actual statute before them...and had not derived much assistance from previous decisions on statutes dealing with similar topics...⁶⁷

Their Lordships' main contention was that the "means of knowledge" regarding the number of Catholic shareholders rests with the corporation and the separate schools not

⁶⁴ Ibid.

⁶⁵ Ibid., p.295

⁶⁶ Ibid., p.301.

with the public school. Furthermore, they suggested that determining the minimum figure of Catholic shareholders would not constitute a grave difficulty.

“But the difficulties, such as they are, are not as great as stated by the court of appeal and the majority of the Supreme Court, consideration of which seems to have influenced their final decision.”⁶⁸

This decision had effectively stripped Catholics of the financial means which were readily available to the public schools making it difficult to expand their educational system to meet the ever growing demands of the modern state.

The divergence in the legal interpretations by the Privy Council and amongst the Supreme Court Justices can easily be linked to the legal ideology by which they were guided. In the Supreme Court of Canada, the justices were clearly divided in their approach to the question at hand. Davis and Duff chose to apply the law in a positivist manner without taking into consideration the “intention” of the statute in question. Rinfret, Crocket and Kerwin applied principles which could more easily be reconciled with the franco-Ontarian perspective. Their decision clearly sought to provide “an equitable” and just settlement to the issue. As with previous cases, the JCPC based its decision on the “statute” alone and arrived at a positivist conclusion which did not take into account the policy issues surrounding the questions before them. Again, positivism in legal interpretation served as a means of avoiding an arbitrary pronouncement on these contentious policy issues. Nonetheless, by not taking these issues into consideration Catholic separate schools although legally sanctioned under the BNA Act were forced to exist in the shadow of the common school system.

⁶⁷ *Windsor Education Board v. Ford Motor Company of Canada Limited, and Others*, (1941) A.C. (1941-1942) 461 (P.C.)

⁶⁸ *Ibid.*, p.461

As the events of the 1930's leading up to the Ford Motor Company case demonstrate, contentious social and political issues were deferred to the courts as a safeguard against political repercussions. In this sense a court decision represented an attempt to make an authoritative statement of public policy which in turn established the foundation for subsequent decisions regarding the continued existence of denominational education. The events of 1930's also illustrate how politicians, in an attempt to avoid confronting and debating major policy decisions and their political implications, relied on law and the use of legal positivism. These practices, although seemingly making for good politics in the sense of defusing immediate controversy, prevented Catholics from gaining a "just" share of taxes to support their schools system. The principle of financing all public education equally could not be implemented and funds for minority Catholic and franco-Catholic separate schools would gradually be assimilated into a modern public educational system.

Conclusion

Of all the units that came together to make the modern Canadian federation, Ontario was almost certainly the most strongly in favour of the separation of Church and State and the most strongly opposed to confessional schools (whether publicly funded or not) and educational duality in general. Thus it is one the great ironies of Canadian history that Ontario's dual system of education is, in terms of publicly -funded separate education for Roman Catholics, the most comprehensive and entrenched in Canada.¹

Donald Swainson (1989)

As has been demonstrated in this study, the political and legal conflicts which surrounded questions related to denominational rights of Catholics were a prominent theme in Ontario's educational history. In particular, this examination has attempted to demonstrate how law and legal “actors” played a substantive role in defining Ontario's educational policies either directly or indirectly and thus helped shape the educational system's future in terms of a modern liberal ideological model. More precisely, this “modernist liberal” conception of education, that is, the notion of common schools for a common citizenship, implied that cultural minorities should be assimilated, with the suppression of cultural difference being facilitated by an integrated public education system.

Although some current contemporary liberal theorists like Will Kymlicka have presented a defence of group rights, the 19th century modernist liberal ideology viewed group rights as an obstacle to the development of the modern state. In other words, as state formation historians tend to emphasize, the rise of the modern state and ambitious new initiatives to shape identity were premised on individual rights and assimilated national citizenship, which compromised or involved the suppression of traditional

¹ Donald Swainson, "Franklin Walker, Separate Schools and the Question of Canadian Identity", Queen's Quartely, Vol. 96, No. 1, Spring 1989, p.18.

community and cultural attachments. Schools, and public education were at the centre of these initiatives and a focal point of concern for minority cultures, notably francophones in Ontario who sought practical means to implement what were thought to be constitutional guarantees and what tended to be understood as "natural rights".

As this study suggests, the law played an important role in dealing with the conflicts that emerged. The courts not only proved to be a useful way of defusing political controversies. Litigation and appeals also forced issues into legal discursive practices, which tended to render collective concerns invisible, ideologically diminishing group rights, while reinforcing a liberal individualist agenda.

As discussed in the first two chapters, throughout the 19th and early 20th century, the rise of the modern Canadian state involved a process by which political, legal and social institutions developed bureaucratic and professional structures. The thesis has examined the role of law in the development of Ontario's educational system in the 19th century within this larger process. As Bruce Curtis states: "The reform of education was the creation both of new state institutions and political subjects."² The thesis also examined how legal actors working within the framework of legal positivism (the characteristic modern form of law) played a significant role in legitimizing the liberal orthodoxy which sought to limit the development of minority denominational rights within a modern public educational system.

As discussed in chapter I and II, when denominational rights were granted to Catholics and francophones at the time of Confederation, many Protestants were equally interested in developing their own sectarian schools. Moreover, the Scott Act of 1863, the

² Bruce Curtis, Building the Educational State: Canada West, 1836-1871, (London: The Althouse Press, 1988), p.25.

legislation on which section 93 of the BNA Act was based, was primarily the result of intense efforts on the part of political actors from Lower Canada (Quebec) who had a particular interest in preserving their culture. These aspects of the BNA Act represented a “compact” between Lower and Upper Canada, francophone and anglophone, Catholic and Protestant. Although denominational rights were granted at the time of Confederation, the conflicts surrounding these issues were not resolved. The compact as it related to religion, schools and cultural protections, was an obstacle to progress for some, an unnecessary concession to minority interests to others.

After 1867, Catholic and francophone denominational rights outlined in the BNA Act, come into intensifying conflict with new institutional initiatives within legal and political structures of the modern state. As the provincial arm of the state exercised active legislative power over educational policy issues, the legal system was resorted to authoritatively resolve conflict. The supposedly non-partisan review of issues by judges who actually favoured a formalist interpretation of legislation, was generally to the detriment of minority rights. As a result, the spirit of the “Confederation compact”, based on the more traditional concerns about cultural guarantees understood by the actors as “natural law”, was subverted by the drive for the development of “modern” institutions and structures based on a modernist liberal ideology, supported by the partisan political agitation of sectarian Protestants. The law played an important and complex role in supporting this modernist drive.

Chapters 3 to 5 examined the historical circumstances surrounding the most contentious issues related to denominational schools namely: French language education, denominational secondary schools and the division of taxation between public and

separate schools. Chapter 3 focussed on Regulation 17 and the subsequent court challenge, *Ottawa Separate Schools Trustees v. Mackell*³ of 1917 in which the Judicial Committee of the Privy Council provided a narrow interpretation to section 93 of the B.N.A. Act.⁴ It addressed the cultural and linguistic aspects of the separate schools question and how the Judicial Committee of the Privy Council reverted to positivist legal interpretation as a means of avoiding considerations related to the cultural ties which francophones had to their religion.

Examination of the 1928 case, *Roman Catholic Separate School Trustees v. the King*, in chapter 4 also demonstrates this pattern, as again the Catholics appealed to section 93 of the B.N.A. Act, claiming the right to maintain their own denominational secondary schools, the right to receive government grants for these schools and the right to be exempt from municipal taxation which did not go to support their separate secondary system.⁵ Although the B.N.A. Act made no implicit reference to these rights, Catholics believed that section 93 implied an expansionary vision of the separate schools and therefore believed to be fully justified in their claim. In 1928, the Roman Catholic trustees of Tiny Township fought their case through the full gamut of Canadian courts and the Privy Council with the result remaining the same. The courts held that the rights claimed by the Roman Catholic trustees were not guaranteed at the time of Confederation and thus were not protected under the B.N.A. Act.⁶ The formalist interpretation limited

³ *Ottawa Separate Schools Trustees v. Mackell* (1917) A.C. 62 (P.C.)

⁴ Peter H. Russell, Leading Constitutional Decisions- Third Edition, (Ottawa: Carleton University Press, 1982) p.453.

⁵ C.B. Sissons, Church and State in Canadian Education, (Toronto: The Ryerson Press, 1959) p.97.

⁶ *Ibid.*, p.100.

Catholics' (and indirectly francophones) ability to develop and expand their separate schools beyond the initial legislative enactments at the time of Confederation and that the separation of church and state in educational policy was an inevitable aspect of modern developed nations.

Chapter 5 confirms this pattern in examining the issue of the division of taxation as outlined in the *Ford Motor Company of Canada Ltd. v. Windsor Board of Education, 1941*. This case involved the Windsor Board of Education contesting the fact that the Ford Motor Company attributed a percentage of its taxes derived by its shareholders to the Windsor separate schools system. The Ontario Court of Appeal reversing both the Court of Revision and the County Court stated that the intention of the statute in question was to grant an "equitable apportionment" of corporate taxes.⁷ Following this, the Windsor Board of Education appealed to the Supreme Court of Canada which upheld this decision.⁸ Consequently, in 1941⁹, the Windsor Board brought their case before the Judicial Committee of the Privy Council who reversed both the Ontario Court of Appeal and the Supreme Court of Canada's decision. These conflicts regarding denominational schools did not end following the Ford Motor Company Case, and the issue had continued to occupy significant attention.

Throughout the early 1940's, little progress had been made by Catholics to obtain the slightest concession in regards to their traditional demands for greater taxes revenues

⁷ Ibid., p.480.

⁸ *Ford Motor Company of Canada Ltd. v. Windsor Board of Education*, (1939) C.L.R. 412 (S.C.R.)

⁹ *Ford Motor Company of Canada Ltd. v. Windsor Board of Education*, (1941) A. C. (1941-1942) 453 (P.C.)

and denominational secondary education. It seemed that modern Ontario society was reluctant to accept Catholic denominational education as part of the reality of the Ontario school system. As one author described, Ontario society shared:

...the typical view of bureaucratic, industrialized democracy; the view of people whose modes of thought about Society and its needs have been modelled, more than they realize, on the modern processes of mass-production and techniques of the 'strong executive'.¹⁰

Nevertheless, Catholics maintained political pressure on government officials to review the issues of funding in regards to their schools. In 1944, their demands would finally materialize in the form of a Royal Commission which was appointed by Conservative Premier George Drew, to examine outstanding educational issues.

However, when in 1950 the Hope Commission's recommendations were released. Catholics had not been vindicated in their demands, instead it recommended that denominational education be reduced and not expanded.¹¹ The Commission favoured the continuation of the moral and religious based courses which had begun in public school in 1944. The recommendations were reminiscent of Ryerson's modernist vision of a "enlightened and enlarged views of Christian relations, rights and duties". As a result of the political sensitivity of certain recommendations, in particular that of the limitations to denominational education, the newly elected Conservative government of Leslie Frost decided not to act on any of the Report's proposals. Instead, Frost came to the rescue of

¹⁰ John J. Poggie and al., Rethinking Modernization-Anthropological Perspectives, London, Greenwood Press, 1974, p.16.

¹¹ Report of the Royal Commission on Education in Ontario 1950, (Toronto: Baptist Johnston, 1950) p.532-533.

separate schools by allowing them access to funded intermediate education (grades 9 and 10) and by adjusting the grants to provide greater funds for separate schools.¹²

The Second World War had marked a new phase in the development of Ontario's educational system. Catholic schools had gained unprecedented privileges and public schools clung to the ideal that education should inculcate traditional democratic and Christian values, hence the introduction of the religion course in public schools. Moreover, as Robert Stamp explains, the popular view of the day was that the schools should "produce loyal, intelligent, right-thinking, religious, and freedom-loving citizens."¹³ Ontario's educational system was not only dualistic but contained polarized ideologies which were now politically and legally sanctioned. By this time, Ontario's educational system was a mixture of secular humanism and selective denominationalism.¹⁴

Part of the explanation for the continued presence of this duality lies in the massive population growth of the post-war period in Ontario and the rest of Canada. The boom in population had seemingly effected the political power relations between the Catholic traditionalist and the majority liberal modernist. In her article on education and ideology, Angéline Martel described how power relations vis-à-vis the Canadian educational system varied in proportion to the dominant group in society.¹⁵ If this

¹² Franklin Walker, Catholic Education and Politics in Ontario, Volume III, (Toronto: Catholic Education Foundation of Ontario, 1986) p. 77.

¹³ Ibid., p. 193.

¹⁴ Sussel, T., A., Canada's Legal Revolution: Public Education, the Charter, and Human Rights, Emond Montgomery Publications Limited, Toronto, 1995, p.135.

¹⁵ Angéline Martel et al., "Idéologies de la nation, idéologies de l'éducation au Canada entre 1867 et 1960: le 'bénéfice du locuteur' majoritaire ou minoritaire", Revue Canadienne de l'Éducation, Vol. 20, No. 3, 1995, p.392-393.

conception was applied to Ontario in the 1960's, it seemed that the balance of power was rapidly changing in that province. The Catholic population increased from 744 740 in 1931¹⁶ to 1 873 110 by 1961, to become the single largest denomination in Ontario (although technically the combined population of the various Protestant denominations still outnumbered the Catholics).¹⁷ Moreover, a new phenomenon of growth was occurring in the other religious groups which made up Ontario's denominations.¹⁸ Throughout the thirty or so years following the war, Canada's immigration policy was changing from a Eurocentric perspective to accepting a new diversity of cultures and ethnicity from Asia, Africa, Latin America, Italy, Portugal, Greece and the Caribbeans;¹⁹ and Ontario received a good proportion of this population influx.²⁰

Throughout the late 1960's and 1970's, the Christian values in education were decisively replaced by abstract modern civil concepts such as democracy, rights, freedoms and equality as symbolized in the enactment of the Canadian Bill of Rights in 1960. Even if the Bill only provided limited civil rights protection and did not extend to provincial law, it was nevertheless an important symbolic piece of legislation.²¹ This

¹⁶ Census of Canada, 1931, Table 45, p. 783.

¹⁷ Census of Canada, 1961, Table 44-11 and 44-12.

¹⁸ Census of Canada, 1961, Table 44-11 and 44-12.

Other religious groups in this context means groups other than Roman Catholics or the traditional Protestant denominations Anglican, United Church of Canada and Lutheran.

¹⁹ Donald H. Avery, Reluctant Host - Canada's Response to Immigrant Workers, 1896-1994, Toronto, MacClelland & Stewart, 1995, p.197.

²⁰ J. K. Mackay, "Religious Information and Moral Development", The Report of the Committee on Religious Education in the Public Schools of the Province of Ontario, Ontario Department of Education, February 3, 1969, p.14.

²¹ Sussel, *supra* note 14, p.26.

legal modernist emphasis on rights and equality was also reflected in subsequent educational policy.

Throughout the 1970's, although emphasis was placed on the secularization of the public school curriculum, the issues surrounding denominational education and religion in public schools had not been resolved. Nevertheless, new legislation held the promise to provide a legal sphere for the resolution of such issues. In 1982, the introduction of the *Canadian Charter of Rights and Freedom*²² largely embodied individual rights (although with some acknowledgement of groups rights), becoming another vehicle for dealing with many of these issues, and contributing yet further to the "legalization" of politics. For example, many parents and students who opposed the indoctrination of religious exercises in public schools could now challenge this aspect of public education under the guarantees of freedom of conscience and religion in section 2 a) of the Charter. Thus, with the Charter in place, individuals who could afford to do so could now police largely individual rights and consequently accelerate the process of secularization in the public school curriculum.²³ Again the law indirectly defines the nature of educational policies, facilitating liberal modernist ideology, of secularization, equality, participatory democracy, in the educational sphere.

As for Catholics, the Charter is an awkward piece of legislation which raises yet more potential problems in regard to denominational rights to education. Nevertheless, in the short term recent events appear to finally turn in the Catholics' favour. In 1984 the Conservative government of William Davis, finally granted Catholics full funding for all

²² *Constitution Act, 1982 (Part I), Canadian Charter of Rights and Freedoms.*

²³ *Ibid.*, p.138.

secondary grades. In 1987, the constitutionality of Bill 30, as it was called, was appealed to the Supreme Court of Canada in *Re: An Act to Amend the Education Act of 1987*. Not only did the court find that the bill was constitutional but it held that the Privy Council had denied Catholics their entitled rights in the Tiny Township case.²⁴ Section 29 of the Charter stated that denominational or separate schools would preserve the rights held at Confederation under s.93 of the Constitution Act, 1867. These rights are technically open to every denomination, supported by section 15 (1) of the Charter of Rights, which guaranteed every individual equality before and under the law.

The Supreme Court of Canada's decision reflects a vindication of the compact theory of confederation, not in terms of natural rights which transcend legislative authority, but in terms of contemporary understandings of minority rights. Moreover, the Court maintained that even if certain sectors of the community considered it discriminatory, the fact remained that the province of Ontario held obligations to Catholics in regards to education which did not apply to other denominations.²⁵ Furthermore, the Supreme Court Justices, although varying their reasoning, ruled in favour of the special privileges with regard to educational funding and policies for denominational schools in Ontario.²⁶ Madame Justice Wilson suggested that section 93 was an essential clause and condition for the confederation between Upper and Lower Canada in the nineteenth century. She added: "The incorporation of the Charter into the

²⁴ Ronald Manzer, Public Schools & Political Ideas, Toronto, University of Toronto Press, 1994, p.170..

²⁵ Thomas Claridge, "Religious schools deserve tax funds, parents contend", The Globe and Mail, Toronto, September 8, 1993, p.A10.

²⁶ Subsequent decisions had also upheld this notion. *Alder v. Ontario*, (1992) 9 O.R. 676 (3d) (O.C.)

Constitution Act, 1982, does not change the original Confederation bargain.”²⁷

Nonetheless, the decision in 1987 to grant full funding to Catholic schools did not necessarily represent an end to the ongoing struggle by Catholics to preserve their school system under the constant pressures of a modern liberal democratic state.

In recent years, the questions surrounding separate schools have been of concern both inside and outside the province of Ontario. For example, in the early 1990's, when Newfoundland proposed to reform its church-run school system to allow for a public system, concerns were immediately raised regarding the impact of such reforms on minority rights in other provinces. Given that the proposed reforms represented a constitutional amendment of the Terms of Union²⁸, the Newfoundland government had to obtain Parliamentary approval and approval from the provincial legislature.²⁹ In September 1997, following approval by Newfoundland legislature, the issue was presented to the people of the province who voted in favour of the proposed changes. Similar issues were raised in Quebec, when the provincial government obtained parliamentary approval to change the long standing school system divided between Protestant and Catholic boards for a linguistically based school system.

More recently, in Ontario, the Conservative government of Mike Harris attempted to pass Bill 160 which sought to centralize control over certain aspect of education in the province. The government was quickly reminded of the Constitutional guarantees that

²⁷ An Act to Amend the Education Act, (1987) 1R.C.S., p.1198-1199.

²⁸ Under the Terms of Union of 1949, the schools of Newfoundland were placed under the control of three kind of church dominated boards - Roman Catholic, Pentecostal and interdenominational -(composed of the principle Protestant churches).

²⁹ “Amending its ways” Ottawa Citizen, Wednesday May 29, 1996

Catholics had to levy taxes to finance their separate schools. On July 22, 1998, the Ontario Court had ruled that in effect, the proposed changes within Bill 160 violated the rights of Catholics by removing the right to levy property taxes, a privilege guaranteed at Confederation.³⁰

As these recent cases demonstrate, the historical issues surrounding denominational schools have relevance today. Moreover, from a broader perspective, constitutional issues surrounding minority or group rights continue to be significant and contentious. Historically, law and legal actors had great influence over Ontario's educational policy. The legal formalist interpretation of various legislative enactments disguised what were in actuality major policy decisions regarding the educational future of separate schools. The most recent cases, briefly sketched above, may change the outcomes in favour of francophone aspirations. However, this should not necessarily be interpreted as progress. The conflicts surrounding these issues have not disappeared. The Charter is essentially another legal mechanism used to settle an ongoing and historical conflict of ideology between the demands of the group or minority which is based on community attachment versus the needs of the individual within a modern liberal state. While it opens the possibility for the contemplation of group rights by the courts, a range of concerns remain including the policy outlook of judges and who is in a position to effectively litigate. These remain concerns, along with the political struggles in the legislative spheres. The contemporary debates have many parallels to the issues in the 19th and early 20th century but we should also be wary about teleological judgement; historical circumstances, as well as conflicts, are specific to the period. Even if at its root,

³⁰ Ottawa Citizen, Wednesday July 23, 1998

the basis of conflict remains the same; the political struggles in the legal and political arenas as well as social attitudes toward diversity do change over time.

Although many contemporary liberals have come to the defence of minority group rights, the conflicts are no less intense, nor are they closer to being resolved. Recent developments in legal and political spheres, though showing some signs of accommodation, have not decisively addressed minority aspirations. From a wider perspective, we have seen that modern forms of regulating behaviour of the citizen as an individual are not necessarily less arbitrary than forms of regulating behaviour based on traditional community norms. In this sense, the rise of modern education based on orthodox liberalism emphasized the formation of the “good” citizen; whereas denominational education attempted to encourage the formation of the “good” Christian. In the Foucaultian sense, power is expressed in many forms. The language of “rights” as law, is a power which emphasizes modern liberal democratic values. Law as text, as Constitution, as “rights”, tends to legitimate the form and terms of the resolution of social conflicts and policy questions along the liberal individualist lines and common citizenship of the modern state.

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