HODGINS, J.A., IN CHAMBERS. MARCH 10TH, 1919.

OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

Appeal—Settlement of Case on Appeal to Privy Council—Dispute as to what Exhibits and Evidence were before Court at Trial—Conflicting Affidavits—Inference.

Application by the plaintiffs to settle the case on appeal to the Privy Council from the judgment of the Appellate Division, 43 O.L.R. 637, 15 O.W.N. 88.

A previous application for the same purpose had been heard and disposed of by HODGINS, J.A.

J. H. Fraser, for the plaintiffs.

W. N. Tilley, K.C., and H. S. White, for the defendants.

HODGINS, J.A., in a written judgment, said that he had already disposed of the point, now raised again, whether the whole of the proceedings in the Mackell case were put in at the trial, and not merely the printed case which had been before the Privy Council.

On the first application, the learned Judge went carefully over the testimony given at the trial, and concluded that the language used by counsel thereat rendered it almost certain that the additional material and evidence had been in fact put in, though not then at hand or marked. Otherwise much of what was said was meaningless in view of the fact that exhibit 14, the printed case in the Privy Council, had been put in previously without question.

The learned Judge was now asked to receive and act on affidavits made by counsel for the plaintiffs at the trial, the statements in which were distinctly challenged by counsel for the defendants.

In such a case of clear difference between those who ought to know, the learned Judge was compelled to adhere to his former ruling, for he received no assistance from statements made on one side and denied on the other.

Under our practice a Judge of the Appellate Division does not know what papers are before the Divisional Court during the argument, and has to assume that the record of the trial contains specific information shewing what the trial Judge admitted or rejected. If that record is faulty or obscure, the safer way is to admit all that by fair inference can be found to have been before him, and which is not rejected nor clearly inadmissible.

Counsel for the parties always have it in their power to make clear just what exhibits are to form part of the record.

This second application failed, and the costs of it should be to the defendants in the appeal in any event.