18962

SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal of Alberta)

B E T W E E N:

THOMAS LARRY JONES

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

APPELLANT'S FACTUM

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APPELLANT'S FACTUM page

PART I - STATEMENT OF FACTS 1

PART II - POINTS IN ISSUE 4

PART III - ARGUMENT 5

PART IV - NATURE OF ORDER REQUESTED 27

PART V - TABLE OF AUTHORITIES 28

APPENDIX - STATUTES

1. The School Act, R.S.A. 1980, c. 3; Sections 142, 143, 180 . . 29

2. The Canadian Charter of Rights and Freedom; Sections 1, 2, 7 31

3. The Constitution Act, 1982; Section 52 32

IN THE SUPREME COURT OF CANADA
ON APPEAL FROM THE
COURT OF APPEAL OF ALBERTA

BETWEEN:

THOMAS LARRY JONES
Appellant

- and -

HER MAJESTY THE QUEEN
Respondent

FACTUM OF THE APPELLANT

PART I

STATEMENT OF FACTS

1. On the 8th day of March, 1983 an information was laid under oath before a Justice of the Peace for the Province of Alberta by Robert Bach consisting of three counts alleging that THOMAS LARRY JONES, between September 6, 1982 and January 7, 1983 inclusive:

(a) was the parent of Allison Charlene Jones, a child within the meaning of s.142 of the School Act of Alberta, R.S.A. 1983, Chapter S-3, who contravened without lawful excuse the provision of the said Act respecting school attendance and did thereby commit an offence contrary to s.180(1) of the said Act, and

(b) was the parent of Laura Joan Jones, a child within the meaning of s.142 of the School Act of Alberta, R.S.A. 1983, Chapter S-3, who contravened without lawful excuse the provision of the said Act respecting school attendance and did thereby commit an offence contrary to s.180(1) of the said Act, and

(c) was the parent of Carol Lynn Jones, a child within the meaning of s.142 of the School Act of Alberta, R.S.A. 1983, Chapter S-3, who contravened without lawful excuse the provision of the said Act respecting school attendance and did thereby commit an offence contrary to s.180(1) of the said Act.

2. The trial was heard on the 14th and 16th of March, 1983. On March 16, 1983, His Honour Judge D.F. Fitch acquitted the Appellant herein of all charges.

3. The Attorney General of Alberta appealed by way of stated case to the Court of Appeal. In the stated case of April 13, 1983, His Honour Judge D.F. Fitch:

(a) found as a fact that, apart from the constitutional validity of the School Act of Alberta, the prosecutor had proved his case.

(b) Made no ruling with respect to the defence of freedom of religion.

4. On October 3, 1983, the Court of Appeal ordered that the matter be referred back to the learned Trial Judge

for further argument upon notice to the Attorney General for Alberta and the Attorney General for Canada pursuant to the Judicature Act of the Province of Alberta, R.S.A. 1980, Chapter J-1.

5. On November 4, 1983, further argument was heard by His Honour Judge D.F. Fitch and on December 20, 1983, he acquitted the Appellant herein of all charges.

6. The Attorney General of Alberta appealed by way of stated case to the Alberta Court of Appeal.

7. The Appeal was heard on June 15, 1984. On June 15, 1984, the Alberta Court of Appeal unanimously (per Lieberman, Haddad and McClung, J.J.A.) reversed the acquittal and entered convictions against the Appellant herein on all three counts. The Alberta Court of Appeal sentenced the Appellant herein to a fine of 5,00$ on each count and in default of payment judgment to issue that amount.

8. The Alberta Court of Appeal found it unnecessary to answer any of the questions contained in the stated case.

9. On October 22, 1984 the Appellant sought leave to appeal the decision of the Alberta Court of Appeal to this Honourable Court and on November 1, 1984 this Honourable Court granted leave to appeal.

10. On January 2, 1985 an application was made to

this Honourable Court for an order stating a constitutional question and giving directions with respect to the deadlines for intervention. On January 9, 1985 the Honourable Mr. Justice Estey made an Order stating a constitutional question.

PART II

POINTS IN ISSUE

11. The constitutional question stated in this appeal is as follows:

> " Whether Sections 142, 143 and 180 of the School Act, R.S.A., 1980, Chapter 3 are inconsistent with Section 2(a) or Section 7 of the Canadian Charter of Rights and Freedoms and therefore of no force or effect to the extent of the inconsistencies pursuant to Section 52(1) of the Constitution Act, 1982? "

The Canadian Charter of Rights and Freedoms is hereinafter referred to as "the Charter".

PART III

ARGUMENT

Background

12. Sections 142 and 143 of the School Act establish a scheme of government control over all aspects of education and school attendance for all children in the Province between the ages of 6 and 16 years. Section 180 then provides sanctions upon the parents of such children if the children do not conform to this scheme. Each of these sections is reproduced in the Appendix hereto.

13. Section 142 makes it compulsory for all chidren to attend a government operated school unless a child is lawfully excused from attendance. Section 143 both lists the lawful excuses and sets out the means by which these excuses may be proven. Nearly all of these excuses depend to some extent upon the actions of a government official.

14. A parent who does not wish his child to attend a government operated school has only two alternatives given to him in Section 143. First, he could arrange for a tutor for his child (or teach the child himself) in which case he must obtain a written certificate from a Department of Education inspector or a Superintendent of Schools, that his child is receiving efficient instruction [see Section 143(1)(a)]. Alternatively, he could arrange for his child to attend a private school approved by the government under the Department of Education Act [Section 143(1)(e)]. Consequently, all parents in the Province must either

obtain government approval for the method and style of education they choose for their children, or submit their children to the government-operated (and hence government controlled) school system. This is in marked contrast to such statutes as the Child Welfare Act, which allow parents to exercise their rights in raising their children unless a government official has reasonable and probable grounds to believe that the child is being harmed. The School Act, on the other hand, restricts the freedom of everyone to prevent a possible abuse by someone.

Section 2(a) of the Charter

15. Section 2(a) of the Charter reads as follows:

> " 2. Everyone has the following fundamental freedoms:
>
> (a) Freedom of conscience and religion. "

16. The Appellant respectfully submits that while the purpose of the School Act is not to enforce religious observance, it is nonetheless legislation which has the unconstitutional effect of compelling parents to conform to a religious dogma and to do so despite their own religious convictions. As this Honourable Court held in R. v. Big M Drug Mart Ltd. (S.C.C., April 24, 1985; not yet reported, p. 47, lines 20-21), "either an unconstitutional purpose or an unconstitutional effect can invalidate legislation".

17. This unconstitutional effect arises because section 142 of the School Act establishes that absolute

control over the education of children is in the hands of the government, and nothing in section 143 modifies or removes that absolute control. For the Appellant, any act of submission to the government in this area is not a purely secular act devoid of religious significance, for it requires a parent to acknowledge that the government, rather than God, is the final and absolute authority over his child. This is the very thing that the Appellant disputes. As the learned trial judge stated at page 6, lines 6-14 of his reasons for judgment dated March 21, 1986 (Appeal Case, p. 163, lines 14-28):

> " The accused rejects... registration as a private school, as inconsistent with his belief that his authority over his children and his duty to attend to their education comes from God and it would be sinful for his to request the state to permit him to do God's will...
>
> ... the accused states he has no objection to the school authorities ... testing his own children... to ascertain their achievement level, but his religious convictions prevent his making such a request of the school authorities. "

18. When the case at bar was heard by the Court of Appeal for Alberta, that Honourable Court stated (p. 3, lines 26-30) (A.C. p. 207, lines 40-48) that:

> " It must be borne in mind that the respondent has never requested and therefore has never been refused a certificate under s. 143(1). At

> trial he explained his failure to request the certificate on the ground that it offended his religious beliefs to do so. That motiviation (sic) was rejected by the trial judge. "

The Appellant respectfully submits that the learned Court of Appeal erred in reaching this conclusion. In fact, the learned trial judge made extensive reference to the Appellant's religious convictions in the following passages in his written judgment dated March 21, 1983: lines 17-19 on page 5,* lines 6-17 on page 6,** and lines 6-14 on page 9.*** The learned trial judge made further references to the Appellant's religious beliefs in his reasons for judgment dated December 20, 1983, at lines 1-3 on page 7, lines 22-24 on page 8, and lines 28-32 on page 16. Consequently, it is not correct to state that the learned trial judge rejected the assertion of the Appellant that he was motivated by religious convictions. Rather, what the learned trial judge decided was that:

> " Asking the state for authority to educate one's children, and asking the state to certify the education one is already giving those children is of high quality, are not the same thing. " (Reasons for judgment dated December 20,1983, p. 8, lines 24-26) (A.C. p. 177, lines 42-48)

19. However, the Appellant respectfully submits that the learned trial judge did err in concluding that the requirement to seek certification did not offend the right to religious freedom guaranteed in Section 2 of the Charter. One does not ask for a certificate from an entity one

believes has no authority to grant it. The Appellant could not ask the state to certify the education he is giving to his children is of high quality without admitting that the state has control or supremacy in that area. This is precisely what is contrary to his religious convictions. The act of asking the government whether one is giving efficient instruction still places man's representative, the government, rather than God's representative, the parent, as the final authority over the child. It is true that the Appellant did retain a secular expert of his own choosing to test his children and to give evidence as to the education that the children were receiving. However, it is not the secular nature of the individual involved that is offensive to the Appellant's religious convictions; rather, it is the authority or control that such an expert purports to have. In the case of an expert retained by the parent, the parent does not relinquish his God given control or authority over the child, but in the case of the government, the government will not proceed on any basis other than one in which the government has final authority over the child.

20. The key to the Appellant's submissions concerning section 2(a) of the Charter is what is encompassed by "freedom of religion" as that term is used in the Charter.

21. The concept of freedom of religion has been discussed in a number of Canadian cases, primarily in connection with the Canadian Bill of Rights. The Appellant submits, however, that the decisions rendered in cases decided under the Canadian Bill of Rights cannot automatically

and without reservation be applied to cases to be decided under the Charter. As this Honourable Court has held in R. v. Big M Drug Mart Ltd. (supra, p. 65, lines 18-21) cases decided under the freedom of religion provisions of the Canadian Bill of Rights "cannot easily be transferred to a constitutional document like the Charter and the fundamental guarantees it enshrines".

22. Moreover, cases decided under the Canadian Bill of Rights are restricted by the limiting provision in that statute to "such rights and freedoms as they existed in Canada immediately before the Statute was enacted". This restriction does not apply to cases to be decided under the Charter (R. v. Big M Drug Mart, supra, p. 66, line 22; p. 67, line 20).

23. In R. v. Big M Drug Mart (supra), this Honourable Court discussed the concept of freedom of religion as follows (p. 55, line 12; p. 56, line 21):

> " The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that. (The writer's underlining)
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another

> to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of 'the tyranny of the majority'. "

24. The Appellant respectfully submits that this passage is directly applicable to the case at bar. First, this Honourable Court specifically refers to the right to manifest religious belief by teaching, which is precisely what the Appellant is seeking to do. The position of the government is that the Appellant can do this provided he

first obtains the permission of the government for what he proposes to teach and the method in which he will teach it. This is a restriction upon the Appellant's freedom of religion because his religious convictions do not allow him to divide his life into separate areas of "secular life" and "sacred life". Rather, every aspect of every day must be dedicated to God.

25. Secondly, this Honourable Court has referred to the right to be free from coercion or constraint. In the case at bar, the state is seeking to compel the Appellant to adopt a "course of action which he would not otherwise have chosen"; namely, seeking state approval to fulfill his religious obligations.

26. Thirdly, this Honourable Court has referred to such limitations as are necessary to protect others in the field of public safety, order, health or morals. The Appellant respectfully submits that nothing he is doing requires the state to intervene to protect anyone in any of these areas. The Appellant respectfully submits that the Crown has not presented any evidence to indicate that the Appellant is in any way adversely affecting anyone in the area of public safety or in any other area. Rather, the Crown has simply asserted an unsubstantiated fear that if the Appellant is allowed to proceed in this manner, abuses may result. The Appellant respectfully submits that the Crown has an obligation to present evidence which supports the necessity of the provisions of the School Act which form an infringement upon the Appellant's right to religious freedom. Further submissions in this regard are

contained in the discussion of Section 1 of the Charter, infra.

27. Fourthly, this Honourable Court has stated that the Charter safeguards "religious minorities from the threat of the tyranny of the majority". The Appellant respectfully submits that the fact that the majority hold no religious beliefs related to education or choose to educate their children in a particular way should not give the majority the right to infringe upon the religious beliefs of those who hold a different view. As this Honourable Court has stated in R. v. Big M Drug Mart (supra, p. 74, lines 8-11):

> " The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment. "

28. In summary, the Appellant respectfully adopts the following words from this Honourable Court in R. v. Big M Drug Mart Ltd. (supra, p. 79, line 21; p. 80, line 1):

> " With the Charter, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise. "

In the case of the Appellant, this involves more than one hour of worship on Sunday morning when the government is

prepared to allow such worship to take place. It involves constant obedience to God and to His commands, including those commands which relate to the education of children.

29. The Appellant also relies upon the decision of this Honourable Court in the case of National Bank of Canada and Retail Clerks' International Union and Canada Labour Relations Board [1984] 1 S.C.R. 269. In his concurring reasons for judgment, which were agreed upon by four other members of this Honourable Court, Beetz, J., stated (at p. 296, lines 19-22) that the Charter guarantee to freedom of thought, belief, opinion and expression "guarantee to every person the right to express the opinions he may have: a fortiori they must prohibit compelling anyone to utter opinions that are not his own". Similarly, the Appellant respectfully submits that the right to exercise one's own freedom of religion must also include the corresponding right not to have to do anything contrary to one's own religion or to express a contrary faith. To be forced to acknowledge government control in the field of education of children would be the same as requiring the Appellant to express a creed that is not his own.

Section 7 of the Charter

30. Section 7 of the Charter reads as follows:

> " 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. "

31. The Appellant respectfully submits that he is being deprived of his liberty in a way that is not in accordance with the principles of fundamental justice. This deprivation of liberty arises in two ways. First, by depriving the Appellant of his right to bring up his children in a manner he sees fit, and secondly, by providing penal sanctions in Section 180 of the Act. In regard to the first branch of this submission, the United States Supreme Court has consistently given a generous interpretation to the term "liberty". For example, in Meyer v. State of Nebraska (262 U.S. 390, 67 L. ed. 1042), the Court held (at p. 1045 L. ed., lines 41-56):

> " While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contact, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. "

Similarly, in Bolling v. Sharpe (347 U.S. 497, 98 L. ed. 887) the Court held (at p. 887, L. ed., lines 11-21):

> " Although the Court has not assumed to define "liberty" with any great

> precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. "

This generous interpretation has also been adopted in Canada in R. v. Neale (Alta Q.B., June 12, 1985, not yet reported, at p. 20, lines 9-16). The Appellant respectfully submits that if the right to bring up children is to have any meaning, it must include the right to provide those children with the education that the parent of the child deems to be best suited for that child. In regard to the second branch of the submission, Section 180 (1) of the School Act provides penal sanctions which include "imprisonment for a term not exceeding 60 days". The Appellant respectfully submits that this would be an obvious deprivation of his liberty.

32. Section 7 of the Charter provides that the Appellant can only be deprived of his liberty "in accordance with the principles of fundamental justice". The Appellant respectfully submits that the provisions of the School Act breach the principles of fundamental justice in the following ways:

(a) They require parents of children who are not in attendance at a school "over which a board has control" to prove that their children are receiving efficient instruction but do not require parents of other children to prove that

their children are also receiving "efficient instruction". These provisions assume the very points that are in issue: First, that children in government operated or controlled schools are receiving efficient instruction and other children are not, so that school attendance equates to efficient instruction; and secondly, that the government has an absolute right to control the method of educating children even if the parents are providing efficient instruction;

(b) They require someone employed by the school system to decide the issue of efficient instruction, thus placing someone with a vested interest in the school system in the position of judging the situation; and

(c) They limit the evidence admissible to prove that efficient instruction is being given to a certificate in writing signed by an Inspector or Superintendent of Schools, thus preventing a full answer and defence.

33. The Appellant respectfully submits that these provisions of the School Act are analogous to the provisions of the Combines Investigation Act that this Honourable Court struck down as violating the Charter in the case of Hunter et al v. Southam Inc. [14 C.C.C. (3rd) 97].

34. One of the issues that this Honourable Court dealt with in the Hunter case was whether an objective

standard had been established by which to judge whether a search and seizure was necessary. The Appellant respectfully submits that in this case there is no objective standard by which efficient instruction is judged. Rather, the government assumes that children in attendance at government schools are receiving efficient instruction (or at least does not require the parents of such children to prove that efficient instruction is being given) but does require that parents who wish to educate their children outside the government school system must obtain a certificate from the government that efficient instruction is being given. There are no standards set out as to what does or does not constitute efficient instruction or as to how the school inspector or superintendent of schools is to make his decision. In this regard, the Appellant respectfully adopts the following words of this Honourable Court in the Hunter case (at p. 114, line 41 to p. 115, line 4):

> " The State's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly based probability replaces suspicion. History has confirmed the appropriateness of this requirement as a threshold for subordinating the expectation of privacy to the needs to law enforcement. "

35. In the case at bar, the government does not even require a "suspicion" that efficient instruction is not being given before a prosecution can arise. The Appellant therefore submits that the way in which proceedings arise under the School Act is not in accordance with the principles of fundamental justice.

36. In the Hunter case, this Honourable Court also held (p. 112, lines 24-28) that:

> " A member of the R.T.P.C. passing on the appropriateness of a proposed search under the Combines Investigation Act is caught by the maxim nemo judex in sua causa. He simply cannot be the impartial arbiter necessary to grant an effective authorization. "

The Appellant respectfully submits that the Inspector or Superintendent of Schools is caught by the same maxim. He cannot be an impartial arbiter because he is not a neutral and impartial person. He is appointed and paid by the Calgary Public School Board. The Appellant respectfully adopts the following statement made by the learned trial judge in his reasons for judgment, dated December 20, 1983 (at p. 17, lines 8-13) (A.C. p. 190, lines 25-33

> " Giving an arbitrary power to grant or withhold certification to the superintendent of the public school system, the chief competitor of the private tutor and the private school, offends the notion of fundamental justice, whether or not there is a religious element involved in the dispute as to what is efficient instruction. "

37. As was the case in Hunter, this Honourable Court may wish to consider whether the legislation would be saved if an impartial arbiter were appointed. In Hunter, this Honourable Court held (at p. 113, lines 35-37) that an impartial arbiter would still not be sufficient to remedy

the situation if his decision was unreviewable. In the case of Rex ex rel Brooks v. Ulmer (1923) 1 W.W.R. 1 (Alta A.D.), a previous case concerning the School Act, Stewart J.A. suggested that the decision could be reviewed (p. 24, lines 4-12). The opposite view was expressed by Beck J.A. in that case, when he referred (at p. 27, line 9) to "this arbitrary power, subject to no review". The question of whether the decision could be reviewed was not dealt with in the case of R. v. Wiebe [1978] 3 W.W.R. 36 (Alta Prov. Ct.), a further case under the School Act. The learned trial judge in the case at bar also did not deal with the possibility of an impartial arbiter being appointed.

38. The Appellant also submits that the provisions of the School Act do not permit him to make a full answer and defence for two reasons. First, because the one who can issue the certificate that efficient instruction is being provided is associated with the prosecution of the offence; and secondly, because the only proof of efficient instruction that is acceptable under the School Act is that Certificate. In the case at bar, the Appellant has shown why he cannot produce a certificate and has also presented evidence which shows that, notwithstanding his lack of such a certificate he is providing his children with efficient instruction.

39. The Appellant therefore respectfully submits that the Sections of the School Act are inconsistent with the Charter for the same reasons that the impugned Sections of the Combines Investigation Act were held to be inconsistent with the Charter.

Section 1 of the Charter

40. If, as the Appellant submits, his rights under Sections 2 and 7 of the Charter have been infringed, the impugned Sections of the School Act must be held to be of no force or effect to the extent of the inconsistencies unless Section 1 of the Charter applies. Section 1 of the Charter reads as follows:

> " The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. "

41. In the Big M Drug Mart case (supra), this Honourable Court has stated (at p. 80, lines 16-21) that:

> " ... not every government interest or policy objective is entitled to Section 1 consideration. Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. "

The Appellant therefore submits that it is incumbent upon the Respondent to demonstrate what the government objective is in this case. The Appellant respectfully submits that the government objective cannot be that all children receive the same education. If that were the case, the School Act would not permit any variation

from the government operated school system. Moreover, education itself is not an absolute requirement under the School Act. Subsection 143(1)(f) excuses a child under the age of 7 or over the age of 15 if the school is unable to offer proper instruction for that particular child, while subsection 143(1)(g)(ii) excuses a child from attendance if that child has been expelled from school. In neither case does the Act require that a child be given any instruction at all. The Appellant therefore submits that the real government objective is to have control or supremacy over all children in the Province and that this is not an objective which is entitled to Section 1 consideration.

42. If this submission is incorrect and there is a government objective which is entitled to Section 1 consideration, the Appellant respectfully submits that there are three criteria set out in Section 1 which must be met before Section 1 can apply to save the impugned statute. First, the limits must be reasonable. Secondly, they must be prescribed by law. Thirdly, they must be such as can be demonstrably justified in a free and democratic society.

43. Before considering whether or not the limits are "reasonable" the Appellant submits that it is necessary to determine what these limits are. In the case at bar, the limit that the Respondent seeks to uphold is not the requirement that children receive an education, but rather the limit that the government has absolute control over education through school attendance and the only evidence which can permit a child to be excused from school attendance rests in the hands of the government. The Appellant

respectfully submits that this limit is not "reasonable" although it is "prescribed by law".

44. The Appellant also submits that while the requirement that the certificate is the only proof is prescribed by law, the further requirement that the Respondent seeks to uphold; namely, that the Appellant must apply for the certificate, is not prescribed by law and is therefore not protected by Section 1 of the Charter. The requirement that a parent must apply for such a certificate is merely a policy which has been adopted by the school authorities. At trial, both the school inspector and the attendance officer admitted that there was no requirement to apply for a Certificate in either the School Act or the regulations thereto.

45. In R. v. Paul Mathew Therens (S.C.C., May 23, 1985, not yet reported), this Honourable Court held that where a limit on a Charter protected right was imposed by the conduct of police officers and not by Parliament, the Court is not concerned with Section 1 of the Charter (p. 3 of reasons by Estey, J., lines 10-19; p. 1 of reasons by Dickson, C.J.C., lines 4-10; p. 33 of reasons by LeDain, J., lines 11-16). The Appellant submits that the Therens case is analogous to the case at bar in that the limit has been imposed by the conduct of the school authorities, not by the legislature, and that Section 1 therefore cannot save this limit.

46. In regard to the third criteria, the onus of demonstrating that the limit is justified rests with the

one seeking to uphold it, in this case Her Majesty the Queen. (Hunter v. Southam, supra, p. 116, lines 11-13).

47. In The Law Society of Upper Canada v. Skapinker [1984] 1 S.C.R. 357, this Honourable Court found (at p. 384, lines 8-12) that the record concerning Section 1 "was indeed minimal, and without more, would have made it difficult for a court to determine the issue as to whether a reasonable limit on a prescribed right had been demonstrably justified". In the case at bar, the record presented by the Crown concerning Section 1 is not minimal; it is non existent. The Crown has not presented anything to justify the limitation. Accordingly, the Appellant submits that there is no case for him to answer concerning Section 1.

48. If the Crown does wish to justify this limit, one area to examine is the legislation in effect elsewhere in Canada. The learned trial judge has stated at page 14, lines 12-15 of his reasons for judgment dated December 20, 1983 (A.C. page 185, line 44 to page 186, line 10):

> " ... the compulsory education provisions of the school acts or ordinances of three provinces and one territory, British Columbia, the Northwest Territories, Ontario and Quebec, all permit the issue of efficient instruction to be decided on evidence in Court... "

The Appellant respectfully submits that a limit which is unnecessary elsewhere in Canada cannot be demons-

49. The Appellant submits, however, that even if other provinces have legislation identical to that in effect in Alberta, a mere reference to laws in effect in other jurisdictions cannot determine the issue. As Tarnopolsky, J.A. has held in R. v. Videoflicks Ltd. et al (1984) 48 O.R. (2d) 395 (at p. 429 line 4 to p. 430 line 3), the Crown also has an obligation to show why such limitations in other jurisdictions are reasonable and how they are justified.

50. Moreover, the Appellant respectfully submits that the Crown has an obligation to show "an actual demonstration of harm or a real likelihood of harm to a society value before a limitation can be said to be justified". (National Citizens' Coalition Inc. v. Attorney General of Canada [1984] 5 W.W.R. 436 at p. 453, lines 14-16). It is not enough to show a mere suspicion of harm. In the case at bar, the Crown has not shown that any harm will result if the limit is removed. The learned trial judge found that the children of the Appellant are in fact receiving efficient instruction now.

51. Thirdly, the Appellant submits that for the Crown to succeed in invoking Section 1, "the object and means chosen must be shown to be preferable to some other state object and preferable to some other means of attaining a state object". Re Reich and College of Physicians and Surgeons (No. 2) (1984) 8 D.L.R. (4th) 696 at p. 712, lines 28-30. The Appellant respectfully submits that the Crown has not shown either of these to be true. Even if one concedes that the state object is quality education,

there is no evidence that the School Act leads to this object. The Appellant respectfully submits that the School Act only ensures government control of education; it does not in any way ensure efficient instruction.

PART IV

NATURE OF ORDER REQUESTED

1. The Appellant respectfully asks for an Order granting the Appeal, overturning the conviction of the Appellant entered by the Court of Appeal for Alberta and restoring the acquittal of the Appellant made by the learned trial judge.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

PHILIP E. CARR
of FOSTER WEDEKIND, Barristers & Solicitors
Counsel for the Appellant

PART V

TABLE OF AUTHORITIES

page

Bolling v. Sharpe 347 U.S. 497; 98 L. ed. 887 (U.S.S.C.) 15

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