18962

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 RESPONDENT

ATTORNEY GENERAL OF ALBERTA

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PART I

STATEMENT OF FACTS

1. The Attorney General of Alberta, Respondent, accepts, with respect, the Statement of Facts contained in the Factum of the Appellant herein and makes the following additions:

2. Defences to the charges alleged against the Appellant include proper certification that the children are under efficient instruction or attendance at an approved private school pursuant to s. 143(1)(a) and s. 143(1)(e) of the School Act, R.S.A. 1980, c. S-3. The Appellant has neither applied for nor been refused certification or approval. This Court is referred to the decision of the learned trial judge on December 20, 1983, where he states "the accused has not attempted to comply with the law by obtaining certification or approval", Appeal Case, p. 177, line 19.

3. The learned trial judge, in his reasons for judgment, December 20, 1983, stated that the Appellant "has failed to establish a factual basis for his claim that the requirement of certification of approval offends his religious beliefs", Appeal Case, p. 178, lines 30-33.

PART II

POINTS IN ISSUE

4. The constitutional question stated by The Honourable Mr. Justice Estey on January 9, 1983 is as follows:

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

PART III

ARGUMENT

Section 2(a) of the Charter of Rights

5. It is respectfully submitted that s. 2(a) of the Charter is not violated by ss. 142, 143 and 180 of the School Act (reproduced in Appendix A). Section 2(a) of the Charter provides as follows:

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

6. Section 142(1) of the School Act provides that children between the ages of 6 and 16 shall attend a school over which a board has control, unless excused by s. 143. Section 143 provides that a pupil is excused from attendance at school if a Department of Education inspector or a Superintendent of Schools certifies in writing that the pupil is receiving efficient instruction.

7. In R. v. Big M Drug Mart [1985] 3 W.W.R. 481 (S.C.C.), Dickson, J. (as he then was) defined freedom of religion at p. 517:

> 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.

8. Freedom of religion was also defined by Tarnopolsky, J.A. in R. v. Videoflicks (1984), 5 O.A.C. 1 (Ont. C.A.), at p. 19:

> Freedom of religion goes beyond the ability to hold certain beliefs without coercion and restraint and entails more than the ability to profess those beliefs openly. In my view, freedom of religion also includes the right to observe the essential practices demanded by the tenets of one's religion and, in determining what those essential practices are in any given case, the analysis must proceed not from the majority's perspective of the concept of religion but in terms of the role that the practices and beliefs assume in the religion of the individual or group concerned.

9. In R. v. Morgentaler (1984), 41 C.R. (3d) 193 (Ont. H.C.), Parker, A.C.J.H.C. stated at p. 258:

> To find a breach of freedom of religion, however, there must be more than a religious component to the impugned law; it must be one that infringes a tenet or fundamental doctrine of a religion.

10. It is respectfully submitted that the learned trial judge was correct in his decision that the Appellant has failed to establish a factual basis for his claim that the certification procedures of the School Act violate his religious beliefs.

11. In the case of R. v. Big M Drug Mart (supra), at p. 513, the Court stated that both purpose and effect of the legislation are relevant in determining constitutionality. Unlike the purpose of the Lord's Day Act, in the case at bar, the purpose of the School Act is clearly secular. The impugned provisions relate strictly to school attendance and exemptions thereto

There is no reference, express or implied to the religious views of the pupils of the schools.

12. It is further submitted that the effect of the School Act is not such as to violate the religious freedom of the Appellant. The effect of the impugned provisions advance the province's secular goals; at best there is only an indirect burden on the observance of the Appellant's religion.

13. It is submitted, that an indirect effect is not sufficient to warrant the legislation in question to be declared inoperative. In R. v. Big M Drug Mart (supra) Dickson, J. at p. 514 quoted with approval the statement of Warren, C.J. in the case of Braunfield v. Brown, 366 U.S. 599 (1961) at 607:

> Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

14. In Baxter v. Baxter (1983), 36 R.F.L. (2d) 186 (Ont. S.C.), a husband opposed the granting of a divorce decree on religious grounds. Pennel, J. stated that p. 189:

> The fact that the government cannot exact from the individual a surrender of the smallest part of his religious scruples does

> not mean that he can demand of the government exclusion of his marriage from the provisions of the Divorce Act the better to exercise his religious beliefs.

Similarly in the case at bar, there can be no exclusion by the Appellant of his children from operation of the provisions of the School Act.

> See also: Re D (1982) 22 Alta. L.R. (2d) 228 (Alta. Prov. Ct.)

15. It is respectfully submitted that in the event this Honourable Court holds that the statute under review violates the freedom of religion guaranteed in the Charter, reliance can be placed on s. 1 of the Charter. That section provides 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.

16. Jeffery Wilson writing in the text, Children and the Law (1978) comments on children and education at p. 234:

> Since public education is seen as not only for the benefit of the parent or child, but also in the interests of the province--'the making of true subjects of all its children' - the right of a child, however qualified, to attend school, is complemented by the duties of compulsory attendance imposed upon the parent and child ...

17. In Re M (1978), 7 Alta. L.R. (2d) 220 (Alta. Prov. Ct.), the Court discussed religious freedom under the Alta. Bill of Rights at p. 242:

> Certainly the religious concern of each person is a personal matter, but the concern

> for children's upbringing is society's major concern, and it has to be predicated by the court's interpretation.

18. It is respectfully submitted that society has an overriding interest in seeking to ensure proper instruction is provided to children. This interest is paramount to the religious beliefs of parents.

19. This same kind of philosophy has been affirmed in American cases which have considered private schools and the First Amendment of the American Bill of Rights. The First Amendment provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...

20. In New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education, U.S. District Ct. for the District of N.J., (unpublished opinion, July 29, 1983); aff. by U.S. Court of Appeals for the Third Circuit, (unpublished opinion, July 17, 1984); certiorari denied, S.C., Jan. 7, 1985, the issue was whether a statute which required a private religious college to obtain a license to grant baccalaureate degrees involved an impermissible intrusion by the State into the affairs of a religious institution. The Court held that on its face the statute did not involve an undue entanglement with religious liberty. The Court referred to the fact that the New Jersey Supreme Court in a previous case involving the same parties, New Jersey State Board of Higher Education v. Board of Directors of Shelton College, 90 N.J. 470, 448 A. 2d 983, had stated that the

law should be administered in a manner so not as to intrude unduly upon religous matters.

21. The U.S. Courts have also stated that teacher certification requirements are valid with respect to private religious schools, Sheridan Road Baptist Church v. Department of Education, 132 Mich. 1, 348 N.W. (2d) 263 (1984).

22. In State of North Dakota v. Rivinius, 328 N.W. 2d 220 (1982), the defendants were convicted of violating a compulsory school attendance law. A tenant of their religion forbid compliance with a specific requirement needed to secure state approval, i.e. teacher certification. The Court held that the laws requiring licensing and certification did not unduly impinge on the constitutional rights of the defendants.

23. Further, in State of Nebraska v. Faith Baptist Church of Louisville, 207 Neb. 802, 301 N.W. 2d 571 (1981), app. dismissed 454 U.S. 803, the defendants refused to apply for school certification on the basis that this would infringe upon their freedom of religion as guaranteed by the first amendment. The Court recognized the critical interest of the State in the education provided to its youth. At p. 579:

> Although parents have a right to send their children to schools other than public institutions, they do not have the right to be completely unfettered by reasonable government regulations as to the quality of the education furnished.

24. The learned trial judge in his reasons for judgment dated December 20, 1983, Appeal Case, page 185, line 44, stated:

> ... 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.

25. While B.C. and Quebec do permit the Court to determine whether efficient instruction exits, the following provinces have legislation similar in effect to that in Alberta: the Education Act, S.S. 1981 c. E-0.1, s. 156; the Public Schools Act, S.M. 1980, c. 33, s. 261; the Schools Act, R.S.N.B. 1973, c. S-5, s. 59(3); and the School Act, R.S.P.E.I. 1974, c. S-2, s. 49(3).

Section 7 of the Charter of Rights

26. It is respectfully submitted that s. 7 of the Charter guarantees only procedural fairness. Section 7 provides as follows:

> 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.

On the facts herein, the procedures duly established by the School Act were followed, at least by the Respondent.

27. It is submitted that the phrase "principles of fundamental justice" does not extend beyond the requirements of fair procedure and is not intended to cover substantive requirements as to the policy of the law in question.

> The Queen v. Hayden (1983), 3 D.L.R. (4th) 361 (Man. C.A.) leave to appeal refused (S.C.C. Dec. 19, 1983)

Langevin v. The Queen (1984), 8 D.L.R. (4th) 485 (Ont. C.A.)

(contra) Reference Re Section 94(2) Motor Vehicle Act (1983), 4 C.C.C. (3d) 243 (B.C.C.A.) leave granted Mar. 21, 1983 (S.C.C.)

28. As was stated in the Facts, the Appellant has neither applied for nor been refused certification. It is submitted that only where personal rights or freeedoms have actually been infringed, or denied, or where there is imminent danger of violation, does s. 24(1) of the Charter apply. That is not the situation in this case as the Appellant refuses to apply for certification. The denial of certification, if it were denied, might be attacked by invoking s. 24(1) but there has been no such infringement:

R. v. G.B. [1983] 3 W.W.R. 141, 24 Alta. L.R. (2d) 226 at 228 (Q.B.)

Quebec Association of Protestant School Boards et al. v. A.G. of Quebec et al. (1983), 140 D.L.R. (3d) 33 at 41 (Que. Sup. Ct.) aff. 7 C.R.R. 139 (Que. C.A.), aff. [1984] 2 S.C.R. 66

29. In R. v. Corcoran (1985) 52 Nfld. & P.E.I. 308 (Nfld. Dist. Ct.), the Court considered the issue of whether mandatory enrollment provisions of the School Attendance Act (Nfld.) violated ss. 2 and 7 of the Charter. At p. 329 of the Judgment, Inder, D.C.J., stated that only in the event of nonapproval by the school Superintendent to have their child excused from attendance, would the arguments based on ss. 2 and 7 of the Charter arise.

30. In the event the Appellant is refused a certificate, an appropriate remedy does exist. Mr. Justice Lieberman, writing for the Court of Appeal stated at Appeal Case, p. 208, line 12:

> If the respondent had requested a certificate and had been refused, he could then attack such refusal by way of prerogative writ.

31. The prerogative remedy of certiorari lies to quash a decision once made where, among other things, the complaint is that the decision maker failed to observe the rules of natural justice when performing his function. Traditionally, this remedy was only available if the function in question could be classified as judicial or quasi-judicial. Recently, the Honourable Court has held that certiorari will lie even where the function is administrative because there is a general duty of fairness:

> Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police [1979] 1 S.C.R. 311

32. Should the Appellant be refused certification, he could then apply by way of certiorari to have the refusal struck claiming unfair practice. The meaning of fairness seems to be something less than a full trial hearing but at the very least requires that the person be given an opportunity to answer the case against him:

> Mauger v. Minister of Employment and Immigration (1980) 119 D.L.R. (3d) 54 at 67 (Fed. C.A.)

33. An alternative remedy exists in that in the event the Appellant is refused certification for an improper reason, he could apply for a writ of mandamus:

> Regina ex el Christoffersen v. Minister of Highways (1959) 28 W.W.R. (N.S.) 36 (Alta. S.C.)

34. It is respectfully submitted that the Alberta Court of Appeal was correct in concluding that the learned trial judge rejected religious convictions as a reason for not obtaining certification. The learned trial judge stated his reasons for judgment of Dec. 20, 1983, Appeal Case, p. 178, lines 30-33 that the Appellant herein failed to establish a factual basis for his claim of violation of religious beliefs. This failure is due in part to the fact that a secular expert was called at court by the defence. There is no apparent reason why the state should not simply be asked for certification.

35. In the alternative, if s. 7 of the Charter creates substantive rights in addition to procedural guarantees, it is the position of the Respondent that the provisions under review are fair and just.

36. It is submitted that s. 143(1)(a) of the School Act does not preclude evidence of efficient teaching. Evidence of efficient and proper teaching would have been relevant and available towards the charge as a defence of lawful excuse, if there were doubt as to the fairness or reliability of the certification process. Here, however, the fairness or [illegible] certification process was irrelevant because

procedure deliniated in the Act for certification is utilized, s. 143(1)(a) does not need to be "read down" so as to allow defence evidence of efficient instruction. This sort of evidence would, it is conceded, be available if there was doubt as to the reliability or fairness of the process. This allows a judge to "go behind" the absence of a certificate if the defence alleges bad faith. In R. v. Ulmer (1923), 1 W.W.R. 1 (Alta. A.D.) it was not possible to go behind the lack of a certificate because of an admitted set of facts (at pp. 23-24). In R. v. Wiebe, [1978] 3 W.W.R. 36 (Alta. Prov. Ct.) Oliver, J. certainly allowed evidence of efficient instruction by the defence, but there the allegation was that certification was being improperly withheld.

37. It is further submitted, contrary to the view of the learned trial Judge, that s. 143(1)(a) is not an absolute liability offence; but rather, that it is a strict liability offence. Strict liability offences have been held not to contravene s. 7 of the Charter:

> R. v. Christman (1984), 56 A.R. 108 (Alta. C.A.)
>
> R. v. Watch (1983), 37 C.R. (3d) 374 (B.C.S.C.)
>
> R. v. Maidment (1984), 37 C.R. (3d) 387 (N.S.C.A.)

38. It is respectfully submitted that an individual relying on s. 143(1) of the School Act bears the onus of proving that one of the exceptions contained therein is relevant:

> R. v. Holmes (1983), 32 C.R. (3d) 322 (Ont. C.A.)

R. v. Conrad (1983) 4 D.L.R. (4th) 226
(N.S.S.C. App. Div.)

39. In the further alternative, the Respondent relies on s. 1 of the Charter, and in that regard we refer to paragraphs 15-18 of this Factum.

PART IV

NATURE OF ORDER DESIRED

The Respondent hereby asks this Honourable Court to dismiss the appeal and answer the constitutional question in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Wm. Henkel Q.C.
of Counsel for the
Attorney General of Alberta

PART V

LIST OF AUTHORITIES