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

- and -

THE ATTORNEY GENERAL OF NOVA SCOTIA

INTERVENOR

FACTUM OF THE INTERVENOR ATTORNEY GENERAL OF NOVA SCOTIA

FOSTER WEDEKIND
444 Market Mall Professional Centre
4935 - 40th Avenue N.W.
Calgary, Alberta

Solicitors for the Appellant

GOWLING & HENDERSON
160 Elgin Street
Ottawa, Ontario
K1N 8S3

Ottawa Agent

WILLIAM HENKEL, Q.C.
9833 - 109th Street
Edmonton, Alberta

Solicitor for the Attorney
General of Alberta

GOWLING & HENDERSON
160 Elgin Street
Ottawa, Ontario
K1N 8S3 (232-1781)

Ottawa Agent

REINHOLD M. ENDRES
ALISON SCOTT
Department of the Attorney General
1723 Hollis Street, 3rd Floor
Halifax, Nova Scotia B3J 2L6

Solicitors for the Attorney
General of Nova Scotia

STEPHEN J. GRACE
Burritt, Grace & Neville
77 Metcalfe Street, 500
Ottawa Ontario K1P 5L6
613-237-7092

Ottawa Agent

INDEX

PART I

FACTS

1. The Intervenor adopts the statement of facts as set out in the Respondent's factum.

2. The Attorney General of Nova Scotia intervenes in this matter pursuant to an order made by the Honourable Mr. Justice McIntyre.

PART II

ISSUE

3. The constitutional question stated in the Order of this Honourable Court made on January 9, 1985 and addressed by the Intervenor is:

> Whether Sections 142, 143 and 180 of the School Act, R.S.A., 1980, c.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?

Position of the Intervenor

(i) Section 2(a) of the Charter

4. Legislation that requires school attendance or approved alternate education, does not violate freedom of conscience and religion. The secular purpose and the effect of such legislation is to educate children to an approved standard. It is important for public order and in the public interest to educate children. Rather than infringing the religious freedom of a parent such a system respects a

parent's wish respecting his child's religious and moral education in conformity with his own convictions and permits alternate education, if desired, while at the same time preserving the purpose of the legislation that a child receive efficient instruction.

(ii) Section 7 of the Charter

5. Compulsory schooling is not contrary to s.7 of the Charter. If the Appellant's liberty has been infringed, it was not infringed in a manner contrary to the principles of fundamental justice. The legislation does not mandate the issuance of a certificate in circumstances that deny fundamental justice, and the legislation does not deprive the Appellant of a defense to a prosecution under the Act. Also, the alleged right of a parent to educate his child would be subject to the rights and freedoms of others and to the public interest, including the public interest in children receiving education. Any parental right to educate one's child would also have to be infringed by the impugned legislation in a manner contrary to fundamental justice.

6. In a similar case, Inder, D.C.J., was quite unable to see how the "duty to enroll" a child could infringe or

encroach on rights under ss.2(1) or 7 of the Charter, particularly where, as in the present case, the parent had refused to seek exemption from compulsory attendance by way of a certificate of "efficient instruction" at home or elsewhere.

> R. v. Corcoran and Corcoran (1985), 52 Nfld. & P.E.I.R. 308, at pp. 328-329 (Nfld. Distr. Ct.).

PART III

ARGUMENT

A. Section 2(a) of the Charter

7. Whether Sections 142, 143 and 180 of the School Act, R.S.A. 1980, c.3 are inconsistent with the fundamental freedom of conscience and religion guaranteed in s. 2(a) of the Charter, depends on:

(i) the meaning and scope of freedom of conscience and religion; and

(ii) the purpose and effect of the impugned legislation.

R. v. Big M Drug Mart, [1985] 3 W.W.R. 481 (S.C.C.).

(i) Meaning and scope of freedom of conscience and religion

8. It is respectfully submitted that under the Charter, the American Constitution, the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, freedom of conscience and religion is limited by the need to protect public safety, order, health or morals and the rights and freedoms of others.

9. Section 2(a) of the Charter guarantees:

> (a) the right to hold and affirm the religion or belief of one's choice;
>
> (b) the right to manifest one's religion or belief in worship, dissemination, practice and teaching; and
>
> (c) the absence of coercion, which includes indirect forms of control that limit alternative courses of conduct available to others,

subject to such limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

R. v. Big M Drug Mart, supra, pp. 517-581.

10. While in the American First Amendment freedom of religion is not articulated in the same way as it is in the Charter, in Cantwell v. Connecticut, 60 S. Ct. 900 (1940), freedom of religion has been interpreted in a manner consistent with the interpretation offered in Big M Drug Mart, as forestalling a law that coerces the acceptance or practice of a religion, and as safeguarding free exercise of a chosen religion. The latter, the Court in Cantwell said, involves freedom to believe, which is an absolute freedom; and freedom to act, which is subject to regulation for the protection of society.

11. Likewise, "freedom of thought, conscience and religion" in both Article 18 of the International Covenant on Civil and Political Rights (to which Canada is a signatory) and Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms expressly includes:

> (a) the right to hold a religion or belief of one's choice; and
>
> (b) the right to manifest a religion or belief in worship, observance, practice and teaching,

subject to the limitations necessary to protect public safety, public order, health or morals or the rights and freedoms of others.

12. In each case, the freedom to manifest one's religion and beliefs is subject to limitations in the public interest or limitations necessary to protect the rights and freedoms of others. European, American and Canadian cases are supportive of this.

13. In Rjeldsen, Busk Madsen and Pedersen referred to by Zaim M. Nedjati in European Studies in Law (Vol. 8, 1978), Ch. 5 at 194, the European Court of Human Rights considered Article 2 of Protocol No. 1 to the European Convention which

expressly provides in addition to freedom of religion in Article 9, that the religious opinions of a parent in regard to the education of his child be respected. Despite this, the European Court upheld compulsory sex education and held that such education did not overstep what a democratic state may regard as the public interest. Nor, the court held, did such instruction affect the right of a parent to guide his child in accordance with the parents' own religious convictions.

14. In the United States it has been held that there is an important state interest in regulating the education of children and that under the so-called "police power" of the state to provide for the public safety, order and morals, the state has a duty to regulate education. Attempts by parents to deny the state the right to set educational standards have been consistently rejected despite the constitutional privacy right of a parent to choose how his child will be educated. Once a parent chooses at-home education for his child the state properly satisfies itself that the home program is "sufficient in extent".

> Perchemlides et. al. v. Frizzle, Massachusetts Superior Ct., Nov. 13, 1978, Greaney J. (unreported).

15. In Canada public interest in the education of children was articulated in R. v. Powell and Powell, Alta. Provincial Court, July 16, 1985, Litsky J. (unreported). In that case the Court extended the principles in Re M. (1978), 7 Alta. L.R. (2d) 220 (Alta. Prov. Ct.) and Re D. (1982), 22 Alta. L.R. (2d) 228 (Alta. Prov. Ct.), (both child welfare cases in which religious freedom was argued by the parent), to apply to compulsory education as a concomitant of child welfare. The Court in Powell, supra, subscribed to the following from the decision in Re M:

> Freedom does not, however, include, absolute freedom, especially when it comes to the right of children, their best interests or welfare, ... the concern for the childrens' upbringing is also society's major concern ... the Alpha and Omega Order has a right to an untrammelled religious belief, but it steps over its bounds when it creates an environment which is not conducive to allowing a child to reach his potential on an individual basis. (emphasis added)
>
> R. v. Powell and Powell, supra, at p.10.
>
> See also: Wheelock et al. v. Masse, infra, at p.18.

16. It is respectfully submitted that even if a parent has a right under S.2(a) of the Charter to manifest his religion and beliefs in the education of his child, that aspect of freedom of conscience and religion is inherently

limited by the long-standing and widely acknowledged public interest in the child receiving an efficient education.

17. The following excerpt from the judgment in Board of Education v. Barnette (1943), 319 U.S. 624 at 653, which was approved by the majority of this Honourable Court in Robertson and Rosetanni v. The Queen, [1963] S.C.R. 651, at 656, is apposite:

> Its [freedom of religion] emphasis is freedom from conformity to religious dogma, not freedom of conformity to law because of religious dogma.

The Appellant cannot excuse compliance with secular education laws merely because he believes that his authority to act one way or another comes from God and not the Government (Appellant's factum, p.7). He cannot under the guise of the Charter refuse to submit himself to a range of secular laws according to his preference.

(ii) Purpose and Effect of the Impugned Legislation

18. Following the approach of Dickson J. in Big M Drug Mart, supra, either an unconstitutional purpose or an unconstitutional effect can invalidate the legislation in issue. The "effects test", of course, will only be necessary

to defeat legislation with a valid purpose. The initial test under s.2 of the Charter, hence, relates to legislative purpose.

19. The Legislature undoubtedly has constitutional authority over education. The purpose of the School Act, R.S.A., 1980, c.3, is to ensure the education of children, a purely secular purpose. The object of compulsory school attendance provisions, and certification requirement as to the efficiency of alternate education, is an educated citizenry.

20. The effect or impact of the compulsory school attendance and certification provisions is indistinguishable from their purpose, which is entirely secular. Moreover, the effect of the legislation accommodates the religious convictions of parents in the education of their children, and, if not, allows for home or private study courses. The religious content of a home study or private program will not in itself vitiate certification.

21. If an indirect impact on freedom of religion were established, Braunfeld v. Brown (1961), 366 U.S. 599, as

quoted by this Honourable Court in Big M. Drug Mart, supra, at p.514 when discussing the purpose and effect approach, offers a direction:

> 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.

22. In R. v. Powell and Powell, supra, the Court applied this reasoning in upholding the legislation. It concluded that the purpose end effect of the Alberta School Act, R.S.A. 1980, c.3, was secular and regulatory, ensuring that a child receives suitable education, and that the Act only incidentally affected religious philosophy.

23. It is respectfully submitted that the impugned legislation has, at most, an indirect effect on freedom of religion and does not contravene the entrenched freedom of religion. In Wheelock et al v. Masse, N.S. Fam. Ct., Sept. 7, 1984, Comeau J. (unreported) the Court could find no link between religious freedom and the teaching of such core subjects as Math and English, which were taught both in the home study program and the public school system.

24. It is respectfully submitted that neither the purpose nor the effect of the impugned provisions violate the Charter.

(iii) Section 1 of the Charter

25. If it is found that Sections 142, 143 and 180 of the School Act, R.S.A. 1980, c.3, infringe the entrenched freedom of conscience and religion, it is respectfully submitted that the legislation which provides for the education of children is of such overriding significance as to justify the infringement. Certainly, such a limitation is recognized in the context of the U.S. Constitution, the European Convention, and the International Covenant. The means chosen to achieve the end is effective and reasonable. It is not a greater infringement than is necessary, allowing, as it does, a parent to indoctrinate his child with his own religious convictions provided the secular standard of efficient education is met.

B. Section 7 of the Charter

26. The Appellant submits (paragraph 31 of his factum) that he is being deprived of his liberty in a manner contrary to fundamental justice: (a) because he is being deprived of his right to bring up his children as he sees fit; and (b) because of the penal sanctions, including imprisonment, in Section 180 of the School Act.

27. The Intervenor responds that the legislation did not, as alleged, deprive the Appellant of his liberty at all, and even if it did, such deprivation was not accomplished in a manner contrary to fundamental justice, in either of the ways advanced by the Appellant.

(i) Liberty to educate one's child

28. The Appellant alleges that Section 7 of the Charter is offended because he has been deprived of the constitutional "liberty" to bring up his children in the manner that he sees fit. He urges a broad interpretation of the right to liberty, based on the broad interpretation given to "liberty" in the U.S. (paragraph 31 of the Appellant's factum).

However, in the United States, where the right of a parent to decide how his child is to be educated is apparently constitutionally protected, the courts have consistently rejected parental attempts to deny the state's right (under the so-called police power to regulate in the interest of public health, morals, and safety) to set educational standards for school age children.

Perchemlides et al. v. Frizzle, supra, at 7 and 10.

"Liberty", then, under the U.S. constitution, is not to be considered as having so broad a meaning that even when augmented by the parental right to educate, it is capable of limiting the state interest in an educated citizenry.

29. Similarly, Madame Justice Wilson, at page 51 of Operation Dismantle Inc. et. al. v. The Queen, S.C.C., May 9, 1985 (unreported), held that the "right to liberty" is not absolute but must accommodate the corresponding rights of others. Therefore, it is submitted that s.7 does not guarantee to a parent the absolute right to dictate how and whether his child should be educated. Any parental right to educate one's child is restricted by the public interest in children receiving an acceptable level of education.

30. Even if, however, it could be said that s.7 enshrined the absolute prerogative of a parent vis-à-vis his child's education, thus allowing for the argument that the School Act constituted an infringement of a Charter right, following the "single right theory" of s. 7 of the Charter advanced in Singh et. al. v. Minister of Employment and Immigration (1985), 58 N.R. 1, and referred to in Operation Dismantle, supra, at p.50, s.7 would still not offer a remedy unless the entrenched right is denied by a law that deprived the parent of fundamental justice. As submitted in more detail at paragraph 34, the impugned provisions do not preclude the application of the principles of fundamental justice.

(ii) Procedural Fairness

31. It is submitted that even if the impugned legislation denies liberty, the denial is not accomplished in a manner which precludes the application of the principles of fundamental justice.

32. In Singh, supra, at p. 62, this Court accepted the proposition based on Martineau v. Matsqui Institution

Disciplinary Board (No. 2), [1980] 1 S.C.R. 602, to the effect that "procedural fairness may demand different things in different contexts", but left no doubt that "fundamental justice" in s.7 of the Charter includes the notion of procedural fairness as articulated by Fauteux C.J., in Duke v. The Queen, [1972] S.C.R. 917 at 923, to wit: the duty to act in good faith, without bias, in a judicial temper, and the duty to provide a person an opportunity to state his case.

33. If procedural fairness is not precluded by the impugned legislative provisions, there has been no denial of fundamental justice under s.7. As Madam Justice Wilson said in Singh at p.32:

> If, as a matter of statutory interpretation, the procedural fairness sought by the appellants is not excluded by the scheme of the Act, there is, of course, no basis for resort to the Charter.

34. The impugned provisions clearly do not exclude procedural fairness where the Act provides for a certification procedure by which a parent may avoid prosecution by obtaining certification that his child will receive efficient instruction. If the refusal of a

certificate were based on bias, bad faith or precluded an opportunity to state one's case, the prerogative remedies are, presumably, available.

35. Furthermore, in any prosecution under s.180 of the School Act, supra, the accused has the right to make full answer to the charge. Following the principles in R. v. City of Sault St. Marie, [1978] 2 S.C.R. 1299, s.180 of the School Act, R.S.A. 1980, c.3, creates a strict liability offence which permits a defence to be raised. This is demonstrated in R. v. Powell, supra, and in Wheelock v. Masse, supra. In R. v. Powell, the accused was charged with violating s.180 of the School Act. The Court examined the procedure followed by the school authorities and concluded that it was open to the accused to show the efficiency of the alternate education provided. In Wheelock v. Masse, the Court held that in a compulsory attendance prosecution the accused, in exercising his rights under s.577(3) of the Criminal Code, should be allowed to raise the defence of public school equivalent.

36. The Appellant submits, at paragraph 31 of his factum, that because the impugned provisions do not contain express standards for granting the certificate, fundamental

justice is denied. As found in D. & H. Holdings, the principles of administrative law adequately protect the right to fundamental justice by imposing a requirement that discretion be exercised in a manner that cannot be characterized as capricious or discriminatory, unreasonable or in bad faith.

> D. & H. Holdings v. City of Vancouver et. al., B.C.S.C. July 3, 1985, MacKay J. (unreported), at pp. 9-10.

37. There is no authority, it is submitted, that dictates that fundamental justice has been denied, unless appropriate standards are set out in the legislation.

38. The Appellant further argues at paragraphs 33 and 34 of his factum, that the impugned provisions are in breach of the Charter on the basis of the principles established by Hunter et. al. v. Southam Inc. (1984), 14 C.C.C. (3d) 97 (S.C.C.). Hunter, of course, involved a question under s.8 of the Charter concerning unreasonable search and seizure. In that case, the Court did not purport to enunciate principles applicable to s.7 of the Charter, and the decision does not purport to be of application in administrative law matters in general.

Re Workers' Compensation Board of Nova Scotia and Coastal Rentals, Sales and Services Ltd. et. al. (1985), 12 D.L.R. (4th) 564 at 567 (N.S.S.C.).

See also: Belgoma Transportation Ltd. v. Director of Employment Standards, O.C.A., June 5, 1985 (unreported).

39. In any event, the key to Hunter was the finding that a post facto review in such cases could not protect the right guaranteed by the Charter. The impugned provision which precluded impartial review of the request for a warrant to search and seize was therefore unconstitutional. By contrast, a post facto review of the decision of the administrators denying a certificate under the School Act offers adequate protection of the rights which the Appellant claims s.7 enshrines.

PART IV

ORDER SOUGHT

The Intervenor respectfully requests an Order dismissing the appeal and answering the constitutional question in the negative.

All of which is respectfully submitted.

Dated at Halifax, Nova Scotia, this 24th day of October, A.D. 1985.

Reinhold Endres

Alison Scott

Solicitors for the Attorney General of Nova Scotia.

PART V

AUTHORITIES

AUTHORITIES