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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

FACTUM OF THE ATTORNEY GENERAL OF ONTARIO

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
(232-1781)
Ottawa Agents

WILLIAM HENKEL, Q.C.
9833 - 109th Street
Edmonton (Alberta)
Solicitor for the Attorney
General for Alberta

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

ARCHIE CAMPBELL, Q.C.
Deputy Attorney General
Ministry of the Attorney General
18 King Street East
Toronto (Ontario)
M5C 1C5

SOLWAY, WRIGHT, HOUSTON
170 Metcalfe Street
Ottawa (Ontario)
K2P 1P3
Ottawa Agents

I N D E X

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COURT OF APPEAL OF ALBERTA

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PART I

THE FACTS

1. The Attorney General of Ontario intervenes in this case pursuant to the Notice of a Constitutional Question dated January 14th, 1985, and Notice of Intention to Intervene dated February 22nd, 1985.

PART II

THE ISSUE

2. The Constitutional Question stated by this Honourable Court 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?

PART III

THE ARGUMENT

3. The School Act, R.S.A., 1983, c.S-3, requires school attendance for all children between the ages of 6 and 18. A number of exceptions are provided for instances of illness, disability, religious observance or discipline. The statute also permits a child to satisfy the school attendance requirement at an approved private school or by private instruction upon certification that the child is receiving "efficient instruction". The compulsory education programme is enforced by prosecution against the parent under Section 180 of the School Act. The province monitors educational standards through these mandatory attendance requirements.

4. The Attorney General for Ontario intervenes to make submissions in regard to the Appellant's argument based on section 2(a) of the Charter.

5. Appellant argues that the province's imposition of mandatory school attendance, or an approved substitute therefor, infringes his freedom of religion guaranteed under Charter s.2(a) on the ground that such provisions "require a parent to acknowledge that the government, rather than God, is

the final and absolute authority over his child", and thus to express a "creed that is not his own".

Appellant's Factum, para 17 (p.7), para 29 (p.14)
School Act, s.142 and 143

6. The Appellant resists the application of the School Act's attendance requirements to his children because of his religious belief that the supreme authority over the education of his children is vested in God and not in the province of Alberta. Thus, he objects to the system of mandatory school attendance, or approved substitute therefor, and not merely to the means of enforcement. The practice under the legislation is that a parent must request an exemption for his children from public education. The Appellant has not applied for exemption by way of registration as a private school or by certification that he is providing "efficient instruction". However, he has no objection to examination of the educational achievement levels of his children.

Appellant's Factum, para 17 (p.7)

7. The purpose of the Charter is to give unremitting protection to individual rights and freedoms (Hunter v. Southam Inc., [1984] 2 S.C.R. 145 at 155). This Honourable Court has described freedom of religion as the prototypical and

paradigmatic right and recognized the centrality to the Charter's essential values of "respect for individual conscience and the valuation of human dignity". These values, in turn, are regarded as essential to the ongoing vitality of the free and democratic political order. As Mr. Justice Dickson (as he then was) stated in R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 at 346:

> It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the Canadian Charter of Rights and Freedoms as "fundamental". They are the sine qua non of the political tradition underlying the Charter.
>
> See also National Bank of Canada v. Retail Clerks' International, [1984] 1 S.C.R. 269 at 296.

8. Liberal theory regards the guarantee of freedom of religion as a model for a political order that eschews metaphysical foundations in favour of the ideal of social cooperation among free and equal persons. Thus, the state does not impose a particular or standardized morality on its citizens. Rather the state provides education to enable each person to regard himself or herself as an equal, capable of espousing ends and beliefs, within a society of moral persons. While education contributes to economic efficiency and to social welfare, it also enables each individual to enjoy the culture of his society, to participate in its political process and thus to develop a "secure sense of his own worth".

> Rawls, Theory of Justice (1971) at 101, 107, 514-6.
>
> Rawls, "Justice as Fairness: Political not Metaphysical", (1985) 14 Phil. & Public Affairs 223 at 249.
>
> R. v. Big M Drug Mart at 351.

9. This Honourable Court has stated that the essence of freedom of religion is:

> ... the right to entertain such religious beliefs as a person choses, 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... 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.
>
> R. v. Big M Drug Mart, at 336.

The School Act provisions enforce the province's standards for education of children, and by practice require a parent giving private instruction to apply for certification as to the level of instruction. The Appellant's religious beliefs recognize God as the ultimate authority over his children's education and disable him from complying with the legislative. Since the legislative provisions challenged by the Appellant are clearly secular in purpose and general effect they are not inconsistent with section 2(a) of the Charter. However, the Appellant's sincerely held belief as to his religious duty to teach his children without acknowledging the state's power to set standards does lead to prosecution under the School Act. What the Appellant really seeks within the context of the prosecution is a "constitutional exemption" from valid legislation on the basis of his freedom of religion under s. 2(a) of the Charter.

R. v. Big M Drug Mart, at 315.

10. Exemptions from generally valid policies are provided to adherents of minority religions in order to free them from the "tyranny of the majority" whose religious needs are usually reflected in the results of the majoritarian political process. The Appellant's claim to infringement of his religious freedom must be considered from his viewpoint and justified under section 1.

R. v. Big M Drug Mart at 337

R. v. Video Flicks Ltd. (1984), 48 O.R. (2d) 395 at 420.

11. Section 1 permits the province to limit enumerated Charter rights when such limits are "reasonable", "prescribed by law" and justifiable "in a free and democratic society". Because the Ontario legislation is somewhat different from the mandatory attendance requirements in place in Alberta, the Attorney General of Ontario will make submissions only in regard to the component of section 1 which relates to justification of limits on enumerated rights in a free and democratic society. It is respectfully submitted that considerations of whether the measure is "reasonable" or "prescribed by law" must be met before the test encapsulated in the final words of section 1 come into play.

12. In R. v. Big M Drug Mart (at 352) this Honourable Court stated that principles must be developed to ascertain which government interests are of such significant importance as to warrant overriding an enumerated Charter right or freedom. This Court then went on to express the view that an argument rooted in convenience and expediency to justify limits on constitutionally protected rights is "fundamentally repugant" to the Charter because the basis for justifying the limit on the right would be identical to the reasons for finding that the right had been violated. It is respectfully submitted that a view of section 1 which incorporates the values inherent in the enumerated rights themselves, and the underlying Charter values of dignity of the individual and freedom of conscience, gives content to the requirement that limits be justifiable "in a free and democratic society" and provides a principled basis for section 1. Under this view it is possible for the state to defend policies which conform to these essential values, under section 1, even though enumerated rights and freedoms are consequentially limited.

See also Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at 217-219, per Wilson J.

The mandatory imposition of educational standards, through the enforcement of school attendance laws, is an example of how section 1 may be relied upon to vindicate Charter values which are not encapsulated in enumerated rights.

13. The link between the Charter's commitment to individual dignity and freedom of conscience on the one hand, and the democratic process on the other has been outlined in paragraph 7 supra. There is also a strong relationship between our free and democratic political system and public education. For public education provides preparation for the kind of citizenship required for democracy to function well. The freedom to make responsible choices within the democratic political process rests on the development of analytic skills as well as the accumulation of knowledge and understanding of the nation and the world. The province's interest in assuring that every future citizen will function well in the political community, and fulfil his or her human potential, is forwarded by mandatory public education. Thus the policy of mandatory education carries forward the Charter's purposes and does not undermine them. It is respectfully submitted that where the state can demonstrate such a strong link between the values which inform the Charter and a policy, which in a less central

way infringes upon an enumerated Charter right, the burden of satisfying section 1 has been discharged. Such a view does not violate the principle of equal liberty enumerated in R v. Big M Drug Mart (at 336), for the Appellant's equal liberty to enjoy his freedom of conscience is limited only to guarantee an equal respect for his and all other children in their formative years.

14. For discussions of the role of education within constitutional democracy in the United States see:

Brown v. Board of Education, 347 U.S. 483 (1954)

Plyler v. Doe, 457 U.S. 202 (1982)

The primacy of public education is also demonstrated by the fact that in forty-eight of the American states it is a constitutional requirement to establish public schools.

Mondschein and Sorenson, "Home Instruction in Lieu of Compulsory Attendance: Statutory and Constitutional Issues," School Law Update (1982) 257 at 259

15. The legislative programme challenged by the Appellant already provides exemptions which accommodate religious minorities in permitting education of children to be

carried out in private schools and by private instruction. Thus considerable allowance for individual religious beliefs is already built into the province's educational policy. Accommodation of this sort has been mandated in the United States under the Constitution.

> Pierce v. Society of Sisters, 268 U.S. 510 (1925) (Right to attend approved private schools, including religious schools.)
>
> Wisconsin v. Yoder 406 U.S. 205 (1972) (Exemption of Amish children from last two years of public high school on basis of continuing vocational education within religious community. It appears from the Court's reasoning that no exemption would have been granted for primary education.)

16. The province's allowance for varieties of educational programmes, including those based on religious belief, does not permit any children to be excluded from provincially approved education altogether. This position is compatible with the Charter's respect for all individuals, as individuals, and is not merely a preferred policy as to uniform application of provincial laws. The general application of the legislation does not infringe religious liberty. The Appellant's religious liberty is limited by enforcing school attendance on his children but this is a justifiable limitation in a free and democratic society because all children must be

educated to participate in that society. A parent may imbue his children with his religious faith but not exclude them from state educational standards on the basis of his faith.

17. It is therefore respectfully submitted that mandatory attendance rules such as Alberta's meet the criteria within section 1 because they forward the state's vital interest in having informed, reasoning, intellectually mature individuals to maintain the commitment to liberty and democracy within the Canadian nation. Thus, the religious liberty of the parent may be limited in order to provide his children with the opportunity to acquire the knowledge and skills which are prerequisites to full participation within the political order of their society. This limit placed upon the parent's religious principles does not contradict the commitment to the inherent dignity and inviolable rights of the person which inform the enumeration of Charter rights generally, but rather provides the realization of those values for those who are very young. Thus section 1 may be relied upon to forward general values of ordered and equal liberty in a free and democratic society.

Reference may be made to Prince v. Massachusetts, 321 U.S. 158 (1944).

PART IV

ORDER SOUGHT

18. The Attorney General for Ontario respectfully requests an Order that the impugned provisions of the School Act are not inconsistent with section 2(a) of the Charter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

L. E. Weinrib

Lorraine E. Weinrib
of Counsel for the Attorney
General of Ontario

PART V

AUTHORITIES