Appendix F

Constitutional and Legal Context

The purpose of this chapter is to summarize as succinctly as possible the constitutional and legal context for home-based education in Canada, while at the same time, relating the new legal framework for home-based education in Saskatchewan to this constitutional and legal context.

When parents elect to educate their children on a home-based educational program, they are exercising a constitutional right, pursuant to section 2(a) of the *Charter of Rights and Freedoms, 1982*, to educate their children **in accordance with their conscientious beliefs.**[18]

However, no rights are absolute. As stated in section 1 of the Charter, all rights are **"subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."**

In particular, the right of parents to educate their children in accordance with their conscientious beliefs must be **balanced** against both the **right of every child to an education** and the **compelling interest of the state in the education of all children.**

The new legal framework for home-based education in Saskatchewan represents precisely the kind of balance envisaged by the Supreme Court of Canada in *Jones* vs. *The Queen*, and in other cases.

Freedom of Conscience and Religion in Education

Section 2(a) of the *Canadian Charter of Rights and Freedoms, 1982*, reads as follows:

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

In *Regina* v. *Big M Drug Mart ltd.*, which was the first freedom of conscience and religion case decided by the Supreme Court of Canada subsequent to the Charter in 1982, Mr. Chief Justice Dickson held that freedom of conscience and religion includes the freedom of parents to manifest conscientious and religious beliefs through teaching their beliefs to their children:

[18] *Jones* v. *The Queen* (1987) 31 Dominion Law Reports, at p. 683. Throughout this chapter, bold type represents emphasis added by the Department in preparing this document.

> 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, 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.
>
> 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.[19]

In *Jones* v. *The Queen*, which was the first and is the still the only occasion, post-Charter, that the Supreme Court of Canada has specifically passed judgment on Canada's compulsory attendance laws, Mme Justice Wilson held that a parent has the right **"to educate his children in accordance with his conscientious beliefs".**[20]

Furthermore, this right to educate one's children in accordance with one's conscientious beliefs is, according to Mme Justice Wilson, one facet of the right to **raise** one's children in accordance with one's conscientious beliefs. A parent has the right

> to raise his children in accordance with his conscientious beliefs. The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world. This right to educate his children is one facet of this larger concept. This has been widely recognized. Article 8(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), 213 U.N.T.S. 222, states in part "Everyone has the right to respect for his private and family life...." Particularly relevant to the appellant's claim is art. 2 of Protocol No.1 of the Convention:
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> > No person shall be denied the right to an education. In the exercise of any functions which it assumes in relation to education and to teaching, **the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.**[21]

Conscientious beliefs are broader than, and include, religious beliefs.

> Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the Charter. Equally protected, and for the same reasons, are

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[19] (1985) Supreme Court Reports, at p. 97-98.

[20] *Supra*, at p. 583.

[21] *Ibid*, p. 583.

> expressions and manifestations of religious non-belief and refusals to participate in religious practice.[22]

Freedom of religion is prototypical in the sense that freedom of conscience, which was first expounded and accepted for religious beliefs, has subsequently been broadened to include freedom of conscience based on moral and political beliefs as well.[23]

Thus, when parents elect to provide a home-based education program for their children, they may base their home-based education program on **either a philosophical or a religious perspective.** While in accordance with section 8, of the regulations, they must notify a registering authority in writing before commencing their program, no aspect of the notification is intended to diminish or to infringe on the right of parents to educate their children at and from their home in accordance with their conscientious beliefs, subject only to such reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society.

Reasonable Limits

Section 1 of the *Canadian Charter of Rights and Freedoms, 1982,* reads as follows:

> 1. 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.

In other words, freedoms are "subject to such limitations as are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others."[24]

Every individual is "free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own."[25]

Since every child has the right to an education, freedom of conscience and religion in education **does not include the right not to educate one's children.** Thus, a home-based education program should be an academically credible program which respects the rights, freedoms, and moral principles, upon which our society is based, including the right of all children to an education.

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[22] *Regina* v. *Big M Drug Mart Ltd., supra,* p. 105.

[23] See also the discussion of this in Saskatchewan Education, *Final Report of the Minister's Advisory Board on Independent Schools* (November 1990), pp. 65-68.

[24] *Regina* v. *Big M Drug Mart Ltd., supra,* p. 97.

[25] *Ibid,* p. 105.

Furthermore, according to Mme Justice Wilson, freedom of conscience and religion in education **does not include the right to educate one's children "as one sees fit"**, as legal counsel for Pastor Jones had claimed.[26]

Rather, the right to educate children at home is based on the **right of parents to educate their children in accordance with their conscientious beliefs.**

The Compelling Interest of the State in the Education of All Children

In *Jones* v. *The Queen,* all seven justices concurred that the interest of the state in the education of children is **compelling**.

In the words of Mr. Justice La Forest,

> Whether one views it from an economic, social, cultural or civic point of view, the education of the young is critically important in our society. From an early period, the provinces have responded to this interest by developing schemes for compulsory education. Education is today a matter of prime importance to government everywhere. Activities in this area account for a very significant part of every provincial budget. Indeed, in modern society, education has far-reaching implications beyond the province, not only at the national, but at the international level. Much of what was said by the Supreme Court of the United States in the following passage in *Brown* v. *Board of Education of Topeka* (1954), 47 U.S. 48 at p. 49, has application here:
>
> > Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[27]

In Saskatchewan, as in other provinces, this compelling interest of the state in the education of all children is manifested in a number of ways including the very establishment of public systems of education and compulsory attendance laws.

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[26] *Jones* v. *The Queen, supra,* p. 583.

[27] *Jones* v. *The Queen, supra,* p. 592.

In Canada, the public education system can be traced back to the establishment of common schools as "public authorities" in the United Province of Canada after 1841, and in Saskatchewan, to *The Northwest Territories Ordinance* of 1884, which was the first legislation providing for the establishment of public schools in what is now Saskatchewan.

Similarly, compulsory attendance laws originated in Ontario in 1871, and existed in most provinces and territories by the 1890s, both to ensure an educated workforce for the industrial age as well as to counteract child labour practices.

More recently, Canadian governments have affirmed in many places and in many forms the right of every child to an education. These include Saskatchewan's *Education Act,* subsection 144(1); *The Saskatchewan Human Rights Code*, subsection 13(1); and international declarations to which Canada has assented: *The International Covenant on Economic, Social, and Cultural Rights,* Article 13(1), and *The United Nations Convention on the Rights of the Child,* Article 28.

Home-Based Education as an Exemption from Compulsory Attendance

Since the first compulsory attendance legislation in Saskatchewan in 1888, territorial and provincial law have always provided for home-based education as an exemption from attendance in a public school. In *Jones* vs. *The Queen,* the Supreme Court of Canada upheld both the constitutionality of compulsory attendance laws and the provision for home-based education as an exemption from compulsory attendance at a public school.

At the time of the case, the Alberta *School Act,* like the Saskatchewan *Education Act,* provided that parents could seek an exemption from compulsory attendance in a public school by applying to a Department of Education inspector or superintendent for a certificate of efficient instruction for a home-schooling program, or by enrolling their children in a registered private school. Operators of private schools, in turn, could register their school with the Department of Education.

Speaking of these accommodations, Mr. Justice La Forest stated:

> It would be to negate history to fail to recognize that for many years the individual and the church played a far more significant role in the education of the young than the State. And when the State began to take the dominant role, **it had to make accommodations to meet the needs and desires of those who had dissentient views.** The provisions regarding separate schools in the Constitution are an example. But our historical experience is by no means confined to these arrangements. One need only refer to the serious social and political crises that developed in this country in the latter part of the 19th century when governments sought to establish common schools in the various provinces. These attempts gave rise to major political issues, and compromises inevitably followed. Many of

> these continue to this day.[28]

Pastor Jones had refused to register his private church school with the Department of Education, or to seek a certificate of efficient instruction as a home-schooling program. Since he sincerely believed that his right and duty to educate his children came from God, "requesting the state for permission to do what he [was] authorized by God to do would, he assert[ed], violate his religious convictions",[29] contrary to the section 2(a) of the Charter.

Four of the seven justices held that the Alberta School Act did not violate Pastor Jones' freedom of religion to educate his children in accordance with his conscientious beliefs. Rather, according to Mme Justice Wilson, by envisaging the education of students at private schools, and at home or elsewhere, *The School Act* **accommodated** religious freedom. It provided for **compulsory education, but not education in a compulsory manner or place.**

> It defers to parental authority by allowing home instruction and instruction in private schools, thereby accommodating the State purpose to the preferences of individual parents. It defers, in other words, to beliefs such as the appellant's. It recognizes the very values for which the appellant contends. If the statutory machinery has any impact at all on the appellant's freedom of conscience and religion which, for the reasons I have given, I doubt, it is an extremely formalistic and technical one.[30]

Three of the seven justices, including Mr. Justice La Forest, writing for the majority, held that *The School Act* constituted some interference with Pastor Jones' freedom of religion, but that this interference was saved by section 1 of the Charter. Requiring anyone who sought exemption from the general scheme of education in the province to make application for this purpose -- such as requiring Pastor Jones to register his church school as a private school -- was a **reasonable limit** on his or her religious convictions concerning the upbringing of his or her children that was **"demonstrably justified in a free and democratic society"**.

> To permit anyone to ignore it on the basis of religious conviction would create an unwarranted burden on the operation of a legitimate legislative scheme to assure a reasonable standard of education....
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> No proof is required to show the importance of education in our society or its significance to government. The legitimate, indeed compelling, interest of the State in the education of the young is known and understood by all informed citizens. Nor is evidence necessary to establish the difficulty of administering a

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[28] *Ibid*, pp. 591-592.

[29] *Ibid*, p. 588.

[30] *Ibid.* p. 579.

> general provincial education scheme if the onus lies on the educational authorities to enforce compliance. The obvious way to administer it is by **requiring those who seek exemptions from the general scheme to make applications for the purpose.** Such a requirement constitutes a **reasonable limit** on a parent's religious convictions concerning the upbringing of his or her children.[31]

Mr. Justice La Forest **did not define precisely what "registration" meant**. He did not inquire how far the province could go in imposing conditions, such as the program of studies or the qualifications of the teachers in his school if Pastor Jones had registered his church school as a private school or sought a certificate of efficient instruction as a home-schooling program. However, Mr. Justice La Forest did say:

> Certainly a reasonable accommodation would have to be made in dealing with this issue to ensure that provincial interests in the quality of education were met in a way that did not unduly encroach on the religious convictions of the appellant. In determining whether pupils are under "efficient instruction", it would be necessary to delicately and sensitively weigh the competing interests so as to respect, as much as possible, the religious convictions of the appellant as guaranteed by the Charter. Those who administer the province's educational requirements may not do so in a manner that unreasonably infringes on the right of parents to teach their children in accordance with their religious convictions. The interference must be demonstrably justified.[32]

The recent amendments to Saskatchewan's *Education Act* continue to view home-based education **as an exemption from** compulsory attendance in a public school:

> 156 A pupil may be exempted from attendance at a school, and no parent, guardian or other person shall be liable to any penalty imposed by this Act, where:
>
> > (a.2) the pupil is receiving instruction in a registered home-based education program.

Parents or guardians who meet certain requirements, including a written educational plan which outlines their home-based education program, are entitled to have their program registered with their resident board of education, or for a transitional period of time, with the Department of Education, Training and Employment. Once their program is registered, then their children are automatically exempted from compulsory attendance at a public school in accordance with section 155 of *The Education Act.*

While, in accordance with section 12 of the regulations, each written educational plan must be (a) not inconsistent with the goals of education for Saskatchewan; and (b) not inappropriate for the age and ability of the students on the program, parents retain the

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[31] *Ibid*, p. 594.

[32] *Ibid*, p. 593.

freedom to base their home-based education program on a religious or philosophical perspective different from that of the public education system. They also have the freedom to select instructional and support materials that are consistent with their religious or philosophical perspective. For parental choice to be meaningful, the state has to accommodate such freedoms for home-based educators.

The Principles of Fundamental Justice

Registering authorities must also review each home-based education program in accordance with the principles of fundamental justice, as provided in section 7 of the Charter:

> 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.

The liberty of parents to educate their children in accordance with their conscientious beliefs having been deduced from section 2(a) of the Charter, and conceded by public authority, the state cannot intrude arbitrarily into such an area except in accordance with the principles of fundamental justice.

Freedom of conscience and religion being a substantive right and fundamental justice being a procedural right, that the two are complementary is a fundamental principle of our constitutional heritage that goes back to the *Magna Carta* in 1215 and the British *Bill of Rights* in 1689. In order for rights to be significant there must be a procedure to give them practical operation.

Pastor Jones had contended that the Alberta *School Act* deprived him of his liberty to educate his children as he saw fit in a manner that was not in accordance with the principles of fundamental justice, contrary to section 7 of the Charter. In particular, the Act conferred on someone employed by the school system, i.e. someone with a vested interest in that system, the power to judge whether a person outside that system was providing efficient instruction; and the Act limited the evidence of efficient instruction to a certificate signed by an inspector or superintendent of schools, thus preventing him a full answer and defence to the charge.

With respect to this argument, Mr. Justice La Forest, speaking for six out of the seven justices, found that Pastor Jones had not been deprived of his liberty to educate his children as he saw fit contrary to the principles of fundamental justice. Notwithstanding that a school inspector or superintendent had a vested interest in the public education system, Pastor Jones should not have presumed that they would necessarily be biased in certifying or failing to certify that instruction was efficient. Some pragmatism was necessary in the administration of *The School Act* with respect to compulsory attendance. The province had to be given room to make choices regarding the type of administrative structure that would suit its needs without always an appeal to the courts.

> It is sufficient to protect the individual against the disregard of his rights or unfairness by the school authorities **when they come to deal with his application....** If it can be established that the school authorities' action is exercised in an unfair or arbitrary manner, then the courts can intervene.[33]
>
> I have no doubt that if in exercising their functions the school authorities sought to impose arbitrary standards, i.e. standards extraneous to the educational policy under the Act, or if they in other respects acted in a manner that was fundamentally unfair, such as failing to examine the facts or to fairly consider the appellant's representations, the courts could intervene. But I am unable to categorize the issue as the appellant does.[34]

The subsequent Saskatchewan case, *The Queen* v. *Cline* confirmed that public authorities must act fairly when receiving applications for home-based education. As to precisely what would represent procedural fairness, Justice Young offered only the following comment:

> The Saskatchewan *Education Act* must now be read in light of the *Canadian Charter of Rights and Freedoms. The Education Act* when read as a whole also has the underlying principle of equality of education throughout the province. If students are allowed to make use of a home school program as referred to by the Act as an exception for attendance in one school division, the same right should exist and should be governed by generally the same principles in another area of the province.[35]

As result of these cases, the Ministry has taken pains to ensure that all aspects of the administration of home-based education programs will be handled through clearly defined processes which reflect the principles of fundamental justice and administrative fairness.

Not only the regulations with respect to registration, but also those with respect to monitoring and cancellation attempt to balance **delicately and sensitively** the respective interests of the children, the parents, and the state in order to respect, as much as possible, the conscientious beliefs of the parents in a manner which is consistent with the principles of fundamental justice.

In accordance with clause 3(e) and section17 of the regulations, each board of education is required to develop and approve procedures with respect to a local dispute resolution process for reviewing disagreements between an official of the board and a parent with respect to the administration of home-based education regulations and policies.

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[33] *Ibid*, pp. 599-600.

[34] *Ibid*, p. 597.

[35] K.J. Young, P.C.J. *Her Majesty the Queen* v. *Elizabeth Cline (Saskatchewan* provincial court at Turtleford, Saskatchewan, December 20, 1988), p. 13.

Sincerity of Belief

Freedom of conscience and religion does not mean that anyone can claim an exemption from the operation of an otherwise valid law. In Canadian jurisprudence, the operative principle is "sincerity of belief".[36]

For example, in *Regina* v. *Wiebe,*[37] the court referred to the sincerity of Mennonite convictions in declaring that the particular regulatory requirement that approved private schools should employ only certified teachers was **an unnecessary intrusion of the state into the freedom of religion of the defendants.** For these reasons, Saskatchewan's independent schools regulations permit religiously-based-registered schools to employ teachers with a Letter of Eligibility to Teach.

Also, in *Jones* v. *The Queen,* Mr. Justice La Forest accepted the sincerity of Pastor Larry Jones' convictions with respect to the education of his children in Western Baptist Academy in Calgary:

> Assuming the *sincerity* of his convictions, I would agree that the effect of the *School Act* does constitute some interference with the appellants' freedom of religion. For a court is in no position to question the *validity* of a religious belief, notwithstanding that few hold that belief. But a court is not precluded from examining into the sincerity of a religious belief when a person claims exemption from the operation of a valid law on this basis.[38]

As a practical matter, when individuals claim an exemption based on a sincere **religious** belief -- and, by extension, on a sincere **conscientious** belief -- individuals are assumed in the first instance to act in good faith. That is, sincerity is generally assumed. However, individuals' sincerity can subsequently be challenged on one of several grounds:

- That their religion is not a *bona fide* religion, but just a sham to claim the benefits accruing to religious status;
- That the tenets and articles of faith of their religion do not in fact entitle them to the exemption; or
- That they were not sincerely practising in conformity with the articles and tenets of faith of their religion.

Ordinarily, in most civil disputes, plaintiffs or informants first have the onus, on a balance of probabilities, to make their case. Once a certain threshold of evidence has been met, however, the onus would then shift to the defendants or respondents to defend their sincerity of belief.

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[36] In American jurisprudence, it is “conviction” as opposed to mere “preference”. A sincere belief or conviction is something one would endure severe legal sanctions in order to uphold. A preference, on the other hand, is something like a suit of clothes, which may reflect transient fashion.

[37] (1978) 3 Western Weekly Reports 36 (Alberta Prov. Ct.).

[38] *Supra,* p. 591.

Freedom of Conscience and Religion Revisited

While freedom of conscience and religion is supported by the Charter, it did not originate with the Charter. In the hierarchy of rights and freedoms which Canadians enjoy, the Charter simply enumerated freedom of conscience and religion as the **first of four fundamental freedoms.** As explained by Mr. Chief Justice Dickson in *Regina* v. *Big M Drug Mart Ltd.,*

> The Charter was not enacted in a vacuum, and must therefore.... be placed in its proper linguistic, philosophic and historical contexts.
>
> With regard to freedom of conscience and religion,.... the on origins of the demands for such freedom are to be found in the religious struggles in post-Reformation Europe. The spread of new beliefs, the changing religious allegiance of kings and princes, the shifting military fortunes of their armies and the consequent repeated redrawing of national and imperial boundaries led to situations in which large numbers of people -- sometimes even the majority in a given territory -- found themselves living under rulers who professed faiths different from, and often hostile to, their own and subject to laws aimed at enforcing conformity to religious beliefs and practices they did not share....
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> Beginning, however, with the Independent faction within the Parliamentary party during the Commonwealth or Interregnum, many, even among those who shared the basic beliefs of the ascendent religion, came to voice opposition to the use of the State's coercive power to secure obedience to religious precepts and to extirpate non-conforming beliefs. The basis of this opposition was no longer simply a conviction that the State was enforcing the wrong set of beliefs and practices but rather **the perception that belief itself was not amenable to compulsion.** Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in his creatures. It is from this antecedent that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our Charter, the single integrated concept of "freedom of conscience and religion".[39]

Mr. Chief Justice Dickson then continued to comment on the placement of "freedom of conscience and religion" in section 2(a) of the Charter and the role of freedom of conscience in our democratic political tradition.

> What unites enunciated freedoms in the American First Amendment, s. 2(a) of the Charter and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation,...

[39] *Supra,* p. 104.

> 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.
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> Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.[40]

Indeed, Western political philosophers place freedom of conscience at or near the top of the distinctive features of Western civilization and trace the concept to both Greek and Judeo-Christian roots. The Greek element consisted in the development of the mind in the quest for truth, and the Judeo-Christian element emphasized the importance of moral obligation to God as found in conscience. It is often said that these twin pillars of the Hellenistic and Hebraic-Christian heritage are among the main supports of Western culture.

With respect to education, the ability of each citizen to make free and informed decisions would apply, among other things, to the election of public and separate boards of education. Electors and parents, in deciding who is to represent their interests in the education of children, are presumed to cast their ballots in a "free and informed" manner.

The principle would also apply to parental decisions to educate their children at home. Our democratic system assumes that this is a free and informed choice unless demonstrated otherwise. Even where the views on religion or the values of children diverge from those of the parents, the courts have generally allowed the parents, within limits, to impose their views on their children.

[40] *Ibid*, p. 105.

The Onus of Proof

In the case of an alleged failure of parents to provide an adequate education for their children, **the burden of proof resides with public authorities.**

This principle arises directly from the previous one, discussed immediately above, that "the ability of each citizen to make free and informed decisions is absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government". The phraseology comes from the Ontario case, *Lambton County Board of Education* v. *Beauchamp.*[41] Because of her sincere religious convictions, Mrs. Beauchamp had removed her child from the public education system and was supervising her at home in a correspondence course offered by the Christian Liberty Academy. The court held:

> Those seeking to invoke the compulsive powers of the state in the face of the alleged failure of the parent or guardian to provide an adequate alternative, and thereby to impose the sanctions of a quasi-criminal legislation, **have a substantial burden of proof.**
>
> In this case the evidence tendered on behalf of the Lambton County Board of Education falls short of establishing beyond a reasonable doubt that Mireille Beauchamp is guilty of the offence charged.

The **corollary** is that public education authorities must have **access at reasonable times** to information about home-based education programs **in order to substantiate a concern** that a particular program might not be appropriate for the age and ability of a particular child.

Before a program starts, public authorities can reasonably expect that parents should have a written educational plan which demonstrates a positive and constructive approach to the education of their children. **Once a program has started,** public authorities should be able to monitor the educational outcomes of the home-based education program. In accordance with section 19 of the regulations, such monitoring includes determining whether a home-based student is making satisfactory educational progress (a) in relation to the written educational plan; and (b) with respect to his or her age and ability.

Unreasonable Search and Seizure

Section 8 of the *Canadian Charter of Rights and Freedoms, 1982,* reads as follows:

> 8. Everyone has the right to be secure against unreasonable search and seizure.

This imposes a requirement of reasonableness on the techniques available to public authorities, such as boards of education, to look for and obtain evidence of some legal wrong, such as parents failing to educate their children on a home-based education

[41] (1979) 10 Reports of Family Law (2d) 354 (Ontario Prov. Ct.), at p. 362.

program. Any evidence discovered by unreasonable search or seizure is obtained in breach of the Charter. While such evidence may still be admissible in a court of law if the public authorities acted in good faith or were unaware that they were acting in violation of the Charter, deliberate violations of the Charter will nearly always lead to the exclusion of evidence in accordance with section 24(2) of the Charter.[42]

Following the landmark British case of *Entick* v. *Carrington* (1765), the common law holds that a "government official has no authority to enter private property for the purpose of searching for evidence, and no authority to seize private property for use as evidence, unless authorized by law."[43]

The issue with respect to home-based education is the legality of home visits by board of education officials, without the consent of the parents, for the purpose of administering the home-based education regulations and policies. So far, there has been no case law with respect to this issue in Canada. However, for a number of reasons, it seems likely that Canadian courts will follow the emerging American precedent in this area, where the courts are regarding home visits without consent as "warrantless searches".

In the case of analogous provisions in the *Canadian Charier of Rights and Freedoms* and the American Constitution, the Supreme Court of Canada is frequently finding American case law to be helpful and persuasive, although not of course binding. The Supreme Court of Canada is drawing upon American precedent because the United States represents not simply the closest constitutional framework but also the closest social milieu to Canada. The American *Bill of Rights,* by the fourth amendment to the Constitution, also guarantees people the right to be secure against "unreasonable search and seizure".[44]

For example, the Supreme Court of Canada has followed American precedent in defining and extending the value which is protected by the law of search and seizure. Historically, the rationale for the common law prohibition against unreasonable search and seizure was the protection of property rights. Following *Katz* v. *United States*[45], the Supreme Court of Canada held in *Hunter* v. *Southam*[46] that section 8 protects not only property, but also "a reasonable expectation of privacy", which is a broader concept than property. Thus, the protection against unreasonable search and seizure protects not just private places, but also the privacy of people, whether their reasonable expectation of privacy is being exercised on their own property or not.

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[42] Peter W. Hogg, *Constitutional Law of Canada,* Third Edition (Toronto: Carswell, 1992), p. 1052. Section 24(2) holds that “evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”

[43] *Ibid,* pp. 1052.1053.

[44] Indeed, this was one of the major grievances of the American colonists leading to the American revolution.

[45] (1967) 389 United States 347.

[46] (1984) 2 Supreme Court Reports 145.

Second, the Supreme Court of Canada is also following American precedent in defining various exigent circumstances which constitute lawful exceptions to requiring public authorities to possess a warrant for the collection of evidence. These include "a search incident to a lawful arrest, a search conducted in the course of a 'hot pursuit', a 'stop and frisk' search for concealed weapons, a search of a vehicle which could be quickly removed from police surveillance, a search at the international border and seizure of evidence 'in plain view',"[47] none of which obviously apply to home-based education.

Although the state has a "compelling interest" in the education of all children, where this compelling interest abuts against a constitutionally protected right, such as the right of parents to educate their children in accordance with their conscientious beliefs, the state must exercise its compelling interest by the "least intrusive means".

In its final report, the Advisory Committee on Home-based Education did not envisage routine home visits by board of education officials without the consent of the parents as necessary for the compelling interest of the state in the education of all children. First of all, once a program has been lawfully registered along with a written educational plan, there are no "reasonable and probable grounds" to believe that an offence has occurred. The initial presumption is that the parents are providing their children with a satisfactory education.

Second, there exist other means, which are less intrusive than home visits, to assess the educational progress of the children on the home-based education program. Section 13 of the regulations require parents to maintain a portfolio of work and summative record of their children's educational progress. Subsequently, in accordance with section 14, they must send an annual progress report to the board of education. Given the philosophical and structural diversity of home-based education programs, the regulations provide four options with respect to the nature and format of this progress report.

Boards of education may require two conferences a year with the parents who are directing the home-based education program, the first at the time of the initial registration and the second at the time of the annual progress report. The failure to schedule or attend such a conference constitutes grounds for cancelling a home-based education program.

In accordance with section 19 of the regulations, if the responsible board official can substantiate that a home-based student is not making satisfactory educational progress on the home-based education program, then the official may require the parents to implement a remedial instruction plan, which may involve more intensive monitoring of the student's educational progress. After a remedial instruction process, if the official can substantiate that the student is still not making satisfactory educational progress, then the official may take steps to cancel the home-based education program.

[47] Peter W. at, *op. cit.*, p. 1054.