

In the Supreme Court of Canada

(On Appeal from the Court of Appeal
for the Province of Ontario)

B E T W E E N :

EDWARDS BOOKS AND ART LIMITED

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

A N D B E T W E E N :

HER MAJESTY THE QUEEN

Appellant

- and -

NORTOWN FOODS LIMITED

Respondent

A N D B E T W E E N :

LONGO BROTHERS FRUIT MARKETS LIMITED,
THOMAS LONGO, JOSEPH LONGO, carrying
on business as LONGO BROTHERS FRUIT MARKET

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

A N D B E T W E E N :

PAUL MAGDER

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE CROWN REPRESENTED BY
THE ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO

RESPONDENT ON THE APPEALS BY
EDWARDS BOOKS AND ART LIMITED, LONGO BROTHERS
FRUIT MARKETS LIMITED ET AL., AND PAUL MAGDER

APPELLANT ON THE APPEAL AGAINST NORTOWN FOODS LIMITED

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MEMORANDUM OF THE CROWN PART I STATEMENT OF FACTS

PART I
THE FACTS

I) OVERVIEW OF THE APPEALS:

10 1. The central issue on these appeals is the constitutional validity of provincial legislation governing the closing of retail stores on Sunday and other holidays.

20 Four appeals are conjunctively before this Honourable Court. All are from the judgment of the Court of Appeal for Ontario, in Regina v. Videoflicks et al.. Leave to appeal to this Honourable Court was granted on May 9, 1985.

Reference:

Case on Appeal,
Notices of Application for Leave to Appeal
to the Supreme Court of Canada,
Vol. 1, pages 43-58.

30 Case on Appeal,
Orders of the Supreme Court of Canada
granting Leave to Appeal,
Vol. 1, pages 58-62.

Case on Appeal Notices of Appeal to the
Supreme Court of Canada,
Vol. 1, pages 63-67.

Case on Appeal, Order of the Supreme Court
of Canada in respect of the Constitutional
Questions,
Vol. 1, pages 68-71.

40 Regina v. Videoflicks, et al., (1984), 48
O.R. (2d) 495; 15 C.C.C. (3d) 353 (Ont.
C.A.)

2. On the appeal before the Court of Appeal for the Province of Ontario, eight cases were joined together. All of those cases involved charges under Section 2 of the Retail Business Holidays Act R.S.O. 1980, c. 453. That Act regulates, inter alia, carrying on a retail

MEMORANDUM OF THE CROWN PART I STATEMENT OF FACTS

business or offering goods or services for sale on a Sunday.

10 3. The Crown, represented by the Attorney General for the Province of Ontario, was the Respondent in all cases before the Ontario Court of Appeal. In the result, that Court dismissed the appeals of five of the Appellants before the Court, including Edwards Books and Art Limited, Longo Brothers Fruit Markets Limited et al., and Paul Magder. The appeals of the remaining three Appellants before that Court were allowed. Two of those appeals were
20 allowed on grounds related to the statutory interpretation of the Retail Business Holidays Act. Those issues are not raised before this Honourable Court. With respect to the third Appellant who was successful in the Ontario Court of Appeal, Nortown Foods Limited, the Court of Appeal allowed the appeal on grounds based on the Canadian Charter of Rights and Freedoms. The Attorney General for the Province of Ontario appeals to this Honourable Court in respect of
30 those issues.

Reference:

Case on Appeal,
Judgments of the Ontario Court of Appeal
Regina v. Videoflicks Ltd. et al., dated
September 19, 1984,
Vol. 2, pages 232-234.

40 Case on Appeal,
Reasons for Judgment of the Ontario Court
of Appeal,
Vol. 2, pages 240-317.

4. The constitutional questions stated by this Honourable Court are as follows:

1. Is the Retail Business Holidays Act, R.S.O. 1980, c. 453 within the legislative powers of the Province of Ontario pursuant to Section 92 of the Constitution Act, 1867?

MEMORANDUM OF THE CROWN PART I STATEMENT OF FACTS

10 2. Does the Retail Business Holidays Act, R.S.O. 1980, c. 453 or any part thereof, infringe or deny the rights and freedoms guaranteed by sections 2(a), 7 and/or 15 of the Canadian Charter of Rights and Freedoms and, if so, to what extent does it infringe or deny these rights?

20 3. If the Retail Business Holidays Act, R.S.O. 1980, c. 453, or any part thereof, infringes or denies in any way sections 2(a), 7 and/or 15 of the Canadian Charter of Rights and Freedoms, to what extent, if any, can such limits on the rights protected by these sections be justified by section 1 of the Canadian Charter of Rights and Freedoms and thereby rendered not inconsistent with the Constitution Act, 1982?

Reference:

Case on Appeal,
Order of the Supreme Court of Canada,
Vol. 1, pages 68-71.

30 II) HISTORY OF THE INDIVIDUAL CASES:

40 5. In Nortown Foods Ltd. the Respondent, a limited corporation, was convicted at trial in Provincial Offences Court by His Honour Provincial Court Judge Davidson, on August 24, 1983, on a charge under Section 2(1) of the Retail Business Holidays Act. The conviction was upheld on appeal to the Provincial Offences Appeal Court by His Honour County Court Judge Kane in a judgment dated October 31, 1983. On appeal to the Ontario Court of Appeal, the appeal was allowed and the conviction quashed on the basis that Section 2 of the Retail Business Holidays Act is of no force and effect with respect to the Respondent because of inconsistency with the Respondent's rights under Section 2(a) of the Charter.

MEMORANDUM OF THE CROWN PART I STATEMENT OF FACTS

Reference:

Case on Appeal,
Judgment of His Honour Provincial Court
Judge Davidson,
Vol. 2, pages 180-182.

10

Case on Appeal,
Judgment of His Honour County Court Judge
Kane,
Vol. 2, page 231.

Case on Appeal,
Reasons for Judgment of the Ontario Court
of Appeal,
Vol. 2, pages 240-317.

20

6. In Edwards Books and Art Ltd., the Appellant was acquitted at trial in Provincial Offences Court by His Honour Provincial Court Judge Charlton on November 18, 1983, on a charge under Section 2(1) of the Retail Business Holidays Act. On appeal to the Provincial Offences Appeal Court the acquittal was overturned and a conviction entered by His Honour County Court Judge Conant in a judgment dated February 23, 1984. The conviction was upheld on appeal to the Ontario Court of Appeal.

30

Reference:

Case on Appeal,
Judgment of His Honour Provincial Court
Judge Charlton,
Vol. 2, pages 160-169.

Case on Appeal,
Judgment of His Honour County Court Judge
Conant,
Vol. 2, pages 183-189.

40

Case on Appeal,
Reasons for Judgment of the Ontario Court
of Appeal,
Vol. 2, pages 240-317.

MEMORANDUM OF THE CROWN PART I STATEMENT OF FACTS

7. In Longo Brothers Fruit Markets Ltd. et al., the Appellant was acquitted at trial in Provincial Offences Court by His Worship, Justice of the Peace McDermott in a judgment dated August 11, 1983, on a charge under Section 2 of the Retail Business Holidays Act. On appeal to the Provincial Offences Appeal Court, the acquittal was overturned and a conviction entered by His Honour Provincial Court Judge Latimer in a judgment dated January 13, 1984. The conviction was upheld on appeal to the Ontario Court of Appeal.

Reference:

20 Case on Appeal,
Judgment of His Worship Justice of the
Peace McDermott,
Vol. 2, pages 170-175.

Case on Appeal,
Judgment of His Honour Provincial Court
Judge Latimer,
Vol. 2, pages 190-201.

30 Case on Appeal,
Reasons for Judgment of the Ontario Court
of Appeal,
Vol. 2, pages 240-317.

40 8. In Paul Magder, the Appellant was acquitted at trial by His Honour Provincial Court Judge Harris, on December 23, 1983, on a charge under Section 2(1) of the Retail Business Holidays Act. On appeal to the Provincial Offences Appeal Court, the acquittal was overturned and a conviction entered by His Honour County Court Judge Davidson in a judgment dated February 17, 1984. The conviction was upheld on appeal to the Ontario Court of Appeal.

Reference:

Case on Appeal,
Judgment of His Honour Provincial Court
Judge Harris,
Vol. 2, pages 176-179.

MEMORANDUM OF THE CROWN PART I STATEMENT OF FACTS

Case on Appeal,
Judgment of His Honour County Court Judge
Davidson,
Vol. 2, pages 202-230.

10

Case on Appeal,
Reasons for Judgment of the Ontario Court
of Appeal,
Vol. 2, pages 240-317.

III) FACTS OF THE INDIVIDUAL CASES:

A) The Facts in Nortown Foods Ltd.

9. The Respondent is a limited corporation,
carrying on business in the name "Nortown Foods Ltd." The
Respondent was charged that it:

20

On or about the 16th day of January, 1983
at the Municipality of Metropolitan Toronto
in the Judicial District of York, did
commit the offence of being the operator
carrying on a retail business in a retail
business establishment, unlawfully did fail
to ensure that no member of the public was
admitted to the said establishment, and no
goods were sold or offered for sale therein
by retail on a holiday, to wit: 892
Eglinton Avenue West, time: 12:22 p.m.,
contrary to the Retail Business Holidays
Act, 1975, Section 2(1).
Reference:

30

Case on Appeal,
Transcript of Trial,
Vol. 1, page 124, lines 6 to 29.

10. The Respondent corporation Nortown Foods
Ltd. carries on business at 892 Eglinton Avenue
West, in the City of Toronto, as a grocery store
specializing in the sale of fresh meats, poultry and
groceries geared primarily to a Jewish clientele.

40

Reference:

Case on Appeal,
Transcript of Trial, Evidence of Leonard
Schacter,
Vol. 1, page 130, lines 4 to 15.

MEMORANDUM OF THE CROWN PART I STATEMENT OF FACTS

Case on Appeal,
Transcript of Trial, Evidence of Constable
S. Smith,
Vol. 1, page 125, lines 15 to 24,
page 127, lines 20 to 25.

10

11. On Sunday, January 16, 1983, the Respondent corporation was open for business. A police officer observed 40 persons in the store including customers who were purchasing goods. Fifteen persons were working in the establishment, of which nine were serving customers. Products from the meat counter constituted the majority of the store's sales.

20

Reference:

Case on Appeal,
Transcript of Trial, Evidence of Constable
S. Smith,
Vol. 1, page 125, line 16 to
page 126, line 31,
page 127, lines 20 to 25.

30

12. The corporate Respondent was owned by two shareholders both of whom were officers of the company. The Vice President of the corporate Respondent testified that he had a Jewish religious affiliation. The store operated as "a Jewish style - Jewish oriented meat market". The store observed certain Jewish dietary and religious customs, and the evidence indicated that the store was "kosher style" in its butchering practices.

40

Reference:

Case on Appeal,
Transcript of Trial, Evidence of Leonard
Schacter,
Vol. 1, page 128, line 25 to
page 130, line 8.

Case on Appeal,
Transcript of Trial, Evidence of Nancy
Kumer,
Vol. 1, page 133, lines 2 to 12.

MEMORANDUM OF THE CROWN PART I STATEMENT OF FACTS

13. The Respondent corporation has been in business for 22 years. The store has always been closed on Saturdays in order to respect the religious beliefs of its customers. Jewish religious law recognizes the Sabbath as a holy day, and on that day work is prohibited. The store has also closed on other Jewish religious holidays, of which there are 18 throughout the year.

Reference:

Case on Appeal,
Transcript of Trial, Evidence of Leonard Schacter,
Vol. 1, page 130, lines 1 to 15,
page 132, lines 4 to 16.

14. One of the busiest days of the week in the store is Sunday, and the evidence of Mr. Schacter was that it would be detrimental to business and inconvenient for customers if the store were closed on that day. Further, because of the volume of business on Sundays it could not operate on that day if limited to using seven employees.

Reference:

Case on Appeal,
Transcript of Trial, Evidence of Leonard Schacter,
Vol. 1, page 130, line 15 to
page 131, line 5.

15. Two Jewish customers of the Respondent corporation testified that they would not patronize the store if it were open on Saturdays, because it is against Jewish religious law to sell Jewish food on that day. That the store is open Sundays is a convenience given the Jewish religious prohibition against shopping on Saturdays.

MEMORANDUM OF THE CROWN PART I STATEMENT OF FACTS

Reference:

Case on Appeal,
Transcript of Trial, Evidence of Nancy Kumer,
Vol. 1, page 132, line 25 to
page 133, line 17.

Case on Appeal,
Transcript of Trial, Evidence of Gloria Yasny,
Vol. 1, page 133, line 26 to
page 134, line 15.

B) The Facts in Edwards Books and Art Ltd.

16. The Respondent accepts the Statement of Facts set out in the Appellant's Factum at paragraphs 1 through 7.

C) The Facts in Longo Brothers Fruit Markets Ltd. et al.

17. The Respondent accepts the Statement of Facts set out in the Appellant's Factum at paragraphs 1 through 11.

D) The Facts in Paul Magder

18. The Respondent accepts the Statement of Facts set out in the Appellant's Factum at paragraphs 1 through 9, and 11.

19. With respect to paragraph 10 of the Appellant's Statement, concerning the evidence before the Ontario Court of Appeal regarding Section 1 of the Charter, the Report on Sunday Observance of the Ontario Law Reform Commission was before the Court, and was relied on by the Court in determining the intent and purpose of the Act. The report examines the sociological and policy issues related to the question of Sunday shopping, and was considered by the Legislature of Ontario in the enactment of the Retail Business Holidays Act. That report and other legislation was relied on by the Crown with respect to the argument concerning the application of Section 1 of the Charter.

10.

MEMORANDUM OF THE CROWN PART I STATEMENT OF FACTS

Reference:

10

Case on Appeal,
Reasons for Judgment of the Ontario Court of
Appeal,
Vol. 2, at pages 257-259,
and at 48 O.R. (2d) at 409-410; and 15 C.C.C.
(3d) at 367-368.

20. There was no evidence at trial of the religious
practices of the Appellant Magder. The store served a wide
clientele, including American tourists.

Reference:

20

Case on Appeal,
Transcript of Trial,
Vol. 1, pages 102-121.

30

40

MEMORANDUM OF THE CROWN PART II QUESTIONS IN ISSUE

PART II

POSITION OF THE CROWN

WITH RESPECT TO THE CONSTITUTIONAL

QUESTIONS IN ISSUE

10

Question 1: Is the Retail Business Holidays Act, R.S.O. 1980, c. 453 within the legislative powers of the Province of Ontario pursuant to Section 92 of the Constitution Act, 1867?

20

21. It is the position of the Crown, represented by the Attorney General for Ontario, that the Court of Appeal for the Province of Ontario correctly found that the Retail Business Holidays Act was enacted for a valid secular purpose within the competence of the provincial legislature.

30

Question 2: Does the Retail Business Holidays Act, R.S.O. 1980, c. 453 or any part thereof, infringe or deny the rights and freedoms guaranteed by sections 2(a), 7 and/or 15 of the Canadian Charter of Rights and Freedoms and, if so, to what extent does it infringe or deny these rights?

40

22. It is the position of the Crown, represented by the Attorney General for Ontario, that the Retail Business Holidays Act does not infringe or deny any of the rights and freedoms guaranteed by Section 2(a), 7 or 15 of the Canadian Charter of Rights and Freedoms.

MEMORANDUM OF THE CROWN PART II QUESTIONS IN ISSUE

10 Question 3: If the Retail Business Holidays Act, R.S.O. 1980, c. 453, or any part thereof, infringes or denies in any way sections 2(a), 7 and/or 15 of the Canadian Charter of Rights and Freedoms, to what extent, if any, can such limits on the rights protected by these sections be justified by section 1 of the Canadian Charter of Rights and Freedoms and thereby rendered not inconsistent with the Constitution Act, 1982?

20 23. It is the position of the Crown, represented by the Attorney General for Ontario, that to the extent of any infringement of Sections 2(a), 7 or 15 of the Charter found by this Honourable Court, the limit on the rights protected by those sections is justified under Section 1 of the Charter.

30 24. It is further the position of the Crown that even if an infringement not justified by Section 1 were to be found, the relevant part of the Retail Business Holidays Act would be rendered inconsistent, and therefore of no force or effect, only to the extent of the inconsistency, that is, only in relation to those who had shown that their rights or freedoms had been infringed.

40 25. It is further the position of the Crown that even if this Honourable Court were to agree with the decision of the Court of Appeal for Ontario that the rights of a party holding a sincerely held religious belief could be infringed such that the legislation was of no force or effect in relation to that party, the Court of Appeal for Ontario erred in holding that the Respondent Nortown Foods Ltd., being a corporation, could have a sincerely held religious belief.

MEMORANDUM OF THE CROWN PART III BRIEF OF ARGUMENT

PART III
MEMORANDUM OF ARGUMENT

10 Question 1: Is the Retail Business Holidays Act, R.S.O. c. 453 within the legislative powers of the Province of Ontario pursuant to Section 92 of the Constitution Act, 1867?

20 26. It is respectfully submitted that the Court of Appeal for Ontario did not err in holding that the Retail Business Holidays Act was valid provincial legislation enacted pursuant to legislative authority granted by Section 92 of or the Constitution Act, 1867.

30 27. It is respectfully submitted that the Retail Business Holidays Act, R.S.O. 1980, c. 453 is valid legislation under the Province's authority to legislate in relation to matters coming within the following heads of power enumerated in Section 92 of the Constitution Act, 1867:

92(13) Property and Civil Rights in the Province.

(15) The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any matter coming within any of the Classes of Subjects enumerated in this Section.

(16) Generally all Matters of a merely local or private Nature in the Province.

40 28. It is respectfully submitted that the Retail Business Holidays Act is legislation designed to set aside common days (including a weekly pause day) for rest and recreation generally free from work. The "pith and substance" of the Act can be ascertained from its terms, the legislative debates which preceded its enactment, and the Report on Sunday Observance Legislation (1970) of

MEMORANDUM OF THE CROWN PART III BRIEF OF ARGUMENT

the Ontario Law Reform Commission which was its genesis.

10 29. It is respectfully submitted that the true character of the legislation is evident from its title, its operative section (s. 2) requiring retail businesses to close on the defined days, and its list of exemptions (s. 3) which indicates the kinds of leisure activities people are encouraged to pursue.

20 30. It is respectfully submitted that extrinsic evidence, such as legislative debates, and Law Reform Commission Reports, is admissible to assist in characterizing legislation for constitutional purposes. It may be relevant in determining the purpose of the legislation by revealing the mischief at which the legislation was directed, and the background against which the legislation was enacted.

Reference:

Reference re Residential Tenancies Act, [1981] 1 S.C.R. 714 at 723

30 Lyons v. the Queen (1985), 56 N.R. 6; 15 C.C.C. (3d) 417

40 31. The Retail Business Holidays Act was intended to implement the recommendations of the Ontario Law Reform Commission in its Report on Sunday Observance Legislation, completed in 1970. Upon introducing the Bill in the Legislature, the Solicitor General, Mr. MacBeth stated as follows:

Hon. Mr. MacBeth: It is hoped that the establishment of certain "pause days" will slow the growing commercialism and materialism about us and result in an improvement in our quality of life and permit the encouragement of recreation and leisure on these common days of rest.

MEMORANDUM OF THE CROWN PART III BRIEF OF ARGUMENT

When the Bill came on for second reading, the Solicitor General said:

10 Rather than the approach that the original Lord's Day Act took in 1906 - it was a federal Act and took a religious approach - the law Reform Commission suggested that a secular approach should be taken, and that is the approach, of course, that is embodied in our legislation. The intent of the legislation is to permit as many people as reasonably possible to enjoy a common pause day.

20 I can't help but make reference to this morning's Globe and Mail. In the editorial it suggested operating six days a week, but six days a week of the operator's choice. Of course the purpose of this bill is just the opposite to that; not to suggest that everybody should have a one-day holiday each week - we have already achieved that through other types of legislation - but that there should be a day when people can holiday together. So as I have said on several -

Mr. Singer: Except for the exceptions, yes.

30 Hon. Mr. MacBeth: So, as I have said on other occasions, that a daughter may go out with her father or a mother and son, even though they are all working in different fields of employment. As I have said, we have taken a secular rather than a religious approach to this.

40 It is not easy to come up with legislation that is going to be satisfactory to everybody. I have found in speaking to people that most people feel this kind of legislation is good and desirable, but that each person has their own idea of what should be permitted and what should be excluded and how we should go about it.

Reference:

Debates, First Session of the Thirtieth Legislature, October 29, 1975, page 17, and November 6, 1975, page 330.

32. The Report on Sunday Observance Legislation (1970) of the Ontario Law Reform Commission contains an

MEMORANDUM OF THE CROWN PART III BRIEF OF ARGUMENT

exhaustive analysis of the desirability of common pause days and the need for legislation to secure them in certain industries. Among the conclusions drawn in the Report were the following:

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i) The need for a pause day:

The basis for this almost universal demand for at least one day of non-work would appear to be humanitarian and sociological in nature, relating to both the physiological and psychological well-being of the individual worker in particular, and social interaction among families and friends in general. (page 265)

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ii) The need to enact legislation to enforce a weekly pause day for those industries which would not voluntarily regulate themselves. (at pages 266-7)

iii) The pause days should be uniform:

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The next question in logical progression was substantially more difficult: should the weekly pause day, as supported by law, be one specific day for practically all people in Ontario, or should it be a "staggered" or "floating" pause day, according to some arrangement worked out in various industries, businesses, communities or professions? The arguments for a staggered pause day are initially attractive when one is reminded of the crowded recreational and entertainment facilities and the busy highways on most weekends in Ontario as compared with their lighter use on weekdays, and considers the possibility that a staggered pause day system would permit a more even distribution in the use of these facilities. However, these arguments soon become overtaken by countervailing considerations: the problems of coordinating pause days among a family and friends in a staggered system, particularly where there are children of school age; the difficulties of holding "community" events particularly during the daytime where large numbers of persons may get together for a particular recreational or social purpose; or indeed, the simple fact that a majority of persons actually prefers to spend their pause day together with family, friends or

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even among crowds, rather than in solitude. We have no hesitation in placing a higher priority on these latter considerations since they are based more on fundamental societal needs rather than on individual convenience. (at page 266)

10 iv) The weekly pause day should be Sunday:

20 Sunday as a day of religious observance in Ontario appears to be decreasing in significance, if church and Sunday school attendance on that day is any indication. But this does not mean that Sunday is losing its significance as a pause day - characterized by a high degree of social interaction and leisure activities among family and friends. Indeed, our behavioural research revealed that Sunday in Ontario in 1970 has these latter characteristics to a very high degree, certainly more so than on any other day of the week. We would therefore regard the singling out of Sunday as the day for government support as consistent with the promotion of these characteristics.

30 It would be naive for us to suggest that the selection of Sunday had no significance for religious observance in the province. The Christian tradition of observing the Lord's day has been very much a part of the history of this province, as it has in all the other Canadian provinces and indeed in most countries of the western world. Yet this does not mean necessarily that modern legislation supporting a pause day on Sunday need be religious in purpose or effect, just because Sunday is the day chosen. This is particularly true if Sunday pause day legislation actually facilitates social interaction and leisure activities among all persons on the day of non-work, clearly marking it as secular and not religious legislation. Under these conditions, Sunday would then be a Christian religious and only for those who choose to treat it as such and spend it in whole or in part in appropriate religious observance. (at pages 268-9)

10 33. The primary purpose and effect of the legislation were said in the Report to be the following:

(1) to create and preserve a "quality" environment in which the great majority of Ontario residents will have at least one day a week for recreation and fulfilment with their

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family and friends through leisure pursuits of their own choosing.

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(2) to ensure that as many persons as possible will be protected from being required to work on Sundays against their will. In these, we seek both to preserve a social environment for leisure and to protect labour. (at pages 271-2)

Reference:

Ontario Law Reform Commission, Report on Sunday Observance, 1970 at pages 265-272.

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34. It is respectfully submitted that it is within provincial legislative authority under Section 92(13) and (16) of the Constitution Act, 1867 to enact legislation regulating local trade, including hours of business.

It seems clear that the matter of the hours at which shops of specified classes shall close in particular localities in the Province of Quebec is a matter which is substantially of local interest in the province and which in itself is not of any direct or substantial interest to the Dominion as a whole.

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Reference:

City of Montreal v. Beauvais (1909), 42 S.C.R. 211 per Duff J., at 215.

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35. Furthermore, it is submitted that it is within provincial legislative authority to regulate hours of labour and to ensure a weekly pause from labour.

Reference:

Reference re Weekly Rest in Industrial Undertakings Act, [1937] A.C. 326

36. Legislation prohibiting activities and directed at preventing profanation of the Lord's day or compelling religious observance has been held to be "Criminal Law" and therefore within the federal legislative competence under Section 91(27) of the Constitution Act, 1867.

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Reference:

Regina v. Big M Drug Mart, [1985] 1 S.C.R. 295

Attorney General of Ontario v. Hamilton Street Railway Co., [1903] A.C. 523 (P.C.)

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37. The issue therefore is whether the Retail Business Holidays Act is characterized as legislation in relation to preventing the profanation of Sundays, in which case it would be invalid, or whether it was enacted for secular purposes, in which case it would be valid.

Quimet v. Bazin (1912), 46 S.C.R. 502 at 525-6

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Lieberman v. the Queen, [1963] S.C.R. 643 at 647

Regina v. Big M Drug Mart, (supra)

38. It is submitted that the inclusion of Sunday in the list of days a business must be closed is not determinative of this issue. Provincial legislation which required businesses to close on Sundays or which treated Sundays differently from other days has been upheld many times.

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It is not to be lightly assumed that any part of the by-law is directed to a purpose beyond the legislative competence of the enacting authority and I do not think that the inclusion of Sunday in the hours of closing of these businesses necessarily carries with it any moral or religious significance.

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. . . .

I am of opinion that the mere addition of the words 'or on Sunday' at the end of s. 3 [prohibiting bowling alleys from opening between midnight and 6:00 a.m. or on Sunday] does not afford sufficient evidence to justify the inference that this by-law is directed towards the prevention of the profanation of the Sabbath and that it is thus beyond the ambit of provincial authority.

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Reference:

Lieberman v. the Queen, (supra), at 648 and 649-50.

See also:

Hodge v. the Queen (1883), 9 App. Cas. 117

Re Karry and City of Chatham (1910), 21 O.L.R. 566 (C.A.)

Re Gregory and the City of Hamilton, [1942] 4 D.L.R. 735 (Ont. C.A.)

Regina v. Top Banana Ltd. (1974), 4 O.R. (2d) 513 (H.C.)

Regina v. Tamarac Foods Ltd. (1978), 45 C.C.C. (2d) 442 (Man. C.A.)

39. It has been observed recently by this Honourable Court that aspects of Sunday observance are within provincial legislative competence.

Reference:

Multiple Access Ltd. v. McCutcheon (1982), 138 D.L.R. (3d) 1 at 17

40. More recently, in Regina v. Big M Drug Mart, Dickson, J. (as he then was) in commenting on the federal Lord's Day Act, stated:

Were its purpose not religious but rather the secular goal of enforcing a uniform day of rest from labour, the Act would come under s. 92(13), property and civil rights in the province and, hence, fall under provincial rather than federal competence.

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Reference:

Regina v. Big M Drug Mart, (supra) at 355

10 41. It is submitted that the secular purpose of the
Retail Business Holidays Act is evident from its terms,
which lack any reference to religious observance. The
defined holidays are days which are generally taken as
holidays by most people in the province, and even the
holidays which were originally religious in nature are
taken as holidays by those for whom they never had any
20 religious significance. The exemptions provided for in
Section 3 indicate the kind of leisure activities the Act
is designed to encourage, and would not be appropriate in
an Act designed to promote religious observance.

42. Legislation similar to the Retail Business
Holidays Act has been upheld in courts (in addition to the
judgment under appeal) in three provinces.

30 In Regina v. Top Banana Ltd. a municipal by-law
which required most stores to close on Sundays, New Year's
Day, Good Friday, Thanksgiving Day, Christmas Day, Boxing
Day and Dominion Day, was upheld as valid provincial
legislation. Mr. Justice Morden of the Ontario High Court
made the following comments about this legislation:

40 If the by-law, considered as a whole,
discloses an intention to regulate closing times
for local trade purposes this should be
sufficient. I can find that intention here when
the "holidays", set forth in s. 1, are
considered as a group. The majority of them have
no religious significance. Further, as the
learned Provincial Court Judge observed: "the
'holidays' set out in the legislation are, as a
matter of local practice, generally recognized
as holidays despite the fact that some of them
have religious significance."

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It may be noted that the list of holidays in Section 1(a) of the Retail Business Holidays Act includes as well Labour Day and Victoria Day, both without any religious significance.

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Reference:

Regina v. Top Banana, (supra) at 519

43. In Regina v. Tamarac Foods Ltd., the Manitoba Court of Appeal in a four to one decision upheld the validity of the Retail Business Holidays Act, which is substantially the same as Ontario's legislation. On behalf of the majority, Hall, J.A. explained:

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An examination of the statute itself and the agreed statement of facts does not reveal a legislative object or intent to prevent the profanation of the Sabbath or other days of religious significance. On the contrary, the title of the enactment and its substantive provisions reveal that the Legislature desired and intended to make provisions for holidays to some persons engaged in certain retail trades. The fact that Sunday and some other days of a religious significance are included in the definition of "holiday" is incidental to the main purpose of the legislation and is not a sufficient basis from which to conclude that the statute is directed towards the prevention of the profanation of the Sabbath or others days of religious significance and thus beyond provincial legislative competence.

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In my view, the impugned statute can and should be quite properly regarded as intra vires of the Provincial legislature under the heads of property and civil rights and matters of merely a local and private nature. I would so find.

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Reference:

Regina v. Tamarac Foods Ltd., (supra) at 445-6

See also:

Regina v. Duncan Supermarket Ltd. (1982), 66 C.C.C. (2d) 534 (B.C.S.C.)

23.

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44. It is therefore respectfully submitted that the Retail Business Holidays Act is valid provincial legislation.

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Question 2: Does the Retail Business Holidays Act R.S.O. 1980, c. 453, or any part thereof, infringe or deny the rights and freedoms guaranteed by Section 2(a), 7 and/or 15 of the Canadian Charter of Rights and Freedoms and, if so, to what extent does it infringe or deny these rights?

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1) STANDING

45. In the within case, three of the four defendants are corporations: the Appellant Edwards Books and Art Ltd., the Appellant Longo Brothers Fruit Markets Ltd., and the Respondent Nortown Foods Ltd. The Crown did not in the courts below, and does not on this appeal, challenge the standing of the corporations charged to challenge the validity of the law as being invalid or inconsistent on either a division of powers argument or an argument based on the Charter of Rights. It is submitted that this position is in accord with the judgment in Regina v. Big M Drug Mart.

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Reference:

Regina v. Big M Drug Mart, (supra), per Dickson, J. (as he then was) at 312-314

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46. It is however, submitted that the question of whether or not a corporation can enjoy or exercise freedom of religion is relevant to the within appeal by the Crown in Regina v. Nortown Foods Ltd. If this Honourable Court were to find an infringement of Section 2(a) of the Charter, and were to interpret the protection in this case as being limited only to those persons who could prove a genuinely or sincerely held religious belief, as did the Court of Appeal for the Province of Ontario, then the question becomes relevant. It is submitted that the judgment of this Honourable Court in Regina v. Big M Drug Mart recognized the relevancy of the question in this context:

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...if the legislation under review had a secular purpose and the accused was claiming that it interfered with his religious freedom, the status of the accused and the nature of his belief might be relevant: it is one thing to claim that the legislation is itself unconstitutional, it is quite another to claim a "constitutional exemption" from otherwise valid legislation, which offends one's religious tenets.

Reference:

Regina v. Big M Drug Mart, (supra), per Dickson, J. (as he then was) at 314-315

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2) SECTION 2(a) OF THE CHARTER:

FREEDOM OF CONSCIENCE AND RELIGION

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47. It is respectfully submitted that the Retail Business Holidays Act does not infringe the freedom of conscience and religion guaranteed by Section 2(a) of the Charter. The Act, it is submitted, has a secular purpose and effect, which is to provide for uniform pause days, by restricting the days on which retail businesses may open. In conjunction with other provincial legislation, the Retail Business Holidays Act provides for a society in which commercial and business transactions are restricted on holidays, including Sundays.

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48. It is respectfully submitted that guidance as to the most appropriate approach to be taken to this issue may be found in the judgment of this Honourable Court in Regina v. Big M Drug Mart.

As set out in the majority reasons, the initial test of constitutionality in a Charter context is whether or not the legislation's purpose is valid. If the purpose test is passed, then the effects of the legislation should be considered. In other words, the effects test cannot save legislation with an invalid purpose.

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10 In the reasons of Wilson, J., concurring in the result, the approach of the Courts on a Charter-based challenge to the validity of legislation should be to determine whether the effect of the legislation is to violate the right or freedom under consideration. If the effect is to violate the right, then the purpose of the enactment will be relevant to the assessment under Section 1 of the Charter.

20 49. For the within case, it is submitted that this distinction in approach between the majority and concurring reasons in Regina v. Big M Drug Mart is of little, if any, significance. Unlike the situation in Big M Drug Mart where a religious purpose made the legislation valid on a division of powers analysis but subject to invalidity on a Charter analysis, a finding of religious purpose underlying the Retail Business Holidays Act would result in the legislation being declared an invalid exercise of provincial powers; the issue under Section 2(a) of the Charter would thereby become moot. If, on the other hand, the finding is that there is no religious purpose underlying the Retail Business Holidays Act, the legislation would be declared valid on a division of powers analysis; and the assessment which would follow under Section 2(a) of the Charter would focus on the effects of the legislation. In that way the analytical problem posed by the Big M Drug Mart judgment is, for the practical purposes of this case, obviated.

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A) SCOPE OF FREEDOM OF CONSCIENCE AND RELIGION

50. The scope of the constitutional guarantee of freedom of conscience and religion in the Charter has been examined by this Honourable Court in Regina v. Big M Drug Mart:

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 belief by worship and practice or by teaching and dissemination. But the concept means more than that.

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Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

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Reference:

Regina v. Big M Drug Mart, (supra), per
Dickson, J. (as he then was) at 336-337

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51. From this passage, it may be seen that freedom of religion means more than the right to entertain, declare, and manifest religious beliefs. It includes freedom from indirect forms of control which determine or limit alternative courses of conduct. No one is to be forced to act in a way contrary to his beliefs or his conscience, subject to certain necessary limitations.

The question remains as to what constitute "indirect forms of control which determine or limit alternative courses of conduct available to others."

52. In Regina v. Big M Drug Mart, this Honourable Court also held that the meaning of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the Charter.

The Court, in the judgment of the majority, took a "purposive approach" to analyzing the meaning of a right or freedom in the Charter.

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

. . . .

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

Reference:

Regina v. Big M Drug Mart, (supra), per Dickson, J. (as he then was) at 344-345

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53. With regard to the historical context of freedom of conscience and religion in our society, the Court noted that the single concept now guaranteed by Section 2(a) of the Charter developed from the idea that the State's coercive power should not be used to secure obedience to religious precepts and to extirpate non-conforming beliefs. Expressions and manifestations of religious belief or non-belief are central to the definition. But it is submitted that the judgment in Regina v. Big M Drug Mart did not go so far as to decide the question now before the Court: does the definition of freedom of religion extend to cover what the Appellants contend is a coercive economic effect of this legislation.

Reference:

Regina v. Big M Drug Mart, (supra)

B) APPLICATION OF U.S. LAW CONCERNING RELIGIOUS FREEDOM
AND SUNDAY CLOSING

54. In relation to the application of the American "Sunday closing" cases to the issue of the meaning of freedom of conscience and religion, it was held in Regina v. Big M Drug Mart that recourse to the categories of the "free exercise" and the "establishment" clauses of the First Amendment of the U.S. Bill of Rights was not helpful in interpreting the Charter because of the inevitable overlap between those clauses and the difference in wording of the freedom guaranteed in the Canadian Charter.

Reference:

Regina v. Big M Drug Mart, (supra), per
Dickson, J. (as he then was) at 339-341

55. However, it is submitted that the American cases do provide useful assistance in considering the question of whether the effect of Sunday closing legislation must be characterized as a religious effect.

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10 56. The "free exercise" of religion clause in the First Amendment to the American Constitution precludes any Government regulation of religious beliefs. The law may neither compel the acceptance nor prohibit the maintenance of any religious view. But while there is no legislative power over mere opinion, the Government has control over religious practices which involve some substantial threat to public safety, peace or order. For example, the prohibition against polygamy has been upheld as constitutional in the face of a Mormon claim to the free exercise of religion.

20 Reference:

Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940)

Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680 (1961)

Fowler v. Rhode Island, 345 U.S. 67, 73 S.Ct. 526 (1953)

30 Reynolds v. U.S., 98 U.S. 145 (1879)

40 57. If the State regulates conduct by enacting a law the purpose and effect of which is to achieve a compelling State interest, the law would be valid notwithstanding an incidental and indirect burden on religious observance unless the State could attain its purpose by means which do not impose such a burden.

There is generally no burden on religion unless the impugned statute or administrative action goes to attack or otherwise impede a fundamental tenet, cardinal principle, or related practice of a religion.

Reference:

Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144 (1961)

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Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963)

Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526 (1972)

10 Thomas v. Review Board of Indiana
Employment Security Division, 450 U.S. 707,
101 S.Ct. 1425 (1981)

U.S. v. Lee, 455 U.S. 252, 102 S.Ct. 1051
(1982)

20 58. In the case of Sunday closing legislation, the
United States Supreme Court has held that the State has a
legitimate interest in establishing a common day of rest
on which industrial or commercial activity may be
curtailed by various degrees, and subject to various
exemptions. Notwithstanding that Sunday closing laws
at one time generally possessed a religious significance
it is open to legislators to achieve legitimate policy
goals by maintaining Sunday as a secular day of rest. That
such legislation may have an incidental, indirect and
inconvenient effect on the practices of people who, for
30 religious reasons, choose to rest on a day other than
Sunday is not sufficient to invalidate a legislative
scheme which otherwise has valid aims and effects.

Reference:

Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144 (1961)

40 McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101 (1961)

Gallagher v. Crown Kasher Supermarket of
Massachusetts, 366 U.S. 617, 81 S.Ct. 1122
(1961)

Two Guys from Harrison-Allentown v.
McGinley, 366 U.S. 582, 81 S.Ct. 1135
(1961)

C) OTHER CONCEPTS OF FREEDOM OF RELIGION

59. It is submitted that the scope of the concept of freedom of conscience and religion may also be considered in the context of international documents.

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60. Canada is a signatory to the International Covenant on Civil Political Rights. Article 18 of that Covenant provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

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2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

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4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

61. The European Convention for the Protection of Human Rights and Fundamental Freedoms provides in Article 9:

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Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

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Reference may also be made to:

Universal Declaration of Human Rights, Article 18

62. It is respectfully submitted that the Charter concept of freedom of conscience and religion is properly considered in the context of such universal definitions of human rights. From these declarations it may be seen that the concept of freedom of religion is viewed as a right to hold uncoerced religious beliefs and a right to espouse those beliefs openly.

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D) SECTION 27 OF THE CHARTER:

63. It is respectfully submitted that this interpretation of both the purpose and effect of the Retail Business Holidays Act as not offending the guarantee of freedom of conscience and religion is not inconsistent with Section 27 of the Charter.

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In Regina v. Big M Drug Mart, it was held that Sunday closing legislation which had a religious purpose was contrary to the provisions of Section 27. The purpose of the Retail Business Holidays Act does not offend the philosophy of multiculturalism. In one sense, the harmony of a pluralistic society is enhanced by promoting a common pause day where persons of all cultures may join together in common activities or rest and relaxation.

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So also, it is submitted that holding that the effect of the Retail Business Holidays Act is not inconsistent with Section 2(a) of the Charter does not offend the principle of multiculturalism, since the

expression or manifestation of religious beliefs is not interfered with. One aspect of a multicultural society is an accomodation of the beliefs and traditions of all.

E) FREEDOM OF CONSCIENCE:

10 64. It is respectfully submitted that the Retail Business Holidays Act does not offend freedom of conscience, as distinct from religion, guaranteed in Section 2(a) of the Charter. In relation to this argument, raised by the Appellant Magder, the Court of Appeal for Ontario held:

20 ... the freedom protected in Section 2(a) would not appear to be the mere decision of any individual on any particular occasion to act or not act in a certain way. To warrant constitutional protection, the behaviour or practice in question would have to be based upon a set of beliefs by which one feels bound to conduct most, if not all, of one's voluntary actions.

30 It was held that the right did not give the right to object to the enforcement of Sunday closing legislation because it coincided with someone else's Sabbath, and that there was no evidence that any of the appellants had any such fundamental belief based on conscience rather than religion.

Reference:

Factum of the Appellant Paul Magder, Page 22, Paragraph 51

40 Case on Appeal,
Reasons of the Court of Appeal for Ontario,
Vol. 2, page 283.

65. In Regina v. Big M Drug Mart, this Honourable Court reviewed the purpose of protecting freedom of conscience and religion under the Charter. An underlying value is the freedom of the individual to hold and manifest whatever beliefs and opinions are dictated by conscience. Conscientiously held beliefs are protected as

well as religious beliefs, as is the right not to have a religion.

Reference:

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Regina v. Big M Drug Mart, (supra), per Dickson, J. (as he then was) at 346-347

Canadian Bill of Rights, Section 1(c)

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66. It is submitted that the inclusion of freedom of conscience in Section 2(a) of the Charter simply makes clear that the freedom encompasses systems of belief, which may not be recognized religions. However, it is submitted that there is nothing to suggest that the Act, in either its general or its individual application, offended the freedom of conscience.

F) THE PURPOSE OF THE RETAIL BUSINESS HOLIDAYS ACT:

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67. In Regina v. Big M Drug Mart this Court held:

In my view the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. The element of religious compulsion is perhaps somewhat more difficult to perceive (especially for those whose beliefs are being enforced) when, as here, it is non-action rather than action that is being decreed, but in my view compulsion is nevertheless what it amounts to.

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After noting the value of a spiritual day, the Court continued:

In my view, however, as I read the Charter, it mandates that the legislative preservation of a Sunday day of rest should be secular, the diversity of belief and non-belief, the diverse socio-cultural backgrounds of Canadians make it constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion.

[emphasis added]

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Reference:

Regina v. Big M Drug Mart, (*supra*), per Dickson, J. (as he then was) at 350-351

10 68. It is therefore submitted that it is clear that the Charter requires that any legislative preservation of Sunday as a day of rest must be for a secular purpose. A legislative purpose of preferring one religion at the expense of another will not be a valid purpose.

20 In Regina v. Big M Drug Mart it was unnecessary to decide the additional issue of whether the effect of Sunday closing legislation with a valid secular purpose would necessarily offend the Charter guarantee of freedom of conscience and religion, since the Lord's Day Act in issue in that case had been determined to have a purpose classified as offending the freedom. However the possibility of such legislation, having both a valid purpose and effect, was not denied.

30 It is submitted that the Retail Business Holidays Act has provided for a secular preservation of Sunday as a day of rest, in terms of both purpose and effect. The Act does not compel or coerce the observance of any religious tenet or creed, and abstention or work on Sunday does not in and of itself have any religious significance.

40 69. It is submitted that the purpose of the Retail Business Holidays Act as set out at paragraphs 26 to 41, above, is secular. Its aim is to secure a common pause day for residents of the province.

Reference:

Regina v. Magder (No. 1) (1983), 41 O.R. (2d) 281 (Ont. C.A.) per Grange, J.A. at 285

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70. It is further respectfully submitted that the purpose of providing a uniform pause day is in keeping with the legislative scheme of a number of other provincial enactments which are designed to secure Sunday as a day free from business activity. Among others these include closing of the courts, restrictions on certain judicially related activities such as service of subpoenas and other legal documents, closing of pawn shops and closing of land registry and land title offices.

General reference may be made to:

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Judicature Act, R.S.O. 1980, c. 223,
Sections 92, 132

Surrogate Courts Act, R.S.O. 1980, c. 491,
Section 16

Pawn Brokers Act, R.S.O. 1980, c. 372,
Section 8

Land Titles Act, R.S.O. 1980, c. 230,
Section 92

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Registry Act, R.S.O. 1980, c. 445, Section
8

County Courts Act, R.S.O. 1980, c. 100,
Section 7

Game and Fish Act, R.S.O. 1980, c. 182;
R.R.O. 1980, Reg. 407, 408, 411

Liquor Licence Act, R.S.O. 1980, c. 244;
R.R.O. 1980, Reg 581, ss. 8(17), 9

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71. The purpose of providing a uniform day of rest from labour was characterized as a secular purpose in Regina v. Big M Drug Mart. It was also noted that where the uniform day is Sunday, the religious element will almost inevitably also be present, considering the Anglo-Canadian historical tradition.

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Reference:

Regina v. Big M Drug Mart, (supra) per
Dickson, J. (as he then was) at 316.

10 72. The question of whether Sunday closing laws have
a secondary religious purpose was considered by the
Supreme Court of the United States in McGowan v. Maryland.
Where the purpose of the legislation was acknowledged to
be the setting aside of a common day of rest, it was held
that the fact that the legislation also harmonized with
the tenets of a religion did not mean it violated the
prohibition against the establishment of religion.

20 This suggests that an indirect result flowing
from legislation akin to the Retail Business Holidays Act,
such as the result in issue here, is not necessarily
characterized as a "purpose" of similar legislation.

Reference:

McGowan v. Maryland, (supra) at 1113-4,
1118-9

30 73. It is submitted that any "religious element"
arising from the fact that the uniform day is Sunday is
more properly considered in the context of the argument on
the "effects" of the legislation. This is consistent with
the position taken by the Appellant Edwards Books and Art
Limited.

Reference:

40 Factum of the Appellant Edwards Books and
Art Ltd., Page 8, Paragraph 13.

74. With respect to the argument posed directly by
the Appellant Longo Brothers Fruit Markets Ltd., and
adopted by the Appellant Paul Magder, that there is a
secondary religious purpose underlying the legislation, it
is submitted that the Ontario Law Reform Commission Report

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10 on which the legislation was based clearly indicates that Sunday was chosen for its continuing place in our society as a day of rest. Although traditionally and historically the day had religious significance, Sunday and other religious holidays have to a large extent become secular days of rest. The Ontario legislation maintains this tradition.

Therefore, it is again submitted that any residual religious aspect to the Retail Business Holidays Act is more properly viewed in the context of the "effects" argument.

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Reference:

Factum of the Appellant Longo Brothers
Fruit Markets Ltd., pages 10 to 16,
paragraphs 15 to 1 23

Factum of the Appellant Paul Magder, pages
10, 22, 24, paragraphs 22, 50, 55, 56

Report on Sunday Observance Legislation,
Ontario Law Reform Commission, 1970, pages
268-269

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G) THE EFFECT OF THE RETAIL BUSINESS HOLIDAYS ACT:

75. The critical issue in these appeals is whether or not the requirement that retail stores remain closed on holidays, including Sundays, can be said to have an effect that infringes the freedom of religion guaranteed by Section 2(a) of the Charter.

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76. The question of the purpose and effect of Sunday closing laws similar to the Retail Business Holidays Act has been considered by the United States Supreme Court. While the constitutional context is different, it is submitted that the American approach is nonetheless of assistance. The "effect" under consideration was held not to constitute a contravention of the American Bill of Rights guarantee of religious freedom. Applying this

conclusion to the analytical approach required by the Charter, this could be either because such an effect does not have a sufficient nexus to bring it within the guarantee of freedom of religion, or because it is a justifiable limit under Section 1 of the Charter.

It is submitted that the former reason is correct: it is consistent with the definition of the freedom as set out in Regina v. Big M Drug Mart, and is consistent with our historical understandings of the scope of the concept of freedom of religion.

In the American cases, it has been decisively held that the historical religious origins of such laws, and the fact that the 'pause day' of Sunday has significance for the Christian majority, does not mean that the American constitutional guarantee of freedom of religion is infringed.

In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than a religious character.... The present purposes and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

[emphasis added]

Reference:

McGowan v. Maryland, (supra) 81 S.Ct. at 1115-1116

77. With respect to drawing the line between secular and religious effect, the U.S. Supreme Court held:

10 ... the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sundays. And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to appellants and others similarly situated - retaining their present occupations and

20 incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor - may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.

30 To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday

40 impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

Reference:

Braunfeld v. Brown, (supra) 81 S.Ct. at 1147-1148

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78. In Braunfeld v. Brown it was held by the United States Supreme Court that the economic disadvantage resulting from the secular regulation of store openings on Sunday, to those whose religious choices had them close on a day other than Sunday, was only an "indirect burden".

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.

Reference:

Braunfeld v. Brown, (supra) 81 S.Ct. at 1148

79. The Court went on to hold, in reliance on the companion case of McGowan v. Maryland, that the suggested alternative means would not accomplish the valid purpose, and accordingly the legislation did not offend the constitutional guarantee.

Reference:

Braunfeld v. Brown, (supra) 81 S.Ct. at 1148-9

McGowan v. Maryland, (supra)

80. Other American cases have also considered this question of whether an indirect financial burden violates the constitutional guarantee of religious freedom as set out in the First Amendment.

81. Examples of cases where statutes or legislative schemes which posed an indirect and incidental economic burden on religions were found to be constitutionally

valid and not an impermissible infringement of religious liberty include:

- a municipal zoning by-law which precluded the use of a home as a Church.

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Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983)

- a labour law which prohibited children from selling goods in a public place as applied to a child who was selling religious literature with her guardian.

20

Prince v. Massachusetts, 321 U.S. 158, 645 S.Ct. 438 (1944)

- a social security income tax scheme levied on all employers as applied to an Amish employer who claimed that participation in such a scheme violated Amish religious beliefs.

U.S. v. Lee, (supra)

30

82. Examples of cases where statutes or decisions of administrative boards which posed an indirect burden on religion were found to be constitutionally invalid include the following:

- the refusal of unemployment benefits to a Seventh Day Adventist, who declined to work on a Saturday because of religious beliefs.

Sherbert v. Verner, (supra)

40

- a state law which required compulsory education up to age 16 as applied to Amish families for whom the requirement would gravely endanger or destroy the free exercise of their religious beliefs.

Wisconsin v. Yoder, (supra)

10

- a State regulation which prohibited solicitation of money at State fairs except in designated booths as applied to members of the Krishna Consciousness religion who practice the ritual of 'sankirtan' which requires roving devotees to solicit money from the uninitiated. International Society for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (1981)

20

- a narcotics law which prohibited the hallucinogen peyote as applied to Indians who used it for sacred religious purposes. California v. Woody, 394 P.2d 813 (1964)

30

- an unemployment insurance board refusal of benefits to a worker who quit work at an armaments factory for religious reasons. Thomas v. Review Board of Indiana Employment Security Division, (supra)

40

83. These cases all support the finding of the Court of Appeal for Ontario that the Retail Business Holidays Act cannot be said to infringe the freedom of conscience or religion of those who do not close their business establishments on a day other than Sunday for religious reasons. It is respectfully submitted that the finding was correct.

However, it is submitted that the additional finding of the Ontario Court of Appeal that the religious freedom of those who do sincerely observe a day other than Sunday by closing their business establishments for religious reasons was incorrect.

On this issue, the reasoning in the U.S. cases of Sherbert and Thomas was relied on. It is submitted that the "effects" considered in those cases are

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distinguishable from the effects in the Sunday closing cases, in that in Sherbert and Thomas there was a nexus between the legislation and the burdensome effect. In other words, the legislation was a direct cause of the burden.

10

It is submitted that the burden in the Sunday closing situation is different. There is no direct connection between the requirement of Sunday closing and the economic burden suffered by closing on another day.

84. It is submitted that the effect of Sunday closing legislation is an economic effect, that of the loss of potential profit. Before it can be said that this effect offends the Charter guarantee of freedom of religion, it must in some way be related to religion.

20

It is submitted that for those who do not choose to close their stores on a day other than Sunday, the effect cannot be related to religion. It is a purely secular, economic effect.

30

For those who, because of religious beliefs, close their stores on a day other than Sunday, the question becomes whether the effect of the loss of potential profits is related to the legislation. It is submitted that it is not. The economic burden results not from the Sunday closing, but from the closing on the other day. The economic effect of the Sunday closing law is the same for everyone, regardless of religious belief. Therefore there is an economic burden on such observers, but it flows from the religious choice, not from the common closing on Sunday.

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85. It is respectfully submitted that this effect need not be characterized as an indirect burden on religion. The Sunday closing burden falls equally on Sunday observers, non-Sunday observers, and non-observers. It is submitted that the additional burden that falls on

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non-Sunday observers as a result of their religious choices results directly from those choices, and not from the Retail Business Holidays Act.

10

It is therefore respectfully submitted that the Retail Business Holidays Act does not have any direct effect on freedom of religion. The freedom of religion of those who do not close their retail business establishments on a day other than Sunday cannot be said to be affected, and any effect flowing from an individual's decision, based on a sincerely held religious belief, to close on a day other than Sunday, is not an effect that is tied to the legislation. Consequently, the Retail Business Holidays Act does not offend the guarantee of freedom of conscience and religion set out in Section 2(a) of the Charter.

20

H) EFFECTS ARGUMENT AS APPLIED TO CORPORATIONS:

86. It is respectfully submitted that even if this Honourable Court were to agree with the Court of Appeal for Ontario that the effect of the Retail Business Holidays Act does infringe the freedom of conscience and religion of those who close their retail business establishments on a day other than Sunday, nonetheless the Court of Appeal for Ontario erred in finding that the Respondent Nortown Foods Ltd., being a corporation, possessed the requisite belief.

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It is submitted that a corporation cannot hold a sincerely held religious belief.

40

87. A corporation possesses a legal personality separate and distinct from its shareholders, directors and officers. This principle is rooted firmly at common law and is supported by statute. Legal personality allows a corporation to own property, to incur obligations, to sue or be sued, or otherwise to engage in activities or

transactions in its own name. A corporation is liable for its own activities, such liability not extending to its shareholders or managers.

Reference:

10

Salomon v. Salomon and Co., Ltd., [1895-9] All E.R. Rep. 33 (H.L.)

Ontario Business Corporations Act, S.O., 1982 c. 4, s. 15

Canada Business Corporations Act, S.C. 1974-75, c. 33, s. 15(1)

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88. Courts have generally refused to ignore or suspend this legal distinction between corporations and their shareholders or managers. In cases where Courts have 'lifted the corporate veil', the aim has been to prevent the individual agents or shareholders from hiding fraudulent or improper conduct behind the corporate person.

30

The company is always an entity distinct from its incorporators, unless it has been formed or used for the express purpose of doing a wrongful or unlawful act.

Reference:

Clarkson v. Zhelka (1967), 64 D.L.R. (2d) 457 at 470 (Ont. H.C.)

Reference may also be made to:

Littlewoods Mail Order Stores Ltd. v. I.R.C.; Same v. McGregor, [1969] 1 W.L.R. 1241 (C.A.)

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Wallersteiner v. Moir, [1974] 1 W.L.R. 991 (C.A.)

L.C.B. Gower, Modern Company Law, 4th ed., (ch. 6)

89. In criminal law, a corporation is capable of possessing a mens rea because the identification theory identifies the mental state of the corporation with that

of one of its directing minds, when he acts in the sphere of corporate operations assigned to him. The mens rea of the directing mind is not attributed to the corporation on a vicarious basis, but rather on the basis that the mental state of the "directing mind" is deemed in law to be that of the corporation in certain circumstances.

Reference:

Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd., [1915] A.C. 705 (H.L.)

Canadian Dredge and Dock v. the Queen (1985), 19 C.C.C. (3d) 1 (S.C.C.)

90. Therefore, a corporation is a separate legal entity. Its mental state, for certain purposes, is found in the state of mind of certain corporate representatives who are considered its "directing minds". However the corporate mind is not identical to the minds of the individuals involved in the corporation. A corporate mind is in essence the abstract sum of particular decisions or mental states of the human agents strictly with respect to particular corporate actions. A corporation does not adopt the full emotional and psychological range of its agents' minds. Consequently in a criminal proceeding against a corporation, its officers and directors who were its directing mind are compellable witnesses. Also a "directing minds" mental state is only attributed to the corporation where he acts in the field of corporate operations assigned to him.

Reference:

Regina v. Fell (1982), 64 C.C.C. (2d) 456 (Ont. C.A.)

Regina v. Paterson (N.M.) and Sons Ltd., [1980] 2 S.C.R. 679; 55 C.C.C. (2d) 289

Canadian Dredge and Dock v. the Queen, (supra)

91. It is respectfully submitted that a corporation cannot claim infringement of the guarantee of freedom of religion in Section 2(a) of the Charter because a corporation is factually unable to possess religious belief. Although a corporation adopts certain mental functions of its directors and officers with respect to corporation business, such attribution does not extend to mental workings or attitudes which are extrinsic to the legal nature of a company's actions. Religious belief is an example of a human activity which is irrelevant in terms of analysing the legal nature of corporate acts.

3) SECTION 7 OF THE CHARTER: THE RIGHT TO LIFE, LIBERTY AND SECURITY OF THE PERSON

92. The Appellant Paul Magder also raises the argument that the Retail Business Holidays Act contravenes Section 7 of the Charter. Section 7 provides:

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.

Reference:

Factum of the Appellant Paul Magder, pages 25-29, paragraphs 58-67

93. The Court of Appeal for Ontario held, in rejecting this argument, that the right to life, liberty and security of the person, did not provide "a right to work whenever one wishes." It was held that the differential regulation of retail businesses' Sunday closing, by providing for certain exemptions from the provisions of Section 2 of the Act, did not constitute discrimination, and that being required to close at certain times did not, in any event, amount to a "deprivation". It is submitted that the Court of Appeal for Ontario was correct in these conclusions.

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Reference:

Case on Appeal,
Reasons of the Court of Appeal for Ontario,
Vol. 2, Pages 304-5

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94. It is submitted that the concept of "life, liberty and security of the person" has no application to the within case.

Reference:

Singh v. Minister of Immigration, [1985] 1
S.C.R. 177

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Operation Dismantle Inc. et al v. the Queen,
[1985] 1 S.C.R. 44; aff'g [1983] 1 F.C. 745; 3
D.L.R. (4th) 193

Regina v. Morgentaler et al, October 1, 1985,
(Ont. C.A.)

95. It is also submitted that economic freedoms must be considered to be excluded from Section 7, particularly given the lack of any reference to "enjoyment of property" as referred to in Section 1(a) of the Canadian Bill of Rights or the 5th and 14th Amendments to the Constitution of the United States.

30

Reference:

Singh v. Minister of Immigration, (supra)

Public Service Alliance of Canada v. Her Majesty the Queen in Right of Canada (1984), 9 C.R.R. 248 (F.C.T.D.); aff'd 26 A.C.W.S. (Fed. C.A.); leave to appeal granted, 57 N.R. 161

Re Becker and the Queen (1983), 148 D.L.R. (3d) 534 (Alta. Q.B.); aff'd (Alta C.A.)

Re Klein and Law Society of Upper Canada (1985), 50 O.R. (2d) 118 (Div. Ct.)

Minutes of Special Joint Committee of the Senate and House of Commons on the constitution of Canada, Proceedings, 32nd Parl., Sess. 1 (1980-81), 4:87; 9:64; 113-114; 11:35; 15:9; 27:40-41; 41:10-12; 44:7, 19, 25-28; 46:26-17; 49:70

40

D.C. McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1982), ch. 4

U.S. CONST. amend. V, XIV

10

96. It is further respectfully submitted that the issue of the scope of the concept of fundamental justice in Section 7 need not be determined in this case, there being no deprivation of any right of life, liberty or security of the person. In any event, it is submitted that the parameters of fundamental justice should develop on a case by case basis and that the broader question of whether "fundamental justice" includes what has been termed in the American jurisprudence, "substantive due process" need not be decided on this appeal.

20

Reference:

Reference re Section 94(2) of the Motor Vehicle Act of British Columbia (1983), 4 C.C.C. (3d) 243; 33 C.R. (3d) 22 (B.C.C.A.) (under reserve in S.C.C.)

30

Regina v. Morgentaler, October 1, 1985, (Ont. C.A.) (supra)

97. The Appellant Magder submits that the legislation "blatantly discriminates": it is submitted that this argument stands to be determined on the basis of whether the legislation is shown to infringe one of the specifically protected freedoms, as set out in the arguments on Section 2(a) and 15 of the Charter. It is therefore submitted that reference to Section 7 is of no assistance to the Appellant.

40

4) SECTION 15 OF THE CHARTER: EQUALITY RIGHTS

98. The judgment of the Court of Appeal for Ontario in the case at bar was handed down on September 19, 1984.

99. Section 15 of the Canadian Charter of Rights and Freedoms came into force on April 17, 1985.

Section 15(1) provides as follows:

10 15. (1) every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Reference:

Canadian Charter of Rights and Freedoms, Section 32 (2)

20 100. It is respectfully submitted that Section 15(1) can have no application to the cases at bar since it was not in effect at the time the events which brought about these prosecutions occurred. Section 15 could not, therefore, have had the effect of rendering the Retail Business Holidays Act unconstitutional at the time the events in question occurred. At that time, the actions of the Appellants Edwards Books and Art Ltd., Longo Brothers Fruit Market Ltd. and Paul Magder and the Respondent Nortown Foods Ltd., were still offences under the Act regardless of Section 15.

Reference:

Minister of Fisheries v. Curbera (1983), 1 D.L.R. (4th) 599 at 603 per Laskin, C.J.C. (S.C.C.)

40 Regina v. Longtin (1983), 41 O.R. (2d) 545 (Ont. C.A.)

Re Attorney General of Canada and Stuart (1982), 137 D.L.R. (3d) 740 (Fed. C.A.)

101. It is further submitted that it is inappropriate for Charter issues to be considered by the Supreme Court of Canada at first instance. There may not have been an opportunity to adduce necessary facts in the courts below, especially with respect to Section 1 of the Charter as it applies to Section 15. This Honourable Court should have

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the benefit of reasoned judgments in the courts below on the issues which come before it.

Northern Telecom Ltd. v. Communications Workers of Canada (1979), 98 D.L.R. (3d) 1 (S.C.C.)

10

102. It is respectfully submitted that the Retail Business Holidays Act is not inconsistent with Section 15 of the Charter simply because it applies only to some retail businesses and not to all, nor because it applies only to retail businesses.

20

103. The classes of "retail business" or "certain retail businesses" are not among the enumerated grounds of discrimination which are explicitly prohibited under Section 15. It is respectfully submitted that they should not be recognized by this Honourable Court as unenumerated grounds deserving of protection under Section 15 because those classifications exhibit none of the characteristics which mark the enumerated grounds - they have not historically been the basis of discrimination; they do not result in groups which are politically powerless; they are not immutable. Members of these classes are not, in other words, "a discrete and insular minority".

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Reference:

U.S. v. Carolene Products, 304 U.S. 144 (1938).

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104. In any event, it is respectfully submitted that the limitation of the scope of the Act to certain retail businesses is in furtherance of a "valid provincial objective" as outlined above in paragraphs 26 to 44. Thus, having regard to the mischief the Act was designed to cure, these legislative classifications do not amount to inequality, since different circumstances pertain with respect to each of them, requiring different legislative treatment.

Reference:

MacKay v. the Queen, [1980] S.C.R. 370 per
McIntyre, J.

10

U.S. Railroad Retirement Board v. Fritz, 449 U.S.
166, 101 S.Ct. 453 (1980), per Stevens, J.

R v. McDonald, unreported, released August 7,
1985, (Ont. C.A.)

Ontario Law Reform Commission, Report on Sunday
Observance Legislation, (1970)

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Question 3: If the Retail Business Holidays Act, R.S.O. 1980, c. 453, or any part thereof, infringes or denies in any way sections 2(a), 7 and/or 15 of the Canadian Charter of Rights and Freedoms, to what extent, if any, can such limits on the rights protected by these sections be justified by section 1 of the Canadian Charter of Rights and Freedoms and thereby rendered not inconsistent with the Constitution Act, 1982?

1) THE APPLICATION OF SECTION 1 OF THE CHARTER:

105. It is respectfully submitted that, in the event that a prima facie infringement of an asserted Charter right guaranteed by Section 2(a), 7 or 15 of the Charter is found by this Honourable Court, the Retail Business Holidays Act is nonetheless justified under Section 1 of the Charter. It is submitted that the legislation, to the extent that it so infringes the Charter, is a reasonable limit prescribed by law and demonstrably justifiable in a free and democratic society. The limitation is "prescribed by law", since the limits are set out by the provincial legislature in statute form.

Reference:

Regina v. Therens (1985), 18 C.C.C. (3d) 481 (S.C.C.) at 488

Regina v. Bryant (1984), 16 C.C.C. (3d) 408 (Ont. C.A.) at 413

106. The phrase "demonstrably justified" puts the onus of justifying a limitation on a right or freedom set out in the Charter on the party seeking to limit. The onus on the Crown under Section 1 of the Charter is to establish 'on a balance of probabilities' that a limitation is reasonable.

Reference:

Regina v. Bryant, (supra) at 415-6

Re United States of America and Smith (1984), 10 C.C.C. (3d) 540 (Ont. C.A.) at 556

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Regina v. Oakes (1983), 2 C.C.C. (3d) 339 (Ont. C.A.) at 352

Re Southam Inc. and the Queen (No. 1) (1983), 3 C.C.C. (3d) 515 (Ont. C.A.) at 526

10 Regina v. Smith (1984), 11 C.C.C. (3d) 411 (B.C.C.A.) at 429-431 (leave to appeal to S.C.C. granted April 24, 1984)

Regina v. Talbourdet (1984), 12 C.C.C. (3d) 173 (Sask. C.A.) at 181

20 107. It is submitted that a principled approach to Section 1 of the Charter is required. As is the case in assessing whether or not the legislation infringes one of the enumerated freedoms, the Court must consider both the purpose of the legislation, and the intended actual effects or consequences of the legislation.

Reference:

Regina v. Big M Drug Mart Ltd., (supra) at 331-336

30 108. It is submitted that in determining whether a legislative limit withstands a Section 1 review the court engages in a two-step inquiry:

1. Does the legislation further an important government objective or interest?

2. Are the means chosen to achieve this interest reasonable?

40 Reference:

Regina v. Big M Drug Mart, (supra) at 351-353

Regina v. Oakes, (supra) at 352

Regina v. Bryant, (supra) at 415

Herbert Marx, "Entrenchment, Limitations and Non-Obstante", Canadian Charter of Rights and Freedoms, Tarnopolsky and Beaudoin ed, (Toronto: Carswell, 1982)

109. It is respectfully submitted that the Crown need not demonstrate actual or real hindrance or prejudice to public safety and welfare if the legislation in question did not exist, but rather that an objectively rational basis exists for the legislature's actions.

Reference:

Re Global Communications Ltd. and Attorney General for Canada (1984), 10 C.C.C. (3d) 97 (Ont. C.A.) at 102, 110

110. It is submitted that Section 1 of the Charter balances textual Charter rights against other important values and societal goals.

Reference:

Canadian Newspapers Co. Ltd. v. Attorney General for Canada (1985), 17 C.C.C. (3d) 385 (Ont. C.A.) at 404 (leave to appeal to S.C.C. granted April 24, 1985)

Regina v. Big M Drug Mart, (supra) at 424, 425, 430 S.C.R.s

111. It is respectfully submitted that the expression "demonstrately justified" in Section 1 of the Charter does not of necessity require evidentiary proof in every instance. While the Charter assures measurability of the reasonableness of the limit it is submitted that the range of means open to the claimant in its constitutional defence of the limit is broad, ranging from the production of no evidence with reliance on a showing by force of logic and reasoning to the production of empirical or statistical data.

Reference:

Regina v. Bryant, (supra) at 428

Arcade Amusements Inc. v. Montreal (1985), 58 N.R. 339 (S.C.C.) at 356-7

Re Canadian Newspaper Co. Ltd. and the Queen
(1984), 16 C.C.C. (3d) 495 (Alta. C.A.) at 508

Black's Law Dictionary (5th ed.) (1979) page 389
"demonstrate"

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The Oxford English Dictionary 1933 ed. Oxford,
Vol. III, page 186 "demonstrable",
"demonstrably"

20

112. It is respectfully submitted that the demonstrable justification of a limit as reasonable involves consideration of the terms and purposes of the limiting enactment: the social, economic and political background of the enactment and, the effects of the legislation itself.

30

113. It is submitted that to the extent that the Retail Business Holidays Act might be held to infringe or deny in any way Section 2(a), 7 and/or 15 of the Charter, the limits are demonstrably justified in a free and democratic society. The Attorney General for Ontario will be relying on the Ontario Law Reform Commission's Report on Sunday Observance Legislation, which studied the historical, sociological and commercial reasons for the enactment of Sunday closing legislation.

40

114. As noted above in the argument concerning the division of powers, at paragraphs 26 to 44, the Retail Business Holidays Act was enacted as a result of the Law Reform Commission's Report on Sunday Observance. The Report recommended legislation to enforce a uniform pause day.

The selection of Sunday as a uniform weekly pause day is based on historical and cultural traditions and customs which are deeply rooted, not only in Ontario but throughout the world. Although these traditions have historically been based on religion, that is not a

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10 necessary function. Even at the time of Blackstone, it was clear that the institution of Sunday as a holiday possessed secular purposes wholly distinct from religion. Sunday is designated as a common pause day not only through much of the world generally, but also in communist countries such as the U.S.S.R.. This demonstrates that secular purposes can dominate over the traditional religious associations of Sunday.

Reference:

Ontario Law Reform Commission, Report on Sunday Observance Legislation, ch. 9, s. B; and Appendix III

20 Blackstone, Commentaries, Book IV, Lewis ed., (Philedelphia: Rees Welsh & Co. 1900)

30 115. The Report considered various justifications for legislation enforcing a uniform pause day for retail businesses, including the fact that there is generally a low percentage of workers who are unionized in the retail industry, and that such workers in the absence of collective labour agreements regulating holidays and premium wages for Sunday work, would be adversely affected by an "open" Sunday. Such adversity would be in addition to - forfeiture of a common pause day with friends and families.

Reference:

40 Ontario Law Reform Commission, Report on Sunday Observance Legislation, ch. 5, s. B

116. It is submitted that secular Sunday closing legislation which does not include a sabbatarian exemption (that is, an exemption for those who claim they must close their retail businesses for religious reasons on a day other than Sunday) is a reasonable limit on any incidental infringement of Section 2(a), 7 or 15 of the Charter. It is submitted that a sabbatarian exemption would severely

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undermine and contradict the policy objectives which underlie the Retail Business Holidays Act.

10 117. It is submitted that the legislative institution of a uniform weekly pause day is a government objective of sufficient importance to warrant overriding the protected freedom. However, to add a sabbatarian exemption to this statutory scheme would be deleterious to the aim of the law for two reasons. First, such a religious qualification might make the law ultra vires the provincial legislature. Secondly it would impose a religious discrimination in law. Whereas the Ontario Legislature enacted the Retail Business Holidays Act in terms of strict religious neutrality, the inclusion of a sabbatarian exemption would tend to give the statute a religious colour.

30 118. It is submitted that there are other detrimental effects which would result if a sabbatarian exemption were added to the scheme of the Retail Business Holidays Act. In surveying the range of problems and inequities which would be occasioned by a sabbatarian exemption the Ontario Law Reform Commission in its Report took note of the comments of United States Supreme Court Justice Frankfurter in McGowan v. Maryland:

40 There are tenable reasons why a legislature might choose not to make such an exception. To whatever extent persons who come within the exception are present in a community, their activity would disturb the atmosphere of general repose and reintroduce into Sunday the business tempos of the week. Administration would be more difficult, with violations less evidence and, in effect, two or more days to police instead of one. If it is assumed that the retail demand for consumer items is approximately equivalent on Saturday and on Sunday, the Sabbatarian, in proportion as he is less numerous, and hence the competition less severe, might incur through the exception a competitive advantage over the non-Sabbatarian, who would then be in a position,

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presumably, to complain of discrimination against his religion. Employers who wished to avail themselves of the exception would have to employ only their co-religionists, and there might be introduced into private employment practices an element of religious differentiation which a legislature could regard as undesirable.

Finally, a relevant consideration which might cause a State's lawmakers to reject exception for observers of another day than Sunday is that administration of such a provision may require judicial inquiry into religious belief.

The Report also noted Chief Justice Warren's reasoning in Braunfeld v. Brown:

...[T]hus, reason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity. Although not dispositive of the issue, enforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring.

Additional problems might also be presented by a regulation of this sort. To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day; this might cause the Sunday-observers to complain that their religions are being discriminated against. With this competitive advantage existing, there could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day. This might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs, a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees. Finally, in order to keep the disruption of the day at a minimum, exempted employers would probably have to hire employees who themselves qualified for the exemption because of their own

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religious beliefs, a practice which a State might feel to be opposed to its general policy prohibiting religious discrimination in hiring.

Reference:

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McGowan v. Maryland, (supra), per Justice Frankfurter, 81 S.Ct. at 1183-4

Braunfeld v. Brown, (supra), 81 S.Ct. at 1148-9

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119. It is respectfully submitted that given the Retail Business Holidays Act's policy goal and its value as a sufficiently significant government interest, the legislation constitutes the least restrictive limitation possible on Section 2(a), 7 and 15(1) without breaching the principle of religious neutrality. It is further submitted that the Retail Business Holidays Act is a reasonable limit on Section 2(a), 7 and 15(1) if the objectives of the legislation are assessed proportionately against what would be only an indirect and incidental infringement of the Charter guarantee. It is the position of the Crown that the Ontario legislature in the Retail Business Holidays Act achieves a reasonable balance and compromise between the diverse policy and constitutional values involved.

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Reference:

Ontario Law Reform Commission, Report on Sunday Observance Legislation, ch. 16

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Regina v. Big M Drug Mart, (supra), per Dickson, J. (as he then was) at 351-353

120. It is submitted that the secular justification for a day of rest in the Canadian context has been accepted by this Honourable Court in Regina v. Big M Drug Mart:

The other more plausible argument is that everyone accepts the need and value of a universal day of rest from all work, business and labour and it may as well be the day

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traditionally observed in our society. I accept the secular justification for a day of rest in a Canadian context and the reasonableness of a day of rest has been clearly enunciated by the courts in the United States of America.

Reference:

Regina v. Big M Drug Mart, (supra), per Dickson, J. (as he then was) at 352-353

121. In Regina v. Big M Drug Mart, this justification was necessarily rejected because of the invalid religious purpose underlying the Lord's Day Act.

It is submitted that in the case of provincial legislation with a valid purpose such as the Retail Business Holidays Act this justification shows that the alleged limit on the enumerated right or freedoms is demonstrably justified in our free and democratic society.

2) APPLICATION OF SECTION 52 OF THE CHARTER:

122. It is respectfully submitted that if the finding of the Court of Appeal for Ontario that the Retail Business Holidays Act infringes the freedom of conscience and religion of those who close on a day other than Sunday because of a sincerely held belief was correct, then the Court of Appeal was also correct in holding that Section 52 of the Charter allows a court to refuse to apply legislation in circumstances where it would be unconstitutional to do so, while allowing the legislation to remain in force in other circumstances.

Section 52 of the Charter provides as follows:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

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123. The language of Section 52 is descended directly from Section 2 of the Colonial Laws Validity Act, 1865, 28 & 29 Vict, c. 63 (U.K.) which provides as follows:

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2. Any colonial law which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

[emphasis added]

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124. It is submitted that the words "to the extent of any inconsistency" are a codification of the pre-Charter judicial technique of 'reading down' legislation so that it would extend only to those matters which were within the legislative authority of the enacting body, even though the terms of the legislation may be broader.

Reference:

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McKay v. the Queen, [1965] S.C.R. 798

125. It is submitted that this technique may result in the creation of a "constitutional exemption" where otherwise valid legislation does not apply in particular circumstances. This approach has been recognized by implication by this Honourable Court in Regina v. Big M Drug Mart:

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[I]f the legislation under review had a secular purpose and the accused was claiming that it interfered with his religious freedom the status of the accused and the nature of his belief might be relevant: it is one thing to claim that the legislation is itself unconstitutional, it is quite another to claim a "constitutional exemption" from otherwise valid legislation, which offends one's religious tenets.

Reference:

Regina v. Big M Drug Mart, (supra), per Dickson,
 1 (as he then used it)

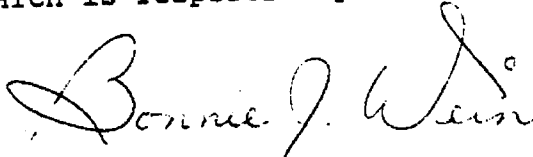
PART IV
NATURE OF THE ORDER REQUESTED

10 126. It is respectfully submitted that the appeals of the Appellants Edwards Books and Art Ltd., Longo Brothers Fruit Markets Ltd. and Paul Magder should be dismissed and the appeal by the Attorney General for the Province of Ontario against the acquittal of the Respondent Nortown Foods Ltd. should be allowed and the conviction restored.

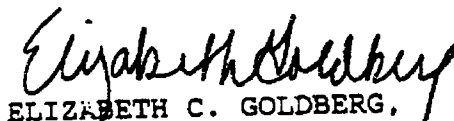
20 127. It is further respectfully submitted that the constitutional questions should be answered as follows:

- 30 1) The Retail Business Holidays Act is within the legislative powers of the Province of Ontario.
- 2) The Retail Business Holidays Act does not infringe or deny the rights and freedoms guaranteed by the Charter.
- 3) If there is an infringement of the rights and freedoms guaranteed by the Charter, the limits on the rights and freedoms are justified by Section 1 of the Charter.

ALL OF WHICH is respectfully submitted by,

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