18125

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

\- and -

BIG M DRUG MART LTD.

Respondent

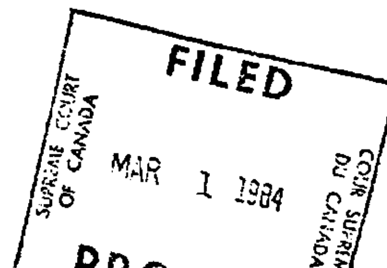
\- and -

THE ATTORNEY GENERAL OF CANADA,
THE ATTORNEY GENERAL FOR NEW BRUNSWICK,
THE ATTORNEY GENERAL FOR SASKATCHEWAN

Intervenors

FACTUM OF THE RESPONDENT

(For the names and addresses of the Solicitors for the parties and their respective Ottawa Agents see inside following title page)



FILED
SUPREME COURT OF CANADA
MAR 1 1984
COUR SUPREME DU CANADA

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12. Definition of Freedom, Encyclopedia of Philosophy, Vol. 3 @ 221

13. Kubo, "Day for Type "A", Liberty: A Magazine of Religious Freedoms, (Jan. Feb. 1984) @ 17

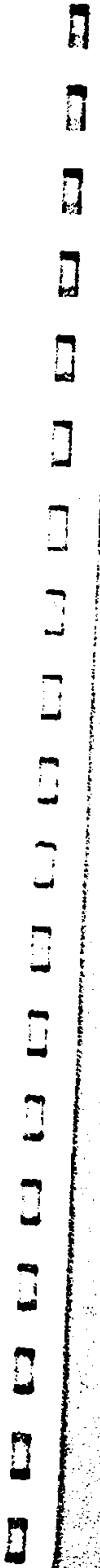
14. Westminster Confession of Faith, Chapter XXIII

15. The Memorial and Remonstrance Against Religious Assessments, James Madison.

PART I

STATEMENT OF FACTS

The Respondent agrees with the Appellant's Statement of Facts as set out in Part I of the Appellant's Factum.



PART II

POINTS IN ISSUE

It is the Respondent's respectful submission that:

(1) The Lord's Day Act, and especially s. 4 thereof, does infringe upon the freedom of conscience and religion guaranteed in s. 2(a) of the Canadian Charter of Rights and Freedoms.

(2) The Lord's Day Act, and especially s. 4 thereof, is not justified on the basis of s. 1 of the Canadian Charter of Rights and Freedoms.

(3) The Lord's Day Act, and especially s. 4 thereof is enacted pursuant to the criminal law power under s. 91(27) of the Constitution Act, 1867.

PART III

ARGUMENT

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ISSUE I LIMITATION OF LEGISLATIVE POWERS UNDER CHARTER

Does the Lord's Day Act, and especially s. 4 thereof, infringe upon the freedom of conscience and religion guaranteed in s. 2(a) of the Canadian Charter of Rights and Freedoms.

20

(A) Status and Standing

1. The Appellant argues (para. 11, App. Factum) that the Respondent must seek its remedy under s. 24 of the Charter which application must be made before a superior court. The Respondent demures on the availability of s. 24 of the Charter to the issue at hand and submits that it does not seek a remedy of the sort contemplated by s. 24. The Respondent is not voluntarily before the Courts seeking a remedy to a perceived or potential infringement of its rights, rather it has been brought before the Courts charged with an offence and seeks only to defend itself on the basis that the law under which it has been charged is inconsistent with s. 2(a) of the Charter and by reason of s. 52 of the Constitution Act, 1982 the Lord's Day Act is of no force or effect. It is submitted that an accused has always the right to question the validity of the law under which he has been charged and the Canadian Charter of Rights and Freedoms simply provides an additional basis for such challenge.

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40

Thorson v. Attorney General of Canada (No. 2) [1975] 1 S.C.R. 138

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Nova Scotia Board of Censors v. McNeil [1976] 2 S.C.R. 265

Minister of Justice (Canada) v. Borowski [1981] 2 S.C.R. 575

2. The Appellant further states that the Respondent, by reason of it being a corporation, is incapable of holding religious beliefs and is therefore incapable of claiming the rights under s. 2(a) of the Charter. It is respectfully submitted that this statement confuses from the outset the central issue of this appeal. To paraphrase Mr. Justice Frankfurter, this is not a case where the Respondent is seeking freedom from conformity to law because of its religious beliefs, rather it is a case where the Respondent is seeking freedom from conformity to religious dogma, West Virginia State Board of Education et al v. Barnette, 319 U.S. 624, (1943).

10

s. 52 of the Constitution Act, 1982 reads:

20

> (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. [emphasis added]

It is submitted that a law which imposes a religious obligation is, by that reason alone, inconsistent with s. 2(a) of the Charter and it matters not whether the accused is a Christian, Moslem, individual, corporation or an elephant. It is the nature of the law, not the status of the accused, that is at stake, as was stated by Mr. Justice Cartwright:

30

> It was argued that, in any event, in the case at bar the appeal must fail because there is no evidence that the appellants do not hold the religious belief that they are under no obligation to observe Sunday. In my view such evidence would be irrelevant. The task of the Court is to determine whether Section 4 of the Act infringes freedom of religion. This does not depend on the religious persuasion, if any, of the individual prosecuted but on the nature of the law. To give an extreme example, a law providing that every person in Canada should, on pain of fine or imprisonment, attend divine service in an Anglican Church on at least one Sunday in every month would, in my opinion, infringe the religious freedom of every Anglican as well as that of every other citizen.

40

50

Robertson and Rosetanni v. The Queen, S.C.R. 651 @ 661

3. 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 individual and the nature of his belief would be relevant. In such circumstances, under American jurisprudence, the courts have considered the nature of the belief or conviction being interfered with--i.e. is it religious?; the genuineness of the belief; the centralness of the interfered practice to the individual's religious precepts; and, the importance of the secular object of the impugned legislation (this last consideration would be comparable to the test set out in s. 1 of the Charter). In this type of case it would be appropriate to examine the religious convictions of the accused and question whether a corporate accused has the capacity to hold religious beliefs. Thus, it might fairly be argued that a corporation, being in the nature of a legal fiction, is incapable of holding religious beliefs. It is submitted, however, that if the law can attribute to a corporation the powers and capacities of a natural person, and hold that such an entity can have an evil mind such as to justify a criminal conviction, then it would be nothing novel to extend the fiction to allow a corporation to possess religious convictions. As stated by the Court below if it is possible that a corporation "can have a bad conscience, it does not strain the language to hold in the same manner it can have the good conscience or even the religion of its officers".

(B) Purpose of the Legislation

4. It has been long established that the purpose of the Lord's Day Act is to impose a Christian doctrinal (as opposed to moral) obligation:

The Attorney General for Ontario v. The Hamilton Street Railway Company [1903] A.C. 524

Re the Jurisdiction of a Province to Legislate Respecting Abstention from Labour on Sunday (1905), 35 S.C.R. 581

Ouimet v. Bazin [1912], 46 S.C.R. 502

Henry Birks & Sons (Montreal) Ltd. and others v. The City of Montreal and A.G. of Quebec [1955] S.C.R. 799

Robertson and Rosetanni v. The Queen [1963] S.C.R. 651; 41 D.L.R. (2d) 485.

The Corporation of The City of Hamilton v. The Canadian Transport Commission, (1978) 1 S.C.R. 640

Indeed, it was the religious purpose of the legislation which
10 established federal jurisdiction over the matter under Parliament's Criminal Law Powers contained in s. 91(27) of the B.N.A. Act (Constitution Act, 1867). Justice Duff in Ouimet v. Bazin stated:

> It appears to me on the whole abundantly clear that the intention of the legislature was to forbid certain things which, in its opinion, are calculated to interfere with the proper observance of Sunday. In the Hamilton Street Railway case their Lordships hold,
> 20 impliedly at least, that Christianity is part of the common law of the realm; that the observance of the Sabbath is a religious duty; and that a law which forbids any interference with that observance is, in its nature, criminal ...
>
> It is impossible for me to believe that the legislature intended by the enactment in question, to regulate civil rights. On the contrary, the evident object was to conserve public morality and to provide for the peace and order of the public on the Lord's Day. I am confirmed in this belief by the title of the Act ...

30

Ouimet v. Bazin, [1912] S.C.R. 502 @ 507

5. Included, as Appendix 6 is a survey of the origins of the present Lord's Day Legislation, dating from the Early Saxon Laws to the present as recorded by the Ontario Law Reform Commission, which makes clear the religious origins and purpose of such legislation.

40

Report on Sunday Observance Legislation, (1970) Appendix II

Indeed, Sunday observance is only one of several religious obligations that the state has sought to enforce throughout the ages. Chapter XXIII, Article III of the Westminster Confession of Faith, sets out the
50 duties of the civil magistrate in respect to religious obligations:

III. The civil magistrate may not assume to himself the administration of the word and sacraments, or the power of the keys of the kingdom of heaven; yet he hath authority, and it is his duty, to take order, that unity and peace be preserved in the church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed. For the better effecting whereof, he hath power to call synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God.

Reprinted as Appendix E to Free Church of Scotland v. Lord Overtoun [1904] A.C. 515 @ 733. (note: the Westminister Confession of Faith was ratified and adopted by Acts of Parliament, 1649 and 1690 [Thompson, vi. 161; ix. 117]) (full text included as Appendix 14)

6. It is submitted that the purpose of the Lord's Day Act, being what it is, inextricably renders the legislation inconsistent with s. 2(a) of the Charter of Rights and Freedoms and accordingly, requires the legislation to be declared of no force or effect, pursuant to s. 52 of the Constitution. It is submitted that the essence of s. 2(a) is to grant to the individual the right of self-determination in matters relating to religion, subject only to the limits imposed by s. 1. To the extent that Parliament imposes religious obligations, it to that extent substitutes its mind and will for that of the individual, in an area of concern which s. 2(a) has made the exclusive preserve of the individual. The Lord's Day Act dictates both the object and manner of reverence; the object is the Christian Deity and the matter is achieved by commanding the omission of a broad spectrum of activities in which one would otherwise naturally indulge.

7. The Appellant argues that the freedom contained in s. 2(a) of the Charter only prevents the state from interfering with the religious practices of the individual and presumably does not prevent the state from imposing religious obligations, provided such sanctions are not inconsistent with the religious practices of the individuals against whom the law is enforced. It is submitted that this definition of s. 2(a) is illogical and clashes with how the concept of "religious freedom" is commonly understood. As Lord Sankey, L.C. said in Edwards

v. The A.G. of Canada [1930] A.C. 124 @ 138, when considering whether or not the word person included women, stated: "The word 'person', as above mentioned, may include members of both sexes, and to those who would ask why the word should include females, the obvious answer is, why should it not?" Similarly, it is submitted to those who would ask, why freedom of conscience and religion would require the state to refrain from imposing religious obligations, the better question would be, why should it not?

8. It is respectfully submitted that the meaning of "freedom of conscience and religion" under the Charter includes the freedom "from" compulsory religious observance and can not be fairly interpreted to mean only the freedom "to" the free exercise of one's own religion.

9. This Court has on at least one prior occasion recognized that in the area of fundamental freedoms, the individual should neither be compelled nor constrained, thus when the Alberta Government proposed a law that would have required a newspaper to publish government statements to "correct" previously published press reports, under threat of penal sanction, Cannon J. stated:

> The mandatory and prohibitory provisions of the press bill are, in my opinion, ultra vires of the provincial legislature, Re: Alberta Statutes [1938] S.C.R. 100 @ 149.

Hence Mr. Justice Cannon fully appreciated that in regards to the freedom of the press, there was no difference between taking away the editor's pen, or moving his arm--both were considered to "nullify the political rights of the inhabitants of Alberta, as citizens of Canada". In a similar vein, the European Court of Human Rights, when considering a British Statute which required all British rail workers to belong to one of three trade unions, dealt with the issue of compellability as follows:

> 51. A substantial part of the pleadings before the Court was devoted to the question whether Article 11 guarantees not only

> freedom of association, including the right to form and to join trade unions, in the positive sense, but also, by implication, a "negative right" not to be compelled to join an association or a union...
>
> 52. The Court does not consider it necessary to answer this question on this occasion.
>
> 10 The Court recalls, however, that the right to form and to join trade unions is a special aspect of freedom of association; it adds that the notion of a freedom implies some measure of freedom of choice as to its exercise...
>
> ...it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 and that each and every compulsion to join a particular trade union is compatible with the intention of that provision. To construe Article 11 as permitting every kind of compulsion in the
> 20 field of trade union membership would strike at the very substance of the freedom it is designed to guarantee.

Young et al v. United Kingdom, (1981) 4 E.H.R.R. 38 @ 52.

(C) Effect of the Legislation

10. It is argued by the Appellant that the proper constitutional test
30 rests upon the "effect" of the legislation. The Lord's Day Act is said to have a secular effect "causing only an indirect inconvenience". Reliance is placed upon the decision in this Court in Robertson and Rosetanni v. The Queen [1963] S.C.R. 651, where the majority stated:

> " own view is that the effect of the Lord's Day Act rather than its purpose must be looked to in order to determine whether its application involves the abrogation, abridgment or infringement of religious freedom, and I can see nothing in that statute which in any way affects the liberty of religious thought and practice of any citizen of this country. Nor is the "untrammelled affirmations of religious belief and its propagation" in any way curtailed.
>
> The practical result of this law on those whose religion requires them to observe a day of rest other than Sunday, is a purely secular and financial one in that they are required to refrain from carrying on or conducting their business on Sunday as well as on their own day of rest. In some cases this is no doubt a business inconvenience, but it is neither an abrogation nor an abridgment nor an infringement of religious freedom, and the fact that it has been brought about by reason of the existence of a statute enacted

for the purpose of preserving the sanctity of Sunday, cannot, in my view, be construed as attaching some religious significance to an effect which is purely secular in so far as non-Christians are concerned.

@ 657-658

10

11. With respect it is submitted that "purpose" is the primary test of constitutional validity and that "effect" is only to be considered when the law under review has passed or at least has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to further consider its effect, since it has already failed. Thus, if a law with a valid secular purpose interferes with one's religious freedom, one could still argue the legislation's effect as a further means to defeat its validity or applicability. It is submitted, however, that the effect test is only used to defeat legislation with an apparently valid purpose and can never be relied upon to save legislation with an avowedly invalid purpose.

20

12. Moreover, if it is the effect of the Lord's Day Legislation which is to determine its constitutional validity, and if that effect is secular, then presumably, the legislation could not be construed as proper criminal law, since the Criminal law characterization rests upon a determination that the legislation is religious in nature.

30

13. In any event, it is submitted with the greatest respect, that centering on the legislation's effect would allow for the most flagrant interference with religious freedom, since the effect of all extremes of religious compulsion could be described in secular terms. It is submitted as axiomatic that legislating compulsory church attendance would be an infringement of religious freedom. Yet, presumably it could be said that requiring all persons to attend Anglican Mass would only inconvenience the non-Anglicans, resulting in a loss of time and nuisance of having to be some where and to do something that non-Anglicans would rather not. That an infringement of religious freedom results in a secular burden is not proof of the law's

non-religious effect but rather the certain evidence of its injustice. What is left unexplained by the majority decision in Robertson and Rosetanni is what a "religious" as opposed to a "secular" result would look like.

10

14. It is submitted that an example of the injustice that may occur when (in this case) the judiciary is free to sanction and impose compulsory religious observances is provided by the dialogue between a citizenship judge and candidate for Canadian citizenship:

Q. What Church do you go to? A. I don't go to church.

20

Q. Are you Catholic or Protestant? A. I am a Protestant.

Q. And your wife? A. She is a Protestant too.

Q. How long have you lived in Canada? A. Nine years.

. . . .

Q. You know this is a Christian Country. A. Yes--it was home too.

30

Q. Do you believe in God? A. You are asking me a personal question. I will have to say "no".

Q. This is very important. Do you not believe in God. A. I don't.

HIS HONOUR: I will have to refuse your application and I don't feel I can grant your application. Perhaps you can apply again at a later date after you have given this more thought.
A. It will not do me any good because I still feel that way.

40

HIS HONOUR: I think you and your wife should give this serious thought. You must believe in something. The oath you have taken really does not mean anything because you do not believe in God ... The things that we believe in this Country stand for Christianity--being honest and being kind--believing in Christ's teachings. Not everyone follows this but that is what we try to attain in this Country, the Christian way of life. I feel you must have some kind of faith but you don't seem to believe in anything from what I can gather--not even a Buddist. As I understand your evidence, you have no religion at all.

50

A. We don't go to church and we think that is the way to do it. This is something a man has to work out for himself. I stand here and I don't tell something that isn't true. I want to be honest with you. That is the way I wish it.

R. v. Leach, ex parte Bergsma, (1966) 1 O.R. 106 @ 108 to 109, 52 D.L.R. (2d), 594 (C.A.)

The Applicant in this case was not attempting to practice or manifest his religion, indeed it is apparent he had no religion. Yet, he quite clearly understood and expressed in uncomplicated terms that it was the right of every man "to work out for himself" what one's religious obligations should be and not the right of the state to dictate otherwise. It is respectfully submitted that it is this simple message that s. 2(a) of the Charter seeks to communicate to the law makers, administrators and courts of our land.

15. Fortunately, in this case the Ontario Court of Appeal inferred into the Citizenship Act, S.C. 1974, -75, -76, Chap. 108, the general option found in Canadian Law of making a solemn affirmation instead of swearing an oath, thus preventing the judicial imposition of a religious observance upon a non-believer. It is respectfully submitted that under a Constitution which enshrines the notion of "freedom of conscience and religion" that an individual should not have to rely upon judicial artistry in order to avoid submitting to a religious observance.

16. It is submitted the only apparent difference between the proscriptions under the Lord's Day Act and compulsory church attendance is that the former is not generally perceived to have a religious purpose. Indeed, the continued existence of the Lord's Day Act is likely due in large measure to the public misperception of the statute as having a secular (i.e. to create a holiday) as opposed to a religious objective. It is submitted, however, that the public perception of legislative intent is neither a legitimate nor a reliable test of constitutional validity.

17. It is submitted that to the extent that the Lord's Day Act is successfully enforced, its effect is precisely the same as its purpose-- the attainment of conformity to a religious observance of all the

inhabitants of Canada. As was stated in the dissenting judgment of Cartwright, J.:

> I can find no answer to the argument of counsel for the appellant, that the purpose and the effect of the Lord's Day Act are to compel, under the penal sanctions of the Criminal law, the observance of Sunday as a religious holy day by all the inhabitants of Canada; that this is an infringement of religious freedom I do not doubt.
>
> I agree with my brother Ritchie that the following words which he quotes from the judgment of Frankfurter, J. in Board of Education v. Barnette, supra, are appropriate to describe the freedom of religion referred to in the Canadian Bill of Rights:
>
> > Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.
>
> But this passage presupposes that the word "law" which I have italicized means a law which has a constitutionally valid purpose and effect other than the forbidding or commanding of conduct in a solely religious aspect.
>
> In my opinion a law which compels a course of conduct, whether positive or negative, for a purely religious purpose infringes the freedom of religion.
>
> A law which, on solely religious grounds, forbids the pursuit on Sunday of an otherwise lawful activity differs in degree, perhaps, but not in kind from a law which commands a purely religious course of conduct on that day, such as for example, the attendance at least once at divine service in a specified church.
>
> Robertson and Rosetanni v. The Queen (supra) @ 660-61.

(D) Meaning of "religious freedom"

(1) Bill of Rights contrasted with the Charter

18. In Robertson and Rosetanni v. The Queen this Court considered the meaning of religious freedom within the context of the Canadian Bill of Rights. Proclaimed the 10th day of August, 1960, s. 1(c) of The Bill of Rights states:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, ...
>
> (c) freedom of religion ...

10 s. 2(a) under the Charter of Rights and Freedoms provides for the protection of religious freedoms as follows:

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

20 It is respectfully submitted that the essential difference between the two provisions is that the language of the Charter is imperative while that of the Bill of Rights is merely declaratory. Consequently, it is submitted that the Bill of Rights could not purport to create or enlarge human rights but only affirm such rights as they existed at the time of its enactment; whereas under the Charter, it is submitted, this limitation does not apply and that the Charter does on its face purport 30 to establish rights irrespective of the present state of affairs. The distinction has been stated by Professor Hogg as follows:

> One part of the Canadian Bill of Rights which was occasionally construed as a limitation on the various guaranteed civil liberties was the recitation in s. 1, that the rights and freedoms declared in the Bill "have existed and shall continue to exist". This phrase led to the theory of which Prof. Tarnopolsky has amply 40 stigmitized as the "frozen concepts" theory, under which only rights in existence in 1960 (when the Bill was enacted) were guaranteed, and those rights were circumscribed by the state of the law in 1960. On this theory, any feature of our law which was in existence in 1960 (for example, capital punishment) could not be held to be contrary to the Bill; only post--1960 deprevations of civil liberties were within the scope of the Bill. This theory, which would have robbed the Bill of much of its force was never consistently applied, and is contradicted by the decision in R. v. 50 Dry Bones (1969) ... still, the frozen concepts theory kept appearing from time to time as a ground of decision in other cases, and has never been squarely laid to rest.

> The Charter scrupulously avoids reference to existing or continuing rights which could form the basis of a frozen concept theory. That theory therefore should not bedevil the interpretation of the Charter, ...
>
> Hogg, P.W., A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights; Canadian Charter of Rights and Freedoms; edited by W.S. Tarnopolsky and G.A. Beaudoin, Toronto, Carswell, (1982) 1 @ 10.

10

This "frozen concept theory" was concisely stated by Laycraft, J. below:

> Thus the declaratory language of Section 1 of The Canadian Bill of Rights had a double effect; the right itself is defined by the state of the law in 1960 and the protection afforded is limited by the same definition. (Appeal Book, p. 168)

0

Ritchie, J. appears to have anticipated the distinction between the two provisions when he stated:

> It is to be noted at the outset that the Bill of Rights is not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted. [emphasis added]
>
> Robertson and Rosetanni @ 654

Accordingly, it is submitted that the concept of religious freedom under 2(a) of the Charter must be determined independently of the degree to which . . right of religious freedom was enjoyed by Canadians prior to the proclamation of the Charter. It is submitted that the Charter is intended to set a standard upon which present and future legislation be tested. If this standard is determined or defined by what is being tested, the exercise is futile, as failure would be impossible. The meaning of "freedom of conscience and religion" under the Charter is one thing and must always be kept distinct from the scope of its operation. It is submitted the former is primarily a linguistic exercise, historical only in an etymological sense in determining how the concept has been used. On the other hand, the scope of 2(a) is limited by s. 1

and in determining what are justifiable limitations in a free and democratic society, past governmental policy may be appropriately considered.

(2) Charter:Extrinsic Aids

10

(a) Large and Liberal Interpretaion

19. It is submitted that as a remedial and constitutional enactment the Charter should be given a large and liberal interpretation. The classic statement in Canadian Law is found in the words of Lord Sankey:

20

> The British North American Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada ... their Lordship do not conceive it to be the duty of his Lord--it is certainly not their desire--to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.

Edwards v. A.G. of Canada, [1930] A.C. 124 @ 136 (P.C.)

30

And in another decision stated:

> In interpreting a constituant or organic statute ... that construction most beneficial to the widest amplitude of its powers must be adopted.

British Coal Corp. v. The King (1935) A.C. 500 @ 518 per Lord Sankey (P.C.) - The Supreme Court of Canada took note of this statement in Bogoch v. C.P.R. and C.N.R. (1963) S.C.R. 247 @ 255

20. Recently, this idea has been re-affirmed by the privy council in a Bermuda appeal which required the Court to determine whether a provision of the Bermuda Constitution bestowing certain rights on the "child" extended to illegitimate children. Notwithstanding the common law presumption to construe "child" as legitimate offspring only, the privy council held that illegitimate children were included. In speaking for

the Court, Lord Wilburforce made it clear that the constitutional nature of the enactment called for a special approach:

> Here ... we are concerned with the Constitution, brought into force certainly by an act of the United Kingdom Parliament ... but established by a self-contained document ... it can be seen that this instrument has certain special characteristics.
>
> (1) It is ... drafted in broad and ample style which lays down principals of width and generality.
>
> (2) Chapter 1 is headed "protection of fundamental rights and freedoms of the individual". It is known that this Chapter, as similar portions of other constitutional instruments drafted in the post-colonial period ... was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... it was in turn influenced by the United Nations Universal Declaration of Human Rights, 1948. These antecedents, and the form of Chapter 1 itself, call for generous interpretation avoiding what has been called "the austerity of tabulated legalism", suitable to give individuals the full measure of the fundamental rights and freedoms referred to.
>
> Minister of Home Affairs v. Fisher (1979) 3 All, E.R. 21 (P.C.) Cited with Approval in: Re Regina and Potma (1982) 37 O.R. 2d 189 @ 199 (Ont. C.A.)

21. It is further submitted that in determining the meaning of "freedom of conscience and religion" (as opposed to determining its scope) it should be kept in mind that the mere fact that legislation is in relation to or affects a guaranteed freedom does not per-se mean that it is invalid. It still remains for the Government to demonstrate that the limits imposed by the impuned legislation are justifiable in a free and democratic society, s. 1 Charter. Thus, given this safeguard it is submitted that the Courts should be even more reluctant to abridge the meaning of a guaranteed freedom when an abridgement of its scope can be justified by what is acceptable in a free and democratic society.

(b) Definition of "freedom"

22. The Oxford Dictionary defines "freedom", inter alia, as follows:

5. The quality of being free from the control of fate or necessity; the power of self-determination attributed to the will.

23. Websters International Dictionary defines "freedom" as:

> The quality or state of not being coerced or constrained by fate, necessity, or circumstances in one's choices or actions.

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24. The Encyclopedia of Philosophy, Volume 3 @ 221 in defining "freedom" states:

> It is best to start from a concept of freedom that has been central in the tradition of European individualism and liberalism. According to this conception, freedom refers primarily to a condition characterized by the absence of coercion or constraint imposed by another person; a man is said to be free to the extent that he can choose his own goals or course of conduct, can choose between alternatives available to him, and is not compelled to act as if he would not himself choose to act, or prevented from acting as he would otherwise choose to act. By the will of another man, of the state, or any other authority. Freedom in the sense of not being coerced or constrained by another is sometimes called negative freedom (or "freedom from"); it refers to an area of conduct within which each man chooses his own course and is protected from compulsion or restraint. [emphasis added]
> (full text included as Appendix 12)

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Given the definition of "freedom" it is submitted that freedom in respect to matters of religion would at least require that the individual have the right to choose what if any religion to believe in and to determine for one's self the manner in which to manifest that belief without compulsion or constraint from the civil authorities.

(c) Definition of "religious freedom"

(i) Natural Law Concept

25. It is submitted that freedom of religion is one of the fundamental human rights to which every person is entitled by reason of being endowed with free will and intelligence. As Belzil, J. stated in the dissent below:

It [religious freedom] derives from natural law and not from positive law. It is the same for all humans, of all nations and of all eras. In the Oxford Companion to Law, David M. Walker, Regius Professor of Law in the University of Glasgow, the learned author at page 591 defines human rights as:

> Claims asserted as those which should be, or sometimes stated to be those which are, legally recognized and protected to secure for each individual the fullest and freest development of personality and spiritual, moral and other independence. They are conceived of as rights inherent in individuals as rational, free-willing creatures, not conferred by mere positive law, nor capable of being abridged or abrogated by positive law.
>
> The origins of assertions of human rights are to be found in the ideas of natural law and natural rights. These ideas were developed by the Greek and Roman Stoics, by the Roman lawyers and the Christian fathers, and by Aquinas and some of the mediaeval English jurists, as the basis of the beliefs in the freedom and equality of all men; the crucial case was slavery, which positive law commonly recognized but natural law condemned.
>
> ... From the seventeenth century, the law of nature was utilized as a basis of modern international law, ... The founders of modern international law stressed the value and importance of the natural rights of man. Vitoria asserted that the primitive peoples of America were entitled to the protection of law and justice. (Appeal Book, p. 180-181)

26. That the fundamental freedoms, including freedom of religion derived from natural law concepts, has on at least one occasion been articulated by this court. Mr. Justice Rand has stated:

> Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.
>
> Saumur v. City of Quebec, [1953] 2 S.C.R. 299 @ 329

(ii) Madison's Concept

27. The influence of the natural law concept of human rights as applied to religious freedom upon the framers of the 1st Amendment to the

American Constitution is exemplified by The Memorial and Remonstrance Against Religious Assessments presented by James Madison to the General Assembly of the Commonwealth of Virginia. It stated, inter alia:

> 1. Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. [emphasis added]
>
> II Madison 183-191, Appended to Everson v. Bd. of Ed., 330 U.S. 1 @ 63, (1946) (Full text included as Appendix 15)

Madison's influence on the establishment of religious freedom for the fledgling American Nation was recounted by Mr. Justice Frankfurter, thus:

> Madison was co-author with George Mason of the religious clause in Virginia's Great Declaration of Rights of 1776. He is credited with changing it from a mere statement of the principle of tolerance to the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual.
>
> Everson v. Bd. of Ed., 330 U.S.1 @ 34, (1946)

28. The preamble to the Virginia Bill, originally written by Thomas Jefferson stated among other things, that:

> Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, ... [emphasis added]
>
> 12 Henning, Statutes of Virginia (1823) 84 cited in Everson v. Bd. of Ed., 330 U.S. @ 12

29. Jefferson and Madison carried the initiative which began with the Virginia Bill, to the U.S. Congress and the protection of religious freedom was entrenched by the 1st Amendment into the American Constitution. The wording chosen by Madison which has been described as "a model of technical precision and perspicuous brevity* reads:

> Article I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

*Frankfurter, J. in Everson v. Board of Education, 330 U.S. @ 31.

30. It is the first part of this principle which has been labelled the "establishment" clause that has received a very broad interpretation by the American Supreme Court. Speaking for the majority in Everson v. Bd. of Ed., @ 15 and 16, Mr. Justice Black stated:

> The "establishment of religion" clause of the First Amendment means at least this: neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or remain from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretively, participate in the affairs of any religious organization or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state". Reynolds v. United States, (supra) 98 U.S. @ 164, 25 Led 249.

31. Though Frankfurter, J. has described the "establishment" and "free exercise" clauses of the 1st Amendment to be "correlative and coextensive ideas, representing only different facets of a single great and fundamental freedom", Everson v. Bd. of Ed. @ 40, it has been the former clause which has received the greatest attention and has had the greatest impact on the development of religious freedom under American jurisprudence.

32. Appendix "1" is provided to depict the issues which have been considered by the U.S. Supreme Court under the "establishment" and "free exercise" clauses of the 1st Amendment. Among other things it is intended to show that each of the two issues is not an homogeneous class but particularly in the case of the "establishment" clause admits of several sub-categories. While it is not submitted that s. 2(a) of the Charter would encompass all the issues caught by the "establishment" clause it is submitted that governmental compulsion or coercion of the sort described in categories 1 to 3 of Appendix "1" is precluded by the concept of religion freedom contained in s. 2(a) of the Charter. It is noteworthy, that this type of governmental interference with religious freedom was held at an early stage by the U.S. Supreme Court to be an infringement of the 1st Amendment. Mr. Justice Frankfurter stated:

> Compulsory attendance upon religious exercises went out early in the process of separating church and state, together with forced observance of religious forms and ceremonies. Test oaths and religious qualification for office followed later.

Everson v. Board of Education, @ 44

33. Notwithstanding the strictness of the standards for religious freedom under the 1st Amendment, the U.S. Supreme Court in a series of decisions has upheld legislation similar to the Lord's Day Act.

Braunfeld v. Brown, 366 U.S. 599 @ 607, (1961)

McGown v. Maryland, 366 U.S. 420 @ 455, (1961)

Gallagher v. Crown Kosher Super Market of Massachusetts, 366 U.S., 617 @ 227, (1961)

Two Guys from Harrison v. McGinley, 366 U.S. 582 @ 598, (1961)

It is submitted, however, that it is of critical importance that the U.S. Supreme Court found that the legislation, despite its historic roots, could no longer be considered as legislation in regards to religion--that neither the statute's purpose nor its effect was religious. This finding is in sharp contrast to the decision of this

court in Robertson and Rosetanni where the legislation was readily acknowledged to have a religious purpose. Mr. Chief Justice Warren in McGown v. Maryland:

> Sunday closing laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose 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 dominate Christian Secs, does not bar the state from achieving its secular goals. To say that the state 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.
>
> McGown v. Maryland, 366 U.S., 420 @ 455, (1961)

And in another decision, the Chief Justice stated:

> ... when we examine the statutes now before the Court, we find that, for the most part, they have been divorced from their religious orientations of their predecessors. ...
>
> admittedly, the statutes still contain references to the Lord's Day and some provisions speak of weekdays as being secular days. ... it would seem that the objectionable language is merely a relic ...
>
> Gallagher v. Crown Kosher Super Market of Massachusetts, 366 U.S., 617 @ 227, (1961)

And in yet another decision stated:

> having carefully examined the entirety of the present legislation, the relevant judicial characterizations and particularly, the legislative history leading to the passage of the 1959 Act immediately before us, we hold that neither the statute's purpose nor its effect is religious.
>
> Two Guys from Harrison v. McGinley, 366 U.S. 582 @ 598, (1961)

34. It is respectfully submitted as most significant that the U.S. Supreme Court in these decisions took pains to point out that if the

purpose of the legislation remained religious, that it would be an infringement of the 1st Amendment protection of religious freedom:

> We do not hold that Sunday Legislation may not be a violation of the "establishment" clause if it can be demonstrated that its purpose--evidenced either on the face of the Legislation in conjunction with its Legislative History, or in its operative effect--is to use the states' coersive power to aid religion. [emphasis added]
>
> McGown v. Maryland, 366 U.S., 420 @ 456, (1961)
>
> 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. [emphasis added]
>
> Braunfeld v. Brown, 366 U.S., 599 @ 607, (1961)

35. The contrast between the United States and Canadian decisions has been cogently stated thus:

> In the United States, the religious purpose of Sunday legislation is denied as sternly as it is insisted upon in Canada. The legislation is declared to be today entirely secular in purpose, providing the citizenry with a uniform day of rest and recreation. If the United States Supreme Court had found a continuing religious purpose behind the Sunday legislation, the no-establishment principle would have commanded invalidation.
>
> B..ron, J.A., (supra) @ 43, Sunday in North America, H.L.R. Vo. 79:42

(iii) Other nations

36. Australia and Japan have also made it clear, when entrenching the concept of religious freedom into their constitutions, that governmental impositions of religious practices or observances are not permitted. The Australian Constitution states:

> Article 116: The commonwealth shall not make any law establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion.

The constitution of Japan provides:

Article 20: Freedom of religion is guaranteed to all. No religious organization shall receive any privilege from the state nor exercise any political authority.

(ii) No person shall be compelled to take part in any religious acts, celebrations, rights or practice.

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(iii) The state and its organs shall refrain from religious education or any other religious activity.

(iv) Meaning under Canadian Law

37. The right of religious freedom, not having been constitutionally protected prior to the Charter has received limited judicial consideration. Nevertheless, and notwithstanding the results of Robertson and Rosetanni, there is significant dictum arising from this court and other Canadian courts which acknowledge the natural law origins of the right and attribute to it a large and liberal interpretation as to make it, it is submitted, inconsistent with the Lord's Day Legislation. In Saumur v. City of Quebec, Mr. Justice Rand stated:

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... freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery. Their significant relation to our law lies in this, that under its principles to which there are only minor exceptions, there is no prior or antecedent restraint placed upon them: the penalties, civil or criminal, attach to results which their exercise may bring about, and apply as consequential incidents.

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Saumur v. City of Quebec, [1953] 2 S.C.R. 299 @ 329

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Casey, J. relying on the dictum of Rand, J. above stated:

[W]hile in principle no one should be coerced into the practice of a religion, or subjected to compulsion in following outwardly the

dictates of conscience, or prevented from practising as he sees fit the religion of his own choice, this immunity disappears if what he does or omits is harmful or opposed to the common good or in direct violation of the equal rights of others.

Chabot v. School Commissioners of Lamorandiere, (1957) 12 D.L.R. (2d) 796 (Que. Q.B.) @ 805

10 And he further states:

In this present instance no one denies appellant's right to practise his religion, or that the exposure of his children to the Roman Catholic faith in its teaching or in its practice is for him a matter of conscience, ...

Ibid @ 806

And further:

20 It is well to remember that the rights of which we have been speaking, find their source in natural law--those rules of action that evoke the notion of a justice which "human authority expreses, or ought to express--but does not make; a justice which human authority may fail to express--and must pay the penalty for failing to express by the diminution, or even the forfeiture, of its power to command", and of which it has been said: "But for natural law there would probably have been no American and no French revolution; nor would the great ideals of freedom and equality have found their way into the law books after having found their way into hearts of men".

Ibid @ 807

38. In Chabot the court upheld the right of Jehovah Witness parents to have their children exempted from religious instruction at the Catholic school which proved most convenient for their children to attend. This decision accords with various provincial education acts which, while prescribing religious exercises in public schools, allowed exemptions to any student whose parents requested it. Thus, for example the Manitoba Public School Act, (1890) 53 Vict. c. 38, provided:

6. Religious exercises in the public school shall be conducted according to the regulations of the Advisory Board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend

> such religious exercises, then such pupil shall be dismissed before such religious exercises take place.

Under the terms of the cited legislation and the dictum of Casey, J. it was not a requirement for exemption for the parent to establish that the prescribed religious exercise conflicted with the religious convictions of either the child or the parent. It was simply enough that one signified a desire not to have one's children compelled to perform a religious exercise. Thus, recognizing at least a limited "establishment" principle that religious dogma was not to be imposed where it was not welcome.

39. Another passage from Mr. Justice Rand evinces a recognition that separation of Church and State is a fact of Canadian Society:

> From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.
>
> Saumur v. City of Quebec, [1953] 2 S.C.R. 299 @ 327

40. Moreover, it is submitted that had the majority decision in Robertson and Rosetanni, included the precedent and antecedent sentences in the quotation from Chaput v. Romain it would have revealed that in this decision the Court was not only affirming that there was no State religion, but also that the State had no right to impose religious obligations. The full passage is as follows:

> Dans notre pays, il n'existe pas de religion d'Etat. Personne n'est tenu d'adherer a une croyance quelconque. Toutes les religions sont sur un pied d'egalite, et tous les catholiques comme d'ailleurs tous les protestants, les juifs, ou les autres adherents des diverses denominations religieuses, ont la plus entiere liberte de penser comme ils le desirent La conscience de chacun est une affaire personnelle, et l'affair de nul autre. Il serait desolant de penser qu'une majorite puisse imposer ses vues religieuses a une minorite. [emphasis added]

> In our Country there is no state religion. No one is required to adhere to any religious belief. All religions are on an equal footing, the Catholics as well as the Protestants, Jews, and other adherents to various religious denominations enjoy the most complete liberty of thought. The conscience of each is a personal matter and the concern of nobody else. It would be distressing to think that a majority might impose its religious views upon a minority. [translation] [emphasis added]

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Chaput v. Romain, [1955] S.C.R. 834 @ 840

41. It is submitted that reference should also be made to the pre-Confederation Act of the Province of Canada which provided:

> free exercise and enjoyment of religious profession and worship, with discrimination or preference ... is ... allowed to all Her Majesty's subjects.

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1851, Vict, Ch. 175 e.t. Ch. 175

42. Even in Robertson and Rosetanni the court appeared to be accepting that the "establishment" principle was inherent in Canadian law, both before and after the enactment of the Bill of Rights:

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> Although there are many differences between the constitution of this country and that of the United States of America, I would adopt the following sentences from the dissenting judgment of Frankfurter, J. in Board of Education v. Barnette, as directly applicable to the "freedom of religion" existing in this country both before and after the enactment of the Canadian Bill of Rights:
>
> > The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.

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Robertson and Rosetanni v. The Queen, @ 656

43. With respect, it is submitted that what the majority decision appears not to have recognized, was either that "freedom from conformity to religious dogma" was Frankfurter's way of expressing the "establishment" principle or that the principle would have commanded invalidation of the Lord's Day Act. Consequently, the result of this is

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that this court, it is respectfully submitted, has embraced the "establishment" principle while at the same time denying its application to the Lord's Day Act. If such a result impliedly rejects the "establishment" principle as the Appellant submits, then there would appear to be little, if any, meaningful content left to the concept of freedom of religion in Canada since the passage just cited expressly rejects the "free exercise" principle.

(3) Charter-Intrinsic Aids

(a) Addition of word "conscience"

44. What immediately contrasts with the Bill of Rights is that there has been added to the Charter provision the word "conscience". It is submitted that the significance of the addition of this word is at least twofold: (1) to make it clear that fundamental beliefs, besides those which could be considered religious are also protected as a fundamental right of the individual, and (2) the emphasis of the right is focused on the liberty of the individual's conscience, particularly, and most importantly, in matters relating to religion. It is submitted that the addition of the word "conscience" makes it clear that an individual is not only free to choose a religion but free to choose no religion if that be what his conscience dictates. This freedom to choose no religion or to be agnostic or atheistic only makes sense if the individual is free from compulsory religious obligations. If this were not so the Atheist would not be able to even make the feeble assertion that it was against his religion to perform the religious rights of another religion, since by definition the Atheist has no religion, which could be interfered with. Moreover, it is absurd to say that the agnostic or atheistic individual has even the freedom "to" the free exercise of his conscience unless he can refuse to adhere to the religious observances which are repugnant to him.

(b) 2(a) as distinct from 2(b)(c)(d)

45. It is submitted that if religious freedom consists only of the freedom "to" the free exercise of one's religion (i.e. to express, manifest, practice or propagate) then ss. 2(b)(c)(d) would adequately protect this right and would effectively render s. 2(a) redundant. If, however, freedom of religion includes the freedom "from" imposed religious observances and practice, 2(a) would possess a uniquenes which would justify a separate existence. It is submitted that it is a first principle of constitutional interpretation that the language used should be given meaning and interpretations which rob certain provisions of all meaningful content should be rejected.

(c) s. 15

46. Though s. 15 does not come into effect until April, 1985 by virtue of s. 32(2) it is submitted that this provision can be and should be used in determining the meaning of "freedom of conscience and religion" under s. 2(a). s. 15 reads:

> 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 orgin, colour, religion, sex, age or mental or physical disability.

s. 32(2) reads:

> notwithstanding s. (1), s. 15 shall not have effect until three years after this section comes into force.

47. It is submitted that to abridge the meaning of "freedom of conscience and religion" so as to allow a protection or preference to be conferred by one religious group in preference to all other religious groups or non-believers would render s. 2(a) inconsistent with the expressed provisions of s. 15(1), which in accordance with fundamental principals of statutory and constitutional interpretation should be avoided.

> To say that a statute must be read as a whole means not merely that the meaning of the words contained in a particular provision is to be gathered from reading them in their verbal and grammatical context; it means that the substance of the particular provision must be seen in the context of the ideas expressed in the whole act, "because" as Lord Reed said in Inland Revenue Commissioners v. Hinchey (1960) A.C. 748 @ p. 766 "one assumes that in drafting one clause of a Bill the draftsman had in mind the language and substance of the other clauses, and attributes to Parliament a comprehension of the whole Act.
>
> Driedger, E.A., Construction of Statutes; Butterworth, Toronto (1974) @ 69 and 70.
>
> There is general principle of statutory construction, equally applicable to constitutions, that a word, phrase or provision ought to be read in its total context. We must be cautioned against reading a phrase in isolation and out of context--the other sections of the Charter, its overall aims and objectives, the working of its previous drafts and its underlying political assumptions cannot be ignored.
>
> Conklin, W.E., Interpreting and Applying the Limitation Clause: An Analysis of s. 1; (1982) 4 S.C.L.R. 267.

(d) s. 27

48. It is submitted that to accept the abridged interpretation of "freedom of conscience and religion" and to accept that Parliament retains the right to compel universal observances of a preferred religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians which is contrary to the expressed provisions of s. 27 which reads:

> This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

(e) Preamble

49. The Appellant submits (App. Factum @ 14) citing a passage from Irwin Cotler that separation of church and state has never been an avowed policy of Canadian Legislatures and that the existence of s. 29

and the preamble to the Charter evince a contrary intention. Regrettably the passage is more a statement than it is an argument but as it was relied upon by Mr. Justice Belzil in his dissent in the Court below it is perhaps well to consider its import. Dealing with the preamble first which reads:

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> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

50. Firstly, it is submitted that "God" by itself has such a wide and general application that to conclude that it means the God of Christendom invokes a specificity which is absent from the words themselves. The Oxford English Dictionary provides the following definition:

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> God: The supreme or ultimate reality: as (a): the Being, perfect in power, wisdom, and goodness, who men worship as Creator and Ruler of the Universe; (b) Christian Science: the incorporeal divine principle ruling over all as eternal Spirit: infinite mind

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Given this wide definition and the requirement that the Charter be interpreted in a fashion consistent with s. 27 thereof, it is submitted that it would be inappropriate to conclude that "God" in the preamble necessarily refers to the God of Christendom.

51. Moreover, even if "God" is to be interpreted as the God of Christendom, it is submitted that it is one thing to acknowledge that he is supreme and quite another to say that the state, over the conscience of each individual, has the ability to divine his pleasure and the authority to enforce his will. Even in the United States, where religious freedom is interpreted very strictly, tributes to the Deity have not been found inconsistent with the 1st Amendment. The imprinting of currency with the legend "In God we Trust"; the use of Chaplins by various congresses; references to God in the "Star Spangled Banner", "America", the "Declaration of Independence" and in the "Pledge of Allegiance" all provide examples of official recognition and tribute to

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the Christian influence and contribution to the social make-up of American Society in ways which have not been found inconsistent with the "establishment" clause of the 1st Amendment.

(f) s. 29

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52. s. 29 of the Charter of Rights and Freedoms reads:

> 29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

The constitutional protection of the rights and freedoms of denominational, separate and dissentient schools are contained in s. 93 of the Constitution Act, 1867 which provides:

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> 93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:--
>
> (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

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53. The Appellant argues and Belzil, J. took the position that the existence of s. 29 is incompatible with the "establishment" doctrine and makes it clear that such doctrine was not intended to be part of s. 2(a) of the Charter. (Appeal Book, p. 195). With respect it is submitted that such a position makes three errors: (1) that s. 29 establishes a standard rather than an exception to a standard; (2) that the standard it establishes is inconsistent with the "establishment" principle under the 1st Amendment; (3) that the inconsistency proves that the "establishment" principle was not intended to be part of the protection of religious freedom under s. 2(a) of the Charter.

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(i) Rule or Exception to Rule

54. On the first point the position of the Appellant would perhaps be stronger had s. 29 been left out of the Charter. Under such circumstances 2(a) would have had to receive an interpretation consistent with s. 93, since the latter is as much a part of the Constitution as is the former. However, the inclusion of s. 29, it is submitted, evinces an acknowledgement by the framers of the Charter that the standard set by s. 2(a) was of such breadth as to inevitably conflict with the protection and privileges granted under s. 93 and that accordingly, a constitutional exception was required. Contrary to the submissions of the Appellant and the view of Belzil, J. it is respectfully submitted that s. 29 does not set a limiting standard to the meaning of religious freedom under s. 2(a) of the Charter but in contrast provides evidence of the wide application that s. 2(a) was intended to have. In short s. 29 is the exception that proves the rule.

(ii) Standard under s. 93 not inconsistent with "establishment" principle

55. Essentially s. 93 constitutionally preserves the rights of denominational and dissentient schools as those rights existed at the time of confederation. (as provinces joined confederation s. 93 was slightly altered to accommodate the status quo existing in the joining province, e.g. the Alberta Act 4-5 Edw VII c.3, s. 17). Typically the status quo regarding education at the time of union allowed the minority of ratepayers whether Protestant or Catholic to establish separate schools and exempted the minority ratepayers from the education levy if contribution were made to the separate school. Thus, s. 14 of the North West Territories Act, R.S.C. 1886, c. 50, as amended to September 1, 1905, being the date of coming into force of the Alberta Act, reads:

> 14. The Legislative Assembly shall pass all necessary ordinances in respect to education; but it shall therein always be provided, that a majority of the ratepayers of any district or portion of the Territories, or of any less portion or subdivison thereof, by

whatever name the same is known, may establish such schools therein as they think fit, and make the necessary assessment and collection of rates therefor; and also that the minority of the ratepayers therein, whether Protestant or Roman Catholic, may establish separate schools therein,--and in such case, the ratepayers establishing such Protestant or Roman Catholic separate schools shall be liable only to assessments of such rates as they impose upon themselves in respect thereof. (AM. 1898 (Can.), c. 5, s. 1)

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56. It is submitted that such an arrangement would not offend even the strict establishment test under the 1st Amendment as it does not involve public funds being distributed pro rata to public and secretarian schools as was the situation considerated by the U.S. Supreme Court in the decisions of Everson v. Bd. of Ed., (supra) U.S. 1. Rather the Alberta scheme simply exempts non-users of the public system and allows dissentient ratepayers to establish their own system. This arrangement in principle does not result in government support of religion but simply allows accommodation for the religious pursuits of the dissentients which presumably the state would be obligated to achieve under the "free exercise" principle which the Appellant admits is inherent in s. 2(a). If there is fault with s. 93 it is that it accommodates only the Catholic and Protestant Faiths, an accommodation which perhaps under s. 15 of the Charter could be judicially expanded to accommodate non-Christians intent upon establishing separate schools.

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(iii) Scope of "establishment" principle under s. 2(a)

57. Granting the best case to the Appellant by assuming that s. 93 and s. 29 are inconsistent with the establishment principle, it does not follow that all of the cases considered establishments by American jurisprudence would be permitted under s. 2(a) of the Charter. If this were so compulsory church attendance would be allowed under s. 2(a), since this sort of state interference is categorized as an "establishment" issue rather than a "free exercise" issue. It is acknowledged, however, that the wide scope of the "establishment" principle may go beyond what is contemplated by s. 2(a) of the Charter. Appendix 1 is intended as a model depicting the kinds of religious

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freedom issues located along a spectrum of greater to lesser governmental involvement. While the issues have been divided according to the American dichotomy of "establishment" and "free exercise" issues such dichotomy, it is submitted, is neither necessary nor particularly helpful in determining the constitutional limits imposed by s. 2(a) of the Charter. While seven categories are described it is submitted that there are four significant distinctions; compulsion, coercion, interference and neutral involvement. It is submitted that s. 2(a) of the Charter would preclude any governmental involvement amounting to interference, coercion or compulsion (categories 1 to 4) but would not necessarily affect those issues described as neutral involvement. As the Lord's Day Act commands a religious doctrinal obligation it is included in category 1, the most extreme and accordingly, the most unacceptable kind of State involvement in religion. Non-discriminatory state aid for secretarian schools, on the other hand, is located in the neutral category and might not, regardless of s. 29 or s. 93, be considered an infringement of religious freedom. Indeed, this was precisely the conclusion arrived at by the Australian High Court, notwithstanding Article 116 of the Australian Constitution which prohibited the state from making "... any law for establishing any religion, or for imposing any religious observance ..." Attorney General (Vic) v. Commonwealth of Australia, (1980) 33 A.L.R. @ 321.

58. The difficulty created by Jefferson's metaphor "a wall of separation between church and state" and the "establishment" clause of the 1st Amendment is that the emphasis was placed on the means to rather than the goal of religious freedom. This emphasis can be understood given the historical context from which it arose. As described by Mr. Justice Black:

> A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious

> supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persectued Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers or government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.
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> Everson v. Board of Education, 330 U.S. @ 8 and 9

59. This emphasis on "establishment" and "separation of church and state" has unhappily provided questionable distinctions and adament dissent by the U.S. Supreme Court when that Court has had to deal with the kinds of issues described by the model as neutral involvement. Thus, while a transportation rebate to parents of children attending Catholic schools was not considered an establishment, Everson v. Board of Education, 330 U.S. 1, (1946) (a 5 to 4 split decision) a 15% annual salary supplement to teachers of secular subjects in parochial elementary schools was held to be an establishment, Lemon v. Kurtzman, 403 U.S. 602 (1971). In another Supreme Court decision the majority held that a policy of the City of New York exempting churches from property tax was not an establishment, Walz v. Tax Commission, 397 U.S. 664 (1969) which decision was largely grounded on the basis that churches were non-profit charitable organizations. Nevertheless, when Minnesota passed an amendment to its Charitable Contributions Act requiring registration and reporting from religious organizations receiving under 50% of their funding from members or affliated organizations, the amendment was struck down as contrary to the establishment principle of the 1st Amendment. The Court has also found that the practice of the Nebraska Legislature of opening each legislative day with a prayer by a Chaplin, paid by the state, did not offend the establishment principle, Marsh v. Chambers, U.S.S.C. 77 L Ed 2d 1019 (1983) but that a program of voluntary prayer in a public school

did, Engel v. Vitale, 456 U.S. 228 (1962) as did the posting of the Ten Commandments in public school classrooms, Stone v. Graham, 449 U.S. 39 (1980). Indeed, even the display of a nativity scene in a public park has been held to offend the establishment clause, Donnelley v. Lynch, 525 Fed. Sup., 1150 (1981) (this case was heard October 14. 1983 by the U.S. Supreme Court, their decision is still pending).

60. It is submitted that the interpretation of 2(a) would be better served by focusing on the goal of religious freedom rather than the means to achieving it. If religious freedom must be expressed in metaphor, it would be better to picture the right as a panoply protecting the conscience of each individual from all forces that might interfere with its free operation rather than a wall separating the two institutions of Church and State. The difficulty with Jefferson's metaphor is that it is an hyperbole, suggesting a standard that is at once too strict and unnecessary; one that does not recognize well or at all the notion that in many cases, Church and State involvement need not be harmful and indeed in some cases may be necessary to ensure the fullest enjoyment to the right of religious freedom.

61. Indeed, what may be strictly prohibited under American jurisprudence may be the duty of Canadian Legislatures. Paragraph 14 of Article 18 of the International Covenant on Civil and Political Rights ratified by all governments of Canada in 1976 provides:

> 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 convictions.

It is submitted that such an undertaking will in some circumstances require at least a minimal degree of Church/State involvement.

ISSUE II THE LORD'S DAY ACT IS NOT DEMONSTRABLY JUSTIFIABLE

62. The second question placed in issue by this Court is as follows:

> Is the Lord's Day Act, R.S.C. 1970, c. L-13 and especially s. 4 thereof justified on the basis of s. 1 of the Canadian Charter of Rights and Freedoms?

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63. It is submitted that the Respondent has satisfied the initial part of s. 1 of the Charter by showing that the "freedom of conscience and religion" is infringed by the Lord's Day Act and that the burden to show that such infringement is a "reasonable limitation, which can be demonstrably justified in a free and democratic society" rests upon the Appellant.

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Federal Republic of Germany v. Rauca (1982), 38 O.R. (2d) 705 (H.C.) @ 716, per Evans, C.J.H.C.

Reference re Constitutional Validity of Section 12 of the Juvenile Delinquents Act, (1982), 38 O.R. (2d) 748 (H.C.) per Smith, J. @ 754

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Quebec Association of Protestant School Boards et al v. Attorney General of Quebec, (1982) 140 D.L.R. (3d) 33 (Que. S.C.)

Joel Skapinker v. The Law Society of Upper Canada (unreported) per Grange, J.A. and Weaterston, J.A. (concurring) @ 13 and per Anup, J.A. (dissenting) @ 35.

Also see generally: Conklin,W.E.; Interpreting and Applying the Limitations Clause: An Analysis of Section 1 (1982) 4 S.C.L.R. @ 75. And: Finkelstein, N.; The Relevance of Pre-Charter Case Law for Post-Charter Adjudication, (1982) 4 S.C.L.R. @ 268.

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(A) No Competing Public Interest

64. It is submitted that the Court in determining whether or not the limits imposed by the Lord's Day Act on the "freedom of conscience and religion" are justifiable is obliged to weigh whatever competing public interest might be involved. However, it is submitted, that as the

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avowed purpose of the legislation is to prevent profanation of the Christian Institution of the Lord's Day, Ouimet v. Bazin, supra @ 507, its object is not to advance the public interest, or the interest of other individuals (i.e. Orthodox Christians) but presumably the religious morality of the individual for his own sake and also, perhaps, the interest of the Christian God. If true to its purpose the Lord's Day Act does not seek to adjust interests of individuals inter-se but rather only the rights and obligations as between the individual and the designated deity. Accordingly, it is respectfully submitted it makes little sense to attempt to weigh competing interests.

65. Mr. Justice Jackson in considering whether a state law compelling school children to salute the flag and recite the pledge of allegiance, inter alia, violated the 1st Amendment, by prohibiting the free exercise of the Appellant's religion held that it did and was therefore unconstitutional. In arriving at this decision, the majority took full cognizance of the principle that legislation compelling patriotic observance for its own sake has no justification:

> The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behaviour is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

West Virginia v. Barnette, 319 U.S. 624, @ 630-31, (1943)

(B) Religion cannot be Legislated

66. It might be argued as it has been historically, with fire and brimstone from the pulpit, that the Lord's Day Act legislation is

justifiable on the basis that it enhances the moral fibre of the individual, in particular, and society in general (Appendix 13 provides a contemporary example of such an argument). It is submitted that this argument has not been advanced and indeed, such argument would be futile as it is precisely this kind of doctrinaire religious imposition that s. 2(a) seeks to expunge. Moreover, as has been pointed out by the Ontario Law Reform Commission, morality simply cannot be legislated:

> In any event, we are sceptical as to whether any law can effectively compel virtue. At best, law can merely prevent and regulate activities which are deemed to be prejudicial to the welfare of the community in general ...
> It has been said many times that it is impossible to make men moral by an Act of Parliament. Indeed, when the state has tried to compel through law the morality of aspiration, it has often deprived individual citizens of many of the fundamental freedoms which we cherish in a parliamentary democracy and without which spiritual life is impossible.

<u>Report on Sunday Observance Legislation</u> (1970) @ 271 (Appendix 13)

(C) <u>Peace and Order; Secondary Object</u>

67. The Appellant submits (para. 34, App's Factum) that the avowed purpose of the <u>Lord's Day Act</u> is to protect public order and morals of society. It should be made clear, however, that public peace and order taken in this context, is only a subordinate objective to the primary objective of preventing profanation to the Christian Deity on the first day of week. Acts which are perfectly orderly and moral on the other six days of the week can only be considered disorderly or immoral on the first day of week if one accepts such actions profane to the Christian Deity. Accordingly, to the extent Parliament can justify providing for peace and order on the Lord's Day, the Appellant must be able to show that the elimination of the profanation on the Christian Deity is a valuable social objective, such as to justify an infringement of s. 2(a).

(D) Public convenience

68. It was argued by the Appellant in the Court below that the Lord's Day Act is demonstrably justifiable on the basis that the "standardization of a day of rest is a matter of public convenience". This position stated more elaborately has been put forth by Mr. Justice Warren as follows:

> ... we cannot find a State without power to provide a weekly respite from all labour and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquillity--a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created, a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which people may visit friends and relatives who are not available during working days, a day when the weekly labouror may best regenerate himself.
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> Braunfeld v. Brown, (supra) @ 607

69. It is submitted, as Warren, J. has so eloquently stated, that it may well be a matter of public convenience and social welfare to have a standard day of rest on Sunday of every week, however, for the Appellant to attempt to justify the Lord's Day Act in this fashion is to undermine its constitutional foundation as legislation relating to the Criminal Law. Such justification is clearly premised on the ground that the legislation is secular in both purpose and effect which under Canadian federalism places the matter squarely within the powers vested to the Provincial Legislatures. It is submitted that the Lord's Day Act having been characterized as Criminal Law must be justified as Criminal Law and not as legislation in regards to Civil Rights, s. 92(13); or matters of a local nature, s. 92(16).

70. It is submitted that if there is a public demand for legislation regulating Sunday retail businesses (as opposed to prohibiting all Sunday business and recreational activity) as a matter of public convenience, then it is for the province to enact such legislation, not

the federal parliament. That some provinces have already done so is evinced by the following statutes:

Municipal Government Act, R.S.A. 1980c., Sec. 241-47, App. 8

Retail Business Holidays Act, R.S.O. 1980, Ch. 453, App. 7

10 Bill 240, Province of Alberta, App. 9

71. It is further submitted, that Parliament has recognized it has no jurisdiction to sanction civil rights in the provinces when passing the Holidays Act, R.S.C. (1970), c. H-10 (App. 10) which contains none of the proscriptions found under the Lord's Day Act.

20 72. It is further submitted that the constitutional validity of such statutes has already been confirmed by the Supreme Court of Canada.

Lieberman v. The Queen, [1963] S.C.R. 643

(E) Lord's Day Act Unreasonable

0 73. It is respectfully submitted that not only can no justification of the Lord's Day Act, or the principle upon which it rests, be made on any proper ground, there has been ample argument provided demonstrating the legislation's inequities. The unreasonableness and undemocratic nature of such legislation was made by Mill, J.S. some time ago:

> Another important example of illegitimate interference with the rightful liberty of the individual, not simply threatened, but long since carried into triumphant effect, is Sabbatarian legislation, ... [Mill then builds an admirable case that such laws are needed labour legislation pointing out that any other day of the week would be an acceptable alternative to those who must work on Sunday] ... The only ground, therefore, on which restrictions on Sunday amusements can be defended, must be that they are religiously wrong; a motive of legislation which can never be too earnestly protested against. "Deorum injuriae Diis curae". It remains to be proved that society or any of its officers holds a commission from on high to avenge any supposed offense to Omnipotence, which is not also a wrong to our fellow-creatures. The notion that it is one man's duty that another should be

religious, was the foundation of all the religious persecutions ever perpetrated, and, if admitted, would fully justify them. Though the feeling which breaks out in the repeated attempts to stop railways traveling on Sunday, in the resistance to the opening of museums, and the like, has not the cruelty of the old persecutors, the state of mind indicated by it is fundamentally the same. It is a determination not to tolerate others in doing what is permitted by their religion, because it is not permitted by the persecutor's religion. It is a belief that God not only abominates the act of the misbeliever, but will not hold us guiltless if we leave him unmolested.

Mill, J.S. On Liberty Ch. IV (lines 635-685)

74. That this statement was made over 120 years ago should make it acutely embarrassing for any modern democratic state to justify such legislation on religious or moral grounds--particularly one which has enshrined such notions as "freedom of conscience and religion" into its constitution. More recently the present Canadian Lord's Day Act has been condemned as follows:

Sunday laws work two injustices: Firstly, they deprive the individual of freedom of thought and his full measure of society's bounty. They subject minority faiths to economic hardship and often intimidate them into abandoning their own tenets in an effort to mitigate their loss. They influence the agnostic unfairly. And they perpetuate the hostility and contempt which have so often in the past led to further discrimination and suffering. Secondly, these laws deprive society of a good measure of its civilization. They present an aura of repression and hypocrisy. And for each citizen they discriminate against, there is a corresponding loss to all.

Curtis, R. Sunday Observance Legislation in Alberta [1974] Alberta Law Review, Vol XII 236 @ 263.

ISSUE III

CHARACTERIZATION

75. The third question put in issue by this Court is whether:

> The Lord's Day Act, and especially s. 4 thereof is enacted pursuant to the Criminal Law Power under s. 91(27) of the Constitution Act, 1867.

76. The Respondent accedes to the submissions of the Appellant on this issue.

PART IV

NATURE OF ORDER DESIRED

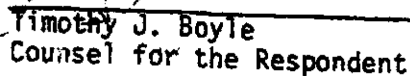
77. The Respondent respectfully requests that this Honourable Court should dismiss the appeal with costs and answer the questions posed in the following manner:

(1) The Lord's Day Act, and especially s. 4 thereof, does infringe upon the freedom of conscience and religion guaranteed in s. 2(a) of the Canadian Charter of Rights and Freedoms.

(2) The Lord's Day Act, and especially s. 4 thereof, is not justified on the basis of s. 1 of the Canadian Charter of Rights and Freedoms.

(3) The Lord's Day Act, and especially s. 4 thereof is enacted pursuant to the criminal law power under s. 91(27) of the Constitution Act, 1867.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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