

IN THE SUPREME COURT OF CANADA

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

BETWEEN:

EDWARDS BOOKS AND ART LIMITED
Appellant

-and-

HER MAJESTY THE QUEEN
Respondent

AND BETWEEN:

HER MAJESTY THE QUEEN
Appellant

-and-

NORTOWN FOODS LIMITED
Respondent

AND BETWEEN:

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

-and-

HER MAJESTY THE QUEEN
Respondent

AND BETWEEN:

PAUL MAGDER
Appellant

-and-

HER MAJESTY THE QUEEN
Respondent

FACTUM OF THE ATTORNEY GENERAL OF CANADA
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FACTUM OF THE ATTORNEY GENERAL OF CANADA
INTERVENOR

PART I

STATEMENT OF FACTS

1. The Attorney General of Canada adopts the statement of the facts set forth in the Factum of the Crown represented by the Attorney General for Ontario.

2.

PART II

POINTS IN ISSUE

2. The points in issue in this appeal are set out in the Constitutional Questions stated in the Order of the Chief Justice dated the 29th day of August, 1985:

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*?

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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 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?

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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*?

3. The Attorney General of Canada wishes to restrict his intervention in these appeals to the following issue:

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Assuming that the Ontario Court of Appeal was correct in its analysis of the effects of the *Retail Business Holidays Act*, was that Court obliged pursuant to s.52(1) of the *Constitution Act, 1982* to declare a portion or portions of the challenged statute to be of no force or effect?

The Attorney General of Canada submits that this question should be answered in the negative.

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PART III

ARGUMENT

10 4. Assuming that the Ontario Court of Appeal was correct in its analysis of the "effects" of the legislation and of the denials or infringements of Charter rights or freedoms thereby engendered, it is submitted that it nevertheless erred in its disposition by making a finding of "inconsistency" under s.52(1) of the *Constitution Act, 1982*. That provision only serves to invalidate legislation which is inherently offensive to the Constitution. Having found that the relevant provisions of the *Retail Business Holidays Act* were not by their nature unconstitutional, the Court of Appeal had no basis for proceeding beyond the Charter, that is, it ought to have resolved the concerns of *individuals* by way of Charter remedies and not by way of the *general* power under s.52(1) of the *Constitution Act, 1982*.

20 5. In order to give effect to the finding that the *Retail Business Holidays Act* infringed s.2(a) of the *Canadian Charter of Rights and Freedoms* in a way that had not been "demonstrably justified", Tarnopolsky, J.A. for the Ontario Court of Appeal made the following disposition:

30 "In accordance with s.52(1) of the Constitution Act, 1982, the Act "is inconsistent with the provisions of the Constitution" and is "to the extent of the inconsistency, of no force or effect". I have already held that the Act is inconsistent only to the extent that it does not provide for adequate religious exemptions. Otherwise s.2 of the Act is valid in its application to all appellants who cannot make such a claim sincerely or genuinely. The only appellant to establish such a claim is Nortown Foods Ltd. It would appear with respect to Nortown, that the defect in the Act is not in s.2,

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but in s.3(4) in that that sub-section does not provide for adequate religious exemption. However, to strike down s.3(4) would leave s.2 in operation and thus no exemption at all for religious minorities who do not observe Sunday as the Sabbath. What is required is a re-drafting of s.3(4) to meet the requirements of the Charter. This is not the role of the judiciary (R. v. Oakes, supra). The criteria which a new exemption section must meet have been described. For the purposes of disposing of these appeals it is sufficient to hold that s.2 of the Act is of no force or effect as concerns Nortown Foods Ltd. and so its appeal is allowed, the conviction is quashed and a verdict of acquittal is directed to be entered. With respect to all other appellants, their appeals are dismissed to the extent they are based on this ground."

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Reasons of the Court of Appeal for Ontario,
Case on Appeal, Vol. 2, pp. 298-299

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6. It is respectfully submitted that the net effect of this reasoning is to "read in" an exception to the words of the charging provision (s.2) of the statute, in order to avoid its application to persons who have a sincere claim to religious exemption. But as this Court made clear in *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, per Dickson, .. at p. 169, the resort to such techniques is not consistent with the judicial function under the Constitution:

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"While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional."

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7. In this regard, it appears that the Court below misconceived the meaning of the words "to the extent of the inconsistency" in s.52(1) of the *Constitution Act, 1982* which provides, in its two "equally authoritative" versions:

10 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.

52.(1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

As can be seen, the English words "to the extent of the inconsistency" do not have any exact counterpart in the French version of s.52(1), which indicates only that inconsistent provisions of a rule of law are inoperative.

20 8. It is submitted that the French version and the English version, read together, clarify the purpose underlying s.52(1). The phrase "to the extent of the inconsistency" was included in the English version of s.52(1) in order to avoid the possibility of wholesale striking down of enactments which are not offensive to the Constitution in their entirety, as might have occurred if s.52(1) had read "...any law that is inconsistent with the provisions of the Constitution is of no force or effect". Such a possibility is clearly precluded by the French version, which emphasizes that only the "dispositions incompatibles", not the enactment as a whole, are rendered inoperative.

30 9. As this Court made clear in *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 746, s.52(1) of the *Constitution Act, 1982*, "does not alter the principles

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which have provided the foundation for judicial review over the years". Those principles have consistently held that the courts, in the discharge of their adjudicative function under the Constitution, must necessarily interpret legislation in order to arrive at a judgment as to its constitutionality. But those principles have also recognized the essential difference between the act of interpreting legislation and the act of supplying words in order to render an unconstitutional enactment constitutional. The latter exercise is of a legislative, not an adjudicative, nature.

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10. As Professor Hogg notes, the interpretive exercise has occasionally led the courts to employ certain canons of construction, such as "reading down":

"The 'reading down' doctrine requires that, whenever possible, a statute is to be interpreted as being within power. What this means in practice is that general language in a statute which is literally apt to extend beyond the power of the enacting Parliament or Legislature will be construed more narrowly so as to keep it within the permissible scope of power. Reading down is simply a canon of construction (or interpretation). It is only available where the language of the statute will bear the (valid) limited meaning as well as the (invalid) extended meaning; it then stipulates that the limited meaning be selected. Reading down is like severance in that both techniques mitigate the impact of judicial review; but reading down achieves its remedial purpose solely by the interpretation of the challenged statute, whereas severance involves holding part of the statute to be invalid."

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But the Ontario Court of Appeal in these cases, in order to find the "(valid) limited meaning", in effect "read in" words in order to create an exemption to the charging provision, and thus strayed beyond its interpretive and adjudicative role.

Peter Hogg, *Constitutional Law of Canada* (2d ed.), Toronto: Carswell (1985), at p. 327.

10 11. While it will be, in appropriate cases, proper for a court to discharge its duty under s.52(1) by "reading down" legislation or by severing portions which are inconsistent with the Constitution, it is important to understand at which point in the process of constitutional adjudication the duty under s.52(1) arises. In this regard, there is a distinction to be made between:

(a) provisions of laws which, by their nature, are unconstitutional, and

20 (b) provisions of laws which are valid but which, in their application to certain individuals or groups, result in the infringement or denial of guaranteed rights or freedoms.

This Court alluded to that distinction in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, per Dickson, J. at pp. 314 and 315:

30 "A law which itself infringes religious freedom is, by that reason alone, inconsistent with s.2(a) of the *Charter* and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation.

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It is the nature of the law, not the status of the accused, that is in issue.

* * *

10 As the respondent submits, 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.*

(italics added)

20 12. It is respectfully submitted that the Ontario Court of Appeal in these cases failed to appreciate the distinction and, as a result of that error, moved prematurely to s.52(1) of the *Constitution Act, 1982*. If Tarnopolsky, J.A. was correct in his analysis of the "effect" of the *Retail Business Holidays Act*, then it appears that the constitutional problem flows not from the nature of the statute itself -- which was found to be valid vis-à-vis all but one accused -- but instead from its application to a particular accused, that is, its "adverse impact" on one who had sincerely held religious convictions. In such circumstances, it is submitted, the validity of the impugned provisions of the statute should have been sustained without exception and the Court of Appeal ought not to have considered s.52(1).

30 13. This is not to say, however, that an accused who establishes a claim to exemption on genuine religious grounds would have to be convicted in any event. If it is

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shown that the application of a valid statute to a person gives rise to an infringement of s.2(a) of the Charter which cannot be demonstrably justified under s.1, then such a person has established his or her right to a constitutional remedy pursuant to s.24(1), which provides:

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"24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

In the circumstances of the present cases, the "appropriate and just remedy" would be an acquittal. Professor Hogg has envisaged such a result:

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"Subject to the possibility discussed in the previous section of this chapter that a court is confined to its usual remedies, there is no limit to the remedies that may be ordered under s.24(1). They include 'defensive' remedies, where the court nullifies or stops some law or act, for example, by dismissing a charge, staying proceedings, quashing a conviction, injunctioning an act, or declaring an apparently applicable law to be invalid."

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Peter Hogg, *Constitutional Law of Canada* (2d ed.),
supra, at p. 697

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PART IV

ORDER REQUESTED

14. In view of the limited nature of his intervention, the Attorney General of Canada submits that if the answers to Questions 2 and 3 result in a finding that the *Retail Business Holidays Act* is valid in itself but in its application gives rise to the denial or infringement of guaranteed rights or freedoms, then the *Act* ought not to be declared to be inconsistent with the *Constitution Act, 1982*.

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ALL OF WHICH is respectfully submitted.



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PART V

LIST OF AUTHORITIES

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1. <i>Big M Drug Mart Ltd., R. v.</i> , [1985] 1 S.C.R. 295	7
2. <i>Hunter et al. v. Southam Inc.</i> , [1984] 2 S.C.R. 145	4
3. <i>Reference Re Manitoba Language Rights</i> , [1985] 1 S.C.R. 721	5
4. Peter Hogg, <i>Constitutional Law of Canada</i> (2d ed.), Toronto: Carswell (1985)	7, 9

Service of a TRUE COPY

HEREOF ADMITTED

THIS 6th DAY OF

January AD. 1886.
HEWITT, HEWITT, NEBBITT, REID per, *Andakirby*
Solicitor for Edwards Books
LONG BROTHERS
Paul Magder
7th Day Adventist Church.

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THIS 9th DAY OF

Jan 1886
BARRON, GRACE, DEUCE, HALL
Solicitor for

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HEREOF ADMITTED

THIS 9th DAY OF

January 1886
Andakirby & Co. Solicitors
Attended Agents for the sale
of the property, Victoria Farm
& 24 acres of Alberta &
was to be held

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THIS 9th DAY OF

January 1886
Banker Robert and Charles Mitchell
Solicitor for
B. & C. Co. Agents for the sale
of the property, Victoria Farm
& 24 acres of Alberta

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THIS 9th DAY OF

January 1886
Graham Wright et al,
Solicitor for
Attended Agents for the
sale of the property, Victoria Farm
& 24 acres of Alberta

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January 1886
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