

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
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Report on the Study of Discrimination
in the Matter of Religious Rights and
Practices by Arcot Krishnaswami

PART I

STATEMENT OF FACTS

1. The Attorney General of Alberta adopts the Statement of Facts as stated in the Factum of the Crown represented by the Attorney General for the Province of Ontario.

PART II

POINTS IN ISSUE

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

- (1) Is the Retail Business Holidays Act, R.S.O. 1980, c. 453 within the legislative powers of the Province of Ontario pursuant to s. 92 of the Constitution Act, 1867?
- (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 ss. 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?
- (3) If the Retail Business Holidays Act, R.S.O. 1980, c. 453, or any part thereof, infringes or denies in any way ss. 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 s. 1 of the Canadian Charter of Rights and Freedoms and thereby rendered not inconsistent with the Constitution Act, 1982?

PART III
ARGUMENT

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

3. The Attorney General of Alberta adopts the arguments of the Attorney General of Ontario as set out in the Crown's factum at paragraphs 26-44, and relies specifically on the following cases:

R. v. Lieberman [1963] S.C.R. 643

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

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 ss. 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?

Section 2(a) of the Charter

4. The phrase "freedom or religion" has recently been interpreted by this Honourable Court in R. v. Big M Drug Mart Ltd., (supra) by Dickson, J. (as he then was) at p. 336.

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and

dissemination. But the concept means more than that.

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

5. It is respectfully submitted that the legislation in issue does not violate the freedom of religion and conscience guarantee contained in the Charter of Rights. There is no attempt made to coerce religious attendance. Unlike the Lord's Day Act R.S.C. 1970, c. L-13 which prohibited for religious reasons non-Christians from carrying on activities, the Retail Business Holidays Act has a clearly secular purpose and effect.

6. It is respectfully submitted that the Court of Appeal of Ontario was incorrect in stating that for those individuals who observe a day other than Sunday as their Sabbath, "a law which prohibits certain practices which are an essential part of one's religion must be considered an abridgement or infringement of freedom of religion. This is so even though the impact on

religion occurs, as here, in an indirect sense." (Case on Appeal, vol. II, pp. 284-285).

7. It is respectfully submitted that an indirect impact on freedom of religion is insufficient to render the legislation inoperative. In R. v. Big M Drug Mart Ltd. (supra), Dickson, J. (as he then was) stated at p. 331:

Purpose and effect respectively in the sense of the legislation's object and its ultimate impact are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity. (emphasis added)

8. In Braunfield v. Brown, 366 U.S. 599 (1961) an American case concerned with Sunday closing, the Court commented on indirect burdens at p. 607:

Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

Section 7 of the Charter

9. It is respectfully submitted that the Court of Appeal for Ontario was correct in holding that the right to "life,

liberty and security of the person" does not provide "a right to work whenever one wishes." Section 7 does not protect "commercial" or "economic" rights.

Smith, Kline and French Laboratories Ltd. v. A.G. Canada, unreported, F.C.T.D., Nov. 18, 1985

Becker v. The Queen (1982) 148 D.L.R. (3d) 539 (Alta. C.A.)

Gershman Produce Co. v. Motor Transport Board, unreported, Man. C.A., Sept. 23, 1985

10. It is further submitted that the Appellant Magder has been afforded the principles of "fundamental justice." A person who contravenes the Retail Business Holidays Act is subject to a fine of not more than \$10,000.

Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288, unreported decision S.C.C., Dec. 17, 1985

Section 15 of the Charter

11. It is respectfully submitted that s. 15 of the Charter should not be given retrospective application. All of the prosecutions took place prior to April 17, 1985.

R. v. Graham, unreported, Ont. C.A., June 5, 1985

Jones v. A.G.B.C. (1985) 63 B.C.L.R. 137 (B.C.S.C.)

12. It is further submitted that s. 15 does not preclude the legislatures from making classifications. The burden is on the businesses in question to demonstrate that they fall within the

protection offered by s. 15.

Smith, Kline and French Laboratories Ltd. v. A.G. Canada (supra)

13. It has been stated that the purpose of s. 15 is to require "that those who are similarly situated be treated similarly." It is respectfully submitted that retail businesses need not be treated in the same manner as other businesses, nor do all retail businesses have to be treated the same.

R. v. McDonald (1985) 10 O.A.C. 321 (Ont. C.A.)

McGowan v. Maryland 366 U.S. 420 (1961)

If the Retail Business Holidays Act, R.S.C. 1980, c. 453, or any part thereof, infringes or denies in any way ss. 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 s. 1 of the Canadian Charter of Rights and Freedoms and thereby rendered not inconsistent with the Constitution Act, 1982?

14. It is respectfully submitted that in the event this Honourable Court finds a prima facie violation of ss. 2(a), 7 and/or 15, reliance can be had to s. 1 of the Charter.

15. In R. v. Big M Drug Mart Ltd. (supra), Dickson, J. (as he then was) stated at p. 352:

The other more plausible argument is that everyone accepts the need and value of a universal day of rest from all work, business and labour and it may as well be the day traditionally observed in our society. I accept the secular justification for a day of rest in a Canadian context and the

reasonableness of a day of rest has been clearly enunciated by the courts in the United States of America.

16. In a Report on the Study of Discrimination in the Matter of Religious Rights and Practices by Arcot Krishnaswami to the United Nations in 1960 (excerpt reproduced in the Appendix). The author recognized that it was not always possible to have a sabbatarian exemption in a legislative scheme. At p. 35, he states:

In many areas special permission is granted to persons of certain faiths to observe a weekly day of rest different from that of the majority, but this is not always possible, since public convenience usually requires some standardization of working days.

PART IV

NATURE OF THE ORDER REQUESTED

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

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

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Wm. Henkel, Q.C.
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PART V
LIST OF AUTHORITIES

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STUDY OF
DISCRIMINATION IN THE MATTER OF
RELIGIOUS RIGHTS AND PRACTICES

by Arcot Krishnaswami
*Special Rapporteur of the Sub-Commission
on Prevention of Discrimination
and Protection of Minorities*



U N I T E D N A T I O N S

New York, 1960

Where cemeteries or burial grounds are privately operated, religious or non-sectarian groups are usually free to establish and maintain their own, either directly or through a trust or a corporation. Here no problem arises except perhaps in the case of groups so small that they are not in a position to operate a cemetery.

In many areas funeral or commemorative rites are protected, either by law or by administrative action, against interference by outsiders, and cemeteries and burial grounds are protected against desecration. Criminal penalties are often visited upon those who disregard such laws. But if equal protection in this respect is not afforded to all faiths, either in law or in fact, discrimination results.

As a general rule the prescriptions of the religion or belief of a deceased person should be followed in the assignment of places for burial, cremation or other methods of disposal of the dead, in the display in such places of religious or other symbols, and in the performance of funeral or commemorative rites. Equal protection against desecration should be afforded to all places for burial, cremation or other methods of disposal of the dead, as well as to religious and other symbols displayed in these places, and equal protection against interference by outsiders should be afforded to the funeral or commemorative rites of all religions and beliefs.

(vi) *Observance of holidays and days of rest*

In a multireligious society, a problem arises in connexion with the observance of holidays and days of rest. No doubt, religious holidays, including periodic days of rest, play an important part in the life of members of every religion. But various faiths attach differing degrees of importance to holidays and days of rest; while for some, strict observance of such days is a categorical imperative, for others it involves only a limited prohibition of certain activities or a prescription to attend services or to perform certain ceremonies.

One of the most common instances of public authorities giving legal effect to the practices of the faith of the majority of the population is in the designation of the holidays and days of rest of that faith as official holidays and days of rest. In many areas special permission is granted to persons of certain faiths to observe a weekly day of rest different from that of the majority, but this is not always possible, since public convenience usually requires some standardization of working days.

When occasional holidays other than the weekly day of rest are considered, the situation may be different. Public authorities are usually in a position to declare holidays for institutions under their control, such as public schools, government offices and defence establishments. But even here, in a multireligious society, the occasional holidays of all faiths when put together may reach a total which is prohibitive. This may not only preclude the granting of all religious holidays to members of all faiths, but may even lead to a reduction in the number of holidays granted to the members of each group, including the predominant one. However, public authorities must take care to mete out approximately equal treatment to all faiths. As a general rule the prescriptions of each religion or

belief relating to holidays and days of rest should be taken into account, subject to the overriding consideration of the interest of society as a whole.

(vii) *Dietary practices*

Although dietary regulations prescribed by various religions and beliefs are usually followed in private, they nevertheless give rise to some problems which the public authorities cannot overlook. It may not be possible, for example, to conform to such regulations in preparing food for members of a mixed group — as for example in schools, hospitals, prisons or the armed forces — unless the number of people observing a particular regulation is sufficiently large. Moreover, certain dietary practices are dependent upon the performance of certain other acts of a preparatory nature, and these acts may not be permitted. Thus, according to the Jewish religion, only meat prepared by the ritual slaughtering of animals (*Shehitah*) may be eaten; and in some countries the law precludes this form of slaughter. Such laws may not expressly prohibit *Shehitah*, being phrased in general terms, but their intent as well as their effect may be to prevent the observance of this rite; and this is felt to be discriminatory by the group affected, even though public authorities take measures to mitigate their difficulties by permitting the importation of ritually prepared meat from abroad. Moreover, in countries where the entire economy — or at least the provision of food — is government-controlled or government-operated, the observance of such dietary practices may be difficult if not impossible unless special provisions are made.

Although it would not seem possible to impose upon the public authorities a duty of securing by positive measures the observance of dietary practices of all faiths in all circumstances, the general rule should be that no one should be prevented from observing the dietary practices prescribed by his religion or belief. In the case of a country which has an economic system under which the Government controls the means of production and distribution, this rule would imply that its public authorities are under an obligation to place the objects necessary for observing dietary practices prescribed by particular faiths, or the means of producing them, at the disposal of members of those faiths.

(viii) *Celebration of marriage and its dissolution by divorce*

A particularly fertile ground for conflicts between the prescriptions of religious law and those of secular law is to be found in questions pertaining to the celebration and dissolution of marriage. These conflicts occur because most religions or beliefs consider these questions to be within their competence, whereas the modern State assumes the right to regulate family relationships on the ground that the family is the basic unit of society.

(ix) *Celebration of marriage*

Most countries prescribe or recognize one or more forms of celebration of marriage. Some recognize only marriage performed by the civil authorities, others give equal recognition to civil and to religious marriage

SERVICE HEREOF ADMITTED
THIS 25th DAY OF Jan
1926

Wm. H. ...
SOLICITORS FOR

SERVICE HEREOF ADMITTED
THIS 25th DAY OF Jan
1926

Wm. H. ...
SOLICITORS FOR

SERVICE HEREOF ADMITTED
THIS 24th DAY OF Jan
1926

Wm. H. ...
SOLICITORS FOR

SERVICE HEREOF ADMITTED
THIS 24th DAY OF January
1926

Wm. H. ...
SOLICITORS FOR ~~...~~ Appellants
Edwards Books and Art Limited
George Brothers Fruit Markets Limited and
Paul Magdon

SERVICE HEREOF ADMITTED
THIS 24th DAY OF Jan
1926

Wm. H. ...
SOLICITORS FOR

SERVICE HEREOF ADMITTED
THIS 24th DAY OF January
1926

Wm. H. ...
SOLICITORS FOR the ~~...~~ The Seventh
Day Adventist Church

SERVICE HEREOF ADMITTED
THIS 24th DAY OF Jan
1926

Wm. H. ...
SOLICITORS FOR

SERVICE HEREOF ADMITTED
THIS 24th DAY OF January
1926

Wm. H. ...
SOLICITORS FOR

SERVICE HEREOF ADMITTED
THIS 24th DAY OF Jan
1926

Wm. H. ...
SOLICITORS FOR

24th
January 26
J. A. Brennan