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IN THE SUPREME COURT OF CANADA

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

NORTOWN FOODS LIMITED

Respondent

FACTUM OF THE ONTARIO CONFERENCE CORPORATION
OF THE SEVENTH-DAY ADVENTIST CHURCH
INTERVENOR

(FOR A LIST OF THE SOLICITORS AND THEIR OTTAWA AGENTS,
PLEASE SEE INSIDE FRONT PAGE)

FILED
FEB 2 1966
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COURT SUPREME
OTTAWA CANADA

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PART I: FACTS

A. The Case

1. This Intervenor adopts the facts of the case as set out by the Appellant and Respondent.

B. The Intervenor

2. The Ontario Conference Corporation of the Seventh-day Adventist Church is an official corporate organization representing approximately 13,000 official members of the Seventh-day Adventist Church in Ontario.

3. This Intervenor states that the following facts pertaining to itself are relevant to the consideration of the issues herein:

(a) The Seventh-day Adventist Church is a Christian church, believing and teaching that Christ is the Son of God, the Biblical Messiah and Saviour of mankind.

Appendix "B", paragraph 3

10 (b) The most visible and unique characteristic of the Seventh-day Adventist Church, as a Christian church, is its belief and teaching that the Bible, being God's word to man, enjoins the observance of Saturday (the seventh day of the week) as the Sabbath, and does not enjoin the observance of any other weekly day of rest. (see Appendix "B", paragraph 4). The credibility of this position has been confirmed from time to time by other Christian denominations (see Appendix "A"). The Worldwide Church of God and the Seventh Day Baptist churches are also Christian churches which observe Saturday.

20 (c) The Seventh-day Adventist Church has developed a sophisticated eschatological theology (i.e. pertaining to the "end of the world"). It is taught that there will be people who, in the last era of earth's history, will "keep the commandments of God and the faith of Jesus". (Rev.14:12). The "commandments of God" include the fourth: "Remember the Sabbath day to keep it holy". (Exodus 20:8-11) In that last era, it is taught, a power ("beast") will "make war with the saints", (Rev. 13:7) i.e. make it difficult for people to "keep the commandments of God". Sunday legislation is believed to form a part of this Biblical prophecy.

Appendix "B", paragraph 7

30 (d) The Seventh-day Adventist Church teaches that Christians should be peaceful, not seeking strife, and obedient to the civil laws of the land insofar as is possible without abandoning one's duty and loyalty to God.

Appendix "B", paragraph 8

(e) Most members of the church regularly spend their Sabbath mornings in

congregational worship and study at church; the afternoons are spent by most with family and friends, engaging in interaction of a religious tone.

Appendix "B", paragraphs 5 and 6

4. Members of the Seventh-day Adventist Church encounter the following effects from the present Sunday legislation:

10 (a) It is extremely difficult for an adherent to be a retailer. By religious conviction the adherent will not engage in commercial activity on Saturday, and by present law many would be prohibited from so doing on Sunday. Thus, adherents have one fewer work day than competitors. In actual fact, very few members have been successful in retailing under the present situation.

Appendix "B", paragraph 9

20 (b) As the present law does not permit Sunday retailing, adherents are prevented from offering their services to retailing employers for Sunday work. Since the Adventist employee will, for religious reasons, decline to work on Saturdays, scheduling problems are encountered for the employee and employer. Despite the fact that the Adventist employee will have spent his "quality" day with his family, friends and co-believers in a spiritually and physically regenerative fashion, he is largely prevented by law from working as a retail employee on Sunday. He has one fewer "employable" day available than Sunday observers.

30 (c) As a working consumer, the Adventist does not have a day available for general shopping, under the present legislation. The shopping needs for the week must be attended to during weekday noon-hours or evenings. Simple household chores are amplified into significant inconveniences; changing a washer in a dripping tap cannot be done on a Sunday, for no hardware or plumbing store is likely to be open to match the required part. Haircuts, groceries, sports equipment - none of these requirements can be tended to on a "shopping day". And this despite the fact that there may be many retailers willing, or even anxious, to serve these needs on a Sunday. Indeed, it may be that other Adventists, Seventh Day Baptists, Worldwide Church of God

adherents, Orthodox Jews, or observers of other days, would fill the void without measurable effect on those who choose to spend a "quiet" Sunday.

- (d) A civil law which impedes Sunday activity which would otherwise be lawful, forces Adventists to give homage to the form of a religious practice considered by Adventists to be obfuscating of the law of God. Certainly, Sunday observance is inconvenienced by existing law, and Saturday observance is burdened.

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PART II: POINTS IN ISSUE

5. 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, as follows:

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

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?

20 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?

PART III: ARGUMENT

A. Respecting Question 1:

Is the Retail Business Holidays Act within the legislative powers of the Province of Ontario pursuant to Section 92 of the Constitution Act, 1867?

6. It is well established that legislation in respect of religion is (or has been) a federal matter, not within Provincial authority.

7. This Intervenor takes the position that the legislation in question is, in its essence, in respect of religion and public morals.

8. The following points are relevant:

(a) Sunday has historically been protected by legislation, and for an admittedly religious purpose;

(b) the very concept of a rest day being weekly is religious (Exodus 20:8-11; Genesis 2:2,3);

(c) the very concept of the weekly day being a "rest from labour" day is religious (Genesis 2:2,3; Exodus 20:8-11)

(d) the concept of "commercialization" being prohibited on the day of rest is religious. (see, for example, Appendix "C")

9. This Intervenor teaches and believes that the weekly day of rest was made for man's benefit: spiritual, emotional, and physical. The Appellant acknowledges a secular benefit and seeks to divorce that element from the religious, and support it as a legitimate legislative purpose, despite its religious origins, history, context, and perception.

10. This is nothing more than legislating a particular religious practice because it is believed that such practice has secular benefits for society.
11. This Intervenor takes the position that a title or published purpose of legislation is not conclusive of its true purpose or goal.
12. The Attorney General takes the position that the purpose of the legislation is "to set aside common days (including a weekly pause day) for rest and recreation generally free from work."

Crown Factum, paragraph 28

and quotes with approval from the Ontario Law Reform Commission, Report on Sunday Observance, 1970 at pages 271-72, to the effect that the objectives of the legislation are two:

1. to create and preserve a "quality" environment in which the great majority of Ontario residents will have at least one day a week for recreation and fulfillment with their family and friends through leisure pursuits of their own choosing;
 2. to ensure that as many persons as possible will be protected from being required to work on Sundays against their will. In these, we seek both to preserve a social environment for leisure and to protect labour.
13. The legislation in question is so out of harmony with the stated objectives as to make its purpose suspect. In particular, the legislation:
 - (a) does not prohibit or regulate labour on Sunday, and does not guarantee workers "protection from being required to work on Sundays against their will";
 - (b) does not apply to all, or even a majority, of workers in any event; (the Law Reform Commission recommended a prohibition of work in manufacturing, production and construction (apparently not implemented). p.343);

(c) does not apply to those activities which the Law Reform Commission gave as specific examples of activities destructive to the "quality" aspect of the day;

Ontario Law Reform Commission, Report on Sunday Observance,
1970, p.296

(d) allows exemptions with conditions not reasonably relating to the stated purposes.

10 14. The Attorney General relies upon the Ontario Law Reform Commission report (cited herein), which report itself admits of the religious factor involved:

(a) "It would be naive of us to suggest that the selection of Sunday had no significance for religious observance in the province." p.269

20 (b) "The selection of Sunday as a uniform pause day does have an incidental religious effect. Yet this should not be considered undesirable when 96% of Canadians in the 1961 census admitted to being at least nominally Christian, and when in Ontario at least a substantial minority of the population attends a Christian church regularly on Sundays. The secular selection of a pause day, therefore, might better be Sunday than any other day for this puts the option of spending the day in a religious way, in whole or in part, at its maximum level of usefulness in Ontario society as it is composed today." p.269

15. The above statement was made at a time when there was no constitutional guarantee of freedom of religion.

30 16. In addition, despite purposeful avoidance of religious matters in the drafting, the ingrained religious element seeps through the Act. See, for example, section 5 of the Act.

17. The Law Reform Commission report puts emphasis on the fact that the behavioural research revealed that Sunday was characterized by "a high degree of social interaction and leisure activities among family and friends". p.269

This fact is taken to support Sunday as the pause day to be chosen, the implication being that people naturally prefer Sunday.

18. Two obvious flaws are neglected in the report:

if Sunday is preferred for such activity it is likely due to

(a) religious considerations of the majority, and

(b) the simple fact that legislation has largely prohibited other activity on Sunday, leaving little other choice.

10 19. It would have to be admitted that (religious considerations ignored) one day of the week is no different in the nature of its time component than any other day. Saturday could be chosen as a "common pause day" and could afford all the same secular considerations as a Sunday. The atheist could adjust very quickly to another day; but religion tips the scales.

B. Respecting Question 2

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

20. This Intervenor takes the position that the purpose of the legislation is religious, and it therefore contravenes s.2(a) of the Canadian Charter of Rights and Freedoms.

R.v. Big M Drug Mart Ltd. (1985) 1 S.C.R. 295

30 21. Further, the effect of the legislation is to impose a coercive burden on non-Sunday-observing religions, thereby impeding the practice and promulgation of such religions, which constitutes an infringement on "freedom of religion".

22. The Law Reform Commission report acknowledges that such legislation has a

positive effect on Sunday-observing religions: p.269. This effect would not accrue to other religions; in fact, the impact would be negative. Thus, the legislation creates "favoured" and "burdened" religions, as surely as if a tax were imposed on adherents of certain faiths. The result is a breach of s.15, the equality section, of the Canadian Charter of Rights and Freedoms.

23. The legislature has admitted of an undesirable negative effect on Sabbatar-ians, and consequently has enacted the limited exemption found as section 3(4) of the Act.

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C. Respecting 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?

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24. The Attorney General has the burden of establishing the infringements in question to be "demonstrably justified in a free and democratic society".
25. This Intervenor adopts and relies upon the reasons set out in the judgment rendered in the Court of Appeal and takes the position that the Attorney General has not discharged the onus.


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PART IV: ORDER

26. It is respectfully submitted that the Constitutional Questions be answered as follows:

1. The Retail Business Holidays Act is not within the legislative powers of the Province of Ontario.
2. The Retail Business Holidays Act infringes sections 2(a) and 15 of the Charter.
3. The infringements are not justified under s.1 of the Charter.

ALL OF WHICH is respectfully submitted.



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