

IN THE SUPREME COURT OF CANADA
ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO

BETWEEN:

EDWARDS BOOKS AND ART LIMITED
- and - APPELLANT

HER MAJESTY THE QUEEN
RESPONDENT

AND BETWEEN:

HER MAJESTY THE QUEEN
- and - APPELLANT

NORTOWN FOODS LIMITED
RESPONDENT

AND BETWEEN:

LONGO BROTHERS FRUIT MARKET LIMITED,
THOMAS LONGO, JOSEPH LONGO, carrying
on business as LONGO BROTHERS FRUIT MARKET
- and - APPELLANTS

HER MAJESTY THE QUEEN
RESPONDENT

AND BETWEEN:

PAUL MAGDER
- and - APPELLANT

HER MAJESTY THE QUEEN
RESPONDENT

FACTUM OF THE INTERVENOR
ATTORNEY GENERAL OF NOVA SCOTIA

(For the names and addresses of the solicitors for the parties
and their respective agents, see inside following title page.)

MINISTRY OF THE ATTORNEY
GENERAL
16th Floor
18 King Street East
Toronto, Ontario
M5C 1C5

Solicitors for the Crown

BLAKE, CASSELS & GRAYDON
Barristers & Solicitors
Box 25, Commerce Court West
Toronto, Ontario
M5L 1A9

Solicitor for the Appellant
Edwards Books and Art Limited

MCCARTHY & MCCARTHY
Barristers & Solicitors
Box 48
Toronto Dominion Centre
Toronto, Ontario
M5K 1E6

Solicitor for the Respondent
Nortown Foods Limited

GOODMAN AND GOODMAN
Barristers & Solicitors
Suite 3000
20 Queen Street West
Toronto, Ontario
M5H 1V5

Solicitor for the Appellant
Longo Brothers Fruit
Markets Limited, Thomas
Longo, Joseph Longo,
carrying on business as
Longo Brothers Fruit Market

LOBL, RECHT, FREEDMAN
& DANSON
Barristers & Solicitors
Suite 202
250 Dundas Street West
Toronto, Ontario
M5T 2Z5

Solicitor for the Appellant
Paul Magder

SOLOWAY, WRIGHT, HOUSTON
Barristers & Solicitors
170 Metcalfe Street
Ottawa, Ontario
K2P 1P3

Ottawa Agent for the
Solicitors for the Crown

HEWITT, HEWITT, NESBITT, REID
Barristers and Solicitors
Suite 604, 75 Albert Street
Ottawa, Ontario
K1P 5E7

Ottawa Agent for the Solicitor
for the Appellant Edwards Books
and Art Limited

GOWLING & HENDERSON
Barristers & Solicitors
160 Elgin Street
Ottawa, Ontario
K1N 8S3

Ottawa Agent for the Solicitor
for the Respondent Nortown Foods
Limited

HEWITT, HEWITT, NESBITT, REID
Barristers & Solicitors
Suite 604
75 Albert Street
Ottawa, Ontario
K1P 5E7

Ottawa Agent for the Solicitor
for the Appellant Longo
Brothers Fruit Markets Limited,
Thomas Longo, Joseph Longo,
carrying on business as
Longo Brothers Fruit Market

HEWITT, HEWITT, NESBITT, REID
Barristers & Solicitors
Suite 604
75 Albert Street
Ottawa, Ontario
K1P 5E7

Ottawa Agent for the Solicitor
for the Appellant Paul Magder

DEPUTY ATTORNEY GENERAL
OF CANADA
Department of Justice
Wellington & Kent Streets
Ottawa, Ontario

Solicitor for the Intervenor
the Attorney General of
Canada

ATTORNEY GENERAL FOR BRITISH
COLUMBIA
Ministry of the Attorney
General
Parliament Buildings
Victoria, B.C.

Intervenor

BURKE-ROBERTSON, CHADWICK &
RITCHIE
Barristers & Solicitors
Suite 1800
130 Albert Street
Ottawa, Ontario K1P 5G4

Ottawa Agent for the Intervenor
the Attorney General of British
Columbia

ATTORNEY GENERAL OF ALBERTA
227 Legislature Building
Edmonton, Alberta

Intervenor

GOWLING & HENDERSON
Barristers & Solicitors
160 Elgin Street
Ottawa, Ontario K1N 8S3

Ottawa Agent for the Intervenor
the Attorney General of Alberta

ATTORNEY GENERAL OF
SASKATCHEWAN
Department of Justice
Legislative Building
Regina, Saskatchewan

Intervenor

GOWLING & HENDERSON
Barristers & Solicitors
160 Elgin Street
Ottawa Ontario
K1N 8S3

Ottawa Agent for the Intervenor
the Attorney General of
Saskatchewan

ATTORNEY GENERAL OF
MANITOBA
Department of the
Attorney General
405 Broadway Avenue
Winnipeg, Manitoba
R3C 3L6

Intervenor

SOLOWAY, WRIGHT, HOUSTON
Barristers & Solicitors
170 Metcalfe Street
Ottawa, Ontario
K2P 1P3

Ottawa Agent for the Intervenor
the Attorney General of Manitoba

ATTORNEY GENERAL OF
QUEBEC
Department of Justice
1200, rte. de L'Eglise
Ste-Foy, Quebec

Intervenor

ATTORNEY GENERAL OF
NEW BRUNSWICK
Centennial Building
P.O. Box 6000
Fredericton, N.B.

Intervenor

ATTORNEY GENERAL OF
NOVA SCOTIA
Department of the
Attorney General
Provincial Building
P.O. Box 7
Halifax, Nova Scotia

Intervenor

ATTORNEY GENERAL OF
NEWFOUNDLAND
Department of Justice
Confederation Building
St. John's, Newfoundland

Intervenor

DAVID THOMAS
Barrister & Solicitor
Suite 403
22 King Street West
Oshawa, Ontario
L1H 1A3

Intervenor

NOEL, DECARY, AUBRY & ASSOCIATES
Barristers & Solicitors
111, rue Champlain
Hull, Quebec

Ottawa Agent for the Intervenor
the Attorney General of Quebec

BURKE-ROBERTSON, CHADWICK &
RITCHIE
Barristers & Solicitors
Suite 1800, 130 Albert Street
Ottawa, Ontario K1P 5G4

Ottawa Agent for the Intervenor
the Attorney General of New
Brunswick

BURRITT, GRACE NEVILLE & HALL
Barristers & Solicitors
Suite 500
77 Metcalfe Street
Ottawa, Ontario
K1P 5L6

Ottawa Agent for the Intervenor
the Attorney General of Nova
Scotia

BURKE-ROBERTSON, CHADWICK &
RITCHIE
Barristers & Solicitors
Suite 1800
130 Albert Street
Ottawa, Ontario K1P 5G4

Ottawa Agent for the Intervenor
the Attorney General of
Newfoundland

HEWITT, HEWITT, NESBITT, REID
Barristers & Solicitors
Suite 604
75 Albert Street
Ottawa, Ontario
K1P 5E7

Ottawa Agent for the Intervenor
7th Day Adventist Church

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PART I

FACTS

1. The Intervenor adopts the statement of facts as set out in the factum for the Attorney General of Ontario.

PART II

ISSUES

- 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?
- 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?

2. The Intervenor submits that the Retail Business Holidays Act is within the legislative power of Ontario pursuant to Sections 92(13), (15) and (16) of the Constitution Act, 1867, that the Act does not infringe Sections 2(a), 7 and/or 15 of the Charter, and that if the Act did infringe or deny any of these rights and freedoms, Section 1 of the Charter would be a complete defence.

PART III

ARGUMENT

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?

3. The Intervenor adopts Ontario's submission that the Retail Business Holidays Act is valid legislation pursuant to Sections 92(13), (15) and (16) of the Constitution Act, 1867.

4. The Act purports to set aside certain days (including each Sunday) as holidays, days free of retail business activities, without any reference to religious observance.

5. Unlike the Lord's Day Act, considered by the Court in Regina v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at p. 355, this Act has a purely secular goal, p. 260 Case on Appeal, and is therefore valid provincial legislation.

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?

1. STANDING

6. Assuming a secular purpose in the Retail Business Holidays Act, it is submitted that the issue of the effect of that statute on a holder of a sincerely held religious belief involves the question of standing to claim a "constitutional exemption", especially where the claimant is a corporation as opposed to an individual.

7. The two corporate Appellants and the Respondent Nortown Foods Limited have no standing to claim exemption from the impugned legislation based on a sincerely held religious belief because as corporations they cannot establish religious beliefs.

See 'Not "Never On A Sunday" R. v. Videoflicks et al.'; Petter, Andrew; (1984-85) 49 Saskatchewan Law Review 96 at 101.

2. SECTION 7 OF THE CHARTER

8. In response to the submission of the Appellant Paul Magdar, at paragraphs 58 - 67 of his Factum, that the impugned legislation deprives him of the rights guaranteed by Section 7 of the Charter by limiting right to work, it is submitted that Section 7 has no application in this case because it does not enshrine a right to work, p. 304 Case on Appeal.

9. Furthermore, the structure of the Charter requires that Section 7 be interpreted in the context of the entire group of rights guaranteed by Sections 7 through 14 headed LEGAL RIGHTS, which deals with the various aspects of the rights of the physical person.

10. This approach to the interpretation of the Charter, accords with that taken by Dickson, J. (as he then was), in R. v. Hafey et al. (1985), 57 N.R. 321 at 328, where he uses the heading DISORDERLY CONDUCT preceding Sections 169 through 175 of the Criminal Code as an aid to interpreting the word "disturb" in Section 172(3).

See also a discussion of the role of headings in statutory construction in Law

Society of Upper Canada v. Skapinker,
[1984] 1 S.C.R. 357, at p. 370 et seq.

See also Tarnopolosky & Beaudoin; Canadian
Charter of Rights and Freedoms, (Carswell,
1982), page 263.

11. This is consistent with the view taken by Mr. Justice Tarnopolosky of the Ontario Court of Appeal in "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights", (1982) 8 Queens Law Journal 211, at 217:

It [Section 7] appears to be a rather broad provision serving both as an explanatory introduction to all of the legal rights that follow in Sections 8 to 14, and as a residual provision for those rights which are "in accordance with the principles of fundamental justice", but not specified. (emphasis added).

12. The Appellants' legal rights to "life, liberty and security of the person" are not affected; hence Section 7 has no application.

3. SECTION 15 OF THE CHARTER

13. It is submitted that Section 15(1) of the Charter does not retrospectively operate to the events which precipitated the original prosecutions in this matter. The words of Laskin,

C.J.C., in Minister of Fisheries and Ocean et al. v. Curbera (1983), 1 D.L.R. (4th) 599 at 603, are instructive on this point:

I would add that the Canadian Charter of Rights and Freedoms was not in force when the litigation in this appeal originated, and there is no need to say anything about its possible effect on the legislation.

See also R. v. Longtin (1983), 41 O.R. 545 at 548 (Ont. C.A.), Re Attorney General of Canada and Stuart (1982), 137 D.L.R. (3d) 740 at 748 (Fed. C.A.) and Boudreau v. Lynch (1984), 66 N.S.R. (2d) 271 (N.S.C.A.).

14. It is further submitted that the purpose of the Charter, including Section 15, is to protect and enhance substantive rights relating to equality of opportunity. Not all different treatment of individuals by the law is prohibited by Section 15 of the Charter.

15. From an historical perspective, constitutional guarantees of rights and freedoms in Canada have developed after the widespread enactment in this Country of human rights legislation directed towards eliminating the adverse effects on people of treatment based on characteristics such as their race, sex or religion and which had nothing to do with their individual capacities. This concept of discrimination defines equality as

the right not to be treated on the basis of stereotypes, a concept which, in turn, relates to membership in identifiable groups.

See Hogg; Constitutional Law of Canada, 2d ed. (1985), pgs. 798-99.

16. International human rights legislation contains provisions similar to Section 15. For example, Articles 2 and 7 of the Universal Declaration of Human Rights, Article 26 of the International Covenant on Civil and Political Rights and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms tie equality to the anti-discrimination clause in the same manner as does Section 15 of the Charter.

See: Appendices.

See also: Tarnopolsky & Beaudoin;
Canadian Charter of Rights and Freedoms,
(1982) pgs. 396-97.

17. That differential treatment per se may not be contrary to Section 15 has been recognized by Canadian courts.

18. In R. v. Killen (N.S.C.A.) (November 22, 1985, unreported), Macdonald, J.A., at p. 11, quoted with approval from Re Rebic and The Queen (1985), 20 C.C.C. (3d) 196 at 202-203, as follows:

I consider that it is appropriate in construing s. 15(1) of the Charter to apply the "valid federal objective test" formulated by the Supreme Court of Canada with respect to s. 1(b) of the Bill of Rights. This is best illustrated by the reasoning of McIntyre, J. in MacKay v. The Queen (1980), 54 C.C.C. (2d) 129 at pp. 158-9, 114 D.L.R. (3d) 393, [1980] 2 S.C.R. 370:

It seems to me that it is incontestable that Parliament has the power to legislate in such a way as to affect one group or class in society as distinct from another without any necessary offence to the Canadian Bill of Rights. The problem arises however when we attempt to determine an acceptable basis for the definition of such a separate class, and the nature of the special legislation involved. Equality in this context must not be synonymous with mere universality of application. There are many differing circumstances and conditions affecting different groups which will dictate different treatment. The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class - here the military - is arbitrary, capricious or unnecessary,

or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.

19. In Paquin v. Ville de Montreal et al. (1981), 12 M.V.R. 123, the mandatory seat belt law in the Province of Quebec, being Section 69 of the Quebec Highway Code, R.S.Q. 1977, c. C-24, was challenged as violating the equality rights provision in the Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, Section 10, as amended:

Every person has a right to full and equal protection and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

20. Hugessen, A.C.J.S.C., found as follows on this point at page 124:

[TRANSLATION]

Finally it is mentioned that the section is discriminatory, in the sense that it isn't every operator who has to wear his seat belt. There are certain categories, and it is mentioned notably taxi drivers, who are exempt.

The Charter doesn't prohibit all distinction that the legislator sees fit to make in its various laws. The law specifies clearly certain types of discrimination which are forbidden, and without giving the whole list, it is a question notably of discrimination based on sex, race, civil status, etc. The distinction which allows a taxi driver to drive without wearing his seat belt when a driver of a private car has to, if it is really a discrimination, it doesn't fall within the scope of Section 10 of the Charter.

21. It is submitted that the impugned legislation is not inconsistent with Section 15 of the Charter merely because it is not universally applied to the retail business sector. By enacting legislation such as the Retail Business Holidays Act, a legislature is seeking to attain a laudable social objective, namely setting aside a uniform day of rest for its citizens. Whatever inequality may be perceived in the application of the Act is necessary in the attainment of that socially desirable objective and is not arbitrary or capricious.

4. SECTION 27 OF THE CHARTER

22. It is submitted that Section 27 of the Charter is interpretive only, requiring the Charter be interpreted in a manner consistent with Canada's multicultural heritage, and does not confer any independent rights.

See Hogg, P.W.; Canada Act 1982 Annotated; Carswell (1982) at page 72.

See Tarnopolsky & Beaudoin; Canadian Charter of Rights and Freedoms; Carswell (1982) at pages 441-42.

5. SECTION 2(a) OF THE CHARTER

(i) The Test

23. The test according to Dickson, J., in the Big M Drug Mart case, supra, at page 334 is:

.... the legislation's purpose is the initial test of constitutional validity and its effects are 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 consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a

litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.

24. It is submitted that the Retail Business Holidays Act has the valid secular purpose of enforcing uniform days of rest from the conduct of "retail business" and that it does not have the effect of infringing the fundamental freedom of conscience and religion guaranteed by Section 2(a) of the Charter.

(ii) The Scope of the Freedom

25. The scope of the fundamental freedom of conscience and religion contemplated by Section 2(a) of the Charter was defined by Dickson, J., in the Big M Drug Mart case, supra, at page 336-337:

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 or the

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

26. It is submitted that this definition entails three aspects: (1) freedom to entertain religious beliefs; (2) freedom to make physical and outward acknowledgements that one holds those religious beliefs; and (3) freedom to live in the absence of coercion, which includes indirect forms of control that limit alternative courses of conduct available to others.

27. The impugned legislation does not prohibit the free exercise of any aspect of the freedom of conscience and religion.

(iii) Sunday Closing Laws

28. Sunday observance law in Canada has been discussed in cases such as A.G. Ont. v. Hamilton Street Railway Co., [1903] A.C. 524 (P.C.), Saumur v. City of Quebec, [1953] 4 D.L.R. 641 (S.C.C.), Henry Birks & Sons (Montreal) Ltd. et al. v. City of Montreal, [1955] 5 D.L.R. 321 (S.C.C.), and Robertson and Rosetanni v. The Queen, [1963] S.C.R. 651 (S.C.C.). In the Big M Drug Mart case, supra, p. 333, Dickson, J., found this case law to be of little assistance in determining the vires of the legislation insofar as the cases involved the application of the legislation.

29. American Sunday closing laws appear to be derived most directly from a law passed in 1676 during the reign of Charles II, being the Sunday Observance Act, 1677 U.K. c. 7. That law required church attendance, prohibited all labour except that of necessity and charity, and outlawed the sale of any merchandise on Sunday. However, such laws existed in what is now the United States of America earlier in its colonial period than 1676. One of the earliest laws prohibiting Sunday labour in the American colonies was the Virginia Colony Act of 1610. Similar colonial law was enacted throughout the 17th century.

See Sommer, Kenneth; "Sunday Closing Laws in the United States: An Unconstitutional Anachronism", (1977) 11 Suffolk University Law Review 1089.

30. Exceptions to Sunday closing legislation began to appear in Sunday closing laws such as the Massachusetts Sunday law in 1858, permitting licensed sports activities on the Lords Day.

Mr. Sommer, supra, comments as follows at page 1089:

Although the constitutionality of Sunday blue laws has been challenged, the power of states to enact and enforce Sunday restrictions has withstood repeated judicial attack throughout American history.

31. He continues at page 1093:

While current Sunday laws of certain states contain language reminiscent of their religious origin, the statutes of most states read as a secular ban on nearly all Sunday business activities because the professed objective of modern blue laws is to provide a common day of rest.

32. As Neil Dilloff points out in "Never on Sunday: The Blue Laws Controversy", 1980 39 Maryland Law Review 679, at p. 679:
"It is well established that Sunday is not only a day set aside

for religious observance but also a recognized, and often enforced day of rest." In support of that statement he refers to the series of decisions of the United States Supreme Court in 1961, including McGowan v. Maryland, 366 U.S. 420 (1961), Gallagher v. Crown Kasher Supermarket Inc., 366 U.S. 617 (1961), Two Guys v. McGinley, 366 U.S. 582 (1961) and Braunfeld v. Brown, 366 U.S. 599 (1961).

See also: Supermarkets General Corporation v. Maryland, 409 A (2d) 250 (1979).

33. This series of cases leads Dilloff to comment as follows at page 682:

Claims that the laws violate the free exercise and establishment of religion clauses of the First Amendment have consistently failed because courts have been virtually unanimous in finding that the blue laws have a primarily secular purpose. When state courts have struck down blue laws, they have done so based upon constitutional grounds, such as due process and equal protection, and other grounds such as monopoly, discriminatory enforcement, invalid delegation of legislative powers to counties, and violations of particular state constitutional provisions prohibiting special laws.

34. This history of Sunday closing laws in the U.S.A. indicates that Sunday can be acknowledged as originally having

been a religiously motivated choice for a day away from labour, and that over the centuries this religious connotation has been lost.

35. It is submitted that the Legislature was not religiously motivated in enacting the Retail Business Holidays Act. Rather, it has pursued legitimate government policy in designating Sunday as a weekly day of rest, and such a designation in no way infringes freedom of religion.

36. Any indirect effect of the Legislation on Charter rights and freedoms is not sufficient to invalidate it because the means chosen to accomplish the legitimate ends are the least objectionable. In Braunfeld v. Brown, 366 U.S. 599 (1961), at p. 607, the Court pointed out:

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.

See also: Big M Drug Mart, supra, at p. 337.

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?

37. It is submitted that if the Retail Business Holidays Act, or any part thereof, infringes in any way Sections 2(a), 7 and/or 15 of the Charter, such infringement is a reasonable limit prescribed by law and demonstrably justified in a free and democratic society.

38. The limitation is "prescribed by law" since it is set out in the statute itself.

See: Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1984), 45 O.R. (2d) 80 (C.A.), affirming (1983) 41 O.R. (2d) 583 (Div. Ct.).

See also: R. v. Therens (1985), 18 C.C.C. (3d) 481 at 488.

39. The onus on the Crown under Section 1 is to establish the reasonableness of the limitation on a balance of probabilities.

See: R. v. Bryant (1984), 16 C.C.C. (3d) 408 at 415-6 (Ont. C.A.).

See also: Re Federal Republic of Germany and Rauca (1983), 70 C.C.C. 416 at 428.

See also: Fricot: "The Challenge of Legislation By Means of The Charter: Evidentiary Issues"; [1984] 16 Ottawa Law Review 565, at p. 587-88.

See also: Finkelstein; "A Question of Emphasis: The State's Burden in Fed. Republic of Germany v. Rauca"; (1984) 30 Criminal Reports (3d) 112 at 116.

40. The inquiry to be made by a court on a Section 1 review of legislation was described by Dickson, J. in Big M Drug Mart, supra, at page 110:

Once a sufficiently significant government interest is recognized then it must be decided if the means chosen to achieve this interest are reasonable -- a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question.

See also: Christian; "The Limitation of Liberty: A Consideration of Section 1 of the Charter of Rights and Freedoms"; (1982) U.B.C. Law Review Charter Edition 105 at 108 and 128.

See also: Fricot, supra, at 577-82.

41. The concept of "demonstrably justified" contemplated by Section 1 is not restricted to evidentiary submissions, but supports the broader considerations described by Fricot, supra,

at pages 582-84, in analyzing Rauca, supra, and R. v. S.B.
(1983), 1 C.C.C. (3d) 73 at 81.

See also: Christian, supra, at pages
113-116.

See also: Finkelstein; "Section 1: The
Standard For Assessing Restrictive
Government Actions And The Charter's Code
of Procedure and Evidence"; (1983) 9
Queen's Law Journal (No. 1) 143 at
162-64.

42. The justification for a day of rest has already been
accepted by this Court. In Big M Drug Mart, supra, Dickson, J.,
stated, at page 110:

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.

43. It is submitted that the legislation at issue is the least
restrictive means available to the legislature to achieve the
secular objective of a uniform day of rest.

PART IV
ORDER SOUGHT

44. It is 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 Sections 2(a), 7 and/or 15 of the Charter.
- 3) If there is an infringement or denial of the rights and freedoms thus guaranteed by the Charter, the limits on the rights and freedoms are justified by Section 1 of the Charter.

45. All of which is respectfully submitted.

Dated at Halifax, Nova Scotia, this 4th day of
February, 1986.


Reinhold Endres


James G. Spurr

Solicitors for the Attorney
General of Nova Scotia

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<u>Law Society of Upper Canada v. Skapinker</u> , [1984] 1 S.C.R. 357	7
<u>McGowan v. Maryland</u> , 366 U.S. 420 (1961) (U.S.S.C.)	18
<u>Minister of Fisheries and Oceans et al. v. Curbera</u> (1983), 1 D.L.R. (4th) 599 (S.C.C.)	8
<u>Paquin v. Ville de Montreal et al.</u> (1981), 12 M.V.R. 123 (Que. S.C.)	11
<u>Re Attorney General of Canada and Stuart</u> (1982), 137 D.L.R. (3d) 740 (Fed. C.A.)	8
<u>Re Federal Republic of Germany and Rauca</u> (1983), 70 C.C.C. 416 (H.C.J.)	21 22
<u>Re Ontario Film and Video Appreciation Society and Ontario Board of Censors</u> (1984), 45 O.R. (2d) 80 (Ont. C.A.)	20
<u>Re Rebic and The Queen</u> (1985), 20 C.C.C. (3d) 196 (B.C.S.C.)	10

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<u>Regina v. Big M Drug Mart Ltd.</u> [1985], 1 S.C.R. 295 (S.C.C.)	4 13 14 16 19 21 22
<u>R. v. Bryant</u> (1984), 16 C.C.C. (3d) 408 (Ont. C.A.)	21
<u>R. v. Hafey et al.</u> (1985) 57 N.R. 321 (S.C.C.)	6
<u>R. v. Killen</u> (unreported, November 22, 1985) (N.S.C.A.)	10
<u>R. v. Longtin</u> (1983), 41 O.R. 545 (Ont. C.A.)	8
<u>R. v. S.B.</u> (1983), 1 C.C.C. (3d) 73 (B.C.S.C.)	22
<u>R. v. Therens</u> (1985), 18 C.C.C. (3d) 481 (S.C.C.)	20
<u>Robertson and Rosetanni v. The Queen</u> [1963] S.C.R. 651 (S.C.C.)	16
<u>Saumur v. City of Quebec</u> [1953] 4 D.L.R. 641 (S.C.C.)	16
<u>Supermarkets General Corporation v. Maryland</u> , 409 A. (2d) 250 (1979) (U.S.S.C.)	18
<u>Two Guys v. McGinley</u> , 366 U.S. 582 (1961) (U.S.S.C.)	18

REFERENCES

	<u>Page</u>
Christian, Timothy; "The Limitation Of Liberty: A Consideration of Section 1 of The Charter of Rights And Freedoms"; (1982) <u>U.B.C. Law Review Charter Edition</u> 105	21 22
Dilloff, Neil; "Never On Sunday: The Blue Laws Controversy"; (1980) 39 <u>Maryland Law Review</u> 679	17
Finkelstein, Neil; "A Question of Emphasis: The State's Burden In Fed. Republic of Germany v. Rauca"; (1984) 30 <u>Criminal Reports</u> (3d) 112	21
Finkelstein, Neil; "Section 1: The Standard For Assessing Restrictive Government Actions And The Charter's Code Of Procedure And Evidence"; (1983) 9 <u>Queen's Law Journal</u> (No. 1) 143	22
Fricot, Yves; "The Challenge of Legislation By Means of The Charter: Evidentiary Issues"; [1984] 16 <u>Ottawa Law Review</u> 565	21
Hogg, Peter; <u>Canada Act 1982 Annotated</u> (Carswell, 1982)	13
Hogg, Peter; <u>Constitutional Law of Canada</u> , 2d ed (Carswell, 1985)	9
Petter, Andrew; "Not Never On A Sunday" R. v. Videoflicks et al."; (1984-85) 49 <u>Saskatchewan Law review</u> 96	5
Sommer, Kenneth; "Sunday Closing Laws In The United States: An Unconstitutional Anachronism"; (1977) 11 <u>Suffolk University Law Review</u> 1089	17
Tarnopolsky, Walter; "A Comparison Between The Canadian Charter of Rights And Freedoms And The International Covenant On Civil And Political Rights"; (1982) <u>Queens Law Journal</u> 211	7
Tarnopolsky, Walter and Beaudoin, Gerald; <u>Canadian Charter of Rights and Freedoms</u> (Carswell, 1982)	7 9 13