

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 BRITISH COLUMBIA  
- INTERVENER -

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IN THE SUPREME COURT OF CANADA

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PART I

STATEMENT OF FACTS

1.  
The Attorney General of British Columbia accepts  
the facts as set out in the Appellant of the Attorney  
General of Ontario.

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PART IIPOINTS IN ISSUE

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7 2. The Attorney General of British Columbia accepts and  
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9 adopts the answers given to the Constitutional Questions by  
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11 the Attorney General of Ontario at paras. 21 to 25 of its  
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13 Factum.  
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PART III

ARGUMENT

3. The Attorney General of British Columbia supports and adopts the submissions of the Attorney General of Ontario in their entirety.

4. The Attorney General of British Columbia makes the following supplemental submissions.

- FREEDOM OF RELIGION AND SECTION 52  
OF THE CONSTITUTION ACT, 1982 -

5. For the reasons advanced by the Attorney General of Ontario, the Attorney General of British Columbia submits that both the purpose and effect of the Retail Business Holiday Act is, in all of its applications, consistent with the Charter. Accordingly, the Ontario Court of Appeal was correct in dismissing the appeal of the Appellants, Edward Books and Art Limited ("Edwards Books"), Longo Brothers Fruit Market Limited et al ("Longo Bros.") and Paul Magder ("Magder"). However, the Ontario Court of Appeal erred in allowing the appeal and directing an acquittal of the Respondent, Nortown Foods Ltd. ("Nortown").



1 6. If, arguendo, the Ontario Court of Appeal was  
2 correct in its conclusion that the Retail Business Holiday  
3 Act infringed the religious freedom of the Respondent,  
4 Nortown and that such infringement was not justified by s. 1  
5 of the Charter then the Attorney General of British Columbia  
6 submits that the Ontario Court of Appeal was correct in  
7 holding that s. 2 of the Retail Business Holidays Act was  
8 "of no force and effect as concerns Nortown Foods Ltd.":  
9 Case On Appeal, p. 299.  
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21 7. The Appellants, Edward Books, Longo Brothers and  
22 Magder, however, are not entitled to an acquittal, as they  
23 claim, merely because the Retail Business Holiday Act  
24 infringes the religious freedom of some other individual.  
25 (See Factum of Edward Books, para. 21; Factum of Longo  
26 Bros., para. 56; Factum of Magder, para. 50). These  
27 Appellants are not entitled to a remedy under s. 24 of the  
28 Charter because that is a personal remedy available only to  
29 those whose rights and freedoms have been infringed or  
30 denied.  
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41 Reference: Re Edmonton Journal & Attorney General For  
42 Alberta (1983), 146 D.L.R. (3d) 673 @ 675-76  
43 (Alta. Q.B.)  
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46 Hundal v. Superintendent of Motor Vehicles,  
47 [1985] 5 W.W.R. 449 @ 454 (B.C.C.A.)

1 8. The Ontario Court of Appeal's ruling as regard the  
2 Respondent, Nortown, is not inconsistent with this Court's  
3 decision in Hunter v. Southam, [1984] 2 S.C.R. 145 as the  
4 Appellants, Edward Books, Longo Bros. and Magder claim.  
5 (See Facta of Edward Books, paras. 31 to 35; Longo Bros.,  
6 para. 59 and Magder, para. 50).  
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15 9. It is respectfully submitted that this Court could  
16 not possibly have intended to repudiate the propriety of  
17 "reading down" legislation in order to ensure that it be  
18 applied consistently with the Constitution. Such a process  
19 has long been regarded as appropriate in the context of  
20 interpreting the Constitution Act, 1867: See Hogg,  
21 Constitutional Law of Canada, 2nd Ed. @ p. 327 and well as  
22 the Canadian Bill of Rights: R. v. Shelley, [1981] 2 S.C.R.  
23 186. It is also a process that is well established in  
24 United States: See Broadrick v. Oklahoma, 413 US 601, 37  
25 L Ed. 2d 830 @ 839, 93 S Ct 2908 (1973). Chief Justice  
26 Dickson does not in Hunter v. Southam, supra, cast any  
27 doubt on the reading-down principle as articulated in McKay  
28 v. The Queen, [1965] S.C.R. 798 or of its application in the  
29 context of the Charter. See e.g. Reynolds v. A.G.B.C.,  
30 [1984] 5 W.W.R. 270 @ 274 (B.C.C.A.) and also Finklestein  
31 "Section:1 The Standard For Assessing Restrictive Government  
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1 Actions And The Charter's Code of Procedure and Evidence"  
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3 (1983-84) 9 Queen L.J. 143 @ 150-152.  
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8 10. In fact, the Ontario Court of Appeal's approach  
9 respecting the Respondent Nortown does not depend on any  
10 common law rule of constitutional interpretation. Whereas  
11 the "reading-down" doctrine was a judge-made rule for the  
12 purpose of interpreting the Constitution Act, 1867, that  
13 doctrine (and the related doctrine of severance: Hogg,  
14 supra, @ p. 326) has now been constitutionalized in s. 52(1)  
15 of the Constitution Act, 1982.  
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25 11. Although the purpose of legislation will usually be  
26 either per se consistent or inconsistent with the Charter  
27 the same cannot be said of the effect of legislation. Where  
28 the effect of legislation is to infringe the constitutional  
29 rights and freedoms of everyone to whom the law applies then  
30 the legislation will be, in toto, of no force and effect.  
31 However, where the legislation only has an unconstitutional  
32 effect on some of the persons to whom the law is directed,  
33 then it is only of no force and effect vis a vis those  
34 persons. Section 52(1) of the Constitution Act, 1982 thus  
35 requires that the legislation be "read-down" so as not to  
36 apply to such persons.  
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1 12. Hunter v. Southam was an obvious case of where  
2 legislation could not be read-down to have any application  
3 consistent with the Charter. In order to save s. 10(1) and  
4 (3) of the Combines Investigation Act the Court was invited  
5 to "read-out" the portions of the legislation which provided  
6 for a partial arbiter and "read-in" detailed standards as  
7 prerequisites for a lawful search. This, if accepted, would  
8 have been an extraordinary and unprecedented exercise of  
9 judicially rewriting legislation. Furthermore, given this  
10 Court's interpretation of s. 8 of the Charter the resulting  
11 revision would still have been inconsistent with the  
12 Charter. This Court held that s. 8 guaranteed a "reasonable  
13 expectation of privacy" (p. 159) which could only be  
14 achieved if Parliament created, where feasible, a "system of  
15 prior authorization" (p. 160) which in turn required the  
16 specification of appropriate safeguards and the designation  
17 of an impartial arbiter (p. 169). The fact is that s. 10(1)  
18 and (3) of the Combines Investigation Act could only have  
19 been consistent with the Charter if it was rewritten by  
20 Parliament.  
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43 13. The Ontario Court of Appeal did not have to read-in  
44 or in any way rewrite the provisions of the Retail Business  
45 Holiday Act in order to reach its conclusion respecting  
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1 the Respondent Nortown. Indeed, the Court expressly  
2  
3 acknowledged that any revision of s. 3(4) of that Act was  
4  
5 not "the role of the judiciary": Case On Appeal, p. 299.  
6  
7 The Court did not construe the Retail Business Holiday Act  
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9 "as if" it provided for a religious exemption. Rather the  
10  
11 Court simply measured the purpose and effect of the Act as  
12  
13 against the provisions of the Charter. The Court of Appeal  
14  
15 concluded that the Retail Business Holiday Act, in some of  
16  
17 its applications (or effects), was inconsistent with the  
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19 Charter. It was accordingly of no force and effect for  
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21 those applications but otherwise of full force and effect.  
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25 14. If the Appellants were correct the result would be  
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27 that all laws which had any unconstitutional application  
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29 would be per se invalid. Few enactments would survive such  
30  
31 a onerous and unrealistic test. In Moore v. The Queen  
32  
33 (1984), 6 D.L.R. (4th) 294 @ 300 (Ont. H.C.J.) Ewaschuk, J.  
34  
35 stated:  
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38 "In assessing Charter applications, it is generally  
39 socially unrealistic to consider only the possible  
40 worst case where such case is not before the court.  
41 Indeed, it is only too easy for the creative legal  
42 imagination to concoct bizarre examples that never  
43 come to court. Where the worst case comes before the  
44 court, then the preferable practice is not to  
45 invalidate otherwise valid legislation but to hold it  
46 inoperative in that particular case."  
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- SECTION 7 -

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5 15. The Appellant Magder's definition of liberty  
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7 (Factum, para. 64) is so broad that it becomes virtually  
8  
9 empty of meaning. In Reference Re S. 94(2) of the Motor  
10  
11 Vehicle Act (unreported decision S.C.C., Dec. 17, 1985)  
12  
13 Wilson, J. @ p. 5  
14

15 "Leaving aside for the moment the mandatory  
16 imprisonment sanction, I cannot find an interference  
17 with life, liberty or security of the person in s. 94  
18 of the Motor Vehicle Act. It is true that the  
19 section prevents citizens from driving their vehicles  
20 when their licences are suspended. Citizens are also  
21 prevented from driving on the wrong side of the  
22 road. Indeed, all regulatory offences impose some  
23 restriction on liberty broadly construed. But I  
24 think it would trivialize the Charter to sweep all  
25 those offences into s. 7 as violations of the right  
26 to life, liberty and security of the person even if  
27 they can be sustained under s. 1."  
28

29 See also: Operation Dismantle Inc. et al v. The Queen,  
30 [1985] 1 S.C.R. 44 per Wilson, J. @ 488-89  
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34 16. Furthermore, if the Retail Business Holdiay Act has  
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36 a valid purpose and effect and does not infringe the  
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38 Appellant's freedom of religion or conscience then it cannot  
39  
40 be said that it violates any principle of fundamental  
41  
42 justice. The Act breaches no "basic tenet of our legal  
43  
44 system": Reference Re S. 94(2) of the Motor Vehicle Act,  
45  
46 supra, @ p. 18 per Lamer, J. and @ p. 15 per Wilson, J.  
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SECTION 15 OF THE CHARTER  
- THE RETROACTIVITY ISSUE -

17. Section 15, like the other provisions of the Charter, cannot be given a retroactive application.

Reference: Hogg, Constitutional Law of Canada, 2nd Ed., 665 - 66

Dubois v. The Queen (unreported S.C.C. Nov. 21, 1985, @ p. 10

Regina v. Konechny (1983) 10 C.C.C. (3d) 233 @ 239, 250 (B.C.C.A.)

Brar v. Minister of Employment & Immigration (1985), 60 N.R. 344

18. The Retail Business Holiday Act must admittedly be consistent with s. 15 of the Charter to have any force or effect on or after April 17, 1985. However, s. 15 can only provide the basis for an acquittal if the alleged violation of the Retail Business Holiday Act took place after April 17th, 1985. For the Appellants, Edward Books, Longo Bros. and Magder, and the Respondent Nortown to claim that s. 15 can, today, be used to justify an acquittal for the offences that occurred prior to April 17, 1985 would clearly be an attempt to invoke s. 15 retroactively.

19. Any consideration of s. 15 must therefore be

1 premised on this Court's power on an appeal from a summary  
2 conviction proceeding to give, at the behest of the  
3 defendants, a declaratory order concerning the  
4 constitutionality of legislation.  
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11 20. The Attorney General of British Columbia agrees with  
12 the Attorney General of Ontario that this Court should  
13 decline to consider s. 15 in this appeal. The Attorney  
14 General of British Columbia, however, makes the following  
15 submissions in the event that the Court is prepared to  
16 consider s. 15. However, it is respectfully submitted that  
17 if this Court ultimately concludes that the validity of the  
18 Retail Business Holiday Act might depend upon additional  
19 evidence the Court should not issue any declaration.  
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32 - THE MEANING OF "WITHOUT DISCRIMINATION" -  
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36 21. Section 15, like other sections of the Charter  
37 should be interpreted "in light of the interests it was  
38 meant to protect" and be placed in "its proper linguistic,  
39 philosophic and historical contexts": Big M Drug Mart v. The  
40 Queen, [1985] 1 S.C.R. 295 at 344.  
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22. Our analysis begins with an examination of the



1 language of s. 15. Section 15 guarantees "equality rights"  
2 only to individuals. It is submitted, therefore, that s. 15  
3 offers no protection to corporations: Smith, Kline & French  
4 Laboratories Ltd. v. A.G. Canada (unreported F.C.T.D. Nov.  
5 18, 1985 @ p. 63); Surrey Credit Union v. Mendoca et al  
6 (unreported B.C.S.C. Nov. 6. 1985); Re P.P.G. Industries  
7 Canada (1983), 146 D.L.R. (3d) 261 @ 268 (B.C.C.A.). Since  
8 a declaratory order is, in effect, being sought the standing  
9 issue which did not arise in Big M Drug Mart, supra, @ p.  
10 312, does arise in the Case on Appeal: Smith, Kline & French  
11 Laboratories Ltd., supra, @ 63.

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25 23. Section 15 then continues with the declaration that  
26 "every individual is equal before and under the law".  
27 Section 15 does not say that every individual has the right  
28 to be "equal before and under the law". The right  
29 guaranteed in s. 15 is the "right to the equal protection  
30 and equal benefit of the law without discrimination".  
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39 24. The declaratory nature of the opening words in s. 15  
40 serves a very important function. It identifies that there  
41 are two ways in which an individual can be treated  
42 unequally. One is by those who administer and apply the  
43 law. Equality before the law ensures that the Charter  
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1 applies to redress inequality in the administration or  
2 application of the law: A.G. Canada v. Lavell, [1924]  
3 S.C.R. 1349 @ 1366. The second way in which inequality can  
4 take place is in the content or creation of the law.  
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6 Inequality under the law will be a result of legislative  
7 classifications (or failure to classify). Hence, equal  
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9 before the law relates to the administration of the law and  
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11 equal under the law relates to the content of the law.  
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19 25. Having declared that both kinds of equality are  
20 guaranteed - equality in the administration and content of  
21 the law - the section then proceeds to define the nature of  
22 the "right". Section 15 guarantees a right to equal  
23 protection and equal benefit of the law without  
24 discrimination. The significance of the collocation of the  
25 "declaration" with the "right" is that s. 15 guarantees the  
26 right to the equal protection and equal benefit of the  
27 administration of the law without discrimination and the  
28 right to equal protection and equal benefit of the content  
29 of the law without discrimination. This interpretation is  
30 consistent with the "Explanatory Note" which accompanied the  
31 final draft of s. 15 when it was tabled in the House of  
32 Commons (see, Elliott "Interpreting The Charter - Use of The  
33 Earlier Versions As An Aid" (1982), U.B.C. L. Rev. 11 @  
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1 38). Professor Elliot says (at p. 17) that the Explanatory  
2 Note suggests "that the phrase 'equal before and under the  
3 law' is intended to describe not the scope of the right to  
4 equality as such, but the spheres of governmental  
5 activity to which the right to equality can be applied."  
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13 26. The inclusion of both the right to equal protection  
14 (the word commonly used in other Charters such as the  
15 Canadian Bill of Rights and U.S. Constitution) and equal  
16 benefit was probably designed to ensure that s. 15 was not  
17 given the interpretation that was given to s. 1(b) of the  
18 Bill of Rights by the Supreme Court of Canada in Bliss v.  
19 A.G. Canada, [1979] 1 S.C.R. 183. In Bliss, supra, @ 191-92  
20 unemployment maternity benefits were not considered to come  
21 within the right to equality in the Bill of Rights because  
22 they were a privilege and not a right. Accordingly the  
23 legislature and the executive (as well as the courts)  
24 violate s. 15 when the individual is discriminated against  
25 with respect to rights or privileges.  
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41 27. The focal point of s. 15 is the phrase "without  
42 discrimination". Section 15 does not merely prohibit laws  
43 that deny individuals the equal protection and equal benefit  
44 of the law. For there to be a violation, the denial of  
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1 equal protection and benefit must be by legislation (or  
2 orders) that discriminates.  
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7 28. Before defining the words "without discrimination",  
8 it is first necessary to determine what meaning should be  
9 ascribed to "equal protection and equal benefit". It is  
10 submitted that legislation which classifies or  
11 differentiates between groups or individuals does not, per  
12 se, violate the requirement of equal protection or benefit.  
13 Almost all legislation classifies or differentiates.  
14 Indeed, in order to ensure equal protection and equal  
15 benefit it may be necessary for the Legislature to treat  
16 groups and individuals differently. In Big M Drug Mart,  
17 supra, @ 347, Dickson, C.J. stated: "... the interests of  
18 true equality may well require differentiation". It is  
19 submitted that the essential meaning of the constitutional  
20 requirement of equal protection and equal benefit is that  
21 persons who are "similarly situated be similarly treated"  
22 and the converse, those who are "differently situated be  
23 differently treated". See: Weinstein et al v. Minister of  
24 Education for British Columbia and Stables, [1985] 5 W.W.R.  
25 724 @ 738 (B.C.S.C.) and Tussman and tenBroek, "The Equal  
26 Protection of the Laws", (1949) 37 Calif. L. Rev. 341 @ 344:  
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"The measure of the reasonableness of the

1  
2 classification is the degree of its success in  
3 treating similarly those similarly situated."  
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7 29. For there to be a violation of s. 15, it is  
8 necessary, but not sufficient, for the Plaintiff to prove  
9 that individuals "similarly situated" were "not similarly  
10 treated". However, there still must be a finding that the  
11 legislation (or executive act or court order) discriminates  
12 against the individuals in question.  
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21 30. It is submitted that "discrimination" has a special  
22 meaning in law and one that is perjorative. It is  
23 descriptive of legislation which treats individuals not only  
24 differently but does so on the basis of prejudice, misguided  
25 paternalism or improper stereotyping. It is legislation  
26 which affronts the dignity and worth of the individual:  
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33 "Discrimination involves not only burdening a  
34 particular individual or group per se; it  
35 involves the imposition of burdens for  
36 particular kinds of reasons. These reasons  
37 involve a denial of the essential worth and  
38 dignity of the class against whom the law is  
39 directed, a denial based on unwarranted  
40 stereotypes about the capacities and roles of  
41 the members of that class. When legislation  
42 is enacted with these as motivating reasons,  
43 that legislation is discriminatory."  
44

45 M. Gold, "A Principled Approach To Equality  
46 Rights: A Preliminary Inquiry" (1982) 2 S.Ct.  
47 L. Rev. 131 @ 147

1 31. In Andrews v. Law Society of B.C. (unreported  
2 decision of B.C.S.C. Oct. 2, 1985) Taylor, J. stated @ p.  
3  
4  
5 10:  
6

7 "The word 'discrimination' when used in an enactment  
8 such as the Charter should, I think, be taken to  
9 refer to a particular mischief well-understood in our  
10 society. I think it possible that distinctions might  
11 be drawn by law on the basis of some, at least, of  
12 the grounds enumerated in s. 15(1) without giving  
13 rise to discrimination in the sense in which that  
14 word should be understood in an enactment dealing  
15 with fundamental rights. Without attempting an  
16 exhaustive definition, I would say that the essence  
17 of discrimination for the present purpose is the  
18 drawing of an irrational distinction between people  
19 based on some irrelevant personal characteristic for  
20 the purpose, or having the effect, of imposing on  
21 certain of them a penalty, disadvantage or dignity,  
22 or denying them an advantage. Some of the personal  
23 characteristics which might form a basis for  
24 discrimination are listed in s. 15(1), but I do not  
25 think this is intended as a complete listing."  
26

27  
28 32. This approach to the meaning of the phrase "without  
29 discrimination" is also consistent with the submission that  
30 s. 15 only applies to natural persons.  
31  
32

33 33. It is submitted that the phrase "without  
34 discrimination" thus encompasses the concept of equality but  
35 adds a new dimension. A law which does not treat similarly  
36 those who are similarly situated may violate the requirement  
37 of equality but it does not necessarily discriminate. A  
38 law, however, which discriminates necessarily fails to treat  
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1 similarly those similarly situated. Thus a law does not  
 2 discriminate merely because a classification is irrational.  
 3 It is submitted that the classification must also be based  
 4 on some "irrelevant personal characteristic" - in  
 5 otherwords, characteristics which deny the essential worth  
 6 and dignity of the class. See also Milk Board v. Clearview  
 7 Dairy Farm Inc. (unreported, B.C.S.C. January 8, 1986 @  
 8 p. 47-48); Brown v. City of Vancouver (unreported, B.C.S.C.  
 9 Jan. 10, 1986).

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 21 34. The grounds enumerated in s. 15 are indicative,  
 22 although not exhaustive, of the kind of legislative  
 23 classifications (or executive or judicial orders) that might  
 24 be discriminatory. Similar factors are specifically  
 25 included and prohibited in most human rights (or  
 26 anti-discrimination) legislation in Canada which undoubtedly  
 27 provides the historical basis for s. 15. (see e.g. Human  
 28 Rights Act, S.B.C. 1984, c. 22, the Newfoundland Human  
 29 Rights Code, R. S. Nfld. 1974, c. 22; Human Rights Code,  
 30 S.P.E.I. 1968, c. 2, Human Rights Act, S.M. 1974, c. H175;  
 31 Saskatchewan Human Rights Code, R.S.S. 1978, c. S-24.1,  
 32 Ontario Human Rights Code, R.S.O. 1980, c. 340, Human Rights  
 33 Act, S.N.S. 1969, c. 11; Alberta Bill of Rights, S.A. 1972,  
 34 c. A-16; Charter of Human Rights and Freedoms, R.S.Q. 1977,  
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1 c. C-12; Human Rights Act, S.N.B. 1971, c. 8). Tarnopolsky  
2  
3 in Discrimination and The Law (1982) @ 840 summarizes his  
4  
5 review of the legislation:

6  
7 "To reiterate, the various anti-discrimination  
8 statutes in Canada prohibit specific actions  
9 taken 'because of' certain specified grounds  
10 and thereby provide illustrations of what is  
11 'discrimination' against someone."  
12

13  
14 35. The enumerated grounds in s. 15 or grounds similar,  
15  
16 are the hallmarks of the equality or anti-discriminatory  
17  
18 provisions in the Canada Bill of Rights (s. 1(b))), the  
19  
20 European Convention for the Protection of Human Rights and  
21  
22 Freedoms, Article 14, the Universal Declaration of Human  
23  
24 Rights, Article 2 and the International Covenant on Civil  
25  
26 and Political Rights, 1966 Article 2. These enactment are  
27  
28 similarly relevant in placing s. 15 in its "philosophic and  
29  
30 historical contexts".  
31

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34 36. It is submitted therefore that discrimination can  
35  
36 only exist when a law classifies on one of the grounds  
37  
38 enumerated in s. 15 or on a ground similar thereto and then  
39  
40 only if the law fails to treat similarly, those who are  
41  
42 similarly situated. The words "in particular" not only  
43  
44 identify the most unacceptable kinds of criteria that might  
45  
46 discriminate but also provide the courts with some guidance  
47



1 as to the other kinds of classification that might  
2 discriminate.  
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7 37. Section 15 should be viewed in the context of the  
8 Charter as a whole. The Charter might be considered to  
9 enshrine five kinds of fundamental rights and freedoms or  
10 "civil liberties". The "political liberties" in ss. 2-5,  
11 the "legal rights or liberties" in ss. 7-14, the  
12 "egalitarian rights" (s. 15), the "linguistic, cultural and  
13 aboriginal rights" in ss. 23, 25 and 27 and "mobility  
14 rights" (s. 6): Hogg, Constitutional Law of Canada, 1977 @  
15 417). Each section is important in enshrining and advancing  
16 one of these kinds of civil liberties. No one section  
17 should be regarded as paramount or as encompassing all of  
18 the other sections. That, however, is what might become of  
19 s. 15 if it is not interpreted in the matter submitted  
20 herein. Section 15, like the 14th Amendment in the U.S.  
21 Constitution will dwarf the other provisions of the Charter  
22 and be the central issue in virtually all Charter  
23 litigation. Laws which do not violate any other fundamental  
24 right or freedom, will almost always (if the U.S. experience  
25 is any guide) be alleged to violate s. 15 because the  
26 Legislature classified or failed to classify. Even though  
27 legislation does not violate any other section, it will  
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1 always be required to run the gauntlet of the "rationality  
2 test" that will inevitably arise out of s. 15. Instead of  
3 s. 15 being relied on to ensure that the Legislature does  
4 not "discriminate" it will be relied on to ensure that the  
5 Legislature acts "rationally". Not only does the Charter  
6 expressly address the problem of arbitrary legislation in  
7 other sections (e.g. s. 9 and arguably s. 7 and s. 12 and  
8 see also s. 1) but to approach s. 15 on the assumption that  
9 it is needed to prevent the Legislature from acting  
10 arbitrarily is clearly an unwarranted assumption. The  
11 instances are rare where legislation which is not based on  
12 race, sex, etc., can be characterized as arbitrary or  
13 capricious. Checks on that kind of legislation exist  
14 without the Charter both through the normal workings of the  
15 political process as well as from the judiciary. See:  
16 Reference Re S. 94(2) of the Motor Vehicle Act, supra, @  
17 p. 11 per Lamer, J. To interpret s. 15 as other than a  
18 section guaranteeing equal protection and benefit without  
19 discrimination, is, to quote Chief Justice Dickson, "to  
20 overshoot [its] actual purpose ...": Big M Drug Mart, supra,  
21 at 344.

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45 38. It is unnecessary and probably unwise for the Court  
46 to speculate as to what additional grounds are capable of  
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1 raising an issue of discrimination. However, while the  
 2 following factors are not meant to be exhaustive, they are,  
 3 it is submitted, helpful in determining which kinds of  
 4 classifications have the greatest chance of obtaining  
 5 inclusion in s. 15:  
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 9

- 10 (1) Does the classification refer to a group that has  
 11 received statutory protection from discrimination?  
 12
- 13 (2) Has the group been subject to a pattern of  
 14 discrimination?  
 15
- 16 (3) Is the major characteristic defining the group one that  
 17 is not easily changed by the individual?  
 18
- 19 (4) Is the group a discreet and cohesive class?  
 20
- 21 (5) Is the group identified by non-economic considerations?  
 22

23  
 24 39. Accordingly, legislation which classifies on grounds  
 25 which do not have any of the above mentioned features should  
 26 not be subjected to any s. 15 analysis. Thus, laws which  
 27 impose penalties, burdens or disadvantages on persons who  
 28 drink and drive, grow exotic plants, work on a particular  
 29 construction site or drink diet soft-drinks could not  
 30 possibly raise a s. 15 issue. Legislation which classifies  
 31 on an enumerated ground or a ground which is similar might  
 32 discriminate but does so only if the classification fails to  
 33 treat similarly, those similarly situated.  
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40. The Retail Business Holiday Act classifies or draws

1 distinction on the basis of inter alia whether a person  
2 carries on a retail business, on the nature of goods  
3 available for sale, on the number of persons engaged in the  
4 service of the public, on the total area used for serving  
5 the public, etc. It is submitted that none of the  
6 classification found in the Retail Business Holiday Act  
7 could ever amount to discrimination. Accordingly, it is  
8 unnecessary to consider whether these legislative  
9 classifications treats similarly those similarly situated.  
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21 - THE RATIONALITY TEST -  
22

23 41. Even if all legislation which differentiates between  
24 groups or individuals must pass muster with s. 15 of the  
25 Charter, it is submitted that the Retail Business Holiday  
26 Act easily does so.  
27  
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33 42. Where the legislation classifies on a ground that  
34 is not enumerated and particularly where it classifies on a  
35 ground that is not even ejusdem generis an enumerated ground  
36 then the legislation should be subject to minimal judicial  
37 scrutiny. This will usually be the case with legislation  
38 with a social and economic purpose.  
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43. It is submitted that such legislation does not

1 violate s. 15 if the legislative classification is  
 2 rationally related to a valid provincial objective. If a  
 3 rationality test is not imported into s. 15 but is instead  
 4 considered to be an s. 1 consideration the result will be a  
 5 trivialization of the guarantee of the s. 15 right:  
 6 Reference Re S. 94(2) of the Motor Vehicle Act, supra, @ 5  
 7 per Wilson, J.  
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18 44. This approach is supported by Professor Tarnopolsky  
 19 (as he then was) who after analyzing both U.S. and Canadian  
 20 jurisprudence states:  
 21  
 22

23 "...with respect to distinctions made on grounds not  
 24 listed in section 15(1), particularly with respect to  
 25 legislation having an economic or social purpose, one  
 26 should expect the court to defer to legislative  
 27 opinion on these issues. As in the United States, or  
 28 under either of the two tests suggested by Justices  
 29 Ritchie and McIntyre, the legislation would withstand  
 30 challenge unless the one who challenges it can show  
 31 that there is no rational relationship between the  
 32 means and ends chosen and valid legislative activity.  
 33  
 34

35 W.S. Tarnopolsky, "The Equality Rights In The Canadian  
 36 Charter of Rights & Freedoms" (1983), 61 Can. Bar. Rev.  
 37 212 @ 255  
 38  
 39

40 45. The United States courts have not insisted that the  
 41 relation between the legislative classification be "rational  
 42 in fact" but only that the Legislature "could have  
 43 rationally decided" that there was a connection between the  
 44 classification and the (conceivable) purpose: For example  
 45  
 46  
 47

1 in Minnesota v. Clover Leaf Creamery Co., 449 U.S. 546, 101  
 2 S.Ct. 715, 66 L.Ed. 2d 659 (1981) the issue was whether a  
 3 statute that banned the retail sale of milk in plastic  
 4 nonreturnable and nonrefillable containers violated the  
 5 equal protection clause. The Petitioner presented evidence  
 6 that there was no actual link between the legislation and  
 7 the alleged purpose of promoting energy savings. The Court  
 8 held that the empirical evidence was irrelevant:

17 "States are not required to convince the courts of  
 18 the correctness of their legislature's judgments.  
 19 Rather those challenging the legislature's judgment  
 20 must convince the court that the legislative facts on  
 21 which the classification is apparently based could  
 22 not reasonably be conceived to be true by the  
 23 government decision-makers". (at 464) (emphasis  
 24 added)

26 See also: United States Railroad Retirement Board v.  
 27 Fritz, 449 U.S. 166, 66 L.Ed. 2d 360, 101 S.Ct.  
 28 453 (1980) @ 66 L.Ed. 2d @ 387

30 "Where, as here, there are plausible reasons for  
 31 Congress' action, our inquiry is at an end. It is of  
 32 course 'constitutionally irrelevant whether this  
 33 reasoning in fact underlay the legislative decision'  
 34 ... because this Court has never insisted that a  
 35 legislative body articulate its reasons for enacting  
 36 a statute."

40 46. The rationale for this measure of judicial deference  
 41 is explained by Powell, J. (dissenting on another point) in  
 42 Schweiker v. Wilson, 450 U.S. 221, 67 L.Ed.2d 186 @ 204, 101  
 43  
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1 S.Ct. 1074:  
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4 "The deference to which legislative accommodation of  
5 conflicting interests is entitled, rests in part upon  
6 the principle that the political process of our  
7 majoritarian democracy responds to the wishes of the  
8 people ... Our democratic system requires that  
9 legislation intended to serve a discernible purpose  
10 receive the most respectful deference."  
11  
12

13 47. Although the Respondent Nortown has identified some  
14 United States cases where Sunday closing laws were struck  
15 down on the ground that the classifications violated the  
16 equal protection clause of the 14th Amendment, there are  
17 just as many, if not more, United States decision which have  
18 reached opposite conclusions. For a summary of most of the  
19 decisions up to 1981 see Annotation, "Validity, Construction  
20 and Effect of 'Sunday Closing' or 'Blue' Laws - Modern  
21 Status", 10 A.L.R. 4th 246.  
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33 48. Although it may be difficult to reconcile many of  
34 the lower court decisions on this point, it must be  
35 emphasized that the U.S. Supreme Court has consistently  
36 rejected challenges to Sunday closing laws on the basis of  
37 the 14th Amendment.  
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43 Reference: McGowan v. Maryland, 366 U.S. 420, 6 L.Ed.  
44 2d 393, 81 S.Ct. 1101 (1961)  
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3 Gallagher v. Crown Kosher Supermarket of  
4 Massachusetts, 366 U.S. 617, 6 L.Ed. 2d 536,  
5 81 S.Ct. 1122 (1961)

6 Two Guys From Harrison-Allen Town Inc. v.  
7 McGinley, 366 U.S. 582, 6 L.Ed. 2d 551,  
8 81 S.Ct. 1135 (1961)  
9

10 49. The Respondent Nortown describes as "the leading  
11 case" in support of its s. 15 challenge the decision of  
12 People v. Abrahams, 353 N.E. 2d 574 (New York 1976). The  
13 decision is also relied upon by the Appellant, Longo Bros.  
14 (Factum, para. 51(a)).  
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21 50. The Supreme Court of Massachusetts, however, in  
22 Zayre Corporation v. Attorney General, 362 N.E. 2d 878  
23 (1977) faced with "an analogous situation ... reached a  
24 contrary conclusion". Of Abrahams the Massachusetts Supreme  
25 Court said, at p. 885:  
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32 "The nature of the particular statute involved, its  
33 legislative history and the context within which the  
34 case arose lessens the degree to which it may be  
35 considered persuasive."  
36

37 See also: Commonwealth v. Franklin Fruit Co. Inc.,  
38 446 N.E. 2d 63 @ 67 (Mass. 1983)  
39  
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42 51. The Retail Business Holiday Act is more akin to the  
43 Massachusetts law considered in Zayre than the New York law  
44 considered in Abrahams. The New York law was, unlike the  
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1 Massachusetts law and the Ontario legislation, enforced in a  
2 discriminatory fashion. The exemptions under the New York  
3 law "were so numerous that Sunday was a day of rest in name  
4 only" whereas the Massachusetts law (with 49 exemptions) and  
5 the Ontario law (with far less) "accomplishes its goal to a  
6 considerable degree". The New York law "evolved from a  
7 format conceived in 1881" whereas the Massachusetts law,  
8 like the Ontario legislation, is of far more recent origin.  
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20 52. The Massachusetts Supreme Court in Zayre quoting  
21 from well known U.S. Supreme Court authorities stated, at  
22 p. 884:  
23  
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25 "... a Court will not invalidate a classification  
26 merely because the Legislature has not chosen to  
27 address an entire problem in defining a  
28 classification ... or because the classification be  
29 they slightly over or under inclusive could have been  
30 drawn to more precise standards ... "  
31

32 See also: Tribe, American Constitutional Law @ 997-999  
33 Tussman & tenBroek, supra, @ 399  
34  
35

36 53. The Massachusetts Supreme Court in Zayre recognized  
37 the "legislative dilemma" in enacting Sunday closing  
38 legislation: "On the one hand, there is the general policy  
39 for such a day ... on the other hand, there is a recognition  
40 that certain activities must for societal needs, be allowed  
41 to continue ..." (p. 885).  
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1 54. The Court in Zayre quoted (at pp. 884-885) from the  
2 decision of Frankfurter, J. in McGowan v. Maryland, supra,  
3 as follows:  
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7 "In the case of Sunday legislation, an extreme  
8 complexity of needs is evident. This is so, first,  
9 because one of the prime objectives of the  
10 legislation is the preservation of an atmosphere - a  
11 subtle desideratum, itself the product of a peculiar  
12 and changing set of local circumstances and local  
13 traditions. But in addition, in the achievement of  
14 that end, however formulated, numerous compromises  
15 must be made. Not all activity can halt on Sunday.  
16 Some of the very operations whose doings most  
17 contribute to the rush and clamor of the week must go  
18 on throughout that day as well, whether because life  
19 depends upon them or because the cost of stopping and  
20 restarting is simply too great, or because to be  
21 without their services would be more disruptive of  
22 peace than to have them continue ..."  
23

24 The Court in Zayre concluded at p. 887:  
25

26 "It is true that the entire scheme of objections  
27 cannot be called 'cohesive'. Our response to that is  
28 that logical symmetry is not required under either  
29 the State or United States Constitutions. ... So long  
30 as the particular exemptions have a rational basis  
31 consistent with the statutory purposes they will pass  
32 constitutional muster."  
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34

35 55. The Ontario Law Reform Commission in its Report On  
36 Sunday Observance Legislation (1970) while recommending a  
37 general prohibition of all forms of selling, also recognized  
38 the need and desirability of certain clearly defined  
39 exceptions. The exceptions subsequently enacted by the  
40 Ontario Legislature reflect in large part, the  
41 recommendations of the Law Reform Commission. It is clear  
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1 that due and thoughtful consideration was given to each of  
2 these exceptions. There can be no suggestion that any of  
3 the exceptions are arbitrary, irrational or "devoid of rhyme  
4 and reason" (Longo Bros.' Factum, paras. 51 & 51(d) and  
5 Nortown's Factum, para. 34). At pp. 321-328 of its Report  
6 the Law Reform Commission states:  
7  
8

- 9 (2) "The exceptions from the general prohibition of  
10 Sunday selling should be based on their  
11 'essentiality' as measured by one or more of the  
12 following determinants: (1) humanitarian; (2)  
13 emergency; (3) perishability; (4) seasonal; (5)  
14 recreational; (6) familial; (7) convenience and (8)  
15 technical. ...  
16  
17 (4) The following methods of regulation and containment  
18 of 'essential' Sunday selling are available for use  
19 in the legislation: (1) maximum number of employees;  
20 (2) maximum square footage; (3) product or trade  
21 designation; (4) maximum assessed value of premises  
22 or inventory; (5) hours limitations; (6) location  
23 restriction based on area and population density; (7)  
24 rotational system; (8) time of year; (9) type of  
25 management; (10) other physical limitations; and (11)  
26 licensing."  
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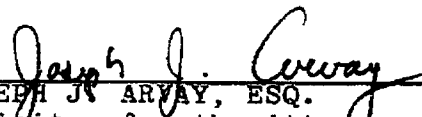
33 56. In conclusion, it is submitted that the  
34 classifications drawn by the Legislature in the Retail  
35 Business Holiday Act are rationally related to, and indeed  
36 have a substantial connection with, the purpose of that  
37 Act. The Retail Business Holiday Act is thus consistent  
38 with s. 15 of the Charter. Resort to s. 1 of the Charter is  
39 not necessary to justify this legislation.  
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PART IV

NATURE OF ORDER SOUGHT

57. The Attorney General of British Columbia agrees with the submissions of the Attorney General of Ontario respecting the nature of the order requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

  
JOSEPH J. ARVAY, ESQ.  
Solicitor for the Attorney General  
of British Columbia, Intervener

DATED: Victoria, British Columbia, this 12th day of February, 1986.

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of February 1986  
do

R. Dwyer  
for  
Deputy Attorney General of Canada  
Sous-procureur général du Canada