

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal
for the Province of Ontario)

BETWEEN:

EDWARDS BOOKS AND ART LIMITED
-and- Appellant

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

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HER MAJESTY THE QUEEN
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PART I
STATEMENT OF FACTS

1. The Attorney General of Saskatchewan accepts the facts as set out in the Factum of the Attorney General of Ontario.

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PART II

POINTS IN ISSUE

- 10 2. The first constitutional question states:
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?

20 The Attorney General for Saskatchewan adopts the position of the Attorney General for Ontario that the Retail Business Holidays Act was enacted for a valid secular purpose within the competence of the provincial legislature.

- 30 3. The second constitutional question states:
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?

40 The Attorney General for Saskatchewan adopts the position of the Attorney General for Ontario that the Retail Business Holidays Act does not infringe or deny any of the rights and freedoms guaranteed by section 2(a), 7 or 15 of the Canadian Charter of Rights and Freedoms.

4. The third constitutional question states:

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?

The Attorney General for Saskatchewan adopts the position of the Attorney General for Ontario as stated in paragraphs 23 to 25 inclusive of his Factum.

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PART III

ARGUMENT

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?

20 5. It is submitted that the Court of Appeal correctly held that the Retail Business Holidays Act was valid legislation enacted pursuant to section 92 of the Constitution Act, 1867.

30 6. The Attorney General for Saskatchewan supports and adopts in their entirety the submissions of the Attorney General for Ontario set out in paragraphs 26 to 44 inclusive of his Factum.

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

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(a) Section 2(a)

7. The analysis of the impact of the Retail Business Holidays Act on freedom of conscience and religion as guaranteed in section 2(a) of the Charter must begin with a consideration of the purpose of the Act. It is submitted, for the reasons stated in paragraphs 67 to 74 of the Factum of the Attorney General for Ontario, that the purpose of the Act is secular. Its object is the establishment of a common pause day.

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8. However, as stated in R. v. Big M Drug Mart Ltd. both purpose and effect are relevant to the question of constitutional validity. Thus, the central issue with respect to section 2(a) of the Charter turns on the effect of the Retail Business Holidays Act.

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R. v. Big M Drug Mart Ltd., [1985] 1
S.C.R. 295 at pp. 331, 332, 334.

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9. In R. v. Big M Drug Mart Ltd., Dickson J. (as he then was) described freedom of religion in the following terms:

10 Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the Charter. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.

Dickson J. also said:

30 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.

(emphasis added)

R. v. Big M Drug Mart Ltd. at 346-7,
336-7.

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10. It is submitted that the scope of freedom of
religion in paragraph 2(a) of the Charter is clear.
"Freedom of religion" means that individuals are free to
20 hold and manifest religious beliefs. It also means that
government may not coerce individuals to affirm specific
religious beliefs or undertake religious practices for
sectarian purposes.

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11. In that regard, it is essential to note that the
Retail Business Holidays Act enforces a common pause day
rather than observance of the Christian Sabbath. It does
not coerce individuals to affirm a specific religious
belief or to undertake a specific religious practice for
40 sectarian purpose. Nor does the Act preclude any
individual from entertaining his own religious beliefs or
from performing his religious practices.

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12. Thus, the core issue in this appeal is whether the Retail Business Holidays Act falls within the ambit of the "indirect forms of control which determine or limit alternative courses of conduct available to others" referred to in the foregoing passage from the Big M case. If it does, then presumably it represents a prima facie violation of religious freedom.

13. Some laws with legitimate secular purposes and effects may indirectly have the consequence of infringing freedom of religion if they preclude an individual from actually practicing the rites of his religion. This was the situation in California v. Woody 394 P. (2d) 813 (1964) where an otherwise valid narcotics law was not applied to Indians who used peyote for sacred religious purposes. In such cases the analysis pursuant to section 1 of the Charter may lead to the conclusion that the law must accommodate the religious practice in question.

See also: International Society for Krishna Consciousness Inc. v. Barbara 650 F (2d) 430 (1981).

However, laws such as the Retail Business Holidays Act are in a different category. They have no immediate impact whatsoever on religious beliefs, rites or practice.

14. The Appellants Edwards and Longo argue that the
Retail Business Holidays Act infringes freedom of religion
by imposing an economic penalty on those who observe a
Sabbath Day other than Sunday and by imposing "an economic
sanction on those who are of the Jewish faith". However,
the true impact of the Act is much more remote than they
suggest. This can be seen by assuming, for example, that
there are no laws enforcing Sunday or any other day as a
common pause day. This would not eliminate the financial
burden on individuals who chose to close their stores on
their Sabbath. Those individuals would continue to
operate at a business disadvantage relative to atheists
and persons of religious conviction who elected not to
close their stores and who consequently were open for
business an extra day each week. Thus, it is important to
note that the entire economic disadvantage felt by Jewish
merchants in the instant case does not spring from the Act
itself. The very nature of their religious belief entails
an economic sacrifice. The Act operates only to give some
indirect and fortuitous business advantage to those
persons who, for personal, cultural or religious reasons,
would in any event have closed their shops on Sunday.

Factum of Edwards Books and Art
Limited, p. 23.

Factum of Longo Brothers Fruit Markets Limited, p. 5.

10 15. Therefore, it is submitted that the Retail Business Holidays Act should not be found to fall within the kind of "indirect forms of control" referred to by Dickson C.J.C. in the Big M case. At most the Act has some consequential economic effect. It does not burden religious beliefs or practices per se. Any other
20 interpretation of paragraph 2(a) of the Charter would give freedom of religion a scope of absolute breadth. But, as Wilson J. stated in Operation Dismantle Inc. et al. v. The Queen, [1985] 1 S.C.R. 441 at 489:

30 The rights under the Charter not being absolute, their content or scope must be discerned quite apart from any limitation sought to be imposed upon them by the government under section 1.

40 16. It is submitted, therefore, that the Retail Business Holidays Act does not operate so as to violate freedom of conscience and religion as guaranteed in paragraph 2(a) of the Canadian Charter of Rights and Freedoms.

(b) Section 7

10 17. The Appellant Magder argues that the Retail Business Holidays Act violates section 7 of the Charter. It is submitted that the Court of Appeal was correct when it held that was no such violation.

Factum of Magder, paras. 58-67.

20 18. The Act does not create any denial or infringement of "life, liberty and security of the person" because section 7 of the Charter does not protect purely economic freedoms. This conclusion is particularly supported by the absence of any reference to property rights in section 7 and by the heading "Legal Rights" which introduces 30 sections 7 to 14. Thus, the Appellant Magder errs when he asserts that a "substantial intrusion upon his monetary earning capabilities" represents a violation of section 7.

40 Smith, Kline & French Laboratories Limited et al. v. Attorney General of Canada, No. T-2696-80, November 18, 1985 (F.C.T.D.).

Reference Re Section 94(2) of The Motor Vehicles Act of British Columbia, [1986] 1 W.W.R. 481 (S.C.C.).

19. Further the Retail Business Holidays Act does not
contravene "principles of fundamental justice". As stated
by Lamer, J. at p. 504 in Reference Re Section 94(2) of
10 The Motor Vehicle Act, supra, "... the principles of
fundamental justice are to be found in the basic tenets
and principles, not only of our judicial process, but also
of the other components of our legal system". Our legal
system knows no basic tenet which casts doubt on the
20 propriety of regulating economic activity in the interests
of securing legitimate and broader social objectives.
Moreover, it is submitted that the courts should accept
the invitation to undertake a substantive review of the
law "... only in exceptional cases where there has been a
30 marked departure from the norm of civil or criminal
liability ...".

R. v. Morgentaler, Smoling and Scott
(1985), 52 O.R. (2d) 353 at 385 (C.A.).

(c) Section 15

40 20. The Appellants Edwards, Longo and Magder and the
Respondent Nortown seek to invoke section 15 of the
Charter to justify an acquittal notwithstanding that the
50 alleged offences as well as the trial and Court of Appeal

10 proceedings all took place prior to April 17, 1985. It is submitted that section 15 of the Charter cannot be applied retroactively and thus cannot be of assistance in this case. Section 15 could only provide the basis of an acquittal if the alleged violation of the Retail Business Holidays Act had taken place after April 17, 1985.

20 21. Moreover, there are sound policy reasons why the Court should decline to hear argument on a Charter issue which was not raised in the courts below. The Court does not have the benefit of the analysis of lower courts. Nor have the parties had an opportunity to introduce evidence
30 with respect to possible justifications of the Act pursuant to section 1 of the Charter.

S. S. Tordenskjold v. S.S. Euphemia,
[1909] 41 S.C.R. 154 at 163-4.

Law Society of Upper Canada v.
Skapinker, [1984] 1 S.C.R. 357 at 383-4.

40 Northern Telecom Canada Ltd. v.
Communications Workers of Canada,
[1983] 1 S.C.R. 733.

22. Finally, it is submitted that there exists very serious doubt as to whether this Honourable Court has
50 jurisdiction to make an order based on section 15 of the

Charter. Section 47 of the Supreme Court Act, R.S.C. 1970, c. S-19 states as follows:

10 The Court may dismiss an appeal or give the judgment and award the process or other proceedings that the Court, whose decision is appealed against, should have given or awarded.

20 23. This section has been interpreted as precluding the Court from making rulings based on laws that were not in effect at the time the relevant court of appeal had been seized with a case. Similar considerations may apply here. The Ontario Court of Appeal handed down its judgment on September 19, 1984, well before section 15 of the Charter came into force and could not have made a ruling based on section 15.

30 Boulevard Heights Limited v. Veilleux,
[1915] 52 S.C.R. 185.

The K.V.P. Company Limited v. McKie et al., [1949] S.C.R. 698 at 700.

Interprovincial Co-operatives Limited v. R., [1976] 1 S.C.R. 477 at 511.

40 24. If the Court does consider the arguments based on section 15 of the Charter which have been advanced, the Attorney General for Saskatchewan submits that the Court should find that the Retail Business Holidays Act does not violate section 15. The submission of the Attorney
50 General for Saskatchewan, in summary form, is as follows.

10 25. The right guaranteed by section 15 is "the right to the equal protection and benefit of the law without discrimination". Section 15 does not guarantee the universal application of all laws. The opening words of the section, "every individual is equal before and under the law", serve to define its scope rather than its content. The phrase ensures only that section 15 applies to both the substance of laws and to their administration.

20 26. Section 15 proscribes only those classifications which are discriminatory in character, i.e. those which deny the worth and dignity of the members of the class on the basis of unwarranted stereotypes as to their personal capacities. It seeks to protect discrete and insular
30 minorities rather than to ensure the universal application of the law. Thus, it is submitted that section 15 may be triggered only by legislative classifications based on the grounds enumerated in that section or by classifications based on grounds of an ejusdem generis nature.
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50 27. The Appellant Magder argues that the Retail Business Holidays Act violates section 15 by effecting differential treatment between or among persons on the basis of the kinds of business they operate. The

10 Respondent Nortown and the Appellant Longo make similar arguments. It is submitted that these propositions should be rejected for the reason that classifications based on the kind of retail business carried on by a merchant or the number of people he employs or the floor space of his establishment simply do not engage section 15 of the Charter.

20 Factum of Paul Magder, para. 72.
Factum of Nortown Foods Limited, paras. 27-34.
Factum of Longo Brothers Fruit Markets Limited, paras. 47-49.

30 (d) Section 52 of the Constitution Act, 1982

40 28. If the Court of Appeal was correct in holding that the effect of the Act as regards the Respondent Nortown was an unjustifiable infringement of religious freedom, then it is respectfully submitted that the court erred by purporting to exempt Nortown from the application of the Act by reliance on section 52(1) of the Constitution Act, 1982. Tarnopolsky J.A. made the following disposition with respect to the application of the Act to Nortown:

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10 In accordance with s.52(1) of the Constitution Act, 1982, the Act "is inconsistent with the provisions of the Constitution" and is "to the extent of the inconsistency, of no force or effect". I have already held that the Act is inconsistent only to the extent that it does not provide for adequate religious exemptions. Otherwise s.2 of the Act is valid in its application to all appellants who cannot make such a claim sincerely or genuinely. The only appellant to establish such a claim is Nortown Foods Ltd. It would appear with respect to Nortown, that the defect in the Act is not in s.2, but in s.3(4) in that that subsection does not provide for adequate religious exemption. However, to strike down s.3(4) would leave s.2 in operation and thus no exemption at all for religious minorities who do not observe Sunday as the Sabbath. What is required is a re-drafting of 20 s.3(4) to meet the requirements of the Charter. This is not the role of the judiciary (R. v. Oakes, supra). The criteria which a new exemption section must meet have been described. For the purposes of disposing of these appeals it is sufficient to hold that s.2 of the Act is of no force or effect as concerns Nortown Foods Ltd. and so its appeal is allowed, the conviction is quashed and a verdict of acquittal is directed to be entered. With respect 30 to all other appellants, their appeals are dismissed to the extent they are based on this ground.

Case on Appeal, Vol. 2, pp. 298-299.

29. Dickson C.J.C. noted in Big M, supra, that there might be occasions when a law with a valid purpose 40 interferes by its impact on rights or freedoms, and said at p. 334 that "a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity". However, it is submitted that

10 the effects of a law with a valid purpose should result in
its invalidity only in those circumstances where the
impact in all, or at least substantially all, of its
applications creates an unjustifiable denial of rights or
freedoms. Such situations are likely to be extremely rare.

20 30. If, as argued by the Appellants, a law should be
struck down if any unconstitutional effect can be
demonstrated, virtually every statute would attract a
declaration of invalidity. Such an approach is
unrealistic and, moreover, is unnecessary to ensure that
rights and freedoms are protected fully. Individual
remedies granted pursuant to section 24(1) of the Charter
30 can protect rights adequately by dealing discretely and
precisely with those situations where the effect of an
otherwise valid law results in a denial of rights.

Re Moore and The Queen (1984), 6 D.L.R.
(4th) 294 at 300 (Ont. H.C.).

40 31. With regard to the instant case, the remedy with
respect to Nortown should have been made pursuant to
section 24(1) of the Charter. Section 52 performs the
same role in the Constitution as did the predecessor
sections of the Colonial Laws Validity Act, 1865 and the
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Statute of Westminster. It is concerned with ensuring the primacy of the Constitution and deals with the constitutional validity of laws themselves. While the concept of "reading down" has been preserved by section 52, the existence of section 24 of the Charter indicates clearly that, when an individual is denied rights by or through the effect of an otherwise valid law, he should be granted his personal remedy pursuant to section 24.

Operation Dismantle, supra, Wilson, J.
at 481-3.

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PART IV

NATURE OF ORDER REQUESTED

10 32. It is submitted that the appeals of the Appellants
Edwards Books and Art Limited, Longo Brothers Fruit
Markets Limited and Paul Magder be dismissed and the
appeal by the Attorney General for Ontario against the
acquittal of the Respondent Nortown Foods Limited should
20 be allowed and the conviction restored.

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

30 i) The Retail Business Holidays Act is within
the legislative powers of the Province of
Ontario.

40 ii) The Retail Business Holidays Act does not
infringe or deny the rights and freedoms
guaranteed by the Charter.

50 iii) If there is an infringement of the rights and
freedoms guaranteed by the Charter, the
limits on the rights and freedoms are
justified by section 1 of the Charter.

ALL OF WHICH IS RESTFULLY SUBMITTED.

Robert G. Richards

Robert G. Richards

Counsel for the Attorney General
for Saskatchewan

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LIST OF AUTHORITIES

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1.	<u>Boulevard Heights Limited v. Veilleux,</u> [1915] 52 S.C.R. 185.	14
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7.	<u>Operation Dismantle Inc. et al. v. The Queen,</u> [1985] 1 S.C.R. 441.	10 19
8.	<u>R. v. Big M Drug Mart Ltd.,</u> [1985] 1 S.C.R. 295.	5, 6, 7, 8, 10, 17
9.	<u>R. v. Morgentaler, Smoling and Scott</u> (1985), 52 O.R. (2d) 353 (C.A.).	12
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12.	<u>S.S. Tordenskjold v. S.S. Euphemia,</u> [1909] 41 S.C.R. 154.	13

13. Smith, Kline & French Laboratories Limited et al. v. Attorney General of Canada, No. T-2696-80, November 18, 1985 (F.C.T.D.). 11
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