

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

BIG M DRUG MART LTD.

Respondent
(Defendant)

- and -

THE ATTORNEY GENERAL OF CANADA,
THE ATTORNEY GENERAL FOR NEW
BRUNSWICK and THE ATTORNEY GENERAL
FOR SASKATCHEWAN

(Intervenors)

FACTUM OF THE INTERVENOR
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STATEMENT OF FACTS
PART I

PART I
STATEMENT OF FACTS

1. The Intervenor, Attorney General for New Brunswick, adopts the facts as set out in the Factum of the Appellant.

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POINTS IN ISSUE

PART II

PART II
POINTS IN ISSUE

2. It is the respectful submission of the Intervenor, Attorney General for New Brunswick, that:

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(1) The Lord's Day Act and especially s. 4 thereof, does not infringe upon the freedom of conscience and religion guaranteed in s. 2(a) of the Canadian Charter of Rights and Freedoms.

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(2) The Lord's Day Act, and especially s. 4 thereof, (assuming it to be necessary to so justify), is justified on the basis of s. 1 of the Canadian Charter of Rights and Freedoms.

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(3) The Lord's Day Act, and especially s. 4 thereof is enacted pursuant to the criminal law power under s. 91(27) of the Constitution Act, 1867.

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PART IIIARGUMENTTHE LORD'S DAY ACT DOES NOT INFRINGE UPON FREEDOM OF CONSCIENCE
AND RELIGION

10 3. The Trial Judge in the Alberta Provincial Court dismissed
charges for a violation of the Lord's Day Act against the
Respondent on the basis that this would be an appropriate
remedy under subsection 24(1) of the Charter and declared
pursuant to subsection 52(1) of the Charter that section 4 of
the Lord's Day Act was of no force and effect as being incon-
20 sistent with the Charter.

Reference: Case on Appeal, pages 133-134

30 4. This action on the part of the Trial Judge was confirmed
by the Court of Appeal of Alberta. The reliance on these pro-
visions of the Canada Act raise the issue of the interrelation-
ship of these various provisions taken in conjunction with
sections 1 and 2 thereof. Subsection 52(1) declares any law
inconsistent with the provisions of the Constitution, to the
extent of the inconsistency, of no force and effect. Subsection
24(1) in turn allows a Court of competent jurisdiction to apply,
on behalf of anyone whose freedoms as guaranteed by the Charter
have been infringed, such remedy as the Court considers ap-
propriate and just in the circumstances. The freedom in this
40 particular case is described in paragraph 2(a) of the Charter as:

Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion.

5. In turn, section 1 of the Charter guarantees this freedom
subject to such reasonable limits prescribed by law as can be

demonstrably justified in a free and democratic society.

10 6. It is submitted that the interrelationship of these various sections is demonstrative, particularly where a corporate entity is involved, of the nature of the freedom of religion which is guaranteed. Subsection 24(1) of the Charter allows anyone whose freedoms have been "infringed or denied" to apply to a Court of competent jurisdiction. Central to the application to the Court, however, it is submitted, is a determination of whether that particular person enjoys the freedom alleged to have been in-
20 fringed or denied. One would not ordinarily describe the corporate entity as capable of enjoying the freedom of conscience and religion. While it is true that a corporation may, by virtue of section 14 of the Lord's Day Act, be guilty of an offence, the mere charging of a corporation is not in any way determinative of the issue of whether in fact that corporation enjoys the freedom of conscience and religion as guaranteed under the Charter.

30 7. It is submitted that in applying subsection 24(1), the Court of competent jurisdiction must first determine whether the person making the application enjoys the right or freedom said to have been infringed or denied. Secondly, the Court must hear evidence as to the infringement or denial of that particular right or freedom. Finally, the Court, after having heard the evidence
40 of infringement or denial may, assuming there to have been an infringement or denial, apply "such remedy as the Court considers appropriate and just in the circumstances". This latter terminology, it is submitted, is also indicative of the freedom. In

Association of Radio and Television Employees of Canada v. Canadian Broadcasting Corporation, 40 D.L.R. (3d) 1 at page 8, Chief

Justice Laskin in his dissenting reasons for judgment involving the interpretation of a collective agreement and the relief to be given under the terms of the collective agreement stated:

I need not say whether I would have administered the same relief. It is enough in my view, that the Board could apply a remedy and (I am prepared to add) the remedy has a rational relation to the violation and is an effective way of dealing with it in the particular circumstances.

8. It is submitted that there must be a relationship between the right or freedom enjoyed and the remedy granted. In the instant case, the prohibition to which the Respondent is subjected is the engagement in commercial activities on Sunday. No evidence was offered on behalf of the Respondent as to how this "denied or infringed" the Respondent's freedom of conscience or religion. Presumably, the remedy should be such as to remove the infringement or denial of the Respondent's "freedom of conscience or religion". It is submitted, however, that the removal of the prohibition against business activity on Sunday in no way removes an infringement or denial of the Respondent's freedoms.

9. The Respondent's raison d'être is to engage in the commercial sale of its products in the hope of gain. This commercial activity would not in ordinary parlance be described as the exercise of its freedom of conscience or religion. To argue that

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any prohibition of this activity infringes on the Respondent's freedoms is to deny all Federal and Provincial regulatory power over the Respondent.

10 10. The Provincial power over the Respondent may be demonstrated by two Decisions of This Honourable Court. In Lieberman v. The Queen [1963] S.C.R. 643, this Court confirmed the power of the City of Saint John to pass a by-law dealing with closing hours. The relevant provision of the by-law stated:

20 3. No person shall keep open any public billiard or pool room or bowling alley on any weekday between the hour of 12:00 o'clock at night and the hour of 6:00 o'clock in the forenoon, or on Sunday.

11. This activity was held to be a valid exercise of the Provincial power found in subsection 92(2) of the British North America Act (now the Constitution Act, 1867).

30 11 Similarly, in Lord's Day Alliance of Canada v. Attorney General of British Columbia [1959] S.C.R. 497, this Court considered legislation which allowed individuals to engage in certain activities on Sunday to be valid. In neither case, whether the legislation prohibited or allowed activities on Sunday, did the Court consider the problem to be one of interference with the freedom of conscience or religion. While it is true that both of these cases were decided prior to the Charter and indeed the Bill of Rights, this had not inhibited the Court

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ARGUMENT

PART III

in the past as witness Chief Justice Duff's famous exposition on these rights in reference Re Alberta Statutes [1938] S.C.R. 100 at page 134 where he stated:

10 Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion be incompetent to the legislatures of the Provinces, or to the legislature of any one of the Provinces, as repugnant to the provisions of The British North America Act, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion
20 legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the Province, or a matter private or local within the Province.

13. It is submitted that the mere prohibition or allowance of certain secular or commercial activities on Sunday is not
30 sufficient to constitute either an infringement or denial of the fundamental freedom of conscience and religion guaranteed in the Charter. To adopt the argument of the Respondents is to suggest that once it is established that a particular day, whether it be Friday, Saturday or Sunday has religious significance for a segment of the population, it follows that any legislation which
40 prescribes either a prohibition or allows certain activities on that particular day must of necessity interfere with the fundamental freedom of conscience and religion. Thus, any legislation, for whatever purpose it might be enacted, which

ARGUMENT
PART III

10 in any way affects the activities which might be carried out on those days must, in order to be effective, be shown to be a "reasonable limit prescribed by law" and "demonstrably justified in a free and democratic society". It is submitted that this is clearly not the starting point in determining whether a particular piece of legislation either abridges or denies a fundamental freedom. Legislation should not be characterized as constituting an infringement or denial of the fundamental freedom of conscience and religion simply because of the beliefs of the individual. While the beliefs of the individual may be relevant as an expression of that particular individual's freedom, those beliefs cannot
20 of themselves be sufficient to strike down a piece of legislation. To proceed in such a fashion is to deny legislative power in almost all situations and indeed to deny the freedom of expression. Moreover, it would call upon the legislative authority in all cases ab initio to justify legislation solely on the basis of individual belief. It is submitted that the fundamental freedom
30 of conscience and religion is an individual one, capable of being exercised only by natural persons rather than corporate entities.

40 14. The nature of the freedom must first be determined in an effort to determine whether legislation is truly that which might be characterized as an infringement or denial of the fundamental freedom. It is only when the law can be said to infringe or deny the fundamental freedom of conscience and

10 religion that it becomes necessary to demonstrate that the law
in question places a reasonable limit on that freedom which can
be demonstrably justified in a free and democratic society.
Here, not only is there no demonstration of what is the freedom
of conscience or religion said to have been infringed but there
is no evidence of what is the limit prescribed by law which
presumably must be shown as both reasonable and justified in
a free and democratic society. The so-called limit in this
20 case would, in view of the judgments of the court below, appear
to be the prohibition found in section 4 of the Lord's Day Act.
However, there is no evidence as to how this in any way "limits"
the Respondent's freedom of conscience and religion. The law
limits commercial activity on the part of the Respondent and
in no way limits its freedom of conscience or religion.

30 15. To suggest that one must look first to the belief of
individual litigants in order to determine the validity of a
piece of legislation is to defeat one of the very principles on
which the Charter is premised, namely, the rule of law. In many
cases, the rights as between individual litigants will be
determined by various pieces of legislation enacted for the
general benefit of the populace at large. To allow or disallow
40 legislation solely on the basis of the beliefs of the individual
party litigants must surely result in defeating the rule of law
by allowing the legislation to have effect in one case where
the litigants share a common belief and to disallow it in
another where the litigants do not share that common belief.
The validity of legislation must be determined on a broader

10 basis than the simple belief of individual parties. Since
section 2 of the Charter vests everyone with the freedom of
conscience and religion, it is submitted that the "limit
prescribed by law" must be reasonably recognized by the
populace at large as being a restriction on the fundamental
freedom of conscience and religion enjoyed by all. Surely, if
it is a right enjoyed by all it must be recognized by all as
being so. How else are the freedoms enjoyed by everyone to be
safeguarded (bearing in mind that anyone may apply under
20 section 24 of the Charter) if the populace does not recognize
that its freedoms are being infringed?

16. Mr Justice Cartwright in his dissent in Robertson and
Rosetanni v. The Queen [1963] S.C.C. 651 at 661 characterized
both sides of religious freedom in the following terms:

30 It was argued that, in any event, in the case at bar
the appeal must fail because there is no evidence
that the Appellants do not hold the religious belief
that they are under no obligation to observe Sunday.
In my view such evidence would be irrelevant. The
task of the Court is to determine whether s. 4
of the Act infringes freedom of religion. This
does not depend on the religious persuasion, if
any, of the individual prosecuted but on the
40 nature of the law. To give an extreme example, a
law providing that every person in Canada should,
on paying a fine or imprisonment, attend divine
service in an Anglican church on at least one
Sunday in every month would, in my opinion, infringe
the religious freedom of every Anglican as well as
that of every other citizen.

10 17. Here, in the example by Mr. Justice Cartwright, it is submitted that the Anglicans, who may or may not be the beneficiary of someone else's attendance at their religious services, as well as the individual required to attend the service and indeed the populace at large, would recognize the law as being a general infringement on, or to use the terms of the Charter, a "limit" on the freedom of conscience and religion. Such is not the case in the instant case where the prohibition is simply against engaging in commercial activity on Sunday. Historically, this type of prohibition has been allowed both on the part of the Provinces and municipalities as well as in other countries.

20 18. It is submitted that the reason for the attack on the Lord's Day Act and the suggestion that it thereby limits the fundamental freedom of conscience and religion is by reason of the fact that the majority in this country are of the Christian religion and the Lord's day has religious consequences for that majority. Such being the case, it is said that a law which facilitates that purpose interferes with the fundamental freedom of conscience and religion. Moreover, since the Act in question is enacted pursuant to the Federal criminal power, the historical significance of which is now well known, it is said that it must thereby be religious in nature and since it is premised on a religious origin, any exercise of that power must of necessity be a limit on the freedom of conscience and religion. It is submitted, however, that both of these propositions are false. In this regard Mr. Justice Martland stated in Walter

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v Attorney General of Alberta [1969] S.C.R. 383 at page 393:

10 Religion as the subject-matter of legislation, wherever
the jurisdiction may lie, must mean religion in the
sense that it is generally understood in Canada. It
involves matters of faith and worship, and freedom of
religion involves freedom in connection with the
profession and dissemination of religious faith and
the exercise of religious worship. But it does not
mean freedom from compliance with provincial laws
relative to the matter of property holding. There
has been no suggestion that mortmain legislation by
20 a provincial legislature is incompetent as inter-
fering with freedom of religion.

19. In the first place, even if the Lord's Day Act is supposed
to be construed as enhancing or facilitating a Christian's
religious obligations, it could not be said that it thereby
"limits" the observance by members of other religious faiths
30 of their religion. A law which benefits one segment of society
even on religious grounds cannot be said to limit the exercise
of that fundamental freedom by members of other religious faiths.

20. The Charter itself advances the interests of minorities
with respect to language (section 23), aboriginal rights (section
25), race, national or ethnic origin, colour, religion, sex,
40 age and mental and physical disability (section 15(2)), denomina-
tional schools (section 29), regional disparities (section 36),
social programs for amelioration of social or economic disadvan-
tage (section 6(4)) among others.

10 21. Secondly, any attack on the Lord's Day Act which is
premiered on that Act being enacted pursuant to the Federal
power over religion ignores the fact that it is not legis-
lation with respect to religion. Nowhere in either sections
91 or 92 of the Constitution Act, 1867 is the power over
religion vested in either the Provinces or the Federal
Government. The source of the Federal power, it is sub-
mitted, rests in the Federal Government's jurisdiction
20 over criminal law. This, it is submitted, is criminal law
in its widest sense. Criminal law may relate to matters
with respect to public morals. For example, bigamy, abortion,
theft, and murder all have religious connotations, however,
they are not for that reason invalid.

30 22. To strike down a law as was done in this particular case
on the flimsy premise that religion is somehow involved is to
effectively nullify Federal criminal power as it relates to
matters affecting public morals and decency. In effect, it
is to restrict such legislation only to those moral principles
which are generally accepted by everyone and to preclude
legislation where those moral principles are not shared
by all citizens of Canada. Moreover, it must of necessity
do injustice to the preamble to the Charter which suggests
40 that "Canada is founded upon principles that recognize
the supremacy of God".

23. It is submitted that the comments of Mr. Justice Eberle in the Ontario High Court in Re Regina and Potma 1 C.R.R. 298 at 304 are relevant where he stated:

10 As is all too common, Parliament has said virtually nothing about this subject; however, I think it is fair to say that the Charter of Rights was not passed in a vacuum. We have in this country a long established legal system, both as to the principles of law and the physical framework of courts to deal with them, and it must be taken that parliament was aware of the basic principles of law existing and applied in this country.

20 24. Similarly, in The Queen v. Drybones (1970) S.C.R. 282 at page 302 Mr. Justice Pigeon stated:

30 There can be no doubt that in enacting legislation Parliament is presumed to be aware of the state of the law (Walker v. The King). A fortiori must it be so when the enactment itself has reference thereto. Where is the extent of existing human rights and fundamental freedoms to be ascertained if not by reference to the statute books and other legislative instruments as well as to the decisions of the courts?

40 25. The Decisions of the Courts are replete with expressions concerning the fundamental freedom of religion enjoyed in this country. In Ex Parte Renaud (1872-73) 14 N.B.R. 273 at 290, Mr. Justice Ritchie of the New Brunswick Court of Appeal stated:

Education raises a question involving important and delicate rights, - rights which, in this land of civil and religion freedom, few may be willing to see infringed.

26. In R. v. Burnshine 44 D.L.R. (3d) at page 590 Chief Justice Laskin stated:

Section 1 of the Bill (a reference to the Bill of Rights) declared that six defined human rights and freedoms "have existed" and that they should "continue to exist". All of them had existed and were protected under the common law. The Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute and further by s. 2, to protect them from infringement by any Federal statute.

27. In Chaput v Romain [1955] S.C.R. 834 at 840 Mr. Justice

Taschereau stated:

... religions are on an equal footing, and Catholics as well as Protestants, Jews, and other adherents to various religious denominations, enjoy the most complete liberty of thought. The conscience of each is a personal matter and concern of nobody else.

28. Similarly, in Saumur v. City of Quebec [1953] 2 S.C.R. 299 Mr. Justice Rand stated at page 327:

From 1760, therefore, to the present moment religious freedom has in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church,

10 that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.

20 29. It is thus submitted that in general the fundamental freedom of conscience and religion has existed in this country for some time. The sole question is one of whether the Lord's Day Act can be said to infringe upon the right which has existed for some time. Here, the Decision of this Court in Robertson and Rosetanni v. The Queen is of preeminent importance. It is submitted that the reasons advanced by the majority in the Alberta Court of Appeal are not sufficient as to warrant a reversal of Robertson and Rosetanni v. The Queen. The fact that the Bill of Rights was on a different footing than the Constitution is not determinative of the issue. It is submitted that the language and results utilized in both the Bill and the Charter are the same. The Charter describes the freedom thusly:

- 30 2. Everyone has the following fundamental freedoms:
- (a) freedom of conscience and religion.

40 30. The Bill describes is as:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human

rights and fundamental freedoms, namely,

(c) freedom of religion.

10 31. A conflict under the Bill is dealt with under section 2 as:

20 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular no law of Canada shall be construed or applied so as to...

32. While section 52(1) of the Constitution states:

30 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Charter is, to the extent of the inconsistency, of no force or effect.

33. Clearly, under the Bill of Rights a statute was liable to be construed and applied so as not to abrogate or infringe upon the freedom of religion. In MacKay v. The Queen 114 D.L.R. (3d) at page 422 Mr. Justice McIntyre stated:

This Court decided in R v. Drybones, [1970] 3 CCC 355, 9 D.L.R. (3d) 473, [1970] SCR 282, that the Canadian Bill of Rights was effective to render inoperative validly enacted federal legislation where such legislation infringed the right of a subject to equality before the law.

34. It is submitted that for the Court to strike down the Lord's Day Act, one must of necessity conclude that the freedom of religion which existed in 1960 at the time of the enactment of the Bill of Rights is substantially different from the "fundamental freedom of conscience and religion" granted to everyone under the constitution. In R. v. Burnshine (1974) 44 D.L.R. (3d) 584 Mr. Justice Laskin, as he then was, at page 592 stated:

It is quite clear that, in 1960, when the Bill of Rights was enacted, the concept of "equality before the law" did not and could not include the right of each individual to insist that no statute could be enacted which did not have application to everyone and in all areas of Canada. Such a right would have involved a substantial impairment of the sovereignty of Parliament in the exercise of its legislative powers under s. 91 of the British North America Act, 1867, and could only have been created by constitutional amendment, or by statute. In my opinion, the wording of the Bill of Rights did not do this, because, as has already been noted, by its express wording it declared and continued existing rights and freedoms. It was those existing rights and freedoms which were not to be infringed by any statute. Section 2 did not create new rights. Its purpose was to prevent infringement of existing rights.

35. However, the learned Justice did continue on at page 601 to state:

I would adopt in respect of issues that are said to collide with the Canadian Bill of Rights the same approach that prevails where constitutional collision is suggested, namely, a preference for a construction which would avoid such a collision.

10 36. Here, it is submitted that no collision occurs because of the fact that there is no substantial difference between the freedom enjoyed in 1960 and that which is found in the Constitution.

37. In Attorney General of Canada v Canard [1976] 1 S.C.R., Mr. Justice Beetz stated at page 205:

I take the following principles to be settled by the Decision of this Court in R. v. Drybones:

20 1. The Canadian Bill of Rights is more than a canon of interpretation, the terms of which would give way to any contrary legislative intent. It renders inoperative any law of Canada that cannot be construed and applied so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized by the Bill, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Bill, and confers upon the Court the responsibility to declare any such law inoperative.

30 38. In R. v. Allman and Commissioners of Northwest Territories 144 D.L.R. (3d) 467 at page 478-79 Mr. Justice de Weerd states:

40 Walter S. Tarnopolsky, Q.C., in The Canadian Bill of Rights, 2nd revised ed. (1975), addresses his reader's attention, at the very outset of that work, to the meanings to be given to the words "rights", "freedoms" and "liberties", at p. 1:

10 In discussing basic or fundamental rights and freedoms one is concerned with the relationship between the individual or a group and the state. In its simplest form this relationship may be thought of in two ways. It may be that an individual or a group demands non-interference from the state, at least in certain activities: this is a claim for freedom or liberty. It may be, however, that the demand is for state intervention to protect one's way of life against encroachment by others, or to provide it either as a minimum living standard or on the basis of equality with others: this is a claim for the positive assistance of the state in securing of certain rights.

20 Although the passages which follow what I have just quoted are most useful in elaboration of the author's thesis, it is enough for present purposes to notice that the basic difference between a "right" and a "freedom" consists in the nature of the claims which each of these terms describes, in relation to "the state": here the Northwest Territories of Canada. This basic difference, as I understand the words "fundamental freedoms" and "rights" in the Charter, is at the root of the distinction to be made between their respective meanings.

30 The "freedom of thought, belief, opinion and expression" referred to in para. 2(b) of the Charter, on which the applicants rely, is therefore to be understood as recognition of a claim which anyone may make against the state (and no doubt against others also, but we are here concerned solely with a claim against the state) to non-interference in matters of thought, belief, opinion and expression. Viewed in that light, it cannot be said that there is any interference whatsoever, actual or threatened, with anyone in these matters under the Plebiscite Ordinance.

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39. In Walter v. Attorney General of Alberta [1969] S.C.R. at page 393 Mr. Justice Martland described religion as involving matters of faith and worship, and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship.

40. In summary it is submitted one can glean from these decisions the principles that:

(a) The Bill of Rights, which includes freedom of religion would have rendered inoperative any law including the Lord's Day Act, which infringed that Freedom. This Court rejected that approach in Robertson and Rosetanni v. The Queen (supra);

(b) freedom of conscience and religion is a freedom enjoyed by natural persons. It involves the profession and dissemination of religious faith and the exercise of religious worship;

(c) a freedom may be contrasted with a right. A freedom may serve as a shield while a right may serve as a sword.

41. The Lord's Day Act does not interfere with the freedom of religion as that expression has been interpreted in the Courts, nor as it is understood by the average citizen. Section 1 of the Charter does not come into play so as to require the legislative authority to justify a limit placed on a freedom until such time as it can be demonstrated that the law limits a freedom enjoyed

by everyone. The purpose and effect of the Lord's Day Act is not to limit freedom of conscience and religion.

THE LORD'S DAY IS JUSTIFIED ON THE BASIS OF SECTION 1 OF THE CHARTER OF RIGHTS AND FREEDOMS

10 42. It is submitted that if it is necessary to conclude that the Lord's Day Act must be justified in terms of section 1 of the Act as being a limit which must be "reasonable" and "demonstrably justified in a free and democratic society" then it is such a limit. As has already been submitted, the terms of section 2(b) of the Charter are such that the fundamental freedoms conferred are such as to be incapable of being exercised by a corporate entity so as to allow that entity to utilize section 24. It is submitted, 20 in the case of a corporate entity, that if a right exists vis a vis the Lord's Day Act it is to be found in subsection 52(1) of the Canada Act which provides that an Act is to be of no force and effect to the extent that it is inconsistent with the rights conferred on everyone. Hence, on this premise it is not necessary 30 for the Corporate entity itself to actually enjoy the freedom, rather, it is sufficient that the freedom is enjoyed by everyone such that the offending legislation must be construed in accordance with subsection 52(1). Here again, it is submitted that the issue is the same as that faced by this Court in Robertson and Rosetanni v. The Queen where the Court had to determine whether the Lord's Day Act abrogated or infringed the freedoms recognized by the Bill of Rights.

0 43. It is submitted that in making this determination the principles as expounded by Mr. Justice McIntyre in MacKay v.

The Queen 114 D.L.R. (3d) at 423 are relevant. He stated:

It would be difficult, if not impossible, to propound an all embracing test to determine what departures from the general principle of the equal application of law would be acceptable to meet a desirable social purpose without offence to the Canadian Bill of Rights. I would be of the opinion, however, that as a minimum it would be necessary to inquire whether any inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the Canadian Bill of Rights, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective. Inequalities created for such purposes may well be acceptable under the Canadian Bill of Rights.

44. In the instant case, it is submitted that the Lord's Day Act is neither arbitrary nor capricious nor based on a motive offensive to the provisions of the Canadian Bill of Rights. It is of universal application and merely insures a day of rest throughout the nation. The purpose has been held to be valid under the terms of the American constitution. It is submitted that it is of little consequence that the American result arises by reason of legislation premised on a different head of power. Irrespective of the fact that the Canadian result is achieved through legislation which has as its source of power the criminal law, the result is the same. In determining whether the legislation is both reasonable and demonstrably justified it is submitted that one does not look at the head of power under which the legislation is made. It makes little sense to suggest that legislation enacted under some head of power other than the criminal law would be any more reasonable or demon-

strably justified. It is only when it is accepted that the legis-
 lation effectively limits a freedom that one turns to a deter-
 mination of how that limit operates so as to determine whether in
 fact it is reasonable and justified. However, as earlier sub-
 10 mitted, the present case is not one in which a limit on the freedom
 of religion has been shown so as to look at the operation of that
 limit and to demonstrate both the reasonableness of the limits and
 their justification in a free and democratic society. If there
 are limits, it is solely on the engaging in various activities
 on Sunday. The reasonableness of a day of rest has clearly been
 20 enunciated by the Courts in the United States of America and it
 is submitted that the principles are no different in this country.

THE LORD'S DAY IS ENACTED PURSUANT TO THE CRIMINAL POWER UNDER
 S. 91(27) OF THE CONSTITUTION ACT, 1867

45. It is submitted that this particular proposition is now
 beyond question. The question of the Federal criminal power in
 30 this regard has been the subject of a number of judicial
 decisions.

Reference Re Sunday Observance (1905 35 S.C.R. 581

Quimet v. Bazin (1911) 46 S.C.R. 502

St. Prosper v. Rodrigue (1917) 56
 S.C.R. 157

40 Henry Birks and Sons v. City of Montreal
 and Attorney General of Quebec [1955]
 S.C.R. 799

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

Robertson and Rosetanni v. The Queen
 [1963] S.C.R. 651

46. In Morgentaler v. The Queen [1976] 1 S.C.R. 616 at page 625 Chief Justice Laskin elaborated on the Federal criminal power. He stated:

10 The wide scope of the exclusive federal criminal law power has been consistently asserted in the relevant case law in both the Privy Council, when it was Canada's ultimate appellate court, and in this Court. Parliament, in fastening upon certain behaviour or conduct or activity as criminal by proscribing it with penal sanctions, exercises a judgment which is not constitutionally impeachable simply because it may attract the opposition of a section of the population. The remedy or relief, as the case may be, lies with Parliament and not with this Court unless it is made plain to the Court that the use of the penal sanction was a colourable or evasive means of drawing into the orbit of the federal criminal law measures that did not belong there, either because they were essentially regulatory of matters within exclusive provincial competence or were otherwise within such exclusive competence.

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30
47. Moreover, at page 627 the Chief Justice stated:

0 I point also to the Lord's Day Act, R.S.C. 1970, c. L-13 as an illustration of a federal statute drawing its validity from the criminal law power which contains various exemptions.

NATURE OF ORDER DESIRED
PART IV

PART IV

NATURE OF ORDER DESIRED

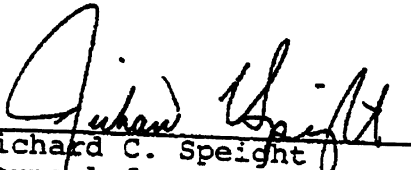
10 48. The Intervenor supports the position of the Appellant in its request that This Honourable Court should allow the appeal and answer the questions posed in the following manner:

20 1. The Lord's Day Act, especially s. 4 thereof, does not infringe upon the freedom of conscience and religion guaranteed in s. 2(a) of the Canadian Charter of Rights and Freedoms.

30 2. That should it be found that the Lord's Day Act must be justified and especially s. 4 thereof, it is justified on the basis of s. 1 of the Canadian Charter of Rights and Freedoms.

0 3. The Lord's Day Act and especially s. 4 thereof is enacted pursuant to the criminal power under s. 91 (27) of the Constitution Act, 1867.

All of which is respectfully submitted.


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New Brunswick

PART V
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