

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 SEVENTH DAY ADVENTIST CHURCH IN CANADA
AND LONDON DRUGS LTD.

(Intervenants in the
Court of Appeal of
Alberta)

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PART I

STATEMENT OF FACTS

1. The Attorney General of Saskatchewan adopts the
statement of facts set out in the factum of the Appellant.

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PART II

POINTS IN ISSUE

10 2. The points in issue in this appeal, as set out in
the Order stating the Constitutional Questions (Case on
Appeal, pp. 11-12), are:

- 20 1. Does the Lord's Day Act, R.S.C. 1970, c. L-13
and especially s.4 thereof infringe upon the
freedom of conscience and religion guaranteed
in s.2(a) of the Canadian Charter of Rights and
Freedoms?
2. Is the Lord's Day Act, R.S.C. 1970, c. L-13 and
especially s.4 thereof justified on the basis
of s.1 of the Canadian Charter of Rights and
Freedoms?
- 30 3. Is the Lord's Day Act, R.S.C. 1970, c. L-13 and
especially s.4 thereof enacted pursuant to the
criminal law power under s.91(27) of the
Constitution Act, 1867?

30 3. The position of the Attorney General of Saskatchewan
is that these questions should be answered as follows:

- 40 1. No
3. Yes

The Attorney General of Saskatchewan takes no
position with respect to Question 2.

PART III

ARGUMENT

PRELIMINARY ISSUE

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4. The Attorney General of Saskatchewan submits that the corporate Respondent (Defendant) has standing to raise the constitutional issues involved in this appeal.

20 See: Robertson and Rosetanni v. The Queen, [1963] S.C.R. 651 at 661 per Cartwright, J.

Minister of Justice (Canada) v. Borowski, [1981] 2 S.C.R. 575.

QUESTION 1

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5. It is submitted that it is necessary to make two inquiries before Question 1 can be answered:

(a) What is included within the phrase 'freedom of religion' in section 2(a) of the Charter?

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(b) Does the Lord's Day Act, in either its purpose or its effect, infringe upon 'freedom of religion' so defined.

(a) Definition of 'freedom of religion'

6. The concept of freedom of religion has been considered in several Canadian cases. One of the leading definitions was enunciated by Martland, J. in giving the reasons of the Court in Walter v. Attorney General (Alberta), [1969] S.C.R. 383 at 393:

Religion, as a 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.

7. A second important definition was formulated by Rand, J. in Saumur v. City of Quebec, [1953] 2 S.C.R. 299 at 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, 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.

8. A recent academic definition, derived from an analysis of the leading Canadian cases, has been advanced by Professor Irwin Cotler:

As a general principle, it has been held that freedom of religion includes freedom of religious thought and expression, but not necessarily all thought nor all religious acts.

See: Cotler, Freedom of Assembly, Association, Conscience and Religion, in Tarnopolsky and Beaudoin (eds.) The Canadian Charter of Rights and Freedoms: Commentary, at p. 203.

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9. Freedom of religion is, of course, a concept central to the political life of many other nations. This fact is reflected in one of the most important international human rights documents, the International Covenant on Civil and Political Rights (to which Canada is a signatory). Article 18 of the Covenant protects, and then defines, freedom of religion:

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1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

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2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

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3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

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10 Although this definition is perhaps more comprehensive than that found in the Canadian cases (e.g. paragraph 4 of Article 18) it is submitted that the essential components of Article 18 are identical to those enunciated by Rand, J. in Saumur, namely the right to hold uncoerced religious beliefs and the right to espouse those beliefs openly by way of worship or teaching.

20 10. A profound respect for religious freedom lies at the heart of the American system of government. This is attested to by the fact that the concept is protected in the First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

30 There are two components in this provision: the 'anti-establishment' component and the 'free exercise' component. The Canadian Charter provision, 'freedom of religion', was probably intended to approximate the 'free exercise' component. However, it is submitted that judicial definitions by the United States Supreme Court of both components of the First Amendment are worthy of attention because, taken together, they give a fairly comprehensive picture of what is considered to be religious freedom in the United States.

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11. A fairly recent and comprehensive definition of the anti-establishment component of the First Amendment is contained in the judgment of Chief Justice Warren in McGowan v. Maryland (a Sunday closing case), 366 U.S. 420 (1961), at 442-3:

10 The most extensive discussion of the 'Establishment' Clause's latitude is to be found in Everson v. Board of Education, supra (330 U.S. at pp. 15, 16):

20 "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

40 12. A rather full definition of the free exercise component of the First Amendment is contained in the judgment of Chief Justice Warren in Braunfeld v. Brown, (another Sunday closing case), 366 U.S. 599 (1961), at 603:

50 Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any

form of worship is strictly forbidden. The freedom to hold religious beliefs is absolute... [A statute cannot] make criminal the holding of any religious belief or opinion, nor [can] it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.

10 13. It is submitted that these interpretations of
freedom of religion, contained in Canadian, international
and American constitutional documents and judicial
decisions, point to a solid core of matters that are
embraced by the concept of freedom of religion. Although
20 no exhaustive list of rights pertaining to freedom of
religion could be given, it is submitted that the essence
of the concept is the right to entertain such opinions as a
person chooses and to make religious beliefs of those
opinions, the right to declare religious beliefs openly and
without fear of hindrance or reprisal, and the right to
30 manifest religious belief by worship and practice or by
teaching and dissemination.

40 b. The Lord's Day Act - Purpose and Effect

40 14. It is submitted that in characterizing the Lord's
Day Act, for purposes of both distribution of powers and
Charter analysis, it is necessary to examine both the
purpose and the effects of the Act. It is incorrect, it is
50 submitted, to focus on only one of these dimensions of the

Act. It is also incorrect, it is submitted, to focus on one dimension (say, purpose) for distribution of powers analysis and then switch to the other dimension (say, effects) for Charter analysis.

10 i. Purpose

15. It is submitted that the majority of the Alberta Court of Appeal erred in concluding "that the law has a religious purpose; it is to enforce the Sunday of the majority of the Christian religion". (Case on Appeal, p. 20 160).

16. The Attorney General of Saskatchewan submits that the purpose of the Act is to give government assistance to "the moral value of a day of rest" (per Belzil, J.A., 30 dissenting, Case on Appeal, p. 198). That, it is submitted, was an important (although not the only) purpose of the Act when it was first enacted in 1907. The federal Act was not enacted until after provincial laws regulating 40 Sunday activities were struck down by the Privy Council in Attorney General (Ontario) v. Hamilton Street Railway, [1903] A.C. 524. Many of those pre-1903 provincial laws may have been motivated in part by religious 50 considerations; but they also dealt with limitations on

work and play from a secular perspective, the perspective of preserving one day a week for community rest and recreation. (See, for example, the original 'Saskatchewan Lord's Day law, attached as Appendix A.) It is submitted that the 1907 federal Act must be understood in this context. In effect that Act (especially section 4 which allowed and still allows provincial governments to create exceptions to the Act) was intended to reinstate the pre-Hamilton Street Railway position, a position characterized by laws regulating Sunday activities from both religious and secular perspectives. In other words, it is submitted that the original purpose of the Lord's Day Act was a mixture of religious and secular factors.

17. It is submitted that the purpose of the Lord's Day Act today is largely secular, namely the prohibition of activities which might undercut the moral value of a single community-wide day of rest and recreation.

18. As a preliminary or introductory point, it is submitted that just as the effects of a law can change over time as the law operates in changing social circumstances so the purpose of a law can also change over time to respond to those new circumstances. As expressed by Laskin, C.J.C. in Regina v. Zelensky, [1978] 2 S.C.R. 940 at 951:

New appreciations thrown up by new social conditions, or re-assessments of old appreciations which new or altered social conditions induce make it appropriate for this Court to re-examine courses of decision on the scope of legislative power when fresh issues are presented to it, always remembering, of course, that it is entrusted with a very delicate role in maintaining the integrity of the constitutional limits imposed by the British North American Act.

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19. In the United States the judicial characterization of the purpose of Sunday closing laws has in fact undergone a transformation. In McGowan v. Maryland, supra, Chief Justice Warren said, at pp. 444-5:

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In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than a religious character... The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

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20. It is submitted that a similar process of change has taken place with respect to the Canadian Lord's Day Act. Although its original purpose was probably one combining religious and secular factors, its 'present purpose', it is

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submitted, is largely secular, namely 'to provide a uniform day of rest for all citizens'. It is submitted that the contemporary secular purpose of the Lord's Day Act emerges particularly clearly when one examines the provincial legislation that has been enacted pursuant to section 4 of the Act. In many respects, the federal Act is a 'framework' law. It contains general prohibitory provisions but it leaves the door open, through section 4, for provincial governments to flesh out the legislation. In Saskatchewan, the fleshing out has occurred under two laws, The Lord's Day (Saskatchewan) Act, R.S.S. 1978, c. L-34 (dealing with games and contests), and sections 166-174 of The Urban Municipality Act, R.S.S. 1978, c. U-10 (dealing with shop closing). It is submitted that a fair reading of these Acts (attached as Appendices B and C) indicates that they (and, through them, the federal Lord's Day Act) have as their purpose today the prohibition of activities which might undercut (and the authorization of activities which might enhance) the moral value of a single community-wide day of rest and recreation. The fact that the day chosen is Sunday flows, it is submitted, from historical and majoritarian - not religious - considerations.

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21. In summary, it is submitted that the Lord's Day Act does not aim at the subject matter of religion. Its purpose today is not to address any of the components of freedom of religion set out above in paragraph 13. The Act is silent or neutral on these components. Its purpose today is secular.

ii. Effects

22. The Attorney General of Saskatchewan submits that Ritchie, J.'s analysis in 1963 of the effects of the Lord's Day Act is still applicable today. In Robertson and Rosetanni v. The Queen, supra, Ritchie, J. said, at pp. 657-8:

My own view is that the effect of the Lord's Day Act rather than its purpose must be looked to in order to determine whether its application involves the abrogation, abridgment or infringement of religious freedom, and I can see nothing in that statute which in any way affects the liberty of religious thought and practice of any citizen of this country. Nor is the "untrammelled affirmations of religious belief and its propagation" in any way curtailed.

The practical result of this law on those whose religion requires them to observe a day of rest other than Sunday, is a purely secular and financial one in that they are required to refrain from carrying on or conducting their business on Sunday as well as on their own day of rest. In some cases this is no doubt a business inconvenience, but it is neither an abrogation nor an abridgment nor an infringement of religious freedom, and the fact that it has been brought about by reason of the existence of a statute enacted for the purpose of preserving

the sanctity of Sunday, cannot, in my view, be construed as attaching some religious significance to an effect which is purely secular in so far as non-Christians are concerned.

(emphasis in original)

10 23. The Attorney General of Saskatchewan also adopts the analysis of Belzil, J.A. (Case on Appeal pp. 190-1) on this point:

20 Nor does the Lord's Day Act have the effect of compelling observance of Sunday as a religious holy day. The compulsion to attend church services found in predecessor English statutes has been removed. The sale of goods or the performance of labour are, per se, void of religious significance, and so is the abstention from these activities. It is only to the extent that these secular acts are shrouded with personal religious cult or belief that they acquire a religious color.

(emphasis in original)

30 24. There can be no doubt that the Lord's Day Act may well operate to the disadvantage of some non-Christians (almost all Acts advantage and disadvantage different groups). But the point is, it is submitted, that the disadvantages that non-Christians may experience because of the Act are not religious disadvantages. The 'freedom of religion' of non-Christians is not impaired by the Act; a non-Christian is not compelled to perform (nor is he prevented from performing) any act of religious
40 significance. Rather, the effects of the Act are entirely
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secular. The disadvantages that a non-Christian may experience are entirely economic; they are not religious.

c. Summary

10 25. Any law that abrogates or infringes a right
protected in the Charter is unconstitutional (unless saved
by section 1). Because of this, it is submitted, care must
be taken not to define the substantive rights enumerated in
the Charter, such as freedom of religion, in too broad a
20 fashion. Equally, care should be taken not to lightly
ascribe an unconstitutional (in this case 'religious')
purpose or effect to a law.

30 26. It is submitted that a valuable framework for
considering the relationship between the concept of freedom
of religion and laws which raise an issue of compliance
with that concept is contained in Professor Lawrence
Tribe's text, American Constitutional Law. Professor Tribe
suggests that the 'central test' for resolving cases
40 raising the relationship mentioned above is the idea of
'secular purpose and effect'. He says, at p. 835:

50 The most fundamental requirement in a
constitutional system designed to secure religious
autonomy is that governmental action at least be
justifiable in secular terms. Actions not
justifiable in this way will typically violate the
establishment clause, and, to the extent that they

limit freedom to act upon one's belief, will violate the free exercise clause as well.

And at p. 839:

A requirement as fundamental in the law of the religion clauses as that of secular purpose is the requirement of secular effect.

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27. But how does one distinguish between what is religious and what is secular? Professor Tribe suggests this framework for considering 'secular purpose', at p.

835:

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[T]he definition of 'secular' here must be a generous one: if a purpose were to be classified as non-secular simply because it coincided with the beliefs of one religion or took its origin from another, virtually nothing that government does would be acceptable; laws against murder, for example, would be forbidden because they overlapped the fifth commandment of the Mosaic Decalogue.

And, for 'secular effect', he says, at pp. 839-40:

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As the secular effect requirement has developed, the premise of governmental neutrality in religious matters has been held to imply that, while no law may be passed whose primary effect is to aid a particular religion or even religion in general, a law may not be struck down simply because the secular effects government seeks to produce (for example, fire and police protection) happen to be realized in a religious context (for example, preventing arson of a church or robbery of a priest). To strike down a public choice on the sole ground that it incidentally makes religious actions easier or less costly would clearly be to single out religious groups for hostile treatment, contrary to the mandate of the first amendment's free exercise clause.

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28. Professor Tribe then applies his analysis in the context of the Sunday closing law decisions of the United States Supreme Court. He says (in a passage which starts with a reference to 'secular purpose' but then incorporates 'secular effect'), at pp. 835-6:

10 The Court has interpreted the secular purpose requirement in much this way. ['generously']. For example, the fact that Sunday closing laws had their origins in religious considerations, and that Sunday remains a day of special religious significance for many, has not led the Court to conclude that such laws fail to meet the requirement of secular purpose. On the contrary, the Court said in McGowan v. Maryland: 'The present... effect of most of [these laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals.'

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29. The Attorney General of Saskatchewan submits that a similar framework of analysis and parallel conclusions are appropriate in the context of the federal Lord's Day Act. That Act, it is submitted, has a secular purpose today, namely the prohibition of activities which might undercut the moral value of a single community-wide day of rest and recreation. As well, it is submitted, the effects of the Act are secular. Some activities are prohibited which will work to the economic disadvantage of some. Other activities are permitted which will benefit the health and safety of some (section 11 of the Act), will work to the economic advantage of some (section 11 of the Act, and

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through the operation of provincial laws enacted pursuant to the authorization contained in section 4 of the Act), and will promote the rest and recreation of some (the provincial laws again - e.g. permission to hold sporting events). None of these effects, it is submitted, is religious. Accordingly, the Attorney General of Saskatchewan submits that the decision of the Court in Robertson and Rosetanni holding that the Lord's Day Act did not violate 'freedom of religion' under the Canadian Bill of Rights was correct and should be followed in this appeal which raises the same question in a Charter context.

QUESTION 2

30. The Attorney General of Saskatchewan submits that the onus of establishing that a limitation on a right protected in the Charter is a reasonable one is on the government contending for the limitation. In this appeal the justification for a section 1 limitation would have to come from the federal government. Accordingly, the Attorney General of Saskatchewan takes no position on this question.

QUESTION 3

10 31. It is submitted that the Lord's Day Act is on authority valid federal legislation under the criminal law power. This Honourable Court has so held - early, regularly and recently.

See: Quimet v. Bazin (1912), 46 S.C.R. 502.

Henry Birks and Sons (Montreal) Ltd. v. The City of Montreal, [1955] S.C.R. 799.

20 Robertson and Rosetanni v. The Queen, supra.

City of Hamilton v. Canadian Transport Commission, [1978] 1 S.C.R. 640.

30 32. The Attorney General of Saskatchewan does not seek to displace that characterization. The Lord's Day Act, when enacted and to this day, couples prohibitions and penalties with the element of a criminal public purpose, in this case morality, and as such falls under the criminal law power.

40 See: Re Section 5(a) of the Dairy Industry Act, [1949] S.C.R. 1 at 50 per Rand, J.

PART IV


NATURE OF ORDER SOUGHT

10 33. The Attorney General of Saskatchewan requests that
the appeal be allowed and that the Constitutional Questions
be answered as follows:

1. No
3. Yes

20 The Attorney General of Saskatchewan takes no
position concerning Question 2.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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James C. MacPherson

Counsel for the Attorney General
of Saskatchewan

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LIST OF AUTHORITIES

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