19053

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

B E T W E E N :

EDWARDS BOOKS AND ART LIMITED

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE APPELLANT EDWARDS BOOKS AND ART LIMITED

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PART I

STATEMENT OF FACTS

1. This is an appeal from the Judgment of the Ontario Court of Appeal which dismissed an appeal by the Appellant from the Judgment of The Honourable Judge Conant of the County Court of the Judicial District of York wherein an appeal was allowed from the Judgment of His Honour Judge Charlton of the Provincial Offences Court of the Judicial District of York acquitting the Appellant on all charges under section 2(1) of the Retail Business Holidays Act, R.S.O. 1980, c. 453 (the "RBHA"). The appeal by the Appellant to the Ontario Court of Appeal was heard together with appeals in seven other cases under the RBHA.

Notice of Appeal to the Supreme Court of Canada, Case, Vol. I, p. 63.

Judgment of the Ontario Court of Appeal, Case, Vol. II, p. 232-233.

Reasons for Judgment of the Ontario Court of Appeal, Case, Vol. II, p. 240-317.

Judgment of The Honourable Judge Conant, Case, Vol. II, p. 183-189.

Judgment of His Honour Judge Charlton,
Case, Vol. II, p. 160-169.

2. This appeal is brought pursuant to leave granted by this Honourable Court on the 9th day of May, 1985.

Order of the Supreme Court of Canada,
Case, Vol. I, p. 59.

3. At the trial, the Appellant pleaded not guilty to three charges that were before the Court and the case proceeded on the basis of agreed facts including the following. Police officers attended on Sunday, the 16th day of March, 1983, at the business premises of the Appellant located at 2301 Yonge Street in Toronto. They observed that the premises, being the Edwards Books and Art store, were open and admitting the public into the store. The sign posted outside the store read "Open Sunday, 11 to 6". Inside the store the officers observed 12 customers browsing through books and two employees working at the cash counters assisting customers with titles and purchases. The store contains an inventory of approximately five to seven thousand books of which 288 are rare or out of print books known as "collectibles".

Transcript of Evidence at Trial,
p. 3, l. 7 - p. 6, l. 27, Case,
Vol. I, p. 74-77.

4. The principals of the Appellant company are of Jewish faith and their Sabbath day is on Saturday. There was no option taken to close the store on Saturday.

Transcript of Evidence at Trial,
p. 17, l. 7-12, l. 20-22, Case,
Vol. I, p. 80.

5. In his Reasons for Judgment, His Honour Judge Charlton found that the RBHA did not provide adequate protection for those who chose to observe another day such as Saturday as a holiday and in the result, dismissed the three charges that were before him.

Judgment of His Honour Judge Charlton,
Case, Vol. II, p. 160-169.

6. The appeal by the Attorney-General of Ontario to the County Court proceeded on only one of the charges. In his Reasons for Judgment, the Honourable Judge Conant held that the RBHA is valid provincial legislation and that it does not infringe upon the freedom of conscience and religion guaranteed by section 2(a) of the Canadian Charter of Rights and Freedoms being Part I of the Constitution Act, 1982 ("the Charter"). In the result, the appeal was allowed and a conviction was registered against the Appellant with a fine imposed of $100.00.

Judgment of The Honourable Judge Conant, Case, Vol. II, p. 183-189.

7. The Appellant's appeal to the Ontario Court of Appeal was heard along with the seven other appeals by a five member panel. The Court of Appeal delivered one set of Reasons dealing with the issues raised in all the appeals before the Court. In delivering the Reasons on behalf of the Court, the Honourable Mr. Justice Tarnopolsky held:

(i) that the RBHA is within the legislative jurisdiction of the Province of Ontario;

(ii) that while there is some duplication between the federal Lord's Day Act and the RBHA, the latter is not rendered inoperative under the doctrine of paramountcy;

(iii) that even though the RBHA may have a secular purpose, the primary question in assessing whether the RBHA contravenes the Charter is to determine the effect of the impugned legislation;

(iv) that the historical restriction which determined the parameters of freedom of religion under the Canadian Bill of Rights is not determinative of freedom of conscience and religion under the Charter;

(v) that the appellants before the Court could not rely upon the Charter's protection of freedom of conscience

because it happens to coincide with someone else's Sabbath, but rather, to make such an objection one would have to demonstrate, based upon genuine beliefs and regular observance, that one holds as a sacrosanct day of rest a day other than Sunday and is thereby forced to close one's business on that day as well as on the enforced holiday;

(vi) that the RBHA cannot be said to infringe the freedom of conscience or religion of those appellants who do not close their business establishments on a day other than Sunday because it is their Sabbath;

(vii) however, for those who do sincerely observe a day other than Sunday as the Sabbath, the effect is dramatically different as the RBHA makes the observance of their Sabbath financially onerous;

(viii) that where one claims exemption on grounds of religion or conscience, one must be prepared to show that the objection is based upon a sincerely held belief based upon a life-style required by one's conscience or religion;

(ix) that on the facts before the Court, only the appellant Nortown Foods Ltd. established that it is entitled to relief from the provisions of the RBHA because of sincerely held religious beliefs;

(x) that the onus upon the Attorney-General under section 1 of the Charter had not been met;

(xi) that the RBHA is "inconsistent" within the meaning of section 52(1) of the Constitution Act, 1982 only to the extent that it does not provide for adequate religious exemptions, but to strike down section 3(4) of the RBHA would leave section 2 of the RBHA in operation with no exemption at all for religious minorities who do not observe Sunday as the Sabbath;

(xii) that what is required is re-drafting of the exemption

provided in section 3(4) of the RBHA to meet the requirements of the Charter, which is not the role of the judiciary;

(xiii) that for the purposes of disposing of the appeals before the Court, section 2 of the RBHA is of no force or effect only in regard to the appellant Nortown Foods Ltd. with its appeal being allowed;

(xiv) that the appeals of the other appellants, including the Appellant, were dismissed to the extent they were based on this ground;

(xv) that the RBHA does not infringe sections 2(b), 6 and 7 of the Charter, but for reasons related to statutory interpretation of certain provisions of the RBHA, the appeals of the appellants Videoflicks Ltd. and Michael Chaimovitz were allowed.

Reasons for Judgment of the Ontario Court of Appeal, Case, Vol. II, p. 240-317 [reported at (1984), 48 O.R. (2d) 395].

8. The constitutional questions stated by this Honourable Court are as follows:

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?

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?

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?

Order of the Supreme Court of Canada
Case, Vol. I

PART II

POINTS IN ISSUE

9. The Appellant makes no submissions to this Honourable Court on the first constitutional question posed for the consideration of the Court.

10. With respect to the second constitutional question, it is the position of the Appellant that the RBHA, and in particular section 2 thereof, infringes the fundamental freedom of religion guaranteed by section 2(a) of the Charter. The Appellant therefore supports the decision of the Ontario Court of Appeal so far as it holds that section 2 of the RBHA infringes freedom of religion. However, the Appellant submits, with respect, that the Ontario Court of Appeal erred in finding that the RBHA was of no force or effect only with respect to those persons who could demonstrate that they had closed their businesses on a day other than Sunday by reason of a genuine or sincerely held religious belief. It is submitted, with respect, that the Ontario Court of Appeal ought to have held that because the RBHA infringes the freedom of religion guaranteed by section 2(a) of the Charter, the RBHA was of no force or effect for all persons within the Province of Ontario.

11. With respect to the third constitutional question, the Appellant submits that the Attorney General for Ontario has not demonstrated that the infringement of freedom of religion which results from the operation of the RBHA can be justified by section 1 of the Charter so as to be rendered not inconsistent with the Constitution Act, 1982.

PART III

ARGUMENT

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?

(i) Analytical Test

12. It is submitted that the first issue to be considered is how the RBHA is to be tested to determine its consistency or inconsistency with the Charter. The Ontario Court of Appeal held in the case at bar that the appropriate approach is to examine the effect of the legislation. In Her Majesty The Queen v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, the decision of this Honourable Court released subsequent to the decision of the Ontario Court of Appeal, the Court considered whether the Lord's Day Act, R.S.C. 1970, c. L-13, was unconstitutional as being beyond the powers of Parliament and, further, whether that statute infringed freedom of religion as guaranteed by section 2(a) of the Charter. Mr. Justice Dickson (as he then was) in his Reasons concurred in by Beetz, McIntyre, Chouinard and Lamer, JJ., held that in testing constitutional validity both the purpose and effect of the impugned legislation must be examined. Mr. Justice Dickson said at p. 334:

> "In short, I agree with the respondent that the legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose."

Madame Justice Wilson, in separate Reasons concurring in the result, stated that the proper analytical approach to a Charter case was to examine the effect of the impugned legislation.

13. In considering whether the RBHA was within the power of the Legislature of Ontario to enact, the Ontario Court of Appeal decided that the RBHA was a law with a secular purpose or intent. If that finding were to be upheld by this Court, the first stage of the analysis adopted by the majority of this Court in R. v. Big M Drug Mart, supra, would not be applicable. However, it is submitted that the approach taken by the Ontario Court of Appeal in examining the effect of the RBHA is consistent with the second stage of the analysis adopted by the majority of this Court and the analysis proposed by Madame Justice Wilson in R. v. Big M Drug Mart, supra.

(ii) Scheme and Effect of the RBHA

14. Section 2(1) of the RBHA requires every person carrying on a retail business in a retail establishment to ensure that no member of the public is admitted to the establishment and no goods or services are sold on a holiday. Section 2(2) provides that no employee of a person carrying on a retail business shall admit members of the public to the retail business establishment or offer any goods or services for sale on a holiday. A "holiday" for the purposes of the RBHA includes Sunday of each week (section 1(1)(a)(ix)). Section 3 of the RBHA provides that section 2 is not applicable to some retail businesses including

- small stores selling only limited types of goods (s. 3(1));
- pharmacies employing fewer than four persons (s. 3(2));
- gasoline stations (s. 3(3)(a));
- nurseries and florists (s. 3(b));
- stores selling fruit or vegetables between April and November (s. 3(a));

- stores which are closed to the public during a period of twenty-four consecutive hours in the period of thirty-two consecutive hours immediately preceding Sunday and which limit the number of employees serving the public on the following Sunday to seven and use less than 5,000 square feet of sales and display space (s. 3(4));
- establishments dispensing goods under permit (s. 3(5) (a) and (b));
- premises admitting the public for educational, recreational or amusement purposes (s. 3(6));
- businesses offering necessary services such as hotels, restaurants, laundromats and boat rentals and repairs (s. 3(7)).

Section 4 of the RBHA permits further exception from the operation of section 2 of the RBHA for classes of retail businesses which are essential to the development or maintenance of a tourist industry where authorized by municipal by-law. Section 7 of the RBHA provides that every person who contravenes the RBHA is guilty of an offence and, on conviction, liable to a fine of not more than $10,000.00.

15. A reading of the RBHA permits the following observations to be made:

(a) while a retail merchant whose retail business establishment is closed Saturday may remain open on Sunday to sell any of the goods or services offered by the merchant on the days of the week other than Saturday, the premises to be used on Sunday are limited to an area of 5,000 square feet (e.g. 70 feet by 70 feet) and no more than seven employees may service customers regardless of the size of the establishment and number of employees working on the other five days of the week;

(b) the right to a limited opening on Sunday where business premises are closed Saturday as provided by section 3(4)

of the RBHA is not conditioned upon the holding of any religious belief;

(c) while a limited exemption is provided for persons closing Saturday, no exemption is provided for persons who may wish to close on other days of the week by reason of religious beliefs or otherwise;

(d) the prohibitions of the RBHA are enforced by the sanction of prosecution, conviction and fine.

16. It is submitted that the effect of the RBHA on a person whose religious beliefs require that person's retail business be closed on a day other than Sunday, is to make him choose between not observing his religious beliefs, on the one hand, or observing them and having his retail business open to the public only part of the time that his competitors who practice the Christian faith or no faith at all will be open for business. It is submitted that the RBHA puts a real and measurable price on a person's freedom to honour the observances required by that person's religion.

(iii) Ambit of Section 2(a) of the Charter

17. If, as submitted, it is accepted that the effect of the RBHA is to impose a financial or economic burden on some persons in respect of their religious practices, the question then to be addressed is whether that effect can be said to render the RBHA inconsistent with section 2(a) of the Charter which provides:

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

The answer to the question necessitates an examination of the ambit of the freedom guaranteed by section 2(a).

18. In R. v. Big M Drug Mart Ltd., supra, this Court considered the meaning of freedom of conscience and religion

guaranteed by the Charter in the context of examining whether the Lord's Day Act, which had been found by the Court to have as its purpose the compulsory observance of Sunday as a Christian Sabbath, infringed that freedom. Mr. Justice Dickson (as he then was) in discussing freedom of religion, said at p. 336-337:

> "... The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."

Mr. Justice Dickson went on to consider the meaning to be given to the freedom of religion and conscience guaranteed by the Charter in the light of the purpose of the guarantee. After considering the historical context of the freedom and observing that the rights associated with freedom of individual conscience were central to "basic beliefs about human worth and dignity and to a free and democratic political system" (p. 346), Mr. Justice Dickson stated at p. 346-347:

> "Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold

> and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. 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. I leave to another case the degree, if any, to which the government may, to achieve a vital interest or objective, engage in coercive action which s. 2(a) might otherwise prohibit."

In the result, the Court held that the Lord's Day Act, for a religious purpose, operated to deny to non-Christians rights which they would otherwise have had and therefore infringed the freedom of religion of those persons.

19. Mr. Justice Tarnopolsky, in his Reasons, concluded that manifestations of religious belief such as the observance of a Sabbath day were within the ambit of the freedom of religion and conscience guaranteed by the Charter. It is respectfully submitted that the Ontario Court of Appeal's decision in this respect is consonant with the statements of Mr. Justice Dickson in R. v. Big M Drug Mart Ltd., supra referred to in the preceding paragraph.

(iv) Infringement of Section 2(a) of the Charter

20. (a) It is submitted that by making it more costly for a person whose Sabbath day is other than Sunday to observe a practice of that person's religion, the RBHA infringes that person's freedom of religion guaranteed by the Charter. Mr.

Justice Tarnopolsky dealt with the effect of the RBHA in his Reasons in this way:

> "The Act cannot be said to infringe the freedom of conscience or religion of those appellants who do not close their business establishments on a day other than Sunday because it is their Sabbath. In that part of this judgment which dealt with the jurisdictional issue, it has been determined that the intent and purpose of the Act is secular. It is not concerned with compelling observance of the Sabbath of the majority of the Christian religion nor is its effect to impose that view upon society at large. In this sense, the present appeal is on an entirely different footing than the decision of the Alberta Court of Appeal in Big M Drug Mart, supra. However, with respect to those appellants who do sincerely observe a day other than Sunday as the Sabbath by having to close their business establishments, the effect is dramatically different. As discussed previously, a law which prohibits certain practices which are an essential part of one's religion must be considered an abridgement or infringement of freedom of religion. This is so even though the impact on religion occurs, as here, in an indirect sense. While the Act does not require that one work on one's Sabbath, it nevertheless constitutes a major inducement to do so. For those who observe a Sabbath other than Sunday, being forced to close on both days of a weekend or, for that matter, any two days in a week, when one's competitors can remain open for six days, makes observance of one's Sabbath financially onerous."
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> Case, Vol. II, p. 284-285; 48 O.R. (2d) at p. 423.

(b) The Appellant also relies on the finding of Madame Justice Wilson in R. v. Big M Drug Mart, supra, at p. 361-362 that the effect of the Lord's Day Act infringed section 2(a) of the Charter.

21. While this Appellant supports the conclusion of the Ontario Court of Appeal, that the RBHA infringes freedom of religion of some persons, it is submitted with respect that the Ontario Court of Appeal erred in limiting the consequences of that infringement to a case by case appraisal by deciding

religious belief and who closed their business premises on a day other than Sunday. It is respectfully submitted the Ontario Court of Appeal should have held that section 2 of the RBHA was of no force or effect.

(v) Robertson and Rosetanni

22. In finding that the effect of the RBHA infringed freedom of religion, Mr. Justice Tarnopolsky considered the decision of this Court in Robertson and Rosetanni and The Queen, [1963] S.C.R. 651. In that case, the issue was whether the Lord's Day Act infringed the freedom of religion guaranteed by section 1(c) of the Canadian Bill of Rights. Mr. Justice Ritchie, who delivered Reasons for the majority of the Court, held that the effect of the Lord's Day Act did not curtail freedom of religious thought or practice within the meaning of the Canadian Bill of Rights. In that case Mr. Justice Ritchie stated at p. 657-658:

> "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."

Mr. Justice Tarnopolsky expressed the view that the conclusion reached by Mr. Justice Ritchie that the "effect" of the Lord's Day Act did not infringe freedom of religion within the meaning of the Canadian Bill of Rights was grounded on the

premise that the Lord's Day Act was in existence at the date when the Canadian Bill of Rights became law and the Lord's Day Act had never been considered an interference with freedom of religion as that right existed in Canada before the passage of the Canadian Bill of Rights by Parliament. The Ontario Court of Appeal decided that the ambit of the Charter's guarantee of freedom of religion was not determined by the parameters of freedom of religion under the Canadian Bill of Rights.

23. Robertson and Rosetanni, supra, was considered by this Court in R. v. Big M Drug Mart, supra. This Court concluded that the decision of the Court in Robertson and Rosetanni as to the meaning of freedom of religion in the Canadian Bill of Rights was not determinative of the scope of freedom of religion in the Charter. In that regard, Mr. Justice Dickson stated at p. 343:

> "I agree with the submission of the respondent that the Charter is intended to set a standard upon which present as well as future legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the Charter. For this reason, Robertson and Rosetanni, supra, cannot be determinative of the meaning of "freedom of conscience and religion" under the Charter. We must look, rather, to the distinctive principles of constitutional interpretation appropriate to expounding the supreme law of Canada."

24. Since the majority of this Court in R. v. Big M Drug Mart, supra, found that the purpose of the Lord's Day Act infringed the Charter freedom of religion, this Court did not need to consider whether that statute had an effect which infringed the Charter freedom of religion. However, it is submitted, with respect, that the characterization by Mr. Justice Ritchie in Robertson and Rosetanni, supra, of the effect of the Lord's Day Act as being only secular and financial and therefore not an infringement of the Canadian Bill of Rights

freedom of religion is not applicable when considering the effect on the Charter guaranteed freedom of religion as found by the Ontario Court of Appeal.

(vi) United States Decisions

25. Laws requiring certain businesses to close on Sundays have been considered and upheld by the Supreme Court of the United States. In four companion cases decided in 1961, (McGowan et al. v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley et al., 366 U.S. 582 (1961); Braunfeld et al v. Brown et al., 366 U.S. 599 (1961) and Gallagher et al. v. Crown Kosher Supermarket of Massachusetts, Inc. et al., 366 U.S. 617 (1961)) the Court rejected arguments that the particular laws violated the religious freedom protected by the First Amendment of the United States Constitution. In Braunfeld, the appellants were Orthodox Jews who were required by their religious beliefs to keep their places of business closed from Friday night to Saturday night. They argued that a Pennsylvania statute which prohibited Sunday sales of certain products would prohibit free exercise of the appellants' religion by impairing their ability to earn a livelihood. Chief Justice Warren, in an opinion concurred in by Justices Black, Clark and Whittaker, said that the Sunday law did not make the practice of the appellants' religious beliefs unlawful but merely more expensive. The Court found the Sunday closing laws to be a legitimate exercise of state legislative authority for a secular purpose, and held that the statute's indirect effect on the religious practice of the appellants should not operate to restrict the legislature's latitude. As a result, the closing laws were valid. A similar argument as to the effect of Sunday closing laws on the free exercise of religion was advanced in Gallagher v. Crown Kosher and rejected by the Court. In McGowan v. Maryland and Two Guys v. McGinley it was argued, inter alia, that the economic burden imposed by the inability to operate a business on Sunday had the effect of making the Sunday closing

law one that provided for the establishment of religion in violation of the First Amendment. This argument was rejected on the basis that neither the purpose nor the effect of the relevant statute was religious but rather provided a uniform day of rest.

26. While those decisions of the United States Supreme Court on their face seem to reach a conclusion opposite to that reached by the Ontario Court of Appeal, it is submitted that an examination of those U.S. decisions shows that they are based upon a constitutional provision which is different from the Charter freedom of religion, and proceed upon a doctrinal analysis that reflects the different schemes of the American and Canadian constitutions and the historical context within which they are to be interpreted. Mr. Justice Tarnopolsky distinguished those cases in the following way:

> "In coming to this conclusion, I am not unmindful of the fact that a majority of the United States Supreme Court in four cases decided on the same day -- McGowan v. Maryland, 366 U.S. 420 (1961), Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961), Braunfeild v. Brown, 366 U.S. 599 (1961), Gallagher v. Crown Kosher Supermarket of Massachusetts, 366 U.S. 617 (1961) -- held that the various impugned Sunday closing laws were not invalid as infringing the First Amendment freedom of religion, including both the non-establishment and free exercise aspects thereof. I agree with counsel for the intervenant Seventh-Day Adventist Church that these decisions were based on a balancing of freedom of religion and reasonable limits that are required in the governing of society. In other words, since the United States Bill of Rights does not have a specific limitations clause, as is the case under our Charter, the definition of freedom of religion in that country has to include a consideration of reasonable limits. Under the Charter, as this Court affirmed in R. v. Oakes (1983), 40 O.R. (2d) 660, in R. v. Southam News, supra, and in Ontario Film Appreciation Society v. The Ontario Board of Censors, supra, the rights and freedoms set out in the Charter must be defined first and then a court must consider whether a limit on such right or freedom is a reasonable limitation expressed by law and which is demonstrably justifiable in a free and democratic society. Moreover, the lack of a specific limitations clause in the United States constitution directly influenced the approach of the

> United States Supreme Court. It proceeded upon a strict presumption in favour of constitutionality which the applicants challenging the legislation had to overcome. Again, the approach mandated by s. 1 of the Charter is on a completely different footing."
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> Case, Vol. II, p. 286-287; 48 O.R. (2d) at p. 424.

27. The decision of the United States Supreme Court in McGowan v. Maryland, supra, and its companion cases should be contrasted with the decision of that Court in the subsequent case of Sherbert v. Verner, 374 U.S. 398 (1963). In that case, the Court had to consider whether the appellant, a Seventh-Day Adventist, who declined to work on a Saturday because of her religious belief and who had been refused unemployment benefits for that reason, was entitled to the protection of the First Amendment guarantee of free exercise of religion. The Court held that the indirect financial burden of the state law on the appellant's free exercise of religion did violate her constitutional right.

28. Sherbert, supra, was followed by the United States Supreme Court in its decisions in Wisconsin v. Yoder, 406 U.S. 205 (1972), which involved a conflict between compulsory education legislation and religious beliefs of the Amish sect, and in Thomas v. Review Board of Indiana Security Division et al., 450 U.S. 707 (1981), which involved a conflict between unemployment compensation legislation and the religious beliefs of a Quaker who objected to working on armament production (but see United States v. Lee, 455 U.S. 252 (1982) where Social Security legislation prevailed over beliefs of Amish sect employers). Mr. Justice Tarnopolsky relied upon the reasoning in the Sherbert and Thomas cases, supra, in support of the conclusion he reached as to the effect of the RBHA on the Charter freedom of religion.

29. It is submitted that the American authorities should be approached with caution when seeking assistance in deciding whether the effect of a Canadian law such as the RBHA infringes

the freedom of religion guaranteed by the Charter. The First Amendment guarantee has been construed as protecting against the establishment of religion by the state and against interference with the free exercise of religion, with the result that the United States courts, addressing questions involving freedom of religion, proceed on a different basis from that which this Court has indicated must be taken in addressing alleged infringements of Charter freedoms. Secondly, as Mr. Justice Tarnopolsky pointed out, the United States Constitution does not have a provision comparable with section 1 of the Charter, which contemplates an objective appraisal by the court of whether or not a restriction of Charter rights once found to exist can be justified. In the United States the court, in examining legislation, balances legitimate state purpose against the effect of the legislation on constitutional rights, and unless it can be demonstrated that the purpose can be achieved in a manner which does not violate those rights, generally speaking the court will give effect to those statutes which are found to be for a valid public purpose. Finally, again as Mr. Justice Tarnopolsky pointed out, the Charter mandates that any assessment of a law which may infringe the Charter must take into account the multicultural heritage of Canadians.

(vii) Section 27 of the Charter

30. Section 27 of the Charter provides that the Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. In R. v. Big M Drug Mart, supra, Mr. Justice Dickson stated at p. 337-338:

> "I agree with the submission of the respondent that to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians. To do so is contrary to the expressed provisions of s. 27, which as earlier noted reads:
>
> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the

multicultural heritage of Canadians."

(viii) Section 52(1) of the Charter

31. The Ontario Court of Appeal held that the defect in the RBHA was not in section 2 which required Sunday closing but in section 3(4) because it provided only an incomplete sabbatarian exemption. While the Court declined to undertake a judicial redrafting of section 3(4) of the RBHA, it did find that with respect to Nortown Foods Ltd., section 2 of the RBHA was of no force or effect because that business establishment was the only appellant in the Court of Appeal which could sincerely or genuinely claim a religious exemption from the RBHA.

32. In Lawson A. W. Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145, it was argued that a section of the Combines Investigation Act, R.S.C. 1970, c. C-23, which authorized entry, search and seizure of premises should be read to include a standard by which orders issued under the section could be tested so as to avoid conflict with section 8 of the Charter which protects against unreasonable searches. Mr. Justice Dickson (as he then was) rejected the argument because the lack of an independent arbiter in the statutory scheme made the impugned section overtly inconsistent with section 8 of the Charter and therefore any possibility of reading in an appropriate standard "purely academic". His Lordship went on to state at p. 168:

> "The appellants submit that even if subss. 10(1) and 10(3) do not specify a standard consistent with s.8 for authorizing entry, search and seizure, they should not be struck down as inconsistent with the Charter, but rather that the appropriate standard should be read into these provisons. An analogy is drawn to the case of MacKay v. The Queen, [1965] S.C.R. 798, in which this Court held that a local ordinance regulating the use of property by prohibiting the erection of unauthorized signs, though apparently without limits, could not have been intended unconstitutionally to encroach on federal competence over elections, and should therefore be "read down" so as not to apply to election signs. In the present case, the overt inconsistency with s.8 manifested by the lack of a neutral and detached arbiter renders the

appellants' submissions on reading in appropriate standards for issuing a warrant purely academic. Even in this were not the case, however, I would be disinclined to give effect to these submission. While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. Without appropriate safeguards legislation authorizing search and seizure is inconsistent with s. 8 of the Charter. As I have said, any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. I would hold subss. 10(1) and 10(3) of the Combines Investigation Act to be inconsistent with the Charter and of no force and effect, as much for their failure to specify an appropriate standard for the issuance of warrants as for their designation of an improper arbiter to issue them."

(emphasis added)

33. In Regina v. Oakes (1983), 40 O.R. (2d) 660 (leave to appeal to this Court granted 2 C.C.C. (3d) 339n), Mr. Justice Martin, speaking for a five member panel of the Ontario Court of Appeal, stated at p. 682-683:

"Initially, I was attracted to the view held by some trial judges, in the cases previously referred to, that s. 8 was constitutional but inoperative in those cases where the accused possessed only a small quantity of a narcotic drug which did not indicate that the drug was possessed for the purpose of trafficking. After careful consideration I have rejected that view. Parliament has made no distinction based upon the quantity of drugs possessed, and I do not think that we are entitled to re-write the statute. Parliament, if it had wished to do so, might have decided that possession of a specified quantity of a certain drug was more consistent with trafficking than possession for personal use, and could have made the possession of the specified quantity presumptive evidence that the drug was possessed for the purpose of trafficking. If Parliament had made that determination (and assuming that the determination was not capricious), I would be disposed to think that it would be a determination that Parliament is constitutionally empowered to make. Since, however, Parliament has not addressed that issue, I do not think the courts should undertake to re-write the statute by applying it on a "case by case" basis even if we were entitled to

do so, and I think we are not. The presumption created by s. 8 is in the nature of a mandatory presumption. Its constitutional validity must be determined by an analysis of the presumption divorced from the facts of the particular case. The judgement of the United States Supreme Court in County Court of Ulster Cty v. Allen, supra, is consistent with this view."

34. In Re Southam Inc. and The Queen (No. 1) (1983), 41 O.R. (2d) 113, Associate Chief Justice MacKinnon, speaking for the Ontario Court of Appeal, stated at p. 134-135:

"Although there is a rational basis for the exclusion of the public from hearings under the Juvenile Delinquents Act, I do not think an absolute ban in all cases is a reasonable limit on the right of access to the courts, subsumed under the guaranteed freedom of expression, including freedom of the press. The net which s. 12(1) casts is too wide for the purpose which it serves. Society loses more than it protects by the all embracing nature of the section. As stated earlier, counsel for the Attorney-General was quick to acknowledge (and very fairly so) that not every juvenile court proceeding would require the barring of public access. An amendment giving jurisdiction to the court to exclude the public from juvenile court proceedings where it concludes, under the circumstances, that it is in the best interests of the child or others concerned or in the best interests of the administration of justice to do so would meet any residual concern arising from the striking down of the section. As Mr. Justice Martin said in R. v. Oakes (released February 2, 1983, unreported) [since reported 2 C.C.C. (3d) 339, 40 O.R. (2d) 660] we are not entitled to rewrite the statute under attack when considering the applicability of the provisions of the Charter. Parliament can give the necessary discretion to the court to be exercised on a case-to-case basis which, in my view, would be a prospective reasonable limit on the guaranteed right and demonstrably justifiable."

35. It is submitted, with respect, that the Ontario Court of Appeal in the case at bar has, in effect, rewritten the RBHA by establishing what constitutes an expanded exemption from the prohibition in section 2 of the RBHA. To paraphrase Mr. Justice Dickson's statement in the passage quoted above in Hunter v. Southam, by providing an exemption from the operation of the statute for Nortown Foods Ltd., the Court filled a "lacuna" left by the legislature. It is submitted that the

determination of the operative scope of section 2 of the RBHA and any exemptions thereto ought to be a matter for the legislature to address having regard to the general criteria pronounced by the courts. It is submitted with respect that, having found that the RBHA infringed freedom of religion as guaranteed by the Charter, the Ontario Court of Appeal ought to have declared that the RBHA was of no force or effect as required by section 52(1) of the Constitution Act, 1982.

36. Even if the decision of the Ontario Court of Appeal with respect to the limited applicability of the RBHA is not properly characterized as the Appellant has submitted in paragraph 34 above, the question still remains whether section 52(1) of the Constitution Act, 1982 should be applied so as to preserve the RBHA for non-infringing purposes, in accordance with the decision of the Ontario Court of Appeal. In other words, should section 52(1) be applied so as to carve out in some, but not all of the cases as bar, an exemption from the operation of a statute based upon constitutional grounds?

37. While Mr. Justice Tarnopolsky in his Reasons proposed that a person can claim exemption from the Sunday closing requirement of the RBHA by showing that the person's objection to being bound by the statute is based upon "a sincerely held belief based upon a life-style required by one's conscience or religion", he declined to suggest a definitive standard of how this would be done but suggested an inquiry analogous to those pursued under labour relations legislation with respect to conscientious objection to trade union membership. In Re Civil Service Association of Ontario (Inc.) and Anderson et al. (1975), 9 O.R. (2d) 341, one of the cases referred to by Mr. Justice Tarnopolsky in this regard, the Ontario Divisional Court reviewed the decision of the Ontario Public Service Labour Relations Tribunal which exempted an employee from paying union dues on the grounds of religious belief. In the

decision reviewed, the Tribunal had found that it had a duty to scrutinize the sincerity of each claim where an individual sought to be relieved of the union dues obligation. The Court quoted at p. 343 from the decision of the Tribunal as follows:

> " ... In order that this objective evaluation takes into account individual religious views, the Tribunal considers that the proper approach is to carefully scrutinize the sincerity of each applicant. The applicant, whose testimony is the only real source of evidence in these cases, is under a burden to establish that his objection to paying dues is based upon sincerely held religious convictions or beliefs. In assessing the sincerity of the applicant, the Tribunal should consider such matters as (1) the demeanour of the witness while testifying; (2) the nature of the applicant's beliefs - their relationship to a divine being and the moral dimensions of such beliefs; (3) the previous religious experience of the applicant; (4) the relationship between that religious experience and the belief currently held by the applicant; (5) the directness of the connection between the religious belief and the objection to paying dues to an employee organization; and (6) the extent to which the religious belief is applied. It is not intended that these considerations be construed as rules restricting the scope of Section 15(2), but only as factors that go to determining the sincerity of the applicant's avowed religious beliefs."

The decision of the Tribunal was upheld by the Divisional Court without commenting on the specific criteria quoted above.

38. It is submitted, with respect, that any resolution of conflict between the RBHA and the Charter guaranteed freedom of religion which involves a case by case analysis of the genuineness or otherwise of a person's religious or conscientious beliefs is inappropriate for the following reasons:

(a) The application of the RBHA will be uncertain and may be regarded by those who are unable to claim an exemption as discriminatory in its operation based on religion;

(b) Although the RBHA is not criminal law in a constitutional sense, a breach of the RBHA does invite prosecution and possible conviction with a resulting fine; requiring a person charged with an offence to

prove his right to exercise his religious freedom has the indirect effect of compelling him to be a witness in a proceeding against himself;

(c) In effect, this approach will result in a reverse onus being placed on an accused;

(d) Requiring a court to adjudicate on the genuineness or sincerity of religious belief leads the court into a procedural quagmire where protection of the fundamental freedom itself may become impossible; for example, cross examination which challenges genuineness of religious belief may be considered by a deeply religious person to infringe the freedom;

(e) There can be no objective standard by which to measure sincerity or genuineness of religious belief or the lack of sincerity or genuineness so that the circumstances in which the exemption may be granted will inevitably vary from case to case.

39. In the earlier case of Attorney-General for Manitoba and Attorney-General for Canada, [1925] A.C. 561, it was held that the legislation in question was indirect taxation and ultra vires the Province of Manitoba. In that case, Viscount Haldane, speaking for the Judicial Committee of the Privy Council, stated at p. 568:

> "... If, therefore, the statute seeks to impose on the brokers and agents and the miscellaneous group of factors and elevator companies who may fall within its provisions, a tax which is in reality indirect within the definition which has been established, the task of separating out these cases of such persons and corporations from others in which there is a legitimate imposition of direct taxation, is a matter of such complication that it is impracticable for a Court of law to make the exhaustive partition required. In other words, if the statute is ultra vires as regards the first class of cases, it has to be pronounced ultra vires altogether. Their Lordships agree with Duff J. in his view that if the Act is inoperative as regards brokers, agents and others, it is not possible for any Court to presume that the Legislature intended to pass it in what may prove to be a highly truncated form."

40. It is also submitted that the approach taken by the Ontario Court of Appeal in the case at bar will generate results that are contrary to the principle of equality before and under the law without discrimination based on religion which is set forth in section 15 of the Charter. Although section 15 was not in force until April 17, 1985 by virtue of section 32(2) of the Charter, it is submitted that section 15 may still be considered in relation to the proper interpretation and application of section 52(1). It is submitted that the "inconsistency" provision in section 52(1) should not be interpreted in a manner that results in a statutory offence applying in an unequal way that is dependent upon the proven religious beliefs of an accused. In this regard, reference may be made to the following cases:

Reference re Waters and Water-Powers, [1929] S.C.R. 200 per Duff J. at p. 216:

"There is nothing more clearly settled than the proposition that in construing section 91, its provisions must be read in light of the enactments of section 92, and of the other sections of the Act, and that where necessary, the prima facie scope of the language may be modified to give effect to the Act as a whole."

The Citizens Insurance Company of Canada v. William Parsons (1881), 7 A.C. 96 per Sir Montague Smith at p. 109:

"It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them."

41. A further concern that arises out of the approach taken by the Ontario Court of Appeal in the case at bar relates to the application of the subjective test of genuine religious beliefs to corporations. The Ontario Court of Appeal held that only Nortown Foods Ltd. had established entitlement to relief among the appellants before the Court. However, many questions arise as to how a corporation can establish

sincerely held religious beliefs. For example, can the requirement only be fulfilled by a privately owned corporation all of whose shareholders hold the same religious belief and all of whom testify to their beliefs? In the case of a publicly held corporation or widely held private corporation, is the relevant test the religious beliefs of the officers and directors who are the directing mind and will of the corporation or is it some proportion of the public shareholders or both?

42. It is further submitted that since an accused corporation or individual has the right to defend a criminal charge by arguing that the law in question is not constitutional, then the same accused ought not to have to establish his own sincerely held religious beliefs to achieve that result. Otherwise, as Mr. Justice Laycraft stated in giving the reasons of the majority of the Alberta Court of Appeal in the R. v. Big M Drug Mart Ltd. ([1984] 1 W.W.R. 625 at p. 637):

> "... If this were not so a legacy of the Charter would be that a statute held to infringe the fundamental freedoms of one individual would nevertheless continue to strike at others, leaving a patchwork of individual liability and non-liability under the statute. ... In my view it is the nature of the legislation and not the attributes of the individual which must be considered."

On appeal to this Court in that case, Mr. Justice Dickson stated at p. 313-314:

> "Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the Charter have been infringed. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.
>
> ...
>
> Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is urging that the law under which it has been

charged is inconsistent with s. 2(a) of the Charter and by reason of s. 52 of the Constitution Act, 1982, it is of no force or effect.

Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant. The respondent is arguing that the legislation is constitutionally invalid because it impairs freedom of religion -- if the law impairs freedom of religion it does not matter whether the company can possess religious belief. An accused atheist would be equally entitled to resist a charge under the Act. The only way this question might be relevant would be if s. 2(a) were interpreted as limited to protecting only those persons who could prove a genuinely held religious belief. I can see no basis to so limit the breadth of s. 2(a) in this case.

The argument that the respondent, by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights under s. 2(a) of the Charter, confuses the nature of this appeal. A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the Charter and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue."

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?

(ix) Section 1 of the Charter

43. It is submitted that it has not been demonstrated that the limits on freedom of religion guaranteed by section 2(a) of the Charter which the RBHA imposes are justified in a free and democratic society as required by section 1 of the Charter. Therefore, it is submitted the finding of the Ontario Court of Appeal in this respect should be affirmed.

44. The Ontario Court of Appeal held that the requirements of section 1 of the Charter which provides:

> "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"

had not been met because the Attorney General for Ontario had not discharged the onus of proof which lies on the party seeking to uphold impugned legislation under section 1 of the Charter. Mr. Justice Tarnopolsky observed that beyond referring to the fact that Sunday was a common day of closing in certain other countries and provinces, no evidence had been presented which showed why such limitations were reasonable nor how they were justified.

45. In R. v. Big M Drug Mart, supra, the second constitutional question posed was whether the Lord's Day Act was justified on the basis of section 1 of the Charter. In his Reasons, Mr. Justice Dickson (as he then was) stated at p. 352:

> "At the outset, it should be noted that not every government interest or policy objective is entitled to s. 1 consideration. Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized then it must be decided if the means chosen to achieve this interest are reasonable -- a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question."

In that case it was argued the Lord's Day Act was a reasonable limit within the meaning of section 1, inter alia, because a universal day of rest was generally accepted as necessary and desirable. Mr. Justice Dickson said that he accepted the secular justification for a day of rest in a Canadian context; however, he held at p. 353:

> "The characterization of the purpose of the Act as one which compels religious observance renders it unnecessary to decide the question of whether

> was otherwise or whether the evidence would be sufficient to discharge the onus upon the appellant to demonstrate the justification advanced."

46. It is submitted that what must be demonstrated by the Attorney General for Ontario to justify the infringement of freedom of religion found by the Ontario Court of Appeal to result from the RBHA is not only that the purpose of the RBHA is secular and otherwise within the jurisdiction of the legislature of Ontario, but also that the legislative means used to accomplish this purpose are in themselves reasonable. This latter test of the reasonableness of the legislative means involves of necessity a consideration of the impact of the legislation not only on those whose religious freedoms are infringed but also, if the legislative means were to be accomplished by a sabbatarian exemption, on those who would not fall within the exempted group.

47. It is submitted that in measuring the onus of section 1, the fundamentality of the freedom guaranteed by the Charter itself imposes a significant threshold. As Madame Justice Wilson stated at p. 218 in Singh et al v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177, when considering agruments made on behalf of the Attorney General of Canada to justify an impugned section of the Immigration Act, 1976:

> "One or two comments are in order respecting this approach to s. 1. It seems to me that it is important to bear in mind that the rights and freedoms set out in the Charter are fundamental to the political structure of Canada and are guaranteed by the Charter as part of the supreme law of our nation. I think that in determining whether a particular limitation is a reasonable limit prescribed by law which can be "demonstrably justified in a free and democratic society" it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter."

48. Finally, it must also be borne in mind that the

to be applied, contains a partial sabbatarian exemption. It was the insufficiency of that exemption which led the Ontario Court of Appeal to find infringement of the Charter in the first stage of its analysis. Therefore, any justification put forward must be on the basis that the legislation as it now stands, including the sabbatarian exemption, is reasonable, and it is submitted that no such justification can be offered.

PART IV

NATURE OF ORDER SOUGHT

49. The Appellant respectfully requests that this Honourable Court should allow the appeal, set aside the Judgments of the Court of Appeal for Ontario and of the County Court of the Judicial District of York, and answer the constitutional questions posed in the following manner:

(1) No position is taken by this Appellant in respect of this question;

(2) The Retail Business Holidays Act, R.S.O. 1980, c. 453, and particularly sections 2 and 3 thereof, infringes upon the freedom of conscience and religion guaranteed by section 2(a) of the Canadian Charter of Rights and Freedoms;

(3) The Retail Business Holidays Act, R.S.O. 1980, c. 453, and particularly sections 2 and 3 thereof, cannot be justified on the basis of section 1 of

the Canadian Charter of Rights and Freedoms, and is therefore of no force or effect pursuant to section 52(1) of the Constitution Act, 1982.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

John W. Brown, Q.C.

Calvin S. Goldman

Of Counsel for the Appellant
Edwards Books and Art Limited.

PART V

TABLE OF AUTHORITIES

CHAPTER 453

Retail Business Holidays Act

1.—(1) In this Act, Interpretation

(*a*) "holiday" means,

(i) New Year's Day,

(ii) Good Friday,

(iii) Victoria Day,

(iv) Dominion Day,

(v) Labour Day,

(vi) Thanksgiving Day,

(vii) Christmas Day,

(viii) Boxing Day,

(ix) Sunday, and

(x) any other public holiday declared by proclamation of the Lieutenant Governor to be a holiday for the purposes of this Act;

(*b*) "retail business" means the selling or offering for sale of goods or services by retail;

(*c*) "retail business establishment" means the premises where a retail business is carried on.

(2) The Lieutenant Governor may by proclamation declare any day that is a public holiday other than a day named in subclauses (1) (*a*) (i) to (ix) to be a holiday for the purposes of this Act. 1975 (2nd Sess.), c. 9, s. 1. Holidays designated for closing

2.—(1) Every person carrying on a retail business in a retail business establishment shall ensure that no member of the public is admitted thereto and no goods or services are sold or offered for sale therein by retail on a holiday. Onus on person carrying on business