

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

B E T W E E N:

PAUL MAGDER

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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Intervenors

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APPELLANT'S FACTUM

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1.

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APPELLANT'S FACTUM

PART ONE

30 THE FACTS

1. The Appellant, Paul Magder, appeared before His Honour Judge S. M. Harris of the Provincial Court in Toronto on the 9th, 24th and 25th days of November, 1983, on charges that he carried on a retail business on a Sunday contrary to Section 2(1) of the Retail Business Holidays Act. For reasons delivered by the learned trial Judge on December 23, 1983, the Appellant was acquitted.

40 Reference: Case on Appeal, Vol. II: Reasons for Judgment, Judge Harris p. 176.

2. The Appellant's acquittal was reversed on appeal following a two day appeal on February 1st and 2nd, 1984, in the County Court by His Honour Judge Alex Davidson, for reasons delivered on February 17th, 1984.

50 Reference: Case on Appeal, Vol. II: Reasons for Judgment, Judge Davidson, p. 202.

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3. The Appellant's conviction was upheld by the Ontario Court of Appeal following an appeal heard on April 2, 3, 4 and 5, 1984, for reasons delivered on September 19th, 1984. This is an appeal from that decision.

Reference: Case on Appeal, Vol. II: Reasons for Judgment, Ontario Court of Appeal, p. 240.

10 4. Leave to appeal to this Honourable Court was granted on May 9, 1985 by Mr. Justice Estey, Mr. Justice McIntyre and Madam Justice Wilson.

Reference: Case on Appeal, Vol. I: Order granting Leave, p. 61.

20 5. The Appellant, Paul Magder conceded that he was in fact carrying on a retail business on a Sunday contrary to Section 2(1) of the Retail Business Holidays Act, but nevertheless entered a plea of not guilty.

Reference: Case on Appeal, Vol. I: Transcript of Evidence, p. 105, lines 20-25.

30 6. Police Constable Gerald Boudeau testified that he attended at the Appellant's place of business on instructions from his superior officer. The police had no concerns insofar as a potential disturbance, traffic problems or crowds. In fact, the officer agreed that the only difference between the activity in Mr. Magder's store on a Sunday from that of Monday through Saturday was simply the day of the week.

Reference: Case on Appeal, Vol. I: Transcript of Evidence, p. 106, lines 1-5; p. 108, lines 5-30; p. 109, lines 5-15.

40 7. The witness also testified that Mr. Magder was always polite and co-operative.

Reference: Case on Appeal, Vol. I: Transcript of Evidence, p. 108, lines 10-15.

8. The Appellant, Paul Magder made the following points during his examination-in-chief in support of his position that he had the right to carry on a business on Sunday afternoon.

50 (a) The Charter of Rights and Freedoms (hereinafter referred to as the Charter) afforded him the protection of freedom of choice, conscience and religion.

(b) Paul Magder Furs is located within the boundaries of the Chinatown West tourist exemption area of Toronto and, therefore, excluding him from the tourist exemption while geographically within it, is contradictory, hypocritical, discriminatory, illogical and blantly unfair.

(c) He applied for a tourist exemption from the Act but his application was refused.

(d) He carries on business on Sunday from 12:00 o'clock noon until 5:00 o'clock in the afternoon.

(e) If the public were against Sunday shopping and stopped purchasing furs on that day, he would not carry on business on that day.

(f) He did approximately 20% to 50% of his weekly sales on Sunday afternoons.

(g) Many of his customers on Sunday were American tourists.

(h) He does not and would not force any of his employees to work extra hours on Sunday. Furthermore, employees who do work Sunday afternoon receive time and a half wages.

(i) He does not and would not do anything that would be in contravention of the Employment Standard Act.

Reference: Case on Appeal, Vol. I: Transcript of Evidence, page 109, lines 20-25; p. 110, lines 5-8; p. 117, lines 28-30; p. 110, lines 16-20; p. 111, lines 10-12; p. 116, lines 1-30; p. 117, lines 15-25.

9. His Honour Judge Davidson found as a fact that prohibiting Paul Magder from carrying on his business on a Sunday constituted a **SUBSTANTIAL INTRUSION UPON PAUL MAGDER'S MONETARY EARNING CAPABILITIES.**

Reference: Case on Appeal, Vol. II: Reasons for Judgment, His Honour Judge Davidson p. 226.

10. Judge Davidson found as a fact that there was NO evidence from the Crown going to the question of reasonable limits in regard to Section I of the Charter. The Ontario Court of Appeal came to the same conclusion.

Reference: Case on Appeal, Vol. II: Reasons for Judgment, His Honour Judge Davidson p. 226; Case on Appeal, Vol. II: Reasons for Judgment, Ontario Court of Appeal p. 296.

11. By Order of the Right Honourable, The Chief Justice of Canada, the Constitutional Questions to be considered during this Appeal are as follows:

- (a) Is the Retail Business Holidays Act, R.S.O. 1980, chapter 453, within the legislative power of the Province of Ontario pursuant to Section 92 of the Constitution Act, 1867?
- (b) Does the Retail Business Holidays Act, R.S.O. 1980, chapter 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?
- (c) If the Retail Business Holidays Act, R.S.O. 1980, chapter 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 or 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?

Reference: Case on Appeal, Vol. I: Order respecting Constitutional Questions, p. 68.



PART TWO

POINTS IN ISSUE

12. It is the Appellant's respectful submission that:

(a) The Retail Business Holidays Act, R.S.O., 1980, chapter 453, is ultra vires the Provincial Legislature.

(b) The Retail Business Holidays Act, R.S.O. 1980, chapter 453, does infringe and deny the rights and freedoms guaranteed by Sections 2(a), 7 and 15 of the Canadian Charter of Rights and Freedoms.

(c) The Retail Business Holidays Act, R.S.O. 1980, chapter 453, is not justified on the basis of Section 1 of the Canadian Charter of Rights and Freedoms.

### PART THREE

#### THE ARGUMENT

##### A. INTRODUCTION AND PERSPECTIVE

13. The very quintessence of a truly free and democratic society is that a person's liberty is absolute, unless in the exercise of that liberty that person does harm to someone else or prejudicially affects the interests of someone else. If this proposition is not acceptable, and the contrary is true, then it means governments can intervene into our personal lives without just cause.

14. The instant case involves a statute which is in several respects more threatening to our constitutional values than a mere impartial provincial regulation of a local economy, and therefore requires a heightened level of judicial review. It is, in the first instance, a prohibitive law, making conduct which is on 6 days a week both legally and socially conforming and acceptable, vulnerable on the 7th to prosecution, fine and public contempt as a crime. It is the indisputable penal nature of the Act which governs. It is the "awesome" power to deprive someone of personal liberty upon which Sunday Closing legislation is squarely founded, which requires the Court to "vigorously" scrutinize the statute assertedly granting that power.

15. There must be a sophisticated inquiry, interweaving in the analysis the character of the classification in question, and the relative importance of the governmental benefits denied and the province's interest assertedly requiring the classification.

Mr. Justice Marshall in Murgia, 427 U.S. at 317, 322 stated:

"Insofar as man is deprived of the right to labour, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

7.

The instant case involves basic and important rights to economic freedom and employment opportunity, protected against arbitrary Government intervention.

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16. The Retail Business Holidays Act fails to construct a coherent, rationally based, and substantially justified piece of legislation. The statute's ends are improper and its means ill-fitting, as the classifications established by the exemptions are severely over-inclusive. Moreover, the classifications not affected are such that the statute's ends are undermined.

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The purposes of the Act are inconsistent and competing. A common day of rest and relaxation, together with such goods and services as are necessary, is the general goal of Sunday closing laws frequently approved by the Courts. But the establishment of an economic advantage to certain business enterprises and business in tourist designated areas regardless of the necessity of the goods or services they provide, cuts directly against the creation of a common day of rest, and hardly can be said to promote uniformity of relaxation and rest. This becomes particularly acute when seen in light of the businesses not affected by the Retail Business Holidays Act. To suggest otherwise is to give the force of law to backward reasoning which distorts the legislative process into a game played to discover some valid government purpose to justify an improperly motivated classification. It is blatantly apparent that the statutory scheme fails to accomplish the goals of the common day of rest and recreation, with only such exceptions as are necessary for the public health, safety and good order. It is difficult to envision how rest, recreation or public necessity are served by the exemptions which are in existence not only in the Act itself, but by those business enterprises that are not covered by the Act.

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17. The multiple infirmities of the Retail Business Holidays Act are the product of its attempt to suit an outdated statute to a variety of mutually inconsistent purposes. As a result, the Act no longer achieves any of its stated goals, for its exceptions have grown so large and arbitrary as to have swallowed the rule. The act is not the product of a single, conceptually cohesive legislative plan, but, instead, the consequence of years of patching and filling by the legislature as it attempted to keep up with rapidly changing societal patterns and needs. Under the circumstances, it was almost inevitable that a time would come when the patch work no longer made any sense.

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18. The purpose of the legislation is to be determined not by the name, description or character given it by the legislature, but by the practical impact of the law itself. What we have is a regulatory guide to accomplish a prohibitory effect. While the regulation of the practice of trades and professions is considered a proper exercise of the provincial legislature, such regulation may not be used, as it is here, as a device for prohibition.

10 The Sunday Closing law as presently written, discriminates improperly against business entities, thereby also discriminating among consumers. The Act represents an unnecessary and unwarranted legislative intrusion into the personal lives of the people of Ontario, by regulating their Sunday consumptive patterns to suit the needs of a favourite class of merchants and religious observers. The statute unfairly and without justification restricts economic opportunity and imposes upon the retailer and the consumer a code of conduct, ethic and activity with which they feel uncomfortable and not of their choosing.

20 19. The law is particularly burdensome to single parent families, to those where both parents are required by circumstance, by economic necessity, or simply by personal preference, to be full-time wage earners and single persons living alone. For them Sunday is a day of considerable importance in the transaction of the numerous commercial details of modern life. As a result of the operation of the statute, these people must pay an extra price by reason of their economic circumstance.

30 Commerce is, in addition, increasingly a recreation in itself, and the Act, which professes to encourage recreation, restricts this manner of it. Moreover, employment opportunities already scarce are inhibited even more by the curtailment of business activity on Sundays.

40 20. The Retail Business Holidays Act goes far beyond the permission of only such commercial activity as may be necessary to serve the purposes of a common day of rest and recreation. Rather, it establishes a prohibition upon otherwise legally and socially conforming activity specifically designed to limit the free market forces of open competition. In so doing, it penalizes those who would compete and those who would benefit by the competition, and transgresses the free enterprise principles upon which this nation was founded. The Retail Business Holidays Act neither advances a valid provincial purpose, nor as presently drawn, does it achieve the purpose stated. The whole direction of this Act is irrationally and arbitrarily

to prefer certain groups over other groups. Governments are to operate for the common benefit of the people, and not for the particular advantage of any special interest group.

21. As stated above, the economic impact of Sunday Closing laws is felt most heavily by households in which both parents are full-time wage earners, by those with only one parent present, and by single persons living alone. Sunday has become in many instances the only convenient day for such persons to accomplish many of the necessary chores of modern life, the great majority of which require commercial transactions.

For a working mother, the burdens of child-rearing and wage earning combine very nearly to eliminate the luxury of mid-week shopping. For a single wage earner living alone and for families whose economic welfare depends upon the full-time employment of both adults, the obligations and pressures of the mid-week render almost all commercial activity unavailable except on weekends. Sunday has, by the very force of our changing social and economic customs, become a day whose commerce is essential to the lives of an increasing number of citizens. The result, however, of the Sunday Closing laws and their myriad exemptions is to decrease the number of open stores, thereby inhibiting and inconveniencing the Sunday consumer, and to increase the price of goods sold, thereby forcing the Sunday consumer to subsidize small stores which are permitted to open.

It is for these reasons, as stated above, that this appeal involves basic and important rights to economic freedom and employment opportunity to protect against arbitrary government legislation.

In State v. Dodge, 76 VT., 197 (1904), the Court held that a person living under a Federal Constitution is:

"at liberty to adopt and follow such lawful industrial pursuits as he sees fit, and has a right to the full exercise and enjoyment of his faculties in a lawful pursuit or calling, in a proper manner, subject only to such restraints as are necessary for the common welfare." (pp. 201 - 202).

The Court also stated at Page 204:

"It is true that this method of doing business may enable a trader to do more business than he otherwise would, and more than his competitor across the street, who does not choose to incur the expense incident to

this method of advertising and increasing his business; but this furnishes no reason for prohibiting the business. There must be something in the methods employed which renders it injurious to the public. It is not enough, to bring a given business within the prohibitory power of the legislature, that it is so conducted as to seriously interfere with, or even destroy, the business of others."

The explicit anti-competitive and protectionist purposes of the Act visited upon Mr. Magder and all similarly situated businesses is insufficient and indeed an improper justification for a statutory scheme prohibitive of Sunday operation by an unfavoured class.

22. The restrictions in the Retail Business Holidays Act in regard to square footage and number of employees along with the exceptions as to what can be open and what cannot be open is indeed absurd. Such distinctions are devoid of a rational basis. The statute falls far short of a reasonable connection between the discrimination practiced and a legitimate purpose served. Indeed it appears that it is precisely because of the inconvenience and economic harm inherent in such a measure that the Retail Business Holidays Act has become honeycombed with exemptions designed to serve particular special interests.

The Retail Business Holidays Act is in fact religiously inspired legislation cloaked in the mantle of some secular garb. To the extent to which the legislation is not religiously inspired, it prohibits.

To the extent the legislation regulates, it does not regulate even-handed fashion. It is a piece of legislation with exception after exception. The constitutional guarantees of the Retail Business Holidays Act strike at the heart of the statutory scheme and do not permit of any excision.

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23. Dilin his article "Never on Sunday; The Blue Blue Laws Controversy" 39 Md. L. Rev. 679 (1980) at page 714 714 stated:

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"Perhaps the most persuasive argument against Sunday Closing is neither a legal nor an administrative one; why should citizens be restricted under penalty of criminal sanctions from engaging in what otherwise would be business activity - to shop on Sundays or to work on Sundays to gain extra income? If the legislature is to prevent forced

Sunday labour, that objective can be achieved in a more limited fashion. Certainly it can no longer be persuasively argued that the closing of businesses alone transforms Sunday into a peaceful day .... the patch-work of exceptions to blue laws not only demonstrates the influence of certain economic groups, but also shows the futility of applying a 300 year old religious law to today's modern society."

It is respectfully submitted that the legal determination of the issues raised in this appeal have been treated by our Courts in such a legalistic, technical and restrictive manner that some of the broader and more substantive realities have been lost.

#### B. LEGISLATIVE JURISDICTION

24. In the context of division of powers, this Court appeared to accept Mr. Justice Laycraft's view that the Court "need not decide the feasibility" of Provincial legislation dealing with Sunday "until it is attempted". It is respectfully submitted that the case at bar now raises this question directly.

Reference: Her Majesty the Queen v. Big M Drug Mart Ltd. (unreported) S.C.C., released April 24, 1985 at pp. 34 and 35.

25. It is respectfully submitted that the Retail Business Holidays Act is ultra vires the Provincial Legislature for three distinct reasons:

- (i) It is prohibitive legislation which falls within Ottawa's criminal law power (s. 91(27)).
- (ii) It is legislation designed to develop and enforce an acceptance of a common conception of how citizens of Ontario will express and exercise their liberty on particular days. It is designed to promote public morals, attitudes and to deal with public wrongs and therefore concerning itself with offences against society rather than against the private citizen. Only the federal government has jurisdiction in this regard.
- (iii) It is legislation that is religiously inspired, religiously motivated and therefore legislation that is, after careful examination, in regard to freedom of religion and therefore within Ottawa's exclusive jurisdiction.

Reference: Attorney General (Ont.) v. Hamilton Street Railway (1903) 7 C.C.C. 326 (P.C.).

Re Jurisdiction of a Province to Legislate Respecting Obstruction from Labour on Sunday (1905) 35 S.C.R. 581.

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

Rex v. Waldon (1914) 18 D.L.R. 109 (B.C.C.A.).

Rodrigue v. Parish of the Prosper (1917) 37 D.L.R. 321 (Sask. C.A.).

Rex v. Slowin (1923 1 W.W.R. 252 (B.C.S.C.)).

Clarke v. Rural Municipality of Wawken (1930 2 D.L.R. 596 (Sask. C.A.)).

Henry Birks & Sons (Montreal) Ltd., et al v. Montreal & Attorney-General of Quebec (1955) 5 D.L.R. 321 (S.C.C.).

Regina v. Tamerac Foods Ltd., et al (1978) 45 C.C.C. (2d) 442 (Man. C.A.).

26. With respect to the first point above, in Regina v. Top Banana Limited Mr. Justice Morden had occasion to consider legislation almost identical to the Retail Business Holidays Act and concluded that it was "prohibitory legislation" which did not "form part of the licencing" scheme.

Indeed in Regina v. Magder No. I the Ontario Court of Appeal had occasion to comment on the Retail Business Holidays Act by concluding "the Act by Section 2 PROHIBITS retail business on holidays ...".

It is therefore respectfully submitted that the Ontario Court of Appeal erred by not following its own previous decision and concluding that the Retail Business Holidays Act was regulatory.

It is submitted that the Attorney General for the Province of Ontario must demonstrate that the Act is not only secular, but also regulatory.

Reference: Regina v. Top Banana Limited 4 O.R. (2d) 213.



Regina v. Magder No. I, (1983) 41 O.R. (2d) 281 (Ont. C.A.).

27. With respect to the second point above, this Court will have to determine whether the Province of Ontario through its Retail Business Holidays Act is regulating civil rights or conserving public morality and creating a common day of rest and thus legislating in regard to civil liberties.

The phrase "civil rights" as it is understood within the context of Section 92(13) of the Constitution Act is not synonymous with "civil liberties". Civil rights are juristically distinct from civil liberties. The civil rights referred to in the British North America Act comprise primarily of proprietary, contractual or tortious rights; i.e. rights between two individuals such as the right to have a loan repaid.

The familiar phrase "property and civil rights" has always been understood to mean a compendious description of the entire body of private law which governs the relationship between subject and subject, as opposed to the law which governs the relationship between the subject and the institutions of government.

It is respectfully submitted that the impact of the Retail Business Holidays Act is such, that people's "liberties" are affected. The Ontario Court of Appeal therefore erred in determining the Act only affected "civil rights".

Reference: Ouimet v. Bazin, (1912) 46 S.C.R. 502.

Clarke v. Rural Municipality of Wawken (1932) D.L.R. 596 (Sask. C.A.).

28. With respect to the third point above, it is submitted that legislation in regard to freedom of religion is also within the exclusive competency of the Parliament of Canada. Accordingly, the Province's attempt to legislate in regard to Sunday under the disguise and pretext of a secular pause day is a clear invasion into federal jurisdiction and therefore, Section 1(1) (a) (ix) of the Retail Business Holidays Act is ultra vires the Provincial legislature.

The following sets out the plain literary definitions of "Sunday":

- (a) Shorter Oxford English Dictionary:  
"The first day of the week observed by Christians as a day of rest and worship, in commemoration of Christ's Resurrection; The Lord's Day.".
- (b) Funk and Wagnall's New Standard Dictionary of the English Language - 1913:  
"The first day of the week observed by Christians in honour of the Resurrection of Christ, as a day of rest from secular occupation and devoted to the worship of God; the Lord's Day; the Christian Sabbath.".
- (c) The Canadian Living Webster Encyclopedia Dictionary of the English Language - 1974:  
"The first day of the week; the Christian Sabbath; the Lord's Day.".
- (d) The Concise Oxford Dictionary:  
"First day of the week, Lord's Day, observed as a day of rest and worship.".
- (e) Black's Law Dictionary: Fifth Edition:  
"The first day of the week is designated by this name; also as the "Lord's Day" and as the "Sabbath".".
- (f) Radin Law Dictionary - 1970:  
"The first day of the week; the Christian Sabbath day.".
- (g) Ballentines Law Dictionary: 3rd Ed. 1969:  
"The first day of the week. A holy day set apart as the Christian Sabbath, the observance of which as a day of rest is generally provided for by Statute.".
- (h) The Dictionary of English Law:  
"The first day of the week, the Lord's Day termed in the Sunday Observance Act 1677, the Lord's Day commonly called Sunday ...".

Counsel for the Attorney General for the Province of Ontario invites this Honourable Court to attach a definition and character to "Sunday" which is secular, and therefore contrary to the clear meaning of the word, both literally and historically.

Reference: Her Majesty the Queen v. Big M. Drug Mart Limited (Ante).

Henry Birk's Sons (Montreal) Limited, et al  
v. Montreal and Attorney General of Quebec  
 (1955) 5 D.L.R. 321 (S.C.C.).

29. In Big M, The Right Honourable, The Chief Justice of Canada, referred to the following passage from Professor J.A. Barron's article "Sunday in North America" (1965), 79, Harv. L. Rev. 42 at 53:

"For the Justice, Sunday has a very special and ceremonial significance in our culture, because of the religious meaning that has historically attached to the day. It is enforced homage to that religious Sunday of history that constitutes a forced abandonment of one of the precepts of the Sabbatarian's religion: the belief that only the Sabbath is a day of rest proclaimed by God. It is this homage that constitutes a burden on the free exercise of his religion. The Sabbatarian, the agnostic, and the indifferent Christian may not be required to observe Sunday in church; neither should they be compelled to acknowledge that day as a religious idea. The legislature may be able to divorce the secular Sunday from the religious Sunday of history, but the Orthodox Jew, the Seventh Day Adventist, and the atheist cannot."

It is submitted, this equally applies to the case at bar.

Reference: Her Majesty the Queen v Big M Drug Mart Ltd. (Ante) at pp 58 and 59.

30. The Ontario Court of Appeal however concluded that the Retail Business Holidays Act was regulatory in scope and intent and secular in its framework. The Court stressed that the cases favouring the Appellant regarding Sunday Observance legislation did not stand for the proposition that the Provinces were without power to regulate activities on Sunday but rather that limitations on work and play which were imposed for religious reasons were criminal laws and consequently within the exclusive competency of the Federal Parliament.

Reference: Case on Appeal, Vol. II: Reasons for Judgment, Ontario Court of Appeal, p. 240 at pp. 245 and 247.

31. On the other hand, the same Court conceded that if, in pith and substance, the Court found that the Retail Business Holidays Act contained 60 holidays rather than 9, to disguise the religious nature of the legislation, "it would be clearly invalid".

Reference: Case on Appeal, Vol. II: Reasons for Judgment, Ontario Court of Appeal, p. 240 at p. 247.

32. In this respect the Court relied upon the decision of Regina v. Top Banana Limited. Of particular importance was the fact that Mr. Justice Morden only found a secular legislative intention after concluding that the "holidays set forth were considered as a group".

Reference: Case on Appeal, Vol. II: Reasons for Judgment, Ontario Court of Appeal, p. 240 at p. 254.

33. Fundamentally, the Court relied upon the majority decision of the Manitoba Court of Appeal in Regina v. Tamerac Foods Ltd. It is submitted that the dissenting judgment of Mr. Justice O'Sullivan best articulates the correct statement of the law.

Reference: Case on Appeal, Vol. II: Reasons for Judgment, Ontario Court of Appeal, p. 240 at p. 255.

34. It is respectfully submitted that there are 60 holidays under the Retail business Holidays Act and not 9. Of the 60 holidays, 52 are Sundays or 87% of the legislated holidays. In addition to Sunday, there are two other holidays that are indisputably religious, to wit: Good Friday and Christmas Day, for a total of 54 holidays or 90%, which are historically and literally anchored in religion. In addition, it will be argued that Boxing Day, New Year's Day and Thanksgiving Day are not secular holidays. Therefore 57 of the 60 holidays or 95%, are non-secular. Only Victoria Day, Dominion Day and Labour Day (3 of 60 or 5%) are truly secular holidays.

It is submitted that the Provincial legislature cannot prohibit common work on Sunday and other days of religious significance (or 95% of the legislated holidays) simply by adding a prohibition against common work on three secular holidays which only represents 5% of the legislated holidays. In Big M, this Court stated "the Charter safeguards religious minorities from the threat of 'the tyranny of the majority'".

While the purpose and object of the particular Legislature in enacting the legislation which is relevant to the inquiry is fundamental, it is submitted this inquiry must be pursued carefully lest it becomes an inquiry into the motive of legislators.

It is respectfully submitted that the Retail Business Holidays Act represents a clever example of innovative draftsmanship but nevertheless, in pith and substance remains legislation which is primarily religiously inspired and motivated.

Reference: Her Majesty the Queen v. Big M. Drug Mart Ltd. (Ante) p. 56.

35. The first premise of rationalization articulated in Regina v. Tamerac Foods Ltd. to find an intra vires purpose was the finding that the legislation intended to make holidays for "certain retail trades". This premise was adopted by the Ontario Court of Appeal in the case at bar. It is submitted (without conceding its validity) that this rationalization contravenes Section 15 of the Charter. Accordingly, an ultra vires premise cannot validate an improper purpose. Moreover, this rationalization eliminates the only possible explanation that the purpose is secular because it creates a uniform day of rest for all.

Reference: Case on Appeal, Vol. II: Reasons for Judgment, Ontario Court of Appeal, p. 240 at pp. 255 and 256.

36. Like the Manitoba Court of Appeal in Tamerac, the Ontario Court of Appeal in the case at bar, concluded that the religious aspect of the legislation was "incidental". However, upon further review it is clear that this argument, is in fact, an argument of convenience.

Speaking for the full Court, Mr. Justice Tarnopolsky stated that the legislation provided for holidays "on days which are generally recognized as such" and further that:

"... although some of the prohibitions and exemptions provided for in the Act are religious in origin, they have retained and developed as secular practices long after their religious significance has ended."

Reference: Case on Appeal, Vol. II: Reasons for Judgment, Ontario Court of Appeal, p. 240 at p. 257.

37. This view was reinforced by the Courts' reading of the Ontario Law Reform Commission on Sunday legislation which recommended that the Legislature create a uniform weekly day of rest on Sunday and that the legislation be secular in nature.

Reference: Case on Appeal, Vol. II: Reasons for Judgment, Ontario Court of Appeal, p. 240 at p. 258.

38. It is submitted that this is a further extension of the "convenience" argument. It also constitutes a "coincidence" which taxes the integrity of judicial articulation. Speaking of a "uniform day of rest" which coincidentally happens to be "Sunday" appears to have a resounding similarity to the Fourth Commandment "Remember the Sabbath day, to keep it holy".

39. This "convenience" argument was considered by this Court in Her Majesty the Queen v. Big M Drug Mart Ltd. and found to be "fundamentally repugnant".

Reference: Her Majesty the Queen v. Big M Drug Mart Ltd. (S.C.C.) (Ante) at p. 82.

40. The suggestion that there has been a change from religious to secular purpose was first articulated by His Honour Judge Stevenson in Big M. On this specific point, all five Justices of the Alberta Court of Appeal agreed that the Charter "did not remove Sunday observance legislation from the field of criminal law". The strongest comments were delivered by Mr. Justice Belzil:

"His ratio for the startling departure from settled authority is that, had these previous decisions been considered, in the light of today's social conditions, they would not have been the same and are therefore not binding on him. This is a novel but erroneous position of law."

It is submitted that this Court agreed with the aforesaid statement.

Reference: Her Majesty the Queen v. Big M Drug Mart Ltd. (Ante).

41. It is respectfully submitted that the Ontario Court of Appeal's finding that the Retail Business Holidays Act is secular, is in fact contradictory. The Court held that without a Sabbatarian exemption, the legislation would

have to fall. To come within the exemption a person must meet a very strict religious test. Therefore, in its attempt to save the legislation, the Court removed the colourable guise that protected it, and thereby highlighted the true pith and substance of the legislation.

42. Most of the authorities regarding Sunday Observance legislation appear to have a common thread running through them. First, they all accept that Ottawa's criminal law power ought to be interpreted broadly "in its widest sense". Secondly, in all the cases the Crown took the position that the impugned legislation simply created a uniform day of rest and therefore came within 92(13) and (16) of the BNA Act. Thirdly, the Crown argued the legislation was regulatory. Fourthly, the Courts, for the most part, rejected Crown Counsel's argument.

43. The Ontario Law Reform Commission in its 1970 Report on Sunday Observance Legislation recommended against a Sabbatarian exemption. The Commission stated:

"... We have proceeded in all our proposals and alternatives made to this point on the basis that the maintenance of Sunday free from work for the pursuit of leisure activities of one's own choosing can and should be placed in a secular framework. We would hardly be consistent with this approach by proposing a Sabbatarian exemption allowing exceptions from the framework for those who would prefer, for religious reasons, to close their business on another day. To do so would be to clothe the legislation with the very religious character which we have deliberately sought to avoid." (emphasis added).

Now that the Ontario Court of Appeal has decided that the legislation can only stand with a Sabbatarian exemption, it is submitted that the act is legislation in relation to religion

Reference: Ontario Law Reform Commission, Report on Sunday Observance Legislation, 1970, Chapter 16, at p. 351.

44. It is respectfully submitted that the Retail Business Holidays Act, is legislation for an ulterior purpose, a purpose ultra vires the Provincial Legislation.

## C. DOCTRINE OF COLOURABILITY

45. A rose by any other name is still a rose. It is no consolation to the Sunday retailer or the Sunday shopper that his or her freedom of choice to choose their activities for the day are prohibited by reason of legislation in the nature of the Federal Lord's Day Act or legislation like the Retail Business Holidays Act. If the Retail Business Holidays Act is not Sunday Shopping legislation then it would be interesting to see what kind of legislation would be.

46. It is submitted that through the Retail Business Holidays Act the Legislature is attempting to accomplish indirectly what it cannot do directly. Through the addition of a few secular holidays, the Legislature has cloaked the true "matter" of the legislation. It is an attempt to interfere with a class of subjects committed exclusively to the Federal Parliament and then to justify it by enacting ancillary provisions falling with Provincial jurisdiction.

Reference: Re: Upper Churchill Water Rights Reversion Act [1984] 1 S.C.R. 297.

Attorney General for Saskatchewan v. Attorney General for Canada [1949] A.C. 110.

Attorney General for Ontario v. Reciprocal Insurers [1924] A.C. 328.

Re: Insurance Act of Canada [1932] A.C. 41.

Switzman v. Elbling [1957] S.C.R. 285.

The Attorney General of Canada v. The Attorney General of Alberta [1922] 60 D.L.R. 513.

Lower Land Dairy Products Board v. Turner's Dairy Limited [1941] S.C.R. 573.

Alberta National Gas Tax Reference (1982) 42 N.R. 361.

Reference re: Alberta Bills [1938] 4 D.L.R. 433.



Board of Trustees of Lethbridge Northern  
Irrigation District v. Independent Order of  
Foresters [1940] 2 D.L.R. 273.

47. In Attorney for Saskatchewan v. Attorney General for Canada, the House of Lords described the Province's attempt to legislate with respect to "interest rates" under the pretext of agriculture legislation, in the following manner:

"It is obvious that the language used has been ingeniously chosen in an endeavour to avoid a conflict with Dominion powers and legislation, but in the view of their Lordships, the endeavour is not successful."

It is submitted that this dicta applies to the case at bar. To use the words of this Court in Lower Land Dairy Products Board v. Insurer's Dairy Limited, "the more one examines the evidence, the more he must be convinced that this is a mere sham". To find otherwise in the instant case, would allow form to triumph over substance.

Reference: Attorney General for Saskatchewan v. Attorney General for Canada [1949] A.C. p. 125.

Lower Land Dairy Products Board v. Turner's Dairy Limited [1941] S.C.R., p. 576.

Alberta Natural Gas Tax Reference (1982) 42 N.R., p.400.

48. Taking the Crown's case at its highest, 87% of the legislated holidays remain Sundays, yet the Crown submits that the Retail Business Holidays Act is not Sunday Observance or Sunday Shopping legislation. The choice of Sunday, we are to believe is a mere coincidence, without religious inspiration or background. To reinforce the non-Christian, non-religious foundation of the legislation the Legislature has included in the list of holidays "Good Friday" and "Christmas". In addition, "New Year's" the Crown argues, is clearly secular, notwithstanding the New Year's the legislation refers to is the Christian's New Year's of January 1st and not for example, the Jewish New Year's which is in September. "Boxing Day" too, suggests the Crown is purely secular, notwithstanding its life and breath is inextricably linked to Christmas. Thanksgiving too is allegedly secular, yet Thanksgiving is the day Christians give thanks to God for the harvest.

49. It is respectfully submitted that to accept the interpretation submitted by Counsel for the Attorney General for the Province of Ontario would be to simultaneously make a mockery of Section 27 of the Charter which demands a new objectivity, perspective and sensitivity to constitutional cases.

#### D. FREEDOM OF CONSCIENCE AND RELIGION

50. The Appellant respectfully adopts the submissions contained in the Factum of Edwards Book & Art Limited and Longo Brothers Fruit Market Ltd. in regard to freedom of conscience and religion and makes the following additional submissions to support the position that the Act is inconsistent with the Charter.

51. It is respectfully submitted that freedom of conscience is not synonymous with freedom of religion. Notwithstanding the Ontario Court of Appeal held that freedom of conscience "necessarily includes" the right not to have a religion the Court went on to say that the only way to avoid the prohibitive aspects of the legislation was to demonstrate "genuine" religious observance. This is augmented by the Court establishing a criteria for "genuine" religious observance with a requirement of "regularity". A religion that does not have, as a requirement, a "sacro-sanct" day of rest other than Sunday would not qualify under the test articulated by the Court of Appeal. Accordingly, in its attempt to distinguish religion from conscience, the Court unites them in their effect. Indeed, the criteria suggested merely reinforces the Christian view of religion.

Reference: Case on Appeal, Vol. II: Reasons for Judgment, Ontario Court of Appeal, p. 240 at p. 283.

52. It is submitted that the sincerity and conviction of one's belief cannot be measured in a truly free society in the manner described above. Surely a person's liberty ought to be given absolute expression provided no harm is occasioned upon others. Moreover, the test articulated by the Court of Appeal clearly imposes a reverse onus. Such a reverse onus is repugnant to principles of fundamental justice.

53. The Court must ask "what is the rightful limit to the sovereignty of the individual over himself and where does the authority of society begin?" There must be a legal determination as to how much human activity should be

assigned to individuality and how much to society. It is submitted that each will receive its proper share if each has that which more particularly concerns it. It is only when a person's conduct affects prejudicially the interest of others that society has jurisdiction over it.

It is submitted that there is a prodigious difference between acts which prejudicially affect others and acts which need not affect others but nevertheless have an affect in some abstract or intellectual sense.

In the conduct of human beings towards one another, it is necessary that general rules should, for the most part be observed in order that people may know what they have to expect. However, in the circumstances which affect the individual personally his individual spontaneity is entitled to free exercise. Considerations to aid his judgment, exhortations to strengthen his will may be offered to him, even obtruded upon him by others, but he himself is the final judge.

It is submitted that the Retail Business Holidays Act violates every aspect of the aforesaid.

54. There are many who consider as an injury to themselves any conduct which they have a distaste for and resent it as an outrage to their feelings - as a religious bigot when charged with disregarding the religious feelings of others has been known to retort that they disregard his feelings by persisting in their abominable worship or creed. It is submitted that there is no parity between the feeling of a person for his own opinion and the feeling of another who is offended at his holding it, no more than between the desire of a thief to take a purse and the desire of the lawful owner to keep it.

It is submitted if a proper balance is not maintained in philosophical terms, moral policing will become a thin disguise for religious morality until it encroaches upon the most unquestionable legitimate liberty of the individual.

It is respectfully submitted that the Sunday closing legislation is an illegitimate interference with the rightful liberty of the individual.

For those who truly and sincerely believe in the sanctity of Sunday, it is submitted at best, it represents a beneficial custom but in a free and democratic society, it is a custom which must operate by consent.

55. If one looks to the history of Sunday observance legislation, it is clear that it is premised on religious grounds. The usefulness of looking at the history of Sunday observance legislation is to demonstrate the religious significance of Sunday and the legislative protection historically given to this Christian day of rest. The Crown now asks us to ignore this history and pretend that the Retail Business Holidays Act is profoundly different as it relates to Sunday.

Reference: Sunday Fairs Act 1448, chapter 5.

Edward XI 1552, chapter 3.

Sunday Observance Act 1625, chapter 1.

Sunday Observance Act 1627, chapter 2.

For the Better Observation and Keeping Holy the Lord's Day, 1676, chapter 7.

For Preventing Certain Abuses and Profanation of the Lord's day Called Sunday 1780 (Imp.), chapter 49.

The Fairs and Market Act, 1850 (Imp.), chapter 23.

56. The basic problem is in the Sunday closing legislation itself. It reflects the Christian belief that Sunday should be a special day of rest and it is respectfully submitted that religious observance has not kept up with the changing times. Our society is far from monolithically Christian. To Jews, Moslems, Hindus, Buddhist, etc., Sunday holds no special religious significance and even among Christians, Sunday is not necessarily holy. It all adds up to an incomprehensible "hodge-podge" which unfairly benefits some businesses to the detriment of their competitors, and which needlessly inconveniences members of the public, who would prefer a greater choice.

The primary principle under Sections 2(a) and 27 of the Charter is that in a pluralistic society, matters of religious observance are best left to individual conscience rather than decree by the State.

Sunday closing laws endeavour to impose and enforce the view of one religion in a country that is home to many religions. But the laws make allowances for exceptions in ways that are blatantly unfair.

It is respectfully submitted that the Sunday closing legislation is offensive to every principle of democracy because it makes "criminals" out of ordinary law abiding citizens in the name of moral and religious protection.

The notion that it is one man's duty that another should be religious was the foundation of all religious persecutions perpetrated in the past, and if admitted, would fully justify them. It is a determination not to tolerate others in doing what is permitted by their religion because it is not permitted by the prosecutor's religion.

Solzhenitsyn once wrote:

"No don't. Don't dig up the past. Dwell on the past and you will lose an eye. Forget the past and you will lose both eyes."

If we dig up the past, we see the pain and suffering from political and religious intolerance. If we forget the past, we allow history to repeat itself.

A person should be free to do as he likes in his own concerns, but he ought not to be free to do as he likes in acting for another, under the pretext that the affairs of the other are his own affairs.

57. It is respectfully submitted that the effect of the Retail Business Holidays Act is the imposition of a religious dogma of the majority upon the minority, thereby robbing freedom of religion of substance.

Reference: Freedom of Religion and the Lord's Day Act  
The Canadian Bill of Rights and the Sunday  
Bowling case (1964) The Canadian Bar Review  
v. XLII, Professor Eora Laskin (as he then was).

#### E. FUNDAMENTAL JUSTICE (Section 7)

58. The Appellant repeats the submissions contained in paragraphs 16, 22, 52 and 53 above.

59. In the case at bar, His Honour Judge Davidson found as a fact that the effect of the Retail Business Holidays Act upon Paul Magder was such that it constituted a substantial intrusion upon his monetary earning capabilities. He further found that the Crown presented no evidence to demonstrate the justification for this "substantial intrusion". The Court of Appeal came to the same conclusion.

In this regard, the Court of Appeal acknowledged that the legislation forces non-Christians to choose between their religious beliefs and their economic interests.

In the context of Section 7 of the Charter and in particular the "concept of life liberty and security of the person", the Court of Appeal held the phrase would appear to relate to "one's physical or mental integrity and one's control over these rather than some right to work whenever one wishes."

It is respectfully submitted that it would be difficult to envisage anything more fundamental to one's "physical and mental integrity" than his or her ability to earn a livelihood, pay his or her mortgage, service his or her bank loan and feed his or her family. Section 7 is not restricted to arbitrary arrest and search and seizure.

60. It is submitted that legislation which blatantly discriminates is unconstitutional. The Retail Business Holidays Act is so fundamentally discriminatory within its own framework that it ought to be struck down. With so many businesses already able to conduct business on a Sunday, there is no fair way to deny the same rights to others.

61. If the pause day principle is to be given the force of law it ought to apply to everyone and not selectively. Moreover, it ought to apply only to PEOPLE not businesses. In this regard the Province could enforce the Employment Standards Act with the same vigour with which it enforces the Retail Business Holidays Act.

If the pause day principle applied only to people we would be able to fairly reconcile two opposing positions. On the one hand, no employee would be forced to work a seven day week and on the other hand, the principles of freedom of choice would remain intact (i.e. shift work operating seven days a week).

62. It is submitted that the Retail Business Holidays Act is so riddled with absurdities, anomalies and blatant injustices that it is becoming increasingly untenable and can no longer command sufficient respect.

63. In Regina v. Young, the Ontario Court of Appeal held that Section 7 of the Charter was not restricted to procedural considerations but rather extended to substantive law.

The Court held that the criteria regarding "fundamental justice" must relate to the "community's sense of fair play and decency". It is submitted that any enabling legislation that allows exemptions on the basis of tourist area whilst at the same time discriminating within the very exemption as is the case regarding this Appellant, offends the "community's sense of fair play and decency".

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In R.L. Crain Inc. v. Couture, et al, the Saskatchewan Court of Queens Bench defined "security of the person" in the context of Section 7 of the Charter to include a "right to personal dignity" which may not be invaded by "arbitrary or unjustified intrusions".

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The effect of the Retail Business Holidays Act upon Mr. Magder's ability to earn a livelihood attacks the "security" of his person and removes his ability to maintain "personal dignity" in a manner that is both "arbitrary" and an "unjustified intrusion".

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Reference: Regina v. Young 46 O.R. (2d) 520 at 541, 542 and 551 (Ont. C.A.).

R.L. Crain Inc. v. Couture, et al 10 C.C.C. (3rd) 191 at 143, 146, 147 and 149 (Sask. Ct. of Q.B.).

Reference re: Sections 94(2) of the Motor Vehicle Act 4 C.C.C. (3d) 243 at 240 (B.C.C.A.).

Regina v. Roche 40 C.R. (3d) 138 at 143 (Ont. Dist. Ct.).

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64. American jurisprudence supports the view that the term "liberty" as contemplated by the fifth and fourteenth amendments of the Constitution of the United States includes economic freedom and liberty and also includes the right to practice, or not to practice, one's religion. Liberty further includes the right "to be let alone". In addition liberty includes absence of arbitrary and unreasonable restraint upon an individual in the conduct of his business. It is submitted that all these criteria are violated in the case at bar.

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Reference: Meyer v. State of Nebraska 262 U.S. 390 at 399 (Nebraska S.C.).

Pavesick v. New England Life Insurance Company, 50 S.E. 68 at 68.

Blauvret v. Beck 76 N.W. (2d) 738 at 741  
(Nebraska S.C.).

65. In The Queen v. Fisherman's Wharf, the New Brunswick Court of Queens Bench held that "security of the person" in the context of Section 7 of the Charter, included the right to enjoyment of the ownership of property which extends to security of the person. It is submitted that any substantial loss of income must affect the capacity of an individual to meet his or her needs and therefore is contrary to Section 7 of the Charter unless imposed in accordance with principles of fundamental justice. In view of the findings by the Courts below that closing Paul Magder's store on a Sunday would constitute a substantial intrusion upon his monetary earning capabilities, it is submitted his rights under Section 7 of the Charter are contravened.

Reference: The Queen v. Fisherman's Wharf (1982) 135 D.L.R. (3d) 307.

Fundamental Justice, Whyte, (1983) 13 Man. L.J. 455 at 474 and 475.

66. It is submitted that fundamental justice is intricably connected to the concept of "due process". American jurisprudence has held that "due process" protects those fundamental principles of liberty and justice which be at the base of all civil and political institutions. Governments cannot deprive an individual of what would otherwise be a lawful pursuit and for which no harm is occasioned upon others. This is particularly true in the case at bar.

Reference: Hurtado v. California, 110 U.S. 516 at 535 (1884).

Tribe, American Constitutional Law (1978) at 509.

67. It is submitted that there are certain principles of law which are so fundamental to our democratic values that no Government has jurisdiction to trespass thereon. These principles are so deeply entrenched in Canadian Constitutional law that resort to a Bill of Rights or a Charter of Rights is not necessary. It is submitted that the Retail Business Holidays Act so fundamentally offends these principles and in particular, economic freedom and freedom of choice that it offends the community's sense of fair play and decency.



Reference: The Alberta Press Case [1938] 2 D.L.R. 81 (S.C.C.).

Switzman v Elbling and Attorney General of Quebec 7 D.L.R. (2d) 337 (S.C.C.).

#### F. DOCTRINE OF RETROSPECTIVITY AND EQUALITY RIGHTS

68. The fundamental criteria as to whether or not a particular Statute or provision thereof is to have retrospective application is to determine whether there has been a "detrimental reliance" by the law enforcement authorities. In the absence of "detrimental reliance" or "good faith reliance", there is no prejudice to the party seeking to prohibit the retrospective effect.

Reference: Her Majesty the Queen v. Anthony McDonald (unreported) Ont. C.A., released August 6, 1985.

69. In addition, it would be practically, philosophically and conceptually absurd not to take advantage of a change in the law in circumstances of prospective jeopardy.

70. In Stovall v. Denno the U.S. Supreme Court established the following criteria:

- (a) The purpose to be served by the new standard;
- (b) The extent of the reliance by law enforcement authorities on the old standards (good faith reliance);
- (c) The effect on the administration of justice of a retroactive application of the new standard. Will it have severe impact upon the administration of justice.

Reference: Stovall v. Denno 388 U.S. 293; 87 S. Ct. 1967; 18 L. Ed. (2d) 1199 (1967).

Linkletter v. Walker 381; U.S. 618; 85 S. Ct. 1731; 14 L. Ed. 2d 601 (1965).

#### G. EQUALITY RIGHTS

71. It is respectfully submitted that the Retail Business Holidays Act contravenes Section 15 of the Charter, which reads as follows:

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"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, and in particular, without discrimination based on race, national or ethnic origin, religion, sex, age or mental or physical disability."

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72. In particular, these equality rights are contravened in the following manner:

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- (a) In order for the legislation to remain valid, the Court of Appeal has introduced a religious exemption. Therefore, those people with a particular religious persuasion are treated differently than those without the same religious persuasion.
  - (b) The Retail Business Holidays Act discriminates, through a myriad of exemptions and exceptions unequally between different classes of retailers.
  - (c) The Act discriminates between those people who choose to earn a livelihood in the retail trade with those who choose to earn a livelihood in other fields.
  - (d) With respect to Paul Magder, the fact that he is prohibited from carrying on business on Sunday notwithstanding he is geographically within the boundaries of the Chinatown West tourist exemption and most businesses around him, that are also within the exempted district, can carry on business.
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73. Prior to Section 15 of the Charter equality rights in Canada were governed by Section 1(b) of the Canadian Bill of Rights, which stated:

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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 ...

- (b) the right of the individual to equality before the law and the protection of the law."

74. The interpretation of equality rights under Section 15 of the Charter will be assisted by reference to the following:

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- (a) United States Constitution: Fourteenth Amendment:  
Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws ...".

(b) American Declaration of Independence:

"We hold these truths to be self-evident, That all men are created equal, that they are endowed with their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.".

(c) French Declaration of the Rights of Man and of the Citizen, 1789, proclaimed in Article I:

"Men are born and remain free and equal in respect of rights. Social distinctions shall be based solely upon public utility.".

75. In addition to Section 15(1), the Charter provides for additional equality rights, to wit:

Section 27:

"This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.".

Section 28:

"Notwithstanding anything in the Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.".

76. The most significant feature of Section 15(1) of the Charter is that it is intended to cover every conceivable operation and application of law. Section 15 applies to "every individual" and every individual is to be treated "without discrimination".

77. Under Section 1(b) of the Canadian Bill of Rights, equality rights were defined in the context of "equality before the law". Section 15 of the Charter is much broader. It deals with:

- (i) Equality before the law;
- (ii) Equality under the law;
- (iii) Equal benefit of the law; and
- (iv) Equal protection of the law.

78. "Equality before the law" has a specific foundation in English constitutional law which we inherited through the preamble of the BNA Act. "Equal protection of the law" is a precept entrenched in American constitutional law. "Equality under the law" and "equal benefit of the law" are new legal precepts which require interpretation.

79. In addition to the expanded scope of "equality rights" under Section 15 of the Charter (which renders many of the distinctions arising from the pre-Charter equality cases irrelevant), the restrictions imposed under the Canadian Bill of Rights have now been eliminated.

Reference: Regina v. Videoflicks Ltd., et al (1985) 48 O.R. (2d) page 395.

Regina v. Big M Drug Mart Ltd., (1984) 5 D.L.R. (4th) 121 (Alta C.A.), affirmed S.C.C. April 24, 1985.

80. It is submitted that use of the wording that every individual is "equal before and under the law and has the right to the equal protection and equal benefit of the law" was to reverse the restrictive interpretation placed by the Supreme Court of Canada on the phrase "equality before the law" under the Canadian Bill of Rights.

81. The words, "and under" were intended to abrogate the "administrative" definition of equality applied by Mr. Justice Ritchie in A.G. of Canada v. Lavell. Judicial Review under Section 15 clearly extends to substantive law and is not restrictive in the way in which it is administered.

Reference: A.G. of Canada v. Lavell 38 D.L.R. (3d) 481.

82. It is further submitted that the use of "equal benefit of the law" was intended to abrogate a suggestion by Mr. Justice Ritchie in Bliss v. A.G. of Canada that the legislative provisions of "benefits" was not subject to equality standards.

Reference: Bliss v. A.G. of Canada [1979] 1 S.C.R. 183.

83. The words "equal protection ... of the law" is similar to the phrase used in the Fourteenth Amendment of the Constitution of the United States, "equal protection of the law". It is therefore submitted that American jurisprudence regarding equality protection is relevant to interpreting Section 15 of the Charter.

Reference: Constitutional Law of Canada 2nd Edition, Peter Hogg, page 799 and 780.

84. Under Section 1(b) of the Canadian Bill of Rights, this Court has stated that no individual or group of individuals is to be treated more harshly than another under the law and an individual is denied equality before the law, if it is made an offence, punishable at law, for him to do something which other Canadians are free to do. For all the reasons stated above, it is submitted that Mr. Magder's equality rights are being infringed even under the more limited and restricted definitions enunciated by the Bill of Rights.

Reference: Regina v. Drybones 9 D.L.R. 473 (S.C.C.) page 484.

Regina v. Gonzalves (1962) 32 D.L.R. (2d) 290.

Curr v. The Queen 26 D.L.R. (3d) 603 (S.C.C.).

Canard v. Attorney General of Canada 30 D.L.R. (3d) 9.

Attorney General of Canada v. Lavell and Isaac, et al v. Bedard 38 D.L.R. (3d) 481.

Plessy v. Ferguson (1896) 163 U.S. 537.

Brown v. Board of Education (1954) 347 U.S. 483.

PART FOUR

RELIEF SOUGHT

85. It is respectfully submitted that this appeal be allowed; the verdict of the Trial Judge re-instated and this Honourable Court answer the questions posed in the following manner:

- (a) The Retail Business Holidays Act, R.S.O., 1980, chapter 453, is ultra vires the Provincial Legislature.
- (b) The Retail Business Holidays Act, R.S.O., 1980, chapter 453 does infringe and deny the rights and freedoms guaranteed by Sections 2(a), 7 and 15 of the Canadian Charter of Rights and Freedoms.
- (c) The Retail Business Holidays Act, R.S.O., 1980, chapter 453 is not justified on the basis of Section 1 of the Canadian Charter of Rights and Freedoms.

All of which is respectfully submitted by

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TIMOTHY S.B. DANSON  
of Counsel

PART FIVE

TABLE OF AUTHORITIES

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3. Attorney General (Ont.) v. Hamilton Street Railway (1903) 7 C.C.C. 326 (P.C.) - Applicant's Factum at page 12.
4. Attorney General for Ontario v. Reciprocal Insurers [1942] A.C. 328 - Applicant's Factum at page 20.
5. Attorney General for Saskatchewan v. Attorney General for Canada [1949] A.C. page 125 - Applicant's Factum at pages 20 and 21.
6. Blauvret v. Beck 76 N.W. (2d) 738 at 741 (Nebraska S.C.) - Applicant's Factum at page 28.
7. Bliss v. A.G. of Canada [1979] 1 S.C.R. 183 - Applicant's Factum at page 33.
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9. Brown v. Board of Education (1954) 347 U.S. 483 - Applicant's Factum at page 33.
10. Canard v. Attorney General of Canada 30 D.L.R. (3d) 9 - Applicant's Factum at page 33.
11. Clarke v. Rural Municipality of Wawken (1930) 2 D.L.R. 596 (Sask. C.A.) - Applicant's Factum at pages 12 and 13.
12. Curr v. The Queen 26 D.L.R. (3d) 603 (S.C.C.) - Applicant's Factum at page 33.
13. Dilloff, "Never on Sunday; The Blue Laws Controversy 39 Md. L. Rev 679 (1980) 714 - Applicant's Factum at page 10.
14. Henry Birks & Sons (Montreal) Ltd., et al v. Montreal and Attorney General of Quebec (1955) 5 D.L.R. 321 (S.C.C.) - Applicant's Factum at pages 12 and 15.

15. Her Majesty the Queen v. Anthony McDonald (unreported) Ont. C.A., released August 6, 1985 - Applicant's Factum at page 29.
16. Her Majesty the Queen and Big M. Drug Mart Ltd. 5 D.L.R. 121 (Alta C.A.) affirmed S.C.C. April 24, 1985 - Applicant's Factum at pages 11, 14, 15, 17 and 18.
17. Hogg, Peter - Constitutional Law of Canada 2nd Edition, pages 799 and 780 - Applicant's Factum at page 33.
18. Hurtado v. California, 110 U.S. 516 at 535 (1884) - Applicant's Factum at page 28.
19. Laskin, Bora (as he then was) Freedom of Religion and the Lord's Day Act, The Canadian Bill of Rights and the Sunday Bowling case (1964) The Canadian Bar Review v XLII - Applicant's Factum at page 25.
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26. Pavesick v. New England Life Insurance Company, 50 S.E. 68 at 68 - Applicant's Factum at page 27.
27. Plessy v. Ferguson (1896) 163 U.S. 537 - Applicant's Factum at page 33.
28. Regina v. Drybones 9 D.L.R. 473 (S.C.C.) page 484 - Applicant's Factum at page 33.
29. Regina v. Gonzalves (1962) 32 D.L.R. (2d) 290 - Applicant's Factum at page 33.



30. Regina v. Magder (No. 1) (1983) 41 O.R. (2d) 281 (Ont. C.A.) - Applicant's Factum at page 13.
31. Regina v. Roche 40 C.R. (3d) 138 at 143 (Ont. Dist. Crt.) - Applicant's Factum at page 27.
32. Regina v. Tamerac Foods Ltd., et al (1978) 45 C.C.C. (2d) 442 (Man. C.A.) - Applicant's Factum at page 12.
33. Regina v. Top Banana Limited 4 O.R. (2d) 213 - Applicant's Factum at page 12.
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37. Re: Insurance Act of Canada [1932] A.C. 41 - Applicant's Factum at page 20.
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39. Reference re: Sections 94(2) of the Motor Vehicle Act 4 C.C.C. (3d) 243 at 240 (B.C.C.A.) - Applicant's Factum at page 27.
40. Reference re: Alberta Bills [1938] 4 D.L.R. 433 - Applicant's Factum at page 20.
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42. Rex v. Waldon (1914) 18 D.L.R. 109 (B.C.C.A.) - Applicant's Factum at page 12.
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45. State v. Dodge 76 V.T. 197 (1904) - Applicant's Factum at page 9.
46. Stovall v. Denno 388 U.S. 293; 87 S. Ct. 1967; 18 L. Ed. (2d) 1199 (1967) - Applicant's Factum at page 29.

47. Switzman v. Elbling and Attorney General of Quebec  
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49. The Alberta Press Case [1938] 2 D.L.R. 81 (S.C.C.) -  
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50. Tribe, American Constitutional Law (1978) at 509 -  
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51. The Queen v. Fisherman's Wharf (1982) 135 D.L.R. (3d)  
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52. Whyte, Fundamental Justice (1983) 13 Man. L.J. 455 at  
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