

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

B E T W E E N :

HER MAJESTY THE QUEEN,

Appellant,

- and -

NORTOWN FOODS LIMITED

Respondent.

FACTUM OF THE RESPONDENT

NORTOWN FOODS LIMITED

ATTORNEY-GENERAL OF ONTARIO,
18 King Street East,
Toronto, Ontario,
M5C 1C4.

Bonnie J. Wein,
Solicitor for the
Attorney-General of Ontario.

MCCARTHY & MCCARTHY,
Box 48, Toronto Dominion
Bank Tower,
Toronto Dominion Centre,
(416) 362-1812

Solicitors for the Respondent
Nortown Foods Limited.

SOLOWAY, WRIGHT, HOUSTON,
GREENBERG, O'GRADY, MORIN,
Barristers and Solicitors,
170 Metcalfe Street,
Ottawa, Ontario,
K2P 1P3.

Ottawa Agents for the
Attorney-General of Ontario.

GOWLING & HENDERSON,
160 Elgin Street,
Ottawa, Ontario,

(613) 232-1781

Ottawa Agents for the Respondent
Nortown Foods Limited.

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for Ontario)

B E T W E E N :

HER MAJESTY THE QUEEN,

Appellant,

- and -

NORTOWN FOODS LIMITED

Respondent.

INDEX TO FACTUM

	<u>Page</u>
PART I - STATEMENT OF FACTS	1
PART II - POINTS IN ISSUE	2
PART III - ARGUMENT	3
PART IV - NATURE OF ORDER REQUESTED	21
LIST OF AUTHORITIES	23

1.

IN THE SUPREME COURT OF CANADA

(On Appeal from Court of Appeal for Ontario)

B E T W E E N:

HER MAJESTY THE QUEEN,

Appellant,

and

NORTOWN FOODS LIMITED,

Respondent.

FACTUM OF THE RESPONDENT,
NORTOWN FOODS LIMITED

10

PART I
STATEMENT OF FACTS

1. The respondent Nortown Foods Limited accepts the statement of facts in paragraphs 5 and 9 to 15 of the factum of the Attorney-General of Ontario in relation to Nortown Foods Limited but says they are incomplete.

The following additional facts are relevant.

Nortown Foods Limited is a private company having two persons of the Jewish faith as the sole shareholders (Mr. Schacter and Mr. Klein) and the Jewish faith prohibits working on Saturdays or shopping on Saturdays.

Evidence of Leonard Schacter - Case, Vol. I,

page 128, line 25 to page 131, line 5, and
page 132, lines 5 to 16;

Evidence of Nancy Kumer - Case, Vol. I,

page 132, line 5 to page 133, line 17;

Evidence of Gloria Yasny - Case, Vol. I,

page 133, line 26 to page 134, line 16.

20

PART II
POINTS IN ISSUE

2. Did the Court of Appeal err in acquitting Nortown Foods Limited of the charge against it under The Retail Business Holidays Act, R.S.O. 1980, c. 453? It is respectfully submitted that the Court of Appeal did not so err.

3. By order of the Chief Justice the following constitutional questions were stated for consideration by this Honourable Court:

(a) 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?

(b) 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?

(c) 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?

PART III
ARGUMENT

4. We are content to assume for the purpose of our submissions that The Retail Business Holidays Act, R.S.O. 1980, c. 453 (hereinafter called "the Act") is within the legislative powers of the Province of Ontario pursuant to section 92 of the Constitution Act, 1867.

5. On the other hand it is respectfully submitted that the Act infringes or denies the rights and freedoms guaranteed by section 2(a) of the Canadian Charter of Rights and Freedoms and that the limits on the rights protected by section 2(a) of the Charter cannot be justified under section 1 of the Charter.

6. It is also respectfully submitted that the Act is inconsistent with the provisions of section 27 of the Charter which provides "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of Canadians".

7. It is important to note that 54 out of 60 specified holidays in section 1(1)(a) of the Act are days of religious significance only for Christians. In order to adhere to their religious beliefs Orthodox Jewish merchants must close their stores on Saturday and to obey the provisions of the Act they must also close on Sundays which are not days of any religious significance to them. Similar considerations apply to Moslems, Hindus and Seventh Day Adventists whose Holy Days are not Sundays.

4.

8. The Act contains many exemptions from its operation and cannot be characterized as requiring a day of uniform rest or pause for retail merchants. The exemptions are as follows:

section 3(1) - small stores;

section 3(2) - pharmacies,

section 3(3) - "special services" - sale of gasoline, motor oil, nursery stock or flowers, fresh fruit or vegetables, between April 1 and November 30 of the same year,

section 3(4) - the "Sabbatical exemption" dealing with situations where a store is closed on Saturday,

section 3(5) - sale of liquor,

section 3(6) - admission of the public to premises for educational, recreational or amusement purposes and in respect of the sale of goods or services incidental thereto,

section 3(7) - prepared meals etc.,

section 3(8) and

section 4 - where it is essential for the maintenance or development of a tourist industry, the council of a municipality may by by-law provide that section 2 does not apply to any class of retail business establishment in respect of the sale by retail of goods or services on such holidays, for such period of time, in such parts of the municipality and under such conditions as are specified in the by-law.

5.

9. It is submitted that one vital test of the validity of legislation for the purpose of the Charter, irrespective of the purpose of the legislation, is whether the legislation has the effect of infringing on or abridging freedom of religion. The important issue in the present case is the effect of the legislation. The freedom of religion protected by the Charter is designed to protect the religion of minority groups as much as the religion of the majority from state enforced action.

10

10. The fundamental submission is that the Act penalizes by an economic sanction those who are of the Jewish faith and that their freedom of religion is infringed or abridged. Jewish merchants by the tenets of their religion must close on Saturday and their Jewish customers must refrain from buying on Saturday. Christian merchants and customers can transact their retail business or obtain their needs, as the case may be, on six days a week whereas the Jews can do so only on five days in a week.

20

11. The effect of the Act on those who do not adhere share the beliefs of the Christian majority is not merely incidental or casual; it is substantial. The Act has the effect of significantly abridging the freedom of religion of those who do not subscribe to the Christian faith. The economic effect on the Jewish merchant is the same as if the state were to impose fines on Jewish merchants for worshipping on Saturday.

6.

12. In order to adhere to their religious beliefs the Orthodox Jews must close their stores on Saturday and to adhere to the law they must also close on Sunday which is not a day of any religious significance to them. They are compelled to bow to the religious faith of the majority who regard Sunday as their Holy Day. As said by Jerome A. Barron in his article in 1965, 79 Harvard Law Review 42 at page 53 entitled "Sunday in North America", after discussing the judgment of this Honourable Court in Robertson and Rosettanni v. The Queen [1963] S.C.R. 651:

"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".

13. The basic submissions above are fully supported by the judgment of this Honourable Court in R. v. Big M Drug Mart, [1985] 1 S.C.R. 295. The test for determining the validity of legislation in charter cases such as the present was discussed by the Chief Justice in the Big M Drug Mart case at pages 331 to 332 as follows:

"In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have been looked to for guidance in assessing the legislation's object and thus, its validity.

"Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the Charter. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of Charter rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact."

and at page 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."

Reference also to: Reasons of Madam Justice Wilson in the Big M Drug Mart at pages 361 to 362;
and to

Hunter v. Southam Inc. [1984] S.C.R. 145.

8.

14. In the Big M Drug Mart case the Chief Justice also discussed freedom of religion which he defined at pages 336 to 338 as follows:

10 "... 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.

20 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 forced to act in a way contrary to his beliefs or his conscience."

30 15. It is respectfully submitted that the choice of Sunday as a forced pause day or the size of the Christian majority does not save the Act from the impact of the Charter. A vital object of the Charter is the protection of minorities. As stated by the Chief Justice in the Big M Drug Mart case at page 337:

10

"What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of a tyranny of the majority".

16.

It is also respectfully submitted that the forced observance of Sunday as a day of rest is inconsistent with section 27 of the Charter as stated by the Chief Justice in the Big M Drug Mart case at pages 337 to 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:

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

17.

In support of the submission that the effect of the Act is to impose economic penalties on Orthodox Jews, reference will be made to statements made by individual Judges of the Supreme Court of the United States in relation to the concept of free exercise of religion. The Constitution of the United States, of course, does not coincide in its language with the Charter of Rights and Freedoms but the comments of some of the Judges of that Court are respectfully submitted to be cogent and highly persuasive with respect to freedom of religion under section 2(a) of the Charter.

Sherbert v. Venner et al Members of South Carolina
Employment Security Commission, 1963, 374 U.S. 398.

18. In this case the appellant, a member of the Seventh Day Adventist Church, was discharged by her employer in South Carolina because she would not work on Saturday which was the Sabbath Day of her faith. She was unable to obtain other employment because she would not work on Saturday. She filed a claim for unemployment compensation benefit under the South Carolina Unemployment Compensation Act which contained a provision that a claimant is ineligible for benefits if he or she has failed without good cause to accept available suitable work when offered.

The State Commission denied the appellant's application on the ground that she would not accept suitable work when offered and its action was sustained by the State Supreme Court. The Supreme Court of the United States held that the South Carolina statute abridged the appellant's right to the free exercise of her religion in violation of the First Amendment made applicable to the States by the Fourth Amendment. Mr. Justice Brennan delivered the majority judgment of the Court, and at pages 403 to 404 he said:

"We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of

"our inquiry. For '[i]f the purpose or effect of a law is to impede observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' Braunfeld v. Brown, supra, at 607. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable.

"The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against the appellant for her Saturday worship."

Mr. Justice Laycraft in his judgment in the Big M Drug Mart case, [1984] 1 W.W.R. 625 at page 643 stated:

"In many cases, the term 'business inconvenience' will not be an apt term to describe the financial or 'secular' effect of being permitted only five days of business activity in a week rather than six. In the face of greater activity permitted a competitor, the 'inconvenience' may become financial ruin. Whatever its degree, The Lord's Day Act, in my opinion, imposes a coercive burden on the free exercise of religion or conscience. Like Brennan, J., I can see little difference between the practical effect of the burden and a penalty imposed for Saturday (or Friday) worship."

Braunfield v. Brown (1961) 366 U.S. 599

19. This was an action to enjoin enforcement of a Pennsylvania criminal statute prohibiting the Sunday retail sale of enumerated commodities on grounds that the Statute

was a law respecting establishment of a religion, that it was a statute violating the equal protection clause and that it was a statute interfering with the free exercise of the plaintiff's Orthodox Jewish religion. The United States District Court dismissed the action and the majority of the Supreme Court agreed with the decision upholding the statute. However, Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Douglas dissented and reliance is respectfully placed on the dissenting reasons of Mr. Justice Brennan and Mr. Justice Stewart. Mr. Justice Brennan said at page 1151:

" In fine, the Court, in my view, has exalted administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous. The Court would justify this result on the ground that the effect on religion, though substantial, is indirect. The Court forgets, I think, a warning uttered during the congressional discussion of the First Amendment itself: '* * * the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand * * *.'

" I would reverse this judgment and remand for a trial of appellants' allegations, limited to the free-exercise-of-religion issue."

At pages 1152 and 1153 Mr. Justice Stewart said:

"I agree with substantially all that Mr Justice Brennan has written. Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion."

20. In American Constitutional Law by Lawrence H. Tribe, Professor of Law, Harvard University, the learned author says at pages 854 and 855:

10 " Another case that may not permanently survive Sherbert - assuming Sherbert itself survives - is Braunfeld v. Brown, 366 U.S. 599 (1961) where Sunday closing laws were upheld against a free exercise attack. The Court's theory was that exempting objecting Sabbatarians might be administratively cumbersome, might afford an undue competitive advantage to the exempted class, and might frustrate the legitimate goal of assuring a largely uniform day of 'rest', with all of its attendant social conveniences. The rationale of convenience is obviously less convincing in the face of a free exercise clause request for a limited number of religious exemptions than in the context of an establishment clause challenge to the laws in their entirety, a challenge the Court somewhat more plausibly rejected in McGowan v. Maryland, 366 U.S. 420 (1961).

20 " Justice Stewart's classic dissent in Braunfeld put the matter plainly: 'Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion.' The notion that it would be awkward or inefficient not to have absolute Sunday togetherness, especially when the laws themselves already grant numerous exemptions, is plainly insufficient to meet the test of Sherbert. Justice Stewart was therefore right in concluding that Braunfeld cannot stand consistently with Sherbert, and in urging that 'the Braunfeld case was wrongly decided and should be overruled.'

40 Reference also to Thomas v. Review Board of the Indiana Employment Security Division et al, (1981) 450 U.S. 707.

21. Counsel for the Attorney General submits that a corporation cannot have a religion for the purposes of The Retail Business Holidays Act. It is respectfully submitted that there are two answers to this suggestion as far as Nortown Foods Limited is concerned:

(a) Nortown Foods Limited has been charged with an offence and it can raise as a defence to the charge that the statute violates the Charter because it interferes with the freedom of religion of Jews or Hindus or Moslems or Seventh Day Adventists;

(b) The contention of the Attorney General also overlooks the fact that there are only two shareholders of Nortown Foods Limited and it is a private company. The impact of the Act complained of is in substance on the two shareholders who are of the Jewish faith and on the customers of the company. The reality of the matter is that although the business is carried on in the form of a limited company, it is really akin to a partnership. For the purposes of the just and equitable rule in connection with the winding up of a limited company, the principles applicable to the winding up of a partnership are applied where there is in substance a partnership in the guise of a private company.

See: In Re Yenidje Tobacco Company Limited, [1916] 2 Ch. 426.

If the Courts will pierce the corporate veil and look at the substance of the matter where there has been a petition for the winding up of a private company a fortiori they should do so where there is an issue of unlawful interference with freedom of religion under the Charter.

ALTERNATIVE ARGUMENT

22. It is respectfully submitted that the Court of Appeal was right in acquitting the respondent Nortown Foods Limited of the charge against it that it had violated the provisions of The Retail Business Holidays Act. The essence of the Court of Appeal's judgment with respect to the position of Nortown Foods Limited may be summarized as follows:

10 (a) "The parties to the litigation may be divided into two distinct groups: those who close on a day other than Sunday because it is required as part of their Sabbath observance and those who do not";

Case - Vol. II - page 284, lines 4 to 7.

(b) "the intent and purpose of the Act is secular";
Case - Vol. II - page 284, lines 16 to 17.

20 (c) "The Act cannot be said to infringe the freedom of religion of those who do not close their business establishments on a day other than Sunday because it is their Sabbath";

Case - Vol. II - page 284, lines 10 to 14.

(d) "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";

Case - Vol. II - page 284, lines 24 to 27.

(e) "A law which prohibits certain practices which are an essential part of one's religion must be considered an abridgement or infringement of religion. This is so even though the impact on religion occurs 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 the observance of one's Sabbath financially onerous".

Case - Vol. II - page 284, line 27 to
page 285, line 10.

(f) "In my view, where one claims exemption on grounds of religion or conscience to a particular government regulation or requirement, one must be prepared to show that the objection is based upon a life-style required by one's conscience or religion".

Case - Vol. II - page 285, lines 12 to 18.

(g) "On the basis of the facts before this Court, I am satisfied that of all the appellants only Nortown Foods Limited have established that they are entitled to relief from the provisions of the Act because of sincerely held religious

beliefs. In my opinion the Act even though enacted for a secular purpose has the effect of infringing their freedom of religion".

Case - Vol. II - page 286, lines 3 to 9.

(h) That the United States Constitution has no counterpart to section 27 of the Charter:

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

10

Case - Vol. II - page 291, lines 2 to 5.

(i) "Religion is one of the dominant aspects of a culture which it [section 27 of the Charter] is intended to preserve and enhance".

Case - Vol. II - page 293, lines 16 to 19.

23. The Court of Appeal's view was that The Retail Business Holidays Act has the effect of infringing or abridging the free exercise of religion by a person who holds sincerely the religious view that he cannot work or shop on Saturday and that he is entitled to a holding that the Act is not applicable to him and that as to him it has no force or effect. This is consistent with what Chief Justice Dickson said in the Big M Drug Mart case [1985] 1 S.C.R. 295 at page 334 as follows:

20

"If a law with a valid purpose interferes by its impact with rights or freedoms, a litigant could still argue the effect of the legislation is a means to defeat its applicability and possibly its validity".

30

18.

24. What the Court of Appeal concluded was that the Act by its impact interfered with the free exercise of their religion by the owners of Nortown Foods Limited. This is tantamount to holding that they and Nortown Foods Limited have a right to an exemption from the operation of the Act based on the bona fide religious faith of the two owners.

10 25. This approach of exemption or non-applicability to which Chief Justice Dickson refers is consistent with the judgments of the Supreme Court of the United States in Sherbert v. Vanner, 1963, 374 U.S. 398 and Thomas v. Review Board of the Indiana Employment Security Division et al (1981) 450 U.S. 707 and the other authorities referred to in paragraphs 18, 19 and 20 (supra).

20 26. In fact in cases dealing with the Canadian Charter of Rights and Freedoms there is a stronger argument for non-applicability or exemption than in the United States. One reason for this is that the United States Constitution contains no provisions similar to section 27 or section 1 of the Charter. This aspect of the matter was discussed in the reasons for judgment of the Court of Appeal:

Case - Vol. II. - page 286, line 10 to
page 291, line 22.

Section 15 of the Charter

27. Although counsel for the Attorney General in her factum does not make any submission as to the applicability of section 15 of the Charter to the case of Nortown Foods Limited, the question may be raised by this Honourable Court.

It is submitted that a consideration of the jurisprudence in the United States is relevant as to this question.

28. The Constitution of the United States in section 1 of the 14th Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws".

In this respect it is similar to section 15 of the Charter of Rights and Freedoms.

10 29. There are a number of cases in which United States Courts have found Sunday closing bylaws to be in violation of the equality provision in the 14th Amendment. The American cases in effect say that each particular statute must be dealt with on its own for the purpose of analysis and consequently there are also American cases which hold that a particular statute involving Sunday closing does not violate the equality provisions of the American Constitution. The issue really turns on the nature and extent of the exceptions in the particular statute under consideration.

20 30. It is submitted that the American cases which have dealt with a statute similar to The Retail Business Holidays Act and its numerous exceptions support the proposition that the Act is of no force and effect because of the equality rights in section 15 of the Charter.

31. The leading case is People v. Abrahams, 353 N.E. (2d) 574 (New York 1976) where the Court found that the "crazy quilt" of exceptions to the Sunday closing law bore no rational relationship to the alleged purpose of

providing a uniform day of rest and that the unequal treatment of those who were exempted from its provisions as opposed to those who were forced to abide by them rendered the entire statute unconstitutional.

Reference also to:

Skag-Way Department Stores v. City of Omaha,
140 N.W. (2d) 28 (Nebraska 1966);

Twin Fair Distributors Corp. v. Cogrove,
380 N.Y.S. (2d) 933 (1976);

Caldor's Inc. v. Bedding Barn Inc., 417 A.
(2d) 343 (Connecticut 1979).

10

32. In State v. Shop 'n' Save Food Markets Inc.,
415 A (2d) 235 (Vermont 1980) the impugned statute granted exemption to businesses on the basis of the number of employees and the gross revenue of the establishment in question. The Court held that there was no rational connection between these criteria and the avowed aim of creating an "atmosphere of repose and tranquility in which families, friends and relatives can gather together for social occasions and recreation."

20

33. In West v. Winsboro, 211 So. (2d) 655 (Louisiana 1968) similar reasoning led the Court to declare unconstitutional law granting exemption to certain stores with less than a certain square footage of sales space.

Reference also to: Hughes v. Reynolds, 157 S.E. (2d) 746
(Georgia 1967);

Terry Carpenter Inc. v. Wood 129 N.W.
(2d) 475 (Nebraska 1964).

30

21.

34. Some of the exceptions in The Retail Business Holidays Act are arbitrary and others are very broad. In particular the powers given to municipal councils to exempt areas from the application of the Act (section 4) and to the Lieutenant Governor to do the same in unorganized territory in a Province which is tourist oriented are fatal to the validity of the Act in the light of the provisions in section 15 of the Charter. It is respectfully submitted, therefore, that the Act is of no force and effect under section 15 of the Charter.

10

Section 1 of the Charter

35. For the reasons given by the Court of Appeal it is clear that the Attorney General has not satisfied the onus which rests upon the Attorney General under section 1 of the Charter.

Case - Vol. II - page 295, line 21 to
page 299, line 10.

PART IV
NATURE OF ORDER REQUESTED


20

37. It is respectfully submitted that the appeal of the Attorney General against the acquittal of Nortown Foods Limited be dismissed.

38. It is further respectfully submitted that the Constitutional Questions 2 and 3 should be answered as follows:

2. The Retail Business Holidays Act infringes or denies the rights and freedoms guaranteed by sections 2(a) and/or section 15 of the Canadian Charter of Rights and Freedoms or that the Act does not apply to Nortown Foods Limited.

3. The infringement or denial of the rights and freedoms guaranteed by sections 2(a) and 15 of the Charter cannot be justified under section 1 of the Charter.


 Counsel for Nortown Foods Limited

LIST OF AUTHORITIES

American Constitutional Law by Lawrence H. Tribe
at 854 & 855

Braunfield v. Brown (1961) 366 U.S. 599

Caldor's Inc. v. Bedding Barn Inc.,
417 A. (2d) 343 (Connecticut 1979)

Hughes v. Reynolds, 157 S.E. (2d) 746 (Georgia 1967)

Hunter v. Southam Inc. [1984] S.C.R. 145

People v. Abrahams, 353 N.E. (2d) 574 (New York 1976)

Regina v. Big M Drug Mart, [1984] 1 W.W.R. 625 (Alta.C.A.)
[1985] 1 S.C.R. 295

Retail Business Holidays Act, R.S.O. 1980, c. 453

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

Sherbert v. Venner et al Members of South Carolina
Employment Security Commission, 1963, 374 U.S. 398

Skag-Way Department Stores v. City of Omaha,
140 N.W. (2d) 28 (Nebraska 1966)

State v. Shop 'n' Save Food Markets Inc.,
415 A (2d) 235 (Vermont 1980)

Ferry Carpenter Inc. v. Wood 129 N.W. (2d) 475 (Nebraska 1964)

Thomas v. Review Board of the Indiana Employment Security
Division et al (1981) 450 U.S. 707

Twin Fair Distributors Corp. v. Cogrove,
380 N.Y.S. (2d) 933 (1976)

West v. Winsboro, 211 So. (2d) 655

In Re Yenidje Tobacco Company Limited, [1916] 2 Ch. 426.

SERVICE HEREOF ADMITTED
THIS 27th DAY OF November
1985

Franklin & Co. Solicitors
SOLICITORS FOR
Arthur & Co. Solicitors

SERVICE HEREOF ADMITTED
THIS 27th DAY OF November
1987

Banks - Robertson Charles & Kitchin
SOLICITORS FOR
Attorneys for the G.S. of New Brunswick

SERVICE HEREOF ADMITTED
THIS 27th DAY OF November
1985

Marie Lucie Curran & Co.
SOLICITORS FOR
Appts A. L. Curran

SERVICE HEREOF ADMITTED
THIS 27th DAY OF November
1985

Burnett, Goss, Goss & Hall
SOLICITORS FOR
Agents A. G. A. G. N. S.

SERVICE HEREOF ADMITTED
THIS 27th DAY OF November
1985

Stacy & Co.
SOLICITORS FOR
to man.

SERVICE HEREOF ADMITTED
THIS 27th DAY OF November
1985

Banks & Robertson Charles & Kitchin
SOLICITORS FOR
Attorneys for the G.S. of B.C.

SERVICE OF A TRUE COPY HEREOF
SIGNIFICATION DE COPIE CONFORME-
Admitted this 28th day
Acceptée le 28th jour
of November 1985
do

for
pour
Josée Desjardins
FRANK MODRILLO
Deputy Attorney General of Canada
Sous-procureur général du Canada

SERVICE HEREOF ADMITTED
THIS 27th DAY OF November
1985

Banks - Robertson Charles & Kitchin
SOLICITORS FOR
Attorneys for the G.S. of Nfld.

INDEX

I.	FACTS	
	A. The case	1
	B. The intervenor	1
II.	POINTS IN ISSUE	5
III.	ARGUMENT	
	A. Respecting Question 1	6
	B. Respecting Question 2	9
	C. Respecting Question 3	10
IV.	ORDER	11
V.	APPENDICES	
	A. Quotations	12
	B. Affidavit of the President, Ontario Conference Corporation of the Seventh-day Adventist Church	15
	C. Quotation	17
	D. Authorities	21