

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

BIG M DRUG MART LTD.

Respondent
(Defendant)

- and -

THE ATTORNEY GENERAL OF CANADA
THE SEVENTH DAY ADVENTIST CHURCH
IN CANADA AND LONDON DRUGS LTD.

(Intervenors in
the Court of
Appeal of Alberta)

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PART I
STATEMENT OF FACTS

1. The Appellant appeals to this Honourable Court pursuant to leave to appeal granted December 19, 1983, by this Court from the Judgment of the Court of Appeal of Alberta.

2. The Respondent corporation was charged with an offence contrary to s. 4 of the Lord's Day Act:

On Sunday, the 30th day of May, 1982, in the City of Calgary in the Province of Alberta, did unlawfully carry on the sale of goods, contrary to the provisions of the said Lord's Day Act, being Chapter L-13 of the Revised Statutes of Canada.

3. On the evidence adduced before the Provincial Court of Alberta, His Honour Judge Stevenson found that the items offered for sale (groceries, plastic cups and a bicycle padlock) did not fall within the exceptions set out in s. 11 of the Lord's Day Act.

4. On March 9, 1983, the Respondent corporation was acquitted of the charge on two grounds: the Lord's Day Act is no longer justified on the basis of Parliament's criminal law power under s. 91(27) of the Constitution Act, 1867, and the Lord's Day Act breaches the freedom of conscience and religion guarantee in s. 2(a) of the Canadian Charter of Rights.

5. The Attorney General of Alberta appealed the acquittal by stated case pursuant to s. 762 of the Criminal Code to the Court of Appeal of Alberta. The Attorney General of Canada intervened in support of Alberta, and the Court of Appeal permitted the Seventh Day

Adventist Church in Canada and London Drugs Ltd. to intervene in support of the Respondent corporation.

6. On November 2, 1983, the Court of Appeal of Alberta dismissed the appeal by a majority judgment of 3-2. The Court of Appeal held that the Lord's Day Act is valid federal legislation under the criminal law power specified in s. 91(27) of the Constitution Act, 1867.

7. Further, the Court of Appeal held that the Lord's Day Act infringes the fundamental freedom of religion and conscience guarantee contained in s. 2(a) of the Canadian Charter of Rights and Freedoms. The court also held that the Lord's Day Act is not justified on the basis of s. 1 of the Charter.

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

(1) Does the Lord's Day Act, R.S.C. 1970, c. L-13 and especially s. 4 thereof infringe upon the freedom of conscience and religion guaranteed in s. 2(a) of the Canadian Charter of Rights and Freedoms?

(2) Is the Lord's Day Act, R.S.C. 1970, c. L-13 and especially s. 4 thereof justified on the basis of s. 1 of the Canadian Charter of Rights and Freedoms?

(3) Is the Lord's Day Act, R.S.C. 1970, c. L-13 and especially s. 4 thereof enacted pursuant to the criminal law power under s. 91(27) of the Constitution Act, 1867?

PART II

POINTS IN ISSUE

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

- (1) The Lord's Day Act, and especially s. 4 thereof, does not infringe upon the freedom of conscience and religion guaranteed in s. 2(a) of the Canadian Charter of Rights and Freedoms.
- (2) The Lord's Day Act, and especially s. 4 thereof, is justified on the basis of s. 1 of the Canadian Charter of Rights and Freedoms.
- (3) The Lord's Day Act, and especially s. 4 thereof is enacted pursuant to the criminal law power under s. 91(27) of the Constitution Act, 1867.

PART III

ARGUMENT

THE LORD'S DAY ACT, AND ESPECIALLY S. 4 THEREOF, DOES NOT INFRINGE UPON THE FREEDOM OF CONSCIENCE AND RELIGION GUARANTEED IN S. 2(a) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS.

10. A question which must be addressed is the extent to which the corporation may rely on s. 52. An argument that a statute is ultra vires, either on the basis of division of powers, or because of a Charter violation, is a defence on the merits which should be raised at the trial. The remedy, if the statute is ultra vires, is a dismissal of the charges by the Provincial Court hearing the evidence. As such the application is actually pursuant to s. 24(1) of the Charter:

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

11. If the Respondent is proceeding under s. 52 and desires a declaration that s. 4 of the Lord's Day Act is ultra vires, it is required to raise the issue in a Superior Court, as only that Court may grant prerogative remedies. The Respondent is asking for a remedy, that the charges be dismissed, and on that basis must be proceeding under s. 24.

12. In an article entitled "The Charter: An Overview and Remedies" by E.G. Ewaschuk, (1982) 26 C.R. (3d) 54, at p. 67, the author refers to the distinction between s. 52 and s. 24:

It is respectfully submitted that s. 24 is in fact self-contained as to Charter remedies. Obviously the declaration that a law is inoperative must be considered a remedy since to declare a law, e.g. a law creating an offence, inoperative is to result in the quashing of an offence based on that law. Although s. 52 refers to the power to declare laws inoperative, s. 52 applies generally to the Constitution of Canada, which includes the Charter, whereas s. 24 is the specific remedies provision applying to the Charter and therefore should be viewed as encompassing all appropriate remedies, including striking-down, for the Charter violations.

13. This question was raised in the case, R. v. Shutlak, (unreported, Sask. Prov. Ct.), but not answered conclusively. An accused was charged with impaired driving, and he argued certain provisions of the Charter were violated. He stated he was not bringing his application under s. 24(1) of the Charter, but under s. 52(1). At p. 2 of the Judgment:

A preliminary question arises here: How does one apply under Section 52(1) for a remedy for denial of a right under the Charter, as is the case here, when a finding of a denial must be made under the remedial section 24(1) before a remedy can be granted?

It would appear to me that if any action is to be founded on Section 52(1) alone it would be for a declaration that the law as it stands is of no force or effect and that this type of judgment is not within the jurisdiction of this court. Since a decision upon this point is not necessary to the disposition of this case I leave it open.

14. If this analysis is accepted, the Respondent is entitled to apply for a remedy if it's rights and freedoms have been denied,

Collin v. Kaplan (1982) 143 D.L.R. (3d) 121 (F.C.T.D.). It is respectfully submitted that the Charter of Rights does not apply so as to guarantee corporations the freedom of conscience and religion. While other sections of the Charter may be applicable to corporations, freedom of religion is not one of these. The right to freedom of religion and conscience is a personal freedom, and applies only to natural persons. A corporation is a statutory creation and cannot be said to have a conscience or hold a religious belief.

15. A helpful decision on this aspect is Southam Inc. v. Director of Investigation and Research of the Combines Investigation Branch et al, [1982] 4 W.W.R. 673 (Alta. Q.B.) appeal allowed on other grounds, [1983] 3 W.W.R. 385 (Alta. C.A.). One of the issues was whether a corporation enjoyed the benefit of s. 8 of the Charter - "Everyone has the right to be secure against unreasonable search or seizure". Cavanagh, J. concluded that s. 8 did apply to corporations, and he discussed which rights a corporation could enjoy at p. 681:

An objection raised by the defendants in argument is that the plaintiff has no status to bring this action. The defendants argued that the beneficiary of rights guaranteed in ss. 2, 7, 9, 10, 12 and 17 of the Charter is described as 'everyone'. In those sections the rights guaranteed are rights that only a human being can enjoy ...

In addition, it has been urged that in interpreting constitutions a broad and liberal interpretation ought to be given. Having that in mind, I would hold that 'everyone' as used in s. 8 should include all human beings and all entities that are capable of enjoying the benefit of security against unreasonable search. This then would include corporations. That interpretation would not be inconsistent in other sections where the word 'everyone' is used where only human beings can enjoy the rights given.

16. This same type of analysis was used in PPG Industries Canada Ltd. v. A.G. Canada (1982) 67 C.P.R. (2d) 192, (B.C.S.C.); affirmed (1983) 3 C.C.C. (3d) 97, (B.C.C.A.), where a corporation sought to obtain election for trial by jury and relied on s. 11(f) of the Charter which guarantees a right to trial by jury in certain instances. The Combines Investigation Act provides that a corporation charged under that Act "shall be tried without the intervention of a jury". McKay, J. followed the reasoning of Cavanagh, J. and held that there was no inconsistency with the Charter, as the right sought to be protected applied to individuals only and not to corporations.

17. In the event this Honourable Court decides that a corporation is entitled to freedom of conscience and religion, it is respectfully submitted that the cases which have examined the meaning and scope of freedom of religion prior to the Charter are applicable.

18. Section 2(a) of the Charter provides as follows:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

19. This is essentially the same right as recognized by the Canadian Bill of Rights, s. 1(c):

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

(c) freedom of religion;

20. In fact the Bill of Rights has not been repealed, it is also still in force. It is submitted that the Charter did not create a new right in respect of freedom of religion; that right is already protected. The Charter does entrench this right making the process for legislative amendment more detailed.

21. The words in the two pieces of legislation differ only slightly - the Charter includes freedom of conscience, but this is included in the concept of freedom of religion in any event. In Black's Law Dictionary (5th ed.), "right of conscience" is defined as meaning:

As used in some constitutional provisions, this phrase is equivalent to religious liberty or freedom of conscience.

As the protection offered is essentially the same, the cases decided under the Bill of Rights are still authoritative. The Charter was not passed in a vacuum and judicial interpretations surrounding freedom of religion is relevant today, R. v. Potma (1982), 67 C.C.C. (2d) 19 (Ont. H.C.), appeal dismissed on other grounds, (1983) 2 C.C.C. (3d) 383 (Ont. C.A.), leave to appeal to Supreme Court of Canada refused, 4 C.R.R. 17.

22. In Saumer v. City of Quebec, [1953] 2 S.C.R. 299 it was held that a by-law enacted by the City of Quebec could not extend so as to prohibit the distribution of religious pamphlets on the streets. Comments were made in the various decisions concerning the existence of freedom of religion in Canada. Rand, J. at p. 327 states as follows:

From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or instructional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.

At page 371, Locke, J. even went so far as to state that in his view the right to freedom of religious belief and worship has always been accepted throughout Canada as a constitutional right of all the inhabitants.

23. In Walter v. A.G. Alberta [1969] S.C.R. 383, the Court considered whether the Alberta Communal Property Act was an unconstitutional denial of freedom of religion in that it was aimed at preventing the spread of Hutterite colonies, the maintenance of which was a cardinal tenet of their religion. The Court rejected that argument and discussed the concept of freedom of religion at p. 392-393:

The fact that a religious group upholds tenets which lead to economic views in relation to land holding does not mean that a provincial legislature, enacting land legislation which may run counter to such views, can be said, in consequence, to be legislating in respect of religion and not in respect to property.

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

by a provincial legislature is incompetent as interfering with freedom of religion.

24. In Robertson and Rosetanni v. The Queen [1963] S.C.R. 651 the Appellants were charged and convicted for operating their bowling alley on the Lord's Day. They claimed that the effect of the Canadian Bill of Rights, in particular s. 1(c), rendered the Lord's Day Act ineffective. The Supreme Court of Canada in a 4-1 decision rejected this argument. The majority judgment held that although the Lord's Day Act was passed for the purpose of safeguarding the sanctity of the Lord's Day, it did not abrogate or infringe "freedom of religion". Mr. Justice Ritchie stated at p. 657 that:

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

The practical result of this law on those whose religion requires them to observe a day of rest other than Sunday, is a purely secular and financial one in that they are required to refrain from carrying on or conducting their business on Sunday as well as on their own day of rest. In some cases this is no doubt a business inconvenience, but it is neither an abrogation nor an abridgment nor an infringement of religious freedom, and the fact that it has been brought about by reason of the existence of a statute enacted for the purpose of preserving the sanctity of Sunday, cannot, in my view, be construed as attaching some religious significance to an effect which is purely secular in so far as non-Christians are concerned.

25. Ritchie, J. found the effect of this law to be a purely secular and financial one upon non-Christians. The secular and financial effect of the statute is the same for everyone, be they Christian or not.

26. This position was affirmed in the case of R. v. Drybones [1970] S.C.R. 282, where Ritchie, J. deals with the submission of the appellant who relied on the Robertson and Rosetanni case in arguing that one must look at the freedoms as they existed in 1960 in determining whether an infringement occurred. Ritchie, J. held that it was necessary to determine the accepted meaning of "freedom of religion" as it existed immediately before the Bill of Rights in order to determine if the construction runs contrary to s. 5(2) of the Bill of Rights. The argument that the Rosetanni case stands for the "frozen rights theory" was expressly rejected by Ritchie at p. 296:

In any event, it was not necessary to decide this question in Robertson and Rosetanni because it was found that the impugned provisions of the Lord's Day Act and the Bill of Rights were not in conflict, and I accordingly do not consider that case to be any authority for the suggestion that the Bill of Rights is to be treated as being subject to federal legislation existing at the time of its enactment ...

27. It is respectfully submitted that by employing these principles Ritchie, J. interpreted and applied freedom of religion in the same manner as this freedom should be interpreted and applied under the Charter of Rights. The case of Robertson and Rosetanni is directly applicable to the present situation.

28. In concluding that certain rights found in the Charter of Rights should be given the same meaning as corresponding rights in the

Canadian Bill of Rights the Courts in R. v. Currie (1983) 4 C.C.C. (3d) 217 (N.S.S.C. App. Div.) and R. v. Bray (1983) 2 C.C.C. (3d) 325 (Ont. C.A.) considered the following factors:

- a) the Canadian Bill of Rights is a quasi constitutional document
- b) the right contained in the Charter had a virtually identical counterpart in the Bill of Rights
- c) the right had existed in Canada for a long period of time and had been the subject of judicial review even before the right was placed in the Charter.

These factors also exist in the present case and would indicate that the freedom of religion as found in the Charter should be given the same meaning as it has been given in Canadian law before the enactment of the Charter.

29. As was stated by Eberle, J. in R. v. Potma (1982), 67 C.C.C. (2d) 19 at p. 27:

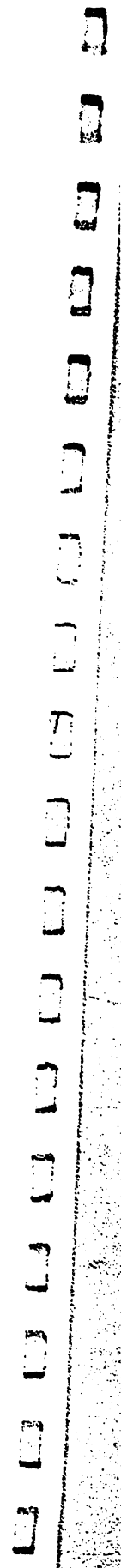
... the Charter was not passed in a vacuum. This country has a well developed and long established system of laws, including many presumptions in favour of an accused person. We have a whole body of legal principles and concepts, substantive and adjectival, together with a system of tribunals to apply that whole complex of laws to the cases that arise from day to day. It cannot be thought that the intent of the provisions of the Charter that are in issue in this case, is to undermine and bring to the ground the whole framework of laws and the legal system of the country at the stroke of a pen, even if it be a royal pen. I can see

nothing in the provisions of the Charter relied on in this case to suggest that they are intended to alter the principles on which courts have acted traditionally in relation to the subject-matter of this case ...

30. Although the American cases have characterized Sunday observance legislation as being enacted in relation to secular rather than religious concerns the cases are of interest in that their consideration of the effect of the legislation is similar to the approach taken by Ritchie, J. in Robertson and Rosetanni (supra). In Braunfield v. Brown (1961), 366 U.S. 599, the U.S. Supreme Court stated as follows:

But, again, this is not the case before us because the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sundays. And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to appellants and others similarly situated-retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor-may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.

To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden



on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday.. The list of legislation of this nature is nearly limitless.

Three other cases which upheld Sunday observance legislation were decided by the U.S. Supreme Court on the same day as Braunfield (supra):

McGowan v. Maryland (1961), 366 U.S. 420

Gallagher v. Crownkosh Supermarket of Massachusetts (1961), 366 U.S. 617

Two Guys from Harrison-Allen Town v. McGinley (1961), 366 U.S. 582

31. It should be noted that the U.S. Bill of Rights contains two separate rights relating to religion. The First Amendment states in part:

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

The "free exercise" cases are the only ones relevant to Canada since there is no equivalent in Canada to the clause prohibiting the establishment of religion. In an article entitled "Freedom of Assembly, Association, Conscience, and Religion" by Irwin Cotler found in the text edited by Tarnopolski and Beaudoin, Canadian Charter of Rights and Freedoms, (1982) the author states the following concerning the freedom of religion in Canada, at p. 201:

However, as we have seen, freedom of religion in the United States, and in Australia for that

matter, includes not only a guarantee against the abridgment of the free exercise of religion, but a guarantee against the establishment of religion. In Canada, on the other hand, separation of church and state has never been an avowed policy of Canadian legislators, and indeed, the incorporation of s. 93 into the Charter, together with the reference in the Preamble to the Supreme Deity, would seem to evince a contrary legislative intention, let alone a distinguishable legal culture. Also, what are we to make of the Proclamation of the Constitution Act, 1982 which begins with the words 'In the year of our Lord'?

Moreover, the very fact that the Supreme Court upheld the Lord's Day Act, which was enacted to safeguard the sanctity of Sunday in support of Christian religious tenets, could lead to the contrary conclusion that freedom of religion in Canada is intended to include only a guarantee against infringement of its free exercise, and not a guarantee against the establishment of religion.

Almost identical comments were made by W.S. Tarnopolsky in his text, The Canadian Bill of Rights (Second Revised Edition) at pages 175 and 176. In this respect the Canadian Charter of Rights and Freedoms is similar to the United Nations International Covenant on Civil and Political Rights (Article 18) and the European Convention on Human Rights (Article 9). (These Articles are reproduced in Appendix C). Both the United Nations and the European documents protect "the right to freedom of thought, conscience and religion" but do not contain a clause concerning the establishment of religion similar to the U.S. "establishment" clause.

32. It is respectfully submitted that s. 4 of the Lord's Day Act is not inconsistent with the right to freedom of religion. Compliance with the Lord's Day Act does not result in any person being prevented from practicing their religious beliefs. The Act does not restrict a person's freedom to worship as they wish. Put in another way, the

absence of the Act would not give anyone more religious freedom than they now possess. While the Act may indirectly cause an inconvenience to those who wish to observe a religious holiday on a day other than Sunday, the Act does not prohibit such observance nor does it require that religious worship must take place on Sunday. The simple effect of the Act is to prohibit businesses and forms of entertainment from operating on Sunday.

THE LORD'S DAY ACT, AND ESPECIALLY S. 4 THEREOF IS JUSTIFIED ON THE BASIS OF S. 1 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

33. Article 9 of the European Convention on Human Rights provides that:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

34. The restrictions contained in the Convention are useful in that they demonstrate the kind of limitations that the Courts can use in interpreting s. 2(a) of the Charter and applying s. 1 of the Charter. The avowed purpose of the statute as stated in the earlier cases stated that the Lord's Day Act is necessary in order to protect public order and morals of society.

35. In 1956, a study was commissioned on the issue of religious freedom by the United Nations. The Report was finished in 1959, and Arcot Krishnaji considered whether days of rest violated religious freedom. (An excerpt from that Report is included in Appendix D.) At p. 35, the Report recognized that it is not always possible for persons of certain faith to observe a weekly day of rest different from that of the majority. Public convenience requires some standardization of working days, and this overrides certain beliefs.

THE LORD'S DAY ACT, AND ESPECIALLY S. 4 THEREOF IS ENACTED PURSUANT TO THE CRIMINAL LAW POWER UNDER S. 91(27) OF THE CONSTITUTION ACT, 1867.

36. The criminal law, including procedure in criminal matters is, by head 27 of s. 91 of the Constitution Act, 1867, assigned to Parliament. The nature and extent of this power has been the subject of considerable judicial opinion, and can be said to have a number of attributes:

(a) criminal acts are those forbidden by law, and accompanied by penal sanctions, O'Grady v. Sparling [1960] S.C.R. 804.

(b) there must be a public purpose served by the legislation, Re Margarine Reference, [1949] S.C.R. 1 (appealed to 1951 A.C. 179). In the words of Rand, J. at p. 50:

Is the prohibition enacted with a view to the public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality, these are all the ordinary though not exclusive ends served by that law.

(c) as a general rule, mens rea is required, R. v. Prue [1979], 2 S.C.R. 547.

37. It is respectfully submitted that the Lord's Day Act meets all of these criteria. The statute is essentially prohibitory as it does not seek to regulate activities held on Sundays, the object of the Act is to promote public order, safety and morals, and the Act contains penal sanctions. These criteria are relevant today, even with the enactment of the Canadian Charter of Rights and Freedoms. The Charter does not change the distribution of powers (s. 31), and it should not be used in making a determination of whether the Lord's Day Act falls within provincial or federal jurisdiction.

38. The enforcement of the observance of Sunday by prohibition and penalties has long been recognized as part of the criminal law, and, as such, within the exclusive competence of the Parliament of Canada. In Attorney General for Ontario v. The Hamilton Street Railway Company [1903] A.C. 524, the Privy Council, held that the Ontario Legislature did not have the authority to enact legislation in relation to the Lord's Day observance. At pages 528 and 529, the court stated:

The question turns upon a very simple consideration. The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary significance. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords. Sec. 92, sub-s. 27, of the British North America Act, 1867, reserves for the exclusive legislative authority of the Parliament of Canada 'the criminal law, except the constitution of Courts of criminal jurisdiction'.

It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their Lordships have listened, to doubt that an infraction of the Act, which in its original form, without the amendment afterwards introduced, was in operation at the time of confederation, is an offence against the criminal law.

39. In the case of Quimet v. Bazin, [1912] S.C.R. 502, the Supreme Court of Canada held that Quebec legislation in relation to Lord's Day observance was invalid. Such legislation was found to be within the exclusive legislative authority of the federal Parliament. Fitzpatrick, C.J. states -- p. 507:

It appears to me on the whole abundantly clear that the intention of the legislature was to forbid certain things which, in its opinion, are calculated to interfere with the proper observance of Sunday. In the Hamilton Street Railway case their Lordships hold, impliedly at least, that Christianity is part of the common law of the realm; that the observance of the Sabbath is a religious duty; and that a law which forbids any interference with that observance is, in its nature, criminal ...

It is impossible for me to believe that the legislature intended by the enactment in question, to regulate civil rights. On the contrary, the evident object was to conserve public morality and to provide for the peace and order of the public on the Lord's Day. I am confirmed in this belief by the title of the Act ...

At page 525, Duff J. states as follows:

The Quebec statute which is impeached on this appeal professes to create offences which, in my opinion, if validly created would be offences against the criminal law within the meaning of section 91, sub-section 27, of the 'British North America Act'. The enactment appears to me, in effect, to treat the acts prohibited as constituting a profanation of the Christian institution of the Lord's Day and to declare them punishable as such. Such an enactment we are, in my opinion, bound to hold, on the authority of The Attorney General v. Hamilton Street Railway Co., to be an enactment dealing with the subject of the criminal law.

40. More recently, the Supreme Court of Canada has confirmed that the Lord's Day legislation is part of the criminal law power. In Henry Birks and Sons (Montreal) Ltd. and Others v. The City of

Montreal and A.G. of Quebec, [1955] S.C.R. 799, the court construed a Quebec statute which purported to authorize municipal councils to pass by-laws for the closing of stores on "feast days". Rand, J. stated at page 813:

That Sunday observance legislation is within the field of the Dominion as criminal law has long been settled: Attorney General of Ontario v. The Hamilton Street Railway Company.

41. The headnote summarizes the decision of Fauteux, J. which was given in the French language (pg. 799-800):

In its true nature and character, the impugned statute authorizes municipal councils to compel Feast Day observance. Similar legislation in England is, as is Sunday observance legislation, assigned to the domain of criminal law. Furthermore, in its essence, the statute is prohibitory and not regulatory. As such, it is beyond the legislative competence of the legislature as infringing on criminal law.

42. More recently, the Supreme Court of Canada has interpreted the Lord's Day Act in light of the provisions of freedom of religion in the Canadian Bill of Rights, in the case of Robertson and Rosetanni v. The Queen (supra). In his reasons for judgment, Ritchie, J. at p. 656 states as follows:

There have been statutes in this country since long before Confederation, passed for the express purpose of safeguarding the sanctity of the Sabbath (Sunday) and since the decision in A.G. Ont. v. Hamilton Street Railway it has been accepted that such legislation and the penalties imposed for its breach, constitutes a part of the criminal law in its widest sense, and is thus reserved to the Parliament of Canada by s. 91(27) of the B.N.A. Act.

43. In R. v. Boardwalk Merchandise Mart, [1973] 1 W.W.R. 190 (Alta. S.C. App. Div.), the Court followed the Robertson and Rosetanni case and held the Lord's Day Act fell under criminal law.

44. As recently as 1977, the Supreme Court of Canada has confirmed that the Lord's Day Act is validly enacted as being criminal law. In City of Hamilton v. Canadian Transport Commission [1978] 1 S.C.R. 640 at pp. 642 and 643, Martland, J. states as follows:

It is necessary to consider the Act as a whole in order to make that determination. Its general purpose is to maintain Sunday observance, and it is because of that that its constitutional validity has been supported as being legislation in relation to criminal law under s. 91(27) of the British North America Act, 1867. That purpose is, however, sought to be achieved by preventing the transaction of business, the pursuing of a gainful calling, or the employment of any person to do work, business or labour on a Sunday.

45. Even though it may be alleged that social conditions may have changed, the object of the Lord's Day Act remains the same. That object being "to conserve public morality and to provide for the peace and order of the public on the Lord's Day", (Ouimet v. Bazin at p. 507). As well the Act remains prohibitory rather than regulatory. it may be alleged that the Act is no longer sufficient to achieve its objective or that the achievement of its objective is no longer desirable. However, the character of the legislation has not changed. As stated by Laskin, C.J.C. in Re Anti-Inflation Act Reference [1976] 2 S.C.R. 373 at 425:

... the wisdom or expediency or likely success of a particular policy is not subject to judicial review.

In Re Agricultural Products Marketing Act [1978] 2 S.C.R.
1198 Laskin, C.J.C., stated the court should depart from previous
decisions only for compelling reasons (at p. 1257).



PART IV

NATURE OF ORDER DESIRED

The Appellant respectfully requests that this Honourable Court should allow the appeal and answer the questions posed in the following manner:

- (1) The Lord's Day Act, and especially s. 4 thereof, does not infringe upon the freedom of conscience and religion guaranteed in s. 2(a) of the Canadian Charter of Rights and Freedoms.
- (2) The Lord's Day Act, and especially s. 4 thereof, is justified on the basis of s. 1 of the Canadian Charter of Rights and Freedoms.
- (3) The Lord's Day Act, and especially s. 4 thereof is enacted pursuant to the criminal law power under s. 91(27) of the Constitution Act, 1867.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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Counsel for the Appellant

PART V

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