1985 CarswellAlta 316
Supreme Court of Canada

R. v. Big M Drug Mart Ltd.

1985 CarswellAlta 316, 1985 CarswellAlta 609, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, [1985] A.W.L.D. 610, [1985] A.W.L.D. 635, [1985] A.W.L.D. 638, [1985] S.C.J. No. 17, 13 C.R.R. 64, 14 W.C.B. 157, 18 D.L.R. (4th) 321, 18 C.C.C. (3d) 385, 37 Alta. L.R. (2d) 97, 58 N.R. 81, 60 A.R. 161, 85 C.L.L.C. 14,023, J.E. 85-405

R. v. BIG M DRUG MART LTD.

Ritchie,* Dickson, Beetz, McIntyre, Chouinard, Lamer and Wilson JJ.

Heard: March 6 and 7, 1984
Judgment: April 24, 1985
Docket: No. 18125

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Subject: Criminal; Constitutional; Civil Practice and Procedure; Public
Headnote
Constitutional Law --- Charter of Rights and Freedoms — Scope of application — Who having rights under Charter — Corporations
Constitutional Law --- Procedure in constitutional challenges — Jurisdiction of courts — Under Charter of Rights and Freedoms
Sunday Observance and Public Holidays --- Federal legislation
Sunday Observance and Public Holidays --- Effect of Charter of Rights and Freedoms — Freedom of religion
Lord's Day Act unconstitutional.
After police witnessed several sales transactions at the accused store on a Sunday, the accused was charged with unlawfully carrying on the sale of goods contrary to the Lord's Day Act. An acquittal was granted at trial for two reasons: 1) the Act infringed the guarantee of religious freedom in the Canadian Charter of Rights and Freedoms, and 2) it was no longer justified under the federal criminal law power in s. 91(27) of the Constitution Act, 1982. In dismissing a Crown appeal, the court held that the Act was valid criminal law legislation but agreed that it violated the Charter. The Crown brought a further appeal.
Held:
Appeal dismissed.
Per Dickson J. (Beetz, McIntyre, Chouinard and Lamer JJ. concurring):
Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. The accused therefore had standing to challenge the Lord's Day Act without first establishing that a corporation can enjoy freedom of religion. The nature of the law, not the status of the accused, was at issue. The accused was not challenging the Act under s. 24(1) of the Charter on the basis that only its religious rights were infringed, nor voluntarily as an interested person pursuant to s. 52. Further, Provincial Courts have always had the power to declare legislation invalid in criminal cases since no one may be convicted of an offence under an invalid statute. The Provincial Judge in the first instance was not called upon to make either a prerogative declaration or a s. 24(1) order. It was accordingly within his jurisdiction to prevent a violation of a fundamental principle of the Charter by dismissing the charges.
Both the purpose and effect of impugned legislation are relevant in determining constitutionality. If a statute has a purpose which violates the Charter, it must be held invalid regardless of its actual effect. Effect need only be considered to defeat legislation

with a valid purpose; effect can never be relied upon to save legislation with an invalid purpose. A finding that the Lord's Day Act has a secular purpose is simply not possible. Its religious purpose in compelling sabbatical observance has been long established and consistently maintained and this purpose offends religious freedom. It is unnecessary to consider the actual effects of Sunday closing upon religious freedom. Even if the effects were found inoffensive, this could not save legislation with a purpose violating the Charter's guarantees. It is also not possible to conclude that the purpose of the Act has shifted with changing social conditions. Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable. While the effect of the Lord's Day Act may be more secular today than previously, this cannot justify a conclusion that its purpose has also changed.

To the extent that it binds all to a sectarian Christian ideal, the Lord's Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. Compelling universal observance of the day of rest preferred by one religion is also not consistent with the preservation and enhancement of the multicultural heritage of Canadians secured by s. 27 of the Charter.

Although the Charter does not include a clause similar to the American Bill of Rights prohibiting laws respecting an establishment of religion, it does not follow that the religious freedom protected by the Charter extends only to the "free exercise" of religion. As well, the meaning of "freedom of conscience and religion" in the Charter does not have the same meaning recognized by the Canadian Bill of Rights since the Charter is not limited to guaranteeing rights which were enjoyed by Canadians prior to its proclamation. The meaning of religious freedom should be understood in light of the interests it was meant to protect and as such should be given a generous interpretation aimed at fulfilling the purpose of the guarantee, rather than a legalistic interpretation. Accordingly, freedom of conscience and religion must at least mean that government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.

The Lord's Day Act, especially s. 4, infringes the freedom of conscience and religion guaranteed in s. 2(1) of the Charter. This infringement cannot be justified on the basis of s. 1 as a reasonable limit, demonstrably justifiable in a free and democratic society. There is secular justification for a day of rest in a Canadian context and the reasonableness of a day of rest has been clearly enunciated by the courts in the United States. However, this was not the motivation for the Act, and it cannot offend the Charter by compelling observance of a Christian religious duty, yet still be a reasonable limit because it achieves the secular objective the legislators did not primarily intend. Parliament cannot rely on an ultra vires purpose under s. 1 of the Charter.

The Lord's Day Act is valid legislation in relation to the criminal law because, at risk of penalty, it compels the observance of a religious obligation, intending to safeguard public morality. Were its purpose not religious but rather the secular goal of enforcing a uniform day of rest from labour, the Act would come under s. 92(13), property and civil rights in the province, falling within provincial competence instead of federal.

Per Wilson J. (concurring in the result):

There is a distinction in the analytic approach to a division of powers case under the Constitution Act, 1982, and a Charter case. The analytic focal point in a division of powers case is the pith and substance or primary purpose of the legislation. The effect of an impugned statute is important only insofar as it serves to reflect the underlying statutory purpose. The appropriate analytic starting point for a Charter case, however, is the statute's effect rather than its purpose.

The Lord's Day Act infringes upon the right to religious freedom guaranteed by the Charter, not because the statute was enacted for this purpose, but because it has this effect by compelling Sunday observance.

Appeal from judgment of Alberta Court of Appeal, 28 Alta. L.R. (2d) 289, [1984] 1 W.W.R. 625, 9 C.C.C. (3d) 310, 5 D.L.R. (4th) 121, 7 C.R.R. 93, 49 A.R. 194 , dismissing appeal from judgment of Stevenson Prov. J., 25 Alta. L.R. (2d) 195, [1983] 4 W.W.R. 54, 5 C.R.R. 281 .

The judgment of the court was delivered by *Dickson J. (Beetz, McIntyre, Chouinard* and *Lamer JJ.* concurring):

1 Big M Drug Mart Ltd. was charged with unlawfully carrying on the sale of goods, on Sunday, 30th May 1982, in the city of Calgary, Alberta, contrary to the Lord's Day Act, R.S.C. 1970, c. L-13.

2 Big M has challenged the constitutionality of the Lord's Day Act, both in terms of the division of powers and the Canadian Charter of Rights and Freedoms. Such challenge places in issue before this court, for the first time, one of the fundamental freedoms protected by the Charter, the guarantee of "freedom of conscience and religion" entrenched in s. 2.

3 The constitutional validity of Sunday observance legislation has in the past been tested largely through the division of powers provided in ss. 91 and 92 of the Constitution Act, 1867. Freedom of religion has been seen to be a matter falling within federal legislative competence. Today, following the advent of the Constitution Act, 1982, we must address squarely the fundamental issues raised by individual rights and freedoms enshrined in the Charter, as well as those concerned with legislative powers.

I

The Facts and the Legislation

4 On Sunday, 30th May 1982, police officers of the city of Calgary attended at premises owned by Big M and open to the public. They witnessed several transactions including the sale of groceries, plastic cups and a bicycle lock. Big M was charged with a violation of s. 4 of the Lord's Day Act.

(A) The Lord's Day Act

5 An understanding of the scheme of that Act and its basic purpose and effect is integral to any analysis of its constitutional validity. Section 2 defines, inter alia, the Lord's Day:

> "Lord's Day" means the period of time that begins at midnight on Saturday night and ends at midnight on the following night ...

Section 4 contains the basic prohibition against any work or commercial activity upon the Lord's Day:

> 4. It is not lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law in force on or after the 1st day of March 1907, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business or labour.

6 Section 5 provides that any worker, required to work by an employer operating on Sunday in conformity with the Act, be given a substitute day of rest; s. 6 prohibits any games or performances where an admission fee is charged; s. 7 prohibits any transportation operated for pleasure where a fee is charged; s. 8 prohibits any advertisement of anything prohibited by the Act; s. 9 prohibits anya shooting of firearms; s. 10 prohibits any sale or distribution of a foreign newspaper.

7 It is important to note that any person may be exempted from the operation of ss. 4, 6, and 7 by provincial legislation or municipal charter. The following exemptions are also contained in the legislation: s. 3 — the railways may be operated for passenger traffic; s. 11 — any person may do any work of necessity or mercy which covers a broad range of activities listed in paras. (*a*) to (*x*).

8 The Act makes it an offence punishable on summary conviction for: any person to violate the Act (s. 12); any employer to direct any violation of the Act (s. 13); any corporation to authorize, direct or permit any violation of the Act (s. 14).

9 Section 16 requires the Attorney General's fiat before any prosecution may be commenced for a violation of the Act. The Attorney General of Alberta granted his fiat before commencement of proceedings against Big M.

(B) The Charter

10 Section 2 of the Charter contains the basic guarantee of religious freedom:

> Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion ...

11 Various provisions of the Charter must also be considered when analyzing the nature of the guarantee contained in s. 2. The preamble states:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law ...

12 Section 27 makes the multicultural heritage of Canada an interpretive guideline for the Charter:

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

13 Section 29 preserves the rights of denominational schools guaranteed under s. 93 of the Constitution Act, 1867:

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

14 The following provisions of the Charter of general application are relevant as well:

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 ...

32(1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and ...

52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

II

Alberta Courts

(A) Provincial Court

15 At trial, in a decision reported at 25 Alta. L.R. (2d) 195, [1983] 4 W.W.R. 54, 5 C.R.R. 281 , Stevenson Prov. J. found on the evidence that Big M had offered items for sale on a Sunday contrary to s. 4 of the Lord's Day Act and that such items did not fall within the exceptions set out in s. 11 of the Act. Big M was nonetheless acquitted on two grounds: (i) the Lord's Day Act could no longer be justified on the basis of Parliament's criminal law power under s. 91(27) of the Constitution Act, 1867, and (ii) the Lord's Day Act infringed freedom of religion guaranteed in s. 2(*a*) of the Charter.

16 Stevenson Prov. J. summarized his reasons for concluding the Lord's Day Act no longer fell within federal competence at pp. 71-72:

1. In Canada, following Confederation in 1867, it was generally believed that legislative authority over Sunday observance was committed to the provincial legislatures under s. 92 of the B.N.A. Act;

2. This situation was changed by the *Hamilton Street Ry.* reference [[1903] A.C. 524] in 1902, when the Judicial Committee held that Sunday observance legislation was "criminal law in its widest sense"

3. Courts in Canada have "religiously" followed the *Hamilton Street Ry.* ratio to the present day, with the exception of Riley J. in the 1972 Alberta *Boardwalk Merchandise Mart Ltd.* case [[1972] 6 W.W.R. 1];

4. The scope of the definition of the criminal law power as set out in the *Hamilton Street Ry.* case has been substantially narrowed in Canada;

5. There is serious doubt that Christianity was ever part of the common law of the realm;

6. Adoption of this precept in subsequent decisions (to the *Hamilton Street Ry.* case) may, as a result, bring their conclusions into question;

7. Even if Christianity was at one time part of the common law of the realm, its influence on the criminal law has been virtually eliminated by changed social conditions and attitudes, and by statutes; and

8. Without the moral grounds that the common law may have provided, there is no public purpose, nor is there any evil or menace to suppress. Therefore, there can no longer be any valid reason for the Lord's Day Act to be upheld as valid criminal law. As Riley J. held in *Boardwalk Merchandise Mart Ltd.* , supra, at p. 20: "It is deprived of its constitutional underpinnings".

17 The judgment upon which Stevenson Prov. J. relied, that of Riley J. in *Boardwalk Merchandise Mart Ltd. v. R.*, [1972] 6 W.W.R. 1, 9 C.C.C. (2d) 548, 31 D.L.R. (3d) 162 , was reversed by the Alberta Court of Appeal ([1973] 1 W.W.R. 190, 10 C.C.C. (2d) 50, 31 D.L.R. (3d) 452), without calling upon counsel for the appellant. Leave to appeal to the Supreme Court of Canada was denied [1972] S.C.R. ix.

18 The second main point taken by Stevenson Prov. J. was that s. 4 of the Lord's Day Act represented an infringement of "freedom of religion" guaranteed under the Charter which must be struck down. With respect to *Robertson v. R.*, [1963] S.C.R. 651, 41 C.R. 392, [1964] 1 C.C.C. 1, 41 D.L.R. (2d) 485 , the judge made several comments (at p. 75):

The first is that the Canadian Bill of Rights, R.S.C. 1970, App. III, is not an *entrenched* Bill of Rights and therefore does not necessarily attract the same broad and liberal interpretation principles. Secondly, the Bill of Rights is couched in much narrower terms than is the Charter. Finally, implicitly, at least, the court in the *Robertson* case acknowledged that the "purpose" of the Lord's Day Act *could* amount to an "abrogation, abridgement or infringement of religious freedom". That was a unique case in that the "purpose" of the legislation was given little consideration by the courts.

Ritchie J., speaking for the majority in the *Robertson* case said [at p. 657] the effect of s. 4 of the Lord's Day Act was "purely secular and financial" on non-Christians. He does not mention that there are Christians who do not observe Sunday as a day of worship, such as Seventh Day Adventists and others. [The italics are Stevenson Prov. J.'s.]

Stevenson Prov. J. adverted to the preamble of the Charter (at p. 76):

A purpose of the Lord's Day Act is to recognize Sunday as the day of rest for certain Christian denominations. If one now turns to the preamble of the Charter we see that, "Canada is founded upon principles that recognize the supremacy of God". Bearing in mind that the preamble may not carry the force of law, it still shows that the Charter does not recognize any particular denomination, and (noticeable by its absence) it does not refer to a *Christian* God. The preamble surely is intended to reflect the multicultural and multi-denominational make-up of Canada. If, then, a law which in any way adversely affects the religious freedoms of Canadians is in conflict with the Charter, it must be struck down in accordance with s. 52 of the Charter.

19 Stevenson Prov. J. concluded (at p. 78) that the appropriate remedies were:

... a dismissal of charges against the corporate accused under s. 24(1) of the Charter and a declaration pursuant to s. 52(1) of the Constitution Act, 1982, that s. 4 of the Lord's Day Act is of no force or effect, as being inconsistent with the Charter.

(B) The Alberta Court of Appeal

20 The Attorney General of Alberta appealed the acquittal by stated case pursuant to s. 762 of the Criminal Code. The Alberta Court of Appeal dismissed the appeal: now reported at 28 Alta. L.R. (2d) 289, [1984] 1 W.W.R. 625, 9 C.C.C. (3d) 310, 5 D.L.R. (4th) 121, 7 C.R.R. 93, 49 A.R. 194 . All five judges held the Lord's Day Act to be valid federal legislation under the criminal law power. On the Charter, the court divided. The two judgments delivered reflect, with clarity, the conflicting values, concerns and interests raised in this litigation. It is difficult to do justice to the judgments in brief compass.

21 Laycraft J.A., Harradence and Stevenson JJ.A. concurring, delivered the majority judgment. Laycraft J.A. began with a consideration of the Lord's Day Act and its characterization. For division of powers purposes he found it to be intra vires by virtue of Parliament's criminal law powers. In reference to the "seventh reason" of Stevenson Prov. J. respecting a shifting purpose, Laycraft J.A. said (pp. 632-33):

> In my view, however, the Charter did not intend to effect a redistribution of legislative powers in Canada. Indeed, s. 31 of the Charter expressly so provides: "Nothing in this charter extends the legislative powers of any body or authority". Moreover, s. 33 provides that Parliament or a legislature may override the Charter. Thus if a legislative power had been transferred by the Charter either Parliament or a provincial legislature could retransfer it by its unilateral action. That would be an odd result of enactment of the Charter. In my view the Charter of Rights did not remove Sunday observance legislation from the field of criminal law ...
>
> Even assuming for the purpose of argument that changing public perceptions or attitudes could render ultra vires a statute found repeatedly by the courts over three quarters of a century to be within federal powers, nothing demonstrates the profound change in public attitudes in the last six years which would be required to warrant the conclusion reached. In my opinion the Lord's Day Act is valid federal legislation under the criminal law power specified in s. 91(27) of the Constitution Act, 1867.

22 In the present case, all five judges in the Alberta Court of Appeal rejected the division of powers argument. Even the respondent, in its submissions before this court, did not seek to support the trial judge's conclusions on this point, but rather acceded to the Crown's submissions that the Lord's Day Act was within the federal Parliament's legislative jurisdiction pursuant to the criminal law power under s. 91(27) of the Constitution Act, 1867.

23 Having concluded that the Lord's Day Act is a statute with a religious purpose, Laycraft J.A. went on to consider whether the Act infringed the fundamental freedom of conscience and religion. He concluded that it did. He contrasted the majority judgment of this court in *Robertson* , supra, with the view expressed by Brennan J. in the Supreme Court of the United States in a case decided in the same year: *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963).

24 In that case the appellant held religious beliefs which required her to observe the Sabbath on Saturday. She lost her job in consequence of her refusal to work on Saturday and was subsequently denied benefits under state unemployment legislation on the ground that she was "not available" to work. Brennan J. stated, at p. 404, in holding that the denial of benefits infringed the First Amendment to the Constitution:

> 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 appellant for her Saturday worship.

25 Laycraft J.A. expressed himself as being in agreement with the dissenting judgment of Cartwright J. in *Robertson* . He concluded that *Robertson* did not preclude a finding that the Lord's Day Act infringed freedom of religion and conscience under the Charter.

26 The first difference between the Bill and the Charter was, in his view, that the Bill is declaratory. He noted (at p. 645) that the declaratory language, "It is hereby recognized and declared ..." was the foundation of this court's decision in *Robertson* .

> Thus the declaratory language of s. 1 of the Canadian Bill of Rights had a double effect; the right itself is defined by the state of the law in 1960 and the protection afforded is limited by the same definition.

The most fundamental difference between the Charter and the Bill, in the opinion of Laycraft J.A., was the enhanced status of the Charter as part of "the supreme law of Canada" (s. 52(1)); it was not merely a declaration of existing law or a tool for use in statutory construction. The status of the Charter as well as the declaratory language in which the Bill was expressed required the conclusion that *Robertson* did not apply to Charter cases.

27 Belzil J.A., McGillivray C.J.A. concurring, began by noting (at p. 650) the "startling departure from settled authority" of the judge of first instance, in finding 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.

Belzil J.A. referred to this (at p. 650) as:

> ... a novel but erroneous proposition in law. The vires of legislation is determined as at the date of the passing of the legislation, and does not thereafter fluctuate with social change.

Belzil J.A. referred inter alia to art. 18 of the Universal Declaration of Human Rights, G.A. Res. 217A, 3 U.N. GAOR., Pt. I, U.N. Doc. A-810 (1948), adopted by the General Assembly of the United Nations on 10th December 1948; to art. 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4th November 1950, 213 U.N.T.S. 221, signed on 4th November 1950, coming into force on 3rd September 1953; and to art. 18 of the International Covenant on Civil and Political Rights, G.A. Res. 2200 A, 21 U.N. GAOR., Supp. 16, U.N. Doc. A-6316 (1966), adopted by the General Assembly on 16th December 1966 and which entered into force on 23rd March 1976. Canada adopted the covenant 19th May 1976 and it came into force for Canada on 19th August 1976.

28 Belzil J.A. then said (at p. 655):

> Thus it can be seen that the Canadian Charter was not conceived and born in isolation. [I agree.] It is part of the universal human rights movement. It guarantees that the power of government in Canada shall not be used to abridge or abrogate the fundamental rights to which every Canadian, as well as every other human being in the world, is entitled by birth.

29 In the view of Belzil J.A. the effect of the Lord's Day Act upon religious freedom had been effectively and authoritatively settled in *Robertson* , supra, and the distinction made in the nature of the right to freedom of religion secured by the Canadian Bill of Rights is not valid. The judge said (at p. 659):

> The Charter does not purport to change the meaning of words and in particular the meaning of "freedom of conscience and religion" as traditionally and universally understood and earlier defined as the birthright of every human being. The "freedom of religion" declared and secured by the Canadian Bill of Rights in 1960 and considered by the Supreme Court of Canada in *Robertson* has the same meaning as the "freedom of conscience and religion" guaranteed by the Charter of Rights in 1981. The effect of the Lord's Day Act upon that same freedom of conscience and religion has been decided in *Robertson* . While it may be technically true that this court is not bound in this case by *Robertson* because the two cases deal with different documents, yet the interpretation by the Supreme Court of Canada of the same provision of the Lord's Day Act and the same fundamental right of freedom of conscience and religion is compelling.

30 Later, alluding to the dissenting judgment of Cartwright J. in *Robertson* he said (at p. 659):

> ... it is inaccurate to say that the Lord's Day Act compels the observance of Sunday *as a religious holy day* by all the inhabitants of Canada. The Lord's Day Act does no such thing; it compels neither Christian nor non-Christian to observe Sunday *as a religious holy day* . A distinction must be made between mere observance of Sunday as a day of rest by observing the prohibitions in the Act and the observance of Sunday as a *religious holy day* . While the legislation was

> undoubtedly religiously motivated to conform to the desires of the large Christian majority of the day its purpose was not compulsion or interference with the religions of others.

The judge continued (at p. 660):

> Nor does the Lord's Day Act have the *effect* of compelling observance of Sunday as a *religious holy day* . The compulsion to attend church services found in predecessor English statutes has been removed. The sale of goods or the performance of labour are, per se, void of religious significance, and so is the abstention from these activities.

31 Belzil J.A. said it was realistic to recognize that the Canadian nation is part of "Western" or "European" civilization, moulded in and impressed with Christian values and traditions, and that these remain a strong constituent element in the basic fabric of our society. The judge quoted a passage from the Oxford Companion of Law expatiating on the extent of the influence of Christianity on our legal and social systems and then appears the cri de coeur central to the judgment (pp. 663-64):

> I do not believe that the political sponsors of the Charter intended to confer upon the courts the task of stripping away all vestiges of those values and traditions, and the courts should be most loathe to assume that role. With the Lord's Day Act eliminated, will not all reference in the statutes to Christmas, Easter, or Thanksgiving be next? What of the use of the Gregorian Calendar? Such interpretation would make of the Charter an instrument for the repression of the majority at the instance of every dissident and result in an amorphous, rootless and godless nation contrary to the recognition of the Supremacy of God declared in the preamble. The "living tree" will wither if planted in sterilized soil.

Two further passages should be quoted from the judgment (at p. 664):

> As much as it may be desirable and fair that all religious preferences be treated equally, there are times when that is not possible. The Lord's Day Act is an example. Civil authority, while bowing to pressure from religious groups, recognized the moral value of a day of rest. That it should have selected the day of the week regarded as holy by the great majority of Canadians is not inconsistent with the basic principles of democracy. That is political reality. Majority rule is restricted by the Charter only when it abridges or abrogates the guaranteed rights of others.

And (at p. 665):

> What the Canadian Charter, the United Nations Covenant and the European Convention have in common is a guarantee that no person shall be subjected to oppression or repression on religious grounds, or be compelled to conform to religious cult, doctrine or belief. The Lord's Day Act does not offend that guarantee.

I hope that I have fairly presented the position, strongly held and expressed, of the dissenting justices.

III

The Constitutional Questions

32 The constitutional questions stated by this court are:

> 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?*

33 The Attorney General of Canada and the Attorneys General of New Brunswick and of Saskatchewan have intervened in support of the appellant Attorney General of Alberta.

IV

Standing and Jurisdiction

34 As a preliminary issue the Attorney General for Alberta challenges the standing of Big M to raise the question of a possible infringement of the guarantee of freedom of conscience and religion and the jurisdiction of the Provincial Court to declare the Lord's Day Act inoperative.

35 As best I understand the first submission, the assertion is that Big M is not entitled to any relief pursuant to s. 24(1) of the Charter. It is urged that freedom of religion is a personal freedom and that a corporation, being a statutory creation, cannot be said to have a conscience or hold a religious belief. It cannot, therefore, be protected by s. 2(*a*) of the Charter, nor can its rights and freedoms have been infringed or denied under s. 24(1); Big M's application under that section must consequently fail.

36 The second preliminary submission of the Attorney General for Alberta is that the Provincial Judge lacked jurisdiction to make any form of declaration under s. 52 of the Charter. In oral argument the Attorney General did not press this point. In his factum, however, it was his submission that prior to the enactment of the Constitution Act, 1982, any tribunal was competent to find a statute ultra vires under s. 2 of the Colonial Laws Validity Act, 1865 (28 & 29 Vict., c. 63), and s. 7(1) of the Statute of Westminster, 1931 (R.S.C. 1970, App. II, No. 26). These provisions have, however, been repealed and they have been replaced by s. 52(1) of the Constitution Act, 1982. The Attorney General submitted that only a court of superior jurisdiction has the prerogative powers to make a declaratory order under s. 52.

37 Standing and jurisdiction to challenge the validity of a law pursuant to which one is being prosecuted is the same regardless of whether that challenge is with respect to ss. 91 and 92 of the Constitution Act, 1867, or with respect to the limits imposed on the legislatures by the Constitution Act, 1982.

38 Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the Charter have been infringed. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.

39 Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such "public interest litigation" it would have had to fulfil the status requirements laid down by this court in the trilogy of "standing" cases (*Thorson v. A.G. Can.*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, 1 N.R. 225 ; *N.S. Bd. of Censors v. McNeil*, [1976] 2 S.C.R. 265, 32 C.R.N.S. 376, 55 D.L.R. (3d) 632, 12 N.S.R. (2d) 85, 5 N.R. 43 ; and *Min. of Justice of Can. v. Borowski*, [1981] 2 S.C.R. 575, [1982] 1 W.W.R. 97, 24 C.R. (3d) 352, 24 C.P.C. 62, 64 C.C.C. (2d) 97, 130 D.L.R. (3d) 588, 12 Sask. R. 420, 39 N.R. 331) but that was not the reason for its appearance in court.

40 Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is urging that the law under which it has been charged is inconsistent with s. 2(*a*) of the Charter and by reason of s. 52 of the Constitution Act, 1982, it is of no force or effect.

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

42 The argument that the respondent, by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights under s. 2(*a*) of the Charter, confuses the nature of this appeal. A law which itself infringes religious

freedom is, by that reason alone, inconsistent with s. 2(*a*) of the Charter and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue. As Laycraft J.A. observed in the Alberta Court of Appeal (at p. 636):

> The task of the court is to see whether all or part of the Lord's Day Act is inconsistent with freedom of conscience and religion and therefore of no force or effect. It does not affect that task that a person charged has no religion or even that he has no feelings of conscience.

Cartwright J., dissenting in *Robertson v. R.* , supra, though not in conflict with the majority of the court on this point, stated at p. 661:

> It was argued that, in any event, in the case at bar the appeal must fail because there is no evidence that the appellants do not hold the religious belief that they are under no obligation to observe Sunday. In my view such evidence would be irrelevant. The task of the Court is to determine whether s. 4 of the Act infringes freedom of religion. This does not depend on the religious persuasion, if any, of the individual prosecuted but on the nature of the law. To give an extreme example, a law providing that every person in Canada should, on pain of fine or imprisonment, attend divine service in an Anglican Church on at least one Sunday in every month would, in my opinion, infringe the religious freedom of every Anglican as well as that of every other citizen.

43 As the respondent submits, if the legislation under review had a secular purpose and the accused was claiming that it interfered with his religious freedom, the status of the accused and the nature of his belief might be relevant: it is one thing to claim that the legislation is itself unconstitutional, it is quite another to claim a "constitutional exemption" from otherwise valid legislation which offends one's religious tenets.

44 In my view there can be no question that the respondent is entitled to challenge the validity of the Lord's Day Act on the basis that it violates the Charter guarantee of freedom of conscience and religion.

45 The second objection is to the jurisdiction of the Provincial Court regarding the exercise of a prerogative power to declare legislation invalid. It must also be rejected. There are two prevailing views as to the meaning of "court of competent jurisdiction" in s. 24(1) of the Charter. On one view, the competent court in which to bring a constitutional challenge is the court with jurisdiction over the remedy sought: Gibson, "Enforcement of the Canadian Charter of Rights and Freedoms" in Tarnopolsky and Beaudoin (eds.), The Canadian Charter of Rights and Freedoms: Commentary (1982), at p. 500. In contrast is the view that the competent court is that which has jurisdiction over the subject matter being litigated: Hogg, Canada Act, 1982, Annotated (1982), at p. 65.

46 Advancing the first view, the Crown argues that Big M should not have been able to bring a s. 52 application in a Provincial Court because it does not have prerogative powers. Even under the Crown's interpretation of "court of competent jurisdiction" the majority of the Alberta Court of Appeal held that the Provincial Court has independent jurisdiction, aside from the Charter, in the case at bar.

47 The appellant overlooks the fact that it has always been open to Provincial Courts to declare legislation invalid in criminal cases. No one may be convicted of an offence under an invalid statute.

48 The respondent Big M was commanded by Her Majesty the Queen to face prosecution for a violation of an Act of Parliament. It came to court, not for the purpose of having the Act declared unconstitutional, but in order to secure a dismissal of the charges against it. The Provincial Judge was not called upon to make either a prerogative declaration or a s. 24(1) order. He simply was asked to prevent a violation of the fundamental principle of constitutional law embodied in s. 52(1) by dismissing the charges.

V

The Characterization of the Lord's Day Act

(A) The Problem

49 There are obviously two possible ways to characterize the purpose of Lord's Day legislation, the one religious, namely securing public observance of the Christian institution of the Sabbath, and the other secular, namely providing a uniform day of rest from labour. It is undoubtedly true that both elements may be present in any given enactment, indeed it is almost inevitable that they will be, considering that such laws combine a prohibition of ordinary employment for one day out of seven with a specification that this day shall be the Christian Sabbath — Sunday. In the Anglo-Canadian tradition this intertwining is to be seen as far back as early Saxon times in such laws as that promulgated by Ine, King of Wessex from 688-725:

> If the theoman [slave] work on Sunday by his lord's command, let him be free; and let the lord pay thirty shillings as a fine. But if the theow work without his knowledge, let him suffer in his hide, or in hide-gild [money paid in lieu of corporal punishment]. But if a freeman work on that day without his lord's command, let him forfeit his freedom, or sixty shillings; and be a priest doubly liable.

50 The presence of both secular and religious elements in Sunday observance legislation was noted by Blackstone, Commentaries (1897 ed. Lewis), vol. IV, at p. 63:

> [B]esides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God so necessary to make them good citizens, but which yet would be worn out and defaced by an unremitted continuance of labor, without any stated times of recalling them to the worship of their Maker.

51 Despite this inevitable intertwining, it is necessary to identify the "matter" in relation to which such legislation is enacted and thereby to decide within which of the heads of s. 91 or s. 92 of the Constitution Act, 1867, such legislation falls.

(B) The Historic Underpinnings

52 Historically, there seems little doubt that it was religious purpose which underlay the enactment of English Lord's Day legislation. From early times the moral exhortation found in the Fourth Commandment (Exodus 20: 8-11), "Remember the Sabbath day, to keep it holy", increasingly became a legislative imperative. The first major piece of legislation, the Sunday Fairs Act, 1448 (27 Hen. 6, c. 5), prefaced its prohibition of fairs and markets on Sunday with a recital of "abominable injuries and offences done to Almighty God, and to his Saints" because of bodily labour, deceitful bargaining, drunkenness and religious non-observance associated with fairs. Following the Reformation under Henry VIII, religious observance acquired an added political significance and a number of statutes aimed at securing religious conformity were promulgated, including the Act of Uniformity, 1552 (5 & 6 Edw. 6, c. 1), the Act for the Keeping of Holy-Days and Fasting-Days, 1552 (5 & 6 Edw. 6, c. 3), and the Act of Uniformity, 1558 (1 Eliz. 1, c. 2). All these Acts contained provisions making Sunday worship and observance compulsory obligations, as did the later Act against Sectaries, 1593 (35 Eliz. 1, c. 1), and Act against Papists, 1593 (35 Eliz. 1, c. 2), which, as their names suggest, were designed not only to enforce mandatory religious observance as provided for by the Church of England, but also to prohibit religious observance as practised by other Christian denominations.

53 Under Charles I the first modern Sunday observance statutes were enacted and their religious purpose is reflected in their titles, An Act for Punishing Divers Abuses Committed on the Lord's Day called Sunday, 1625 (1 Car. 1, c. 1), and An Act for the Further Reformation of Sundry Abuses Committed on the Lord's Day commonly called Sunday, 1627 (3 Car. 1, c. 2). During the Commonwealth or Interregnum period, the Puritan Parliament passed strict laws prohibiting the profanation of the Lord's Day by any form of marketing, travel, worldly labour, sports or recourse to taverns, tobacco shops or restaurants. With the Restoration came An Act for the Better Observation of the Lord's Day commonly called Sunday, 1676 (26 Car. 2, c. 7), also known as the Sunday Observance Act. As its full title indicates, the primary object of this legislation, like that of

its predecessors, was clearly religious rather than secular. It aimed at securing observance of the Lord's Day by prohibiting all persons from engaging on a Sunday in "any worldly labour or business or work of their ordinary calling" except "works of necessity or charity".

54 The Sunday Observance Act of 1677 served as a model for Canadian pre-Confederation legislation, especially An Act to prevent the Profanation of the Lord's Day, commonly called Sunday, 1845 (8 Vict., c. 45) (U.C.), which substantially re-enacted the English law with only minor alterations designed to suit it to the specific conditions and activities of Upper Canada. It was this statute, as re-enacted by the post-Confederation legislature of Ontario ([An Act to prevent the Profanation of the Lord's Day] R.S.O. 1897, c. 246), that the Privy Council found to be beyond the competence of the province to enact in *A.G. Ont. v. Hamilton Street Ry. Co.*, [1903] A.C. 524, 2 O.W.R. 672, 7 C.C.C. 326 , a decision which lay behind the passage in 1906 of the federal Lord's Day Act. Like the Ontario Act, the federal Act embodied the basic framework and much of the language of the English Sunday Observance Act of 1677. After four consolidations, it still exhibits these same essential characteristics in its present form.

(C) Canadian Case Law

55 From the time of Confederation until the Privy Council decision in 1903 in *Hamilton Street Ry.* , it was the widely held view that Sunday observance legislation fell within provincial purview under the Constitution Act, 1867, as being a matter falling under either s. 92(13), property and civil rights within the province, or s. 92(16), a matter of merely local or private nature in the province. Several of the provinces passed laws prohibiting Sunday activities. In the *Hamilton Street Ry.* case the Ontario statute fell to be considered. Aylesworth K.C. argued before the Privy Council that the primary object of the Act under consideration was the promotion of public order, safety and morals, and not the regulation of civil rights as between subject and subject. That view would seem to have prevailed, as their Lordships held that the Act as a whole was beyond the competence of the Ontario legislature to enact. The Lord Chancellor stated, at pp. 528-29:

> 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 signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords. Sect. 91, subs-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.

56 In a special case referred by the Governor General in Council to this court for hearing two years after *Hamilton Street Ry.* , the question was asked whether a province has jurisdiction to legislate prohibition or regulation of labour so as to prevent any work, business or labour from being performed within the province upon the first day of the week, commonly called "Sunday", subject to certain exemptions. The court answered in *Re the Jurisdiction of a Province to Legislate Respecting Abstention From Lab. on Sunday* (1905), 35 S.C.R. 581 at 592, *(*sub nom. *Re Sunday Laws)* 25 C.L.T. 77 :

> ... it appears to us that the day, commonly called Sunday, or the Sabbath, or the Lord's Day, is recognised in all Christian countries as an existing institution, and that legislation having for its object the compulsory observance of such day or the fixing of rules of conduct (with the usual sanctions) to be followed on that day, is legislation properly falling within the views expressed by the Judicial Committee in the Hamilton Street Railway reference before referred to and is within the jurisdiction of the Dominion Parliament.

The Parliament of Canada passed the federal Lord's Day Act, 1906 (Can.), c. 27, with what would appear to have been some degree of reluctance because, firstly, s. 14 provided that nothing in the Act should be construed to repeal or in any way affect "any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any province of Canada when this Act comes into force". Sunday observance legislation in force in a province at the time it entered Confederation was expressly preserved. Secondly, while the Act prohibited a very few activities unconditionally, such as shooting in such a manner

as to disturb public worship or observance of the day, or selling foreign newspapers, the most important sections of the Act made other activities unlawful only to the extent that provincial legislation did not provide otherwise.

57 Acting under the authority of the federal Lord's Day Act, the provinces have enacted legislation such as the Lord's Day (Ontario) Act, R.S.O. 1980, c. 253, and the Lord's Day (Saskatchewan) Act, R.S.S. 1978, c. L-34. Provincial legislation of this nature was upheld by the Judicial Committee of the Privy Council in *Lord's Day Alliance of Can. v. A.G. Man.*, [1925] A.C. 384, [1925] 1 W.W.R. 296, 43 C.C.C. 185, [1925] 1 D.L.R. 561 , and more recently by this court in *Lord's Day Alliance v. A.G.B.C.*, [1959] S.C.R. 497, 30 C.R. 193, 123 C.C.C. 81, *(*sub nom. *Re Constitutional Questions Determination Act and Vancouver Charter)* 19 D.L.R. (2d) 169 .

58 The next case is *Ouimet v. Bazin* (1912), 46 S.C.R. 502, 11 E.L.R. 482, 20 C.C.C. 458, 3 D.L.R. 593 . The Quebec statute there impugned professed to forbid certain acts calculated to interfere with the proper observance of Sunday. Ouimet was charged with having, for profit and without necessity or urgency, carried on a business and given theatrical representations on Sunday. The Chief Justice, Sir Charles Fitzpatrick, was of the opinion, at p. 507, that:

> 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. [The italics are mine.]

He considered that the evident object of the legislation impugned was to conserve public morality and to provide for the peace and order of the public on the Lord's Day. He felt confirmed in this belief by the title of the Act, described as "A law concerning the observance of Sunday". Duff J. was equally explicit, at p. 525:

> 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.

59 In dictum, Duff J. used language which I would wish to adopt, at pp. 525-26:

> It is perhaps needless to say that it does not follow from this that the whole subject of regulation of the conduct of people on the first day of the week is exclusively committed to the Dominion Parliament. It is not at all necessary in this case to express any opinion on the question, and I wish to reserve the question in the fullest degree of how far regulations enacted by a provincial legislature affecting the conduct of people on Sunday, but enacted solely with a view to promote some object having no relation to the religious character of the day would constitute an invasion of the jurisdiction reserved to the Dominion Parliament. But it may be noted that since the decision of the Judicial Committee in *Hodge v. The Queen* [(1883), 9 App. Cas. 117], it has never been doubted that the Sunday-closing provisions in force in most of the provinces affecting what is commonly called the "liquor trade" were entirely within the competence of the provinces to enact: and it is, of course, undisputed that for the purpose of making such enactments effective when within their competence the legislatures may exercise all the powers conferred by sub-section 15 of section 92 of the "British North America Act."

60 It is perhaps needless for me to say that if the Lord's Day Act, as presently drafted, falls because it is in conflict with the freedom of religion guaranteed by the Charter, it does not ineluctably follow that the whole subject of a day of rest and recreation for Canadians is exclusively committed to the provincial legislatures. As Laycraft J.A. observed, however, it would be necessary for Parliament to demonstrate that any amending legislation had shed its sectarian robes and, further, that the "re-classified" law rested upon some constitutional foundation within its competence. As Laycraft J.A. noted, "we need not decide the feasibility of that course until it is attempted" (at p. 640).

61 The *Ouimet* decision was said in *St. Prosper v. Rodrigue* (1918), 56 S.C.R. 157 at 160, 40 D.L.R. 30 , to be founded upon the common notion of a peculiar sanctity found in religious observances, which leads to viewing their desecration with such abhorrence as to constitute something that is criminal in its nature and hence, legislation relative thereto as criminal in character.

62 Although the issue in *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299, 106 C.C.C. 289, [1953] 4 D.L.R. 641 , was the validity of a by-law of the city of Quebec, attacked by a member of the Jehovah's Witnesses, forbidding distribution in the streets of any book or pamphlet without permission, the judgments in the case are wide-ranging. There is a passage in the judgment of Rand J. touching upon religious freedom, found at p. 327:

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

63 In *Henry Birks & Sons (Montreal) Ltd. v. Montreal*, [1955] S.C.R. 799, 113 C.C.C. 135, [1955] 5 D.L.R. 321 , Rand J. spoke again of the recognitions and observances ordained by religious bodies and churches, saying at p. 812:

> The Sabbath, the last day of the week, has been claimed by some teachers to be of Divine fiat and Sunday is, to most Christians, its present day equivalent.

And later, on the same page:

> Their compelled observance by any means involves the acknowledgement of the authority of a church to ascribe to them their special character, and of a duty in relation to them. Being the creation of a church, under a secular legislature and in the circumstances here they possess no significance unless by positive legislative enactment; and such an enactment cannot be taken otherwise than as having that character and that duty as the reason and purpose for the enjoined observance.

64 In *Birks* , a Quebec statute purporting to authorize municipal councils to pass by-laws for the closing of stores on certain feast days was in issue. The statute was struck down as infringing on criminal law and beyond provincial legislative competence. Rand J., at p. 813, spoke of the statute as "enacted in relation to religion; it prescribes what is in essence a religious obligation". Kellock J. said, at p. 818, "[i]t is concerned with the observance of these days as holy days and not simply as holidays". And at p. 823:

> While Sunday is often and popularly referred to as the Sabbath, the original Sabbath was, of course, not that day at all. Blackstone long ago pointed out (vol. 4, p. 63) that Sunday became a special object of the attention of Parliament not only because of its significance in the Christian religion but because the keeping of one day in seven "as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution". No such twofold significance attaches to any of the six days mentioned in the present legislation. Their significance is based entirely on their religious aspect. To citizens of a faith other than Christian or of no faith, they have no significance. Accordingly, the enforcement of their observation as such by legislation of the character here in question can only be from the standpoint of the religious faith of those citizens to whom they have such significance and legislation from that standpoint or for that purpose is, in my opinion, competent only to Parliament.

65 The decision in *Chaput v. Romain*, [1955] S.C.R. 834, 114 C.C.C. 170, 1 D.L.R. (2d) 241 , contains a frequently quoted passage from the judgment of Taschereau J. at p. 840:

> Dans notre pays, il n'existe pas de religion d'Etat. Personne n'est tenu d'adhérer à une croyance quelconque. Toutes les religions sont sur un pied d'égalité, et tous les catholiques comme d'ailleurs tous les protestants, les juifs, ou les autres adhérents des diverses dénominations religieuses, ont la plus entière liberté de penser comme ils le désirent. La conscience de chacun est une affaire personnelle, et l'affaire de nul autre. Il serait désolant de penser qu'une majorité puisse imposer ses vues religieuses à une minorité. Ce serait une erreur fâcheuse de croire qu'on sert son pays ou sa religion, en refusant dans une province à une minorité, les mêmes droits que l'on revendique soi-même avec raison, dans une autre province.

66 We come now to the case of *Robertson v. R.* , supra, to which much attention was directed during argument. The appellants were convicted on a charge of operating a bowling alley on a Sunday, contrary to the Lord's Day Act. They contended that the

Canadian Bill of Rights, R.S.C. 1970, App. III, had in effect repealed s. 4 of the Lord's Day Act or, in any event, rendered it inoperative. The court, Cartwright J. dissenting, rejected the contention and dismissed the appeal.

67 By s. 1 of the Canadian Bill of Rights, it is:

> ... 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 [as statutory provisions] ...
>
> (*c*) freedom of religion ...

68 Ritchie J., writing for the majority, noted at the outset that the Canadian Bill of Rights is not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted. He then quoted from the passage in the decision of Taschereau J. in *Chaput v. Romain* , reproduced above, and the passage from the judgment of Rand J. in *Saumur v. Quebec (City)* , quoted earlier. Ritchie J. concluded from these passages [at p. 655] that "complete liberty of religious thought" and "the untrammelled affirmation of 'religious belief' and its propagation, personal or institutional" were recognized by this court as existing in Canada before the Canadian Bill of Rights and notwithstanding the provisions of the Lord's Day Act.

69 Ritchie J. acknowledged that there had 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 Ry.* , supra, it had been accepted that such legislation and the penalties imposed for its breach constituted a part of the criminal law in its widest sense and thus reserved to the Parliament of Canada by s. 91(27) of the Constitution Act, 1867.

70 In response to the argument advanced on behalf of the appellants that freedom of religion means "freedom to enjoy the freedom which my own religion allows without being confined by restrictions imposed by Parliament for the purpose of enforcing the tenets of a faith to which I do not subscribe", Ritchie J. said, at pp. 657-58:

> 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, abridgement or infringement of religious freedom, and I can see nothing in that statute which in any way affects the liberty of religious thought and practice of any citizen of this country. Nor is the "untrammelled affirmations of religious belief and its propagation" in any way curtailed.
>
> The practical result of this law on those who 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 abridgement 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. [The italics are Ritchie J.'s.]

71 In a strong dissent, Cartwright J., at p. 660, wrote:

> I can find no answer to the argument of counsel for the appellant, that the purpose and the effect of the *Lord's Day Act* are to compel, under the penal sanctions of the Criminal law, the observance of Sunday as a religious holy day by all the inhabitants of Canada; that this is an infringement of religious freedom I do not doubt.

And:

> In my opinion a law which compels a course of conduct, whether positive or negative, for a purely religious purpose infringes the freedom of religion.

Cartwright J. continued, on p. 661 (part of this passage has already been quoted at p. 114):

> A law which, on solely religious grounds, forbids the pursuit on Sunday of an otherwise lawful activity differs in degree, perhaps, but not in kind from a law which commands a purely religious course of conduct on that day, such as for example, the attendance at least once at divine service in a specified church.
>
> It was argued that, in any event, in the case at bar the appeal must fail because there is no evidence that the appellants do not hold the religious belief that they are under no obligation to observe Sunday. In my view such evidence would be irrelevant. The task of the Court is to determine whether s. 4 of the Act infringes freedom of religion. This does not depend on the religious persuasion, if any, of the individual prosecuted but on the nature of the law. To give an extreme example, a law providing that every person in Canada should, on pain of fine or imprisonment, attend divine service in an Anglican church on at least one Sunday in every month would, in my opinion, infringe the religious freedom of every Anglican as well as that of every other citizen.
>
> I have reached the conclusion that construed by the ordinary rules of construction s. 4 of the *Lord's Day Act* is clear and unambiguous and does infringe the freedom of religion contemplated by the *Canadian Bill of Rights* .

72 In 1963 this court rendered judgment in *Bernstein v. Thurston*, [1963] S.C.R. 643, 41 C.R. 325, [1964] 1 C.C.C. 82, 41 D.L.R. (2d) 125 . The judgment of the court was delivered by Ritchie J. Lieberman, convicted for keeping a bowling alley open on Sunday, contrary to the provisions of a by-law of the city of Saint John, contended that s. 3 of the by-law was invalid as being an encroachment on the field of criminal law. The court thought otherwise. The conviction was affirmed on the ground that the by-law was primarily concerned with secular matters, that it had "for its true object, purpose, nature or character" the hours at which businesses of special classes should close, a matter of a merely private nature in the province [p. 649].

73 The final case to which I would refer in this review of the Canadian authorities is a recent decision of this court in *Hamilton v. Can. Tpt. Comm.*, [1978] 1 S.C.R. 640, 77 C.L.L.C. 14,103, 80 D.L.R. (3d) 263, 17 N.R. 573 . The respondent companies, common carriers operating a trucking service between Montreal and Vancouver, applied, in respect of their "long haul" operations, to the Canadian Transport Commission for exemption from the operation of the Lord's Day Act. The city of Hamilton intervened and sought to show that the operation of the carriers would cause congestion, noise and pollution and create safety problems. The C.T.C. excluded the evidence as irrelevant and this court affirmed the correctness of that action. Martland J. for the court said, at pp. 642-43:

> This appeal involves a determination of the "object of the Act" to which the Commission must have regard in making its decision. 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* . 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.

And at p. 644:

> The Act does not purport to regulate the conduct of individuals so as to prevent their interfering with the sanctity of Sunday, or with Sunday observance by others. The provisions making it unlawful to provide or be present at public games or public performances on a Sunday apply only if the public game is for gain, prize or reward or a fee is charged for admission to the performance. Similarly with respect to Sunday excursions, it is only if they are operated for hire that they are forbidden. This emphasizes the fact that the purpose of the Act is not to protect Sunday observance from the conduct of others. The Act seeks to obtain Sunday observance by persons by prohibiting them from engaging in a gainful occupation or employment on that day.

(C) The American Authorities

74 The United States Supreme Court has sustained the constitutionality of Sunday observance legislation against First Amendment challenges: *McGowan v. Maryland*, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961); *Braunfeld v. Brown*, 366

U.S. 599, 6 L. Ed. 2d 563, 81 S. Ct. 1144 (1961); *Gallagher v. Crown Kosher Super Market of Massachusetts*, 366 U.S. 617, 6 L. Ed. 2d 536, 81 S. Ct. 1122 (1961); and *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582, 6 L. Ed. 2d 551, 81 S. Ct. 1135 (1961). Despite the undoubted religious motivation of the state laws in question at the time of their passage and their clear origin in the religiously coercive statutes of Stuart England, Warren C.J., writing for the majority, found that those statutes had evolved to become purely secular labour regulation. In his view, none of the impugned state statutes violated the First Amendment guarantee of freedom of religion. Whatever religious terminology still appeared in the legislation (such as the use of the term "Lord's Day" in the Maryland statute) was to be seen simply as a historical curiosity.

75 Frankfurter J., Harlan J. concurring, wrote a separate concurring opinion. His reasons also focused on the evolution of a civil institution of Sunday rest. The fact that such a civil institution harmonizes with religious doctrine could not, alone, justify a finding of unconstitutionality. Moreover, any violation of an individual right of free exercise was justified by an overriding state interest in securing a uniform day of rest.

76 In the *McGowan* case, the Maryland statute was found neither in its purpose nor in its effect to enlist the aid of the state's coercive power to aid religion. Though the statute's origins were religious, it had lost that character. It had been substantially changed and re-enacted to prescribe the secular goals of rest and recreation for the citizens. In reaching this conclusion, the court noted that numerous legislative changes since the original enactment had made "the air of the day ... one of relaxation rather than religion" (at p. 448).

77 In *Braunfeld v. Brown* the court held that the impugned Pennsylvania statute did not by its purpose nor by its direct effect impede the observance of one or all religions nor discriminate invidiously among religions. In the result the statutes impugned were held not to offend the First Amendment.

78 It is somewhat ironic that the United States courts upheld the validity of Sunday observance laws, characterizing them as secular in order not to run afoul of the religion clauses of the First Amendment, while in contrast, in *Robertson* , supra, the court found in the same type of legislation, a religious purpose in order to sustain its vires as criminal law. At the same time it accorded to the legislation a secular effect in order not to bring it into conflict with the religious freedom recognized and declared in the Canadian Bill of Rights. The contrast between the United States and Canadian decisions has been cogently stated by J. A. Barron, in "Sunday in North America" (1965), 79 Harv. L. Rev. 42, at p. 43:

> In the United States, the religious purpose of Sunday legislation is denied as sternly as it is insisted upon in Canada. The legislation is declared to be today entirely secular in purpose, providing the citizenry with a uniform day of rest and recreation. If the United States Supreme Court had found a continuing religious purpose behind the Sunday legislation, the no-establishment principle would have commanded invalidation.

On the same page Professor Barron writes:

> In Canada, Sunday legislation is frankly conceded to be religious in purpose; indeed, if it were otherwise the basis for federal jurisdiction would be questionable. But the Supreme Court of Canada claims purpose can be separated from effect, and the effect of the Canadian Sunday legislation is said to be entirely secular.

VI

Purpose and Effect of Legislation

79 A finding that the Lord's Day Act has a secular purpose is, on the authorities, simply not possible. Its religious purpose, in compelling sabbatical observance, has been long established and consistently maintained by the courts of this country.

80 The Attorney General for Alberta concedes that the Act is characterized by this religious purpose. He contends, however, that it is not the purpose but the effects of the Act which are relevant. In his submission, *Robertson* , supra, is support for the proposition that it is effects alone which must be assessed in determining whether legislation violates a constitutional guarantee of freedom of religion.

81 I cannot agree. 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 often been looked to for guidance in assessing the legislation's object and thus, its validity.

82 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.

83 This approach to the relevance of purpose and effect is explicit in the American cases. In *McGowan v. Maryland* , supra, Warren C.J. stated at p. 453:

> We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose — evidence either on the face of the legislation, in conjunction with its legislative history, or in its operative effect — is to use the State's coercive power to aid religion.

Similarly, in *Braunfeld v. Brown* , supra, he wrote at p. 607:

> Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the 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. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

84 I would note that this approach would seem to have been taken by this court, in its unanimous decision in *A.G. Que. v. Que. Assn. of Protestant Sch. Bd.*, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321, 9 C.R.R. 133, 54 N.R. 196 . When the court looked for an obvious example of legislation that constituted a total negation of a right guaranteed by the Charter, and therefore one to which the limitation in s. 1 of the Charter could not apply, it recited the following hypothetical at p. 88:

> An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(*a*) of the *Charter* , which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s. 1.

85 If the acknowledged purpose of the Lord's Day Act, namely, the compulsion of sabbatical observance, offends freedom of religion, it is then unnecessary to consider the actual impact of Sunday closing upon religious freedom. Even if such effects were found inoffensive, as the Attorney General of Alberta urges, this could not save legislation whose purpose has been found to violate the Charter's guarantees. In any event, I would find it difficult to conceive of legislation with an unconstitutional purpose, where the effects would not also be unconstitutional.

86 *Robertson* cannot be of assistance for the simple reason that, in applying an interpretive standard of statutory weight, the application and not the constitutionality of the legislation was in issue. This was recognized by the majority when, at p. 657, it held that the effect rather than the purpose of legislation fell to be assessed, because it was testing not the vires of the legislation, but whether its "application" offended religious freedom.

87 Furthermore, the reliance upon effect to the exclusion of purpose in *Robertson* has been severely criticized: see, for example, Laskin, "Freedom of Religion and the Lord's Day Act" (1964), 42 Can. Bar Rev. 147; Finkelstein, "The Relevance

of Pre-Charter Case Law for Post-Charter Adjudication" (1982), 4 Sup. Ct. L. Rev. 267; and Cotler, "Freedom of Assembly, Association, Conscience and Religion", Tarnopolsky and Beaudoin (eds.) (1982), p. 123, at pp. 201-207. Many of these criticisms are telling.

88 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.

89 A second related submission is made by the Attorney General of Saskatchewan with respect to the characterization of the Lord's Day Act. Both Stevenson Prov. J., at trial, and the American Supreme Court, in its quartet on Sunday observance legislation, suggest that the purpose of legislation may shift, or be transformed over time by changing social conditions. This submission is related to the argument that the emphasis should be on "effects" rather than "purposes". It is urged that courts, in ignoring the religious motivation for the legislation as well as its religious terminology, are implicitly assessing the legislation's effects rather than the purposes which originally underlay its enactment: see, for example, Frankfurter J. in *McGowan v. Maryland* , supra, at p. 466. A number of objections can be advanced to this "shifting purpose" argument.

90 First, there are the practical difficulties. No legislation would be safe from a revised judicial assessment of purpose. Laws assumed valid on the basis of persuasive and powerful authority could, at any time, be struck down as invalid. Not only would this create uncertainty in the law, but it would encourage relitigation of the same issues and, it could be argued, provide the courts with a means by which to arrive at a result dictated by other than legal considerations. It could effectively end the doctrine of stare decisis in division of power cases. This concern underlay the judgment of Viscount Simon L.C. in *A.G. Ont. v. Can. Temperance Fed.*, [1946] A.C. 193, [1946] 2 W.W.R. 1, 1 C.R. 229, 85 C.C.C. 225, [1946] 2 D.L.R. 1 (P.C.) , wherein he refused to re-characterize the Canada Temperance Act, R.S.C. 1927, c. 196 (at p. 206):

> ... on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on both by governments and subjects. In the present case the decision now sought to be overruled has stood for over sixty years; the Act has been put into operation for varying periods in many places in the Dominion; under its provisions businesses must have been closed, fines and imprisonments for breaches of the Act have been imposed and suffered.

91 Furthermore, the theory of a shifting purpose stands in stark contrast to fundamental notions developed in our law concerning the nature of "Parliamentary intention". Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable.

92 As Laskin C.J.C. has suggested in *R. v. Zelensky*, [1978] 2 S.C.R. 940 at 951, [1978] 3 W.W.R. 693, 2 C.R. (3d) 107, 41 C.C.C. (2d) 97, 86 D.L.R. (3d) 179, 21 N.R. 372 , "new appreciations" and "re-assessments" may justify a reinterpretation of the scope of legislative power. While this may alter over time the breadth of the various heads of power and thereby affect the classification of legislation, it does not affect the characterization of the purpose of legislation, in this case the Lord's Day Act. As the Law Reform Commission of Canada observed in its Report on Sunday Observance (1976) (at p. 42):

> While the Supreme Court has never said so explicitly, it would seem apparent that any recharacterization of the *Lord's Day Act* in a modern context so as to provide a clarification of the province's role with respect to Sunday legislation is a task the Parliament of Canada and the provincial legislatures will have to take up directly.

93 While the effect of such legislation as the Lord's Day Act may be more secular today than it was in 1677 or in 1906, such a finding cannot justify a conclusion that its purpose has similarly changed. In result, therefore, the Lord's Day Act must by characterized as it has always been, a law the primary purpose of which is the compulsion of sabbatical observance.

VII

Freedom of Religion

94 A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. 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.

95 Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect within reason from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

96 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 "the tyranny of the majority".

97 To the extent that it binds all to a sectarian Christian ideal, the Lord's Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.

98 Non-Christians are prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal. The arm of the state requires all to remember the Lord's day of the Christians and to keep it holy. The protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity.

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

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

As Laycraft J.A. wrote (at p. 642):

> Whatever the origins of the division of belief, it is indisputable that there can now be seen among Canadians different deeply held beliefs of religion and conscience on this subject. One group, probably the majority, accepts Sunday as the Lord's Day. Another group consisting of those of the Jewish faith, and Sabbatarians whose religious beliefs do not accept Sunday as the Lord's Day distinct from Sabbath on the seventh day of the week, believe in Saturday as their holy day. Canadians of the Muslim religion observe Friday as their holy day. Some Canadians who have no theistic belief, while perhaps accepting the concept of a day for rest and recreation, object to the enforcement of a Christian Sunday.

100 If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish. It seems to me that any law purely religious in purpose, which denies me that right, must surely infringe my religious freedom.

101 Professor Barron, in the Harvard Law Review article to which I have referred, speaks, at p. 53, of the dissent of Cartwright J. in *Robertson:*

> 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 the 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 athiest cannot.

102 The main submission of the Attorney General of Alberta, and the federal and provincial Attorneys General who intervened in his support, is that, regardless of the religious purpose of the Lord's Day Act, none of its provisions offend the freedom of conscience and religion guaranteed by s. 2(*a*) of the Charter. This argument draws on several sources.

(i) The Absence of an "Establishment Clause"

103 Much of the argument before this court on the issue of the meaning of freedom of conscience and religion was in terms of "free exercise" and "establishment". These categories derive from the guarantee of freedom of religion in the First Amendment to the Constitution of the United States. The relevant part of the First Amendment reads:

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

104 It is the appellant's argument that, unlike the American Bill of Rights, the Canadian Charter of Rights and Freedoms does not include an "establishment clause." He urged therefore that the protection of freedom of conscience and religion extends only to the "free exercise" of religion. In the American cases to which I have referred, *McGowan v. Maryland; Braunfeld v. Brown; Gallagher v. Crown Kosher Super Market of Massachusetts;* and *Two Guys from Harrison-Allentown v. McGinley* , all supra, Sunday observance legislation has been dealt with by a majority of the court as only presenting a potential violation of the anti-establishment principle. It is said to follow from the purported absence of such a principle in the Charter that the Lord's Day Act does not in any way affect the guarantee in s. 2(*a*).

105 In my view this recourse to categories from the American jurisprudence is not particularly helpful in defining the meaning of freedom of conscience and religion under the Charter. The adoption in the United States of the categories "establishment" and "free exercise" is perhaps an inevitable consequence of the wording of the First Amendment. The cases illustrate, however, that these are not two totally separate and distinct categories, but rather, as the Supreme Court of the United States has frequently recognized, in specific instances "the two clauses may overlap". Indeed, according to Professor Tribe in his leading textbook, American Constitutional Law (1978), at p. 815, Sunday closing cases are paradigmatic examples of such overlap. Perhaps even more important is the fact that neither "free exercise" nor "anti-establishment" is a homogeneous category; each contains a broad spectrum of heterogeneous principles. This heterogeneity is reflected in the not infrequent conflict that arises between the two clauses, evident in the opposing views of Harlan J. and Stewart J. in *Sherbert v. Verner* , supra. Another recent and particularly telling example of this conflict is *Widmar v. Vincent*, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981).

106 Thus while it is true that in its four Sunday closing cases the United States Supreme Court does categorize compulsory religious observance as a potential violation of the "anti-establishment" principle, more frequently and more typically these same words signify the very different principle of the prohibition of preferential treatment of, or state financial support to, particular religions or religious institutions.

107 In further support for this line of argument the appellant cites s. 29 of the Charter quoted earlier, and s. 93 of the Constitution Act, 1867. These provisions were cited as proof of the non-existence of an anti-establishment principle because they guarantee existing rights to financial support from the state for denominational schools. The respondent replies that these express provisions constitute specific and limited exceptions to the general principle of religious freedom which would otherwise prohibit any support or preference to denominational schools. Subsequent cases will decide the extent to which the Charter allows for state financial support for, or preferential treatment of, particular religions or religious institutions. That issue is not before us in the present case.

108 Nonetheless, even assuming arguendo that the appellant were correct, it does not follow that s. 2(*a*) is not offended by Sunday observance laws. If I were to accept the notion that the sections cited are proof that there is no constitutional obstacle to such support or preference, that conclusion has no necessary implications for the question of whether the state may constitutionally compel religious behaviour or observance. The fact that both practices are prohibited by the American "anti-establishment" principle offers no support for the contention that the putative lack of prohibition of the one in the Canadian Constitution necessarily imports at the same time permission to do the other.

109 In my view the applicability of the Charter guarantee of freedom of conscience and religion does not depend on the presence or absence of an "anti-establishment principle" in the Canadian Constitution, a principle which can only further obfuscate an already difficult area of the law. The acceptability of legislation or governmental action which could be characterized as state aid for religion or religious activities will have to be determined on a case by case basis.

(ii) "Freedom of Religion" under the Canadian Bill of Rights

110 The Attorney General for Alberta draws support for his restrictive reading of freedom of conscience and religion from the majority judgment in *Robertson v. R.* , supra. It was the view of Ritchie J. that the meaning of freedom of religion, as recognized by the Bill of Rights, was well described in two excerpts which he set forth, quoted earlier in these reasons, the first from the judgment of Taschereau J. in *Chaput v. Romain* , the second from the judgment of Rand J. in *Saumur v. Quebec (City)* , both supra.

111 Ritchie J. was of opinion that it was this "complete liberty of religious thought" and "untrammelled affirmation of 'religious belief' and its propagation, personal or institutional" which the Bill of Rights recognized under the rubric of "freedom of religion". On testing the provisions of the Lord's Day Act against this definition he concluded at p. 657:

> ... I can see nothing in that statute which in any way affects the liberty of religious thought and practice of any citizen of this country. Nor is the "untrammelled affirmations of religious belief and its propagation" in any way curtailed.

It was his view therefore that the Lord's Day Act did not abrogate, abridge or infringe "freedom of religion" as guaranteed by the Canadian Bill of Rights.

112 The appellant contends that "freedom of conscience and religion" as guaranteed by s. 2(*a*) of the Charter has the same meaning as "freedom of religion" as recognized by the Canadian Bill of Rights and that Ritchie J. was correct in restricting it to "liberty of religious thought" and untrammelled affirmation of religious belief and its propagation. It follows therefore, in the appellant's submission, that the Lord's Day Act no more violates the guarantee in s. 2(*a*) of the Charter than it did the analogous guarantee in the Canadian Bill of Rights.

113 I cannot agree with these submissions. In my view the meaning attributed by the majority in *Robertson v. R.* to the concept of "freedom of religion" under the Canadian Bill of Rights depends on the majority's view of the distinctive nature and status of that document. An examination of the reasoning that underlies the majority's interpretation demonstrates that it cannot easily be transferred to a constitutional document like the Charter and the fundamental guarantees it enshrines.

114 The basis of the majority's interpretation in *Robertson* is the fact that the language of the Bill of Rights is merely declaratory: by s. 1 of the Bill of Rights, certain existing freedoms are "recognized and declared", including freedom of religion.

For Ritchie J. this language dramatically narrowed the possible interpretation of the rights and freedoms enunciated by the Canadian Bill of Rights (at p. 654):

> It is to be noted at the outset that the *Canadian Bill of Rights* is not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted ... It is therefore the "religious freedom" then existing in this country that is safe-guarded by the provisions of s. 2 ...

It is on this basis that the excerpts from *Chaput v. Romain* and *Saumur v. Quebec (City)* were seen to be significant, since they articulate descriptions of religious freedom that, in the words of the majority "were recognized by this Court as existing in Canada before the *Canadian Bill of Rights* and notwithstanding the provisions of the *Lord's Day Act* " (at p. 655).

115 It is not necessary to reopen the issue of the meaning of freedom of religion under the Canadian Bill of Rights, because whatever the situation under that document, it is certain that the Canadian Charter of Rights and Freedoms does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the Charter's entrenchment. The language of the Charter is imperative. It avoids any reference to existing or continuing rights but rather proclaims in the ringing terms of s. 2 that:

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

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

(iii) The Purpose of Protecting Freedom of Conscience and Religion

117 This court has already, in some measure, set out the basic approach to be taken in interpreting the Charter. In *Hunter v. Southam Inc.* (decision rendered 17th September 1984 [now reported *Hunter, Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*, [1984] 2 S.C.R. 145, 33 Alta. L.R. (2d) 193, *(*sub nom. *Dir. of Investigations & Research, Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 41 C.R. 97, 27 B.L.R. 297, *(*sub nom. *Hunter v. Southam Inc.)* 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 11 D.L.R. (4th) 641, 84 D.T.C. 6467, 55 A.R. 291, 9 C.R.R. 355]) this court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

118 In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this court's decision in *L.S.U.C. v. Skapinker*, [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, 8 C.R.R. 193, 53 N.R. 169, 3 O.A.C. 321 , illustrates, be placed in its proper linguistic, philosophic and historical contexts.

119 With regard to freedom of conscience and religion, the historical context is clear. As they are relevant to the Charter, the origins of the demand for such freedom are to be found in the religious struggles in post-Reformation Europe. The spread of new

beliefs, the changing religious allegiance of kings and princes, the shifting military fortunes of their armies and the consequent repeated redrawing of national and imperial frontiers led to situations in which large numbers of people — sometimes even the majority in a given territory — found themselves living under rulers who professed faiths different from, and often hostile to, their own and subject to laws aimed at enforcing conformity to religious beliefs and practices they did not share.

120 English examples of such laws, passed during the Tudor and Stuart periods, have been alluded to in the discussion above of the criminal law character of Sunday observance legislation. Opposition to such laws was confined at first to those who upheld the prohibited faiths and practices, and was designed primarily to avoid the disabilities and penalties to which these specific adherents were subject. As a consequence, when history or geography put power into the hands of these erstwhile victims of religious oppression, the persecuted all too often became the persecutors.

121 Beginning, however, with the Independent faction within the Parliamentary party during the Commonwealth or Interregnum, many, even among those who shared the basic beliefs of the ascendant religion, came to voice opposition to the use of the state's coercive power to secure obedience to religious precepts and to extirpate non-conforming beliefs. The basis of this opposition was no longer simply a conviction that the state was enforcing the wrong set of beliefs and practices but rather the perception that belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(*a*) of our Charter, the single integrated concept of "freedom of conscience and religion".

122 What unites enunciated freedoms in the American First Amendment, s. 2(*a*) of the Charter and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation. In *Hunter v. Southam* , supra, the purpose of the Charter was identified, at p. 13 [p. 155 S.C.R.], as "the unremitting protection of individual rights and liberties". It is easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivates such unremitting protection.

123 It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the Canadian Charter of Rights and Freedoms as "fundamental". They are the sine qua non of the political tradition underlying the Charter.

124 Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided, inter alia, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously held beliefs and manifestations and are therefore protected by the Charter. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. I leave to another case the degree, if any, to which the government may, to achieve a vital interest or objective, engage in coercive action which s. 2(*a*) might otherwise prohibit.

125 It is the contention of the respondent that the Lord's Day Act violates freedom of conscience and religion by coercing the observance of the religious institution of the Christian Sabbath. It is, therefore, important in the appellant's argument that freedom from such coercion forms no part of "freedom of religion" as it has been articulated in the Canadian jurisprudence. The

definition of freedom of conscience and religion proposed above, including freedom from compulsory religious observance, corresponds precisely to the description of religious freedom in Canada offered by Taschereau J. in the passage in *Chaput v. Romain* , supra, when he noted that all adherents of various religious faiths are entirely free to think as they wish. This is not to endorse that part of the passage from the judgment of Taschereau J. where he states that religions are on a footing of equality. The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.

126 The general lack of comment through the cases on the effect of Sunday closing legislation on freedom of religion may be attributable to the fact that, before the passage of the Canadian Bill of Rights and the entrenchment of the Charter, human rights and freedoms, no matter how fundamental, were constitutionally vulnerable to government encroachment. As Rand J. noted in *Saumur v. Quebec (City)* , supra, at p. 329:

> ... freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.

He also recognized, however, [at p. 329] that:

> *It is in the circumscription of these liberties* by the creation of civil rights in persons who may be injured by their exercise, and *by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery* . [The italics are mine.]

127 Canadian law has recognized freedom of religion, though until the Charter this principle was subject to statutory law. Nonetheless, some legislation did expressly recognize freedom of religion. As early as 1851, the legislature of the United Canadas enacted the following in An Act to Repeal an Act as related to Rectories, 1851 (Can.), c. 175:

> That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of this Province be allowed to all Her Majesty's subjects within the same.

The preamble stated as follows:

> Whereas the recognition of legal equality among all Religious Denominations is an admitted principle of Colonial legislation; And whereas in the state and condition of this Province, to which such a principle is peculiarly applicable, it is desirable that the same should receive the sanction of direct Legislative Authority, recognizing and declaring the same as a fundamental principle of our civil polity.

128 Freedom of religion was among those rights protected by the Bill of Rights. It was this guarantee that was the subject of inquiry in *Robertson v. R.* , supra. I have already noted that, for the majority in *Robertson v. R.* , the positive law had circumscribed freedom of religion so as to prevent the Lord's Day Act from breaching the guarantee in the Canadian Bill of Rights. Notwithstanding its conclusion, however, the majority in that case approved the description of freedom of religion given by Frankfurter J. in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 at 653, 87 L. Ed. 1628 (1943):

> *Its essence is freedom from conformity to religious dogma* , not freedom from conformity to law because of religious dogma. [The italics are mine.]

While the majority apparently intepreted the latter clause as confirming the supremacy of positive law such as the Lord's Day Act, its approval of the first clause indicates that absent such legislative incursion freedom of religion would include freedom from compulsory religious observance.

129 With the entrenchment of the Charter the definition of freedom of conscience and religion is no longer vulnerable to legislative incursion. I conclude therefore that a definition of freedom of conscience and religion incorporating freedom from

compulsory religious observance is not only in accord with the purposes and traditions underlying the Charter; it is also in line with the definition of that concept as found in the Canadian jurisprudence.

130 Two bases for restricting the scope of s. 2(*a*) have been suggested by the appellant and his supporting interveners. First was the approach, adopted by Belzil J.A. in the court below, which maintained that there is no compulsion of religion. Abstention from work on Sunday does not, in itself, have any religious significance. Its effect is, therefore, merely secular.

131 This argument cannot be accepted for reasons already outlined. Once the purpose has been classified as offensive, then the legislation cannot be saved by permissible effect. As a result it is unnecessary to determine whether the secular effect here in issue is sufficient, or whether a secular effect could ever be relevant, once a finding has been made that the legislation is invalid by reason of an impermissible purpose.

132 A second basis for urging a more restricted reading of freedom of conscience and religion was the position of the American courts on Sunday observance legislation. Such legislation has been sustained by the United States Supreme Court, though it has been recognized that such legislation might offend the non-establishment clause of the First Amendment. The absence of such a clause in the Charter, it was submitted, indicated that this court should sustain the Lord's Day Act.

133 Such a finding is not possible, in light of the earlier discussion in these reasons on the relevance of the absence of an anti-establishment provision in s. 2(*a*) of the Charter.

134 In my view, the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. The element of religious compulsion is perhaps somewhat more difficult to perceive (especially for those whose beliefs are being enforced) when, as here, it is non-action rather than action that is being decreed, but in my view compulsion is nevertheless what it amounts to.

135 I would like to stress that nothing in these reasons should be read as suggesting any opposition to Sunday being spent as a religious day; quite the contrary. It is recognized that for a great number of Canadians, Sunday is the day when their souls rest in God, when the spiritual takes priority over the material, a day which, to them, gives security and meaning because it is linked to Creation and the Creator. It is a day which brings a balanced perspective to life, an opportunity for man to be in communion with man and with God. In my view, however, as I read the Charter, it mandates that the legislative preservation of a Sunday day of rest should be secular, the diversity of belief and non-belief, the diverse socio-cultural backgrounds of Canadians make it constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion.

136 In an earlier time, when people believed in the collective responsibility of the community toward some deity, the enforcement of religious conformity may have been a legitimate object of government, but since the Charter, it is no longer legitimate. With the Charter, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise. The state shall not use the criminal sanctions at its disposal to achieve a religious purpose, namely, the uniform observance of the day chosen by the Christian religion as its day of rest.

137 On the authorities and for the reasons outlined, the true purpose of the Lord's Day Act is to compel the observance of the Christian Sabbath and I find the Act, and especially s. 4 thereof, infringes upon the freedom of conscience and religion guaranteed in s. 2(*a*) of the Charter. The answer to the first constitutional question will be in the affirmative.

VIII

Section 1 of the Charter

138 Is the Lord's Day Act, and especially s. 4 thereof, justified on the basis of s. 1 of the Canadian Charter of Rights and Freedoms? That is the second question posed.

139 The appellant submits that even if the Lord's Day Act does involve a violation of freedom of conscience and religion as guaranteed by s. 2(*a*) of the Charter, the provisions of the Act constitute a reasonable limit, demonstrably justifiable in a free and democratic society on that right and that therefore the Act can be saved pursuant to s. 1 of the Charter. In support of this submission the Attorney General for Alberta maintains that public convenience, order and health necessitate standardized working hours and a standardized day of rest. As evidence he cites a study undertaken for the United Nations by Professor Arcot Kreshnaswami. The Attorney General for Canada supplements these arguments with submissions as to the venerable history of the "secondary principle" underlying Sunday observance legislation, namely the provision of a uniform day of rest for labouring people. He also cites numerous statutes enacted in such free and democratic societies as Great Britain, Australia and New Zealand whose purpose is to mandate a compulsory day of rest on Sunday.

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

141 Two reasons have been advanced to justify the legislation here in issue as a reasonable limit. It can be urged that the choice of the day of rest adhered to by the Christian majority is the most practical. This submission is really no more than an argument of convenience and expediency and is fundamentally repugnant because it would justify the law upon the very basis upon which it is attacked for violating s. 2(*a*).

142 The other more plausible argument is that everyone accepts the need and value of a universal day of rest from all work, business and labour and it may as well be the day traditionally observed in our society. I accept the secular justification for a day of rest in a Canadian context and the reasonableness of a day of rest has been clearly enunciated by the courts in the United States of America. The first and fatal difficulty with this argument is, as I have said, that it asserts an objective which has never been found by this court to be the motivation for the legislation. It seems disingenuous to say that the legislation is valid criminal law and offends s. 2(*a*) because it compels the observance of a Christian religious duty, yet is still a reasonable limit demonstrably justifiable because it achieves the secular objective the legislators did not primarily intend. The appellant can no more assert under s. 1 a secular objective to validate legislation which in pith and substance involves a religious matter than it could assert a secular objective as the basis for the argument that the legislation does not offend s.2(*a*). While there is no authority on this point, it seems clear that Parliament cannot rely upon an ultra vires purpose under s. 1 of the Charter. This use of s. 1 would invite colourability, allowing Parliament to do indirectly what it could not do directly.

143 The characterization of the purpose of the Act as one which compels religious observance renders it unnecessary to decide the question of whether s. 1 could validate such legislation whose purpose was otherwise or whether the evidence would be sufficient to discharge the onus upon the appellant to demonstrate the justification advanced.

144 If a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding effect of the Charter, s. 52(1), is to give the court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer "of force or effect". That, in my view, is the position in respect of the Lord's Day Act. The answer to the second question will be in the negative.

IX

Classification

145 The third question put in issue by this court is this:

> 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* ?

146 All members of the Alberta Court of Appeal agreed that settled authority compelled the conclusion that the Lord's Day Act was competent to Parliament pursuant to its power to legislate in relation to criminal law under s. 91(27). The appellant and his supporting interveners submit that the Court of Appeal was correct in their conclusion and the respondent concedes the point.

147 The Lord's Day Act has been held "early, regularly and recently" to be in relation to a criminal law matter because, at risk of penalty, it compels the observance of a religious obligation, specifically the preservation of the sanctity of the Christian Sabbath. The Lord's Day Act is legislation in relation to a matter which falls within s. 91(27), one of the classes of subjects reserved to the exclusive authority of Parliament, because it is directed towards the maintenance of public order and public morals. As expressed by Rand J. in *Ref. re S. 5(a) of the Dairy Indust. Act ("Margarine Case")*, [1949] S.C.R. 1 at 50, [1949] 1 D.L.R. 433 , the "ordinary though not exclusive ends" of the criminal law are "[p]ublic peace, order, security, health, [and] morality". There can be no doubt that legislation such as the Lord's Day Act, which has as its purpose the compulsion of religious observance, is intended to safeguard public morality.

148 Whether or not Christianity is part of the common law is relevant to the theoretical question of whether, absent legislation, "Sabbath breaking" would be indictable as a criminal offence in England, where common law crimes still exist. It has no relevance to the correct classification of a statute prohibiting the profanation of the Sabbath, which in England, as in Canada, has historically been characterized as criminal legislation: see, e.g., *Henry Birks & Sons* , supra, at p. 813 per Rand J. and at pp. 820-22 per Kellock J.

149 The evolution of Canada as a pluralistic, multicultural society, as well as the reference to "God" rather than to an identifiably Christian conception of God, can have no bearing either on the characterization of laws aimed at enforcing specifically Christian observances nor on the classification of such legislation as being within Parliament's criminal law power.

150 It should be noted, however, that this conclusion as to the federal Parliament's legislative competence to enact the Lord's Day Act depends on the identification of the purpose of the Act as compelling observance of Sunday by virtue of its religious significance. Were its purpose not religious but rather the secular goal of enforcing a uniform day of rest from labour, the Act would come under s. 92(13), property and civil rights in the province, and hence fall under provincial rather than federal competence: *A.G. Can. v. A.G. Ont. (Ref. re Weekly Rest in Indust. Undertakings Act, etc.)*, [1937] A.C. 326, [1937] 1 W.W.R. 299, [1937] 1 D.L.R. 673 (P.C.) , and *Ref. re Hours of Lab.*, [1925] S.C.R. 505, [1925] 3 D.L.R. 1114 . The answer to the third question will be in the affirmative.

Conclusion

151 In my view the majority in the Alberta Court of Appeal was correct in its disposition of the issues in this appeal. The *Lord's Day Act* is enacted pursuant to the criminal law power under s. 91 (27) of the *Constitution Act, 1867*. In providing for the compulsory observance of the religious institution of the Sabbath (Sunday), the Act and especially s. 4 thereof does infringe on the guarantee of freedom of conscience and religion in s. 2(a) of the *Canadian Charter of Rights and Freedoms* and this infringement cannot be justified on the basis of s. 1 of the *Charter*. I would declare the *Lord's Day Act* to be of no force or effect, by reason of s. 52 (1) of the *Consitution Act, 1982*.

152 I would consequently dismiss the appeal, with costs, and answer the questions posed in the following manner:

(1) The *Lord's Day Act*, and especially s. 4 thereof, does 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 not 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*.

***Wilson J.*:**

153 The issue to be addressed on this appeal is the constitutional validity of the Lord's Day Act, R.S.C. 1970, c. L-13, having regard in particular to its impact on the guarantee of freedom of conscience and religion entrenched in s. 2(*a*) of the Canadian Charter of Rights and Freedoms.

154 In his reasons for judgment the Chief Justice (Dickson J. at the date of the hearing) has canvassed in a most thorough fashion all the substantive questions entailed in the analysis of constitutionality and has come to the conclusion that the Lord's Day Act is validly enacted pursuant to the federal criminal law power under s. 91(27) of the Constitution Act, 1867. He has concluded, however, that it infringes upon the right to freedom of religion in s. 2(*a*) of the Charter and that such infringement cannot be justified under s. 1 of the Charter. I agree with those conclusions and the only issue I wish to address in these reasons is the appropriate analytic approach to a Charter case, in a word, the distinction between the analysis demanded by the Charter and the analysis traditionally pursued in resolving division of powers litigation under ss. 91 and 92 of the Constitution Act, 1867.

155 It is, of course, trite law that the analytic starting point in a division of powers case is the determination of the "pith and substance" of the challenged enactment. In the words of Professor Bora Laskin (as he then was), the court endeavours to achieve a "distillation of the 'constitutional value' represented by the challenged legislation ... and its attribution to a head of power": Laskin, Canadian Constitutional Law, 3rd ed. (1969), p. 85. This distillation is achieved through an examination of the primary legislative purpose with a view to distinguishing the central thrust of the enactment from its merely incidental effects. As Professor Hogg points out, identification of the purpose of an impugned piece of legislation is a way of assessing whether, in terms of ss. 91 and 92, the enacting government has pursued a function within the class of subject matters in relation to which it can validly legislate or function as a government: Hogg, Constitutional Law of Canada (1977), pp. 80-81, 85.

156 When viewed in this way it becomes evident that the primary legislative purpose must be abstracted from the broader spectrum of legislative effects. Given that the heads of power listed in ss. 91 and 92 are not watertight compartments, the "pith and substance" approach, concentrating as it does on the analysis of legislative purpose and generally ignoring incidental effects, is essential for a functional delineation of the constitutional jurisdiction of the two tiers of government. Thus, for example, a provincial legislature can legislate in relation to taxation within the province despite the impact of such a tax on a federally regulated subject matter such as the banking industry: *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575 (P.C.) . Similarly, the federal government can validly enact legislation for the purpose of creating a national capital region in Ottawa despite the evident impact of such legislation on property and civil rights in the province: *Munro v. Nat. Capital Comm.*, [1966] S.C.R. 663, 57 D.L.R. (2d) 753 .

157 The division of powers jurisprudence is replete with instances where the analytic focal point in determining whether a given piece of legislation is ultra vires the enacting legislature is the purpose or primary function of the legislation. Only when the effects of the legislation so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose do the effects themselves take on analytic significance: see, e.g., *Ref. Re Alta. Legislation*, [1939] A.C. 117, [1938] 3 W.W.R. 337, *(*sub nom. *A.G. Alta. v. A.G. Can.)* [1938] 4 D.L.R. 433 (P.C.) . As indicated by Locke J. in *Texada Mines Ltd. v. A.G.B.C.*, [1960] S.C.R. 713, 32 W.W.R. 37, 24 D.L.R. (2d) 81 , the effects of an impugned statute are important in the division of powers analysis only insofar as they serve to reflect the underlying statutory purpose and thereby its primary function.

158 Nowhere is this analytic focus on purpose more clearly stated than in those pre-Charter division of powers cases in which legislation was being attacked as impinging on the civil liberties of the subject. For example, in *Walter v. A.G. Alta.; Fletcher v. A.G. Alta.*, [1969] S.C.R. 383, 66 W.W.R. 513, 3 D.L.R. (3d) 1 , a provincial statute prohibiting communal ownership of land was upheld as valid legislation pursuant to s. 92(13) of the Constitution Act, 1867, despite its impact on members of the Hutterite faith whose existence as a religious community was dependent on such communal land holdings. Martland J. acknowledged that legislation in relation to religion and religious freedom was exclusively within the domain of the federal Parliament. He also recognized that it was essential to the Hutterite faith that communal colonies be permitted to exist. Accordingly, any legislative prohibition in this regard would touch upon a fundamental religious tenet of the Hutterite community. He then went on to reason [at p. 393] that "the [provincial] legislation in question here undoubtedly affects the future expansion and creation of Hutterite colonies in Alberta, but that does not mean it was enacted in relation to a matter of religion." The direct impact on a religious

practice was seen as incidental to the intra vires purpose of the legislation and therefore did not enter into the constitutional characterization of the legislative purpose embodied in the statute. Martland J. stated at p. 392:

> It is a function of a provincial legislature to enact those laws which govern the holding of land within the boundaries of that province. It determines the manner in which land is held. It regulates the acquisition and disposition of such land, and, if it is considered desirable in the interests of the residents in that province, it controls the extent of the land holdings of a person or group of persons. The fact that a religious group uphold 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.

159 A similar approach was taken in *Quong-Wing v. R.* (1914), 49 S.C.R. 440, 6 W.W.R. 270, 23 C.C.C. 113, 18 D.L.R. 121 ; *Co-op. Ctee. on Japanese Canadians v. A.G. Can.*, [1947] A.C. 87, [1947] 1 D.L.R. 577 (P.C.) ; and *Morgan v. A.G.P.E.I.*, [1976] 2 S.C.R. 349, 55 D.L.R. (3d) 527, 7 Nfld. & P.E.I.R. 537, 5 N.R. 455 .

160 In my view, the constitutional entrenchment of civil liberties in the Canadian Charter of Rights and Freedoms necessarily changes the analytic approach the courts must adopt in such cases. As Burger C.J. indicated in the celebrated anti-discrimination case of *Griggs v. Duke Power Co.*, 401 U.S. 424 at 432, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1970), the starting point for any analysis of a civil rights violation is "the *consequences* of the [discriminatory] practices, not simply the motivation". Speaking in the context of equality rights as they pertain to employment, Burger C.J. stated at p. 432:

> ... good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups ...

While it remains perfectly valid to evaluate the purpose underlying a particular enactment in order to determine whether the legislature has acted within its constitutional authority in division of powers terms, the Charter demands an evaluation of the impingement of even intra vires legislation on the fundamental rights and freedoms of the individual. It asks not whether the legislature has acted for a purpose that is within the scope of the authority of that tier of government, but rather whether in so acting it has had the effect of violating an entrenched individual right. It is, in other words, first and foremost an effects-oriented document.

161 In *A.G. Que. Assn. of Protestant Sch. Bd.*, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321, 9 C.R.R. 133, 54 N.R. 196 , this court had occasion to assess the constitutionality of s. 73 of Quebec's Charter of the French Language, R.S.Q. 1977, c. C-1, which imposed restrictions on those children who could receive English language education in the province. It was alleged that the provision violated minority language education rights entrenched in s. 23 of the Charter. Although much of the discussion in that case centred upon the question of the applicability of s. 1 of the Charter, the argument was made that s. 73 could not possibly have been intended to represent a violation of s. 23 of the Charter of Rights since the Charter had not come into existence when s. 73 was drafted. In its unanimous reasons for decision, this court dismissed that argument somewhat summarily, stating at pp. 87-88:

> ... buts its [the Quebec legislature's] intent is not relevant. What matters is the effective nature and scope of s. 73 in light of the provisions of the *Charter* , whenever the section was enacted.

162 It seems, with respect, to be inconsistent to hold legislative intent irrelevant when dealing with a statute whose effect is to violate one Charter right and to emphasize, as does the Chief Justice in his reasons in the present case [at p. 128], that "the legislation's purpose is the initial test of constitutional validity" when dealing with another Charter right. For the sake both of consistency and analytic clarity it would seem preferable to avoid confusing the traditional approach to division of powers cases with the approach demanded by the Charter. The first stage of any Charter analysis, I believe, is to inquire whether legislation in pursuit of what may well be an intra vires purpose has the effect of violating an entrenched right or freedom.

163 Applying such reasoning to the case at bar, one can agree with the Chief Justice that in enacting the Lord's Day Act "[t]he arm of the state requires all to remember the Lord's day of the Christians and to keep it holy" [p. 131], and that "[t]he protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity" [p. 131]. Accordingly, the Act infringes upon the freedom of conscience and religion guaranteed

in s. 2(*a*) of the Charter. This is not, however, because the statute was enacted for this purpose but because it has this effect. In my view, so long as a statute has such an actual or potential effect on an entrenched right, it does not matter what the purpose behind the enactment was.

164 Moreover, it seems to me that placing the analytic focus on the effect of legislation impugned under the Charter rather than on its purpose will impose a less heavy evidentiary burden on the plaintiff. Once the plaintiff can point to an actual or potential impingement on a protected right, it will not matter that the underlying legislative purpose is subject to conjecture. In the case at bar the effect of the Lord's Day Act is to compel adherence to the Christian Sabbath by requiring the uniform observance of the day chosen by the Christian religion as a day of rest. It is this effect which infringes upon the freedom of conscience and religion guaranteed by the Charter.

165 Although the Charter is, as indicated above, an effects-oriented document in the first instance, the analysis required under s. 1 of the Charter will entail an evaluation of the purpose underlying the impugned legislation. I agree with the Chief Justice when he states in his reasons [at p. 142] that s. 1 demands an assessment of the "government interest or policy objective" at stake, followed by a determination as to whether this interest is of sufficient importance to override a Charter right and whether the means chosen to achieve the objective are reasonable. In addition, it would seem correct to say that the objective asserted as a reasonable limit under s. 1 will necessarily reflect the purpose of the enactment in the division of powers analysis. As the Chief Justice points out, the Lord's Day Act has been found to be within federal legislative competence based on its characterization as legislation in relation to religious observance. Given that the federal government cannot rely on an ultra vires purpose in attempting to uphold the legislation under s. 1, any attempt to characterize the Lord's Day Act as a reasonable limit on the Charter right to freedom of religion must fail. To hold otherwise would be to find that the s. 2(*a*) right to religious freedom can be legitimately curtailed where Parliament acts for the purpose of curtailing religious freedom. Without having to determine at this point the principles upon which an evaluation of a given governmental objective and its reasonableness as a limit on a Charter right will be premised, it is possible to state with certainty that this governmental objective or interest cannot pass the s. 1 test. Indeed, it was made clear in *Que. Protestant Sch. Bd.* , supra, that legislation cannot be regarded as embodying legitimate limits within the meaning of s. 1 where the legislative purpose is precisely the purpose at which the Charter right is aimed.

166 Accordingly, I agree with the Chief Justice that the appeal in this case must be dismissed. The Lord's Day Act is in pith and substance legislation with a criminal law purpose and is therefore enacted by Parliament pursuant to the federal criminal law power in s. 91(27) of the Constitution Act, 1867. Insofar as the Charter of Rights is concerned, however, I believe that the appropriate analytic starting point is the effect rather than the purpose of the enactment. Inasmuch as the effect of the Lord's Day Act is to compel the observance of Sunday as a day of rest, it violates the guarantee of freedom of conscience and religion in s. 2(*a*) of the Charter. Moreover, the legislative purpose or governmental objective underlying the Act does not represent a reasonable limit on the right to freedom of conscience and religion which can be justified under s. 1 of the Charter.

Appeal dismissed.

Footnotes

* Ritchie J. did not take part in the judgment.

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