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SUNDAY CLOSING AND THE CHARTER OF RIGHTS:

PUBLIC POLICY IN COURT

by

CONSTANCE E. ROBINSON

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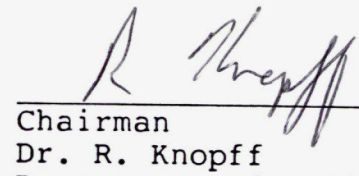
The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled SUNDAY CLOSING AND THE CHARTER OF RIGHTS: PUBLIC POLICY IN COURT submitted by Constance E. Robinson in partial fulfillment of the requirements for the degree of Master of Arts in Political Science.



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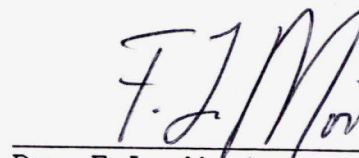

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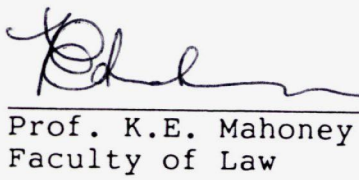

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ABSTRACT

This thesis is a case study of Sunday closing legislation, a policy area that is embroiled in Charter jurisprudence. A review of the history of the issue, an investigation of the watershed decision Edwards Books and Art, and a survey of what is now happening with Sunday closings reveal some of the weaknesses of judicial review of substantive, political policies. It is a propitious time to examine the basis of Sunday observance laws in Canada. The long contested issue has been revitalized by Charter arguments and the increased scope of courts to engage in judicial review. Not only is the topic current and relevant to the lifestyle of every Canadian, the matter of Sunday closings provides a real-world context in which to observe the relationship between the legislature and the judiciary in defining rights and assessing statutes.

ACKNOWLEDGEMENTS

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A special debt of gratitude belongs to my husband. His love and support have been indispensable. Though no words can fully express my appreciation for his help, I dedicate this thesis, and all of the hours of work it represents, to him.

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I

Introduction

Several observers of constitutional law and politics have argued that the Canadian Charter of Rights and Freedoms does not protect rights; rather, it changes the way in which decisions are made about rights, shifting the power of delimiting or balancing conflicting rights from legislatures to courts.(1) These observers further contend that the disputes which will come before the courts under the Charter will concern not so much violations of the core or fundamental rights of the liberal democratic tradition as subsidiary (though not unimportant or uncontroversial) questions about which reasonable liberal democrats, equally devoted to the protection of rights, can and do disagree.(2) This perspective casts doubt on the necessity or legitimacy of judicial review under an entrenched Charter: if the typical question raised in such review is inherently contestable, one to which there is no obvious right or wrong answer, why should it not be left to the normal democratic process? Prior to the Charter, this view formed part of the argument against an entrenched bill of rights; now that the Charter is in place, it is used to counsel judicial restraint.

The most recent version of the democratic critique of judicial review is found in Patrick Monahan's Politics and the Constitution.(3) Monahan advocates a process-oriented reading of the Charter, which would limit the courts to policing the fairness of the democratic process itself: the substantive outcomes of the process would be left untouched. Monahan denies that, in invalidating substantive policy under the Charter, the courts are really protecting rights against a callous and unprincipled legislature, which is the main enemy of rights and freedoms rather than their champion. To the contrary, he claims that "state regulation, while it might limit the opportunities of some citizens, will also expand the oppportunities of others."(4) Thus, substantive (as opposed to procedural) constitutional limits on the state do not so much protect rights and freedoms, as favour some rights and freedoms over others. "The effect of constitutional limits," he says, "is to expand the freedom of some individuals, while simultaneously restricting the freedom of others."(5) In this view, there is no definitive boundary between political questions that can be left to the legislatures and legal questions that can appropriately be settled by the courts. The kinds of questions arising under the Charter will often be eminently political, and judicial review will involve little more than the courts

substituting their opinions for the no less, indeed more, legitimate opinion of the legislature.

In addition to calling into question the democratic legitimacy of activist jurisprudence under the Charter, critics of expansive judicial power suggest that the courts are constitutionally ill-equipped for broad social policy-making; the legal framework suitable for adjudicating particular disputes is inappropriate to the kinds of societal policy making that will be required by the Charter.(6) Not only does substantive review involve the courts in second guessing the legislature, but they will often do so incompetently.

Even if these concerns are valid, they should be tempered with the recognition that the courts will not have the final say on policy questions raised by the Charter. The courts inject their decisions into a policy-making matrix they cannot entirely control. If they strike down a policy under sections 2 and 7 to 15 of the Charter, they may be overridden through the use of section 33, though this is unlikely to be a popular response. A determined legislature may seek other ways of achieving the same objectives.(7) Alternatively, if the courts uphold legislation, they may find that their decision is irrelevant, because the forces challenging the policy, though "legally" weak, may prove to be politically strong. In such cases,

the courts may be providing legal support to a politically doomed policy. In still other cases, although a positive judicial finding may countenance a law, the very process of judicial scrutiny might undermine the political will to sustain the legislation because of the doubts, uncertainties and controversies exacerbated by subjecting political issues to legal adjudication.

This thesis is a case study of a single policy area that has become embroiled in constitutional jurisprudence under the Charter: the question of Sunday closing legislation. It looks at what has happened and what is now happening in this policy area in light of the concerns and considerations outlined above. The federal Lord's Day Act was struck down under section 2 of the Charter in 1985, while Ontario's Retail Business Holidays Act was upheld in 1986. Chapter II studies the Supreme Court's characterization of the Lord's Day Act, revealing an inherent and important limitation on the judicial capacity to assess social policy in an accurate and realistic manner; the jurisprudential equipment it must use, and the standards it must live up to, may lead to a doctrinally required distortion of social and historical reality. A review of the Court's struggle with the issues posed by secular closing legislation in Chapter III underlines the truth of the claim that courts will often find themselves second

guessing legislatures on policy matters about which reasonable liberal democrats disagree, and for which the courts are poorly equipped. The survey of the development of Sunday closing policy at the legislative level, in Chapter IV, assesses the impact of the Supreme Court's Charter decisions on Sunday Closing.

NOTES

1 Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms," The Canadian Bar Review, vol. 61, 1983, pp. 30, 45.

2 Russell, op.cit. and Rainer Knopff, "What do Constitutional Equality Protect Canadians Against?" Canadian Journal of Political Science, XX: 2, June 1987, pp. 265-286.

3 Patrick Monahan, Politics and the Constitution (Calgary: Carswell, 1987).

4 Ibid., p. 116.

5 Ibid.

6 Paul Weiler, "Two Models of Judicial Decision Making," Canadian Bar Review, 1968, p. 406 and Donald L. Horowitz, The Courts and Social Policy (Washington: The Brookings Institution, 1977).

7 Monahan, op.cit., pp. 224-225, and Peter Russell, "The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources," Canadian Public Policy, vol. XI, no. 2, pp. 168-169.

II

Lord's Day Legislation

> Judges must beware of Hard Constructions, and Strained Inferences; For there is no Worse Torture, then [sic] the Torture of Lawes.
>
> Francis Bacon(1)

Introduction

In 1985, the Supreme Court of Canada found that the federal Lord's Day Act violated the guarantee of religious freedom in section 2 of the Charter of Rights because, as the Act's title implied, its purpose was to promote a particular religion. Such a religious purpose was clearly unconstitutional. Subsequently, the Court upheld Ontario's Retail Business Holiday Act, which was very similar in operation and effect, but which did not have an impermissible religious purpose. Hence, substantively similar pieces of legislation can have different purposes. This suggests that, legal considerations aside, different purposes might also characterize a single piece of legislation like the Lord's Day Act. It also raises the possibility that the relative importance of the different purposes underlying a statute may shift over time; a subordinate purpose at the time of enactment might eventually become the objective that sustains the law. This is how the

American Supreme Court approached Sunday closing legislation, finding that although it had been enacted for religious purposes, the legislation eventually served permissible secular purposes. Even if this American approach were desirable (Chief Justice Dickson thinks it is not), it would not have saved the Canadian Lord's Day Act. The determination of the federal vires of legislation requires the attribution of a primary purpose or "pith and substance" and the federal validity of the Lord's Day Act could be sustained only if its pith and substance was religious in nature; had it been otherwise, it would have come under provincial jurisdiction.

The procrustean requirements of constitutional jurisprudence are not tolerant of dual purposes, such as the secular/religious dichotomy of Sunday closing legislation. This may sometimes distort political and historical reality, and this is the case with the judicial characterization of the Lord's Day Act in Big M.(2) It is implausible to suggest that in the late twentieth century the Act served to promote religious observance rather than to establish a day of rest. Furthermore, although the historical importance of religious elements in the Act is indisputable, it is an exaggeration to suggest that the Act's promotion of religious observance overwhelmed its secular elements, even at the time of enactment. This chapter looks behind the

legal veil of "pith and substance" or "primary purpose" to examine the actual mixture of purposes in the Lord's Day Act; it shows that both religious and secular purposes were present to a significant degree from the beginning. Of course, the doctrine of "pith and substance" does not require the denial of subordinate purposes in a piece of legislation.(3) However, it rhetorically depreciates the importance of purposes other than the "main" one, especially when other purposes are jurisdictionally invalid. This legalistic distortion of reality is predictable; courts often cannot avoid it without abandoning sound jurisprudential principles. Nevertheless, this ought to be taken into consideration when evaluating the policy-making capacities of the courts. In brief, judicial policy making may be hampered by jurisprudential lenses that prevent courts from accurately characterizing issues and social realities.

The explicit reference to the "Lord's Day" in the title of the federal Act does not undermine the conclusion that secular purposes were present in substantial degree. To make this clear, one must distinguish between Lord's Day and sabbatarian legislation. Popular usage of "Lord's Day" and "sabbath" has led many to believe that the only purpose of Lord's Day legislation is the promotion of religion. This view has been strengthened by two Canadian studies on

Sunday legislation. Both the report of the Ontario Law Reform Commission of 1970 and the Canadian Law Reform Commission's investigation of the question in 1976 acknowledged the long history of Sunday legislation, but neither report gave serious consideration to the pedigree of Sunday laws and sabbath traditions. Contrary to Webster's Dictionary,(4) the terms "Lord's Day," and "sabbath" do not necessarily carry the same meaning. They have not always been used interchangeably. The differences in their connotations reveals the varying characters and purposes of Sunday laws.

Briefly stated, the term "sabbath" refers to a complete day devoted to worshipping God and the consequent abstention not only from labour, but also from secular recreation. This is most readily identified with the Jewish faith and many Christian sects. The "Lord's Day" is the title of the weekly day of celebration of the resurrection of Christ in many Christian denominations, but unlike a sabbath, it does not necessarily imply abstention from labour or recreation. Sunday simply refers to the first day of the week, which coincides with the "sabbath" or "Lord's Day" of many Christian sects. It follows that strict sabbatarian legislation is predominantly religious in purpose; although it results in a "day of rest," its prohibition of recreation leaves no doubt that this rest is

not understood in secular terms, but as a time devoted to worship. By contrast, Lord's Day legislation is quite compatible with the promotion not only of celebratory worship, but also of secular rest and recreation.

Had the federal Lord's Day Act been true sabbatarian legislation, it would have prohibited virtually all secular activity, not just labour. In fact, it appears on its face to do just that. However, understood in historical context as part of a complex scheme of "cooperative federalism," it is more properly characterized as what its title proclaims: Lord's Day legislation, embodying both religious and secular purposes. Unlike sabbatarian legislation, Lord's Day legislation is indistinguishable in its effect from secular Sunday closing legislation. This raises the question why legislation so similar in operation should not share the same constitutional fate under constitutional freedom of religion guarantees. This question is the subject of the next chapter.

History of Sunday Legislation

Sabbath

Ancient usage of the term "sabbath" refers to the Jewish practice of setting aside the seventh day of the week, from sunset Friday to sunset Saturday, as a day of

rest and worship. There is no consensus among scholars regarding the actual origin of the custom. According to the most common theory, the sabbath is based on the Bible. In Genesis, God rested on the seventh day and hallowed it. The Jews, believing that this was a direction for them to observe a hallowed day, set Saturday aside in recognition of the creation story. Biblical support for the sabbath can also be found in the Decalogue of the Old Testament, which formally institutes the observance of the sabbath in the fourth commandment as a covenant between God and the Jewish people, and as a reminder of their deliverance from Egypt.(5) Some historians have traced possible sabbath origins to other nomadic tribes of the Biblical lands, who celebrated Moon festivals and other rites based upon astronomical occurances at almost weekly intervals. However, this view is not supported as strongly as the Biblically based theories.(6)

Regardless of the precise beginnings of the sabbath, its observance on the seventh day was firmly established in the Jewish tradition by the time of the Exodus. Hence, the practice of neither working nor performing agricultural tasks, but devoting the entire day to God, was fixed within the Jewish religion at least 1500 years before the birth of Christ.(7)

It would appear from the origins of the sabbath that the day was undeniably religious in character. Yet, there is a suggestion that the sabbath was just as much a day of rest in the interest of labour regulation as it was a day of worship. One of the proponents of this theory was Aphrahat the Persian. In his work De Sabbato (dating somewhere between A.D. 336 and 345), he noted that the fourth commandment was to be observed by servants and beasts of burden as well as by the practising Jew. Since it has never been a tenet of the Jewish faith that animals have souls, or that beasts will be resurrected, there could be no question of sin or righteousness on the part of the animals working or resting on the sabbath. Instead, Aphrahat argued that the sabbath was a commandment of mercy to give respite to all creatures that work and tire of their labours.(8) Thus, one might argue that the sabbath had a secular purpose of giving rest for the physical wellbeing of all, while requiring worship by the devout, though for the faithful, the religious purpose clearly predominated.

Sunday and Lord's Day

Early Church history shows that the "Lord's Day" was initiated after Christ's crucifixion. As the day celebrating the resurrection, it was observed on Sunday.

However, the Lord's Day did not originally have any of the characteristics of the Jewish sabbath, which was also practised by Christian Jews. The Lord's Day observance did not require Christians to abstain from work on Sunday; believers merely gathered together to celebrate the Eucharist before going about their daily routine.(9)

There is little evidence as to when the Christian and Jewish faiths made a definitive break from each other. However, it is generally held among theological historians that as the Christians sought to establish an independent identity from the Jews, sabbath observance was abandoned and Sunday became the central day in the week for Christians as the Lord's Day.(10)

There were several means by which the early Church sought to justify the abdication of the Jewish sabbath. One school conducted an extensive study of the examples set by Christ, which revealed a number of occasions where the sabbath laws were not strictly observed. Some argued that because Christ was the Son of God he was above the sabbath commandment; others held, under the eschatological theory, that the sabbath referred to the final or golden age when all the world would rest from its labours in a final, perpetual sabbath.(11) Another group used a more radical argument, declaring that the Old Testament had been fulfilled by Christ and that its word no longer required a

literal reading; Christ had explained the meaning of the Old Testament through his life on Earth. Hence, the sabbath commandment was taken to mean that Christians should observe a perpetual sabbath by abstaining from sin throughout the week, not that they should abstain from work on one day out of seven.(12)

Thus, the early Christian development of the "Lord's Day" did not represent a shift of the traditional sabbath from Saturday to Sunday; indeed, it was associated with the rejection of the idea of a sabbath day requiring abstention from everyday activities of work and recreation. It was only over a long period of time, during which the Church gradually sought to increase control of its members, that Lord's Day practices began to take on the appearance and some of the substance of a sabbath.

Two factors contributed to the development of more familiar Sunday observances. The first was the growing breach between Christians and Jews. In making the break from the Jewish community, Christians sought to distinguish their religious practices by shifting the emphasis from the Saturday sabbath to Sunday as the Lord's Day. Comparisons between the two days were made to justify the Christian belief that the Lord's Day was superior. Ironically, to do so, the Christians began to transfer some of the religious rites of the sabbath to their Lord's Day practices, thereby

giving the latter some of the characterisitics of the former.

The second factor was the creation of secular day-of-rest laws coinciding with the Lord's Day. This development began in A.D. 321, when Emperor Constantine the Great promulgated the first known Sunday legislation:

> On the venerable day of the sun, let the magistrates and people residing in cities rest, and let all workshops be closed. In the country, however, persons engaged in the work of cultivating may freely and lawfully continue their pursuits ... lest by neglecting the proper moment for such operations the bounty of heaven should be lost.(13)

The Roman law applied only in the cities and allowed the inhabitants of rural areas, where pagan religions were stronger, to work on Sunday, lest they believe that the Roman laws were being influenced by Christian interests. Although some scholars interpret the edict as a sabbatarian and hence a religious piece of legislation, the contrary arguments carry greater weight. Constantine's law permitted agricultural labour; traditional sabbath rules placed great emphasis on the prohibition of such work. Instead of a religious law to secure the observance of Christian or pagan rites, W. Rordorf contends that the Roman Sunday legislation was a "product of political and social considerations."(14) He adds that the Christians

made no immediate move to claim the day as one of abstinence from work; it was the role of the state to regulate the time for work and leisure, so long as Christians could have the freedom to assemble for worship on Sundays.(15)

Since the secular law only limited labour and did not otherwise direct the activities of the citizenry, the Church began to take on the responsibility of regulating Christian activities that would be appropriate on the Lord's Day. Part of this objective was achieved with the development of the liturgical calendar to celebrate historical events and to honour saints and martyrs. Unfortunately this also made Lord's Day observance more difficult. The numerous holy days tended to obscure Sunday practices. In an attempt to offset this tendency, the Church began to assert various obligations on special days, such as a strict rest and attendance at services. Despite the demands placed upon believers for liturgically significant days, recreational activities were not regulated by the Church before the end of the fifth century.

During the medieval period, Christian sabbatarianism developed as a means of declaring Christian ceremonies to be the "legitimate successors of Jewish traditions."(16) Although the medieval Church developed rigid theory regarding a Christian sabbath on Sunday, compliance of the

general populace was not achieved. It being very difficult for the ordinary person to attend Sunday services as well as to observe feast days, many chose to overlook Sunday observances, simply enjoying the day of rest and taking part in the festivities of other days.(17)

Throughout the Middle Ages several European sects sought to reform Christian practices. Some increased the strictness of Sunday observances, making it more like a sabbath, while others resisted this approach. The debate intensified during the Protestant Reformation, further clarifying the opposing stands.

The Sabbatarian argument considered the sabbath to be a moral or natural law to be observed on Sunday as strictly as the Jewish faith observed its seventh day sabbath. Becoming associated with Puritanism as early as the 1590's,(18) sabbatarianism was held dear by those who sought to follow a literal reading of the Bible with the Decalogue intact. Neither work nor recreation was to be performed on Sunday. By contrast, the "Ecclesiastical" school insisted that the Lord's Day was not a sabbath, that it was a Christian institution whose observance was meant to benefit the body as well as the soul(19) (although, as already noted, there are those that contend that the Jewish sabbath also provided for physical rest). Desistance from

labour, but not from recreation, was the Ecclesiatical formula for Sunday activities.

These two schools, Puritan and Ecclesiastical, created a perilous tension within the political structure of Britain, which lasted almost a century; periods of strict sabbatarian edicts were offset with times when people were encouraged to engage in sports on Sundays. With each vacillation, the tension between the two groups increased, culminating in a political and religious crisis during the reign of King Charles I. As head of the Church of England, the King upheld the Ecclesiastical version of the Lord's Day. However, the Parliament was under the considerable influence of its Puritan members. The Sunday question became a key indicator of political alignment in the uneasy years preceding the Civil War.

As an individual who enjoyed sports and fetes on Sundays, the King was reluctant to limit Sunday activities in any way. However, to achieve some peace, he agreed to pass a Lord's Day Act in 1627.(20) This legislation proscribed certain types of labour, particularly in the transportation of goods and the butchering of meats. This did not go nearly as far as Puritans would have preferred, as the law did nothing to regulate Sunday recreation. However, people now had a day free from labour and could choose to do as they liked. This freedom led to a

disturbing tendency for the general populace to engage in recreations that, in the eyes of all factions of the Church, did not suit the Lord's Day. Indeed, Sunday wakes and ales, which consisted of country festivals and revels, became associated with civil disorder and unChristian conduct. This created further pressure for increased government regulation.

This period of political and religious unrest in England resulted in a Puritan emigration to what is now the United States of America. The Puritan ideology proved a powerful force in molding early American culture.(21) This pervasive belief structured not only the daily life of the colonists, but the early Sunday laws of the settlements. Remnants of the Puritan influence, in references to recreations proscribed on the Lord's Day, could still be found in American Sunday laws well into the twentieth century.(22)

Meanwhile, Sunday observance laws in England continued to avoid the recreational issue by being more concerned with the regulation of labour.(23) Nevertheless, the prohibition of most forms of labour effectively denied almost all forms of recreation.

> Everything was bolted and barred that could possibly furnish relief to an overworked people. No picture, no unfamiliar animals, no rare plants or flowers, no artificial or natural won-

> ders of the ancient world - all taboo with an enlightened strictness that the ugly seagods in the British Museum might have supposed themselves at home again....Nothing to change that brooding mind, or raise it up. Nothing for the spent toiler to do, but to compare the monotony of his seventh day with the monotony of his six days, think about what a weary life he led, and make the best of it - or the worst, according to the probabilities(24)

Although one is often warned not to read too much secularism into the English Sunday observance laws,(25) it cannot be denied that a strong concern to provide rest for the labourer exists in most Lord's Day laws. Whether as a day of rest from work to enjoy recreation or to abstain from all activities to worship, one can see that the secular and religious aspects of a day of rest are often closely intertwined, at once in a symbiotic relationship and yet in tension with one another. This dichotomy is evident in the Canadian context.

Federal Lord's Day Act

Just as there were two main schools of thought as to the proper observance for Sunday, so there are two theories as to the driving political forces that molded Sunday legislation in Canada. One is that the federal Lord's Day Act was a mere continuation of the same Puritan attitudes that had determined the American sabbath laws, which denied

almost all forms of work and recreation. The other hypothesis is that the Canadian legislation was a product of the social gospel movement and labour movements which were united within the Lord's Day Alliance,(26) which represented ideas similar to the Ecclesiastical line of thought.

Although puritanism and sabbatarianism was imprinted on the character and lifestyles of early American settlers and thus was pervasive in the shaping of early American sabbath laws, one cannot assume that Canadian Sunday legislation followed from its American neighbour. As G. Horowitz pointed out in his article "Conservatism, Liberalism and Socialism in Canada", the "point of departure" and "congealment" for the values and principles of Canadian society is much later than that of the United States.(27) Hence, the Puritanical practice of Sabbatarianism may not have influenced the creation of Sunday laws in Canada to the extent it did south of the border. European and other influences should be recognized for their role in the early formulations of Canadian Sunday laws.

Many of these influences culminated in the Lord's Day Alliance. As a reaction to the industrial revolution, the Alliance was one of a number of similarly purposed groups to be organized across Europe and North America. Intent to improve the condition of the working classes by

guaranteeing at least Sunday as a day of rest, as well as to promote the religious observance of the day, international congresses were held during the late nineteenth and early twentieth centuries to consider the physiological, economic and ethical aspects of Sunday rest.(28)

In Canada, the movement targeted the federal government as the locus of jurisdiction for Sunday observance. It was in the interest of the Alliance's goals to pursue federal legislation that would provide uniform laws across the country. However, both the federal and provincial governments held that Sunday legislation was the responsibility of the provinces as a matter of property and civil rights, or as a matter of a local or private nature under sections 92(13) and (16) of the Constitution Act 1867. In this way, the religious interests which varied from region to region could be accommodated.(29) During the early period of agitation, the federal government enacted no statutes regarding the matter, leaving the provinces to enact their own Sunday laws.

However, in 1903 the status quo was disrupted by the Judicial Committee of the Privy Council's decision in the case of the Attorney-General of Ontario v. Hamilton Street Railway.(30) In that opinion, the Judicial Committee struck down the Lord's Day Act of Ontario because the prohibition of activities on Sundays was traditionally a matter of

criminal law and hence came within the federal jurisdiction under section 91(27).(31)

The Hamilton Street Railway decision encouraged the activities of the Lord's Day Alliance. Many of its members were prominent parliamentarians. However, the federal government remained reluctant to accept responsibility for the matter. In 1905, it referred a draft provincial Sunday observance bill to the Supreme Court of Canada in the hope that an alternate structure would enable the provinces to continue to legislate the issue.(32) However, this scheme would not overcome the weaknesses that the Judicial Committee had found in the Ontario act and the Dominion government was forced to consider its own legislative solution.

Although the federal government eventually filled the void in Sunday legislation with its own Lord's Day Act, the intitial sentiment that there were certain aspects of Sunday observance that belonged to local decision-makers remained. This was evident in the structure of the federal Act, and continued to be manifest in the nature of subsequent Sunday closing laws.

The federal Lord's Day Act of 1906 prohibited a variety of activities, yet allowed the provinces to opt-out of key portions of the Act.(33) This made the Act difficult to characterize, since much of its enforcement depended upon the actions of provincial governments. It might have

been considered sabbatarian law because of the prohibition of recreational, as well as labour activities. On the other hand, since the Act made some allowances for activities and contained provisions under which the provinces could exempt themselves from most restrictions on recreational pursuits, the rubric of sabbath law does not apply easily. In its practical operation, the law sometimes approaches that of secular day-of-rest legislation.

Since neither purely sabbatarian nor wholly secular characterizations seem appropriate descriptions for the federal Act, it appears that it was indeed a Lord's Day Act, as the title implies. Most forms of labour and business operations were prohibited on Sunday, while only certain types of sport and recreation, such as horse racing and boxing, were strictly forbidden. The permitted activities were regulated so as not to interfere with the usual hours of Sunday morning and evening services. In addition, as already noted, the Act was quite permissive in allowing the provinces to make exemptions in the key areas of Sunday observance provisions. Thus, one cannot deny that although there were religious objectives underpinning the legislation, the Lord's Day Act also provided for the secular interests of Canadians.

This appears to be a reflection of the zeitgeist at the time the legislation was enacted. John Stuart Mill,

writing during this era, sympathized with the secular objectives of Sunday legislation while denouncing its religious aspects:

> Without doubt, abstinence on one day in the week, from the usual daily occupation is a highly beneficial custom. And inasmuch as this custom cannot be observed without a general consent to that effect among the industrious classes, it may be allowable and right that the law should guarantee to each the observance by others of the custom, by suspending the greater operations of industry on a particular day. But this justification does not apply to the self-chosen occupations in which a person may think fit to employ his leisure; nor does it hold good in the smallest degree, for legal restrictions on amusements ... the useful recreation of the many is worth the labour of a few, provided the occupation is freely chosen and can be freely resigned.(34)

As one may discern, there were forces at work in the nineteenth century which opposed completely "closed" Sundays. The Canadian Parliament sought to be sensitive to both the sabbatarian and secular concerns that were present. At the time, there was no pressure on the government to avoid any association with religious issues. Indeed, it was generally held that Canada was a country whose laws were inspired in part by Christianity.(35) Thus the federal Act gave sanction to the divine aspect of the day. However, Prime Minister Laurier was very careful to note in

the debate on the bill that, although civil sanction was given to the observance of the day, the law did not oblige people to attend church or perform any religious rites or customs. "The liberty of the subject is not interfered with in that respect, and a man can do on the Sabbath whatever he pleases to do."(36) Laurier then went on to emphasize that there was another aspect as important as the religious facet of the law:

> Every labouring man shall have a day of rest. That is the corollary of the first principle of the Bill, and that is the reason why we have introduced this legislation.(37)

Thus, as David Bercuson points out, "the humanitarian aspect was the desire to guarantee the working man a day's rest. The religious part was the belief that day had to be Sunday."(38)

The tension between the religious and secular facets of the legislation are also highlighted in the variety of responses made by the provinces under the exemption provisions of the Act. Almost all of the provinces passed their own statutes to take advantage of the opt-out provisions of the federal Lord's Day Act. All of the provinces and territories, except Newfoundland, eventually enacted a Lord's Day Act of their own. Newfoundland made no attempt to exercise the opting-out clause; it passed a secular

shops act, which was completely independent of the federal legislation. Most of the other provinces did not pass Lord's Day statutes under the federal Act until after the Second World War. However, Quebec, in a move to maximize its independence from the Dominion Parliament, brought its own Sunday Observance Act(39) into effect the day before the federal Act was proclaimed, in order to take advantage of the federal Act's provision that it would not rescind provincial statutes already in force. The other provinces waited half a century or more to take advantage of the opt-out clauses in the Act, by passing provincial Lord's Day acts or other Sunday laws. Nevertheless, religious interest expressed in provincial legislation had not waned. Despite the Hamilton Street Railway decision, which declared religious legislation the exclusive purview of the federal government, the provinces admitted to considering the religious character of Sunday; they made no attempt in their initial Lord's Day Acts to dissociate the provincial statutes from religious content. Indeed, this was an inherent factor in determining what activities would be appropriate for the Lord's Day, even while drafting legislation that was supposed to eschew religious purpose. This is illustrated in the comments of the Attorney-General of Ontario as he introduced the 1950 Lord's Day Ontario Act:

> The government is most anxious to preserve the essential features of the Sabbath Day, and believes that anything approaching a wide-open Sunday is undesirable. The religious aspect of the day should be regarded by everybody as being of primary importance.(40)

The federal opt-out clauses provided a point of access for the provinces to influence the tenor of the federal Act within their borders. The provinces were supposedly limited by the fact that they could only pass dispensatory exemptions to the federal Lord's Day Act; nevertheless, the provinces could determine how restrictive the Sunday observance laws should be simply by limiting, or not exercising at all, the option to make exemptions. The federal government had set the standard for maximum strictness in Sunday observance, while the provinces were given a great degree of latitude in determining how strict or lenient the provincial law should be. They could promote strict sabbatarianism simply by choosing not to enact exemptions.

The provincial exemptions under the federal opt-out provision tended to fall into two categories: those that delegated the responsibility of making exemptions to municipalities or allowed municipalities to make exemptions to the provincial law, and those that enacted Sunday legislation on a province-wide basis.

Provincial acts which empowered municipalities to make Sunday observance exemptions existed in Alberta, British Columbia, Manitoba, Ontario and Saskatchewan as well as both the Northwest and Yukon Territories. However, this was not carte blanche authority. Only British Columbia and Ontario empowered municipalities to pass exemptions without requiring the assent of the majority of the electorate in a plebiscite. Most provinces limited the hours during which exemptions were permitted.(41) Hence, even those provinces that were reluctant to assume the responsibility of legislating province-wide exemptions placed certain parameters on the behavior deemed acceptable for the Lord's Day. Quebec, New Brunswick, Prince Edward Island and Newfoundland passed province-wide Sunday legislation, without any recourse to municipal exemptions. However, this did not necessarily mean that the Sunday closing situation was stricter in these provinces. In most cases, sporting and recreational activity were permitted, in addition to the operation of small foodstores, businesses relating to the tourist industry, agricultural businesses and fruitstands.

A brief note of explanation regarding Newfoundland is necessary. It has never, technically, had a Lord's Day act.(42) The Hours of Work Act, however, serves as a de facto holiday closing act which included Sunday as a closed

day. Stores and businesses whose principal trade consists of those goods or services that are permitted to be sold on "restricted" days are exempted from the Act in so far as the sale of those goods and services is concerned.(43) Although the Act appears to be secular in nature and is quite strict in assuring relatively uniform closing days across the province, it makes no provisions to permit recreational activities that would otherwise be illegal under the federal Lord's Day Act. Hence, until the federal Act was struck down, Newfoundlanders could neither work, nor play on the day of rest. In many ways, the province's choice of legislation enforced a strict version of a Sunday sabbath without grounding it in religious terminology.

The provinces exercised a wide variety of options available under the federal Lord's Day Act. At first, they ranged from strict sabbatarian to "Lord's Day" type legislation that had both religious and secular purposes. However, by the time the Lord's Day Act was struck down in 1985, it is unlikely that either the federal government or the provinces saw Sunday closing laws in religious terms. Indeed, as Chapter Three will show, many provinces replaced or supplemented their Lord's Day legislation with purely secular legislation. Exemptions from the federal Act came to be understood as a part of an overall secular day-of-rest scheme.

Conclusion

A review of the history of Lord's Day legislation shows that it has always embodied an ambiguous mixture of religious and secular purposes. Furthermore, common sense indicates that its secular objectives had become predominant by the time it was finally struck down for its religious "pith and substance."(44) The doctrinaire legal characterization of the legislation was required both by the way in which the courts had previously justified the Lord's Day Act as federal legislation, which depended on its religious purpose, and by the requirements of sound jurisprudence. The former is not sufficient to explain the unrealistic characterization of the law. It was open to the Court to characterize the law as having acquired a secular "pith and substance," and then strike it down as ultra vires the federal government. The result would have been the same, but it would have been reached with less rhetorical distortion of reality. However, there were good reasons for rejecting this alternative. As Chief Justice Dickson pointed out, using the flexible interpretive doctrine of "shifting purpose" would threaten the credibility and authority of courts and strain their judicial capacity. "Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable."(45) If the legislative intent could be

completely ignored and laws so easily reinterpreted, then re-litigation of previously determined principles would be encouraged; no decision could ever be considered definitive and no issue closed. Thus, even though the true nature of a law may change, the court cannot admit this adaptation. Dickson insisted that once pith and substance was established, it could not be changed. In short, a realistic characterization of the law and judicial propriety were mutually exclusive alternatives; Justice Dickson chose jurisprudential propriety.

The Charter has shifted considerable policy making power from legislatures to courts. This chapter has shown that the jurisprudential lenses through which courts must view issues often distort reality. In the debate about comparative strengths and weaknesses of legislatures and courts in the policy-making process, this must be counted a weakness.

NOTES

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4 "Sabbath," Webster's New Collegiate Dictionary, 1949 ed.

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9 Willy Rordorf, Sunday (Philadelphia: Westminster Press, 1968), pp. 167-168.

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14 Rordorf, op.cit., p. 166.

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16 Solberg, op.cit., pp. 13-14.

17 Ibid., pp. 14-15.

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32 In re Legislation Respecting Abstention from Labour on Sunday, S.C.R. (1905), 587.

33 Lord's Day Act, R.S.C. 1952, c. 171. ss. 4, 6 and 7.

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37 Ibid., col. 5642.

38 David Bercuson, quoted by Fay Orr in "Piety & Humanity," Alberta Report, 4 April 1983, p. ..

39 1964 R.S.Q., c. 302.

40 Ontario Legislative Debates, 1950, pp. A-6,7.

41 The provices of Alberta, British Columbia, Manitoba, Nova Scotia, Saskatchewan and Ontario set specific hours during which businesses could be conducted.

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III

Sunday Retailing Legislation

Introduction

Big M Drug Mart invalidated Sunday closing legislation that is animated by religious purpose. However, it left unanswered the question of whether secular day-of-rest legislation also infringed the Charter's freedom of religion guarantees. The only thing that was clear was that, as a matter of federal jurisidiction, such secular legislation could only be enacted by the provinces.

One can see that although sabbatarian legislation differs from secular day-of-rest legislation both in avowed purpose and substantive provisions, Lord's Day legislation differs from its secular counterpart mainly in rhetorical packaging. In other words, the "effect" of both kinds of legislation is the same. However, if the only difference is rhetorical, should they not share the same constitutional fate under section 2 of the Charter? Justice Wilson underlined the importance of this question in her Big M Drug Mart opinion when she argued that "effect" should be the only test of constitutionality under the Charter.(1)

The common effect of both kinds of legislation is the comparative disadvantages imposed on conscientious observers of a sabbath other than Sunday. Although Chief Justice Dickson was unwilling to dispense with the test of purpose, he conceded that legislation with a constitutional objective might also be found unconstitutional because of this effect. It thus became inevitable that a constitutional challenge to provincial Sunday closing legislation, based on its effects, would reach the Supreme Court.

The question of judicial policy making is raised even more dramatically in the assessment of effects than in the judicial distortion of reality discussed in the previous chapter. The unconstitutional effects of a statute with a constitutional purpose cannot lead to a simple finding of unconstitutionality. If the purpose is constitutional, then its incidental effects on constitutionally protected interests must be weighed against the importance of the valid legislative objective. This usually involves the courts in assessing, under section 1 of the Charter, the importance of the legislative purpose, and if they judge it to be sufficiently important, in determining whether the legislature has chosen means to achieve its objective that minimize the unconstitutional effect. These are paradigmatically political policy questions about which reasonable people can differ. As we shall see, reasonable

judges also differ - so much so, that some are led to conclude that certain types of disagreements are not suitable for judicial resolution.

History of Secular Legislation

Big M ended the era of cooperative federalism in Sunday closing legislation under the aegis of the federal Act, but it did not leave a legislative vacuum in its wake. Beginning in the late 1960's, several provinces passed secular Sunday closing legislation, completely free of the federal Act.

It had not always been entirely clear that provinces had the constitutional authority to enact such legislation. In 1911, in Ouimet v. Bazin, the Supreme Court of Canada found that a Quebec statute that prohibited theatre performances on Sunday was ultra vires.(2) Although the opt-out clauses in the federal Lord's Day Act permitted provinces to make exemptions, the court held that because the province was prohibiting an activity rather than making allowances for Sunday activities, Quebec had been making criminal law. Thus, it first appeared that the provinces could only enact permissive Sunday legislation. This would have precluded independent provincial legislation, and Sunday closings in Canada, at all jurisidictional levels, would have died with the Lord's Day Act in 1985.

The Supreme Court again struck down prohibitory Sunday legislation twenty-two years after Ouimet in Birks v. City of Montreal.(3) The law required stores to close on several Catholic holy days. In this case, however, it was clear that the legal prohibitions were enacted for religious purposes, something that, under the rule established in Hamilton Street Railway, could only be done by the federal government. If Ouimet could be interpreted in the same manner, it might be that it was not the prohibitory nature of the law that offended the constitution, but only prohibitions based on religious purpose. This was the conclusion reached by the court in 1963 in Lieberman v. The Queen,(4) in which, for the first time, a prohibitory Sunday closing by-law was upheld. The Court distinguished previous cases, such as Birks, by emphasizing the secular nature of the legal proscriptions in Lieberman. Thus, the jurisdictional validity of prohibitory provincial Sunday closing legislation was assured. It seemed that the dual character of Sunday legislation was being resolved by establishing federal purview over religious concerns and provincial jurisdiction over secular aspects.

The province of Ontario pioneered secular retailing legislation. Despite the enthusiasm exhibited in the introduction of the Lord's Day Ontario Act in 1950, the willingness to be involved in religious matters quickly

waned. In 1969 the Attorney-General asked the Ontario Law Reform Commission to review Sunday observance legislation in the province. When the Commission published its findings in 1970, it strongly recommended a move away from any recognition of Sunday as a Lord's Day or sabbath. Sunday recreation and leisure became activities to be enjoyed, rather than activities to be regulated. Instead, the focus of control was retailers, so that retail employees could enjoy Sunday as a day of rest. Sunday was emphasized as a uniform pause day that would be completely secular in character.(5)

The Report on Sunday Observance Legislation went into great detail in outlining the Commission's vision of appropriate Sunday closing legislation reforms, including what services or goods should be exempted and what secular criteria could be used to regulate "essential" Sunday retailing.(6) Most of the recommendations were incorporated in Ontario's Retail Business Holidays Act, 1975.

The Ontario government chose to regulate Sunday activities under the same legislation governing other secular holidays. Prohibiting retail trade on proscribed days, the Act also provides a complex formula for exemptions based on the size of the store, the number of people employed, and the types of goods sold. Businesses that sell only food, newspapers, tobacco, antiques or handi-

crafts, that do not employ more than three people to serve the public, and that are smaller than 2400 square feet are completely exempt. A second exemption is made for stores less than 5000 square feet in area and employing no more than three people, so long as the establishment is closed for twenty-four consecutive hours during the thirty-two hour period immediately preceding Sunday.(7) Although it was framed in neutral terms, this "Saturday exemption" was obviously intended to accommodate the religious practice of Saturday sabbatarians such as Jews and Seventh Day Adventists.

The Saturday exemption led to much controversy as to the true nature of the law. When the bill was introduced in the Ontario legislature on 29 October 1975, emphasis was placed on the fact that the legislation was secular in character, establishing a "common uniform pause day".(8) Yet the degree of uniformity that could be achieved by the Act was undermined by the Saturday exemption. The Ontario law Reform Commission had strongly urged that no accommodation be made for individuals whose religious convictions dictated closing businesses on days other than Sunday. It was the Commission's position that such exemptions would "clothe the legislation with the very religious character which we [the commission] deliberately sought to avoid."(9) Most of the legal opinions involved in interpreting the

legislation agree that the Saturday exemption is the Ontario government's attempt to make allowances for Saturday sabbatarians without using religious terminology in the Act.(10) The accommodation of some Saturday sabbatarians was perceived to be a weakness in the secular provincial law and led to challenges under sections 2 and 15 of the Charter.

Despite some of the problems inherent in the Ontario Act, it became a model from which several other provinces created their own secular Sunday closing legislation. The first to follow Ontario's lead was its western neighbour, Manitoba. Difficulties in enforcing the Lord's Day Manitoba Act had reached a critical point during the Christmas shopping season of 1976.(11) The fines set out by the Act, as dictated by the federal law, no longer deterred stores from defying the Sunday closing portions of the law. The Manitoba government chose to rectify the problem by enacting its own Retail Businesses Holiday Act, which included exemptions similar to its Ontario counterpart, including a Saturday exemption with size limitations.(12) As in Ontario, questions were raised about how a secular act could contain religious accommodations. Debate in the legislature raised the matter on several occasions.(13) However, with strong support from community organizations

and the Manitoba Federation of Labour, the Act passed with little difficulty.(14)

British Columbia waited three years before amending its Sunday legislation. Desiring to overcome the weaknesses of the federal Lord's Day Act, which was considered "antique," "archaic," and "unenforceable,"(15) because of its vague classifications and negligible fines, the province passed the Holiday Shopping Regulation Act in 1980. The Act provides general prohibitions but allows municipalities to pass permissive by-laws. If the municipalities wish to preserve "closed" Sundays, they need do nothing but enforce the provincial law; to "open" Sundays, the municipalities need only pass permissive by-laws. The system reproduced within the province the relationship that had existed between the provincial and federal legislation under the federal Lord's Day Act.

British Columbia's legislation did not solve all of the difficulties normally associated with Sunday legislation. Although fines were greatly increased in the hopes of improving compliance, the provincial legislation failed to consider the competitive pressures that would encourage, or even force, municipalities to have open Sundays. Labelled the "domino effect," it was argued that if one municipality were to have open Sundays then its neighbouring municipalities would be compelled to pass

similar by-laws to remain competitive. This process would continue until the entire province had open Sundays. But for a few exceptions, this scenario has been realized in British Columbia. Applied at the provincial level, the "delegated legislation" model of closing legislation provides little protection from the economic advantages of Sunday openings for those who would prefer to close on Sundays.

The province of Quebec took a somewhat different approach from that of Ontario, Manitoba and British Columbia. In 1966, the Quebec government appointed a committee to study the business hours of establishments. The Rameau committee's recommendations led to the passage of the Commercial Establishments Hours Act in 1969.(16) This was not a Sunday retailing or holiday act per se; instead, it established uniform hours of operation across the province. Eventually however, the Act acquired the characteristics of explicit day-of-rest legislation.(17) Its exemptions include a schedule of stores that specialize in certain types of goods, from books and tobacco to meals and tombstones. In addition, it permits establishments to partition off parts of the store that do not carry the scheduled articles, so that only the permitted goods are available to the public. Small stores that do not have more than three employees working at one time are complete-

ly exempt. Even large pharmacies that carry a wide range of goods may operate with more than three people on Sundays if given authorization from the Quebec government. As in other provinces, Quebec included a Saturday exemption. The provision applied to businesses not employing more than three people, regardless of the size of the establishment.

Alberta and Saskatchewan augmented their Lord' Day Acts with secular legislation in 1968 and 1970 respectively. The secular statutes, in the form of municipality acts, provided for the regulation of Sunday retailing on a local basis. Although they were originially intended to work in conjunction with the Lord's Day Act, supporting the objective of closed Sundays, they were secular and thus remained in effect following the Big M decision.

In response to Big M, Nova Scotia, New Brunswick and Prince Edward Island quickly passed Retail Business Uniform Closing Day acts and Days of Rest acts in 1985. Alberta repealed its Lord's Day Act. However it did not replace it with any kind of province-wide legislation of uniform application, leaving only the Municipality Act. The Northwest Territories struck Lord's Day legislation from their books.(18) Only the Yukon Territory still has Lord's Day Ordinances on the books. Despite the various responses of the provinces, no one approach has proven immune from legal challenge.

The Road to Edwards Books and Art

In 1981, British Columbia's Holiday Shopping Act was challenged in R. v. Thrifty Foods Ltd et. al.(19) Because the Constitution had not yet been patriated, the case was decided on federalism grounds. The court found no obvious intent to compel Sunday observance. Thus, the legislation was not deemed religious in nature and was found to be intra vires. Since many provinces had legislation with similar purposes, it was assumed that they were valid as well. When the Charter came into effect, provincial closing legislation became open to challenges of infringing the constitutional guarantee of freedom of religion, especially if, as Big M was eventually to decide, legislation could be found unconstitutional on the basis of effect as well as purpose. R. v. Videoflicks, challenging Ontario's Retail Business Holidays Act in the Ontario Court of Appeal, proved to be a crucial case.

Videoflicks involved the combined appeals of eight businesses that had been charged under section 2(1) of Ontario's retail closing act:

> Every person carrying on a retail business establishment shall ensure that no member of the public is admitted thereto and no goods or services are sold or offered for sale therein by retail on a holiday.(20)

Two of the businesses that had been convicted in the lower courts were allowed their appeals on narrow grounds. Videoflicks Ltd., in renting a video, was held not to be engaged in "selling" on a Sunday; Chaimovits, selling goods at a Sunday flea market, was deemed not to be carrying on a retail business establishment.(21) Two other convicted businesses, Commisso and Creative Sportswear Co. Ltd., failed in their appeals and chose not to proceed further. The remaining four businesses, Magder, Longo Bros. Fruit Market Ltd., Edwards Books and Art Ltd. and Nortown Foods Ltd., are of particular interest because their cases eventually ended up in the Supreme Court of Canada.

Of these four, only Nortown Foods had been convicted at trial in the Provincial Offences Court. For although the store was owned by two Orthodox Jews who closed the store on Saturday, it did not meet the additional requirements of being smaller than 5000 square feet and employing no more than seven people. Magder, a Toronto furrier, had been acquitted at trial because the judge found the provincial act to be ultra vires because of the religious implications of Sunday as a holiday.(22) Longo Brothers was acquitted on the grounds that the Retail Business Holidays Act infringed sections 2(a) and 27 of the Charter which guarantee freedom of conscience and religion, and the preservation of multicuturalism, respectively. The acquit-

tal in the case of Edwards Books and Art Ltd. was based on the judge's opinion that the provincial Act did not provide adequate protection for people wishing to have a day of rest other than Sunday.(23)

When these cases arrived at the Provincial Divisional Court for a first appeal, Nortown Foods was appealing conviction, while the other three businesses were in court because the Attorney-General of Ontario was appealing their acquittal. In this court, all of the acquittals were overturned on the grounds that the Act was valid in toto. Thus, to some extent, the cases reached the Ontario Court of Appeal on an even footing.

At the Ontario Court of Appeal, the appeals of Magder, Longo Brothers and Edwards Books and Art were dismissed, while that of Nortown Foods was allowed. The cases were then appealed to the Supreme Court of Canada. The decisions of both the Ontario Court of Appeal and the Supreme Court of Canada investigated the Retail Business Holidays Act from two perspectives. First, the traditional approach was used, distilling the purpose of law to discern if it was intra vires and constitutional under the Charter. Second, the courts considered the direct and indirect "effects" of the legislation to determine if it created unconstitutional burdens.

Purpose of Secular Legislation

Both the Ontario Court of Appeal and the Supreme Court of Canada held that the legislative purpose of the Retail Business Holidays Act was to provide protection to a vulnerable group of employees from certain pressures to work on a day of rest shared by many other members of society, so that all could enjoy a day of social, leisure and recreational activities. The fact that the province had chosen Sunday as the common "pause day" was not sufficient cause to find the legislation "a colourable attempt to enforce majoritarian religious beliefs."(24) The judges noted that the Retail Businesses Holidays Act included several "secular" holidays which were enumerated in its first section. They also observed that the exemptions found in the Act included recreational businesses, small retailers and the tourist industry; such activities fly in the face of the traditional perceptions of sabbatarian conduct.

In further defence of the choice of Sunday as the common pause day of the Act, Chief Justice Dickson referred to the report issued by the Ontario Law Reform Commission on Sunday observance legislation. That study reported figures showing that Sunday was characterized by a high degree of social and leisure activities among friends and relatives.(25) Dickson noted that these attributes

coincided with the qualities desired in a common day of rest.

Although the legislation was generally secular, Justice Dickson recognized that the Saturday exemption, regardless of its religiously neutral language, was designed to accommodate Saturday sabbatarians. However, he did not think that this undermined the secular character of the legislation as a whole. Justice Dickson noted that religion was not a subject of exclusive jurisdiction under the Constitution. For example, section 92(12) gives the provinces jurisdiction over the solemnization of marriage, while legislation regarding morals is considered to be the prerogative of the federal government. He held that jurisdictional competence over matters touching on religion is resolved by examining the issue in its context. Although no guidelines were set out as to how contexts were to be weighed, Dickson held that since the aim of the Act's exemptions was to ease, not to impose, a burden on non-Sunday sabbatarians, the exemption did not invalidate the Act. Hence, he found that the religious nature of the exemption did not contravene the federal division of powers. Dickson argued that it would be peculiar if Parliament was the only level of government competent to provide religious exceptions from provincial law.(26)

Although the Saturday exemption did not prove a serious problem for the secular purpose of provincial laws, it became the focus of debate when the court considered the effects of Sunday retailing legislation.

Effects of Secular Legislation

In Big M Drug Mart, the Supreme Court noted that a law can be challenged on the basis of both purpose and effect. Once, in the Edwards Books decision, the purpose of Ontario's closing legislation was found to be constitutional, the second aspect of the law, its effects, came under close scrutiny. It is at this point that consensus among the justices broke down. Of particular relevance to this study is their disagreement regarding the extent to which a judicial assessment of effect requires the Court to "second guess" the legislature on political or policy questions.

The Court's investigation of effects was divided into two stages. First, it had to determine whether the economic burden suffered by non-Sunday sabbatarians was caused by Sunday closing legislation. If it was not, then the court's task was complete and the legislation was valid. However, if the effects were caused by the Act, then they were unconstitutional and the legislation was invalid, unless it could be saved under section 1 of the Charter. Section 1 permits such "reasonable limits" of

Charter rights "as can be demonstrably jusitified in a free and democratic society." Only Justices Beetz and McIntyre were prepared to uphold the legislation because it caused no unconsitutional effects. The other judges found such effects and proceeded to the section 1 question.

The section 1 analysis, as set out in The Queen v. Oakes,(27) also addressed two chief questions. First, is the legislative objective sufficiently compelling to justify an infringement of a Charter right? If so, the second question asks whether the legislature chose the best possible means of achieving the desired end; is the infringement minimized? All of the justices who invoked section 1 answered the first question in the affirmative; the real controversy centred on the question of appropriate means.

Once again, the question of means has two parts. The first asks if the legislature is compelled to make some attempt to ameliorate the unconstitutional effect by accommodating or exempting those who suffer the burden? Second, if accommodation is necessary, what form should it take, and how far should it go? With the exception of Justice LaForest, all of the justices addressing section 1 agreed that some type of exemption was constitutionally required. Justice Dickson's majority opinion concluded that the Ontario exemption passed constitutional muster; Justice

Wilson disagreed. Justice LaForest argued that questions concerning the kind of exemption to be used, and indeed whether there should be an exemption at all, were political or policy questions, ill-suited to judicial resolution. Each aspect of the Court's assessment of effects will be examined in turn.

Characterizing Effects

The first question proved difficult. At the Ontario Court of Appeal, the Retail Business Holidays Act was held to infringe the freedom of conscience and religion. However, this was not an "absolute" infringement, requiring a section 1 test. Instead, the Court found that the infringement was confined to only those people who closed their stores on a day other than Sunday because of their religious beliefs. The section 2(a) guarantee was deemed to protect only those individuals who could prove a genuine belief.(28) Hence, the infringement caused by the Ontario Act was specific, not general; personal, not all encompassing.

The basis of this infringement was the economic disadvantage placed on non-Sunday sabbatarians, which was found to be more than a mere inconvenience. Merchants who were conscientious Saturday sabbatarians were at a competi-

tive disadvantage because they would have to close for two days a week, while Sunday sabbatarians and non-religious shopkeepers would close for only one day.

The Supreme Court did not pursue the bifurcated interpretation of "absolute" and "personal" infringements. However, the majority agreed that the effect of the Ontario Act created an indirect, coercive burden on some retailers. Chief Justice Dickson arrived at this conclusion after considering the effects of the legislation upon several groups: non-observers of sabbaths, Sunday observers, Saturday observers, and those who observe another day of the week. He assumed that in the absence of legislation, non-observers might wish to operate their businesses seven days a week. Whether or not they qualify for the exemption under section 3(4) of the Act, most businesses are only permitted to operate six days a week. Yet, since the non-observers are not being affected in any religious practices or beliefs, the impact of the Act, in this instance, was seen to be purely secular. Sunday observers are favourably affected by the Sunday closing legislation. They are able to close their stores on Sunday and are not exposed to wide-open competition from other stores that would otherwise stay open. On the other hand, Saturday sabbatarians and other non-Sunday observers, who do not qualify under the Act's exemptions, are forced to close

their businesses on two days of the week. Chief Justice Dickson held that it was the Retail Business Holidays Act which created unequal levels of competition among retailers. In addition, he found that the financial disadvantage to non-Sunday sabbatarians was substantial. Therefore, the Act was found to infringe the freedom of religion of some Saturday sabbatarians.

This finding was not supported by a unanimous bench. Justice Beetz (writing for McIntyre) dissented. He found that section 2(a) of the Charter was not trenched by the Act because the economic burdens suffered by non-Sunday sabbatarians was caused by their beliefs, not by the Act. Justice Beetz contended that the disadvantage is the result of a retailer giving priority to religious tenets over financial gain.(29)

Justice Beetz appeared to adopt the argument of an article by Andrew Petter. Petter reasoned that if all Sunday closing legislation were repealed, non-Sunday sabbatarians would still have to compete with retailers who opened seven days a week. Sunday sabbatarians would also suffer the same disadvantage, but in both cases this is the consequence of religious beliefs, since there would be no legislation to cause it.(30)

There is a common sense attractiveness to Petter's view. Many religious beliefs impose some costs upon their

followers. Tithing, pilgrimages, the regulation of daily routines and diet restrictions are just a few of the ways in which religious people may be burdened or inconvenienced, without any influence of secular laws. Since closing on a day other than Sunday for a religious purpose is similar to these practices, the economic burden of closing on a sabbath which does not coincide with legislated holidays may be considered simply another cost of being devout.

Nevertheless, not everyone holds with this view. Justice Dickson contends that a causal link between the legislation and the economic disadvanatage does exist. His argument is that the Act treats Sunday observers (the majority of Christians) differently from Saturday sabbatarians, thereby creating benefits for the former and burdens for the latter.(31) Thus, one finds that even at this initial stage of assessing legislative effect, consensus is difficult to achieve. Both arguments for and against the constitutional character of effects have strengths and weaknesses. Neither has any obvious superiority. The ability for eminently reasonable people, like Supreme Court Justices, to agree on these questions further disintegrates when section 1 tests are applied.

Section 1: Compelling Purpose

As indicated, the five justices who proceeded to section 1 analysis agreed that the first test established in Oakes was satisfied: the purpose of secular Sunday closing legislation was sufficiently compelling to warrant some limitation of the section 2 right to freedom of religion. This conclusion was so uncontroversial that Justice Dickson considered it "self-evident."

> I regard as self-evident the desirability of enabling parents to have regular days off from work in common with their child's day off from school, and a day off enjoyed by most other family and community members.... I am satisfied that the Act is aimed at a pressing and substantial concern.(32)

Dickson's quick acceptance of the value of the legislative objective may seem surprising. In earlier Charter cases, the Supreme Court had stressed high standards of proof to justify the usage of section 1,(33) but on this question at least, the standard appears to be very low. This discrepancy might be explained in terms of the Court's reluctance to give the appearance of substituting its own policy judgements for that of the legislature. Scholars have observed that the section 1 question of what is "reasonable" or "demonstrably justified in a free and democratic society" is not a traditionally legal one.(34)

This is especially the case when the courts are assessing the importance of a legislative objective. Monahan notes that a challenge regarding the importance of legislative purpose is so obviously political that the courts could not openly engage in such activity without being charged with taking on the mantle of a "super legislature." Hence, the courts will usually grant the importance of an objective and focus instead on whether or not the legislative means are proportionate to the goal.(35) In doing so, the conflict between the two institutions is blunted and the courts can claim more plausibly that they are concerned with only matters of legal right, not policy wisdom. Monahan contends that this judicial strategy does not succeed in extricating the courts from political or policy judgements; means, he argues, are often as political as ends. As the following discussion shows, Justice LaForest agrees.

Section 1: Proportionate Means

According to Oakes, there are three tests for establishing the proportionality between legislative means and ends. First, there must be a rational connection between the legislation and its purpose; second, the resulting limitation of the right must not outweigh the benefits of the objective; and third, the abridgement of

the right in question should not be greater than necessary. For Justice Dickson, these principles made it incumbent upon the legislature to attempt to alleviate the burdens of Sunday closing laws placed on non-Sunday observers.(36) Justice Wilson agreed. These two judges then proceeded to inquire whether the infringement of freedom of religion was minimized; did the exemption go far enough in accommodating the religious needs of non-Sunday sabbatarians? This involved comparing the existing exemption to alternative forms of accommodation and determining if a less injurious policy was possible without further undermining the purpose of a common day of rest. For Justice Dickson, Ontario's Saturday exemption emerged unscathed from this comparison; for Justice Wilson, it did not.

Justice LaForest took issue with the process of judicially comparing of alternate legislative schemes. His position was similar to that of such commentators as Russell and Monahan, who suggest that many substantive constitutional questions are not disputes between rights and non-rights, but questions about how to distribute the benefits and burdens of competing rights, that limiting the opportunities of one group often expands the opportunities of others. "[A]ttempts to protect the rights of one group," said LaForest, "will inevitably impose burdens on the rights of other groups. There is no perfect scenario

in which the rights of all can be equally protected."(37) To illustrate this, he refers to the fact that just as Sunday closing imposes burdens upon retailers who observe a Saturday sabbath, an exemption for such retailers may create disadvantages for their Sunday-observing employees. "How," asks Justice LaForest, "is a court able to second guess the Legislature on such issues?"(38) He adds that employers faced with this problem might try to avoid infringing others' religious beliefs by hiring only those who share their own beliefs, "but this too, is a result a legislature might not wish to encourage."(39) Though he personally favoured exemptions, Justice LaForest held that

> the nature of the choices and compromises that must be made in relation to Sunday closing are essentially legislative in nature. In the absence of unreasonableness or discrimination, courts are simply not in a position to substitute their judgement for that of the Legislature.(40)

Not only did Justice LaForest oppose the judicial weighing of alternative accommodations, he argued against a constitutional requirement of accommodation. This was because such a requirement would lead inevitably to the courts second guessing legislatures on the appropriateness of specific exemptions. For example, having upheld Ontario's scheme, the courts would have to determine

whether Quebec's narrower exemption is sufficient to pass constitutional muster?(41) Such a rigid standardization of provincial legislation would be inappropriate. "[W]hat may work effectively in one province (or a part of it) may simply not work in another.... And a compromise adopted at a particular time may not be possible at another."(42) In other words, because of the varying social and political conditions from province to province, the courts are not well equipped to appraise the appropriateness of one policy over another.

Protecting Rights or Second Guessing Policy?

Justice Dickson rejects Justice LaForest's contention that the evaluation of alternative exemptions inevitably second guesses the legislature.

> it is not the role of the Court to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it, or to consider what legislation might be the most desirable. The discussion of alternative legislative schemes that I have undertaken is directed to one end only, that is, to address the issue whether the existing scheme meets the requirementss of the second limb of the test for the application of section of the Charter as set down in Oakes.(43)

A brief review of Dickson's discussion of alternatives will permit an assessment of the opposing positions of the two Justices.

One of the alternatives Justice Dickson discusses is no exemption at all. The claim that this might infringe freedom of religion less than a Saturday exemption is based on a hypothetical suggestion, made in the American case Braunfeld v. Brown,(44) that if Sunday proved to be a more lucrative retailing day for Saturday sabbatarians, Sunday sabbatarians would complain that their religions were being discriminated against. Justice Dickson rejects this contention because "there is no evidence before this Court to suggest that Sunday is generally a preferable day for retailers.... In the absence of convincing evidence to the contrary, the Court must presume that one day is on average as good as another."(45) This can be understood to play directly into Justice LaForest's hands. Justice Dickson's argument tacitly admits that everything depends upon circumstances; if there was convincing evidence of the greater profitability of Sunday shopping, he might have come to a different conclusion. LaForest's point is that, given both the geographical and temporal variables, legislatures, not courts, should be making such judgements. It is true that Justice Dickson is supporting legislative judgement in this instance; however, to raise the question implies that it

would be possible for the courts to override a legislative determination on a different reading of the evidence.

Another alternative considered by Justice Dickson was a complete exemption for non-Sunday sabbatarians, regardless of the size of their establishment. This kind of exemption is found in New Brunswick's Days of Rest Act. Justice Dickson saw both advantages and disadvantages to such a scheme.

> Such an exemption has advantages and disadvantages relative to subs. 3(4) of the Ontario Act. From the perspective of the Saturday-observing consumer the New Brunswick exemption is more beneficial in the restriction of its availability to retailers with a specified religious or conscientious belief.(46)

Dickson is unable to determine whether either scheme has greater benefits for Jewish or Seventh Day Adventist consumers. However, he notes that the 1961 census provides evidence that the large majority of retail outlets are able to take advantage of the Ontario size qualifications. Even if the proportion of large stores had doubled in the meantime, he observes, "a very substantial variety of products, including specialty products such as Kosher foods, [will] be available to Sunday shoppers."(47)

Once again, Dickson's comments underline LaForest's contention that the issue does not rely on legal facts, but

social circumstance, which courts are rarely capable of evaluating adequately. Justice Dickson's argument implies that the validity of Ontario's exemption depends on the extent to which the size limitation does not unduly inhibit Sunday shopping for Saturday sabbatarians. Hence, if most stores, particularly kosher establishments, were larger than the limit, Ontario's exemption might become unconstitutional, and something similar to New Brunswick's religiously oriented exemption would have to be employed. The very nature of the evidence employed in this case--twenty-six year old census data, which does not specifically address the size of kosher shops or Saturday sabbatarian shopping habits--reveals the weakness of the courts in making such judgements. In addition, one should note that Dickson was concerned about the rights of consumers, while the case at hand was brought to the Court by retailers. LaForest could also point to this argument as an example of how the expansion of rights for some, like Saturday sabbatarian consumers, would limit the rights of others, like Sunday sabbatarian retail workers.

Dickson prefers Ontario's religiously neutral exemption to New Brunswick's explicitly religious exemption because the latter requires the government and the courts to make inquiries into the sincerity of religious beliefs. He found that such a practice would be undignified and

should be avoided wherever possible to protect the privacy of individuals and their beliefs from public airing and testing.(48)

Given the legitimate purpose of a single common day of rest, any exemption must be structured so as not to overwhelm that purpose, turning a common day into two or more days. Ontario's law does this by limiting its exemption to small stores. Explicitly religious exemptions must do this by requiring proof of sincere religious belief, in order to prevent non-religious retailers from inventing religious excuses for violating the law if Sunday business proves more profitable than Saturday. "The striking adavantage of the Ontario Act," says Justice Dickson, "is that it makes available an exemption to the small and mid-size retailer without the indignity of having to submit to such an inquiry."(49) He concedes that a sincerity test will be unavoidable in instances where neutral exemptions cannot ameliorate a burden. However, he argues that they should be avoided where possible.

Justice Dickson's arguments on this point suggest that Ontario's religiously neutral exemption achieves his constitutional requirement of maximum accommodation of religious interests with minimum erosion of the purpose of a common day of rest. But this is less obvious than it might appear. "In terms on intrusion on religion," replies

Justice LaForest, "there can be no difference between the owner of a large or small establishment. Indeed, the owner of the larger establishment is likely to suffer a greater economic loss than the owner of the smaller one."(50) Such considerations lead Justice Wilson to prefer a complete sabbatarian exemption, thus repealing the size qualification of the Ontario exemption. For Justice LaForest, these considerations deepen his conviction that this is not a matter for judicial resolution, that everything depends on the socio-political context. For example, it would depend on how many Saturday sabbatarians inhabited a province, and how large their establishments were. If too many Saturday observing retailers are present, a religious exemption might not ensure a predominantly common day of rest. In such a case, a size limitation might be the best solution. However, if most Saturday sabbatarians' retail businesses were too large to be included in an exemption, the accommodation provides little benefit. Perhaps neither scheme could ensure the desired level of uniformity in a day of rest. In this case, LaForest contends that the legislature should be free to enact legislation with no accommodation for non-Sunday sabbatarians. Thus, he held that the legislative objective was important enough to warrant a limitation of the freedom of religion under section 1 even in the absence of a exemption.

Legislative alternatives adopted in other countries emphasize LaForest's assertion that there is no perfect solution to this embattled question; protecting the rights of some will inevitably infringe the rights of others. The distribution of benefits and burdens is decisively influenced by attendant conditions. For instance, Italy uses a one-day-in-seven law which permits each shopkeeper to choose a day of closing.(51) Although this might place all retailers on an equal footing regarding the number of business days in the week, religious retailers may still suffer an economic disadvantage if they must close on a more lucrative day of the week. In addition, such a statue does not protect retail workers from being forced to take the day of rest of the proprietor. Dickson's chief concern with this option is that it would also deny the possibility of a common non-commercial day. In sum, this scheme places burdens on retail workers, denies society a common day of rest, and may not even ameliorate the competitive differences among retailers due to their religious choice.

The situation is very similar where the type of law used in the Netherlands is exercised. Dutch retailers choose their hours of business, so long as they do not surpass some predetermined maximum of weekly hours set by the legislature.(52) Once again, society is denied a common

day of rest and it is difficult to assess to whom benefits of such a scheme accrue.

England and New Zealand offer an interesting alternative, although it too is fraught with controversies and dilemmas.(53) A schedule of goods and services that are exempt from a Sunday proscription provides citizens with access to "necessities" seven days a week, and ensures, to some extent, a uniform day of closing. However, since the exemption is neutral in character, being derived from a determination of what is necessary and for immediate use, there is no real accommodation for religious interests. Saturday sabbatarians who retail "unnecessary" goods find no relief in such an exemption. Any non-Sunday sabbatarian who benefits from this scheme does so because of coincidence, not intention of the law. Such legislation protects the interests of consumers in giving them access to "necessary" goods throughout the week, and protects retail workers. However, it does not address any infringement of the religious interests of retail owners. For this reason, Canadian jurisdictions typically supplement the "schedule of goods" approach with exemptions aimed explicitly at non-Sunday sabbatarians. Leaving aside the problem of religious observers, the schedule-of-goods approach also raises the possibility that the purpose of a common day may be eroded if the number of establishments carrying or

providing scheduled goods became too numerous. Hence, the effectiveness of such an exemption is dependent upon the demographics of the area: how many non-Sunday sabbatarians are able to take advantage of the schedule of goods exemption; how many stores over all may use the exception.

Another option would be to have open shopping practices, as in California. In the absence of any closing legislation, the government cannot be accused of having legislation which discriminates or infringes on religious interests. Indeed, all sabbatarians would suffer the same burden, being required to close one day out of each week, while non-sabbatarians may choose to remain open. Hence, there is no accommodation for religious interests at all. The same result would be realized if day-of-rest legislation selected a religiously neutral day like Tuesday. Sabbatarians would still have the economic disadvantage of having to close one day more per week than their competitors. Given Justice Dickson's overriding concern with accommodating religious observers, this might suggest that, in order to accommodate religious observers, the government is obliged to enact Sunday closing legislation, but Justice Dickson is not prepared to push his interest in accommodation that far.(54) A stronger implication is that if government chooses to enact day-of-rest legislation, it should pick the day of the majority religion. Thus, Sunday

would be the inevitable choice for a day of rest in Canada, thereby accommodating the largest group of religious day-of-rest observers in the country. Once again, everything depends upon social factors. Sunday would accommodate more sabbatarians in Canada, whereas, in Israel, Saturday would be far more appropriate.

Legislative alternatives are not easily evaluated on the basis of legal principles. If such were the case, what was optimal in one circumstance should be optimal in all other situations. But as this discussion has shown, this is not the case.

Conclusion

The process of assessing the appropriateness of legislation means courts become further embroiled in disputes where reasonable people differ. To avoid charges of involvement in political issues, strict legal structures of interpretation, such as those used in section 1 determinations, are implemented to clothe policy concerns in the guise of legal considerations. Nevertheless, the construction of the discussion does not change its substance. There can be no doubt that the courts are expanding their ventures into areas traditionally considered the realm of legislatures. The comments of Justices Dickson and LaForest indicate that the Court is aware of the dangers of

this trend. Nonetheless, the Edwards Books and Art decision finds the Supreme Court Justices suggesting severing subsections from legislation, and encouraging, if not indeed requiring legislatures to promote accommodational legislation. In other words, by assessing the merits of various policy options, the Court is second guessing the course of Sunday legislation in the provinces.

The courts are able to determine and fix the purpose of a statute. Such a determination is appropriate to the concept of a constitution which has some continuity of substance. However, the task of assessing effects requires a measurement of the changes experienced by society, and the variations from community to community. Since society is in a constant state of flux, the effects of legislation are also constantly changing. The evaluation of effects is less problematic at the point of determining constitutional violations. Justice LaForest had no difficulty finding that the Retail Business Holidays Act had some unconstitutional effects. However, evaluation of effects is more problematic when the courts try to determine the "best" scheme way, under section 1, of minimizing the constitutional violation. Rarely, is there a unique "correct" answer to this constitutional question. The practice may place the courts in awkward positions in the future where a law that was once ruled constitutional has become unconsti-

tutional, not because of any change in the law, but because of a change in circumstances across space and time. If the judiciary is unwilling to break with stare decisis, then this practice will exacerbate the courts tendency to distort reality for the sake of good jurisprudence. In addition, this introduces a rigidity in the ability of legislatures to respond to the changing needs of society and creates uncertainties as to what specific clauses must be included in exemption clauses to ensure that a law passes constitutional muster.

NOTES

1 R. v. Big M Drug Mart, [1985] 1 S.C.R., p. 360.

2 Ontario Law Reform Commission, Report on Sunday Observance Legislation (Toronto: Department of Justice, 1970), pp. 414-415.

3 Henry Birks & Sons (Montreal) Ltd. v. City of Montreal, [1955] S.C.R. 799.

4 Lieberman v. The Queen, [1963] S.C.R. 643.

5 Ontario Law Reform Commission, Report on Sunday Observance Legislation (Toronto: Department of Justice, 1970), pp. 269-270.

6 Ibid., p. 372.

7 S.O. 1986, s. 3(4).

8 Ontario, Legislative Debates, 1975, p. 17. p. 17.

9 Ontario Law Reform Commission, op.cit., p. 351.

10 Edwards Books and Art v. The Queen, [1986] 2 S.C.R. 713.

11 Manitoba, Legislative Debates, 1977, p. 1605

12 S.M. 1977 c.26, ss. 4 and 5 and S.M. 1978 c. 6.

13 Manitoba, op.cit, 1977, p. 817.

14 Ibid., 1977, p. 1698.

15 British Columbia, Legislative Debates, 1980, p. 1184.

16 1969 S.Q., c. 16.

17 1984 S.Q., c. 17

18 Geoffrey M. Bickert, Deputy Minister of Justice, Northwest Territories, letter to author, 11 February 1988.

19 [1981] 3 W.W.R 626.

20 R.S.O. 1980, c. 4, s.3.

21 Ivan F. Ivankovich, "Prolonging The Sunday Closing Imbroglio: Regina v. Videoflicks Ltd.," Alberta Law Review, vol. XXIV, 1986, p. 335.

22 Edwards Books and Art, op.cit., p. 731.

23 Ibid.

24 Ibid., p. 740.

25 Ibid., p. 744.

26 Ibid., p. 751.

27 The Queen v. Oakes, [1986] 1 S.C.R. 651.

28 Ivankovich, op.cit., p. 342

29 Edwards Books and Art, op.cit., p. 789.

30 Andrew Petter, "Not 'Never On A Sunday' R. v. Videoflicks Et. Al.," Saskatchewan Law Review, vol. 49, no. 1, 1985, p. 99.

31 Edwards Books and Art, op.cit., pp. 766-767.

32 Ibid., p. 770.

33 R. v. Oakes, op.cit., and Lawson A.W. Hunter v. Southam Inc. [1984] 2 S.C.R. 147.

34 Rainer Knopff,"What do Constitutional Equality Rights Protect Canadians Against?," Canadian Journal of Political Science, vol. XX, No. 2, p. 286.

35 Patrick Monahan, Politics and the Constitution (Calgary: Carswell, 1987), pp. 67-68.

36 Edwards Books and Art, op.cit., pp. 781-782.

37 Ibid., p. 795.

38 Ibid., p. 797.

39 Ibid.

40 Ibid., p. 806.

41 Ibid., p. 801.

42 Ibid., p. 802.

43 Ibid., p. 783.

44 Braunfeld v. Brown, 366 U.S. 599 (1961).

45 Edwards Books and Art, op.cit., pp. 776-777.

46 Ibid., p. 774.

47 Ibid

48 Ibid., pp. 779-780.

49 Ibid., p. 779.

50 Ibid., p. 801.

51 "Shopping laws in Europe's cities can be a nightmare for foreigners," Calgary Herald, 14 December 1986.

52 Ibid.

53 Geoff Holgate, "The Shops Act: Enforcement Problems and Enforcement Duty I," New Law Journal, 4 July 1986, p. 639.

54 Edwards Books and Art, op.cit., p. 765.

IV

THE IMPACT OF JUDICIAL REVIEW

Introduction

The literature regarding constitutional jurisprudence shows that court decisions have no "intrinsic finality."(1) Judicial decisions often do not settle political issues; instead, the court is merely part of a policy process. The literature demonstrates that legal defeat does not always imply political defeat. For example, both Russell and Monahan show that in federalism issues, determined legislatures almost always can find ways of overcoming unfavourable judicial decisions.(2) Yet, the fact that legal defeats may be overcome does not encompass the entirety of the complex relationship between legal and political realms. Legal defeat may sometimes contribute to political victory, as is illustrated in the Bliss case. The judicial defeat of a woman's challenge to the unemployment insurance system raised public awareness and mobilized interest groups to remedy the problem in the political arena.(3)

The obverse is also true: legal victory does not necessarily lead to political success. It is fairly obvious that judicial legitimacy is not sufficient to

sustain a law; political support is also required. What is less often noted is that just as legal defeat may contribute to a political victory, so legal victory may contribute to political defeat. In the latter case, it is obviously not the outcome of judicial review--the favourable decision-- but the process itself that contributes to the downfall of the legislation. Edwards Books and Art illustrates this in dramatic fashion, for although six of seven judges upheld the legislation, with none questioning the importance of a common day of rest Ontario has announced that it is abandoning the legislation.

Policy and Uncertainty

The ironic turn of events in Ontario may be due to the fact that the legislative scheme was not politically viable, quite apart from any judicial influence. If this is true, if the law was truly fated to die, the court decision only compounded the irony by expounding the importance of a common day of rest as political support for this view apparently declined. In fact, it is difficult to see any indication that the legislation was politically doomed.

This thesis contends that at least part of the explanation lies in the judicial process, that although the result of the adjudicative process upheld the legislation,

the process itself undermined it. The constitutional challenge created uncertainty regarding the legitimacy of the law, and made it unenforceable.(4) Thus, despite the Court's solid support for the governmental objective of a common day of rest, the process of reaching that conclusion weakened the authority of the Act. During the time when the Act was supported by the Ontario government, enforcement was harried by numerous repeat offenders. A few retailers attempted to be inconspicuous in their Sunday openings. However, other shopkeepers did not hesitate to advertise their hours in the Toronto Star.(5) In 1986, the number of grocery stores charged with disobeying the statute rose from 167 in August to 308 in September to 499 in October.(6). The possibility of vindication in court surely contributed to the increasing number of violations.

The situation was exacerbated by individuals such as Paul Magder, who repeatedly flouted the law by remaining open seven days a week and inviting the media to do stories on his battle against the Act. He announced numerous times that he would continue to accumulate fines and charges against his business until he won his case. Magder had been one of the appellants who lost in the Edwards Books and Art decision. By the time the Supreme Court handed down its decision on 18 December 1986, there were 285 outstanding charges against him.(7)

Even after the Edwards Books decision was handed down, uncertainty remains. The legislation is still open to constitutional challenges under other provisions, such as section 15, and Paul Magder, for one, has already launched such a challenge. The Supreme Court decided Edwards Books in December 1986. By 23 July 1987, a provincial court judge ruled that Magder had a right to open his store seven days a week under section 15 of the Charter, and all charges laid after 17 April 1985, the effective date of that section, were dismissed. This was not a sure signal that the Retail Business Holidays Act was in peril; the same judge that ruled in favour of Magder convicted a drugstore chain on thirty counts under the Act.(8) The judge held that the Magder decision was not a serious threat to the Sunday closing law because his decision was determined by the location of Magder's store in Chinatown, where stores catering to tourists were permitted to stay open. However, the Attorney-General believed that the decision held potentially grave consequences for the law and thus appealed it.(9) Hence, the Ontario Act remains in a constitutional and enforcement imbroglio. Even a final and unambiguous ruling in favour, after many years of litigation, might not restore the legislation; maintaining a successful pattern of enforcement is much easier than reestablishing it after a hiatus.

The Ontario government has reacted to this state of uncertainty by changing its legislative stance on the issue. Soon after the Edwards Books and Art decision, Premier Peterson established a committee to find a social consensus on Sunday closings. At first, it appeared that this was an effort to consolidate public opinion behind the basic principle of the existing law. However, it has turned out that the renewal of government studies was a precursor of a change in the government's stand. In December 1987, the province announced that the matter will be passed on to the municipalities.(10) This is a retreat from the government's previous commitment to a common day of rest for the province. Municipal authority over the matter tends to result in a "domino effect," whereby community after community opens up Sunday retailing in order to remain competitive with neighbouring municipalities. Hence, what was once the driving force of Ontario's retailing legislation, a common pause day, may disappear.

The corrosive effects of the Supreme Court's adjudication are not limited to Ontario. Other provinces are not only subject to the continuing uncertainty posed by section 15, but may also remain open to section 2 challenges to the extent that their legislation varies significantly from that of Ontario. The concerns of Justice LaForest remain

unanswered. Will narrower exemptions, like those of Quebec, be brought into question because they might infringe freedom of religion more than necessary? Will New Brunswick's religious exemption be attacked because of Justice Dickson's argument that religiously neutral exemptions that avoid a sincerity test are preferable? Dickson's opinion regarding accommodation(11) if taken as a constitutional standard, may have consequences on public law that extend far beyond the matter of Sunday closings. Legislators may choose to abdicate certain legislative agendas to avoid challenges that they are failing to accommodate religious interests.

The provincial reaction to these uncertainties varies: some provinces are allowing Sunday closing laws to fail, while others continue to legislate and enforce their laws. The result is that the current status of Sunday legislation is confused. The provinces of British Columbia, Manitoba, Newfoundland, Manitoba, Prince Edward Island and Quebec continue to enforce various forms of Sunday closing regulations, while the governments of Alberta, Ontario, New Brunswick and Saskatchewan, as well as both the Northwest and Yukon Territories, have removed themselves from the policing of Sunday closures. The odd collection of closing laws in Canada has been nicknamed a quilt. It is an apt description. Tattered and worn, it threatens to disinte-

grate in every breeze of a constitutional challenge. Some governments are giving in to the wind, others are actively resisting.

Alberta's position regarding Sunday closing legislation is minimalist. The Municipal Government Act, which has been the sole piece of provincial legislation regarding Sunday closing since Big M Drug Mart, provides municipalities with the authority to regulate Sunday retailing in localities and sets the range of fines from $2000 to $10,000. The provincial government has shown no indication that it will create a unifying Act that would standardize the regulation of Sundays throughout the province. Hence, municipalities have no guidance from the province in this matter.

Not only must the municipalities deal with the difficulties of drafting legislation that can withstand judicial scrutiny, they must also contend with the "domino effect." At present, only a few districts, like Red Deer, Medicine Hat and Lethbridge, are trying to enforce Sunday closings. Approximately 13% of Alberta towns and 23% of villages have Sunday by-laws.(12) It is uncertain, how many are policing the regulations.

The province of Alberta provides no support for the local governments. Open Sundays are assumed unless otherwise stipulated in a by-law. The task of restricting

Sunday retailing is difficult for municipalities. Uncertainty concerning the enforceability of closing legislation exists at the municipal as well as provincial levels of government. Prohibitive legislation, like Sunday closing regulation, does not seem to carry the same weight at the municipal level as it might if it were province-wide. Large grocery stores, like the Safeway chain, have shown a proclivity to defy the municipal by-laws in both Red Deer and Medicine Hat.(13) The local authorities have been cautious in their enforcement policy, lest they be drawn into long and expensive litigation,(14) something that might be avoided if the province would defend the prohibitive law. Hence, it is not surprising that municipalities, like the city of Calgary, have been hesitant to pass by-laws addressing the issue.(15)

It is striking to discover that New Brunswick is among those provinces not enforcing Sunday closings. With the detailed provisions of its Days of Rest Act, one might have thought that the province was committed to the objective of the statute. The Act gives a carefully defined list of exempted goods and services, and permits municipalities to pass permissive by-laws. In addition, a province-wide board is established under the Act to issue permits exempting specific establishments that close on a day other than Sunday "due to the dictates of conscience or reli-

gion." Despite the ease with which local governments may become exempt from the Act, only the city of Edmunston has officially passed a by-law permitting Sunday openings. Elsewhere in the province, illegal openings are overlooked.(16) There is no indication that the province or municipalities are going to change their behavior in the near future. Hence, New Brunswick has de facto open Sundays.

The case of Saskatchewan particularly manifests the effects of legal uncertainty upon political will. Since repealing its provincial Lord's Day Act following Big M Drug Mart, Saskatchewan relied upon its Urban Municipality Act to regulate shop closings using secular language. On 20 August 1987, Justice Wimmer of the Saskatchewan Court of Queen's Bench ruled that the Act was unconstitutional under the Charter because of its discriminatory effects. Exemptions were granted for only a schedule of goods and services, with no accommodation for religious observers who closed on days other than Sunday.(17) The province quickly restored Sunday closing laws in an amendment. The new law requires major stores to close on Sunday, but permits shops smaller than 500 square metres to choose the day they will close. Fines were increased from $5000 to $10,000 for the first offence and $20,000 for subsequent breaches of law.(18) The Act does not apply to convenience stores at

all. The amended Act was still open to Charter challenges. For example, how did the new exemptions remedy the problem of discrimination? However, this will never be answered in either political or judicial arenas for the issue is moot; the province announced in early December 1987 that, like Ontario, it will change its legislation to allow municipalities to determine the Sunday closing issue.(19)

Not all provinces have exhibited strong anxieties over the constitutional validity of their closing laws. Both Newfoundland and Prince Edward Island have remained unscathed from the doubts raised in Edwards Books and Art decision. Neither face serious challenges to their closing laws at this time. In fact, Newfoundland has noted a decrease in the number of contraventions of its Shops Closing Act since the Supreme Court handed down its judgement.(20) However, the other provinces that are trying to enforce Sunday closing laws have had to act, either in the courts or in the legislatures, to maintain control over Sunday retailing.

British Columbia has had some experience in the courts over the Holiday Shopping Regulation Act. However, it has not yet had a serious challenge that threatens the existence of the legislation.(21) Fifty-six of its one humdred and forty-five municipalities permit Sunday retailing.(22) The province contends that the statute is not concerned

with Sunday shopping; rather, the government holds that it addresses shopping on holidays (even though Sundays provide approximately fifty-two of the sixty-two holidays under the Act).(23)

Unlike some other provinces, Manitoba has strongly supported the principle of Sunday closing legislation and has moved vigourously to sustain it. Despite the Edwards Books and Art decision in Ontario, the Manitoba government found that some stores, particularly the SuperValu food store chain,(24) were not complying with the provincial legislation. In trying to prosecute defiant businesses, the province discovered that there were loopholes in the exemption clauses of the Act, and that the range of fines of $1000 to $5000 was not sufficient to deter infractions.(25) The legislature acted quickly by passing emergency legislation in February 1987 and then enacting a new, tighter Sunday retailing act in May of the same year.(26) The new Act increased the maximum penalty tenfold to $50,000 and clarified the exempted categories. Previously, the list of goods that were exempt from Sunday restrictions was used as a loopohole for major stores to remain open. For example, a store that sold automotive parts (which are exempt) in addition to a variety of goods that were not exempted, stayed open because it sold some of the exempted goods. The new legislation makes it clear

that stores that sell only goods and services listed as exempt in the legislation may be open on Sundays.(27)

Thus far, in Nova Scotia the Sunday disputes have been fought in the political arena. Although the Retail Business Uniform Closing Day Act has not yet faced a judicial challenge, the defiance of stores has pointed out certain weaknesses in the Act. During the 1986 Christmas shopping season, many stores in the cities of Halifax and Dartmouth agreed to respect the Sunday shopping laws. However, their competitors located in malls beyond the metro limits were being encouraged by the County of Halifax to remain open under a clause in tourism statutes, as the area is considered a tourist region.(28)

The Attorney-General of Nova Scotia quickly quashed this trend by threatening to charge defiant stores. Although the government was able to win one round against these retailers on the basis of existing law, the Act was amended during the spring session of 1987 to eradicate potential weaknesses. The amendments included an increase in fines from $5000 to $15,000. Most importantly, the amendments removed the power of the municipalities to issue permits to businesses for Sunday openings.(29) This has closed off the means for towns to circumvent the provincial Act. The modifications would make it appear that the province of Nova Scotia, like Manitoba, was prepared to

stand firm by the principle of a uniform day of closing, were it not for a series of Orders-in-Council which extend the businesses exempted from compliance by increasing the maximum size of exempted stores as well as expanding the types of goods that may be sold on Sundays.(30) Only time will tell if this is the beginning of the erosion of the Act, or merely an adjustment to make the law more harmonious with Scotian society.

Quebec's Commercial Establishment Hours Act has been served well by the Edwards Books and Art decision. Thus far, the only serious challenge to arise against the Act has been the case of L'Association Des Detaillants En Alimentation Du Quebec c. Ferme Carnaval Inc. In the opinion of Justice Gonthier of the Quebec Court of Appeal, the Act is secular, containing no reference to religion and possessing no religious character. In considering the effect of the legislation, the court held that any religious burden was an indirect consequence of the overlapping of legislative and religious proscriptions. The Justice admitted that a person might claim a constitutional exemption from legislation which offends one's religious tenets. However, because the defendants were businesses which could have no religious character, such exemptions could not be invoked. Gonthier then went on to say that even if the Act trenched upon freedom of religion, the legislation could be

justified under section 1 of the Charter and referred to the Edwards Books and Art decision.

> d'une loi d'ordre public dont les buts, soit un jour repos commun et des conditions de concurrence equitables entre les besoins raisonnable des consommateurs dans le domaine du l'alimentation, sont legitimes et d'importance pour l'ordre social....(31)

Hence, for the time being, Quebec's Commercial Establishments Business Hours Act remains intact. However, Justice Gonthier's remarks regarding the ability of individuals to apply for exemptions to an otherwise valid act because it offends tenets of religion augurs difficult decisions in the future. Businesses might not be able to challenge the legislation, but individuals can. What legislation will be beyond the reach of such "remedies"? Thus, the courts continue to exacerbate the uncertainties of Sunday closing legislation by suggesting new ways of challenging it.

No province has been immune to the questions raised in Edwards Books and Art. However, as the above survey of the status of closing legislation shows, the provinces have not reacted in the same manner. While constitutional uncertainty surely affects the fate of legislation, it does not appear to determine it. Instead, it appears to be a

contributing factor that may tip the balance where political opinion is divided, rather than an influence that can destroy an established consensus favouring Sunday closing.

Conclusion

At present five provinces and the two territories have de facto open Sundays, or are moving in that direction. British Columbia and New Brunswick have virtually open Sundays, even though each has provincial legislation that relieves the municipalities of the responsibilities of creating prohibitive by-laws. Alberta, having left the issue to local governments, has open practices in most areas. Ontario and Saskatchewan appear ready to give up the battle and pass the legislation to the municipalities. Because of the "domino effect" this may be seen as a move toward open Sundays. The two Territories no longer police Sunday closings.(32)

Although the remaining provinces still have relatively closed Sundays in the retailing sector, the future of a non-commercial day of the week appears bleak. Ontario, the province that provided a secular model which several provinces have followed, may now be playing a leadership role in the decline of closed Sundays. The very province

that fought so hard to save its Retail Business Holidays Act in Edwards Books and Art is now retreating.

What has happened to the principles for which legislation like the Retail Business Holidays Act was passed? Have the circumstances of retail workers changed so much that they no longer need a common day of rest with their families? Is the concept of a uniform day of closing so that friends and relatives may share time together (a good which was recognized by the Supreme Court of Canada as worthy enough to justify some limitations of the guaranteed freedoms under the Charter), no longer a worthy aim for provincial governments to police? If, as this discussion contends, the erosion of political will is due in part to the process of judicial review of substantive law, is the price of judicial guardianship too high? Not only does the process undermine the political support for the legislation, the positive finding of the Supreme Court places it in the awkward position of giving support to a legislative objective which the judicial process is weakening. The ironies of constitutional adjudication are many.

NOTES

1 Leslie A. Pal and F.L. Morton, "Bliss v. Attorney General of Canada: From Legal Defeat to Political Victory," Osgoode Hall Law Journal, vol. 24, no. 1, (Spring 19.), p. 159.

2 Peter Russell, "Political Uses of Legal Resources" and Patrick Monahan, Politics and the Constitution (Calgary: Carswell, 1987)

3 Pal, op.cit.

4 F.L. Morton, Judicial Nullification of Statutes Under the Charter of Rights, 1982-1986 (Calgary: Research Unit for Socio-Legal Studies, 1986), p. 8.

5 Ontario, Legislative Debates, 1982, p. 1121.

6 Ibid., 1986, p. 4398.

7 "Sunday merchants in court," Calgary Herald, 8 January 1987.

8 "Ontario furrier wins battle to stay open," Calgary Herald, 24 July 1987.

9 "Ontario appeals Sunday opening," Calgary Herald, 25 August 1987.

10 "Ontario to permit Sunday shopping," Calgary Herald, 3 December 1987.

11 Edwards Books and Art v. The Queen, [1986] 2 S.C.R. p. 782.

12 Mary Nameth, "Sunday's out," Alberta Report, 4 November 1985, p. 36.

13 "Sunday merchants," op.cit.

14 Ibid.

15 Ibid.

16 "No rest in Sunday shopping wars," Maclean's, 17 November 1987, pp. 70-71.

17 "Judge quashes Sunday closing law," Calgary Herald, 28 August 1987.

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20 Leslie R. Thoms, Solicitor for the Department of Justice, Newfoundland and Labrador, A letter to the author, 31 August 1987.

21 Jan L. Rossley, Barrister & Solicitor for Ministry of Attorney General, Province of British Columbia, Letter to author, 1 September 1987.

22 "The debate about shopping on Sundays." op.cit.

23 Rossley, op.cit.

24 Manitoba, Legislative Debates, 1987, p. 37.

25 "Manitoba boosts Sunday fines," Calgary Herald, 28 February 1987.

26 Jeffrey A. Schnoor, Director of Legal Research for the Manitoba Law Reform Commission, Letter to author, 19 August 1987.

27 Ibid.

28 "Dispute brews between AG and Halifax Co.," Halifax Mail Star, 20 December 1986, and "Holiday hours upset shop clerks, managers," Halifax Mail Star, 18 December 1986.

29 John Ashley, Solicitor for the Department of the Attorney General, Nova Scotia, Letter to author, 15 September 1987.

30 Ibid.

31 Jean-Baptiste Pelletier, Solicitor for Ministere de l'Industrie, du Commerce et du Tourisme, Letter to author, 30 August 1987.

32 Geoffrey Bickert, Deputy Minister of Justice, Northwest Territories, Letter to author, 11 February 1988, and Malcolm Florence, Legislative Counsel for the Department of Justice, Yukon Territory, Letter to author, 19 August 1987.

V

Conclusion

> The power of judicial review of legislation, although given greater scope in the Charter, is not unlimited. The courts must confine themselves to such democratic values as are clearly expressed in the Charter and refrain from imposing or creating rights with no identifiable base in the Charter.(1)

Sunday closing legislation is a topic on which reasonable people can and do disagree. The subject is inherently debatable and is not easily described as a battle between rights and overtly political or policy considerations. It is more accurately seen as a matter of distributing costs and benefits among competing interests. In this context, constitutional challenges are political resources through which interest groups may challenge policies they oppose. They should, therefore, be handled in the courts with restraint. Three facets of the matter illustrate the weaknesses of judicial review of political issues: the distortion of reality through judicial lenses, the lack of equipment with which to make political evaluations, and the corrosive effect of the process itself.

As the Supreme Court's characterization of the federal Lord's Day Act reveals, its judicial capacity is limited when using legal instruments to assess social and political

matters. "Good" jurisprudence often requires doctrinaire descriptions of the issue before the court; jurisprudential lenses frequently distort reality.

The Sunday closing issue also illustrates the inherently political nature of the kinds of legislation most likely to arise under the Charter--second order questions about which reasonable people disagree--rather than questions about core rights of the liberal democratic tradition. Despite the protestations of Justice Dickson, it is evident from the Edwards decision that Justice LaForest was right in worrying about the court involving itself in matters in which it is not competent. The extensive assessment of legislative effects, particularly the comparative weighing of policy options, requires the use of social evidence and political consideration. The Court was not involved in protecting a right in Edwards; it was deciding between the rights of some groups and interests and those of others: consumers versus retailers versus retail workers. A determination of the best solution by the legislature, instead of the judiciary, permits future flexibility as the needs and circumstances of society change. A judicial decision based upon the shifting sands of such considerations is repugnant to the traditional concepts of law and the role of the judiciary and the constitution.

This weakness is reflected in the impact of judicial review. Not only is the adjudication of political issues based upon the changing elements in society, the process of constitutional scrutiny itself changes the context of the decision. Uncertainties and confusions, as well as problems of enforceability are created, which in turn may doom the impugned legislation before the Court's determination is reached. Hence, judicial review becomes a political force whose effects are difficult to guage.

Thus, on three counts, the courts have shown themselves unwieldy instruments for policy evaluation. Not only does the process of judicial review of substantial policy contain weaknesses, it creates obstacles to attaining constitutionally valid goals. Given the inherently political and controversial nature of the issues at stake, these conditions counsel restraint in the exercise of judicial review.

NOTES

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