WALTER ROBERTSON AND FRED ROSETANNI ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

1963

*Feb. 27, 28
Oct. 18

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Constitutional law—Sunday closing—Bowling alley—Whether infringement of religious freedom—Whether conflict with Canadian Bill of Rights, 1960 (Can.), c. 44—Lord's Day Act, R.S.C. 1952, c. 171.

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Ritchie JJ.

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The appellants were convicted on a charge that they unlawfully carried on their ordinary calling, to wit, the operation of a bowling alley on a Sunday, contrary to the *Lord's Day Act*, R.S.C. 1952, c. 171. Their appeals were dismissed and they were granted leave to appeal to this Court. Their main attack was that the *Canadian Bill of Rights*, 1960 (Can.), c. 44, had in effect repealed s. 4 of the *Lord's Day Act*, or, in any event, rendered it ineffective.

Held (Cartwright J. dissenting): The appeal should be dismissed.

Per Taschereau, Fauteux, Abbott and Ritchie JJ.: The *Canadian Bill of Rights* was not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted. Legislation for the preservation of the sanctity of Sunday has existed in Canada from the earliest times and has, at least since 1903, been regarded as part of the criminal law in its widest sense. Historically such legislation has never been considered as an interference with the kind of "freedom of religion" guaranteed by the *Canadian Bill of Rights*. The effect rather than the purpose of the *Lord's Day Act* should be looked to in order to determine whether its application involved the abrogation, abridgment or infringement of religious freedom. There was nothing in that statute which in any way affected the liberty of religious thought and practice. The practical result of this law on those whose religion required them to observe a day of rest other than Sunday was purely secular and financial. In some cases this was no doubt a business inconvenience, but it was neither an abrogation nor an infringement of religious freedom. The fact that it had been brought about by reason of the existence of a statute enacted for the purpose of preserving the sanctity of Sunday could not be construed as attaching some religious significance to an effect which was purely secular insofar as non-Christians were concerned.

Per Cartwright J., *dissenting:* The purpose and effect of the *Lord's Day Act* are to compel the observance of Sunday as a religious holy day by all the inhabitants of Canada; this is an infringement of religious freedom. Construed by the ordinary rules of construction s. 4 of the *Lord's Day Act* is clear and unambiguous and infringes the freedom of religion contemplated by the *Canadian Bill of Rights*. Parliament could not be taken to have been of the view that the *Lord's Day Act* did not infringe freedom of religion merely because that Act had been in force for more than half a century when the *Canadian Bill of Rights* was enacted. To so hold would be to disregard the plain words of s. 5(2) of the *Canadian Bill of Rights*. Where there is irreconcilable conflict between another Act of Parliament and the *Canadian Bill of Rights* the latter must prevail. Section 4 of the Lord's Day Act infringes the freedom of religion declared and preserved in the *Canadian Bill of Rights* and must, therefore, be treated as inoperative.

APPEAL from a judgment of the Court of Appeal for Ontario affirming the conviction of the appellants on a charge of operating a bowling alley on Sunday. Appeal dismissed, Cartwright J. dissenting.

J. J. Robinette, Q.C., and *S. Paikin, Q.C.*, for the appellants.

W. C. Bowman, Q.C., and *F. W. Callaghan*, for the respondent.

T. D. MacDonald, Q.C., and *D. H. Christie*, for the Attorney General of Canada.

I. G. Scott, for the Lord's Day Alliance.

The judgment of Taschereau, Fauteux, Abbott and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Court of Appeal for Ontario rendered without formal reasons, which dismissed an appeal from a judgment of Schatz J. dismissing an appeal by the appellants, by way of stated case for the opinion of the Court, against their conviction by a provincial magistrate in and for the County of Hamilton of a charge that they did unlawfully carry on their ordinary calling, to wit, the operation of a bowling alley, contrary to *The Lord's Day Act*, R.S.C. 1952, c. 171.

By the stated case the learned Magistrate raised the following questions:

Was I right:—

(a) In holding that the appellants were in contravention of The Lord's Day Act, R.S.C., 1952, Ch. 171, and not solely in breach of By-Law No. 9252 of the Corporation of the City of Hamilton;

(b) In assuming that in proper construction and application the Lord's Day Act, R.S.C. 1952, Ch. 171, is not in conflict with the Canadian Bill of Rights, S.C. 1960, C. 44 and more particularly with Section 2 thereof.

Mr. Justice Schatz having answered both these questions in the affirmative without giving any formal reasons, the sole ground of appeal argued before the Court of Appeal for Ontario was that:

> . . . in proper construction and application the Lord's Day Act, R.S.C., 1952 Ch. 171 is in conflict with the Canadian Bill of Rights, S.C. 1960, C. 44 and more particularly with Section 2 thereof. . . .

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This Court however granted the appellants leave to appeal "at large" and on their behalf argument was directed to the following issues:

(a) That by the legislative imposition of Sunday observance as a religious value upon the whole Canadian Community, including those whose religious values and precepts permit them to engage in activities thus prohibited, the Lord's Day Act is in conflict with that human right and fundamental freedom set out in the Bill of Rights as "freedom of religion".

(b) That the effect of Section 2 of the Bill of Rights is, subject to the single qualification set out in that section, to repeal any federal enactments which are in direct conflict with the enumerated ". . . human rights and fundamental freedoms . . ." declared and enshrined in the Act.

(c) That statute law necessary for the regulation of the mode and method in which premises on which bowling is carried on are to be enjoyed, including the conditions as to time and otherwise during which the game and recreation might properly be carried on, is properly the subject of Provincial legislation.

By Section 1 of the *Canadian Bill of Rights* it is "recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex the following human rights and fundamental freedoms, namely,

(a) The right of the individual to life, liberty, security of the person and enjoyment of property; and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press."

It is to be noted at the outset that the *Canadian Bill of Rights* is not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted. (See also s. 5(1)). It is therefore the "religious freedom" then existing in this country that is safe-guarded by the provisions of s. 2 which read, in part, as follows:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or in-

fringement of any of the rights or freedoms herein recognized and declared, . . .

It is accordingly of first importance to understand the concept of religious freedom which was recognized in this country before the enactment of the *Canadian Bill of Rights* and after the enactment of the *Lord's Day Act* in its present form, and in this regard the following observations of Taschereau J., as he then was, speaking for himself and Kerwin C.J. and Estey J., in *Chaput v. Romain*[1], appear to me to be significant:

> All religions are on an equal footing, and Catholics as well as Protestants, Jews, and other adherents to various religious denominations, enjoy the most complete liberty of thought. The conscience of each is a personal matter and the concern of nobody else.

The position of "religious freedom" in the Canadian legal system was summarized by Rand J. in *Saumur v. The City of Quebec*[2], where he said:

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

It is apparent from these judgments that "complete liberty of religious thought" and "the untrammelled affirmation of 'religious belief' and its propagation, personal or institutional" were recognized by this Court as existing in Canada before the *Canadian Bill of Rights* and notwithstanding the provisions of the *Lord's Day Act*.

It is to be remembered that the human rights and fundamental freedoms recognized by the Courts of Canada before the enactment of the *Canadian Bill of Rights* and guaranteed by that statute were the rights and freedoms of men living together in an organized society subject to a rational, developed and civilized system of law which imposed limitations on the absolute liberty of the individual. In referring to the "right of public discussion" in *Re Alberta Statutes*[3],

[1] [1955] S.C.R. 834 at 840, 1 D.L.R. (2d) 241 at 246, 114 C.C.C. 170.
[2] [1953] 2 S.C.R. 299 at 327, 106 C.C.C. 289.
[3] [1938] S.C.R. 100 at 133, 2 D.L.R. 81.

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Sir Lyman Duff acknowledged this aspect of the matter when he said:

> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in James vs. Commonwealth, (1936) A.C. 578, at 627, 'freedom governed by law'.

Although there are many differences between the constitution of this country and that of the United States of America, I would adopt the following sentences from the dissenting judgment of Frankfurter J. in *Board of Education v. Barnette*[1], as directly applicable to the "freedom of religion" existing in this country both before and after the enactment of the *Canadian Bill of Rights*:

> The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.

It is against this background that the effect of the provisions of the *Lord's Day Act* on "religious freedom" as guaranteed by the *Canadian Bill of Rights* is to be considered. Section 4 of the *Lord's Day Act* reads as follows:

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

The italics are my own and indicate the offence with which the appellants were charged.

There have been statutes in this country since long before Confederation passed for the express purpose of safeguarding the sanctity of the Sabbath (Sunday), and since the decision in *Attorney General for Ontario vs. Hamilton Street Railway*[2], it has been accepted that such legislation and the penalties imposed for its breach, constitutes a part of the criminal law in its widest sense and is thus reserved to the Parliament of Canada by s. 91(27) of the *British*

[1] (1943), 319 U.S. 624 at 653.
[2] [1903] A.C. 524, 2 O.W.R. 672, 7 C.C.C. 326.

North America Act. Different considerations, of course, apply to the power to legislate for the purely secular purpose of regulating hours of labour which, except as to the regulation of the hours of labour of Dominion servants, is primarily vested in the provincial legislatures. See the reference *re Hours of Labour*[1] and *Attorney General for Canada v. Attorney General for Ontario Reference re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act* and *Limitation of Hours Act*[2].

The immediate question raised in this appeal, however, is whether the prohibition against any person carrying on or transacting any business of his ordinary calling on Sunday as contained in the *Lord's Day Act, supra,* is such as to "abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of . . . ." the right of the appellants to freedom of religion.

It is said on behalf of the appellants that freedom of religion means "freedom to enjoy the freedom which my own religion allows without being confined by restrictions imposed by Parliament for the purpose of enforcing the tenets of a faith to which I do not subscribe." It is further pointed out that Orthodox Jews observe Saturday as the Sabbath and as a day of rest from their labours, whereas Friday is the day so observed by the members of the Mohammedan faith, and it is said that the *Lord's Day Act* imposes an aspect of the Christian faith, namely, the observance of Sunday on some citizens who do not subscribe to that faith.

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

The practical result of this law on those whose religion requires them to observe a day of rest other than Sunday, is a purely secular and financial one in that they are required

[1] [1925] S.C.R. 505.
[2] [1937] A.C. 326, 1 W.W.R. 299, 1 D.L.R. 673.

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

As has been indicated, legislation for the preservation of the sanctity of Sunday has existed in this country from the earliest times and has at least since 1903 been regarded as a part of the criminal law in its widest sense. Historically, such legislation has never been considered as an interference with the kind of "freedom of religion" guaranteed by the *Canadian Bill of Rights.*

I do not consider that any of the judges in the courts below have so construed and applied the *Lord's Day Act* as to abrogate, abridge, or infringe or authorize the abrogation, abridgment or infringement of "freedom of religion" as guaranteed by the *Canadian Bill of Rights,* nor do I think that the *Lord's Day Act* lends itself to such a construction.

I dismiss this appeal with costs.

CARTWRIGHT J. (*dissenting*):—The appellants were convicted on February 21, 1962, on the charge that they did, at the city of Hamilton, unlawfully carry on their ordinary calling, to wit, the operation of a bowling alley on January 14, 1962 (which was a Sunday) contrary to the *Lord's Day Act,* R.S.C. 1952, c. 171.

It is not questioned (i) that the appellants did in fact carry on their business as charged or (ii) that their so doing was forbidden by s. 4 of the *Lord's Day Act* or (iii) that that Act is *intra vires* of the Parliament of Canada.

The conviction is attacked on the ground that the *Canadian Bill of Rights,* 1960, 8-9 Eliz. II, c. 44, has in effect repealed s. 4 of the *Lord's Day Act* or, in any event, rendered it ineffective.

The relevant words of the *Canadian Bill of Rights* are set out in the reasons of my brother Ritchie, which I have

had the advantage of reading. As applicable to the circumstances of this case the provisions of s. 2 may be put as follows:

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights,* be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of . . . freedom of religion.

That the *Lord's Day Act* is a law of Canada within the intendment of this section is made clear by s. 5(2) of the *Canadian Bill of Rights* which reads:

> (2) The expression 'law of Canada' in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

The first question to be decided is whether s. 4 of the *Lord's Day Act* does infringe freedom of religion, within the meaning of those words as used in the *Canadian Bill of Rights.* In approaching this question it must be borne in mind that it has been decided repeatedly that the constitutional power of Parliament to pass the *Lord's Day Act* is found in the fact that it is enacted in relation to religion and prescribes what are in essence religious obligations. It is for this reason that it has been held to fall within head 27 of s. 91 of the *British North America Act,* the Criminal Law. Conversely it has been decided that legislation affecting the conduct of people on Sunday but enacted solely with a view to promoting some object having no relation to the religious character of that day is within the powers of the Provincial Legislatures.

It cannot be doubted that in 1867 and for many years prior thereto laws forbidding or compelling specified conduct on Sunday were regarded as forming part of the criminal law.

In Blackstone's Commentaries, vol. IV, p. 63, the learned author says:

> Profanation of the Lord's day, or *sabbath-breaking,* is a ninth offence against God and religion, punished by the municipal laws of England.

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In *Fennell et al. v. Ridler*[1], Bayley J. delivering the judgment of the Court of King's Bench and referring to *An Act for the better observation of the Lord's Day, commonly called Sunday* (1676) 29 Charles II, c. 7, said:

> The spirit of the act is to advance the interests of religion, to turn a man's thoughts from his wordly concerns, and to direct them to the duties of piety and religion.

In *Henry Birks & Sons (Montreal) Ltd. v. Montreal and Attorney General for Quebec*[2], the Court was considering the question whether provincial legislation could authorize the enactment of a by-law requiring shops to be closed on certain religious feast-days. Kellock J., with whom Locke J. agreed, said at page 823:

> Even if it could be said that legislation of the character here in question is not properly 'criminal law' within the meaning of s. 91(27), it would, in my opinion, still be beyond the jurisdiction of a provincial legislature as being legislation with respect to freedom of religion dealt with by the statute of 1852, 14-15 Vict., c. 175, Can.

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

I agree with my brother Ritchie that the following words which he quotes from the judgment of Frankfurter J. in *Board of Education v. Barnette, supra,* are appropriate to describe the freedom of religion referred to in the *Canadian Bill of Rights*:

> Its essence is freedom from conformity to religious dogma, not freedom from conformity to *law* because of religious dogma.

But this passage presupposes that the word "law" which I have italicized means a law which has a constitutionally valid purpose and effect other than the forbidding or commanding of conduct in a solely religious aspect.

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

[1] (1826), 5 B. & C. 408, 108 E.R. 151.
[2] [1955] S.C.R. 799, 113 C.C.C. 135, 5 D.L.R. 321.

A law which, on solely religious grounds, forbids the pursuit on Sunday of an otherwise lawful activity differs in degree, perhaps, but not in kind from a law which commands a purely religious course of conduct on that day, such as for example, the attendance at least once at divine service in a specified church.

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

I have reached the conclusion that construed by the ordinary rules of construction s. 4 of the *Lord's Day Act* is clear and unambiguous and does infringe the freedom of religion contemplated by the *Canadian Bill of Rights*.

I cannot accept the argument that because the *Lord's Day Act* had been in force for more than half a century when the *Canadian Bill of Rights* was enacted, Parliament must be taken to have been of the view that the provisions of the *Lord's Day Act* do not infringe freedom of religion. To so hold would be to disregard the plain words of s. 5(2) quoted above.

It remains to consider the reasons for judgment of Davey J.A. in *Regina v. Gonzales*[1]. At page 239 of the C.C.C. Reports the learned Justice of Appeal says:

> In so far as existing legislation does not offend against any of the matters specifically mentioned in clauses (*a*) to (*g*) of s. 2, but is said to otherwise infringe upon some of the human rights and fundamental freedoms declared in s. 1, in my opinion the section does not repeal such legislation either expressly or by implication. On the contrary, it expressly recognizes the continued existence of such legislation, but provides that it shall be construed and applied so as not to derogate from those

[1] (1962), 37 C.R. 56, 37 W.W.R. 257, 132 C.C.C. 237, 32 D.L.R. (2d) 290.

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rights and freedoms. By that it seems merely to provide a canon or rule of interpretation for such legislation. The very language of s. 2, 'be so construed and applied as not to abrogate' assumes that the prior Act may be sensibly construed and applied in a way that will avoid derogating from the rights and freedoms declared in s. 1. If the prior legislation cannot be so construed and applied sensibly, then the effect of s. 2 is exhausted, and the prior legislation must prevail according to its plain meaning.

With the greatest respect I find myself unable to agree with this view. The imperative words of s. 2 of the *Canadian Bill of Rights,* quoted above, appear to me to require the courts to refuse to apply any law, coming within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the *Canadian Bill of Rights.* As already pointed out s. 5(2), quoted above, makes it plain that the *Canadian Bill of Rights* is to apply to all laws of Canada already in existence at the time it came into force as well as to those thereafter enacted. In my opinion where there is irreconcilable conflict between another Act of Parliament and the *Canadian Bill of Rights* the latter must prevail.

Whether the imposition, under penal sanctions, of a certain standard of religious conduct on the whole population is desirable is, of course, a question for Parliament to decide. But in enacting the *Canadian Bill of Rights* Parliament has thrown upon the courts the responsibility of deciding, in each case in which the question arises, whether such an imposition infringes the freedom of religion in Canada. In the case at bar I have reached the conclusion that s. 4 of the *Lord's Day Act* does infringe the freedom of religion declared and preserved in the *Canadian Bill of Rights* and must therefore be treated as inoperative.

It follows that I would allow the appeal and quash the conviction. Since I have the misfortune to differ from the other members of the Court as to the result of the appeal it is unnecessary to consider what order I would otherwise have suggested as to costs.

Appeal dismissed with costs.

Solicitors for the appellants: White, Paikin, Foreman & Dean, Hamilton.

Solicitor for the respondent: J. J. Freeman, Toronto.