

Robertson and Rosetanni v. The Queen, [1963]  
S.C.R. 651, Lieberman v. The Queen, [1963] S.C.R.  
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Commentary

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*Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 651.  
*Lieberman v. The Queen*, [1963] S.C.R. 643.

The case of *Robertson and Rosetanni v. The Queen*<sup>1</sup> concerns the judicial interpretation of the *Lord's Day Act*<sup>2</sup> and the possibility that section 4 of that Act is inoperative in the light of the intended effect of section 2 of the Canadian *Bill of Rights*.<sup>3</sup>

It was decided by the Supreme Court of Canada, Cartwright J. dissenting, that section 4 of the *Lord's Day Act* was in no way a transgression of the right preserved by section 2 of the Canadian *Bill of Rights*, and that no limitation is imposed on a man's right to enjoy freedom of religion simply because the Lord's Day Act requires him to refrain from operating a commercial enterprise on Sunday.

The reasons of the learned judges in the majority were delivered by Ritchie J. The argument is as follows:

Human rights and fundamental freedoms must be construed as the rights and freedoms existing in Canada immediately before the Canadian *Bill of Rights* was passed in 1960, for it is these rights that are safeguarded by the *Bill of Rights* and no others.<sup>4</sup> Upon this rather unwarranted assumption the Court then proceeds to determine the meaning of religious freedom by adopting the observations of Taschereau J., as he then was, in *Chaput v. Romain*<sup>5</sup> and Rand J. in *Saumur v. City of Quebec and A.G. Que.*,<sup>6</sup> concluding that religious freedom means the right to think and act freely according to the dictates of one's conscience so long as this thinking and acting does not transgress a

civilized system of law which imposed limitations on the absolute liberty of the individual.<sup>7</sup>

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<sup>1</sup> [1963] S.C.R. 651.

<sup>2</sup> R.S.C. 1952, c. 171.

<sup>3</sup> R.S.C. 1960, c. 44.

<sup>4</sup> *Supra* footnote 1 at p. 491.

<sup>5</sup> (1955) 1 D.L.R. (2d) 241 at p. 246, [1955] S.C.R. 299.

<sup>6</sup> [1953] 4 D.L.R. 641 at p. 668.

<sup>7</sup> *Supra*, footnote 1, p. 492.

This conclusion is then fortified by reference to Duff J.'s observations in *Re Alberta Legislation*<sup>8</sup> and the dissenting judgment of Frankfurter J. in *West Virginia State Board of Education v. Barnette*,<sup>9</sup> a United States Supreme Court case.

Against this background the Court distinguishes between the effect and the purpose of the *Lord's Day Act* and stresses the need to look to the effect of the Act rather than its original purpose, pointing out that even though the statute was originally enacted for the purpose of preserving the sanctity of Sunday the contemporary effect of the statute is purely secular. In other words, the fact that a non-Christian must close his bowling alley on Sunday may effect an economic inconvenience but this secular effect in no way infringes on his right to follow the dictates of his conscience as far as religion is concerned. In this sense, the Court holds, it cannot be said that there has been any interference with the right of each individual Canadian to practise the religion of his choice.

Cartwright J., however, refuses to adopt the Court's distinction between the purpose and the effect of the *Lord's Day Act* and after discussing the question of why the *Lord's Day Act* is within federal jurisdiction he concludes that because the purpose of the statute was to preserve the sanctity of Sunday, and because that preservation requires persons who have no wish to sanctify Sunday to act in a certain way (e.g. to close their bowling alley on Sunday), that requirement is by definition an infringement of the right to freedom of religion.

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.<sup>10</sup>

It is suggested that Cartwright J.'s interpretation of the *Lord's Day Act* is the only interpretation (in view of the relevant case law) that does not offend a proper application of the wording of both section 4 of the *Lord's Day Act* and section 2 of the Canadian *Bill of Rights*. To this end then, it is submitted that the majority decision is in error.

The cases cited by Ritchie J. in support of the majority decision, while certainly substantiating the definition of "religious freedom" adopted by the court, do not fit the conceptual framework within which the court should have been working. Maintaining that human rights and fundamental freedoms (such as the freedom of religion preserved by section 2 of the Canadian *Bill of Rights*) must be construed as the rights and freedoms that existed in Canada immediately before the legislature passed the Bill of Rights is simply a way of saying that the words "human rights" and "fundamental freedoms" mean whatever they meant before 1960 and that the Canadian *Bill of Rights* will merely preserve the status quo. This interpretation is

<sup>8</sup> [1938] S.C.R. 100 at p. 133.

<sup>9</sup> 319 U.S. 624 at p. 653.

<sup>10</sup> *Supra* footnote 1, at p. 488.

consistent with preserving any type of prejudice so long as that prejudice was able to pass unchallenged or unrecognized up to 1960, and it is equally obvious that whatever else the legislature meant to do when they passed the *Bill of Rights* they did not mean to preserve any type of prejudice. In point of fact the *Bill of Rights* was passed in order to give teeth to those who oppose prejudice in any form.

The Court was asked to define the concept of religious freedom and to define it in such a way that it would reflect the true purport of those words, but instead of doing this they begged the question by blandly assuming that religious freedom did exist in Canada before 1960 (as delineated by the cases noted earlier).

They act on this assumption by judicially noticing that things are now what they had been before 1960 and since this was so, ergo, there could be no infringement of the right to freedom of religion.

To resort to authority in order to clarify what other judges have thought about the concept in the past is an excellent method of putting the problem in some kind of perspective, but it is more than a little perverse to allow the principle of *stare decisis* to transmute classification into decision. The court was not asked to substitute previously accepted definitions of religious freedom (gleaned from cases whose orientation and conceptual frame-work were not even similar) for their own; they were asked to define religious freedom as they understood it and then to decide if this definition was consistent with the simultaneous operation of section 2 of the Canadian *Bill of Rights* and section 4 of the *Lord's Day Act*.

But even assuming that the Supreme Court's definition of religious freedom would have been the same as the learned judges whose opinions they adopted, if the Court had turned its mind to a fresh analysis of these words found in a new statute, the further question of whether the distinction between "the purpose and the effect" of a statute such as the *Lord's Day Act* would justify the conclusion of the court must be answered. What then is the purpose of the *Lord's Day Act*? It seems implicit in the Robertson case, from the judgment of Ritchie J., that the purpose of the statute was to govern the morality, in effect the behaviour, of Canadians. In so doing, of course, the federal legislature is legislating under the power given it by head 27 of section 91 of the British North America Act, i.e. criminal law, and as such the *Lord's Day Act* is constitutional. Moreover, what is implicit in the *Robertson* case has been made explicit in a host of other decisions, that is to say the purpose of the *Lord's Day Act* was to conserve public morality and sanctify Sunday as the Sabbath.<sup>11</sup> As Sedgewick J., speaking for the majority of the Court, said in relation to the provincial statute then before him:

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<sup>11</sup> Cf. *Ouimet v. Bazin* (1912) 3 D.L.R. 593; *Parish of St. Prosper v. Rodrique* (1917) 40 D.L.R. 30, 31; *Henry Birks & Sons v. Montreal and A.-G. Que.* (1955) 5 D.L.R. (2d) 321.

We cannot with propriety shut our eyes to the words of the title.<sup>12</sup>

Indeed, if the purpose of the Act had been any different it is a hard question as was pointed out by the same Ritchie J. in delivering the majority judgment in *Lieberman v. The Queen*,<sup>13</sup> whether or not the federal legislature would have had the jurisdiction to enact such an Act. But, while preserving the constitutionality of the *Lord's Day Act* by reference to its purpose, the court does a complete about face when they attempt to interpret the statute; they regard the purpose as irrelevant; what is important is the effect, and that effect, they conclude, is purely secular.<sup>14</sup>

Certainly the original purpose of this statute infringes the other statute, but the purpose of that original statute is not important now, given all the economic and social changes that have taken place between the time of the passing of the original statute and the present day; what we must consider is the effect that this statute has on the individuals it governs and determine whether or not this effect infringes the rights that the individual has under the statute allegedly in conflict with it.

It is not suggested that the effect of a statute is an unimportant consideration when the meaning of the statute is being investigated. Clearly the effect of a statute is often the most important test of the constitutionality of the statute, but this method of interpretation should not take the place of, or override the test of the purpose of the legislature in enacting a statute. If such reasoning were carried to its logical conclusion, the judiciary would have free rein to obstruct the purpose of the legislature by simply pointing to some economic or social change which they say renders the purpose of the legislation irrelevant, and then substitute the effect (or what they consider to be the effect) for a purpose which might seem a little out of line with any intelligible interpretation of section 2 of the Bill of Rights.

In the *Robertson case* the Supreme Court has simply dressed up the *Lord's Day Act* to coincide with the accepted words of what is fair or unfair to the contemporary man. Whether this sense of fairness springs from a religious conviction or simply from the belief that a man should only be compelled to work so many hours a week does not seem to matter. In point of fact when one considers both the purpose and the effect of such labour legislation as *The One Day's Rest in Seven Act*<sup>15</sup> it is a little difficult, in view of the Supreme Court's interpretation of the *Lord's Day Act*, to reach any clear conclusion as to exactly what the *Lord's Day Act* does in fact do, that the *One Day's Rest in Seven Act* does not also accomplish. Yet these statutes read very differently both in content and purport and it

<sup>12</sup> *O'Connor v. N.W. Telephone*, 22 S.C.R. 276 at p. 293.

<sup>13</sup> [1963] S.C.R. 643.

<sup>14</sup> Cf., Laskin "Tests for Validity of Legislation under the British North America Act: What's the matter?" 1955 U. of T. L.J. 114 at p. 117, for an explanation of the methodology behind the 'effect' interpretation of statutes.

<sup>15</sup> R.S.O. 1960, c. 269.

would seem to be asking a little too much to seriously contend that they both mean (even though they do not say) the same thing. Surely it would not be asking too much to allow Parliament to perform their function and to face changing economic and social conditions with new legislation rather than distort the old to serve a purpose for which it was never intended.

Suppose the distinction between the purpose of the statute and its effect is accepted.<sup>16</sup> The court held in the *Robertson* case that the effect of the *Lord's Day Act* was purely secular and that since this was true the conflict between section 4 of the *Lord's Day Act* and section 2 of the Bill of Rights was merely illusory. The fact that a man must close his bowling alley on Sunday in no way inhibits or infringes upon his right to follow the religion of his choice. Superficially, of course, this is true. But consider the ramifications. By depriving a man of his right to earn money on a certain day in a week will, in all probability, force him to keep his shop open on another day which he may have set aside for his own religious observance.<sup>17</sup> The immediate effect is economic, but the collateral effect is an infringement of the right of every Canadian to freedom of religion. For any law which compels a certain course of conduct for a purely religious purpose infringes freedom of religion, whether that freedom is as defined by Rand J. in *Chaput v. Romain*<sup>18</sup> or by the Oxford English Dictionary. Alternatively, if various labour laws require a man to work only so many hours a week, then all other things being equal he should be able to get Sunday off if he so chooses. But it is to be noted that the right is an individual one, and provided that he is bound by no other contractual obligations (such as union agreements or licensing provisions) a man must, in view of even the narrowest interpretation of section 2 of the Bill of Rights be given the opportunity of opening a shop or bowling alley on Sunday.

Religious freedom amounts to more than telling a person that he may practise his religion at the cost of economic security or than attempting to rationalize religious prejudice by giving it the flavour of labour legislation.

If the constitutionality of the *Lord's Day Act* is to be defended at all then it might better be defended under head 27 of section 91 of the British North America Act as governing the moral behaviour of the citizens of Canada so as to come under the criminal law jurisdiction of the federal parliament.<sup>19</sup> But in the *Robertson* case the Supreme Court appears to interpret the statute as having nothing more than a secular, regulative function much akin to various labour laws, which are within the competency of the provincial legislature. The horns of the dilemma are plain. Either the *Lord's Day Act* is

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<sup>16</sup> After all the *Robertson* case is now law in Canada.

<sup>17</sup> Saturday in the case of Jews and Seventh Day Adventists; Friday in the case of Mohammedans.

<sup>18</sup> *Supra*, footnote 6.

<sup>19</sup> *Supra*, footnote 13, per Ritchie, J.

constitutional, in which case the original purpose of that statute must overshadow any other conceptual analysis in order to bring it within head 27 of section 91 of the British North America Act; or the *Lord's Day Act* is unconstitutional in view of the stress laid on the secular, economic effects of the statute, a stress which drives the pith and substance of the statute beyond the authority of the federal legislature. In the former case the Act would be in plain conflict with the right preserved by section 2 of the Canadian *Bill of Rights*, and in the latter case the whole statute would be ultra vires the federal legislature as pertaining to property and civil rights.

It is submitted that in view of the apparent religious partiality of the provisions of the *Lord's Day Act*, it should be the subject of close scrutiny with a view to either scrapping the whole Act as anachronistic and unnecessary or reconciling its provisions with a realistic interpretation of the Canadian *Bill of Rights*.

R.J.S.