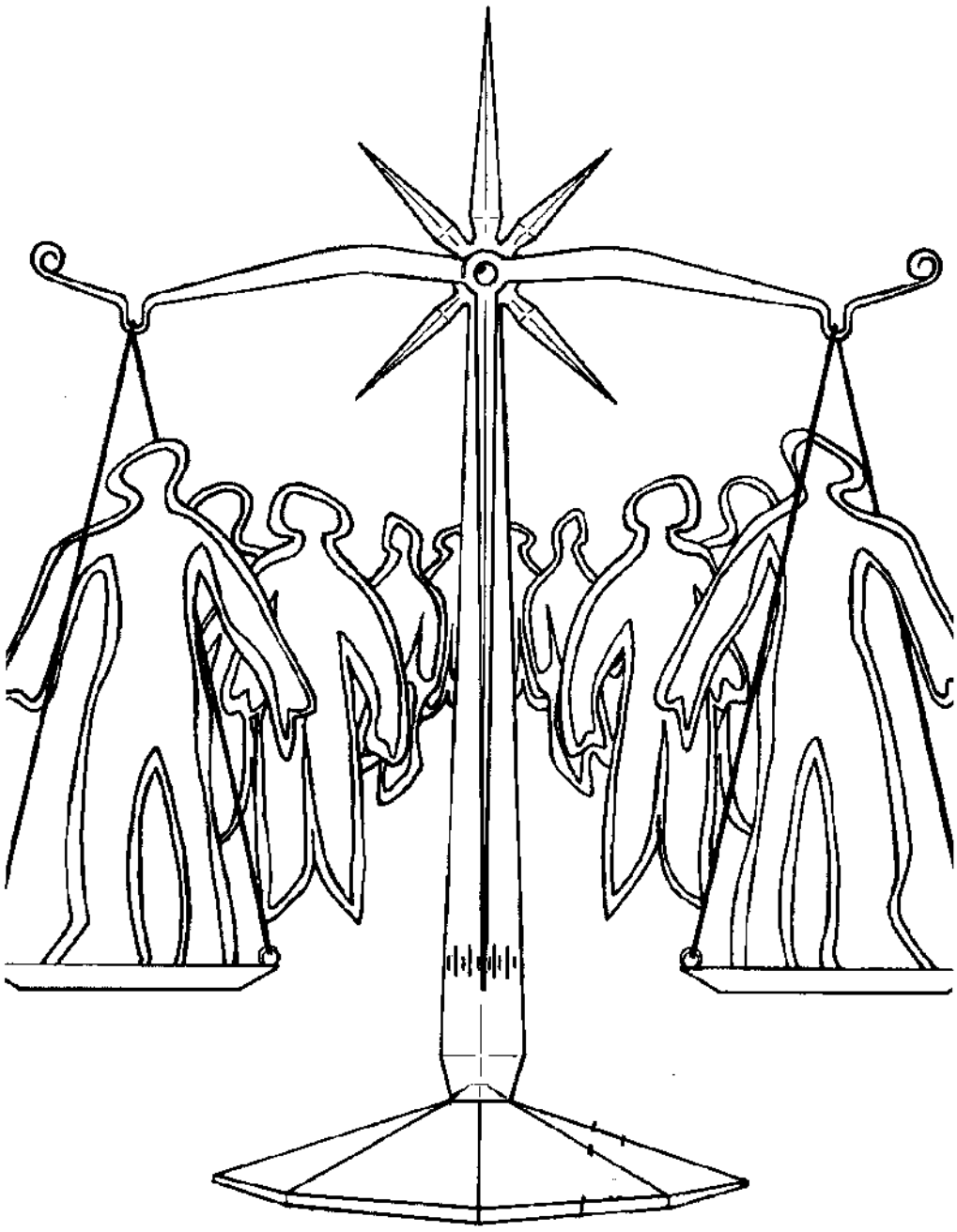
Law Reform Commission of Canada
Commission de réforme du droit du Canada

REPORT

SUNDAY OBSERVANCE



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March 1976

The Honourable S. R. Basford,
Minister of Justice,
Ottawa, Ontario

Dear Mr. Minister:

In accordance with the request of the previous Minister of Justice under section 12(2) of the *Law Reform Commission Act* to review the *Lord's Day Act* and pursuant to section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith the report with our recommendations on the studies undertaken by the Commission on Sunday observance.

Yours respectfully,

E. Patrick Hartt
Chairman

Antonio Lamer
Vice-Chairman

J. W. Mohr
Commissioner

G. V. La Forest
Commissioner

REPORT

ON

SUNDAY OBSERVANCE

Commission

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Summary of Report

The antecedents of Sunday observance laws in Canada can be traced back to early Roman and English law. While the primary purpose of such laws was religious, i.e. to prevent profanation of the Lord's Day, there was also a secular purpose in ensuring that working people had one day's rest in seven on a regular basis. The religious purpose dominated the early laws in Canada both before and after Confederation, but there was uncertainty as to whether the provincial legislatures or the Parliament of Canada had jurisdiction to legislate in the field.

This doubt was largely removed respecting the religious purpose by the Judicial Committee of the Privy Council in 1903 in the *Hamilton Street Railway* case when Ontario's legislation was declared *ultra vires* as impinging on Parliament's jurisdiction over criminal law. This resulted in Parliament's enacting the *Lord's Day Act* in 1906 in a form that has continued with no major amendments up to the present time. The Act had as its major purpose the prevention of the profanation of the Lord's Day, as its name implies, and it attempted to achieve this through a series of prohibitions of certain activities on Sunday. However, it also had an important secondary purpose of protecting the working man, which was apparent from both the parliamentary debate and the words of the Act. The strictness of the prohibitions was somewhat attenuated by a clause permitting the provinces to "opt out" of the major ones, by a list of twenty-four exemptions for "works of necessity or mercy", and by the prosecutory discretion given to the provincial Attorneys-General.

Quebec was the first province to avail itself of the "opting out" clause, enacting the Sunday Observance Act, immediately following effective proclamation of the *Lord's Day Act* in 1907. Starting in 1950, all other provinces and territories except Newfoundland began availing themselves of the "opting out" clause on a limited basis related primarily to cultural, recreational and entertainment activities.

The *Lord's Day Act* has withstood constitutional challenges in the courts on three grounds: (1) that the "opting out" clause is an unlawful delegation to the provinces; (2) that the Act conflicts with the right to "freedom of religion" as contained in the *Canadian Bill of Rights;* and (3) that the Act is no longer criminal law but labour legislation which falls under provincial jurisdiction.

The present relationship between the federal and provincial laws is determined by the extent to which a province invokes its right to "opt out" of the federal prohibition, by the manner in which a provincial Attorney-General or his agent exercises his prosecutory discretion under section 16 and by the extent to which certain activities can be classified in practice or by judicial definition as "works of necessity or mercy" so as to be exempt from the prohibitions. Federal and provincial laws requiring one day's rest in seven tend to dovetail whether the industry concerned is federally or provincially regulated. The legality of Sunday contracts is determined according to common law principles relating to enforceability of illegal contracts, and therefore hinges on the application of either federal or provincial statutory prohibitions.

The legality of judicial proceedings on Sunday is determined by federal and provincial statutory provisions and the common law. In the event of a federal-provincial conflict, federal paramountcy will prevail.

Most provinces have a range of secular laws containing special Sunday provisions concerning hunting, liquor sales, billiard halls, public offices and the like, and there is no direct relationship with the federal *Lord's Day Act*. Independent of the federal Act, some provinces have municipal legislation permitting shop closing by-laws on Sundays and other days of the week and Ontario, Quebec and Newfoundland now have comprehensive province-wide

shop closing legislation which could be applied to Sundays as well as other holidays.

Today, there are four major anomalies and conflicts either in the *Lord's Day Act* or in its relationship with provincial Sunday laws:

1. The prohibition of various types of activities on Sunday has been largely neutralized through provincial "opting out" legislation, through failure to prosecute, either because of the refusal of provincial Attorneys-General to grant leave to prosecute violators or otherwise, through exemptions for "works of necessity or mercy", and through the ineffectiveness of the deterrent resulting from the low level of maximum fines permitted by the Act or imposed by the judges.

2. There is some uncertainty under the Act respecting the sort of Sunday trucking to be permitted as a "work of necessity or mercy" and the criteria to be utilized by the Canadian Transport Commission in granting permits under section 11(*x*), particularly whether road congestion and safety in a province are to be considered as factors.

3. There is some uncertainty respecting the possible constitutional role of the provincial legislatures in the field of Sunday observance.

4. The concepts of freedom of religion and religious tolerance have not been satisfactorily reconciled with existing Sunday observance legislation although such concepts do not appear to be constitutional impediments to effective legislative change at either the federal or provincial level.

Because of these anomalies and conflicts, it is proposed that

> The federal *Lord's Day Act* should be repealed and the provinces and territories should be free to enact independent secular measures to the extent that the enforced observance of Sunday or other holidays is desired.

Among the reasons for this proposal is that we do not believe the matters regulated by the Act should be enforced by means of the criminal law. These relate largely to secular matters that can be more appropriately dealt with at the local level. The provinces

have already expressed some interest in assuming primary responsibility for Sunday laws, and in fact Newfoundland, Quebec and Ontario already have legislative and administrative mechanisms in place for Sunday regulation of retail business establishments. All the provinces have existing administrative and enforcement machinery in the field of labour standards and business regulations, so there would be no major disruptions or gaps if the provinces were to take over the field. Greater variations in Sunday laws from province to province might occur, reflecting differing cultural and regional values in Canada. This would seem desirable and consistent with the general consensus reached by the Joint Parliamentary Committee on the Constitution in 1972 which favoured fuller provincial control over the quality and style of life. In any event, the provincial legislatures may be in a better position than Parliament to determine social and commercial needs, in the sense of assessing recreational practices or consumer shopping habits and retailing trends in each area of Canada.

Before undertaking the wholesale repeal of the *Lord's Day Act*, the federal government should indicate its intention to do so in such a way as to allow the provinces and territories sufficient time to review, amend or introduce their own secular and comprehensive measures concerning Sundays. However, the commencement of the orderly transition from federal to provincial law should not be delayed, otherwise confusion and hypocrisy may result.

Finally, with respect to Sunday trucking now regulated by the Canadian Transport Commission under section 11(*x*) of the *Lord's Day Act*, it is suggested that with the repeal of that Act the federal power to regulate interprovincial trucking on Sunday might, as an interim measure, be included in the provisions of the federal *Motor Vehicle Transport Act* while federal transportation policy is being reviewed. In that interim period the Commission could, in granting permits to interprovincial truckers, be expressly empowered to consider traffic congestion on Sundays as well as undue delay.

Abstract of Recommendations

1. The *Lord's Day Act* should be repealed.

2. The provinces and territories should be free to enact independent secular measures respecting the observance of Sunday and other holidays as desired.

3. Before undertaking the wholesale repeal of the *Lord's Day Act*, the federal government should indicate its intention to do so in such a way as to allow all of the provinces and territories sufficient time to review, amend or introduce their own secular and comprehensive measures concerning Sundays and other holidays.

4. However, this commencement of the orderly transition from federal to provincial law should not be long delayed, if confusion and hypocrisy are to be avoided.

5. The federal power to regulate interprovincial trucking on Sunday, now exercised by the Canadian Transport Commission under section 11(*x*) of the *Lord's Day Act* should as an interim measure be included in the provisions of the federal *Motor Vehicle Transport Act* when provision could be made to empower the Commission to consider traffic congestion and safety as well as undue delay.

I. History of Sunday Observance Laws

Early Roman and English Laws

The first Sunday observance laws are generally attributed to the Roman Emperor Constantine in 321 A.D. These early laws had features which were both religious and secular in nature. In general terms, they enjoined all city people and tradesmen to rest on Sundays, but they created certain exceptions for persons engaged in agriculture or for those who were required to perform public acts. The setting aside of Sunday as a special day was not to promote any Christian idea but to honour the day of the Sun, the Apollo of Greek and Roman mythology. While it is true that the selection of Sunday was not insignificant to the Christians in the Roman Empire at that time, the original Sunday edicts were the product of the pagan practice of sun worship. It was not until many years later that the term "Lord's Day" began to appear in any civil legislation of the Empire.

For the most part these early Roman laws were prohibitions, forbidding business, legal proceedings, theatre, circus and exhibitions of wild beasts on the Lord's Day. Exceptions were made for agriculture and certain public acts as well as for humanitarian acts relating to the treatment of prisoners and the liberation of slaves. These exceptions were the forerunners of what are known as "works of necessity or mercy" under the present *Lord's Day Act* in Canada.

With the fall of the Roman Empire in the fifth century and the ascendency of the Holy Roman Empire for the next four centuries,

Sunday laws reverted to the ecclesiastical, with the Pope becoming what the Emperor had been. Sunday laws became more restrictive, and the penalties prescribed for violations became generally more severe and included whipping.

The early Sunday laws in England up to the Conquest in 1066 were basically the product of the ecclesiastical commands of the Holy Roman Empire. However, it is possible to detect in these early Saxon laws the occasional social objective such as the freeing of slaves. Slaves who were made to work on a Sunday by command of their master were freed, and the master was required to pay a fine. Laws against Sunday marketing and against various forms of recreation and entertainment such as hunting became prevalent although the dominant theme throughout was to compel religious observance of Sunday as a Christian holy day.

The pre-Reformation period in England up to 1500 A.D. is noteworthy in two respects. First, the Christian church in England began to claim officially that the religious observance of the Lord's Day complied with the Old Testament fourth commandment to observe the legal Sabbath, according to the canonical institutes. Second, despite this assertion of the Old Testament connection there were an increasing number of commercial and recreational activities taking place on Sundays during the period, most notably the Sunday markets and taverns that were very popular. With the intent of abating these activities, Henry VI enacted the Sunday Fairs Act in 1448 A.D. which prohibited all manner of fairs and markets on Sundays and principal religious feast days, with the exception of "necessary victuals" and on Sundays in harvest season.

The post-Reformation period in England from the sixteenth to the nineteenth century gave rise to some of the most strict Sunday observance legislation that has ever been enacted. Not only was there curtailment of commercial activities and recreation on Sundays but many of the laws required open adherence to the practice and doctrines of the established Church of England, in an effort to produce political as well as religious conformity. This involved both compulsory church attendance and compulsory fasting on certain occasions as commanded by the Sovereign. Control of the observance of the Lord's Day was retained by the Sovereign as a political measure, and that observance was regu-

lated by proclamation as an exercise of assumed spiritual power. However, it was in 1625, 1627 and 1677 that the three principal statutes which eventually formed the basis of eighteenth and nineteenth century Sunday observance legislation in North America were enacted by the Imperial Parliament. The three statutes remained in force in England until 1969 along with the Sunday Fairs Act of 1448. More important, all four were theoretically part of the law of Canada until 1955 to the extent that they were not in conflict with the *Lord's Day Act* or provincial legislation derived therefrom. The 1948 Sunday Observance Act of British Columbia specifically lists these four statutes as part of the law in that province.

The Sunday Observance Act of 1677 reflected many of the Puritan values and forms of regulation that had been part of the Cromwell repressive régime in the period 1649-1660. It purported to secure the observance of the Lord's Day by prohibiting any person from engaging in "any worldly labour or business or work of ordinary calling" upon that day, except for "works of necessity and charity". The Act forbade the showing or holding out for sale of any goods. Travelling was prohibited for drovers, horse-coursers, wagoners, butchers and pedlars; nor were they allowed to go into any inn or lodge upon the Lord's Day. There were exceptions for the preparation of meals in inns and restaurants and for the selling of milk before 9.00 a.m. or after 4.00 p.m. on Sunday.

Pre-Confederation Laws in Canada

The background in Ontario and Quebec is reasonably clear. With the Treaty of Paris and the Royal Proclamation of 1763, the inhabitants of early Canada acquired "enjoyment of the benefit of the laws" of England. This automatically meant that the Sunday observance laws of England referred to above applied in their full force and effect. If there was any doubt about the adoption of the four English laws in the colony, it was soon dispelled by the passage in the English Parliament in 1774 of The Quebec Act, a significant section of which continued the use of the criminal law of England throughout the entire colony.

English law was incorporated into the early Canadian colonies either by virtue of statute or in the operation of the rule that English settlers bring the common law system to new colonies. While the four English statutes had never been authoritatively held to be a matter of criminal law by an English court at that time, the fact that they contained offences for profaning the Lord's Day with penalties for their commission was probably sufficient to render them such. In any event, that is the position that has since been adopted by the Supreme Court of Canada. While The Quebec Act in 1774 delegated power to a newly constituted legislative council to make laws for the colony, no local Sunday laws were ever enacted, the new colony relying on the mother country for the substantive law of Sunday observance.

This situation continued to the beginning of the nineteenth century when the new legislatures in Lower Canada and Upper Canada, recently created under the Constitutional Act of 1791, began shaping their own laws. In Lower Canada, the legislature in 1805 enacted An Act to Prohibit the Sale of Goods, Wares and Merchandise, Wine, Spirits and other Strong Liquors on Sundays. These provisions, together with further measures enacted in 1827 prohibiting tippling in public houses during divine service on Sundays were eventually brought together in the consolidated statutes of Lower Canada in 1860.

In Upper Canada, the legislature in 1800 merely updated its incorporation of English criminal law so as to include a further Sunday Observance Act enacted in England in 1780. This new English Act prohibited the operation of any house or room for public entertainment or amusement for a fee on Sunday, the main purpose being to suppress the working class "disputing societies" which were seen by the English government to be politically undesirable at that time.

The Union Act of 1840 reuniting the provinces of Upper Canada and Lower Canada made it clear that the colonial legislature in Canada at that time was free to make its own Sunday observance laws if it wanted to. The new legislature did not waste much time in entering the field, for in 1845 it enacted An Act to Prevent the Profanation of the Lord's Day, commonly called Sunday, in Upper Canada. This statute essentially reiterated most

of the prohibitive Sunday observance provisions of the 1677 English statute which had already been received in Upper Canada. While the Act differed slightly from the English Act of 1667, its general thrust and purpose was to re-enact the English law in a form which was more suited to the conditions and activities of Upper Canadians of the day. Neither the new Act of 1845 (nor its consolidation in 1859) dealt with the English Act of 1780 prohibiting the acts of "disputing societies"; that law therefore continued in force in Ontario until 1948 when it was repealed by the Parliament of Canada.

The situation in the Atlantic provinces is not entirely clear. These provinces, being settled colonies, automatically incorporated such of the English laws as were suitable to their situation and conditions. The courts, therefore, exercised some discretion in adopting British statutes. In New Brunswick, for example, the practice has been to accept as applicable the English statutes preceding the restoration in 1660, and consequently it may be doubted whether the Sunday Observance Law of 1677 ever applied there. The earlier English statutes may, however, have been applicable.

Laws Following Confederation

Section 129 of *The British North America Act* continued in Ontario, Quebec and Nova Scotia and New Brunswick all laws in force at the time of union. Thus, to the extent that Nova Scotia and New Brunswick relied on the early English legislation, such legislation merely continued in force until repealed, abolished or altered by the competent legislature according to the division of powers under the *B.N.A. Act*. Where, as in the case of both Lower and Upper Canada, local legislation had been enacted, that legislation continued in force subject also to being repealed, abolished or altered according to the provisions of section 129.

What was not clear, however, was whether following Confederation the authority to repeal, abolish or alter Sunday observance legislation lay with the Parliament of Canada or the legislatures of the provinces. The provinces more or less assumed that authority

lay with them. Ontario, for example, continued the 1845 statute, as consolidated in 1859 in the Revised Statutes of Ontario, 1877. Nova Scotia enacted An Act of Offences against Religion in 1868, providing fines for desecration of the Lord's Day through shooting, gambling or sporting, frequenting tippling houses and engaging in servile labour on that day.

The Parliament of Canada took no initiatives until 1886 when it enacted the first revision of the Statutes of Canada. The law officers of Canada at that time appear to have regarded Parliament's jurisdiction respecting the 1845 Upper Canadian statute (as consolidated in 1859) as "doubtful" but they did not regard it as necessarily within provincial jurisdiction. In the meantime, the Ontario Legislature continued to add new provisions to its statute—in 1885 prohibiting steamboat and railway passenger excursions on Sunday; in 1896 prohibiting farmers from selling or carrying on their ordinary trade or calling on Sunday; and in 1897 prohibiting street railways and electric railways carrying passenger traffic in places other than Toronto, Ottawa and Hamilton on Sunday.

Ontario legislation, as amended, was the subject of a further statute revision in 1897, again emphasizing the common assumption of primary provincial jurisdiction at that time.

However, in 1903 the entire superstructure of the Ontario legislation, and that of the other provinces for that matter, collapsed. In *Attorney-General for Ontario* v. *Hamilton Street Railway Company,* the Judicial Committee of the Privy Council declared the whole of the 1897 Act to Prevent the Profanation of the Lord's Day *ultra vires* the Province of Ontario because, "treated as a whole" it was "criminal law" in the wide sense in which that term was used in section 91(27) of the *B.N.A. Act.* Lord Halsbury, speaking for the Privy Council, left little room for doubt that it was the entire legislative scheme as consolidated in 1897 that was to be struck down as unconstitutional. This meant that for most Canadian provinces the four English statutes of 1625, 1627, 1677 and 1780 constituted the only operative laws on Sunday observance, notwithstanding any post-Confederation enactments in the provinces. In the case of Ontario, the pre-Confederation legislation of 1845 continued in full force by virtue of section 129, as did the 1805 legislation in Québec. Any further

changes, amendments or new legislation, according to the Privy Council, had to come from the Parliament of Canada and not the provincial legislatures. This set the stage for the introduction of the federal *Lord's Day Act* in 1906.

Federal *Lord's Day Act*

Up to this point, Parliament had been a reluctant legislator on this subject. Private members' bills and resolutions dealing with various aspects of Sunday observance had been introduced as early as 1878 by M.P.'s who were either sympathetic to or staunch members of the Lord's Day Alliance in Canada. Most notable among these was John Charlton, Liberal Member for North Norfolk, who attracted widespread publicity for his campaign promoting Sunday observance in Canada to counteract what he regarded as crass secularization taking place on Sundays in many leading American cities. Charlton's objects were both for religious purposes and to secure a better deal for the working man. The Charlton bills failed to gain government support more on constitutional grounds than on their merits, it being felt that the subject of Sunday observance was sufficiently and amply dealt with by the provincial legislatures.

Even in the face of the Privy Council's decision in the *Hamilton Street Railway* case, Laurier's government still entertained doubts on the constitutional issue, for in 1905 a draft provincial Sunday observance bill was submitted by the federal government to the Supreme Court of Canada for an opinion. The Court replied that the legislation would have prohibited on Sunday the performance of work and labour, transaction of business, engaging in sport for gain or keeping open places of entertainment, and would therefore be *ultra vires* a provincial legislature and within the jurisdiction of Parliament since it was indistinguishable from that struck down in the *Hamilton Street Railway* case. Application for leave to appeal to the Privy Council was refused.

The *Lord's Day Act* was introduced in the House of Commons on March 11, 1906 by The Honourable Charles Fitzpatrick, Minister of Justice. It followed closely a draft previously submitted by the Lord's Day Alliance for government consideration, and

that body played a major role in the intensive debate which took place in committee and in the House in the ensuing three-month period. The Alliance had been active in the 1890's having sent John Charlton, M.P. as its representative to a major international conference on Sunday Rest held in Chicago in 1893. The Alliance was founded in Hamilton, Ontario in 1888 and had assisted in the drafting of Charlton's bills. During the period from 1900 to 1906 the Alliance grew rapidly under the direction of Rev. J. G. Shearer, spreading from an Ontario-based organization of just over 100 branches to over 600 branches in all the provinces, receiving the support of all major Protestant denominations and the cordial encouragement of the Roman Catholic hierarchy. In 1907, the periodical of the Alliance, the Lord's Day Advocate, had risen to a circulation of 40,000. Rev. Shearer and Mr. R. U. McPherson, counsel to the Alliance, were in constant attendance at the hearings of the Select Committee considering the Lord's Day Bill.

Labour interests played a smaller part in the Select Committee hearings. The bill generally was supported by the secretary of the Trades and Labour Congress of Canada who purported to represent nearly all organized labour except the railwaymen. It is fair to say that the religious and labour groups in Canada combined together to support the bill, each for their own separate reasons.

After some acrimonious debate concerning a proposal for a Sabbatarian exemption (which was eventually rejected) and an attempt by the Senate to change the name of the Act to "The Sunday Act", the bill received Royal Assent on July 13, 1906 and came into force on March 1st, 1907. In the course of debate on the bill, Prime Minister Laurier articulated the two principles upon which the bill was based:

> I say . . . that the very basis of any legislation of this kind must be to give the civil sanction, the sanction of the positive law to the moral law and the divine law . . . Now the secondary principle of this bill . . . is . . . to provide that every labouring man shall have a day of rest.

Laurier had perceived accurately the alliance between religious and labour groups in support of the bill. While Laurier himself admitted in debate that the government would have preferred to have left the whole subject matter in the hands of the provinces, the Lord's Day Alliance was the primary force in seeing that Parliament did

not shirk its duty in the face of the Privy Council's decision in the *Hamilton Street Railway* case. Laurier was successful over the objections of the Alliance in assigning a role to the provinces through including an "opting out" device under which the principal prohibitions in the Act were subject to the phrase "except as provided in any provincial act now or hereafter in force".

The *Lord's Day Act* of 1906 has gone through four consolidations (in 1906, 1927, 1952 and 1970) with only a renumbering of sections, and has been amended only twice. The first amendment was in 1948 and consisted of two sections, the one providing that consent for prosecution should be given by the Deputy Attorney-General of the province as well as the Attorney-General, and the other repealing the pre-Confederation legislation still in force in Ontario. The other amendment was in 1966 and was a consequential amendment to the *National Transportation Act* to substitute The Canadian Transport Commission for the Board of Transport Commissioners in permitting certain freight traffic on Sunday as a work of necessity or mercy, and also to extend the scope of such permission to any transportation undertaking and not just railways.

The only other legislation enacted by Parliament relevant to Sunday observance was the *Weekly Rest in Industrial Undertakings Act* in 1935. It purported to require every employer in any industrial undertaking to grant a day of rest of at least 24 consecutive hours in each period of seven days, wherever possible on the Lord's Day. Exceptions were to be provided by regulation, having "special regard to all proper humanitarian and economic considerations", and where the day of rest was not Sunday the employer was required to post notices in his establishment making known the days and hours of rest. However, shortly after the act was enacted, it, together with two other pieces of social legislation purporting to give effect to I.L.O. Labour Conventions entered into by Canada, were declared *ultra vires* by the Judicial Committee of the Privy Council. The principal ground relied on by the Judicial Committee was that the federal Acts were all in relation to "property and civil rights in the province", and could not be constitutionally sustained merely by virtue of the fact that they purported to implement Canadian treaty obligations.

Since its enactment in 1906 the *Lord's Day Act* has been attacked several times on constitutional grounds but in each case its validity has been sustained. The use of the "opting out" device by a province was considered by the Privy Council in 1924 and again by the Supreme Court of Canada in 1959, but in each case the constitutional challenge was rejected. In 1963 the Act was challenged on the ground that it conflicted with the *Canadian Bill of Rights* in that it abridged or infringed freedom of religion, but this was rejected as well. In 1972 the Supreme Court of Canada refused leave to appeal from the decision of the Alberta Court of Appeal reversing a trial judgment which would have struck down the *Lord's Day Act* as *ultra vires* on the ground that it is no longer criminal legislation but labour legislation. Each of these decisions will be further discussed in subsequent chapters. Suffice it to say here that the *Lord's Day Act* has endured as a law *de jure* for almost seventy years. What is its present impact *de facto*?

Federal Operations

It is anomalous that the *Lord's Day Act*, though a federal statute, plays a much smaller role in areas of federal regulatory control than in matters falling generally within the provincial regulatory sphere. In part this is owing to the terms of the Act itself. It is true that its general provisions are sufficient to cover federal activities such as transportation and communications, but there are wide exempting provisions. For example passenger traffic by railways is exempted unless prohibited by other legislation (section 3), and for that matter the conveying of travellers generally and work incidental thereto were categorized as "works of necessity or mercy", so that travelling by air, ship or bus would be exempted from the operation of the Act. A number of activities concerning the transportation of goods by ship or rail, and the maintenance of railways are similarly classified and, therefore, exempted. Thus, the continuance on Sunday of ships and trains in transit, and the loading and unloading of merchandise at intermediate points on or from passenger boats and trains do not fall within the Act. And keeping the tracks open and doing necessary repairs are also classified as works of necessity or mercy.

Similarly, a number of activities in the field of communications are exempted. Thus, receiving, transmitting or delivering telegraph or telephone messages are classified as works of necessity or mercy, as is the conveyance of Her Majesty's mails.

Partially too, federal enterprises are not affected by the *Lord's Day Act* because other statutes now govern various matters and, more importantly, because the Act is simply not enforced. The first type of situation may be exemplified by the provision that a person who is required to do work on Sunday because the activity is exempted by the Act must be allowed a day's rest during the next six days. This is now adequately dealt with by the *Canada Labour Code*, and indeed, more generally the latter statute and other statutes governing working conditions now cover the secondary purpose of the *Lord's Day Act*.

But the major reason the Act plays such a small role in federal areas appears to be that it is not enforced because it would, in a modern setting, be inappropriate to do so in certain situations. For example, there are no exceptions for air cargo transport, yet no one has enforced the prohibitions of the Act against air carriers. The same is true of freight trains. It is true, of course, that the Act by section 11(*x*) contemplates specific exemption by the Canadian Transportation Commission from the operation of the Act in connection with freight traffic. This now applies to all transportation undertakings but until 1967 it was confined to rail traffic. In fact, however, we understand that there have been no exemptions from rail traffic in many years even though rail traffic appears to be conducted on Sunday without regard to the prohibitions in the *Lord's Day Act*. The only enforcement of the prohibition against freight traffic appears to be that of the provinces in respect of truck transport. As a result, applications for the exemption of interprovincial trucking are frequently made to the Canadian Transportation Commission. This raises an important problem that will be examined in more detail later.

Provincial Sunday Laws

Quebec was the first province to take advantage of the "opting out" device in the *Lord's Day Act* when in 1907 it enacted

its own Act respecting the observance of Sunday. This Act specifically continued in force all the Sunday observance laws previously in existence in the province, but also added other sections restricting industrial work, business, theatrical performances or pleasure excursions, and provided a limited sabbatarian exemption. The section of the Act dealing with prohibitions of industrial work, business, theatrical performances or excursions was declared *ultra vires* by the Supreme Court of Canada in 1911 as creating offences against the criminal law. However, the other permissive sections in the legislation continued in force with the exception of the sabbatarian exemption which was dropped in 1941. The permissive provisions in the Quebec legislation were not specific but simply stated that every person in the province was to be entitled to do on Sunday any act not forbidden by the Acts of the Quebec legislature in force on February 28, 1907, and to enjoy on Sunday all such liberties as are recognized by the customs of the province. Significantly, the *Lord's Day Act* was proclaimed in force as of March 1st, 1907, and in section 15 provided that:

> Nothing herein shall be construed to repeal or in any way affect any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any province of Canada when this Act comes into force . . . .

Thus the provincial Act was designed to dovetail with section 15. The practical effect of this was to virtually neutralize the impact of the *Lord's Day Act* in Quebec, a situation that has prevailed with very few exceptions up to the present time.

In the other provinces and the territories, it was not until well after the Second World War that there was any movement towards taking advantage of the "opting out" device, although the operation of the Act was effectively modified in some areas by the discretion not to prosecute given the Provincial Attorneys-General by the Act. Ontario was the first to enact legislation, introducing a bill in 1950 giving to municipalities the right to permit sports specified by by-law between the hours of 1:30 and 6:00 p.m. on Sundays, provided the assent of a majority of municipal electors voting on the specific question had been obtained. These provisions were substantially expanded ten years later to include municipal permission for movies and theatrical performances,

concerts and lectures and the like, and in 1968 there was a further extension to agricultural, horticultural or trade shows or scientific exhibitions and to horseracing.

Other provinces soon followed suit. British Columbia amended the Vancouver Charter in 1953 to permit public games or sports by municipal by-law assented to by the electorate, and this was later extended to motion pictures, theatrical performances, concerts, lectures or any other exhibitions or performances for a fee in 1963.

Manitoba, Nova Scotia and the Northwest Territories were next in 1964, their legislation following the same pattern of permitting certain cultural, recreational and entertainment events, under conditions specified by municipal by-law. The Nova Scotia system was slightly more complex in that it authorized a system of permits from a municipal council for certain classes of stores or establishments. The permissive sections in the Nova Scotia legislation respecting public games, contests, performances or public meetings are province-wide and do not depend on municipal by-law.

Saskatchewan (1965), New Brunswick (1967), the Yukon Territory (1968), Alberta (1969) and Prince Edward Island (1971) all enacted comprehensive "opting out" legislation permitting certain cultural, recreational and entertainment events that might otherwise have been prohibited by the *Lord's Day Act*. The scope of the New Brunswick Act is perhaps much broader than the others insofar as it provides for a province-wide board to issue permits for various types of retail selling establishments. Newfoundland is the only province that has not enacted "opting out" legislation permitting various cultural, recreational and entertainment events in the manner of all the other provinces and territories. However, in 1963, Newfoundland enacted a comprehensive statute called The Hours of Work Act covering shop closing and employment both on statutory holidays and on Sunday throughout the province as well as dealing with hours of work generally in retail sale establishments. Under this legislation Newfoundland is able to achieve the same practical result by permitting certain classes of retail selling establishments to open Sunday, as is achieved in other provinces under more conventional "opting out" legislation.

In 1969, Quebec enacted a similar type of comprehensive statute entiled The Commercial Establishments Business Hours Act regulating both statutory holiday and evening closings on a province-wide basis. However, the Act carefully avoided trying to regulate Sunday hours.

Effective January 1st., 1976, Ontario enacted The Retail Business Holidays Act which sets forth in fairly specific terms the conditions under which various retail establishments can open and close on named statutory holidays as well as on Sunday. This legislation is province-wide, except with respect to the provision allowing for municipal exceptions to the general prohibition where essential for the maintenance and development of the tourist industry in a particular locality.

Apart from the specific laws referred to above, all the provinces have a range of secular laws containing special Sunday provisions relating to such matters as hunting, the sale of liquor and closing of billiard halls. Most provinces have legislation requiring employers to provide employees with one day's rest in seven, and this legislation usually stipulates that the day should be provided "wherever possible on a Sunday". Typically, provincial municipal enabling legislation permits a municipal council to enact shop closing by-laws which can be made applicable to all or a portion of hours on Sunday in a way that is different from other days of the week. These and other provincial laws containing special Sunday provisions will be referred to in specific contexts in the chapters following.

II. Relationship between Federal and Provincial Laws

As is evident from the foregoing chapter, the main substantive rules prohibiting activities on Sundays come under the federal *Lord's Day Act*. Section 4 is most significant, making it unlawful for any person on Sunday (i) to sell or offer for sale or purchase any goods, chattels or other personal property, or any real estate; (ii) to carry on or transact any business of his ordinary calling; or (iii) in connection with such calling, or for gain to do, or employ any other person to do on Sunday any work, business or labour. This section is aimed at prohibiting Sunday sales, business transactions and employment.

The other significant prohibition in the *Lord's Day Act* relates to games and performances where an admission fee is charged. This prohibition, found in section 6, applies to (i) engaging in any public game or contest for gain or for any prize or reward; (ii) being present at any such public game or contest; or (iii) providing, engaging in or being present at any performance or public meeting at which any fee is charged.

Other prohibitions in the *Lord's Day Act*, now somewhat anomalous, relate to excursions by conveyance for amusement or pleasure where a fee is charged (section 7), advertising of prohibited Sunday performances or activities (section 8), shooting on Sunday for gain so as to disturb public worshippers (section 9) and sale of foreign newspapers on Sunday (section 10).

The prohibitions found in sections 4 and 6, together with the prohibition against excursions by conveyance for amusement or

pleasure where a fee is charged (section 7) are set forth in the *Lord's Day Act* in a way that almost invites provincial legislation softening their impact. Each such prohibition is subject to the phrase "except as provided by any provincial Act or law in force now or hereafter". This represents an opportunity for any extent of "opting out" from those sections in a province that the provincial legislature there desires to permit. The validity of this "opting out" technique was fully canvassed by the Supreme Court of Canada in 1959 in *Lord's Day Alliance* v. *A.-G. B.C.* There Chief Justice Kerwin held that this clause was not a delegation of federal power to the province but merely federal permission for a provincial legislature to choose to permit a certain occurrence in which case the federal prohibition would not apply. As Mr. Justice Rand put it in the same case,

> the effect of the exception is to declare that in the presence of a provincial enactment of the appropriate character the scope of [these sections] automatically ceases to extend to the provincial area covered by that enactment. The latter is a condition of fact in relation to which Parliament itself has provided the limitation for its own legislative Act.

The pattern and extent of provincial opting out legislation permitting certain activities on Sunday that would be otherwise prohibited has varied from province to province. New Brunswick has probably gone furthest in specifying in clear and modern terms the sales, businesses, employment, games, performances or public meetings that are to be permitted notwithstanding federal prohibitions. This statute was introduced in 1967 following the report of the New Brunswick Select Committee on the *Lord's Day Act* of the previous year. All the other provinces, except Newfoundland, have permissive legislation which focuses primarily on permitting games, performances and public meetings on Sunday subject to certain conditions, and in a few cases there are some provincial permissive provisions relating to Sunday sales, business and employment. Typically, the provincial opting out statute will deal with various forms of recreation, entertainment and culture which would have been prohibited by sections 6 or 4 of the *Lord's Day Act*. Many of the provinces further delegate a decision to go along with this "opting out" to the municipalities, which can proceed by by-law through a permit system.

Thus, one cannot assess the impact of the *Lord's Day Act* in a province without also examining closely its provincial counterpart to see the extent to which the province has softened the scope of the federal prohibitions.

Nor can the operation of the Act be assessed without examining other techniques afforded the provinces by the Act to soften its operation. One of these is set forth in section 16, which gives the provincial Attorney-General a discretion to refuse to authorize any action or prosecution for a violation of the federal Act in the province. To the extent that a province has not "opted out" of any of the prohibitions in the federal Act, a provincial Attorney-General or his lawful deputy can achieve much the same result in a province by refusing leave to prosecute in certain types of cases. Conventionally, the section has been regarded as a means by the provinces for preventing the *Lord's Day Act* from becoming an instrument of persecution and harrassment.

A further method by which some of the federal prohibitions are softened is through the twenty-four examples of works of necessity or mercy which are excepted from certain prohibitions by section 11 of the federal Act itself. However, it is only the section 4 prohibitions (i.e., sales, business and work) that are softened, by inclusion of the words "except as provided herein". No such phrase is included in section 6 (games, contests and public meetings) and section 7 (excursions for amusement or pleasure). Nor is there any such exception from the prohibitions of advertising prohibited activities, shooting or selling foreign newspapers. Nevertheless, the range of activities permitted as works of necessity or mercy under these twenty-four examples is very broad; a case might well be made that they are exceptions from all the prohibitions in the federal Act by virtue of the introductory words of section 11: "notwithstanding anything herein contained".

In any event, it is always open to a court to characterize an otherwise prohibited activity as a "work of necessity or mercy". The case law is substantial here and the judicial tendency to narrow the scope of the prohibitions through finding works of "necessity or mercy" as exceptions is almost as significant substantively as the provincial opting out technique or the prosecutory discretion of the Attorneys-General, in terms of neutralizing the impact of the main prohibitions in the Act.

Indirectly related to Sunday observance laws are various federal and provincial requirements for one day's rest in seven for certain types of employees. Significantly such a requirement is included in section 5 of the *Lord's Day Act* which makes it unlawful to require an employee engaged in transportation, communication or any industrial process to work on Sunday unless he is allowed during the next six days of the week twenty-four consecutive hours off work. As noted in Chapter I, many provinces have the equivalent of a One Day's Rest in Seven Act applicable to certain types of employees, and often this legislation stipulates that the one day's rest is to be granted "whenever possible on a Sunday". The division of responsibility in this area between the federal government and the provinces would appear to be based on the constitutional division of powers respecting labour standards generally: legislative jurisdiction is primarily vested in the provinces, subject to the qualification that a province has no authority to regulate standards of federal civil servants or of persons employed in enterprises falling within the scope of federal authority such as interprovincial transportation and communications undertakings. Section 5 of the *Lord's Day Act* may extend to work in industrial processes to the extent that those processes would be "works of necessity or mercy" under section 11, because the section prescribes that one day's rest in seven is mandatory where an employee works on the Lord's Day.

There is an interesting relationship between the prohibitions in the federal Act and the common law principle concerning enforceability of illegal contracts. If a contract is made on Sunday and thereby violates the sale or business prohibitions in section 4 of the federal Act, it is an illegal contract and may therefore be unenforceable in the courts. There are two statutory exceptions to this, one where the transaction involved is found to be a work of necessity or mercy under section 11, and the other where the prohibited sale or business activity is permitted under provincial opting out legislation. A quasi-exception has also been developed by the courts whereby Sunday contracts have been upheld in circumstances where there were collateral key events before or after Sunday, such as later delivery of the goods, part payment, the obtaining of financing, the working out of further details, or the advance delivery of completed documents.

Alberta is the only Canadian province with provincial legislation dealing expressly with Sunday contracts. Both The Land Titles Act and The Sale of Goods Act of that province contain a provision rendering sales and purchases and contracts for the sale or purchase of any real or personal property on the Lord's day utterly null and void. One of these provisions was considered alongside section 4 of the *Lord's Day Act* by the Supreme Court of Canada in 1972 in *Neider* v. *Carda of Peace River District Limited*. While the trial judge in the lower court in Alberta in invalidating certain transfers of land executed on Sunday, had based his judgment purely on the provision of The Land Titles Act and not the federal *Lord's Day Act*, the Supreme Court of Canada relied exclusively on section 4 of the *Lord's Day Act* in dismissing the claim of a real estate and loan company to enforce its purchase of certain farm lots through transfer forms signed by the vendor on a Sunday. Mr. Justice Hall for the court found that the purchaser in question was carrying out his ordinary business in realizing on an overdue security, and thus the transaction came squarely within section 4.

The federal and provincial statutory provisions providing special rules for certain judicial proceedings on Sunday seldom come into conflict. The general rule today is that Sunday is a *dies non juridicus* at common law unless specific provision to the contrary is provided by statute. Only when there are federal and provincial statutes leading to opposite situations does a real conflict occur. There is an apparent conflict between section 20 of the *Criminal Code* permitting on a Sunday the issuing or execution of a warrant or summons or the making of a bail order and entering into of the recognizance, and the relevant provisions of the various provincial Judicature Acts prohibiting a person on Sunday from serving or executing any writ, process, warrant, order or judgment, etc. The probability is, however, that the courts would read the provincial Act as applying solely to court proceedings. Otherwise, the courts would resolve the conflict by holding the federal law paramount as part of Parliament's jurisdiction over criminal law and procedure, and would render the provincial law suspended and inoperative to the extent of the conflict. Alternatively, the courts might well characterize certain legal proceedings on Sunday as "works of necessity or mercy", as happened in the recent case of

R. v. *Humphreys* involving the service by a constable of a notice of appeal by way of trial de novo on Sunday.

All other laws touching or concerning Sundays are provincial. They range from province-wide legislation dealing with shop closing on Sundays and on statutory holidays, as in Ontario and in Newfoundland, to provincial legislation authorizing municipalities to make by-laws or establish licencing schemes providing for the regulation of closing hours of various types of commercial establishments, such as in Nova Scotia and in the three Prairie Provinces. Seldom do these provincial laws authorizing municipal closing by-laws or licencing schemes respecting Sundays and other holidays make any reference to the *Lord's Day Act* in an attempt to dovetail with it. A notable exception is the recently enacted Retail Business Holidays Act in Ontario which exempts from its prohibitions the sale of goods or services permitted under the *Lord's Day Act*, and makes lawful any sale, purchase or employment permitted under the Ontario Act which would be unlawful under section 4 of the *Lord's Day Act* (the latter being an isolated use of the opting out provision by Ontario in its otherwise independent legislation).

All provinces and territories have a range of regulatory legislation affecting Sundays dealing with game laws, liquor sales, billiard rooms, the closing of public buildings, courts and offices, etc. None of these regulatory laws make reference to the *Lord's Day Act*.

III. Anomalies and Conflicts

The prohibitions of the *Lord's Day Act* appear rather severe on their face. Most Canadians today would be surprised to learn that federal law prohibits sales, business, transportation, employment, games, performances or public meetings where an admission fee is charged on Sunday. Such surprise would be justified of course because these prohibitions, while still part of the law *de jure*, have been to a large extent neutralized as law *de facto*. This apparent neutralization of federal prohibitions is perhaps the greatest anomaly in the field of Sunday observance law in Canada. How has it happened?

In respect of games, performances and public meetings where an admission fee is charged, the neutralization has come about through provincial opting out legislation and the provincial Attorney-General's refusal to authorize prosecution. Most of the provinces have enacted permissive laws allowing various forms of recreation, entertainment and culture on Sundays, subject to certain limitations such as time of day and manner in which the permission is granted. In many cases this opting out legislation includes permission for certain types of commercial establishments to make sales and to employ people on Sundays such as drug stores, service stations, small convenient stores, automatic laundries, nurseries and greenhouses, and the like. The cumulative effect of this legislation has largely been to eviscerate the federal prohibitions. More has been taken away through provincial permissive legislation than remains of the original prohibition.

Not that this is a bad thing. Indeed, what has happened is a development specifically authorized in sections 4, 6 and 7 of the *Lord's Day Act* by the phrase "except as provided. . . in any provincial Act or law now or hereafter in force". When the *Lord's Day Act* was introduced in the House of Commons in 1906 by the Laurier government, it did not contain this clause but it was later urged by such prominent members of the House as Camille Piché, Henri Bourassa and Robert Borden. The then Minister of Justice, Mr. Aylesworth, initially opposed introduction of such a clause saying "it would in fact be delegating, if we had the power to delegate, the whole question of dealing with this subject to each one of the several provincial legislatures". The government's position later changed and an amendment was accepted partially because Laurier was prepared to leave the question of Sunday sales and business to be regulated in accordance with local custom (and believed that no province other than Quebec would take advantage of the provision), and because the Senate felt such a clause was necessary to secure the support and co-operation of the people of Quebec. Little did the legislature of that day realize that virtually all the provinces, not just Quebec, would invoke the opting out provisions as a means of reflecting changing public attitudes and values.

Quite apart from the opting out provision, the federal prohibitions have also been neutralized through provincial Attorneys-General refusing to grant leave to prosecute violations of the prohibitions, as they are empowered to do under section 16 of the Act. This is an unusual provision. Under it one level of government prohibits certain activities and the principal law officer of the other level has a virtually unfettered discretion as to whether these prohibitions can be enforced. There is virtually no public record of the number of instances or types of cases in which leave to prosecute has been denied by a provincial Attorney-General. However we do have information from the report of the Ontario Law Reform Commission that in that province leave to prosecute is generally denied in cases involving Jewish bakery shops, summer resorts and small shops of the milk store variety. At the 1972 meeting of the Uniformity Commissioners (a group of officials representing all ten provincial governments as part of the annual Uniform Law Conference), the minutes reveal that the

Ontario and Quebec representatives indicated that some prosecutions were undertaken, depending on the type of store involved, where there was a complaint. The Alberta representative indicated they followed the same practice as Ontario. However, the representatives from the North West Territories and Saskatchewan indicated that there were no prosecutions in their jurisdiction under the federal Act, the Saskatchewan representative stating that "there had been no prosecutions in Saskatchewan for many years".

It would appear that while section 16 was included in the original *Lord's Day Act* in 1906 to prevent that Act from being used as an instrument of persecution and harrassment, or to prevent what the Courts have subsequently called indiscriminate private prosecutions, the section has permitted provincial policy variations in the enforcement of the Act resulting in its further neutralization as an Act having national impact. The language of the section clearly permits selective and unequal enforcement of the law.

Another contributor to the neutralisation of the *Lord's Day Act de facto* is the inconsistent manner in which its prohibitions have been interpreted by the Courts, particularly when the accused claims that the impugned activity is a "work of necessity or mercy" under section 11. The many cases involving sale of food, drinks and sundries best illustrate this point. The sale of milk for domestic use, bananas, root beer, and food and drink consumed on the premises have all been held by various Courts to be works of necessity or mercy, and their sale on Sunday thereby exempt from the prohibitions of the *Lord's Day Act*. On the other hand, the sale of apples and candy, groceries, toothbrushes, toothpaste, magazines, records, cigarettes and other small convenience store items have been held not to be exempt.

The "food, drink and sundries" cases have also revealed some judicial inconsistency as to whether the necessity or mercy is to be that of the seller, the purchaser, or both, although the preponderance of cases seems to emphasize the necessity of the purchaser as governing. Certainly many of the twenty-four examples of works of necessity in section 11 would indicate that the expression is open to either interpretation. For example, section 11(*b*) "work for

the relief of sickness and suffering, including the sale of drugs . . ." is clearly concerned with the necessity or mercy of another person receiving the benefit of such work or sale. However, section 11(*m*) "the caring for milk, cheese and live animals . . ." probably is concerned with the commercial necessity of the person doing the caring.

A review of cases in other areas of Sunday activities reveals no discernible trend in the interpretation of the term "work of necessity or mercy". Some courts have held a coin laundry, a coin-operated car wash and gasoline service stations to be "works of necessity or mercy". However others have held that a skating rink for hire to member teams of a league, a small food and convenience store and a gasoline service station to be outside the scope of the term. Only with respect to industrial processing and construction does there appear to have been a judicial propensity in the cases to find the impugned activity within the scope of the exceptions. Continuous operation of a pulp and paper mill, operation of a lumber mill, construction or repair of wharves to avert ice damage, continuous production of lime as a chemical involved in manufacture of war products in 1942, and the delivery and receipt of milk from farmers for the purpose of making condensed milk the next day, all have been found to be within the exceptions in section 11 when carried out on a Sunday.

Another area where judicial inconsistency in reported cases has been apparent is the transportation of goods by truck on a Sunday, and related activities. Various courts have found works of necessity or mercy in the following Sunday situations: (1) the running of tractor-trailer units carrying non-perishables on the highway running between two or more provinces; (2) the operation of trailer-transport units between Baltimore, Maryland and Toronto carrying bananas; and (3) the running of large trucks between Winnipeg and Kitchener carrying meat, with the journey starting Thursday night in Winnipeg which was the only time the meat could be obtained.

On the other hand, in the following situations the courts have refused to find a work of necessity or mercy: (1) a truck loaded with general merchandise leaving New Jersey Saturday evening for Quebec; (2) a commercial vehicle carrying non-perishable

products on a Sunday as a result of the owner's operational requirements, the long distance between departure and destination and the economic requirements of the owner, of his customer taking delivery and of the ultimate purchaser of the goods being transported.

Fortunately, some of the confusion in the interpretation of the phrase "work of necessity or mercy" as applied to Sunday trucking was cleared up by a judgment of Mr. Justice Laskin (as he then was) in the Supreme Court of Canada decision in *Motorways (Ontario) Limited* v. *R.* in 1974:

> *The Lord's Day Act* does not define "work of necessity or mercy", and the heterogeneous classes of deemed inclusions in paras. (*a*) to (*x*) of s. 11 do not reflect any consistent approach. They range from the supply of health services and attendant drugs and medicines to specified emergency services; they include utility and communication services and specified transportation services; milk delivery and maple sugar and maple syrup grove operations; domestic service and service of watchmen; certain loading and unloading operations; unavoidable late Sunday work by fishermen and by newspapermen preparing next day's edition. Although para. (*g*) excepts conveyance of travellers without limitation of the means of conveyance, there is no equivalent provision respecting conveyance of goods save as this is included in para. (*h*) respecting trains and vessels in transit and as may be permitted under para. (*x*). Assuming the conveyance of perishable goods ("caring" for them is covered in para. (*m*)) could fall within the general words "work of necessity", that is not this case [involving non-perishable goods].

Laskin J. went on to point out that paragraph (*h*) was confined to trains and vessels, and did not apply to motor transport which could only be permitted on Sunday by decision of the Canadian Transport Commission under paragraph (*x*). Thus the accused Motorways, not having made application to the C.T.C. under that paragraph, was unable to invoke the general words "work of necessity" in section 11, and the conviction was sustained.

This brings us to the anomaly previously mentioned that the *Lord's Day Act* plays a very small role in federal areas of regulation. This as we noted arises from the fact that many of the activities that fall within the federal regulatory sphere are excepted and when not excepted are not enforced. So far as we have been able to determine, the only exception to this is interprovincial

trucking. The provinces enforce the prohibitions in the *Lord's Day Act* against offending truckers unless their operations have been exempted by the Canadian Transportation Commission under section 11(*x*) of the *Lord's Day Act*. That section raises special problems that require closer examination.

Section 11(*x*) of the Act, as presently worded, came into effect on September 19, 1967. It gives the Canadian Transport Commission power to permit *any work* "having regard to the object of this Act, and with the object of preventing undue delay . . ." that the C.T.C. "deems necessary to permit in connection with the freight traffic of any transportation undertaking". Over fifty trucking firms, many of them having nation-wide operations, have received permits to operate on Sundays. Many of the intervenants, including provincial governments, appearing before the C.T.C. on these applications for Sunday trucking permits have emphasized the phrase "having regard to the object of this Act", with a view to urging the C.T.C. to restrict such permits to situations where real necessity or mercy is involved. Such intervenants have argued that to permit routine transportation of equipment or freight on Sunday merely to accommodate the economic or operational needs of the trucking firm can pose a potential danger to the safety of recreational drivers and their passengers on a Sunday and the applications should therefore be denied. The C.T.C. so far has resisted attempts by intervenants to introduce and have considered evidence which relates to the "objects of the Act".

The C.T.C.'s approach was recently upheld by the Federal Court of Appeal in *Re Ministry of Transportation and Communications for Ontario and Imperial Roadways Ltd.* in an appeal brought by the governments of Ontario and Quebec. In that case, counsel for Ontario and Quebec had argued that the C.T.C. erred when it stated that the object of the *Lord's Day Act* was to provide a holiday and also erred when it excluded as irrelevant evidence concerning the effect of granting the applications upon the safety and the congestion of certain highways. Mr. Justice Pratte for the Court rejected both arguments stating that the C.T.C. had proceeded on the understanding that the Act had been enacted "to provide that as many Canadians *as possible* should hold Sunday as a holiday". He also said that the exclusion of evidence by the C.T.C. was clearly well-founded. In reference to the argument of

counsel for Quebec that the C.T.C. may not permit work to be done on Sunday in connection with the transportation of goods unless it is satisfied that such transportation is a "work of necessity", Mr. Justice Pratte rejected this, saying that such interpretation would render section 11(*x*) meaningless since the only work the C.T.C. is empowered to authorize is a work that could be lawfully done under the introductory words of section 11.

The case, therefore, determines that the C.T.C. under section 11(*x*) has a virtually unfettered discretion to neutralize the prohibitions of the *Lord's Day Act* in respect of the freight traffic of any transportation undertaking. Apparently the only effective criteria the C.T.C. must consider is whether the work for which the permit is sought is for "the object of preventing undue delay". The exclusion by the C.T.C. of evidence of road congestion and the need for safety on the roads, though certainly understandable on a technical level, given the fact that what has to be considered is "the objects of the Act", underscores the inappropriateness of the *Lord's Day Act* as the vehicle for creating the C.T.C.'s regulatory jurisdiction in this area under modern conditions. The substantive interest in road safety and prevention of road congestion is real and genuine, and that interest should not be thwarted by an anachronistic legislative framework which was created many years ago for substantially different objects.

A case similar to *Imperial Roadways* involving Motorways (Ontario) Limited, the firm involved in the 1974 Supreme Court of Canada decision which subsequently applied to the C.T.C. for an exempting permit following the implied suggestion of Mr. Justice Laskin, is now being appealed by the City of Hamilton to the Supreme Court of Canada. Leave to appeal has been granted, with argument to be heard sometime in 1976.

There is another aspect of the *Lord's Day Act* tending to neutralize its impact in a modern setting. This is the low level of fines prescribed for violations. These remained unchanged since the Act was first enacted in 1906. For an individual the maximum is forty dollars for each offence, for an employer authorizing or directing the violation it is one hundred dollars (together with the cost of the prosecution), and for a corporation authorizing, directing or permitting the violation it is two hundred and fifty dollars for the first offence and for each subsequent of-

fence five hundred dollars. The Act also specifies minimum fines, one dollar in the case of an individual, twenty dollars in the case of an employer and fifty dollars for a corporation on first offence and one hundred dollars for each subsequent offence.

For the large commercial concern to violate the Act, the threat of a maximum five hundred dollar fine is regarded as little more than a licence fee to violate. There is little deterrent in fines at this level, even assuming the Attorney-General gives leave to prosecute and there is no work of necessity or mercy or provincial opting out legislation exempting the activity.

Contrast the maximum fines permitted at the federal level with those permitted under the legislation of some of the provinces. The new Retail Business Holidays Act in Ontario permits fines of up to $10,000 for each offence. The Lord's Day Act in New Brunswick permits either a maximum fine of five hundred dollars or imprisonment for a period not exceeding six months, as well as automatic cancellation of any Sunday permit issued by the Minister and forfeiture of any goods seized relating to the violation for which a conviction was obtained. In Prince Edward Island, the Lord's Day (P.E.I.) Act provides for maximum fines of five hundred dollars or imprisonment for a period not exceeding six months. In Quebec, the Commercial Establishments Business Hours Act, which was first enacted in 1969 and applies to all holidays except Sunday in that province, permits fines of up to one thousand dollars for each offence by an owner, tenant or manager of an establishment, plus fines of up to one hundred dollars for each employee who admits a customer contrary to the Act.

It is perhaps fair to add that there are also provincial examples of maximum fines being lower than the federal Act. The Hours of Work Act in Newfoundland permits maximum fines of twenty-five dollars for the first offence, fifty dollars for the second offence, and two hundred and fifty dollars for the third or subsequent offences. In Quebec, the Sunday Observance Act permits maximum fines of forty dollars for the first offence, and one hundred dollars for the second and subsequent offences in the case of work unlawfully done on Sunday, and a maximum fine of twenty dollars for the first offence and forty dollars for the second and subsequent offences in the case of unlawful Sunday sales of goods.

In the latter case, one-half of every fine collected belongs to the person prosecuting and the other half to the Crown.

While the level of maximum fines in the various provincial laws seems to vary, depending on whether the statute has been recently enacted or amended, the maximum fines in the federal Act are clearly inadequate under modern conditions for deterring the conduct proscribed therein. The Uniformity Commissioners of the provinces agreed in 1971 that if the *Lord's Day Act* was to be continued as a federal statute (the majority were in favour of Parliament vacating the field), the penalties should be increased to a $500 fine or six months' imprisonment or both. The Attorney-General of Ontario early in 1975 recommended substantial increases in penalties under the federal Act. The Ontario Law Reform Commission in 1971 had commented on the frequent criticism of the low level of maximum fines under the federal Act stating that fines were in many instances "regarded by the offender as a mere licence fee as a cost of doing business on Sunday".

In our Working Paper on *Fines* published in October, 1974, we considered the fine as a sentencing alternative, and stated that they are certainly less awesome than imprisonment and have not been shown to be any less effective a deterrent than other dispositions. We expressed support for fines as a supplementary or alternative sanction to restitution, where the harm is not to an individual but to society generally with the fine as a form of paying back to the whole community. However our comments were premised on the amount of the fine being sufficient to achieve these deterrent and restitutional objectives. Where the maximum amount of fine permitted under a statute is at such a low level that some potential violators of the statute are undeterred from committing the violation, the force of the statute itself is neutralized. In our Working Paper, we opposed uniformity in the dollar amount of fines and suggested a scheme of day-fines that recognizes the financial circumstances of each individual offender. Such a scheme could not be effectively implemented for Sunday observance violators under the low level of maximum fines now contained in the federal *Lord's Day Act*.

Quite apart from the low level of maximum fines permitted, there has been in recent years a judicial propensity to impose fines much lower than the maximum, and in some cases at the minimum

level prescribed by the Act. It is not clear whether this has happened because many of the cases involved mere technical violations of the Act without the presence of *mens rea,* or because the sentencing judges felt it would be unjust to impose anything more than a nominal fine given the anachronistic nature of the statute under which the conviction was registered.

In conclusion, the prohibitions in the *Lord's Day Act* have been neutralized *de facto* in four ways: (1) the enactment and application of provincial "opting out" legislation; (2) the failure to prosecute, either by the exercise of the prosecutory discretion of the provincial Attorneys-General or otherwise; (3) the characterization of certain prohibited activities as "works of necessity or mercy"; and (4) the absence of any effective deterrent to continued violations in view of the low level of maximum fines permitted.

What other anomalies and conflicts exist in the field of Sunday observance laws in Canada? For one, there appears to be uncertainty and some disagreement respecting the possible constitutional role of the provincial legislatures in the field. Ever since the Judicial Committee of the Privy Council in 1903 struck down Ontario's Act to Prevent the Profanation of the Lord's Day in the *Hamilton Street Railway* case because "treated as a whole" the Act was "criminal law" in the wide sense in which that term was used in section 91(27) of the *B.N.A. Act,* the provinces have been reluctant to enact legislation to meet modern commercial and social situations involving many aspects of Sunday other than the "opting out" type of legislation earlier discussed.

Some provinces have taken the position that provincial opting out legislation, permitting activities that would otherwise be prohibited by the federal Act, is all that is possible from a constitutional point of view. This was the position of the New Brunswick Select Committee on the Lord's Day Act which reported in 1967 to the Legislative Assembly in that province, and recommended a provincial Sunday Observance Act which "must of necessity be permissive in its context". It was also the position by implication of the Rameau Committee on the Opening and Closing Hours of Business Establishments in Quebec which reported to the Quebec government in 1966. However, that Committee did suggest that the provincial "permitting" legislation could also take the form of a regula-

tion which in its impact could either allow or prohibit, partially or totally, various commercial activities as long as such regulation was not religious in its purpose.

Both the New Brunswick Lord's Day Act enacted in 1967 and the Quebec Commercial Establishments Business Hours Act enacted in 1969 followed the recommendations of the respective Committee in each province insofar as the constitutional jurisdiction of the province over Sunday observance was concerned. The New Brunswick legislation sets forth a complex array of permissions administered through a permit scheme run by a five-man Board advising the Minister. The Quebec legislation completely side-stepped Sunday by excluding any reference thereto in the list of holiday dates covered, and for which strict opening and closing times are prescribed.

By way of contrast, the Ontario Law Reform Commission in its 1970 report concluded that the provincial legislatures have the constitutional jurisdiction to enact a plenary scheme of Sunday laws respecting provincial fields of activity as long as the legislation is carefully drawn to achieve secular and not religious purposes. The Commission further concluded that the secular plenary scheme of provincial Sunday laws can take either a prohibitive or a permissive form, and can be enforced by means of fines or other penalties. Only if a scheme of Sunday laws is designed to achieve religious purposes would it be required constitutionally to be permissive in form, as "opting out" legislation.

The recently enacted Retail Business Holidays Act in Ontario essentially follows these conclusions with a plenary scheme of prohibitions applying to eight named holidays plus Sunday and any other public holiday declared by the Lieutenant-Governor. There is no mention whatever of religion or a religious purpose in the Act. It avoids conflict with the *Lord's Day Act* by exempting from the provincial prohibitions the sale of goods or services permitted under the federal Act. The Act also acknowledges the scope permitted a province by the "opting out" provision in the federal Act by providing that any sales or employment of persons connected therewith that would be unlawful under section 4 of the federal Act become lawful if not prohibited by the new provincial Act. But apart from this the scheme for Sunday under the new Act stands

on its own, and is both prohibitive and permissive in its impact. The intermingling of Sunday with other named holidays of a non-religious nature for purposes of the plenary scheme of prohibitions points to its secular nature and, therefore, bodes well for its constitutional survival.

No other province has recently attempted or ever contemplated new plenary legislation in the field of Sunday observance. In British Columbia for example, the Sunday Observance Act, first enacted in 1863, is still law. That Act specifically includes the English Sunday Observance Acts of 1625, 1627 and 1677 and the Sunday Fairs Act of 1448 as part of provincial law, although there have been no known prosecutions in recent times. These ancient statutes go to great lengths to prevent profanation of the Lord's Day by prohibiting a broad range of both vocational and recreational activities. Municipal shop closing by-laws and permissive municipal by-laws pertaining to various types of recreation, entertainment and culture are permitted under the Municipal Act (other than in Vancouver) and under the Vancouver Charter for all or parts of that city.

Nova Scotia has a comprehensive province-wide "opting out" statute, the Lord's Day (Nova Scotia) Act which permits on Sunday public games or performances after 2 p.m., motor vehicle service stations, drug stores and restaurants, and certain classes of stores upon their obtaining a permit from the council of the municipality in which the store is located. While the permit system is local, the categories of permissions apply generally throughout the province and not by municipal by-law. However, Nova Scotia's Municipal Act authorizes a municipal council to enact shop closing by-laws in respect of "any day—for the entire day". Any such by-laws override the permissive sections of the Lord's Day (Nova Scotia) Act by virtue of the phrase "subject to any other Act of the Legislature or any by-law, ordinance or regulation made thereunder" which appears in each of the permissive sections of the latter Act. An early Act entitled Of Offences Against Religion, dating back to 1868 and last appearing in the Revised Statutes of 1900, has not been repealed although it may well have been regarded as unconstitutional by the statute revision officer on the strength of the *Hamilton Street Railway* case decided by the Privy Council in 1903. The Act provides fines for desecration of the Lord's Day

through shooting, gambling or sporting, frequenting tippling houses, and engaging in servile labour on that day, and fines for loosing or injuring horses in the vicinity of certain religious meetings.

The case law subsequent to the *Hamilton Street Railway* case has not clearly delineated the constitutional role of the provinces with respect to Sunday. While the courts have been consistent in holding as *ultra vires* provincial legislation having as its main purpose the prevention of profanation of the Lord's day (*Ouimet* v. *Bazin* in 1912, on appeal to the Supreme Court of Canada from Quebec) or of other religious feast days (*Henry Birks* case in 1955, on appeal to the Supreme Court of Canada from Quebec), there is a long line of cases in which the validity of municipal Sunday closing by-laws for certain business establishments has been upheld. While most of the municipal by-laws in these cases also contained provisions regulating business hours for other days of the week as well as Sunday, the prohibitions or regulations for Sunday were generally stricter than for weekdays. The best known of these cases was a decision of the Supreme Court of Canada in 1963 in *Lieberman* v. *The Queen*, involving the validity of a by-law of the city of Saint John, New Brunswick prohibiting the opening of public billiard or pool rooms or bowling alleys between midnight and 6 a.m. weekdays and all day Sunday. In upholding the by-law, Mr. Justice Ritchie for a unanimous seven-man court said:

> I do not think the inclusion of Sunday in the hours of closing of these businesses necessarily carries with it any moral or religious significance.

In the 1912 case of *Ouimet* v. *Bazin*, Mr. Justice Duff made the following distinction between federal religious legislation and provincial secular legislation affecting Sundays:

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

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

In the more recent case of *Robertson and Rosetanni* v. *The Queen* heard in the Supreme Court of Canada in 1963, the Court considered whether the federal *Lord's Day Act* was in conflict with the "freedom of religion" clause in the *Canadian Bill of Rights*. Mr. Justice Ritchie, for the majority, in deciding there was no conflict had this to say:

> 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*, 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 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.

One of the reasons advanced by Ritchie J. for finding that the Act was not in conflict with the *Canadian Bill of Rights* was that the *effect* of the Act was a purely secular and financial one, in some cases causing "a business inconvenience". Yet he had no hesitation in finding that the *purpose* of the Act was to safeguard the sanctity of the Sabbath (Sunday).

The somewhat unclear distinction drawn between purpose and effect in that case was criticized by Professor Laskin (now Chief Justice) writing in the Canadian Bar Review the following year. Chief Justice Laskin's casebook on Canadian Constitutional Law (3rd ed. 1967) also contains this statement:

> Of course, the *Lord's Day Act* could not be supported as valid federal legislation if it had a secular purpose.

Where provincial jurisdiction is well established is with respect to permissive provincial legislation enacted under the opting out clauses in sections 4, 6 and 7 of the *Lord's Day Act*. This was characterized by the Judicial Committee of the Privy Council in 1925 in *Lord's Day Alliance of Canada* v. *Attorney-General for Manitoba* in the following language:

> Legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath-breaking is not part of the criminal law where the acts and things permitted had not previously been prohibited. Such permission might aptly enough be described as a matter affecting "civil rights in the Province" or as one of "a merely local nature in the Province." Nor would such permission necessarily be otiose. The borderline between the profanation of Sunday—which might at common law be regarded as an offence and therefore within the criminal law—and the not irrational observance of the day is very indistinct. It is a question with reference to which there may be infinite diversity of opinion. Legislative permission to do on Sunday a particular act or thing may, therefore, amount to a useful pronouncement that within the Province the acts permitted are on the one side of the line and not on the other.

The Ontario Law Reform Commission in 1970 described provincial laws enacted under the opting out clause as:

> . . . a small island of permission in a federal sea of prohibitions defining profanations of the Lord's Day, with the island taking its religious character from the sea. As such a provincial permission has the effect of putting the designated activity outside of the federal *Lord's Day Act*.

The most recent opportunity presented to the Supreme Court of Canada for further analysis of the *Lord's Day Act* as possibly impinging on provincial jurisdiction over "civil rights" or "matters of a merely local nature in the Province" was in the case of *Boardwalk Merchandise Mart Ltd.* v. *The Queen* in 1972. There Mr. Justice Riley of the Supreme Court of Alberta decided that "safeguarding the sanctity of the Sabbath" was not within the fed-

eral criminal law power, and he, therefore, refused to convict Boardwalk, an Edmonton merchandising complex, for violating section 4 of the *Lord's Day Act* by opening on Sundays. He found the Act was not directed to cover any evil, and therefore could not qualify as "criminal law" as defined by earlier decisions of the Supreme Court of Canada. Moreover Riley J. accepted the argument that even if the *Lord's Day Act* was valid criminal law in 1906, it had become so watered-down by 1972 as to be in pith and substance labour legislation and no longer criminal law.

> We have now come to accept as proper many of the things which religion condemned as sinful at one time. . . . To examine the Lord's Day Act within this framework, it would become absurd to suggest that the statute is intended for a religious purpose.

The case was appealed to the Alberta Court of Appeal where Riley J.'s judgment was reversed on the authority of *Hamilton Street Railway*, McDermid J.A. stating that Boardwalk's arguments could only be dealt with in the Supreme Court of Canada. But leave to appeal to that Court was refused by Fauteux C.J.C., Abbott and Pigeon JJ. without reasons.

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

The final anomaly or conflict involving the federal *Lord's Day Act* involves the concept of freedom of religion. Even when the Act was first introduced as a bill in 1906, it was denounced by some M.P.'s as an attempt by Protestant Ontario to coerce Roman Catholic Quebec. While this opposition eventually died out largely owing to the support of the Roman Catholic archbishops of Canada, a more intense and long-lasting opposition campaign appeared to claim that the bill discriminated against those who observe out of religious conviction a day other than Sunday as the Sabbath. The Jewish community in Canada and the Seventh Day Adventists, both of which as a general practice observe the Sabbath on Saturday, argued strongly for an exemption clause in the bill permitting freedom from prosecution for engaging in one of the prohibited activities on Sunday if he observed Saturday as the Sabbath and actually refrained from work and labour on that day.

After an acrimonious debate, which saw both the government and the House divided, the proposal for such an exemption clause was defeated in the House by a vote of 79 to 57. The Act has been virtually unamended since that time.

Not that some degree of religious tolerance hasn't been present in the application of the *Lord's Day Act*. Prime Minister Laurier himself in the 1906 debate made it clear that the Attorney-General's prosecutory discretion under section 16 was included to prevent the Act from being used as an instrument of persecution and harassment. The Canadian Jewish Congress (Central Region) in a brief presented to the Ontario Law Reform Commission in 1970 stated:

> In the early 1950's the then Attorney-General of Ontario let it be known that bakery shops which were closed on the Jewish Sabbath would not be prosecuted if they kept open on Sundays. This arrangement has functioned successfully for more than 15 years in the Toronto area without once creating disruption or problems.

Similar practices may well be in effect in other provinces.

The Seventh Day Adventist Church in Canada has shifted recently from a position claiming an exemption clause to one urging repeal of the entire *Lord's Day Act* because of its religious purpose which discriminates and imposes economic sanctions against its members. The Church through its spokesman told the Commission in a brief that federal and provincial legislation could be easily amended to provide the necessary protection for employees who are fearful of any requirement for a seven-day work week.

How much religious tolerance is there in fact under existing Sunday laws in Canada? Section 11(*a*) of the *Lord's Day Act* declares as a work of necessity or mercy "any necessary or customary work in connection with divine worship". This phrase is not further clarified so as to indicate that the work must be connected with divine worship in a Christian church. Section 9 makes it unlawful to shoot a gun "in such a manner or in such places as to disturb other persons in attendance at public worship", with no further qualification as to the kind of worship. The term "Lord's Day" is defined in section 2(*b*) in neutral terms, i.e., "the period of time that begins at twelve o'clock on Saturday and ends at twelve o'clock on the following afternoon", without any biblical reference at all.

Yet taken as a whole, the *Lord's Day Act* on its face clearly has as its purpose the promotion of the strict Christian view of appropriate conduct for the Lord's day. Apart from the literal interpretation of the three sections just referred to, there is little room for the non-Christian to escape the net of federal prohibitions other than through the prosecutory discretion of the Attorneys-General or their agents under section 16.

Neither do the provincial opting-out laws necessarily provide complete religious freedom from some of these prohibitions. While these provincial laws are generally permissive rather than prohibitive in form, it is significant that some follow the pattern of permitting certain cultural, recreational or entertainment events to take place on Sunday only after 1:30 p.m., presumably so as not to interfere with attendance of the public at Christian churches (although this reason is seldom stated in the provincial Acts). In Quebec, section 7 of the Sunday Observance Act prohibits retail sales on Sunday but provides an exemption for "articles collected from the public for churches, and those destined for pious purposes [which] may be sold on Sunday at the doors of country churches". While there is no reference to Christian churches, the inference is clear. New Brunswick's Lord's Day Act includes a section making it an offence for an employer receiving a Sunday permit to open his shop to discriminate against an employee "who, by virtue of his faith, does not wish to work on the Lord's Day".

By way of contrast, Ontario's new Retail Business Holidays Act, 1975 contains an interesting provision which will permit greater freedom for non-Sunday observers who choose to close their businesses on Saturday. The provision exempts from the Sunday closing section any retail business establishment that is closed for a period of twenty-four consecutive hours in the period of thirty-two hours immediately preceding Sunday, as long as there are no more than seven employees and 5,000 square feet in such establishment. While the draftsman has carefully avoided any reference to the religion or faith of the shopowner seeking the exemption, it is obvious that Jews and Seventh Day Adventists in Ontario will be the principal beneficiaries of such a provision since they observe their Sabbath in each case from sundown on Friday evening until sundown on Saturday evening. However, the exemption is open to anyone, not just Jews and Seventh Day Adventists, who wishes to

comply with its terms and conditions, and therefore the Ontario Act successfully avoids the sort of religious characterization that might otherwise leave it open to constitutional attack.

Quebec had a limited sabbatarian exemption in its 1907 Sunday Observance Act for a person who "conscientiously and habitually observes the seventh day of the week as the Sabbath day, and actually abstains from work on that day", in which case he would be permitted to work on Sunday as long as he did not "disturb other persons in the observance of the first day of the week as a holy day" and "the place where such work was done [was] not open for trade on that day". However the section was repealed by the 1941 statute revision in that province.

The courts in Canada, unlike the U.S., were not really confronted with the problem of reconciling Sunday observance legislation with the notion of religious freedom until *Robertson and Rosetanni* v. *The Queen*, a case that arose in 1963 following the enactment of the *Canadian Bill of Rights* in 1960. There, Robertson and Rosetanni were charged and convicted for operating their bowling alley in the City of Hamilton on the Lord's Day. On appeal to the Supreme Court of Canada they claimed that the effect of the *Canadian Bill of Rights*, in particular the clause recognizing and declaring "freedom of religion", was to repeal section 4 of the *Lord's Day Act*, or alternatively to render it ineffective. As noted earlier the court by a four to one decision rejected this argument on two grounds: (1) the freedoms specified in the Bill were those existing immediately before that statute was enacted, and complete liberty of religious thought and untrammelled affirmation of religious belief existed before the Bill, notwithstanding the *Lord's Day Act*; and (2) the practical effect of the *Lord's Day Act* on those whose religion required them to observe a day of rest other than Sunday was a purely secular and financial one in having to abstain from business on Sunday.

It would have been possible to characterize the law as one compelling Robertson and Rosetanni to close their bowling alley on Sunday, for the purpose of promoting the Christian view of appropriate conduct for the Lord's Day. Cartwright J. in dissent did so, in suggesting that the Act differed only in degree but not in kind from one commanding a purely religious course of conduct such as attendance at least once at divine service in a specified

church. He concluded that section 4 of the Act infringed "freedom of religion" as declared and preserved in the *Canadian Bill of Rights* and thus must be treated as inoperative. He later in *Regina* v. *Drybones* in 1970 repudiated his position that a provision which infringes one of the declared rights in the *Canadian Bill of Rights* must be treated as inoperative, although he said nothing concerning his view that section 4 of the *Lord's Day Act* infringes "freedom of religion". Ritchie J. in *Drybones* maintained his earlier position that section 4 did not infringe "freedom of religion" although he found a section of the *Indian Act* to be inoperative as infringing the declared right of "equality before the law".

The net result of the *Robertson and Rosetanni* and *Drybones* cases, therefore, seems to be that the Lord's day is not affected by the right to "freedom of religion" as recognized and declared in the *Canadian Bill of Rights.*

This position would appear to be consistent with that taken by the U.S. Supreme Court which in a series of four cases heard in 1961 considered Sunday observance laws of Maryland, Pennsylvania and Massachusetts. These laws were challenged on the basis that they infringed the first amendment guarantees against any establishment of religion and against abridgment of its free exercise. The court rejected these challenges holding that, although the laws once had their origins in religion, both their purpose and effect in modern times were not to aid religion but to set aside Sunday for rest and recreation as a secular matter. It was also held that these laws did not impose on Jewish Sabbatarians an unconstitutional economic burden on the free exercise of their faith, since their inability to open their shops on Sunday when closed Saturday was considered as only an indirect burden on the exercise of religion since their religious practice as such was not made unlawful.

With respect to provincial Sunday laws which may "affect" freedom of religion, such as the provincial laws permitting certain cultural, recreational or social events only after 1:30 p.m., or providing exemptions from Sunday closing laws for those who close Saturday, the courts in Canada have not had occasion to consider the question primarily because few of the provinces have had a statutory bill of rights guaranteeing freedom of religion in the same manner as the *Canadian Bill of Rights.*

However, in *Walter* v. *Attorney-General of Alberta* in 1969, the Supreme Court of Canada considered whether the Alberta Communal Property Act was an unconstitutional provincial denial of freedom of religion in the sense that it was aimed at preventing the spread of Hutterite colonies in Alberta, the maintenance of which was a cardinal tenet of the Hutterite religion. The court rejected this argument on the ground that while the legislation limited the territorial area of communal land held and controlled the acquisition of land by new colonies, it did not prohibit the existence of such colonies nor the holding of land by them. Thus, it was not legislation in relation to religion. Even if "freedom of religion" (as an independent constitutional value) was beyond the power of the provincial legislature, the court held that this only involved freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship, and did not mean freedom from compliance with provincial legislation in relation to property holding.

Taking both the *Walter* and *Robertson and Rosetanni* cases together it would appear that the Supreme Court of Canada is unwilling to give such weight to freedom of religion as to invalidate federal and provincial laws reasonably regulating a particular area merely because they may have some impact on religious practices. Thus the concept of freedom of religion is not really a major constitutional impediment to legislative change at either the federal or provincial level, as long as the legislation is otherwise within the jurisdiction of the enacting legislature. This bodes well for the validity of provincial Sunday laws which do not have a religious purpose.

It has been suggested by various civil liberties commentators in Canada that freedom of religion is best protected if only Parliament has the authority to enact laws which have a religious concept. This suggestion is usually based on the premise that provincial legislatures have a greater propensity to take away civil liberties than does the Parliament of Canada, and that such legislation at the federal level is much harder to obtain because of the greater complexities and broader diversities in that institution. Thus, the argument goes, there is a valid *practical* basis for regarding any law-making power over religion as federal, if only because federal laws

are more difficult to come by, or at least more moderate in impact once enacted.

Others, however, do not accept this thesis and draw attention to the many positive steps taken by the provinces in recent years for the protection of civil liberties, such as for example, human rights commissions, ombudsmen and bills of rights. We do not find it necessary to enter into this matter because we are convinced that prohibitions obviously intended to curtail religious freedom—as opposed to the reasonable regulation of commercial and other activities that may in some way or other incidentally affect religious activities—would be categorized as criminal law and so within federal legislative competence.

In summary, the anomalies or conflicts inherent in the federal *Lord's Day Act* can be reduced to the following:

1. The prohibition of various types of activities on Sunday has been largely neutralized through provincial "opting out" legislation, through the failure to prosecute, either through refusal of provincial Attorneys-General to grant leave to prosecute violators or otherwise, through exemptions for "works of necessity or mercy", and through the ineffectiveness of the deterrent resulting from the low level of maximum fines permitted by the Act or imposed by the judges.

2. There is some uncertainty under the Act respecting the sort of Sunday trucking to be permitted as a "work of necessity or mercy" and the criteria to be utilized by the Canadian Transport Commission in granting permits under section 11(*x*), particularly whether road congestion and safety in a province are to be considered as factors.

3. There are constitutional problems regarding the exercise of jurisdiction by the provincial legislatures in the field of Sunday observance.

4. The concepts of freedom of religion and religious tolerance have not been satisfactorily reconciled with existing Sunday observance legislation although such concepts do not appear to be constitutional impediments to effective legislative change at either the federal or provincial level.

IV. Proposals for Change

What should be done about these anomalies and anachronisms? In our view nothing short of a major shift from the federal to provincial government responsibility for Sunday laws and their enforcement will suffice. **In specific terms this means the repeal of the *Lord's Day Act* and the enactment of independent secular measures in those provinces and territories where the enforced observance of Sunday and other holidays is desired.**

The reasons for our proposal are varied. First, we are certain that under modern conditions the criminal law is an inappropriate vehicle for legislating Sunday observance. In our Working Paper on the criminal law, *The Meaning of Guilt*, we attempted to draw a distinction between "real crimes" and "offences". Reference was made to the 19th century master of the criminal law, Mr. Justice Stephen, to whom we largely owe our Criminal Code, and who defined a crime in the popular sense as "an act which is both forbidden by law and revolting to the moral sentiments of society". We noted that "crimes" violate fundamental values, constitute wrongs of greater generality, and involve harm of a far more obvious kind than "offences".

In our Working Paper on the *Principles of Sentencing and Dispositions*, we suggested that since the criminal law is only one of the ways in which society attempts to promote and protect certain values respecting life, morals and property, it becomes important, if we are to avoid unnecessary social conflict and alienation, that the criminal law be used with restraint. We stated that where conflict arises in an area in which values may be changing

or uncertain, or where the injury to the protected value is small, we may not wish to resort to the full force of the criminal trial, conviction and sentence.

The *Lord's Day Act* in a modern setting surely does not create the type of "crimes" contemplated by Mr. Justice Stephen. It surely does not contain fundamental and general rules but ones that are merely useful in terms of providing regulatory protection in respect of commercial activities on a particular day of the week. Few people today would brand a violator of the *Lord's Day Act* as a "criminal" in the sense understood by ordinary citizens.

Our courts in Canada have not fully defined the parameters of what constitutes "criminal law", which is a responsibility assigned to the federal Parliament by the *British North America Act*, but it is clear that it is very wide. The Judicial Committee of the Privy Council in 1931 supported the validity of federal combines legislation as "criminal law" in the widest sense, and stated that there was little value in seeking to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence". However when the case was before the Supreme Court of Canada prior to being appealed to the Privy Council, Mr. Justice Duff did indicate some of its major objects, which he said were concerned primarily not with rights, with their creation, the conditions of their exercise, or their extinction, but with some evil or some menace, moral or physical, which the law aims to prevent or suppress through the control of human conduct.

Mr. Justice Rand provided further guidelines in the *Margarine Reference* in 1949 in suggesting that public peace, order, security, health and morality were the ordinary though not exclusive ends served by criminal law. He explained:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed, yet that effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.

It would appear to us that the objectives sought to be achieved in the enforcement of the *Lord's Day Act* under modern conditions are not within the scope of "real crimes" as we have defined them

in our Working Papers, or within the primary scope of "criminal law" described by these two distinguished judges of the Supreme Court of Canada.

This brings us to the second reason for our proposal: that modern laws regulating Sunday are primarily secular in nature. While the criminal law characteristics of the *Lord's Day Act* may, on its enactment in 1906, have been one of the dominant features, there is little doubt that its practical application and enforcement today is secular in nature and effect. The courts have taken note of this development. Mr. Justice Ritchie, speaking for himself and three of his brethren in the Supreme Court of Canada in *Robertson and Rosetanni* v. *The Queen* in 1963, described the effect and practical result of the *Lord's Day Act,* as a "purely secular and financial one" which in the case of non-Lord's Day observers can cause "a business inconvenience". This is not to say that the Act can no longer be justified under the "criminal law" power. In the same case Mr. Justice Ritchie reaffirmed earlier Canadian and Privy Council decisions that the "purpose" of the Act was to safeguard the sanctity of the Lord's Day. But, along with decisions such as the *Lieberman* case, it does indicate that provincial laws regulating commercial, recreational and other activities on Sunday will not lightly be categorized as religious and consequently invalid as constituting criminal law. Significantly, the United States Supreme Court in a series of cases decided in 1961 expressly denied the religious purpose of state Sunday observance laws, stating that although the laws once had their origins in religion, both their purpose and effect in modern times were not to aid religion but to set aside Sunday for rest and recreation as a secular matter.

Our third reason is that the law ought to say what it means and be applied evenly. As we mentioned, the *Lord's Day Act* today deals essentially with matters that are largely of local concern, but in order to do so it has required the manipulation of the law in such a way that it seems to say one thing while doing another.

In our Working Paper on the *Meaning of Guilt* we suggested that where the law says one thing but practises another this at best produces confusion and at worst hypocrisy. We stated that gaps between law in the books and law in practice are undesirable, and that it is far better that the law should do what it says and say what

it does so as to not allow myth and reality to be drawn too far apart. If there is lack of respect for a law or its standards of enforcement, then there is potential for damage to the institutions of government through public cynicism if that law is allowed to remain unaltered. All Canadian provinces and territories have to varying degrees availed themselves of the "opting out" provisions of the *Lord's Day Act,* and the prosecutory discretion of the provincial Attorneys-General. In our view these are facts which should not be ignored in any overall assessment of the Act. The Ontario Law Reform Commission strongly criticized the prosecutory discretion given to the provincial Attorneys-General by section 16 stating that it permits them to "vitiate unilaterally the effect" of the Act in their respective provinces and thus bring about a system of selective enforcement and the possibility of unjust discrimination. We agree with the Ontario Commission. If the Act is so controversial and uncertain as to require selective enforcement, then it is ripe for repeal.

A fourth reason for our proposal is that we are sceptical that law can effectively compel virtue and morality. There is a danger, too, that when the state tries to compel religious observance through law it may deprive individual citizens of many of the fundamental freedoms that are cherished in a parliamentary democracy and without which spiritual life is impossible. We would not, of course, deny that the law can be used to reaffirm fundamental values. In fact, we indicate in other reports that this is the major role of the criminal law.

The fifth reason for our proposal is that the provinces have already expressed some interest in assuming primary responsibility for Sunday laws. In 1971 a majority of the Uniformity Commissioners agreed with a suggestion that Parliament vacate the field occupied by the *Lord's Day Act* and that such legislation should be left to the provinces. This consensus was discussed by the Commissioners again in 1972.

Since 1963, Newfoundland has had province-wide secular shop closing and employment legislation which covers holidays and Sundays in The Hours of Work Act. Shops whose principal trade or business consists of the sale of one or more of a detailed

list of twenty-five classes of goods are exempted as long as they do not sell on the restricted days any articles other than those in the specified classes.

In 1969 the province of Quebec, following the recommendation of the three-man Rameau Committee, enacted the Commercial Establishment Business Hours Act. That Act carefully specified uniform store hours throughout the province for every day of the week and on holidays but it carefully avoided regulating Sunday hours. Nevertheless the Act establishes a modern and comprehensive scheme of a secular nature which could easily be made applicable to Sundays by simple proclamation of the Lieutenant Governor in Council if the *Lord's Day Act* were repealed.

The province of Ontario recently enacted The Retail Business Holidays Act, 1975 which establishes certain holidays on which retail business establishments must be closed. Sunday is included in the definition of "holiday", and all those things permitted by the *Lord's Day Act* and The Lord's Day (Ontario) Act are excepted from the provincial closing prohibition.

In short, in the provinces where over two-thirds of Canadians reside there is already in place a modern legislative mechanism for the regulation and restriction of Sunday selling.

Virtually all provinces now have legislation restricting hunting on Sunday, the sale of alcoholic beverages on that day, the closing of billiard rooms and the provision by employers of one day's rest in seven for employees; and all provinces and territories except Newfoundland have enacted legislation "opting out" in varying degrees of various federal prohibitions in the *Lord's Day Act* relating to recreation, entertainment or culture. In all cases but New Brunswick's the opting out is done through the vehicle of municipal "permitting" by-laws within specified provincial limits. In New Brunswick it is done on a province-wide basis and the Sunday activities permitted include both commercial establishments providing certain goods and services as well as recreational, entertainment and cultural activities. The municipal enabling legislation in most provinces contains authority for the enactment of shop closing by-laws which can be made applicable to all or a portion of hours on Sundays as well as to other days of the week.

Therefore, with a few limited exceptions, there is no jurisdiction in Canada where there is not some form of existing legislative and administrative framework under which Sunday selling and other commercial activities could not immediately be restricted or regulated if the *Lord's Day Act* were repealed.

This leads to a second and equally important proposal. **Before undertaking the wholesale repeal of the *Lord's Day Act*, the federal government should indicate its intention to do so in such a way as to allow all the provinces and territories sufficient time to review, amend or introduce their own comprehensive measures concerning Sundays and other holidays.**

From the briefs we have received and from the studies undertaken by other bodies, it would appear that there is widespread support in all parts of Canada for regulatory restrictions of some type on large scale commercial activities on Sunday. The federal government and Parliament have an obligation to make provision for an orderly transition from federal to provincial law and to avoid creating an unwanted legislative vacuum except in those provinces or territories where Sunday legislation is considered unnecessary.

This orderly transition cannot take place overnight. It may well involve providing that the federal repealing legislation come into effect in the various provinces on dates to be fixed by proclamation. This would allow the provinces and territories time to get their legislation in place. It undoubtedly will involve further discussions among the Uniformity Commissioners, and among the provincial Attorneys-General and the federal Minister of Justice. Much of the provincial legislation referred to earlier would probably have to be revised.

Equally important, **the commencement of this orderly transition from federal to provincial law should not be delayed.** As we mentioned earlier, it is never advisable to tolerate too large a discrepancy between what the law is and what it purports to be. With the present *Lord's Day Act* this discrepancy continues to grow. The outdated language (e.g., "hiring of horses and carriages") or concepts (e.g., section 10 prohibiting the sale or distribution of foreign newspapers on Sunday), which makes the Act anachronistic, added to the lack of consistency in the enforcement of the Act, gives some urgency to this question.

What are the substantive arguments favouring the assumption of responsibility by the provinces in this field? How can they do the job of regulating Sundays any better?

The provinces already have established jurisdiction in the field of labour standards and business regulation, except for certain federally regulated industries like the airlines, railroads and the post office. It is these two substantive fields of jurisdiction that allow the provinces to legislate one day's rest in seven and to permit municipalities to pass shop closing by-laws. Once the religious aspect of the legislation is removed, then clearly any remaining bases for the enforced observance of Sunday are both legally and for administrative purposes within the purview of provincial jurisdiction. In short, the provinces are already part way in the field and they have the administrative and enforcement machinery to do the job that is required. Repeal of the *Lord's Day Act* would not cause any major disruptions or dramatic changes in Sunday practice.

But more important, the type of Sunday laws desired by Canadians may not be the same in various parts of the country. There are bound to be local variations reflecting differences in culture, commercial activity, prevailing customs and mores. One of the great advantages of a federal system is that it permits decentralization of the legislative process in areas designated as being within the jurisdiction of the local component of the federation. In Canada, we are bound of course by section 92 of the *British North America Act* in determining what is properly within provincial jurisdiction, but judicial interpretation of that section has varied from time to time. It now seems reasonably clear that it would encompass the regulation of Sunday activities that are secular in nature, so long as this does not conflict with valid criminal and other federal legislation.

In recent years there have developed certain trends in intergovernmental practice between Ottawa and the provinces, particularly in discussions concerning constitutional reform. Out of these discussions and practices, there would appear to be developing a consensus that considerable decentralization of governmental power in areas touching culture and social policy is desirable, while greater centralization of power in areas having important economic effects at the national level is also to be encouraged. This approach was in fact recommended by the Special Joint Committee of the

Senate and of the House of Commons on the Constitution of Canada in its Final Report released in 1972, as part of an initial recommendation that there be a new Canadian Constitution based on functional considerations. The Joint Committee cited Sunday observance legislation as one example where each province should be permitted to regulate the conduct of its own people, as part of a general recommendation for fuller provincial control over the quality and style of life. We agree with this position. Not only would it permit greater flexibility throughout Canada in the substantive law of Sunday regulation, but it would permit experimentation within a province and facilitate further decentralization through delegation to municipalities where desirable.

The 1921 Convention of the International Labour Organization relating to weekly rest in industrial undertakings recognized the possibility of decentralization of laws relating to the requirement of one day's rest in seven when it provided in article 2(3) that the day of rest "shall, wherever possible, be fixed so as to coincide with the days already established by the traditions or customs of the country *or district*". By this Convention, it should be conceivable (but not probable) that the day of rest could be stipulated as a day other than Sunday. In fact, only one of the many nations which are signatories of the 1921 I.L.O. Convention, the State of Israel, has specified a day other than Sunday, although clearly there are federal countries like the United States, Australia and Germany where the substantive rules of Sunday regulation are determined at the local rather than the national level.

The provinces are in a better position to determine local, social and commercial needs and particularly the extent to which regulation is required to establish a uniform weekly day of rest. Decisions as to the extent of shop closing or limitations on recreational, cultural or entertainment facilities will obviously vary from area to area. So will the techniques of regulation, e.g., licensing system vs. criminal-type prohibition; municipal by-law vs. province-wide regulation; licence suspension or revocation vs. minimum and maximum fines, etc.

It is interesting to note for example the difference in the scope and technique of holiday closing legislation in Ontario and Quebec. In Quebec, there is an exemption for establishments located in places declared to be tourist areas by regulation of the Lieutenant

Governor in Council, whereas in Ontario any local municipality by by-law can provide what is in effect a tourist exemption for any class of retail business establishment; the former is a provincial government exemption while the latter is a decentralized municipal "opting out" exemption. Also, the maximum fine for an offence in Quebec is $1,000 while in Ontario it is $10,000. Quebec provides a number of exemptions based on a restricted trade or product designation or a maximum of three employees while Ontario requires a trade or product designation, a maximum of three employees and a maximum total floor area of 2,400 square feet.

It would be expected that legislation in other provinces would reflect the different consumer shopping habits and retailing trends present there, again emphasizing the suitability of local rather than nation-wide regulation.

A sixth reason for proposing the repeal of the *Lord's Day Act* is that in federal regulatory areas, with the exception of Sunday trucking, it is virtually a dead letter. In part this is because certain aspects of the Act have been superseded by more modern legislation, as for example, the *Canada Labour Code*. In part, it is because it has become inapplicable to modern conditions and is no longer enforced.

We discussed in previous chapters certain anomalies and conflicts in the regulation of Sunday trucking. Specific submissions on this subject were made to us by the Canadian Automobile Association, the Canadian Labour Congress and the Lord's Day Alliance. These three groups took the position that the Canadian Transport Commission under section 11(*x*) of the *Lord's Day Act* should grant fewer exempting permits for transportation undertakings as being works of necessity and mercy, primarily to reduce interference with Sunday recreational driving. The Ontario Law Reform Commission noted that

> Sunday trucking would be most destructive of the type of Sunday leasure environment which we wish to preserve, particularly for recreational driving on the main highways in the province or on those access routes going to and from recreational areas. It would also contribute substantially to noise pollution in or near residential and recreational areas.

We certainly understand this concern, but we are not prepared to endorse that Commission's proposal that Sunday trucking should

be wholly regulated by the provincial highway transport boards, including (by means of federal administrative delegation) interprovincial trucking.

There is an obvious federal interest here which would not disappear with the repeal of the *Lord's Day Act*. Interprovincial and international trucking clearly is subject to federal jurisdiction. Only intraprovincial trucking is subject to the jurisdiction of the provinces. While there is an obvious relationship between the type of Sunday regulation we have been discussing and the regulation and prohibition of trucks on Sunday, we are of the view that this aspect of Sunday regulation should come within the framework of motor vehicle transport legislation, and not Sunday observance legislation.

There may well be a case for applying special Sunday conditions to trucking firms based on a recognition of Sunday as a day on which there is increased recreational driving. However these special Sunday conditions should not be imposed under the federal *Lord's Day Act* but through amendments to federal transportation laws. This power could again be given to the Canadian Transportation Commission as at present, but the Commission should, in making its decision be required to consider traffic congestion and safety, as well as undue delay. This could be effected by providing in the *Motor Vehicle Transport Act* that no one licensed under that Act should operate on Sunday except with the permission of the Canadian Transport Commission and that in exercising its discretion the Commission should give consideration not only to the question of undue delay but also to the impact that Sunday trucking would have on traffic congestion and safety.

It may nonetheless be argued that this function should be delegated to the provinces. After all, the federal Parliament has delegated to provincial boards the power to regulate interprovincial trucking by means of licenses and tariffs. We do not wish to enter into the wisdom or otherwise of this approach. This is a matter of transportation policy, which we have not studied. But whatever justification there may be for this general course, there is ground for thinking that it should not apply to prohibitions against Sunday trucking. For example, should a trucking firm that begins a trans-Canada voyage in Vancouver on, say, Thursday be subjected to the vagaries of different provincial Sunday laws administered by different bodies? We are all the more hesitant to suggest delegation to

provincial bodies at a time when federal transportation policy is undergoing extensive re-examination. There is much, therefore, to recommend the retention of arrangements similar to those now existing so that they can be assessed in the light of general transportation policy currently being formulated. Our proposal is, therefore, advanced as an interim measure, to avoid the hiatus that would be created by the repeal of the *Lord's Day Act*. In developing a comprehensive transportation policy, many other factors would have to be considered. For example, it may well be necessary to give thought to whether the Commission should be given power to consider the impact on communities by various modes of transportation on Sundays based on the fact that Sunday is generally regarded as a day of rest.

But such matters, as we noted, are fundamentally questions of transportation policy and should be examined in that context. We do not believe this special problem should be looked at from the special perspective of the *Lord's Day Act* alone. Our recommendation that the repeal of that Act should be delayed to provide an orderly transition should afford the federal government time to consider alternative provisions.

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