

**ONTARIO SUPERIOR COURT OF JUSTICE DECLARES MANDATORY CLOSURE OF STORES TO BE VALID**

*R. v. Hy Zel's Inc.*, unreported dated November 30, 2000

In a judgment handed down on November 30, 2000, McCombs J. of the Ontario Superior Court of Justice overturned a 1996 decision of the Ontario Court of Justice which had struck down the *Retail Business Holidays Act*, S.O. 1990, c.R.30 as am. (the "*Act*") as unconstitutional.

**Facts**

The respondents were a number of corporations, individual corporate directors and employees, all involved in the operation of retail businesses. At trial, the respondents had faced charges under sections 2(1) and 2(2) of the *Act* for having unlawfully operated their respective businesses on a proscribed holiday. In the interests of expediency the parties agreed to have the charges consolidated and tried together. Counsel for the respondents had conceded at trial that the businesses were open on a proscribed holiday and thus were in violation of the *Act*. The only issue before the trial judge was the constitutional validity of the *Act*.

**Ontario Court of Justice**

At trial, the judge found that the evidence called by the prosecution was neither credible nor accurate. He went on to hold that the *Act* infringed multiple sections of the *Charter*, in particular freedom of religion under s.2 (a), life, liberty, and security of the person under s.7, and equal protection under the law under s.15 (1). In reaching his decision, he did not go through a s. 1 analysis rather he stated only that the *Act* could not be saved under s. 1. Accordingly, he declared the *Retail Business Holidays Act* to be unconstitutional and of no force and effect and he stayed the charges against the respondents under s. 24(1) of the *Charter*. The Crown appealed this decision.

**Ontario Superior Court of Justice**

McComb J. of the Superior Court of Justice found that the trial judge had erred in a number of fundamental ways. With respect to his findings of fact, McComb J. noted that the trial judge had failed to substantiate his findings regarding the credibility and reliability of the evidence presented by the parties. In the trial court decision, the judge merely stated that he preferred the evidence of the defendants to that of the prosecution, but he offered no explanation for his preference.

McComb J. noted that in reaching his conclusion that the *Act* violated s. 2(a) of the *Charter*, the trial judge did not address the decision of the Ontario Court of Appeal in *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd. et al.* (1991), 2. O.R. (3d) 65. In the *Peel v. A & P Ltd.* decision, the Ontario Court of Appeal had held that the *Act* did not violate s. 2(a) and, in the alternative, any violation would be justified under s. 1. In the *Peel v. A & P*

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*Ltd.* decision, the Court held that certain traditionally religious holidays, such as Christmas and Good Friday, had become secular common pause days. As such, these days did not limit the religious freedom of retailers who did not observe these holidays, and if they did, such a limit was insubstantial and did not warrant the protection of s. 2(a). The trial judge simply did not address this decision in coming to his conclusions, a decision that was obviously binding on him.

McComb J. noted that there are two components of s. 7, both of which must be satisfied before a violation will be established. McComb J. then went on to note that the trial judge had erred in failing to apply both facets of the test under s. 7. While the trial judge concluded that the defendants' rights to life, liberty and security had been infringed (a conclusion that is in direct opposition to the ruling in *Peel v. A & P Ltd.*), he failed to consider whether the law violated principles of fundamental justice. McComb J. noted that at the time of the decision in *Peel v. A & P Ltd.*, the *Act* prohibited shopping on sixty days of the year (holidays and Sundays) whereas the current *Act* prohibits shopping on only eight days. In McComb J.'s view, these amendments weakened the respondents' position on the s. 7 argument.

At trial, the judge had held that the *Act* violated the respondents' s. 15 right to equality based on the exemption of certain retail businesses, such as pharmacies, from the operation of the *Act*. McComb J. rejected the reasoning of the trial court judge and noted that his analysis under s. 15 of the Charter did not take into account the fact that the Court of Appeal in *Peel v. A & P Ltd.* had previously held that the *Act* did not violate s. 15. McComb J. also noted that the trial judge had concluded that the *Act* could not be saved under s. 1 of the *Charter*, but he had provided no reasons or analysis to support this conclusion.

In allowing the appeal, McComb J. held that the evidence relied upon by the trial judge was insufficient to justify the conclusions he reached with regard to the alleged *Charter* violations. McComb J. concluded his analysis by briefly summarizing the substance of the trial judge's errors as follows:

The only issue before the learned trial judge was whether the provisions of the Act met constitutional criteria, in the light of the evidence upon which he purported to rely, and in the face of authoritative findings of courts of superior jurisdiction.

With respect, in my view, the learned trial judge erred in failing to conclude that he was bound by the principle of stare decisis to apply the decisions of the Ontario Court of Appeal and the Supreme Court of Canada to which I have referred in this decision.

McComb J. allowed the appeal on the basis that the trial judge had erred in declaring the *Act* to be unconstitutional and of no force and effect. The judgment of the trial judge was set aside and the respondents were found guilty. As the trial judge had retired in the interim, McComb J. was asked to deal with the matter of sentencing. That hearing is pending.

The effect of this decision is to prohibit non-exempt retail businesses from operating on the eight proscribed holidays under the *Act*, namely New Year's Day, Good Friday, Easter Sunday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day and Christmas. Any retail business

that is not specifically exempted under the *Act* and that operates on one of the proscribed days may be fined as much as \$50,000 or the total amount of gross sales for the day, whichever is greater.