IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Sobeys Group Inc. v. Nova Scotia (Attorney General), 2006 NSSC 290

Date: 20061004
Docket: S.H. No. 268169
Registry: Halifax

Between:

Sobeys Group Inc., et al

Applicant

v.

The Attorney General of Nova Scotia, Representing Her Majesty the Queen in Right of the Province of Nova Scotia

Respondents

- and

Atlantic Wholesalers Ltd., et al.

Intervenors

DECISION

Revised Decision::	The names of counsel have been corrected according to the erratum dated October 4, 2006
Judge:	The Honourable Justice K. Peter Richard
Heard:	August 30 - 31, 2002 in Halifax, Nova Scotia
Written Decision:	October 4, 2006
Counsel:	David P.S. Farrar, Q.C., Sherri Conlon and Donn Fraser for the Applicant Edward Gores, Q.C., Glenn Anderson, Q.C., Alex Cameron, for the Respondents

John A. Keith, Colin J. Clarke, W. Harry Thurlow,
For the Intervenors

By the Court:

[1] In this application Sobey's Inc. et al (Applicants) and Atlantic Wholesalers Ltd. et al (Intervenors) seeks a declaration that certain regulations made pursuant to the *Retail Business Uniform Closing Day Act* (the Act) are ultra vires in that the Act does not provide legislative authority to the Governor - in - Council (the Cabinet) to make such regulations. Counsel for the applicant, in oral submission put the matter quite succinctly in his opening remarks:

> Well, what this application is about is not about social or political considerations. It's not about the appropriateness of Sunday shopping, nor is it about the power of the legislature to pass an Act dealing with Sunday shopping. This case, this application is about one fact and it is about the scope of the Cabinet's power to pass Regulations pursuant to the Act.

[2] Neither the Applicant nor the Intervenor suggested that the province lacked the constitutional authority to enact legislation respecting these matters and it was implicit throughout the hearing that had the impugned sections been incorporated into the Act, rather than the Regulations, this hearing probably would not have taken place. This point will become clearer in the later discussion of the Ontario Act upon which, according to the Respondent, the Nova Scotia Act was patterned.

[3] The specific sections to which this application refers are underlined in the following:

> *3(1) The goods and services provided by a retail business in any of the following categories are prescribed as goods and services to which Section 3 of the Act does not apply*:
>
> (a) a store
>
> (i) whose principal business is selling groceries, and
>
> (ii) that at no time operates a retail sales area greater than 4000 sq.ft.

> (2) For the purposes of clause 1(a), 2 or more stores that are owned, occupied or operated by related persons are deemed to be one store if they are (a) in the same building; or (b) adjacent or in close proximity to each other.
> (3) For the purposes of subsection (2), "related persons" has the same meaning as in the Income Tax Act
> (4) Subsection (2) does not apply to a store if that store was regularly open to the public on Sunday before June 1, 2006.

[4] The nature of the challenge to the validity of these regulations is set our at page 1 of the Applicant's pre-hearing Memorandum as follows:

> (a) It exceeds the jurisdiction of the Governor in Council and is thus ultra vires on the basis that (i) it is outside the scope of the purpose and intent of Act; and (ii) it unlawfully discriminates against the Applicants
> (b) it was enacted for an improper purpose and was based on arbitrary, irrelevant and extraneous considerations, amounting to bad faith.

Legislative Review

[5] The various parties, in written and oral submissions, traced the history of holiday closing legislation back to those times when such legislation had definite religious overtones. Such names as *Sunday Desecration Act., An Act for the Better Observation of the Lord's Day, Sunday Observance Act, Offences Against Religion Act and The Lord's Day Act* - all denote a certain Christian sense of origin. The religious nature of this sort of legislation was the subject of a constitutional challenge in 1985 in the Supreme Court of Canada case of *R. v Big M Drug Mart* (1985) 18 D.L.R. (4th) 321. This case challenged the constitutionality of the Federal *Lord's Day Act* . The Act was struck down as being in conflict with s.2(a) of the *Charter of Rights and Freedoms*. The resulting void in Sunday closing legislation prompted the provinces to enact "secular" legislation. There is no dispute that the provinces had the constitutional authority to enact such legislation. For the purposes of this decision there is no need to go back further than the original "secular" Act in Nova Scotia.

[6] The original Nova Scotia legislation directed to this subject started with Bill 70 which was passed through the Legislature in 1985. The Bill was originally

entitled *An Act Respecting the Operation of Retail Businesses on Holidays* but in the process of going through the Legislature the name was changed to *Retail Business Uniform Closing Act.* The original Act provided that municipalities could enact by-laws pursuant to the act.

> *(4) A by-law made pursuant to this section shall provide for the issuing of permits pursuant thereto and may*
> *(a) limit the number of permits that may be issued for any class or classes of business;*
> *(b) prescribe the classes or types of business with respect to which permits may be issued;*
> *(c) designate an area of the municipality as a tourist area;*
> *(d) prescribe the hours during which any class or classes of business may be operated on a uniform closing day;*
> *(e) prescribe fees for permits*
> *(f) provide for the suspension or cancellation of permits;*
> *(g) prescribe the term or duration of permits.*

[7] Several years later the Act was amended to remove this authority from municipalities since it was generally determined that the existing Act made for a "patchwork" of store hours throughout the province. The store closing powers were assumed by the province and the Act now contained the following clause respecting the delegation of authority to the Cabinet to make regulations:

> *8. The Governor in Council may make regulations*
> *(a) defining a word or expression used in this Act and not defined herein;*
> *(b) determining or modifying the meaning of a clause of subsection (2) of Section 3;*
> *(ba)permitting a retail business to operate on Sunday between one o'clock in the afternoon and six o'clock in the afternoon in order to implement the result of the plebiscite held pursuant to Section 10.*
> *© respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.*

[8] The regulations challenged in this application were enacted pursuant to powers which the Cabinet assumed under the terms of the above delegation clause. In this context, counsel for the Intervenors attacked the entire regulation making power that the Cabinet had assumed under the provisions of the Act. In his oral submission counsel said:

> *The important thing my Lord is, this regulation that started this whole mess was completely invalid. They [Cabinet] took a power that belonged to the municipality and they assumed if for themselves and they did it by pretending that the word business didn't mean business even though the Act says what a business was, they said it means a good and service. So what you have my Lord, is you have a very strange situation in December, 1986 where the Governor in Council created a regulation province-wide shutting down grocery stores over 8,000 sq. feet at the same time the Legislature has said that the municipalities have that power. They [Cabinet] took away a legislative power and gave it to themselves with no statutory power*.

[9] Counsel then expanded this argument so as to call into question the entire regulatory regime set out in the Act. This is a much broader attack on the regulations and goes beyond what both the Applicant and the Intervenor are seeking in this Application. For this reason, I find it unnecessary to consider this aspect of the argument. Perhaps that will be left for a future Application by other interested parties.

[10] Pete's Frootique, a large grocery business located in a Bedford Shopping Mall (later opening a branch on Spring Garden Road in Halifax) re-configured its corporate structure to provide for separate incorporated businesses, each with a square footage equal to, or less than, the maximum allowable under the Regulations. In 1999 The province laid charges against Pete's Frootique for being in breach of the Regulations under the Act. The matter went to trial in Provincial Court and resulted in an acquittal. In his brief decision, Judge Curran found that the legislation and regulations made pursuant thereto constituted penal legislation and ought be given strict interpretation. Judge Curran interpreted the Regulations strictly and found against the province. He found that the corporate structure of Pete's Frootique was in compliance with the Regulations. This finding is consistent with the authorities on this point. In Sullivan and Driedger on the Construction of Statutes Butterworths 2000 at page 384 the author states the principle as follows:

> *Penal legislation is legislation that creates offences punishable by fine, loss of freedom or curtailment of a privilege or right. Because of the potential for serious interference with individual rights, penal legislation is strictly construed*.

[11] Surprisingly, this acquittal was not appealed by the Crown. At this hearing, counsel for the Respondent (Crown) asserted that this decision was "bad law". On questioning by the court, counsel offered no explanation as to why the province had not appealed. One may conclude from this case that, by not appealing the decision, the province at least acquiesced in it. As a logical extension of this it is reasonable to suggest that others who followed the same procedure could do so without fear of prosecution.

[12] In the Spring of 2006 both the Applicant and the Intervenor moved to re-configure their respective corporate structures to comply with the provisions of the *Retail Business Uniform Closing Day Act*...and its regulations. In the result the re-structured corporations opened separate corporate entities to operate businesses on Sundays, commencing on 11 June 2006.

[13] Halifax police investigated stores of both the Applicant and the Intervenor for alleged violations of the Act. On 10 August 2006 the HRM Police issued a release which stated in part:

> *After a thorough review of the evidence and extensive consultation with the Public Prosecution Service, police have determined there are insufficient grounds at this time to lay charges. Police are satisfied that the current openings are within the law*.

[14] In response to this finding by the police and prosecutor Cabinet then moved to amend the regulations by adding sub sections (2), (3) and (4) to Section 3 (1) (a) of the Regulations. It is the challenge to these sections which comprise the substance of this application.

[15] The province also moved to provide relief to retail workers respecting work on Sundays. A press release dated 10 July 2006 spoke to a Bill which was introduced to amend the *Labour Standards Code*. The release stated in part:

> *The bill will use a two-step approach to protecting the existing rights of retail employees not to work on Sundays. First, it will amend the Labour Standards Code to give every retail employee the right to refuse to work on a uniform closing day as defined in the Retail Business Uniform Closing Day Act —Sundays and Holidays. Then, through regulation, cabinet will create exemptions similar to those in the Retail Business Uniform Closing Day Act.*

[16] The wording in the *Code* is strikingly similar to the wording in the *Retail Business Uniform Closing Day Act.*

[17] It is somewhat revealing that the power given to the Governor in Council in the Labour Standards Code states in part *The Governor in Council may make regulations concerning any matter or thing which appears **to him** necessary or advisable for the effectual working of this Act...* This introduces a subjective element into the power given by the legislation, whereas, in the Retail Business Uniform Closing Day Act this power is defined as - *respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act* . The difference between these two approaches is substantial as stated in Driedger in *Construction of Statutes* (2ed, 1983) at 328:

> *Sometimes the authority is to make such regulations as are necessary for carrying out the Act. It is doubtful that the words -as are necessary- add anything. In their absence, the Courts would no doubt strike down a regulation they thought unnecessary. In either case, the Courts would no doubt be the judges of necessity. Wider authority is conferred if a subjective test of necessity is prescribed. This power may be conferred on the Governor in Council to make such regulations as he deems necessary (advisable, expedient) for carrying out the purposes of the Act. In such a case...the regulation making authority is the sole judge of necessity and the Courts will not question his decision, except possibly if bad faith were established. (Underscoring mine) There is, therefore a vast difference between the two following examples and the extent of the power conferred:*
> *May make such regulations as may be necessary for carrying out of the provisions of this Act*
> *May make such regulations as he deems necessary for carrying out the provisions of this Act.*

[18] It appears from this analysis that had the Minister or Cabinet (the regulating authority) been granted the power to make such regulations *as he deems necessary* then this court would be hard pressed to find the legal authority to question such decision. In the absence of such a subjective authority it is open to the Courts to objectively review the challenged regulations to determine if they were made under the authority of the Act, or, whether such regulations exceeded the specific authority and are thus *ultra vires* the Cabinet.

Respondent's Position

[19] The respondent places great emphasis on the Supreme Court of Canada case of *Edwards Books and Art Ltd. V. The Queen* (1987), 35 D.L.R.(4th) 321, and the comments of Dickson CJ contained therein. In his opening comments, Dickson CJ:

> *In this appeal the court is called upon to consider the constitutional validity of Sunday-closing legislation enacted by the Province of Ontario sub nom. Retail Business Holidays Act, R.S.O. 1980.c/ 458.*

[20] The constitutional questions which the court was asked to consider were as follows:

> *1. Is the Retail Business Holidays Act, R.S.O. 1980, c. 453, within the legislative powers of the Province of Ontario pursuant to s. 92 of the constitution Act, 1867?*
> *2. Does the Retail business Holidays Act, R.S.O., 1980, c. 453 or any part thereof, infringe or deny the rights and freedoms guaranteed by ss. 2(a), 7, and/or 15 of the Canadian Charter of Rights and Freedoms and, if so, to what extent does it infringe or deny these rights?*
> *3. If the Retail Business Holidays Act, R.S.O. 1980, c. 453, or any part thereof, infringes or denies in any way ss. 2(a), 7 and/or 15 of the Canadian Charter of Rights and Freedoms, to what extent, if any, can such limits on the rights protected by these sections be justified by s. 1 of the Canadian Charter of Rights and Freedoms and thereby rendered not inconsistent with the Constitution Act, 1982?*

[21] In addressing these questions Dickson CJ, in his usual articulate and comprehensive manner considered the reasons for the legislation and the social and economic backdrop in which the legislation was promulgated. He examined in detail the Ontario :Law Reform Commission "Report on Sunday Observance Legislation" as well as the text of the impugned legislation and the legislative debates relating thereto. In considering the thrust and social imperatives implicit in the legislation, Dickson CJ at page 42 quoted the following passage from the Ontario Law Reform Commission report:

> *Thus while our productive capacity and economic standard of living continue to increase in Ontario, our collective opportunity for the more intangible benefits of participation in leisure activities together [emphasis of the report] with family, friends and others in society*

> *continues to decrease. It is in the light of this continuing erosion of statutory holidays and evening hours that we consider it absolutely essential [emphasis added] that the government now attempt to preserve at least one uniform day each week as a pause day, before it is too late.*

[22] He then went on to say:

> *The opinion of the commissioners in reaching this conclusion was influenced by a number of studies summarized in c. 6 of the report, but, in my view, it is unnecessary to resort to these studies in order to understand the importance of a common pause day. I regard as self-evident the desirability of enabling parents to have regular days off from work in common with their child's day off from school, and with a day off enjoyed by most other family and community members. I reiterate the view expressed in Big M. Drug Mart at p. 353:*
> *I accept the secular justification for a day of rest in a Canadian context and the reasonableness of a day of rest has been clearly enunciated by the courts in the United States of America."*

[23] Clearly, Dickson CJ and the other members of the court in *Edwards Books*, shared the concerns of the Law Reform Commission in protecting the rights of those workers who were particularly vulnerable to the pressures of large retail operations - see page 46 et seq of the decision. The court seems to have no difficulty in finding that the impugned legislation was intra vires the provincial legislature. At page 49 Dickson CJ stated:

> *When the interests of more than seven vulnerable employees (seven being the maximum number permitted to work in those exempted retail operations) in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the legislature for determining that the protection of the employees ought to prevail. This is not to say that the Legislature is constitutionally obligated to give effect to employees interests in preference to the interests of the store owner for large operations, <u>but only that it may do so if it wishes</u>".(underscoring mine)*

[24] The court went on to find that the impugned legislation was within the legislative powers of the province.

[25] In my view, the Edwards Books case confirms the constitutional validity of "Sunday shopping" legislation aimed at protecting the rights of those more vulnerable employees. One must bear in mind, when considering this case in the context of the present discussion, that the relevant provisions were found in the Act itself and not in regulations passed by the Governor - in- Council under the authority of the Act. There was no question in Edwards Books of the appropriateness of regulations or whether the subject legislation gave specific authority to prescribe such regulations.

[26] For these reasons I fail to see how Edwards Books can be of assistance in determining the validity of Regulations made pursuant to the Nova Scotia Act.

Ontario Legislation

[27] The Respondent places emphasis upon the similarities between the *Ontario Retail Business Holidays Act* and the Nova Scotia *Retail Business Uniform Closing Day Act.* After discussing the purported objectives of the Ontario legislation the Respondent, at page 21 of the brief said:

> *64. Those objectives of Ontario's Retail Business Holidays Act were described by the Supreme Court of Canada. Since Nova Scotia's Retail Business Uniform Closing Day Act was "patterned after" indeed, "copied directly from" Ontario's legislation, Chief Justice Dickson's analysis is, with respect, binding on this Court. In fact, the Nova Scotia legislation was before the Court in Edwards Books and Art (p.66)*
> *65. Indeed, Chief Justice Dickson's description of the objects of the legislation are on all fours with the Attorney General of Nova Scotia's description of those objects when the Retail Business Uniform Closing Day Act was introduced at second reading in the Nova Scotia House of Assembly .*
> *This legislation, quite frankly, Mr. Speaker, is patterned after the 1975 Ontario legislation. Quite some time ago, I was aware of the case that was coming up from Alberta. In anticipation of this possibility we had looked at alternative forms of legislation in an attempt to devise ways and means by which we could still maintain*

> *some degree of control over the opening hours of retail businesses on holidays, and to attempt to deal with the issue in a secular manner, so that we would not be trespassing on the Charter of Rights.*

[28] In my view, it is somewhat of a "stretch"to state that the Nova Scotia legislation was before the Supreme Court of Canada in the *Edwards Books* case. A closer reading of the case shows that La Forest, JA, at page 66 in his dissenting opinion, made mention of several such Acts in the context of the constitutionality of those Acts. Also, this Court would be bound by this decision of the Supreme Court of Canada - if this court was asked to interpret similar legislation. Such is not the case. At the risk of repetition, this Court is asked to determine whether or not Cabinet had the legislative authority to enact the impugned regulations.

[29] Is it accurate to state that the Nova Scotia Act was "patterned after" or "copied directly from" the Ontario legislation? In the context of this application that is very much open to question. There are several substantial differences between the two Acts which bear heavily on this case and militate against a conclusion that the Act was "copied directly from" the Ontario statute:

> 1. - The blanket prohibition respecting holiday shopping is set out in s. 2 of the Ontario Act which is followed by a series of exemptions including a retail business employing three or less employees serving the public and has a total area less than 2,400 square feet. These provisions are set out in the Act and not in Regulations made pursuant to the such Act
> 2. - The power to make regulations under the Ontario Act are circumscribed by s.4(3) and (4) of the Act as follows:
> *(3) the Lieutenant governor in Council may make regulations providing that section 2 does not apply to any class of retail business establishment in territory without municipal organization or any part thereof in respect of the sale by retail of such goods or services on such holidays for such periods of time and under such conditions as are specified in the regulations.*
> *(4) A by-law or regulation made under this section may classify retail business establishments by Size, number of persons employed, character of business, location or any other criterion.*

[30] Clearly, the power to make regulations is restricted to the specific provisions of s.4 of the Act and more particularly to s.4(2) *"Where it is essential for the maintenance or development of a tourist industry..."*.

[31] Here, the clauses in dispute are in the Regulations passed by Cabinet pursuant to the power given to Cabinet under the "omnibus" section of the Act which is cited earlier in this decision.

[32] It is clear from this analysis that there are substantial differences between the Ontario Act and the Nova Scotia Act. And these are differences which go to the very root of the application before me.

Employees

[33] The Respondent takes the position that the Act, and regulations have, as their principle goal, the protection of a "day of rest" for that vast number of retail employees who are non union and therefore have no formal body to protect their rights. The Applicant and the Intervenor, on the other hand argue that the Act is silent respecting employees and its sole thrust is to regulate businesses. In contrast, the Ontario Act refers to "Retail Holidays" and states the maximum number of employees who can be working on those days. And other restrictions are found in the Ontario Act. Additionally, the Applicant and Intervenor say that the Province of Nova Scotia elected to provide protection to employees by amending the provisions of the *Labour Standards Code* as earlier discussed. Therefore, there would be no need to provide additional protection in the *Retail Business Uniform Closing Day Act*. These arguments seem to weaken the position of the Respondent in this respect. However, that is not determinative of the issues before the Court in this Application.

Summary and Conclusions

[34] In order to put this entire matter in the proper perspective I will repeat, yet again, what this application is NOT about. It is not about any social or political considerations respecting the appropriateness of Sunday shopping; nor is it about the constitutional authority of the legislature to enact legislation dealing with Sunday shopping; nor is it about the protection of vulnerable retail employees

being required to work on Sundays. This application is simply about the scope of the authority or power granted to the Governor in Council (Cabinet) to make regulations pursuant to the Act.

[35] By enacting the *Retail Business Uniform Closing Day Act* the province exercised its undisputed constitutional power to control business operations on selected holidays, including Sunday. Had the province (as did Ontario) passed the restrictive measures as part of the Act there would probably be no question as to the validity of such laws.

[36] By electing to place the power with Cabinet by way of the impugned Regulations it became the responsibility of Cabinet to make certain that such power was exercised in accordance with the powers delegated to it by the Legislature through the Act. It is trite to say that Cabinet can only do that which it is expressly, or impliedly permitted or authorized to do by the Legislature. Ths delegated power could have been greatly enhanced by the use of subjective discretionary provisions such as those found in the Labour Standards Code. Such a subjective power may even be sufficient to withstand any challenge based upon allegations of discrimination since the Cabinet would be the sole judge of "necessity or reasonableness".

[37] It is the finding of the Court that the impugned Regulations are discriminatory as against the Applicants and the Intervenors, and indeed against any other retailer not falling within the restrictive provisions of such Regulations. Objectively considered, these regulations do not give to Cabinet the power to discriminate in the manner which it did in this case. Cabinet cannot discriminate either as to the size of the retail outlet or the corporate structure of it without the requisite regulatory power. Such power is neither express or implied in Section 8 of the Act. It logically follows that the impugned regulations are *ultra vires* the Governor in Council (the Cabinet) and are therefore of no force and effect.

[38] I decline to make any ruling with respect to the allegations of bad faith since such a finding is not necessary to the disposition of this matter.

[39] Accordingly, an order will issue declaring that s.3(1)(a)(ii),s.3(2),s.3(3) and s. 3(4) of the Order in Council 2006-315, N.S. Regulation 98/2006 dated June 28, 2006 enacted pursuant to the *Retail Business Uniform Closing Day Act* , R.S.N.S. 1989, c. 402 are invalid, *ultra vires* and of no force and effect.

[40] Judgment accordingly

Richard, J.