

June 22, 2006

Supreme Court of Canada: Mandatory “Secular” Holidays Do Not Infringe Charter Rights

In March of this year, the Supreme Court of Canada dismissed an appeal regarding a constitutional challenge of the *Retail Business Holidays Act*. Most of us thought this topic had died down some time ago.

The *Retail Business Holidays Act* (Ontario) was enacted in 1975 to regulate shopping on holidays. Amendments in 1989 loosened the restrictions, and in 1993 Sunday shopping was allowed, except on Easter Sunday. In 1996, Boxing Day was removed from the list. Currently, Section 1 of the Act defines “holiday” as New Year’s Day; Good Friday; Victoria Day; Canada Day; Labour Day; Thanksgiving Day; Christmas Day; and Easter Sunday.

Hy and Zel’s Inc. took the matter on in the late 1990s when they, along with some employees, were charged with working on a “forbidden day.” Their defence was that the Act was unconstitutional; they claimed it infringed their rights to freedom of religion and equality guaranteed by the *Canadian Charter of Rights and Freedoms*. At trial, Hy and Zel’s won; the Act was declared unconstitutional. The Crown successfully appealed. Hy and Zel’s further appealed but the Court of Appeal and most recently the Supreme Court of Canada upheld the Act.

The Court of Appeal ruled that the Act did not infringe the Charter right to freedom of religion, based on a finding that the secular purpose of the Act was to provide a day of common pause for retail employees; the purpose was not to prefer Christian religious observance. The Court disposed of the equality rights argument, holding that the differential treatment of the workers was not based on any of the grounds listed in the *Charter* (e.g. age and sex).

The Act was upheld as constitutional and therefore remains in full effect. This means it is an offence for retailers to carry on business on a “holiday” as listed above. These 8 days are the only prohibited days, but the Act does provide exemptions for small stores; pharmacies; art galleries; premises used for the purposes of education, recreation or amusement; necessary services and certain other uses. Municipalities may also allow certain establishments to be open on a holiday for the purposes of tourism.

We can take from the decision that future constitutional challenges to this type of legislation will likely be unsuccessful. The Supreme Court has effectively stated that it is within the Legislature’s domain to determine which days are “holidays” regardless of their religious historical roots.

Relocation – A Risky Business

A landlord created a remerchandising plan, hoping to improve the fortunes of its shopping centre: it would add a major grocery store and a bank. It lined up lease deals with both, then set out to relocate a number of tenants, including a small 700 square foot convenience/souvenir store to execute the plan.

The convenience/souvenir store lease contained the following, fairly common limitation: “The landlord’s right to relocate shall not be exercised for the *purpose* of depriving the tenant of the use and enjoyment of the premises, *or* in order to re-let the premises to another party” (*our emphasis*). This limitation was designed to give the tenant some measure of protection against the landlord arbitrarily relocating the tenant for the purpose of giving its space to another tenant. Or, could it be argued that it was intended to *prevent* the landlord from relocating the tenant at all? This was the issue facing Justice Matlow in *Nicholby’s*

Franchise Development Inc. v. 1263448 Ontario Limited. [2005] O.J. No. 4396

The court accepted that the “purpose” of the relocation was to make way for a grocery store anchor tenant whose presence would benefit the entire shopping centre. The “effect” of the relocation would be to deprive the tenant of the use and enjoyment of its premises. (Indeed, a landlord cannot relocate a tenant without doing so.) The convenience/souvenir store premises would be consolidated with other space including common areas, to create the space to be leased to the grocery store. (Most relocations entail re-letting the premises to another party, unless the landlord converts the premises into common areas.) The landlord tried to persuade the court to look at the “purpose” of the relocation: it was not *aimed* solely at depriving this tenant of its premises or re-letting the premises to another party. The landlord argued that the relocation was for the larger purpose of enabling the redevelopment and remerchandising of the shopping centre, to the benefit all of the tenants, and that the premises were being demolished to make room for another tenant’s larger premises.

The court disagreed. Justice Matlow’s decision reads, in part, as follows:

It is the position of the [tenant] that its compulsory relocation by the [landlord] would be contrary to the lease and would violate the [landlord’s] covenant for quiet enjoyment of the leased premises. In particular, its counsel submits that the relocation provision in the lease is both paramount and unambiguous and expressly forbids the [landlord] to require the [tenant’s] relocation in order to lease the leased premises to another tenant.

I agree with the [tenant’s] position. I am satisfied that the [landlord] is attempting

to do something which is contrary to the provisions of the lease and that it is not entitled to proceed to require the [tenant’s] relocation. The [landlord’s] intention to lease a portion of the leased premises to another tenant is not allowed. It matters not that the relocation sought is required, even in good faith as claimed, to enable the [landlord] to proceed with its plans to remerchandise the mall. Nor does it matter that the leased premises have not been singled out and that the [tenant] is not the only tenant whom the [landlord] wishes to relocate.”

The court used the protective wording to nullify the relocation right. Reviewing the history of the negotiations of this particular lease clause, it appeared that this may not have been the intent of the parties. Nevertheless, this is how the court interpreted it, so those who continue to use such wording should consider themselves warned.

In the Canadian shopping centre industry, this language is found in many leases. It may be perceived that the language was designed merely to protect a tenant from being singled out, but not to curtail the landlord’s right to relocate tenants generally in the context of an overall remerchandising or reconfiguration of the mall. Unfortunately for the landlord, the court did not see it that way.

How does the story end? The landlord did not appeal. After the litigation came the negotiation; ultimately, the tenant relocated to the very premises that the landlord offered in the first place. The grocery store has now opened and the shopping centre has been improved. The *Nicholby’s* decision is an important caution to redevelopment-minded landlords, who need to be aware that the scope of their relocation rights may be significantly limited by the courts if they are not generously articulated.



Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients’ needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

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FRANCINE BAKER-SIGAL
416-597-8755
francine@dv-law.com

JEANNE BANKA
416-597-0830
jbanka@dv-law.com

JOANNA BOARD
416-597-9225
jboard@dv-law.com

DENNIS DAOUST
416-597-9339
ddaoust@dv-law.com

WENDY DONNELLY
416-597-9306
wdonnelly@dv-law.com

BITALI FU
416-598-7053
bitalif@dv-law.com

LINDA GALESSIERE
416-597-8758
Lgalesiere@dv-law.com

JOSEPH GRIGNANO
416-598-7049
jgrignan@dv-law.com

RONALD HABER
416-597-6824
rhaber@dv-law.com

WOLFGANG KAUFMANN
416-597-3952
wolfgang@dv-law.com

LYNN LARMAN
416-598-7058
llarman@dv-law.com

MIMI LIN
416-597-8493
mimil@dv-law.com

DAWN MICHAEOFF
416-597-8578
dmichaeloff@dv-law.com

FRANCES PENG
416-598-7038
fpeng@dv-law.com

ALICE PERALTA
416-597-1536
aperalta@dv-law.com

NATALIE VUKOVICH
416-597-8911
nvukovich@dv-law.com

DEBORAH A. WATKINS
416-598-7042
dwatkins@dv-law.com