

*ARE CORPORATIONS ENTITLED
TO FREEDOM OF RELIGION UNDER THE
CANADIAN CHARTER OF RIGHTS AND FREEDOMS?*
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Introduction

Those who have been expecting a clear resolution of the issue of the right of corporations to religious freedom have undoubtedly been disappointed by the recent decision of the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*¹ Indeed, the Supreme Court has missed an excellent opportunity to address an issue that has been before the Canadian Courts several times and had been even prior to the coming into force of the *Canadian Charter of Rights and Freedoms*.²

In *R. v. Big M Drug Mart Ltd.*,³ Chief Justice Dickson did not find it necessary to answer this question. He observed:

Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is urging that the law under which it has been charged is inconsistent with s. 2(a) of the *Charter* and by reason of s. 52 of the *Constitution Act, 1982*, it is of no force or effect.

Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant. The respondent is arguing that the legislation is constitutionally invalid because it impairs freedom of religion — if the law impairs freedom of religion it does not matter whether the company can possess religious belief. An accused atheist would be equally entitled to resist a charge under the *Act*. The only way this question might be relevant would be if s. 2(a) were interpreted as limited to protecting only those persons who could prove a genuinely held religious belief. I can see no basis to so limit the breadth of s. 2(a) in this case.⁴

In view of such a position, one could easily be led to believe that the whole issue of the right of corporations to freedom of religion is irrelevant. Yet, it must be kept in mind that the Supreme Court was dealing here only with a particular federal statute, i.e., the *Lord's Day Act*.⁵ Thus, while the decision of the Supreme Court in *R. v. Big M Drug Mart Ltd.*⁶ has perhaps disposed of the issue vis-à-vis the federal *Lord's Day Act*,⁷ the situation as regards provincial and municipal legislation regulating business on Sundays is less clear.⁸ The right of corporations to enjoy freedom of religion is likely to loom large in cases concerning the true effect of such legislation since a statute purely secular in intent and perhaps, therefore, not generally uncon-

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1. [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, [1985] 3 W.W.R. 481.

2. *Canadian Charter of Rights and Freedoms*, being Part I of *Constitution Act, 1982*, being Schedule B to *Canada Act 1982*, c. 11 (U.K.) (hereinafter referred to as the *Charter*). The issue was certainly present in *Henry Birks and Sons (Montreal) Ltd. v. City of Montreal*, [1955] S.C.R. 799, [1955] 5 D.L.R. 321. However, this case was decided on the basis of the division of powers.

3. *Supra* n. 1.

4. *Supra* n. 1, at 313-314.

5. *Lord's Day Act*, R.S.C. 1970, c. L-13.

6. *Supra* n. 1.

7. *Lord's Day Act*, R.S.C. 1970, c. L-13.

8. See *R. v. Videoflicks Ltd.*, *infra* n. 10. However, this case has yet to be decided by the Supreme Court of Canada.

stitutional, may still be held to interfere with the religious freedom of a particular individual in a particular situation. The Supreme Court saw this possibility, but its position, unfortunately, did not shed any light on the right of corporations specifically to claim such personal "constitutional exemptions".⁹ Indeed, by dealing with the question of the right of corporations to religious freedom strictly on the basis of standing, the Supreme Court of Canada failed to examine many other assumptions that had been made by the lower Courts in regard to the substantive issue. It is neither too early nor too late to pay closer attention to the right of corporations to religious freedom.

This question has been examined in several cases decided after the adoption of the *Canadian Charter of Rights and Freedoms*.¹⁰ Although the right of corporations to freedom of religion is not the only issue examined in these decisions, the opinions expressed by the lower courts on this matter deserve consideration.

In *R. v. Smith*,¹¹ and *R. v. Big M Drug Mart Ltd.*,¹² corporations were charged with violations of the *Lord's Day Act*¹³ for wrongfully carrying on the sale of goods on a Sunday. In *R. v. Video Flicks Ltd.*,¹⁴ several individuals and corporations appealed against their convictions for "carrying on a retail business or offering goods or services for sale on a Sunday" contrary to section 2 of the (Ontario) *Retail Business Holidays Act*.¹⁵ One of the many questions the courts had to answer in these cases was whether the *statutes* in question infringed upon freedom of religion and were thus unconstitutional. In this paper we will not pay much attention to this aspect of the problem. Rather, focus will be upon examining the courts' opinions regarding the *right* of corporations to freedom of religion.

In *R. v. Big M Drug Mart Ltd.*,¹⁶ Stevenson J. was of the opinion that subsection 2(a) of the *Charter* guarantees freedom of religion to corporations.¹⁷ His position received support from the Alberta Court of Appeal that upheld his decision, and, furthermore, suggested that, given a corpo-

9. The Court did not specifically examine the situation of corporations when it stated:

As the respondent submits, if the legislation under review had a secular purpose and the accused was claiming that it interfered with his religious freedom, the status of the accused and the nature of his belief might be relevant: it is one thing to claim that the legislation is itself unconstitutional, it is quite another to claim a 'constitutional exemption' from otherwise valid legislation, which offends one's religious tenets.

Supra n. 1, S.C.R. at 315.

10. See: *R. v. Big M Drug Mart Ltd.*, [1983] 4 W.W.R. 54 (Alta. Prov. Ct.); aff'd (1984), 5 D.L.R. (4th) 121, [1984] 1 W.W.R. 625, 9 C.C.C. (3d) 310 (C.A.); and *R. v. W.H. Smith*, [1983] 5 W.W.R. 235 (Alta. Prov. Ct.); and *R. v. Videoflicks Ltd.* (1984), 5 O.A.C. 1, 48 O.R. (2d) 395 (C.A.).

11. *Ibid.*

12. *Ibid.*

13. *Lord's Day Act*, R.S.C. 1970, C. L-13.

14. *Supra* n. 10.

15. *Retail Business Holidays Act*, R.S.O. 1980, C. 453, s. 2.

16. *Supra* n. 10.

17. Subsection 2(a) of the *Charter* reads: "Everyone has . . . freedom of conscience and religion . . ." Stevenson J. observed: "The context in which 'everyone' is used in s. 2 suggests that corporations were to be included since s. 2(b) includes media vehicles which are generally owned by corporations."

Supra n. 10, at 73 (Prov. Ct.).

ration may have the *mens rea* of its officers, it could also have their religion.¹⁸ Similarly, Jones J., in *R. v. Smith*¹⁹ was of the opinion that a broad interpretation of the *Charter* authorizes the recognition of freedom of religion for corporations and consequently ordered an acquittal of the *Lord's Day Act*²⁰ charges.²¹

In *R. v. Video Flicks Ltd.*,²² the Ontario Court of Appeal quashed the conviction of one of the appellants, Nortown Foods Ltd., on the basis that, with respect to this appellant, section 2 of the *Retail Business Holidays Act*²³ was inconsistent with subsection 2(a) of the *Charter*. However, the Court did not clearly assume the view that Nortown Foods Ltd. was personally entitled to the protection of subsection 2(a) of the *Charter*. Mr. Justice Tarnopolsky, delivering the judgment of the Court, observed that "of all the appellants, only Nortown Foods Ltd. have established that they are entitled to relief from the provisions of the *Act* because of sincerely held religious beliefs."²⁴ Nortown Foods Ltd., as the Court was told, was managed by its two shareholders, two Orthodox Jews, who had to observe Saturday as a sabbath. It seems that the Ontario Court of Appeal here attributed to the accused corporation the religion of its officers, although the Court did not reveal the rationale that was followed in so doing.

The possibility for corporations to enjoy freedom of religion was, and still is, quite a new idea in Canadian law. Never before these cases had the courts decided that a corporation was entitled to religious freedom.²⁵

According to the judges who delivered their opinions, in *R. v. Big M Drug Mart Ltd.*²⁶ and *R. v. Smith*,²⁷ a new vision of fundamental rights is commanded by the *Charter*. However, while there is no doubt that the *Charter* opens up new horizons for the exercise of rights and freedoms, it did not arrive in a complete judicial vacuum. The words used in the *Charter* are not concepts entirely alien to the legal tradition established in Canada. Of course, it is understood that a frozen conception of human rights will not be welcomed in the application of the *Charter*.²⁸ Yet, the introduction

18. The Court stated:

... [I]t has long been held that a corporation can have the *mens rea* for a criminal offence; it is that of its officers. If it can have a bad conscience it does not strain language to hold that in the same manner it can have the good conscience or even the religion of its officers.

Supra n. 10, W.W.R. at 636.

19. *Supra* n. 10.

20. *Lord's Day Act*, R.S.C. 1970, C. L-13.

21. Jones J. observed:

... [T]he context of the section within which the guarantee of freedom of conscience and religion appears is not without significance because it tends to support the view that the corporate entity may have a guarantee of one or more of the freedoms in certain circumstances, especially when one considers that 'freedom of the press and other media of communication' is most often these days carried out through the vehicle of the corporation.

Supra n. 10, at 257.

22. *Supra* n. 10.

23. *Retail Business Holidays Act*, R.S.O. 1980, C. 453.

24. *Supra* n. 10, O.R. at 424.

25. There is no indication of such a claim to be found in any of the following studies on religious creed: D. Schmeiser, *Civil Liberties in Canada* (2d ed. 1964); I. Cotler, "Freedom of Assembly, Association, Conscience and Religion (s. 2(a), (c) and (d))" in *The Canadian Charter of Rights and Freedoms* (W.S. Tarnopolsky and G. Beaudoin ed. 1982) 723.

26. *Supra* n. 10.

27. *Supra* n. 10.

28. In *Hunter v. Southam Inc.*, *infra* n. 40, Mr. Justice Dickson, as he then was, referred to the principle of the constitution as a 'living tree' to stress the importance of a broad perspective in interpreting constitutional documents.

of the *Charter* into Canadian law has not 'tollled the knell' of any common sense in legal decisions. Neither does it compel a denial of all the principles that have inspired Canadian courts over the years.²⁹ With this in mind, we will explore the following five facets of the question: 'Are corporations entitled to freedom of religion?'

- Are corporations entitled to the same fundamental rights as those of individuals?
- When the *Charter* states that "Everyone has freedom of conscience and religion," are corporations necessarily included in 'Everyone'?
- Is the parallel drawn by the Alberta Court of Appeal in *R. v. Big M Drug Mart Ltd.*³⁰ about *mens rea* and religion of a corporation an appropriate one?
- Considering the nature of religion, is it possible for an artificial being like a corporation to have freedom of religion?
- Does a corporation have standing to challenge the validity of legislation on the basis that such a legislation infringes upon freedom of religion of third parties?

Ultimately, in focusing our attention on a specific problem, namely, the right of corporations to freedom of religion, we do not want to lose sight of other more fundamental questions related to the new orientation demanded by the *Charter*. Above all, the examination of the rights of corporations will be worthwhile only if considered in the context of human rights in general.

Corporations and the Exercise of Fundamental Rights

Before embarking on a study of the right of corporations to religious freedom, it is undoubtedly appropriate to ask whether corporations are generally entitled to the same constitutional rights as natural persons. There is much value in such an inquiry. Indeed, if, in theory, a corporation has the same rights as a natural person, the logical conclusion to be drawn is that they are also entitled to religious freedom. This question, to which much American jurisprudence is relevant, will therefore serve as an appropriate starting point for our general study.

The respect of human rights, over the years, has not always been assured. But on almost every continent, and at any epoch, a certain concern for individual fundamental rights has been expressed through customs and legal documents. In an effort to prevent discrimination, persecution, torture, slavery or genocide, many bills of rights have been drafted on the assump-

29. See the opinion of the Ontario Court of Appeal on this matter in *Re Federal Republic of Germany and Ranca*, where it is stated that:

... [I]n considering the interpretation to be placed on s. 1 of the Charter, it must be remembered that the Charter has been placed in a fabric of existing laws to which consideration has to be given... Nevertheless the Charter was not enacted in a vacuum and the rights set out therein must be interpreted rationally having regard to the then existing laws and, in the instant case, to the position which Canada occupies in the world and the effective history of the multitude of extradition treaties it has had with other nations.

(1983), 41 O.R. (2d) 225 at 244.

30. *Supra* n. 10.

tion that they could promote the cause of human rights either by their moral or legal force.³¹ The drafters of these documents were generally concerned with the rights of individuals, and the exercise of fundamental rights by corporations was not a major issue.

Race, sex, religious beliefs or creed, colour and ethnic origin are among the characteristics that were intended to be protected by these bills of rights,³² and essentially, litigation alleging discrimination on the basis of these variables has always been introduced by individuals.³³ However, in the United States at least, courts have, in some circumstances, accepted that corporations can exercise some constitutional rights when it is necessary for their survival or the pursuit of their objects.³⁴ Thus, in *Grosjean v. American Press Co.*,³⁵ where a special tax levied on all newspapers issuing more than 20,000 copies a week was constitutionally challenged by a corporation, the U.S. Supreme Court interpreted the First Amendment^{36a} as intending to protect the freedom of speech of corporations against abusive and discriminatory legislation. In *Pierce v. Society of Sisters*,³⁶ the *Oregon Compulsory Education Act* requiring parents to send their children to the primary schools of the State was challenged by two corporations owning and conducting private schools. Considering that the statute threatened the very existence of the corporations, the U.S. Supreme Court held that they could take advantage of the Fourteenth Amendment³⁷ under the due process of law clause.³⁸ And in American law, the protection against unreasonable search and seizure is a privilege certainly available to corporations.³⁹ Interestingly, in a recent decision of the Supreme Court of Canada, *Hunter v. Southam Press Inc.*,⁴⁰ the Court itself did not deny to a corporation the protection against unreasonable search and seizure guaranteed in section 8 of the *Charter*.

However, despite this advancement, American courts of justice have generally kept the exercise of fundamental rights by corporations within the limits dictated by the pursuits of their objects.⁴¹ This has ensured that

31. See J. Greenberg, "Race, Sex, and Religious Discrimination" in *Human Rights in International Law*, vol. 2 (T. Meron ed. 1984) 307.

32. See J. Shesstack, "The Jurisprudence of Human Rights" in *Human Rights in International Law*, vol. 1 (T. Meron ed. 1984) 69.

33. See M. McDouglas, H. Sasswell, L. Chen, *Human Rights and World Public Order* (1980) 653.

34. "Constitutional rights" are used here in the sense of rights and freedoms protected in the Canadian *Charter* and the American *Bill of Rights*. See C.E. Baker, "Commercial Speech: A Problem in the Theory of Freedom" (1976), 62 *Iowa L. Rev.* 1.

35. 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936); see also *Munn v. State of Illinois*, 94 U.S. 113, 4 Otto 113, 24 L. Ed. 77 (1877), and *Minneapolis and St. Louis Railway Co. v. Beckwith*, 129 U.S. 26, 9 S. Ct. 207, 32 L. Ed. 585 (1889).

35a. U.S. Const. amend. 1.

36. 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).

37. U.S. Const. amend. XIV.

38. Reynolds J. stated:

Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. But they have business and property for which they claim protection. These are threatened with destruction . . . And this Court has gone very far to protect against loss threatened by such action.

Supra, n. 36, U.S. at 535.

39. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 694 (1946).

40. [1984] 2 S.C.R. 145, (sub nom. *Hunter et. al. v. Southam Inc.*) 11 D.L.R. (4th) 641, 14 C.C.C. (3d) 97, (sub nom. *Director of Investigation and Research, Combines Investigation Branch v. Southam Inc.*) [1984] 6 W.W.R. 577.

41. See *supra* n. 34.

any exercise of fundamental rights by a corporation would be subject to serious scrutiny, and, in this context, it is not surprising that profit-making corporations have not been inclined to claim religious freedom. However, an important decision delivered by the U.S. Supreme Court in 1978 stirred up the issue concerning the scope of the rights that corporations can exercise.

In *First National Bank of Boston v. Bellotti*,⁴² a Massachusetts statute was challenged by two national banking corporations on the grounds that it violated their freedom of speech. The legislation made it a criminal offense for banks "to make direct or indirect contributions or expenditures for the purpose of influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property or business of the Corporation".⁴³ The U.S. Supreme Court, in a five to four decision, declared the Massachusetts statute unconstitutional, reasoning that it was legitimate for a corporation to participate in any debate concerning the expenditures incurred by taxpayers. This did not mean, according to the majority judges, that corporations therefore have the same fundamental rights as individuals.⁴⁴ Neither was it suggested that corporations even have an absolute entitlement to fundamental rights.⁴⁵ In fact, the strong dissent expressed by the minority judges in the *Bellotti* case, especially by Rehnquist J., shows that the belief in restricting the constitutional rights available to corporations, as expressed by Chief Justice Marshall in 1819 in *Dartmouth College v. Woodward*, still has some adherents.⁴⁶ The *First National Bank of Boston v. Bellotti*⁴⁷ case may have expanded the scope of corporate speech; it is, however, difficult to conclude that corporations are, therefore, now entitled to any fundamental constitutional right.

It must be recognized that there are restrictions on the rights corporations can claim, dictated by the nature of the rights involved, or by the traditional position which the courts have taken on the character of those

42. 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. (2d) 707 (1978).

43. *Ibid.*, U.S. at 768.

44. See F.W.D. Schaefer, "The First Amendment, Media Conglomerates and 'Business' Corporations: Can Corporations Safely Involve Themselves in the Political Process?" where it is observed in commenting on the *Bellotti* case:

It is important to note that the *Bellotti* majority did not hold that a corporation has first amendment rights coextensive with those of an individual; rather the entitlement to first amendment protection was based on the nature of the speech involved and its contribution to the dissemination of information to the Public. It is also significant that four Justices dissented on this very issue, arguing that the source of first amendment protection for corporate speech derived from the business interests of the corporation.

(1981), 55 St. John's L. Rev. 1.

45. The Court said: "... [W]e need not survey the outer boundaries of the Amendment's protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment."

Supra n. 42, U.S. at 777.

46. The learned Chief Justice declared: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the Charter of creation confers upon it..."

17 U.S. 518 at 636, 4 Wheat. 518 at 636, 4 L. Ed. 629 at 659 (1819).

In this respect, Rehnquist said in *Bellotti*:

Although the Court has never explicitly recognized a corporation's right of commercial speech, such a right might be considered necessarily incidental to the business of a commercial corporation.

It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a commercial corporation.

Supra n. 42, U.S. at 825.

47. *Supra* n. 42.

rights. It is understandable that any protection on the ground of sex or race, for example, would not apply to a corporation as it cannot have those purely personal characteristics.⁴⁸ Likewise, there are some rights that, in theory, corporations could exercise, but in practice are open to natural persons only. The right to self-incrimination is in that category⁴⁹ as illustrated by *R. v. Paterson and Sons Ltd.*,⁵⁰ where an officer of a corporation charged with a breach of the *Canada Grain Act*⁵¹ claimed that he was not a compellable witness since he was a director of the company. In his opinion, the corporation, through him, could claim the privilege against self-incrimination. The Court considered that, under the circumstances of the case, the officer was not called to speak for the corporation. Yet, the Court recalled that the privilege against self-incrimination was initiated for the protection of individuals "in revulsion from the system of interrogation practised in the Old Ecclesiastical Courts and the Star Chamber".⁵² Hence, when it comes to determining whether a right is purely personal, history, it seems, may play an important role in the test.⁵³

In many a treatise on the history of human rights and freedom of religion, there is no mention of any corporate right to religious freedom.⁵⁴ With the introduction of the *Charter* in Canadian law, some judges seem to understand that there is now freedom of religion for everyone, corporations included. If such should be the case, it would be an innovation, since this approach in the law has been unknown to date.

Freedom of Religion and Subsection 2(a) of the *Charter*

Subsection 2(a) of the *Charter* reads: "Everyone has . . . freedom of conscience and religion".⁵⁵ It is important to note that the phrase "Everyone has" in section 2 of the *Charter* controls a series of rights labeled fundamental freedoms. Among these fundamental freedoms is the freedom of expression, including freedom of the press and other media of communication. The fact that freedom of expression, which is usually open to

48. There are also rights, such as the right to *habeus corpus* or the right to bail that only individuals can exercise, since corporations cannot be arrested or imprisoned.

49. See *United States v. White*, where Murphy J. notes: "The constitutional privilege against self-incrimination is essentially a personal one applying only to natural individuals."

322 U.S. 694 at 698, 64 S. Ct. 1248 at 1251, 88 L. Ed. 1542 at 1546.

50. [1980] 2 S.C.R. 679, 117 D.L.R. (3d) 517, [1981] 2 W.W.R. 103, 7 Man. R. (2d) 382.

51. *Canada Grain Act*, S.C. 1970-71-72, c. 7.

52. *Supra* n. 50, S.C.R. at 683, quoting Dickson J., as he then was, in *Marcoux and Solomon v. The Queen*, [1976] 1 S.C.R. 763 at 768, (1975) 60 D.L.R. (3d) 119 at 123. This would indicate that the positions of the U.S. Supreme Court and the Canadian Supreme Court on the privilege of self-incrimination are similar.

53. See *First National Bank of Boston v. Bellotti* where Powell J. proposes the following test: "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." *Supra* n. 42, U.S. at 779, footnote 14.

54. See K. Ewing, W. Finnie, *Civil Liberties in Scotland* (1982) 190; E. Campbell, H. Whitmore, *Freedom in Australia* (1966) 203; F. Jacobs, *The European Convention on Human Rights* (1975) 143; S. Tierny, *Religion, Law and the Growth of Constitutional Thought* (1982) 114.

55. Section 2 of the *Charter* states:

Everyone has the following fundamental freedoms:

- a) freedom of conscience and religion;
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- c) freedom of peaceful assembly;
- d) freedom of association.

corporations, is protected in the same section as freedom of religion has induced Jones and Stevenson J.J., both of the Provincial Court of Alberta, to conclude that 'Everyone' includes corporations, even as far as freedom of religion is concerned.⁵⁶ However, this reasoning is not entirely convincing.

The mere fact that two concepts are expressed in the same section does not necessarily mean that they are both applicable to corporations. For example, while freedom of thought is protected in section 2 as well as religion, it would be difficult to imagine that this freedom could be available to corporations. According to the Shorter Oxford English Dictionary, thought may be defined as "the action of thinking, of conceiving and exercising ideas in the mind".⁵⁷ Apart from the possibility of attributing the thought of its officers to a corporation, there is no reason to believe, on this definition, that a corporation could have a thought of its own. Therefore, freedom of thought, in normal circumstances, should not be attributed to a corporation. Furthermore, in a similar manner, the First Amendment of the *American Bill of Rights* expresses the protection of freedom of religion, freedom of the press and freedom of assembly in a single disposition.⁵⁸ However, the United States Supreme Court has not concluded that, since corporations may have freedom of speech and of the press, they are automatically entitled to the other protections of the First Amendment.⁵⁹ In addition, adopting the reasoning of the Provincial Court of Alberta⁶⁰ could produce undesirable results. The Fourteenth Amendment of the *American Bill of Rights*, for example, states that "nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of laws."⁶¹ Corporations in the United States are recognized as persons for the application of the due process of law and the equal protection clauses when their properties or their existence are in jeopardy.⁶² Does this mean that a corporation could argue that revocation of its charter amounts to deprivation of life? It is unlikely that such a result is desirable, or that such an argument would be well accepted by the courts.⁶³

Despite the foregoing criticisms, it is still suggested that every concept in the *Charter* must be analyzed within its own context. It is perhaps this approach that Peter Hogg had in mind when he commented on section 2 of the *Charter*: "In the absence of any contextual indication to the contrary, one would expect terms of such generality [everyone, any person, etc.] to

56. See *R. v. W.H. Smith*, *supra* n. 10, at 257; *R. v. Big M Drug Mart Ltd.*, *supra* n. 10, W.W.R. at 73 (Prov. Ct.).

57. (3d rev. ed 1964) 2178.

58. Amendment I of the *American Bill of Rights* reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . ."

U.S. Const. amend. I.

59. *Supra* n. 47.

60. *Supra* n. 56.

61. U.S. Const. amend. XIV.

62. See *Santa Clara County v. Southern Pacific Railway Co.* 118 U.S. 394, 6 S. Ct. 1132, 30 L. Ed. 118 (1886); *Smyth v. Ames* 169 U.S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898).

63. A suggestion of capital punishment for corporations convicted of serious crimes was considered by J. Brathwaite, "On Theory and Action for Corporate Crime Control" 28 *Crime and Delinquency* 293 at 307. And according to Peter Hogg, "Some of the Charter's rights could not be applicable to corporations, for example, s. 7 (life, liberty, and security of the person)." *Canada Act 1982 Annotated* (1982) 14.

include artificial as well as natural persons.”⁶⁴ However, it is difficult to say whether Hogg thinks that corporations should have the right to freedom of religion. He acknowledged that subsection 2(b) (freedom of the press and other media of communication) would be a hollow right if it could not be invoked by a corporation.⁶⁵ Likewise, among the rights that he considers inapplicable to corporations, Hogg does not mention freedom of conscience and religion.⁶⁶ Another commentator on the *Charter* has observed that even though a corporation could have the right to freedom of religion, it would remain difficult for a profit corporation to claim such a right.⁶⁷

Appraising the context of freedom of religion in section 2 of the *Charter* should involve more than establishing a certain connection with other concepts mentioned in the section. In *R. v. Big M Drug Mart Ltd.*, the Alberta Provincial Court and the Alberta Court of Appeal referred to *Union Colliery Co. v. The Queen*⁶⁸ to point out that ‘everyone’ in a public statute, as the word ‘person’, generally includes corporations.⁶⁹ It must be remembered that in the *Union Colliery* case the corporation itself argued that it was not included in the term ‘everyone’.⁷⁰ *Union Colliery* appealed before the Supreme Court of Canada its conviction for “unlawfully causing the death of certain persons by neglecting to properly maintain a bridge over which certain trains were run when a train broke through”.⁷¹ Sedgewick J. delivered the judgment of the majority of the Court and referred to a decision of the Privy Council in *Pharmaceutical Society v. London and Provincial Supply Association*,⁷² concluding that the accused corporation was included in ‘everyone’ under what then was section 213 of the *Criminal Code* of Canada. Part of the *Pharmaceutical Society* decision that Sedgewick J. cited indicates that the public nature of the statute they were applying definitely influenced the decision of the Court:

There can be no question that the word ‘person’ may, and I should be disposed myself to say *prima facie* does, in a public statute include a person in law, that is, a corporation as well as a natural person . . .

That is a statute provides that *no person shall do a particular act except on a particular condition*, it is *prima facie*, natural and reasonable (unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject matter to exclude that construction) to understand the legislature as intending such persons . . . [emphasis added].⁷³

64. *Ibid.*, at 14.

65. *Ibid.*, at 14.

66. *Ibid.* at 14-15.

67. H. Brun, “Quelques notes sur les articles 1, 2 et 15 de la Charte Canadienne des droits et libertés” (1982), 23 *Les Cahiers de Droit* 781 at 787.

68. [1902] 31 S.C.R. 81, (1906) 4 C.C.C. 400.

69. *Supra* n. 10, at 73 (Prov. Ct.), D.L.R. at 131 (C.A.).

70. *Supra* n. 68, Section 213 of the *Criminal Code* stated, at the time of the case:

Everyone who has in his charge or under his control anything whatever . . . which . . . may endanger human life, is under a legal duty to avoid such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

The *Criminal Code*, 1892, S.C. 1892, c. 29.

71. *Supra* n. 68, S.C.R. at 81.

72. (1880) 5 A.C. 857.

73. *Supra* n. 68, S.C.R. at 88.

In a similar case, *R. v. The Toronto Railway Co.*,⁷⁴ the defendants were charged with an offence of common nuisance for having neglected to take reasonable care to avoid endangering the lives and safety of the public. The Ontario Court of Appeal, in upholding the conviction of the defendants, observed that 'everyone' in section 192 of the *Criminal Code*⁷⁵ included a corporation.

There is an obvious public interest in including corporations within the scope of criminal statutes in order that they may be held liable for the crimes they commit. To be sure, the objective of the *Charter* is not to systematically exclude the protection of corporations. Yet, it is still important to analyse every term with care in order to determine whether such an interpretation is appropriate. Section 12 of the *Charter*, for example, guarantees everyone the right "not to be subjected to any cruel or unusual treatment or punishment."⁷⁶ It would be difficult, it seems, to say that a corporation is protected under this section. The Eighth Amendment of the *American Bill of Rights* states that "Excessive bail shall not be required . . . nor cruel and unusual punishment inflicted."⁷⁷ There is no mention of "everyone" in the Eighth Amendment and seemingly its protection is available to all. It has been applied in claims by natural persons to contest death penalty sentences and conditions of imprisonment.⁷⁸ However, it has never come to the mind of any American jurist that corporations could also be subject to its protection.

If the history of a right can help to appreciate its context, it may be beneficial to recall that before *R. v. Big M Drug Mart Ltd.*,⁷⁹ corporations had never been recognized by Canadian courts as having the right to religious freedom. In *Boardwalk Merchandise Mart Ltd. v. The Queen*,⁸⁰ the Alberta Supreme Court had to pronounce on the case of a corporation charged with a violation of the *Lord's Day Act*.⁸¹ The Court took note of the appellant's argument that the *Lord's Day Act*⁸² contravened subsection 1(b) of the *Canadian Bill of Rights*⁸³ prohibiting discrimination on the basis of religion, but the Act⁸⁴ was eventually declared *ultra vires* the federal Parliament because it was, according to the Court, legislation in relation to labor which is within the jurisdiction of the provincial governments.⁸⁵ Therefore, the Court refrained from determining whether a corporation could exercise religious freedom.⁸⁶

74. (1905) 10 O.L.R. 26, 10 C.C.C. 106 (C.A.). In this case, a woman was knocked down and killed late in the evening by a street car on which the fender and a headlight were missing.

75. The *Criminal Code*, 1892, S.C. 1982, c. 29.

76. The *Canadian Charter of Rights and Freedoms*, s. 12.

77. U.S. Const. amend. VIII.

78. See M. J. Hulkoewer, "Cruel and Unusual Punishment" (1983), 72 Geo. L.J. 620.

79. *Supra* n. 10 (Prov. Ct.).

80. (1972) 31 D.L.R. (3d) 162, (*sub nom. Boardwalk Merchandise Mart Ltd. v. The Queen*) [1972] 6 W.W.R. 1 (Alta. S.C.); *rev'd (sub nom. R. v. Boardwalk Merchandise Mart Ltd.)* (1973), 31 D.L.R. (3d) 452, [1973] 1 W.W.R. 190 (Alta. C.A.); leave to appeal to S.C.C. refused [1972] S.C.R. ix.

81. *Lord's Day Act*, R.S.C. 1970, c. L-13.

82. *Lord's Day Act*, R.S.C. 1970, c. L-13.

83. *Canadian Bill of Rights*, being Part 1 of *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, 1960, S.C. 1960, c. 44.

84. *Lord's Day Act*, R.S.C. 1970, c. L-13.

85. *Supra* n. 80.

86. *Supra* n. 80.

In *Henry Birks and Sons (Montreal) Ltd. v. City of Montreal*,⁸⁷ the constitutionality of a Quebec statute authorizing municipal councils to compel Feast Days observance was challenged. The days enumerated in the statute were within the ordination of the Roman Catholic Church thus their observation became a religious obligation. The Supreme Court of Canada examined the statute and concluded that, as it was concerned with matters of religion, it was therefore beyond the jurisdiction of the provincial legislature. However, neither the appellants nor the Supreme Court suggested that the freedom of religion of the corporations involved in the case might have been violated.

While it could be argued that the judges in these cases had not been asked to pronounce on the right of corporations to religious freedom and that therefore there is no certainty as to the opinion they would have expressed in this matter, there have been cases where the issue has been more closely examined and which better indicate the opinion traditionally held by Canadian judges.

In 1905, in *Les Syndics de la Paroisse St-Paul de Montréal v. Cie des Terrains de la Banlieue de Montréal*,⁸⁸ the defendant, a corporation active in land transactions, argued that it had no obligation to pay the contributions which a Quebec Statute authorized the plaintiffs to levy on every "catholic freetenant" on the ground that, even though its shareholders were Catholic, the corporation was nonetheless a moral entity upon which such a parochial tax could not be imposed. The Superior Court of Quebec expressed the following opinion on this issue:

The defendant is a corporation, a moral person, a creature of the law. From a legal standpoint and for those who have an interest in its existence, its life is real. Yet for any other respect its life is but a fiction. Its only capacities originate from the law. No one would ever think that a corporation could believe in dogmas or practice a religion. A corporation cannot have a religion.⁸⁹

[Translation and emphasis added]

In 1946, the Supreme Court of Canada took notice of this case in *Pollack v. Comité paritaire du Commerce de détail*.⁹⁰ In this case, a decree governing the retail trade in the city of Quebec, made under the authority of the *Collective Agreement Act*,⁹¹ required an employer to pay his employees double wages for each day the employer closed his establishment for religious reasons. Here, the appellant corporation (a retail merchant) had closed its door in observance of the Jewish New Year and Day of Atonement. Notice had been given to those desiring to work that they could do so. All employees, whether they worked on those three days or not, received only their regular salary. Among the defences raised by the appellant was the argument that the establishment could not be closed to respect a religion in the meaning of the decree since the appellant, as a corporation, could

87. *Supra* n. 2.

88. (1905) 28 C.S. 493.

89. *Ibid.*, at 497.

90. [1946] S.C.R. 343, [1946] 2 D.L.R. 801.

91. *Collective Agreement Act*, R.S.Q. 1941, c. 163.

not have a religion. Chief Justice Rinfret observed that, in fact, the appellant was a commercial corporation which cannot have a religion or belong to a religion.⁹² This position is not different from the opinion that was expressed by a judge of the High Court of Australia in the case of *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth*.⁹³ In this case, an Order in Council had been passed outlawing the association of Jehovah's Witnesses of Australia on the basis that its activities were prejudicial to the interests of the Commonwealth, then engaged in the Second World War. Chief Justice Latham of the High Court of Australia observed that it was obvious that a company could not exercise a religion.⁹⁴ It is noteworthy that this observation was addressed to a corporation involved in religious activities.

At this point, it seems safe to conclude that the term 'everyone', at least in the context of freedom of religion in section 2 of the *Charter*, will not support an interpretation broad enough to include within its scope a corporate entity. However, an entirely different approach to the present problem alluded to by the Alberta Court of Appeal in *R. v. Big M Drug Mart Ltd.*⁹⁵ may prove more fruitful. The Court in this case drew a parallel between the present issue and the theory of attributing the *mens rea* of corporate officers to the corporation in criminal offenses.⁹⁶ This was said as an *obiter dictum* and the religion of the officers of *R. v. Big M Drug Mart Ltd.*⁹⁷ was not taken into consideration. Nevertheless this observation raises an important possibility that deserves further consideration.

***Mens rea* and Corporate Personality**

In order to determine whether or not the theory of the attribution of the officers' *mens rea* to the corporation can provide a means for vesting the corporation with a religion, some points must first be considered. In corporate law, it is a well known principle that the corporate entity possesses a specific personality distinct from that of its shareholders and officers.⁹⁸ Furthermore, before the twentieth century, corporations were generally considered as being beyond the scope of the criminal law.⁹⁹ It was believed that a corporation, as a moral entity, could not commit a crime.¹⁰⁰ However, a solution soon had to be found in order to solve the problems generated by unregulated corporate activities. Even after many statutes and cases con-

92. *Supra* n. 86, S.C.R. at 347.

93. (1943), 67 C.L.R. 116 (Aust. H.C.).

94. *Ibid.*, at 147; see also *Rolloswin Investments Ltd. v. Chromolit* [1970] 2 All. E.R. 673 (Q.B.). In this case the validity of a contract between limited companies made on a Sunday was at stake. The 1677 Act prohibited "tradesman, artificer workman labourer or other person whatsoever" from exercising any business upon the "Lord's Day". The Court held the contract valid and said, at p. 675: "A limited company is incapable of public worship or repairing to a church or of exercising itself in the duties of piety and true religion, either publicly or privately, on any day of the week. Mr. Moschi when he negotiated and signed the contract, was acting not as a tradesman but as managing director of the plaintiff company. In my judgment, the Act had no application to what the plaintiff, through the person of Mr. Moschi did that evening."

95. *Supra* n. 10, D.L.R. at 131.

96. *Ibid.*

97. *Supra* n. 10.

98. See D. H. Bouham and D. A. Soberman, "The Nature of Corporate Personality" in *Studies in Canadian Company Law* (J.S. Ziegel ed. 1967) 3 at 21.

99. See C.M. Fien, "Corporate Personality Under Criminal Law: A Study of the *Mens Rea* of Corporations" (1973), 5 Man. L.J. 421.

100. *Ibid.*

sidered the criminal liability of corporations, the conviction of corporations for crimes requiring *mens rea* did not follow quickly.¹⁰¹ After some decades, the identification theory came to light. In 1941, in *Rex v. Fane Robinson*, the Alberta Court of Appeal introduced the notion of 'primary corporate liability' to conclude that a corporation could be convicted for a crime requiring *mens rea*.¹⁰² Later on, many English decisions based the concept of primary corporate liability on the identification theory which finds its origins in the opinion of Lord Haldane in the *Lennard's Carrying Co. case*.¹⁰³ It was later developed by Lord Denning in *H.L. Bolton Engineering Co. v. Graham & Sons* and based on the supposition that the *mens rea* of the officers constitutes the *mens rea* of the corporation charged with a crime requiring such an element.¹⁰⁴ The theory was applied recently by the Supreme Court of Canada in *R. v. Canadian Dredge and Dock Co.*¹⁰⁵ where the directing mind and will of certain corporations was, for purposes of fixing criminal liability on the corporations, determined to be that of their managers. In this case the corporations unsuccessfully argued that their managers, as their directing minds, had acted outside the scope of their authority. The Supreme Court acknowledged that in some cases a manager can cease to be the directing mind of the corporation. But in this particular case, the Court held that the criminal acts of the managers could be attributed to the corporations.

A corporation cannot do anything without the hands of its agents and the minds of its directors or managers. However, the religion of an officer generally has no impact on the activities of the corporation¹⁰⁶ although in

101. In 1840, in *R. v. Birmingham and Gloucester Railway*, [1842] 3 Q.B. 223, 114 E.R. 492, a company was convicted for failing to comply with a statutory obligation to repair a bridge. See also *R. v. Great North of England Railway*, [1846] 9 Q.B. 315, 115 E.R. 1294. The notion of vicarious liability was applied in these cases.

102. Ford J.A. opined:

I find it difficult to see why a corporation which can enter into binding agreements with individuals and other corporations cannot be said to entertain *mens rea* when it enters into an agreement which is the gist of conspiracy . . .

[1941] 3 D.L.R. 409, [1941] 2 W.W.R. 235, 76 C.C.C. 196, at D.L.R. 413.

103. Lord Haldane set the foundation of the identification theory as follows:

It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

[1915] A.C. 705 at 713.

104. Lord Denning noted:

A company may in many ways be likened to a human body. It has a brain and nerve center which controls what it does. It also has hands which hold the tools and act in accordance with directions from the center. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

[1957] 1 Q.B. 159 at 172.

105. (1985) N.R. 241 (S.C.C.): It is important to realize that the identification theory was conceived strictly to solve problems of corporate criminal liability. It was not intended to go beyond the field of criminal law because by doing so an erosion of the specific identity of the company would be inevitable. When the *mens rea* of an officer is attributed to a corporation, the principle of the separate entity is nevertheless kept safe because, as seen before, the corporation thinks and acts through its agents and officers' body and mind. It is only reasonable that when the actions and thoughts of the corporation have to be examined, actions and minds of those who act and think for the corporation have to be considered. It is not an exception to the principle of the separate entity; it is only an operation designed to complete the corporate personality and it is only legitimate to the extent required by the activities of the corporation; see also M.R. Goode, "Corporate Conspiracy: Problems of *Mens Rea* and the Parties to the Agreement" (1975) 2 Dalhousie L.J. 121.

106. It is conceivable that a corporation could be a victim of discrimination because of the religion of its officers or shareholders. The same thing could happen for other reasons such as sex, race, ethnic origin, etc. If this posed a serious problem, legislation could be enacted forbidding any such discrimination, without, at the same time, giving to corporations the personal rights guaranteed to natural individuals, assuming that a corporation cannot have a race, sex, etc.

some cases, the managers of a corporation, because of their faith, may decide to close on Saturdays, while a statute compels them to keep their establishment closed on Sundays.¹⁰⁷ Under these circumstances, would it be appropriate to give to the corporation the religion of its officers? It seems that the answer has to be negative in view of what was said in *Les Syndics de la Paroisse St-Paul de Montréal v. La Compagnie des terrains de la banlieue de Montréal*:

It is plain that a secular corporation destined to serve industrial purposes, or lands exploitation, as in the case of the defendant, could not practice any religion. The suggestion to distinguish between corporations with a majority of Catholic shareholders and the others has no significance.

A corporation as a moral or fictitious person has an absolutely distinct personality from its shareholders or from the individuals who are part of it and *the religion of these ones or the religion of a majority of them cannot give any religious nature to a corporation.*¹⁰⁸

[translation and emphasis added]

If the religion of an officer could be attributed to a corporation, arguably everything pertaining to an officer could, on the same basis, be given to the corporation. That could include the political convictions, the philosophical orientations and moral values of the officer. Since it is beneficial to keep the corporation a separate entity, this is not a solution that the law can command.

A corporation would not always find advantage in the approach suggested by the Alberta Court of Appeal in *R. v. Big M Drug Mart Ltd.*¹⁰⁹ For instance, when the officers have no religion, or have among them a variety of religious or political convictions, what would be the prevailing orientation of the corporation? It could be argued that the same observation could be made for the attribution of *mens rea* to a corporation. However, this problem does not occur when the corporation is charged with an offence since the *mens rea* can be looked for and perhaps found in those who were the directing mind of the corporation.¹¹⁰ It is more difficult to find a rational basis to make a choice among the possible religions observed by the officers. Thus, after having said that corporations are not guaranteed religious freedom either by history or human rights or by the *Charter*, and also that the parallel between *mens rea* and religious freedom is inappropriate, another question has yet to be answered: Is freedom of religion, by its very nature, a right that a corporation can exercise?

The Nature of Freedom of Religion

There is a constant confusion surrounding the meaning of religion and freedom of religion.¹¹¹ The basic assumption held in this paper is that to have freedom of religion, one must be able to have a religion. That leads to the examination of the possible definitions of religion, and whether a corporation can have a religion, and, consequently, the freedom to exercise it.

107. For instance, the Ontario *Retail Business Holidays Act*, R.S.O. 1980, c. 453, s. 2.

108. *Supra* n. 88, at 496.

109. *Supra* n. 10.

110. See M.R. Goode, *supra* n. 105.

111. *Ibid.*

The primary difficulty in defining religion lies in the possible bias affecting any author.¹¹² Nevertheless, there are many definitions that have been proposed, although it is difficult to find one that rallies unanimous consent.¹¹³ The necessity of having a definition that is both broad and operational is another source of difficulties since it is hard to reconcile the two requirements.¹¹⁴ But, in spite of these difficulties, the two concepts of 'belief' and 'man' can be seen to be common to most definitions of religion or attempts to define religion.¹¹⁵ The terms 'belief' and 'man' (in reference to human beings) are also often encountered in legal provisions concerning religious freedom.¹¹⁶

Even if the courts in Canada and in the United States are moving away from a theistic concept of religion, the notion of belief remains central to the idea of religion.¹¹⁷ The court will inquire into a defendant's adherence to his belief, but will not investigate the nature of the belief itself.¹¹⁸ Generally, the courts will be satisfied with a demonstration of a genuine adherence to a belief, whatever that belief may be.¹¹⁹ From that point of view, it becomes hard to see how a corporation can have a religion or a belief. All the concepts that are associated with religion such as 'thought', 'creed', 'conscience', and so on, are psychic activities that only a natural being with a brain can manifest. This reason in itself should suffice to deny religious freedom to corporations. And it is perhaps this reason that has motivated many judicial decisions.

An American court has already noted that the mere pretention to having a religion does not automatically confer the privileges associated with freedom of religion.¹²⁰ In Canada, in *Walter v. A.G. of Alberta*, the concept

112. See J.P. Moore, "Piercing the Religious Veil of the So-Called Cults" (1980), 7 *Pepperdine L. Rev.* 655.

113. *Ibid.*, at 655.

114. Here, Moore illustrates well that difficulty:

To define religion, it is important to understand the criteria being used. For example, does religion necessarily involve an institutional structure? To what extent is it relevant that an individual labels or refuses to label a particular belief religious? Must religion involve beliefs at all? Must it involve some sort of ritual? Must its adherents meet regularly or otherwise? Must there be worship, meditation or designated leaders who perform specified roles?

Supra n. 112, at 691.

115. W.J. Torpege proposes the following definition:

In its broadest sense, religion includes all forms of *belief* in the existence of superior beings exercising power over humans and imposing rules of conduct with future rewards and punishments. [emphasis added].

Judicial Doctrines of Religious Rights in America (1970) at 3.

116. For instance, the Virginia State amendment proposed to Congress in 1785 read: "All men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience." [emphasis added]. Article Nine of the *European Convention on Human Rights* states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief . . ." [emphasis added].

117. See *U.S. v. Ballard* 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944); *R. v. Jack and Charlie*, [1982] 5 W.W.R. 193 at 196 (BCCA).

118. Some authors question this approach and favour a functional analysis more concerned with the place the belief occupies in an individual's life. The decision of the U.S. Supreme Court in *U.S. v. Seeger* 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965) seems to take that orientation. See also *Malnak v. Yogi* 592 F.2d 197 (3rd Cir. 1979) and M. Sanderson, "Objective Criteria for Defining Religion for the First Amendment" (1980), 11 *U. Tol. Rev.* 988. Nevertheless, the concept of "belief" will remain important in the determination of "religion".

119. See J.B. Burg, *A History of Freedom of Thought* (1975) 1-3.

120. As was stated in *Founding Church of Scientology v. U.S.*:

Not every enterprise cloaking itself in the name of religion can claim the constitutional protection conferred by that status. It might be possible to show that a self-proclaimed religion was merely a commercial enterprise, without the underlying theories of man's nature or his place in the Universe which characterize recognized religions.

409 F. (2d) 1146 (D.C. Circ.) at 1160. Those who think that corporations should have freedom of religion must be aware of the growing concern about the troublesome character of some corporate activities. Not only is it unknown what corporations would do with freedom of religion, but the result could be undesirable if some tendencies hold on, as pointed out by J.P. Moore. Explaining the situation in regard to the Unification Church, he observed that the findings of a Congressional subcommittee in the United States organized to investigate Korean-American relations noted numerous financial arrangements involving the Unification Church that permitted conjecture that these so-called religious institutions are engaged in activities outside the parameters authorized by their charter which qualify them as tax exempt institutions. According to Moore, an examination of the economic enterprises affiliated with the Unification Church provides justification for its being characterized as a multi-national corporation. However, principal figures within the Church are instructed to disavow any inter-relationship between the various corporate entities, and if possible, they are advised to obfuscate their involvement. *Supra* n. 112, at 703.

of faith was viewed as an essential element of a religion.¹²¹ In Germany in 1976, a commercial corporation was denied the privileges associated with freedom of religion that would exempt it from a religious tax payment. In its decision, the German Federal Court acknowledged the position of the European Commission of Human Rights which, at that time, did not recognize religious freedom for any corporation.¹²²

So far, no distinction has been made between religious and non-religious corporations. This has been deliberate because all of the observations up to now in this paper could be addressed to both religious corporations and non-religious corporations. However, different status is generally conferred upon religious corporations, especially in the matters of tax exemptions¹²³ although the fact that a corporation is religious does not mean that the so-called religious corporation is deemed to have freedom of religion in its full meaning. The corporation is an instrument used to organize the temporal affairs of the religion, and, basically, it has no more religious freedom than any religious building.¹²⁴

In *Pastor X and the Church of Scientology v. Sweden*,¹²⁵ the European Commission on Human Rights accepted that a corporation could evoke section 9 of the *European Convention on Human Rights*¹²⁶ on behalf of its members. However, the decision of the European Commission is somewhat ambiguous. The Commission seems to say on the one hand that the religious corporation has rights in and of itself, but on the other hand, that it is the rights of its members that it assumes in reality.¹²⁷ The Commission could be making here a distinction between the standing to invoke the rights of

121. Martland J. opined:

Religion . . . must mean religion in the sense that is generally understood in Canada. It involves matters of faith and worship, and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship.

[1969] S.C.R. 383 at 393, 66 W.W.R. 513 at 521, 3 D.L.R. (3d) 1 at 9.

122. The Court observed:

Section 9 is not intended to protect moral entities from tax, the product of which is used for religious purpose; sect. 9 is there to guarantee the free exercise of any religion or conviction and to prevent any state interference with that freedom. That freedom does not protect moral entities. [translation].

[1979] Yearbook of the European Convention on Human Rights 582 at 583.

123. See A. Burstein, *Religion, Cults and the Law* (2nd ed. 1980) 117.

124. W. Torpeg writes that:

The distinction between a religious society and a religious corporation is frequently emphasized. The religious society is the group of communicants who attend divine services at a church. The religious corporation is an inanimate person possessing exclusively temporal powers. . . . It is clear that membership in the corporation and membership in the society are not necessarily concomitant.

Supra n. 115, at 84.

125. [1979] Yearbook of the European Convention on Human Rights 244.

126. Adopted Nov. 4, 1950, amended May 6, 1963 and Jan. 20, 1966.

127. The Court said:

In respect of the Church, the Commission has previously applied the rule according to which a corporation being a legal and not a natural person is capable of having or exercising the rights mentioned in Art. 9(1) of the Convention. . . . It is now of the opinion that the above distinction between the church and its members under Art. 9(1) is essentially artificial. When a church body lodges an application under the Convention, it does so in reality, on behalf of its members. It should therefore be accepted that a church body is capable of possessing the rights contained in Art. 9(1) in its own capacity as a representative of its members.

[1979] Yearbook of the European Convention on Human Rights 244 at 246.

other parties and exercising one's rights. Consequently, it might be said that, while religious corporations have no religious freedom, they can defend the rights of the church members in court.

In most instances, the right of freedom of speech should be enough for a religious corporation to assert its own rights to exist and to carry on its purpose. There is often an overlap between freedom of religion and freedom of speech.¹²⁸ Nevertheless, in matters of religious freedom or other fundamental rights, it is suggested that, if a corporation cannot exercise a religion itself, a non-profit organization should at least have standing to assert the rights of its members.¹²⁹ It is, however, a different situation when a profit-making corporation, charged with an offence under such legislation as the *Lord's Day Act*,¹³⁰ claims immunity from the statute on the ground that it infringes upon rights of third parties.

Standing and Rights of Other Parties

This question was raised before the Alberta Court of Appeal in *R. v. Big M Drug Mart Ltd.* in which the Court held that the accused corporation did have standing to challenge the *Lord's Day Act*.¹³¹ In the Court's opinion, the very charge against the corporation was sufficient ground for it to have such standing. This position found its inspiration in the dissenting opinion of Cartwright J. in *Robertson and Rosetanni v. The Queen*.¹³² According to Cartwright J., it was immaterial whether or not the appellants subscribed to a religion, for the *Lord's Day Act*¹³³ would be a nullity if it infringed upon the religious freedom of any citizen.¹³⁴ The Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.* adopted the same position, as expressed by Chief Justice Dickson:

The argument that the respondent, by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights under s. 2(a) of the *Charter*, confuses the nature of this appeal. A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the *Charter* and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue. As Mr. Justice Laycraft observed in the Alberta Court of Appeal:

The task of the Court is to see whether all or part of the *Lord's Day Act* is inconsistent with freedom of conscience and religion and therefore of no force or effect. It does not affect that task that a person charged has no religion or even that he has no feelings of conscience. (at p. 636)

128. See *Cantwell v. State of Connecticut* 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); and *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth*, *supra* n. 93.

129. See *National Association for the Advancement of Colored People v. State of Alabama* 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. (2d) 1488.

130. *Lord's Day Act*, R.S.C. 1970, c. L-13.

131. *Lord's Day Act*, R.S.C. 1970, c. L-13. Laycraft J. expressing the opinion of the majority stated that:

In any event, in my opinion, this argument is irrelevant. The task of the court is to see whether all or part of the *Lord's Day Act* is inconsistent with freedom of conscience and religion and therefore of no force or effect. It does not affect that task that a person charged has no religion or even that he has no feeling or conscience. It is the nature of the law which must be considered and not the attributes of the person charged.

Supra n. 10, W.W.R. at 636 (C.A.).

132. [1963] S.C.R. 651, 41 D.L.R. (2d) 485, [1964] 1 C.C.C. 1.

133. *Lord's Day Act*, R.S.C. 1970, c. L-13.

134. *Supra* n. 131, S.C.R. at 661.

Mr. Justice Cartwright, dissenting in *Robertson and Rosetanni v. The Queen, supra*, though not in conflict with the majority of the Court on this point, stated at p. 661:

It was argued that, in any event, in the case at bar the appeal must fail because there is no evidence that the appellants do not hold the religious belief that they are under no obligation to observe Sunday. In my view such evidence would be irrelevant. The task of the Court is to determine whether Section 4 of the Act infringes freedom of religion. This does not depend on the religious persuasion, if any, of the individual prosecuted but on the nature of the law. To give an extreme example, a law providing that every person in Canada should, on pain of fine or imprisonment, attend divine service in an Anglican Church on at least one Sunday every month would, in my opinion, infringe the religious freedom of every Anglican as well as that of every other citizen.

...

In my view there can be no question that the respondent is entitled to challenge the validity of the *Lord's Day Act* on the basis that it violates the *Charter* guarantee of freedom of conscience and religion.¹³⁶

The position expressed here by the Supreme Court of Canada is perhaps inspired by the desire to give the *Charter* a broad scope as to those who can benefit from it. However, the plain words of section 52 of the *Charter* do not seem to authorize the position assumed by the Supreme Court concerning the standing of corporations to challenge statutes such as the *Lord's Day Act*.¹³⁶ Subsection 52(1) of the *Charter* reads:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.¹³⁷

[emphasis added]

In view of section 52, it seems reasonable to state that a statute can infringe upon the constitutional rights of some people and remain valid against others.

In matters of the constitutional validity of penal statutes, the Supreme Court of the United States has often adopted a restrictive approach, despite the non-existence of a clear limitation in the U.S. constitution such as the one found in section 52 of the *Charter*. Cases decided in the United States by the Supreme Court could set an example with regard to the right of standing to challenge legislation which infringes upon constitutional rights. Instead of a court declaring a statute null and void because a litigant has proven that the statute generally offends the concept of religious freedom, a more selective approach would be used. A litigant charged with a breach of a statute would have to argue that the duty imposed on him by the statute would prevent either him, or a citizen with whom he had a special connection, from asserting his or their rights. The statute would then be invalid only to the extent that it violated the right. This is the test proposed by the American cases.

135. *Supra* n. 1, S.C.R. at 314-315.

136. *Lord's Day Act*, R.S.C. 1970, c. L-13.

137. *Canadian Charter of Rights and Freedoms*, s. 52(1).

In *Griswold v. Connecticut*,¹³⁸ a statute making it a crime to aid married people in the acquisition of contraceptives was struck down. A planned parenthood league's executive director and a doctor were consequently acquitted by affirming the constitutional rights of the married people with whom they had a professional relationship. The same privilege was later extended to a benevolent helper who provided an article on contraception to a single person in contravention of a Massachusetts statute.¹³⁹ A step forward was taken in *Craig v. Boren*¹⁴⁰ where a beer vendor won a verdict of acquittal by asserting the rights of male buyers under 21 years of age to buy 3.2 per cent beer, restricted by an Oklahoma statute which also restricted its access only to females under 18.

With such an approach, an accused, in order to establish standing, must demonstrate that he has a special relationship with the third party to be able to assert his rights. The courts would have discretion to decide whether the relationship was significant. This approach has two obvious advantages. First, there is no basic discrimination between corporations and individuals as far as standing is concerned. This would perhaps answer a criticism of opponents of religious freedom for corporations.¹⁴¹ The other advantage offered by this solution is that it would save legislation as much as possible, which is the orientation suggested by section 52 of the *Charter*.

It is indirectly this position that was adopted in *R. v. Video Flicks Ltd.* when the Ontario Court of Appeal held that, even though the *Retail Business Holiday Act*¹⁴² violated religious freedom generally, those corporations or individuals who did not have to observe a Sabbath on a day other than a Sunday could not take advantage of it.¹⁴³ The Court, nevertheless, failed to mention the question of standing. While it would have been interesting to approach the case from this angle the result, in any case, seems to be quite appropriate.

When corporations have to carry on business on Sunday, contrary to a statute, their standing should rest on the rights of their employees or officers

138. 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. (2d) 510 (1965). See also *Chearney v. State of Indiana* 410 U.S. 991, 93 S. Ct. 1516, 36 L. Ed. (2d) 189 (1972) where the U.S. Supreme Court denied the appellant, a non-physician abortionist, the standing to challenge her criminal conviction on the basis that the legislation prohibiting abortions violated the right of all women to an abortion, (the case was decided before *Roe v. Wade* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. (2d) 147 (1973)). Douglas, J. presented his concurring opinion as a decision on the merits rather than a ruling on standing.

139. *Eisenstadt v. Baird* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. (2d) 349 (1972).

140. 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. (2d) 397 (1976). The majority of the Court stated that since the challenged statutory provisions were addressed to vendors who were forced to either obey the statutory provisions and incur economic injury or disobey the statute and suffer sanctions, then, in such circumstances, vendors could resist efforts to restrict their operations by advocating the rights of third parties seeking access to their market.

141. Laycraft, J. expressed his concern about the denial of religious freedom to corporations in the following words:

If this were not so, [i.e. that corporations had such freedom] a legacy of the *Charter* would be that a statute held to infringe the fundamental freedoms of one individual would nevertheless continue to strike at others, leaving a patchwork of individual liability and non-liability under the statute. In the extreme case under the Lord's Day Act, liability would turn on whether or not the family business had been incorporated.

Supra n. 10, W.W.R. 637 (C.A.).

142. *Retail Business Holidays Act*, R.S.O. 1980, c. 453.

143. The Court noted that:

In accordance with s. 52(1) of the *Constitution Act 1982*, the Act is inconsistent with the provisions of the *Charter* only to the extent that it does not provide for adequate religious exemptions. Otherwise, the Act is valid in its application to all appellants who cannot make such a claim sincerely or genuinely. The only appellant to establish such a claim is Nortown Foods Ltd.

Supra n. 10, O.R. at 430.

(who have to observe another day of Sabbath) to be exempt from economic disadvantages incurred because of their religious beliefs.¹⁴⁴ Indeed, if the corporation has to close on Sundays, any employee that has to observe another day of rest is subject to financial inconvenience. In *McGowan v. State of Maryland*¹⁴⁵ the question of standing was addressed in considering whether a corporation challenging the validity of a Sunday observance statute could invoke the violation of the rights of its managers. Thus, while a corporation should not be given the right to freedom of religion in its own right, it should have the standing, if possible, to assert the rights of its officers or employees to such freedom.¹⁴⁶ The corporation that has no employees or officers having to observe a day other than a Sunday, would have no standing to challenge the validity of a Sunday observance statute. It is a nuance that the Supreme Court of Canada has failed to notice. It is hoped that in matters of Sunday observance or other problems regarding constitutional rights, Canadian courts will pay more attention to this important aspect of the *Charter*.

Conclusion

The present discussion might indicate that Sunday observance statutes may not correspond to the needs of a modern and pluralist society. Nevertheless, the problems brought before the court under such legislation should not be used to give corporations a right to exercise religious freedom. They neither need, nor deserve such a right.

The time has come when many are feeling concerned about the growth of the corporate personality. Are the decisions granting freedom of religion to corporations the forerunner of the artificial creation of a superperson? It is certain that such an event would have serious impact upon law and society in general.¹⁴⁷ Beyond the issue of a specific right, this paper was intended to raise some concern about the tendency to think that corporations should have the same privileges and rights as natural individuals. It is perhaps the occasion to understand that:

The monster has just passed its head through the entrance; there is time yet to shut the door.

144. Individuals could challenge legislation either by alleging infringement upon their own religious freedom or on the religious freedom of their employees.

145. 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. (2d) 393.

146. The Supreme Court stated that:

... since the appellants do not specifically allege that the statute infringe upon the religious beliefs of the department store's present or prospective patrons, we have no occasion here to consider the standing question of *Pierce v. Society of Sisters* [*supra* n. 36].

366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. (2d) 393, at U.S. 427.

147. John Woytash writes:

It's time to put an end to the fiction that corporations are people.

...

The corporation-as-person is becoming a monster. Like Dr. Frankenstein's creation, the juridical person has come to life. And the first thing it wants to do is speak.

...

The bare fact that a corporation has but one goal — turning a profit — distinguishes it utterly from human beings ... It is the nature of human beings, in their humanity to make choices and to seek their own varied, indeterminable goals ...

Carry the juridical-person fiction far enough and there will be created at law, a race of 'superpersons' with limited liability, unlimited life and in many cases, vast resources.

"We must stop viewing corporations as people" (1978) 64 A.B.A.J. 814.