

The Central Fallacy of Canadian Constitutional Law

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Legal theory is important because it shapes the questions we frame about the law and the way we respond to those questions in concrete cases. Constitutional theory is especially important because it determines the way we perceive the functions and relationships of the various institutions of government and hence the quality of our system of representative government under law. The purpose of this article is to consider how well Canadian constitutional theory reflects the law of the Canadian Constitution, and the conclusion offered will be that we claim the theoretical simplicity of the English doctrine of parliamentary supremacy by largely ignoring the written character of our basic constitutional law. The thesis is *not* that parliamentary supremacy is not a central principle of Canadian constitutional law, but rather that in its application to the Canadian system the doctrine must be qualified in the face of a limited legal separation of powers imposed by the *British North America Act, 1867*.¹

The doctrine of parliamentary supremacy leads to the twin propositions that Parliament cannot bind its successors and that an Act of Parliament, duly passed, cannot be impeached in a court of law. We shall be concerned only with the second of these concepts, and with the extent to which the separation of powers between all three branches of government — the Legislature, Executive and Judiciary — is a matter of law for enforcement by the courts.

English lawyers can assert with confidence that from the point of view of legal theory, the supremacy of Parliament is absolute and unqualified. In law, there is nothing that Parliament cannot do. In Canada the principle of legislative supremacy is also part of our constitutional law, the preamble to the *British North America Act* informing us that the Act was intended to unite the Provinces federally into one dominion “with a constitution similar in principle to that of the United Kingdom”. Now it may seem a simple matter to adapt the principle of legislative supremacy to a federal system, but in fact this is not so, and the common belief to the contrary has led to a simplistic conception of the basic theoretical framework of

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¹ 30-31 Vict., c.3.

Canadian constitutional law. That conception causes confusion in constitutional analysis and leads to a failure to ask some important questions.

An example may help before pursuing the nature and cause of the central fallacy alleged in the title. When the breathalyzer law introduced in Canada in 1969² was referred to the Supreme Court for an opinion as to its validity, the Court had to determine whether the Governor in Council had acted with authority in proclaiming some, but not all, of the provisions of the amendment.³ It will be remembered that the breathalyzer amendment was part of an omnibus bill containing a number of unrelated amendments to the *Criminal Code*⁴ and to other federal statutes, and that this collection of amending packages was followed by section 120, which delegated proclaiming power to the Executive in the following terms:

This Act or any of the provisions of this Act shall come into force on a day or days to be fixed by proclamation.

The Governor in Council proclaimed those parts of the amendment authorizing mandatory breath tests, the results of which could be admitted in evidence in prosecutions for driving offences, but left unproclaimed those parts which created an obligation on the police to provide the person being tested with a sample of his or her own breath in a suitable container. The reason given by the federal government for this truncation of the amendment, was that a suitable container could not be designed and produced in time to coincide with the measures introduced to meet the urgent demand of provincial attorneys-general for more effective laws to deal with drinking drivers.

Although the Supreme Court divided five to four, all nine Judges considered that the outcome turned on whether Parliament intended to authorize staggered proclamation of the various packages in the Act or whether it intended to authorize the Executive to proclaim *parts* of packages, leaving the other parts unproclaimed altogether. This in turn led the Court to pursue, as the central inquiry in the case, the true meaning of the word "provision". Did it mean only whole packages or did it mean either packages *or* their constituent parts?

² *Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c.38, s.16.

³ *Reference Re Proclamation of Section 16 of the Criminal Law Amendment Act, 1968-69* (1970) 10 D.L.R. (3d) 699 (hereinafter referred to as the *Breathalyzer Reference*).

⁴ S.C. 1953-54, c.51 (now R.S.C. 1970, c.C-34).

There was a preliminary question which the Court should have asked but did not; the failure of all the Judges to consider it is indicative of the extent to which our constitutional law is dominated by the simplistic conception that the English version of legislative supremacy can be applied to the system of government created by the *British North America Act*. The question that should have been asked is this: Does the law of the Canadian Constitution impose any limit on Parliament's power to delegate to the federal Executive? If it does, then any intention of Parliament to go beyond that limit cannot be given effect, however clearly it may emerge from the words of the statute.

The dissenting Judges obviously worried about the separation of powers, but they gave an explanation appropriate to English not Canadian law, and an understanding of why this is so leads to a search for our own constitutional identity as Canadian lawyers. What the dissenters said was that Parliament cannot have intended to delegate to the Executive power to alter the substance of the law in the process of proclaiming it in force. That is what English judges must say in such cases, their power being merely one of interpretation not constitutional adjudication. Their interpretations of the law can always be overcome by a legislative amendment making clear beyond doubt that Parliament *does* intend what the court thought was impossible. The court provides a check, but in the end Parliament can always prevail, legally speaking, because the Parliament of the United Kingdom is truly a continuously functioning constitutional convention,⁵ with power to alter the law of the English Constitution in any way it chooses, at any time, by a simple Act of Parliament.

When Canadian judges adopt the attitude of English judges in approaching questions of this kind, they simply decline their responsibility to interpret the law of the Canadian Constitution as found in the *British North America Act*. If an excursion into Canadian constitutional law should lead them to conclude that no legal limit exists on Parliament's power to delegate to the Executive, then they still have the less powerful but nevertheless effective English

⁵ A phrase borrowed from Mr Justice Black in *Katz v. U.S.* 389 U.S. 347 (1967), who dissented in the case because he did not share his colleagues' opinion that electronic eavesdropping could constitute a "search" or "seizure" within the meaning of the Fourth Amendment to the U.S. Constitution. He stated:

"I will not distort the words of the Amendment in order to "keep the Constitution up to date" or "to bring it into harmony with the times". It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention." (at 373).

approach based on interpretation. It is the persistent refusal to make the excursion into Canadian constitutional law at all that is here being criticized, and that refusal flows from the unexamined assumption that Canadian legislatures enjoy a supremacy of the same quality as that of the Parliament of the United Kingdom, subject only to a federal division into two domains. The assumption is deeply embedded in our legal thinking, so that a return to the origins of our conception of the Canadian federal system is necessary if we are to test the hypothesis being put forward here.

Our quest begins in 1883 with the judgment of the Judicial Committee in *Hodge v. The Queen*,⁶ where Sir Barnes Peacock responded in the following terms to the argument that provincial legislatures are "local" legislatures with no power to create a new legislative body like the Board of Licence Commissioners for Toronto, nor to delegate powers to such a Board:

It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, *would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.*⁷

The words in italics were omitted when the passage was quoted by the Judicial Committee in the subsequent case of *Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick*. The result of the omission was to create the impression that the *Hodge* case had equated provincial legislatures to the Imperial Parliament, for the truncated passage reads as follows:

Within these limits of subject and area, the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion.⁸

⁶ (1884) 9 App.Cas.117.

⁷ *Ibid.*, 132 (emphasis added).

⁸ [1892] A.C. 437, 442.

To the extent that words relate to conceptions, this truncated passage reflects, I submit, the dominant conception of the Canadian Constitution shared by Canadian lawyers. If the English Constitution can be represented by a closed circle of legislative supremacy within which all legal questions must be located and answered, the Canadian equivalent based on this dominant conception consists of two closed circles, one for the Parliament of Canada, the other for provincial legislatures, coloured section 91 and section 92 respectively. This mental set is expressed most commonly through the following kind of assertion: Subject to the federal division of powers, Canadian constitutional law is the same in principle as English constitutional law (. . . "a constitution simliar in principle" . . .) and is founded on the supremacy of the legislatures.

This assertion and the conception it reflects do not stand up under close examination. Legislative supremacy is certainly *a* central principle of Canadian constitutional law, but it is not *the* central principle as is the case in the United Kingdom. The *British North America Act* did not spend its force in the act of creation and then disappear from the legal landscape. It is still with us, and its legal force and importance were reaffirmed by the *Statute of Westminster, 1931*, which enacted that "the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder" should continue to lie beyond the reach of any Canadian legislative body.⁹

Little attention has been paid, however, to the fact that the entire *British North America Act* is part of the law of the Canadian Constitution — not just sections 91 and 92. Legal interpretation of the federal division of legislative powers has so captured the attention of lawyers that one can infer a prevailing view that Canadian constitutional law consists only of sections 91 and 92 and cases interpreting them. Beyond that, the common assumption seems to be that Canadian constitutional law coincides with English constitutional law.

This assumption has now been shattered by an authoritative decision, not of a Canadian court but of the Judicial Committee of

⁹ 22-23 Geo.V, c.4. The provision in question is section 7(1):

"Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder."

This provision was necessary, of course, because the Act terminated the doctrine of repugnancy enacted by the *Colonial Laws Validity Act, 1865*, 28-29 Vict., c.63 which had formerly served to keep the British North America Acts beyond the reach of Canadian legislative bodies.

the Privy Council.¹⁰ Certain enactments of the Legislature of Ceylon (a unitary system) were held *ultra vires* because they were attempts to usurp judicial power which the Constitution of Ceylon (an order in council of the British Government) had vested exclusively in the judiciary.¹¹ In finding that the Constitution of Ceylon enacts a separation of powers as part of the law of the Constitution, Lord Pearce responded in this way to the attempt to claim for the Legislature of Ceylon a supremacy comparable to that of the Parliament of the United Kingdom:

During the argument analogies were naturally sought to be drawn from the British Constitution. But any analogy must be very indirect, and provides no helpful guidance. The British Constitution is unwritten whereas in the case of Ceylon their Lordships have to interpret a written document from which alone the legislature derives its legislative power.¹²

This judgment has great significance for Canadian constitutional law, the more so because the provisions in the Ceylon Constitution held by the Judicial Committee to manifest an intention of vesting judicial power exclusively in the judiciary are substantially the same as sections 96, 99 and 100 of the *British North America Act*. In considering why the *Liyana* case has attracted so little interest in Canada (it was not even referred to in the *Breathalyzer Reference*), one can only conclude that in a conceptual framework based on a view of the Canadian Constitution as involving two replicas of the British system — one federal, one provincial — *Liyana* cannot exist. There is no place for it in the scheme of things as seen by Canadian judges and lawyers, so it is simply ignored.

What, then, is wrong with the view that subject to the federal division of powers the Parliament of Canada and the provincial legislatures are replicas of the Parliament of the United Kingdom? The main answer is that it assumes that the federal division of powers is an exercise in arithmetic that does not bring into play those interactions between the different branches of government which in the United Kingdom are all contained within the closed circle of legislative supremacy. Moreover, it ignores all but Part VI ("Distribution of Legislative Powers") of the written law of the Constitution found in the *British North America Act*, which defines, and thereby limits, the powers and the functions of the various institutions of government.

This leads to an inquiry into the total effect of a federal system on constitutional theory, remembering that in the Canadian Constitu-

¹⁰ *Liyana v. The Queen* [1967] 1 A.C. 259.

¹¹ Ceylon (Constitution) Order in Council, 1946.

¹² *Supra*, note 10, 288.

tion the division of legislative powers is brought about by laws whose final interpretation lies with courts for which the *British North America Act* itself makes some provision.

First, consider the mental set of an *English* judge as he approaches an Act of Parliament. His function is to interpret; under no circumstances is he to contemplate impeaching an Act of Parliament.¹³ His attitude is one of total deference to the legislative branch, and his view of his role is pervaded by this theoretical framework. Introduce one exception to this view and the theoretical purity is gone, and with it the simplicity of the single, guiding principle of legislative supremacy.

Our trouble is that we believe we can have both the purity of English constitutional theory *and* a federal division of legislative powers that is justiciable under a written Constitution which assigns particular functions to particular institutions. The result is decisions like that in the *Breathalyzer Reference*, where none of the Judges even posed the constitutional question that is fundamental to the case.

Let us pursue our comparison of Canadian and English constitutional theory a little further. In England the executive and judicial branches are subject to the will of Parliament and could be altered in any way or even abolished by Parliament. In Canada the federal division of powers itself, since it is justiciable, makes the judicial branch at once both supervisory of, and beyond the reach of, the legislative branch. When courts of law have a duty to tell legislatures there are things they cannot do, a certain tension is created. It is not helpful to ask whether we have legislative supremacy or judicial supremacy when faced with this reality. It is more useful to recognize that supremacy resides in the Constitution, if anywhere, and that the Constitution prescribes the powers and functions of the various institutions. The adjudication of the federal limits of legislative powers is but one matter on which the judicial branch has the last word. The whole of the *British North America Act* is law on which the courts have long had the final word in the parliamentary system that provided the basic model in 1867 ("... a constitution similar in principle to that of the United Kingdom").

For example, sections 96, 99 and 100 of the Act require that superior court judges be appointed by the Governor General, that

¹³ The immunity of Acts of Parliament from judicial review in the U.K. is a concept so trite as not to require specific authority. As Lord President Cooper put it in *MacCormick v. The Lord Advocate* [1953] S.C. 396, the issue of constitutional *vires* is not a justiciable one under British constitutional law.

they have tenure (that is, hold office during good behaviour), and have their salaries, allowances and pensions fixed and provided by Parliament. If the decision in *Liyanage*¹⁴ is sound in principle, it points to the conclusion that the *British North America Act* vests judicial power exclusively in the judiciary *as a matter of law*, so that constitutional amendment, not just an Act of Parliament or of a provincial legislature, would be required before such power could be exercised by the legislative or executive branches of government.¹⁵

In *Liyanage*, Lord Pearce, after referring to the Ceylonese equivalents of sections 96, 99 and 100 of the *British North America Act*, made it clear that the Constitution of Ceylon, as interpreted by the Judicial Committee, introduced a legal separation of powers into the unitary parliamentary model adapted from the United Kingdom:

These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature.¹⁶

If we accept that judicial responsibility to apply sections 91 and 92 and sections 96, 99 and 100 of the *British North America Act* is, as Lord Pearce implies, the necessary corollary of a written constitution, and not just an exception to a general rule of total judicial deference to the legislative branch, then we can begin to regard all of the *British North America Act* as an important, written part of the law of the Constitution which is, by definition, judicially enforceable.

This brings us back to the *Breathalyzer Reference*.¹⁷ In response to the theoretical framework applied in the *Liyanage* case, we are

¹⁴ *Supra*, note 10.

¹⁵ In my note entitled *Constitutional Validity of Sections 3 and 4 of the Public Order Regulations, 1970* (1972) 18 McGill L.J. 136, I suggest that these sections in effect constituted an Executive judgment that the F.L.Q. and its members, friends and supporters were guilty of seditious conspiracy, and were therefore void as an Executive usurpation of judicial power. The same reasoning led to the conclusion that the successor provisions of the *Public Order (Temporary Measures) Act, 1970*, S.C. 1970-71-72, c.2 were *ultra vires* Parliament.

¹⁶ *Supra*, note 10, 287-288.

¹⁷ *Supra*, note 3.

forced to take the step of asking the question which was not posed in the Supreme Court of Canada: Does the law of the Constitution impose any limit on Parliament's power to delegate to the Federal Executive? Having posed the question, we must now read past the preamble to the *British North America Act*, because if we stop there we climb into a mental set in which the question cannot exist. Confused or obscure legal decisions may not be simply the product of technically inadequate reasoning. They may flow from fundamental defects in the conceptual framework within which that reasoning is done.

Although we must go beyond the preamble to the *British North America Act*, we quite properly pause there to infer the principle of legislative supremacy, not as *the* organizing principle of our constitutional law but as *one* of its most basic principles. From the *Hodge* case, we learn that this principle applies both to the Parliament of Canada and to the provincial legislatures, and that the power to delegate inheres in the plenary legislative powers conferred through the *British North America Act*. We then proceed to Part IV of the Act to note that section 17 establishes "One Parliament for Canada", consisting of the Queen, Senate, and House of Commons. In section 20 we note that the British practice of holding annual sessions of Parliament is made a requirement of law in Canada. Nothing more that helps us with our question appears until we arrive at section 91, which enacts that:

It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada

If there is a legal limit on the power of Parliament to delegate, this is where it is prescribed. Section 91 entrusts the power to "make laws" to the Queen in Parliament, not the Queen in Council, and we have a precedent to tell us that where power is delegated by Parliament it cannot be exercised in a manner that is inconsistent with any provision of the delegating statute.¹⁸

Just as the Judicial Committee in *Liyanage* inferred from the relevant provisions of the Constitution of Ceylon that judicial power is to be exercised by, and only by, judges appointed and secured in accordance with those provisions, so it can be inferred from section 91 of the *British North America Act* that the power to make laws, in the primary sense of that expression, is to be exercised by, and only by, the Parliament of Canada constituted in accordance with Part IV of that Act. Delegation under the *Hodge* case is limited

¹⁸ *Booth v. The King* (1915) 51 S.C.R. 20, 21 D.L.R. 558.

to the power to elaborate or flesh out laws whose basic policy has been prescribed by Parliament. If Parliament delegates power to enact new laws or to alter existing Acts of Parliament, it can be argued that it is passing on to another body the power to "make laws" within the meaning of section 91. We are then forced to ask what point there is in providing that it shall be lawful for the Queen in Parliament to "make laws" if it turns out to be lawful for the Queen in Council to do the same thing without a similar grant of express authority to do so.¹⁹

Applying this analysis to the *Breathalyzer Reference* in terms of the language used in section 91, the advice and consent of the Senate and House of Commons were obtained to a Bill which included provisions conferring a right on suspects to obtain a sample of their own breath in a suitable container, obviously for purposes of independent analysis as a basis for defense evidence. The Queen, through her representative, assented to the Act as passed by both Houses, including section 120 delegating the proclaiming power. Then, in the process of proclaiming the law, the Governor in Council in effect repealed the provisions described above, to which both Houses had given their consent and to which Royal assent had been obtained. Irrespective of what Parliament may have intended, this was an exercise by the Governor in Council of power vested exclusively in the Queen in Parliament by the law of the Constitution. The fact that the same thing was done once before in our constitutional history²⁰ does not make it lawful, but simply shows how long we have been captives of a defective theory of constitutional law based on a misconception of the *Hodge* case.

To adopt the English legal stance towards legislative supremacy is to open but a single door in one's mind and to view the constitutional landscape always from the same narrow perspective. When difficulties arise which cannot be dealt with from that perspective, we simply ignore them. Thus in the *Breathalyzer Reference* the problem was seen as one of statutory interpretation to determine the true meaning of section 120. The Supreme Court did not even perceive the possibility that the legal separation of powers enacted by the *British North America Act* imposed a limit on the permissible effect of section 120, whatever the intention of Parliament may have been.

¹⁹ Judicial enforceability of conditions attached to legislative powers by constitutional enactments of the U.K. Parliament is illustrated by *Harris v. Minister of the Interior* 1952 (2) S.A. 428 (South Africa).

²⁰ *Re Gray* (1918) 57 S.C.R. 150, 42 D.L.R. 1.

To enter the kind of inquiry pursued in the *Liyanage* case is to open other doors in one's mind, resulting in a more complex conception of Canadian constitutional law, an approach which is at once more difficult and more responsive than the unidimensional conception resulting from the uncritical adoption of English legal theory. One of the doors opened leads to a theory of legal separation of powers, a theory enunciated in *Liyanage* and applied above to the question raised in the *Breathalyzer Reference*.

Two other significant lines of inquiry generated by the search for a coherent theory of Canadian constitutional law will be pursued in order to test the interpretation put forward here and to indicate some of its implications. The first concerns the significance for fundamental rights of allocating exclusive legislative competence in relation to criminal law and procedure to the central legislature in the Canadian federal system. The second concerns the lack of response among lawyers and judges to the *Canadian Bill of Rights*.²¹

As to the first of these, the assertion made here is that the law of the Constitution, by giving Parliament exclusive competence in matters relating to criminal law and procedure,^{21a} has at the same time entrusted it with basic political freedoms. The reason why this is so is connected with the intention to give Canada a constitution "similar in principle" to that of the United Kingdom, a similarity which touches principles other than the basic principle of legislative supremacy.

The chief proponents of this interpretation of the Canadian Constitution have been Professor Frank Scott and the late Mr Justice Ivan Rand. The latter, with his usual eloquence, stated the relevant principle of the English constitution this way in *Saumur v. City of Quebec*:

Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates.²²

The attempt to give effect to this principle by interpreting the preamble to the *British North America Act* as entrenching in Canadian constitutional law those basic liberties that existed in England in 1867 (an attempt first made in an *obiter dictum* in *Reference re*

²¹ S.C. 1960, c.44 (see R.S.C. 1970, Appendix III).

^{21a} *British North America Act, 1867, supra*, note 1, s.91(27).

²² [1953] 2 S.C.R. 299, 329.

Alberta Statutes)²³ proved abortive. The reason, I suggest, is that it set the matter into a framework of interpretation too broad and general for Canadian judges to tolerate, and was vulnerable to having the federal principle superimposed on it, so that Cartwright J. (dissenting) was able to assert in the *Saumur* case that:

There are thus no rights possessed by the citizens of Canada which cannot be modified by either Parliament or the Legislature, but it may often be a matter of difficulty to decide which of such bodies has the legislative power in a particular case.²⁴

It is one thing to "modify" a right by legislative action (and here I assume the learned Judge meant to include freedoms in his use of the word "rights") but quite another to make laws in relation to a "right" which has the character of a fundamental political freedom. Mr Justice Rand's sense of the importance of such freedoms in the English Constitution should have been tied more explicitly to the criminal law, which in both England and Canada has traditionally defined the outer limits of these freedoms through the crimes of sedition, criminal libel, criminal contempt of court and obscenity (freedom of expression and of the press), unlawful assembly (freedom of assembly), criminal conspiracy (freedom of association), and profaning the Sabbath and other offences against an established church, (freedom of religion). Now we can add the offence referred to as hate propaganda,^{24a} and no doubt there are other criminal offences that go to define the limits of fundamental freedoms. But these are sufficient to make the point that at the core of the criminal law of England traditionally there have been severely punished offences going to public order and civil government, which offences define the limits of political freedoms.

It is not suggested here that limits on fundamental rights have been imposed exclusively through criminal law in English constitutional practice, but rather that their treatment in a direct manner for the purpose of balancing order with liberty has been done through the criminal law and is one of its central purposes. Therefore any provincial law which seeks to alter the basic balance created by the criminal law should be found invalid. Provincial laws of defamation may have the effect of limiting free speech, but only indirectly as an incident to the quite different and central provincial concern of providing civil redress for injury inflicted. Whether a law limiting the freedom to picket is a sufficiently direct limitation to give it an

²³ [1938] S.C.R. 100.

²⁴ *Supra*, note 22, 384.

^{24a} *Criminal Code*, R.S.C. 1970, c.C-34, s.281.1, added by R.S.C. 1970, c.11 (1st Supp.), s.1.

essentially criminal law nature was the question faced in *Koss v. Konn*.²⁵ A more fully developed analysis of the core area of the criminal law as it defines the limits of fundamental freedoms might have made it less easy to characterize the provincial law in question as one in relation to labour relations, an aspect of civil rights in the province.

If this principle of the English Constitution is to be given expression in the Canadian context, more is required than an assertion that the two levels of legislature in Canada have between them the same omnipotence in law as the Parliament of the United Kingdom. Some inquiry is needed into the special character of the heads of legislative power described in sections 91 and 92 of the *British North America Act* in the light of English Constitutional theory and practice. When one finds that criminal law and procedure are represented as matters going to the peace, order and good government of Canada,^{25a} it is relevant to look into the nature and purpose of English criminal law in the context of constitutional history.

English constitutional law has a theoretical unity that is made possible by the unwritten nature of that constitution. When we distinguish between *the Constitution* and *the law of the Constitution*, we see that in Britain the former lacks this theoretical unity and has been as concerned with preserving the rule of law through the separation of powers as it has with preserving democratic values through parliamentary supremacy. The fact that the rule of law in Britain finds its ultimate base in political rather than legal sanctions does not make it any the less a principle of the English Constitution to which the similarity of the Canadian Constitution is referable.

²⁵ (1962) 30 D.L.R. (2d) 242. In that case a provincial enactment which limited freedom of expression through picketing was held by a majority of the B.C. Court of Appeal to be a law relating to property and civil rights in the Province, designed to protect the liberty of a person to carry on his legitimate business in the Province and to the use of his premises without interference. While the enactment clearly affected freedom of expression, it was, in the Court's opinion, "in no way *directed* to the suppression of free speech" (*per* Tysoe J., at 265, emphasis added). Whatever one may think of the result in this case, the line of reasoning followed preserves the view expressed by numerous judges in the Supreme Court of Canada that fundamental political freedoms, as subjects of direct legislative intervention, are committed to the Parliament of Canada exclusively.

^{25a} This premise is based upon a reading of the *British North America Act*, *supra*, note 1 that perceives the enumerated heads of s.91 as instances of the general power to legislate for the peace, order and good government of Canada.

It is in the process of giving legal expression to the civil liberties dimension of the criminal law under the Constitution of the United Kingdom that Canadian jurisprudence has been found wanting. The theory of an implied bill of rights located in the preamble to the *British North America Act* lacked the specificity necessary for judicial development of principles. It also had the effect of subordinating both the federal principle and the principle of legislative supremacy. A Canadian theory of fundamental political freedoms that is related to the central legislature's responsibility for criminal law overcomes the difficulty by locating these freedoms at a common level with the principle of legislative supremacy and the federal principle, calling for a rational accommodation where conflict seems to exist. The implied-bill-of-rights theory based on the preamble suggested an either/or choice between apparently conflicting principles, in which the choice of legislative supremacy as the superior value was inevitable, given the dominance of the *Hodge*-based conception of Canadian constitutional law reflected in the statement of Cartwright J. in the *Saumur* case quoted above.²⁶

By transferring the focus of our theory of fundamental rights from the preamble to section 91(27) of the *British North America Act*, we may be able to broaden our conception of Canadian constitutional law in terms of "similarity in principle" and to see that we adopted in 1867 the English principle that the criminal law, with its severe penalties and rigorous procedural requirements, is the instrument through which the community defines the limits of fundamental political freedoms. If the federal division of legislative powers on the subject carries this implication, then attempts by provincial legislatures to impose further limits on the area of freedom left by the federal criminal law become repugnant to the "similar" Constitution, however supreme that legislature may be for other purposes.²⁷

²⁶ *Supra*, note 22.

²⁷ The clearest example of a provincial attempt to protract the limits on a political freedom prescribed by federal criminal law was Alberta's *An Act to ensure the Publication of Accurate News and Information*, Bill 9, 3d. Sess., 8th Leg., Alta. Nat. Ass., 1937 which was held *ultra vires* in *Reference re Alberta Statutes*, *supra*, note 23 because it was part of a legislative scheme at the core of which was a statute that encroached on exclusive federal competence in relation to banks and banking. Had the Act stood alone, the Supreme Court might have been forced to consider the thesis later developed by Rand J. that freedom of the press is the residual area left after the criminal law prohibits certain acts. Provincial libel laws can hardly be said to define the limits of political freedom of expression since their concern is with harm done between citizens. Speech or writing is the action through which the harm is done, but such laws are directed at the individual harm and its

While this repugnancy will obviously be expressed in terms of *ultra vires*, a developed theory of constitutional law requires that this important dimension of the theory be articulated by judges, as Rand J. attempted to do in the *Switzman*²⁸ and *Saumur*²⁹ cases. If it is not, trial judges and legal counsel will fill the gap in analysis by falling back on the overemphasized principle of legislative supremacy in Canadian constitutional law.

These two cases, *Switzman* and *Saumur*, while perhaps the best-known instances of judicial invocation of the exclusivity of the federal criminal law power for civil liberties purposes, are far from isolated examples. There is a fairly consistent and negative judicial response to provincial encroachments on fundamental freedoms, especially freedom of expression. The result has been that the concurrency doctrine developed in *O'Grady v. Sparling*,³⁰ and applied not only to highway safety but also to public health³¹ and child welfare³² as well as other situations,³³ has not been extended to areas where the criminal law defines the limits of fundamental freedoms. For example, in *R. v. Board of Cinema Censors*³⁴ Batshaw J. of the Quebec Superior Court denied the provincial legislature entry into the field of suppression and control of obscene publications, which bears on freedom of expression, even though a respectable judgment upholding the legislation could have been built on the authority of *O'Grady* and subsequent decisions. In *Kent District Corp. v. Storgoff*³⁵ Whittaker J. of the Supreme Court of British Columbia struck down a municipal by-law which denied a group of Sons of Freedom Doukhobors entry into a municipality to protest the imprisonment of their men. The learned Judge referred to section 64 of the *Criminal Code*³⁶ prohibiting unlawful assemblies, and to the preventive powers conferred by section 27 of the Code as the applicable laws for the problem faced by the municipality. Again, a notion of municipal power delegated by the Province to control the use of its streets, coupled with an *O'Grady* concurrency analysis, could have been used to support the by-law had the Judge been unaware of, or in-

redress, not at the speech or writing *per se*. They regulate civil rights rather than define civil liberties, the latter being of a fundamental political nature.

²⁸ *Switzman v. Elbling* [1957] S.C.R. 285.

²⁹ *Supra*, note 22.

³⁰ [1960] S.C.R. 804.

³¹ *E.g.*, *R. v. Snyder and Fletcher* (1967) 61 W.W.R. 112.

³² *E.g.*, *R. v. Chief* (1964) 42 D.L.R. (2d) 712.

³³ *E.g.*, securities, see *Smith v. The Queen* [1960] S.C.R. 776.

³⁴ (1968) 69 D.L.R. (2d) 512.

³⁵ (1962) 38 D.L.R. (2d) 362, 41 W.W.R. 301, 308.

³⁶ S.C. 1953-54, c.51 (now R.S.C. 1970, c.C-34).

different to, the coincidence of the criminal law power and the limits of fundamental freedoms in this area of activity.

Indeed, numerous counter-examples can be found. One of them is the case of *Dupond v. Ville de Montréal*³⁷ where the decision of Trépanier J. of the Quebec Superior Court declaring *ultra vires* Montreal's anti-demonstration by-law of 1969 primarily on the authority of *Switzman v. Elbling*, has now been reversed by the Quebec Court of Appeal on a municipal law-and-order rationale, with the concurrency doctrine called in in aid.³⁸

The failure to understand that cases like *Dupond* involve more than the federal division of legislative powers results from the corresponding failure to appreciate the interpretation of our constitutional law put forward most vigorously and persistently by Professor Scott³⁹ and introduced, however precariously, into our jurisprudence by Mr Justice Rand. If the *Dupond* case goes on appeal to the Supreme Court of Canada it will provide the Court with an opportunity to explore the civil liberties implications of the federal competence in relation to criminal law and procedure. The appearance of the *Canadian Bill of Rights*⁴⁰ since *Switzman* and *Saurmur*, connecting criminal law (through the words "Every law of Canada" in section 2) to the fundamental freedoms set out in section 1 of the Bill through standards of judicial interpretation, makes it especially important that the Court explore the suggested link. The result could well be a warning against interpreting *O'Grady v. Sparling*⁴¹ as indicating provincial access to areas where the *Criminal Code*⁴² defines the limits of fundamental political freedoms. While in *O'Grady* the Supreme Court stated that the province was pursuing a different, non-criminal purpose, it is obvious that the effect of the decision was to allow the province to extend criminal sanctions beyond the limit Parliament had decided was appropriate.

Much more is at stake than the need to accommodate federal and provincial purposes within the federal framework, and it would be of the greatest importance if the Supreme Court were to develop the added dimension of fundamental freedoms. This it could do by asking afresh what is the full significance of criminal law and procedure in English constitutional theory with its very indirect approach

³⁷ S.C.M. 16,086, June 18, 1970, unreported. The by-law in question and the text of the judgment are reprinted in the Appendix to this article, *infra*.

³⁸ C.A. 13,482 and 13,590, September 26, 1974, unreported.

³⁹ F. R. Scott, *Civil Liberties and Canadian Federalism* (1959).

⁴⁰ *Supra*, note 21.

⁴¹ *Supra*, note 30.

⁴² R.S.C. 1970, c.C-34.

to fundamental rights, and then asking whether that significance has properly been recognized in the interpretation of section 91(27) of the *British North America Act*, which allocates exclusive legislative competence over that field to the central legislature in a federal system whose constitution is intended to be similar in principle to that of the United Kingdom.

I turn now to the *Canadian Bill of Rights* to consider whether that Act of Parliament takes on a different and more acceptable character when viewed through a changed conception of Canadian constitutional law. This can best be done by first considering what is unacceptable about the Bill when viewed through the dominant, *Hodge*-based conception of the supremacy of Parliament. Returning to that vantage point for a moment, it becomes appropriate to ask how a statute like the *Canadian Bill of Rights* would sit with the English Parliament. When this kind of problem was raised in the *Drybones*⁴³ case, it led the dissenting Judges to conclude that the Bill offended the principle of legislative supremacy if given effect to the point of a judicial order rendering an enactment of Parliament inoperative. Hence they declined to use the Bill to protect *Drybones'* asserted right to equality before the law. But because the Bill itself is an Act of the supreme Parliament, as in the *Breathalyzer Reference*, all the Judges declined to examine the case directly in the context of constitutional theory and instead presented their conclusions as an interpretation of Parliament's true intention in enacting the Bill. This is what an English judge would have done.

The most spectacular feat of avoiding underlying questions of constitutional theory has been the use of the declaratory form of section 1 of the Bill as indicating a legislative intention to perpetuate the law on human rights and fundamental freedoms as it existed in 1960 when the Bill of Rights was enacted.⁴⁴ It is no compliment to the perception of those who adopt this position nor to that of the legislators who enacted the *Canadian Bill of Rights*, that the law as it stood in 1960 included a Supreme Court decision upholding the right of a tavern operator to refuse service to a black man because of his colour, a right which the Court considered flowed from freedom of commerce.⁴⁵ Other cases could be cited to show that it is ludicrous to attribute to Parliament in enacting the

⁴³ *R. v. Drybones* [1970] S.C.R. 282, (1969) 9 D.L.R. (3d) 473.

⁴⁴ This was the basis of the minority position in *Drybones* and has begun to emerge as a majority position in the recent decisions in *Attorney-General of Canada v. Lavell* [1974] S.C.R. 1349, (1973) 38 D.L.R. (3d) 481 and *R. v. Burnshine* (1974) 44 D.L.R. 584 (S.C.C.).

⁴⁵ *Christie v. York Corp.* [1940] S.C.R. 139.

Canadian Bill of Rights the intention of freezing the existing law, not to mention the concern expressed during the debate that preceded the Bill about serious denials of human rights in the world community and about the lack of real teeth in Canadian law to back up vague generalities about Magna Carta and the common law.

The lack of response to the *Canadian Bill of Rights* has been reinforced, or perhaps provoked, by a sense that the general formulations of section 1 of the Bill, such as the notions of equality before the law and freedom of speech, are more suitable as guides to legislative action than as standards for judicial reasoning and decision. The result has been a generally negative stance toward the Bill of Rights. An active response is seen as an improper invasion by the judiciary of the legislative domain and thus a usurpation by judges of the supremacy that belongs to Parliament. The retreat from the positive position taken in *Drybones*, most clearly evidenced by the *Lavell*⁴⁶ case, is accompanied by statements which indicate a strong sense of judicial guilt at having tasted what is perceived as the forbidden fruit of judicial supremacy. The philosopher-king scarecrow used by so many who subscribe to the *Hodge*-based conception of Canadian constitutional law has had its effect on judicial attitudes.

Before re-examining the *Canadian Bill of Rights* through the different conception of Canadian constitutional law presented earlier in this article, it is worth observing that the Bill as an interpretation statute directed at the construction and application of laws of Canada, is designed primarily as authority for judicial review of the exercise of *executive* power. The *Drybones* case was one where judicial ingenuity in interpretation was exhausted and the Court was faced with a choice between two conflicting Acts of Parliament. By holding section 94 of the *Indian Act*⁴⁷ inoperative the Court was carrying out what it considered to be the will of Parliament. While *Drybones* did raise an important question of constitutional theory, the question was never really discussed because the judicial conscience conditioned by the *Hodge*-based conception of the supremacy of Parliament indicated that the Court was doing the impossible, namely impeaching an Act of Parliament on other than federal constitutional grounds.

The members of the Supreme Court were aware that to hold an enactment inoperative is quite different to holding it *ultra vires*, which is why the majority was able to reconcile the decision with

⁴⁶ *Supra*, note 44.

⁴⁷ R.S.C. 1952, c.149 (now R.S.C. 1970, c.I-6).

predominant legal theory. But their uneasiness at embarking on the supervisory function conferred on them by the *Canadian Bill of Rights* is beginning to show particularly, as already mentioned, in the *Lavell* case. If we cannot escape the *Hodge*-based conception of Canadian constitutional law that leads Canadian judges mistakenly to adopt the stance of English judges (although *Liyanage* suggests that English judges would not fall into the same trap if given the same constitutional responsibilities), then the *Canadian Bill of Rights* may die a quiet death for want of a judiciary that is able to cope with its responsibilities. That would be unfortunate because judicial development of a satisfactory human rights jurisprudence is going to be equally difficult on whatever authority it is based, given the neglect of this area for so long.

Unfortunately, the reaction to *Drybones* has led most members of the Supreme Court to reject the Bill of Rights even as an interpretation statute in reviewing the exercise of executive power. In *Hogan v. The Queen*⁴⁸ the majority held evidence to be admissible even though obtained following clear and deliberate violation by police of the accused's right to retain and instruct counsel without delay when detained, a right specified by section 2(c)(ii) of the Bill of Rights. The tendency to see the spectre of *Drybones* in every Bill of Rights argument is apparent in the *Burnshine* case.⁴⁹ The determination of the majority to retreat from what is believed to be the forbidden ground of impinging upon the supremacy of Parliament seemed to disable them from seeing that Chief Justice Laskin, along with Justices Spence and Dickson, were responding to the will of Parliament by redirecting the main thrust of judicial concern into development of the Bill as an interpretation statute. Using the Bill of Rights as a springboard to a broader, more creative approach to statutory interpretation, the feared confrontations could be avoided.

How do we come to terms with the judicial responsibility imposed by the *Canadian Bill of Rights*? Perhaps we can say that Canadian judges have long engaged in the process of judicial review of legislation through application of the division of legislative powers, so that we are no longer concerned with the purity of legislative supremacy. While this response may reduce judicial uneasiness about *Drybones* it does not provide a theoretical framework that will enable judges to give effect to the *Canadian Bill of Rights* in a manner consistent with the fundamental principles of our Constitution.

⁴⁸ (1975) 48 D.L.R. (3d) 427.

⁴⁹ *Supra*, note 44.

The search for such a framework takes us back yet again to the preamble to the *British North American Act*,^{49a} with its reference to a constitution similar in principle to that of the United Kingdom. The judicial power of interpretation in Britain has long been the judges' strongest tool for maintaining the rule of law. Recently it has been used in the *Anisminic*⁵⁰ and *Padfield*⁵¹ cases to maintain a functional separation between the Executive on the one hand and the Judiciary and Parliament respectively on the other. At the constitutional level, the judicial power of interpretation has been used in England to protect fundamental rights through a series of presumptions which require clear legislative language to overcome. And the necessary clear language may prove too risky to a government unwilling to face a hostile opposition, press, or public, so that the interplay of judicial and political processes results in effective protection of fundamental rights.

This aspect of English constitutional law is described by Keir and Lawson in the following way:

The principle of parliamentary sovereignty therefore implies that the courts will not intrude into the legislative process, and that an Act of Parliament validly passed under the appropriate procedure and in the accustomed form must be put into effect. Its meaning and effect must, however, be examined if any question about them arises in the course of litigation. Here the canons of interpretation followed by the judges embody in an attenuated form the ancient doctrine, already referred to, that there was a sense in which the common law was fundamental. A statute which is contrary to the reason of the common law or purports to take away a prerogative of the Crown is none the less valid, but it will, so far as is possible, be applied in such a way as to leave the Prerogative or the common law rights of the subject intact. To this extent the reason

^{49a} *Supra*, note 1.

⁵⁰ *Anisminic v. Foreign Compensation Commission* [1969] 2 W.L.R. 163, where the House of Lords declared a decision of the Commission to be a nullity even though the statute establishing the Commission provided that "[t]he determination by the Commission of any application made to them under this Act shall not be called in question in any court of law"; *Foreign Compensation Act, 1950*, 14 Geo.VI, c.12, s.4(4) (U.K.). The judges explained this apparent defiance of the will of Parliament by saying that when the Commission exceeds the powers delegated to it under the Act, the resulting order is a nullity which cannot be a "determination" to which the privative clause applies.

⁵¹ *Padfield v. Minister of Agriculture* [1968] 2 W.L.R. 924. Here the House of Lords held that a decision of the Minister made in the exercise of a discretion was subject to judicial interference if its effect, in the view of the judges, was to frustrate the policy of the Act. Observing that the policy and objects of the Act were matters of legal construction of the Act, the House of Lords ordered *mandamus* against the Minister requiring him to appoint a committee of investigation, which he had decided he would not do.

of the common law still prevails; we cannot say that Parliament cannot do any of these things, but we can still say that there is a presumption against its doing them. If it is clear from the express words of the statute or by necessary implication that Parliament has intended to do them, *cadit quaestio*.⁵²

These authors then go on to describe the presumptions of interpretation in English law, including the following presumption against repeal of laws that protect fundamental liberties:

The judges seem to have in their minds an ideal constitution, comprising those fundamental rules of common law which seem essential to the liberties of the subject and the proper government of the country. These rules cannot be repealed but by direct and unequivocal enactment. In the absence of express words or necessary intendment, statutes will be applied subject to them. They do not override the statute, but are treated, as it were, as implied terms of the statute. Here may be found many of those fundamental rights of man which are directly and absolutely safeguarded in the American Constitution or the *Déclaration des droits de l'homme*. In England they are protected, but not absolutely, for Parliament may, if it thinks fit, and if it expresses its intention unequivocally, take them away. It is worthy of mention that in Canada, where the same conditions apply, the Dominion Parliament has enacted a Bill of Rights . . . which is protected against facile invasion by rules such as that no statute shall be construed as interfering with the enumerated fundamental liberties unless it also includes an express statement that it is to operate notwithstanding the Bill of Rights.⁵³

The reference to the *Canadian Bill of Rights*^{53a} is interesting, and implicit in the assertion that the same conditions apply in Canada is the proposition that the Bill is but an extension of this principle of protection of fundamental liberties through the power of interpretation.

Interpretation Acts, both in Canada and in England, tend to provide fairly specific rules of construction for judicial guidance, although it is common to find in Canadian versions a provision stating that every enactment shall be deemed remedial and shall receive such fair, large and liberal interpretation as will best ensure the attainment of its object according to its true intent.⁵⁴

Thus, both the use of the judicial power of interpretation to protect fundamental liberties and the use of statutes to enact rules of construction are features of the model on which the Canadian Constitution is based. When the two are combined in a single statute and called a *Canadian Bill of Rights*, the identity of name

⁵² D. L. Keir and F. H. Lawson, *Cases in Constitutional Law* 5th ed. (1967), 9.

⁵³ *Ibid.*, 11.

^{53a} *Supra*, note 21.

⁵⁴ See, e.g., *Interpretation Act*, R.S.C. 1970, c.I-23, s.11.

with the much more potent, entrenched U.S. Bill of Rights should not scare us off the important task of developing our own Bill of Rights within an articulated theory of Canadian constitutional law.

This brings us back to our starting point — the misquotation of *Hodge v. The Queen*⁵⁵ in the *Maritime Bank* case.⁵⁶ A full sense of judicial responsibility depends upon realizing that the quality of legislative supremacy that exists under the Canadian Constitution is quite different to that found in the United Kingdom, and seeing why that is so and what consequences flow from it. This is not to say that a written Bill of Rights in the United Kingdom could not lead to a British *Drybones*, but rather that the established responsibility of Canadian judges for constitutional adjudication makes it unnecessary to undergo any major adaptation of legal theory and judicial attitudes to accept as proper the ultimate step taken by the majority in *Drybones*. Clarifying our theory of constitutional law does not *make possible* an outcome like that in *Drybones* — that outcome was possible all along because a court of law must always make a choice when faced with conflicting legislative edicts. It was the *kind* of conflict that was new, created by the enactment of human rights-based standards of interpretation. What the clarification of Canadian constitutional theory *can* do is enable judges to remove the nagging sense of impropriety that now threatens the modest progress we have made toward effective legal protection against official violation of those rights and freedoms that we assert to be essential to the parliamentary system.

⁵⁵ *Supra*, note 7.

⁵⁶ *Supra*, note 8.

APPENDIX

Règlement
By-law

3926*

Ville de Montréal
Montreal City

Règlement concernant certaines mesures exceptionnelles pour assurer aux citoyens la paisible jouissance de leurs libertés, réglementer l'utilisation du domaine public et prévenir les émeutes et autres troubles de l'ordre, de la paix et de la sécurité publics.

A la séance du conseil de la ville de Montréal tenue le 12 novembre 1969,

le conseil décrète:

ATTENDU qu'il est impérieux d'assurer la protection des citoyens dans la jouissance de leurs libertés et de la paix publique et contre toute violence à leur personne et à leur propriété;

ATTENDU qu'il s'est avéré que certaines manifestations s'accompagnent souvent d'actes de violence, de vols à main armée et d'autres actes criminels;

ATTENDU qu'il y a lieu de prendre des mesures d'urgence exceptionnelles pour la protection des citoyens et le maintien de l'ordre et de la paix publics;

ATTENDU qu'il y a lieu de réglementer l'utilisation du domaine public et de garantir les droits du citoyen à la paisible croissance du domaine public de la Ville;

1. — Toute personne a le droit d'utiliser et de jouir des voies et places publiques et du domaine public de la ville de Montréal dans la tranquillité, la paix et l'ordre publics;

2. — Les assemblées, défilés ou autres attroupements qui mettent en danger la tranquillité, la sécurité, la paix ou d'ordre public sont interdits

By-Law relating to exceptional measures to safeguard the free exercise of civil liberties, to regulate the use of the public domain and to prevent riots and other violations of order, peace and public safety.

At the meeting of the Council of the City of Montreal held on November 12, 1969,

Council ordained:

WHEREAS it is imperative to provide for the protection of citizens in the exercise of their liberties, safeguard public peace and prevent violence against persons and property;

WHEREAS violence, armed robberies and other criminal acts often accompany certain demonstrations;

WHEREAS it is in order to enact exceptional emergency measures for the protection of citizens and the maintenance of peace and public order;

WHEREAS it is in order to regulate the use of the public domain and safeguard the right of citizens to the peaceful enjoyment of the public domain of the City;

1. — Anyone is entitled to the use and enjoyment of the streets, public places and public domain of the City of Montreal untroubled and in peace and public order.

2. — Assemblies, parades or other gatherings that endanger tranquility, safety, peace or public order are prohibited in public places and

* Montreal City By-laws, Nos.3758-3986, 1969.

sur les voies et places publiques et dans les parcs ou autres endroits du domaine public de la Ville;

3. — Une personne qui participe à ou est présente à une assemblée, un défilé ou un attroupeement dans le domaine public de la Ville ne doit molester, bousculer ou autrement gêner le mouvement, la marche ou la présence des autres citoyens qui utilisent également le domaine public de la Ville à cette occasion;

4. — Toute assemblée, défilé ou attroupeement dans le domaine public dont le déroulement s'accompagne d'une violation d'un des articles du présent règlement ou d'actes, conduites ou propos qui troublent la paix ou l'ordre public devient dès lors une assemblée, un défilé ou un attroupeement qui met en danger la tranquillité, la sécurité, la paix ou l'ordre public au sens de l'article 2 du règlement et doit immédiatement se disperser;

5. — Lorsqu'il y a des motifs raisonnables de croire que la tenue d'assemblées, de défilés ou d'attroupeements causera du tumulte, mettra en danger la sécurité, la paix ou l'ordre public, ou sera une occasion de tels actes, sur rapport du directeur du service de la police et du chef du contentieux de la Ville qu'une situation exceptionnelle justifie des mesures préventives pour sauvegarder la paix ou l'ordre public, le comité exécutif peut, par ordonnance, prendre des mesures pour empêcher ou supprimer ce danger en interdisant pour la période qu'il détermine, en tout temps ou aux heures qu'il indique, sur tout ou une partie du domaine public de la Ville, la tenue d'une assemblée, d'un défilé ou d'un attroupeement ou de toute assemblée, défilé ou attroupeement;

6. — Toute personne doit se conformer immédiatement à l'ordre d'un agent de la paix de quitter les

thoroughfares, parks or other areas of the City's public domain.

3. — No person participating in or present at an assembly, parade or other gathering on the public domain of the City shall molest or jostle anyone, or act in any way so as to hamper the movement, progress or presence of other citizens also using the public domain of the City on that occasion.

4. — Any assembly, parade or gathering on the public domain which gives rise to a violation against any article of this by-law or to any acts, behaviour or utterances which disturb the peace or public order shall ipso facto be an assembly, parade or gathering which endangers tranquility, safety, peace or public order under the terms of Article 2 of this by-law, and shall disperse forthwith.

5. — When there are reasonable grounds to believe that the holding of assemblies, parades or gatherings will cause tumult, endanger safety, peace or public order or give rise to such acts, on report of the Directors of the Police Department and of the Law Department of the City that an exceptional situation warrants preventive measures to safeguard peace or public order, the Executive Committee may, by ordinance, take measures to prevent or suppress such danger by prohibiting for the period that it shall determine, at all times or at the hours it shall set, on all or part of the public domain of the City, the holding of any or all assemblies, parades or gatherings.

6. — All persons shall immediately obey the order of a peace officer to leave the scene of any assembly,

lieux de toute assemblée, défilé ou attroupement tenu en violation du présent règlement;

7. — Quiconque participe à une assemblée, défilé ou attroupement tenus en violation du présent règlement ou contrevient autrement, de quelque manière à l'une des dispositions du présent règlement, est passible d'un emprisonnement ou d'une amende, avec ou sans frais, pour le terme ou le montant que la cour municipale de Montréal déterminera, à sa discrétion, et à défaut du paiement immédiat de l'amende ou de l'amende et des frais, selon le cas, d'un emprisonnement pour un terme déterminé par la cour municipale, à sa discrétion; l'emprisonnement pour défaut du paiement de l'amende ou des frais doit cesser en tout temps avant l'expiration du terme déterminé par la Cour, sur paiement de l'amende ou de l'amende et des frais, selon le cas.

L'emprisonnement ne doit pas être d'une durée de plus de soixante (60) jours et l'amende de plus de cent (100) dollars.

The power of the Executive Committee under section 5 of the by-law to authorize the prohibition of all public assemblies for a period to be determined at its discretion has been used twice: Ordinance No. 1 prohibited any such assembly for a period of thirty days from November 12, 1969 anywhere in the City of Montreal. Ordinance No. 2 prohibited assemblies for a period of thirty days from October 28, 1971 in an area bounded by the St Lawrence and Dorchester Boulevard (North and South) and St Denis Street and Bleury Street (East and West).

DUPOND *v.* VILLE DE MONTREAL ET AL., S.C.M. 16,086, June 18, 1970, The Honourable Mr Justice Paul Trépanier (unreported).

La requérante demande l'annulation du règlement numéro 3926 de la Ville de Montréal et de l'ordonnance numéro 1 édictée en rapport avec ledit règlement qui s'intitule comme suit:

"Règlement concernant certaines mesures exceptionnelles pour assurer aux citoyens la paisible jouissance de leurs libertés, réglementer l'utilisation du domaine public et prévenir les émeutes et autres troubles de l'ordre, de la paix et de la sécurité publics."

parade or gathering held on (*sic*) violation of this by-law.

7. — Whoever participates in an assembly, parade or gathering held in violation of this by-law or otherwise contravenes, in any way, any provision of this by-law, shall be liable to either imprisonment or a fine, with or without costs, for the term or the amount that the Municipal Court of Montreal will determine, at its discretion, and failing the immediate payment of such fine, or such fine and costs, as the case may be, to imprisonment for a term to be determined by the said Municipal Court, at its discretion; the imprisonment for failure to pay the fine or costs shall cease at any time before expiry of the term determined by the Court upon payment of the fine or of the fine and costs, as the case may be.

Such imprisonment shall not exceed sixty (60) days nor such fine one hundred (100) dollars.

La requérante allègue que le règlement et l'ordonnance en question sont nuls et de nul effet, ultra vires et anticonstitutionnels pour les raisons suivantes:

- a) ils sont contraires au préambule de la Loi de 1867 concernant l'Amérique du Nord Britannique qui mentionne que le Dominion canadien est régi par une constitution semblable en principe à celle du Royaume-Uni, cette dernière de même que les us, coutumes et traditions britanniques ayant reconnu, depuis des siècles, la liberté de parole, la liberté de réunion, la liberté de presse et la liberté d'association, toutes ces libertés, y compris celle de manifestation, faisant partie du libre fonctionnement de l'organisation politique au Canada;
- b) ils sont en contravention avec le préambule de l'art. 91 de la Loi de 1867 concernant l'Amérique du Nord Britannique qui mentionne que le Parlement canadien pourra légiférer en vue de la paix, de l'ordre public et de la bonne administration au Canada;
- c) les libertés de parole, de réunion, d'association, de presse, de manifestation, de religion, sont de stricte juridiction fédérale, et non pas des matières d'une nature purement locale ou privée, et ne concernent pas d'avantage la propriété et les droits civils;
- d) ils créent une nouvelle offense criminelle, contrairement à la Loi de 1867 concernant l'Amérique du Nord Britannique qui donne juridiction exclusive au Parlement canadien en matière de droit pénal, et sont de toutes façons, un enpiètement sur la juridiction exclusive du Parlement canadien, en matière de droit pénal;
- e) vu ce susdit, les lois de cette province n'ont pas juridiction pour accorder à l'intimé le pouvoir d'adopter les susdits règlement et ordonnance, et conséquemment la charte de l'intimée ne peut lui donner l'autorisation nécessaire à l'adoption desdits règlement et ordonnance;
- f) ils sont en contravention avec la Déclaration canadienne des droits, qui mentionne que les libertés de parole, de réunion, d'association, de presse ont existé au Canada et continueront à exister pour tout individu au Canada, et que toute loi du Canada doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés par ladite Déclaration canadienne des droits, ni à en autoriser la suppression, la diminution ou la transgression;
- g) ils sont abusifs, arbitraires et discriminatoires dans leur prétention illégale de contrôler les libertés de parole, de presse, de réunion et d'association, en ce qu'ils ne mentionnent aucune condition ou aucun critère pour leur application;
- h) ils sont contraires à la justice naturelle;

Les procureurs des quatre parties intéressées ont produit des notes et autorités où l'on cite ou réfère à une abondance de décisions et d'opinions d'auteurs;

Les procureurs de la Ville de Montréal et ceux du Procureur général de la Province soutiennent la validité du règlement et de l'ordonnance;

Le procureur du Gouvernement du Canada qui n'a traité que de la question de constitutionnalité du règlement en relation avec le droit criminel, la liberté de parole et la Déclaration des droits de l'homme a conclu que

le règlement est nul en son entier comme étant de la nature du droit criminel;

A la page 18 de ses notes, il pose bien le problème en s'exprimant ainsi: "A notre sens la question qui se pose ici et à laquelle la Cour doit répondre a trait à la nature, la substance et le but du règlement 3926 de la ville de Montréal.

S'agit-il de législation relative au droit criminel (A.A.B.N. art. 91 paragraphe 27)? Si oui, le règlement est nul comme outrepassant la juridiction de la ville et de la province, et l'on n'a pas à procéder plus loin. Si non, il faut se poser une autre question: s'agit-il de législation relative à des matières de juridiction provinciale énumérées à l'art. 92 A.A.B.N., soit, par exemple le paragraphe 16, "Generally all Matters of a merely local or private Nature in the Province", comme étant relatif soit à l'utilisation et la protection des rues, parcs et autres parties du domaine public de la ville, soit (possiblement) au maintien de l'ordre et la protection de la propriété pour rencontrer une situation purement locale (ce qui en ferait un simple règlement de police)? Si la réponse à cette question est affirmative le règlement est valide, dans le cas contraire il est nul."

Il aurait pu ajouter à sa deuxième question, soit le paragraphe 13 "Property and civil rights in the Province";

Cherchons donc à découvrir la nature, la substance et le but du règlement;

A la lecture des quatre paragraphes du préambule du règlement, l'on constate aisément qu'il est dirigé contre certaines manifestations s'accompagnant souvent d'actes de violence, de vols à main armée et d'autres actes criminels et que le but à atteindre est la protection des citoyens dans la jouissance de leurs libertés quant à eux et quant à leur personne et à leur propriété, et, à cette fin, régler l'utilisation du domaine public;

L'article 1 du règlement n'est qu'une déclaration de principe quant au droit de toute personne d'utiliser dans la paix et l'ordre les voies et places publiques de la ville;

L'article 4 est un article de définition;

Les articles 6 et 7 concernent l'obligation de se conformer au règlement et la pénalité à être imposée en cas de violation;

Ce sont les articles 2, 3 et 5 qui constituent réellement la substance du règlement;

L'article 2 interdit les assemblées, défilés ou autres attroupements qui mettent en danger la tranquillité, la sécurité, la paix ou l'ordre public. Cette interdiction est restreinte au domaine public de la Ville. L'interdiction prévue, à cet article 2, fait déjà le sujet des articles 64, 65 et 66 du *Code criminel* avec cette variante qu'elle ne s'applique qu'au domaine public de la Ville alors que ces dispositions du *Code criminel* reçoivent, en plus, leur application partout ailleurs;

L'article 3 vise non seulement celui qui participe mais aussi celui qui est présent à une assemblée, un défilé ou un attroupement et lui interdit de molester, bousculer ou autrement gêner le mouvement, la marche ou la présence d'autres citoyens. Ici encore cette interdiction est limitée au domaine public de la Ville. Cette interdiction est déjà couverte en grande partie

par les articles 230, 231 et 232 du *Code criminel*, quant aux voies de fait, et, l'article 372, quant aux méfaits;

Au surplus, cet article 3 ne viendrait-il pas en conflit, ou ne serait-il pas incompatible avec l'article 30 du *Code criminel* en interdisant à une personne présente d'intervenir pour empêcher une violation de la paix sans compter que cette interdiction pourrait possiblement s'appliquer à un agent de la paix contrairement aux articles 31 et 32 du *Code criminel*;

Enfin l'article 5 donne le pouvoir au comité exécutif de la Ville d'émettre une ordonnance pour interdire sur le domaine public de la Ville la tenue de toute assemblée, défilé ou attroupelement. Cet article va au delà du *Code criminel* en ce que selon l'article 68 de ce code pour que l'ordonnance de se disperser soit proclamée, il faut que l'émeute ait déjà commencé et qu'au moins 12 personnes y participent. Il y a toujours aussi cette restriction au domaine public de la Ville;

Il semble donc que ce règlement en substance traite de deux matières différentes, l'une en relation avec le droit criminel en regard des interdictions des articles 2, 3 et 5, et l'autre en ce qu'il affecte la propriété et les droits civils des citoyens d'une part, et l'utilisation du domaine public de la Ville d'autre part;

Cette dualité d'aspect d'une législation a fait l'objet de nombreuses décisions des plus hauts tribunaux à partir de celles de *The Citizens Insurance Company of Canada v. Parsons*, (1881-82) 7 A.C. 96, et de *Russell v. The Queen*, (1881-82) 7 A.C. 829;

Il serait fastidieux de les citer toutes. Je me bornerai à extraire de celles qui me semblent les plus appropriées à notre cas, les principes sur lesquels je base ma décision;

Dans la cause précitée de *Russell v. The Queen*, le Conseil privé après avoir donné quelques exemples de loi créant une offense criminelle, tel que le fait pour un homme de mettre volontairement le feu à sa maison ou de surmener son cheval, ou de lois restreignant la vente d'animaux atteints de maladie contagieuse s'exprimait ainsi:

"Laws of this nature designed for the promotion of public order, safety or morals and which subject those who contravene them to criminal procedure and punishment belong to the subject of public wrongs rather than that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to Criminal law which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada.

Few, if any, laws could be made by Parliament for the peace, order and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must always be determined in order to ascertain the class of subject to which it really belongs."

Une fois la matière déterminée, il faut chercher si elle se rattache à l'un ou l'autre des sujets des articles 91 et 92 (A.A.B.N.). Dans la cause de

A. G. Ontario v. Canada Temperance Federation, [1946] A.C. 193, le vicomte Simon s'exprimait ainsi:

"In their Lordships' opinion the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must in its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case ... and the Radio case ...) then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures."

Il faut aussi distinguer entre la nature d'une législation et ses effets. Le même vicomte Simon dans la cause de *Attorney General for Saskatchewan v. Attorney General for Canada* [1949] A.C. 110, à la page 123 disait:

"Consequential effects are not the same thing as legislative subject matter. It is "the true nature and character of the legislation," — not its ultimate economic results — that matters."

Ce n'est donc pas parce qu'une législation municipale dont le caractère et la nature sont de droit criminel, comme dans le cas qui nous occupe, a des effets sur la propriété et les droits civils qu'elle peut être validée;

L'urgence exceptionnelle exprimée au préambule du règlement de la Ville n'autorise pas non plus la Ville à passer une telle législation;

"True it is that an emergency may be the occasion which calls for a legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not." *A. G. Ontario v. Canada Temperance Federation*, (précité).

D'ailleurs, les manifestations tumultueuses accompagnées de violence et d'actes criminels ne sont pas un phénomène particulier et exceptionnel à la Ville de Montréal. Ce phénomène fait partie des "public wrongs" dont parle la décision de *Russell v. The Queen*, précitée, et, à ce titre, est une matière en relation avec le droit criminel réservée au Parlement du Canada;

Ce n'est pas non plus parce que ce règlement est limité au domaine public de la Ville qu'il peut être valide. Dans la cause de *Saumur v. City of Quebec* [1953] 2 S.C.R. 299, le juge Kellock s'exprimait ainsi:

"No citation of authority is needed to establish the proposition that civil regulation of the use of highways is a matter within the jurisdiction of provincial Legislatures, but there is a distinction between legislation in relation to a subject matter within s.92 and legislation which may have an effect upon such matters: *A. G. Sask. v. A. G. Can.* [1949] 2 D.L.R. 145 at pp. 149-50, A.C. 110 at p. 123, per Viscount Simon. It is only legislation "in relation to" matters within s.92 which is committed to provincial Legislatures...

Legislation which is concerned not primarily with highways at all but with other subjects must depend for its validity upon the legislative competence of the Legislature with respect to such subjects."

Ce n'est pas non plus parce que la Ville estime que le Parlement du Canada n'est pas allé assez loin dans l'établissement d'un crime qu'elle a droit d'y suppléer, en créant un nouveau crime par l'article 5 de son règlement et l'ordonnance émise en vertu dudit article. Le juge Middleton de la Cour Suprême d'Ontario dans *Re Race Track and Betting* (1921) 61 D.L.R. 504 s'exprimait ainsi:

"To the Dominion has been given exclusive jurisdiction over "criminal law". It alone can define crime and enumerate the acts which are to be prohibited and punished in the interests of public morality. The Province may prohibit many things when its real object is the regulation of and dealing with property and civil rights, or any of the subjects assigned to its jurisdiction. Parliament may deal with the same things from the standpoint of public morality, so there may be in many cases room for discussion as to the apparent conflict between the two legislative fields.

In the case in hand the proposed legislation is not in any way within the ambit of the provincial jurisdiction, but it is an attempt by the Province to deal with the question of public morals. Gambling is regarded as an evil. Parliament has undertaken, in the exercise of its powers, to lay down rules in the interest of public morals to regulate it. It has considered that on certain race-tracks betting by means of pari-mutuel machines shall not be unlawful. The Province, thinking this does not sufficiently guard public morals, seeks, in an indirect way to accomplish that which it thinks the Dominion should have done, and so proposes to prohibit racing on all tracks upon which it is lawful under the Dominion Act to operate pari-mutuel machines.

This is in no sense a conflict between the two jurisdictions by reason of the overlapping of the fields, but it is a deliberate attempt to trespass upon a forbidden field."

Cet article 5 du règlement de la Ville avec le pouvoir qu'il confère au Comité exécutif de la Ville d'interdire "toute assemblée, défilé ou attroupement" est nettement une législation dont la nature et le caractère sont en relation avec le droit criminel et conséquemment ultra vires;

En est-il autant des autres articles du règlement? Il paraît évident que cet article 5 est le coeur du règlement et que les autres articles n'ont été édictés que pour y arriver et qu'ils sont en quelque sorte ses vaisseaux sanguins et que, partant, ils n'auraient probablement pas été édictés sans l'article 5;

Le procureur du Ministre de la justice du gouvernement fédéral conclut que le règlement est nul en son entier et je partage cette opinion, et, à cette fin, je fais mien l'exposé qu'il a fait dans ses notes à ce sujet:

"Le Conseil Privé a énoncé le principe comme suit dans *Reference re Alberta Bill of Rights Act* [1947] 4 D.L.R. 1:

"There remains the second question whether when Part II has been struck out from the Act as invalid, what is left should be regarded as surviving, or whether, on the contrary, the operation of cutting out Part II involves the consequence that the whole Act is a dead letter. This sort of question arises not infrequently and is often raised (as in the present instance) by asking whether the legislation is intra vires 'either in whole or in part', but this does not mean that when Part II is declared invalid what remains of the Act is to be examined bit by bit in order to determine whether the Legislature would be acting within its powers if it passed what remains. The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that

the Legislature would have enacted what survives without enacting the part that is ultra vires at all."

Dans *Garrick v. Point Grey* [1927] 1 D.L.R. 446, la règle de la divisibilité a été exposée dans le même sens mais d'une façon un peu différente:

"A by-law may be good in part and bad in part, but the part that is good must be *clearly* distinguishable from the part that is bad, so that if the invalid portion is eliminated there will still remain a perfect and complete by-law capable of being enforced. The instances which admit of the severance of the good from the bad portion of by-laws are *confined to cases where the parts sought to be severed relate to distinct subject matters.*"

La Cour d'appel d'Ontario dans *Morrison v. Kingston* [1937] 4 D.L.R. 740, a déclaré ultra vires dans son entier un règlement municipal dont la partie ultra vires n'était pas clairement divisible ("clearly severable") du reste. Dans cette cause, le juge Latchford disait: "A by-law may be compared to an egg. If bad in part it is bad everywhere" (p. 541). Voir aussi *Nelson v. London* [1944] 3 D.L.R. 604, et *Rex v. Joly Oil Co.* 97 C.C.C. 338.

Parmi les causes citées par les procureurs partisans de l'invalidité du règlement, il en est une qui a retenu mon attention à cause de sa ressemblance avec le présent cas. Il s'agit de la décision d'un juge de la Cour Suprême de la Colombie Britannique *Kent District Corp. v. Storgoff* (1962) 38 D.L.R. (2d) 362, qui a déclaré invalide un règlement municipal, (il s'agissait d'un règlement interdisant aux Doukobors de pénétrer sur le territoire de la municipalité), comme étant un sujet relatif au droit criminel. Au préambule dudit règlement, on pouvait lire entre autre ce qui suit:

"And whereas the arrival of a group of this kind in the District of Kent will disorganize the educational system of the School district, will be a menace to health, and is likely to lead to breaches of the peace and the possible break-down of law and order in the district.

And whereas the powers and authorities vested in or conferred upon the Council are inadequate to deal with the emergency created by these conditions."

Venant à la conclusion que le règlement numéro 3926 de la Ville de Montréal est ultra vires de même que l'ordonnance numéro 1 adoptée le 12 novembre 1969 parce qu'il est une législation dont le caractère et la nature sont en relation avec le droit criminel, je m'abstiendrai d'examiner les autres motifs soulevés par la requérante;

Reversed by the Quebec Court of Appeal, C.A. 13,482 and 13,590, September 26, 1974 (unreported).
