THE MONTREAL ANTI-DEMONSTRATION BY-LAW— "BAD EVERYWHERE"

INTRODUCTION

A study of the by-laws adopted by our thousands of municipalities in Canada would undoubtedly turn up hundreds that are unconstitutional infringements of our basic civil liberties.[1] The courts have invalidated many of these by-laws,[2] but in many cases the average citizen will hesitate before bucking City Hall, considering the enormous financial sacrifice involved. The Montreal anti-demonstration by-law is, I would suggest, not only an infringement of freedom of assembly and expression but as well *ultra vires* on its face.

On November 12, 1969 the Montreal City Council adopted by-law No. 3926. Ironically this by-law is entitled — "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." The preamble explains the necessity for such measures in the following terms:

> 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;
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> WHEREAS it is in order to enact exceptional emergency measures for the protection of citizens and the maintenance of peace and public order;
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> WHEREAS it is in order to regulate the use of the public domain and safeguard the rights of citizens to the peaceful enjoyment of the public domain of the City . . .

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1. A clear example is by-law No. 493 of the Montreal suburb of Saint-Laurent adopted on July 10, 1969 that **inter alia** prevents posting during Federal elections. This provision is of course **ultra vires.** See **McKay** v. **The Queen,** [1965] S.C.R. 798, where an Etobicoke by-law forbidding the posting of signs was construed as not applying to the soliciting of votes for candidates during a federal election. Such an enactment would be **ultra vires** the powers of a municipal council or of a provincial legislature. Etobicoke adopted a similar by-law on June 19, 1967 which was applied during a provincial election. In quashing the by-law Richardson J. referring to **McKay** observed: "I should have thought that the borough in view of that expression of opinion, although it clearly does not refer to provincial elections, might well have hesitated to pass the section of the by-law herein referred to." **Re Millard and Borough of Etobicoke** (1968), 65 D.L.R. (2d) 414, 415. (Ont. H.C.)

2. See, e.g., the well known decisions of the Supreme Court in **Saumur v. City of Quebec,** [1953] 2 S.C.R. 299 (forbidding the distribution on city streets of any book, pamphlet, booklet, circular or tract) and, **Birks v. City of Montreal,** [1955] S.C.R. 799 (forbidding stores to keep open on religious holidays). For a review of the case law dealing with freedom of assembly, see, Tarnopolsky, **The Canadian Bill of Rights,** 26-36 and 138-146 (1966); Jodouin, **La liberté de manifester,** (1970) 1 Revue Générale de Droit (Ottawa) 9.

The by-law then goes on to effectively stangle freedom of expression by way of demonstrations.[3]

This by-law has already been ruled *ultra vires*.[4] The following discussion will centre on the by-law's invalidity due to I) the infringement of the criminal law power, and as to II) the infringement of civil liberties.[5]

I. INFRINGEMENT OF THE CRIMINAL LAW POWER

It is of course unquestionable that s. 91 head 27 of the *British North America Act* sets up an exclusive federal criminal law power.[6] Another truism is that whether Parliament does or does not legislate in this field a provincial legislature cannot do so.[7] The provincial power in s. 92 (15) is simply to permit the enforcement of valid legislation

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3. The by-law is set out in full so that comparisons made with the Criminal Code **infra** can be textually appreciated:
   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 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, parade or gathering held in 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 dollars ($100.00).
4. **Dupont** v. **La Ville de Montréal**, Superior Court, District of Montreal, June 18, 1970, No. 16,086 (not reported). Mr. Justice Trepanier ruled that the by-law was **ultra vires** because it was in effect of the nature and character of criminal law. This decision is now on appeal. In La Ville de Montréal v. X. [1970] R.L. 276 Mr. Justice Lacroix of Social Welfare Court also held that the by-law was **ultra vires**. Emphasis was put on the Duff **dicta** in **Reference Re Alberta Statutes** (see **infra**). Montreal **Municipal Court** decisions (unreported) have held the by-law to be **intra vires.**
5. It can also be argued that the by-law is **ultra vires** because it is not permitted by the City Charter, and that s. 5 not only does not conform to procedures forseen in the Charter but it illegally permits the Executive Committee of the City to adopt certain ordinances. These issues were pleaded in Superior Court (supra note 4). However, in deciding the case on the criminal law issue these questions were never reached by the Court.
6. See, e.g., **Russell** v. **The Queen** (1881-82), 7 App. Cas. 829, 839.
7. See, e.g., **Union Colliery Co.** v. **Bryden**, [1899] A.C. 580, 588.

under s. 92[8]. The result is that neither a provincial legislature nor its delegatee, a municipality, can enact criminal law. Although criminal law, in opposition to civil rights (s. 92 (13) and the imposition of penal sanctions, (s. 92 (15), has never been defined and is perhaps undefinable, a number of criteria can be used to determine whether or not the by-law has infringed on this exclusive federal power.[9]

We can compare the Montreal by-law to provisions in the Criminal Code so that we can distinguish the "true object, purpose, nature or character"[10] of the by-law as well as its objective effects.

Sections 2 and 4 of the by-law prohibit assemblies that endanger public order and foresee that such gatherings shall disperse forthwith. This ground has already been covered by sections 64 to 69 of the Criminal Code which define an unlawful assembly and a riot; provide for the reading of a proclamation ordering rioters to disperse; and , provide penalties for those committing prohibited acts. Sections 30 to 33 of the Code deal with breach of the peace and suppression of riots.

The assemblies or gatherings that endanger the peace under s. 2 would be unlawful under s. 4 of the by-law. Since it is not specified otherwise an assembly of two persons could constitute an unlawful assembly under the terms of the by-law. This provision is repugnant to s. 64 of the Criminal Code where three or more persons are required to constitute an unlawful assembly. Repugnancy is a sure indication that both provisions cannot "live together and operate concurrently"[11]– that the federal legislation is paramount.

The third section of the by-law provides that persons participating in demonstrations refrain from hindering the free movement of other persons. Surely the offences of assault (ss. 230 and 231) and mischief (s. 372) are comprehensive as to the punishment of reprehensible demonstrators. This section of the by-law also creates the new crime of *jostling*.

Section 5 of the by-law aims at preventing assemblies or gatherings that endanger the peace. The Executive Committee of the City can prohibit gatherings of presumably as few as two persons. Section

8. For what seems to be an untenably wide description of the provincial penal power see, Normandin, **Jurisdiction provinciale en matière criminelle**, (1968) 28 R. du B. 604.
9. On the criminal law power generally, see, Chevrette, **Prolégomènes à l'étude de la notion de droit criminel en droit constitutionnel canadien**, (1969) Revue Juridique Thémis, Vol. 3 no. 3, p. 17; Laskin, **Canadian Constitutional Law** (3rd edition) 849-854; Laskin, **Occupying the Field: Paramountcy in Penal Legislation**, (1963) 41 Can. Bar. Rev. 234; Leigh, **The Criminal Law Power: A Move Towards Functional Concurrency**, (1966-67) 5 Alta. Law Rev. 237; Normandin, **supra** note 8; Symposium, **The Criminal Law Power in Canada**, (1957) 15 Univ. of Tor. Faculty Law Rev. 1 ff.
10. **Lord's Day Alliance of Canada v. A.-G. of British Columbia**, [1959] S.C.R. 497, 509.
11. **O'Grady v. Sparling**, [1960] S.C.R. 804, 811. Of course, if the by-law is in essence criminal law the question of concurrency will not arise.

64 of the Criminal Code is also of a preventive nature insofar as an assembly of three or more persons who disturb the peace tumultuously constitutes an unlawful assembly.[12] Although this section of the Criminal Code is not as wide as the by-law provision, sections 408 (conspiracy) and 717 (recognizance to keep the peace) can also be applied as preventive measures.

Some importance has been attached to the fact that the by-law only applies to "all or part of the public domain of the City".[13] There are no suitable provincial or federal grounds for demonstrations in the City such as Parliament Hill in Ottawa. Presumably one could hold a very small demonstration on the Provincial Court house steps without infringing the by-law, and of course one could rent an arena or hall and hold a peaceable indoor demonstration. The point is that many demonstrations are organized on short notice by the non-affluent who often would not be able to rent an arena on short notice and who may not be able to raise the required rental. Besides which, an outdoor demonstration is visible to those persons the demonstrators are petitioning as well as to passers-by, whereas these effects are sterilized if indoor demonstrations are held.

As an infringement of the criminal law power the Montreal by-law closely parallels the emergency by-law discussed in *Kent District Corporation v. Storgoff*.[14] This by-law provided for the arrest and punishment of certain Doukhobors who entered the district. In deciding that the by-law was *ultra vires* Whittaker J. stated that Kent had clearly acted beyond its powers in creating a new crime and that:[15]

> The by-law is also designed to prevent conditions arising which may lead to a breach of the peace or unlawful assembly. These are matters relating to the criminal law and, as such are within the exclusive legislative jurisdiction of the Parliament of Canada. Both are covered by the Criminal Code; breach of the peace, by ss. 30 and 31, and unlawful assembly, by s. 64.

The Montreal by-law is in the nature of a criminal enactment; it is contrary to provisions of the Criminal Code; it creates at least one new "crime"; and its objective effect is to infringe on the criminal law power. If there is any doubt as to the purposive criminal law character of the by-law, such doubt is swept away by the plain words in its preamble.[16]

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12. Section 5 of the by-law is also repugnant to the provisions in the Criminal Code. See **supra** at note 11.
13. Baudouin, Fortin and Szabo, **Terrorisme et Justice** 117 (1970).
14. (1962), 38 D.L.R. (2d.) 362 (B.C.S.C.)
15. **Id.**, at p. 367. See too, **Johnson** v. **A.-G. of Alberta**, [1954] S.C.R. 127 (holding invalid a provincial statute, which provided for the confiscation of pin ball machines, as an invasion of the criminal law power).
16. "Ordinarily," as Rand J. explained in the **Reference as to the Validity of Section 5 (a) of the Dairy Act**, [1949] S.C.R. 1 at p. 47, "a preamble indicates the purpose of the statute and it may be a guide to the meaning and scope of the language where that is doubtful or ambiguous . . ."

As to the possible severability[17] of the Montreal by-law Latchford C.J.A. made the succinct observation that – "A by-law may be compared to an egg. If bad in part it is bad everywhere."[18] The Montreal City Council laid such an egg.

II. INFRINGEMENT OF CIVIL LIBERTIES

"Freedom of assembly is concerned with the public expression of opinion by spoken word and by demonstration."[19] The fundamental issue arising from the adoption of the Montreal by-law is the head-on challenge to this freedom.

It has long been clear in Canadian constitutional law that the right to assemble in order to express political opinions falls under exclusive federal jurisdiction.[20] Over seventy-five years ago Mr. Justice Mignault observed that the right of association, of peaceful assembly and of petition are not civil rights. He classed them as public rights (droits publics).[21] This statement has often been cited at the Supreme Court.[22] Public rights cannot be supported as being within provincial jurisdiction neither under s. 92 (13) nor under s. 92 (16) of the B.N.A. Act.

The well known *dicta* of Duff C.J. (with Davis J. concurring) and Cannon J. in the *Reference Re Alberta Statutes*[23] deals with the crux of the fundamental point at issue here. Mr. Justice Cannon after referring to the preamble of the B.N.A. Act stated:[24]

> Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State, within the limits set by the criminal code and the common law. Every inhabitant of Alberta is also a citizen of the Dominion. The province may deal with his property and civil rights of a local and private nature within the province; but the province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern.

17. For the criteria of severability see, e.g., **A.-G. for Alberta** v. **A.-G. for Canada**, [1947] A.C. 503, 518-519; **Garrick** v. **Point Grey**, [1927] 1 D.L.R. 446 (B.C.S.C.)
18. **Morrison** v. **Kingston**, (1937) 4 D.L.R. 740, 741 (Ont. C.A.).
19. Tarnopolsky, **supra** note 2 at p. 138.
20. Mr. Justice Abbott has put infringement of these liberties beyond even federal control. He follows his citation of Chief Justice Duff's **dicta** in the **Reference Re Alberta Statutes** (see infra) with the proposition that: "I am also of opinion that as our constitutional Act stands, Parliament itself could not abrogate this right of discussion and debate." (**Switzman v. Elbling**, [1957] S.C.R. 285, 328.) He affirmed this statement in **Oil, Chemical & Atomic Workers International Union, Local 16-1601** v. **Imperial Oil Ltd.**, [1963] S.C.R. 584, 600.
21. Mignault, **Traité de droit civil canadien**, vol. 1 at p. 131 (1895).
22. See, e.g., **Switzman, supra** note 20 at p. 308; **Saumur, supra** note 2 at p. 348; **Oil, Chemical and Atomic Workers** . . . supra note 20 at p. 599. Also see Mr. Justice Rand's statement in **Saumur** at p. 329.
23. [1938] S.C.R. 100.
24. **Id.**, at p. 146.

Chief Justice Duff used similar language in stating that the preamble to the B.N.A. Act showed plainly enough that the Canadian constitution was to be similar in principle to that of the United Kingdom and that this "contemplates a parliament working under the influence of public opinion and public discussion."[25] He conceded that the provinces could regulate newspapers to some degree, but the limit of this regulation is reached "when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of *The British North America Act* and the statutes of the Dominion of Canada."[26]

The Montreal by-law has substantially the same effect as the *Alberta Press Bill* – the by-law does effectively interfere with the rights of Canadians to express freely their opinion about governmental policies and matters of public concern. Those persons who use demonstrations in order to express and discuss matters of public concern are in large measure persons who do not have access to the media, or whose access to the newspapers, radio and television is dependent on their demonstrating.

In the Saumur case a Quebec City by-law forbidding distribution in the streets of any book, pamphlet, booklet, circular or tract whatever without permission of the Chief of Police was held as not applying to Jehovah Witnesses. Rand J. characterized this uncontrolled discretion as permitting the diffusion of only certain writings. The "public way" he stated, "in some circumstances the only practical means available for any appeal to the community generally, have from the most ancient times been the avenues for such communications . . ."[27] Mr. Justice Kellock made a similar observation and concluded that "such a by-law was not enacted 'in relation to' streets but in relation to the minds of the users of the streets."[28]

A simple reading of section 5 of Montreal by-law 3926 confirms the concern expressed by Rand and Kellock JJ. The test in section 5 by which freedom of assembly can be prohibited is a purely subjective test – "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

25. Id., at p. 135.
26. Id., at pp. 136-137.
27. Saumur, supra note 2 at p. 332.
28. Id., at p. 338.

peace or public order . . .", demonstrations and assemblies can be prohibited by the Executive Committee of the City.[29] There are no objective standards to restrain purely discretionary official action. It need hardly be emphasized that such a by-law can be used to regulate the "minds of the users of the street" rather than the streets themselves.

Control of the mind is not a particularly new phenomenon in Montreal by-laws. The by-law held *ultra vires* in *Dionne v. Municipal Court*[30] provided that:[31]

> It is forbidden to carry or distribute any posters, advertisements, prospectuses, circulars or papers in, near or on the streets, alleys, sidewalks and public places of the City.

Nevertheless the Executive Committee of the City of Montreal could at its discretion permit such distribution.[32] The plaintiff, a candidate for the Labour Progressive Party (communist) during a federal election, was distributing campaign literature door to door. She challenged the validity of the by-law after having been charged and found guilty of having "distributed circulars . . . in, near or on the streets . . . of the City of Montreal without having previously secured a permit from the Director of Police on the recommendation of the Executive Committee of the said City." Scott A.C.J. cited at length the dicta from the *Reference Re Alberta Statutes* as being "relevant to these proceedings."[33]

It is the Duff/Cannon *dicta*, as applied in *Saumur* and *Switzman*, which states clearly that a local government[34] cannot trample on freedom of speech that is "relevant" to the validity or invalidity of the Montreal by-law. To hold otherwise is simply begging the question.

CONCLUSION

Hopefully, when the Montreal by-law comes before the Supreme Court, as it probably will, the Court will tackle the fundamental issue

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29. The Executive Committee adopted an ordinance prohibiting demonstrations on November 12, 1969. This ordinance was ruled invalid. See **supra** note 4.

30. [1956] S.C. 289 (Que. S.C.)

31. **Id.**, at p. 291.

32. This second paragraph of the by-law read as follows:
> Nevertheless, the Executive Committee of the City, on recommendation from the Director of the Police Department, may, at its discretion, allow by resolution the carrying or distribution of such placards, advertisements, prospectuses, circulars or papers in, near or upon the streets, lanes, sidewalks and public places of the City, on conditions which it shall deem it advisable to impose, providing that nothing in the above mentioned objects be of a commercial nature or against good order, morals, the religious, racial, political or social convictions of certain classes of society or of such a nature as to provoke gatherings, rioting, or to spread subversive ideas or disturb the peace and, in case of the distribution of such, this be entirely gratis.

The Court, without hesitation, found this to be an oppressive or gratuitous interference with the inherent rights of those subject to its provisions. (**Id.**, at p. 299).

33. **Id.**, at p. 299.

34. Most of the limitations on civil liberties have resulted from provincial or municipal prohibitions, at least when Federal emergency legislation is not operative. On this latter point see, Marx, **The Emergency Power and Civil Liberties in Canada**, (1970, 16 McGill L.J. 39. It would surely be highly over optimistic to expert the Court to adopt the dictum of Abbott J. (**supra**, note 20.)

clearly and forthrightly. The criminal law issue or other issues[35] should be employed as subsidiary arguments in holding the by-law *ultra vires*.

The Duff/Cannon *dicta* are either (1) an irrelevant obiter; (2) an integral part of Canadian Constitutional law; (3) or a principle of law anchored in limbo. Presumably, the Court could not at this late date disown this *dicta*. Keeping it in limbo permits some jurists to suggest that it is a "mere obiter" that is not binding on the Court.[36]

Since the 1950 cases of *Saumur* and *Switzman* the Supreme Court has only twice touched upon the *Alberta Reference dicta*. The majority, through Martland J., in the *Oil, Chemical and Atomic Workers* case cited the Duff dictum stating that – "The test stated is as to whether legislation effects such a curtailment of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada."[37] Presumably this is the "test" the Court will apply in the future. Martland J. (dissenting) in the *McKay* case again applied this test.[38]

What is now needed is a clear affirmative statement by the Court that this "test" is undoubtedly the test that will be applied in future free speech cases. Future case law could refine its application. If the Court does not hurry up, it may be overtaken by constitutional reform.[39]

On the basis of the test given by the Court in the *Oil, Chemical and Atomic Workers* case, but misapplied there, the Montreal by-law must fall. Otherwise the test is simply empty rhetoric.[40]

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THE SIGNIFICANCE OF PUNCTUATION IN STATUTORY INTERPRETATION

I would not be surprised if many people in reading the title to

35. See **supra** at note 5.

36. This was pleaded in oral argument during the hearing on the validity of the Montreal anti-demonstration by-law. See **supra**, note 4.

37. **Supra** note 20 at p. 594. Martland J. did not find this interference in the legislation at issue. For a criticism of his position see, Brewin, **Comment**, (1964) 22 Faculty of Toronto Law Rev. 161, 165. See **supra** note 20 for Mr. Justice Abbott's (dissenting) position in this case.

38. Again, wrongly I believe, he found no "substantial interference with the working of the parliamentary institutions of Canada." **Supra** note 1 at pp. 816-17. Cartwright J., giving the majority opinion, side stepped the question. What could have been clearer "interference"?

39. See the communiqué of the Constitutional Conference of February 1971 which suggests that freedom of expression and assembly may be incorporated into the B.N.A. Act.

40. Mr. Justice Laskin states that there is a "question whether civil liberties are within exclusive federal or exclusive provincial competence or within the competence of both or neither. The cases have not yet given a definitive answer to this question, because as is evident from the **Imperial Oil Ltd.** case and the **McKay** case . . . it is still fighting ground whether civil liberties issues are segregable from otherwise valid provincial legislation in which they are involved." **(Canadian Constitutional Law** (3rd edition) at p. 973).

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