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]

HERBERT MARX*

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).

* Faculty of Law, University of Montreal.

this comment would react by saying to themselves: "So what! Who can become excited about punctuation? It is a matter of little consequence." My reaction would be: "Is it really so unimportant? If so, then why can't we quickly straighten out the confusion by deciding one way or the other as to its use?"

Certainly, despite E. A. Driedger's well-known advice to draftsmen ("Punctuation should not be used to convey meaning. If the force or scope of a modifier is determined by punctuation alone, the danger is great that a reader will misconstrue the section or that the printers will ruin it. Punctuation, judiciously used, will guide the reader through the sentence and help him sort out its elements; but the sentence should be so constructed that by omitting the punctuation the sentence can be correctly read from the beginning to the end."[1]), the end result of the drafting of some sections is that the punctuation of such sections becomes extremely crucial to the meaning of those sections or at least causes confusion. Three examples ought to suffice. The Mechanics' Liens Act of Manitoba, s. 22 reads as follows:

> "Every lien that has been duly registered under this Act ceases to exist after the expiration of two years after the work or service has been completed or materials have been furnished or placed, or the expiry of the period of credit, where that credit is mentioned in the claim of lien registered . . . "[2]

The comma after the word "placed" seems to be important in determining whether the two-year period relates to both the situations where "work or service has been completed or materials have been furnished or placed" and the situation where credit has been spelled out in the contract, or simply to the former situation, insofar as calculating the period after which a lien ceases to exist, The Real Property Act of Manitoba, s. 125(1) reads as follows:

> "Where default is made in the payment of the principal sum, interest, annuity, or rent charge, or any part thereof, secured by a mortgage or encumbrance registered under this Act, or in the observance of any covenant expressed or implied in the mortgage or encumbrance, if the default is continued for the space of one month, or for such longer period of time as is therein for the purpose expressly limited, the mortgagee or encumbrancer may forthwith give a written notice, a copy of which shall be filed in the land titles office, to the mortgagor or owner of land subject to an encumbrance, and to every other person appearing at the time of filing the notice to have any mortgage, encumbrance, or lien upon, or estate, right, or interest in, the lands subsequent to his mortgage or encumbrance requiring the mortgagor or owner of land subject to an encumbrance and the other persons to be served with the notice to pay, within a time to be specified therein, the money then due or owing on the mortgage or encumbrance or to observe the covenants therein expressed or implied, and stating that in case default is made in so doing, all remedies provided in this Act will be resorted to, to remedy the default."[3]

1. The Composition of Legislation (Queen's Printer, Ottawa, 1957) at p. 107.
2. R.S.M. 1970, c. M80.
3. R.S.M. 1970, c. R30.

It seems to me, insofar as punctuating this section to convey the desired meaning, that the comma after the word "in" in line 11 above should be removed and a comma ought to be inserted after the word "encumbrance" in line 13 and after the word "notice" in line 14; as well, incidentally, it seems to me that the section is completed in an awkward fashion. And thirdly, The Hospital Tax Act of Nova Scotia, s. 10(n) reads as follows:

> "10. The following classes of tangible personal property are specifically exempted from the provisions of this Act [i.e. are things in connection with the purchase of which no sales tax is payable] . . .
>
> (n) commercial vessels, or boats that normally operate in extra territorial waters, and repairs thereto . . ."[4]

Depending upon whether or not either or both of the commas now included in this section were taken out, different meanings could be given to the exemptions provided by the section.

The current situation in Canada with respect to the use to which punctuation can be or is being put by judges in making interpretations of statutes is unclear and confusing. The interpretation statutes in Canada say nothing about punctuation, although they do deal with other internal aids such as preambles, marginal notes and headings. There is, of course, the common law rule of rather uncertain force and weight to the effect that any amendable part of a statute is available as an aid to interpretation. I know of only one example of an amendment being made solely to the punctuation of a section.[5] I do not know whether or not the rules of the various legislatures in Canada permit the moving of amendments concerning solely punctuation, although I suspect that such amendments would be proper in many of the legislatures. There is a practice in some legislatures, I think, of dealing with punctuation changes by repealing and re-enacting the entire section involved, altering only the punctuation. As for the Canadian cases, they are not consistent, to say the least.[6] Finally, a number of comments have been written by Englishmen and Americans on the use that should

4. R.S.N.S. 1967, c. 126.

5. S.Q. 1964, c. 61, s. 2.

6. See for example, **Re College of Dental Surgeons and Moody** (1909) 10 W.L.R. 525 (B.C.S.C.) (considered the punctuation); **Smart Hardware v. Melfort** [1917] 1 W.W.R. 1184 (Sask. C.A.) (disregarded the punctuation); **McPherson v. Giles** (1919) 45 O.L.R. 441 (Ont. H.C.) (ignored the punctuation); **Medicine Hat v. Howson** [1920] 2 W.W.R. 810 (Alta. C.A.) (would not consider the punctuation); **Re Winding-Up Act and Gibson Mining Co.** [1923] 3 W.W.R. 171 (B.C.C.A., Macdonald, C.J.A.) (would not consider the punctuation); **Medical Centre Apts. Ltd. v. Winnipeg** (1969) 3 D.L.R. (3d) 525 (Man. C.A., Guy J.A.) (took into account the punctuation); and **Re Associated Commercial Protectors Ltd. and Mason** (1970) 13 D.L.R. (3d) 643 (Man. Q.B.) (considered the punctuation).

be made by judges of punctuation, most of it in favour of making punctuation an available internal aid.[7]

In an attempt to gain some idea of the attitude of Canadian judges and draftsmen towards the use of punctuation for the purpose of interpretation, I sent a questionnaire to as many superior court judges, legislative counsel and legislative clerks in Canada as of whom I could obtain the names.[8] Approximately 280 questionnaires were mailed; 91 persons (i.e., 33%) completed the questionnaires at least partially and three persons expressly declined to answer.

Generally speaking, the results indicate that punctuation is currently considered to be a legitimate aid to interpretation, and interestingly there is virtually an equal difference of opinion with respect to short titles.[9] In my opinion both should be available as aids, for both are in the bills and statutes perused and approved by the legislators, used by the public, and applied by the courts. Besides, both can be useful in ascertaining the meaning of statutes drafted ambiguously, and I have no trepidation that our judiciary would use them in an unreasonable or nonsensical manner. In any event, it would seem to me that it should not be a particularly insurmountable hurdle for the various legislatures in their interpretation statutes to deal clearly with the use to which punctuation, and long[10] and short titles can be put.

CAMERON HARVEY*

QUESTIONS

1. Is it your understanding that judges currently can base a judicial interpretation of a statute on, inter alia, the way in which the statute is punctuated?
   Yes – 82, No – 9.

2. In reference to your answer to question #1, do you think the legal situation should be any different?
   Yes – 4, No – 76, No opinion – 8.

7. See R. E. Megarry (1959) 75 L.Q.R. 29; D. Mellinkoff, **The Language and the Law** (Little Brown, Boston, 1963) at pp. 152-170, 247-52 and 366-74; The English and Scottish Law Commission Final Report on Statutory Interpretation, 1969, at p. 25; and Nutting, Elliott and Dickerson, **Legislation** (West, St. Paul, 4th ed. 1969) at pp. 496-97. For general treatments of the English position on the use of punctuation see the texts by Craies, Maxwell and Odgers.

8. The questions and a tabulation of the results for whatever they are worth is appended to this comment. Two points concerning the results: with regard to question 4, I am sure some judges answered it, and I have not analyzed results of the questionnaire as to who answered and from where, for I specifically indicated in the covering letter that I would not do so. Going by the postmarks I received answers from at least nine of the ten provinces. The questionnaires are currently lodged in the Archives of the Faculty of Law, The University of Manitoba.

9. Short titles are not used in all jurisdictions.

10. The common law situation with respect to short titles, I think, is somewhat clearer than the situation regarding punctuation, with judges generally following English cases such as **Vacher v. London Society of Compositors** [1913] A.C. 107, at pp. 128-9.

* Faculty of Law, The University of Manitoba.

3. (a) It is your understanding that according to the rules, or the practice and procedure, of your provincial Legislature or the House of Commons, that punctuation is an amendable part of a bill? That is to say, is it your understanding that at the appropriate reading or in committee a member could propose an amendment to a bill that solely involved the punctuation (which is also to say that in voting on the bill the members are also voting on the punctuation)?

Yes – 69, No – 5, No knowledge – 2,

(b) If your answer to (a) is No, is your answer based upon the existence of an express rule proscribing the proposal of amendements to the bills solely on the basis of the punctuation?

Yes – 0, No – 7,

4. If you are a legislative counsel or clerk can you tell me about the experience in your legislature:
(a) Do you recollect any purely punctuation amendments?

Yes – 10, No – 7.

(b) Is there a practice of dealing with punctuation by repealing the whole section, or the relevant part, and then re-enacting it changing only the punctuation?

Yes – 3, No – 36.

5. Changing the topic slightly, would your answers to any of the questions be any different if I were asking about the short titles and not punctuation?

Yes – 34, No – 36, Undecided – 3.