LAURIER SAUMUR.....(*Plaintiff*) APPELLANT;

AND

THE CITY OF QUEBEC.....(*Defendant*) RESPONDENT

AND

THE ATTORNEY GENERAL FOR QUEBEC ..... INTERVENANT.

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*Dec. 9, 10, 11, 12, 15, 16, 17.

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*Oct. 6.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Constitutional law—Validity of municipal by-law—Prohibition to distribute pamphlets etc. in the streets without permission from chief of police—Whether interference with Freedom of Worship and of the Press—Whether criminal legislation—Statute of 1852 of Old Province of Canada, 14-15 Vict., c. 175—Freedom of Worship Act, R.S.Q. 1941, c. 307—B.N.A. Act, ss. 91, 92, 93, 127—By-Law 184 of City of Quebec —Noncompliance with Rule 30 of Supreme Court of Canada.

By an action in the Superior Court of Quebec, the appellant, a member of Jehovah's Witnesses, attacked the validity of a by-law of the City of Quebec forbidding distribution in the streets of the City of any book, pamphlet, booklet, circular, tract whatever without permission from the Chief of Police. The action was dismissed by the trial judge and by a majority in the Court of Queen's Bench (Appeal Side). In this Court the appellant declined to contend that the by-law was invalid because a discretion was delegated to the Chief of Police.

Held: (reversing the decision appealed from), that the by-law did not extend so as to prohibit the appellant as a member of Jehovah's Witnesses from distributing in the streets of the City any of the writings included in the exhibits and that the City, its officers and agents be restrained from in any way interfering with such distribution.

Per Kerwin J.:—Whether or not the *Freedom of Worship Act* whenever originally enacted (it is now R.S.Q. 1941, c. 307) be taken to supersede the pre-Confederation Statute of 1852 (14-15 Vict., c. 175), the specific terms of the enactment providing for freedom of worship have not been abrogated. Even though it would appear from the evidence that Jehovah's Witnesses do not consider themselves as belonging to a religion, they are entitled to "the free exercise and enjoyment of (their) Religious Profession and Worship" and have a legal right to attempt to spread their views by way of the printed and written word as well as orally; and their attacks on religion generally, and one in particular, as shown in the exhibits filed, do not bring them within the exception "so as the same be not made an excuse for licentiousness or a justification of practices inconsistent with the peace and safety of the Province", and their attacks are not "inconsistent with the peace and safety of the Province" even when they are directed particularly against the religion of most of the Province's residents. As the by-law may have its effect in other cases and under other

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

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circumstances, if not otherwise objectionable, it is not *ultra vires* the City of Quebec, but since it is in conflict with the freedom of worship of the appellant, it should be declared that it does not extend so as to prohibit the appellant as a member of Jehovah's Witnesses from distributing in the streets any of the writings included in the exhibits.

Furthermore, since both the right to practise one's religion and the freedom of the press fall within "Civil Rights in the Province", the Legislature had the power to authorize the City to pass such by-law.

Per Rand J.:—Since the by-law is legislation in relation to religion and free speech and not in relation to the administration of the streets, and since freedom of worship and of the press are not civil rights or matters of a local or private nature in the Provinces, the subject-matter of the by-law was beyond the legislative power of the Province.

Per Kellock J.:—The by-law is *ultra vires* as it is not enacted in relation to streets but impinges upon freedom of religion and of the press which are not the subject-matter of legislative jurisdiction under s. 92 of the *B.N.A. Act.*

Per Estey J.:—Since the right to the free exercise and enjoyment of religious profession and worship is not a civil right in the province but is included among those upon which Parliament might legislate for the preservation of peace, order and good government, s. 2 of c. 307 of the Revised Statutes of Quebec, 1941, could not be enacted by the province under any of the heads of s. 92 of the *B.N.A. Act.* By-law 184 is legislation in relation to and interferes with that right; it is therefore in conflict with the Statute of 1852 and authority for its enactment could not be given to the City by the Legislature. Even if s. 2 of c. 307 was *intra vires,* the by-law would be in conflict therewith and, therefore, could not be competently passed by the City because it was not authorized by the terms of its charter.

Per Locke J.:—The belief of the Jehovah's Witnesses and their mode of worship fall within the meaning of the expression "religious profession and worship" in the preamble of the Statute of 1852 and in s. 2 of c. 307 of the Revised Statutes of Quebec, 1941.

The true purpose and nature of the by-law is not to control the condition of the streets and traffic but to impose a censorship upon the distribution of written publications in the streets. The right to the free exercise and enjoyment of religious profession and worship without discrimination or preference, subject to the limitation expressed in the concluding words of the first paragraph of the Statute of 1852, is not a civil right of the nature referred to under head 13 of s. 92 of the *B.N.A. Act,* but is a constitutional right of all the people of the country given to them by the Statute of 1852 or implicit in the language of the preamble of the *B.N.A. Act.* The Province was not therefore empowered to authorize the passing of such a by-law restraining the appellant's right of freedom of worship.

The by-law further trenches upon the jurisdiction of Parliament under head 27 of s. 91 of the *B.N.A. Act.* It creates a new criminal offence and is *ultra vires.*

Per Rinfret C.J. and Taschereau J. (dissenting):—The pith and substance of this general by-law is to control and regulate the usage of streets in regard to the distribution of pamphlets. Even if the motive of the City was to prevent the Jehovah's Witnesses from distributing their literature in the streets, that could never be a reason to render the

by-law illegal or unconstitutional, since the City had the power to pass it: usage of the streets of a municipality being indisputably a question within the domain of the municipality and a local question.

Freedom of worship is not a subject of legislation within the jurisdiction of Parliament. It is a civil right within the provinces. The provisions of the by-law are not covered by the preamble to s. 91 of the *B.N.A. Act*, nor have they the character of a criminal law. Furthermore, even if the right to distribute pamphlets was an act of worship, freedom of worship is not an absolute right but is subject to control by the province.

Per Cartwright and Fauteux JJ. (dissenting):—It was within the competence of the Legislature to authorize the passing of this by-law under its power to legislate in relation to (1) the use of highways, since the legislative authority to permit, forbid or regulate their use for purposes other than that of passing and repassing belongs to the provinces; and (2) police regulations and the suppression of conditions likely to cause disorder, since it is within the competence of the Legislature to prohibit or regulate the distribution in the streets of written matter having a tendency to insult or annoy the recipients thereof with the possible result of giving rise to disorder, and perhaps violence, in the streets. An Act of a provincial legislature in relation to matters assigned to it under the *B.N.A. Act* is not rendered invalid because it interferes to a limited extent with either the freedom of the press or the freedom of religion.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Bertrand J.A. dissenting, the decision of the trial judge and holding that By-law 184 of the City of Quebec was valid.

W. Glen How for the appellant.

E. Godbout Q.C. for the respondent.

L. E. Beaulieu Q.C. and *Noël Dorion Q.C.* for the intervenant.

The dissenting judgment of Rinfret C.J. and Taschereau J. was delivered by

The CHIEF JUSTICE: Dépouillée de son extravagante mise-en-scène et réduite à sa véritable dimension, cette cause, à mon avis, est vraiment très simple. Elle n'a sûrement pas l'ampleur et l'importance qu'ont tenté de lui donner les Témoins de Jéhovah par le truchement de M. Laurier Saumur, l'appelant, se désignant comme un missionnaire-évangéliste.

Il s'agit de la validité d'un règlement municipal et il y a probablement eu des centaines et des centaines de causes de ce genre depuis la Confédération. Si, par contre, cette

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catégorie de causes n'a pas été soumise très fréquemment à la Cour Suprême du Canada, c'est uniquement à raison de son peu d'importance relative et de son application restreinte, dans chaque cas, au territoire de la municipalité concernée.

Voici le texte du règlement attaqué:

Règlement nº 184

1º Il est, par le présent règlement, défendu de distribuer dans les rues de la Cité de Québec, aucun livre, pamphlet, brochure, circulaire, fascicule quelconque sans avoir au préalable obtenu pour ce faire la permission par écrit du Chef de Police.

2º Toute personne qui contreviendra au présent règlement sera passible d'une amende avec ou sans les frais, et à défaut du paiement immédiat de ladite amende avec ou sans les frais, selon le cas, d'un emprisonnement, le montant de ladite amende et le terme d'emprisonnement à être fixé par la Cour du Recorder de la Cité de Québec, à sa discrétion; mais ladite amende ne dépassera pas cent dollars, et l'emprisonnement n'excédera pas trois mois de calendrier; ledit emprisonnement cependant, devant cesser en tout temps avant l'expiration du terme fixé par le paiement de ladite amende et des frais, selon le cas; et si l'infraction est réitérée, cette récidive constituera, jour par jour, après sommation ou arrestation, une offense séparée.

L'appelant, invoquant sa qualité de sujet de Sa Majesté le Roi et de résident dans la Cité de Québec, alléguant en outre qu'il est un missionnaire-évangéliste et l'un des Témoins de Jéhovah, déclare qu'il considère de son devoir de prêcher la Bible, soit oralement, soit en distribuant des publications sous forme de livres, opuscules, périodiques, feuillets, etc., de maison en maison et dans les rues.

Il prétend que le règlement nº 184, reproduit plus haut, a pour effet de rendre illégale cette distribution de littérature sans l'approbation écrite du Chef de Police de la Cité de Québec. Il ajoute qu'en sa qualité de citoyen canadien il a un droit absolu à l'expression de ses opinions et que cela découle de son droit à la liberté de parole, la liberté de la presse et le libre exercice de son culte envers Dieu, tel que garanti par la Constitution britannique non écrite, par l'*Acte de l'Amérique britannique du Nord* généralement, et également par les Statuts de la province de Québec, spécialement la *Loi concernant la liberté des cultes et le bon ordre dans les églises et leurs alentours* (S.R.Q. 1941, c. 307).

Il allègue que la Cité de Québec et la province de Québec n'ont aucune juridiction, soit en loi, soit constitutionnellement, pour adopter un règlement tel que ci-dessus, et que ce dernier est *ultra vires,* inconstitutionnel, illégal et nul.

D'après lui, ce règlement aurait été adopté, le 27 octobre 1933, expressément pour empêcher les activités évangéliques des Témoins de Jéhovah et ce règlement est arbitraire, oppressif, partial et injustifié; il est, en outre, discriminatoire, vindicatif et constitue un abus de pouvoir.

Il demande qu'il soit déclaré que ce règlement n'est pas autorisé par la Charte de la Cité de Québec et qu'à tout événement, en ce qu'il tente de limiter la liberté de parole et la liberté de la presse, il empiète sur la juridiction du Parlement du Canada et, en particulier, du *Code criminel.*

L'appelant se plaignait, en plus, de la délégation illimitée et arbitraire en faveur du Chef de Police, ainsi qu'elle est contenue dans le règlement, mais à l'audition devant cette Cour il a déclaré qu'il abandonnait ce moyen.

Il allègue que, par application du règlement, il a été illégalement arrêté et poursuivi et qu'à la date de l'institution de l'action, une information était encore pendante contre lui à la Cour du Recorder de la Cité de Québec, bien que la poursuite de cette information ait été arrêtée par bref de prohibition alors inscrit devant la Cour du Banc du Roi (en appel).

La déclaration de l'appelant conclut donc que le règlement n° 184 de la Cité de Québec, du moins en autant qu'il est lui-même concerné, soit déclaré *ultra vires,* inconstitutionnel, illégal et nul; que les Statuts de la province de Québec, en autant qu'ils prétendent autoriser l'adoption de ce règlement par la Cité de Québec, soient également déclarés *ultra vires,* inconstitutionnels et illégaux; et que la Cour émette une injonction permanente empêchant la Cité de Québec, ses officiers, ses agents et ses représentants de tenter de mettre en vigueur le règlement n° 184, à défaut de quoi ils soient condamnés pour mépris de cour et aux pénalités que cela comporte.

L'intimée, la Cité de Québec, a plaidé que le règlement n° 184 était une loi municipale légalement passée dans l'exercice des pouvoirs de réglementation de la Cité et

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conforme à son acte d'incorporation; que la loi de la province, en vertu de laquelle le règlement a été adopté, est constitutionnelle, légale et valide; que le règlement concerne la propreté, le bon ordre, la paix et la sécurité publiques, la prévention de troubles et émeutes et se rapporte à l'économie intérieure et au bon gouvernement local de la ville; que le demandeur a systématiquement contrevenu à ce règlement de façon délibérée et s'est obstinément refusé à s'y soumettre; qu'il n'a jamais demandé et, par conséquent, n'a pu obtenir de permis pour distribuer ses pamphlets dans la ville de Québec et qu'il a ignoré d'une manière absolue si le règlement est susceptible de le priver d'aucun de ses droits, ayant préféré y désobéir de son plein gré. Comme conséquence, l'appelant fut condamné suivant la loi par un tribunal compétent.

La plaidoirie écrite allègue, en outre, que l'appelant n'est pas un ministre du culte et que l'organisation dont il fait partie n'est pas une église ni une religion. Au contraire, les pamphlets ou tracts qu'elle insiste à distribuer sans autorisation ont un caractère provocateur et injurieux, ne sont pas des gestes religieux mais des actes anti-sociaux qui étaient et sont de nature à troubler la paix publique et la tranquillité et la sécurité des paisibles citoyens dans la Cité de Québec, où ils risquent de provoquer des désordres. Il est malvenu en fait et en droit d'invoquer des libertés de parole, de presse et de culte, qui ne sont aucunement concernées en l'occurrence; il n'a jamais été persécuté et, si la Cité de Québec a mis en vigueur son règlement, ce ne fut que pour remplir ses obligations envers le bien commun, l'ordre public exigeant que le règlement soit dûment appliqué dans la Cité.

Après une longue enquête et la production de quelque chose comme soixante-quinze exhibits, avec en plus des mémoires rédigés par l'abbé Gagné, le très révérend Doyen Evans, le rabbin Frank et M. Damien Jasmin, le juge de première instance a maintenu la défense et rejeté l'action de l'appelant. Ce jugement a été confirmé dans son intégrité par la Cour du Banc de la Reine (en appel) (1), (les honorables juges Barclay, Marchand, Pratte et Hyde), l'honorable juge Bertrand se déclarant dissident.

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L'honorable juge de première instance commence par dire dans son jugement qu'il est d'avis que la preuve offerte en cette cause était en grande partie inutile et illégale, mais qu'il l'a permise parce qu'il n'a pas voulu restreindre la liberté de discussion et qu'il a désiré fournir à toutes les parties l'opportunité d'exposer leurs théories et leur doctrine.

Sur la question de savoir si la doctrine prêchée par les Témoins de Jéhovah est une religion ou non, il déclare qu'il ne se prononce pas parce que, suivant lui, il était appelé à décider seulement si le règlement attaqué était *ultra vires*. Après avoir cité les articles 335, 336 et 337 de la Charte de la Cité de Québec, il se déclare d'avis que le conseil de cette dernière avait obtenu de la Législature de Québec le pouvoir d'adopter le règlement en litige.

Disons tout de suite que le texte de ces articles de la Charte ne laisse aucun doute sur ce point de vue et ce n'est pas là-dessus que l'appelant a insisté.

A ce sujet, cependant, le jugement de la Cour Supérieure contient le paragraphe suivant:

...Il ne s'agit pas d'une prohibition absolue.

De plus, le règlement ne fait aucune distinction. Il s'applique à tous les citoyens et n'a en soi aucun caractère discriminatoire. Naturellement, il peut prêter à des abus, mais dans cette cause, on ne se plaint nulle part qu'il y en ait eus. Il n'a pas été prouvé que ce règlement avait été passé spécialement dans le but de limiter les activités du demandeur et des témoins de Jéhovah; au contraire, il s'applique à tous, quelles que soient leur nationalité, leur doctrine ou leur religion.

L'honorable juge examine ensuite la question de savoir si la Cité avait le droit de déléguer ses pouvoirs à son Chef de Police et il conclut dans l'affirmative. Il cite deux décisions de la Cour d'Appel de Québec sur ce point et arrive à la conclusion que le principe de délégation de pouvoir, en pareil cas, lui paraît admis, du moins dans l'état actuel de la jurisprudence. Mais, comme nous l'avons fait remarquer, nous n'avons plus à nous occuper de ce prétendu motif d'illégalité puisque, à l'audition devant nous, le procureur de l'appelant a déclaré formellement qu'il abandonnait ce moyen.

Le savant juge analyse ensuite le jugement de la Cour Suprême du Canada, rendu en 1938, sur la législation de la province de l'Alberta: *"An Act to Ensure the Publication of accurate News and Information"*; également

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l'arrêt de la Cour du Banc du Roi de Québec dans la cause de *Vaillancourt* v. *la Cité de Hull*. A la suite de cette analyse, il déclare en venir à la conclusion que le règlement n° 184 est *intra vires*, valide et légal. Il fait remarquer que l'appelant ne pouvait guère se plaindre sans avoir d'abord demandé un permis, ce qu'il a négligé et refusé de faire. C'est ainsi qu'il aurait pu prétendre que l'officier chargé d'émettre des permis commettait des injustices à son égard et agissait d'une façon discriminatoire en lui refusant l'autorisation requise. C'est alors qu'il aurait eu un recours devant les tribunaux en se plaignant qu'il avait essuyé un refus injuste et arbitraire et que l'on agissait envers lui d'une manière oppressive.

Comme le fait remarquer M. le Juge Barclay:

...The Appellant complains of attacks and disorders. If this state of affairs is brought about by the contents of the pamphlets distributed it may well be that their distribution should be prohibited. I refrain from any comment on the contents of these publications, although they have been put before us by the Appellant. If a demand for a licence to distribute them be refused, then that question will be of importance, but not until then.

Le principal jugement en la Cour du Banc de la Reine (1) a été écrit par M. le Juge Pratte. Il fait remarquer que les arrêts rendus aux États-Unis ne sauraient avoir le moindre effet devant les tribunaux canadiens parce que la constitution des États-Unis garantit en termes formels la liberté d'expression et la liberté des cultes, tandis que chez-nous, au Canada, la situation juridique est différente. "La vérité, ici comme en Grande-Bretagne, c'est que, contrairement à ce qui est aux États-Unis, le peuple n'a pas abdiqué le pouvoir de légiférer en la matière, et que le cadre dans lequel peut s'exercer la liberté que nous connaissons est susceptible d'être modifié par l'autorité législative compétente".

L'honorable juge fait observer:

...que les rues sont destinées à permettre le passage d'un endroit à un autre (*Harrisson* v. *Duke of Rutland* (1893), 1 Q.B., p. 142; *Hickman* v. *Massey* (1900), 1 Q.B. 752. C'est là leur fin première, à laquelle toute autre utilisation qu'on voudrait en faire est nécessairement subordonnée. Et s'il arrive que les rues soient utilisées pour d'autres fins, c'est seulement à la faveur d'un privilège spécialement octroyé, ou en raison d'une tolérance à laquelle l'autorité compétente doit toujours pouvoir mettre fin lorsqu'elle juge que l'intérêt public le requiert. Il faut bien qu'il

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en soit ainsi, pour empêcher que l'exercice du droit de se servir des rues suivant leur destination ne soit gêné par ceux qui voudraient détourner les voies publiques de leur fin première, ou que l'usage de la rue pour une fin autre que celle de passer ne devienne une cause de désordre.

Un peu plus loin, l'honorable juge ajoute:

...S'il n'est point douteux que l'usage des rues doive être réglementé, il est aussi certain que, d'une façon générale, ce pouvoir de règlementation est du ressort de l'autorité locale. Il n'est point nécessaire de la démontrer ici, car l'appelant le reconnaît.....

.....

Tandis que les dispositions du Code criminel sont destinées à assurer la sécurité de l'État et à maintenir un degré minimum de moralité par tout le pays, le règlement attaqué lui, a seulement pour but de prévenir l'utilisation des rues de la cité pour une fin contraire à leur destination et que l'autorité locale compétente ne jugerait pas opportun de tolérer.

M. le Juge Hyde s'accorde d'une façon générale avec ses deux collègues, mais il réfère en particulier au jugement de la Cour Suprême dans la cause de *Provincial Secretary of Prince Edward Island* v. *Egan* (1), après avoir dit:

...Here there is no question but that the municipality has the power to enact by-laws for regulation of the use of its public thoroughfares and the prevention of nuisances thereon,

et il cite ce passage du jugement de la Cour, rendu par l'honorable Juge Rinfret, à la page 415:

...The right of building highways and of operating them within a province, whether under direct authority of the Government, or by means of independent Companies or municipalities, is wholly within the purview of the Province (*O'Brien* v. *Allen*, 30 S.C.R. 340), and so is the right to provide for the safety of circulation and traffic on such highways. The aspect of that field is wholly provincial, from the point of view of the use of the highway and of the use of the vehicles. It has to do with the civil regulation of the use of highways and personal property, the protection of the persons and property of the citizens, the prevention of nuisances and the suppression of conditions calculated to make circulation and traffic dangerous. Such is amongst others, the provincial aspect of section 84 of The Highway Traffic Act.

Disons tout de suite que le règlement en litige n'est rien autre chose qu'un règlement de police; il est basé primordialement sur le fait que les rues ne doivent pas être utilisées pour fins de distribution de documents. L'usage normal des rues est celui de la circulation à pied ou en voiture (Voir *Dillon* "On Municipal Corporations", 5e éd., p. 1083; *McQuillin* "On Municipal Corporations", 2e éd., vol. 3, p. 936 et suivantes; même volume, p. 61, n° 938).

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Faisons remarquer d'abord que la Charte de la Cité de Québec est antérieure à la Confédération (29-30 Vict. c. 57). La Cité n'est pas régie par la *Loi des Cités et Villes*, S.R.Q. 1941, c. 233, mais il n'est pas hors de propos de référer à cette loi pour se rendre compte de l'étendue des pouvoirs qui y sont conférés pour la réglementation des rues.

Le conseil y est attribué (art. 424) le pouvoir général de faire des règlements "pour assurer la paix, l'ordre, le bon gouvernement, la salubrité, le bien-être général et l'amélioration de la municipalité". Plus spécialement (art. 426, par. 10), il peut "réglementer ou empêcher les jeux et les amusements sur les rues, allées, trottoirs ou places publiques"; il a le pouvoir général de nommer des agents de police ou constables avec autorité et juridiction dans les limites de la municipalité (par. 16a). Il peut (art. 428) "prohiber, empêcher et supprimer les attroupements, rixes, troubles, réunions désordonnées et tous spectacles ou amusements brutaux ou dépravés"; "permettre, moyennant le paiement d'une licence, et réglementer l'affichage de placards"; "empêcher qu'aucune congrégation ou réunion pour le culte religieux ne soit troublée dans ses exercices, même prohiber la distribution, aux portes des églises, le dimanche, de toutes feuilles volantes ou circulaires imprimées". Enfin et spécifiquement, sujet aux dispositions de la Loi relative aux rues publiques (S.R.Q. 1941, c. 242)—à laquelle il n'est pas nécessaire de référer plus amplement—en vertu de l'article 429, le conseil peut faire des règlements de la plus grande étendue pour l'ouverture et l'entretien des rues, des trottoirs et des places publiques, pour en réglementer l'usage, empêcher et faire cesser tout empiétement; prescrire la manière de placer les enseignes, poteaux d'enseignes, auvents, poteaux de téléphone, de télégraphe et d'électricité, abreuvoirs pour chevaux, rateliers et autres obstructions; faire disparaître toute nuisance ou obstruction sur les trottoirs, rues, allées et terrains publics et empêcher qu'ils ne soient encombrés de voitures ou d'autres choses; réglementer la vitesse des véhicules dans les limites de la municipalité; réglementer l'usage des bicycles et des automobiles et les empêcher de circuler sur certaines rues; réglementer ou défendre l'usage de voitures bruyantes dans les rues et places publiques; réglementer ou défendre l'exhibition, ou le port, ou la distri-

bution de bannières, placards, annonces et prospectus ou autres articles dans les, près des, ou sur les rues, allées, trottoirs et places publiques; réglementer ou empêcher le déploiement de drapeaux, bannières et enseignes à travers les rues et places publiques, et réglementer, permettre moyennant un permis, ou défendre la construction et l'usage de tableaux à affiches et enseignes le long ou près des rues, allées et places publiques ou sur les lots vacants ou ailleurs.

Cette longue énumération fait bien voir jusqu'à quel point les municipalités ont le contrôle de leurs rues, en vertu de la loi générale.

Le règlement attaqué est strictement du même ordre d'idée.

Il est non moins clair que *l'Acte de l'Amérique britannique du Nord 1867*, dans la distribution qu'elle fait des pouvoirs législatifs, aux paragraphes 91 et 92 attribue, dans chaque province, à la Législature, le pouvoir exclusif de faire des lois relatives aux institutions municipales dans la province (par. 8), à la propriété et les droits civils dans la province (par. 13) et généralement à toutes les matières d'une nature purement locale et privée dans la province (par. 16).

Il serait vraiment fantastique de prétendre que quelques-uns des pouvoirs ci-dessus mentionnés et que l'on trouve dans la *Loi des Cités et Villes* de la province de Québec, pourraient relever du domaine fédéral. Je ne me représente pas facilement le Parlement fédéral entreprenant d'adopter des lois sur aucune de ces matières (Voir le jugement du Conseil Privé dans *Hodge* v. *The Queen* (1)).

Je ne comprends pas, d'ailleurs, que le procureur de l'appelant dirige son argumentation à l'encontre de ce principe général. Il demande à la Cour de s'écarter du texte du règlement et il cherche à y trouver un motif qui serait celui, qu'il avait déjà allégué dans sa déclaration, "que ce règlement avait été passé spécialement dans le but de limiter les activités du demandeur et des Témoins de Jéhovah".

(1) (1883) 9 App. Cas. 117, 131, 133, 134.

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Il est à remarquer que le règlement lui-même ne dit rien de tel; il s'applique à tous, quelle que soit leur nationalité, leur doctrine ou leur religion. Mais, en plus, le juge de première instance a décidé en fait qu'il "n'a pas été prouvé que ce règlement avait été passé spécialement dans ce but". D'autre part, en matière d'excès de pouvoirs, c'est toujours au mérite ("pith and substance") de la législation qu'il faut s'arrêter. Ce que le règlement vise est uniquement l'usage des rues pour fins de distribution. En outre que, ainsi que l'a décidé le juge de la Cour Supérieure, aucun motif, aucune arrière-pensée n'a été dévoilée par la preuve faite à l'enquête, c'est une idée erronée que de chercher à attribuer un motif à une loi qui n'en mentionne pas. Un règlement peut être valide même si le but du conseil municipal est mauvais.

J'avoue trouver étrange que l'on mette même en discussion le pouvoir des corporations municipales de réglementer de la façon la plus absolue l'usage de leurs rues et d'en exercer le contrôle. Notre Cour s'est prononcée là-dessus d'une façon catégorique dans l'affaire de *Winner* v. *S.M.T. (Eastern) Limited & Attorney General of Canada* (1). La majorité des juges a exprimé alors l'avis, même lorsqu'il s'agissait d'un cas de droit international, qu'une loi provinciale pouvait valablement stipuler que, dans les limites de la province du Nouveau-Brunswick, un bureau ("board"), en vertu de "The Motor Carrier Act", pouvait empêcher M. Winner, un propriétaire de ligne d'autobus, demeurant à Lewiston, dans l'État du Maine, États-Unis, de faire des arrêts dans les rues du Nouveau-Brunswick pour y prendre des passagers dont la destination était à l'intérieur du Nouveau-Brunswick.

En ce qui me concerne, je n'ai pas eu à me prononcer sur ce point, parce que je suis arrivé à mes conclusions pour des raisons différentes de celles de la majorité, mais je n'ai aucune hésitation à ajouter que, si j'eusse eu à le faire, je me serais accordé avec la majorité sur ce sujet.

En envisageant le règlement qui nous a été soumis, il est à remarquer, je le répète, que le texte de ce règlement ne fait aucune allusion au caractère religieux des tracts ou des feuillets qui sont visés. Je ne saurais me rendre à l'idée que, pour décider de la validité de ce règlement, il

(1) [1951] S.C.R. 887.

faille aller au-delà de ce qu'il dit et se demander si la Cité de Québec en l'adoptant avait un motif ultérieur. Cela n'importe pas du tout. Si une corporation municipale a le pouvoir de prohiber ou de contrôler l'usage de ses rues, nous n'avons pas à nous demander quel a pu être son motif; pas plus, par exemple, qu'en reconnaissant à tout citoyen le droit d'interdire l'accès de sa maison, on puisse disputer le motif qui le pousse à en agir ainsi. Il se peut que sa raison soit qu'il ne veuille pas laisser entrer un communiste dans sa maison; même si c'est là son motif caché ou son arrière-pensée, cela ne lui enlève pas son droit absolu de défendre l'accès de sa maison à qui que ce soit. La Cité de Québec eut-elle eu même dans l'idée—ce que le règlement ne fait pas voir—de prendre ce moyen d'empêcher les Témoins de Jéhovah de distribuer leurs feuillets et leurs tracts, cela n'aurait jamais pour résultat de rendre sa décision illégale, ni surtout inconstitutionnelle.

La seule question que les tribunaux ont à examiner est celle de savoir si la Cité de Québec avait le pouvoir d'adopter ce règlement. Nous n'avons pas à chercher derrière le texte qu'elle a adopté pour voir quel a pu être son but en ce faisant. J'irai même plus loin et je dirai que l'usage des rues d'une municipalité est indiscutablement une question du domaine municipal et une question locale. Je cherche encore en vertu de quoi on pourrait prétendre que cette matière ne tombe pas exclusivement dans la catégorie des sujets attribués aux provinces en vertu de l'article 92 de l'*Acte de l'Amérique britannique du Nord;* et, dans ce cas, même s'il est admis que le droit de culte est du domaine fédéral, le pouvoir de contrôle des rues municipales, étant un sujet spécifiquement attribué aux provinces, il aurait préséance sur le pouvoir supposé du Parlement fédéral de légiférer en matière de culte. Il est de jurisprudence constante que du moment qu'un sujet est spécialement attribué au domaine provincial par l'article 92, il a préséance et priorité sur tout pouvoir que prétendrait exercer le fédéral, en vertu des pouvoirs généraux mentionnés dans l'article 91.

Il n'y a pas si longtemps que l'on a eu, dans la Cité d'Ottawa, l'exemple d'une loi provinciale qui permettait à une municipalité d'empêcher la pratique des jeux commercialisés le dimanche, qui, cependant, sous un certain aspect,

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doit être considérée comme un exercice qui empiéterait sur l'observance du Jour du Seigneur et serait donc, si l'on admettait la prétention que je discute, du domaine des cultes et d'un caractère religieux. Cette loi provinciale est dans les statuts de la province d'Ontario et jusqu'ici nul ne s'est avisé d'en soulever l'inconstitutionnalité.

La question de juridiction ne peut jamais dépendre de la valeur des raisons qui sont données, pas plus dans un règlement que dans un jugement. Ce que l'appelant soulève et ce qu'il demande à la Cour de prononcer, c'est que la Cité de Québec n'avait pas le pouvoir d'adopter ce règlement. Il ne pourra jamais justifier cette conclusion en prétendant que la Cité l'a adopté pour un motif erroné.

En réalité, le véritable argument que l'appelant tente de faire prévaloir c'est que ce règlement l'empêche d'exercer son culte ou, comme il l'allègue pour les fins de la cause, sa religion.

Je partage absolument l'opinion du juge de première instance et celle de la majorité de la Cour du Banc de la Reine (en appel) à l'effet que le règlement attaqué ne fait rien de tel. Tout d'abord, ce n'est pas un règlement qui prohibe: c'est un règlement qui permet, sous certaines restrictions.

Je répète que l'appelant devant la Cour se trouve, à cet égard, dans une position défectueuse, parce qu'il n'a pas soumis au Chef de police de la Cité de Québec les pamphlets qu'il avait l'intention de distribuer. Comme l'affirme la défense, il a préféré ignorer absolument le règlement et procéder à faire sa distribution sans en demander la permission. Il en résulte que nous ne savons pas ce que l'appelant voulait distribuer et nous ne connaissons nullement la nature de ces tracts.

Il y a lieu, par conséquent, de limiter notre investigation à la question de savoir si vraiment l'appelant, par ce règlement, est empêché de pratiquer sa religion; et il faut encore restreindre le débat à la question de savoir si l'appelant, par suite de ce règlement, ne peut pas distribuer des pamphlets religieux dans les rues de la Cité de Québec. Car il est évident que, sur ce chapitre, il faut que le règlement prohibe la distribution des pamphlets religieux que

l'appelant voudrait disséminer. Cet argument ne vaut nullement à l'encontre de la prohibition de distribuer tout autre pamphlet.

Ironie du sort, les Témoins de Jéhovah qui, dans leurs publications, affirment catégoriquement non seulement qu'ils ne constituent pas une religion, mais qu'ils sont opposés à toute religion et que les religions sont une invention du démon, sont maintenant devant les tribunaux du Canada pour demander protection au nom de la religion; et, à cette fin, à l'encontre de la constitutionnalité des lois municipales de la province de Québec, ils sont contraints d'invoquer une loi de la province de Québec, à savoir: *la Loi concernant la liberté des cultes et du bon ordre dans les églises et leurs alentours* (c. 307, S.R.Q. 1941).

Cette loi, invoquée par eux, contient l'article suivant:

2. La jouissance et le libre exercice du culte de toute profession religieuse, sans distinction ni préférence, mais de manière à ne pas servir d'excuse à la licence ni à autoriser des pratiques incompatibles avec la paix et la sûreté de la province, sont permis par la constitution et les lois de cette province à tous les sujets de Sa Majesté qui y vivent. S.R. 1925, c. 198, a. 2.

C'est bien ainsi que l'appelant a posé le problème dans sa déclaration:

...his unqualified right as a Canadian citizen to the expression of his views on the issues of the day and in employing thereby his right of freedom of speech, freedom of the press and free exercise of worship of Almighty God as guaranteed by the unwritten British Constitution, by the provisions of the British North America Act generally and, in particular, in its preamble and sections 91, 92 and 129, as well as by the statute of the Province of Quebec generally and in particular, by "An Act Respecting Peddlers", (R.S.Q. 1941, Chapter 230, especially section 8 thereof); and by "An Act Respecting Licences", (R.S.Q. 1941, Chapter 76, especially section 82 thereof); and by "An Act Respecting Freedom of Worship and the Maintenance of Good Order In and Near Places of Public Worship", (R.S.Q. 1941, Chapter 307, especially section 2 thereof);

Il n'y a pas lieu de s'arrêter à la référence à la Loi concernant les colporteurs et à la Loi des licences.

Le procureur de l'appelant ne s'est pas non plus expliqué sur ce qu'il entend par "the unwritten British Constitution" comme gouvernant les pouvoirs respectifs du Parlement canadien et des Législatures provinciales (tels qu'ils sont définis dans les articles 91 et 92 de l'*Acte de l'Amérique britannique du Nord*). C'est cette loi qui contient la Constitution du Canada et le Conseil Privé, à plusieurs

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reprises, a déclaré que les pouvoirs ainsi distribués entre le Parlement et les législatures couvraient absolument tous les pouvoirs que pouvait exercer le Canada comme entité politique. Mais l'appelant prétend que la question de l'exercice du culte est exclusivement de la juridiction du Parlement fédéral et, en particulier, que les prescriptions du règlement attaqué seraient couvertes par le début de l'article 91 qui autorise l'adoption de "lois pour la paix, l'ordre et le bon gouvernement du Canada", ou la *Loi criminelle*.

Au sujet de la première prétention, il suffit de poursuivre la lecture de l'article 91 pour constater que le pouvoir du Parlement fédéral relativement à la paix, l'ordre et le bon gouvernement du Canada se bornent à toutes les matières ne tombant pas dans les "catégories de sujets exclusivement assignés par le présent acte aux Législatures des provinces". Comme il a été invariablement décidé par le Conseil Privé et conformément, d'ailleurs, au texte précis que nous venons de citer, dès que la matière est couverte par l'un des paragraphes de l'article 92, elle devient du domaine exclusif des législatures de chaque province et elle est soustraite à la juridiction du Parlement fédéral. Naturellement, nous ne parlons plus ici du contrôle des rues municipales, car il est évident que, dans ce cas, les paragraphes 8, 13 et 16 de l'article 92 (comme d'ailleurs nous l'avons vu plus haut) attribuent cette juridiction exclusivement aux législatures. Mais, si nous comprenons bien la prétention, c'est que la garantie de l'exercice du culte doit venir du Parlement fédéral et n'appartient pas aux législatures. Nous disons bien qu'elle doit venir, car il est très certain que, pour le moment, elle n'existe pas ailleurs que dans la *Loi concernant la liberté des cultes* invoquée par l'appelant dans sa déclaration (S.R.Q. 1941, c. 307).

La difficulté qu'éprouve ici l'appelant résulte de plusieurs raisons:

Premièrement:—Son droit de distribuer des pamphlets religieux ne constitue pas l'exercice d'un culte d'une profession religieuse.

Deuxièmement:—A tout événement, la jouissance et le libre exercice du culte d'une profession religieuse ne jouit pas, en vertu du chapitre 307, S.R.Q. 1941, d'une autori-

sation absolue, mais il faut que ce culte s'exerce "de manière à ne pas servir d'excuse à la licence, ni à autoriser des pratiques incompatibles avec la paix et la sûreté de la province".

Troisièmement:—L'exercice du culte est un droit civil et, par conséquent, tombe sous le paragraphe 13 de l'article 92 de l'*Acte de l'Amérique britannique du Nord*. Il est donc du domaine provincial.

Le premier point ci-dessus dépend d'une question de fait. Or, l'appelant a fait entendre comme témoin un monsieur Hayden C. Covington, qui s'est décrit comme "ordained minister of the gospel, and lawyer, 124 Columbia Heights, Brooklyn, New York". Au cours de ce témoignage, ce témoin a identifié un nombre considérable de publications dont il a déclaré qu'elles contenaient la doctrine des Témoins de Jéhovah, en ajoutant: "They comprise the official view, doctrines and principles advocated and taught by Jehovah's Witnesses at the date of publication of each of such books". Or, dans toutes ces publications, il est affirmé que les Témoins de Jéhovah ne sont pas une religion; que, au contraire, leur but est de combattre toutes les religions et que la religion est une invention du démon. Nous avons déjà, au début de ce jugement, fait allusion à cette doctrine.

Dans les circonstances, il m'est impossible de voir en vertu de quoi les Témoins de Jéhovah pourraient invoquer la liberté du culte qui est prévue dans le chapitre 307 des Statuts Refondus de Québec 1941. D'ailleurs, il serait exagéré de prétendre que, par application du chapitre 307, aucune manifestation religieuse ne pourrait être empêchée par règlement. C'est ainsi qu'il est de pratique courante que les municipalités ne permettent pas la vente d'insignes ("tag-days"), pour fins de bienfaisance, sans une autorisation qui est réservée au conseil; et je n'entretiens pas le moindre doute qu'une corporation municipale a le pouvoir d'interdire les processions religieuses dans ses rues, quelle que soit la nature ou le caractère de ces processions. J'ai même eu connaissance de règlements municipaux qui défendaient aux églises de sonner les cloches pour appeler les fidèles aux exercices religieux.

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Pour ce qui est du deuxième point ci-dessus mentionné, il faut réitérer que l'article 2 du chapitre 307 ne permet pas la jouissance et le libre exercice du culte d'une profession religieuse d'une façon absolue. Il faut que cela ne "serve pas d'excuse à la licence, ni à des pratiques incompatibles avec la paix et la sûreté de la province". C'est le texte même de la loi.

Si donc, à l'encontre de la preuve, il fallait décider que les Témoins de Jéhovah pratiquent un culte, il n'en faudrait pas moins, en vertu du texte de la Loi concernant la liberté des cultes, que la province ou la municipalité ait le droit de contrôler cet exercice "de manière à ne pas servir d'excuse à la licence, ni à autoriser des pratiques incompatibles avec la paix et la sûreté de la province".

Puisque les Témoins de Jéhovah prétendent que leur profession religieuse consiste à distribuer des tracts religieux, il s'ensuit que la province ou la municipalité, à laquelle la province délègue ce pouvoir, a le droit d'examiner les pamphlets religieux que l'on entend distribuer, de façon à en autoriser ou non la distribution.

A cet égard, je le répète, les Témoins de Jéhovah, ayant pris la position qu'ils ne demanderaient pas l'autorisation et qu'ils ne soumettraient pas la littérature qu'ils voulaient distribuer, nous n'avons aucune preuve au dossier susceptible de nous permettre de savoir si cette littérature tombait ou non dans les exceptions prévues par l'article 2 du chapitre 307. Mais, si nous nous croyions justifiés de prendre pour acquit que cette littérature serait de la même nature que les livres et les tracts qui ont été produits au dossier, ou encore qu'elle contiendrait les déclarations faites par le vice-président Covington, il serait inconcevable qu'une municipalité ne put empêcher la circulation dans ses rues de cette littérature que son conseil pourrait certainement considérer comme constituant de la licence ou des pratiques incompatibles avec la paix et la sûreté de la province; et, dès lors, comme tombant dans l'exception exprimée dans l'article 2.

Voici, en effet, ce qu'on trouve dans le témoignage de M. Covington:

Q. Are you informed that the religion of a greater part of the people in this province and in this city is Roman Catholic?—A. Yes, I have that information.

En fait, il est notoire que 90 pour cent de la population de la Cité de Québec est catholique romaine et 45 pour cent de la population du Canada appartient à la même religion.

On lui demande alors de lire les passages suivants des publications des Témoins de Jéhovah:

...Religion is the adulteress and idolatress that befriends and commits religious fornication with the political and commercial elements. She is the lover of this world and blesses the world from the balcony of the Vatican and in the pulpits. Religion, whose most powerful representative has ruled from Rome for sixteen centuries, traces her origin all the way back to Babylon of Nimrod's founding, and organized religion deservedly bears the name Babylon.....

I will shew unto thee the judgment of the great whore (or idolatress) that sitteth upon many waters: with whom the kings of the earth have committed fornication, and the inhabitants of the earth have been made drunk with the wine of her fornication.....full of abominations and filthiness of her fornication; and upon her forehead was a name written, MYSTERY, BABYLON THE GREAT, THE MOTHER OF HARLOTS AND ABOMINATIONS OF THE EARTH.

Les citations qui précèdent sont tirées de l'exhibit D-49, aux pages 345 et 346.

Après avoir mis le témoin Covington en présence des extraits ci-dessus, l'avocat de la Cité de Québec lui demande:

Q. Do you consider that writing such books with such insults against another religion, in fact the religion practised by the people of this province or city, a proper means of preaching the gospel?—A. I do.

Et au cours de cette réponse, il dit:

...history abundantly attests to the fact that the Roman Catholic Hierarchy has had relationship with the world and has had part tacitly in the wars between the nations and the destruction of nations.

Un peu plus loin:

Q. Do you consider necessary for your organization to attack the other religions, in fact, the Catholic, the Protestant and the Jews?—A. Indeed. The reason for that is because the Almighty God commands that error shall be exposed and not persons or nations.

La Cour demande au même témoin:

Q. You are the only witnesses of the truth?—A. Jehovah's Witnesses are the only witnesses to the truth of Almighty God Jehovah...

Q. Is the Roman Catholic a true church?—A. No.

Q. Is it an unclean woman?—A. It is pictured in the Bible as a whore, as having illicit relationship with the nations of this world, and history proves that fact, history that all have studied in school.

A un autre point de vue, ce même témoin déclare:

If obedience to a law of the state or nation would compel them (les Témoins de Jéhovah) to thereby violate God's law, they will obey God rather than men.

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Ce que, d'ailleurs, il avait déjà affirmé peu de temps auparavant au cours de son témoignage, à une demande de la Cour:

Q. Notwithstanding the laws of the country to the contrary?—A. Notwithstanding the laws of the country to the contrary.

Qui oserait prétendre que des pamphlets contenant les déclarations qui précèdent, distribués dans une cité comme celle de Québec, ne constitueraient pas une pratique incompatible avec la paix et la sûreté de la Cité ou de la province? Quel tribunal condamnerait un conseil municipal qui empêcherait la circulation de pareilles déclarations? Et je n'ai choisi que quelques passages dans des livres et des tracts qui fourmillent de semblables affirmations. La décence, d'ailleurs, me commanderait de ne pas en citer davantage. Et cela ne me paraît pas nécessaire pour démontrer qu'une municipalité, dont 90 pour cent de la population est catholique, a non seulement le droit, mais le devoir, d'empêcher la dissémination de pareilles infamies.

Enfin, le dernier point c'est la question que l'exercice des cultes est un droit civil qui relève de la juridiction des législatures provinciales. C'est ainsi que l'ont considéré les provinces de la Saskatchewan et de l'Alberta, qui ont adopté des lois intitulées: *An Act to Protect Certain Civil Rights* (1947, 11 Geo. VI, c. 35). L'objet de la loi est déclaré dans le préambule comme étant "to protect certain civil rights" et l'article 3 de la Loi stipule:

...Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief, and freedom of religious association, teaching, practice and worship.

La province de l'Alberta a un statut semblable.

Il est intéressant, sur ce point, de référer à l'interprétation donnée par le Conseil Privé de l'expression "civil rights" dans l'Acte de Québec de 1774, dans la cause de *Citizens Insurance Company of Canada* v. *Parsons* (1):

...It is to be observed that the same words, "Civil rights" are employed in the Act of 14 Geo. 3, c. 83, which made provision for the Government of the province of Quebec, Sect. 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreably to the said laws. In this statute the words "property" and "civil rights"

(1) (1881) 7 App. Cas. 96.

are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.

Il suffit de signaler la contradiction de l'argumentation du procureur de l'appelant qui, d'une part, allègue l'inconstitutionnalité de la Charte de Québec, en invoquant, d'autre part, qu'elle est en conflit avec la *Loi concernant la liberté des cultes* (S.R.Q. 1941, c. 307) de cette même province de Québec. Il est indiscutable que la législature qui a adopté le chapitre 307 avait la compétence voulue pour adopter la Charte de la Cité de Québec, en vertu de laquelle le règlement 184 a été édicté.

En plus, d'ailleurs, le chapitre 307 n'est rien autre chose qu'une loi déclaratoire d'un statut antérieur à la Confédération, dont le procureur de l'appelant a fait grand cas. On la trouve dans les Statuts Revisés du Canada de 1859, c. 74, qui est lui-même la reproduction d'une loi de 1851.

Et alors entre en cause l'article 129 de l'*Acte de l'Amérique britannique du Nord 1867*, en vertu duquel toutes les lois en vigueur en Canada lors de l'Union continuent d'exister, entre autres, dans la province de Québec, "comme si l'Union n'avait pas eu lieu". Elles peuvent "être révoquées, abolies ou modifiées par le Parlement du Canada ou par la législature de la province respective, conformément à l'autorité du Parlement ou de cette législature, en vertu du présent acte". Mais, il n'y a pas lieu de se demander ici si la révocation était du ressort du Parlement fédéral ou de la Législature de Québec ou d'Ontario, parceque telle révocation n'a pas eu lieu. Le Parlement du Canada a nullement révoqué ou modifié cette loi antérieure à la Confédération et, par conséquent, en vertu même de l'article 129 de la Constitution, cette loi a continué d'être en vigueur dans la province de Québec "comme si l'Union n'avait pas eu lieu". En vain l'appelant a-t-il prétendu qu'un règlement de ce genre avait le caractère d'une *loi criminelle* et serait, dès lors, du domaine du Parlement du Canada, en vertu du paragraphe 27 de l'article 91 de l'*Acte de l'Amérique britannique du Nord*. Ce règlement n'a aucunement l'aspect de la définition d'un acte criminel. On peut voir, sous ce rapport, ce que dit Lord Hewart dans *Thomas* v. *Sawkins* (1), et également, dans la même cause, les commentaires de Avory J.

(1) [1935] 2 K.B. 249.

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Nous avons là une situation semblable à celle qui fut étudiée par cette Cour dans la cause de *Provincial Secretary of Prince Edward Island* v. *Egan* (1), déjà citée plus haut. La Cour Suprême du Canada ne faisait alors que réitérer ce qui avait été dit dans *In Re McNutt* (2), et surtout dans *Bédard* v. *Dawson* (3), où cette Cour a maintenu la validité d'un statut de Québec autorisant la Cour à ordonner la fermeture d'une maison de désordre sur le principe qu'il s'agit là d'une matière de propriété et de droit civil et qui ne tombe pas sous le coup de la *Loi criminelle*. D'ailleurs, les provinces ont le pouvoir d'aider à l'application du droit criminel en tentant de supprimer le crime et le désordre, comme le faisait remarquer le Juge en chef Duff dans l'affaire des *Lois de la province d'Ontario relatives aux enfants abandonnés ou négligés* (4).

Sur le tout, je n'ai donc aucune hésitation à dire que le règlement attaqué est légal, valide et constitutionnel et que les jugements qui l'ont déclaré tel doivent être confirmés, avec dépens.

KERWIN J.:—The appellant Saumur is a member of Jehovah's Witnesses and by action, brought in the Superior Court of Quebec, asks that by-law 184 of the City of Quebec, passed October 27, 1933, be declared to be—both on its face and in so far as he is concerned—ultra vires, unconstitutional, illegal, null and void and be quashed and set aside for all legal purposes. The Superior Court, and the Court of Queen's Bench (Appeal Side) (5) with Bertrand J. dissenting, dismissed the action and hence this appeal.

Clause 2 of the by-law provides penalties for the breach of clause 1, the important provision, which is in these words:—

> 1o.—It is, by the present by-law forbidden to distribute in the streets of the City of Quebec, any book, pamphlet, booklet, circular, tract whatever without having previously obtained for so doing the written permission of the Chief of Police.

Counsel for the appellant declined to contend that the by-law was invalid because a discretion was delegated to the Chief of Police. Counsel for the respondent, the City of Quebec, and for the intervenant, the Attorney General

(1) [1941] S.C.R. 396 at 415.
(2) (1913) 47 Can. S.C.R. 259.
(3) [1923] S.C.R. 681.
(4) 71 C.C.C. 110 at 112, 113.
(5) Q.R. [1952] Q.B. 475.

of Quebec, did not deal with the point and nothing is therefore said about it. However, an argument was advanced based upon a pre-Confederation statute of 1852 of the old Province of Canada, 14-15 Vict. c. 175, the relevant part of which provides:—

> the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

Section 129 of the *British North America Act, 1867*, enacts:—

> 129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

By virtue of this section that part of the pre-Confederation statute extracted above continued to operate in the Province of Quebec at the time of the coming into force of the *British North America Act*. Since then the Quebec Legislature enacted legislation practically in the same words, and certainly to the same effect, which legislation has been continued from time to time and is now found in section 2 of R.S.Q. 1941, c. 307, *The Freedom of Worship Act*. Whether or not such legislation be taken to supersede the pre-Confederation enactment, no statutes such as the Quebec City Charter, in the general terms in which they are expressed, and whenever originally enacted, have the effect of abrogating the specific terms of the enactment providing for freedom of worship.

It appears from the material filed on behalf of the appellant that Jehovah's Witnesses not only do not consider themselves as belonging to a religion but vehemently attack anything that may ordinarily be so termed but in my view they are entitled to "the free exercise and enjoyment of (their) Religious Profession and Worship." The Witnesses attempt to spread their views by way of the printed and

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written word as well as orally and state that such attempts are part of their belief. Their attacks on religion generally, or on one in particular, do not bring them within the exception "so as the same be not made an excuse for licentiousness or a justification of practices inconsistent with the peace and safety of the Province." While several definitions of "licentious" appear in standard dictionaries, the prevailing sense of that term is said to be "libertine, lascivious, lewd." To certain biblical expressions the pamphlets, etc., of Jehovah's Witnesses which they desire to distribute attach a meaning which is offensive to a great majority of the inhabitants of the Province of Quebec. But, if they have a legal right to attempt to spread their beliefs, as I think they have, the expressions used by them in so doing, as exemplified in the exhibits filed, do not fall within the first part of the exception. Nor in my opinion are their attacks "inconsistent with the peace and safety of the Province" even where they are directed particularly against the religion of most of the Province's residents. The peace and safety of the Province will not be endangered if that majority do not use the attacks as a foundation for breaches of the peace.

Confined to the argument now under consideration, the above reasons do not justify a declaration that the by-law is ultra vires the City of Quebec since, if not otherwise objectionable, the by-law may have its effect in other cases and under other circumstances; but they do warrant a declaration that the by-law does not extend so as to prohibit the appellant as a member of Jehovah's Witnesses from distributing in the streets of Quebec any book, pamphlet, booklet, circular or tract of Jehovah's Witnesses included in the exhibits and an injunction restraining the City, its officers and agents from in any way interfering with such actions of the appellant.

The appellant further contended that the by-law should be declared illegal on the ground that the Provincial Legislature has no power to authorize the Council of the City of Quebec to pass a general by-law prohibiting the distribution of books, pamphlets, etc., in the City streets. At first he argued that the subject-matter of any such legislation and by-law falls under section 91 of the *British North*

America Act and not section 92, but later changed his position by arguing that neither Parliament nor the Provincial Legislatures possessed the requisite power. I am unable to agree with either of these submissions. I do not find it helpful to refer to rights conferred by early treaties or sanctioned by Imperial Statutes dealing with the old colonies and subdivisions of what is now Canada since it is well-settled that the *British North America Act* has conferred all powers of legislation either upon Parliament or the Legislatures of the Provinces and that there is no field in which the one or the others may not operate: *Bank of Toronto* v. *Lambe* (1):

> Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law.

Attorney General for Ontario v. *Attorney General for Canada (Companies Reference)* (2):

> In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada.

In my view the right to practise one's religion is a civil right in the Province under head 13 of section 92 of the *British North America Act* just as much as the right to strike or lock-out dealt with by the Judicial Committee in *Toronto Electric Commissioners* v. *Snider* (3). That decision, as has been often remarked, was made inter partes, and at page 403 Viscount Haldane states:—

> Whatever else may be the effect of this enactment (The Industrial Disputes Investigation Act, 1907, of Caanda), it is clear that it is one which could have been passed, so far as any Province was concerned, by the Provincial Legislature under the powers conferred by s. 92 of the British North America Act. For its provisions were concerned directly with the civil rights of both employers and employed in the Province. It set up a Board of Inquiry which could summon them before it,

(1) (1887) 12 App. Cas. 575 at 587. (2) [1912] A.C. 571 at 581.
(3) [1925] A.C. 396.

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administer to them oaths, call for their papers and enter their premises. It did no more than what a Provincial Legislature could have done under head 15 of s. 92, when it imposed punishment by way of penalty in order to enforce the new restrictions on civil rights. It interfered further with civil rights when, by s. 56 it suspended liberty to lock-out or strike during a reference to a Board. It does not appear that there is anything in the Dominion Act which could not have been enacted by the Legislature of Ontario, excepting one provision. The field for the operation of the Act was made the whole of Canada.

For the same reason I also think that freedom of the press is a civil right in the Province. In *Re Alberta Information Act* (1), Sir Lyman Duff stated a short ground considered by him (and Davis J.) sufficient to dispose of the question as to whether Bill No. 9 of the Legislative Assembly of Alberta, "An Act to Ensure the Publication of Accurate News and Information" was *intra vires* the Legislature of that Province. With the greatest respect I am unable to agree with that part of his ensuing reasons for judgment commencing at the foot of page 132 and continuing to the end of page 135, and particularly the following statement:— "Any attempt to abrogate this right of public debate or to express the traditional forms of the exercise of the right (in public meeting and through the press), would, in our opinion be incompetent to the Legislature of the Province." Also, with respect, I must dissent from the views of Cannon J. upon this topic as expressed in the same report.

We have not a Bill of Rights such as is contained in the United States Constitution and decisions on that part of the latter are of no assistance. While it is true that, as recited in the preamble to the *British North America Act* the three Provinces expressed a desire to be federally united with a constitution similar in principle to that of the United Kingdom, a complete division of legislative powers being effected by the *Act*, I assume as it was assumed in *Re Adoption Act* (2), (with reference, it is true, to entirely different matters) that Provincial Legislatures are willing and able to deal with matters of importance and substance that are within their legislative jurisdiction. It is perhaps needless to say that nothing in the foregoing has reference to matters that are confined to Parliament.

(1) [1938] S.C.R. 100. (2) [1938] S.C.R. 398.

As to both freedom of religion and freedom of the press, with relation to the use of highways in the Province, I have already stated my view in *Winner* v. *S.M.T.* (1), that highways, generally speaking, fall within "Property and Civil Rights in the Province" under head 13 of section 92 of the *British North America Act*. As to what are the rights of the public in highways, it is sufficient to refer to Woolrych's Laws of Ways, p. 3:— "The King's highway is a public passage for the King and his subjects" and Pratt and McKenzie's Law of Highways, 19th ed. pp. 1 and 2:— "The right of the public in a highway is an easement of passage only—a right of passing and repassing. In the language of pleading, a party can only justify passing along, and not being in, a highway".

The appeal should be allowed and a declaration and injunction granted in the terms set out above. Although he does not secure all that he claims, the appellant is entitled to his costs of the action and of the appeal to the Court of Queen's Bench (Appeal Side). He is also entitled to his costs of the present appeal except that nothing should be allowed for the preparation of a factum. Rule 30 of the Rules of this Court provides for the contents of the factum or points of argument of each party, Part 3 whereof is to consist of "A brief of the argument setting out the points of law or fact to be discussed." This Rule was not complied with by the appellant filing two volumes containing 912 mimeographed pages together with an appendix thereto of 86 mimeographed pages. The costs awarded the appellant are payable by the respondent, the City of Quebec: No order should be made as to costs for or against the intervenant, the Attorney General of Quebec.

RAND J.:—The appellant seeks a declaration that by-law No. 184, of the City of Quebec, passed in October, 1933, is beyond the legislative power of the province:—

> 1. It is by the present by-law forbidden to distribute in the streets of the City of Quebec any book, pamphlet, booklet, circular, or tract whatever without having previously obtained for so doing the written permission of the Chief of Police.

Contravention is punishable by fine, with imprisonment in default of payment. No question is raised that the by-law is not authorized by the city charter, and the grounds

(1) [1951] S.C.R. 887 at 908.

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upon which it is challenged are that it infringes the freedom of religious worship, secured by a statute to which I shall later refer, and that it trenches upon the jurisdiction of the Dominion in restraining freedom of communication by writings.

The practice under it is undisputed and as stated to us by counsel is this: when a license is sought, a copy of the document or writing proposed to be distributed is brought to the police department and there the chief officer, acting with or without the city solicitor or others, or in his absence, an official representing him, peruses the writing; if there is nothing in it considered from any standpoint to be objectionable, the license issues; if there is, suggestions are made that the offending matter be removed, but if that is not done the license is refused.

As in all controversies of this nature, the first enquiry goes to the real nature and character of the by-law; in what substance and aspect of legislative matter is it enacted? and we must take its objects and purposes to be what its language fairly embraces. The by-law places no restriction on the discretion of the officer and none has been suggested. If, under cover of such a blanket authority, action may be taken which directly deals with matters beyond provincial powers, can the fact that the language may, at the same time, encompass action on matters within provincial authority preserve it from the taint of *ultra vires?* May a court enter upon a delineation of the limits and contours of the valid and invalid areas within it? Must the provision stand or fall as one or can it be severed or otherwise dealt with? These are the subsidiary questions to be answered.

What the practice under the by-law demonstrates is that the language comprehends the power of censorship. From its inception, printing has been recognized as an agency of tremendous possibilities, and virtually upon its introduction into Western Europe it was brought under the control and license of government. At that time, as now in despotisms, authority viewed with fear and wrath the uncensored printed word: it is and has been the bête noire of dogmatists in every field of thought; and the seat of its legislative control in this country becomes a matter of the highest moment.

The Christian religion, its practices and profession, exhibiting in Europe and America an organic continuity, stands in the first rank of social, political and juristic importance. The Articles of Capitulation in 1760, the Treaty of Paris in 1763, and the *Quebec Act of 1774,* all contain special provisions placing safeguards against restrictions upon its freedom, which were in fact liberations from the law in force at the time in England. *The Quebec Act,* by sec. 5, declared that His Majesty's subjects,

> professing the religion of the Church of Rome of and in the said Province of Quebec, may have, hold and enjoy, the free exercise of the religion of the Church of Rome, subject to the King's supremacy . . . .

and, by sec. 15, that

> no ordnance touching religion . . . . . shall be of any force or effect until the same shall have received His Majesty's approbation.

This latter provision, in modified form, was continued by sec. 42 of the *Constitutional Act of 1791*:—

> whenever any act or acts shall . . . . . in any manner relate to or affect the enjoyment of or exercise of any religious form or mode of worship

the proposed *Act* was to be laid before both Houses of Parliament and the assent of the Sovereign could be given only if within thirty days thereafter no address from either House to withhold assent had been presented. *The Union Act of 1840,* sec. 42, contained a like provision. In each of the latter Acts existing laws were continued by secs. 33 and 46 respectively. From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.

This is confirmed by a consideration of legislative powers conferred by the same statutes. By sec. 12 of the *Quebec Act,* the legislative council, with the consent of the governor, could make ordnances, generally, for the "peace, welfare and good government" of the province. By sec. 8, the Canadian subjects were to hold their property and possessions "together with all customs and usages relating

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thereto and all other their civil rights" as before the capitulation so far as they might be consistent with their new allegiance; and in all matters of controversy relating to property and civil rights "resort should be had to the laws of Canada" as the rule for decision. By sec. 11 the criminal law of England was to be administered. The change of sovereignty had necessarily brought with it the public law of England, and so far as its provisions might conflict with the local laws and usages they would prevail.

In 1852, cap. 175 of 14-15 Vict. (Canada) was with the specified assent of Her Majesty enacted:—

> Whereas the recognition of legal equality among all Religious Denominations is an admitted principle of Colonial Legislation; And whereas in the state and condition of this Province, to which such a principle is peculiarly applicable, it is desirable that the same should receive the sanction of direct Legislative Authority, recognizing and declaring the same as a fundamental principle of our civil polity: Be it therefore declared and enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of the United Kingdom of Great Britain and Ireland, and intituled, An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada, and it is hereby declared and enacted by the authority of the same, That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

That law is now embodied in cap. 307, sec. 2 of R.S.Q. 1941.

By cap. 118 of the Imperial Statutes of 1854, sec. 42 of the *Act of Union, 1840,* was repealed and it was provided that the Governor might, in Her Majesty's name, assent to any bill of the Legislature of Canada or for Her Majesty to assent to any such bill reserved for the signification of Her pleasure, although the bill should not have been laid before the Houses of Parliament.

Finally, the *Confederation Act of 1867* effected a distribution of legislative power for the "peace, order and good government of Canada" between the Dominion and the provinces. Sec. 6 of cap. 118, 1854, remains unrepealed save by the effect upon it of that *Act:* and it would appear that its provisions for assent and reservation are incompatible with the provincial status.

The only powers given by sec. 92 of the *Confederation Act* which have been suggested to extend to legislation in relation to religion are nos. 13, Property and Civil Rights, and 16, Matters of a merely local or private nature in the province. The statutory history of the expression "Property and Civil Rights" already given exhibiting its parallel enactment with special provisions relating to religion shows indubitably that such matters as religious belief, duty and observances were never intended to be included within that collocation of powers. If it had not been so, the exceptional safeguards to Roman Catholics would have been redundant.

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. What we realize is the residue inside that periphery. Their significant relation to our law lies in this, that under its principles to which there are only minor exceptions, there is no prior or antecedent restraint placed upon them: the penalties, civil or criminal, attach to results which their exercise may bring about, and apply as consequential incidents. So we have the civil rights against defamation, assault, false imprisonment and the like, and the punishments of the criminal law; but the sanctions of the latter lie within the exclusive jurisdiction of the Dominion. Civil rights of the same nature arise also as protection against infringements of these freedoms.

That legislation "in relation" to religion and its profession is not a local or private matter would seem to me to be self-evident: the dimensions of this interest are nationwide; it is even today embodied in the highest level of the constitutionalism of Great Britain; it appertains to a boundless field of ideas, beliefs and faiths with the deepest roots and loyalties; a religious incident reverberates from one end of this country to the other, and there is nothing to which the "body politic of the Dominion" is more sensitive.

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There is, finally, the implication of sec. 93 of the *Confederation Act* which deals with education. In this section appear the only references in the statute to religion. Subsec. (i) speaks of *"Denominational Schools"* and preserves their existing rights and privileges. Subsec. (ii) extends to the separate schools "of the Queen's Protestant and Roman Catholic subjects" in Quebec the same "powers, privileges and duties" then conferred and imposed upon the separate schools of the "Queen's Roman Catholic subjects" in Upper Canada. Subsec. (iii) provides for an appeal to the Governor-General in Council from any act or decision of a provincial authority "affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education". Subsec. (iv) declares that in the event of any failure on the part of the provincial authority to observe or enforce the provincial laws contemplated by the section, Parliament may provide for the execution of the provisions of the section. On the argument advanced, and apart from the question of criminal law, these vital constitutional provisions could be written off by the simple expedient of abolishing, as civil rights and by provincial legislation, the religious freedoms of minorities, and so, in legal contemplation, the minorities themselves.

So is it with freedom of speech. *The Confederation Act* recites the desire of the three provinces to be federally united into one Dominion "with a constitution similar in principle to that of the United Kingdom. Under that constitution, government is by parliamentary institutions, including popular assemblies elected by the people at large in both provinces and Dominion: government resting ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under license, its basic condition is destroyed: the government, as licensor, becomes disjoined from the citizenry. The only security is steadily advancing enlightenment, for which the widest range of controversy is the sine qua non.

In the Reference re *The Accurate News and Information Act of Alberta* (1), Sir Lyman Duff deals with this matter. The proposed legislation did not attempt to prevent discussion of affairs in newspapers but rather to compel the publication of statements as to the true and exact objects

(1) [1938] S.C.R. 100.

of governmental policy and as to the difficulties of achieving them. Quoting the words of Lord Wright in *James* v. *Commonwealth* (1), that freedom of discussion means "freedom governed by law" he says at p. 133:—

> . . . . . it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

He deduces authority to protect it from the principle that the powers requisite for the preservation of the constitution arise by a necessary implication of the *Confederation Act* as a whole. He proceeds:—

> But this by no means exhausts the matter. Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the legislatures of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of The British North America Act, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the province, or a matter of private or local within the province. It would not be, to quote the words of the judgment of the Judicial Committee in *Great West Saddlery Co.* v. *The King* (1921) 2 A.C. 91, at 122, "legislation directed solely to the purposes specified in section 92"; and it would be invalid on the principles enunciated in that judgment and adopted in *Caron* v. *The King* (1924) A.C. 999, at 1005-06.

Conceding aspects of regulation of newspapers to be within provincial powers, he adds that

> in this region of constitutional practice, it is not permitted to a provincial legislature to do indirectly what cannot be done directly.

Cannon J. expressed similar views:—

> Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy. As stated in the preamble of The British North America Act, our constitution is and will remain, unless radically changed, "similar in principle to that of the United Kingdom." At the time of Confederation, the United Kingdom was a democracy. 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.

(1) [1936] A.C. 578 at 627.

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What is proposed before us is that a newspaper, just as a religious, political or other tract or handbill, for the purposes of sale or distribution through use of streets, can be placed under the uncontrolled discretion of a municipal officer; that is, that the province, while permitting all others, could forbid a newspaper or any writing of a particular colour from being so disposed of. That public ways, 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, is demonstrated by the Bible itself: in the 6th verse of ch. xi of Jeremiah these words appear: "Proclaim all these words in the cities of Judah, and in the streets of Jerusalem"; and a more objectionable interference, short of complete suppression, with that dissemination which is the "breath of life" of the political institutions of this country than that made possible by the by-law can scarcely be imagined.

But it is argued that the by-law relates not to religion or free speech at all but to the administration of streets. Undoubtedly the city may pass regulations for that purpose but within the general and neutral requirement of license by the by-law a number of equally plausible objects may be conjectured. No purpose whatever is indicated much less specified by the language; its sole effect is to create and vest in a functionary a power, to be exercised for any purpose or reason he sees fit, disclosed or undisclosed. The only practice actually followed is not remotely connected with street regulation: matters of traffic interference, of nuisance, of cleanliness or anything of like character would be within the city's authority, but these are no more to be inferred than others. A suggested possible purpose is to deal with writings that might provoke breaches of the peace by persons who dislike what they contain, but the same observation applies: that matter or purpose is not prescribed, and, assuming it to be within the provincial purview, on which I express no opinion, it would be only one of a number of objects of equal speculative inclusion within the enactment, some of which relate to matters beyond provincial powers. The alternatives of interpretation are whether of that group of objects, one being valid the by-law in its entirety is valid, or whether one being invalid, the

by-law in its entirety falls; or shortly, can legislation embracing such a combination of unspecified possibilities be upheld?

It was urged by Mr. Beaulieu that the city as proprietor of the streets has authority to forbid or permit as it chooses, in the most unlimited and arbitrary manner, any action or conduct that takes place on them. The possibilities of such a proposition can be easily imagined. But it misconceives the relation of the province to the public highways. The public entitled to use them is that of the Dominion, whose citizens are not of this or that province but of Canada. What has been confided to the provinces is the regulation of their use by that public.

Conceding, as in the Alberta Reference, that aspects of the activities of religion and free speech may be affected by provincial legislation, such legislation, as in all other fields, must be sufficiently definite and precise to indicate its subject matter. In our political organization, as in federal structures generally, that is the condition of legislation by any authority within it: the courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter *in relation to which* the legislature acting has been empowered to make laws. That principle inheres in the nature of federalism; otherwise, authority, in broad and general terms, could be conferred which would end the division of powers. Where the language is sufficiently specific and can fairly be interpreted as applying only to matter within the enacting jurisdiction, that attribution will be made; and where the requisite elements are present, there is the rule of severability. But to authorize action which may be related indifferently to a variety of incompatible matters by means of the device of a discretionary license cannot be brought within either of these mechanisms; and the Court is powerless, under general language that overlaps exclusive jurisdictions, to delineate and preserve valid power in a segregated form. If the purpose is street regulation, taxation, registration or other local object, the language must, with sufficient precision, define the matter and mode of administration; and by no expedient which ignores that requirement can constitutional limitations be circumvented.

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I would, therefore, allow the appeal, direct judgment declaring the by-law invalid, and enjoin the respondent City from acting upon it. The costs will be as proposed by my brother **Kerwin.**

KELLOCK J.:—This appeal arises out of an action brought by the appellant against the respondent city, the Attorney General for the province intervening, for a declaration that a by-law, No. 184, of the city, passed October 27, 1933, as well as the provincial legislation constituting the city charter in so far as such legislation may be said to authorize the said by-law, are *ultra vires.* The appellant contends that the said legislation and by-law are neither of them within any of the classes of matters assigned by section 92 to the legislatures of the provinces, but that their subject matter lies exclusively within the legislative jurisdiction of Parliament under section 91. The appellant invokes the provisions of the pre-Confederation statute of 1852, 14-15 Victoria, Ch. 175, which provides for religious freedom throughout the then province of Canada. This statute was continued in force by section 129 of the *British North America Act* and has never been repealed.

The appellant, a member of the sect or denomination "Jehovah's Witnesses", alleges that the right to preach the Christian Gospel both orally and by means of the distribution of printed matter is secured to him by the terms of the statute of 1852 equally with all other religious denominations. Appellant alleges that in so doing by this latter means, he has been illegally arrested and imprisoned under the said by-law at the instance of the respondent and that an additional charge is pending against him thereunder.

In his declaration the appellant also attacked the by-law upon the ground that the delegation of the power of licensing therein contained was incompetent to the city council, but the appellant does not wish to argue this contention in this court.

The learned trial judge considered the by-law in question to be a mere "police" regulation, having to do with the maintenance of order and good government in the city and accordingly within the general powers granted by the city charter. The learned judge did not amplify this statement.

The Court of Appeal (1) dismissed the appeal, Bertrand J., dissenting. Marchand J., did not, so far as the record shows, deliver any reasons. Pratte J., considered the by-law as one relating only to the "use of streets", a subject-matter of legislation he considered to be entirely within provincial jurisdiction. The learned judge also considered that the by-law did not trench upon such an exclusive mater of legislative jurisdiction as criminal law.

Barclay J., concurred generally with Pratte J. and he affirmed a statement he had made in an earlier decision, viz., "I fail to see how a mere police regulation governing the distribution in the streets or public places" of printed matter "without previously obtaining a written permission is, per se, an attack upon the freedom of the press."

Hyde J. also agreed with Pratte J. The learned judge also referred to the Reference with respect to the *Accurate News and Information Act of Alberta* (2), and, in particular, to the judgments of Duff J., as he then was, and of Cannon J., and distinguished the case at bar on the ground that the by-law in question was one dealing merely with the "use of streets".

Bertrand J., dissenting, considered the by-law to be in essence one of censorship, and as trenching upon the right of freedom of worship and profession. In his opinion the by-law was not within the city's charter, which does not mention such matters. The learned judge regarded the argument put forward on behalf of the respondent and the intervenant that the by-law was merely "une simple mesure de protection contre l'encombrement des rues et place publiques" as involving too great confidence on their part in the naiveté of the court. With respect to the construction of the Act of 1852, he was of opinion that the words "mais de manière à ne pas servir d'excuse à des actes d'une licence effrénée, ni à autoriser des pratiques incompatibles avec la paix et la sûreté de la province" had reference only to "des actes criminels en soi ou tellement contraires aux moeurs des pays chrétiens qu'ils puissent faire l'object de règlements spéciaux pourvu toutefois qu'ils ne portent pas atteinte à la liberté des cultes." In this view, the learned judge did not consider it necessary to deal with the question of the freedom of the press.

(1) Q.R. [1952] Q.B. 475. (2) [1938] S.C.R. 100.

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Before this court the respondent seeks to support the by-law as legislation in relation to the "use of streets" or as police regulations with relation to public order, and reliance is placed upon section 92(8), (13) and (16) of the *British North America Act*.

For the appellant it is contended that the by-law is so wide in its terms that even if authorized by the relevant provisions of the city charter, both the by-law and the charter provisions are *ultra vires* as trenching upon freedom of religion, the subject-matter of the statute of 1852, and liberty of the press, both subject-matters of legislation, in the appellant's contention, exclusively within the jurisdiction of Parliament.

The question, therefore, which lies at the threshold of the case is as to the true nature and character of the by-law. Paragraph 1 reads as follows:

> It is, by the present by-law, forbidden to distribute in the streets of the City of Quebec, any book, pamphlet, booklet, circular, tract whatever without having previously obtained for so doing the written permission of the Chief of Police.

Paragraph 2 provides a penalty for distribution without license.

It will be observed that the by-law is perfectly general in its terms and that while it prohibits in the absence of a licence, at the same time it contemplates, fully as much, distribution at the unfettered will of the municipal official to whom is delegated the power to grant or to refuse to grant licences. The by-law affords no guide whatever for the regulation from any standpoint of the prohibition or permission for which it provides. To borrow language used in another connection by Lord Watson in *Union Colliery Company* v. *The Queen* (1), "the leading feature" of this by-law consists in this that it establishes no rule or regulation for its application except that nothing but that which is permitted by the censor may be distributed. What he permits will appear in the streets. What he refuses will not. The grant or refusal of a licence will depend upon the contents of the document proposed to be distributed and the will of the censor. To equate such a by-law to by-laws which are purely prohibitory is to lose sight of the real

(1) [1899] A.C. 580 at 587.

nature of the by-law here in question. This has largely contributed to the error into which the courts below have, in my opinion, fallen.

Counsel not only for the respondent but for the intervenant as well, agree that such is the character of the by-law, and counsel for the respondent stated that it had been so administered by the respondent, its officers and servants. In so stating counsel has admitted nothing more than is clear from the record itself. A single illustration will suffice.

In case No. 51647 in the Superior Court, *Saumur* v. *Recorder's Court,* referred to by the respondent in its factum, the plaintiff was convicted under the by-law here in question. A writ of habeas corpus subsequently issued was quashed by the Superior Court, whose judgment was affirmed by the Court of Appeal, Galipeault J., dissenting. In the course of his reasons, the learned judge of first instance, Boulanger J., in quashing the writ, said:

> J'admets que le règlement est rédigé *en termes assez généraux pour servir à restreindre la liberté de parole ou la liberté de religion, ou la liberté tout court* quand cela devient nécessaire *comme mesure de police* et quand *la liberté menace de tourner à la licence et de* compromettre la paix de la municipalité.
>
> J'admets aussi que les pourvoirs donnés au directeur de la police sont larges et qu'ils peuvent servir *à censurer* des publications de caractère religieux.

I shall have something to say subsequently with respect to the limitation upon the exercise of the power given to the chief of police which the learned judge reads into the by-law. For the moment, I quote his language for the purpose of showing that the administration of the by-law is from the standpoint of the contents of the literature proposed to be distributed. Galipeault J. had this to say in the same case:

> Comme on le voit, le savant juge lui-même (Boulanger J.) est d'avis que le règlement dans sa rédaction comme dans sa substance quel que soit la but que la cité de Québec ait voulu obtenir, peut porter atteinte "à la liberté de parole, ou la liberté de religion, ou la liberté tout court" . . .
>
> J'estime que la législation se rapportant aux droits ou à liberté de parole, de pensée, de critique, de la presse en général, n'est pas du domaine de la législature, mais relève du Parlement du Canada qui, par son droit statutaire, le Code Criminel, a légiféré en la matière.

The learned judge reads the by-law as it is itself expressed, without any limitation whatever.

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Speaking for the majority of the court below, Pratte J., says:

> En effet, il suffit seulement de songer ce que pourrait . . . . . résulter de la distribution à tout venant d'écrits offensants pour les habitants de la localité; ou encore, au sort fait aux parents dont les enfants seraient sans cesse exposés à recevoir dans la rue des écrits susceptibles de troubler leur esprit, ou propageant des doctrines réprouvées par ceux qui ont non seulement le droit mais le devoir de veiller à leur éducation . . .

Clearly, therefore, the by-law is not directed to the mere physical act involved in the handing to another of a document but has in view the contents of the document and the desirability or otherwise, in the view of the chief of police, as to its circulation. A document refused a licence would not involve anything more from the standpoint of obstruction of the highway or the impeding of those using it, than one with respect to which a licence is granted, and both documents, if discarded by the recipients, would equally be a source of litter. The by-law, however, is not concerned with such matters. Nothing more is needed, in my opinion, to discern the real nature and character of the by-law, namely, to provide that some material may reach the public using the streets, while the rest may not.

Being perfectly general in its terms and setting no standard by which the official it names is to be governed in granting or refusing licences, the by-law can be used, as it has been, to deny distribution of its literature to one religious denomination, while granting that liberty to another or others. The by-law is equally capable of being applied so as to permit distribution of the literature of one political party while denying that right to all others, or so as to refuse to allow the selling in the streets of some newspapers while permitting others. In any or all of these cases, the same physical acts would be involved occasioning the same degree of obstruction, if obstruction there would be. Nothing more is needed to demonstrate, in my opinion, that such a by-law was not enacted "in relation to" streets but in relation to the minds of the users of the streets.

If the by-law were one which prohibited all distribution in the streets, entirely different considerations would very well apply. It is a confusion of thought, in my opinion, to regard by-law 184 as in the same category with purely prohibitive by-laws, as the intervenant seeks to do and as was done by the court below. Pratte J., for example, refers to

In re Kruse (1). The by-law in question in that case, however, provided that "no person" should play any musical instrument on a highway within a specified distance of a house after being requested by the occupant to desist. Entirely different considerations are applicable to such by-laws, and judgments with respect to them have no application, in my opinion, to a by-law such as No. 184, which is as much permissive as it is prohibitory.

Assuming, for the purposes of argument, that the by-law here in question might, in actual administration by the official mentioned therein, be administered solely to prevent literature reaching the streets which might cause disturbance or nuisance therein, and that a by-law expressly so limited would be within provincial competence, the present by-law is not so limited in its terms. Its validity is not to be judged from the standpoint of matters to which it might be limited, but upon the completely general terms in which it in fact is couched.

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; *Attorney General for Saskatchewan* v. *Attorney General for Canada* (2), per Viscount Simon. It is only legislation "in relation to" matters within section 92 which is committed to the provincial legislatures.

In the judgment in the court below and in argument on behalf of the intervenant in this court, some relevance was found to the case at bar in the decision of this court in *Provincial Secretary of Prince Edward Island* v. *Egan* (3). In that case it was held that a provincial statute providing for suspension of a licence to drive a motor car upon conviction under section 285(4) of the Criminal Code of driving while intoxicated, was valid. In my opinion it would be impossible to draw any analogy between the provincial legislation there in question and legislation such as by-law No. 184. It would scarcely be argued that the decision in

(1) [1898] 2 Q.B. 91. (2) [1949] A.C. 110 at 123.
(3) [1941] S.C.R. 396.

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Egan's case would afford any ground of support for provincial legislation which sought to make the grant or refusal of a licence to operate a motor car on a highway dependent upon the religious denomination to which the driver belonged or the sectarian character of the literature carried in the vehicle. Such legislation would not be legislation in relation to highways at all, although no doubt it would affect traffic seeking to use the highways. There can be no question but that the legislation in question in *Egan's* case was "in relation to" highways and safety on the highways. 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.

There is equally no analogy, in my opinion, between a by-law restricting a designated area in a municipality to private residences, for example, and one which would exclude from such a designated area buildings erected by one religious denomination. By-laws of the former character, being purely prohibitory, are usually recognized as valid provincial legislation, but they would be in an entirely different category from the latter, if it could be conceived that a by-law of the latter type would be enacted. Reference may be made to *Toronto* v. *Roman Catholic Separate Schools Trustees* (1), per Viscount Cave L.C.

The same may be said of the type of by-law in question in *In re Cribbin and the City of Toronto* (2), which provided that

> No person shall on the Sabbath Day, in any public park . . . . . in the City of Toronto publicly preach, lecture or declaim.

Had the by-law there in question been expressed to be applicable to persons of a particular religious persuasion only, entirely different considerations would have applied to the question of its constitutional validity.

Bedard v. *Dawson* (3), is also relied upon by the intervenant. Again it is to be observed that the legislation there in question provided that

> It shall be illegal for *any* person who owns or occupies *any* house or building . . . to use or allow *any* person to use the same as a disorderly house.

(1) [1926] A.C. 81 at 88. (2) (1891) 21 O.R. 325.
(3) [1923] S.C.R. 681.

It is perfectly true, as stated by Duff J., as he then was, at p. 685, that

> The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate.

If, however, the legislation there under consideration had been operative so as to interfere with rights which are not the subject of legislative jurisdiction under s. 92, other considerations would have applied. The question in the case at bar is as to whether by-law 184 impinges upon such matters.

This brings me to the first ground upon which the by-law is attacked, namely, the rights granted by the Act of 1852. That statute, so far as material, is as follows:

> Whereas the recognition of legal equality among all Religious Denominations is an admitted principle of Colonial Legislation; And whereas in the state and condition of this Province, to which such a principle is peculiarly applicable, it is desirable that the same should receive the sanction of direct Legislative Authority, recognizing and declaring the same as a fundamental principle of our civil policy: Be it therefore declared and enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada . . . That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

The respondent strenuously argued that the Jehovah's Witnesses were not entitled to rely upon the *Act* as they were not a "religious denomination" within the meaning of the statute. It was further contended that because the appellant had refused to apply for a licence under the by-law before bringing the present action, this amounted to an "act of licentiousness" or a "practice inconsistent with the peace and safety of the province" within the meaning of the statute. With respect I am of opinion that neither contention is tenable. So far as the second is concerned, in my opinion, the language of the statute has no effect beyond removing protection from particular "acts" or "practices" which are in themselves illegal by the common or statute law. The statute does not mean, for instance, that if a sect practises polygamy, it becomes disentitled to rely on the statute for all purposes. It merely means that the statute

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affords no defence to polygamy. The same would apply in the case of any literature circulated by the appellant or those associated with him.

Mr. Beaulieu argues that "the free exercise and enjoyment of Religious Profession and Worship" in the statute do not cover more than the carrying on of religious exercise in some place of worship. In that view the statute would have nothing to say with regard to such a matter, for example, as the dissemination of religious views or material, e.g., the Scriptures themselves, outside such places of worship.

I do not think the statute is to be so narrowly construed. It recites that "the recognition of legal equality among all Religious Denominations" was an admitted principle of colonial legislation and that it was desirable that that principle should receive legislative sanction "as a fundamental principle of our civil polity". By sec. V of the Act of 1774 it was "the free exercise of the Religion of the Church of Rome" which was granted. The principle of legal equality provided for by the Act of 1852 can mean no less than this. I would adopt the language of the writer in Volume II, "La Revue Critique", p. 130, where he says:

> From this principle of our public law flow the rights and liberties which are dearest to our mixed population; liberty of conscience, freedom of public worship and freedom of the press in religious matters . . . . Every person has a right to speak, write and print his opinion upon any religious question or point of controversy, without permission from the government or from any one else.

The Christian religion would hardly have survived had it permitted itself to be circumscribed in accordance with the argument of Mr. Beaulieu. From the beginning it has propagated itself by the written as well as the spoken word. The Scriptures themselves are a sufficient illustration of this. That propagation by such means was not, however, limited to the Scriptures is a matter of common knowledge. This is conveniently illustrated by the Canadian Act of 1843, 7 Victoria, c. 68: "An Act to Incorporate the Church Societies of the United Church of England and Ireland in the Dioceses of Quebec and Toronto." By the preamble one of the purposes of incorporation was "for circulating in the said Dioceses, respectively, the Holy Scriptures, the Book of Common Prayer of the said Church, and such other

Books and Tracts as shall be approved by the Several Central Boards or Managing Committee."

It is undoubted that, under a by-law of the nature of by-law 184, the circulation of such material as the above would be impossible except with permission of the censor. This aspect of religious freedom would thereby be interfered with. The question is, therefore, as to the competency of provincial legislation in this field. In support of the by-law, it is said that this is a subject matter within the category of "civil rights in the province."

In considering this contention certain historical matters are relevant. Under the *Quebec Act of 1774*, 14 Geo. III, c. 83, provision is made for the government of the Province of Canada, which included, inter alia, all of the present provinces of Ontario and Quebec. By section VIII it is provided that all His Majesty's Canadian subjects within the province, with the exception of religious orders and communities, might hold and enjoy "their Property and Possession, together with all Customs and Usages relative thereto, and all other their *Civil Rights*, in as large, ample and beneficial Manner" as if certain previously made proclamations, etc., had not been made. And it was further provided that in all matters of controversy "relative to *Property and Civil Rights*" resort should be had to the laws of Canada as the rule for decision of the same and that all causes which might thereafter be instituted in any of the courts of justice should, with respect to "such Property and Rights" be determined agreeably to the said laws and customs of Canada until varied by subsequent enactment.

It is plain from other provisions of the statute that "Property and Civil Rights" do not include the right of exercise and profession of religion, as to which express provision was made elsewhere.

By section V it is enacted

> That his Majesty's Subjects, professing the Religion of the Church of Rome of and in the said Province of Quebec, may have, hold, and enjoy, the free Exercise of the Religion of the Church of Rome, subject to the King's supremacy, declared and established by an Act, made in the first year of the Reign of Queen Elizabeth . . . . and that the Clergy of the said Church may hold, receive, and enjoy, their accustomed Dues and Rights, with respect to such Persons only as shall profess the said Religion.

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Section VI enacts that

> Provided nevertheless, That it shall be lawful for his Majesty, his Heirs or Successors, to make such Provision out of the rest of the said accustomed Dues and Rights, for the Encouragement of the Protestant Religion, and for the Maintenance and Support of a Protestant Clergy within the said Province, as he or they shall, from Time to Time, think necessary and expedient.

Section XII provides for the government of the province by a council, but Section XV provides that "no Ordinance touching Religion . . . ." is to be of any force or effect until the same shall have received the approval of His Majesty. Section XI confirms English criminal law as the law of the province.

By section XVII provision is made for "Courts of Civil, Criminal and Ecclesiastical" jurisdiction.

In 1791 the *Constitutional Act,* 31 Geo. III, c. 31, was passed. This statute provided for the division of the province into two separate provinces of Upper and Lower Canada, and for a separate legislative council and assembly for each, with power to make laws for the peace, welfare and good government of each of the provinces. All laws previously existing were to continue until repealed or varied under the authority of the *Act.*

Section XLII provided, however, that with respect to any Act or Acts which might be passed by the legislative council or assembly of either of the provinces varying or repealing the matters covered by Sections V and VI of the Act of 1774 or which "shall in any Manner relate to or affect the Enjoyment or Exercise of any religious Form or Mode of Worship; or shall impose or create any Penalties, Burthens, Disabilities, or Disqualifications in respect of the same" or should affect the enjoyment of the dues or rights of any "Minister, Priest, Ecclesiastic, or Teacher, according to any religious Form or Mode of Worship in respect of his said Office or Function" should, before assent should be given to it, be laid before both Houses of Parliament in Great Britain, and His Majesty was prohibited from assenting to any such Act in case either House within thirty days should present an address to His Majesty to withhold assent therefrom.

In 1792, by 32 Geo. III, c. I, the Legislature of Upper Canada, after reciting the provision in the Imperial Act of 1774 providing "that in all matters of controversy relative to Property and Civil Rights, resort should be had to the laws of Canada, as the rule for the decision of the same", and that that part of the former Province of Quebec then included within Upper Canada having become inhabited principally by persons familiar with the laws of England, this provision was repealed and it was enacted by Section III that "from and after the passing of this Act, in all matters of controversy relative to *Property and Civil Rights,* resort shall be had to the Laws of England, as the rule for the decision of the same." Section VI, however, expressly provided that nothing in the statute should vary or interfere or be construed to vary or interfere, with any "of the subsisting provisions respecting *Ecclesiastical rights* or dues within this Province."

In 1840, by 3-4 Victoria, c. 35, the two provinces were reunited under one legislative council and assembly. Section XLII again provided that whenever any bill should be passed containing any provisions

> which shall in any Manner relate to or affect the Enjoyment or Exercise of any Form or Mode of Religious Worship, or shall impose or create any Penalties, Burdens, Disabilities, or Disqualifications, in respect of the same,

every such bill, prior to assent, should be laid before both Houses of Parliament of the United Kingdom, and within thirty days thereof, in case either House of Parliament should address Her Majesty to withhold Her assent from any such bill, it should not be lawful for Her Majesty to signify Her assent. This section was altered in 1854, by 17-18 Vic., c. 118, s. 6, empowering the Governor to give the Queen's assent.

In the meantime, the Act of 1852, c. 175, was passed by the local legislature in 1851 and, as required by the statute of 1840, was assented to by Her Majesty at Westminster on May 15, 1852.

It would therefore appear plain from all this legislation that, commencing with the statute of 1774, the phrase "property and civil rights" did not include the right to the exercise and enjoyment of religious profession, that being a

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matter the subject of special provision in each case, and, by the statute of 1852, made a *fundamental principle* of the *constitution* of the entire country.

It is, of course, well settled that the right to hold any view in matters of religious belief is not a civil right at all except in relation to title to property. In *Forbes* v. *Eden* (1), the appellant, a clergyman of the Episcopal Church of Scotland, brought action for a declaration that it was *ultra vires* of the church to amend its canons and that he was entitled to celebrate Divine Worship and to administer the sacraments and other rites of the church in accordance with the original canons. The appellant had not been deprived of his status and had sustained no damage. The respondents, in their defence, relied upon the principle that courts of civil jurisdiction will not take cognizance of questions as to religious doctrine or discipline except for the purpose of enforcing "civil rights" or redressing "civil wrongs".

The following from the opinions of members of the House are sufficient:

Lord Chelmsford L.C. at 573:

> The Court had therefore, to consider whether it could properly entertain the question of the reduction of the canons upon the ground that they were a departure from the doctrine and discipline of the Scotch Episcopal Church at the time the appellant became its minister. Now this it refused to do, as it was a mere abstract question involving religious dogmas, and resulting in no civil consequences which could justify the interposition of a Civil Court.

Lord Colonsay, 588:

> A Court of Law will not interfere with the rules of a voluntary association unless to protect some civil right or interest which is said to be infringed by their operation. Least of all will it enter into questions of disputed doctrine, when not necessary to do so in reference to civil interests.

The same principle underlies the decision in the *Free Church* case (2); see the judgment of Lord James of Hereford at p. 655.

This principle was well understood in Canada before 1867. In 1857, by the statute 20 Victoria, c. 43, provision was made for the appointment of commissioners to reduce into one code "those provisions of the laws of Lower Canada which relate to *civil matters* and are of a general and permanent character." In their second report, dated May 22,

(1) (1867) L.R I Ex. App. 568 (2) [1904] A.C. 515.

1860, the majority of the commissioners, in discussing the scope of their terms of reference, refer to a disagreement among the commissioners on this point.

At page 149 of Vol. I, the majority say:

> On one hand, it is pretended that the laws to be codified are exclusively those upon which the provincial parliament has the right to legislate, and therefore that all those which proceed from or make part of the imperial laws should be omitted. On the other hand it is pretended that the codification required should extend to all classes of categories of laws in force in the province, provided they refer to *civil matters*, from whatever source they come, and that the objection would only be valid in case it should be proposed to repeal or alter these laws, which has never been contemplated; but is without force, for a case like the present, where it is only intended to announce their existence.

The latter view was that of the majority and, while the draft code in its first title" is concerned with the enjoyment and loss of "civil rights", it does not deal with the subject matter of the Act of 1852, although it does deal with the loss of civil rights occasioned by the taking of religious vows upon entry into a religious order. The majority view was adopted by the legislature in the code of 1866, the relevant provisions being found in Articles 18, 30 and 34 of the first title.

In speaking of the loss of civil rights consequent upon the taking of religious vows, the majority say also, at page 153:

> One of the Commissioners is, however, of opinion that the religious profession no longer exists legally in this province, at least so as to produce civil death; that the cession of the country has abolished it, by putting an end to the state of things upon which its existence depended; that, moreover, it is contrary to the laws of public order and incompatible with certain *civil* and *religious* rights pertaining equally to all classes of the population. For these reasons set forth in the special report already mentioned, the present article 20 and the second paragraph of article 17 are only adopted by two of the Commissioners.
>
> They are of opinion that whatever may have been the principle, the origin and the source of the laws on this subject, to establish that it is in force in this country, it is only necessary to show that it was admitted and put into execution in France, until its abolition in 1789, *as forming part of the civil laws;* that as such it was introduced into Canada at its settlement, and that since it has been constantly followed and practised as well before as since the cession of the country, which, far from abolishing it by implication or otherwise, has, on the contrary, given rise to treaties and legislative provisions, which by granting to the inhabitants of the country the free exercise *of their religion* and the enjoyment *of their civil laws,* have thereby confirmed and continued the existence of the law in question, which makes *part of the one* and is *intimately connected* with the other.

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In the view of the codifiers, therefore, and in that of the legislature, freedom of worship and profession was not a "civil right" and certainly not a civil right "within" the province of Lower Canada.

It has been decided by the Judicial Committee that "Property and Civil Rights" in the Act of 1774, although "used in their largest sense" have exactly the same meaning in the statute of 1867; *Citizens Insurance Company* v. *Parsons* (1), per Sir Montague Smith. Section 94 of 1867 authorizes Parliament to make provision for the uniformity of all or any of the laws relative to "property and civil rights" in Ontario, Nova Scotia and New Brunswick with the consent of those provinces.

As pointed out in the *Parsons* case, at page 110:

> The Province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is in the main the French law as it existed at the time of the cession of Canada, and not the English law which prevails in the other provinces.

It is equally obvious that so far as the law relating to freedom of worship and profession is concerned, that law was not the French law but rather the statute of 1852, which applied equally to both of the Canadas.

Mr. Justice Mignault in Volume I has the following at p. 131:

> Les droits sont les facultés ou avantages que les lois accordent aux personnes. Ils sont *civils, politiques* ou *publics*. . . . .
>
> Certains droits existent qui, à proprement parler, ne sont ni *civils* ni *politiques;* tels sont les droits de s'associer, de s'assembler paisiblement et sans armes, de pétitionner, de manifester sa pensée par la voie de la presse ou autrement, la liberté individuelle et enfin la liberté de conscience. Ces droits ne sont point des droits *civils,* car ils ne constituent point des rapports de particulier à particulier; ce ne sont pas non plus de véritables droits *politiques,* puisqu'on les exerce sans prendre aucune part au gouvernement du pays. Quelques personnes les rangent dans une classe particulière sous la dénomination de *droits publics.*

"I consider" says Lord Bacon, "that it is a true and received division of law into *ius publicum* and *ius privatum,* the one being the sinews of property, and the other of government." See *Holland, "Jurispurdence"* 13th ed. p. 366. The same learned author places

"the relation, if any, between church and state" as in the realm of constitutional law, which is, of course, a branch of public law.

(1) (1881) 7 App. Cas. 96 at 111.

Pagnuelo, in his work "de la Liberté Religieuse en Canada" treats the subject-matter of the Act of 1852 (correctly in my opinion) as within this field. At p. 257 the learned author says:

> Cependant le droit public s'etablissait dans le pays, et finalement la législature Bas-Canadienne, anticipant les décisions des premiers juges et légistes d'Angleterre, déclarait en 1851 par la seule force de la conscience intime de l'état social de la colonie, quels sont les principes de notre constitution politique quant aux affaires religieuses.

Similarly, the writer in La Revue Critique Vol. II, which I have already quoted in part, says at p. 130:

> To sum up the discussion, it may confidently be concluded that it is a fundamental maxim of law in Canada, consecrated both by the French and the British constitutions of the country, by imperial statutes and treaties, by the peculiar jurisdiction and by repeated decisions of our courts, that all the churches in the colony are free and independent of civil or judicial intervention in spiritual matters.
>
> From this principle of our public law flow the rights and liberties which are dearest to our mixed population: liberty of conscience, freedom of public worship and freedom of the press in religious matters.

Galipeault J., also, in *Saumur* v. *la Cité de Québec* (1), in referring to the subject-matter of the very by-law here in question, says, (and in my opinion, with respect, perfectly correctly)

> Et il convient de nous rappeler que nous sommes ici en matière de droit public plutôt qu'en matière de droit.

Any contention that the right to the exercise of religion is a mere "civil right" is, therefore, for these reasons, quite untenable in my opinion. Even if such a matter could be so regarded, it would not be a civil right "within the province".

The British North America Act itself indicates, in my opinion, that the subject-matter of religious profession is not a matter of provincial legislative jurisdiction within any of the heads of s. 92.

By s. 93 it is enacted that a provincial legislature may legislate "in relation to" education but subject, inter alia, to the provision that

> (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union.

(1) (1948) 26 Can. Bar. Rev. 780.

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The "class" in s-s. (1) must, as stated by the Judicial Committee in *Ottawa Separate Schools* v. *Mackell* (1), be a class determined "according to religious belief". The right or privilege preserved by s-s. (1) to such a class with respect to its denominational schools is such only as existed "by law" at the time of Union. It would in my opinion be absurd to say that a provincial legislature, while it cannot strike at the right of any such class to impart religious instruction to its adherents, may nevertheless legislate so as to affect or destroy the religious faith of the denomination and thus affect or entirely do away with all necessity for religious instruction in that faith.

S-ss. (3) and (4) of s. 93 provide that

> (3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:
>
> (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

In *Roman Catholic Separate School Trustees* v. *The King* (2), Viscount Haldane said:

> Their Lordships are of opinion that where the head of the executive council in Canada is satisfied that injustice has been done by taking away a right or privilege which is other than a legal one from the Protestant or Roman Catholic minority in relation to education, he may interfere. The step is one from mere legality to administrative propriety, a totally different matter. But it may be that those who had to find a new constitution for Canada when the British North America Act was passed in 1867, came to the conclusion that a very difficult situation could be met in no other way than by transferring the question from the region of legality to that of administrative fairness.

Accordingly, even though its legislation in matters of education may be *intra vires*, a provincial legislature may be restrained by the federal executive if, in the view of the latter, its intervention is called for within the terms of s. 93. It can hardly be that although the express power of the

(1) [1917] A.C. 62 at 69. (2) [1928] A.C. 363 at 370.

provincial legislatures as to education is thus restricted where matters of religious belief are involved, there nonetheless exists a jurisdiction under some head of s. 92 to legislate as to matters of religious profession and worship itself which could, conceivably, reduce s-ss. (3) and (4) to a dead letter. In my view any such view is untenable.

I therefore conclude that it is incompetent for a provincial legislature to legislate with respect to the subject-matter of the statute of 1852 and that by-law 184, couched as it is in general terms, purports to interfere with the rights granted by the statute, and is consequently *ultra vires*.

I have not overlooked that the Legislatures of Ontario and Quebec have, since Confederation, purported to re-enact the statute of 1852. The question of the competency of this legislation has, however, so far as I am aware, not been previously judicially considered. No doubt the provisions of the 1852 statute relating to rectories were matters of provincial legislative jurisdiction.

There are other standpoints also from which the by-law is equally invalid. In so far as the by-law may be said to have in view the prohibition of the publication of blasphemous libel, it would be clearly outside the comptence of a provincial legislature as impinging upon the criminal law. As pointed out by Lord Parker in *Bowman* v. *Secular Society Limited* (1):

> In my opinion to constitute blasphemy at common law there must be such an element of vilification, ridicule, or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace. I cannot find that the common law has ever concerned itself with opinion as such, or with expression of opinion, so far as such expression is compatible with the maintenance of public order. Indeed there is express authority that heresy as such is outside the cognizance of a criminal Court unless the heretic by setting up conventicles or otherwise endangers the peace: see Hawkins' pleas of the Crown, vol. 1, p. 354.

Again, at page 451, Lord Parker adopted the language of Coleridge J. in *Shore* v. *Wilson* (2), as follows:

> There is nothing unlawful at common law in reverently doubting or denying doctrines parcel of Christianity, however fundamental. It would be difficult to draw a line in such matters according to perfect orthodoxy, or to define how far one might depart from it in believing or teaching without offending the law. The only safe, and, as it seems to me, practical rule, is that which I have pointed at, and which depends on the sobriety and reverence and seriousness with which the teaching, or believing, however erroneous, are maintained.

(1) [1917] A.C. 406 at 446. (2) 9 Cl. & F. 355 at 539.

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The offence of blasphemy is, of course, expressly covered by section 198 of the *Criminal Code*.

Again, in so far as the by-law may be said to be directed at seditious literature,

> nothing short of direct incitement to disorder and violence is a seditious libel;

Rex v. *Aldred* (1), per Coleridge J.

Lower down on the same page the learned judge said:

> The test is this: was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of state.

The same result obtains in so far as the by-law could be said to be directed against the publication of libelous matter regarded from the standpoint of public law. Libel in its aspect other than as giving rise to an action for damages as at the instance of the person defamed, is a crime. Odgers, Sixth Edition, at page 7, has the following: "A libel is a crime: a slander on a private individual is not." On the same page the authors refer to the judgment of Lush J., in *R.* v. *Holbrook* (2), as follows:

> Libel on an individual is, and has always been, regarded as both a civil injury and a criminal offence. . . . It is ranked amongst criminal offences because of its supposed tendency to arouse angry passion, provoke revenge, and thus endanger the public peace . . . . .

However this may be, the by-law is not limited in terms to such matters but extends to all matters to which the censor may see fit to apply it. As it is capable of application to matters beyond the ambit of s. 92, it must be held to be invalid.

In the Reference re the *Alberta Accurate News and Information Act* (3), there was in question a bill the relevant provisions of which, for present purposes, imposed upon those concerned in the publication of newspapers in the province, at the direction of the chairman of a provincial board, the obligation of publishing statements furnished by him having for their object the correction or amplification of any statement relating to any policy or activity of the government of the province which had already been published by the newspaper concerned, and requiring the newspaper to make returns setting out every source from which any information had emanated with respect to any statement contained in the newspaper, and

(1) 22 Cox C.C. 1 at 3. (2) (1878) 4 Q.B.D. 42 at 46.
(3) [1938] S.C.R. 100.

the names, addresses and occupations of all persons by whom such information had been furnished as well as the name and address of the writer of any editorial, article or news item.

Three members of this court dealt with this legislation from a standpoint which is relevant to the case at bar. Duff, C.J., with whom Davis J., agreed, after referring to the provisions of the *British North America Act* relating to the Senate and the House of Commons, said at page 133:

> The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. . . . .
>
> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James* v. *Commonwealth,* (1936) A.C. 578, at 627, "freedom governed by law".
>
> Even within its legal limits, it is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.
>
> We do not doubt that (in addition to the power of disallowance vested in the Governor General) the Parliament of Canada possesses authority to legislate for the protection of this right. That authority rests upon the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from The British North America Act as a whole (*Fort Frances Pulp & Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.* (1923) A.C. 695); and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.
>
> But this by no means exhausts the matter. Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion be incompetent to the legislatures of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of The British North America Act, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject-matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the province, or a matter private or local within the province. It would not be, to quote

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the words of the judgment of the Judicial Committee in *Great West Saddlery Co.* v. *The King*, (1921) 2 A.C. 91, at 122, "legislation directed solely to the purposes specified in section 92"; and it would be invalid on the principles enunciated in that judgment and adopted in *Caron* v. *The King*, (1924) A.C. 999, at 1005-06.

The learned Chief Justice then referred to the question as to the validity of the legislation before the Court, considered as an independent enactment with no relation to the other provincial legislation there in question and, conceding that there was "a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers", continued:

> But the limit, in our opinion, 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. Such a limitation is necessary, in our opinion, "in order," to adapt the words quote above from the judgment in *Bank of Toronto* v. *Lambe* (1887) 12 A.C. 575, "to afford scope" for the working of such parliamentary institutions. In this region of constitutional practice, it is not permitted to a provincial legislature to do indirectly what cannot be done directly (*Great West Saddlery Co.* v. *The King* (1921) 2 A.C. 91, at 100).

Whether the learned Chief Justice was of opinion that the legislation in question in that case was incompetent to parliament as well as to a provincial legislature, it is not necessary to consider. It was clearly, in the opinion of the learned Chief Justice, beyond provincial competence.

I respectfully agree with this view, in the light of which it is plain that by-law 184 cannot be supported as within any of the heads of legislative jurisdiction conferred upon the provinces by section 92. If provincial legislation could validly authorize a by-law such as that here in question, it could legislate so as to prevent the distribution within the whole or any part of the province, of pamphlets or newspapers published elsewhere within or without the province. This is clearly contrary to the law as envisaged by Duff, C.J.

In the same case, Cannon J. said at p. 144:

> The bill does not regulate the relations of the newspapers' owners with private individual members of the public, but deals exclusively with expressions of opinion by the newspapers concerning government policies and activities. The pith and substance of the bill is to regulate the press of Alberta from the viewpoint of public policy by preventing the public from being misled or deceived as to any policy or activity of the Social Credit Government and by reducing any opposition to silence or bring upon it ridicule and public contempt.

I agree with the submission of the Attorney-General for Canada that this bill deals with the regulation of the press of Alberta, *not from the viewpoint of private wrongs or civil injuries* resulting from any alleged infringement or privation of civil rights which belong to individuals, considered as individuals, *but from the viewpoint of public wrongs or crimes,* i.e., involving a violation of the public rights and duties to the whole community, considered as a community, in its social aggregate capacity.

The learned judge referred to the sections of the *Criminal Code* dealing with seditious words and publications and pointed out that while at first in England criticism of any government policy was regarded as a crime, since the passing of Fox's Libel Act in 1792 it is not criminal, as the Canadian Criminal Code now provides, to point out errors in the government of the country and to urge their removal by lawful means. The learned judge then continued:

Now, it seems to me that the Alberta legislature by this retrograde Bill is attempting to revive the old theory of the crime of seditious libel by enacting penalties, confiscation of space in newspapers and prohibitions for actions which, after due consideration by the Dominion Parliament, have been declared innocuous and which, therefore, every citizen of Canada can do lawfully and without hindrance or fear of punishment. It is an attempt by the legislature to amend the Criminal Code in this respect and to deny the advantage of sec. 133(*a*) to the Alberta newspaper publishers.

Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government. Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy. As stated in the preamble of The British North America Act, our constitution is and will remain, unless radically changed, "similar in principle to that of the United Kingdom." At the time of Confederation, the United Kingdom was a democracy. 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 in 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. The mandatory and prohibitory provisions of the Press Bill are, in my opinion, *ultra vires* of the provincial legislature. They interfere with the free working of the political organization of the Dominion. They have a tendency to nullify the political rights of the inhabitants of Alberta, as citizens of Canada, and cannot be considered as dealing with matters purely private and local in that province. The federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press

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in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion. These subjects were matters of criminal law before Confederation, have been recognized by Parliament as criminal matters and have been expressly dealt with by the criminal code. No province has the power to reduce in that province the political rights of its citizens as compared with those enjoyed by the citizens of other provinces of Canada. Moreover, citizens outside the province of Alberta have a vital interest in having full information and comment, favourable and unfavourable, regarding the policy of the Alberta government and concerning events in that province which would, in the ordinary course, be the subject of Alberta newspapers' news items and articles.

With the same reservation already made with respect to the judgment of Duff C.J., in the same case, I agree that such a subject-matter of legislation is at any rate beyond the jurisdiction conferred by any of the heads of s. 92 and, accordingly, the provisions of the by-law here in question cannot stand. With respect to the charter, I would construe its provisions as not intended to authorize such a by-law; Reference re *Minimum Wage Act* (1).

I would therefore allow the appeal. The appellant is entitled to a declaration that the said by-law is *ultra vires* the respondent and the respondent, its officers and agents are restrained from in any way attempting to enforce its provisions. I agree with the order as to costs proposed by my brother Kerwin.

ESTEY, J.:—The City of Quebec, on October 23, 1933, enacted By-law 184, the material portion of which reads as follows:

It is, by the present by-law forbidden to distribute in the streets of the City of Quebec, any book, pamphlet, booklet, circular, tract whatever without having previously obtained for so doing the written permission of the Chief of Police.

The appellant submits that the by-law is legislation that interferes with "the free exercise and enjoyment of religious profession and worship," authority for the enactment of which the Province could not give to the City of Quebec as under the *B.N.A. Act* only the Parliament of Canada can competently enact such legislation.

Counsel for the City and the Province of Quebec submit that the by-law is but legislation on the part of the City in relation to its power over the public streets and in particular was enacted to avoid a nuisance and to protect the health of the citizens and the cleanliness of the City.

(1) [1948] S.C.R. 248.

That a by-law passed for such purposes would be competently authorized by ss. 335, 336 and 337 of the charter granted by the Province to the City of Quebec (19 Geo. V. S. of Q., Ch. 95) is not contested. It is, therefore, unnecessary to set forth these provisions further than to point out that it is expressly stated in s. 337 that the by-laws of the City of Quebec shall not be "inconsistent with the law of Canada or of this Province . . ."

In this regard it is important to observe that s. 2 of Ch. 307, R.S.Q. 1941, reads:

> 2. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, provided the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, are by the constitution and laws of this Province allowed to all His Majesty's subjects living within the same.

This s. 2 has been in the statute law of the Province of Quebec since at least 1888 (R.S.Q. 1888, Art. 3439). With some minor changes in expression this provision is found in a statute enacted in 1851 (S. of C. 14-15 Vict., Ch. 175) at a time when the problems arising out of clergy reserves were engaging the minds of the Members of Parliament.

Under s. 42 of the *Act of Union, 1840*, it was provided, inter alia, that a bill in relation to or affecting the enjoyment or exercise of any form or mode of religious worship should not come into force until assented to by Her Majesty. This was in force when the legislation of 1851 was enacted which, in accordance therewith, was transmitted to London and Her Majesty assented thereto on May 15, 1852.

It is also significant, and its importance was stressed throughout the hearing of this appeal, that in the Treaty of Paris, 1763, the following is included:

> 4. . . . His Britannick Majesty on his side, agrees to grant the liberty of the Catholick religion to the inhabitants of Canada: he will in consequence give the most precise and most effectual orders that his new Roman Catholick subjects may profess the worship of their religion according to the rites of the Romish Church, as far as the laws of Great Britain permit. . . . . .

While the treaty, in Art. 4, refers to Nova Scotia, or Acadia, and Canada as separate entities and is open to the construction that the foregoing applied only to Canada, this is clarified when the boundaries of the British and

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French territories on the Continent of America are fixed in Art. 7, which concludes with the words:

> The stipulations inserted in the IVth article, in favour of the inhabitants of Canada, shall also take place with regard to the inhabitants of the countries ceded by this article.

It, therefore, appears that the foregoing portion of Art. 4 was intended to apply to all of the British Dominions in North America.

This right granted by the Treaty of Paris has been preserved by *The Quebec Act of 1774*, *The Constitutional Act of 1791*, and *The Act of Union of 1840*. The existence of this right and the provisions of the Act of 1851 would be present to the minds of those who drafted and the Members of Parliament who enacted the *B.N.A. Act*. It must be assumed, therefore, that it was intended legislation in relation thereto would come within the provisions of the *B.N.A. Act* and be competently enacted either by the Parliament of Canada or the provincial legislature as therein provided. The circumstances under which the Treaty of Paris and the legislation of 1851 were prepared and adopted suggest the provisions of each of these here referred to were both intended to promote peace, order and good government in the country as a whole. This conclusion finds support from the fact that the foregoing quotation was placed in Art. 7 of the Treaty of Paris, which commences with the words "In order to re-establish peace on solid and durable foundations, ..." It is also emphasized both by the preamble of the Act of 1851 and in the operative part by the limitation imposed upon the free exercise and enjoyment of religious profession and worship. In the preamble it is set out that

> the recognition of legal equality among all Religious Denominations is an admitted principle of Colonial Legislation; And . . . . in the state and condition of this Province . . . . it is desirable that the same should receive the sanction of direct Legislative Authority, recognizing and declaring the same as a fundamental principle of our civil polity:

and then in the operative part a limitation is imposed to the effect that its exercise and enjoyment should not be "made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province."

It will also be observed that in the declaration of this right in the Act of 1851 no penalty is provided for infraction thereof. That would indicate that such was left to the field of criminal law where, in principle, it would seem to belong. The right of the free exercise and enjoyment of religious profession and worship, is a personal, sacred right for which, history records, men have striven and fought. Wherever attained they have resisted restrictions and limitations thereon in every possible manner. In one sense it may be styled a civil right, but it does not follow that it would be included within the phrase "Property and Civil Rights in the Province" within the meaning of s. 92(13) of the *B.N.A. Act*. On the contrary it would rather seem that such a right should be included among those upon which the Parliament of Canada might legislate for the preservation of peace, order and good government.

Moreover, having regard to the nature and character of the right which was, by the Treaty of Paris, given "to the inhabitants of the countries ceded" and the legislation of 1851 where it is in the preamble thereto stated "legal equality among all Religious Denominations is an admitted principle of Colonial Legislation" and such "a fundamental principle of our civil polity" that legislative sanction should be given thereto, it would appear that if the draftsmen and those enacting the *B.N.A. Act* had intended that legislation in relation to this right should be enacted by the province and effective in a part, rather than by the Parliament of Canada and, therefore, effective in the country as a whole, that express language to that effect would have been embodied in that enactment, more particularly as by that Act "one Dominion under the Crown . . . . . with a constitution similar in principle to that of the United Kingdom" was created.

Furthermore, if such had not been the intention of those preparing and enacting the *B.N.A. Act* it would seem most unlikely that under s. 93 thereof they would have given, in relation to education, the exclusive legislative authority to the provincial legislature and then have specifically reserved an appeal "to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic

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minority of the Queen's subjects in relation to education" and given power to the Parliament of Canada to enact legislation, in the absence of appropriate provincial legislation, requisite for the due "Execution of the Provisions" of s. 93 and necessary to give effect to its decision upon any appeal under that section.

It, therefore, appears that legislation in relation to this right comes within the description and classification referred to by Sir Montague E Smith in *Russell* v. *The Queen* (1), where his Lordship, when considering the competence of the Parliament of Canada to enact *The Canada Temperance Act, 1878,* stated:

> 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 to 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. It was said in the course of the judgment of this Board in the case of the *Citizens Insurance Company of Canada* v. *Parsons* (7 App. Cas. 96) that the two sections (91 and 92) must be read together, and the language of one interpreted, and, where necessary, modified by that of the other. 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. In the present case it appears to their Lordships, for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects "Property and Civil Rights" within the meaning of sub-sect. 13.

The provision of the enactment of 1851 (assented to in 1852), being legislation under s. 91 of the *B.N.A. Act,* by virtue of s. 129 thereof continued in force after Confederation and thereafter could be repealed, abolished or altered by the Parliament of Canada but not by a provincial legislature. It has never been repealed or altered by that Parliament and, therefore, remains in force. The enactment, therefore, of s. 2 of ch. 307 by the Province of Quebec, being legislation in relation to this right, could not be enacted under either heading (13) (Property and Civil

(1) (1882) 7 App. Cas. 829 at 839.

Rights in the Province) or (16) (Generally all Matters of a merely Local or Private Nature in the Province) of s. 92 of the *B.N.A. Act*.

The Act of 1851 being still in force, it is necessary to examine the by-law to determine whether, in its true nature and character, it is legislation in relation to the free exercise and enjoyment of religious profession and worship or to the exercise of power over the public streets.

The by-law contains neither preamble nor language that expressly sets forth with what intent and purpose it was passed. It is contended, as already stated, that it was passed to prevent the existence of a nuisance, to protect the health of the people and the cleanliness of the city. Distribution of pamphlets and other printed matter has taken place since time immemorial and it is significant that no instance was mentioned where the distribution of such ever constituted a nuisance or an interference with the health of the people or the cleanliness of the city. If, as it may be conceded, the distribution of pamphlets or other printed matter might be done in a manner to create a nuisance, impair the health and make the city unclean, such an unusual circumstance could be dealt with apart from any such by-law as here in question. Moreover, it is pertinent to observe that the by-law contains no direction to the Chief of Police that might guide or assist him in determining whether in a given instance the distribution might constitute a nuisance, undermine the health of the people or impair the cleanliness of the city. This would appear a significant omission, more particularly as the by-law was passed in 1933 at a time when Jehovah's Witnesses were being brought before the courts of the Province for various offences, and in the course of the hearing of this appeal it was stated and not contradicted that distribution under this by-law has been refused only to Jehovah's Witnesses. The fact that the appellant had made no application does not, therefore, affect the issues in this appeal. In these circumstances Mr. Justice Bertrand appears to accurately state the real intent and purpose or pith and substance of this by-law:

La tentative de la dite Cité de Québec de présenter son règlement comme une simple mesure de protection contre l'encombrement des rues et places publiques ne nous oblige pas d'être naïfs au point de croire à leurs protestations de bonne foi, car en étudiant mes notes, j'ai été obligé de

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prendre connaissance des différentes causes qui nous ont été soumises, ainsi qu'à la Cour Suprême du Canada. Sur le sujet, j'y ai constaté que les personnes en autorité dans plusieurs villes de cette province ont traité les témoins de Jéhovah comme des criminels. Les notes du savant Juge Rand, dans la cause de Boucher, entre autres, m'ont convaincu d'une véritable persécution religieuse.

It is, however, contended that the by-law does not interfere with any act of worship on the part of Jehovah's Witnesses. It is conceded that the appellant and other citizens may believe what appears to them to be consistent with their conception of truth and that they have the right "to worship God in their own way." In this connection it is important to observe that the statute of 1851 protects "the free exercise and enjoyment of religious profession and worship." This provision contemplates that subject to the proviso contained therein individuals may select their own form of religious profession and worship. It is hardly necessary to observe that the foregoing does not in any way prevent a provincial legislature enacting legislation within its own jurisdiction that may affect the right of religious profession and worship.

Moreover, the language of the foregoing provision ought not to receive a narrow or restricted construction. History plainly indicates that in England the Roman Catholics and other religious bodies and in France the Protestants were denied that which is declared in the foregoing section. Indeed, it was a religious controversy in this country, mainly in respect of clergy reserves and matters incident thereto, that led to the enactment of this provision in 1851.

In clear and unambiguous language the Legislature of that day ensured freedom of religious profession and worship and the Parliament of Canada has not seen fit to repeal, alter or amend this statutory provision. In these circumstances it is the duty of the courts to give effect thereto and, in particular, in the adjudication of particular cases, to see that it is not used to defeat the very end the statute was intended to maintain.

It may be pointed out that even if s. 2 of ch. 307, R.S.Q. 1941, was *intra vires*, this By-law 184 would be in conflict therewith and, therefore, could not be competently passed by the City of Quebec because it was not authorized by the terms of its charter.

The parties hereto expressly asked that the decision be reached quite apart from any issue that might be raised with respect to delegation of authority within the terms of By-law 184.

I am, therefore, of the opinion that the appeal should be allowed and a judgment directed declaring the by-law invalid and an injunction restraining the City from acting thereunder. I agree with my brother Kerwin as to the disposition of costs.

LOCKE J.:—The preamble to chapter 175 of the Statutes of the Province of Canada for the year 1851 reads as follows:—

> Whereas the recognition of legal equality amongst all Religious Denominations is an admitted principle of Colonial Legislation: And whereas in the state and condition of this Province, to which such a principle is peculiarly applicable, it is desirable that the same should receive the sanction of direct Legislative Authority recognizing and declaring the same as a fundamental principle of our civil polity: Be it therefore declared and enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of the United Kingdom of Great Britain and Ireland, and intituled, An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada, and it is hereby declared and enacted by the authority of the same, That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

The statute was reserved for the signification of Her Majesty's pleasure and the Royal assent given by Her Majesty in Council on May 15th, 1852.

This statute was in force when the *British North America Act of 1867* was passed by the Imperial Parliament. It could not, in my opinion, be repealed by the Province of Quebec or by the Legislature of any other province of Canada (*Dobie* v. *Temporalities Board* (1)). Whether it would be *intra vires* Parliament to repeal the Act, in view of the language of the preamble to the *British North America Act*, is a matter to be decided when that question arises. It does not arise in the present case. Parliament has passed no legislation purporting to repeal the *Act*.

(1) (1882) 7 App. Cas. 136.

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In the Revised Statutes of Quebec of 1888 there appeared as Article 3439 the following:—

> The free exercise and enjoyment of religious profession and worship without discrimination or preference so as the same be not made an excuse for acts of licentiousness or a justification of practices inconsistent with the peace and safety of the Province are by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

This provision is continued as section 2 of chapter 307 of the Revised Statutes of Quebec 1941. If this section was an attempt to confer substantive rights and not merely a recital of the rights declared by the Statute of 1852, the section dealt with matters which were beyond the powers of the Province unless, as is contended by the respondent in the present matter, under Head 13 of section 92 of the *British North America Act* the Province was empowered to legislate as to the free exercise and enjoyment of religious profession and worship within the Province.

The articles of the City charter under which the by-law attacked in the present proceedings was passed are 335 and 337 and read:—

> 335. The council may, at any of its meetings at which the absolute majority of its members are present, pass by-laws for the following purposes: For the good order, peace, security, comfort, improvement, cleanliness, internal economy and local government of the said city; for the prevention and suppression of all nuisances, and of all acts, matters and things in the said city, opposed, contrary or prejudicial to the order, peace, comfort, morals, health, improvement, cleanliness, internal economy or local government of the said city.
>
> And for the greater certainty, but not so as to restrict the scope of the foregoing provision or of any power otherwise conferred by this charter, it is hereby declared that the authority and jurisdiction of the city council extends and shall hereafter extend to all matters hereinafter mentioned, that is to say:
>
> 1. The raising of money by taxation;
>
> 2. The borrowing of money on the city credit;
>
> 3. Streets, lanes, and highways, and the right of passage above, across, along, or beneath the same;
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> 4. Sewers, drains and waterworks;
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> 5. Parks, squares and ferries;
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> 6. Licenses for trading and peddling;
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> 7. The public peace and safety;
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> 8. Health and sanitation;
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> 9. Vaccination and inoculation;
>
> 10. Public works and improvements;
>
> 11. Explosive substances;
>
> 12. Nuisances;

13. Markets and abattoirs;
14. Decency and good morals;
15. Masters and servants;
16. Water, light, heat, electricity and railways;
17. The granting of franchises and privileges to persons or companies;
18. The inspection of food.

337. In order to give full effect to articles 335 and 336, and to extend and complete the same, so as to secure full autonomy for the city and to avoid any interpretation of such articles or their paragraphs which might be considered as a restriction of its powers, the city is authorized to adopt, repeal or amend and carry out all necessary by-laws concerning the proper administration of its affairs, peace, order and safety, as well as all matters which may concern or affect public interest and the welfare of the citizens; provided always that such by-laws be not inconsistent with the laws of Canada or of this Province, nor contrary to any special provision of this charter.

The by-law attacked was enacted in the year 1933 by the Council of the City and reads:—

IT IS ORDAINED and ENACTED by the by-law of the Municipal Council of the City of Quebec and the said Council ORDAINS and ENACTS as follows, to wit:—

1. It is by the present by-law forbidden to distribute in the streets of the City of Quebec any book, pamphlet, booklet, circular, tract whatever without having previously obtained for so doing the written permission of the Chief of Police.

2. Any one contravening the present by-law shall be liable to a fine, with or without costs, and in default of immediate payment of said fine, with or without costs, as the case may be, to an imprisonment, the amount of the said fine and the term of imprisonment to be fixed by the Recorder's Court of the City of Quebec, at its discretion, but the said fine shall not exceed one hundred dollars and the imprisonment shall not exceed three months of the calendar, said imprisonment nevertheless shall cease at any time before the expiration of the term fixed by the said Recorder's Court, upon payment of the said fine or of the said fine and costs, as the case may be, and if said infraction is repeated, said repetition of offence shall constitute day by day, after summons or arrest, a separate offence.

While, on the face of it, the by-law may be said to be directed to the controlling of the condition of the streets of the City by preventing the accumulation of litter from circulars or pamphlets distributed in the streets being thrown away, or of traffic on the streets which might be impeded by the presence of persons distributing such writings, the course of the trial, the factums filed on behalf of the respondent and intervenant and the argument addressed to us make it quite clear that the purpose of the by-law and its real nature are something entirely different.

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The trial was held before Casgrain, J. Part of the evidence tendered on behalf of the present appellant was that of Mr. H. C. Covington, a minister of the religious organization known as Jehovah's Witnesses and Vice-President of the legal governing body of that organization. In describing the nature of the religious belief of Jehovah's Witnesses and of their activities, he said in part:—

> Jehovah's witnesses are an unincorporated body of missionary evangelists, their primary purpose being to preach the gospel of God's Kingdom throughout the whole world, as a witness, in execution of the commission recorded in Matthew 24:14, and this body is a missionary society preaching throughout the whole world, in every country, under the sun, save and except Russia.
>
> Jehovah's witnesses preach the gospel as missionary evangelists world-wide, including Quebec, by calling from door to door, doing missionary work, visiting the people and explaining to them about God's Kingdom as the only hope of mankind. That's the primary introduction to the people, and if they find people who are disinterested, they pass on to the next house. If they find persons interested, they stay and talk with them about the Bible and concerning God's Kingdom. And if the interested people desire to have them call back or re-visit, they do so. That is what we call re-visiting for back-calls, re-visiting for the purpose of answering questions and explaining Bible prophecy concerning God's Kingdom. And in addition to that method of preaching, Jehovah's witnesses hold Bible studies in the homes of the people where groups of from 2 to 15 or more people attend regularly each week. In these studies, the missionary evangelist presides as minister, and then he explains where these texts are to be found in the Bible. And that work is carried on throughout the whole world, including Canada and Quebec. Jehovah's witnesses, in preaching missionary evangelical work, employ primarily the facilities of the press. Printed literature is prepared by Jehovah's witnesses and left with the people for the purpose of leaving with them printed sermons concerning God's Kingdom as the only hope for mankind, and every one of Jehovah's witnesses employs this facility of the press in addition to the word as a method of preaching and teaching. In addition, Jehovah's witnesses also preach from the pulpit, from the platform, to public gatherings, just like the orthodox clergy.
>
> Jehovah's witnesses differ primarily between themselves and the orthodox clergy in that Jehovah's witnesses go to the people with their message and talk to them in their homes, instead of forcing the people to come to them to some meeting. Jehovah's witnesses do employ public meetings, but in addition to that, the great part of their missionary work is done by Jehovah's witnesses going to the home, and that is exactly the way Jesus Christ and the apostles did it. Jesus Christ and the apostles, according to the Bible, went from house to house and door to door, for instance, St. Paul and St. Luke, and in Matthew 28:20, and 1 Peter, 2nd Chapter, 21st verse, Peter says that all those followers of the Lord Jesus Christ, who was the first minister, should follow in his footsteps, in Christ's steps. The new text uses the word "house" in the gospel more than 120 times. And Jehovah's witnesses therefore employ this primitive method of preaching and teaching. It is not only a biblical way, but we have found from practice that that is the only way of getting this message to the people effectively.

Mr. Covington said further that they considered the distribution of literature in which they sought to convey their belief to others was a necessary and vital part of their activities and way of worship. The Bible he referred to as their text book and declared their belief in God and in his Son Jesus Christ as the Saviour and Redeemer of mankind. Speaking of other religious organizations, he said:—

We do not judge other people, we emphatically take the view that other religious organizations that have departed from the Christian principles are teaching errors that lead mankind into the battle of destruction at Armageddon, and for that reason we hold the truth of the Bible so that any honest person, whether Catholic, Protestant or Jew, or non-Catholic or non-Jew, will see the truth and get on the highway that leads to life and avoid destruction at Armageddon. We do not pass judgment on any man, we merely act as witnesses to people, preaching what is to be found in the Bible.

By way of defence, the respondent called a number of witnesses, including a Roman Catholic priest, a Rabbi, a Clergyman of the Church of England and a Professor of Philosophy, to give evidence on such diverse subjects as to what were the elements of a religion, as to whether preaching alone was a religious act, whether the belief of the Jehovah's witnesses, as disclosed in a number of periodicals and pamphlets which it was shown were circulated by them, was in fact a religion, whether the activities of the witnesses were in fact religious activities, what was "the meaning in philosophy" of religious freedom "as regards modern civilization", whether the distribution of religious tracts in the homes of the people was a violation of religious liberty and as to whether they thought it permissible to disobey the law if to obey it was contrary to their religious beliefs.

The claim of the appellant included the claim that he was being restrained in his right to the free exercise and enjoyment of religious profession and worship guaranteed to him by the Freedom of Worship Act of the Province. The respondent City had pleaded by paragraph 17 of its Defence that:—

Le demandeur n'est pas un ministre du culte et l'organisation dont il fait partie n'est pas une église ni une religion; au contraire, les actions illégales du demandeur, en accord avec celles d'autres membres du groupement appelé "Témoins de Jéhovah", lorsqu'ils distribuent des pamphlets ou tracts d'un caractère provocateur et injurieux, ne sont pas des gestes religieux mais des actes anti-sociaux qui ont été et sont de nature à troubler la paix publique et la tranquilité et la sécurité des paisibles citoyens particulièrement dans la cité de Québec, et risquent d'y provoquer des désordres.

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These witnesses were apparently called as experts. The question for the learned trial Judge to decide on this issue was whether the belief of Jehovah's Witnesses and their mode of worship fell within the meaning of the expression "religious profession and worship" in the preamble of the Statute of 1852. Covington had stated the nature of that belief and his evidence was not contradicted and its truth cannot be questioned. Counsel for the appellant objected to the admission of the evidence of these witnesses, but his objections were overruled. The matter was not one upon which expert evidence was admissible and none of this evidence should have been received.

I see no difficulty in interpreting the simple and clear language of the preamble of the Statute of 1852 nor of section 2 of the Provincial Statute of 1941 if, contrary to my opinion, the latter statute touches the matter. To claim that those who believe in God and in his Son Jesus Christ do not hold a religious belief and that to profess that belief and attempt to communicate it to others, in the manner which the Jehovah's Witnesses believe they are commanded to do by the Bible, is not exercising a religious profession and an act of worship is, in my opinion, untenable.

In the factum filed on behalf of the respondent, lengthy extracts are given from various publications of Jehovah's Witnesses, some of which appear to me to be expressed in intemperate language and are no doubt obnoxious to others who entertain other Christian beliefs as well as to people of the Jewish faith. The purpose of bringing these lengthy quotations to our attention is apparently in an endeavour to establish that the faith of Jehovah's Witnesses and their mode of worship are not entitled to the protection of the Statute of 1852 and the Quebec statute, and also to support the view that the effect of distributing this literature in a province where the people are predominantly of the Roman Catholic faith will be to provoke disorders.

The learned counsel for the respondent, at the commencement of his argument, said with commendable frankness that the by-law was directed against the contents of the documents. This was made abundantly clear by the proceedings at the trial and is, in my opinion, quite beyond dispute. If anything further were needed to demonstrate

that the purpose of the by-law is to impose a censorship, it is to be found in the evidence given on behalf of the respondent. Among the witnesses called by the City was a Mr. Ohman, described as an Evangelist of the Seventh Day Adventist Church, who had obtained a permit which allowed him to sell the religious literature of his faith from house to house. According to this witness, he had received a good reception when he applied for his permit. Saumur did not apply for a permit, being advised apparently that as the by-law was *ultra vires* it was wholly ineffective, but the whole attitude adopted on behalf of the City makes it plain that had he done so the permit would have been refused. Apparently, the Chief of Police of the City of Quebec did not object to the teachings of the Seventh Day Adventists while disapproving that of Jehovah's Witnesses.

On behalf of the intervenant it has been contended before us that, assuming the belief of the Jehovah's Witnesses is one entitled otherwise to the protection of the Statute of 1852 or the Provincial Statute, he may be deprived of that right by or under the authority of a statute of the Provincial Legislature. The argument is based on the contention that the rights so given to the people of Canada to complete freedom in these matters is a civil right of which they may be deprived by appropriate legislation by the Province. It is further contended, though rather faintly, that the legislation may be justified under Head 16 as being a matter of a merely local or private nature in the province.

In the factum of the intervenant the matter is thus expressed:—

> Under our constitution there is no religious freedom except within the limits determined by the competent legislative authority. No such authority is known other than the provincial authority; religious teaching as a matter of fact is part of the realm of education reserved to the provinces; besides, religious freedom is one of the civil rights also reserved to the provinces.

The reference to rights reserved to the provinces in respect of religious teaching refers, of course, to the provisions of section 93 of the *British North America Act*. If the argument is sound, then the holding of religious services by the adherents of any faith designated by the Legislature may be prohibited.

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This argument put forward, so far as I am aware, for the first time in any reported case in Canada since Confederation raises questions which are of profound importance to all of the people of this country. Not only the right of freedom of worship would be affected but the exercise of other fundamental rights, such as that of free speech on matters of public interest and to publicly disseminate news, subject only to the restraints imposed by the *Criminal Code* and to such civil liability as may attach to the publication of libelous matters, might be restrained or prohibited. The language of the by-law is perfectly general and if this contention of the intervenants be right the Chief of Police might forbid the distribution in the streets of circulars or pamphlets published by one political party while allowing such distribution by that party which he personally favoured. It is well, in my opinion, that it be made clear that this right is involved in the decision of this case. Once a right of censorship of the contents of religious publications is established, the dissemination of the political views of writers by circulars or pamphlets delivered on the streets may equally be prohibited or restrained.

The idea of imposing censorship upon the distribution of political and religious publications is not of course new. After the Restoration in England, the *Licensing Act of 1662* prohibited any private person to publish any book or pamphlet unless it were first licensed: law books by the Lord Chancellor, historical or political books by the Secretary of State and all other books by the Archbishop of Canterbury or the Bishop of London or by the Chancellor or Vice-Chancellor of one of the universities. Authors and writers of works considered obnoxious were liable to capital punishment or to be flogged or fined or imprisoned, according to the nature of the offence (Taswell-Langmead Constitutional History, 10th Ed. p. 739). At the Accession of James II in 1685, the *Licensing Act* was revived for several years and was thus in force at the Revolution and was once more revived in 1692 for one year, but a further attempt to revive it in 1695 was negatived by the Commons and thenceforth the censorship of the press ceased to be part of the law of England. The history of the restriction of religious liberty in England and upon the freedom of the

press is traced in Taswell-Langmead's work, commencing at p. 728. At p. 744 of this work the learned author, after referring to the changes brought about by the *Reform Act of 1832*, said that from that year the freedom of the press has been completely established and the utmost latitude of criticism and invective has been allowed it in discussing the actions of the Government and of all public men and measures.

The purpose of this by-law is to establish a censorship upon the distribution of written publications in the City of Quebec. It is not the distribution of all pamphlets, circulars or other publications in the streets which is prohibited but of those in respect of which the written permission of the Chief of Police has not been obtained.

In the preamble to the *British North America Act* the opening paragraph says:—

> Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a constitution similar in principle to that of the United Kingdom.

and, after reciting that such a union would conduce to the welfare of the provinces, it is said that it is expedient not only that the constitution of the legislative authority in the Dominion be provided for but also that the nature of the Executive Government therein be declared. At the time this *Act* was passed, the Act of 1852 declaring the right to freedom of religious belief and worship was in force in Canada and gave to the inhabitants of the provinces the same rights in that respect as were then enjoyed by the people of the United Kingdom.

It has, I think, always been accepted throughout Canada that, while the exercise of this right might be restrained under the provisions of the saving clause of the statute of 1852 by criminal legislation passed by Parliament under Head 27 of section 91, it was otherwise a constitutional right of all the inhabitants of this country. An examination of the reports of the arguments advanced by the parties to the litigation which ensued following the passing of the *Manitoba School Act of 1890* (*Barrett* v. *City of Winnipeg* (1) and *Brophy* v. *Attorney General of Manitoba* (2)),

(1) (1891) 7 M.R. 273; 19 Can. S.C.R. 374; [1892] A.C. 495.
(2) [1895] A.C. 202.

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makes it clear that it was common ground as between the litigants that the Province might not in any manner limit or restrict the right of the Roman Catholic minority to the free exercise and enjoyment of Religious Profession and Worship. Dubuc, J., later Chief Justice of the Court of King's Bench for Manitoba, who dissented from the judgment of the majority on the appeal from Killam, J. is the only one of the Judges who considered *Barrett's* case who made any reference to the matter. At p. 360 of 7 M.R., he said:—

> The State may hold that ignorance is an evil to be remedied by public instruction and may see that certain secular subjects, which are known to form the basis of a proper education, be taught in schools assisted by public money. But in a community composed of different elements, the State should not ignore the particular conditions, wants and just claims of an important class of citizens, especially when such important class are, in every respect, loyal and law-abiding subjects, and there is nothing in their wants and claims clashing with the rights of other classes, or contrary to, or conflicting with, the letter, the spirit or the true principles of the Constitution. *The liberty of conscience is one of the fundamental principles of our Constitution. What the Roman Catholics ask in claiming the right to maintain their denominational schools is only the carrying out, to the full extent, of that fundamental principle.* The desirability of having religious instruction combined with secular teaching in schools is, as stated by my brother Killam, considered as of the utmost importance by very many Protestants as well as by Roman Catholics.

The constitutional right to which Dubuc, J. referred was either that given by the Statute of 1852 or that which, in my opinion, is implicit in the language of the preamble of the *British North America Act*.

Whether the right to religious freedom and the right to free public discussion of matters of public interest and the right to disseminate news, subject to the restrictions to which I have above referred to, differ in their nature, it is unnecessary to decide. The former of these rights is, however, certainly not the lesser of them in Canada. Unless they differ, had the powers of censorship vested by the by-law in the Chief of Police of the City of Quebec been exercised by preventing the distribution of the written views of a political party (and they may be so used) rather than the religious views of Saumur, the opinion of Sir Lyman

Duff, C.J. in the Reference as to *The Accurate News and Information Act of the Province of Alberta* (1), would be directly to the contrary of the argument advanced on behalf of the intervenant.

It is true that in that case *The Accurate News and Information Act* was considered by all of the members of the Court who considered the various matters referred to them, as a bill which was a part of the general scheme of social credit legislation, the basis of which was the *Alberta Social Credit Act* and presupposed as a condition of its operation that the latter *Act* was validly enacted and that since it was *ultra vires* the ancillary and dependent legislation must fall with it. Nonetheless, Sir Lyman Duff expressed his considered view as to the right of a province to restrain public discussion upon affairs of public interest and Davis, J. agreed with him. The Act in question set up what was in effect a censorship of the newspapers of the province and would have imposed upon them the obligation of publishing a statement to be prepared by an official appointed by the Government "as to the true and exact objects of the policy of the Government." The learned Chief Justice, after referring to the manner whereby under the constitution established by the *British North America Act* legislative power for Canada is vested in one Parliament consisting of the Sovereign, the Senate and the House of Commons, said in part (p. 133):—

> It can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to vote. The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. . . .
>
> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James* v. *Commonwealth*, 1936 A.C. 578 at 627, 'freedom governed by law.'

(1) [1938] S.C.R. 100 at 132.

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We do not doubt that (in addition to the power of disallowance vested in the Governor General) the Parliament of Canada possesses authority to legislate for the protection of this right. That authority rests upon the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from The British North America Act as a whole (*Fort Frances Pulp & Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.* 1923, A.C. 695), and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.

But this by no means exhausts the matter. Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the legislatures of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of The British North America Act, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the province, or a matter private or local within the province. It would not be, to quote the words of the judgment of the Judicial Committee in *Great West Saddlery Co.* v. *The King,* 1921, 2 A.C. 91, at 122, 'legislation directed solely to the purposes specified in section 92'; and it would be invalid on the principles enunciated in that judgment and adopted in *Caron* v. *The King,* 1924, A. C. 999 at 1005-6.

The question, discussed in argument, of the validity of the legislation before us, considered as a wholly independent enactment having no relation to the Alberta Social Credit Act, presents no little difficulty. Some degree of regulation of newspapers everybody would concede to the provinces.

Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, 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. Such a limitation is necessary, in our opinion, 'in order,' to adapt the words quoted above from the judgment in *Bank of Toronto* v. *Lambe,* 1887, 12 A.C. 575, 'to afford scope' for the working of such parliamentary institutions. In this region of constitutional practice, it is not permitted to a provincial legislature to do indirectly what cannot be done directly (*Great West Saddlery Co.* v. *The King,* 1921, 2 A. C. 91 at 100).

After quoting section 129 of the *British North America Act* which, inter alia, continued all laws in force in Canada, Nova Scotia and New Brunswick at the Union, until repealed, abolished, or altered by the Parliament of Canada or the Legislature of the respective Province,

according to the authority of the Parliament or of that Legislature under this Act, he continued:—

> The law by which the right of public discussion is protected existed at the time of the enactment of The British North America Act and, as far as Alberta is concerned, at the date on which the Alberta Act came into force, the 1st of September, 1905. In our opinion (on the broad principle of the cases mentioned which has been recognized as limiting the scope of general words defining the legislative authority of the Dominion) the Legislature of Alberta has not the capacity under section 129 to alter that law by legislation obnoxious to the principle stated.

With this opinion in its entirety I respectfully agree and I have heard no reasoned argument against any of its conclusions. It may be said, with at least equal and I think greater force, that the right to the free exercise and enjoyment of religious profession and worship without discrimination or preference, subject to the limitations expressed in the concluding words of the first paragraph of the Statute of 1852, existed at the time of the enactment of the *British North America Act* and was not a civil right of the nature referred to under Head 13 of section 92 of the *British North America Act.*

Cannon, J. considered the question of the validity of the bill independently of the fact that it was part of the general scheme of social credit legislation and must accordingly be held *ultra vires,* since the *Alberta Social Credit Act* was itself beyond the powers of the Legislature. He expressed the view that *The Accurate News and Information Act* was an attempt by the Legislature to amend the *Criminal Code* and deny the advantage of section 133(*a*) to the Alberta newspapers' publishers, and so *ultra vires.* He was further of the opinion that the powers of the Province to deal with the property and civil rights of its citizens did not enable it to interfere with their fundamental rights to express freely their untrammelled opinion about Government policies and discuss matters of public concern. Crocket, Kerwin and Hudson, JJ., considering that the bill must of necessity be held *ultra vires,* since the *Alberta Social Credit Act* was found to be beyond the powers of the Legislature, did not express any opinion on the matters which I have referred to above. If there has been expressed any judicial opinion on this subject, however, contrary to that expressed by Sir Lyman Duff and by Davis and Cannon, JJ., we have not been referred to it.

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The right of which Dubuc, J. spoke in *Barrett's* case in the passage above referred to was a right of the subjects of Her Majesty under the constitution of the United Kingdom referred to in the preamble of the *British North America Act* when that statute was passed in 1867. The effect of the Statute of 1852 and that of 1867 was to continue that right in the people of Canada as a constitutional right and one which, in my opinion, did not fall within the category of civil rights under Head 13 of section 92. I have had the advantage of reading the opinion of my brother Kellock and I agree with his reasons and with his conclusion on this aspect of the matter.

The distinction between this and the by-law considered in *In Re Cribbin and the City of Toronto* (1), and in *Toronto Corporation* v. *Roman Catholic Separate Schools Trustees* (2) is, in my opinion, quite clear. In *Cribbin's* case the City of Toronto had passed a by-law providing that no person should on the Sabbath Day in any public park, square, garden, etc. in the City publicly preach, lecture or declaim. One of the objections to the by-law was apparently that it violated what is referred to in the judgment of Galt, C.J. as the constitutional right of all persons to hold meetings and make speeches in public parks. The argument on behalf of Cribbin does not indicate that it was objected that the by-law infringed any religious right of the applicant and the matter was not considered on that basis. What completely distinguishes the case, however, is that it applied to all persons of every religious denomination or belief. Had it applied to those of one religious denomination only while not to others and had the point been argued and decided, the case would have some application to the present matter.

In *City of Toronto Corporation* v. *The Trustees of the Roman Catholic Separate Schools* (2), a by-law passed by the City under section 399a of the *Municipal Act* prohibited the erection of buildings in a certain district, except for use as private residences. The by-law was attacked by the trustees who desired to erect a separate school in the

(1) (1891) 21 O.R. 325. (2) [1926] A.C. 81.

area. Dealing with an argument based upon section 93 of the *British North America Act*, Viscount Cave, L.C. said (p. 88):—

> In their Lordships' opinion this provision has no application to the present case. It is a restriction upon the power of the Province to make laws in relation to education, but does not prevent the provisions of the Municipal Act with reference to building, and other matters relating to the health and convenience of the population, from applying to denominational schools as well as to other buildings.

Had the by-law prohibited the erection of a Roman Catholic school in the area while permitting those of other religious denominations, the case would directly touch the present matter.

The appellant further contends that the by-law is *ultra vires* the City and to authorize it *ultra vires* the Province of Quebec, since it trenches upon the jurisdiction of Parliament under Head 27 of section 91. The answer of the intervenant and of the City to this contention is that in pith and substance the by-law does not deal with crime but is directed to the prevention of crime. On the strength of decisions such as *Hodge* v. *The Queen* (1) and *Bedard* v. *Dawson* (2), they contend the by-law to be *intra vires*.

An examination of the history of the legislation dealing with offences against religion in Taswell-Langmead's Constitutional History and Hallam's History of England shows that the statutes dealing with what were declared to be offences against religion were all penal in their nature. In the *Criminal Code*, under the heading "Offences against Religion", sections 198 to 201 deal with the offence of blasphemous libel and acts interfering with the free exercise of religious worship by the people of Canada. Section 198 provides that whether any particular published matter is a blasphemous libel or not is a question of fact and does not define the offence. It does, however, declare that no one is guilty of a blasphemous libel for expressing in good faith and in decent language, or attempting to establish by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject.

The *Criminal Code* also deals with libels in terms that go far to express in statutory form the rights of the Canadian people to freedom of speech in regard to matters of public

(1) (1883) 9 App. Cas. 117. (2) [1923] S.C.R. 681.

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interest. After defining a defamatory libel by section 317, sections 322, 323 and 324 provide that it is not an offence to publish in good faith, for the information of the public, a fair report of the proceedings of the Senate and House of Commons, or any committee thereof, or of the public proceedings before any court exercising judicial authority, or any fair comment upon any such proceedings: that no one commits an offence by publishing in good faith, in a newspaper, a fair report of the proceedings of any public meeting if such meeting is lawfully convened for a lawful purpose and is open to the public, and if such report is fair and accurate, and if the publication of the matter complained of is for the public benefit and if the defendant does not refuse to insert in a conspicuous place in the newspaper in which the report appeared a reasonable letter or document of explanation or contradiction by or on behalf of the prosecutor: and that no one commits an offence by publishing any defamatory matter which he, on reasonable grounds, believes to be true, and which is relevant to any subject of public interest, the public discussion of which is for the public benefit.

I am quite unable to accept the contention of the intervenant that the real purpose of this by-law is to prevent public disorders, or that it is other than to provide a means to prevent the dissemination of religious views which are not approved by the authorities. The publication of religious writings which offend people entertaining different religious beliefs to those of the publisher is not confined to any particular religious denomination or to those which adhere to any particular religious belief. It is also a matter of common knowledge that political writings expressed in pamphlets, circulars and newspapers have many times in the past, and no doubt will many times in the future, cause anger and resentment on the part of those entertaining different political views. If it be accepted for the purpose of argument that the distribution of such literature might induce some persons to commit acts of violence, it is for Parliament to decide whether this should be declared an offence in the *Criminal Code*. Parliament has not seen fit to pass such legislation and the Province is without any jurisdiction to do so. The appellant in the present matter has exercised what, in my opinion, is his constitutional

right to the practice of his religious profession and mode of worship, and if doing so provokes other people to commit crimes of violence he commits no offence (*Beatty* v. *Gilbanks* (1)).

In *Hodge* v. *The Queen,* the Judicial Committee held that the Liquor License Act of 1877 of Ontario, which prescribed regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, did not in respect of those sections interfere with the general regulation of trade and commerce, but came within the jurisdiction of the Province to legislate in regard to municipal institutions in the Province under Head 8, the imposition of punishment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in section 92 under Head 15, and generally all matters of a merely local or private nature under Head 16. In *Bedard* v. *Dawson,* a Quebec statute which authorized the Judge to order the closing of a disorderly house was held *intra vires,* as it dealt with a matter of property and civil rights by providing for the suppression of a nuisance and not with criminal law by aiming at the punishment of a crime. I think these cases have no application to the present matter, where the true purpose of the by-law is not to regulate traffic in the streets but to impose a censorship on the written expression of religious views and their dissemination, a constitutional right of all of the people of Canada, and to create a new criminal offence.

I would allow the appeal and direct that judgment be entered declaring the by-law invalid and enjoin the respondent city from acting upon it. I agree with the order as to costs proposed by my brother Kerwin.

The dissenting judgment of Cartwright and Fauteux, JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Queen's Bench, Appeal Side (2), affirming the judgment of Casgrain J. whereby the action of the appellant, asking that by-law 184 of the City of Quebec, passed on the 27th October, 1933, be declared to be—both on its face and insofar as the plaintiff is concerned—*ultra vires,*

(1) (1882) 9 Q.B.D. 308 at 314. (2) Q.R. [1952] Q.B. 475.

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unconstitutional, illegal, null and void and be quashed and that the Statutes of the Province of Quebec insofar as they purport to authorize the enactment of such by-law be similarly declared *ultra vires,* was dismissed.

At the outset it is to be observed that the question submitted to us for decision has been narrowed in the following respect. Counsel for the appellant, at an early stage of the hearing before us, expressly abandoned the argument that the by-law in question is invalid because of unlawful delegation of discretion to the Chief of Police and stated that it was his position that if it is within the powers of the Legislature of the Province of Quebec to authorize the City of Quebec to pass the by-law it has done so. The question was thereupon raised from the bench whether the Court should permit counsel to take this position, since to do so might well bring about the result that the Court would be giving its opinion on a constitutional issue of importance which did not require decision in this particular proceeding. However, it was the view of the majority of the Court that counsel for the appellant was entitled to limit his attack on the judgment of the Court of Queen's Bench to such grounds as he chose to put forward and this view was made clear to all counsel. Consequently counsel for the appellant did not discuss the questions whether there was an unauthorized delegation to the Chief of Police and whether the enabling statutes conferred the power upon the City to enact the by-law and counsel for the respondent and for the intervenant were not called upon to deal with these aspects of the matter and said nothing about them. In answer to a question from the bench put to counsel for the appellant during his reply he stated explicitly that he invited the Court to deal with the matter as if the relevant legislation of the Province of Quebec had expressly conferred upon the City power to pass the by-law in the very words in which it has been passed.

Under these circumstances the question we are called upon to decide is simply whether it is within the powers of the Provincial Legislature to authorize the City to pass the by-law, which, so far as relevant, reads as follows:—

1. It is, by the present by-law forbidden to distribute in the streets of the City of Quebec, any book, pamphlet, booklet, circular, tract whatever without having previously obtained for so doing the written permission of the Chief of Police.

Section 2 of the by-law prescribes penalties for its breach.

It is first necessary to determine the proper construction of the by-law. In doing so we must give to the words used their plain meaning in everyday language and when this is done I think it clear that what is prohibited is the distribution, without the permission of the Chief of Police, of printed matter of the kind described in the by-law in the streets of the City. The distribution of such matter anywhere else, as for example in private houses is not affected by the by-law. There is evidence in the record to indicate that the officials charged with the enforcement of the by-law have not so construed it and have instituted proceedings against persons, as for an infraction of the by-law, on the ground that such persons had distributed written matter at private residences in the City. Such evidence does not seem to me to be relevant to the proper construction of the by-law. It is only if the words of the by-law are ambiguous that we may resort to extraneous aids in its interpretation and the words used appear to me to be clear and unambiguous. The fact, if be the fact, that the by-law has been misinterpreted, can affect neither its proper construction nor the question of its validity.

In my view, legislation authorizing the city to pass this by-law is *prima facie,* in relation to either or both of two subjects within the provincial power which may be conveniently described as (i) the use of highways, and (ii) police regulations and the suppression of conditions likely to cause disorder. I propose to deal with these in the order mentioned.

The judgments of this Court in *O'Brien* v. *Allen* (1) and in *Provincial Secretary of Prince Edward Island* v. *Egan* (2), establish that the use of highways in the province is a subject matter within the provincial power. The following passages may be referred to. In *O'Brien* v. *Allen* (*supra*) at page 342, Sedgewick J., delivering the unanimous judgment of the Court said:—

> . . . It has never been doubted that the right of building highways, and of operating them, whether under the direct authority of the Government or by means of individuals, companies or municipalities, is wholly within the purview of the provincial legislatures, and it follows that whether they be free public highways or subject to a toll authorized by legislative enactment, they are none the less within the provincial power.

(1) (1900) 30 Can. S.C.R. 340. (2) [1941] S.C.R. 396.

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In *Provincial Secretary of Prince Edward Island* v. *Egan* (*supra*) at page 417, the present Chief Justice of Canada, then Rinfret J., delivering the judgment of himself, Crocket and Kerwin, JJ. referred to the last quoted passage with approval and continued:—

> The aspect of that field is wholly provincial, from the point of view both of the use of the highway and of the use of the vehicles. It has to do with the civil regulation of the use of highways and personal property, the protection of the persons and property of the citizens, the prevention of nuisances and the suppression of conditions calculated to make circulation and traffic dangerous.

In a separate judgment, at page 403, Sir Lyman Duff C.J.C. expressed his concurrence with Rinfret J.

At page 417, Hudson J. said:—

> The Province undoubtedly has the right to regulate highway traffic and, for that purpose, to license persons to use highways. The right to license also involves a right to control and, when necessary, to revoke the licence.

It is said, however, that it is beyond the power of the Province to deny the ordinary use of the highways to any member of the public. Certain passages in the judgment of Rand J. in *Winner* v. *S.M.T. (Eastern) Ltd.* (1), particularly at pages 918 to 920, would require careful consideration if the by-law purported to deny to any persons or classes of persons the right to use the highways for the purpose of passing and repassing, but the by-law in no way interferes with this right. Its operation is limited to prohibiting the distribution of printed matter in the streets, without a licence. In my opinion, the common law is correctly stated in Pratt and Mackenzie's Law of Highways (19th Edition) at pages 1 and 2:—

> The right of the public in a highway is an easement of passage only—a right of passing and repassing. In the language of pleading, a party can only justify *passing along,* and not *being in,* a highway.

In 1 Roll. Abr. 392 tit. "Chimin", cited in Halsbury (2nd Edition) Vol. 16 page 238, it is said:—

> In a highway the King hath but the passage for himself and his people.

In *Ex Parte Lewis* (2), Wills J. said:—

> The only 'dedication' in the legal sense that we are aware of is that of a public right of passage, of which the legal description is a 'right for all her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance.

(1) [1951] S.C.R. 887.

(2) (1888) 21 Q.B.D. 191 at 197.

I agree with the submission of counsel for the intervenant that a member of the public has no legal right in or on a highway beyond such right to pass and repass and that the use of the highway for other purposes is a mater not of right but of tolerance. In *Ex Parte Lewis* (*supra*) at page 197, Wills J. says:—

> Things are done every day, in every part of the kingdom, without let or hindrance, which there is not and cannot be a legal right to do, and not unfrequently are submitted to with a good grace because they are in their nature incapable, by whatever amount of user, of growing into a right.

It appears to me to follow from the judgments in *O'Brien* v. *Allen* (*supra*) and *Provincial Secretary of Prince Edward Island* v. *Egan* (*supra*) that the legislative authority to permit, forbid or regulate the use of the highways for purposes other than that of passing and repassing belongs to the Province.

Dealing next with the subject of police regulations and the suppression of conditions likely to cause disorder, it appears that this Court has decided that the Province has power to legislate in relation to such manners.

In *Bedard* v. *Dawson* (1), Idington J. said:—

> As to the argument addressed to us that the local legislatures cannot legislate to prevent crime, I cannot assent thereto for in a very wide sense it is the duty of the legislature to do the utmost it can within its power to anticipate and remove, so far as practicable, whatever is likely to tend to produce crime;

and on the same page he continued:—

> There are many instances of other nuisances which can be better rectified by local legislation within the power of the legislatures over property and civil rights than by designating them crimes and leaving them to be dealt with by Parliament as such.

At the same page Duff J., as he then was, said:—

> The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate.

In *Reference re the Children's Protection Act of Ontario* (2), Sir Lyman Duff C.J., delivering the unanimous opinion of the Court said at page 403:—

> Moreover, while, as subject matter of legislation, the criminal law is entrusted to the Dominion Parliament, responsibility for the administration of justice and, broadly speaking, for the policing of the country, the

(1) [1923] S.C.R. 681 at 684. (2) [1938] S.C.R. 398.

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execution of the criminal law, the suppression of crime and disorder, has from the beginning of Confederation been recognized as the responsibility of the provinces and has been discharged at great cost to the people; so also, the provinces, sometimes acting directly, sometimes through the municipalities, have assumed responsibility for controlling social conditions having a tendency to encourage vice and crime.

Reference may also be made to the decision of the Judicial Committee in *Lymburn* v. *Mayland* (1).

It follows from these authorities that it is within the competence of the Legislature of the Province to prohibit or regulate the distribution, in the streets of the municipalities in the Province, of written matter having a tendency to insult or annoy the recipients thereof with the possible result of giving rise to disorder, and perhaps violence, in the streets.

It is said, however, if I have correctly apprehended the argument for the appellant, that even if the legislation in question appears *prima facie* to fall within the powers of the Provincial Legislature under the two heads with which I have dealt above it is in reality an enactment destructive of the freedom of the press and the freedom of religion both of which are submitted to be matters as to which the Province has no power to legislate. In support of such submission counsel referred to a large number of cases decided in the Courts of the United States of America but I am unable to derive any assistance from them as they appear to be founded on provisions in the Constitution limiting the power to make laws in relation to such matters. Under the *British North America Act,* on the other hand, the whole range of legislative power is committed either to Parliament or the Provincial Legislatures and competence to deal with any subject matter must exist in one or other of such bodies. 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.

(1) [1932] A.C. 318.

It will be convenient to first examine the appellant's argument in so far as it deals with the freedom of the press. In Blackstone's Commentaries (1769) Vol. 4, at pages 151 and 152 it is said:—

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free-man has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.

Accepting this as an accurate description of what is commonly understood by the expression "the liberty of the press", as heretofore enjoyed by the inhabitants of Canada, it is clear that By-law No. 184 does infringe such liberty to a limited extent. It does, to adapt the words of Blackstone, lay some previous restraint upon publication. So far as the by-law is concerned every individual is left free to print and publish any matter he pleases except that one particular method of publication is conditionally denied to him. He is forbidden to publish such matter by distributing it in the streets of the City of Quebec without having previously obtained for so doing the written permission of the Chief of Police. I will assume, as is argued for the appellant, that the by-law contemplates that the Chief of Police will examine the written matter in respect of which he is asked to grant a permit and that his decision, whether to grant or refuse it, will be based on the view which he takes of the contents of such matter; that if he regards it as harmless, he will grant the permit, and that if he thinks it is calculated to provoke disorder by annoying or insulting those to whom it is distributed he will refuse the permit. It is urged that power to restrict the liberty of the press even to the limited extent provided in the by-law, is committed exclusively to Parliament under the opening words of section 91 or under head 27 of that section and further that Parliament has fully occupied the field by enacting those

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provisions of the Criminal Code which deal with blasphemous libel, seditious libel, speaking seditious words, spreading false news, defamatory libel, and publishing obscene matter. If I have followed the argument correctly, it is that as Parliament has enacted that certain publications are to be deemed criminal it has by implication declared that all other publications are lawful and that consequently the Legislature has no power to deal with any other type of publication. I am unable to accept this conclusion.

In my view, freedom of the press is not a separate subject matter committed exclusively to either Parliament or the Legislatures. In some respects, Parliament, and in others, the Legislatures may validly deal with it. In some aspects it falls within the field of criminal law, but in others it has been dealt with by Provincial legislation, the validity of which is not open to question, as for example "The Libel and Slander Act" R.S.O. 1950 Cap. 204, and the similar acts in the other provinces. If the subject matter of a Provincial enactment falls within the class of subjects enumerated in section 92 of the *British North America Act* such enactment does not, in my opinion, cease to be *intra vires* of the legislature by reason of the fact that it has the effect of cutting down the freedom of the press. The question of legislative competence is to be determined not by inquiring whether the enactment lays a previous restraint upon publication or attaches consequences after publication has occurred but rather by inquiring whether in substance the subject matter dealt with falls within the Provincial power. I have already indicated my view that the Province has power under the two headings which I have discussed above to authorize the passing of the by-law in question.

It is next necessary to consider the argument that the by-law is invalid because, as it is alleged, it interferes with freedom of religion. While it was questioned before us, I will, for the purposes of this argument, assume that the system of faith and worship professed by the body to which the plaintiff belongs is a religion, and that the distribution of printed matter in the streets is a practice directed by its teachings.

It may well be that Parliament alone has power to make laws in relation to the subject of religion as such, that that subject is, in its nature, one which concerns Canada as a whole and so cannot be regarded as of a merely local or private nature in any province or as a civil right in any province; but we are not called upon to decide that question in this appeal and I express no opinion upon it. I think it clear that the provinces, legislating within their allotted sphere, may affect the carrying on of activities connected with the practice of religion. For example, there are many municipal by-laws in force in cities in Ontario, passed pursuant to powers conferred by the Provincial Legislature, which provide that no buildings other than private residences shall be erected on certain streets. Such by-laws are, in my opinion, clearly valid although they prevent any religious body from building a church or similar edifice on such streets. Another example of Provincial Legislation which might be said to interfere directly with the free exercise of religious profession is that under which the by-law considered in *Re Cribbin* v. *The City of Toronto* (1) was passed. That was a by-law of the City of Toronto which provided in part:—

> No person shall on the Sabbath-day, in any public park, square, garden, or place for exhibition in the city of Toronto, publicly preach lecture or declaim.

The by-law was attacked on the ground, *inter alia,* that it was unconstitutional but it was upheld by Galt C.J. and in my opinion, his decision was right. No useful purpose would be served by endeavouring to define the limits of the provincial power to pass legislation affecting the carrying on of activities connected with the practice of religion. The better course is, I think, to deal only with the particular legislation now before us.

For the appellant, reliance was placed upon the Statute of Canada (1851) 14-15 Victoria, Chapter 175, re-enacted in substantially identical terms as R.S.Q. 1941 Cap. 307. I will assume, for the purposes of the argument, that counsel for the appellant is right in his submission that it is to the pre-Confederation Statute that we should look. In the relevant portion of that statute it is enacted:—

> That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not

(1) (1891) 21 O.R. 325.

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made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

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I do not think that, on a proper construction, this statute absolves a religious body or an individual member thereof from obedience to any Act of Parliament or of the Legislature which happens to conflict with the teachings of such body. To give an example, if I am right in my view that *Re Cribbin* v. *City of Toronto* (*supra*) was rightly decided I do not think that an individual could have successfully argued that the by-law, although otherwise valid, did not apply to him because it was one of his beliefs and a teaching of the body to which he belonged that he must preach not only in churches, chapels or meeting houses or on private property but also in parks and public places.

It is argued, on the authority of *Dobie* v. *Temporalities Board* (1), that the Legislature could not repeal this pre-Confederation Statute. I will assume that this is so but I think it clear from the opinions delivered in this Court in *Reference In Re Bowaters Pulp and Paper Mills Ltd.* (2), in which *Dobie* v. *Temporalities Board* was fully considered, that although the Province could not repeal the Act *in toto* it can modify its effects by any subsequent legislation provided such legislation is within the field assigned to the Province. *Leges posteriores priores contrarias abrogant.* I therefore do not think that the by-law is rendered invalid by reason of its alleged interference with the right of the appellant to practise the religion of his choice.

To summarize, I am of opinion that it was within the competence of the Legislature to authorize the passing of the by-law in question under its power to legislate in relation to (i) the use of highways, and (ii) police regulations and the suppression of conditions likely to cause disorder; and that such legislation is not rendered invalid because it interferes to the limited extents indicated above with either the freedom of the press or the freedom of religion. It follows that I would dismiss the appeal.

(1) (1881) 7 App. Cas. 136. (2) [1950] S.C.R. 608.

Before parting with the matter, I wish, at the risk of repetition, to emphasize that, because of the position taken by counsel at the argument, I am deciding only that it was within the power of the Legislature of the Province of Quebec to authorize the City to pass the by-law in question. I have not considered whether the relevant legislation did actually authorize its passing as that question was withdrawn from our consideration and counsel for the respondent and intervenant were not called upon to deal with it. I wish also to make it plain that I do not intend, by implication or otherwise, to express any opinion as to whether or not it would have been within the powers of the Legislature to authorize the passing of a similar by-law which was not, as I have held the one before us to be, limited in its operation to what may be done in the streets.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the Appellant: *Sam S. Bard and W. G. How.*

Solicitors for the Respondent: *Pelletier, Godbout & Leclerc.*

Solicitor for the Intervenant: *Noël Dorion.*