JOHN SWITZMAN (*Defendant*) .....APPELLANT;

AND

FREDA ELBLING (*Plaintiff*) .....RESPONDENT;

AND

ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC (*Intervenant*) ..... } RESPONDENT.

1956
*Nov. 7, 8, 9
1957
Mar. 8

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

Constitutional law—Criminal law—Property and civil rights—Matters of local or private nature in Province—Act Respecting Communistic Propaganda, R.S.Q. 1941, c. 52.

The *Act Respecting Communistic Propaganda* of the Province of Quebec, R.S.Q. 1941, c. 52, is *ultra vires* of the Provincial Legislature. *Fineberg v. Taub* (1939), 77 Que. S.C. 233, overruled.

Per Kerwin C.J. and Locke, Cartwright, Fauteux and Nolan JJ.: The statute is legislation in respect of criminal law which, under head 27 of s. 91 of the *British North America Act,* is within the exclusive competence of the Parliament of Canada. *Bédard v. Dawson et al.,* [1923] S.C.R. 681, distinguished.

Per Rand, Kellock and Abbott JJ.: The subject-matter of the statute is not within any of the powers specifically assigned to the Provinces by s. 92 of the *British North America Act* and it constitutes an unjustifiable interference with freedom of speech and expression essential under the democratic form of government established in Canada.

Per Taschereau J., *dissenting*: The legislation is not in respect of criminal law but deals with property in the Province, under head 13 of s. 92 of the *British North America Act.* It is calculated to suppress conditions favouring the development of crime and to control properties in order to protect society against illegal uses that may be made of them. *Bédard v. Dawson et al., supra,* applied.

Courts—Supreme Court of Canada—Jurisdiction—Whether lis remains between parties—Intervention of Attorney-General.

The plaintiff sued for cancellation of a lease on the ground that the defendant, the lessee, had committed a breach of a provincial statute. The defendant, in his plea, contested the validity of the statute and gave notice of this contestation to the Attorney-General under art. 114 of the Quebec *Code of Civil Procedure.* The Superior Court gave judgment for the plaintiff on the claim for cancellation but dismissed a further claim made by her for damages; it also maintained the intervention and declared the statute valid and effective. This judgment was affirmed by a majority of the Court of Queen's Bench, Appeal Side. The defendant then appealed, by leave of the

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

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

provincial Court, to the Supreme Court. The plaintiff took no part in the appeal, stating by her counsel that she would rely on the argument to be adduced on behalf of the intervenant.

Held (Taschereau J. *dissenting*): The Court had jurisdiction to hear the appeal and should dispose of it. The appellant's claim in the intervention should be considered on the merits and, since the result of that claim affected the plaintiff's claim in the original action, it also should be decided. *Coté v. The James Richardson Company* (1906), 38 S.C.R. 41; *Bédard v. Dawson et al., supra,* applied.

Per Taschereau J., *dissenting*: Since the lease from the plaintiff to the defendant had expired long before the appeal was brought to this Court, and the claim for damages had been dismissed, the only issue that remained between the original parties was as to costs. The intervenant claimed nothing except a declaration that the statute was *intra vires* of the Province and this was not a reference in which the Court was called upon to express its opinion as to the validity of the statute in an abstract way but an ordinary action where the statute was challenged only in relation to the main action. The intervention was not an "aggressive" one as in *Coté v. Richardson, supra.*

APPEAL from a judgment of the Court of Queen's Bench for Quebec (1), affirming (Barclay J. dissenting) the judgment of Collins J. at trial. Appeal allowed.

Abraham Feiner, F. R. Scott and *J. Perrault,* for the defendant, appellant.

L. Emery Beaulieu, Q.C., and *Lucien Tremblay, Q.C.,* for the intervenant, respondent.

THE CHIEF JUSTICE:—This appeal was brought by John Switzman pursuant to leave granted by the Court of Queen's Bench (Appeal Side) for the Province of Quebec from its judgment (1) confirming that of the Superior Court cancelling and annulling a certain lease between the plaintiff, Freda Elbling, and the defendant Switzman and maintaining the intervention of the Attorney-General of the Province of Quebec and declaring "An Act to Protect the Province against Communistic Propaganda", R.S.Q. 1941, c. 52, to be *intra vires* of the Legislature of the Province of Quebec. It is quite true that if no *lis* exists between parties this Court will decline to hear an appeal, even though leave has been granted by a provincial Court of Appeal: *Coca-Cola Company of Canada Limited v. Mathews* (2), where the earlier cases are collected. While, in the present case, it is suggested that the time has elapsed when the appellant had any interest in the lease to him from Freda Elbling,

(1) [1954] Que. Q.B. 421. (2) [1944] S.C.R. 385, [1945] 1 D.L.R. 1

and therefore as between those two parties it is argued that there was nothing left in dispute except the questions of costs, the intervention of the Attorney-General of the Province of Quebec, pursuant to art. 114 of the Quebec *Code of Civil Procedure,* raises an issue between him and the present appellant as to the constitutionality of the statute mentioned.

The plaintiff Freda Elbling presented no factum and took no part in the appeal, a letter being filed in this Court from her counsel to the attorneys for the appellant stating that he would rely upon the argument to be adduced on behalf of the intervenant. Mr. Beaulieu did not argue that we had no jurisdiction, or that we should not deal with the constitutionality of at least part of the statute, but both points were considered by the members of this Court and all except Mr. Justice Taschereau are of opinion that the appeal is competent and should be disposed of. No question as to the amount or value in controversy arises since the appeal is brought by leave and it cannot be said that there is no issue between the appellant and the Attorney-General of the Province of Quebec. The decision in *Coté v. The James Richardson Company* (1) is important as there it was decided that the demand as between the intervenant and the opposite party is that contained in the intervention. Here the appellant's claim in the intervention should be considered on the merits and, as the result therein affects the claim of the plaintiff in the original action, it also, under the circumstances, should be decided.

I am unable to agree with Mr. Beaulieu's contention that there is in issue the constitutional validity of only part of the statute. The order signed by the Attorney-General of the Province of Quebec, dated January 27, 1949, recites the provisions of both ss. 3 and 12 of that Act and in his intervention the Attorney-General asked the Court to declare the said Act in its entirety constitutional and valid and in full force and effect.

Section 1 provides:

This Act may be cited as *Act Respecting Communistic Propaganda.*

(1) (1906), 38 S.C.R. 41.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Kerwin C.J.

Sections 3 and 12 read:

3. It shall be illegal for any person, who possesses or occupies a house within the Province, to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatsoever.

12. It shall be unlawful to print, to publish in any manner whatsoever or to distribute in the Province any newspaper, periodical, pamphlet, circular, document or writing whatsoever propagating or tending to propagate communism or bolshevism.

Sections 4 to 11 provide that the Attorney-General, upon satisfactory proof that an infringement of s. 3 has been committed, may order the closing of the house; authorize any peace officer to execute such order, and provide a procedure by which the owner may apply by petition to a judge of the Superior Court to have the order revised. Section 13 provides for imprisonment of anyone infringing or participating in the infringement of s. 12. In my opinion it is impossible to separate the provisions of ss. 3 and 12.

The validity of the statute was attacked upon a number of grounds, but, in cases where constitutional issues are involved, it is important that nothing be said that is unnecessary. In my view it is sufficient to declare that the Act is legislation in relation to the criminal law over which, by virtue of head 27 of s. 91 of the *British North America Act*, the Parliament of Canada has exclusive legislative authority. The decision of this Court in *Bédard v. Dawson et al.* (1) is clearly distinguishable. As Mr. Justice Barclay points out, the real object of the Act here under consideration is to prevent propagation of communism within the Province and to punish anyone who does so—with provisions authorizing steps for the closing of premises used for such object. The *Bédard* case was concerned with the control and enjoyment of property. I am unable to agree with the decision of Greenshields C.J. in *Fineberg v. Taub* (2). It is not necessary to refer to other authorities, because, once the conclusion is reached that the pith and substance of the impugned Act is in relation to criminal law, the conclusion is inevitable that the Act is unconstitutional.

(1) [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 12.

(2) (1939), 77 Que. S.C. 233.

The appeal should be allowed, the judgments below set aside and the action dismissed with costs, but there should be no costs as between the appellant and the respondent Elbling in the Court of Queen's Bench (Appeal Side) or in this Court. The intervention of the Attorney-General should be dismissed and it should be declared that the statute is *ultra vires* of the Legislature of the Province of Quebec *in toto*. The appellant is entitled, as against the Attorney-General, to his costs occasioned by the intervention in all Courts.

TASCHEREAU J. (*dissenting*):—La cause qui est soumise à la considération de cette Cour, a pris naissance de la façon suivante: L'intimée, demanderesse en Cour Supérieure, a loué un immeuble situé dans la cité de Montréal à un nommé Max Bailey, avec droit de sous-louer. Ce dernier, s'autorisant de ce droit, a cédé son bail à l'appelant dans la présente cause, et défendeur en Cour Supérieure.

L'intimée allègue dans son action en résiliation de bail, que l'appelant, sous-locataire, s'est servi et a permis qu'on se serve de l'immeuble en question, pour la diffusion de la doctrine communiste, et qu'il a ainsi violé une loi provinciale d'ordre public, intitulée "Loi protégeant la province contre la propagande communiste", S.R.Q. 1941, c. 52.

Le 27 janvier 1949, le procureur général de la province de Québec a en effet émis une ordonnance, tel que la loi l'autorise, prescrivant la fermeture de la maison pour toute fin quelconque, pour une période d'une année. La maison fut donc "cadenassée", et c'est maintenant la prétention de l'intimée qu'à cause de l'usage illégal que l'appelant en a fait, elle est en droit d'exiger la résiliation du bail, l'éviction de l'occupant, et des dommages qu'elle a évalués dans ses conclusions à $2,170.

L'appelant a admis s'être servi de l'immeuble pour la propagation de la doctrine communiste, mais a spécifiquement plaidé que ladite loi (S.R.Q. 1941, c. 52) est *ultra vires* de la législature de Québec, et qu'elle constitue un empiétement sur le pouvoir législatif de l'autorité fédérale qui seule pourrait légiférer en la matière. Comme la constitutionnalité d'une loi provinciale était attaquée, avis a été donné au procureur général de la province de Québec,

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Taschereau J.

suivant les dispositions de l'art. 114 C.P.C., et ce dernier a produit une intervention, où il a soutenu la validité complète de la législation.

M. le Juge Collins de la Cour Supérieure a maintenu l'action, annulé le bail, déclaré bien fondée l'intervention du procureur général, et a reconnu en conséquence la validité de la loi. Ce jugement a été confirmé par la Cour du Banc de la Reine, avec la dissidence de M. le Juge Barclay.

Il se présente dans cette cause une première question très sérieuse qui mérite quelques observations. L'action en résiliation de bail a été instituée au mois de février 1949, et le bail se terminait, en raison de la clause de renouvellement dont on a pris avantage, le 30 avril 1950. Il s'ensuit que quand l'appel a été portée devant cette Cour en juillet 1954, le bail se trouvait expiré, et quant à l'appelant et l'intimée, il ne restait qu'à déterminer une question de frais. Il n'y a aucune somme d'argent en jeu, vu que le juge de première instance n'a pas accordé de dommages. Le *"substratum"*, ce sur quoi reposait le litige, était donc disparu. C'est la jurisprudence constante qu'en pareil cas, cette Cour refuse d'entretenir l'appel vu qu'il ne reste rien à être décidé entre les parties: *Glasgow Navigation Company v. Iron Ore Company* (1); *Moir v. The Village of Huntingdon et al.* (2); *McKay v. The Township of Hinchinbrook* (3); *Commissioner of Provincial Police v. The King* (4); *Coca-Cola Company of Canada Limited v. Mathews* (5).

On soutient cependant qu'un autre litige subsiste entre l'appelant et l'intervenant, dans lequel doit être déterminée la validité de la législation contestée. Il s'agirait bien dans l'occurrence d'une intervention aggressive, dans laquelle l'intervenant soutient ses propres droits, et non pas d'une simple intervention accessoire faite dans l'interêt de l'une des parties et qui doit nécessairement tomber quand disparaît le *"substratum"* entre les principaux litigants, soit le demandeur et le défendeur: *La Société Immobilière Maisonneuve Limitée v. Les Chevaliers de Maisonneuve* (6).

(1) [1910] A.C. 293.
(2) (1891), 19 S.C.R. 363.
(3) (1894), 24 S.C.R. 55.
(4) [1941] S.C.R. 317, [1941] 3 D.L.R. 204, 76 C.C.C. 148.
(5) [1944] S.C.R. 385, [1945] 1 D.L.R. 1.
(6) [1952] 2 S.C.R. 456.

Cette dernière cause, et la cause actuelle, se présentent sous un jour entièrement différent. Dans la cause des *Chevaliers de Maisonneuve, supra,* les intervenants réclamaient pour leur bénéfice, la propriété de certains biens, et demandaient qu'un titre leur soit consenti à cet effet. Il importait peu, par conséquent, qu'il n'y eut point d'appel sur l'action principale qui avait été rejetée, vu que la contestation devenait exclusivement entre le demandeur et les intervenants.

Ici, tel n'est pas le cas; l'intervenant ne réclame rien, sauf une déclaration que la loi est constitutionnelle, dans le but unique de faire déclarer la résiliation d'un bail. Il ne s'agit en aucune façon d'une "référence", où cette Cour serait appelée à se prononcer sur la validité ou sur l'invalidité d'une loi d'une façon purement abstraite, mais bien d'un cas concret, d'une action ordinaire, où n'est contestée la loi en question que par rapport à l'action principale. Dans ces cas, nous ne devons retenir que les points essentiels à la détermination de la cause: *Winner v. S.M.T. (Eastern) Limited* (1). Comme dans le cas présent, il n'y a rien à déterminer dans l'action principale, il me semble rationnel de dire que nous ne pouvons juger de la validité de l'intervention et que nous ne devrions pas entretenir le présent appel. Je ne vois pas de matière essentielle nécessaire à un litige civil; il n'y a pas de fond dans ce procès.

Le seul point en litige est la résiliation du bail, et si l'appel était maintenu, il faudrait déclarer que le bail n'est pas résilié et, cependant, il y a six ans qu'il n'existe plus. Il ne s'agirait donc que *d'une question de frais.* Comme le disait Sir Lyman Duff dans *Commissioner of Provincial Police v. The King, supra*:

> From that point of view the appeal had no practical object. Even if the appellant's technical objection to the proceeding by way of *mandamus* had been well founded, the licenses and number plates would still remain in the hands of the respondent; the purported suspension would still remain a void act and the only question for discussion on the appeal would be the academic technical question with regard to the propriety of proceeding by *mandamus* and *the question of costs.*

(1) [1951] S.C.R. 887, [1951] 4 D.L.R. 529, varied *sub nom. Attorney-General for Ontario et al. v. Winner,* [1954] A.C. 541, 13 W.W.R. 657 (*sub nom. S.M.T. (Eastern) Limited v. Winner*).

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Taschereau J.

Je n'oublie pas la décision de cette Cour dans la cause de *Coté v. The James Richardson Company* (1), où il a été décidé que l'intervention ne tombe pas nécessairement, si, à cause d'un défaut de juridiction, cette Cour ne peut être saisie de l'action principale. Il s'agissait dans cette cause non pas d'un débat purement académique, mais bien d'un cas où l'intervenant *réclamait comme étant sa propriété,* une certaine quantité de bois que le demandeur avait saisie entre les mains du défendeur, et qui avait une valeur d'au delà de $2,000. *Il s'agissait, contrairement au cas qui nous occupe, d'une intervention agressive, où l'intervenant ne supportait pas les droits du défendeur, mais, au contraire, affirmait uniquement les siens.*

Dans *Coté v. Richardson, supra,* le jugé est le suivant:

An intervention filed under the provisions of the Code of Civil Procedure of the Province of Quebec is a "judicial proceeding" within the meaning of section 29 of the Supreme and Exchequer Courts Act, *and a final judgment thereon is appealable to the Supreme Court of Canada where the matter in controversy upon the intervention amounts to the sum or value of $2,000 without reference to the amount demanded by the action in which such intervention has been filed.*

Sir Charles Fitzpatrick, alors juge en chef, parlant pour la majorité de la Cour, s'exprime d'une façon bien catégorique lorsqu'il dit, à la page 44:

The intervening party stands in the same position as a plaintiff. *L'intervention n'est que l'exercice d'une action;* Rousseau & Laisney, Vol. 5, p. 494, n. 8. When, as in the present case, the intervenant is a third party who comes into the case, *not to maintain nor contest the principal demand, but to assert a right personal to himself,* new issues are raised which may be disposed of independently of the main suit: *Walcot v. Robinson,* 11 L.C. Jur. 303.

A la page 46, il souligne qu'il s'agit d'une revendication de la part de l'intervenant, par conséquent, d'une intervention agressive, créant nécessairement un *lis* entre ce dernier et l'une des parties. Voici ce qu'il dit:

Here the proceeding in intervention is to all intents and purposes an action in revendication. *Miller v. Déchène,* 8 Q.L.R. 18.

Dans la même cause, à la page 52, l'honorable juge Girouard dit:

If an intervention is a mere incident, it seems to me impossible to conceive that it can survive the principal demand.

(1) (1906), 38 S.C.R. 41.

Dans *Mulholland v. Benning et al.* (1), approuvé par cette Cour dans la cause de *Coté v. Richardson, supra,* la Cour du Banc de la Reine de la province de Québec, a décidé que le désistement de la demande principale ne peut mettre fin à une intervention, lorsque cette intervention a pour objet de revendiquer la chose saisie dans la demande principale. On voit donc que la Cour du Banc de la Reine de la province de Québec, conditionne l'existence d'une intervention à la revendication par l'intervenant d'un droit susceptible d'une appréciation pécuniaire.

La présente cause doit être distinguée de celle de *Bédard v. Dawson et al.* (2). Dans cette dernière, la question de juridiction entre l'appelant et l'intervenant a été soulevée, à cause de l'absence devant cette Cour d'un appel sur le litige principal. Mais il existait tout de même un *"substratum"*, car le litige principal subsistait toujours, vu que le dossier avait été retourné par la Cour d'Appel à la Cour Supérieure, pour preuve additionnelle, et était en conséquence susceptible d'être entendu de nouveau pour être déterminé finalement à la lumière du jugement rendu par la Cour Suprême sur l'intervention.

Même si j'entretenais encore quelque doute sur l'interprétation à être donnée à cette dernière cause, il devrait nécessairement disparaître après les jugements rendus dans la cause des *Chevaliers de Maisonneuve, supra,* et surtout dans la cause de *Winner, supra,* d'où il ressort clairement, que quand il ne s'agit pas d'une référence, mais bien d'une intervention comme celle qui nous est soumise, il ne faut en retenir que ce qui est nécessaire pour la détermination de l'action principale.

Parce que les points que je viens d'exprimer ne rencontrent pas les vues de la majorité de cette Cour, je crois qu'il devient nécessaire de dire ce que je pense de la validité de la loi dont on conteste la constitutionnalité.

Il ne fait pas de doute qu'en vertu de l'art. 91 de l'*Acte de l'Amérique britannique du Nord* (s. 27), le droit criminel est une matière qui relève exclusivement de l'autorité fédérale, sur laquelle cette dernière seule a le pouvoir de

(1) (1864), 15 Low. Can. R. 284.

(2) [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 12.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Taschereau J.

légiférer. Et dans un cas comme celui-là, la théorie dite de l'"unoccupied field" ne peut trouver son application, et ne peut justifier une législature provinciale de s'arroger un pouvoir que la constitution lui refuse: *The Fisheries Case* (1); *Attorney General for Alberta v. Attorney General for Canada et al.* (2).

La loi dite *"Loi protégeant la province contre la propagande communiste"* stipule qu'il est illégal pour toute personne qui possède ou occupe une maison dans la province, de l'utiliser ou de permettre à une personne d'en faire usage pour propager le communisme ou bolchévisme par quelque moyen que ce soit. La loi autorise le procureur général, sur preuve satisfaisante d'une infraction, d'ordonner la fermeture de la maison pour une période n'excédant pas une année. Le recours conféré par la loi au propriétaire de la maison, est de présenter une requête à la Cour pour faire reviser l'ordonnance, en prouvant qu'il était de bonne foi, qu'il ignorait que la maison fût employée en contravention à la loi, ou que la maison n'a pas été employée pour les fins qu'on lui reproche.

L'appelant prétend que cette législation relève exclusivement du droit criminel, et qu'en conséquence, elle dépasse la compétence législative de l'autorité provinciale. Je m'accorderais volontiers avec lui, si la législature avait décrété que le communisme était un crime punissable par la loi, car il y aurait là clairement un empiétement dans le domaine fédéral, qui frapperait la législation d'illégalité et la rendrait *"ultra vires"* de la province. Mais tel n'est pas le cas qui se présente à nous. La législature, en effet, n'a érigé aucun acte au niveau d'un crime, et elle n'a nullement donné le caractère de criminalité à la doctrine communiste. Si la législature n'a pas le droit de créer des offenses criminelles, elle a le droit de légiférer pour prévenir les crimes, les désordres, comme la trahison, la sédition, les attroupements illégaux, déclarés des crimes par l'autorité fédérale, et pour faire disparaître les conditions qui sont de

(1) *Attorney-General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia; Attorney-General for Ontario v. Attorney-General for Canada; Attorneys-General for Quebec and Nova Scotia v. Attorney-General for Canada,* [1898] A.C. 700 at 715.

(2) [1943] A.C. 356 at 370, [1943] 1 All E.R. 240, [1943] 1 W.W.R. 378, 24 C.B.R. 129.

nature à favoriser le développement du crime. Pour atteindre ces buts, je n'entretiens pas de doute qu'elle peut validement légiférer sur la possession et l'usage d'un immeuble, car ceci est exclusivement du domaine du droit civil, et relève en vertu de l'art. 92 de l'*Acte de l'Amérique britannique du Nord* (s. 13) de l'autorité provinciale.

La cause de *Bédard v. Dawson et al., supra,* présente beaucoup de similitude avec le litige actuel. Là encore la validité d'une loi provinciale intitulée "Loi concernant les propriétaires de maisons employées comme maisons de désordre", 10 Geo. V (1920), c. 81, a été attaquée. Cette loi déclarait qu'il était illégal pour toute personne qui possède ou occupe une maison ou bâtisse de quelque nature que ce soit, de l'utiliser ou de permettre à une personne d'en faire usage comme maison de désordre. Une copie certifiée de tout jugement déclarant une personne coupable d'un acte criminel, ou d'une infraction en vertu des arts. 228, 228*a*, 229 ou 229*a* de l'ancien *Code criminel,* constituait une preuve à première vue que la maison avait servi aux fins pour lesquelles la condamnation a été obtenue. Après avis donné à la partie intéressée, si cette maison continuait d'être employée comme maison de désordre, une injonction pouvait être dirigée contre le propriétaire ou le locataire, leur défendant de s'en servir ou de tolérer l'usage de cette bâtisse pour les fins susdites. La Cour pouvait ordonner, après un délai de dix jours, *la fermeture de cette maison.*

La Cour Suprême du Canada, confirmant la Cour d'Appel de la province de Québec (1), a décidé que cette loi était constitutionnelle, et bien que la loi criminelle et les règles de procédure qui s'y rapportent soient du ressort exclusif du Parlement fédéral, le Parlement provincial avait droit de légiférer sur toutes les matières civiles en rapport avec le droit criminel, et de sanctionner ses lois par une pénalité. Le jugé (2) de cette cause est le suivant:

> The Quebec statute entitled "An Act respecting the owners of houses used as disorderly houses," 10 Geo. V, c. 81, authorizing a judge to order the closing of a disorderly house, is *intra vires* the provincial legislature, *as it deals with 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.

(1) (1921), 33 Que. K.B. 246, 39 C.C.C. 175.
(2) [1923] S.C.R. at 681.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Taschereau J.

M. le juge Idington s'exprime dans ses raisons de la façon suivante (1):

I have long entertained the opinion that the provincial legislatures have *such absolute power over property and civil rights*, as given them by section 92 of the B.N.A Act, item 13 thereof, that so long as they did not in fact encroach upon the powers assigned by the said Act to the Dominion Parliament *it would be almost impossible to question any such exercise of power so given unless by the exercise of the veto power given the Dominion Government.* That veto power was originally designed to prevent an improper exercise of legislative power by the provincial legislatures.

M. le juge Duff exprime ainsi son opinion (2):

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. I think the legislation is not invalid.

De son côté, M. le juge Anglin trouve la loi constitutionnelle et s'exprime ainsi (3):

The judgment of the Superior Court maintaining the intervention of the Attorney General on the other hand was confirmed and in that proceeding there is a final judgment upholding the constitutionality of the Quebec Statute (10 Geo. V, c. 81). Substantially for the reasons stated by Mr. Justice Greenshields, *I am of the opinion that this statute in no wise impinges on the domain of criminal law but is concerned exclusively with the control and enjoyment of property and the safeguarding of the community from the consequences of an illegal and injurious use being made of it—a pure matter of civil right.* In my opinion in enacting the statute now under consideration the legislature exercised the power which it undoubtedly possesses to provide for the suppression of a nuisance and the prevention of its recurrence by civil process.

M. le juge Brodeur partage les mêmes vues et dit (4):

Le parlement fédéral peut déclarer criminelle une action quelconque; mais cela ne saurait empêcher les provinces de légiférer sur la même matière *en tant que les droits civils sont concernés.*

Enfin, M. le juge Mignault n'est pas moins catégorique lorsqu'il affirme (5):

C'est cette loi que l'appelante attaque prétendant qu'elle empiète sur la juridiction du parlement canadien sur le droit criminel. A mon avis, il n'y a pas là législation criminelle. *La législature veut empêcher qu'on ne se serve d'un immeuble pour des fins immorales; elle ne punit pas l'offense elle-même par l'amende ou l'emprisonnement, mais elle ne fait que statuer sur la possession et l'usage d'un immeuble.* Cela rentre pleinement dans le droit civil.

(1) [1923] S.C.R. at 683.
(2) At p. 684.
(3) At p. 685.
(4) At p. 686.
(5) At p. 687.

Dans une cause de *Lymburn et al. v. Mayland et al.* (1), le Conseil Privé a eu à décider de la constitutionnalité de la "Security Frauds Prevention Act, 1930, of Alberta". Cette loi stipulait que personne ne pouvait faire le commerce de valeurs mobilières, à moins d'être enregistré au département du procureur général. Effectivement cette loi défendait à une compagnie publique de vendre ses actions à moins que ce ne fut par l'intermédiaire d'une personne enregistrée, ou que la compagnie elle-même fut enregistrée. En vertu de la loi, le procureur général, ou son délégué, pouvait enquêter si quelque acte frauduleux *avait été ou était sur le point d'être commis.* La loi imposait des pénalités pour toute violation de ses dispositions, et, en vertu de l'art. 20 de la loi, c'était une offense de commettre un acte frauduleux qui n'était pas punissable en vertu des dispositions du *Code criminel* du Canada. Le Conseil Privé en est venu à la conclusion que cette loi était dans les limites des pouvoirs de la législature provinciale en vertu de l'art. 92 de l'*Acte de l'Amérique britannique du Nord,* qu'elle n'était pas invalide en ce qui concerne les compagnies fédérales parce qu'elle ne leur défendait pas de vendre à moins qu'elles ne soient enregistrées, mais les assujétissait simplement à certaines règles applicables à toutes les personnes faisant le commerce des valeurs mobilières. Le Conseil Privé a aussi conclu qu'il ne s'agissait pas là d'une tentative détournée pour empiéter sur le pouvoir législatif fédéral, en ce qui concerne le droit criminel.

Lord Atkin s'exprime de la façon suivante, à la page 323:

It was contended on behalf of the Attorney-General for the Dominion that to impose a condition making the bond fall due upon conviction for a criminal offence was to encroach upon the sole right of the Dominion to legislate in respect of the criminal law. *It indirectly imposed an additional punishment for a criminal offence. Their Lordships do not consider this objection well founded.* If the legislation be otherwise *intra vires,* the imposition of such an ordinary condition in a bond taken *to secure good conduct* does not appear to invade in any degree the field of criminal law.

Et plus loin, à la page 327, il dit ce qui suit:

In any case it appears to their Lordships, after reviewing the whole Act, that there is no ground for holding that the Act is a colourable attempt to encroach upon the exclusive legislative power of the Dominion as to criminal law. They have already given their reasons for holding that the Act cannot be considered invalid as destroying the status of Dominion

(1) [1932] A.C 318, [1932] 2 D.L.R. 6, 57 C.C.C. 311, [1932] 1 W.W.R. 578.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Taschereau J.

companies. The provisions therefore of Part II of the Act appear to be competent Provincial enactments dealing with property and civil rights and have to be obeyed by persons subject to them.

Enfin, dans la cause *The Provincial Secretary of Prince Edward Island v. Egan* (1), la Cour Suprême du Canada a décidé que l'art. 84(1) du *Highway Traffic Act, 1936* de l'Île du Prince Édouard était valide, malgré qu'il autorisait la confiscation par l'autorité provinciale de la licence de conducteur de toute personne conduisant son véhicule, alors qu'elle était sous l'influence de liqueurs enivrantes. On a soutenu qu'il s'agissait d'une offense criminelle prévue par l'art. 285(4) du *Code criminel,* et que cette loi provinciale imposait une sanction additionnelle. La Cour a rejeté ces prétentions et Sir Lyman Duff, alors juge en chef, a dit ce qui suit (2):

It is, of course, beyond dispute that where an offence is created by competent Dominion legislation in exercise of the authority under section 91(27), the penalty or penalties attached to that offence, as well as the offence itself, become matters within that paragraph of section 91 which are excluded from provincial jurisdiction.

There is, however, no adequate ground for the conclusion that these particular enactments (section 84(1)(*a*) and (*c*)) are in their true character attempts to prescribe penalties for the offences mentioned, rather than enactments in regulation of licences.

Rinfret J. parlant pour lui-même et pour Crocket et Kerwin JJ. s'est exprimé de la façon suivante, à la page 414:

It cannot be open to contention for a moment that the imposing of such a penalty for enforcing a law of the competency of Prince Edward Island is an interference with criminal law, under section 91, subs. 27. *Regina v. Watson* (1890), 17 Ont. A.R. 221, at 249. *It is not an additional penalty imposed for a violation of the criminal law. It provides for a civil disability arising out of a conviction for a criminal offence.*

Et, plus loin, à la page 415, il ajoute:

It does not create an offence; it does not add to or vary the punishment already declared by the *Criminal Code*; it does not change or vary the procedure to be followed in the enforcement of any provision of the *Criminal Code. It deals purely and simply with certain civil rights in the Province of Prince Edward Island.* Such legislation can rely upon the decision, in this Court, of *Bédard v. Dawson and the Attorney-General for Quebec* [*supra*].

Hudson J. partage les mêmes vues à la page 417:

The section in question does not create a new offence but makes provision in regard to the licence which has been issued under the provincial authority. *I do not think that this can be regarded as an addition*

(1) [1941] S.C.R. 396, [1941] 3 D.L.R. 305, 76 C.C.C. 227.

(2) At p. 403.

to any punishment or penalty provided for in section 285 of the Criminal Code. The situation seems to be analogous to that dealt with by the Judicial Committee in *Lymburn v. Mayland* [*supra*].

Et, à la page 418, Taschereau J. dit:

This section merely provides for a civil disability arising out of a conviction for a criminal offence. *The field of criminal law is in no degree invaded by this legislation which is aimed at the suppression of a nuisance on highways.* There can be no doubt that the control of the roads and highways and the regulation of traffic thereon is assigned by the *B.N.A. Act* to the Legislatures of the Provinces.

Je suis clairement d'opinion que si une province peut validement légiférer sur toutes les matières civiles en rapport avec le droit criminel, si elle peut *adopter des lois destinées à supprimer les conditions qui favorisent le crime,* et contrôler les propriétés afin de protéger la société contre tout usage illégal qu'on peut en faire, si elle a le pouvoir incontestable de réglementer les courtiers dans leurs transactions financières pour protéger le public contre la fraude, si, enfin, elle a le droit d'imposer des incapacités civiles comme conséquence d'une offense criminelle, je ne vois pas pourquoi elle n'aurait pas également le pouvoir de décréter que ceux qui prêchent et écrivent des doctrines de nature à favoriser la trahison, la violation des secrets officiels, la sédition, etc., soient privés de la jouissance des immeubles d'où se propagent ces théories destinées à saper à ses bases, et renverser l'ordre établi.

L'expérience, il nous est permis d'en prendre une connaissance judiciaire, nous enseigne, en effet, que des Canadiens, il y a moins de dix ans, malgré les serments d'allégeance qu'ils avaient prêtés, n'ont pas hésité au nom du communisme à violer les secrets officiels, et à mettre en péril la sécurité de l'État. La suppression de la diffusion de ces doctrines subversives par des sanctions civiles, est sûrement aussi importante que la suppression des maisons de désordre. Je demeure convaincu que le domaine du droit criminel, exclusivement de la compétence fédérale, n'a pas été envahi par la législation en question, *et qu'il ne s'agit que de sanctions civiles établies pour la prévention des crimes et la sécurité du pays.*

On a aussi prétendu que cette législation constituait une entrave à la liberté de la presse et à la liberté de parole. Je crois à ces libertés: ce sont des droits indéniables dont bénéficient heureusement les gens de ce pays, mais ces

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Taschereau J.

libertés ne seraient plus un droit, et deviendraient un privilège, si on permettait à certains individus d'en abuser et de s'en servir pour diffuser des doctrines malsaines, qui conduisent nécessairement à de flagrantes violations des lois établies. Ces libertés, dont jouissent les citoyens et la presse, d'exprimer leurs croyances, leurs pensées et leurs doctrines, sans autorisation ou censure préalables, ne sont pas des droits absolus. Elles sont nécessairement limitées, et doivent s'exercer dans le cadre de la légalité. Quand les bornes sont dépassées, elles deviennent abusives, et la loi doit alors intervenir pour exercer une action répressive, et protéger les citoyens et la société.

Le même raisonnement doit nécessairement servir à rencontrer l'objection soulevée par l'appelant à l'effet que la loi attaquée, est une entrave à la libre expression de pensée de tout individu, candidat à une élection. Les idées destructives de l'ordre social et de l'autorité établie, par des méthodes dictatoriales, n'ont pas plus de droits en temps électoraux qu'en aucun autre temps. Cette loi, dans l'esprit de certains, peut paraître sévère, il ne m'appartient pas d'en juger la sagesse, mais la sévérité d'une loi adoptée par le pouvoir compétent ne la marque pas du caractère d'inconstitutionnalité.

Pour toutes ces raisons, je suis d'avis que le présent appel doit être rejeté avec dépens payables par l'appelant à l'intervenant. Je ne crois pas qu'il doit y avoir d'ordonnance en ce qui concerne les frais devant cette Cour entre l'appelant et l'intimée.

RAND J.:—By 1 Geo. VI, c. 11, passed by the Legislature of the Province of Quebec and entitled "An Act to Protect the Province against Communistic Propaganda" (now R.S.Q. 1941, c. 52), the following provisions are enacted:

3. It shall be illegal for any person, who possesses or occupies a house within the Province, to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatsoever.

* * *

12. It shall be unlawful to print, to publish in any manner whatsoever or to distribute in the Province any newspaper, periodical, pamphlet, circular, document or writing whatsoever propagating or tending to propagate communism or bolshevism.

The word "house" is defined to extend to any building or other construction whatever. By s. 4 the Attorney-General,

> . . . upon satisfactory proof that an infringement of section 3 has been committed, may order the closing of the house against its use for any purpose whatsoever for a period of not more than one year; the closing order shall be registered at the registry office of the registration division wherein is situated such house, upon production of a copy of such order certified by the Attorney-General.

When a house is closed, an owner who has not been in possession may apply to the Superior Court to have the order revised upon proving that in good faith he was ignorant of the use being made in contravention of the Act or that the house has not been so used during the twelve months preceding the order. Conversely, after an order has been so modified or terminated, the Attorney-General may, on application to the same Court, obtain a decree reviving it. No remedy by resort to a Court is extended to the person in possession against whom the order has become effective. The Attorney-General may at any time permit reoccupation on any conditions thought proper for the protection of the property and its contents or he may revoke the order.

The action in this appeal was brought by an owner against a tenant to have a lease set aside and for damages on the ground of the use of the leased premises for the illegal purpose so defined and their closure under such an order. As the validity of the Act was challenged by the defence, the Attorney-General intervened and that issue became the substantial question in the proceedings.

In addition to the closure, a large quantity of documentary matter was seized and removed. In the order both ss. 3 and 12 are recited and the concluding paragraph is in these terms:

> Je, soussigné, procureur général de la province de Québec, croyablement informé des infractions et violations ci-dessus, vous enjoins de fermer pour toutes fins quelconques, pendant un an à compter de l'exécution de cet ordre, la maison portant le numéro civique 5321 de l'avenue du Parc, dans la cité de Montréal, et de plus, vous êtes par les présentes autorisé, et je vous donne les instructions en conséquence, à saisir et confisquer tout journal, revue, pamphlet, circulaire, document ou écrit quelconque imprimé, publié ou distribué en contravention à la dite loi, en particulier et sans restrictions à saisir et à détruire les exemplaires du journal "Combat".

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Rand J.

From this it is clear that the order was based upon both sections.

In the intervention, conclusion C was in these words:

> Adjuger que la dite loi, et toutes les dispositions d'icelle, sont constitutionnelles et valides, et en pleine force et vigueur.

In conformity with this and the conclusions in the action, the judgment of the Superior Court declared the statute in all respects to be valid, allowed the claim for resiliation, but dismissed that for damages because they had not been sufficiently proved. On appeal by the defendant that judgment was affirmed.

Mr. Beaulieu, for the Attorney-General, as a preliminary point, urged that the dismissal of the claim for damages removed the relevancy of s. 12 to the issue on the intervention and that this Court should consider only s. 3, a point which, if upheld, would entail a modification of the judgments below. But the validity of the entire statute was put in issue by the intervention and maintained by the Courts below; and in the circumstances of the case, apart from any question of severance and of prejudice to the rights of the appellant in relation to the judgment on the claim as well as against those executing the order should it not be upheld, I see no sufficient warrant at this stage to limit the scope of the appeal.

The first ground on which the validity of s. 3 is supported is head 13 of s. 92 of the *British North America Act*, "Property in the Province", and Mr. Beaulieu's contention goes in this manner: by that head the Province is vested with unlimited legislative power over property; it may, for instance, take land without compensation and generally may act as amply as if it were a sovereign state, untrammelled by constitutional limitation. The power being absolute can be used as an instrument or means to effect any purpose or object. Since the objective accomplishment under the statute here is an Act on property, its validity is self-evident and the question is concluded.

I am unable to agree that in our federal organization power absolute in such a sense resides in either legislature. The detailed distribution made by ss. 91 and 92 places limits to direct and immediate purposes of provincial action. Under head 13 the purpose would, in general, be a

"property" purpose either primary or subsidiary to another head of the same section. If such a purpose is foreign to powers vested in the Province by the Act, it will invade the field of the Dominion. For example, land could not be declared forfeited or descent destroyed by attainder on conviction of a crime, nor could the convicted person's right of access to provincial Courts be destroyed. These would trench upon both criminal law and citizenship status. The settled principle that calls for a determination of the "real character", the "pith and substance", of what purports to be enacted and whether it is "colourable" or is intended to effect its ostensible object, means that the true nature of the legislative act, its substance in purpose, must lie within s. 92 or some other endowment of provincial power. That a power ostensibly as here under a specific head cannot be exercised as a means directly and immediately to accomplish a purpose not within that endowment is demonstrated by the following decisions of the Judicial Committee: *Union Colliery Company of British Columbia, Limited et al. v. Bryden* (1), holding that legislative power in relation to employment in a coal mine could not be used as a means of nullifying the civil capacities of citizenship and, specifically, of persons qualifying under head 25 of s. 91, Naturalization and Aliens; *Canadian Federation of Agriculture v. Attorney-General for Quebec et al.* (2), holding that the Dominion, under its power in relation to criminal law, could not prohibit the manufacture of margarine for the purpose of benefiting in local trade one class of producer as against another. The heads of ss. 91 and 92 are to be read and interpreted with each other and with the provisions of the statute as a whole; and what is then exhibited is a pattern of limitations, curtailments and modifications of legislative scope within a texture of interwoven and interacting powers.

In support of the legislation on this ground, *Bédard v. Dawson et al.* (3) was relied on. In that case the statute provided that it should be illegal for the owner or occupier of any house or building to use it or allow it to be used as a disorderly house; and procedure was provided by which the

(1) [1899] A.C. 580.
(2) [1951] A.C. 179, [1950] 4 D.L.R. 689.
(3) [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 12.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Rand J.

Superior Court could, after a conviction under the *Criminal Code*, grant an injunction against the owner restraining that use of it. If the use continued, the Court could order the building to be closed for a period of not more than one year.

This power is seen to have been based upon a conviction for maintaining a public nuisance. Under the public law of England which underlies that of all the Provinces, such an act was not only a matter for indictment but in a civil aspect the Court could enjoin its continuance. The essence of this aspect is its repugnant or prejudicial effect upon the neighbouring inhabitants and properties.

On that view this Court proceeded in *Bédard*. Idington J. at p. 684 says:

> Indeed the duty to protect neighbouring property owners in such cases as are involved in this question before us renders the question hardly arguable.
>
> 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.

Anglin J. at p. 685:

> . . . I am of the opinion that this statute . . . is concerned exclusively with the control and enjoyment of property and the safeguarding of the community from the consequences of an illegal and injurious use being made of it—a pure matter of civil right. In my opinion in enacting the statute now under consideration the legislature exercised the power which it undoubtedly possesses to provide for the suppression of a nuisance and the prevention of its recurrence by civil process.

Brodeur J. at pp. 685-6:

> La législature provinciale de Québec, sachant que ces maisons affectaient considérablement la valeur des propriétés du voisinage et rendaient plus difficile la réglementation policière, a jugé à propos d'ordonner leur fermeture si, après avis, les propriétaires ne voyaient pas à y faire cesser le commerce immoral qui s'y faisait.
>
> * * *
>
> Il est incontestable que si une personne maintient une maison ou fait une chose qui constitue une nuisance, et que cet acte soit considéré criminel par le parlement fédéral, nos tribunaux peuvent être autorisés par des lois provinciales à émettre une injonction pour mettre fin à ces violations du droit public.

That the scene of study, discussion or dissemination of views or opinions on any matter has ever been brought under legal sanction in terms of nuisance is not suggested. For the past century and a half in both the United Kingdom and Canada, there has been a steady removal of

restraints on this freedom, stopping only at perimeters where the foundation of the freedom itself is threatened. Apart from sedition, obscene writings and criminal libels, the public law leaves the literary, discursive and polemic use of language, in the broadest sense, free.

The object of the legislation here, as expressed by the title, is admittedly to prevent the propagation of communism and bolshevism, but it could just as properly have been the suppression of any other political, economic or social doctrine or theory; and the issue is whether that object is a matter "in relation to which" under s. 92 the Province may exclusively make laws. Two heads of the section are claimed to authorize it: head 13, as a matter of "Civil Rights", and head 16, "Local and Private Matters".

Mr. Tremblay in a lucid argument treated such a limitation of free discussion and the spread of ideas generally as in the same category as the ordinary civil restrictions of libel and slander. These obviously affect the matter and scope of discussion to the extent that it trenches upon the rights of individuals to reputation and standing in the community; and the line at which the restraint is drawn is that at which public concern for the discharge of legal or moral duties and government through rational persuasion, and that for private security, are found to be in rough balance.

But the analogy is not a true one. The ban is directed against the freedom or civil liberty of the actor; no civil right of anyone is affected nor is any civil remedy created. The aim of the statute is, by means of penalties, to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short, from his own thinking propensities. There is nothing of civil rights in this; it is to curtail or proscribe those freedoms which the majority so far consider to be the condition of social cohesion and its ultimate stabilizing force.

It is then said that the ban is a local matter under head 16; that the social situation in Quebec is such that safeguarding its intellectual and spiritual life against subversive doctrines becomes a special need in contrast with that for a general regulation by Parliament. A similar contention was made in *Re Section 6 of The Farm Security Act*

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Rand J.

(1944) of Saskatchewan (1). What was dealt with there was the matter of interest on mortgages and a great deal of evidence to show the unique vicissitudes of farming in that Province was adduced. But there, as here, it was and is obvious that local conditions of that nature, assuming, for the purpose of the argument only, their existence, cannot extend legislation to matters which lie outside of s. 92.

Indicated by the opening words of the preamble in the Act of 1867, reciting the desire of the four Provinces to be united in a federal union with a constitution "similar in principle to that of the United Kingdom", the political theory which the Act embodies is that of parliamentary government, with all its social implications, and the provisions of the statute elaborate that principle in the institutional apparatus which they create or contemplate. Whatever the deficiencies in its workings, Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.

But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Caanda, as a subject-matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is *ipso facto* excluded from head 16 as a local matter.

This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inherence in the individual it is embodied in his

(1) [1947] S.C.R. 394, [1947] 3 D.L.R. 689, affirmed *sub nom. Attorney-General for Saskatchewan v. Attorney-General of Canada et al.*, [1949] A.C. 110, [1949] 2 D.L.R. 145, [1949] 1 W.W.R. 742.

status of citizenship. Outlawry, for example, divesting civil standing and destroying citizenship, is a matter of Dominion concern. Of the fitness of this order of government to the Canadian organization, the words of Taschereau J. in *Brassard et al. v. Langevin* (1) should be recalled:

> The object of the electoral law was to promote, by means of the ballot, and with the absence of all undue influence, the free and sincere expression of public opinion in the choice of members of the Parliament of Canada. This law is the just sequence to the excellent institutions which we have borrowed from England, institutions which, as regards civil and religious liberty, leave to Canadians nothing to envy in other countries.

Prohibition of any part of this activity as an evil would be within the scope of criminal law, as ss. 60, 61 and 62 of the *Criminal Code* dealing with sedition exemplify. Bearing in mind that the endowment of parliamentary institutions is one and entire for the Dominion, that Legislatures and Parliament are permanent features of our constitutional structure, and that the body of discussion is indivisible, apart from the incidence of criminal law and civil rights, and incidental effects of legislation in relation to other matters, the degree and nature of its regulation must await future consideration; for the purposes here it is sufficient to say that it is not a matter within the regulation of a Province.

Mr. Scott, in his able examination of the questions raised, challenged also the validity of ss. 4 *et seq.* which vest in the Attorney-General the authority to adjudicate upon the commission of the illegal act under s. 3 and to issue the order of closure; but in view of the conclusions reached on the other grounds, the consideration of this becomes unnecessary.

I would, therefore, allow the appeal, set aside the judgments below, dismiss the action and direct a declaration on the intervention that the statute in its entirety is *ultra vires* of the Province. The appellant will be entitled to the costs of the action in the Superior Court against the respondent Elbling and the costs occasioned by the intervention in all Courts against the Attorney-General.

(1) (1877), 1 S.C.R. 145 at 195.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Kellock J.

KELLOCK J.:—I have had the advantage of reading the judgment of my brother Rand, with which I agree. I only desire to add a reference to my own judgment in *Saumur v. The City of Quebec* (1), and particularly to the statement there reproduced from Mr. Justice Mignault's work, vol. 1, p. 131, as follows:

> 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.*

In my opinion, legislation of the character of that here in question cannot be supported as being in relation to civil rights in the Province within the meaning of head 13 of s. 92 of the *British North America Act,* and equally, it cannot be said to be in relation to matters of a merely local or private nature in the province.

No objection was raised by the Attorney-General to the entertaining of this appeal on the ground that there no longer remained any *lis* as between the appellant and the respondent Elbling, but the point should perhaps be noticed. In my view, any such objection, had it been made, would be completely answered by the decision of this Court in *Bédard v. Dawson et al.* (2). There the action had been taken by the respondent Dawson with regard to certain premises alleged to have been used or allowed to be used by the appellant contrary to a statute of the Quebec Legislature entitled "An Act respecting the Owners of Houses used as Disorderly Houses". The constitutional validity of the statute having been brought into question by the appellant, the Attorney-General intervened. The Superior Court maintained the action and the intervention, but by the judgment of the Court of King's Bench, Appeal Side, the main action between the plaintiff and the defendant was remitted to the Superior Court to permit of further proof

(1) [1953] 2 S.C.R. 299 at 348 *et seq.,* [1953] 4 D.L.R. 641, 106 C.C.C. 289.

(2) [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 12.

being adduced in regard to the defendant's ownership of the property in question. That judgment, not being a final judgment, was not the subject of appeal to this Court. On the other hand, the judgment of the Superior Court maintaining the intervention of the Attorney-General was confirmed by the Court of King's Bench. This was a final judgment and was the subject of the appeal to this Court, which overruled an objection to the entertaining of the appeal on the ground that the main action, having been referred back, had still to be dealt with by the trial Court. I am unable to distinguish, in substance, the circumstances of that case from the present.

I would allow the appeal, set aside the judgments below, dismiss the action and direct a declaration on the intervention that the statute in its entirety is *ultra vires* of the Province. The appellant should have the costs of the action in the Superior Court against the respondent Elbling and the costs occasioned by the intervention in all Courts against the Attorney-General.

The judgment of Locke and Nolan JJ. was delivered by

NOLAN J.:—This is an appeal from a judgment of the Court of Queen's Bench (Appeal Side) (1) dismissing an appeal from the judgment of the Superior Court and maintaining the intervention of the Attorney-General for the Province of Quebec.

By a lease dated December 29, 1947, the respondent Freda Elbling leased to one Max Bailey the premises bearing civic number 5321 Park Avenue in the city of Montreal for the term of 15½ months from January 15, 1948.

On December 30, 1947, the respondent Elbling granted to the lessee Bailey an option to renew the lease for an additional period terminating on April 30, 1950.

On February 5, 1948, the lessee Bailey assigned the lease and option to the appellant.

The option was exercised and the appellant, on January 27, 1949, was in possession of the premises under a lease which expired on April 30, 1950.

On February 15, 1949, the respondent Elbling commenced an action against the appellant, praying for cancellation of the lease and for damages in the amount of $2,170. The

(1) [1954] Que. Q.B. 421.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Nolan J.

ground of action was the alleged use of the premises for the purpose of propagating communism contrary to the provisions of "An Act to protect the Province against Communistic Propaganda", R.S.Q. 1941, c. 52, hereinafter referred to as the *Padlock Act*.

The appellant admitted that the premises were used to propagate communism, but pleaded that the *Padlock Act* was wholly *ultra vires* of the Legislature of the Province of Quebec. In accordance with art. 114 of the Quebec *Code of Civil Procedure,* notice of his intention to contest the constitutionality of the legislation was given to the Attorney-General, who intervened in the action.

The learned trial judge ordered cancellation of the lease and rejected the claim for damages. There was no appeal on the question of damages.

The learned trial judge also held that the Act was constitutional and, in pith and substance, was not criminal law and was not related to any matters exclusively reserved to the Dominion Parliament. He found that it was related to property and civil rights in the Province and was a matter of merely local or private nature.

This judgment was affirmed by the Court of Queen's Bench (Appeal Side), Barclay J. dissenting.

On January 27, 1949, the Attorney-General of the Province of Quebec ordered the director of the provincial police to close the premises for a period of one year from the execution of the order and to seize and confiscate all newspapers, reviews, pamphlets, circulars, documents or writings published in contravention of the *Padlock Act*.

The pertinent sections of the *Padlock Act* read as follows:

3. It shall be illegal for any person, who possesses or occupies a house within the Province, to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatsoever.

4. The Attorney-General, upon satisfactory proof that an infringement of section 3 has been committed, may order the closing of the house against its use for any purpose whatsoever for a period of not more than one year; . . .

* * *

12. It shall be unlawful to print, to publish in any manner whatsoever or to distribute in the Province any newspaper, periodical, pamphlet, circular, document or writing whatsoever propagating or tending to propagate communism or bolshevism.

13. Any person infringing or participating in the infringement of section 12 shall be liable to an imprisonment of not less than three months nor more than twelve months, in addition to the costs of prosecution, and, in default of payment of such costs, to an additional imprisonment of one month. . . .

14. Any constable or peace officer, upon instructions of the Attorney-General, of his substitute or of a person specially authorized by him for the purpose, may seize and confiscate any newspaper, periodical, pamphlet, circular, document or writing whatsoever, printed, published or distributed in contravention of section 12, and the Attorney-General may order the destroying thereof.

The main question for determination on this appeal is whether or not the enactment in question is in relation to "Criminal Law" as that term is used in head 27 of s. 91 of the *British North America Act*. It has been held by the Judicial Committee in *Attorney-General for Ontario v. The Hamilton Street Railway Company et al.* (1) and by this Court in *Re Section 498A of the Criminal Code* (2) that the term "Criminal Law" means criminal law "in its widest sense" and is in no way confined to what was criminal law by the law of England or of any Province in 1867. It must extend to the power to make new crimes.

It was contended on behalf of the appellant before this Court that the legislation, judged by its true nature and purpose, is related to public wrongs rather than private rights and is, therefore, criminal law within the exclusive jurisdiction of the Parliament of Canada.

The respondent took the position that the legislation was in no sense criminal law, but was related to property and civil rights and to matters of a local or private nature in the province.

The history of the legislation is not without interest. In 1919 the *Criminal Code* was amended (9-10 Geo. V, c. 46, s. 1) by adding thereto ss. 97A and 97B, which provided that any assoication the purpose of which was to bring about any governmental, industrial or economic change within Canada by the use of force was an unlawful association. Penalties were imposed on anyone who acted as an officer or member

(1) [1903] A.C. 524, 7 C.C.C. 326, 2 O.W.R. 672.

(2) [1936] S.C.R. 366, [1936] 3 D.L.R. 593, 66 C.C.C. 161, affirmed *sub nom. Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 368, [1937] 1 D.L.R. 688, 67 C.C.C. 193, [1937] 1 W.W.R. 317.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Nolan J.

thereof, or who published or imported any literature on their behalf. Sections 97A and 97B later became s. 98 in R.S.C. 1927, c. 36.

In 1930 s. 133A (which is substantially embodied in the present s. 61) was added to the *Criminal Code* (by 20-21 Geo. V, c. 11, s. 2) and ameliorated the sedition laws.

In 1934 the Legislature of Quebec enacted "An Act respecting certain public meetings endangering public, social or religious order", entitled the *Certain Meetings Advertising Act* (24 Geo. V, c. 51), which forbade the distribution of certain circulars in towns or villages unless prior approval had been obtained from the chief of police, and prohibited approval if the printer, maker or author of the circular was not domiciled in the Province.

In 1936 s. 98 of the *Criminal Code* was repealed by 1 Edw. VIII, c. 29, s. 1, and by s. 4 of the same Act a new subs. (4) was added to s. 133 of the *Criminal Code* (now s. 60, subs. (4)) as follows:

> 133 (4) Without limiting the generality of the meaning of the expression "seditious intention" everyone shall be presumed to have a seditious intention who publishes, or circulates any writing, printing or document in which it is advocated, or who teaches or advocates, the use, without the authority of law, of force, as a means of accomplishing any governmental change within Canada.

In 1937 the Legislature of Quebec enacted the *Padlock Act* (1 Geo. VI, c. 11) and on the same day repealed the *Certain Meetings Advertising Act* (by 1 Geo. VI, c. 79).

At the outset it becomes necessary to consider the judgment of this Court in *Bédard v. Dawson et al.* (1), which held that another padlock law, namely, "An Act respecting the Owners of Houses used as Disorderly Houses" (now R.S.Q. 1941, c. 50), was *intra vires*.

Section 3 of that Act provides:

> 3. It shall be illegal for any person, who owns or occupies any house or building of any nature whatsoever, to use or to allow any person to use the same as a disorderly house.

Section 9 of the Act authorizes a judge to order the closing of a disorderly house. This Court held that the legislation was *intra vires* of the Provincial Legislature, as

(1) [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 12.

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.

Anglin J. (later C.J.C.) said at p. 685:

> I am of the opinion that this statute in no wise impinges on the domain of criminal law but is concerned exclusively with the control and enjoyment of property and the safeguarding of the community from the consequences of an illegal and injurious use being made of it—a pure matter of civil right. In my opinion in enacting the statute now under consideration the legislature exercised the power which it undoubtedly possesses to provide for the suppression of a nuisance and the prevention of its recurrence by civil process.

In my view *Bédard v. Dawson et al.* may be distinguished on the ground that the statute there considered was concerned with the control or enjoyment of property and with safeguarding the community from the consequences of an illegal or injurious use being made of property, whereas that in the present case is aimed at the prevention of the propagation of communism. The question of the suppression of a local nuisance does not arise.

In *Johnson v. The Attorney General of Alberta* (1) Locke J., referring to *Bédard v. Dawson et al., supra,* said at p. 157:

> (1) [1954] S.C.R. 127, [1954] 2 D.L.R. 625, 108 C.C.C. 1.
>
> . . . it was the opinion of all the members of the Court that the real purpose of the statute [the *Disorderly House Act*] was the control and enjoyment of property and that it was not directed to the punishment of a crime.

Moreover, in *Bédard v. Dawson et al.* the offence was created under the *Criminal Code* of Canada (ss. 228, 228*a*, 229 and 229*a*) and not under the provincial legislation (the *Disorderly House Act*). The provincial legislation merely provided what would be the civil effect on the owner of a house in which such an offence had been committed.

The facts that in *Bédard v. Dawson et al.* the offence committed was defined in the *Criminal Code,* whereas in the present case it is not; that the nature of the offence dealt with in *Bédard v. Dawson et al.* was so different from that under consideration in the present case as to preclude comparison; and that there is a radical difference in the procedural aspects of the two cases, all impel me to the conclusion that the two cases are clearly distinguishable.

(1) [1954] S.C.R. 127, [1954] 2 D.L.R. 625, 108 C.C.C. 1.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Nolan J.

Bédard v. Dawson et al. was followed by Greenshields C.J. in *Fineberg v. Taub* (1). In that case the constitutionality of the Act now under consideration in the present case, was subjected to attack on similar grounds. In upholding the constitutionality of the legislation Greenshields C.J., at p. 237, said:

> The underlying purpose of the incriminated statute is to protect the Province of Quebec against communistic propaganda. Nowhere in the Act is a crime or criminal offence created. The purpose of the Act is to prevent and not to punish. Clause (3) of the Act declares it to be illegal for any person who possesses or occupies a house within the Province to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatever. That is clearly a declaration affecting the use of property within this Province.

With respect, I am unable to agree that the legislation under attack is purely and simply to determine the civil consequences of a criminal act. Clearly it affects the use of property within the Province, but, in my view, it is not related to property and civil rights or to matters of a local or private nature in the Province, but its true nature and purpose is the suppression of communism by creating a new crime with accompanying penal provisions.

The respondent the Attorney-General contended that only the constitutionality of s. 3 should be passed upon by this Court on the ground that, admittedly, the offence committed was in propagating communism in a house and consequently s. 12 was not in issue.

It should be pointed out that both ss. 3 and 12 were specifically referred to in the order of the Attorney-General closing the house. Moreover, the appellant in his notice of plea of unconstitutionality, given pursuant to art. 114 of the *Code of Civil Procedure,* stated that he had pleaded the unconstitutionality of the whole of the statute and the Attorney-General intervened on the ground that the whole of the statute was *intra vires* of the Provincial Legislature. In my view, therefore, the constitutionality of both ss. 3 and 12 is properly before this Court for adjudication.

It was also contended by the respondent the Attorney-General that ss. 3 and 12 of the Act created two separate and independent illegalities imposing different penalties and that consequently the sections were severable and the invalidity of one would not affect the validity of the other. On this point I agree with the contention of the appellant

(1) (1939), 77 Que. S.C. 233.

that the two separate sections in the statute are so interconnected that they must be read together as expressing a single legislative purpose. In addition the question of severability could only arise if one or other of these sections were held to be *intra vires,* so that the valid might be severed from the invalid. If both are invalid there can be no severance.

The respondent the Attorney-General contended that, there being no provision in the *Criminal Code,* or in any law passed by the Parliament of Canada, which made communism a crime or which forbade the propagation of communism, the field was unoccupied and the provincial legislation was valid. I do not agree with this contention.

In *Union Colliery Company of British Columbia, Limited et al. v. Bryden* (1), Lord Watson, in delivering the judgment of the Judicial Committee, made it clear that the abstinence of the Dominion Parliament from legislating to the full limit of its powers could not have the effect of transferring to any Provincial Legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867. Attention is also drawn to *Attorney-General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia; Attorney-General for Ontario v. Attorney-General for Canada; Attorneys-General for Quebec and Nova Scotia v. Attorney-General for Canada* (2), and to *Attorney-General for Alberta v. Attorney-General for Canada et al.* (3), both to the same effect.

The appellant took the position before this Court that the legislation in question deals with sedition and seditious literature and is an encroachment upon ss. 133 and 133A of the *Criminal Code,* R.S.C. 1927, c. 36. It was contended that these sections provide a complete series of rules governing freedom of discussion and governing the publication of printed matter dealing with political and governmental affairs and consequently the theory of the unoccupied field was inapplicable.

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

(2) [1898] A.C. 700 at 715.

(3) [1943] A.C. 356 at 370, [1943] 1 All E.R. 240, [1943] 1 W.W.R. 378, 24 C.B.R. 129.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Nolan J.

In my view of the matter it is unnecessary to decide upon the merit of this contention because, whether or not the Dominion Parliament has made communism a crime or forbidden its propagation, it has the exclusive jurisdiction so to do.

Holding, as I do, that the legislation under attack, judged by its true nature and purpose, is within the exclusive jurisdiction of the Parliament of Canada, it is unnecessary to consider the other grounds put forward by the appellant in support of the appeal.

I would dispose of the appeal as proposed by my brother Abbott.

CARTWRIGHT J.:—The question in this appeal is whether c. 52 of R.S.Q. 1941, formerly c. 11 of the statutes of Quebec, 1937, 1 Geo. VI, entitled "Act to protect the Province against Communistic Propaganda", hereinafter referred to as the Act, is *intra vires* of the Legislature. The relevant circumstances and the nature of the arguments addressed to us sufficiently appear in the reasons of other members of the Court.

In my opinion the Act is invalid *in toto,* as being in pith and substance legislation in relation to the criminal law, a matter assigned by s. 91, head 27, of the *British North America Act* to the exclusive legislative authority of the Parliament of Canada.

The nature and purpose of the legislation clearly appear from the words of the Act. The propagation of communism or bolshevism is regarded as an evil and such propagation, by any means whatsover in a house within the Province and by any writing whatsoever elsewhere in the Province, is forbidden under punitive sanctions.

The circumstance that the penalty prescribed for a breach of the provisions of s. 3 is the closing of a house within the Province has not the effect of making the enactment one in relation to property and civil rights in the Province, and I find myself unable to relate the Act to any provincial purpose falling within head 13 or 16 of s. 92 of the *British North America Act.* The purpose and effect of the Act are to make criminal the propagation of communism or bolshevism which the Legislature in the public interest intends

to prohibit. It is legislation in relation to what is conceived to be a public evil not in relation to civil rights or local matters.

Having reached this conclusion I do not find it necessary to deal with any of the other grounds upon which the validity of the Act was impugned.

I would dispose of the appeal as proposed by my brother Abbott.

FAUTEUX J.:—L'action en résiliation de bail, intentée par l'intimée à l'appelant, se fonde uniquement sur la *Loi concernant la propagande communiste,* S.R.Q. 1941, c. 52. La constitutionnalité de cette loi a été attaquée par ce dernier, soutenue par le procureur général et maintenue, en première instance, par un jugement confirmé par une décision majoritaire de la Cour d'Appel. Subséquemment, et considérant que la question en était une de "considérable importance", la Cour d'Appel autorisa un pourvoi devant cette Cour.

La loi attaquée est intitulée "Loi protégeant la province contre la propagande communiste" et peut être citée sous le titre de *Loi concernant la propagande communiste* (art. 1). Le statut comporte deux dispositions de substance: (i) l'art. 3 déclare illégale l'utilisation d'une maison pour la diffusion du communisme ou du bolchévisme; et (ii) l'art. 12 déclare illégales l'impression, la publication, la distribution de tout écrit quelconque propageant ou tendant à propager l'une ou l'autre de ces doctrines. La violation de l'une ou l'autre de ces dispositions constitue une infraction sanctionnée, dans le premier cas, par la fermeture de la maison pour toutes fins quelconques pendant une période n'excédant pas un an (art. 4) et, dans le second cas, par un emprisonnement d'au moins trois mois et d'au plus douze mois (art. 13). Bref, et sauf la propagande verbale à ciel ouvert, la loi prohibe toute propagande des doctrines indiquées, que ce soit au moyen d'écrits ou de la parole.

D'autres dispositions de la loi incriminée assurent, par des définitions compréhensives et par une procédure exceptionnelle et expéditive, l'atteinte en plénitude des fins visées aux deux articles de substance. C'est ainsi que (art. 2):

> Le mot "maison" désigne tout bâtiment, abri, appentis, hangar ou autre construction, sous quelque nom qu'elle soit connue ou désignée, attachée au sol ou portative, érigée ou placée au-dessus ou au-dessous du

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Fauteux J.

sol, de façon permanente ou temporaire; et lorsqu'il s'agit d'une maison au sens du présent paragraphe située partie dans le territoire de la province et partie hors de ce territoire, le mot "maison" désigne la partie située dans le territoire de la province de Québec;

et c'est ainsi que l'émission des ordonnances de fermeture, de saisie, de confiscation et de destruction des écrits, échappe à la juridiction normale des tribunaux pour demeurer de la compétence exclusive du procureur général (arts. 4 et 14). Enfin, les autres articles donnent, dans certaines circonstances et à certaines conditions, un pouvoir de revision de l'ordonnance de fermeture à la Cour Supérieure ou au procureur général.

De cet examen, il apparaît qu'il ne s'agit pas ici d'une loi complexe, c'est-à-dire une loi ayant des dispositions embrassant plusieurs matières, au sens des arts. 91 et 92 de l'*Acte de l'Amérique britannique du Nord,* 1867. Il s'agit au contraire d'une loi simple et dont les deux articles de substance, les arts. 3 et 12, ne portent que sur une même matière, manifestant ainsi l'unité de leur objet et de celui de la loi entière, soit: la prohibition de la propagande communiste. Et ce, dans la mesure et par des sanctions précisées.

Pour déterminer la nature et le caractère véritable de la loi, on ne saurait conséquemment—soit dit en toute déférence pour ceux qui entretiennent une opinion contraire—sous le prétexte que le litige se fonde uniquement sur l'art. 3 ou qu'il ne s'agisse pas ici d'une référence, limiter le champ de la considération à ce dernier article, à l'exclusion de l'art. 12. On ne saurait de plus, pour déterminer l'objet de cet art. 3, l'extraire du contexte de la loi où il se trouve pour, le considérant ainsi isolément, lui assigner un objet différent de celui que sa présence dans le cadre de la loi et que le titre d'icelle doivent normalement lui donner. C'est d'ailleurs conformément à ces vues que le problème a été compris et envisagé, en première instance, tant par l'appelant, le procureur général et le juge: ils ont considéré l'art. 3 comme faisant partie d'un tout en attaquant, soutenant et maintenant respectivement la constitutionnalité de la loi dans son entier.

Que l'unique objet légal de cette loi soit de prohiber, avec sanctions pénales, la propagande communiste, ou plus précisément, de faire de la propagande communiste un acte criminel, la chose, je crois, ne peut être plus manifeste.

Quiconque "commet une *infraction* à l'article 12", dit l'art. 13, est passible d'emprisonnement. Ici, la punition prend la forme d'une main-mise de l'État sur la personne du coupable; c'est la restriction de la liberté. Le procureur général "sur preuve satisfaisante d'une *infraction* à l'article 3", dit l'art. 4, peut ordonner la fermeture de la maison utilisée en contravention de cet article. Ici, la punition prend la forme d'une main-mise de l'État sur les biens; c'est l'atteinte au droit de propriété, d'usufruit ou d'usage, du coupable ou d'une personne qui ne l'est pas mais que la loi présume l'être jusqu'à preuve de sa bonne foi (art. 6(*a*)). Dans les deux cas, la violation de la loi constitue une infraction qu'elle punit. Peu importe la forme de la loi, l'agencement des articles et les mots employés. Comme le signale le Lord Chancelier, le Vicomte Caldecote, dans *Board of Trustees of The Lethbridge Northern Irrigation District et al. v. Independent Order of Foresters; The King v. Independent Order of Foresters* (1), au premier paragraphe de la page 534: "The substance and not the form of the enactment in question must be regarded." Dans cette dernière cause, le Comité Judiciaire du Conseil Privé n'a pas hésité, pour rechercher l'essence et la véritable substance, "the pith and substance", d'une législation, à faire entrer dans la considération de la question, l'examen des lois contemporaines de la même Législature, examen qui révéla l'unité d'objet, d'essence et de substance de ces différentes législations; et en déclarant *ultra vires* la législation sous considération, on a appliqué le principe qu'on ne peut faire indirectement ce qu'on n'a pas le pouvoir de faire directement. Bref, la loi incriminée prohibe et punit la propagande communiste par la perte temporaire d'un droit —celui de la liberté ou de la propriété—et non par la perte d'un privilège. En cela, elle rencontre intégralement les conditions de la formule classique établie par Lord Atkin aux pages 324-5 dans *Proprietary Articles Trade Association et al. v. Attorney-General for Canada et al.* (2), pour conclure à la nature criminelle d'un acte: "Is the act prohibited with penal consequences?"

(1) [1940] A.C. 513, [1940] 2 All E.R. 220, [1940] 2 D.L.R. 273, [1940] 1 W.W.R. 502.

(2) [1931] A.C. 310, [1931] 2 D.L.R. 1, 55 C.C.C. 241, [1931] 1 W.W.R. 552.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Fauteux J.

Qu'une Législature provinciale ait le pouvoir de prohiber avec sanctions pénales certaines actions ou omissions, la chose est élémentaire. C'est là un pouvoir que le para. 15 de l'art. 92 établit, mais limite dans les termes suivants:

> 15. The Imposition or Punishment by Fine, Penalty, or Imprisonment *for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.*

Manifestement, ce pouvoir donné à une Législature d'infliger des punitions est, de son essence—contrairement à ce qui est le cas du pouvoir du Parlement d'établir des crimes—un pouvoir auxiliaire, *"ancillary"*. Aussi bien, la validité d'une disposition législative d'ordre pénal décrétée par une Législature, en vertu du para. 15 de l'art. 92, est subordonnée à la validité de la disposition législative principale dont la disposition auxiliaire tend à assurer l'exécution. En l'espèce, la matière de la disposition principale—prohibition de la propagande communiste—n'en est certes pas une qui en soi tombe dans la catégorie des sujets énumérés en l'art. 92 comme étant de la compétence de la Législature. Seul le Parlement, légiférant en matière criminelle, a compétence pour décréter, définir, défendre et punir ces matières d'un écrit ou d'un discours qui, en raison de leur nature, lèsent l'ordre social ou la sécurité de l'État. Tels sont, par exemple, les libelles diffamatoires, obscènes, blasphématoires ou séditieux. Dans ces cas, il ne s'agit plus de lésion de droits individuels donnant droit à compensation monétaire. Il s'agit de lésion des droits de la société, emportant punition. Ceci n'implique pas évidemment que la Législature ne peut validement adopter aucune disposition législative d'ordre pénal affectant indirectement la liberté d'expression; telle serait, par exemple, une prohibition avec sanctions pénales de la tenue de toute assemblée publique dans les 24 heures précédant le jour du scrutin. En ce cas, la disposition législative est une disposition auxiliaire à une disposition principale portant sur une matière qui est de la compétence de la Législature, soit la réglementation des élections dans la province. Aussi bien, les tribunaux tiendront comme n'étant pas des empiétements sur le droit criminel les dispositions pénales d'ordre provincial établies dans le but d'assurer l'exécution d'une loi de la Province, sur une matière également tenue comme

étant de sa compétence. C'est là le fondement des décisions de cette Cour dans *Bédard v. Dawson et al.* (1) et dans *The Provincial Secretary of Prince Edward Island v. Egan* (2).

On a soumis, en invoquant la décision de *Bédard v. Dawson et al., supra,* que la matière de l'art. 3 tombait sous le para. 13 de l'art. 92: "13. La propriété et les droits civils dans la province." L'article 3, dit-on, ne vise qu'à réglementer la possession et l'usage des maisons. Pour ainsi interpréter l'art. 3, on l'a isolé du texte de la loi entière intitulée "Loi protégeant la province contre la propagande communiste". A la vérité, l'objet véritable de l'art. 3, aussi bien que la technique législative adoptée pour réaliser cet objet, ne pouvaient être dénoncés en des termes plus clairs que ceux apparaissant à l'extrait suivant des raisons de jugement de l'un des juges de la majorité en Cour d'Appel, dans la présente cause:

> Dans l'espèce, la loi sous attaque ne définit pas le communisme pour une excellente raison, c'est qu'elle n'entend pas en faire un crime. Ce qu'elle veut réprimer, ce sont les activités de ce mouvement subversif. Il est évident que la Législature se serait réjouie de pouvoir mettre le communisme hors la loi en faisant, des adeptes de cette doctrine, des criminels au sens du droit criminel. Elle savait fort bien qu'elle n'avait pas ce pouvoir, mais elle n'ignorait pas non plus qu'elle avait la responsabilité, dans le cadre de sa compétence législative, de chercher, par tous moyens de réglementation, à paralyser l'action de ces gens et à réprimer la propagation de cette doctrine. Le champ de la propriété et des droits civils lui était ouvert et elle s'en est prévalue.

Mais, ainsi qu'on l'affirme implicitement dans la dernière phrase de cette citation, la Législature pouvait-elle validement utiliser son pouvoir de légiférer sur la propriété et les droits civils comme moyen pour arriver à sa fin véritable, soit à faire une législation relativement à une matière échappant à sa compétence? La négative n'est pas douteuse: *Attorney-General for Ontario v. Reciprocal Insurers et al.* (3); *Attorney-General for Alberta v. Attorney-*

(1) [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 12.

(2) [1941] S.C.R. 396, [1941] 3 D.L.R. 305, 76 C.C.C. 227.

(3) [1924] A.C. 328, [1924] 1 D.L.R. 789, 41 C.C.C. 336, [1924] 2 W.W.R. 397.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Fauteux J.

General for Canada et al. (1). Dans *Ladore et al. v. Bennett et al.* (2), Lord Atkin, à la page 482, déclare:

> It is unnecessary to repeat what has been said many times by the Courts in Canada and by the Board, that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail.

En tout respect, aucune raison ne permet de différencier, quant à leur nature et à leur caractère véritable, "pith and substance", les dispositions de l'art. 3 de celles de l'art. 12 qui prohibe, avec sanctions pénales, l'impression, la publication et la distribution d'écrits propageant ou tendant à propager le communisme, pour en déduire que la Législature n'a visé, par l'art. 3, qu'à réglementer la possession et l'usage des maisons.

Signalons, de plus, deux différences fondamentales entre la présente loi et la "Loi concernant les propriétaires de maisons employées comme maisons de désordre", dont la constitutionnalité fut affirmée par cette Cour dans *Bédard v. Dawson et al, supra.* Dans la *Loi des maisons de désordre,* il n'y a pas, comme dans la présente loi, une disposition de l'ordre de l'art. 12, mais simplement une de l'ordre de l'art. 3, c'est-à-dire une disposition déclarant illégale l'utilisation d'une maison comme maison de désordre. De plus, dans la *Loi des maisons de désordre,* on a, par référence, adopté comme définition de "maison de désordre", la définition de cette expression au *Code criminel.* On a ainsi intégralement subordonné, dans son principe et dans sa mesure, l'existence et l'opération de la loi provinciale sur l'existence et l'opération des dispositions établies au *Code criminel.* Aussi bien a-t-on jugé que la Législature n'avait pas créé un crime mais simplement décrété des conséquences civiles résultant de la commission d'un crime établi par l'autorité compétente, et supprimé les conditions conduisant à la commission de ce crime. Voilà bien la base qui manque en l'espèce; ici, ce n'est pas le Parlement mais c'est la Législature qui a créé le crime. Cet aspect de la question ne se présentait pas dans la cause de *Bédard v. Dawson et al., supra;* il se présentait, mais n'a pas été considéré, dans celle de *Fineberg v. Taub* (3). Pour ces raisons,

(1) [1939] A.C. 117, [1938] 4 D.L.R. 433, [1938] 3 W.W.R. 337.
(2) [1939] A.C. 468, [1939] 3 All E.R. 98, [1939] 3 D.L.R. 1, [1939] 2 W.W.R. 566, 21 C.B.R. 1.
(3) (1939), 77 Que. S.C. 233.

ni la décision de cette Cour dans la première cause, ni la décision de la Cour Supérieure dans la seconde, ne peuvent être invoquées au soutien de la proposition qu'il s'agit ici de "La propriété et les droits civils dans la province", tombant sous le para. 13 de l'art. 92.

On a soutenu aussi que la matière de la loi incriminée tombait sous le para. 16 de l'art. 92: "16. Généralement toutes les matières d'une nature purement locale ou privée dans la province". Ce serait une tâche insurmontable que d'assumer de démontrer que la propagande communiste est une matière locale. Dans son essence, la doctrine elle-même a un caractère international. Mais, dit-on, il existe dans la province de Québec, contrairement à ce qui pourrait être la situation dans le reste du Canada, une nécessité particulière de protéger la population de la province contre la propagande communiste. Cette affirmation est peut-être plus ingénieuse que flatteuse, mais elle n'a pas été démontrée.

On invoque aussi la déclaration de Lord Watson dans *Attorney-General for Ontario v. Attorney-General for the Dominion et al.* (1). A la page 365, le savant juriste indique qu'au para. 16 de l'art. 92 est compris un pouvoir pour la Législature de faire des lois pour la paix, l'ordre et le bon gouvernement de la province relativement aux matières d'une nature purement locale ou privée dans la province. On reconnaît, cependant, aux raisons du jugement faisant l'objet du présent appel, que ce pouvoir ne justifie pas la Législature d'établir des crimes; et tel que déjà indiqué, la matière de la loi n'en est pas une "d'une nature purement locale ou privée dans la province".

Qu'il y ait ou non, au pays, une propagande communiste agissante; que les invitations des propagandistes soient ou non fructueuses; qu'il en résulte ou non un danger ou une possibilité de danger; qu'il y ait lieu ou non pour le législateur de conjurer ce danger ou sa possibilité en ajoutant aux mesures visant déjà la sédition, des mesures coercitives de censure et de main-mise sur la personne et sur les biens, tel que pourvu en la loi incriminée, plutôt que de laisser à la conscience éclairée des citoyens le soin de rejeter ou combattre les invitations de cette propagande: voilà autant de questions qui, en raison de la séparation des pouvoirs, échappent aux tribunaux pour être et demeurer exclusive-

(1) [1896] A.C. 348.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Fauteux J.

ment de la juridiction du législateur. Dans notre système fédératif de gouvernement où la compétence législative se partage, suivant la matière de la loi, entre le Parlement, d'une part, et les Législatures de dix provinces, d'autre part, le corps législatif qui, d'après la constitution, a exclusivement cette compétence législative, la responsabilité et le droit d'établir et contrôler les moyens pour y satisfaire, seul a jurisdiction pour considérer et décider de ces questions. Ces questions, qui s'élèvent aux dimensions de la sécurité de l'État, ne peuvent être considérées comme une matière "d'une nature purement locale ou privée dans la province", ni être tenues comme étant en relation avec "la propriété et les droits civils dans la province". Le pouvoir qu'une Législature peut avoir de decréter les conséquences civiles d'un crime établi par l'autorité compétente, ou de supprimer les conditions qui conduisent à ce crime, n'inclut pas celui de créer un crime pour la prévention d'un autre crime validement établi, tel, par exemple, celui de la sédition.

Étant d'avis que la matière véritable de la loi incriminée est une matière de droit criminel et, comme telle, de la compétence exclusive du Parlement, il n'est pas nécessaire de considérer les autres moyens soulevés par l'appelant pour disposer de cet appel et conclure à l'inconstitutionnalité de la loi.

Sur le point soulevé par mon collègue M. le Juge Taschereau, en préliminaire et en marge du mérite de la question constitutionnelle, j'adopterais les raisons de jugement de mon collègue M. le Juge Kellock. Sur le mérite, je rendrais l'ordonnance proposée par M. le juge en chef.

ABBOTT J.:—The sole question in issue in this appeal is the constitutional validity of a statute of the Province of Quebec commonly known as the *Padlock Act,* the official title of which is "An Act to protect the Province against Communistic Propaganda". The Act in question was passed in 1937 and was 1 Geo. VI, c. 11, of the statutes of Quebec of that year. It is now R.S.Q. 1941, c. 52.

Section 3 of the Act declares it to be illegal for any person who possesses or occupies a house within the Province, to use it or allow it to be used to "propagate communism or bolshevism by any means whatsoever". Section 12 declares it to be unlawful to print, publish or distribute in the Prov-

ince any newspaper, periodical, pamphlet, circular, document or writing "propagating or tending to propagate communism or bolshevism".

No attempt has been made in the Act to define communism or bolshevism but the term "house" is defined in the broadest possible terms and under s. 4 the Attorney-General "upon satisfactory proof" that a house has been used to propagate communism (as to which he is to be the sole judge) may order it closed for a period of not more than one year. This is the only sanction provided for the contravention of s. 3. Contravention of s. 12 renders the offender liable to prosecution and penalties under the *Quebec Summary Convictions Act.*

Appellant was the tenant of premises in Montreal, which were the subject of a padlock order by the Attorney-General under the Act referred to. Sued by his landlord for cancellation of the lease and damages under art. 1624 of the *Civil Code* on the ground that the premises were used for illegal purposes, namely the propagation of communism, appelant in defence pleaded the unconstitutionality of the *Padlock Act* and, as required by art. 114 of the *Code of Civil Procedure,* gave notice to the Attorney-General of Quebec of the questions that he intended to raise. The Attorney-General intervened in the action, as he was entitled to do under the provisions of arts. 114 and 220 C.C.P., and in the conclusions of his intervention asked that the *Padlock Act,* in its entirety, be declared to be within the legislative competence of the Province. The learned trial judge maintained the action and cancelled and annulled appellant's lease but did not award damages on the ground that these had not been proved. In the same judgment he maintained the intervention of the Attorney-General, and this judgment was confirmed in the Court below, Barclay J. dissenting.

Appellant has attacked the constitutional validity of this legislation upon a number of grounds of which I find it necessary to deal with one only.

The first question to be determined is whether the impugned legislation, in pith and substance, deals with the use of real property or with the propagation of ideas. As Mr. Scott put it to us in his very able argument: (1) the *motive* of this legislation is dislike of communism as being

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Abbott J.

an evil and subversive doctrine, motive, of course, being something with which the Courts are not concerned; (2) the *purpose* is clearly the suppression of the propagation of communism in the Province, and (3) one *means* provided for effecting such suppression is denial of the use of a house.

In my opinion the Act does not create two illegalities which are separate and independent, as was suggested to us by Mr. Beaulieu, it creates only one, namely, the propagation of communism in the Province. Both s. 3 and s. 12 are directed to the same purpose, namely, the suppression of communism, although different means are provided to achieve that end. The whole Act constitutes one legislative scheme and in my opinion its provisions are not severable.

Since in my view the true nature and purpose of the *Padlock Act* is to suppress the propagation of communism in the Province, the next question which must be answered is whether such a measure, aimed at suppressing the propagation of ideas within a Province, is within the legislative competence of such Province.

The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours. Moreover, it is not necessary to prohibit the discussion of such matters, in order to protect the personal reputation or the private rights of the citizen. That view was clearly expressed by Duff C.J. in *Re Alberta Statutes* (1), when he said:

> Under the constitution established by *The British North America Act*, legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactments of the Act relating to the House of Commons, 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

(1) [1938] S.C.R. 100 at 132-3, [1938] 2 D.L.R. 81, affirmed *sub nom. Attorney-General for Alberta v. Attorney-General for Canada et al.*, [1939] A.C. 117, [1938] 4 D.L.R. 433, [1938] 3 W.W.R. 337.

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. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

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.

* * *

. . . 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 *Canada Elections Act,* the provisions of the *British North America Act* which provide for Parliament meeting at least once a year and for the election of a new parliament at least every five years, and the *Senate and House of Commons Act,* are examples of enactments which make specific statutory provision for ensuring the exercise of this right of public debate and public discussion. Implicit in all such legislation is the right of candidates for Parliament or for a Legislature, and of citizens generally, to explain, criticize, debate and discuss in the freest possible manner such matters as the qualifications, the policies, and the political, economic and social principles advocated by such candidates or by the political parties or groups of which they may be members.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Abbott J.

This right cannot be abrogated by a Provincial Legislature, and the power of such Legislature to limit it, is restricted to what may be necessary to protect purely private rights, such as for example provincial laws of defamation. It is obvious that the impugned statute does not fall within that category. It does not, in substance, deal with matters of property and civil rights or with a local or private matter within the Province and in my opinion is clearly *ultra vires*. Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation.

For the reasons which I have given, I would allow the appeal and dismiss the action against the respondent Elbling with costs in the trial Court, dismiss the intervention of the Attorney-General with costs occasioned by such intervention in all Courts, and declare the Act I Geo. VI, c. 11, now R.S.Q. 1941, c. 52, *ultra vires* of the Legislature of Quebec. The respondent Elbling was a party to the appeal in the Court below and in this Court but was not represented by counsel at the hearing before us. In the circumstances, there should be no order as to costs against her here or in the Court of Queen's Bench.

Appeal allowed, TASCHEREAU J. *dissenting.*

Solicitors for the defendant, appellant: Marcus & Feiner, Montreal.

Solicitor for the intervenant, respondent: L. E. Beaulieu, Montreal.

Solicitor for the plaintiff, respondent: Louis Orenstein, Montreal.