MOSES McKAY AND SARAH McKAY ..APPELLANTS;

1965

AND

*Feb. 18, 19
June 24

HER MAJESTY THE QUEEN .....RESPONDENT.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Zoning by-law prohibiting signs on private property—Applicability to federal election signs—Canada Elections Act, 8-9 Eliz. II (1960), c. 39, ss. 2(4), 49, 71, 100—B.N.A. Act, 1867, c. 3, ss. 41, 91, 92.

The appellants were convicted by a Justice of the Peace on a charge of unlawfully maintaining a sign on their premises contrary to a municipal zoning by-law. This sign, which was not within the type of signs specifically permitted by the by-law, was displayed during the period of a federal election and urged the people to vote for a certain candidate. The validity of the by-law or of the enabling provincial legislation was not raised, but the appellants contended that on its true construction the by-law was not intended to have the effect of forbidding the use of such a sign during the actual period of an election to the federal parliament. The conviction was quashed by a judge of the Supreme Court of Ontario, but it was restored by the Court of Appeal. The appellants were granted leave to appeal to this Court.

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

Held (Fauteux, Martland, Ritchie and Hall JJ. dissenting): The appeal should be allowed and the conviction set aside.

Per Taschereau C.J. and Cartwright, Abbott, Judson and Spence JJ.: It could not have been the intention of the municipal council to enact a prohibition of the sort which the by-law, as construed by the Court of Appeal, contains, nor could it have been the intention of the legislature to empower it to do so. The legislature had no power to enact such a prohibition as it would be a law in relation to proceedings at a federal election and not in relation to any subject matter within the provincial power. The subject matter of elections to parliament appears to be from its very nature one which could not be regarded as coming within any of the classes of subjects assigned to the legislatures of the provinces by s. 92 of the *B.N.A. Act*. Consequently, on their proper construction, the general words of the by-law, which in their natural meaning do not merely regulate but forbid the display of signs at all times, were not intended to have effect so as to forbid during the actual period of an election to parliament the display of a sign of the sort described in the charge on which the appellants were convicted.

Per Fauteux, Martland, Ritchie and Hall JJ., *dissenting:* The contention of the appellant that the by-law was not intended to have the effect of forbidding the use of such a sign during the period of a federal election, could not be supported. There is nothing in the provisions of the by-law which runs counter to any of the provisions of the *Canada Elections Act*. The contention that the field of proceedings at federal elections is one of federal jurisdiction and cannot be affected by provincial legislation, even though only incidentally, could not be supported. There is no general field of legislation on this subject assigned to the federal parliament under s. 91 of the *B.N.A. Act* to which the proviso of that section can attach. Therefore, provincial legislation in relation to the use of property, which, in its pith and substance, is in relation to property and civil rights in the province, and which is of general application, as in the present case, is not only valid, but can apply even though incidentally it may affect the means of propaganda used by an individual or by a political party during a federal election campaign.

Nor could the contention of the appellant be supported upon the ground that the displaying of the sign was the exercise of a political right in a federal election which could not be affected by any legislation other than federal. The provinces, legislating within their allotted sphere, may affect the carrying on of activities connected with federal elections. In the present case the proposition that, because a by-law of general application incidentally prevented a particular form of political propaganda from being used in a particular area, this constituted a substantial interference with the working of the parliamentary institutions of Canada, could not be supported.

Droit constitutionnel—Règlement de zonage défendant les enseignes sur les propriétés privées—Applicabilité aux enseignes pour les élections fédérales—Loi électorale du Canada, 8-9 Eliz. II (1960), c. 39, arts.

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2(4), 49, 71, 100—L'Acte de l'Amérique du Nord britannique, 1867, c. 3, arts. 41, 91, 92.

Les appellants furent trouvés coupables par un juge de paix sur une accusation d'avoir gardé illégalement sur leur propriété une enseigne contrairement à un règlement municipal de zonage. Cette enseigne, qui n'était pas du type spécifiquement permis par le règlement, avait été exhibée durant la période d'une élection fédérale et exhortait les gens à voter pour un certain candidat. La validité du règlement ainsi que de la législation provinciale l'autorisant n'a pas été soulevée, mais les appelants ont prétendu que le règlement n'était pas destiné à avoir pour effet de défendre l'usage d'une telle enseigne durant la période actuelle d'une élection au parlement fédéral. Le verdict de culpabilité fut cassé par un juge de la Cour suprême de l'Ontario, mais il fut remis en vigueur par la Cour d'Appel. Les appelants ont obtenu la permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être maintenu et le verdict de culpabilité mis de côté, les Juges Fauteux, Martland, Ritchie et Hall étant dissidents.

Le Juge en Chef Taschereau et les Juges Cartwright, Abbott, Judson et Spence: Le conseil municipal n'a pas pu avoir eu l'intention de décréter une prohibition du genre contenu dans le règlement, tel qu'interprété par la Cour d'Appel, et la législature n'a pas pu avoir eu l'intention de lui conférer le pouvoir de le faire. La législature n'avait aucun pouvoir de décréter une telle prohibition parce que cela aurait été un statut se rapportant au mode de procéder aux élections fédérales et ne se rapportant pas à aucun sujet de la compétence provinciale. Le sujet des élections au parlement semble être de par sa propre nature un sujet qui ne peut pas être considéré comme faisant partie des catégories de sujets assignés aux législatures des provinces par l'article 92 de l'*Acte de l'Amérique du Nord britannique*. Par conséquent, le langage général du règlement, qui dans son sens naturel non seulement réglemente mais défend l'affichage des enseignes en tout temps, n'était pas destiné à avoir pour effet de défendre durant la période actuelle d'une élection au parlement l'affichage d'une enseigne de la sorte décrite à la charge sur laquelle les appelants ont été trouvés coupables.

Les Juges Fauteux, Martland, Ritchie et Hall, *dissidents:* La prétention des appelants que le règlement n'était pas destiné à avoir pour effet de défendre l'usage d'une telle enseigne durant la période d'une élection fédérale, ne peut pas être supportée. Il n'y a rien dans les dispositions du règlement qui va à l'encontre des dispositions de la *Loi électorale du Canada*. La prétention que le domaine du mode de procéder aux élections fédérales appartient à la juridiction fédérale et ne peut pas être touché par une législation provinciale, même seulement incidemment, ne peut pas être supportée. Il n'y a aucun domaine général de législation sur ce sujet assigné au parlement fédéral de par l'article 91 de l'*Acte de l'Amérique du Nord britannique* auquel la stipulation au début de cet article peut s'attacher. En conséquence, une législation provinciale relative à l'usage d'une propriété, qui, dans son essence, est relative à la propriété et les droits civils dans la province, et qui est d'application générale, comme dans le cas présent, est non seulement valide, mais peut s'appliquer quoique, incidemment, elle peut affecter les moyens de propagande dont peut se servir un individu ou un parti politique durant une campagne d'élections fédérales.

La prétention des appelants ne peut pas être non plus supportée pour le motif que l'affichage de l'enseigne était le résultat de l'exercice d'un droit politique durant une élection fédérale qui ne pouvait pas être affecté par une législation autre que fédérale. Les provinces, légiférant dans leur propre sphère, peuvent affecter la poursuite d'activités ayant rapport aux élections fédérales. Dans le cas présent, la proposition que, parce qu'un règlement d'application générale empêchait incidemment l'usage dans un endroit particulier d'une forme particulière de propagande politique, cela constituait une interférence substantielle avec les institutions parlementaires du Canada, ne peut pas être supportée.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], infirmant une décision du Juge Hughes. Appel maintenu, les Juges Fauteux, Martland, Ritchie et Hall étant dissidents.

APPEAL from a judgment of the Court of Appeal for Ontario[1] reversing a judgment of Hughes J. Appeal allowed, Fauteux, Martland, Ritchie and Hall JJ., dissenting.

A. Brewin, Q.C., and *Miss Ruby Campbell*, for the appellants.

John S. Herron, for the respondent.

The judgment of Taschereau C.J. and of Cartwright, Abbott, Judson and Spence JJ. was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to special leave granted by this Court, from an order of the Court of Appeal for Ontario[1] reversing an order of Hughes J. and affirming the conviction of the appellants by a Justice of the Peace which conviction had been quashed by the order of Hughes J.

The appellants were convicted before W. H. Williams Esquire, a Justice of the Peace, on November 2, 1962, on the charge that they during the two weeks preceding June 12, 1962, at the Municipality of Metropolitan Toronto in the County of York, unlawfully did maintain a sign on the premises municipally known as 70 Roxaline Street in the Township of Etobicoke other than those permitted under Sections 9.3.1.7. and 6.14(e) of the Township of Etobicoke Zoning By-law 11737 contrary to Township of Etobicoke Zoning By-law 11737.

The relevant facts are not in dispute.

[1] [1964] 1 O.R. 641, 43 D.L.R. (2) 401.

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The appellants are the owners of the premises known as Street number 70 Roxaline Street in the Township of Etobicoke. During the period set out in the charge they attached to the railing of the verandah forming part of their residence an election sign measuring 14 inches by 16 inches bearing the words:—"Vote David Middleton, New Democratic Party". David Middleton was a candidate for election to the House of Commons at the general election which was held on June 18, 1962. He was a candidate for the electoral district in which 70 Roxaline Street is situate. It will be observed that the whole of the period during which the sign was displayed by the appellants was "during an election" as that phrase is defined in the *Canada Elections Act,* 8-9 Elizabeth II, c. 39, s. 2(4).

The relevant provisions of by-law No. 11737 are as follows:

Section 9.3.—Subject to compliance with the regulations under section 6, the following regulations shall apply in an R2 zone.

Section 9.3.1.—USE: No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged or maintained except for the following uses:

Section 9.3.1.7.—SIGNS: Signs in accordance with the regulations in section 6.14(e).

Section 6.14(e)—SIGNS: Residential—one non-illuminated real estate sign not exceeding four square feet in area, advertising the sale, rental or lease of any building, structure or lot and/or one non-illuminated trespassing, safety or caution sign not exceeding one square foot in area, and/or one sign indicating the name and profession of a physician shall be permitted. Bulletin boards advertising sub-divisions in which lots are for sale and/or advertising building projects.

In the case of an apartment not more than one bulletin board not exceeding twelve square feet in area shall be permitted, provided that all such signs are located on the lot to which they relate.

70 Roxaline Avenue is in an R2 zone.

On June 29, 1959, by-law 11737 was approved by order of the Ontario Municipal Board.

No question is raised by counsel for the appellants as to the validity either of this by-law or of the enabling legislation of the Province of Ontario pursuant to which it was passed. His submission is that, on its true construction, it does not forbid the conduct which the learned Justice of the Peace held to be an offence.

In framing those portions of the by-law with which we are concerned the Council has not enumerated the classes of signs the display of which on residential property is prohib-

ited. It has taken the permissible course of forbidding the display of all signs except those few described in regulation 6.14(e). It results from this that the words of prohibition are extremely wide.

In construing the by-law two rules of construction are of assistance. The first is that conveniently expressed in the maxim, *Verba generalia restringuntur ad habilitatem rei vel personae* (Bac. Max. reg. 10) Broom's Legal Maxims, 10th ed., 438. The rule was regarded as already well established when *Stradling v. Morgan*[1] was decided in 1560 and it is scarcely necessary to quote authority in support of it. It is expressed as follows in Maxwell on Interpretation of Statutes, 11th ed., at pages 58 and 59:

> It is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject-matter with reference to which the words are used finds its most frequent application. However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject-matter. While expressing truly enough all that the legislature intended, they frequently express more in their literal meaning and natural force; and it is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention. It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular if the intention be particular, that is, they must be understood as used with reference to the subject-matter in the mind of the legislature, and limited to it.

An example of the application of the rule is the case of *Cox v. Hakes*[2], in which it was held by the House of Lords that the words of the statute there under consideration:

> The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order of Her Majesty's High Court of Justice, or any judges or judge thereof.

did not give a right of appeal from an order discharging a prisoner under a writ of *habeas corpus,* although, as was pointed out by Lord Halsbury at page 517, the words literally construed were sufficient to comprehend such an order.

The second applicable rule of construction is that if an enactment, whether of Parliament or of a legislature or of a subordinate body to which legislative power is delegated, is capable of receiving a meaning according to which its operation is restricted to matters within the power of the

[1] (1560), 1 Plowd. 199, 75 E.R. 308. [2] (1890), 15 App. Cas. 506.

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enacting body it shall be interpreted accordingly. An alternative form in which the rule is expressed is that if words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result the former is to be adopted. If authority is required in support of this rule, on which we have acted repeatedly, it may be found in the judgment of Duff C.J. in *Reference as to the validity of section 31 of the Municipal District Act Amendment Act, 1941, of Alberta*[1] and in *Attorney General for Ontario v. Reciprocal Insurers*[2].

A municipal corporation which derives its legislative power from an act of the Provincial Legislature, of course, cannot have power to enact a provision which would be *ultra vires* of that legislature.

In the case at bar the learned Justice of the Peace and the Court of Appeal have given effect to the by-law as if it provided:

> During an election to Parliament no owner of property in an R2 zone in Etobicoke shall display on his property any sign soliciting votes for a candidate at such election.

I cannot think that it was the intention of the Council to so enact or that it was the intention of the Legislature to empower it to do so. Such an enactment would, in my opinion, be *ultra vires* of the provincial legislature. The power of the legislature to enact such a law, if it exists, must be found in s. 92 of the *British North America Act*. It is argued for the respondent that it falls within head 13, "Property and Civil Rights in the Province." Whether or not the right of an elector at a federal election to seek by lawful means to influence his fellow electors to vote for the candidate of his choice is aptly described as a civil right need not be discussed; it is clearly not a civil right in the province. It is a right enjoyed by the elector not as a resident of Ontario but as a citizen of Canada.

A political activity in the federal field which has theretofore been lawful can, in my opinion, be prohibited only by Parliament. This rule is, I think, implicit in every judgment delivered in this Court in the recent case of *Oil*

[1] [1943] S.C.R. 295 at 302, 3 D.L.R. 145.
[2] [1924] A.C. 328 at 345, 2 W.W.R. 397, 1 D.L.R. 789.

Chemical and Atomic Workers International Union Local 16-601 v. Imperial Oil Ltd. et al.[1] The division of opinion in that case was not as to the soundness of the rule but as to whether the legislation there in question infringed it. The reasons of the majority, who upheld the provincial legislation which was under consideration, were given by Martland J. and by Ritchie J. Martland J. said, at page 594:

> The legislation, however, does not affect the right of any individual to engage in any form of political activity which he may desire. It does not prevent a trade union from engaging in political activities.

Ritchie J. said at page 608:

> The impugned legislation does not, in my view, have the effect of in any sense precluding any trade union from indulging in political activity or from collecting political party funds from its members.

If by-law 11737 is construed as it has been by the learned Justice of the Peace and by the Court of Appeal, it does not merely affect, it destroys the right of the appellants to engage in a form of political activity in the federal field which has heretofore been possessed and exercised by electors without question.

I incline to agree with Mr. Brewin's submission that Parliament has "occupied the field" in enacting *The Canada Elections Act* and particularly s. 71 which reads as follows:

> 71. Every printed advertisement, handbill, placard, poster or dodger having reference to any election shall bear the name and address of its printer and publisher, and any person printing, publishing, distributing or posting up, or causing to be printed, published, distributed or posted up, any such document unless it bears such name and address is guilty of an offence against this Act punishable on summary conviction as provided in this Act, and if he is a candidate or the official agent of a candidate is further guilty of an illegal practice.

This indicates that Parliament contemplates that persons other than candidates may post up placards and posters having reference to an election and subjects the practice to a limited form of regulation. The impugned by-law forbids such posting up altogether on residential property, which will often be the only place on which the owner of that property has the right to post up such a placard. However, I do not find it necessary to reach a definite conclusion on this branch of Mr. Brewin's argument. In my opinion, the

[1] [1963] S.C.R. 584, 45 W.W.R. 1, 41 D.L.R. (2d) 1.

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legislature has no power to enact a prohibition of the sort which by-law 11737, as construed by the Court of Appeal, contains as such a prohibition would be a law in relation to proceedings at a federal election and not in relation to any subject-matter within the provincial power. As was said by Lord Watson in *Union Colliery v. Bryden*[1]:

> 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.

While that case dealt with an attempted invasion by the provincial legislature of a field exclusively reserved to Parliament by head 25 of s. 91 of the *British North America Act*, the subject matter of elections to Parliament appears to me to be from its very nature one which cannot be regarded as coming within any of the classes of subjects assigned to the legislatures of the provinces by section 92. As to this I agree with the following statement of Taschereau J., as he then was, in *Valin v. Langlois*[2]:

> It is admitted, and is beyond doubt, that the Parliament of Canada has the exclusive power of legislation over Dominion controverted elections. By the *lex Parliamentaria*, as well as by the 41st, 91st, and 92nd sections of the *British North America Act*, this power is as complete as if it was specially and by name contained in the enumeration of the federal powers of section 91, just as promissory notes, Insolvency, &c., are.

It will be noted that the Judicial Committee in refusing leave to appeal stated that, although the questions dealt with in the judgment of this Court were undoubtedly of great importance, leave should be refused because the judgment sought to be appealed was clearly right; see *Valin v. Langlois*[3], particularly at page 122.

It is scarcely necessary to add that, just as the legislature cannot do indirectly what it cannot do directly, it cannot by using general words effect a result which would be beyond its powers if brought about by precise words. An enactment in general words which, if literally construed, would bring about such a result is one to which the maxim, *Verba generalia restringuntur ad habilitatem rei vel personae*, is peculiarly applicable.

Earlier in these reasons I have stated that counsel for the appellants did not question the validity of the by-law or of the enabling provincial legislation. I should make it plain

[1] [1899] A.C. 580 at 588. [2] (1879), 3 S.C.R. 1 at 71.
[3] (1879), 5 App. Cas. 115 at 122.

that this admission on his part depended upon the acceptance of his argument that on its proper construction the by-law did not prohibit the display of the sign in regard to which the appellants were convicted. It was implicit in his argument that if the by-law should be construed so as to prohibit that display it would be *pro tanto* invalid.

For these reasons I agree with the conclusion of Hughes J. that on its proper construction by-law number 11737 does not prohibit the display of the sign displayed by the appellants during the period mentioned in the charge against them.

Before parting with the matter I wish to emphasize, perhaps needlessly, the limited scope of the question we are called upon to decide. The constitutional validity of any provincial legislation is not directly impugned; were it otherwise it would have been necessary to give the notices required by Rule 18. The discussion of the extent to which provincial legislation may affect the carrying on of a political activity in the federal field was raised by counsel and has been pursued in these reasons merely to assist in arriving at the true construction of the by-law. That question of construction is in turn confined to ascertaining whether the general words used, which in their natural meaning do not merely regulate but forbid the display of signs at all times, were intended to have effect so as to forbid during the actual period of an election to Parliament the display of a sign of the sort described in the charge on which the appellants were convicted.

I would allow the appeal with costs in this Court and in the Court of Appeal, set aside the order of the Court of Appeal and restore the order of Hughes J.

The judgment of Fauteux, Martland, Ritchie and Hall JJ. was delivered by

MARTLAND J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario[1], which reversed the decision of Hughes J., and affirmed the conviction of the appellants by a Justice of the Peace, for having unlawfully maintained a sign upon premises owned by them contrary to the provisions of By-law 11737 of the Township of Etobicoke. The by-law in question is a zoning by-law,

[1] [1964] 1 O.R. 641, 43 D.L.R. (2d) 401.

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which, inter alia, forbade the use of a building, structure or land within the area in which the appellants' land was situated for signs, save those for certain specified purposes. The sign in question, attached to the railing of the verandah of a residence, and which read: "Vote Middleton, New Democratic Party", was not within the specified permitted types of sign.

It was admitted, in argument, that the by-law in question was intra vires of the municipality. The contention of the appellants is that the by-law was not intended to have the effect of forbidding the use of such a sign during the actual period of an election to the federal Parliament.

This contention was supported upon two grounds:

1. That the displaying of such a sign was subject exclusively to federal legislation, as being in relation to "Proceedings at Elections", within the meaning of s. 41 of the *British North America Act;* and
2. That the displaying of the sign was a political right of the appellants which was not affected by the by-law.

As to the first point, s. 41 was an interim provision of the *British North America Act,* which provided that certain then existing provincial laws should apply to the election of members to serve in the House of Commons from the several provinces, until the Parliament of Canada otherwise provided. Parliament did so provide, and the effect of s. 41 has been exhausted. The law relating to proceedings at federal elections is now to be found in the *Canada Elections Act,* Chapter 39, Statutes of Canada, 1960.

The appellants contended that certain provisions in that Act recognized implicitly the right to erect signs.

The sections relied upon were the following:

49. (3) No person shall furnish or supply any loud speaker, bunting, ensign, banner, standard or set of colours, or any other flag, to any person with intent that it shall be carried, worn or used on automobiles, trucks or other vehicles, as political propaganda, on the ordinary polling day; and no person shall, with any such intent, carry, wear or use, on automobiles, trucks or other vehicles, any such loud speaker, bunting, ensign, banner, standard or set of colours, or any other flag, on the ordinary polling day.

(4) No person shall furnish or supply any flag, ribbon, label or like favour to or for any person with intent that it be worn or used by any person within any electoral district on the day of election or polling, or within two days before such day, or during the continuance of such election, by any person, as a party badge to distinguish the wearer as the supporter of any candidate, or of the political or other opinions enter-

tained or supposed to be entertained by such candidate; and no person shall use or wear any flag, ribbon, label, or other favour, as such badge, within any electoral district on the day of any such election or polling, or within two days before such day.

* * *

71. Every printed advertisement, handbill, placard, poster or dodger having reference to any election shall bear the name and address of its printer and publisher, and any person printing, publishing, distributing or posting up, or causing to be printed, published, distributed or posted up, any such document unless it bears such name and address is guilty of an offence against this Act punishable on summary conviction as provided in this Act, and if he is a candidate or the official agent of a candidate is further guilty of an illegal practice.

* * *

100. (1) When any election officer is by this Act authorized or required to give a public notice and no special mode of notification is indicated, the notice may be by advertisement, placard, handbill or otherwise as he considers will best effect the intended purpose.

(2) Notices and other documents required by this Act to be posted up may, notwithstanding the provisions of any law of Canada or of a province or of any municipal ordinance or by-law, be affixed by means of tacks or pins to any wooden fence situated on or adjoining any highway, or by means of tacks, pins, gum or paste on any post or pole likewise situated, and such documents shall not be affixed to fences or poles in any manner otherwise.

I cannot find in any of these provisions any recognition by Parliament, express or implied, of an overriding right to erect anywhere a sign for purposes of political propaganda.

Subsections (3) and (4) of s. 49 contain prohibitions against the supplying and use of certain kinds of election propaganda on polling day, and during certain other periods.

Section 71 requires printed advertisements, handbills, placards, posters or dodgers having reference to an election to carry the name and address of the printer and publisher.

Section 100 is the only one of the provisions mentioned which contains enabling, rather than restrictive, provisions. It deals with the posting of official notices required under the Act. It authorizes their posting in certain ways and in certain places. It is significant that subs. (2) contains the words "notwithstanding the provisions of any law of Canada or of a province or of any municipal ordinance or by-law", thereby recognizing that, in the absence of the authority of this section, even the posting of official notices in certain places might properly be forbidden by a provincial statute or a municipal by-law.

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In my opinion there is nothing in the provisions of the by-law relating to the erection of signs which runs counter to any of the provisions of the *Canada Elections Act*.

It is, however, contended that, even though Parliament has not legislated on this subject, the field of proceedings at federal elections is one of federal jurisdiction and cannot be affected by provincial legislation, even though it is so affected only incidentally. Reliance is placed upon the statement of Lord Watson in *Union Colliery v. Bryden*[1]:

> 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.

In that case the issue was as to the validity of a provision regarding Chinese men in a British Columbia statute which provided that:

> no boy under the age of twelve years, and no woman or girl of any age, and no Chinaman, shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground.

The Privy Council held that the provision relating exclusively to Chinese men, who are aliens or naturalized subjects, was within exclusive federal jurisdiction under s. 91(25), and was ultra vires of the British Columbia Legislature.

The basis of the decision is set forth by Lord Watson at p. 587:

> But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia.

This legislation was held to be bad in so far as Chinese men were concerned because the provincial legislature had singled out for its legislation a group within the heading "naturalization and aliens". It is, however, implicit in the reasons that provincial legislation dealing with coal mines, applicable to men in a certain age group, would not only be valid but would apply to Chinese men within that group. There was no suggestion that the provision in issue was not valid in relation to boys, or that it could not apply to Chinese boys under the age of twelve years.

[1] [1899] A.C. 580 at 588.

It should also be noted that the statement of Lord Watson cited by the appellants, deals with those legislative powers conferred upon the federal Parliament under the specifically enumerated heads of s. 91 of the *British North America Act,* which section concludes with the provision, relied upon by Lord Watson in his reasons (at p. 585), that

> any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

There is no class of subject within the enumerated heads of s. 91 which deals with "proceedings at elections". That phrase appears in s. 41. It was there used as a description of a subject matter already covered by certain existing provincial laws; i.e., "proceedings at elections" was defined by the terms of those provincial statutes.

Undoubtedly the federal Parliament can legislate and has legislated respecting federal elections. To the extent that it has legislated, such legislation governs and would override any provincial enactment which ran counter to it. The point which I make is that there is no general field of legislation on this subject assigned to the federal Parliament under an enumerated class in s. 91 to which the proviso at the conclusion of that section can attach.

That being so, in my opinion, provincial legislation in relation to the use of property, which, in its pith and substance, is in relation to property and civil rights in the province, and which is of general application, is not only valid, but can apply even though, incidentally, it may affect the means of propaganda used by an individual or by a political party during a federal election campaign.

The only authority to which we were referred in support of this doctrine of non-applicability was the *Reference regarding the Minimum Wage Act of Saskatchewan*[1]. That was a reference to determine whether *The Minimum Wage Act,* R.S.S. 1940, c. 310, applied to the employment of Leo Fleming in the post office at Maple Creek, Saskatchewan. Fleming had been employed temporarily by the postmistress of a revenue post office in December, 1946, and she had been charged with a breach of that Act. There was no suggestion that the Act purported to be applicable generally

[1] [1948] S.C.R. 248, 91 C.C.C. 366, 3 D.L.R. 801.

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to federal civil servants. The decision that it did not apply to Fleming's employment was that, though he was paid by the postmistress out of her postal revenues, he was employed in the business of the Post Office of Canada and was a part of the postal service. That being so, the terms of his employment were the subject matter of federal legislation. In essence, the decision was that provincial legislation as to wages did not apply to federal Crown servants, even though not paid directly by the Crown. It does not support the very wide proposition urged by the appellants in the present case.

In *Attorney-General for Alberta v. Attorney-General for Canada*[1], the Bill entitled "An Act respecting the Taxation of Banks" was held to be ultra vires of the Alberta Legislature, not because a provincial taxing statute could not apply to banks, but because it applied only to banks and because its true purpose was not taxation to raise provincial revenue but the prevention of the operation of banks in the province.

In *Great West Saddlery Company Limited v. The King*[2], the questions in issue involved the validity of certain provincial statutes affecting the position of companies incorporated under the provisions of the *Canadian Companies Act*. One of the statutes under consideration was the *Ontario Mortmain and Charitable Uses Act*. It was held that a federal company was subject to the provisions of this Act, because it was one of general application.

This, I think, is an answer to the suggestion that, if the municipality could not have enacted a by-law aimed exclusively at federal election signs, then a general by-law could not be applicable to them. The essential feature of the by-law in question here is that it is of general application and, admittedly, valid.

I turn now to deal specifically with the second head of the appellants' argument, although what has already been said is, in part, applicable to that submission. The contention is that the displaying of the sign by the applicants was the exercise of a political right in a federal election which would not be affected by any legislation other than federal.

[1] [1939] A.C. 117, [1938] D.L.R. 433.
[2] [1921] 2 A.C. 91, 1 W.W.R. 1034, 58 D.L.R. 1.

The appellants relied mainly upon the decisions of this Court in *Saumur v. The City of Quebec*[1]; *Switzman v. Elbling*[2]; and the reasons of Chief Justice Duff in the *Reference re Alberta Statutes*[3].

The first case involved an attack by a member of Jehovah's Witnesses upon the validity of a by-law of the City of Quebec, which forbade distribution in the streets of the City of books and pamphlets without permission of the Chief of Police of the City. Four of the members of the Court who found the by-law to be invalid were of the view that the true purpose of the by-law was not in relation to the administration of streets, but to exercise censorship, interfering with freedom of religious worship, a subject matter of federal legislation.

Kerwin J. held that the by-law could not operate to prevent the distribution of the literature of Jehovah's Witnesses because of the protection afforded to freedom of religious worship by a pre-Confederation statute of 1852 and by the *Freedom of Worship Act* of the Province of Quebec.

Four members of the Court would have held the by-law to be valid.

In the present case, however, the by-law is admittedly valid and there has been no suggestion that its aim and purpose was anything other than the maintenance of certain standards of amenity in residential areas in the Township. This being so, I would adopt, in relation to this issue, what was said by Cartwright J. in the *Saumur* case respecting provincial legislation which might affect religion. At p. 387 he said:

> It may well be that Parliament alone has power to make laws in relation to the subject of religion as such, that that subject is, in its nature, one which concerns Canada as a whole and so cannot be regarded as of a merely local or private nature in any province or as a civil right in any province; but we are not called upon to decide that question in this appeal and I express no opinion upon it. I think it clear that the provinces, legislating within their allotted sphere, may affect the carrying on of activities connected with the practice of religion. For example, there are many municipal by-laws in force in cities in Ontario, passed pursuant to powers conferred by the Provincial Legislature, which provide that no buildings other than private residences shall be erected on certain streets. Such by-laws are, in my opinion, clearly valid although they prevent any

[1] [1953] 2 S.C.R. 299, 106 C.C.C. 289.
[2] [1957] S.C.R. 285, 117 C.C.C. 129, 7 D.L.R. (2d) 337.
[3] [1938] S.C.R. 100, 2 D.L.R. 81.

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religious body from building a church or similar edifice on such streets. Another example of Provincial Legislation which might be said to interfere directly with the free exercise of religious profession is that under which the by-law considered in *Re Cribbin v. The City of Toronto,* (1891) 21 O.R. 325, was passed. That was a by-law of the City of Toronto which provided in part:—

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

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

Switzman v. Elbling also involved the question of constitutional validity of legislation, in this case the *Quebec Act respecting Communistic Propaganda.* The majority of the Court held that the statute was legislation in respect of criminal law. Three members of the Court held that it was not within any of the powers specifically assigned to the provinces and that it constituted an unjustifiable interference with freedom of speech.

In each of these cases some of the reasons have recognized the existence of fields of federal legislative jurisdiction in relation to freedom of religion (Saumur) and freedom of speech (Switzman). In each of these cases this view was expressed in relation to legislation which the judges expressing that view had found not to fall within any head of s. 92.

The source of this opinion as to such fields of federal jurisdiction is the judgment of Chief Justice Duff in the *Reference re Alberta Legislation.* He was dealing with Bill No. 9, passed by the Alberta Legislature, but which had not received royal assent, "To Ensure the Publication of Accurate News and Information". This bill would have required newspapers which published material criticizing the provincial government to publish a corrective or amplifying statement if required by a government board.

Chief Justice Duff held that this Bill presupposed, as a condition of its operation, that the *Alberta Social Credit Act* was valid, and, since that Act was held to be ultra vires of the Province, the ancillary and dependent legislation fell with it.

In his reasons, however, he suggested another ground on which it might be contended that the Bill was invalid, but

expressed no view as to whether or not it would be unconstitutional as offending against that proposition.

His well known statement is as follows, at p. 134:

> The question, discussed in argument, of the validity of the legislation before us, considered as a wholly independent enactment having no relation to the *Alberta Social Credit Act*, presents no little difficulty. Some degree of regulation of newspapers everybody would concede to the provinces. Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of *The British North America Act* and the statutes of the Dominion of Canada.

It is significant that this statement clearly recognizes that a province has a right to regulate newspapers. Any such regulation must, to some extent, be a curtailment of unlimited freedom of discussion. Chief Justice Duff said that such provincial control could not go beyond a certain point, which he defined.

His views were concurred in by Davis J. Cannon J. was of the view that a province could not curtail free discussion of public affairs, this being within the federal field of criminal law. The other three members of the Court expressed no view regarding this point.

Assuming the correctness of the proposition stated by Chief Justice Duff and the existence of federal legislative powers in the field of freedom of religion and freedom of discussion, there is no case as yet which has ruled that provincial legislation not directed at those fields, but validly enacted in relation to property and civil rights, cannot, incidentally, effect any curtailment of the same.

Earlier in his reasons, Chief Justice Duff said, at p. 133:

> 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."

It is significant that of the two examples which he chose, one, the law of defamation, was a provincial matter, the other, sedition, a federal one.

Freedom of discussion is not an unlimited right to urge views, political or other, at any time, in any place, and in

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any manner. It is a freedom subject to law, and, depending on the nature of the legislation involved, may be subject to certain restrictions, whether federal or provincial.

In *Oil, Chemical and Atomic Workers International Union v. Attorney-General of British Columbia*[1], the appellant urged that provincial legislation preventing the use of union dues, paid as a condition of membership, for contribution to a political party, or candidate, was not within any head of s. 92 and interfered with freedom of political activity. The majority of this Court held that the legislation was in pith and substance labour legislation and within provincial powers.

Counsel for the appellant in that case placed reliance on the passage quoted from the judgment of Chief Justice Duff and urged that the legislation in question effected such a curtailment of the right of association for political purposes as to fall within the proposition there stated.

Dealing with that submission I said, at p. 594:

> The legislation, however, does not affect the right of any individual to engage in any form of political activity which he may desire. It does not prevent a trade union from engaging in political activities. It does not prevent it from soliciting funds from its members for political purposes, or limit, in any way, the expenditure of funds so raised. It does prevent the use of funds, which are obtained in particular ways, from being used for political purposes.

In the same case Ritchie J. said, at p. 608:

> Even if it could be said that the legislation under attack (s. 9(6), (c) and (d)) had any effect on political elections such an effect could, in my view, only be characterized as incidental and this would not alter the fact that the amendment in question is a part and parcel of legislation passed "in relation to" labour relations and not "in relation to" elections either provincial or federal.

The test stated by Chief Justice Duff, assuming it is a sound proposition of constitutional law, is one for the determination of the validity of provincial legislation. That issue is not before us here. This by-law is admittedly valid. There is no suggestion in the reasons of Chief Justice Duff that, if provincial legislation regulating newspapers did not go beyond the limit which he defined, the legislation would be inapplicable in so far as it effected any curtailment of public discussion during a federal election.

Furthermore, applying his test to the circumstances of the present case, I would not accept the proposition that,

[1] [1963] S.C.R. 584, 45 W.W.R. 1, 41 D.L.R. (2d) 1.

because a by-law of general application incidentally prevented a particular form of political propaganda from being used in a particular area, this constituted a substantial interference with the working of the parliamentary institutions of Canada.

In my opinion the appeal fails and should be dismissed with costs.

Appeal allowed with costs, Fauteux, Martland, Ritchie *and* Hall JJ. *dissenting.*

Solicitors for the appellants: Cameron, Brewin, McCallum & Scott, Toronto.

Solicitors for the respondent: McMaster, Montgomery & Co., Toronto.