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

J. W. Mik

R. v. McKAY [1964], 1 O.R. 641, 43 D.L.R. (2d) 401 (C.A.)—CONSTITUTIONAL LAW—CIVIL LIBERTIES AND CONSTITUTIONAL GUARANTEES—ZONING BY-LAW PROHIBITING SIGNS ON PRIVATE PROPERTY—APPLICABILITY TO FEDERAL ELECTION SIGNS—In the recent decision of *R. v. McKay*[1] the Ontario Court of Appeal reinstated a conviction for breach of a by-law,[2] enacted under the authority of the *Municipal Act*[3] and the *Planning Act*,[4] prohibiting the posting of signs, including election signs, on private property. The McKays owned a house in the township of Etobicoke in a residential area designated R2. During the last federal election they had attached to a wire over their veranda a 14" x 16" sign proclaiming: "Vote David Middleton, New Democratic Party". They were convicted before a magistrate.

On appeal before Hughes J. in the Supreme Court of Ontario[5] the conviction was successfully attacked on the basis that although

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28 Smith, p. 172.
29 *Ibid*, at p. 180.

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

2 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:

9.3.1.7. SIGNS: Signs in accordance with the regulations in s. 6.14.

S. 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.

3 R.S.O. 1960, c. 249, s. 379(1), para. 122. "By-laws may be passed by the councils of local municipalities, 122. For prohibiting or regulating the erection or signs or other advertising devices and the posting of notices on buildings or vacant lots within any defined area or areas on or land abutting on any defined highway or part of a highway."

4 R.S.O. 1960, c. 296, s. 30(1), para. 2. "By-laws may be passed by the councils of municipalities, 2. For prohibiting the erection or use of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway."

5 [1963] 2 O.R. 162; 38 D.L.R. (2d) 668.

the by-law was not invalid *per se* it could not be construed as prohibiting the erection of election signs or posters. Hughes J. reasoned that "the display of signs and posters at election time cannot be considered as an element in the user of land any more than the display of coloured lights at Christmas time or of decorations generally to mark occasions of national holidays and rejoicing".[6] The by-law contemplated signs only in relation to the established use of land and not in the wider sense of regulation authorized by s. 379 of the *Municipal Act*.[7] The signs, therefore, not being a user of land, and the by-law not being intended to regulate signs *qua* signs, the by-law in question had no application to the election banner and the conviction was quashed. Hughes J. also based his decision on a second and more substantial ground, namely, that the posting of the election banner related to "proceedings at elections", a field which the Dominion Parliament had occupied by enacting the *Canada Elections Act*.[8] The learned Justice found that the circumstances did not justify a declaration that the by-law was wholly *ultra vires* because it could have a salutary effect in other circumstances; however, it did not extend to prohibit the display of election posters during federal elections.

The Court of Appeal curtly dismissed the first ground of decision below—which point was conceded by the respondents—saying that "so far as an election sign is concerned, the legislation deals specifically with the question of signs and . . . that is sufficient without a consideration of whether or not a particular sign is an element of user of the particular property".[9] As regards the second basis for decision, Aylesworth J.A., who delivered the oral judgment of the court, observed that the phrase contained in s. 41 of the *B.N.A. Act*,[10] namely, "proceedings at elections" is so broad and imprecise that in its application it could conceivably cover much of what is considered property and civil rights in the province. He then presented some illustrations of how political parades and rallies which are incident to an election might interfere with traffic and the important civil right of passage on a thoroughfare. Presumably these illustrations serve to demonstrate that the same subject matter may have different constitutional aspects of varying importance depending on the circumstances. He then concludes that "proceedings at elections" in this

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6 *Id.* at 167.
7 R.S.O., 1960, c. 249.
8 *Statutes of Canada* 1960, c. 39.
9 (1964), 43 D.L.R. (2d) 401 at 403.
10 The British North American Act, 1867, 30 & 31 Victoria, c. 3, s. 41. "Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections or such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same Provinces."

broad sense is a field of concurrent jurisdiction and "that until and unless the Parliament of Canada sees fit to legislate upon a particular subject under the heading of 'proceedings at elections', which particular subject falls within the ambit of property and civil rights, the Province is at liberty to legislate upon the question of such property and civil rights and in doing so is not improperly invading a field exclusively reserved to the Parliament of Canada".[11] The field being unoccupied,[12] the province, or by its authority a municipality, is free to enact zoning by-laws which would, in certain defined residential areas, prohibit the display of election signs for the purpose of protecting the rights of the neighbours of a politically exuberant individual to the enjoyment of their land. Granted that the signs might not be dangerous *per se* or constitute a nuisance, they might "yet be inelegant, inartistic, [or] otherwise objectionable to the surrounding residents in the enjoyment of their property in the area".[13]

It is submitted that the court, by failing to follow the established canons of constitutional construction, erred in its conclusions. The method of approach enunciated by the Judicial Committee of the Privy Council in *John Deere Plow Co. v. Wharton*[14] is to ask, first, whether the challenged law has any feature of meaning which might reasonably cause it to fall within one of or more of the provincial classes of laws in s. 92 of the *B.N.A. Act*. Assuming that it does possess a "provincial" feature, the next step is to consider whether it also has features which would reasonably cause it to fall within the scope of federal legislative jurisdiction.[15] If the answer to this second question is in the affirmative, the Court is confronted with the classic constitutional issue, the competition between the powers assigned to the Dominion and the provinces. It is then the task of the court to weigh the relative importance of the competing interests and factors which would incline the scales in favour of the exclusive jurisdiction of either the Dominion Parliament or the provincial legislature.

In this casenote the problem will be approached by, first, accepting the construction placed on the by-law by the Court of Appeal, namely, that it was intended to include election signs during the

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11 (1963), 43 D.L.R. (2d) 401 at 404.

12 Surprisingly federal legislation in relation to printed advertisements and handbills having reference to an election is confined to the following provision. "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." *Canada Elections Act*, 1960, c. 39, s. 71.

13 (1964), 43 D.L.R. (2d) 401 at 405.

14 [1915] A.C. 330.

15 Although this test was devised specifically with the competition between s. 91 and s. 92 of the *B.N.A. Act* in mind, it is submitted that there is no essential difference in principle where legislative competence with respect to a given subject matter is conferred on the Parliament of Canada through some section other than s. 91.

course of a federal election, and then submitting the by-law to the test authoritatively pronounced in the *John Deere Plow Co.* case.[16] It is the contention of the writer that the display of election signs on private property during the course of a federal election has aspects which fall within the scope of the legislative jurisdiction of both the Dominion and the provinces. The balance of the casenote will be devoted to an assessment of the competing interests: the right of property owners to prevent the temporary display in the neighbourhood of election posters on the ground that it offends their taste or detracts from the appearance of the neighbourhood, and the right of a candidate to reach the public through election signs. If on this basis it is determined that it is within the provincial legislative competence to authorize the by-law, that determines the matter; however, if such legislative power cannot be attributed to the province, it will be necessary to re-evaluate the intended scope of the by-law.

It is readily apparent that signs in general involve a user of the property on which they are placed, and the right to place them in a given location is a civil right. Even when consideration is focused on election signs as a particular species of the genus "sign", it is clear that their display constitutes a user of property. Therefore, the subject matter of the impugned by-law, namely, signs, and election signs in particular, presents an aspect which touches upon provincial legislative jurisdiction.

The question whether the subject matter of this by-law has an aspect touching upon the legislative jurisdiction of the Parliament of Canada may be approached from two directions: first, by considering whether the display of election posters falls within s. 41 of the *B.N.A. Act* as "Proceedings at elections"; secondly, by asking whether the display of these electioneering advertisements goes to the core of freedom of speech, transcending mere civil rights in the province, and is not a proper subject of provincial legislation.

It is submitted that the phrase "proceedings at elections", appearing as it does in s. 41 of the *B.N.A. Act,* must have some meaning. The existence of provisions in the *Canada Elections Act*[17] relating to lists of electors, notices and other documents required by the Act to be posted in a public place and which "may, notwithstanding the provisions of any law of Canada or a province or of any municipal ordinance or by-law be affixed . . . to any wooden fence situated on or adjoining any highway",[18] might favour a narrow construction of the phrase "proceedings at elections", confining it to the official documents and procedures essential to the functioning of a national election, were it not for the fact that s. 71 specifically deals with election posters and handbills.[19] The section requires that the poster bear the name and address of its printer and publisher, and, therefore,

16 [1915] A.C. 330.
17 *Statutes of Canada,* 1960, c. 39.
18 *Ibid.,* s. 100(2).
19 *Supra,* note 12.

to this extent at least it is considered as "proceedings at elections". The display of election signs is so intimately connected with the course of elections, as they are known in Canada, that any prohibition or restriction on the reasonable display of election advertisements would constitute an interference with "proceedings at elections". The freedom to express one's views and to solicit political support is the very essence of an election and the dissemination of opinions and solicitations to the public in the course of an election campaign is to such a significant extent accomplished by means of posters, placards and signs that their display ought to be construed as "proceedings at elections". In *Dionne v. Municipal Court of Montreal*,[20] a decision of the Quebec Superior Court, Scott Associate C.J. overruled the magistrate's conviction of the appellant, a candidate for the Labour Progressive Party in a federal election, who, without having obtained a permit from the Police Department, in contravention of a by-law, distributed from door to door circulars soliciting votes. Scott Associate C.J. stated:

> In its pith and substance by-law 2077 manifestly encroaches upon and usurps a field reserved exclusively for the authority of Parliament so far as a Dominion election is concerned. By the *B.N.A. Act* Parliament and the Legislatures of the Provinces respectively control their own elections . . .[21]

The subject matter of this legislation could also fall within the residual jurisdiction of the Parliament of Canada conferred by the preamble of s. 91 of the *B.N.A. Act*. There is a critical relationship between the free public discussion of political affairs and the functioning of a responsible democratic Parliament.

> The statute [i.e. *The British North America Act*] contemplates a parliament working under the influence of public opinion and public discussion . . . This is signally true in respect of the discharge by the 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.[22]

The institution derives its vigour and vitality from the free concourse and conflict of public opinion and public discussion. It is the life blood of democratic self-government as we know it in Canada. In the words of Duff C.J.C.:

> We do not doubt . . . that the Parliament of Canada possesses authority to legislate for the protection of this right. That authority rests upon the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from the *British North America Act* as a whole . . . ; and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament . . .
>
> 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 legislation of any one of the provinces, as repugnant to the provisions of the *British North America Act* . . . The subject-matter of such legislation could not be described as a provincial

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20 (1956), 3 D.L.R. (2d) 727.

21 *Id.* at 734.

22 *Reference Re Alberta Statutes*, [1938] S.C.R. 100 at 133 *per* Duff C.J.C.

> 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.[23]

Kerwin J. (as he then was) in *Saumur v. City of Quebec*[24] dissented from the views expressed by Duff C.J.C. and Cannon J. in *Re Alberta Statutes*[25] and advanced the opinion that the freedom of the press like the right to practice one's religion were civil rights in the province within the legislative scope of s. 92(13) of the *B.N.A. Act*. It is open to argument that an election sign is in no sense an official document but is advertising owned and paid for by a private individual whereby he hopes to solicit the votes of other private individuals, and the right to display his own advertising is a civil right which it is within the jurisdiction of the provincial legislature to control. Rand J.,[26] however, chose to follow the reasoning of Duff C.J.C. in *Re Alberta Statutes*[27] as also did Estey J.[28] Kellock J., who also approved of Duff C.J.C.'s reasoning, drew a distinction between civil rights and public rights which transcend mere civil rights in the province;[29] freedom of religion, he concluded, fell within this latter category. It is submitted that, in view of his approval of the reasoning of Duff C.J.C. and Cannon J., freedom of expression in political affairs would also come within this class of rights. Election posters and signs in the course of an election campaign are a traditional form of the exercise of this right.

> The impugned by-law purports to curtail inherent rights enjoyed by our citizens in all political matters both before and after confederation and protected by the *B.N.A. Act*. Both before and after 1867 candidates seeking public office and their supporters had the right to solicit votes both orally and by writing, provided of course such solicitation did not contravene the criminal law.[30]

Abbott J. in *Switzman v. Elbling and A.-G. Que.*,[31] refers to the *B.N.A. Act* and the *Canada Elections Act*[32] and continues:

> 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.
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> 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.[33]

Now that it has been established that the subject matter of the by-law possesses aspects which could conceivably bring it within the

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23 *Id.* at 133, 134.
24 [1953] 2 S.C.R. 299.
25 [1938] S.C.R. 100.
26 [1953] 2 S.C.R. 299 at 325-334.
27 [1938] S.C.R. 100.
28 [1953] 2 S.C.R. 299 at 356-363.
29 *Id.* at 348, 349.
30 *Dionne v. Municipal Court of Montreal* (1956), 3 D.L.R. (2d) 727 at 735, *per* Scott C.J.
31 [1957] S.C.R. 285.
32 R.S.C. 1952, c. 53.
33 [1957] S.C.R. 285 at 327, 328.

legislative jurisdiction of both the provincial legislature and the Dominion Parliament, the next step is to evaluate the relative importance of these aspects. To some extent this has already been done, but there remain to be considered certain details which might incline the scales either in favour of the exclusive legislative jurisdiction of the province or of the Dominion.

In several of the decisions involving by-laws placing restrictions upon freedom of expression,[34] the by-law contained a provision whereby its application could be avoided by obtaining permission from the chief of police or some other civic functionary. The Court regarded such a condition as particularly objectionable in that it placed a discretionary power in the hands of civic authorities, which power could be exercised in favour of the established order and denied to all others. In his decision in *Saumur v. City of Quebec*[35] Kellock J. intimated that "if the by-law were one which prohibited all distribution in the streets, entirely different considerations would very well apply".[36] The by-law in *R. v. McKay* applies to all signs regardless of party affiliation. However, on the basis of the reasoning of Duff C.J.C. in *Re Alberta Statutes*[37] the by-law is objectionable quite apart from the question of discrimination against any particular party or candidate. The decisive test is not whether the by-law discriminates against a particular party but "whether [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".[38] Election posters and handbills play a major role in bringing a candidate and his cause to the attention of the electorate and establish some degree of acquaintance without which an even remotely intelligent choice on the part of the elector is impossible. It is of the essence of parliamentary government that candidates for office be free to approach the electorate and make their candidacy and ideas known to them by means of posters, placards and signs. Any gratuitous interference with this right is an unwarranted restriction on the effectiveness of the democratic process of government.

It is at this stage that the problems posed by Aylesworth J.A. in the course of his judgment in *R. v. McKay*[39] must be answered. In one illustration the learned Justice describes a parade of considerable magnitude, consisting of adherents to a particular political party engaged in the election, taking place in a crowded thoroughfare. This, he states, would affect important civil rights within the province; it would endanger the public peace, complicate the control

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[34] *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *Switzman v. Elbling and A.-G. Que.*, [1957] S.C.R. 285; *Dionne v. Municipal Court of Montreal* (1956), 3 D.L.R. (2d) 727.

[35] [1953] 2 S.C.R. 299.

[36] *Id.* at 338.

[37] [1938] S.C.R. 100.

[38] *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*, (1963), 41 D.L.R. (2d) 1, *per* Martland J. at p. 12.

[39] (1963), 43 D.L.R. (2d) 401.

of traffic, and interfere with the ordinary use of the streets by the citizens.[40] Is the province or municipality to stand by, impotent to intervene, because the concourse could, in its broadest sense, be considered proceedings at elections? Would a homeowner be powerless to prevent an exceptionally enthusiastic party worker from tacking election posters all over the exterior of the homeowner's house in the name of freedom of expression in political affairs? Could a candidate with impunity erect a large sign obscuring part of a busy intersection or containing flashing red and green lights which would be certain to attract a motorist's attention by causing a momentary confusion with traffic signals? The answer to these questions is an unequivocal no. The source of the provincial authority to intervene in these cases is not an inherent jurisdiction over proceedings at elections or the right of freedom of expression, but may be arrived at by the canons of constitutional interpretation as enunciated in *John Deere Plow Co. v. Wharton.*[41] The relative importance of the aspects of the subject matter must be weighed against each other to determine where the legislative competence lies. No one would deny that in the above illustrations substantial civil rights are involved and legislation by the province to remedy the situation would not constitute a gratuitous interference in a federal subject matter, the emphatic assertion of which in these illustrations amounts to license. In such a situation the pith and substance of the provincial legislation would not be in respect of proceedings at elections or freedom of expression but in respect of "property and civil rights in the province".

Because this was a subject matter with two different aspects from the constitutional point of view, both Hughes J. and the Court of Appeal arrived at the conclusion that this was a field of concurrent jurisdiction. The former held that it had been fully occupied by the *Canada Elections Act;*[42] the latter accurately observed that the *Canada Elections Act*[43] makes almost no provision for election signs. If effect is given to the finding of the Court of Appeal, in the absence of specific federal legislation relating to election posters, the province would be free to legislate on election posters *per se,* regulating their colour, size and display or prohibiting them altogether even though no substantial property or civil rights are at stake. But the right to legislate in a concurrent field is a two-edged sword. Conversely the Dominion Parliament could occupy the field and authorize all of the absurd illustrations mentioned above.[44] Such a result is not to be countenanced. The doctrine of concurrent powers is applicable only where it develops that the federal and provincial aspects of the challenged law are of equivalent importance. Where this is the case, the allocation of exclusive power one way or the other is not pos-

40 *Id.* at 403.
41 [1915] A.C. 330.
42 *Statutes of Canada,* 1960, c. 39.
43 *Ibid.*
44 *Supra,* p. 11.

sible.[45] The issue in this case ultimately comes down to whether the display of election posters on private property during the course of an election campaign and the right to property owners in a neighbourhood to prevent the temporary display of such posters on the grounds that it offends their taste, or detracts from the appearance of the neighbourhood, are of equivalent importance.[46] This is a question of values. It has been the contention of the writer that they are not of equivalent importance, that the importance of permitting a candidate in an electoral campaign to present his message to the electorate outweighs the temporary inconvenience to neighbouring landowners caused by the display of an election placard on private property. If that is a true assessment of the relative values of the competing interests, then this cannot be a concurrent field of legislative jurisdiction and the power to authorize the enactment of such a by-law is *ultra vires* the provincial legislature.

> The true nature and character of an enactment is to be discerned by a consideration of its meaning, purpose and effect, and does not depend upon whether it is enacted by Parliament or by a Provincial legislature. The statement of Lord Watson in *Union Colliery Company of British Columbia v. Bryden* has been repeatedly followed:
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> > '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.'[47]

Turning to the question which was raised at the beginning of this investigation: does this particular by-law and the provincial legislation from which it derives its authority extend to election signs? This problem was not considered by the Court of Appeal in view of their assessment of provincial legislative powers. It is a principle of constitutional interpretation that if possible such a meaning will be given to a statute as to uphold its validity, for a legislative body must be held to keep within its powers.[48] It is submitted that Hughes J. was correct in adopting the approach taken by Kerwin J. in *Saumur v. City of Quebec*[49] where the learned Justice, dealing with a similar restrictive by-law, stated that the circumstances did not justify a declaration that the by-law was *ultra vires* because it would have a salutary effect in other circumstances; however, he did declare that the by-law did not extend to prohibit Jehovah's Witnesses from distributing books and pamphlets on the street.[50] Similarly the by-law

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[45] W. R. Lederman, "Outline of an Approach to problems of the validity of Federal or provincial laws under the *B.N.A. Act.*"

[46] c.f. *People v. Stover,* 12 NY 2d 462; 191 NE 2d 272; 240 NYS 2d 734 (1963) where a homeowner as a "political protest against high taxes" in violation of a by-law hung laundry from year to year over his front lawn. In a dissenting judgment it was maintained that the by-law exceeded the municipality's zoning authority under the police power in that it was not sufficiently related to the public safety, health, morals or welfare of the community but was directed solely towards aesthetic purposes. The attempt so to restrict the police power to enact zoning by-laws appears to be a dying cause in the U.S.A.

[47] *O'Grady v. Sparling,* [1960] S.C.R. 804, *per* Cartwright J. at 819.

[48] *MacLeod v. A.-G. N.S.W.,* [1891] A.C. 455.

[49] [1953] 2 S.C.R. 299.

[50] *Id.,* at 322.

in issue and the legislation authorizing it is valid in so far as it deals with signs, but does not extend to election signs *qua* election signs displayed during the course of a federal election.

On the basis of *R. v. McKay*[51] it is now the law in Ontario that the provincial legislature is free to interfere with and legislate in relation to an important segment of election advertising in federal elections; on the other hand, provincial elections are wholly a matter of provincial concern. In view of the complexity and detail of federal election legislation, particularly in the *Canada Elections Act*,[52] it is all the more striking that there should be an almost total absence of any legislation with respect to such a fundamental element of Canadian elections. It is to be hoped that the problems raised by the decision of the Court of Appeal will be resolved by appropriate legislation or, should the problem again arise in the courts, by the Supreme Court of Canada. It is in one sense a favourable comment on the tolerance in Canada in political affairs and the healthy state of Canadian democratic institutions that a need has never been felt for any such legislation, and with the exception of *Dionne v. Municipal Court of Montreal*,[53] where the problem arose in a slightly varied form, this matter has not been a subject of reported litigation in Canadian courts.

J. W. MIK