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A. G. for Canada et al v. Claire Dupond: The Right to Assemble in Canada?

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> The renewal of the Federation must confirm the pre-eminence of citizens over institutions, guarantee their rights and freedoms and ensure that these rights and freedoms are inalienable.[1]

These words from Prime Minister Trudeau are a reflection of the concern today for protection of individual rights and freedoms. His words also reflect the past concerns with protection of individual rights and freedoms particularly in countries which espouse democratic principles. He has recognized that the balance between individual and state interests must be struck in favour of the individual. In order to achieve this result, there must be some consensus in a nation as to what are to be rights and freedoms worthy of protection.

Demonstrations, assemblies, parades and street corner orators have been an integral part of the way of life in common law countries such as the United States, Great Britain and Canada. In the United States these assertions of individual liberty are regarded as part of the fundamental freedoms which their constitutional Bill of Rights guarantees will be protected. In Canada, the Supreme Court made it clear on January 19, 1978 that they did not regard demonstrations and street assemblies as fundamental rights or, for that matter, as individual rights at all.[2] They chose, rather to place the state interest above the interest of the individual at a time of political crisis when individual rights are most in need of protection. Although this decision is ostensibly limited to parades, assemblies and demonstrations it could have future implications when other courts are attempting to define the limits of individual liberty. It is this restrictive concept of fundamental freedoms which will create most concern for the future.

I. *Factual Background*

A. G. for Canada v. *Claire Dupond*[3] began in 1969 in the City of

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1. *A Time for Action* — A White Paper on the Constitution presented to Parliament on June 12, 1978
2. *A. G. for Canada et al* v. *Claire Dupond* (1978), 19 N.R. 478
3. *Id.*

Montreal. At this time there were a number of parades, demonstrations and assemblies associated with the F.L.Q. movement. In response to the growing violence, the City of Montreal enacted a By-law which provided for absolute prohibition of any demonstrations, parades or gatherings upon receipt of reports by the City Executive Committee from the city police and legal department stating that there were

> 5. . . . reasonable grounds to believe that the holding of assemblies, parades or gatherings will cause tumult and endanger safety, peace or public order or give rise to such acts . . . .[4]

The By-law did not specify any period for which these demonstrations could be forbidden but left it open to the Executive Committee who could

> 5. . . . by ordinance take measures to prevent or suppress such dangers by prohibiting for the period that it shall determine, at all times or at the hours it shall set on all or part of the public domain of the city, the holding of any or all assemblies, parades or gatherings.[5]

The preamble to the By-law stated that it was a

> By-law relating to exceptional measures to safeguard the free exercise of civil liberties, to regulate the use of the public domain and to prevent riots and other violations of order, peace and public safety.[6]

On November 12, 1969 the Executive Committee met and, pursuant to reports from the Director of the Police Department and the Law Department[7] they passed an "ORDINANCE TO PROHIBIT THE HOLDING OF ANY ASSEMBLY, PARADE OR GATHERING ON THE PUBLIC DOMAIN OF THE CITY OF MONTREAL FOR A TIME PERIOD OF 30 DAYS." The ordinance was based upon the information contained in the report from the city police director who pointed out that in the previous two months, demonstrations had increased and agitators had infiltrated crowds resulting in violence. Adding this violence to the frequency of violence in the past, the police felt that it would be impossible to guarantee against such recurrences in the future.

This By-law and ordinance were challenged by Claire Dupond who was a ratepayer of the City of Montreal. At trial the judge concluded that section 5 of the By-law created a new offence which was intended

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4. By-law 3926 of the City of Montreal
5. *Id.*
6. *Id.*
7. Pursuant to By-law 3926

to supplement the *Criminal Code*. Therefore, the ordinance was in relation to criminal law and *ultra vires* the Province.[8] On appeal, the Quebec Court of Appeal characterized the By-law and ordinance as local police regulations thereby falling within the domain of provincial jurisdiction.[9]

Claire Dupond continued her challenge to the Supreme Court of Canada. In the Supreme Court the By-law and ordinance were challenged on the following two grounds:

1. They are in relation to Criminal law and *ultra vires* of the City of Montreal and of the Provincial legislature;

2. They are in relation to and in conflict with the fundamental freedoms of speech, of assembly and association, of the press and of religion, which are made part of the constitution by the preamble of the *British North America Act*, 1867. . . .[10]

II. *Federal vs. Provincial Jurisdiction*

The majority in the Supreme Court of Canada supported the position adopted by the Court of Appeal on the first ground. They immediately characterized the By-law, by reference to the early Privy Council decision in *Hodge* v. *The Queen*,[11] as pertaining to local matters. They regarded it as a preventive, not a punitive measure because it prohibited all assemblies, parades or gatherings whether violent or innocuous. But then the court maintained that the By-law was more than purely prohibitory because the potential existed for restricting demonstrations to specific times and locations. It is clear, however, that the By-law was primarily intended to prohibit activity rather than merely regulate it, in contrast to the Ontario *Liquor Licensing Act* in *Hodge* which created a broad regulatory scheme. The Act in *Hodge* was not simply aimed at preventing activity but it was also directed to how a particular activity could occur. In other words, any sanctions attached to this Liquor legislation were attached to a valid provincial regulatory scheme. This decision is not support for the Montreal By-law which had as its primary focus the prevention of violent activity on the streets whether caused by a member of the assembly or by by-standers apart from the assembled group.

The Court in *Dupond* then engaged in a circular reasoning process by arguing that when an enactment is itself of a local nature "the onus

8. *A. G. for Canada et al* v. *Claire Dupond* (1978), 19 N.R. 478 at 490
9. *Id.*
10. *Id.* at 489
11. (1883), 9 App. Cas. 117 (P.C.)

of showing that it otherwise comes within one or more of the classes of subjects enumerated in section 91 falls upon the party so asserting." This reasoning overlooks the fact that it is the court itself which has so characterized the By-law and ordinance.

The Court went on to distinguish the By-law from the unlawful assembly provisions in the Criminal Code by stating that the *Criminal Code* dealt with measures which were designed to cope with an assembly in progress, whereas the Provincial regulation covered the situation prior to an assembly. They then referred to a number of decisions where provincial legislation, complementary to federal legislation, was upheld on the basis that it did not collide with the latter. In the final analysis the court adopted the position that the By-law and the *Criminal Code* were complementary. Although the previous decisions on concurrent jurisdiction seem to be supportive of the majority one may question the original characterization of the By-law as in relation to local matters. If it is not in relation to streets and parks there is no room for the concept of concurrency.

Chief Justice Laskin, speaking for the dissent, stated that the city was in fact legislating in relation to Criminal law by preventing what would likely become an unlawful assembly. Furthermore, the By-law, in particular section 5, was not aimed at regulating the streets and public parks, but was in reality designed to maintain peace and public order which is a function of the criminal law power. The By-law spoke of exceptional measures to safeguard the free exercise of civil liberties. In contrast Chief Justice Laskin maintained:

> The reference to safeguarding the free exercise of civil liberties and to regulation of the use of public domain are hollow references, not in any way fulfilled by the substantial terms of the By-law as are the references to riots, breach to the peace and public order. Moreover, the enactment of the By-law as an exceptional measure is in itself an indication of how far removed it is from any concern, except a consequential one, with regulation of the use of streets and public parks.[12]

In addition the By-law was applicable to all persons — no matter how innocent their gathering — which lent further credence to the argument that the By-law was not for local regulation but rather aimed at keeping the peace.

Chief Justice Laskin's position can be supported by reference to s. 61 of the *Criminal Code* which defines an unlawful assembly as an assembly

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12. *A. G. for Canada et al* v. *Claire Dupond* (1978), 19 N.R. 478 at 517

> 61. . . . of three or more persons who with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds that they
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> (a) will disturb the peace tumultuously;
> (b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.
>
> 2. Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful in that manner for that purpose.

The *Code* provisions thus make it an offence to engage in any assembly which would include a demonstration or parade. This section is sufficiently broad in scope to encompass any situations which may have arisen in Montreal in 1969. The *Code* provisions were specifically drafted to ensure that assemblies remained peaceful by providing a penalty for violent assembly rather than by requiring that all assemblies be prohibited. It can also be argued that the *Criminal Code* sanctions are not only designed for purposes of punishment of offenders but also to deter others from engaging in these activities.

When Claire Dupond challenged the By-law the City of Montreal was experiencing problems where the law enforcement agencies were being unusually pressured. In justifying the legislation on the basis that it dealt with a local concern and was preventive, the Supreme Court majority chose the path of expediency since the decision had the effect of making law enforcement less difficult. Although one may sympathize with the Montreal authorities' problems this cannot be used as a reason for supporting local legislation. Also implicit in this reasoning was the assumption that the Federal *Code* provisions did not serve this preventive function but were designed solely to punish.

The majority decision, it can be argued, allows the creation of an additional offence not provided for in the *Criminal Code* and not merely part of a legitimate local concern for regulation of streets. It can be argued further that by making violent assemblies and those which disturb the peace unlawful, it was the intention of the drafters of the Code to make all other assemblies lawful. The municipality would then only have the power to regulate these as to location, time and method of assembly.

In conclusion, the Supreme Court majority characterized the legislation as in relation to local matters and then proceeded to follow previous decisions on concurrency. For those who support this approach the decision will be welcomed; for those who fear the further encroachment into individual lives by local authorities the decision on the criminal law power will be undesirable. It does allow courts in the future to further extend the doctrine of concurrency at least where the court considers it a desirable extension.

III. *Fundamental Freedoms*

On the second ground of appeal the majority summarily rejected the submission that section 5 was in relation to and in conflict with the fundamental freedoms of assembly, speech and association. Rather they criticized the submission for being worded in such vague terms as "fundamental freedoms". Moreover, they emphasized the fact that none of the freedoms mentioned were entrenched in the constitution and no individual freedom could be labelled as exclusively federal or as exclusively provincial. Mr. Justice Beetz, giving the reasons for the majority went on to separate freedom of speech, association, press and religion from the "faculty of holding assemblies, parades, gatherings, demonstrations or processions on the public domain of a city."[13] He continued "demonstrations are not a form of speech but of collective action,"[14] and thus are a display of force rather than an appeal to reason. His conclusion was that demonstrations do not enter the realm of speech. Finally he reverted to English common law stating that there was no right to hold a public meeting in English law and therefore none in Canadian law.

Although Chief Justice Laskin did not explicitly dwell on civil liberties and fundamental freedoms in his judgment his concern seemed implicitly voiced when he criticized the broad ambit of the By-law to restrain the actions of innocent citizens. Since he relegated the By-law to the realm of criminal law he obviously saw no need to further discuss civil liberties.

In *Dupond,* then, the majority decision did not further the interests of the individual. It rather restricted the concepts of fundamental freedoms to exclude assemblies, parades, *etc.* It even left some doubt as to whether the court itself accepted the concept of fundamental

13. *Id.* at 496-497
14. *Id.* at 497

freedoms. A brief examination of the American and British approach to the issue of public protest will assist the analysis of *Dupond*.

In the United States the question of fundamental freedoms is most often resolved by reference to their constitutionally entrenched Bill of Rights and the subsequent judicial interpretation of it.[15] The issue of freedom to assemble, demonstrate, *etc.* has been the subject of a number of court decisions which reflect the constant struggle to find a satisfactory solution to the dilemma of the freedom to assemble, demonstrate *etc.* versus the right of other citizens not to have their rights seriously interfered with by the demonstrators. An early decision and approach by the American Supreme Court gave a narrow interpretation to public rights to utilize the public forum.[16] In *Davies* v. *Massachusetts*,[17] a preacher was convicted under a city ordinance which forbade any "public address" on "public property" unless a permit from the mayor was obtained. In affirming the preacher's conviction for preaching on the Boston commons, the court took the position, by resorting to common law concepts of private property rights, that a state possessed the power to prohibit free speech on public property. Thus, private property rights were seen to take priority over free speech. As the times and the constitution of the court changed in the United States, new approaches to the public forum problem were evolved. The emphasis began to shift more toward free speech and less toward private property values. In two recent Supreme Court decisions a more balanced approached has been developed.[18] In *Grayned* v. *City of Rockford* the result was a test which required an assessment of "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[19] Emphasis was placed on the assumption that expressive activity, such as demonstrations or open-air speeches, must be permitted unless a sufficient justification for the contrary result is given. In *Greer* v.

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15. The American Supreme Court has consistently maintained that the first Amendement

> rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. *Associated Press* v. *United States* (1945), 326 U.S. 1, 20. [It] is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected.

16. See *Davis* v. *Massachusetts* (1897), 167 U.S. 43
17. *Id.*
18. *Grayned* v. *City of Rockford* (1972), 408 U.S. 104; *Greer* v. *Spock* (1976), 96 S. Ct. 1211
19. *Grayned, id.* at 116

Spock, Justice Powell articulated the current criteria to be used:

> [I]t is not sufficient that the area in which the right of expression is sought to be exercised be dedicated to some purpose other than use as a 'public forum' or even that the primary business to be carried on in the area may be disturbed by the unpopular viewpoint expressed. Our inquiry must be more carefully addressed to the intrusion on the specific activity involved and to the degree of infringement on the First Amendment rights of the private parties. Some basic incompatability must be discussed between the communication and the primary activity of an area.[20]

The final result is an approach which balances unrestricted access to public forum against absolute prohibition. If any activity is to be prohibited in a public forum it must be prohibited because the particular communication and the normal activity in the area are basically incompatible. This approach permits a rational evaluation of each demonstration, assembly, *etc.*, rather than merely classifying them in isolation from the area to be affected.

In Britain, as in Canada, the status of public protest is more uncertain. Without the protection of an entrenched Bill of Rights a citizen only has the right to engage in an activity if it is not prohibited by statute. There are no limits on legislative supremacy except the limit of public tolerance to government action. This tolerance is often extensive when a minority is the subject of legislation. Since nothing can be beyond the jurisdiction of the legislature, restrictions on freedom of speech cannot be easily challenged by the courts. With no constitutional guarantees of free speech in Britain, there has been a history of regulation of free expression in public places. The regulation of free speech has, as initially in the United States, been based on the owner's property rights — whether the owner was an individual or public body. It has also been argued by a number of authors that there is no right to hold public meetings — they are only allowed if not expressly forbidden or the requisite conditions for holding them have been met.[21] Lord Justice Scarman, in his report on the Red Lion Square disorder, clearly states the problem confronting the common law with respect to public order:

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20. (1976), 96 S. Ct. 1211 at 1220

21. See D. Williams, *Keeping the Peace, The Police and Public Order* (London: Hutchinson, 1967); Harry Street, *Freedom, The Individual and the Law* (Harmondsworth: Penguin Books Ltd., 1964) at 41 where he says:

> Englishmen have no right to hold a public meeting anywhere, even if they begin to hold public meetings in their own premises they will presumably need town

> Amongst our fundamental human rights there are without doubt the rights of peaceful assembly and public protest and the right to public order and tranquility. Civilized living collapses — it is obvious — if public protest becomes violent protest or public order degenerates into the quietism imposed by successful oppression. But the problem is more complex than a choice between two extremes — one, a right to protest whenever and wherever you will and the other, a right to continuous calm upon our streets unruffled by the noise and obstructive pressure of the protesting procession. A balance has to be struck, a compromise found that will accommodate the exercise of the right to protest within a framework of public order which enables ordinary citizens who are not protesting, to go about their business and pleasure without obstruction or inconvenience.[22]

The approach, as advocated by Lord Justice Scarman seems akin to the attitude expressed by the American courts, but it is certainly not the approach adopted by the Canadian Supreme Court in *Dupond*. In his report Lord Justice Scarman expressly maintained that peaceful assembly is a fundamental right. In the United States, as previously noted, assembly is protected under the provisions relating to free speech. Henry J. Abraham, in his book on *Civil Liberties in the United States,* says freedom of expression is defined as:

> . . . freedom of expression connotes the *broad* freedom to communicate a concept that far transcends mere speech. It embraces the prerogative of the free citizen to express himself, verbally, visually, or on paper. . . . It is vital to recognize at the outset that the freedom of expression extends not only to speech but also to such areas as press, assembly, petition, association, lawful picketing and other demonstrative protests; . . .[23]

In the majority judgments expression in *Dupond, i.e.* that demonstrations are not a form of speech, the court has effectively

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and country planning permission from the local authority for this change in use of the land.

Also see Brownlie, *The Law Relating to Public Order* (London: Butterworths, 1968) at 191:

> Even if one takes the view that it is fallacious to state that there is "no right of public meeting" without more, it is nevertheless the case that the question of legal restrictions is depressing. Moreover, there are no constitutionally guaranteed rights in England and thus no approved criteria for evaluating administrative action . . .

22. (Feb. 1975; Cmnd. 5919) at para. 5

23. *Freedom and the Court — Civil Rights and Liberties in the U.S.* (3rd. ed. New York: Oxford U. Press, 1977) at 171

removed demonstrations, assemblies, *etc.* not only from the realm of protection provided for free speech; but also removed them from the scope of federal jurisdiction where previous decisions had allocated most matters considered to be fundamental liberties.[24] These earlier cases in the Supreme Court, in contrast, generally spoke of freedom of speech as a concern fundamental to our democratic traditions and within the jurisdiction of the federal legislature. One of Canada's greatest advocates of civil liberties, reaffirming those decisions and contradicting the narrow interpretation given by the Court in *Dupond,* wrote

> Without going too deeply into these aspects of the problem, however, it is possible to single out certain essential requisites for freedom of speech. Freedom of association is obviously one. My right to talk is valueless unless I can talk to people. Speaking implies an audience. Any law, any practice which strikes at the right to form clubs, societies and associations or which prevents them from holding meetings, open-air or otherwise is a direct infringement on the right to freedom of speech. The right of association includes the right to petition governing bodies of all sorts and the right to hold parades under proper circumstances.[25]

The greatest danger in the narrow approach adopted by the Supreme Court of Canada is that municipalities will be able to prohibit assemblies at will if they can demonstrate that a possibility of violence exists. In any situation where the cause is unpopular there will always be opposition to that cause and an apprehension that some breach of the peace may occur. In any of these instances it is highly likely that it will be a minority view that is being expressed through the mechanism of an assembly or demonstration. Often these groups may not have ready access to other forum for the dissemination of their views because of a lack of finances or mere discretionary measures on the part of media sources to cover these views.

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24. See for example, *Reference Re Alberta Statutes,* [1938] S.C.R. 100; [1938] 2 D.L.R. 81 where Cannon J. states:

> Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the state within the limits set by the Criminal Code and the common law.

Also see *Boucher* v. *The King,* [1951] S.C.R. 265; [1950] 1 D.L.R. 657 where Rand says at 288:

> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life.

25. F. R. Scott, "Freedom of Speech in Canada" in *Essays on the Constitution* (Toronto: Univ. of Toronto Press, 1977) p. 60 at 62

It is at times of political stress, such as existed in Quebec, that it is most essential to protect freedom of expression if Canadians truly desire a democratic system. In times of tranquility, it is much easier to tolerate the views of a particular minority group; but it is only at these times of severe stress that a true test of belief in these values is demanded.

The Supreme Court has failed to uphold these traditional values and has, instead further eroded them by giving municipal officials license to prevent even completely innocent demonstrations from occurring. It can be argued that the balance between the need for free speech and the need for tranquility has not been equitably drawn.

In sharp contrast is the recent U.S. decision allowing an unpopular pro-nazi group to demonstrate in Chicago despite fears that anti-Nazi groups would attempt to disrupt the march and cause violence.[26] The ordinance which attempted to prohibit the march was considered too broad in its statements of concern for a mere apprehension of violence. This American view supports the approach previously adopted by the American courts and is preferable to the Canadian Supreme Court's validation of a By-law which absolutely forbids demonstrations, even though there may be no prospect of violence.

This does not, of course, mean that there is an unlimited right to assemble if the intention is to disrupt the peace. What is suggested is that such an assessment should be made in each instance. If such extensive suppressive measures are allowed in general, without concern for liberties, the country will be in danger of subverting its democratic prinicples.

Perhaps this decision is an element of Prime Minister Trudeau's call for a re-affirmation of the need to protect the freedom of the citizens of Canada in the interests of renewing the Federation. On page 8 of *A Time for Action* Prime Minister Trudeau states:

> Canadians will progress more rapidly in this direction if their governments recognize the pre-eminence of their rights and freedoms by entrenching them in the Constitution: Perhaps it is not essential to do this in a unitary state where one supreme parliament, representing all the interests of the citizenry, can provide an ultimate guarantee for the rights of citizens. It is different in a federal system where different orders of government, representing different interests of the same citizenry can have opposing views.[27]

In his proposed changes to the Federal constitution an entrenched

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26. *Collins* v. *Smith*, 5/22/78 (U.S. Court of Appeals for Seventh Circuit)
27. *Supra*, note 1

charter of human rights would be included. The Constitutional Amendment Bill, s. 6 states that "freedom of peaceful assembly and association" is to be one of the fundamental rights and freedoms. However, this can only have significance if it ultimately becomes applicable to both the Federal government and the Provinces. If entrenched, this approach would not eliminate all problems since judicial interpretation would still be required. Nevertheless, this approach would be a direction to the court not to permit unlimited legislative control over fundamental freedoms. Following Prime Minister Trudeau's directives, the Canadian judicial system would acquire a specific framework whereby legislation could be struck down without engaging in a division of power balancing. Moreover the almost unrestricted recognition of legislative freedom to restrain fundamental freedoms, as articulated in *Dupond* would be avoided. Without such an approach, local legislatures may, in the future, feel free to continue restraint of individual liberties, at least in times of political stress. Progressive courts could only, in the future, attempt to limit this decision to the factual situation existing in Montreal in 1969.