WESTENDORP — THE DEMISE OF *McNEIL* AND *DUPOND*?

CHARLES BOSECKE*

The author examines the somewhat blurry line between the federal criminal law power under s. 91(27) and the provincial power to impose sanctions under s. 92(15) for the purpose of enforcing any otherwise constitutionally enacted law, in light of the decision in Westendorp by contrast to the decisions in McNeil and Dupond.

I. INTRODUCTION

The Supreme Court of Canada in recent years has straddled a wavering fence with respect to the definition of the Federal Parliament's criminal law power. Following the 1978 decisions in *A.G. (Canada)* v. *City of Montreal* [1] and *McNeil* v. *The Nova Scotia Board of Censors*,[2] provincial intrusion increased into areas traditionally assumed to fall within federal jurisdiction relating to its criminal law power. However, the encroachment of the provinces into this area may have reached its limits if one considers the 1983 decision of the Supreme Court of Canada in *R.* v. *Westendorp*.[3] This decision was concerned with the validity of municipal legislation prohibiting persons from remaining on the streets for the purposes of prostitution. The significance of this decision is that, although it does not clarify the boundary between federal and provincial powers in relation to criminal matters, it does seem to reflect a more restrictive interpretation of provincial jurisdiction.

The importance of the *Westendorp* decision becomes more apparent if one considers the judicial development of the law of solicitation under section 195.1 of the Criminal Code.[4] In 1978 the Supreme Court of Canada in *Hutt* v. *The Queen* [5] held that the word 'solicit' requires an element of "pressing and persistent" conduct and a mere accosting for the purposes of prostitution is not sufficient for a conviction under section 195.1. In 1982 the Supreme Court of Canada further defined 'solicit' in *R.* v. *Whitter; Galjot* [6], as pressing and persistent conduct aimed at one individual rather than a series of acts towards several individuals amounting to pressing and persistent conduct. This definition of section 195.1 has markedly reduced the likelihood of a successful conviction for solicitation. This has caused difficulties for municipalities attempting to control the prostitution trade on their streets.

II. BACKGROUND

The Calgary City By-law in question in *Westendorp* was an attempt by the municipality to avoid the difficulties created by this restrictive interpretation of section 195.1. On July 6, 1981 the accused was arrested for

---

* A student with the firm Emery, Jamieson in Edmonton.

1. [1978] 2 S.C.R. 770.
2. [1978] 2 S.C.R. 662.
3. (1983) 23 Alta. L.R. (2d) 289 (S.C.C.).
4. Criminal Code, R.S.C. 1970 c. C-34, as am.
5. [1978] 2 S.C.R. 476.
6. [1981] 2 S.C.R. 606.

contravention of section 6.1 of By-law 9022 of the City of Calgary[7] (hereinafter referred to as the "By-law"). In June 1981, Calgary City Council had amended By-law 9022 by enacting By-law 25M81 which added section 6.1 prohibiting persons from being on the streets for the purposes of prostitution and prohibiting persons from approaching other persons on a street for the purposes of prostitution. This By-law was held to be ultra vires at trial. The Alberta Court of Appeal reversed the decision of the trial judge and held that this By-law did fall within provincial powers. The appeal to the Supreme Court of Canada was successful and the Supreme Court held that the By-law was ultra vires the province because it infringed on the federal government's legislative authority over matters falling within criminal law.

A. ALBERTA PROVINCIAL COURT

On October 7, 1981 His Honour Assistant Chief Judge H. G. Oliver of the Alberta Provincial Court acquitted the accused of the charge under section 6.1(2) of the By-law.[8] The learned trial judge did so on the grounds that the By-law could not be validly enacted by Calgary City Council as it was not authorized by any provincial statute and because, even if it were so authorized, the subject matter of the By-law was ultra vires the province. Apart from the constitutional validity issue, the learned trial judge would have convicted the accused on the evidence adduced.[9]

One of the grounds upon which Oliver, A.C. Provincial Judge held that the By-law was invalid was that it pertained to a criminal matter and therefore was outside the legislative competence of the province. He determined that the pith and substance of the challenged provision was a prohibition against prostitutes from working the streets, rather than relating to the control of the streets.[10] This decision was reached despite the practice in constitutional cases of presuming the validity of provincial legislation.[11] This conclusion also was contrary to the preamble to the amending By-law 25M81 and the evidence adduced at trial which suggested that the intent of Calgary City Council was to prevent the public nuisance being created by the prostitutes plying their trade on Calgary streets.

B. ALBERTA COURT OF APPEAL

The Alberta Court of Appeal[12] reversed this decision by Oliver, A.C. Provincial Judge and entered a conviction against the accused. The Alberta Court of Appeal, in a judgment written by Kerans, J.A., rejected the characterization of the by-law as a colourable attempt by the

---

7. Calgary Municipal By-law 9022, as am. by By-laws 87/75, 74/77, 185/77, 37M79, and 25M81.
8. *R.* v. *Westendorp* [1981] 6 W.W.R. 525 (Alta. Prov. Ct.).
9. *Id.* at 533.
10. *Supra* n. 8 at 555.
11. *Severn* v. *The Queen* (1878) 2 S.C.R. 70 at 103.
12. (1982) 65 C.C.C. (2d) 417 (Alta. C.A.).

municipality to invade the field of criminal law and decided that the by-law fell within the ambit of section 92(16) of the B.N.A. Act.[13] Kerans, J.A., characterized the by-law in this manner by stating that the by-law did not strike out at the evil of prostitution per se, but was an attempt to regulate public thoroughfares and protect citizens from the nuisance created by the prostitution market. Using this characterization Kerans, J.A., then applied the majority decision of Beetz, J., in the *Dupond* case[14] and held that the by-law related to matters of a merely local or private nature in the province. As such, the enactment falls within the ambit of section 92(16) and Kerans, J.A., impliedly suggests that it would also derive constitutional validity from the heads (8), (13), (14) and (15) of section 92. This characterization of the matter as one of a local or private nature became the major issue in the appeal before the Supreme Court of Canada.

C. SUPREME COURT OF CANADA

There were three issues raised on appeal to the Supreme Court of Canada. The first issue was whether or not the by-law was effectively authorized by a provincial statute. Laskin, C.J., writing the decision for the Court did not deal with this issue as he did not consider it necessary to do so. The second issue which was raised concerned the Charter of Rights and Freedoms under the Constitution Act 1982[15] and whether there was a violation of section 7, which protects an individual's right to life, liberty and security. This ground of appeal was abandoned by counsel during the course of argument before the Supreme Court. The third issue, which is the focus of this paper, was whether section 6.1(2) of the Calgary By-law invaded federal legislative power in relation to criminal law.

The unanimous decision of the Supreme Court of Canada was that the pith and substance of the impugned by-law was an attempt to control or punish prostitution.[16] The fact that it related only to prostitutes, rather than to congregations of persons on the streets in general, seems to have been a persuasive factor in Laskin, C.J.'s decision. Laskin, C.J., dismisses any argument concerning the control of the streets or related nuisances by stating that there is ". . . no question even of interference with the enjoyment of public property, let alone private property."[17] Laskin, C.J., refused to adopt Kerans, J.A.'s, decision because to do so would be "to establish a concurrency of legislative power, going beyond any double aspect principle and leaving it open to a province or to a municipality authorized by a province to usurp exclusive federal legislative power."[18]

The decision of the Supreme Court of Canada in *Westendorp* is disappointing in that it deals with the definition of the federal criminal law power in a very cursory manner. Laskin, C.J. dismisses the by-law as an

13. (1867) 30 & 31 Victoria, c. 3.
14. *Supra* n. 1 at 792.
15. Canada Act (1982) (U.K.), c. 11.
16. *Supra* n. 3 at 296.
17. *Id.*
18. *Id.* at 297.

invasion into criminal law without defining the extent of the criminal law power. This characterization of the by-law as an enactment dealing with criminal matters is done with little coherent judicial reasoning. This is especially so if one considers that the *McNeil* and *Dupond* decisions are strong authority that such legislation could be *intra vires* the province, as a matter relating to the regulation of local trade or crime prevention rather than the prohibition of criminal conduct.

The next portion of this paper will deal with the cases of *McNeil* and *Dupond* as they deal with provincial jurisdiction in relation to criminal matters. The final part of the paper will analyze Laskin, C.J.'s decision in *Westendorp* in light of these two decisions. This analysis will attempt to illustrate the inconsistencies between *Westendorp* and the earlier decisions and will conclude by outlining the consequences of this decision.

III. CRIMINAL LAW AND SECTION 92

A. GENERAL ASPECTS OF CRIMINAL LAW

In Canada the primary responsibility for criminal law is vested in the Federal Parliament under section 91(27) of the B.N.A. Act. However, this section must be read in light of section 92(14) which gives the provinces the power to establish criminal courts and make laws in relation to the administration of justice within the provinces. There is a significant amount of overlap between federal and provincial jurisdiction to enact penal laws. This results from section 92(15) which gives the provinces power to make laws in relation to:

> The imposition of punishment by fine, penalty or imprisonment enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

This power allows the provinces to enforce provincial laws through the use of penal sanctions.

The definition of the federal criminal law power has varied since Confederation. Viscount Haldane, in the *Board of Commerce* case[19], stated that section 91(27) applied "where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence."[20] This domain of criminal jurisprudence theory was a very narrow definition and was rejected by Lord Atkin in the 1931 decision in *Proprietary Articles Trade Association* v. *A.G. of Canada* [21] where he stated: "The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?"[22] The definition, however, was too broad and vague because it would allow the Federal Parliament to legislate over matters falling within the jurisdiction of the provinces under the guise of criminal law if a prohibition and penalty were part of the legislative scheme. The fact that there is a prohibition and a corresponding penalty

---

19. *Re: Board of Commerce Act 1919 and Combines and Fair Prices Act* [1922] 1 A.C. 191, [1922] 1 W.W.R. 20, 60 D.L.R. 513, (P.C.).
20. *Id.* at 198-199.
21. [1931] A.C. 310, [1931] 1 W.W.R. 552, 55 C.C.C. 241, [1931] 2 D.L.R. 1, (P.C.).
22. *Id.* at 324.

is indicative of a criminal aspect but a third indicia was required to delineate laws in relation to criminal conduct from provincial laws dealing primarily with provincial matter which directly dealt with a criminal matter.

This third factor was provided by the Supreme Court of Canada in the *Margarine Reference* case of 1951.[23] Rand, J., stated that a prohibition and a corresponding penal sanction did not necessarily constitute a criminal law unless it related to "a public purpose which can support it as being in relation to criminal law."[24] Several of these purposes were listed, including "public peace, order, security, health and morality"[25], although this list was not exhaustive. This approach was adopted by the Privy Council[26] and has been followed by Canadian courts. Although this definition of the criminal law power is vague, it does seem that the minimal requirements of a criminal law are the existence of a prohibition and a corresponding penal sanction in relation to some public purpose.

The importance of this definition is that only the Federal Parliament can legislate with respect to criminal law under section 91(27). However, the provinces can legislate in relation to matters falling under section 92 and such legislation may have a criminal aspect. The double aspect doctrine of constitutional interpretation allows the provinces to provide for prohibitions and penalties provided these are necessary to effect legislation whose primary aspect falls under one of the heads of power enumerated in section 92. The existence of a prohibition and a penalty does not necessarily invalidate a provincial law as one in relation to criminal law. This is an implication of section 92(15) which allows provinces to impose fines and penalties to enforce provincial laws. However, a provincial law will be *ultra vires* if its pith and substance is criminal law rather than having the criminal aspect as ancillary to a valid provincial purpose.

The determination of the pith and substance of a provincial law is important if the scheme contains the basic elements of a criminal law (i.e. a prohibition and a penalty). The legislation must be enacted for a provincial purpose, with the criminal aspect ancillary to it, for the double aspect doctrine to uphold the provincial enactment. If the primary aspect of the law is criminal, it will be invalid. Two factors used in determining the real nature of a law are the severity of the penalty and the nature of the prohibition.[27] The more severe the penalty the more probable that the legislation is directed at criminal matters rather than at provincial objects.

The use of the nature of the prohibition as a factor to define pith and substance often results in a peripheral area between criminal law and provincial matters. If one uses Viscount Haldane's definition of criminal law in the *Board of Commerce* [28] case, there is an inner core of criminal

23. *Canadian Federation of Agriculture* v. *A.G. Que.* [1949] S.C.R. 1, [1941] 1 D.L.R. 433.
24. *Id.* at 50.
25. *Id.*
26. [1951] A.C. 179 (P.C.).
27. Laskin, *Canadian Constitutional Law*, 4th ed. (1973) 827.
28. *Supra* n. 19.

acts. These acts are inherently criminal[29] and include such wrongs as murder, rape and theft, over which the provinces cannot legislate. However, there are many acts which are not inherently criminal yet do fall within the domain of criminal law. It is these peripheral public wrongs that may have a double aspect in that both the provinces and Parliament can legislate in relation to them. Whether the double aspect doctrine is invoked in favour of a province in a particular situation, is determined by whether the legislative scheme serves a valid provincial purpose.

The purpose of the legislation is the key factor in determining whether these public matters at the outer boundary of the scope of criminal law are also within the ambit of provincial powers. If the scheme is generally regulatory or preventive, a valid provincial purpose is often discerned by the courts. However, if there is no obvious provincial purpose, the seriousness of the penalty and the elements of the offence will be considered. If the elements of the offence concern civil liberties and freedom of expression, it is very likely that a provincial purpose will not be found. This is illustrated by *Saumer* v. *City of Quebec* [30] and *Switzman* v *Elbling*, where provincial legislation dealing with freedom of speech and religion were delcared *ultra vires*. However, if the legislation focuses more on property matters rather than personal freedoms, or if the infringement of freedoms is limited to matters of local significance,[32] a provincial object is likely to be found.

The Supreme Court of Canada has been hesitant to strike down provincial legislation on the grounds that it infringes on the federal criminal law power. This hesitancy originated in the case of *Bedard* v. *Dawson* [33] where provincial legislation authorized the closing down of 'disorderly houses'. The Supreme Court of Canada upheld the legislation as a valid provincial enactment in relation to the use of property, which suppressed conditions likely to foster crime, and was a matter of a purely local or private nature.[34] Other provincial legislation which seemed to overlap Criminal Code, offences in relation to suspensions of drivers' licenses for an impaired driving conviction,[35] careless driving,[36] and furnishing false information on a prospectus,[37] has been upheld. Imprisonment for contempt was also held to be a valid exercise of section 92(14) in *DiIorio* v. *Montreal Jail Warden*.[38] The use of section 92(15) has created a significant amount of concurrent jurisdiction with respect to criminal law, generally in the areas of property and civil rights and the control of

29. J.J. Arvay, *The Criminal Law Power in the Constitution: And then Came McNeil and Dupond* (1979) 11 Ottawa Law Review, 1 at 7-10.

30. [1953] 2 S.C.R. 299, involving a municipal prohibition of written materials on the streets.

31. [1957] S.C.R. 285, involving a municipal prohibition on the propagation of communism and bolshevism by any means whatsoever.

32. Hogg, *Constitutional Law of Canada*, (1977) 428.

33. [1923] S.C.R. 681.

34. This is discussed *infra* at p. 15.

35. *Provincial Secretary of P.E.I.* v. *Egan* [1941] S.C.R. 396.

36. *O'Grady* v. *Sparling* 1960 [S.C.R.] 804.

37. *Smith* v. *The Queen* [1960] S.C.R. 776.

38. (1977) 73 D.L.R. (3d) 491 (S.C.C.).

conditions likely to foster crime, provided that the provincial legislation can be justified under one of the heads of power enumerated in section 92.

B. *NOVA SCOTIA BOARD OF CENSORS* V. *McNEIL*

The Supreme Court of Canada decision in *McNeil*[39] is a recent illustration of the Court's hesitancy to strike down provincial legislation as an invasion into the federal criminal law power. The provincial legislation being challenged by the respondent entitled the Nova Scotia Board of Censors to regulate and control the film industry in the Province of Nova Scotia. Under the Theatres and Amusement Act[40] subsections (b) and (g) of section 2(1) entitled the Board to prohibit and regulate the commercial use and exchange of films. These sections allowed the Board to set local standards as criteria for determining the suitability of films for viewing audiences. The respondent challenged these provisions on the ground that they denied, on moral grounds, citizens from exercising their freedom of choice in determining which films they wanted to view. The challenge was a result of the banning of the film "The Last Tango in Paris", without the Board providing reasons for the ban. The majority of the Supreme Court of Canada, in a judgment written by Ritchie, J., held that the legislation was valid and within the competence of the provinces. In a strong dissent, Laskin, C.J., held that the enactment invaded federal criminal law powers.

The majority decision started with the presumption developed in *Severn* v. *The Queen*[41] that the question as to the validity of the provincial legislation is to be approached on the assumption that it was validly enacted. Ritchie, J., stated that the Act and Regulations, if read as a whole, were directed primarily at the "regulation, supervision and control of the film business within the Province of Nova Scotia."[42] He went on to state: "This legislation is concerned with dealings in and the use of property (i.e. films) which take place wholly within the Province . . ."[43] Ritchie, J.'s, comments in relation to the criminal law argument seem to establish a concurrency of legislative authority with respect to morality which had been previously thought to be a matter exclusively within the jurisdiction of Parliament.

Ritchie, J., approached the criminal law issue by referring to the statement of Kerwin, C.J., in the *Lord's Day Alliance* decision:[44]

> In constitutional matters there is no general area of criminal law and in every case the pith and substance of the legislation in question must be looked at.

39. *Supra* n. 2.
40. R.S.N.S. 1967, c. 304.
41. *Supra* n. 11.
42. *Supra* n. 2 at 688.
43. *Id.*
44. *Lord's Day Alliance* v. *A.G. B.C.* [1959] S.C.R. 497 at 503.

Adopting this framework, Ritchie, J., determined that the pith and substance of the Act was fundamentally different from provisions contained in the Criminal Code:[45]

> In the first place one is directed to regulating a trade or business where the other is concerned with the definition and punishment of crime; and in the second place, one is preventive while the other is penal.

This statement reflects the two basis of provincial authority upon which the validity of the legislation is founded: regulation of intraprovincial trade, and the prevention of crime.

Ritchie, J., then went on to dismiss the morality argument by adopting Lord Atkin's statement in the *P.A.T.A.* decision where he stated:[46]

> Morality and criminality are far from coextensive; is the sphere of criminality necessarily part of a more extensive field covered by morality unless moral code necesarily disapproves all acts prohibited by the State, in which case the argument moves in a circle.

The adoption of this statement allowed Ritchie, J. to hold that "the establishment and enforcement of a local standard of morality is not necessarily 'an invasion of the federal criminal field', ..."[47] Ritchie, J. recognized Parliament's authority to penalize immoral acts or conduct but failed to see this as a constitutional barrier to the provincial government enforcing local standards even if the film was not obscene within the meaning of the Criminal Code.[48] The double aspect of doctrine,[49] with respect to federal and provincial powers, allows the provinces to prohibit certain acts with penal consequences. This is evidenced by *Lieberman* v. *The Queen* [50] where it was held that the prohibition of an immoral act may be valid if it is an incidental means of achieving an otherwise valid trade purpose.

As an alternative to the argument that legislation dealing with morality is criminal in nature, Ritchie, J., noted that the impugned Act dealt with the prevention of crime rather than being primarily directed at criminal conduct. This argument originated in the case of *Bedard* v. *Dawson* [51] where legislation allowing a judge to close a 'disorderly house', defined by Criminal Code convictions, was held to be intra vires the province. The ratio of that case is that the legislation dealt with matters of control and enjoyment of property. However, obiter statements of both Anglin, J., and Duff, J., have been relied on since 1923 to support the contention that provinces have the authority to suppress nuisances and conditions fostering criminal conduct. The crime prevention theory is often based on Duff, J.'s, statement that:[52]

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

---

45. *Supra* n. 2 at 691.
46. *Supra* n. 2 at 324.
47. *Supra* n. 2 at 692.
48. *Id.* at 693.
49. *See Smith* v. *The Queen* [1960] S.C.R. 776; *O'Grady* v. *Sparling* [1960] S.C.R. 804; *Stephens* v. *The Queen* [1960] S.C.R. 823; and *Mann* v. *The Queen* [1966] S.C.R. 238.
50. [1963] S.C.R. 643.
51. *Supra* n. 33.
52. *Id.* at 684.

Although Ritchie, J., does not develop this argument he seems to indicate that this is a valid power upon which provincial legislation can be upheld. However, there is not a direct power given to the provinces in the B.N.A. Act enabling them to pass legislation aimed primarily at suppressing conditions tending to foster crime. It is generally accepted[53] that provincial legislation may only prevent crime if by doing so it is ancillary to some valid provincial purpose within one of the heads enumerated in section 92.

A strong dissent was written in *McNeil* by Laskin, C.J., who characterized the legislation as dealing with public morals and, accordingly, as an enactment in relation to criminal law. Laskin, C.J., did not reject the proposition that provincial law may affect morality if it is passed under a valid provincial purpose; however, such a valid provincial object was not present in the scheme before the court. He rejected the argument that support can be found under section 92(13) with respect to property rights of regulation of trade, because the "censorship of films takes place without relation to any premises and is a direct prior control of public taste."[54]

Laskin, C.J., then defined what he felt was the extent of the federal criminal law power. As there were no criteria for classification by the Board, it was able to censor according to what it considered the moral standards of the community. This was fatal, in Laskin, C.J.'s view, because the determination of what is decent or obscene, and what is morally fit for public viewing is a matter exclusively reserved to Parliament under section 91(27). He stated:[55]

> . . . the federal power in relation to the criminal law extends beyond control of morality, and is wide enough to embrace anti-social conduct or behavior and has, indeed, been exercised in those respects.

While Ritchie J. viewed Lord Atkins statements in the *P.A.T.A.* decision[56] as meaning that only some moral considerations necessarily fall within federal jurisdiction, Laskin C.J. reversed this reasoning and held that the federal criminal law power encompasses all morality issues and embraces other offensive conduct as well.

Laskin, C.J., did leave open the area of moral considerations in the event the legislative scheme is enacted pursuant valid provincial objects. Laskin, C.J., suggested that if the licensing authority of the Board related to some type of film classification system, as found in other provinces, or was concerned with the safety or suitability of the premises in which the films were to be exhibited, then such a scheme might be valid.[57] However, in this case there was no connection to the property aspect of licensing and, therefore, the legislation could not be supported by section 92(13).

---

53. *Supra* n. 33.
54. *Supra* n. 2 at 683-684.
55. *Id.* at 681.
56. *Supra* n. 21.
57. *Supra* n. 2 at 674.

C. *A.G. (CANADA) AND DUPOND* V. *CITY OF MONTREAL*

The second recent Supreme Court of Canada decision which suggests a more liberal approach to provincial legislation overlapping the federal legislative power over criminal law is the *Dupond* [58] case. The legislation in question in *Dupond* was a Montreal Municipal By-law which prohibited the holding of assemblies and demonstrations in any public area in the city of Montreal.[59] The appellant contended that the by-law was ultra vires the City of Montreal and the provincial legislature because it was in relation to criminal law and infringed the appellant's freedoms of speech, religion, assembly and association, and freedom of the press. The majority decision, written by Beetz, J., held that the matter was one of a local or private nature, and therefore, fell within the scope of section 92 and was not in relation to criminal law. This paper will not deal with those aspects of the judgment concerning the fundamental freedoms of the appellant as they are not important to this discussion of the definition of section 91(27). As in *McNeil*, a strong, dissent was written by Laskin, C.J., stating that the by-law was in relation to criminal law and, therefore, did not have validity under any of the heads under section 92.

The majority decision in *Dupond* only superficially deals with the delineation of the federal criminal law power. In his characterization of the by-law, Beetz, J. adopts the statement of the Privy Council in *Hodge* v. *The Queen* [60] where it referred to various regulations as:

> Regulations in the nature of police or municipal regulations of a merely local character . . . and such as are calculated to preserve in the municipality peace . . . and repress . . . disorderly and riotous conduct.

Beetz, J., then goes on to state that the by-law and ordinance were "not punitive but essentially preventive measures, the purpose and effect of which is the prevention of conditions conducive to breaches of the peace and detrimental to the administration of justice."[61] Beetz, J., continues to emphasize this preventive nature by indicating that the by-law prohibits any, including innocuous, gatherings in any public place. Since the matter is one of a purely local and private nature, Beetz, J. held that the enactments also derive constitutional validity from heads (8), (13), (14) and (15) of section 92. It is unfortunate that Beetz, J., did not elaborate why these heads of power would validate the legislation, instead of just suggesting that they are alternatives to a provincial crime prevention power under section 92(16), which arises if the matter is one of a purely local and private nature.

The Chief Justice, in dissent, held that the by-law was one in relation to the criminal law power and, therefore, was ultra vires the municipality and the province. The by-law was characterized by Laskin, C.J., as one concerning public peace and anticipated violence, coupled with penal sanctions. There was no valid regulatory scheme enacted with provincial objects; rather, the by-law was a pre-emptive strike against forbidden

---

58. *Supra* n. 1.
59. City of Montreal By-law 3926, 1969.
60. (1883) 9 A.C. 117 at 131 (P.C.).
61. *Supra* n. 1 at 791.

conduct and behavior.[62] Laskin C.J. rejected the argument that the by-law only dealt with matters of a purely local or private nature and concluded that there was not another head under section 92 which could support the legislation.

IV. *WESTENDORP* — THE DEMISE OF *McNEIL* AND *DUPOND*?

This portion of the paper will focus on the Alberta Court of Appeal and Supreme Court of Canada decisions in the *Westendorp* case, in light of the *McNeil* and *Dupond* cases. It is submitted that the approach of Kerans J.A., in the Court of Appeal[63] is not as 'baffling' as Laskin C.J. suggests.[64] Kerans J.A., adopted the Supreme Court of Canada's approach in *McNeil* and *Dupond* and applied it in a coherent fashion. It is Laskin, C.J.'s, decision which is baffling. The actual outcome of the case may be acceptable since it is arguable that *McNeil* and *Dupond* should be narrowly interpreted, but Laskin, C.J., presents only a minimal amount of analysis in his decision and this is what may cause confusion in the future. Laskin C.J. fails to support his conclusions with any well-formulated propositions but, rather, seems content to state his conclusions in a perfunctory manner. It is suggested that the Supreme Court of Canada, as constituted today,[65] seems ready to take a more restrictive approach towards provincial legislation than it did in 1978. However, doing so without formulating guidelines for defining the ambit of section 91(27) will leave many municipalities and provinces in a state of confusion in dealing with many problems of a local nature.

A. ALBERTA COURT OF APPEAL

Kerans, J.A., adopted the traditional approach that legislation directed at morality is within the exclusive jurisdiction of Parliament, but that provincial legislation may affect public morality if it is enacted under a valid provincial scheme.[66] Using this approach, Kerans J.A. held that the by-law was valid because its pith and substance was to "protect the citizens who use the streets from the irritation and embarrassment of being unwilling participants in that market",[67] rather than being a direct at-

62. *Id.* at 794.
63. *Supra* n. 12.
64. *Supra* n. 3 at 297.
65. It is interesting to note the composition of the Supreme Court of Canada in 1978 and 1983. In *McNeil*, Ritchie, J. wrote the decision and Pigeon, Beetz, de Grandpre and Martland, JJ. concurred. The dissent was written by Laskin, C.J., and concurred in by Spence, Dickson, and Judson, JJ. In *Dupond* the split in the court was similar except that Beetz, J., wrote the decision for the Majority and Judson, J., concurred with the majority and not with Laskin, C.J.

    Of the judges who were in the majority in *McNeil* and *Dupond* only Ritchie and Beetz, JJ. are on the Court in 1983. If I am correct in my proposition that the S.C.C. is taking a more restrictive approach to provincial legislation, one wonders why Ritchie and Beetz, JJ. (who wrote the majority decisions in respectively *McNeil* and *Dupond*) would agree with Laskin, C.J.'s, decision in *Westendorp*.
66. *Supra* n. 12 at 426-427.
67. *Id.* at 429.

tack on the evils of prostitution. He rejected the colourability argument of the respondent and based his opinion on the preamble to the by-law and the evidence presented by witnesses at trial, that the prostitution trade was creating a nuisance in the streets of Calgary.

Difficulties may arise, however, in determining which head under section 92 that Kerans J.A. relied on to categorize the legislation as having provincial objects. He stated that the by-law is prima facie valid by adopting the statement of Beetz J. in *Dupond*:[68]

> In my view, the impugned enactments relate to a matter of a merely local nature in the province within the meaning of section 92(16) of the Constitution. Bearing in mind that the other heads of power enumerated in s.92 are illustrative of the general power of the province to make laws in relation to all matters of a merely local or private nature in the province, I am of the opinion that the impugned enactments also derive constitutional validity from heads 8, 13, 14, and 15 of s.92.

Instead of relying solely on section 92(16) as a proper source for the legislative authority to enact section 6.1 of the by-law, Kerans, J.A., could have developed his reasons for stating that the by-law could be valid under heads (8), (13), (14) and (15) of section 92. Kerans J.A. did state that the regulation of a nuisance[69] and public thoroughfares[70] are matters of local concern and therefore fall within the domain of the provinces.

One source for constitutional validity that Kerans J.A. did not discuss is section 92(13), which gives the provinces the right to regulate intra-provincial trade and business. The fact that the by-law involved a negative prohibition did not necessarily mean that it was not a regulation. The impugned section of the by-law was not a blanket prohibition of prostitution but just restricted the prostitutes from plying their trade on the streets (as does section 5 of the by-law for other businesses).[71] By stating that prostitution is a business[72] Kerans, J.A., could have stated that section 6.1 was a regulation of such a business and therefore fell within provincial powers under section 92(13). Although Kerans J.A. did not explicitly state [other than section 92(16)] on what basis the by-law was within provincial jurisdiction, this does not necessarily mean the pith and substance of the by-law fell outside of section 92. As will be illustrated, this is the trap that Laskin, C.J., fell into in the Supreme Court decision. He seems to sugggest that since Kerans, J.A.'s, decision is 'baffling' with respect to which head under section 92 the by-law falls, it must fall under section 91(27), yet he does not develop a sufficient basis for reaching this conclusion.

B. SUPREME COURT OF CANADA

The characterization of the by-law as one concerning the control of the streets is rejected by Laskin C.J. in his judgment for the unanimous

---

68. *Supra* n. 1 at 792.

69. Kerans, J.A., follows Duff, J.'s, statements in *Bedard* v. *Dawson supra* n. 33.

70. Kerans, J.A., follows Duff, C.J.'s statements in *Provincial Secretary of P.E.I.* v. *Egan supra* n. 35.

71. Section 5(2) reads as follows: "Other than a person set out in subsection (3), no person shall solicit for or carry on his business, trade or occupation on any portion of the street."

72. *Cf. M.N.R.* v. *Eldridge* [1964] C.T.C. 545 (Exch. Ct.).

Supreme Court of Canada in *Westendorp*. Instead, Laskin, C.J., states that the by-law is "patently an attempt to control or punish prostitution as to be beyond question."[73] Laskin C.J. goes on to state that Kerans J.A. was only adopting the approach as laid down in the *Dupond* case. The problem with Laskin C.J.'s decision is that it fails to give adequate reasons. It is submitted that he has taken a more restrictive approach to the validity of provincial legislation, without stating why he is doing so. The approach utilized by Laskin C.J. is reminiscent of the 'domain of criminal jurisprudence' theory set out by Viscount Haldane in the *Board of Commerce* case.[74]

This determination of the pith and substance of section 6.1 of the by-law by Laskin C.J. was done in a vacuum. It is done with little consideration of other portions of the by-law. Since section 6.1 was added as an amendment to deal with a particular problem, Laskin C.J. suggests that it should be considered without reference to the preceding sections of the by-law. However, it is only if one considers the preceding sections that a true determination of the intent of section 6.1 can be made. Section 6.1 of the by-law falls under the portion of the by-law entitled, "Use of Streets"; section 5(1) states that the display or selling of any wares, or the soliciting of purchasers on the streets is prohibited. Section 5(2) then states that, with some exceptions, "no person shall solicit for or carry on his business, trade or occupation on any portion of a street". Subsections (3) and (6) of section 5 excepts certain classes of persons from sections 5(1) and (2) if they are licensed. The impugned section of the by-law then follows these sections.

It is submitted that if one considers section 6.1 in light of section 5, the control of the streets is the primary aspect of section 6.1. Both sections deal with the carrying on of business on the streets of Calgary. Since the particular business of prostitution was creating a nuisance on the streets, the Calgary municipal council enacted section 6.1 to deal specifically with this problem. The fact that prostitution was creating a nuisance on the streets is supported by the general presumption of the validity of provincial legislation, the preamble to the amending by-law and the evidence of three witnesses at trial.

These factors were not considered by Laskin C.J. He appeared to look disfavourably on section 6.1 because it dealt only with prostitutes and not other groups of persons obstructing the streets.[75] Yet, what council did was to attack an existing problem. The fact that they did not deal with problems which might have arisen in the future should not, by itself, have toppled the by-law. The specificity of the section should not be a determinative factor for characterizing pith and substance, especially if one considers it in light of the other sections of the by-law and the circumstances confronting the Calgary Municipal Council at the time it passed the section challenged.

The treatment of cases by Laskin, C.J., was equally as tenuous and unsupported as his characterization of the pith and substance of the by-law.

73. *Supra* n. 3 at 296.

74. *Supra* n. 19.

75. *Supra* n. 3 at 296.

His first reference was to the case of *Switzman* v. *Elbling* [76] where provincial legislation prohibiting the propagation of communism and bolshevism was declared *ultra vires* the province. Laskin, C.J., suggests that section 6.1 of the Calgary by-law in *Westendorp* goes beyond this legislation[77] without stating any reasons. In *Switzman* there was a blanket prohibition for expressing various ideas, whereas section 6.1 only restricted prostitutes from using the streets as their business premises and, therefore, *Switzman* is clearly distinguishable. Laskin C.J. then discussed *Bedard* [78] and seems to restrict its application to a private nuisance dealing with private property. This is consistent with his approach in *McNeil* where he states, in dissent, that the nuisance in *Bedard* is one which interferes with the "occupation and enjoyment of premises".[79] Laskin C.J. in *Westendorp*, suggests that there is not even a question of interference with the enjoyment of public property,[80] yet this is an untenable proposition in light of the preamble and the evidence presented at trial.

The final case that Laskin, C.J., discusses is the Supreme Court of Canada decision in *Dupond* which he dismisses off-handedly by stating that since it dealt with parades and assemblies it was not relevant. By perfunctorily dismissing *Dupond*, Laskin, C.J., fails to deal with the definition of criminal law as presented by the majority of the Supreme Court of Canada in both *McNeil* and *Dupond*. The fact that prostitution in Calgary is a local issue, and therefore, can be seen as a valid provincial matter if one adopts the approach of Beetz, J. in *Dupond*: that section 92(16) gives the provinces plenary power with respect to matters of a purely local and private nature. A more forceful argument for the provincial validity of section 6.1 is the ratio of the *McNeil* case which Laskin, C.J., does not mention in his decision in *Westendorp*. In *McNeil*, local standards of morality were used to censor movies but this was still held to be within provincial jurisdiction. In *Westendorp*, the use of local standards of morality is not really in question although Laskin C.J. undoubtedly felt that it was. Section 6.1 prohibits the carrying on of business in the same manner as does section 5, yet it is unlikely that one could successfully argue that section 5 of the by-law deals with local standards of morality. As suggested earlier, the fact that prostitution is singled out, is because Calgary council was dealing with a specific problem by enacting section 6.1, rather than dealing with all foreseeable and even unforeseeable problems.

The next portion of the judgment of Laskin C.J. attempts to characterize the impugned portion of the by-law as criminal law because of its wording. Laskin C.J. suggests that the by-law cannot be dealing with a nuisance because, "That is not how the Offence under the By-law is either defined or charged".[81] However, the author fails to see the distinction between the charging words of an offence under section 5(2)

76. *Supra* n. 31.
77. *Supra* n. 3 at 296.
78. *Supra* n. 33.
79. *Supra* n. 2 at 684.
80. *Supra* n. 3 at 296.
81. *Id.* at 297.

of the by-law and section 6.1. The fact that the amending by-law defines the offence and its constituent elements does not demonstrate that the by-law is criminal in nature; rather, it displays an attempt to clarify the offence to remove any uncertainties or confusion with section 195.1 of the Criminal Code. Under section 6.1 it is an offence merely to be on the street with the intention of soliciting, whereas section 195.1 requires "pressing and persistent conduct".[82] Although there may be some overlap in the application of these two pieces of legislation, there is no express contradiction. In addition, they are aimed at different 'mischiefs'. Also, the fact that section 6.1 is worded as a prohibition with a corresponding penal sanction should not be used to characterize the section as criminal law.[83] This portion of Laskin C.J.'s approach is overly technical, looking only at the form of the by-law and not its substance.

The final portion of Laskin C.J.'s decision is critical of the decision of Kerans J.A. without stating any guidelines as to what the lower courts and the provinces should consider in the future. Laskin, C.J., declares that Kerans, J.A.'s, decision is baffling, yet, as illustrated earlier, it is really an application of the *McNeil* and *Dupond* decisions. Laskin, C.J., then expresses a fear that to uphold the Alberta Court of Appeal decision would ". . . establish a concurrency of legislative power, going beyond any double aspect doctrine and leaving it open to a province . . . to usurp exclusive federal legislative power."[84] This broad generalization, however, does not accurately reflect the existing state of concurrency of legislative powers as illustrated by *O'Grady, Egan, McNeil,* and *Dupond.* To state that this would go beyond any double aspect doctrine is fallacious if one considers that the double aspect doctrine is only applicable if both levels of legislation are valid within the division of powers set out in sections 91 and 92 of the B.N.A. Act.

Laskin, C.J., suggests that by upholding section 6.1 of the by-law, the provinces would then be able to directly attack the evils of drug trafficking and assault. Again, this is an unsupportable generalization. Both drug trafficking and assault are extensively covered by the Criminal Code and therefore, there is no need for provincial regulation because both are prohibited completely. However, the fact that prostitution once was a criminal act and now is decriminalized does not imply that the provinces cannot control or regulate the prostitution business under a scheme with valid provincial objects. If drug trafficking was decriminalized the business of trafficking would then fall within the provincial domain in the same manner as did the control of the liquor trade. The presence of gaps in the application of the solicitation laws does not imply that the province has no jurisdiction to control the business or nuisance aspects of solicitation, provided that the provincial legislation does not directly deal with the evil of prostitution itself.

82. *Hutt* v. *The Queen supra* n. 5.

83. *O'Grady* v. *Sparling supra* n. 36.

84. *Supra* n. 3 at 10.

V. CONCLUSION

The failure of the Supreme Court of Canada to deal effectively with the definition of the criminal law power in the *Westendorp* decision can only leave this area of the law in a state of confusion. It is submitted that the Court has impliedly rejected the approach and guidelines set out in the majority decisions of *McNeil* and *Dupond* and has elevated Laskin, C.J.'s, dissenting opinion in both of those decisions to being the majority decision today. This has been accomplished by a judgment which seems to have been written as a gut reaction rather than a well-reasoned discussion of the criminal law power and the existence of concurrency of legislative power. Although Laskin, C.J., does not exclude the possibility of any provincial legislation dealing indirectly with public morality, he has restricted the situations in which provinces and municipalities will be able to deal with local problems that have indirect moral considerations. The confusion which develops from *Westendorp* is apparent if one compares that decision with *McNeil*: provinces can regulate business on grounds of local moral standards yet cannot control street nuisances which indirectly affect the moral issues surrounding prostitution. It can only be hoped that the Supreme Court of Canada will be given an early opportunity to clarify its decision in *Westendorp*.