

# OUR COURTS AND OUR PARLIAMENT VIEW THE CANADIAN BILL OF RIGHTS

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August 10, 1960, marked the enactment of the Canadian Bill of Rights<sup>1</sup> and the closing of the third session of the twenty-fourth Parliament of Canada. His Excellency the Administrator addressed Parliament, and in his message said:

A measure of great significance that you have enacted in this session has been the Act for the recognition and protection of fundamental human rights. At a time when the enemies of freedom everywhere mock the words of freedom you have set forth for all the world to see the declaration of Canadians that the dignity of the human personality shall be preserved in Canada in equality before the law without discrimination.<sup>2</sup>

The Canadian Bill of Rights embodies principles of human rights and freedoms which Canadians agree are proper for our way of life. The Canadian House of Commons unanimously approved the Bill on final reading. Yet the operation of the Bill has been a matter of disappointment to some and disillusionment to others. The Bill has been criticized as innocuous and misleading. Litigants asserting rights thought to be included in the Bill have been denied their claims as not within the proper application of its provisions.

That the Bill does not do for human rights and freedoms all that was promised is not reason enough to relegate it to the legal trash can. Nor does the fact that the Bill does not do what the government promised it would do mean that it may not have other unadvertised merits and beneficial effects. Our government oversold us on the Canadian Bill of Rights. In its enthusiasm with the grandness of the Bill's design, believed to remedy those many ills our statute law was heir to, it overlooked sensible but less glamorous reasons for its enactment. Extravagant and needless claims were made for it during its passage through Parliament. They were extravagant as claiming more for the Bill than could reasonably be expected. They were needless as the principles of the Bill did not require the support of promises which could not be fulfilled to persuade Canadians of their merit.

There is difficulty and some danger in assessing our courts' and our Parliament's view of the Bill. The difficulty is to be rid of preconceived

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1. S.C., 1960, c. 44. See Appendix, *infra*, p. 86.

2. *Hansard* 1960, p. 7953.

notions as to the Bill's value, and the danger is that in noting a limitation of some aspect of the Bill's operation, misunderstanding may arise that a wider criticism and condemnation of the whole Bill is intended. Comparison of the expectations held by Parliament with the judgments rendered by our courts opens upon a field still fresh with political strife.

Why is this perhaps the only statute in Canadian law where a fair discussion of its usefulness or lack of usefulness, its successes or failures, raises the hackles of politicians and those who take seriously our public affairs?

The Canadian Bill of Rights has been a political football. Our Prime Minister, always a strong supporter of the idea of a Bill of Rights, proclaims its virtues. The Conservative Party, the government of the day, uses publicity on the Bill for political prestige. Vast numbers of copies were circulated during the last federal election, with the name of the local Conservative candidate prominently displayed. The electorate was to infer that here at last was the great charter of human liberties given to the people of Canada by the Conservative government. The reaction of the opposition was that to be expected under the circumstances. Deriding these political tactics, it maintained that the Bill added little, if anything, to the rights and freedoms already possessed by Canadians. The opposition proclaimed that it was all in favour of the spirit and intent of the Bill, and always had been. The Bill was nothing new, merely an old favorite got up in a new, appealing fashion. Accordingly, whenever a court is required to consider the effect of a provision of the Bill its decision gives ammunition to one side or the other—to those who believe so intensely in the value of the Bill, or to those who believe it to be the greatest piece of political Billmanship since Canadians lost the expert touch of the late Sir John A. Macdonald.

As lawyers, we should remove our political hats and, as a responsibility to our clients, make the best assessment we can of the Bill. We should be aware of how it affects our rights and freedoms. Lawyers do not necessarily condemn the Bill by noting its limitations. If the Bill is not what was promised, if it does not remedy all the inequalities hoped, if it does not alter the law to confirm the expectations of those who held great things for it, it may yet be an important piece of Canadian legislation. Our professional obligation is not to praise or condemn the Canadian Bill of Rights, but to examine its effect dispassionately.

#### BACKGROUND OF THE CANADIAN BILL OF RIGHTS

During the Second World War, limitations imposed on individual rights were accepted as probably necessary to the security of the state.

. . . it has been recognized by all political parties that during the days of war the rights of the individual are placed in pawn, as it were, as security against the day of victory.<sup>3</sup>

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3. The Prime Minister, John Diefenbaker, *ibid.*, p. 7505.

After the war, people all over the world wished to be free of so much state regimentation and control. The vision was of a world united in peace, dedicated to the dignity and worth of the individual. Delegates to the United Nations, after much soul-searching, proposed a Declaration of Human Rights, and many Canadians thought it wise and proper for our country to indicate to the rest of the world as well as ourselves our support of the principles declared by the United Nations. Many of the principles were considered by our representatives to the United Nations to be within the competence of provincial jurisdiction, and only some within the federal power. As our representatives were federal appointees, they felt that they might be encroaching on provincial jurisdiction to support too vigorously the Declaration of the United Nations, although in principle Canadians generally wholeheartedly approved the Declaration.

In Canada itself, many people were uncomfortable when they considered the extent to which some individual rights were limited during and following the war. There was the feeling, particularly since many of the dread things had not happened by war action which it had been thought might happen, that the arm of authority and government had gone too far in regimenting Canadians. Whatever justification there might have been for such measures during the war, the safety of the state was no longer accepted as a valid reason. There were two problems:

- (a) the elimination of the various irritating restrictions which had been acquiesced in as necessary during and immediately after the war; and
- (b) the prevention of their return.

From time to time representations were made to the government respecting the desirability of enacting a Canadian Bill of Rights. It was urged that the individual had or should have the right to be protected from the state in certain prescribed areas. Canadians should know their rights and freedoms as individuals, and should have assurance that these fundamental rights and human freedoms would not and could not be encroached upon by the state. As legislative powers are divided between the provincial and federal governments, a Bill of Rights should be binding on both, and it should be entrenched in our constitution so that it would not be whittled away by ordinary legislation. The fundamental rights and freedoms of individuals should be safe from erosion by the actions of governments or governmental agencies, and safe from encroachment by other individuals or groups.

There were, however, many difficulties to be overcome before such a Bill of Rights could become a reality.

The concept of a Bill of Rights as known in other countries may be completely different to the concept which must prevail under our way of government. Misunderstanding of bills of rights elsewhere, and their importance and effect in other forms of government, tend to cloud the real meaning of the same term as used today in Canada under our parliamentary system of government. Elsewhere the term Bill of Rights may be used to

indicate the formal expression or acknowledgement of a change of the ultimate authority in a state. It may denote a shifting of power from one group to another, or, indeed, to a fixed rule of law agreed to by all power groups, without a method of rapid repeal or amendment.

Russia has a fine Bill of Rights, but what may be acceptable there may be completely unacceptable here due to our different views of human rights. The United States has a Bill of Rights grafted onto its constitution by the first ten amendments. While the fundamental freedoms provided in these amendments were substantially the same as those in the English Bill of Rights of 1689, there is a basic difference. The source of power to change the declared rights and freedoms in England remained vested in Parliament, and its Bill of Rights could be repealed by an ordinary statute. In the United States, the authority to amend such rights and freedoms is withheld from Congress or the state legislatures. A change requires a further constitutional amendment, with all the delay and difficulties inherent in such a procedure.

Canada, though somewhat of a combination of the form of government of the United States and that of the United Kingdom, follows the constitutional theory of the United Kingdom. Parliament is supreme, subject, of course, to the British North America Act, and those other acts affecting the Dominion and provincial governments. This doctrine of the supremacy of Parliament makes impossible under our theory of government the entrenching of any law, or right or freedom beyond the power of Parliament to amend or repeal it. This is not necessarily a disadvantage. It may well be that this fluidity of approach to all laws, rights and freedoms, where the power to change is vested in a freely elected representative Parliament, is more to be desired than the system of fastening on government limitations beyond which it cannot go. Ian MacKenzie, M.P. warned the Canadian Parliament in 1947 against "the impulse to put freedom in a straight-jacket by seeking to define it in words." He feared that setting apart and defining in law certain basic human rights might boomerang on Canadians because of others inadvertently omitted. He feared courts might rule that such undefined rights, not so set out, did not exist in law at all, and therefore could be infringed. John Diefenbaker, M.P., maintained that this danger could be avoided by having a clause in the Bill of Rights to indicate that there might be other rights not named, which were still retained by Canadians.

In Canada the division of legislative authority between those matters which are provincial and those which are federal is another difficulty in formulating a comprehensive and satisfactory Bill of Rights. Without the agreement of the federal and all the provincial governments, there is the danger that a federal Bill of Rights may encroach on provincial matters.

Difficulties were encountered in agreeing on which Human Rights and Freedoms were fundamental, and which merely desirable or incidental. Are the rights of Freedom of the Press, Speech, Religion, Assembly, which were so important to our forefathers in years past, now so much a part of

our way of life that we should no longer be exclusively concerned with them? Ought we also to be thinking of the new freedoms, the economic ones, the social ones, for our Bill of Rights?

#### OUR PARLIAMENT VIEWS THE CANADIAN BILL OF RIGHTS

Our government decided: (a) that we were to have a Bill of Rights, and (b) that it would be enacted as a statute of the Parliament of Canada.

*Hansard*, from July 1, 1960 to August 6, 1960, contains the report of one of the most important and interesting debates to have been held in the Canadian House of Commons.

On July 1, 1960, the Prime Minister introduced the Canadian Bill of Rights, being "an Act for the Recognition and Protection of Human Rights and Freedoms." During the course of the debate the proposed legislation was altered, and finally it was enacted by the House of Commons by a unanimous vote. The Senate passed it on division, Senator Wm. Golding (Liberal, Ontario) saying that he could not work up much enthusiasm about the Bill, as it was simply a declaration enumerating rights and freedoms already enjoyed by Canadians.

Few controversial measures are passed unanimously by our House of Commons. Notwithstanding much disagreement on the wording and content of the proposed legislation it would have been politically unwise for any member to have opposed its final enactment. A vote against the Bill might be construed as opposition to the declared rights and freedoms. A member who might have been sincerely of the view that the liberty of Canadians would be better preserved by leaving our rights unwritten dared not vote against the measure, as such a vote could not easily be explained to the electorate. How could your constituents be persuaded that you were in favour of the intent of the Bill, but that you were opposed to enacting it as law because it covered only some of our rights and freedoms, or because those it did declare ought to have been better expressed? The idea of a law guaranteeing human rights was too strong politically and too popular generally. As the Prime Minister said:

In listening to this debate during the last two and a half days the words of Victor Hugo have come back to me as I remember them: "Nothing can withstand the strength of an idea whose time has come."<sup>4</sup>

In reply to an observation of Mr. Regier, Mr. Walker said:

We in this Parliament do want to identify ourselves, and we do want to identify this Bill of Rights with God. We all feel that in this day of godlessness we in this nation should pride ourselves on our institutions and what they stand for, and in this instance should bring in the name of God. May I say, without any irreverence for the views expressed by the Hon. Member, that this is very important to us. We feel that this is one of our supreme efforts, in which all parties have joined, and we can do nothing better than couple it with God because we have found in the past, as my Hon. friend must admit, that any country that has forsaken God has been very short-lived. We feel that this will be the fate of Russia and any other country that forsakes God.<sup>5</sup>

4. *Ibid.*, p. 5939.

5. *Ibid.*, p. 7516.

What member could vote against such a bill?

The Conservative members of Parliament expressed views on the Bill, praising its value, and indicating their expectations of its substantial effect on Canadian law. By and large they maintained the Bill to be a super-statute, overriding the provisions of other statutes, laws, and regulations which operate contrary to the spirit and intent of its provisions. The citizen was to be a sovereign in his dealings with the state.

One of the Cabinet, the Hon. D. J. Walker, said:

Mr. Speaker, there is our guarantee, right there in clause 3 (renumbered clause 2), because this Bill of Rights is superimposed upon every act and every regulation of the Parliament of Canada. There is no law of the Parliament of Canada that is not subject to this Bill of Rights, and here it is for the first time. How blind are they who will not see. It seems ridiculous at this time that we did not have this years ago, when every one of the 29 other countries which have passed a Bill of Rights saw the necessity long ago. . . . It does not make any difference what stupid government might in another 20 years follow this government. No matter what it does there will always be the Bill of Rights to ensure that even though an act may have been passed clandestinely or surreptitiously, or people may have missed the meaning of it, there is nevertheless superimposed upon that particular piece of legislation the protective terms of the Bill of Rights.<sup>6</sup>

And in answer to a question of Harold E. Winch, as to whether on the passage of the Bill of Rights "any federal legislation which contravenes the principles of this legislation is automatically *ultra vires*," Mr. Walker replied:

The Bill of Rights does superimpose itself on all dominion legislation. It is so clear in its language and understanding that, superimposed on any act, it will be a very simple thing for the courts to determine whether or not any other Act infringes on the superclauses of the Bill of Rights.<sup>7</sup>

The Hon. E. D. Fulton (Minister of Justice) said:

Our intention is to introduce a statute which will define the rights of all Canadians in clear and understandable language, a statute which will clearly authorize and assist the courts to interpret and protect those rights and which will, in addition, set a limit to executive and, insofar as it is possible or desirable, parliamentary authority to interfere with or abridge those rights. This, I submit, we have done. Ours is a draft Bill of Rights that he who runs may read.<sup>8</sup>

And in opposition to an amendment supported by Paul Martin, which would have amended the laws of Canada by:

. . . repealing or revoking them to the extent that any provision thereof would abrogate, abridge, or authorize the abrogation, abridgement or infringement of any of the rights or freedoms declared to exist in Canada by the Canadian Bill of Rights.<sup>9</sup>

Mr. Fulton said:

But my Hon. friend does not realize, or refuses to realize, that the words we have in the present Bill of Rights override all other Acts. . . . So it is now clear, even if it was not clear before, that this Bill of Rights operates as a law, as a rule of construction with respect to every statute of Canada, every law of Canada, unless that law of Canada expressly provides that it shall operate

6. *Ibid.*, p. 5735.

7. *Ibid.*, p. 5739.

8. *Ibid.*, p. 5789.

9. *Ibid.*, p. 7474.

notwithstanding the Bill of Rights. Nothing could be clearer and nothing, in my opinion, could be more all-embracing; so that all that my Hon. friend's amendment does in this respect is to take the protection which we seek to confer by the Bill of Rights out of the Bill of Rights and put it in the Interpretation Act, but it is nothing more than a rule of construction as he has drawn his amendment. . . . (The Courts) find an express legislative enactment of this parliament, as our Bill is drawn, which says that every law of Canada shall, unless it is expressly declared by the Parliament of Canada that it shall operate notwithstanding the Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe. They will then have a look at the section or provision in question and say first, does this statute have within it an express declaration that it operates notwithstanding the Bill of Rights? If the answer to that question be no, it does not contain such an express provision, they would then look at the question of whether or not the provision of the statute which is before them does contravene the Bill of Rights. If the answer to that question be yes, then they would say, by virtue of the Bill of Rights we are directed not to give that statute or provision that construction, interpretation or application; in fact, we are directed not to apply it in a manner which will contravene the Bill of Rights.<sup>10</sup>

These views were supported generally by other members of the government who spoke in the debate. Mr. Regnier said that the Bill:

. . . is not only a declaration of human rights, it also provides for the revision of present and future laws which may come in conflict with its provisions.<sup>11</sup>

The Prime Minister said:

. . . if any of these several rights should be violated under legislation now existing the courts in interpreting the particular laws or statutes which have been passed will hereafter, if this bill is passed, be required to interpret those statutes of today in the light of the fact that wherever there is a violation of any of these declarations or freedoms the statute in question is to that extent non-operative and was never intended to be so operative. . . . whatever act has been passed that violates any of these principles of interpretation, the courts from now on will determine the ineffectiveness and inapplicability of the sections concerned in view of this declaration by parliament.<sup>12</sup> . . . There are many who still hide behind the Maginot line of their own failure to endeavour to understand the Bill of Rights, and who have not yet appreciated the fact that it will be very difficult in days ahead for any statute today existing to be interpreted in a way which will do violence to the letter and spirit of these provisions. It will be very difficult for any statute to be drafted and enacted by Parliament from this day on which will in any way deny the provisions of sub-paragraphs (a) to (g) inclusive in paragraph 2.<sup>13</sup>

The members of the opposition maintained that the Bill would not do those things promised by the government. The leader of the opposition maintained that exaggeration of the significance of the Bill "can only mislead and raise perhaps unrealistic hopes, indeed leading to later disillusionment,"<sup>14</sup> and that in the form presented by the government the Bill was not an entrenched constitutional change, as it could be annulled by an ordinary statute in the ordinary way. Mr. Pearson also objected to the fact that the Bill did not provide that other statutes contrary to the intent of its provisions would be repealed to the extent of such conflict. He maintained that the clause which provided that other laws of Canada

10. *Ibid.*, p. 7475-6.

12. *Ibid.*, p. 5646.

14. *Ibid.*, p. 5657.

11. *Ibid.*, p. 5924.

13. *Ibid.*, p. 7549-50.

should not be "construed or applied" so as to abrogate, abridge or infringe our freedoms was insufficient under legal rules of construction to override the particular provisions of other statutes prescribing something directly contrary to the intent of the Bill. The expression "construe or apply" was one which would be ineffective where there occurred a direct conflict between the Bill and such other statute, and operative only where such other act could reasonably be construed or applied so as to comply with the provisions of the Bill. The courts will not construe a statute expressed in general terms to override one expressed in specific terms. Hazen Argue agreed.<sup>15</sup>

Paul Martin, who agreed with the criticisms made by his leader, also attacked the vagueness of the Bill's language, which, he felt, would lead to a large amount of litigation. He pointed out that the courts are not allowed to examine the debates of Parliament in interpreting the meaning of legislation, and that it was therefore necessary to use very precise language. As an example of what he meant, he referred to the inclusion in the Bill of Rights to a "presumption of innocence." To be consistent, and to effect the meaning for this term which the government maintained for it, the Bill should make clear that the onus of proof of an offence is on the one making the charge. This required more than the proposed wording:

I refer to the right of presumption of innocence. We want to make that effective. We mean by that amendment that under the Bill of Rights an individual subject to the law of Canada is presumed to be innocent until the contrary is proved, the onus resting on the person making the charge. For instance, under our Opium and Narcotic Drug Act there are situations where the presumption of guilt is on the accused. Unless we pass this amendment, or something like it, the putting into paragraph (f) of the presumption of innocence clause will not affect the Opium and Narcotic Drug Act. According to the representations made by the Bar Association and by others, I believe if the minister wants this Bill to be what the government says it is to be, and what this house has declared it should be, this amendment should be accepted.<sup>16</sup>

And speaking to the amendment proposed by Mr. Deschatelets that the words "in accordance with law" be substituted for "by due process of law," Mr. Martin said:

I just want to add that the evidence before the committee clearly established that the phrase "due process of law," while not entirely unknown to Anglo-Canadian law, having been mentioned in a statute of Edward II, has not for a long time been in current use in our jurisprudence. We have relied on the English practice and we recognize "according to law" or "according by law" or "in accordance with law," following the usages in United Kingdom courts as a means of expressing what in the United States legal system they understand by due process. Due process is recognized in the United States constitution and it has been subjected to different interpretations in hundreds of cases in that country. It means different things in different jurisdictions. While our courts are not obligated to regard United States decisions as authoritative, and while I recognize that United States decisions, in the absence of Canadian judgments, may be regarded as persuasive, the fact is that by the use of "due process" in this context and in this unusual way we are imposing upon our courts an obligation to begin a new Canadian jurisprudence.

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15. *Ibid.*, p. 5668.

16. *Ibid.*, p. 7475.



This is not the case in Canadian law with regard to the suggested phrase "in accordance with law" or "by law" or the other phrase I mentioned a moment ago. I hope that the minister has been impressed with the evidence on this point and I hope that he will give consideration to the amendment before the committee.<sup>17</sup>

Mr. Erhart Regier attacked the "due process" provision of the Bill because this wording gave individuals no guarantee that the declared rights might not be removed by a government changing the law and then alleging "due process." He said:

I should like to emphasize the words "except by due process of law." These words make a mockery of any pretence that the individual is now being protected against actions on the part of governments. Anything that is done by a government ought to be by due process of law; and while the Bill may protect my rights from invasion by another individual, it does nothing to protect my rights from invasion by government because the government always has at its disposal the due process of law. In my opinion the whole reason for the origin of the Bill falls down right here in this clause, which contains the words "except by due process of law." I am being allowed to enjoy my fundamental rights with this exception, "except by due process of law." I have those rights only as long as the government of the day deems it advisable that I have them. I feel that the whole intent of the bill is defeated by that little inclusion "except by due process of law."

We have in this bill no protection whatsoever against the law. The law can violate individual human rights at any time a Parliament or a government deems it advisable to do so. In the whole bill—and this is repeated and underlined time after time in the Bill—the prerogative of the government and of Parliament to violate individual human rights is maintained. Any argument that this Bill is going to protect individuals from arrogance or from arbitrary decisions on the part of government falls apart like a house of cards.<sup>18</sup>

A general criticism of the Bill was that it did not adequately cover all rights of Canadians because it was limited to matters within federal competence. It was stated that the government should seek an agreement with the provinces which would result in a Bill protecting individual rights both federal and provincial. Some opposition spokesmen referred to the lack of protection for social and economic rights. Others asserted that the freedoms referred to in the Bill were already adequately protected by law.

Notwithstanding these many objections, the Bill of Rights was passed unanimously in the House of Commons, and by a large majority in the Senate.

#### OUR COURTS VIEW THE CANADIAN BILL OF RIGHTS

The Canadian Bill of Rights is entitled "An Act for the Recognition and Protection of Human Rights and Freedoms." It should be noted that the rights and freedoms so recognized are human rights and freedoms. Accordingly, a corporate entity may not claim for itself under the Act the rights and freedoms recognized for humans. Such a corporate body is limited in its rights to such as are established for it by common and statute

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7. *Ibid.*, p. 7431-2.

18. *Ibid.*, p. 5741.

law. The case of *Oil, Chemical and Atomic Workers International Union, Local 16-601 v. Imperial Oil Ltd.*<sup>19</sup> decided that a trade union in British Columbia, a legal entity for the purpose of the action, had only those rights which it derives from statute and common law, and could not claim rights or freedoms under the Bill of Rights. A section of the Labor Relations Act of British Columbia, which counsel for the unions urged interfered with the status of trade unionists in Canada by curtailing their freedom to participate in politics and political parties (meaning that it curtailed the freedom of trade unionists to participate collectively through their unions, since their freedom as individuals was not curtailed in any way) was held not to be an infringement of the Bill of Rights. The Bill did not envisage such freedoms or rights as applying to corporate legal entities. If a trade union had the legal right to contribute to political parties,

it is not one of those human rights or fundamental freedoms which pertain to an individual and are recognized and declared by the Canadian Bill of Rights.<sup>20</sup>

The provisions of the Bill were carefully drafted to avoid conflict with provincial jurisdiction, and the named human rights and freedoms are recognized and declared to such extent as they may fall within the legislative competence of the Parliament of Canada. Clause 5 states that the provisions of Part I of the Bill:

shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

In *Re Williams and The Ontario Securities Commission*,<sup>21</sup> on an application for an order of prohibition, one of the grounds urged was that Part III of the Ontario Securities Act,<sup>22</sup> was *ultra vires* of the provincial legislature, and was in conflict with the Bill of Rights. It was held by King, J., that the Act was not *ultra vires* of the provincial legislature, and consequently the Bill of Rights had no application:

Once the provisions of the Securities Act sought to be held *ultra vires* of the legislature of the Province of Ontario are, on the contrary, found to be *intra vires* the said legislature as dealing with Property and Civil Rights, then I am of the opinion that an Act for the Recognition and Protection of Human Rights and Fundamental Freedoms has no application.<sup>23</sup>

In *Ayotte v. Wachowicz and Killam*<sup>24</sup>, it was argued that the Bill of Rights shielded an accused who was compelled by the prosecution to take the witness stand under the Saskatchewan Evidence Act, section 31(1). The judge dismissed the plea on the Bill of Rights summarily, and never dealt with it in his judgment, presumably because the Bill of Rights had no

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19. (1961) 36 W.W.R. 385.

20. *Per* Whittaker, J., *ibid.*, p. 392. Of course, the legislation involved was provincial, and the case could have been decided on that ground alone.

21. (1961) O.R. 350.

22. R.S.O. 1950, C. 351.

23. (1961) O.R. 350, at p. 352.

24. (1961) 36 W.W.R. 656.

application to legislation of provincial origin within the competence of the province.

The preamble of the Bill refers to the "position of the family in a society of free men and free institutions." In *Thomas v. Thomas*,<sup>25</sup> McKercher, J., the trial judge, held that the maintenance of the family home owned in Saskatchewan was necessary to protect the position of the family, and the preamble of the Bill of Rights (affirming *inter alia* the position of the family) was effective to prevent a wife from destroying the family home by maintaining an action against her husband for partition and sale. For this and other reasons he held that the wife's action failed, but the Court of Appeal, being of the view that the wife was entitled to a division under the Partnership Act, reversed the trial court's judgment without reference to the Bill of Rights, and inferentially refused to accept the view that the Bill of Rights was applicable.

Most of the decided cases have application to the provisions under either section 1 or 2 of the Bill. Section 1 of the Canadian Bill of Rights recognizes and declares the existence of certain rights and freedoms. Section 2 declares that the laws of Canada shall not be construed or applied so as to abrogate, abridge or infringe such rights and freedoms, and certain matters particularized therein. The reported decisions under the Bill will be dealt with under the sections and clauses giving rise to the questions at issue. Certain cases deal with more than one provision of the Bill, resulting in some duplication.

Section 1 of the Bill recognizes and declares the existence, without discrimination by reason of race, national origin, colour, religion or sex, of certain human rights and fundamental freedoms, the first mentioned being:

- (a) the right of the individual to life, liberty, security of the person, and enjoyment of property, and the right not to be deprived thereof except by due process of law.

This section was commented on by Brossard, J., in *Lafleur v. Guay and the Minister of National Revenue*:

The section does not create any new right and only recognizes those rights which are considered to have always existed so its essential object can only be to assure for the future the respect for these rights in cases where they have not been previously respected.<sup>26</sup>

To assess the import of this clause requires consideration of the phrase "due process of law." These words are of ancient and honourable lineage in English and American jurisprudence, having been mentioned in a statute of Edward II in 1335, and in the fifth and fourteenth amendments to the constitution of the United States. "Due process of law" has been judicially interpreted and commented on in hundreds of United States decisions, yet the expression is not usual in Canadian law, and is unfamiliar and thus

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25. (1961) 35 W.W.R. 4S1. Reversed (1961) 36 W.W.R. 23.

26. (1962), 31 D.L.R. (2nd) 575, at p. 586.

uncomfortable to Canadian lawyers. The more common terms we rely on in Canada, and which follow the current usage in the United Kingdom (yet without admitting an exact similarity of meaning) are "according to law," or "according by law," or "in accordance with law."

In *Regina v. Martin*<sup>27</sup> the accused, suspected of being under the influence of liquor while driving a car, was told that he was to be charged with driving while impaired, and was asked to take certain physical tests, without being informed that he need not submit to the tests, or that the result might be used as evidence against him at his trial. His counsel objected to the evidence thus obtained, but the Magistrate accepted and adopted such evidence. On appeal, Milvain, J., of the trial division of the Supreme Court of Alberta, felt that the Magistrate had failed on the *voir dire* to investigate all the circumstances surrounding the taking of the tests from which the evidence was obtained, particularly the failure of the police to warn Martin of the use that might possibly be made of the result of the tests, and his right to refuse to submit to the tests. Milvain, J., held that this was a disregard of "due process of law." The Court of Appeal reversed this decision, holding there was no need for the Crown to establish that the accused had taken such physical tests voluntarily, and that the evidence so obtained, being objective in nature, was in a different category than a confession which springs from the accused's own words, and might be testimonially untrustworthy. Consideration was given to the phrase, "due process of law":

It would be difficult, indeed unwise to attempt an inclusive definition of the phrase "due process of law" except to state that in my view in the case at bar it means the law of the land as applied to all the rights and privileges of every person in Canada when suspected of or charged with a crime, and including the trial in which the fundamental principles of justice so deeply rooted in tradition, apply.

In the case at Bar, I am of the opinion that the accused was convicted by due process of law.<sup>28</sup>

*Rebrin v. Bird and the Minister of Citizenship and Immigration*<sup>29</sup> involved a deportation order issued under the Immigration Act. It was argued on behalf of the appellant that the Bill of Rights had been infringed, as it was contended that matters irrelevant to a proper determination of whether the appellant should be deported had been considered by the Minister. The Supreme Court of Canada held, per Kerwin, C. J. C., that: (1) there was no infringement of the Bill of Rights, as "the Appellant has not been deprived of her liberty except by due process of law"; and (2) there was no evidence to support the suggestion that matters irrelevant to the proper determination of the appeal to the Minister were considered,

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27. (1961) 34 C.R. 350. Reversed, (1961) 35 C.R. 276.

28. *Per MacDonalD, J. A., ibid.*, at p. 290. The Appeal Court further held that there was no reason under clause 2(e) to consider that the accused was deprived of his right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

29. (1961) 34 C.R. 412; 27 D.L.R. (2nd) 622.

the appellant having had the opportunity to answer all the evidence on the information against her upon which the Minister acted. "Due process of law" here seems to be the ordinary legal working of the Immigration Act and the normal discretionary powers of the Minister. Apparently it would have to be shown that what was done by the Department or the Minister both affected the appellant, and was "unlawful," before the courts would say that she had been deprived of her liberty other than by "due process of law."

In *Louie Yuet Sun v. The Queen*<sup>30</sup> a deportation order was made against the appellant under the provisions of the Immigration Act, her right to remain in the country having expired. The appellant had given birth to a child in Canada, and the child, being a natural-born Canadian citizen, had the right to live in Canada. The applicant desired to remain in Canada because she thought it would be better for the child, and it was urged that the child, a natural-born Canadian citizen, was entitled to the love, care and attention of its mother. The Supreme Court, Kerwin, C. J. C. delivering the judgment, held that the appellant had not been deprived of her liberty except by due process of law, and the fact that she was the mother of a natural-born Canadian citizen did not affect the matter of her rights under the Immigration Act.

In *Regina v. Gonzales*<sup>31</sup> an Indian was accused of possessing liquor contrary to section 94(a) of the Indian Act. His defence was that section 94(a) was now overruled by clause 1(a) of the Bill of Rights, which gave to him the "right to . . . enjoyment of property and not to be deprived thereof except by due process of law." Magistrate Pooles held that the substance of Gonzales' complaint was that the Indian Act prevented him from exchanging estate of one kind for estate of another, namely intoxicants. These provisions of the Indian Act were to prevent Indians from being cheated in their dealings for liquor or when drunk. Gonzales, as an Indian, enjoyed his lawful estate as an Indian, and the full protection of the law. The magistrate felt that section 1 of the Bill of Rights did not overrule, but confirmed all existing legislation. On appeal, the decision of the magistrate was affirmed, although no opinion was expressed as to whether the declaration in section 1 of the Bill that there have existed and shall continue to exist those rights and freedoms recited confirms all existing legislation.<sup>32</sup>

In *Re Spence*<sup>33</sup> the accused objected to the publication of newspaper reports of a preliminary hearing from which the magistrate had excluded members of the public, but not the press, claiming that the publication of the evidence given at the preliminary hearing would necessarily tend to prevent a fair trial if he were committed to trial. Maybank, J. held that a

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30. (1961) S.C.R. 70.

31. (1961) 35 C.R. 320. Affirmed (1962) 37 C.R. 56; 132 C.C.C. 237.

32. Defence counsel also relied on clause 1(b) of the Bill. See *infra*, note 39.

33. (1962) 37 W.W.R. 481.

preliminary hearing may be reported, and that the fact of its being reported is not a matter of complaint that the accused has been proceeded against otherwise than by due process of law:

The law allows proper publication. As counsel for the accused agreed, the Canadian Bill of Rights, for the purposes of this application, might be described as an Act to prevent any harm coming to a person otherwise than by due process of law. In the present case, there is no evidence that the accused has been proceeded against otherwise than by due process, and I see nothing in the magistrate's actions to suggest the contrary.<sup>34</sup>

*Regina v. Jensen et al*<sup>35</sup> established that a destruction order against "slot" machines may be made under section 171(3) of the Criminal Code without convicting the owners of the machine of an offence. By an application under section 171, the law of the land is being enforced, and confiscation and destruction of property is "by due process of law":

I do not believe it was the intention of the Parliament that the Canadian Bill of Rights should be given an interpretation which would invalidate a section directed toward the suppression of a practice declared by Parliament to be a crime.<sup>36</sup>

To summarize the decisions under the "due process of law" clause of the Bill of Rights to date, it appears that this phrase has added little, if anything, to Canadian jurisprudence. There is yet no reported decision where it has been effective, either as a sword to enforce the rights of an individual, or as a shield to give him protection.

Clause 1(b) of the Canadian Bill of Rights recognizes and declares "the right of the individual to equality before the law and the protection of the law."

*Attorney General of British Columbia v. McDonald*<sup>37</sup> considered the right of an Indian to have liquor off the reservation, which right was denied by the Indian Act. This section of the Indian Act was challenged as being inconsistent with clause 1(b) of the Bill of Rights. Judge Morrow of the Cariboo County Court, British Columbia, held that this clause of the Canadian Bill of Rights does not abrogate the section of the Indian Act which makes it an offence for an Indian to have possession of liquor off a reserve. He held that a general enactment like the Bill of Rights cannot and was never intended to repeal a specific enactment without expressly saying so. The accused had the right to equality with other Indians before the law, and the protection of the law. It would appear that Judge Morrow understood "equality" in the phrase "equality before the law" as meaning, not that exactly the same rights would be possessed by each and every individual, but that each individual would be equal before the law, circumscribed by any restrictions which the law might place on such individual as one of a group:

The various sub-clauses of s. 1 are governed by the general opening clause, which merely indicates that the several clauses have always existed in Canada, and always shall. As regards ss. (a) it is clearly stated that while any indi-

34. *Ibid.*, at p. 484.  
35. (1962) 39 W.W.R. 321.

36. *Per Ostler, P.M., ibid.*, at p. 328.  
37. (1962) 131 C.C.C. 126.

vidual (including an Indian) has the right to life, liberty, security of the person and enjoyment of property, he may be deprived of any of these by due process of law. If, therefore, the right to have liquor off a reserve, in a manner similar to other people, can be considered the right to enjoy property, he may legally be deprived of this right, by s. 94(a) of the Indian Act. There has been no suggestion in the Bill of Rights that the Indian Act was abrogated in any way. Then, as regards s. 1(b) which is the subsection argued so strongly in favour of the respondent, I would say it is my view that the respondent has the right to equality with other Indians before the law and the protection of the law. Equality, it should be noticed, goes along with protection. The Indian Act was obviously passed for the protection of the Indians, and the Bill of Rights makes it abundantly clear that he always shall enjoy that protection. Had there been any intention of doing away with the protection afforded the Indians, Parliament would undoubtedly have repealed the section. It seems to me quite apparent that a general enactment like the Bill of Rights cannot and was never intended to repeal a specific enactment without expressly saying so.

On the basis of the authorities considered it is my view, and I so hold, that s. 1(b) of this Bill of Rights is not in conflict with s. 94(a) of the Indian Act. The motion is disallowed.<sup>38</sup>

*Regina v. Gonzales* was referred to earlier in connection with clause 1(a). Defence counsel also argued that the section of the Indian Act denying the right of possession of intoxicating liquor to an Indian off the reservation was a violation of the fundamental right described in clause 1(b). Maclean, J. dealt with this argument in much the same way it had been dealt with in the *McDonald* case.<sup>39</sup> On appeal to the British Columbia Court of Appeal, this decision was affirmed, Tysoe, J. A. (Bird, J. A. concurring) holding that the section of the Indian Act in question did not conflict with the right of an individual to equality before the law. "Equality before the law" does not mean that the same provisions in every law apply in identically the same manner to everybody. It means the right of every person "to whom a particular law relates or extends . . . to stand on an equal footing with every other person to whom that particular law relates or extends."<sup>40</sup> Tysoe, J. A. offered the following explanation:

In a civilized society such as ours, it is necessary for the good of the whole that certain persons be denied rights or privileges of some particular kind and that particular duties and obligations rest upon certain other persons. And this for a variety of reasons, of which age, ability and characteristics are some. In my view, it would be a practical impossibility, having regard to human frailties and weaknesses, for an orderly society to exist if there were equal laws for everyone in the sense of the same laws for everyone. . . . It is neither reasonable nor possible that everyone should have the same rights, the same duties and the same liabilities as everyone else. . . . "equality before the law" has nothing to do with the application of the law equally to everyone and equal laws for everyone in the sense for which appellant's counsel contends, namely, the same laws for all persons, but to the position occupied by persons to whom a law relates or extends. They shall be entitled to have the law as it exists applied equally and without fear or favour to all persons to whom it relates or extends. . . . Equality before the law as I have explained it is quite a different thing to equal laws for everyone which, as I have already indicated, would be a practical impossibility. Never have our laws been the same for everyone regardless of such matters as age, ability and characteristics, but the two rights, "equality before the law" and "protection of the law" are deeply rooted in our traditions.<sup>41</sup>

38. *Ibid.*, at p. 131.

39. (1961) 35 C.R. 320, at p. 322. See *supra*, note 31.

40. *Per* Tysoe, J. A. (1962) 132 C.C.C. 237, at p. 243.

41. *Ibid.*, at p. 242-4.

Davey, J. A. affirmed the decision on the grounds that even if the section of the Indian Act in question violated the right of an individual to equality before the law and the protection of the law (which was not admitted), yet as that section of the Indian Act admitted of no construction or application that would avoid conflict with clause 1(b) of the Canadian Bill of Rights, and as the Bill of Rights does not repeal such other legislation, the courts must apply the section of the Indian Act in question in the only way its plain language permits. The importance of this judgment deserves a full quotation:

The difficulty in interpreting and applying the very general language of the Canadian Bill of Rights has not been exaggerated. It is, in my opinion, impossible at this early date, to fully grasp all the implications of the Act, or to determine its application in circumstances that cannot be fully foreseen. In particular, it occurs to me that these human rights and fundamental freedoms, especially s. 1(b) may operate quite differently on conflicting subordinate legislation, such as orders-in-council and orders and by-laws of ministerial and administrative bodies, than they do on parliamentary enactments. In short, the effect of the Canadian Bill of Rights may be to nullify and avoid orders and regulations of subordinate bodies that abrogate or infringe any of those rights or freedoms. If so, the interpretation of s. 1(b) should perhaps be considered in that light. While I am somewhat reluctant to dispose of this appeal without attempting to explore the meaning of s. 1(b), I am persuaded that it is better to let the jurisprudence under this Act develop step by step as the problems arise. So I propose to base my judgment on a very narrow point.

Turning to this appeal. I am far from being convinced that s. 94(a) violates "the right of the individual to equality before the law and the protection of the law," as that language is used in the Canadian Bill of Rights, but, without deciding the point, I will assume for the purpose of this judgment that it does.

Section 2 declares:

"2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to . . ."

Insofar as the specific matters that follow this part of s. 2 are concerned, it may be that the effect is to nullify existing legislation to the extent that it purports to authorize any of the specifically prohibited things. But since none of those things is involved in this appeal, it is unnecessary to express any final opinion on that point, and I refrain from doing so.

In so far as existing legislation does not offend against any of the matters specifically mentioned in clauses (a) to (g) of s. 2, but is said to otherwise infringe upon some of the human rights and fundamental freedoms declared in s. 1, in my opinion the section does not repeal such legislation either expressly or by implication. On the contrary, it expressly recognizes the continued existence of such legislation, but provides that it shall be construed and applied so as not to derogate from those rights and freedoms. By that it seems merely to provide a canon or rule of interpretation for such legislation. The very language of s. 2, ". . . be so construed and applied as not to abrogate . . ." assumes that the prior Act may be sensibly construed and applied in a way that will avoid derogating from the rights and freedoms declared in s. 1. If the prior legislation cannot be so construed and applied sensibly, then the effect of s. 2 is exhausted, and the prior legislation must prevail according to its plain meaning.

The application of that rule of construction to existing legislation may require a change in the judicial interpretation of some statutes where the language permits and thus change the law.



The difficulty with s. 94(a) of the Indian Act is that it admits of no construction or application that would avoid conflict with s. 1(b) of the Canadian Bill of Rights as appellant's counsel interprets it. Since the effect of the Canadian Bill of Rights is not to repeal such legislation, it is the duty of the courts to apply s. 94(a) in the only way its plain language permits, and that the learned magistrate did when he convicted.

I would dismiss this appeal.<sup>43</sup>

To summarize the decisions under the "equality before the law" clause of the Bill of Rights, it would appear that the Canadian Bill of Rights is not a superstatute which remedies inequalities or differences in the law between persons of one group and persons of another. Under section 2, the words "construe or apply" are not wide enough to superimpose an umbrella of protection over the individual to shield him from the operation of all other statutes which abrogate, abridge or infringe the letter and the spirit of the freedoms and rights recognized by section 1 of the Bill. The *Gonzales* case establishes that where there is no sensible construction or application of the express terms of a specific enactment that will avoid conflict with the provisions of section 1 of the Canadian Bill of Rights, the courts will apply the specific provisions of such other enactment in the only way its plain language permits.

Clause 1(d) refers to "freedom of speech."

The right to freedom of speech as recognized and declared by the Bill of Rights was discussed in the case of *Koss v. Konn*.<sup>43</sup> Section 3 of the British Columbia Trade Unions Act<sup>44</sup> was challenged on the grounds that it infringed the right of free speech enjoyed by Canadians, and was *ultra vires* of the British Columbia legislature. Section 3(2) placed restrictions on persuading persons not to do business with, or handle the products of any person, or enter the place of business of an employer. In support of the argument that such legislation was *ultra vires* of the province, certain decisions were quoted as precedents. It was held that the precedents quoted were limited to the proposition that:

provinces have no power to enact legislation which in its true nature and character relates to freedom of expression concerning any policy or activity of government or political parties or public men or concerning public affairs or religious subjects or bodies.<sup>45</sup>

A provincial legislature is not prevented from incidentally infringing what is called freedom of speech, when legislating in relation to a matter coming within section 92 of the British North America Act. The true object and purpose of section 3(2) of the Trade Unions Act is to protect the liberty of a person to carry on his legitimate business, and use his premises without interference except as provided:

The subsection is in no way directed to the suppression of free speech albeit it may have the incidental effect of limiting what one person may say of or

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42. *Ibid.*, at p. 238-9.

43. (1961) 36 W.W.R. 97 and 100.

44. R.S.B.C., 1960, c. 384.

45. *Per Tysoe, J. A.*, (1961) 36 W.W.R., at p. 125.

about another or his business. This incidental effect does not in my opinion, place it outside the legislative competence of the province . . .

Freedom cannot be unlimited, if only because the interests of the whole community of citizens require that some limitations and restrictions be placed upon it.<sup>46</sup>

Tysoe, J. A., drew attention to the restrictions on freedom of speech to which Duff, J. referred in his famous judgment in *Reference re Alberta Bills*:

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James v. Commonwealth*, 1936 A.C. 578 at 627, 105 L.J.P.C. 57, "Freedom governed by law."<sup>47</sup>

Norris, J. A. took the view (in dissent) that:

it is not necessary to consider the Canadian Bill of Rights. . . . in direct relation to any question of conflicting jurisdiction. It is sufficient to say that such statute recognizes as fundamental throughout Canada, the freedom which, in my opinion, would be destroyed on the interpretation for which counsel for the Attorney General contends.<sup>48</sup>

Clause 2 of the Bill sets out that laws of Canada shall be so construed and applied as not to abrogate, abridge, or infringe any of the recognized rights or freedoms and in particular, not to:

- (b) Impose or authorize the imposition of cruel and unusual treatment or punishment.

A rather novel view as to a meaning of this clause was urged in *Regina v. Jensen*<sup>49</sup>, where defence counsel maintained that the destruction of slot machines under section 171 of the Criminal Code would result in cruel and unusual treatment and punishment of the owners, and to the bailees of the machine, who would suffer a heavy financial loss. In rejecting this argument, Magistrate Ostler said:

There is the final point, taken by Mr. St. Jorre, that to make an order of destruction in this case would violate subsection (b) of section 2 of the Canadian Bill of Rights, in that it would "impose . . . cruel and unusual treatment or punishment" upon his client, Jensen, who as bailee and liable to the owners of the machines, would suffer heavy financial loss; a similar submission was made on behalf of the owners by Mr. Matthews. In that respect, I feel bound to say that both Jensen and the owners, having full knowledge of the nature and purpose of these machines, are the authors of their own misfortune, having sought to reap a profit from the illegal operation of these machines . . . Parliament is supreme and the justice of a statute is not the concern of the court—only its interpretation and application.<sup>50</sup>

46. *Ibid.*, at p. 126.

47. (1938) S.C.R. 100. Affirmed, (1938) 3 W.W.R. 337; (1939) A.C. 117.

48. (1961) 36 W.W.R., at p. 116.

49. *Supra*, note 35.

50. *Ibid.*, at p. 332.

Clause 2(c) provides no law of Canada shall be construed or applied so as to deprive a person who has been arrested or detained:

- (i) of the right to be informed promptly of the reason for his arrest or detention;
- (ii) of the right to retain and instruct counsel without delay; or
- (iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful.

*Walsh v. Jordan*<sup>51</sup> dealt with the interpretation of that clause. An R.C.M.P. constable was convicted by an inspector under the Royal Canadian Mounted Police Act of scandalous conduct. On an application to the court to quash the conviction, it was urged on behalf of the applicant that he had been refused counsel contrary to clause 2(c) (ii). The accused had been allowed the assistance of a member of the R.C.M.P. as provided by the R.C.M.P. Act, section 34(3), and such member so appointed to represent and assist the accused had requested on behalf of the accused the right to obtain professional counsel. This request was refused, as section 68 of the R.C.M.P. regulations prohibited counsel at hearings of this type. In a judgment holding that the applicant's rights under the Canadian Bill of Rights had not been infringed, Mr. Justice Morand of the Ontario Supreme Court held that, as the accused constable had not been arrested or detained, section 2(c) (ii) was not applicable, expressing the view, without finally deciding the point, that the term "counsel" as used in section 2(c) (ii) does not mean professional counsel but means as well under the circumstances of this case, the special type of assistance permitted under the R.C.M.P. Act.

*Re Sommervill's Prohibition Application*<sup>52</sup> was also concerned with clause 2(c). Section 171 of the Criminal Code provides for the issuance of warrants to enter and search for evidence of certain specific offences, (e.g. gaming or betting houses) and to take into custody found-ins. Under section 174, the found-ins may be examined on oath before the justice for the purpose of giving evidence as to the use of the premises and the proper execution of the warrant. On the examination of the found-ins, Crown counsel maintained that the examination was for the benefit of the Crown, and analogous to a coroner's inquest, and applying *Wolfe v. Robinson*,<sup>53</sup> concluded that such persons had no right to counsel, or to cross-examine, or to be cross-examined. The magistrate agreed, but Disbery, J., on appeal, did not:

It was at this point, in my opinion, that the learned counsel fell into error in that he failed to appreciate that section 174 was federal legislation and must be read in conjunction with the Canadian Bill of Rights, 1960, ch. 44, passed by the federal government and applicable only under our constitution to federal statutes. Section 2 of the Canadian Bill of Rights, in part, provides as follows: ". . . and in particular no law of Canada shall be construed or applied so as to . . .

51. (1962) 31 D.L.R. (2nd) 88.

52. (1962) 38 W.W.R. 344.

53. (1962) 31 D.L.R. 2nd 233. See *infra*, note 58.

- (c) deprive a person who has been arrested or detained . . .
  - (ii) of the right to retain and instruct counsel without delay, or . . .
- (d) authorize a court . . . or other authority to compel a person to give evidence if he is denied counsel, protection against self-crimination or other constitutional safeguards.<sup>54</sup>

The Criminal Code is a law of Canada and section 174 is a part thereof. . . . Witness D mentioned the Bill of Rights whereupon the magistrate said: "It has been ruled that the Criminal Code takes precedence over any Bill of Rights." It has been held that certain specific provisions in the Criminal Code relating to such matters as onus of proof and the taking of tests are not affected by the general provisions of the Canadian Bill of Rights; but there is no decision that I can find purporting to hold that the Criminal Code takes precedence over the Canadian Bill of Rights. If such exists it would, in my opinion, be a completely erroneous decision.<sup>54</sup>

It is to be noted that the witnesses were detained, and because of such detention this case may be distinguished from the *Walsh v. Jordan* case. In the result, Disbery, J. held (inferentially) that the found-ins were entitled to counsel on their examination under section 174 of the Criminal Code.

In *Regina v. Gray*<sup>55</sup> the accused, suspected of driving while under the influence of alcohol, was taken to the police station and examined by the police doctor, who confirmed the suspicion of drunkenness. The accused was not promptly advised of the reason for his detention, and he was denied counsel until after the police doctor completed his examination, although he did not object to the medical tests. At the trial the accused's counsel maintained a breach of his client's rights under the Canadian Bill of Rights, claiming his client had been deprived of his right to be informed promptly of the reason for his detention, and as well refused the right to retain counsel without delay. It was urged that because these rights were denied the accused, he was entitled to have the charges against him dismissed. Ostler, P. M., held that a denial of such individual rights under the Canadian Bill of Rights did not itself give rise to the further right to have the criminal charge dismissed. However, under the circumstances of this particular case he held that the accused might have been prejudiced in his defence by the denial of his right to instruct counsel without delay. In his opinion, the denial of a right declared in the Canadian Bill of Rights which prejudices the defence of an individual should result in the charges against the accused being dismissed, and accordingly he acquitted the accused.

I do not conceive it to be the duty of police officers to advise persons suspected of or charged with an offence of their right to retain and instruct counsel or to suggest such a course; nor I think would it be part of their duty to arrange for the attendance of counsel for such persons; but the Bill of Rights does impose upon them the duty not to deprive such persons of the right to retain and instruct counsel without delay. This was done in this case and in the result it is impossible to say with certainty that the defendant has had a fair hearing and has been able to make that full answer and defence which is his right and which may have been open to him had he not been deprived of a right guaran-

54. (1962) 38 W.W.R., at p. 349-50.

55. (1962) 132 C.C.C. 337.

teed to him in the Bill of Rights. Every Act is remedial, and, by s. 15 of the Interpretation Act, R.S.C. 1952, c. 158, shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit." If the Bill of Rights is to be given any meaning or to have any effect, I would think that it must apply in cases such as this—although the courts do seem to have been reluctant to give much effect to it. Counsel for the Crown poses the question, because a person is deprived of the right to retain and instruct counsel without delay, is he, *ipso facto*, to go free? I would think not, unless there is a resultant denial of natural justice, and there are, in fact, few charges in which the deprivation of this right would have the possible prejudicial effect as it does with respect to this particular charge.<sup>56</sup>

To summarize the decisions under the "right to counsel" clause of the Bill of Rights, it would appear that if there has been actual arrest or detention, the courts will insist on the accused's being given a chance to obtain counsel (though perhaps not professional counsel) without delay, and if failure to do so has prejudiced the accused, they may even acquit him.

Clause 2(e) provides that no law of Canada shall be construed or applied so as to:

deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

In *Schumiatcher v. Attorney General of Saskatchewan*<sup>57</sup> it was held that clause 2(e) confirms the fundamental principle of criminal law that an accused person should be able to tell from the information or indictment the precise nature of the charge against him. Chief Justice Hall said:

A prosecutor acting in the name of the Sovereign is in my opinion under a specific duty not to circumvent or negate the intentions of the Parliament of Canada. The courts too must be vigilant in seeing that the provisions of the Canadian Bill of Rights are not breached, ignored, or whittled away.

In *Wolfe v. Robinson*<sup>58</sup>, however, it was held that clause 2(e) added nothing to the existing law. The Jehovah's Witness parents of a new-born infant refused to consent to a needed blood transfusion, and the child died. At a coroner's inquest, a verdict was brought in attributing the child's death to a delay in administering the transfusion. The child's father, considering himself aggrieved by the jury's verdict, moved to have it quashed, urging (amongst other things) that by reason of the conduct of the matter before the coroner, he was deprived of his right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. As the headnote of the report summarized the decision:

Counsel acting on behalf of an interested party has no right to participate at a coroner's inquest or to cross-examine the witnesses and, although he sometimes may be permitted to take part in the proceedings as a matter of courtesy on the part of the coroner, there can be no complaint if he is not allowed to do so. A coroner's inquest is a court of inquiry, not of accusation, and inasmuch as the verdict of a coroner's jury does not bind any person whose conduct may be involved in its finding and it does not in any way constitute an adjudication of

56. *Ibid.*, at p. 347-8.

57. (1962) 39 W.W.R. 577.

58. *Supra*, note 53. See also *Regina v. Martin*, *supra*, note 28.

rights affecting either person or property, the maxim *audi alteram partem*, which requires that a man shall not be subject to final judgment or to punishment without being heard, has no application. For the same reason an interested party cannot be "aggrieved" by the verdict of a coroner's jury; hence he has no *locus standi* to invoke *certiorari* to set aside such a verdict, regardless of irregularities in the conduct of the inquest even though it may reflect serious misconduct on his part.

Schroeder, J. A., delivering the judgment of the Court of Appeal, said:

The appellant endeavoured to support the position taken by him by a reference to s. 2(e) of the Bill of Rights, 1960 (Can.) c. 44, which provides . . . (quoting Section 2(e)) . . . I would observe that this provision adds nothing to the existing law, but, in any event, I have made it plain that in my view a coroner's inquisition is not a hearing for the determination of a subject's rights or obligations or which has that effect. That is sufficient to dispose of this ground of contention.<sup>59</sup>

*Lafleur v. Guay and Minister of National Revenue*<sup>60</sup>. Under section 126(4) of the Income Tax Act, the Minister designated an Inquisitor to conduct an inquiry into the affairs of a taxpayer, who was, in accordance with departmental precedents in similar inquiries, neither notified of the inquiry nor given the right to be represented by counsel. The taxpayer, learning of the inquiry, sought an injunction, maintaining that such an inquiry subjected him to possible jeopardy of his person and goods, and hence the hearing (though not judicial or quasi-judicial) involved the determination of his obligations, and 2(e) of the Canadian Bill of Rights gave him the right not to be deprived of his right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. The court held that such an inquiry under the Income Tax Act, as it was conducted by the department appointee, would deprive the taxpayer of his right to a fair hearing as provided in clause 2(e), and therefore granted the injunction. While the inquiry was not a final inquiry, (had the taxpayer been charged with an offence as a result of the inquiry, he would at that time have had his full right to reply) yet the inquiry could have resulted in a departmental decision of the Minister, which might temporarily have deprived the taxpayer of his property. Such an inquiry might result in the taxpayer losing the use and enjoyment of his property until the case was finally disposed of in the courts. In the case in question, it might have forced the taxpayer into bankruptcy.

Neither in a country professing democratic liberty nor in a dictatorship is the state justified in the name of what it considers the common good in depriving the individual of the protection of the law either in respect of his person or of his property.

Parliament in 1960 by the Bill of Rights demonstrated the admirable intention of putting an end to these abuses and to protect the liberty of the subject against certain statutes the application and the interpretation of which could in the past have constituted a threat to liberty.<sup>61</sup>

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59. *Ibid.*, at p. 244-5.

60. *Supra*, note 26.

61. *Per Brossard, J., ibid.*, at p. 590-1. Note that use was made of the French text.

The decision in this case is under appeal.

In *Regina ex rel Graham v. Leonard*<sup>62</sup> the Attorney-General of Alberta withdrew charges, the information for which had been sworn by a private prosecutor. The informant moved the Supreme Court of Alberta to quash the withdrawal and restore the charges, claiming (*inter alia*) that the action of the Attorney-General in withdrawing the charge deprived the informant of his rights and privileges under the Canadian Bill of Rights, and in particular under clauses 1(b) and 2(e). The court dismissed the motion. Blackburn, J., stated:

It is my opinion that these sections of the Canadian Bill of Rights are not applicable in this case; sec. 1(b), because the action of the Attorney-General cannot in any way be construed as being the assertion of special privilege for any individual before the law. The Attorney-General intervened not in a personal capacity, but as the representative of the crown in his capacity as chief law enforcement officer of the province. In fact the purpose of his intervention was expressly to afford the protection of the law by preventing its abuse in the continuance of a prosecution founded on insufficient evidence. Sec. 2(e) is not applicable because the right of a person to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations surely cannot embrace the right to prosecute charges against another person without such charges being founded on evidence which, in the opinion of the chief law enforcement officer is sufficient to warrant a charge being laid. To permit the continuance of such proceedings would be an abuse of this section.<sup>63</sup>

Clause 2(f) states that no law of Canada shall be construed or applied so as to:

Deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause.

This section divides into three parts: (a) the right of the presumption of innocence; (b) the right to a fair and public hearing by an independent and impartial tribunal; and (c) the right to reasonable bail.

Did the right to the presumption of innocence declared by the Canadian Bill of Rights in any way change the law of the land? There has always been a presumption of innocence in favor of an accused so far as prosecutions under the Criminal Code are concerned, which presumption remained until the accused was "duly" convicted, i.e., convicted "according to law." Section 5(1) (a) of the Code states:

Where an enactment creates an offence and authorizes a punishment to be imposed in respect thereof (a) a person shall be deemed not to be guilty of that offence until he is convicted thereof.

*Regina v. Goldstein*<sup>64</sup> dealt with clause 2(f) of the Bill of Rights. The charge was unlawfully keeping a common gaming house. The evidence was poker chips, cards, slips of paper, men seated at tables, and so on. The Crown relied on the presumption under section 169 (c) of the Code

62. (1962) 38 W.W.R. 300.

63. *Ibid.*, at p. 308.

64. (1961) 34 C.R. 314.

that a house in which gaming equipment is found is deemed to be a gaming house. The defence urged that our Bill of Rights, clause 2(f), provides that no law can or should be construed or applied so as to "deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty according to law." Magistrate Bewley held:

1. *Generalia specialibus non-derogant*—a general act is to be construed as not repealing a particular one. The Bill of Rights is a general and subsequent statute and clause 2(f) "is a general statement which I cannot take to repeal the special enactment of a statutory presumption of fact" such as arises in section 169 of the Code, or the "onus" section, 168.
2. The statutory presumption which arises under section 169 from the finding of gaming equipment is a presumption, not of guilt or innocence, but of fact, i.e., that the place is a common gaming house, not that the accused was or is guilty of being its keeper.
3. The statutory presumption under section 169 of the Code was not repealed by the enactment of the Bill of Rights, as such presumption "is not so conclusive as to preclude the application of the doctrine of reasonable doubt wherever that may properly apply."

*Regina v. Guertin*<sup>65</sup> was a similar case. The charge was possession of explosives without lawful excuse, contrary to section 80 of the Code (under which section the onus lies on the accused to establish "lawful excuse.") The evidence was seven detonation caps in the accused's possession, and the Crown relied on the accused's statutory onus. The argument for the defence was that section 80 of the Code was inconsistent with clause 2(f) of the Bill of Rights. Porter, C. J. O., delivering the judgment for the Ontario Court of Appeal, held that section 80 of the Code does not infringe upon the right to be presumed innocent recognized and declared by the Bill of Rights:

Counsel for the accused argued that s. 80 of the Code, by putting the proof of lawful excuse upon the accused, abrogates or infringes the right of the accused "to be presumed innocent until proved guilty according to law."

I do not agree with this contention. Under s. 80 of the Code the accused is not deprived of the right to be presumed innocent until proved guilty "according to law." The law, it is true, stipulates that upon proof that accused has the explosive substance in his possession, he shall be liable to conviction unless his possession can be justified by lawful excuse. Nevertheless, it is only after conclusion of the evidence, if any, for the defence as well as the evidence for the Crown that the trial tribunal is in a position to find his guilt or innocence. The presumption of innocence remains until the whole evidence is before the court. If the accused elects to adduce no evidence or if the evidence he adduces fails to support the defence of lawful excuse, then in either case he may be convicted "according to law."

For these reasons, I am of the opinion that s. 80 does not abrogate or infringe upon the right to be presumed innocent recognized and declared by s. 2(f) of the Bill of Rights.<sup>66</sup>

65. *Ibid.*, at p. 345.

66. *Ibid.*, at p. 347.



*Regina v. Fulmer*<sup>67</sup> involved a motion to dismiss a charge under the Criminal Code, section 221 (2), on the ground that the Canadian Bill of Rights vitiated the effect of section 221 (3), which provided that failure to stop at the scene of an accident is *prima facie* evidence of an intent to escape civil and criminal liability, an ingredient of the offence created by section 221 (2). Magistrate Hanrahan of the Magistrate's Court for the County of Essex, Ontario, held, in effect, that the presumption of innocence referred to in clause 2 (f) was a presumption "until proved guilty according to law" and in his opinion the words "according to law" should be underlined. He was of the view that as the Canadian Bill of Rights acknowledged that there:

has existed in Canada the fundamental freedom of the protection of the law, and with no attempt made to repeal any particular existing law, it is to be presumed, as stated by the Chief Justice of the Supreme Court of Canada, Parliament was fully aware of the existing law and practices. Most of these, of course, have stood the test referred to of being scrutinized in Courts of Appeal and where there approved would appear to come well within what is described in the Bill as "principles of fundamental justice."<sup>68</sup>

Accordingly, it was his view that neither the presumption of innocence mentioned in clause 2 (f) of the Canadian Bill of Rights, nor the right to equality before the law declared in clause 1 (b), nor the right to a fair hearing in accordance with the principles of fundamental justice in clause 2 (e), vitiated the effect of the particular sections of the Criminal Code involved in the motion before him.

In *Regina v. Sharpe*<sup>69</sup> a similar decision was reached. The headnote reads:

The accused was charged with having narcotic drugs in his possession for the purpose of trafficking contrary to s. 4(3) (b) of the Opium and Narcotic Drug Act, R.S.C. 1952, c. 201 and amendments thereto. He was convicted and appealed to the Court of Appeal submitting that the presumption created by s. 17(1) of the Act was contrary to the Canadian Bill of Rights, s. 2(e) and (f) (Part I). There was an alternative defence that accused had satisfied the onus and met the presumption placed upon him by ss. 4(4) and 17 of the Opium and Narcotic Drug Act.

Held, the appeal should be dismissed.

A statutory provision which places an onus on accused to establish a lawful excuse for having an article in his possession does not infringe upon the presumption of innocence declared by the Canadian Bill of Rights: . . . In particular the Opium and Narcotic Drug Act does not deprive an accused of the benefit of the presumption of innocence.

Morden, J. A., made the following comments:

The burden resting upon the Crown in a criminal case of proving the accused guilty beyond a reasonable doubt is a matter of substantive law and never shifts from the Crown. In contrast to this, the secondary burden—that of adducing evidence—may shift in the course of a trial in depending upon the evidence adduced. The existence of these two burdens and the relation between them is well established in criminal law. . . . The statutory burdens or presumptions raised by s. 4(4) and s. 17 of the Opium and Narcotic Drug Act assist the prosecution by shifting the secondary burden, the burden of

67. (1961) 129 C.C.C. 142.

68. *Ibid.*, at p. 144.

69. (1961) 35 C.R. 375.

adducing evidence, to the accused after evidence is adduced by the prosecution of the basic facts which raise the presumption under s. 17 and a finding of possession is made under s. 4(4). . . . After all the evidence has been heard, if in the mind of the court a reasonable doubt of guilt exists, the accused must be acquitted. . . . In my opinion, the impugned sections of the Opium and Narcotic Drug Act do not deprive an accused of the benefit of the presumption of innocence.

It is interesting to note that the Supreme Court of the United States has on many occasions held that statutory presumptions similar to those I have been considering are not a denial of due process of law guaranteed by the Fifth and Fourteenth Amendments provided that there is a rational connection in common experience between the fact proved and the ultimate fact presumed.<sup>70</sup>

To summarize the decisions under the "Presumption of Innocence" portion of clause 2 (f), to date no cases have yet been reported where the clause has been of value to an accused, or where the courts indicated that the ordinary presumption of innocence which existed prior to the enactment of the Canadian Bill of Rights was either extended or strengthened by the provisions of the Bill.

Under the second portion of clause 2(f), the right to a fair and public hearing by an independent and impartial tribunal, there have been a number of unreported cases before magistrates, where a trial from which the public might otherwise have been excluded, has been left open to the public. In *Regina v. Arsenault*, the accused, a youth of fifteen, appeared before Magistrate W. C. MacDonald at Summerside, P.E.I. on a murder charge. Notwithstanding the fact that the Criminal Code provided by section 427 that the trial of a juvenile should take place without publicity, it was held that under clause 2(f) of the Bill of Rights, the hearing must be held in public and that this was so, notwithstanding section 425 of the Code, which gives the judge the discretion to hold the trial *in camera* where he considers it desirable to do so in the interests of public morals, maintenance of order, or the proper administration of justice. Again, in a case before Magistrate Hugh Meldrum in Kitimat, British Columbia, a man charged with a sexual offence, and whose trial would, had the magistrate exercised his discretion, have been held without the public being present, was held in public, counsel for the accused relying on the provisions of clause 2(f) of the Bill of Rights. The magistrate was of the view that the provision of the Code was as much for the protection of the accused as other members of the public, and accordingly, if the accused wished an open disclosure of the evidence, which might be of an unsavory nature, a public hearing would be had.

Under the third portion of clause 2(f), the right to reasonable bail, there is the reported decision of the Manitoba Court of Appeal in *Regina v. Collins*<sup>71</sup>. To be successful on an application based on denial of reasonable bail without just cause, an applicant has to show that there was such a denial of bail by a magistrate having jurisdiction, or by a judge of the

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70. *Ibid.*, at p. 377-8.

71. (1962) 39 W.W.R. 32.

Superior Court of criminal jurisdiction. Under the circumstances of that case, Miller, C. J. M., said:

I do not feel, therefore, that the Canadian Bill of Rights can be evoked, as whatever was done in so far as the hearing before the learned chief justice was concerned was done by due process of law.<sup>72</sup>

Not specifically under either sections 1 or 2 of the Canadian Bill of Rights, but under the Bill generally, Sissons, J., cited the Bill in support of his decision in *Re Katie's Adoption Petition*.<sup>73</sup> An adoption petition under the provisions of the North-West Territories Child Welfare Ordinance<sup>74</sup> raised a question as to the legality and regularity of an adoption by Eskimo custom. Sissons, J., held that, notwithstanding certain statutory enactments, adoptions in accordance with native custom have not been abrogated, and that the Act<sup>75</sup> which amended the North-West Territories Act<sup>76</sup> by adding the following to section 17:

All laws of general application in force in the Territories are, except where otherwise provided, applicable to and in respect of Eskimos in the Territories.

is not sufficient to change the ancient customary rights and laws of the Eskimo. Sissons, J., said:

The Canadian Bill of Rights prevents Eskimo rights, freedoms, laws and customs being abrogated in this way.<sup>77</sup>

He did not particularize upon this statement.

In *Re Noah estate*<sup>78</sup> Sissons, J., held that the same amendment to the North-West Territories Act was ineffective to abrogate, abridge or infringe the hunting and other rights of Eskimos, including the right of a valid marriage by ancient Eskimo custom. Such vested rights can be extinguished by the Parliament of Canada, but only by "express words or necessary intendment or implication,"<sup>79</sup> and the Canadian Bill of Rights stands in the way of such an interpretation being given the amending act under consideration.

#### COMPARISON OF THE VIEW TAKEN OF THE BILL BY OUR COURTS AND OUR PARLIAMENT

Certain comparisons may be made of the view held by Parliament of the Canadian Bill of Rights and that held by the courts. Members of Parliament differed in their approach. Generally, those of the government maintained that Canada was getting something new and necessary. The provisions of the Bill would be superimposed on the other laws of Canada, taking precedence where such other laws contravened the rights and freedoms declared in the Bill. Generally, those of the opposition

72. *Ibid.*, at p. 36.

73. (1962) 38 W.W.R. 100.

74. N.W.T.O., 1961, 2nd Series, c. 3.

75. S.C., 1960, c. 20.

76. R.S.C., 1952, c. 331.

77. (1962) 38 W.W.R., at p. 101.

78. (1961) 36 W.W.R. 577.

79. *Ibid.*, at p. 600.

maintained the Bill declared nothing new, but merely codified some existing rights and freedoms, and not too effectively at that. The wording of the Bill was not broad enough to do what was claimed by the government.

Our courts and Parliament both agree that the Bill relates to human rights (as distinguished from corporate rights), and that it affects only matters within federal competence.

The provision declaring that the right to life, liberty, security of the person, and enjoyment of property may only be removed "by due process of law" has not yet given rise to any reported decision where the phrase "due process of law" has been given the somewhat extended meaning that the government expected, a meaning beyond that understood by the phrase "in accordance with law". It may be too soon to say that some such meaning may not eventually be given it.

The provision declaring the right of the individual to equality before the law and the protection of the law has not yet given rise to any reported decision which has changed the law of Canada as it existed prior to the enactment of the Canadian Bill of Rights. Those counsel who have seized upon this section as a provision against discrimination have been disappointed. "Equality before the law" does not mean that the law affects each individual in exactly the same way. Nor would it be right if such were so. Some ought to have special rights under the law that others do not need. To give a privilege to those in need may result in others not so in need claiming discrimination against them. "Equality before the law" means that before the law each person shall be treated equitably, but in accordance with any special provision of a particular law applicable to that individual. The impartial majesty of the law is to be extended to each as prescribed for each.

The provision declaring the right to freedom of speech has not extended or altered the legal interpretation of that right as it existed prior to the Bill. Free speech still means freedom governed by law. Our courts view the Canadian Bill of Rights as not preventing restrictions by a provincial legislature on what is called freedom of speech, provided such restrictions arise incidentally to legislation relating to matters of provincial competence.

The provision declaring the right to counsel without delay has altered the law of Canada. In the *Gray* case,<sup>80</sup> a denial of this right, coupled with resulting prejudice to the accused, resulted in his acquittal. In the *Sommervill's Prohibition* case<sup>81</sup>, found-ins under section 171 of the Criminal Code were entitled to counsel on their examinations under section 174.

The clause providing protection against self-crimination has been urged on occasion in unreported cases, but rejected as inapplicable and not falling within its proper meaning.

The right to a fair hearing in accordance with the principles of fundamental justice, is a right which Canadian courts have always striven to

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80. *Supra*, note 55.

81. *Supra*, note 52.

preserve. The clause has been judicially noted as adding nothing to existing law. If the *LaFleur* case<sup>82</sup> is upheld on appeal, it will be a precedent for counsel's presence at inquiries under the Income Tax Act, as in the opinion of the court, a denial of this right would be contrary to the principles of fundamental justice.

The provision declaring the presumption of innocence, a fair and public trial, and reasonable bail, has been considered in a number of cases. It would appear from the reported cases that the "presumption of innocence" under the Bill is only as strong and effective as it was prior to the Bill. It is apparent from *Hansard*, 1960, that our government believed the presumption would apply so as to reverse the onus of proof where it had shifted to an accused. The phrase "presumption of innocence" was used in the debate in a context suggesting that the onus of proof rested on the person making the charge, and continued to rest on such person until the close of the case, not shifting to the accused as provided by some statutes. The opposition maintained that the wording of the Bill was not strong or clear enough to do this. The opposition proposed an amendment to make certain that other statutes were repealed to the extent of conflict with the provisions of the Canadian Bill of Rights. The amendment was not acceptable to the government, which maintained it was unnecessary and that the opposition misunderstood what the effect of the Canadian Bill of Rights would be. The view of our courts on this provision is that no change in the law was effected by the Canadian Bill of Rights. The accused is now, and was prior to the Bill, entitled to be presumed innocent until convicted. Such a presumption of innocence does not prevent the onus of proof shifting to the accused where provided in the statutes. Under some charges, upon proof of certain matters by the Crown, the burden of proof shifts to the accused. He cannot rely on the presumption of innocence declared in the Bill of Rights to escape the shifting of the burden of proof, any more than he could, prior to the Bill, have relied on the presumption of innocence set out in the Criminal Code.

The provision requiring a fair and public hearing has been given effect so as to change the law. Charges which might previously have been tried in closed court have, since the Bill, sometimes been tried publicly. As this may result in disadvantage to some accused, particularly juveniles, it is doubtful whether such a result was intended.

The expectation of the government was that the Canadian Bill of Rights would be such a charter of liberties as would override or superimpose its declared rights and freedoms on other laws of Canada contravening them. The opposition maintained this would not be its result, as apt wording to achieve such a meaning was not used. The judgment of Davey, J. A., in the *Gonzales* case<sup>83</sup> holds that the words "construe and apply" are not in themselves strong enough to superimpose the general

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82. *Supra*, note 26.

83. *Supra*, note 31.

declarations in section 1 of the Bill of Rights on other laws of Canada which admit of no alternative construction or application that avoids conflict with the Bill. To do what the government promised for it, the Bill was deficient in either of two ways: in not providing for the repeal of legislation which contravened its declared freedoms, or in not providing adequate wording to supplement the crucial words "construed or applied" so that they, with the support of such supplemental wording, would have revised the operative effect of other federal legislation which contravened the declarations of the Bill.

But the judgment of Davey, J. A., in the *Gonzales* case, negating as it does the chief promise of the government for the Bill, opens another view as to areas where the Bill may prove useful and effective, areas of benefit which if they were not wholly overlooked by Parliament were certainly underemphasized. The judgment notes that the declared human rights and fundamental freedoms may operate quite differently on conflicting subordinate legislation than on other Canadian statutes. The will of Parliament, as expressed in statutes, is the law of the land, and under our parliamentary system Parliament cannot effectively and irrevocably divest itself of its source of power. It cannot irrevocably destroy its own right to repeal its own statutes expressing its new will in substitution for its old. As a statute of Canada, the Canadian Bill of Rights could not be expected to put its declarations of freedom in an invulnerable position. What Parliament can do it can also undo. But the Bill may well affect "conflicting subordinate legislation such as orders-in-council and orders and by-laws of ministerial and administrative bodies."<sup>84</sup>

There may be a double standard applicable to determine whether the Canadian Bill of Rights supercedes conflicting laws: first, a standard with respect to other statutes of Canada (where the freedoms declared by section 1 would gain no precedence over a conflicting statutory enactment which admitted of no compatible construction), and second, a standard with respect to subordinate legislation—ministerial directives, rules and regulations, orders-in-council and matters emanating from sources to whom Parliament has delegated powers and responsibilities (where the declarations of the Bill may be effective to negative contravening provisions).

The Davey judgment in the *Gonzales* case not only negatives the operation of section 1 of the Canadian Bill of Rights where it is in direct conflict with the only possible interpretation of another particular statute, but also supports the view that the Canadian Bill of Rights may in other circumstances, alter the law of Canada. It points out that where there is no construction that could be applied to the interpretation of such other statute except one in direct conflict with section 1 of the Canadian Bill of Rights such other statute may not be given any other than its plain natural meaning. However, the converse is also true; where an alternative con-

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84. *Supra*, note 42.

struction may reasonably be made of another law of Canada so that it will not conflict with the declarations of the Bill of Rights, then such other law ought to be so construed.

The application of that rule of construction to existing legislation may require a change in the judicial interpretation of some statutes where the language permits and thus change the law.<sup>85</sup>

This judgment deals only with a direct conflict of other laws with section 1 of the Canadian Bill of Rights, the fundamental freedoms. It does not concern itself with a direct conflict of other laws with those particular matters referred to in clauses (a) to (g) of section 2. It is not an authority for the statement that the Canadian Bill of Rights is either effective or ineffective where a law of Canada directly contravenes any of those matters mentioned in clauses (a) to (g) of section 2. This question is left open:

In so far as the specific matters that follow this part of section 2 are concerned it may be that the effect is to nullify existing legislation to the extent it purports to authorize any of the specifically prohibited things.<sup>86</sup>

A contrast of the difficulty in settling the meaning of the Canadian Bill of Rights with the ease that some expected may be seen in comparing the view on the language of the Bill expressed in the House of Commons debate by the Honourable D. J. Walker, a Cabinet Minister, with the view of Davey, J. A. in the *Gonzales* case. Mr. Walker said:

In the course of my practice I have appeared before the Supreme Court of Canada many times over the past 30 years. What they want above all other things is simplicity of language, and here you have it; simple, plain language that cannot be misunderstood by layman, lawyer, or judge.<sup>87</sup>

And Davey, J. A. said:

The difficulty in interpreting and applying the very general language of the Canadian Bill of Rights has not been exaggerated.<sup>88</sup>

During the debate in the House of Commons, Frank Howard described the Canadian Bill of Rights as a "lawyers paradise" and Paul Tardif, with tongue in cheek, prophesied that it would be "a real joy to the legal profession." Actually, it was a politician's paradise, and a real joy to the political profession. To the legal profession, to whom the public looks for answers as to the meaning and interpretation of law as enacted by Parliament, it is neither simple nor easy. Generally, where the Bill has been used to challenge wholly incompatible statutes of Canada it has been ineffective; where the Bill has been used to challenge an alternative interpretation of statutes of Canada which, given another meaning, may reasonably be interpreted harmoniously with the provisions of the Bill, there is authority that the Bill is effective; where conflicting subordinate legislation

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85. *Ibid.*

86. *Ibid.*

87. *Hansard*, 1960, p. 5737.

88. *Supra*, note 42.

is concerned the Bill may well be effective to establish and protect its declared human rights and freedoms. Generally, too, lawyers will agree with the realistic and moderate description of the Bill (though not necessarily with his appraisal of its merits) given recently by the Minister of Justice, Donald Fleming. Such a description would have avoided much of the misunderstanding of Canadians as to the Bill if it had been emphasized by the government early in the Bill's history. Mr. Fleming, giving his view that the Bill was a landmark in the march of our liberties, described it as "in many respects a codification (the first such) of rights already existing."<sup>89</sup>

## APPENDIX

### AN ACT FOR THE RECOGNITION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (Assented to August 10, 1960)

The Parliament of Canada, affirming that the Canadian nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions:

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

THEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

## PART I

### BILL OF RIGHTS

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely:

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

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89. *The Halifax Mail-Star*, August 31, 1962.



- (b) the right of the individual to equality before the law and the protection of the law;
- (c) freedom of religion;
- (d) freedom of speech;
- (e) freedom of assembly and association; and
- (f) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

- (a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
- (b) impose or authorize the imposition of cruel and unusual treatment or punishment;
- (c) deprive a person who has been arrested or detained
  - (i) of the right to be informed promptly of the reason for his arrest or detention;
  - (ii) of the right to retain and instruct counsel without delay, or
  - (iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;
- (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self-crimination or other constitutional safeguards;
- (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
- (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
- (g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this

Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

4. The provisions of this Part shall be known as the Canadian Bill of Rights.

## PART II

5. (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

(3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

6. Section 6 of the War Measures Act is repealed and the following substituted therefor:

"6. (1) Sections 3, 4 and 5 shall come into force only upon the issue of a proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended, exists.

(2) A proclamation declaring that war, invasion or insurrection, real or apprehended, exists shall be laid before Parliament forthwith after its issue, or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting.

(3) Where a proclamation has been laid before Parliament pursuant to subsection (2), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within ten days of the day the proclamation was laid before Parliament, praying that the proclamation be revoked, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made.

(4) If both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect, and sections 3, 4 and 5 shall cease to be in force until those sections are again brought into force by a further proclamation but without prejudice to the previous operation of those sections or anything duly done or suffered thereunder or any offence committed or any penalty or forfeiture or punishment incurred.

(5) Any act or thing done or authorized or any order or regulation made under the authority of this Act, shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the Canadian Bill of Rights."