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THE BRITISH NORTH AMERICA ACT AND THE PROTECTION OF INDIVIDUAL RIGHTS:
THE CANADIAN BILL OF RIGHTS*

EDWARD G. HUDON**

BRITISH ANTECEDENTS

In the English tradition, the issuance of charters not only predates the democratic form of government as we know it today, it even predates the Conquest of England by William the Conqueror in 1066. Thus, as early as 760 Anglo-Saxon kings were expected to make "precepts" of government at the time of their coronation "that God's Church and all Christian people keep a true peace for ever; that he forbid all rapine and iniquity to all ranks; that he enjoin equity and mercy in all judgments." Later, these precepts became "promises" which were made prior to the unction and the crowning of the king, and then they became charters such as that of Canute in 1020. Even William the Conqueror thought it expedient to issue a short, though stately, charter at the time of the Conquest in which he promised that the laws of Edward the Confessor would continue to be in force. After that, charters soon became a habit with English kings. Henry I issued one in 1100 in which he promised to stop the oppressive practices that his brother, Rufus, had introduced after the death of William. Stephen followed suit with one of his own when he became king in 1135, as did Henry II in 1154. Both of these charters confirmed the liberties that Henry I

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** Librarian, Supreme Court of the United States.


2. Stubbs, supra note 1, at 90.

3. Id. at 97.


5. Stubbs, supra note 1, at 142-44; Taswell-Langmead, supra note 4, at 53, 56; Plucknett, supra note 4, at 17.
had granted his subjects. But without a doubt, Magna Carta, the document wrested from King John by the Barons in 1215, is by far the most celebrated of the charters, particularly because of its Chapter 29 which provides, "No freeman shall be taken or imprisoned, or disseised of his free tenement, liberties or free customs, or outlawed or exiled or in any wise destroyed, nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land." Re-issued in 1216 in modified form by the infant King Henry III, and again by him in 1217 and in 1225, Magna Carta was finally put on the statute roll in 1297. In all, it was confirmed no less than thirty-seven times, and to this day it is pointed to as the origin of the rights of the individual.

In addition to the charters there was the Petition of Rights forced on Charles I in 1628 in which the Commons embodied a long list of grievances, declared that arbitrary imprisonment is unlawful, and proclaimed that a Privy Council warrant which sets forth the King's special command was not a sufficient return to a writ of habeas corpus. There was also the Bill of Rights of 1689, the condition imposed on William and Mary when, after the banishment of the Stuarts in 1688, they accepted the Crown as rulers of England. Among other things, this document declared that excessive bail ought not to be required, it condemned the imposition of excessive fines and the infliction of illegal and cruel punishments, it asserted that the election of members of Parliament should be free, and it asserted that there should be freedom of speech and

6. Magna Carta (1215).
7. Id., c. 29. For discussions of Magna Carta, see TASWELL-LANGMEAD, supra note 4, at 65-92; PLUCKNETT, supra note 4, at 20-26. See also MAGNA CARTA COMMEMORATIVE ESSAYS (H. Malden ed. 1917).
9. Thus, Magna Carta was confirmed six times by Henry III, three times by Edward I, fourteen times by Edward III, six times by Edward II, six times by Henry IV, once by Henry V, and once by Henry VI. See TASWELL-LANGMEAD, supra note 4, at 91 n.8.
11. Petition of Right, 3 Car. 1, c. 1 (1627).
12. For a good analysis of the Petition of Right see F. RELF, THE PETITION OF RIGHT (1917).
debate in Parliament.\textsuperscript{14}

But regardless of their terminology, these great English constitutional documents have not always been sufficient to assure the individual the rights that they have proclaimed. This is due to the fact that in England there has always existed "... a supreme, irresistible, absolute, uncontrolled authority, in which the \textit{jura summi imperii}, or the rights of sovereignty, reside.\textsuperscript{15}

Before the Bill of Rights of 1689, that authority which could at will brush charters or bills of rights to one side rested in the Crown; since the Bill of Rights, this authority has rested in Parliament. This is true to such an extent that even today it can be written:

The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be unjust and contrary to sound principles of government; but Parliament is not controlled in its discretion, and when it errs, its errors can only be corrected by itself. To adopt the words of Sir Edward Coke, the Power of Parliament "is so transcendent and absolute, as it cannot be confined either for cause or persons within their bounds.\textsuperscript{16}

Perhaps Chief Justice Holt best expressed the English theory of the supremacy of Parliament when he wrote: "An Act of Parliament can do no wrong, though it may do several things that look pretty odd.\textsuperscript{17}"

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\textbf{CANADIAN ANTECEDENTS TO THE BRITISH NORTH AMERICA ACT OF 1867}

Although it is of much more recent origin, the Canadian tradition follows very closely that of England. Both are constitutional monarchies and both follow the parliamentary system of government. Both have an upper house that is more ceremonial than useful—in the English system this is the House of Lords, in the Canadian system it is the Senate\textsuperscript{18}—and both have a lower house,
the House of Commons, in which the power resides. Under the Canadian system, as under the English, the supremacy of Parliament is generally accepted. Indeed, in Canada not only is the Canadian Parliament supreme within its sphere, but so also are the provincial legislatures within theirs.\(^{19}\) As in the case of the English Parliament, it can equally be said of the Canadian Parliament that it can do no wrong.\(^{20}\) Moreover, until 1960 Canada had nothing which could be called a Bill of Rights. True, the Quebec Act of 1774\(^ {21}\) and the Constitutional Act of 1791\(^ {22}\) started Canada on the road to self-government which was interrupted only briefly by the Revolutions of 1837 and 1838.\(^ {23}\) However, neither these nor subsequent Acts—not even the British North America Act of 1867—provided Canada with anything comparable to the Bill of Rights that became a part of the Constitution of the United States soon after the first Congress of the United States met in 1789.

**The British North America Act and the Rights of the Individual**

The British North America Act of 1867\(^ {25}\) has very little, if anything, in it which can be said to be intended to protect the rights of the individual. There is the provision relating to sectarian schools which is designed to protect the French Catholic minority throughout Canada, and the English Protestant minority in the Province of Quebec.\(^ {26}\) There is also the provision which assures that either English or French may be used by any person in the debates in the

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20. See, e.g., Florence Mining Co. v. Cobalt Lake Mining Co., 18 Ont. L.R. 275 (1908) wherein it is stated: “In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine. . . .” 18 Ont. L.R. at 279.
21. Quebec Act, 14 Geo. 3, c. 83 (1774). The Quebec Act of 1774 assured the French-Canadians the free exercise of their religion and reinstated the laws and customs of Paris to which the French population of Canada was accustomed. Under its terms, Catholicism was no longer a bar to public office since the Test Oath was replaced by another oath to which Catholics could subscribe.
22. Constitutional Act, 31 Geo. 3, c. 31 (1791). The Constitutional Act of 1791 divided Canada into Lower Canada and Upper Canada, each of which was given the right to a representative assembly.
25. Id.
26. Id. § 93.
Houses of the Parliament of Canada and in the debates of the Houses of the Legislature of the Province of Quebec. This same provision specifies that both languages shall be used in the respective Records and Journals of these Houses. It provides further that either French or English may be used by any person and in any pleading or process in any Court of Canada established under the Act, and in any court of the Province of Quebec. The Acts of the Parliament of Canada and of the Legislature of the Province of Quebec are required to be printed in both languages. However, the only mention of civil rights found in the 1867 Act is the provision found in Section 92, Subsection 13, which gives to the legislature of each Province the exclusive right to legislate with respect to "Property and Civil Rights in the Province."

The lack of any form of a Bill of Rights in the 1867 Act, Canada's Constitution, similar to that which is found in the Bill of Rights of the Constitution of the United States has caused problems. Various theories have been advanced to protect the rights of the individual which are as much of concern in Canada as they are in the United States. Perhaps the most ingenious is that which points to the preamble of the British North America Act as the source of the rights of the individual. The preamble reads as follows:

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom.

It is argued that the intent of this was to incorporate into the Canadian system the constitutional principles of the United King-

27. Id. § 133.
28. Id.
29. Id.
30. For discussions of civil liberties and of the question of a Bill of Rights as both relate to Canada see D. Schmeiser, Civil Liberties in Canada (1964); W. Tarnopolsky, The Canadian Bill of Rights (1966) [hereinafter cited as Tarnopolsky].
dom as reflected in Magna Carta,\(^{32}\) the Petition of Right,\(^{33}\) the Bill of Rights,\(^{34}\) and the Act of Settlement.\(^{35}\) In essence, this is the same type argument which was advanced by those who opposed the incorporation of a Bill of Rights in the Constitution of the United States at the time it was being considered by the States before its adoption. Then it was said:

The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A Bill of Rights. The several bills of rights in Great Britain form its Constitution, and conversely the constitution of each State is its bill of rights. And the proposed Constitution, if adopted, will be the bill of rights of the Union.\(^{36}\)

If this theory prevailed, then it would be beyond the competence of Parliament or of any Provincial Legislature to enact legislation depriving the individual of the rights guaranteed by these basic English statutes so long as the Constitution of Canada "remains in its present form of a constitutional democracy."\(^{37}\) But, as Schmeiser points out, when applied to the constitutional law of England and Canada, this reasoning disregards "the doctrine of the Supremacy of Parliament, under which Parliament can amend or repeal any statute as it sees fit."\(^{38}\)

Another theory advanced is that the jurisdiction of the Provincial Legislatures is unlimited with respect to the basic freedoms because of Section 92, Subsections 13 and 16 of the British North America Act. Subsection 13 gives each Provincial Legislature the exclusive power to legislate with respect to "Property and Civil Rights in the Province;"\(^{39}\) Subsection 16 includes within this exclusive power "[g]enerally all Matters of a merely local or private Nature in the Province."\(^{40}\) This theory was espoused by three of the

\(^{32}\) See note 6 supra and accompanying text.
\(^{33}\) See note 11 supra and accompanying text.
\(^{34}\) See note 13 supra and accompanying text.
\(^{35}\) Act of Settlement, 12 & 13 Will. 3, c. 2 (1700).
\(^{36}\) THE FEDERALIST No. 84, at 560-61 (Modern Library ed. 1941) (A. Hamilton).
\(^{38}\) D. SCHMEISER, CIVIL LIBERTIES IN CANADA 15 (1964).
\(^{39}\) British North America Act, 30 & 31 Vict., c. 3, § 13 (1867).
\(^{40}\) Id. § 16.
nine Justices of the Supreme Court of Canada in *Saumur v. City of Quebec*, a case in which a Jehovah's Witness attacked the validity of a by-law of the City of Quebec forbidding the distribution in the streets of the city of any book, pamphlet, booklet, circular, or tract without the permission of the chief of police. In effect, Chief Justice Rinfret and Justices Kerwin and Taschereau held that freedom of religion and freedom of the press are rights that fall within "Civil Rights in the Province" over which the Provincial Legislature has exclusive right to legislate and hence the city could enact the by-law under attack. They would have upheld the by-law.

A third theory points to the preamble of Section 91 of the 1867 Act which states:

> It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada. . . .

But, as Chief Justice Rinfret and Justice Taschereau pointed out in their opinion in *Saumur* one need read the preamble only a little further to discover that the authority granted by this part of Section 91 is limited to "Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." Moreover, to lift out of context the phrase "to make Laws for the Peace, Order, and good Government of Canada from the preamble of Section 91 of the 1867 Act might be said to be an attempt to make of this a "necessary and proper clause" such as that which exists in the Constitution of the United States and which has been used by the Congress of the United States to expand practically every power of the Federal Government.

Even the natural law has been looked to as a means with which to protect the rights of the individual. That happened in *Chabot v. School Commissioners of Lamorandiere and Attorney-General for

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42. *Id.* at 325.
Quebec, another Jehovah's Witness case. This time the question presented involved the right of a member of the Jehovah's Witnesses to send his children to a public school which was under the direction of the Catholic Committee of the Council of Education, pursuant to the Education Act, without having them take part in Catholic exercises of devotion or having them follow Catholic religious instruction.

According to the Education Act of the Province of Quebec, a Council of Education is created which is composed of both Roman Catholics and Protestants which is divided into two committees, one formed of Roman Catholic members and one of Protestant members. Both committees have the same powers to issue regulations "for the organization, administration and discipline of public schools." Provision is made to assure to Roman Catholics and to Protestants the schools which conform to their respective beliefs. But in the case of Chabot, there was only one tax-supported public school and that was subject to the Catholic Committee of Education because the overwhelming majority of the inhabitants of the town were Roman Catholic. Religious instruction and the prayers said in the school were Roman Catholic.

In Chabot, the Appeal Side of the Quebec Court of Queen's Bench reversed the lower court's dismissal of an action for mandamus to compel the defendants to receive Chabot's children as pupils. In doing so it upheld the validity of that part of the Education Act which made it a duty of the school commissioners to take measures to have authorized courses of study followed in each school. This, the court held, could not be considered to require the subjecting of non-Catholics to Catholic religious instruction, but only that Catholic religious exercises should be followed by, and be confined to, Catholic children.

In his opinion, Judge Casey wrote as follows regarding Chabot's right of inviolability of conscience, and his right to be free from interference with respect to his right to control the religious education of his children:

47. 12 D.L.R.2d 796 (1958).
49. Id.
It is well to remember that the rights of which we have been speaking, find their source in natural law—those rules of action that evoke the notion of a justice which "human authority expresses, or ought to express—but does not make; a justice which human authority may fail to express—and must pay the penalty for failing to express by the diminution, or even the forfeiture, of its power to command," and of which it has been said: "But for natural law there would probably have been no American and no French revolution; nor would the great ideals of freedom and equality have found their way into the lawbooks after having found their way into hearts of men."

On this point there can be no doubt for if these rights find their source in positive law they can be taken away. But if, as they do, they find their existence in the very nature of man, then they cannot be taken away and they must prevail should they conflict with the provisions of positive law. Consequently if the regulations under which, rightly or wrongly, this school is being operated make it mandatory that non-Catholic pupils submit to the religious instructions and practices enacted by the Catholic Committee then these regulations are *ultra vires* the Committee, and invalid.51

Perhaps, in his opinion in the *Saumur* case, Justice Cartwright summarized accurately the problem that the protection of individual rights presents under the British North America Act. He rejected references to cases decided by the courts of the United States because, as he expressed it, "I am unable to derive any assistance from them as they appear to be founded on provisions in the Constitution limiting the power to make laws in relation to such matters."52 Then he continued:

51. Id. at 807. See also the opinion of Justice Pratte in *Chabot*, wherein he states: "Thus if one considers natural law, first of all our laws, it is necessary to conclude that children who attend a school are not obliged to follow a religious teaching to which their father is opposed." 12 D.L.R. 2d at 802.


Under the British North America Act, on the other hand, the whole range of legislative power is committed either to Parliament or the Provincial Legislatures and competence to deal with any subject matter must exist in one or other of such bodies. There are thus no rights possessed by citizens of Canada which cannot be modified by either Parliament or the Legislature, but it may often be a matter of difficulty to decide which of such bodies has the legislative power in a particular case.\textsuperscript{53}

If this is an accurate statement of the situation, then, in each Province of Canada, individual rights depend on, and are at the mercy of, one or the other of two legislative bodies, the Provincial Legislature or the Parliament of Canada. And this view cannot be far from accurate. For, as long ago as 1908 it was stated in \textit{Florence Mining Co. v. Cobalt Mining Co.}: "In short, the Legislature within its jurisdiction can do anything that is not naturally impossible, and is restrained by no rule human or divine . . . . The prohibition 'thou shalt not steal,' has no legal force upon the Sovereign body."\textsuperscript{54}

\textbf{PRELUDE TO A CANADIAN BILL OF RIGHTS}

During World War II, in Canada, as in every other country which was involved in that global conflict, civil liberties and economic freedom both suffered from encroachments as restriction was placed upon restriction by a profusion of Orders-in-Council, administrative orders and regulations. Although these were accepted as necessary to the war effort, there was concern even while the war lasted over what would happen after it ended. That was made very evident by a resolution which was unanimously adopted by the 1943 annual meeting of the Canadian Bar Association. The resolution which was drawn up and recommended by the Association's Committee on Civil Liberties provided as follows:

1. Be it resolved that whilst the Association recognizes the necessity of Government control of the liberties and property rights of the individual during the War inas-

\textsuperscript{53} Id. For further discussion of the \textit{Saumer} case and of the manner in which the Justices were divided see Laskin, \textit{An Inquiry into the Diefenbaker Bill of Rights}, 37 \textit{Can. Bar Rev.} 77, 116 (1959).

\textsuperscript{54} 18 Ont. L.R. 275, 279 (1908).
much and in so far as it serves the proper prosecution of the War, we feel that in view of possible errors and excesses in the exercise of emergency powers it is the duty of the Association to:

(a) follow closely all legislation both by Act of Parliament and more particularly by Orders-in-Council and administrative orders so as to be in a position to assist the established authority by making recommendations aimed at preserving the liberties of the individual and

(b) affirm its settled policy that encroachments upon the liberties and property rights of the individual and the principles of democratic government are justified only by the necessities of the War and that responsible government and the liberties and property rights of the individual should be restored at the earliest possible moment after the termination of the War.

2. Be it resolved therefore that a Committee on Civil Liberties be appointed whose Chairman shall have personally all power necessary to effectively follow such legislation, secure all co-operation, retain such help and make such expenditures as he may see fit to that end, and that Mr. R. M. W. Chitty, K.C., of Toronto, be appointed Chairman of that Committee.\(^55\)

During the discussion of the Resolution which preceded its adoption, Chief Justice Brown spoke in part as follows:

I quite agree with the sentiment of the Resolution, that is, that Parliament, the governing body of Canada, and the various Provincial Legislatures should at all times be careful in seeing that regulations and Orders-in-Council in no way infringe upon the rights and privileges of the people in person or property. It is only such situations as war brings that justifies that infringement. I think we all must admit that the exigencies of war do justify that being done. But we all, I think, agree that immediately the emergency is over these restrictions should be done away with.\(^56\)

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\(^55\) Minutes of Proceedings of the Twenty-Sixth Annual Meeting of the Canadian Bar Association 53 (1943).

\(^56\) Id. at 54.
But then he wondered out loud whether there might not be some intention or suggestion in the Resolution that the Governments of Canada and of the Provinces might, in the exigencies of war, be exceeding the privileges that were theirs in so far as the individual was concerned. He asked, "Is there a suggestion that immediately the war is over the Government of Canada or the Governments of the Provinces of Canada are not going to remedy the situation and bring us back to normal levels again?"\(^{57}\)

In reply to Chief Justice Brown's question, Gustave Monette explained in behalf of the Civil Liberties Committee "that possibly with the best of good faith any Government in the exercise of those emergency powers might slip in something that was not intended, or might exercise those powers in a way that was not absolutely necessary to the proper prosecution of the war."\(^{58}\) He explained further that it was the decision of the Committee and their recommendation that the Association should follow war legislation to see whether there was anything that might appear improper or too far-reaching, and make necessary suggestions to the Government. He was careful to point out that if the Resolution were passed, the Committee was not opposing the principle of control during the war. After further assurance that the Resolution was quite in order and that no undue interference with the Government was intended,\(^{59}\) the motion for the adoption of the Resolution was carried unanimously.\(^{60}\)

At the 1944 Annual Meeting of the Bar Association, the Committee on Civil Liberties reported that when it met in Winnipeg during the previous August, it had adopted a Resolution which charged a committee of its own to organize Committees on Civil Liberties in each of the Provinces which, when organized, would appoint one representative to the main Committee.\(^{61}\) The Resolution indicated that the Committee had named one of its members "Chairman of a Special Committee to scrutinize legislation, Orders-

\(^{57}\) Id.  
\(^{58}\) Id. at 54-55.  
\(^{59}\) See remarks of G.H. Aikins, K.C., Minutes of the Twenty-Sixth Annual Meeting of the Canadian Bar Association 55 (1943).  
\(^{60}\) Id.  
\(^{61}\) See Minutes of Proceedings of the Twenty-Seventh Annual Meeting of the Canadian Bar Association 184 (1944).
in-Council, regulations, and orders made under the authority of an Act of Parliament where such appear to encroach upon the field of Civil Liberties." The report stated that it was the opinion of the Committee,

that this work of complete scrutiny of Federal and Provincial legislation should be pursued and completed, with a view, not to antagonize in the slightest degree the war effort, but to have [the] Association prepared for sound and firm action immediately after the war, and possibly, in many cases, before the end of the conflict.

The Committee reported that the civil liberties with which it was concerned covered the wide field of the rights of the subject which could, for the purpose of discussion, be considered in relation to three subjects, i.e.,

1. Civil and property rights proper, which are more in relation to the civil law as distinct from the criminal law, and cover:
   (a) liberty of religion and language;
   (b) liberty of opinion including freedom of speech, of writing and of the press;
   (c) liberty of enterprise, including freedom of private initiative and industry;
   (d) freedom of work;
   (e) freedom of association;
   (f) the right to private property;

2. The protection of the person of the subject, which is more or less in relation to criminal law; and

3. The preservation of the political institutions under which liberties have been acquired and appear to be guaranteed.

At the 1945 meeting of the Bar Association, Willis Chitty, the Chairman of the Committee on Legislation affecting Civil Liberties, reported no progress and asked leave to sit again. As he did this, he

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62. Id.
63. Id. at 191.
64. Id.
commented that although the war in Europe had ceased in May and that in the Pacific in August, those things took "a long time to percolate through the somewhat devious ways of bureaucracy," and that in so far as he could discover neither of those facts had been discovered in the circles that put out orders. "[O]rders that further restrict our already restricted liberties," were, he said, "coming out as fast if not faster, since both these events, than before."65

By 1947 there was enough concern over civil liberties among the members of the Association for one of them to comment:

Mr. T. G. Norris, K.C.: Mr. Chairman, it comes to me as a very great shock to hear that there are lawyers in Canada who are not aware that our civil liberties are being threatened and have been threatened during the time of the war so recently concluded. The war was caused by the insidious and unchecked growth of the very thing which is growing up in Canada today. We have seen examples of what happened, we have seen the concentration camps and we have seen the gentle and easy beginning of the whole thing. That growth, if left unchecked in Canada, will bring with it similar results. That language is not extravagant; it is a mere statement of the truth regarding what we have seen in the world during the last few years.66

As a result of the discussion which preceded and followed this statement, the Committee on Legislation affecting Civil Liberties became a section with its own chairman and a working committee.67

In its report to the 1948 meeting of the Bar Association, the Civil Liberties Section of the Association discussed the problem of a Bill of Rights.68 It started its report with a statement that the object of a Bill of Rights is to guarantee to every person who owes allegiance to the Crown in Canada, as well as to those who, while owing no such allegiance, are within the jurisdiction of the laws of

67. Id. at 143.
68. 1948 Year Book of the Canadian Bar Association and the Minutes of Proceedings of the Thirtieth Annual Meeting 166-69 (1948).
Canada and owe temporary obedience to them, "those freedoms and rights which under our democratic form of government are considered to be inalienable." It noted that these rights are at least sketched in such instruments as Magna Carta, the Bill of Rights of 1689, and the Bill of Rights of the Constitution of the United States. It indicated that it was aware of the fact that most discussions of a proposed Bill of Rights for Canada started from the premise that what was needed was a statute which would enact and give these rights to the people. But that presented not only the constitutional problem of which legislature had the proper legislative competence to enact it, but also the problem created by the "ability of the legislature to amend or repeal the statute at any time and so sweep away any or all those freedoms and rights at a stroke of the pen." The report continued:

If then the freedoms and rights with which we are concerned are really inalienable, it must be because they are or ought to be beyond the reach of legislative action. The real problem then is to put them beyond legislative reach. Therefore it becomes immediately apparent that if those freedoms and rights are inalienable it must be because they are already part of the constitution and cannot be conferred by legislative enactment. The moment it is conceded that they are within the power of gift by the legislature it must be conceded that they are vulnerable to further legislative action and can be withdrawn at any time.

The report concluded with the assertion that what was needed was not so much a Bill of Rights, but rather something in the nature of a declaration of rights of what freedoms and rights were inherent in the Constitution. For, such a declaration would have a dual effect: (1) it would put moral restraint on the legislature itself, and (2) it would arm the courts with something with which to enforce

69. Id. at 166.
70. See note 6 supra and accompanying text.
71. See note 13 supra and accompanying text.
72. U.S. Const. amends. I-X.
73. 1948 Year Book of the Canadian Bar Association and the Minutes of Proceedings of the Thirtieth Annual Meeting 166 (1948).
74. Id.
75. Id.
the restraint should the legislature refuse to honor its moral obligation.

In addition, immediately after World War II there was the realization that the war-time treatment accorded Japanese-Canadians was hardly in accord with fundamental principles of human rights. 76 In Canada, as in the United States, there had been the internment and the forcible resettlement of West Coast persons of Japanese ancestry or origin. In Canada, this was done when, in 1942, the Canadian Government decreed by Order-in-Council that the Japanese-Canadian minority should be completely removed from the British Columbia region. 77 But still worse, even before the war there was discrimination against Japanese-Canadians in British Columbia. Not only were they not allowed to vote in Provincial elections, 78 but they were excluded even from such things as obtaining a hand-loggers license, from learning or practising pharmacy, serving on juries, voting for school trustees, learning or practising law, etc. They could not be employed directly or indirectly by any contractor holding a Public Works contract or by a buyer of Crown timber for logging. 79

There was also the criticism of the methods which were used to deal with those who were suspected of being members of the Soviet spy ring following the exposé of Soviet espionage during the mid-1940's. 80 By an Order-in-Council dated October 6, 1945, the Acting Prime Minister and the Minister of Justice were given broad, sweeping powers. If they thought it necessary to prevent any particular person from communicating secret and confidential information to a foreign power, or otherwise acting in any manner prejudicial to the public safety or the safety of the State, they could interrogate and/or detain such a person in such a place and under such conditions as might from time to time be determined. A person so detained might be released by the Minister of Justice when he was satisfied that no further detention was necessary. 81

77. Id. at 270, 277, 278, 279.
78. Id. at 272, 278.
79. Id. at 279.
80. See Tarnopolsky, supra note 30, at 5.
According to the 1946 Report of the Civil Liberties Committee,\textsuperscript{82} under the authority of this Order persons were arrested and detained without any charges having been brought against them. Some were not allowed to communicate with their friends nor consult legal counsel. Commissioners were appointed under the authority of the Inquiries Act\textsuperscript{83} before whom these persons were brought and questioned without the right of counsel, nor warning given that their answers might incriminate them and could be used against them. After their interrogation, charges were laid against some of these persons and, in at least one case, it is claimed that answers given before the Commissioners were admitted into evidence and the person convicted and imprisoned.\textsuperscript{84}

Although there was no formal suspension of the right of habeas corpus, the prevailing attitude is said to have been the following:

Any one of these persons could have applied for and obtained a writ of habeas corpus, but it would have done him no good, because as soon as the Judge would have been shown the Order in Council under which such person was detained, and the Order in Council which authorized it, he would have said, "You are legally detained" and that would have required the quashing of the writ. So that no writ of habeas corpus would have had any practical effect under the proceedings. . . \textsuperscript{85}

The Committee noted that the only justification advanced for these radical departures in the Espionage cases from normal and long established procedure deemed of importance to secure a fair trial for the accused was "that the safety of the State required it."\textsuperscript{86} As a result, the Committee recommended that the Bar Association "go on record in uncompromising support of the Rule of Law, and of strongly disapproving any action by government or by any individual or organization which infringes in any degree the freedom of

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\item 82. \textit{1946 Year Book of the Canadian Bar Association and the Minutes of Proceedings of the Twenty-Eighth Annual Meeting} 141 (1946).
\item 83. \textit{CAN. REV. STAT.} c. 154 (1970).
\item 84. \textit{1946 Year Book of the Canadian Bar Association and the Minutes of Proceedings of the Twenty-Eighth Annual Meeting} 141-42 (1946).
\item 85. \textit{Id.} at 142.
\item 86. \textit{Id.} at 143.
\end{footnotes}
the subject under the law." It also made recommendations for changes in the Canada Evidence Act, and against the practice of appointing Judges as Commissioners to inquire into the conduct of persons suspected of having committed criminal offences to prevent a repetition of what had happened in these cases. There was opposition to the recitals in the report. In addition, there was a motion which was carried that the recitals be struck out and that the recommendation be passed.

**THE BILL OF RIGHTS IN THE HOUSE OF COMMONS**

In 1945, in the midst of this growing interest in civil liberties and inherent rights, Alistair Stewart, Co-operative Commonwealth Federation Member of Parliament from Winnipeg North, introduced a resolution in the House of Commons which was the start of that party's campaign for a Bill of Rights. The resolution provided:

That, in the opinion of this House, there should be incorporated in the constitution a bill of rights protecting minority rights, civil and religious liberties, freedom of speech and freedom of assembly; establishing equal treatment before the law of all citizens, irrespective of race, nationality or religion or political beliefs; and providing the necessary democratic powers to eliminate racial discrimination in all its forms.

However, on the assurance that the Secretary of State would introduce a bill on citizenship as a result of which some of these things would be discussed, Stewart was willing that his motion should be dropped.

The next step took place in 1949 with the creation of a Special Joint Committee of the Senate and the House of Commons on Human Rights and Fundamental Freedoms. During its delibera-

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87. Id. at 144.
89. 1946 Year Book of the Canadian Bar Association and the Minutes of Proceedings of the Twenty-Eighth Annual Meeting 144 (1946).
90. Id. at 155.
92. Id.
93. See Orders of Reference of both the Senate and the House of Commons dated June
tions, the Special Joint Committee received written submissions from such organizations as the Canadian Jewish Congress, the Congregation of Jehovah's Witnesses, the Civil Rights Union of Toronto, the Canadian Daily Newspapers Association, organizations representing the Chinese people of Canada, and the Committee for a Bill of Rights of Toronto. In addition, the Committee heard testimony. At the request of the Committee, the Deputy Minister of Justice was heard in relation to the effect of the enactment of a Bill of Rights as (1) a Federal statute, (2) a Constitutional amendment, and (3) on the effect of a Bill of Rights on existing and prospective Provincial and Dominion legislation, the common law, the sovereignty of Parliament, and the prerogatives of the Crown.

The Committee came to the conclusion that an attempt to enact a Bill of Rights for Canada as a Federal statute would be unwise for the simple reason that the power of the Dominion Parliament to enact such a comprehensive piece of legislation was disputed. And even if such a Federal statute were enacted, it "would not effect any constitutional guarantee of rights as it could be amended or repealed at any time by Parliament." The Committee recommended that in the consideration of proposals for the enactment of a Bill of Rights as a constitutional amendment, the Government should not only give full consideration to the submissions to the Committee, the evidence given by the Deputy Minister of Justice, and the comments of the members of the Committee as they appeared in the record of the proceedings, "but also obtain the assistance of officers of the Department of Justice or an interdepartmental committee, and such others as it [might] consider necessary." The Committee concluded its report to both the Senate and the House of Commons as follows:

In making this report your Committee wishes to state

95. Id. at 207-08, 210-11.
96. Id. at 208, 211.
97. Id. at 209, 212.
its belief that Canadians enjoy a large measure of civil rights and liberties. That they must be maintained is beyond question. But to attempt to define these rights and liberties in statutory language is a task not to be undertaken lightly. The difficulty of such a task is shown by the struggles for agreement on the wording of an International Bill of Rights which have been occupying the time of the United Nations for so long. However, the meaning of human rights and fundamental freedoms is in general well understood. They exist, are enjoyed and must be preserved.

Attention may be drawn to circumstances in which fundamental rights are alleged to have been curtailed. It is desirable that such circumstances be examined critically and earnestly for they prompt the government and Parliament of the day to take stock of the extent to which Canada has maintained civil rights and liberties for her people. If imperfections appear, are recognized and are remedied progress is made towards full realization of the ideal of general observance of human rights and fundamental freedoms for all envisaged in the Charter of the United Nations.

Respect for the observance of these rights and freedoms depends in the last analysis upon the convictions, character and spirit of the people. There is much to be said for the view that it would be undesirable to undertake to define them before a firm public opinion has been formed as to their nature. It is not evident to your Committee that such an opinion has reached an advanced stage in Canada. There is need for more public discussion before the task of defining the rights and freedoms to be safeguarded is undertaken.

But whatever steps be advocated by way of statutory enactment or otherwise to preserve human rights and fundamental freedoms, Canadians must never fail to recognize that the ultimate and effective safeguard of those rights and freedoms lies in the people themselves, and in a resolute and effective public opinion.98

98. Id.
In spite of the assurances of the Special Joint Committee, agitation for a Canadian Bill of Rights continued. But even as interest became more intensive, there was still the stumbling block of the form that such a piece of legislation should take. There were those who argued that a Bill of Rights should be in the form of an amendment to the British North America Act, there were others who argued that Parliament should enact an overriding Bill of Rights, and there were some who advocated that there should be complementary Bills of Rights enacted by the Federal Parliament and the Provincial Legislatures.99

In 1950, the Senate Special Committee on Human Rights and Fundamental Freedoms favored a National Bill of Rights which would be a part of the Constitution of Canada.100 However, the Committee recognized that this presented problems.101 It meant a change in the British North America Act. And since this is a statute of the Imperial Parliament, it would have required a request by Canada to the Parliament of the United Kingdom that the Act be amended. But such a request would have had the appearance of a surrender of sovereignty by Canada to which some Canadians would have objected. For that reason, the Committee was of the opinion that it would be wise to wait until the time when prospective Dominion-Provincial Conferences would have worked out a method for the control of the Canadian Constitution within Canada, and agreement had been reached for the incorporation of a national Bill of Rights in the Constitution. It was hoped that this would be not too far in the future.

As an interim measure, the Committee recommended that the Canadian Parliament adopt a Declaration of Human Rights which would be limited strictly to its own legislative jurisdiction.102 In the opinion of the Committee:

Such a Declaration would not invade the Provincial legislative authority, but it would nevertheless cover a very wide field. While such a Declaration would not bind the Cana-

99. See generally Tarnopolsky, supra note 30, at 13.
101. Id. at 305-06.
102. Id. at 306.
dian Parliament or future Canadian Parliaments, it would serve to guide the Canadian Parliament and the Federal Civil Service. It would have application within all the important matters reserved to the Canadian Parliament in Section 91 and in other sections of the British North America Act. It would apply without limitation within the North West Territories.103

The Committee proposed that such a Canadian Declaration of Human Rights follow, in general, the Preamble and certain of the articles of the United Nations Universal Declaration of Human Rights, subject to the reservations expressed by the Canadian Delegates to the United Nations. If adopted by the Canadian Parliament, such a Declaration of Human Rights would, the Committee declared, “solemnly affirm the faith of all Canadians in the basic principles of freedom and it would evidence a national concern for human rights and security.”104

Whether statutory or constitutional, the Committee cautioned that a Bill of Rights should be carefully and courageously drawn. In its opinion, what was required for Canada was a broad statement of Human Rights, “leaving as did the drafters of the United States Bill of Rights, the detail of application and the necessary qualifications and exceptions to the Courts.”105 It cautioned that many of the provisions suitable for inclusion in a Bill of Rights clearly appeared in the law of Canada, but that they were not always of nation-wide application. The Committee concluded:

What is required in Canada is one grand and comprehensive affirmation, or reaffirmation, of human rights, equality before the law and of security, as the philosophical foundation of our nationhood, that will assure continually to each Canadian that he is born free and equal in rights and dignity with all other Canadians, that he cannot be held in personal slavery, or arbitrarily arrested, that he will always be presumed innocent of any offence until proven guilty, that he has freedom of thought, conscience, expres-

103. Id.
104. Id.
105. Id. at 307.
sion and movement, and so on through the Universal Declaration. Thus will Canadians know of their freedom, exercise it in manly confidence and be proud of their country.106

In 1950, not only did the Dominion-Provincial Constitutional Conference fail to determine a procedure for the amendment of the British North America Act in Canada by Canadians, but twenty-five years later the problem is still unresolved.107 It is that lack of action which not only caused the adoption of a Bill of Rights to be delayed as long as it was, but also to have it take the direction that it did when one was finally adopted.108 But, at any rate, nothing happened until 1958 when Mr. Diefenbaker, the Prime Minister, introduced Bill C-60 to provide a Bill of Rights, only to withdraw it after the first reading.109 His intention was to reintroduce it the following year after those who were interested had had an opportunity to study his proposal and submit observations and criticism.110 There the matter stood until 1960.

In 1959, in his brief remarks before the annual meeting of the Canadian Bar Association, Prime Minister Diefenbaker stated that it was his intention to have a measure providing for a Bill of Rights introduced early in the next Session of the Parliament and to have it submitted to a Committee of both Houses of the Parliament.111 However, it was not until July 1, 1960, late in the Session of the Parliament, that Diefenbaker reintroduced his proposal for a second reading as Bill C-79. As a result, strong opposition developed because of the late introduction of the Bill, because of some of its provisions, and because the Provinces had not been consulted.112 Perhaps the most telling arguments were those raised by Lester

106. Id.
108. See D. Schmeiser, Civil Liberties in Canada 37 (1964); Tarnopolsky, supra note 30, at 62-66.
109. For an analysis of the part that Prime Minister Diefenbaker played in the enactment of the Canadian Bill of Rights see Tarnopolsky, supra note 30, at 14-16.
110. Id. at 16.
Pearson, the Leader of the Opposition. In defense of his Bill, Diefenbaker proclaimed:

I am a Canadian, a free Canadian, free to speak without fear, free to worship God in my own way, free to stand for what I think right, free to oppose what I believe wrong, free to choose those who shall govern my country. This heritage of freedom I pledge to uphold for myself and all mankind.113

In reply to this, Pearson raised the question of the War Measures Act. As he pointed out, in one form or another this Canadian statute has been on the statute books since 1914,114 and he spoke of it in part as follows:

Moreover, Mr. Speaker, under the War Measures Act it is possible, and it is still possible today, to deprive citizens of their citizenship, to exile citizens from this country. Indeed, certain action was taken with respect to some residents and citizens of Canada of Japanese origin during the last war which I do not believe any Canadian today looks back upon with pride, and which a lot of Canadians look back upon with discomfort and some with shame. But I would remind the house that this action was taken in complete good faith by a government which believed that it was essential at that time for the safety of our country, and in circumstances and in an atmosphere which it is easy to forget now. I would remind the house that some hon. members opposite now on the treasury benches gave strong and even zealous support to the course taken by the government of that day. However, looking back on the matter in retrospect and, of course, with the wisdom of hindsight which always makes judgment so much easier, I wish to say for myself and for those associated with me in this house that we do not believe that certain of those actions were really necessary, or that they should be repeated in a similar situation in the future.115

113. Id. at 5649-50.
114. Id.
115. Id. at 5651.
After extensive debate,\textsuperscript{116} the Bill was referred to a Special Committee on Human Rights and Fundamental Freedoms which would be composed of fifteen members and whose task it was to consider the Bill.\textsuperscript{117}

The Special Committee first met on July 12, 1960, and it intermittently held extensive hearings throughout the remainder of that month. The minutes of its proceedings and of the evidence presented to it extend over 720 pages.\textsuperscript{118} A considerable variety of subjects were covered by the various witnesses which it heard such as legal experts, law and other professors, representatives of various groups, some of which were religious and some not, etc., each of whom came to present either his own views or those of the organization that he represented. But if there was one single thread that extended throughout the entire hearings of the Special Committee, it was the concern expressed by a number of the witnesses with the War Measures Act\textsuperscript{119} and the effect which, when invoked, it could have on civil liberties in general and the rights of the individual in particular.\textsuperscript{120}

Moreover, the testimony which the Special Committee received in 1960 concerning the War Measures Act becomes all the more interesting when it is viewed in the light of events which took place ten years later in Canada in general, and in the Province of Quebec in particular. And of all of this testimony, that given by Professor A. R. Lower of Queen’s University is perhaps the most pertinent and the most illuminating.\textsuperscript{121} He probably made the strongest case against the War Measures Act when he asserted that “it is a most unfortunate people whose laws are completely silent in wartime, because from the arbitrary powers that the government is given

\textsuperscript{116} Id. at 5642-52, 5657-719, 5726-90, 5885-950.

\textsuperscript{117} Id. at 5950-51.

\textsuperscript{118} \textit{Special Committee on Human Rights and Fundamental Freedoms, Minutes of Proceedings and Evidence, House of Commons, 24th Parliament, 3d sess. (1960).}

\textsuperscript{119} \textit{CAN. STAT. 2d sess., c. 2 (1914).}


\textsuperscript{121} Id. at 312-37.
under the War Measures Act, tyranny can easily follow."\textsuperscript{122} He even went so far as to say that he thought that Canada had disgraced itself in the last war when it went further than any other English-speaking country. "The British," he commented, "at least, required their regulations to be laid on the table of the house. I think there was time given after they were made, and there they could be read. Questions could be asked, and so on."\textsuperscript{123} But even more directly, he charged:

The government of the day becomes a dictator under the War Measures Act. I do not know very much that it cannot do under the act. All our civil liberties go into the dust cart. You can be taken out of your house and interned without any trial, and so on: there are an infinite number of things that can be done—and these things were done, as we all know.\textsuperscript{124}

During the hearings of the Special Committee, considerable attention appears to have been given to the form that a Bill of Rights should take. There were those like Dr. Eugene Forsey, Research Director, Canadian Labor Congress, who contended that a Bill of Rights should be given permanence and status. It was his contention that real protection for fundamental rights and freedoms required putting them beyond the reach of Parliament and Provincial Legislatures alike, which Mr. Diefenbaker's Bill did not do. There was, he said, "nothing to prevent the parliament of Canada, by joint address of both houses, from asking the parliament of the United Kingdom to amend the British North America Act by writing into it provisions which would prohibit the parliament of Canada from legislating in any way that would invade fundamental rights and freedoms."\textsuperscript{125} And as for the Provincial Legislatures, the amendment to the British North America Act could provide that any Provincial Legislature could, by its own vote, bring itself under the same prohibition.\textsuperscript{126}

Opposed to this view which asked for a Bill of Rights which

\begin{itemize}
\item 122. Id. at 319.
\item 123. Id.
\item 124. Id. at 318.
\item 125. Id. at 318.
\item 126. Id. at 203.
\end{itemize}
would be "entrenched" in the Canadian Constitution, there was what may be considered to be the Government's view which was best expressed before the Special Committee by the Honourable E. D. Fulton, the then Minister of Justice. Mr. Fulton testified:

My point is that in my view you cannot enshrine a bill of rights which would be any more sacrosanct, by a constitutional amendment, or even an alteration to the B. N. A. act, than you can by what has been variously described as a simple statute, or a mere statute of the parliament of Canada.

Perhaps I am giving evidence there, so I will put this to you in the form of a question. Should members of parliament be asked to accept the principle that an address, asking the United Kingdom parliament to amend our constitution, is any less solemn an enactment that [sic] a statute of the parliament of Canada? 127

Answering his own question he continued:

If you are, I am not able to follow your point, because either one, it seems to me, has the same objective of giving us a Bill of Rights, and therefore the same degree of solemnity. I have said before that you would then have a constitutional document, just as much as an amendment to the B. N. A. act would be a constitutional document. 128

On July 29, 1960, the Special Committee on Human Rights and Fundamental Freedoms submitted its report in which certain amendments were suggested, 129 most of which were accepted, but none of which appear to have removed the major objections to the Bill of Rights as proposed—objections to the War Measures Act 130 and the lack of an "entrenched" Bill of Rights. 131 After that, on August 4, 1960, Mr. Diefenbaker moved for a third reading of the

127. Id. at 223, 224.
128. Id.
129. Id. at 669, 670.
130. See note 119 supra and accompanying text.
Bill. This was followed by a debate during which, to no avail, amendments were offered to protect the individual from the provisions of the War Measures Act. The Bill was read a third time and passed. Following favorable action in the Senate, it received Royal Assent on August 10, 1960.

**The Canadian Bill of Rights and What It Means Today**

*The Bill of Rights and the War Measures Act*

In essence, the Canadian Bill of Rights undertakes to protect the same rights and freedoms that the American Bill of Rights does. But to this there is one very large gapping exception. The Canadian Bill permits an Act of the Canadian Parliament to be made operative notwithstanding its provisions. This, it would seem, belies that the Canadian Bill of Rights is truly "An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms." It would appear to be more in the nature of an advisory piece of legislation.

Section 1 of the Bill recognizes and declares "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 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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133. *Id.*
134. *Id.* at 7553.
135. *Id.* at 7948.
(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."

However, Section 2 of the Bill states in part that:

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, abridgment or infringement of any of these 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;

140. Id. § 1.
(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.\textsuperscript{141}

In essence, although the Canadian Bill of Rights is entitled “An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms,” it acknowledges and preserves the supremacy of Parliament even in the matter of individual rights which it is intended to protect. This is due to the provision which permits the Parliament to set it aside at any time it wishes without either amendment or repeal.\textsuperscript{142} The effect of this is that the provisions of the Canadian Bill of Rights which are intended to recognize and protect human rights and fundamental freedoms may be made a matter of grace which the Canadian Parliament may grant or deny as it sees fit.

Not only does the Canadian Bill of Rights lack constitutional status, but it is also subject to the all embracing provisions of the War Measures Act.\textsuperscript{143} Adopted in 1914 at the start of World War I, this Act\textsuperscript{144} had as its purpose the transfer of the supreme power of Parliament to the Cabinet.\textsuperscript{145} By Order-in-Council, it permitted the Cabinet to exercise all of the powers possessed by Parliament “necessary or advisable for the security, defense, peace, order or welfare of Canada . . . by reason of the existence of real or apprehended war, invasion or insurrection.”\textsuperscript{146} The issuance of a proclamation by the Crown or under the authority of the Governor in Council is

\textsuperscript{141} Id. § 2 (emphasis added).
\textsuperscript{142} Id.
\textsuperscript{143} Id. § 6.
\textsuperscript{144} CAN. REV. STAT. c. 288 (1952).
\textsuperscript{145} See generally id. at § 6.
\textsuperscript{146} Id. at § 3(i).
conclusive proof that a state of war, invasion, or insurrection, real or apprehended, exists.\textsuperscript{147}

Section 6 of the Canadian Bill of Rights repealed Section 6 of the War Measures Act which had provided only that "The provisions of the last three sections last preceding shall be in force during war, invasion, or insurrection, real or apprehended."\textsuperscript{148} The new Section 6 added that a proclamation by the Governor in Council that such a situation exists has to be laid before the Parliament "forthwith after its issue, or if Parliament is not sitting, within the first fifteen days next thereafter that Parliament is sitting."\textsuperscript{149} It provides for debate of such a proclamation upon a notice of a motion in either House of the Parliament, and that it should cease to have effect if both Houses of the Parliament should resolve that the proclamation be revoked.\textsuperscript{150}

It would seem that Section 6 of the Canadian Bill of Rights softened somewhat the effect of Section 6 of the War Measures Act. Yet, Section 6(5) of the War Measures Act as amended by the Bill of Rights should not be overlooked. This provides:

(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, abridgment or infringement of any right or freedom recognized by the \textit{Canadian Bill of Rights}.\textsuperscript{151}

This would appear to protect not only those who use, but also those who abuse the authority granted by the War Measures Act to the detriment of human rights and fundamental freedoms. And how grave this could be is very clearly spelled out by Section 3 of the War Measures Act which states that whenever it is invoked, the powers of the Governor in Council extend to the following:

(a) censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;

\textsuperscript{147} Id. at § 2.
\textsuperscript{148} Id. at § 6.
\textsuperscript{149} Bill of Rights, 8-9 Eliz. II, c. 44, § 6 (1960).
\textsuperscript{150} Id.
(b) arrest, detention, exclusion and deportation;
(c) control of the harbours, ports and territorial waters of Canada and the movement of vessels;
(d) transportation by land, air, or water and the control of the transport of persons and things;
(e) trading, exportation, importation, production and manufacture;
(f) appropriation, control, forfeiture and disposition of property and the use thereof.\textsuperscript{152}

Then there is Section 4 of the Act which authorizes the Governor in Council to prescribe penalties for violations of orders or regulations made under the Act.\textsuperscript{153} These penalties which may be imposed upon summary conviction or upon indictment can be as much as a fine of $5000 or imprisonment for five years, or both. Finally, there is Section 5 of the Act which provides that no person who is held for deportation under the Act or any regulation made under it, or is under arrest or detention as, or under suspicion of being, an alien enemy, "shall be released upon bail or otherwise discharged or tried, without the consent of the Minister of Justice."\textsuperscript{154} This is strong medicine, particularly if it is exercised in time of peace as it has been very recently.

The Bill of Rights in the Courts

\textit{Regina v. Drybones} and the Indian Act

The Canadian Bill of Rights has been criticised as having three vices: (1) that it is essentially negative, (2) that it creates uncertainty, and (3) that it permits the Parliament to evade its responsibility.\textsuperscript{155} If in the beginning there was uncertainty, by 1969 there began to be signs that there might to life in the Bill and that it could become more than a mere declaration of policy. The occasion was

\begin{footnotesize}
\begin{enumerate}
\item[152.] CAN. REV. STAT. c. 288, § 3.
\item[153.] Id. § 4.
\item[154.] Id. § 5.
\end{enumerate}
\end{footnotesize}
Regina v. Drybones,156 a case in which the Supreme Court of Canada asserted the right to declare inoperative and ineffective a law of Canada on the ground that it abrogated, abridged, or infringed one of the rights enumerated in the Canadian Bill of Rights.

Involved in Regina v. Drybones was the conviction of an Indian of being intoxicated off a reserve in the Northwest Territories, contrary to Section 94(b) of the Indian Act.157 Section 94 of the Act provides as follows:

94. An Indian who

(a) has intoxicants in his possession,
(b) is intoxicated, or
(c) makes or manufactures intoxicants off a reserve, is guilty of an offence and is liable on summary conviction to a fine of not less than ten dollars and not more than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment.158

But there is no reserve in the Northwest Territories, and following his conviction by a Magistrate the respondent appealed to the Territorial Court by way of a trial de novo. There, he was acquitted on the ground that Section 94(b) of the Indian Act was rendered inoperative by the Canadian Bill of Rights of 1960 as an infringement of the right of the respondent to equality before the law, i.e., that it made him subject to punishment for conduct which would not have been punishable had he not been an Indian. The decision of the Territorial Court was upheld by the Supreme Court of Canada with three Justices dissenting.

Speaking for the majority, Justice Ritchie agreed with the Court of Appeal that the fact that there were no reserves in the Territories was irrelevant. The use of the words “off a reserve” created an essential element to be proved in a charge laid under Section 94 of the Indian Act, and once it was proved that the offence was not committed on a reserve, the requirement of the Section was satisfied.159 To the Justice, the important question raised by the

157. CAN. REV. STAT. c. 149 (1952).
158. Id. § 04. The Indian Act is now found in CAN. REV. STAT. c. I-6, § 95 (1970).
appeal had its origin in the fact that in the Northwest Territories it was not an offence for anyone except an Indian to be intoxicated "otherwise than in a public place."\(^{160}\) Even an Indian who was intoxicated in his own home "off a reserve" was subject to fine and imprisonment.

In 1962 the question of the validity of Section 94(a) of the Indian Act had been presented to the British Columbia Court of Appeal in *Regina v. Gonzales.*\(^{161}\) In that case, as in *Drybones*, the argument was that the particular Section of the Indian Act violated the right to "equality before the law" as guaranteed by the Bill of Rights. The Appellant submitted that Section 94(a) had to be taken as having been repealed by the Canadian Bill of Rights. As the Court dismissed the appeal, Dary, J. A., wrote of the Canadian Bill of Rights:

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.

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160. *Id.*
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.162

In Drybones, Justice Ritchie did more than just take note of Regina v. Gonzales. He expressly rejected Davey, J. A.'s reasoning which he characterized as striking at the very foundations of the Bill of Rights and converting it "from its apparent character as a statutory declaration of fundamental human rights and freedoms which it recognizes, into being little more than a rule for the construction of federal statutes. . . ."163 Justice Ritchie also found Davey, J. A.'s reasoning objectionable on the ground that it led to the conclusion that any law of Canada "which can only be 'construed and applied sensibly' so that it offends against the Bill of Rights, is to operate notwithstanding the provisions of that Bill."164 And that he found irreconcilable with the opening words of Section 2 of the Bill of Rights:

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. . . .165

In Drybones, Justice Ritchie also took note of Robertson and Rosetanni v. The Queen,166 the Lord's Day Act case decided in 1963. In that case, the Supreme Court of Canada held that the Lord's Day Act167 did not abrogate, abridge, or infringe "freedom of religion" as

162. Id. at 292.
164. Id. at 294.
167. CAN. REV. STAT. c. 171 (1952).
guaranteed by the Canadian Bill of Rights.\textsuperscript{168} The Act made it unlawful for any person on the Lord's Day to sell or offer for sale or purchase goods, chattels, or other personal property or real estate, etc., or to employ any other person to do any work, business or labor on that day. Writing for the majority in the case, Justice Ritchie had expressed the view that it was the \textit{effect} of the Lord's Day Act, rather than its \textit{purpose}, "which must be looked to in order to determine whether its application involves the abrogation, abridgment or infringement of religious freedom."\textsuperscript{169} And he could see nothing in the Act which in any way affected the liberty of religious thought and practice of any citizens in the country. "Nor," he continued, "is the 'untrammelled affirmations of religious belief and its propagation' in any way curtailed."\textsuperscript{170} He had concluded in the \textit{Robertson and Rosetanni} case:

As has been indicated, legislation for the preservation of the sanctity of Sunday has existed in this country from the earliest times and has at least since 1903 been regarded as a part of the criminal law in its widest sense. Historically, such legislation has never been considered as an interference with the kind of "freedom of religion" guaranteed by the Bill of Rights.\textsuperscript{171}

Returning to \textit{Drybones}, Justice Ritchie explained what he understood the word "law" to mean as it was used in the Bill of Rights. He wrote:

I think that the word "law" as used in s. 1(b) of the Bill of Rights is to be construed as meaning "the law of Canada" as defined in s. 5(2) (\textit{i.e.} Acts of the Parliament of Canada and any orders, rules or regulations thereunder) and without attempting any exhaustive definition of "equality before the law" I think that s. 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on ac-

\textsuperscript{168} Bill of Rights, 8-9 Eliz. II, c. 4, pt. I(c) (1960).
\textsuperscript{169} 41 D.L.R.2d at 494.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
count of his race, for him to do something which his fellow
Canadians are free to do without having committed any
offence or having been made subject to any penalty.\textsuperscript{172}

In the light of that, it was the opinion of the Justice that to decide
the case it was only necessary to say that Section 94(b) of the Indian
Act was a law of Canada which created such an offence, and that it
could only be construed in such a manner that its application
"would operate so as to abrogate, abridge or infringe one of the
rights declared and recognized by the Bill of Rights."\textsuperscript{173}

But there were strong dissenting opinions in \textit{Drybones}. Chief
Justice Cartwright did not believe that Section 94(b) of the Indian
Act was rendered inoperative by the Canadian Bill of Rights. To the
contrary, he thought that this Section of the Indian Act was "ex-
pressed in plain and unequivocal words," and that it was not possi-
ble by the application of any rule of construction to give it a mean-
ing other than that an Indian who is intoxicated off a reserve is
guilty of an offence.\textsuperscript{174} In his dissent in \textit{Robertson and Rosetanni v. The Queen},\textsuperscript{175} he had expressed disagreement with Davey, J. A.'s
reasoning in \textit{Regina v. Gonzales}.\textsuperscript{176} However, now he changed his
position and came to the conclusion that Davey, J. A., had been
correct in what he had written in \textit{Gonzales}.

Justice Abbott stated that he shared the opinion expressed by
the Chief Justice and Justice Pigeon in the case that was before the
Court, and by Davey, J. A., in the \textit{Gonzales} case—that with respect
to existing legislation, Section 2 of the Bill of Rights provided
"merely a canon or rule of interpretation for such legislation."\textsuperscript{177}

To Justice Pigeon, the crucial words in the Canadian Bill of
Rights were those found in Section 2 to the effect that every law of
Canada shall, subject to the exceptions noted, "be so construed
and applied as not to abrogate, abridge or infringe' any of the rights
and freedoms recognized and declared in the Bill."\textsuperscript{178} And to him,
these words did not enact anything more than a rule of construction. He concluded:

On the whole, I cannot find in the Canadian Bill of Rights anything clearly showing that Parliament intended to establish concerning human rights and fundamental freedoms some overriding general principles to be enforced by the courts against the clearly expressed will of Parliament in statutes existing at the time. In my opinion, Parliament did nothing more than instruct the courts to construe and apply those laws in accordance with the principles enunciated in the Bill on the basis that the recognized rights and freedoms did exist, not that they were to be brought into existence by the courts.179

Two More Indian Act Cases—A Retreat from Drybones?

On August 27, 1973, almost four years after Drybones was decided, the Supreme Court of Canada handed down a decision in two other Indian Act cases, Attorney-General of Canada v. Lavell and Isaac v. Bedard.180 These were two appeals which were heard together and decided together. They involved Section 12(1)(b) of the Indian Act which provides that an Indian woman who marries a person who is not an Indian is not entitled to register on the Indian Register maintained by the Department of Indian Affairs and the Northern Development.181 She can do so only if she is subsequently the wife or the widow of a person described in Section 11 of the Act i.e., the wife or the widow of an Indian entitled to have his name on the Register.182 Even though a person has been born of Indian parents, that person does not have Indian status if he or she is not entitled to be registered as an Indian.183 And the loss of that status means the loss of the right to tribal privileges such as the right to hold, use, or enjoy lands located on a reserve.

Both Mrs. Lavell and Mrs. Bedard were Indians who married non-Indians. In the case of Mrs. Lavell, her name was deleted from the Indian Register by the Registrar pursuant to Section 12(1) of the

179.  Id. at 307.
182.  Id. § 11.
183.  Id. § 2(1).
Act at the time of her marriage. The evidence disclosed that at the
time of the hearing and for some nine years before her marriage, she
had not lived on any reserve except for sporadic visits to her family.
In the case of Mrs. Bedard, she was born on an Indian reserve of
Indian parents. She lived off the reserve from the time of her mar-
riage to a non-Indian until she became separated from her husband,
which time she returned to the reserve to live in a house on a
property to which her mother held a certificate of possession, and
which her mother had bequeathed her in a will which was approved
by the Council of the tribe and on behalf of the Minister of Indian
Affairs as required by Section 45(3) of the Indian Act. The Council
forced her to dispose of the residence which she did by conveying
her interest in it to her brother who was a registered member of the
tribe. When her brother permitted her to live in the dwelling rent
free, the Council refused to let her live there and served notice on
her to quit the reserve.

The Indian Act does not impose on registered male Indians who
marry non-Indian women the same disqualifications and depriva-
tion of privileges to which Mrs. Lavell and Mrs. Bedard were sub-
jected solely because they were females. For that reason, the two
women claimed that the provisions of Section 12(1)(b) of the Indian
Act were rendered inoperative by Section 1(b) of the Canadian Bill
of Rights as denying them equality before the law. In essence, the
two women claimed that the effect of the Act was to discriminate
against them because of their sex. The Federal Court of Appeal
agreed. The Supreme Court of Canada reversed the Federal Court
of Appeal by a vote of five to four and held that Section 12(1)(b) of
the Indian Act was not rendered inoperative by Section 1(b) of the
Canadian Bill of Rights. Justice Ritchie wrote the principal opin-
ion for the majority in which three other Justices concurred. Justice
Pigeon wrote a separate opinion in which he concurred in the
result. Justice Abbott and the then Justice Laskin wrote dis-
senting opinions.

184. Id. § 45(3).
185. Bill of Rights, 8-9 Eliz. II, c. 44, § 1(b) (1960).
188. Id. at 500.
189. Id. at 484.
190. Id. at 501.
Justice Ritchie reasoned that whatever may have been achieved by the Canadian Bill of Rights, it did not in effect amend or in any way alter the terms of the British North America Act of 1867.191 Because of that, the effect of the Bill of Rights on the Indian Act could only be considered in the light of the provisions of Section 91(24) of the British North America Act which placed "Indians, and Lands reserved for Indians" exclusively within the legislative authority of the Parliament of Canada.192 And, in the light of that Section of the British North America Act, the legislation in question was, Justice Ritchie held, necessary for the implementation of the authority vested in the Parliament by the Constitution.193 It established qualifications required of persons who claimed Indian status and of persons who claimed the right to the use and benefit of Crown lands reserved for Indians. The Justice rejected the notion that the Bill of Rights had the effect of making the whole Indian Act inoperative and discriminatory.194 For, to assert that was to assert that the Bill of Rights had "rendered Parliament powerless to exercise the authority entrusted to it under the Constitution of enacting legislation which treats Indians living on reserves differently from other Canadians in relation to their property and civil rights."195

As for the phrase "equality before the law" as it existed in the Canadian Bill of Rights,196 that was to be construed in the light of law which existed at the time the Bill was enacted. And in this connection, he thought it important to point out that the phrase was not effective to invoke "the egalitarian concept exemplified by the fourteenth amendment of the U. S. Constitution as interpreted by the Courts of that country."197 He continued:

I think rather that, having regard to the language employed in the second paragraph of the preamble to the Bill of Rights, the phrase "equality before the law" as used in s. 1 is to be read in its context as a part of "the rule of law" to

191. Id. at 489.
193. 38 D.L.R.3d at 490.
194. Id.
195. Id.
196. Bill of Rights, 8-9 Eliz., c. 44, § 1(b) (1960).
197. 38 D.L.R.3d at 494.
which overriding authority is accorded by the terms of that paragraph.\footnote{198. \textit{Id.}}

He distinguished \textit{Drybones} as having no application because in no way was it concerned with the internal regulation of the lives of Indians on reserves, or to their right to the use and benefit of Crown lands on these reserves.\footnote{199. \textit{Id.} at 499.} Instead, in his opinion, it dealt exclusively with the effect of the Bill of Rights on a section of the Indian Act creating a crime with attendant penalties for the conduct of Indians \textit{off} a reserve in an area where non-Indians, who were also governed by federal law, were not subject to any such restriction.\footnote{200. \textit{Id.}}

In a strong dissenting opinion Justice Laskin asserted that unless the Court departed from what was said in \textit{Drybones}, both appeals before the Court should be dismissed.\footnote{201. \textit{Id.} at 502.} He was not of a disposition to reject what was decided in \textit{Drybones}, and he found it impossible to distinguish that case from the two before the Court. He argued: "If, as in \textit{Drybones}, discrimination by reason of race makes certain statutory provisions inoperative, the same result must follow as to statutory provisions which exhibit discrimination by reason of sex."\footnote{202. \textit{Id.}}

In answer to Justice Ritchie's "equality before the law" argument he wrote:

I do not think it is possible to leap over the telling words of s. 1 [of the Canadian Bill of Rights], "without discrimination by reason of race, national origin, colour, religion or sex," in order to explain away any such discrimination by invoking the words "equality before the law" in para. (b) and attempting to make them alone the touchstone of reasonable classification. That was not done in the \textit{Drybones} case . . . In short, the proscribed discriminations in s. 1 have a force either independent of the subsequently enumerated paras. (a) to (f) or, if they are found in any
federal legislation, they offend those clauses because each must be read as if the prohibited forms of discrimination were recited therein as a part thereof.\footnote{3}

It mattered not to him that the Indian Act was “a fruit” of the exercise of Parliament’s exclusive legislative power in relation to “Indians, and Lands reserved for the Indians” under Section 91 (24) of the British North America Act, 1867. As he put it:

Discriminatory treatment on the basis of race or colour or sex does not inhere in that grant of legislative power. The fact that its exercise may be attended by forms of discrimination prohibited by the \textit{Canadian Bill of Rights} is no more a justification for a breach of the \textit{Canadian Bill of Rights} than there would be in the case of the exercise of any other head of federal legislative power involving provisions offensive to the \textit{Canadian Bill of Rights}.\footnote{4}

The Supreme Court’s decision in the \textit{Lavell} and the \textit{Bedard} cases has been severely criticised. It has been characterized as “a weak response to a question which generated great public interest because of its implications for Indians, for women and for the continued vitality of the \textit{Canadian Bill of Rights}’ guarantee of ‘equality before the law.’”\footnote{5} In particular, Justice Ritchie’s British North America Act argument has been taken to task as not only irrelevant, but as not even worthy of mention in the case.\footnote{6} As it was used by Justice Ritchie, this argument served to uphold Section 12(b) of the Indian Act as not offensive to “equality” because the provisions of this Section were “imposed” in discharge of Parliament’s constitutional function under Section 91(24) of the British North America Act. As Professor Hogg points out in his comment on the case, Mrs. Lavell and Mrs. Bedard did not claim that they were discriminated against because they were Indians, but because they were women.\footnote{7} And as Professor Hogg further points out, the British North America Act does not confer power over “Indian women.” Instead, it confers

\begin{footnotes}
\footnote{3}{Id. at 510.}
\footnote{4}{Id. at 511-12.}
\footnote{6}{Id. at 271.}
\footnote{7}{Id. at 271, 272.}
\end{footnotes}
power over "Indians" regardless of sex, and therefore discrimination on the basis of sex is not inherent in that grant of power.208 Professor Hogg concludes that the British North America Act argument is sound, but inconsistent with the decision in Drybones and irrelevant to the issue in Lavell and Bedard.209

It might also be added that the Supreme Court's position in this case gives credence to some of the fears of those who fought for an "entrenched" Bill of Rights, rather than a mere statute which the Parliament chose to enact as the protector of human rights and fundamental freedoms. As one reads the opinions for the majority in Lavell and Bedard, one is reminded of the testimony which Dr. Eugene Forsey gave before the Special Committee on Human Rights and Fundamental Freedoms on July 19, 1960. There he said:

[W]e feel that this bill does not put those fundamental rights and freedoms beyond the reach of invasion by parliament, and it does not put them beyond the reach of invasion by provincial legislation. It is not a matter of details. We have some criticism of details; but it is not essentially a matter of details; it is a matter of the inadequacy of the bill as a whole.210

THE CANADIAN AND THE AMERICAN BILL OF RIGHTS COMPARED

Bills of Rights as part of the country's constitutions have been a tradition in the American system since the very start. The same cannot be said of the Canadian system. For, Canada has had a Bill of Rights only since 1960. And at that, it only has a statute enacted by the Parliament of Canada which undertakes to recognize and protect human rights and fundamental freedoms. Lacking constitutional status, this Act may be amended or repealed at any time.

In the United States, not only has a Bill of Rights as a part of the Constitution been considered essential from the very start, but so also have Bills of Rights traditionally been considered essential to the constitutions of the various States. In the constitutions of some of the States—of those States which existed at the time the

208. Id. at 272.
209. Id.
Federal Constitution was adopted—there are Bills of Rights that predate the Federal Bill of Rights which went into effect November 3, 1791, a mere eighteen months after the Constitution of the United States was adopted by the thirteen original States.\textsuperscript{211} In Canada, there is only one Provincial Bill of Rights in force that predates the Canadian Bill of Rights of 1960. That is the Saskatchewan Bill of Rights enacted by the Legislative Assembly of the Province in 1953.\textsuperscript{212} Since 1960, other Provinces have enacted similar provisions such as the Ontario Human Rights Code of 1962,\textsuperscript{213} the Nova Scotia Human Rights Act of 1963,\textsuperscript{214} The Alberta Human Rights Act of 1966,\textsuperscript{215} and now the recently proposed Quebec Bill of Rights;\textsuperscript{216} but like the Canadian Bill of Rights of 1960, these all lack constitutional status and they can be readily repealed or altered by amendment.

Not only may Provincial Bills of Rights such as that of Saskatchewan be readily repealed or amended, but they conceivably may even be held invalid as was an Alberta Bill of Rights which was enacted by the Alberta Legislature in 1946.\textsuperscript{217} Part I of this Bill of Rights declared, among other things, that every citizen of Alberta should “be free to hold and cherish his own religious convictions and to worship in accordance with the dictates of his own conscience.”\textsuperscript{218} Part II of the Act provided for a Board of Credit Commissioners that would have had the power to control the amount of “purchasing power” and the creation of credit within the Province. The Act concluded with a section which stated that it would not go into force until its constitutionality had been tested.\textsuperscript{219} Part I of the Act was upheld as intra vires by the Alberta Court of Appeal, but Part II was found to be invalid—ultra vires—by this same court because it was directed at the control of banking.\textsuperscript{220} However, on appeal to the

\begin{itemize}
\item \textsuperscript{211} See C. Warren, The Making of the Constitution 819-20 (1937).
\item \textsuperscript{212} Saskatchewan Bill of Rights, SASK. REV. STAT. c. 345 (1953).
\item \textsuperscript{213} ONT. STAT. c. 93 (1961-62), as amended in 1965, ONT. STAT. c. 85 (1965).
\item \textsuperscript{214} N.S. STAT. c. 5 (1963), as amended in 1969, N.S. STAT. c. 11 (1969).
\item \textsuperscript{215} ALTA. STAT. c. 39 (1966). For a discussion of the Ontario and Nova Scotia acts see Tarnopolsky, supra note 30, at 56-57.
\item \textsuperscript{216} National Assembly of Quebec, Bill No. 50. On November 14, 1974, the Bill was referred to la commission parlementaire de la justice of the National Assembly for study.
\item \textsuperscript{217} ALTA. STAT. c. 11 (1946).
\item \textsuperscript{218} Id. § 3.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Reference Re Alberta Bill of Rights Act, 3 W.W.R. 772 (1946).
\end{itemize}
Privy Council the entire act was declared to be invalid.\textsuperscript{221} The reason given was that the whole thing hung together—that if Part II was invalid then there was nothing of operative force left to be added to the statute law of Alberta.\textsuperscript{222}

In the American system, the entire Bill of Rights was said to apply only at the Federal level for over a century and a quarter after it became a part of the Constitution of the United States. This is true even though the fourteenth amendment was added to the Constitution in 1868.\textsuperscript{223} As early as 1908, it was without success that Justice John Marshal Harlan (the first) urged in a dissenting opinion that the effect of the “privileges and immunities” clause of the fourteenth amendment was to incorporate in that amendment the entire Bill of Rights so that all of its provisions became limitations upon the States, as well as upon the Federal government.\textsuperscript{224} However, the Supreme Court has not yet subscribed to that doctrine.\textsuperscript{225} On the other hand, in 1925, the Court held that the freedom of speech and press provisions of the first amendment were applicable to the States through the due process clause of the fourteenth.\textsuperscript{226} Since then, the Supreme Court has followed a selective approach applying now one and then another, but not yet all, of the provisions of the Bill of Rights as limitations on the States through the fourteenth amendment.\textsuperscript{227}

Like the fifth\textsuperscript{228} and fourteenth\textsuperscript{229} amendments to the Constitution of the United States, the Canadian Bill of Rights of 1960 contains a due process clause.\textsuperscript{230} It has already been suggested that in interpreting this clause the Canadian judiciary “cannot fail to be

\textsuperscript{221} Attorney General v. Attorney General, 1947 A.C. 503.
\textsuperscript{222} Id. at 519. For a brief discussion of the litigation over the constitutionality of the Alberta Act as it relates to religious freedom see D. Schmeiser, Civil Liberties in Canada 72-73 (1966).
\textsuperscript{223} U.S. Const. amend. XIV.
\textsuperscript{224} Twining v. New Jersey, 211 U.S. 78, 114 (1908).
\textsuperscript{225} For an exhaustive discussion of the “incorporation” theory see Fairman & Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5, 140 (1949).
\textsuperscript{227} Fairman & Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5, 140 (1949).
\textsuperscript{228} U.S. Const. amend. V.
\textsuperscript{229} Id. amend. XIV.
\textsuperscript{230} Bill of Rights, 8-9 Eliz., c. 44, § 1(a) (1960).
affected by the American experience." 231 However that may be, at the present moment it hardly seems likely that the provisions of the Canadian Bill of Rights will be construed as limitations on the Provinces. For that to happen, more would have to be added because of the crystal clear provisions of Part II, Section 5 of the Canadian Bill which reads as follows:

(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 within the legislative authority of the Parliament of Canada. 232

In the American system, civil liberties are protected by the Bill of Rights to the extent that they have achieved a status which has been referred to as a "preferred position." This appeared during the 1940's in such widely separated cases as Thomas v. Collins, 233 a case that involved a labor union, and Marsh v. Alabama, 234 a Jehovah's Witness case. In the former, the Supreme Court asserted that the freedoms of the first amendment occupy a "preferred position," and that the only restrictions on speech that are justified are those which create a "clear and present danger" to a public interest. In the latter case, Marsh v. Alabama, the Court held that freedom of speech, press and religion are "preferred" for all—that even in a company-owned town evangelism cannot be declared by ordinance to be a

231. See Tarnopolsky, supra note 30, at 154.
234. 326 U.S. 501 (1946). For a list of Jehovah's Witnesses cases decided between 1940 and 1949 in which the phrase "preferred position" was used see Justice Frankfurter's concurring opinion in Kovacs v. Cooper, 336 U.S. 77, 89, 93 (1949).
commercial enterprise merely because religious literature is sold rather than donated.

In the Canadian system, there certainly is concern for civil liberties just as there is in the American system. But even with the Canadian Bill of Rights of 1960, it can hardly be said that under Canadian law civil liberties have achieved a “preferred position.” This is made quite evident by Section 2 of the Canadian Bill of Rights which permits the Canadian Parliament to declare that an Act shall operate notwithstanding its provisions. It is made even more evident by the new Section 6(5) of the War Measures Act which declares that “[a]ny 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, abridgment or infringement of any right or freedom recognized by the Canadian Bill of Rights.”
