THE CANADIAN BILL OF RIGHTS: SOME AMERICAN OBSERVATIONS

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One who compares Canadian constitutionalism with that of the United States,[1] while not overlooking important differences, is struck by the basic similarity of the problems north and south of the border. This is not surprising, for Canada and the United States have come to national maturity in the same new-world environment, have developed from a common constitutional heritage, and have been guided by similar political ideals. Both have federal systems the object of which is to vest in a central government the power to deal effectively with matters of national concern while leaving the component provinces or states with autonomy to handle all matters of local interest. While it was originally intended that the balance of the federal system should be much more heavily weighted in favor of the central government in Canada than it is in the United States, the work of the judges in constitutional interpretation over the years has brought the two systems much closer together than the founding fathers ever envisaged.[2]

When one turns from the problems of federalism to the constitutional protection of individual liberty much more striking differences become apparent. There is no doubt that Canadian and American traditions are equally set against the arbitrary exercise of governmental power, an attitude which is part of our common heritage from the English constitutional struggles against the unlimited prerogative of the Crown.[3] But in the United States this attitude finds

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[1]Of course the responsibility for the views expressed in this paper is entirely mine, but it would not have been written if I had not been a Visiting Professor on the Law Faculty of McGill University during the early months of 1961. I wish to express my indebtedness and appreciation for the friendly courtesy and enriching stimulation I received not only from my colleagues at the University, but also from other persons both within and without the government. My colleague at the University of Pennsylvania, Professor John O. Honnold, has taken time from a busy schedule to read a draft of the paper and make many helpful suggestions for which I am grateful.

[2]This is due particularly to the broad construction which the Supreme Court of the United States has placed upon the Commerce Clause (art. I, sec. 8, cl. 3) of the United States Constitution which vests in Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Mulford v. Smith*, 307 U.S. 38, (1939); *United States v. Darby*, 312 U.S. 100, (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942). Compare the restrictive interpretation of the power of the Canadian Parliament to make laws "for the peace, order and good government of Canada" (B.N.A. Act., sec. 91). See *Reference Re Natural Products Marketing Act*, [1936] 3 D.L.R. 622, affirmed by the Privy Council, *sub nom. A.-G.B.C. v. A.-G Can.*, [1937] A.C. 377, [1937] 1 D.L.R. 691.

[3]These struggles, as a background to the American Bill of Rights, are briefly reviewed in Pound, *The Development of Constitutional Guarantees of Liberty* (1957). See also Chafee, *How Human Rights Got into the Constitution* (1952), *Three Human Rights in the Constitution* (1956).

expression in the concept of limited government, the theory that all political power ultimately resides with the people who have authorized the government to act as their agent under a limited franchise which leaves an area of individual freedom inviolate from governmental interference.[4] The province of the American Bill of Rights is to mark off this area and to set legal limits to the authority of government in all of its branches, including the legislative.

As a means of giving effect to this concept of limited government, there was developed the American doctrine of judicial review under which the courts have the final authority to determine what the constitution means and the duty not to give effect to legislation to the extent that it is inconsistent therewith or *ultra vires* the legislative power. This function is exercised by the courts on a case to case basis in the tradition of the English common law.[5] Thus in the United States, individuals and minorities look to the judges as the guardians of their constitutionally protected liberty.

On the other hand, Canada, with "a Constitution similar in principle to that of the United Kingdom"[6], stands in the tradition of the British system, which places ultimate constitutional faith in the supremacy of Parliament.[7] With the expansion of the franchise which has taken place in the western world in the last century, this assures that government will be responsive to the popular will but establishes no impenetrable legal barriers against governmental interference with the freedom of the governed. Freedom under parliamentary supremacy depends upon the self-restraint of government, a self-restraint which may be strongly bolstered, as it is in England and Canada, by long-established tradition, but in the modern state where universal adult suffrage exists and

[4]"Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." Matthews, J., speaking for the Court in *Hurtado v. California*, 110 U.S. 516, 536 (1884), an early case interpreting the due process clause of the Fourteenth Amendment. See also Corwin, *Liberty Against Government* (1948).

[5]There is a prodigious literature on judicial review in the United States. Some of the well-known discussions are: Thayer, "Origin and Scope of American Doctrine of Constitutional Law", 7 Harv. L.Rev. 129 (1893); Corwin, *Court over Constitution* (1938), ch. 1; Boudin, *Government by Judiciary*. Two recent works are Hand, *The Bill of Rights* (1958) and Black, *the People and the Court, Judicial Review in a Democracy* (1960), ch. 4.

[6]Preamble of the B.N.A. Act.

[7]Canada does not stand completely in the British tradition, for the concept of the supremacy of Parliament has necessarily yielded to the necessities of a federal system, which require limitations on the legislative power of the central government as well as that of the provinces in order that the balance of the federal system may be preserved. These limitations are enforced in the courts through the system of judicial review.

legislators become more and more the directed agents of the voters rather than their independent representatives,[8] freedom rests upon the self-restraint of the majority. Consequently, faith in parliamentary supremacy as a protection against arbitrary government becomes faith that the majority can be depended upon not to work its will in arbitrary ways, at least not to a sufficient extent to justify legal restraints on the legislative power.

To one schooled in American constitutional law it is particularly interesting that on August 10, 1960, Parliament gave its assent to the enactment of "An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms", and Prime Minister Diefenbaker's bill of rights[9] became the "Canadian Bill of Rights".[10] In the preamble, it is recited that Parliament was desirous of "enshrining" human rights and fundamental freedoms "in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada". Section 1 opens with the statement: "It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms . . .".

This language might indicate to a person unfamiliar with the terminology of constitutional documents that Parliament was not enacting law but merely making a statement of ideals and reaffirming existing principles without providing any legal means of enforcement. However, the provisions of the Bill make clear that this is not so, and it must be remembered that frequently constitutional provisions have been drafted in the form of assertion or reaffirmation of principles regarded as previously established.[11] Even the leaders of the American Revolution believed they were claiming freedoms to which they were already entitled by British constitutional tradition. For the most part

[8]Even as early as 1835, De Tocqueville commented on this tendency when he said in his famous work, *Democracy in America* (Knopf, 1946), vol. 1, p. 255: "A proceeding is becoming more general in the United States which will, in the end, do away with the guarantees of representative government: it frequently happens that the voters, in electing a delegate, point out a certain line of conduct to him and impose upon him certain positive obligations that he is pledged to fulfill. With the exception of the tumult, this comes to the same thing as if the majority itself held its deliberation in the market-place."

[9]Because of the prominent part Mr. Diefenbaker took over several years in urging the enactment of a bill of rights, the legislation can quite properly be referred to as his bill. The first version of the enacted bill was Bill C-60 which was given its first reading in the House of Commons on September 5, 1958. This bill was comprehensively discussed in a symposium in The Canadian Bar Review, March, 1959 (vol. 37, no. 1). The bill became C-79 upon which hearings were held by a Special Committee of the House of Commons (3rd Sess., 24th Par.) from July 12 to 29, 1960.

[10]8-9 Eliz. II (1960), ch. 44.

[11]The great Bill of Rights of 1689, the Bill of Rights of the Virginia Constitution of 1776, the Declaration of Rights in the Pennsylvania Constitution of 1776, the Delaware Declaration of Rights of 1776, among others, were in this form. Perry & Cooper, *Sources of Our Liberties* (1952), pp. 245, 311, 328, 338.

the American Bill of Rights[12] was regarded by its framers as a restatement of rights and freedoms won in the seventeenth century struggles with the Stuarts, as in fact it was. Consequently the language in the Canadian Bill "recognizing" and "declaring" existing rights should not detract from its character as enacted law.

The protected human rights and fundamental freedoms are declared in Section 1 to be "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; the right of the individual to equality before the law and the protection of the law;" and freedom of religion, speech, assembly and association, and press. Section 2 sets forth a more detailed statement of rights and freedoms relating particularly to criminal justice and procedure, such as freedom from arbitrary detention or imprisonment and the right to protection therefrom by way of *habeas corpus*; the right of the arrested person to be informed promptly of the reason for his arrest and the right to retain counsel;[13] the privilege against self-incrimination;[14] and "the right to a fair hearing in accordance with the principles of fundamental justice".[15]

[12]I use the term "American Bill of Rights" to designate the first eight amendments of the United States Constitution, sometimes referred to as the Federal Bill of Rights because they limit the federal government only, and the Thirteenth, Fourteenth and Fifteenth Amendments (the Civil War Amendments) which limit the states.

[13]The Bill recognizes that "a person who has been arrested or detained" should have "the right to retain and instruct counsel without delay." Sec. 2(c)(ii). It is interesting to compare this language with that of the Sixth Amendment of the United States Constitution which provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." In the leading case of *Johnson v. Zerbst*, 304 U.S. 458 (1938) this was held to be a right to have counsel appointed by the court if the accused was unable to provide his own attorney. Because the Sixth Amendment applies only to the federal government, right to counsel in state courts is derived from the due process clause of the Fourteenth Amendment, and thus far the Supreme Court has been unwilling to hold that the indigent accused in a state court has an absolute right to have counsel appointed for him if he cannot retain his own. See *Betts v. Brady*, 316 U.S. 455 (1942) and the general discussion of the subject in Beaney, *The Right to Counsel in American Courts* (1955).

[14]The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." But in *Adamson v. California*, 332 U.S. 46 (1947), it was said that the privilege against self-incrimination was not a right protected against state infringement by the due process clause of the Fourteenth Amendment.

[15]In making a more detailed statement of civil liberties with respect to criminal justice and procedure, the Canadian Bill is similar to the first eight amendments of the United States Constitution. There is not space in this paper to discuss the criminal and other procedural provisions of Section 2. Only one familiar with Canadian criminal law and administrative procedure (the other field most likely affected) can make an estimate of their possible impact. In the United States, where the criminal law is generally within the jurisdiction of the states rather than the Federal Government, most of the criminal cases involving civil liberties issues arise under state law and involve the application of the due process clause of the Fourteenth Amendment. A different situation exists in Canada where the federal power includes jurisdiction over the criminal law. It may be that the Bill will have its greatest impact in the field of administrative procedure. See the early decisions under it annotated in *Martin's Annual Criminal Code*, 1961, pp. 708-710. The reports of these cases were not available to me at the time of writing.

Relationship between the Bill of Rights and other Legislation

The heart of the Canadian Bill of Rights is to be found in the opening clause of Section 2 which states: "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 . . ." The expression "law of Canada" is defined in Section 5 (2) to mean "an Act of the Parliament of Canada enacted before or after the coming into force of this Act"[16] and "any order, rule or regulation thereunder." These provisions lay down the rule of statutory construction that *no* act of Parliament unless it contains *express* direction otherwise, shall be interpreted and applied so as to abridge or infringe any of the rights or freedoms enumerated in the Bill of Rights. Unless *expressly* repealed or amended, the Bill of Rights is to be applied as basic and controlling legislation.

Section 3 provides that "The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine . . . every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of" the Bill of Rights "and he shall report any such inconsistency to the House of Commons at the first convenient opportunity." It is to be expected that the Minister of Justice will have a leading part to play in the operation of the Bill, not only through his power and duty to report to Parliament regarding any questionable provisions in bills which have been introduced, but primarily because of his opportunity as the draftsman of government measures to shape legislation in conformity with the requirements of the Bill. The latter function is particularly significant under a cabinet system of government which prevents the multiplicity of bills originating from members of the House that occurs in the Congress of the United States. Important responsibilities regarding the protection of civil liberties are thus placed upon Parliament, the Minister of Justice[17] and finally the courts, and the effectiveness of the Bill will depend upon how these organs of government perform their respective roles.

Basic to the operation of the Bill is the role of Parliament. The Bill is purely statutory in character, an act which can be repealed or amended by the ordinary legislative process any time Parliament so determines. It is not

[16]The definition also includes "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." This clause was evidently drafted to cover pre-confederation legislation still on the books which under Section 129 of the B.N.A. Act is subject to repeal or change by Parliament.

[17]The Bill of Rights will become largely ineffective if the practice should develop for the Minister of Justice to insert a clause suspending the operation of the Bill whenever it is anticipated any measure desired by the government of the day may involve an infringement of the protected rights or freedoms. Only if the courts are permitted to adjudicate such conflicts can the maximum meaning and force be given to the Bill.

"constitutional" in the special American sense of that term because it is not law superior to the will of the legislative body; the principle of the supremacy of Parliament thus remains unimpaired. However, the Bill may still provide important protection against parliamentary encroachment upon individual liberty.

In countries like Canada and the United States, which have strong traditions of freedom, the greatest threat to liberty comes not from any direct attack on it but as a by-product of legislative or administrative action purporting (and usually intended) to serve perfectly legitimate public interests. For example, freedom of the press is not so likely to be infringed by a direct attempt to abolish it, as it is by an effort to ban subversive or other literature believed to be harmful to the public welfare. It is not likely that the Parliament of Canada or the Congress of the United States (assuming the latter had the power to do so) would wish to abolish the principle that life, liberty or property may not be taken without due process of law, but the principle may be infringed by a law designed to achieve other purposes and thought at the time of its enactment not to involve any violation of due process. The harsh application of a rule may not be foreseen at the time of its promulgation, or acting under the passion or pressures of the moment, the legislator may ignore the legitimate claims of interests which are damaged. Thus, I should suppose it is unlikely that the Canadian Bill of Rights will be directly repealed, unless it proves ineffective or a more effective way of protecting civil liberty is devised. The threat may come from the temptation to insert clauses in subsequent legislation immunizing it from the Bill of Rights. If support for civil liberty is not strong enough to restrain this temptation, the protection of the Bill will be worth little indeed. The successful operation of the Bill will depend in the first instance on the willingness of Parliament to permit the courts to give full effect to the Bill unimpaired by suspending clauses in subsequent legislation or inserted by amendment in prior legislation.

If Parliament does not curtail the operation of the Bill through the use of clauses expressly immunizing legislation from its effect, the success of the Bill will depend upon how it is interpreted by the courts. They will have two very important interpretative functions to perform; one to give effect to the Bill as basic and controlling legislation so long as it is not expressly repealed or amended; and the other to refine the meaning, on a case to case basis, of the fundamental rights and freedoms protected.

The minimum effect of the Bill as basic civil liberties legislation is to provide a rule of construction; no law of Parliament, unless it contains express direction otherwise, is to be interpreted so as to infringe any of the protected rights or freedoms. Such a rule of construction is one which a judge sensitive to the value of freedom in our society would probably follow even without benefit of the Bill of Rights. How much the Bill would contribute to the protection of civil liberty if this were the limit of its operation, one might question.

But the Bill should be read as also providing a rule of priority as between conflicting legislation, a rule to the effect that whenever an act of Parliament conflicts with the Bill of Rights, the latter is to prevail unless Parliament has inserted an express provision in the conflicting legislation declaring "that it shall operate notwithstanding the Canadian Bill of Rights." Of course, previously enacted legislation does not contain such a provision,[18] with the result that the Bill accomplishes a *pro tanto* amendment or repeal of such legislation to the extent, if any, which is necessary to prevent the forbidden infringement of the declared rights and freedoms. This result is not an unusual one for it represents an application of the familiar rule giving paramount effect to the latest expression of the legislative will.[19]

It is the effect of the Bill on legislation enacted after its passage which poses the most interesting and unusual question. By its terms, Section 2 makes no distinction between such legislation and that previously enacted, thus implying that the restriction of conflicting legislation runs to the future as well as the past. Does Parliament have the power to do this? The lack of such power, it may be urged, follows from the proposition that as between two conflicting pieces of legislation that later in time prevails because a legislative body may not bind its successors and no legislation (which is not given special constitutional authority) is beyond repeal or amendment. I would respectfully submit that this proposition does not prevent Section 2 of the Canadian Bill of Rights from achieving its apparent purpose.

The general rule that subsequent legislation amounts to a *pro tanto* repeal or amendment of earlier conflicting legislation is itself a rule of construction. If two pieces of legislation deal with the same subject in conflicting ways which caunot be reconciled, it is assumed that the subsequent act expresses the current legislative will which is to be enforced. But of course the legislature may provide otherwise. If the subsequent legislation, by its terms, indicates that any conflict with earlier legislation is to be resolved by preserving the full effect of the older statute, this is the legislative will to be followed by the judge or the administrator. In other words, the legislative body has in effect stated in the subsequent legislation that it is not to be given effect to the extent of any conflict with the previous law and it would be a misapplication of the later legislation to ignore this direction. The problem is one of determining and giving effect to the legislative intent.

It can be contended that Section 2 of the Bill of Rights provides that there shall be no implied repeal or amendment of the Bill's protection; only an express amendment or repeal is to be given effect and this can be accomplished

[18]Such a clause could be inserted by amendment of the prior legislation, as was done by the Bill itself in the case of the War Measures Act. See no. 46, *infra*.

[19]The Bill might have stated more explicitly that all inconsistent legislation is repealed to the extent inconsistent, but the language of Section 2 seems to import this. See Crawford, *Statutory Construction* (1940), pp. 192-197; Sutherland, *Statutory Construction* (3rd ed., 1943), secs. 2011-2012.

only by an insertion in subsequent legislation of a provision expressly making the subsequent act superior to the Bill. So read, Section 2 of the Bill becomes a legislative interpretation act for determining the intention of Parliament with respect to amendment or repeal of the Bill of Rights.

This discussion may seem entirely academic, it being anticipated that whenever conflict between the Bill of Rights and subsequent legislation cannot be avoided by interpretation of the subsequent legislation, Parliament will take care of the matter by expressly giving priority to the subsequent act. But situations may arise where Parliament is willing to leave the issue of conflict to the courts and is unwilling to have the subsequent legislation applied if the courts determine that such application will violate the protected rights or freedoms. The protagonists of particular legislation may wish to have it only if there is no violation of fundamental liberties and therefore are unwilling to go on record as suspending the Bill of Rights. This can be illustrated by assuming the following extreme case.

After a bitterly fought general election, a bill is introduced in the House of Commons which would impose a heavy gross receipts tax on newspapers with a daily circulation over a stated figure. All of the papers in this category opposed the government in the recent election. The Minister of Justice, acting pursuant to Section 3 of the Bill of Rights, reports to the House that the proposed taxing measure would infringe the freedom of the press declared in the Bill of Rights. After debate, a proposed clause excepting the measure from the operation of the Bill is rejected because of the unwillingness of members to go on record as curtailing any of the fundamental freedoms, but the tax is enacted. Would not a court be ignoring the expressed will of Parliament if it sustained the application of the tax regardless of any conflict with the Bill of Rights?[20]

The provision in Section 2 forbidding any implied amendment or repeal of the Bill of Rights should be given full effect so long as Parliament does not repeal *that* provision, which of course it may do at any time by adequately indicating its intention of so doing, but surely the mere enactment of legislation inconsistent with the Bill does not of itself indicate that intention. In enacting such a rule against implied repeal, the Parliament sitting in 1960 did not improperly attempt to bind its successors, for they may change the rule simply by indicating a clear intention to do so.

[20]The facts of this hypothetical case have been suggested by *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), involving a Louisiana statute imposing a tax of 2% on the gross receipts of every person or corporation engaged in the business of selling advertisements in a publication having a circulation of more than 20,000 copies per week. There were 13 publications (all newspapers) which fell into the taxable category and they were more or less in competition with other newspapers with a circulation of less than 20,000 copies per week. The Court held the tax to be an infringement of the freedom of the press protected by the due process clause of the Fourteenth Amendment.

There are precedents for this kind of legislation,[21] one of the most important of which is contained in Section 4 of the Statute of Westminster, 1931, providing: "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that Dominion has requested, and consented to that, the enactment thereof." As Professor Wheare points out,[22] this provision does not deny to future Parliaments the power to legislate for the Dominions, but it does lay down "a rule to determine when the power has or may be deemed to have been exercised". The same characterization can be made of Section 2 of the Canadian Bill of Rights; it does not deny to future Parliaments the power to infringe the declared rights and freedoms, but it does lay down a rule to determine when the power has or may be deemed to have been exercised.[23] While this rule may not make the Bill as strong a protection to civil liberties as a constitutional bill of the American type, it nevertheless may provide protection of no mean scope, for as pointed out above, the greatest threat to civil liberty comes from erosion through indirect infringement rather than from direct and express attack.

Scope of the rights protected by the Bill

We turn now to the other aspect of the courts' role under the Bill of Rights, the judicial function of giving meaning, on a case to case basis, to the fundamental rights and freedoms protected. There is space here to do no more than touch lightly on a few of the basic questions that suggest themselves.

Because of the limitations of the federal system, the role of the courts will in one sense be a decidedly restricted one. The Bill was enacted with scrupulous regard for the limits of the federal power[24] and consequently the protection of

[21]Section 1-104 of the Uniform Commercial Code which has been enacted in several of the United States provides: "This act being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided."

A stronger provision, more similar to Section 2 of the Canadian Bill, is Section 2500 of the New York Penal Law which reads: "No provision of this chapter, or any part thereof shall be deemed repealed, altered or amended by the passage of any subsequent statute inconsistent therewith unless such statute shall explicitly refer thereto and directly repeal, alter or amend this chapter accordingly." The validity of this provision, which goes back to legislation of 1886, seems to have been sustained in *People v. Dwyer*, 215 N.Y. 46 (1915). Report of the Law Revision Commission of New York for 1955, vol. 1, p. 170. *Cf.* Section 2(1) (a) of the Interpretation Act, R.S. C. (1952), vol. 3, ch. 158.

[22]Wheare, *The Constitutional Structure of the Commonwealth* (1960), p. 27.

[23]The provision does not go so far as to prescribe a special procedure, such as a specified majority vote, before any act infringing declared rights would be effective. As to the serious question regarding the validity of such a provision, see the authorities cited in Laskin, "An Inquiry into the Diefenbaker Bill of Rights", 37 Can. B. J. 130, no. 204 (1959). For a current discussion of parliamentary supremacy and the controversy over the effect of section 4 of the Statute of Westminster, 1931, see Wade and Phillips, *Constitutional Law* (6th ed., 1960), pp. 43-57.

[24]This is displayed not only by the definition of "law of Canada" in Section 5 (2), but by the provision in Section 5 (3) which states that the Bill "shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada."

its provisions may be invoked only when the application of a dominion law or some regulation or order thereunder is involved. The Bill has no application to provincial statutes or municipal by-laws or the action of officials interpreting and applying them. This removes from the operation of the Bill the areas in which the great Canadian civil liberties cases[25] have arisen in recent years. Such limitation was unavoidable[26] but it is a substantial one, for it seems that in Canada, as in the United States, infringement of civil liberty is more likely to come from provincial or local action than from the federal government.[27]

But in the area to which the Bill applies (federal laws, regulations and orders), the opportunity for judicial contribution is large. The most basic civil liberties are declared in the very broad and general terms which are characteristic of constitutional documents of this kind. In Section 1 the protected "rights" are described as follows:

> "(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;
>
> "(b) the right of the individual to equality before the law and the protection of the law . . ."

It is stated that in Canada these rights "have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex." In applying these provisions, the courts will face a number of important questions of interpretation.

Only rights "of the individual" are referred to. Does this imply that only natural persons may claim the protection of these guarantees and artificial persons, such as corporations, are not protected?[28] The right to life, liberty and security of the person implies personal relationships which only individuals

[25]*Reference Re Alberta Statutes*, [1938] 2 D.L.R. 81; *Winner v. S.M.T. (Eastern) Ltd. and A.-G. N.B.* [1951] 4 D.L.R. 529; *Saumur v. Quebec and A.-G. Que.*, [1953] 4 D.L.R. 641; *Birks Case* [1955] 5 D.L.R. 321; *Chaput v. Romain* [1956] 1 D.L.R. 241; *Switzman v. Elbling and A.-G. Que.*, 7 D.L.R. 2d 337 (1957); *Dionne v. Munic. Court of Montreal*, 3 D.L.R. 2d 727 (Que. Superior Court, 1956). These cases and the Canadian civil liberties situation generally, prior to the adoption of the Bill of Rights, are discussed in Professor Scott's interesting lectures, *Civil Liberties and Canadian Federalism* (1959).

[26]This is not the place to enter into a discussion of what Parliament might do to give additional protection to civil liberties through the exercise of its power to enact criminal law or to define the rights and privileges of Canadian citizenship.

[27]This is not because local officials are less considerate of the individual's freedom, although this may sometimes be so, but for the reason that the matters within the jurisdiction of local government (except in time of war or national emergency) are more likely to bring government regulation in conflict with liberty. Of course this is not true in Canada with reference to the administration of the criminal law which is within federal jurisdiction.

[28]The due process and equal protection clauses of the United States Constitution use the term "person" which is interpreted to include a corporation. Kauper, *Constitutional Law, Cases and Materials* (2d ed., 1960), p. 751. Mr. Justice Black expressed a dissenting view in *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938) but it has never won the support of other members of the Supreme Court.

have,[29] but enjoyment of property,[30] and the right not to be deprived thereof except by due process of law, and the right to equality before the law and the protection of the law are as applicable to artificial persons as natural ones. Perhaps these provisions can be interpreted as protecting individuals when acting through associations as well as when acting personally, and thus be construed to protect associations whether regarded as juristic persons or not. It would seem unfortunate to me if, for example, the enjoyment of property held individually is protected by the Bill, while the enjoyment of the same property would not be protected if owned in substance by the same persons in a corporate name.

Another question is suggested by the language: "*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." Are these to be considered separate rights? If so, what does the first one cover which is not covered by the second? Was it intended to be something of an economic bill of rights, asserting an affirmative right to opportunity?[31] It is difficult (at least for this writer) to foresee what the role of the courts would be in giving effect to the Bill as protecting such a right.

The American Bill of Rights protects civil liberty against deprivation or infringement by governmental action only;[32] no violation of the Bill of Rights results from the conduct of an individual not acting under color of governmental

[29]There are a few decisions of the United States Supreme Court which suggest that the "liberty" which is protected by the due process clause of the Fourteenth Amendment is the liberty of natural, not artificial persons. *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906). *Western Turf Assoc. v. Greenberg*, 204 U.S. 359, 363 (1907). But in *Times Mirror Co. v. Superior Court*, 314 U.S. 252 (1941), the Fourteenth Amendment was held to protect the freedom of the press of a newspaper corporation and the question was not discussed. Because the Canadian Bill enumerates the basic "freedoms" as such, a restrictive definition of the word "liberty" may have little effect on the general coverage of the Bill.

[30]*Cf.* Article 17 (1) of the Universal Declaration of Human Rights: "Everyone has the right to own property alone as well as in association with others."

[31]Such a right, for example, is declared in Article 25 (1) of the Universal Declaration of Human Rights: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." These Rights and Freedoms (U.N. Dept. of Pub. Information, 1950).

[32]Section 1 of the Fourteenth Amendment provides: "*No State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall *any State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis supplied). Because of this language, it is said that the provision gives protection only against "state action." On the subject generally, see Hale, "Force and the State: A Comparison of 'Political' and 'Economic' Compulsion", 35 Colum. L. Rev. 149 (1935). Although the Fifth Amendment does not make the point explicit, it too limits only governmental action, *i.e.* that of the Federal Government. *Barron v. Baltimore*, 7 Peters 243 (1833).

authority,[33] although of course such conduct may render the action liable under some branch of statutory or common law such as tort, contract, property or the criminal law. The Canadian Bill is silent regarding any such distinction, which can be illustrated by imagining the following situation.

A owns a chicken farm adjoining a tract of land which the federal government acquires and develops as an airport for the national air force. The angle of the landing and takeoff of the planes brings them so close over A's property that its utility as a chicken farm is completely destroyed and A suffers substantial damage. It is contended that the federal law allows A no compensation. The deprivation (whether by due process of law or not is the question) is by governmental action and in the United States a bill of rights issue would clearly be raised.[34] On the other hand, if the airfield and planes were purely private, A might or might not be able to recover damages from their owner under the law of nuisance, but the flight of the planes would result in no deprivation of property by governmental action and for this reason would not violate the Bill of Rights.

The distinction between governmental and private action is by no means always easy to draw[35] but it is an application of the American theory that a bill of rights is designed to protect the liberty of the individual against arbitrary

[33]According to the law as it has developed in the United States, the action is governmental within the meaning of the Bill of Rights, if it is taken by a governmental official who is purporting to act in his official capacity; the fact that he actually has no authority so to act or even that his conduct is a crime under the law of the government for which he is pretending to act is immaterial. *Ex parte Virginia*, 100 U.S. 339, 346-347 (1880); *Screws v. United States*, 325 U.S. 91 (1945); *Monroe v. Pape*, 365 U.S. 167 (1961).

[34]The facts of this case are substantially those of *United States v. Causby*, 328 U.S. 256 (1946) in which it was held that the United States was constitutionally obligated to compensate the farmer for the loss he had sustained.

[35]What would otherwise be private action may become governmental because it is supported in some way by governmental authority. This may take the form of governmental enforcement of private arrangements such as racially restrictive convenants in conveyances of real estate. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953). These cases are discussed in Barnett, "Race-restrictive Covenants Restricted," 28 Ore.L.Rev. 1 (1948); Comment, "The Impact of Shelley v. Kraemer on the State Action Concept," 44 Calif.L.Rev. 718 (1956). Canadian cases have reached a similar result under the law of property without benefit of a bill of rights. *Re Drummond Wren* [1945] 4 D.L.R. 674; *Noble & Wolf v. Alley* [1951] 1 D.L.R. 321. In the *Drummond Wren* case, the Ontario High Court held the covenant void (1) as contrary to public policy; (2) as a restraint upon alienation; and (3) for uncertainty. In the *Noble* case, the Supreme Court of Canada relied only on the latter ground. Perhaps if the covenants had been more carefully worded and had arisen in a province having a bill of rights like the Canadian Bill, a serious bill of rights question would have been presented.

The action of a private group may be regarded as governmental action because the power or dominance of the group may make its action substantially that of the community. Thus the regulation by a corporate owner of a company town, keeping Jehovah's Witnesses from distributing their material in the streets, may violate the Bill of Rights. *Marsh v. Alabama*, 326 U.S. 501 (1946). See Berle, "Constitutional Limitations on Corporate Activity"—"Protection of Personal Rights from Invasion Through Economic Power", 100 U.Pa.L.Rev. 933 (1952).

governmental action. Whether the doctrine should have pursuasive appeal in Canada may well be questioned, but still the application of the Canadian Bill may be affected by whether the complainant's deprivation was caused solely by private conduct rather than by governmental action.[36]

One of the heaviest burdens of interpretation placed on the Canadian courts by the Bill results from the use of phrase "due process of law." The clause makes clear that the right to life, liberty, security of the person and enjoyment of property is not absolute, but may be destroyed or impaired by due process of law. Lifted from its context, this phrase might be taken to mean no more than that the civil liberties mentioned should not be impaired except through legislation duly adopted. The meaning of the phrase goes beyond this if it is to have any significant effect in the Canadian Bill. Certainly it is used to prescribe some standard by which law is to be interpreted and applied rather than simply to assert that action in violation of law is unlawful.

For over a century the courts of the United States have been engaged in interpreting due process of law as a standard contained in a bill of rights. They have never succeeded in formulating a very useful general definition. The concept has sometimes been described as embodying the principles of justice "implicit in the concept of ordered liberty"[37] or "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[38] These vague characterizations serve to emphasize the fact that due process takes on concrete meaning only by the gradual formulation of specific principles in particular cases as they arise. However, as Mr. Justice Frankfurter has emphasized: "The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment."[39] In the United States, the due process clause has received its interpretation as part of a bill of rights which limits

[36]There is more to the governmental action concept than simply a fortuitous circumstance of draftsmanship in the case of the American Bill of Rights. There are situations in which it is clear that a restriction imposed by the government should violate the Bill of Rights while the same restriction if privately entered into should not. The frequently cited example is the social club. A statute or municipal by-law barring the members of a specified race from such a club would violate the fundamental freedom of association, but the result is quite different when the members of the club voluntarily agree that the club is to be restrictive in character. In one case the freedom of members, present as well as prospective, is being curtailed, while in the other the present members are exercising a freedom which necessarily restricts that of the would-be members.

[37]*Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

[38]*Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Brown v. Mississippi*, 297 U.S. 278, 285 (1936).

[39]Frankfurter, J., concurring in *Adamson v. California*, 332 U.S. 46, 68 (1947). The same Justice, speaking for the majority in *Barkus v. Illinois*, 359 U.S. 121, 127 (1959), stated: "Decisions of this Court concerning the application of the Due Process Clause reveal the necessary process of balancing relevant and conflicting factors in the judicial application of that Clause . . . The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment."

the legislative power, particularly that of the various states. It can well be questioned whether the phrase in the Canadian Bill should receive as expansive an interpretation.

Clause (b) of Section 1 declares the individual's right "to equality before the law and the protection of the law."[40] In the earlier version of the Bill, which received its first reading in the House of Commons on September 5, 1958, as Bill C-60, this clause was drafted more narrowly to read: "the right of the individual to protection of the law without discrimination by reason of race, national origin, colour, religion or sex." In the final draft, this clause was moved up to the introductory portion of the Section which now declares that the protected rights and freedoms "have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex." At first impression, the inclusion of both of these provisions may seem unnecessary but each one may have its special province. Clause (b) formulates a general right to equal treatment or a right to be free from arbitrary discrimination, much in the same manner as does the clause of the United States Constitution which provides no State shall "deny to any person within its jurisdiction the equal protection of the laws." Again, as in the case of other civil liberties, this cannot be absolute and the state is not denied the power to make reasonable classifications and distinctions.[41] Clause (b) will have possible application to all kinds of discrimination; on the other hand, the specific disapproval of discrimination based on race, national origin, colour, religion or sex can be construed to mean that discrimination of this kind is particularly suspect or presumptively bad.

Clauses (c) to (f) of Section 1 simply enumerate the declared freedoms as "freedom of religion; freedom of speech; freedom of assembly and association; and freedom of the press."[42] None of these freedoms is intended to be absolute; freedom of speech does not include the freedom to set up a false cry of fire in a crowded theatre and thus cause a panic;[43] freedom of assembly does not include the freedom to hold a meeting in the middle of a city street and thus obstruct traffic;[44] freedom of the press does not include freedom to publish obscene material designed to appeal to prurient interest.[45] The delineation of the pro-

[40]The "equal protection clause" in the Fourteenth Amendment provides, no state "shall deny to any person within its jurisdiction the equal protection of the laws." The historical background of the clause is discussed in ten Broek, *The Antislavery Origins of the Fourteenth Amendment* (1951).

[41]See Tussman and ten Broek, "The Equal Protection of the Laws", 37 Calif.L.Rev. 341 (1949).

[42]There is no indication that these freedoms must be those of an individual as distinguished from a juristic person. I would submit that the Bill should be interpreted as protecting the freedom of the press of a newspaper operated by a corporation as well as one operated by an individual.

[43]This is an example first given by Mr. Justice Holmes in *Schenck v. United States*, 249 U.S. 47, 52 (1919). The English background of freedom of speech and of the press is briefly reviewed in Barrett Bruton and Honnold, *Constitutional Law* (1959), p. 967.

[44]*Cox v. New Hampshire*, 312 U.S. 569 (1941).

[45]*Roth v. United States*, 354 U.S. 476 (1957).

tected freedoms inevitably involves a balancing of interests, for the assertion of one person's freedom may mean the injury of another person or the public generally. It is obvious in the examples given above that the value of the freedom asserted is overwhelmingly outweighed by the public interest which would be injured if absolute freedom were sustained. Such appraising and balancing of interests will lie at the heart of the judicial function of giving effect to the Bill of Rights; it must be made on a case to case basis; and it is not foreign to the functions which courts traditionally have performed.[46]

Throughout this discussion extensive reference has been made to the law and judicial decisions in the United States, but there has been no intention to imply that the older American Bill of Rights should be taken as a standard to be followed in the development of the Canadian law. The American law of civil liberties is still groping for answers to many basic problems and it would be a serious error indeed to believe that there is a body of jurisprudence built around the American Bill of Rights which is ready for transplantation to another national environment. Canadian answers are to be sought based upon Canadian conditions and traditions and the American law should be viewed as a body of experience from which to profit rather than a perfected plan to follow.

[46]This paper has not included any discussion of Section 6 of the Bill of Rights which inserts a new provision in the War Measures Act, R. S. C., ch. 288, to the effect that action taken under that Act "shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the Canadian Bill of Rights". However, the War Measures Act comes into force only upon the issue of "a proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended, exists." The proclamation must be laid before Parliament and if both Houses resolve "that the proclamation be revoked, it shall cease to have effect . . ." Whatever one may think of the desirability of creating such an exception to the Bill of Rights, it may not be substantially out of line with what the Supreme Court of the United States has done in sustaining a very broad interpretation of the national war powers, particularly as evidenced in the Japanese exclusion cases. *Korematsu v. United States*, 323 U.S. 214 (1944) discussed in Rostow, "Japanese-American Cases — A Disaster", 54 Yale L.J. 489 (1945). See also ten Broek, Burnhart and Matson, *Prejudice, War and the Constitution* (1954); Corwin, *Total War and the Constitution* (1947).