
April 1959

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Citation Information

Keyes, Gary Murray. "Civil Liberties and the Canadian Constitution." *Osgoode Hall Law Journal* 1.2 (1959) : 20-48.

DOI: <https://doi.org/10.60082/2817-5069.2528>

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol1/iss2/3>

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Civil Liberties and the Canadian Constitution

Civil Liberties and the Canadian Constitution

GARY MURRAY KEYES *

For the most part, fundamental freedoms have been adequately safeguarded in Canada, but there have been a number of disturbing incidents in recent years. The Quebec Padlock Law of 1937, aimed at preventing the propagation of Communism, also struck at freedom of speech and religion;¹ the Alberta "Press Bill" of the same year, was an attempt on the part of the state to restrict freedom of the press;² the threatened deportation of Canadian citizens of Japanese origin in 1945,³ and arbitrary arrest and interrogation in the espionage investigation of 1946, all illustrate that the question of adequate protection of civil liberties is not an imaginary problem. Since the adoption by the United Nations of the Universal Declaration of Human Rights,⁴ there has been a growing conviction that certain civil liberties would be better safeguarded by means of a constitutional amendment to the British North America Act or by a solemn statutory declaration of the federal Parliament. This conviction was early exemplified in a speech by John Diefenbaker in the 1947 House of Commons Debates in support of a Canadian Charter of Human Rights, when he said that:

"a Bill of Rights . . . would be a declaration delineating the field of liberty that must be reserved to the individual against continuing invasion on the part of the state."⁵

Now we are contemplating a manifestation of the views expressed by Mr. Diefenbaker and many others, namely the federal Bill for the Recognition and Protection of Human Rights and Fundamental Freedoms.⁶ We are asking ourselves just what rights we possess as citizens? What do freedom of religion, of the press, of speech, and association mean in Canadian law? Have we any guarantee of equality before the law? Above all is there any value in trying to draw up a Bill of Rights setting out the freedoms and rights we feel the constitution should protect? Or is it wiser to let the judiciary

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¹ See *Communist Propaganda Act*, R.S.Q. 1941, c. 52, ss. 3, 12; *Switzman v. Elbling and A.G. of Quebec*, [1957] S.C.R. 265.

² See *Reference re Alberta Statutes*, [1938] S.C.R. 100; [1939] A.C. 117.

³ See *Co-Operative Committee on Japanese Canadians v. A.G. for Canada*, [1947] A.C. 87 (P.C.).

⁴ For preliminary drafts and final text see (1948), 26 Can. Bar Rev. 548, 1106 and (1949), 27 Can. Bar Rev. 203.

⁵ Canada, House of Commons Debates: 1947, vol. 4, at p. 3155.

⁶ Bill C-60, first reading September 5, 1958; See Appendix "A" for full text.

guard our civil liberties as has been the tradition in England for so long?⁷ To answer these questions, it will be the burden of the first part of this article to define the term "civil liberties", and determine what protection they have been afforded by our written and unwritten constitution and concomitant case law. The second part of this paper shall deal with the jurisdiction of the proposed Bill of Rights as a federal enactment, the meaning in law of some of its salient terms such as "due process of law", and the comparative value of a statutory enactment on civil liberties in the light of American and British experience.

Part I—Traditional Safeguards of Our Rights and Liberties

A. The Meaning of The Term "Civil Liberties"

A leading writer on Constitutional Law, Professor F. R. Scott, has put forth the view that the distinction between freedom and right is without any real difference in law.⁸ In his view, there is no freedom where there is no right. Freedom of speech involves the absence of restraint upon the person enjoying the freedom, but it must also involve a legal restraint upon all persons who would interfere with that freedom, and these legal restraints come either from the common law or from legislation.

It is suggested that these statements by Professor Scott are too sweeping and only add to the confusion surrounding the interpretation of the term "property and civil rights" in head 13 of section 92 of the B.N.A. Act. Most writers in the field of jurisprudence distinguish between a right and freedom. Indeed, a careful analysis indicates that a right exists where there is positive law on the subject, a liberty where there is no law against it.⁹

A right is a correlative to a duty in another person, while a liberty is not. The argument that rights and freedoms are the same is usually based on the proposition that every one has a right not to be interfered with in the exercise of his liberties. But, in fact, there are two essentially different premises involved in this proposition: the first means that he does not commit a legal wrong by doing so-and-so, and the second means that you commit a legal wrong by interfering with my doing so-and-so.¹⁰

Circumstances arise where there is a liberty to do something without a right not to be interfered with in doing it. One of the best examples of a liberty or freedom unprotected by a corresponding

⁷ See McD. Clokie, *The Preservation of Civil Liberties* (1947), 13, Can. J. Eco. Pol. Sci. at 394.

⁸ Scott, *Dominion Jurisdiction over Human Rights and Fundamental Freedoms* (1949), 27 Can. Bar Rev. 497.

⁹ See generally, *Storey v. Graham*, [1899] 1 Q.B. at p. 411 per Channel L.J.; *Allen v. Flood*, [1898] A.C. at p. 29 per Cave L.J.; Hohfeld, *Fundamental Legal Conceptions* (1934), pp. 38-50; Pound, *Fifty Years of Jurisprudence* (1937), 50 Harv. L. Rev. 557; Salmond on Jurisprudence, 10th ed. by G. L. Williams (1947), 328.

¹⁰ Williams, *The Concept of Legal Liberty* (1956), 56 Col. L. Rev. 1129.

duty is freedom of speech. No one has a duty to listen to me. The only duty might be the duty to gag me but this is part of the law of torts. I have no right to be heard. Thus freedom of speech can be regarded as the residuum after subtracting all the particular duties to refrain from sedition and slander, etc.

There is a dual significance in the jurisprudential distinction between a right and freedom. On the one hand, it provides a natural law basis for the judicial creation of certain absolute freedoms,¹¹ "inherent rights of the Canadian citizen",¹² which are immune from abridgment by the provinces of Canada,¹³ and which include "freedom of speech, religion and the inviolability of the person."¹⁴ Indeed, certain dicta exhorting an untrammelled publication of news and political opinion¹⁵ might indicate that civil liberties are forbidden powers implicit in the B.N.A. Act and incapable of abridgment by either the provinces or the Dominion. On the other hand, the word "rights" in civil rights has acquired a very special meaning in Canada through its use to describe a particular area of provincial legislative power in section 92(13) of the B.N.A. Act. As used there, the term is primarily concerned with private law, the legal relationship between persons in private life. The rights and liberties under discussion here are exclusively in the field of public law, defining relationships between government and private persons.

The distinction between "civil liberties" and "rights" in head 13 of section 92 is crucial to the discussion in this paper. Too often it has been assumed that the hereto usual characterizations of "civil liberties" as "Property and Civil Rights" are not open to question, and that, therefore, provincial legislation constitutionally can relate directly to the individual's basic freedoms. The reasons for judgment given by Rand and Kellock JJ. in the *Saumur*¹⁶ case, however, provide solid support for a different, public law, basis of civil liberties. Kellock J. in an excellent historical analysis of the origin of the term "Property and Civil Rights" concludes that the Quebec Act of 1774, the Constitutional Act of 1791, the Act of Union of 1840 and the Freedom of Worship Act of 1852 were not meant to fall within the meaning of the phrase. In his opinion, the British North

¹¹ *Saumur v. The City of Quebec*, [1953] 2 S.C.R. 299 at p. 329, per Rand J.; and see generally Price, Mr. Justice Rand and The Privileges and Immunities of Canadian Citizens (1958), 16 Fac. of L.R. pp. 25-27.

¹² *Reference re Exemption of U.S. Forces from Canadian Criminal Law* (1943), 80 Can. C.C. at pp. 214-5.

¹³ *Winner v. S.M.T. (Eastern Ltd.) and A.G. for New Brunswick*, [1951] 4 D.L.R. 529, where Rand J. affirmed "A right or capacity to remain and to engage in work in the Province."

¹⁴ *Saumur v. City of Quebec and A.G. of Quebec*, [1953] 2 S.C.R. 299 at p. 329 where Rand J., said: "Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order"; and see *ex judicio* writing, I.C. Rand, *The Right to Knowledge and Its Free Use* (1954), Col. L Rev., 67.

¹⁵ *Reference re Alberta Statutes*, [1938] S.C.R. 100 at pp. 132-134 per Cannon J.; and Brewin: (1957), 35 Can. Bar Rev., 234.

¹⁶ *Saumur v. City of Quebec*, ante at pp. 325-356.

America Act itself indicates that the subject matter of religious profession is not a matter of provincial legislative jurisdiction within any of the heads of section 92.¹⁷ Rand J. in the same case recognizes that the statutory history of the expression "Property and Civil Rights" demonstrates that such matters as "religious belief, duty and observances were never intended to be included within the collocation of powers."¹⁸ The recent decision in *Switzman v. Elbing*¹⁹ provided an opportunity for Kellock J. to reaffirm this distinction between "civil liberties" and "rights" of section 92(13).²⁰ Rand J. in the same case declares that the Quebec Padlock Law was "directed against the freedom or civil liberty of the actor; no civil right . . . is affected. . . . There is nothing of civil rights in this. . . ."²¹

The importance, then, of this distinction between rights and liberties throws into relief the true nature of the term civil rights or civil liberties. Civil liberties in this connotation are distinguished from all the other rights that individuals may enjoy under law because they are specially buttressed in one way or another against violation by governments. Civil liberties are also distinguishable from political rights.²² Political rights are those which give adult citizens the right to the franchise or qualify them to hold public office, and so forth; civil liberties, on the other hand, are those which protect individuals against political interference, and are not restricted to citizens but are public rights. There are really two kinds of civil liberties. First, there are the essential freedoms that men want for their own sake. Secondly, there are procedural civil liberties. Both kinds may be termed, civil liberties.²³

B. The Constitutional Basis of Civil Liberties.

The function of the Supreme Court in Canada parallels in part that of the Supreme Court in the United States in that both courts interpret written constitutions and can declare *ultra vires* statutes which are repugnant to their provisions. In Great Britain, no such powers exist, as there are no legal limitations on the supremacy of the British Parliament. Civil liberties in Great Britain legally are quite vulnerable, yet it is generally felt that the rights and liberties of the individual are better protected there than in the United States. The cardinal reason perhaps is that the people of Great Britain have

¹⁷ *Ibid.*, at p. 347; and for further comments on the distinction see: *Citizens Insurance v. Parsons* (1881), App. Cas. 96 (P.C.); *Union Colliery v. Bryden*, [1899] A.C. 580 (P.C.); *A.G. Ont. v. H.S.R.*, [1903] S.C.R. 101.

¹⁸ *Ibid.*, at p. 329.

¹⁹ [1957] S.C.R. 285.

²⁰ *Ibid.*, at p. 308.

²¹ *Ibid.*, at p. 305.

²² *Ibid.*, at p. 306 where Kellock J. refers to his own judgment in *Saumur v. The City of Quebec*, *ante*, and particularly to the statement therein produced from Mr. Justice Mignault's work, as follows: "Les droits sont les facultés ou avantages que les lois accordent aux personnes. Ils sont civils, politiques ou publics . . ."

²³ See generally, Corry, *Democratic Government and Politics* (1952), Chapters 15 and 19.

acquired a veneration for their statutory and common law rights which is founded on a tradition of freedom under law and which makes them jealous of threatened encroachments.²⁴

As indicated above, there has been a growing conviction in Canada that traditional social and political safeguards are not sufficient and that certain fundamental liberties should be specially protected, so that they will not be at the mercy of any intolerant group in a legislature or a cabinet. Aside from actual and threatened infractions of civil liberties in recent years, one of the main reasons for the inadequate protections referred to earlier is the uncertainty as to which authority is responsible for their protection. Unlike the U.S. Constitution, there are few legislative powers denied to both federal and provincial governments. It is generally argued that each is supreme within the limits of power conferred and that there is nothing which is beyond the reach of either federal or provincial law-making authority.²⁵ It should be noted, however, that certain observations of Rand J. in the *Switzman* case, do not support this generally accepted proposition. In his opinion neither the provincial nor the federal authorities can destroy the "constitutional structure" itself. If this is so, power to do so therefore is forbidden and beyond the federal and provincial law-making authorities.²⁶

Nevertheless, the main question for determination here is whether civil liberties are in the exclusive domain of the federal government or of the provinces or whether they are in a common field of legislation?

A convenient grouping of civil liberties for subsequent analysis is as follows:

- (1) freedom of the press and speech
- (2) freedom of religion
- (3) freedom of the person from interference, or security of the person and freedom of association.

This list is by no means exhaustive. It will be used as a basis for examining the protection presently afforded civil liberties by the Canadian constitution.

(1) *Freedom of the Press and Speech*

After the "Glorious Revolution" of 1688-9, the infamous Licensing Acts²⁷ fell into disuse. Thus legislature and administrative inaction laid the basis for freedom of the press. But it should be observed that this does not mean that anyone can say or write whatever he wishes with impunity. If his statements are seditious, libellous or

²⁴ See generally, Mac. Dawson, *The Government of Canada* (1952), Chapter 10.

²⁵ Per Lord Loreburn in *A.G. Ont. v. A.G. Canada*, [1912] A.C. 571 (P.C.) at p. 581: "there can be no doubt that under this organic instrument the powers distributed between the Dominion . . . and the provinces . . . cover the whole area of self-government within . . . Canada."

²⁶ *Switzman v. Elbling*, ante at p. 307, and see *Murphy v. C.P.R.*, [1958] S.C.R. 626 at p. 643 per Rand J.

²⁷ 25 Henry VIII, c. 15 (1533); 14 Charles II, c. 33 (1662).

slandrous, he is liable to be punished under the criminal code or provincial statutes.²⁸ It is, thus only in the residuum after subtracting the particular duties imposed by the state, that freedom of the press exists.

The right to receive and disseminate information is of paramount importance in a democratic state. Of exceptional interest in this regard is the decision of the Supreme Court of Canada in *Boucher v. The King*,²⁹ where sedition was defined so as to remove the danger of the Criminal Code, at the hands of the state in times of crisis, being used to repress freedom of expression in political and religious affairs. In this case, Aimé Boucher, a Quebec farmer, distributed leaflets, published by the Witnesses of Jehovah, containing a vigorously worded protest against what was described as the hateful persecutions of Christians caused by "priest domination." On the first hearing of the appeal, five judges of the Supreme Court ordered a new trial. Application was then made, and granted, to have the appeal reargued before a full Court of nine judges. It was held (Rinfret C.J.C., Taschereau, Cartwright and Fauteux JJ. dissenting), that Boucher be acquitted as there was no evidence either in the pamphlet or otherwise upon which a jury, properly instructed, could find him guilty of the offence charged.

The main interest of this case lies in the conflict of views as to the proper definition of sedition. A seditious libel was stated in section 133(2) of the Criminal Code (1927) to be a libel expressive of seditious intent. The Court had to resort to the common law of England as the Code contained no definition of "seditious intent." The Court rejected the definition in Stephen's Digest of Criminal Law in respect to two clauses: a seditious intention is an intention (i) "to bring into hatred or contempt or to incite disaffection against . . . the administration of justice", and (ii) "to promote feelings of ill-will and hostility between different classes of His Majesty's subjects."³⁰ It was finally held that neither language calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects nor criticizing the courts is seditious unless there is the intention to incite to violence or resistance to or defiance of constituted authority.

This decision is highly significant. There can be no more powerful weapon for the suppression of freedom than vague definitions of sedition and like offences. Locke J. points out that after 1689 the press was exploited in the party warfare when the party in power tried to crush its opponents by prosecuting as seditious libels all publications which supported the opposition. Giving a further statement of the right of free public discussion, Mr. Justice Locke said:

²⁸ See The Canadian Criminal Code, 1953-54, 2-3 Elizabeth II, (Can.), c. 51; publication of material in aid of offences against the Code: s. 123, s. 177(1)(f), s. 179(1)(a), s. 403(1)(a); false advertising: s. 306; material declared offensive: s. 150, s. 151, s. 246, ss. 247-267; An Act respecting Publications and Public Morals, 1950, (Que.) c. 12, amen. 1950-51 (Que.) c. 13, and The Libel and Slander Act, (1958) c. 51 (Ont.).

²⁹ [1951] S.C.R. 265, varying on re-hearing, [1950] 1 D.L.R. 657; Brewin: (1951), 29 Can. Bar Rev. 193.

³⁰ Stephen's Digest of Criminal Law, 8th ed., at p. 94.

"The right of free public discussion upon all matters affecting the state and its government, subject only to the restraint imposed by the laws both civil and criminal as to defamation, and in the case of the administration of justice to the law as to contempt of court, has long since become firmly established."³¹

It is the right, he concludes, of His Majesty's subjects to criticize freely the manner in which the government of the country is carried on, the conduct of those administering the government, and the justice that is carried out.

In discussing the liberties which vest in the people, and, the free play of ideas, Mr. Justice Rand stated, in the spirit of the great free speech opinions of Holmes and Brandeis, that:

"Freedom of thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality."³²

The same basic constitutional problem arose in the *Reference re Alberta Statutes*.³³ The Supreme Court of Canada there invalidated the Alberta Press Bill which had been enacted by the newly-elected Social Credit government as a measure to curtail adverse criticism in the press of its unorthodox financial programme. It should be stated at the outset that the decision in that reference taken in its strict ratio was simply that the Bill in question, being part of, and dependent upon, a general scheme of social credit legislation already invalidated on other constitutional grounds, fell with the other legislation.

The decision in the *Alberta Press* case, is germane here, however, because of the illuminating analysis, by three members of the Court, of the relationship between our constitution ("similar in principle to that of the United Kingdom") our parliamentary institutions and freedom of expression. Sir Lyman P. Duff, then Chief Justice of Canada, was of the opinion that in addition to the federal power of disallowance, the Dominion alone had power to legislate for the protection of the right of free public discussion, and that it was beyond the powers of the Provinces to abrogate the right of public debate or suppress its exercise in public meetings or through the medium of the press.³⁴ The terms in which the Chief Justice (with whom Mr. Justice Davis concurred), spoke were sufficiently broad to embrace federal protection of civil liberties connected with the operation of provincial parliamentary institutions.

A similar view is expressed by Cannon J.:

"... no political party can elect a prohibitory barrier to prevent the electors from getting information concerning the policy of the Government. . . . There must be an untrammelled publication of the news and

³¹ *Boucher v. The King*, ante p. 330.

³² *Ibid.*, at p. 288.

³³ [1938] S.C.R. 100; [1939] A.C. 117; and see Laskin: (1941), 19 Can. Bar Rev. 49; Nichols: (1948), 26 Can. Bar Rev. 1001; Brewin: (1957), 35 Can. Bar Rev. 554.

³⁴ *Ibid.*, at pp. 132-134.

political parties contending for ascendancy . . . the federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion."³⁵

Cannon J. also made another highly significant observation. He threw out the idea that Canadian citizens enjoy freedom of expression as an incident or privilege of their citizenship status.³⁶ This idea was later picked up, though without acknowledgment, by Rand J. in his remarks on the freedom to move from place to place in the *Winner* case:

" . . . a province cannot prevent a Canadian from entering it except, conceivably . . . for some local reason."³⁷

In view of the fact that other reasons were given to strike down the impugned Alberta Statutes, the remarks of the Court on civil liberties were obiter and do not conclusively settle their general constitutional basis. One half of the Court dealt with freedom of the press and speech and each gave different reasons. According to Duff C.J.C., the provinces cannot abridge freedom of speech because the B.N.A. Act contemplates "a Constitution similar in principle to that of the United Kingdom", the basis of which are Parliamentary institutions, to which free discussion is vital. Now an important constitutional rule of the British Constitution is parliamentary supremacy. The British Parliament can validly abrogate any civil liberty. Does this mean that the federal Parliament can validly abrogate freedom of discussion? According to Abbott J. in *Switzman v. Eibling*, Parliament itself cannot (except by a process of constitutional amendment) destroy freedom of discussion in peace-time. The B.N.A. Act is, in the opinion of Abbott J., based on:

"the right of candidates for Parliament or for a legislature, and of citizens generally, to explain, criticize, debate and discuss in the freest possible manner such matters as the qualifications, the policies and the political and economic and social principles advocated by such candidates or by the political parties or groups of which they can be members."

In this interpretation of the B.N.A. Act, the learned judge finds certain constitutional guarantees of freedom implicit and incapable of abridgment by either the provincial or federal government. This conclusion, if well founded, has merit. It would mean that civil liberties could validly be regarded as forbidden powers, at least in normal times, giving the courts a sound basis for invalidating provincial or federal legislation directly relating to such liberties. It would assist the judiciary in discharging its function as guardian of the individual's rights and freedoms. The initial question of which authority has the constitutional right to legislate on civil liberties would have been settled, and the courts could proceed as invited to define the boundaries of these freedoms.

³⁵ *Ibid.*, at pp. 146-147.

³⁶ *Ibid.*, at p. 149.

³⁷ *Winner v. S.M.T. (Eastern Ltd.)*, [1951] S.C.R. 887 at p. 920.

³⁸ [1957] S.C.R. 285; Brewin: (1957), 35 Can. Bar Rev. 554; Cooper: (1954), 1 McGill L.J. 281.

Abbott J.'s conclusion, however, is open to question on two main grounds. In the first place, the decisions of the majority of several members of the Court were severely limited. Kerwin C.J.C., Locke, Cartwright, Fauteux and Nolan JJ., found as the sole ground for striking down the infamous *Padlock Act of Quebec*⁴⁰ that its effect was to make criminal the propagation of communism. It was not legislation in relation to "property and civil rights in the Province or in relation to matter of a merely private or local nature in the province" (notwithstanding the dissent of Taschereau J.). It was criminal legislation under the exclusive control of the federal Parliament. Therefore, the observations of Rand J. (with whom Kellock J. concurred), and Abbott J. go far beyond what was necessary for the decision. In this regard, it should be noted that Rand J. did not go as far as Abbott J.: he nowhere says there is a forbidden power except when it comes to tampering with what he calls the "constitutional structure." Secondly, the learned judge bases his observation that freedom of expression is a forbidden power on the judgment of Duff C.J.C. in the *Alberta Reference*. It has already been suggested that since only one half of the Court in that case expressed an opinion on its civil liberties aspects, no binding conclusions should be based on it; this is especially so as other reasons were given by all the judges to strike down the questioned legislation.

Taken together or singly, it is submitted that the foregoing decisions do not conclusively settle the constitutional basis for freedom of expression, although they may work in favour of the parliament of Canada. Because of this unsettled state of the law, it would be rash to conclude that there is a bill of rights safeguarding freedom of expression embodied in the B.N.A. Act. There is, therefore, a need for judicial clarification of the status of this civil liberty; such a clarification, moreover, may be facilitated, rather than impaired, by the introduction of the proposed Bill of Rights.

(2) *Freedom of Religion*

Aside from Sunday legislation and the separate schools question, the issue of freedom of religion was, prior to 1953, never clearly defined in our Court of last resort. In that year, the case of *Saumur v. The City of Quebec and the A.-G. of Quebec*⁴¹ finally reached the Supreme Court of Canada. This case concerned the constitutional validity of a by-law of Quebec City under which a Jehovah's Witness had been convicted of distributing pamphlets without the prior permission of the police chief as required by the by-law. The Supreme Court, by a five-to-four vote, held that the by-law did not apply to prevent the defendant, as a member of the Jehovah's witnesses, from distributing tracts in Quebec City streets.

³⁹ *Ibid.*, at p. 327.

⁴⁰ R.S.Q., 1941, c. 52.

⁴¹ [1953] 2 S.C.R. 299; Laskin, *Our Civil Liberties* (1954), 61 *Queen's Quarterly*, 455; Chalmers: (1954), 12 *U. of T. School of L.R.* 12; Howe: (1948), 27 *Can. Bar Rev.* 1248.

As a result of the division of opinion, the position of the civil liberty of freedom of religion is unsettled and unsatisfactory. A majority of the Court, Kerwin, Rand, Kellock, Estey and Locke, JJ., held that the legislation authorizing the by-law was beyond the competence of the provincial legislature as an interference with religious freedom and not a matter of property and civil rights.⁴² They relied on the *dicta* of Duff C.J.C. and Cannon J. in the *Reference re Alberta Statutes*. In essence, four judges of the majority viewed the legislation as pertaining to censorship of religion, and, by analogy to censorship of press, they felt this to be a strictly federal matter. Although the Court was not called upon to decide whether religion itself was a subject matter under the legislative competence of the Parliament of Canada, it can be inferred from the reasons given that such is the case.

Kerwin J. as he then was, seems to support the majority, but in fact his explicit disapproval of Duff C.J.C.'s *dicta* in the *Alberta Reference* case indicates that he considered freedom of religion (and presumably of the press) as controlled by provincial legislature under head 13 of section 92 of the B.N.A. Act. The by-law in question did not apply, in his view, to the action of the accused in distributing religious literature because of the Freedom of Worship Act which granted religious freedom in the provinces. To all intents and purposes, Kerwin J. decided with Rinfret C.J.C., Taschereau and Fauteux JJ., that freedom of worship was not a subject of legislation within the jurisdiction of Parliament but instead was a civil right in the province and subject to the control of provincial legislatures.

The reasons given by Cartwright J. in agreeing with the minority are significant. He finds the true nature of the legislation to be related to the use of streets; though it might affect freedom of religion, it was not in relation to freedom of religion. In future tests of how far freedom of religion is beyond the competence of the provinces, the use of this aspect theory by Cartwright J. (with whom Fauteux concurred) would not deprive either judge from holding that legislation aimed at restricting religious freedom is beyond the power of the Province. This characterization of the legislation by Cartwright J. may reflect his view of the constitutional basis of civil liberties, or it may mean that he simply has not made up his mind, or that, having regard to the explosive nature of the case and the obvious split between the Roman Catholic-Protestant judges, he adopted a more compromising position. In an important constitutional case like this, Cartwright J.'s position may illustrate a rough analogy between court solidarity and the cabinet solidarity of the federal government. Perhaps Cartwright J., as an English-speaking Protestant, purposely sided with the minority to prevent showing a split in the Supreme Court to the world at large on racial and religious grounds!

⁴² But see the judgment of Kerwin J. who based his reasons on a different ground.

⁴³ [1955] S.C.R. 799.

If civil liberties have no independent constitutional ground, it would be easy to find its aspect to be in relation to highways or matters of local interest. If, however, civil liberties have an independent constitutional basis, as indicated by the views expressed by Duff C.J.C. and Cannon J. in the *Alberta Reference* and by Rand, Kellock, Estey, Locke JJ. in the *Birk's* case, freedom of religion has some measure of protection.⁴³ In the writer's opinion, these basic liberties would receive more assured protection under federal authority in the light of previous provincial abridgments. As it is now, protection varies unevenly from province to province. Therefore just as criminal law was placed under federal authority to ensure uniformity of justice to all the citizens of Canada, similarly, jurisdiction over fundamental liberties should repose in the federal law-making authority.

In *Henry Birk's & Sons Ltd., v. Montreal and A.-G. of Quebec*,⁴⁴ the Supreme Court of Canada unanimously held to be ultra vires an amendment passed in 1949 by the Quebec legislature to the Early Closing Act of that province and the subsequent Montreal by-law which required the closing on specified Catholic Feast-days, of all retail stores in the city. The real purpose of the legislation, the Court held, was not to provide additional holidays for retail employees under section 92 (13), (15) or (16), but to enforce observance of days because of their religious significance. The legislation, being analogous to Sunday observance laws, was competent only to the Parliament of Canada under section 91(27), "Criminal Law", in the opinions of Kerwin, C.J.C., Fauteux, Taschereau, Estey, Cartwright, and Abbott JJ.

The case is a reminder of the unsettled state of the law as to the seat of legislative power relating to aspects of religion other than Sunday observance. Rand J., referring to his reasons in *Saumur*, expressed the opinion that the legislation related to religion and therefore was beyond provincial competence. Kellock and Locke JJ. agreed that the legislation was analogous to Sunday observance legislation, which had always been part of the criminal law, but also saw the by-law as legislation respecting freedom of religion as dealt with by earlier statutes. This case then goes some way towards making religious freedom a separate head immune to provincial interference; further inferences are less compelling.

(3) *Freedom of the Person and Freedom of Association*

A person cannot be detained or penalized for what he has said on some vague ground that it is unwise in the public interest or unfair generally. A charge must be laid alleging violation of a specific law. Freedom of the person is secured in the same way. The common law, supplemented by statute, defines the offences for which a man may be convicted and imprisoned. The individual who infringes none of these laws, enjoys freedom of person.

⁴⁴ *Ibid.*, and see Brewin: (1956), 34 Can. Bar Rev. 81; Castor: (1956), 14 Fac. of L.R. 105.

Anyone, however, may find himself arrested on suspicion of a crime. But here the law provides limitations. The Petition of Right in 1628 protects the person against arbitrary arrest. In 1763 a series of civil actions established the illegality of general warrants of arrest.⁴⁵ The Criminal Code forbids a blank warrant and attempts to avoid the abuse of the power of arrest and seizure.⁴⁶ If an arrested person is not formally charged and tried speedily for some specific offence, he can secure his release on *habeas corpus*.⁴⁷

Another safeguard of personal freedom is the right to sue for damages for assault, malicious prosecution and false imprisonment when public officials exceed their lawful powers of arrest and detention. The recent decision by the Supreme Court of Canada in *Lamb v. Benoit*⁴⁸ affords an instance of judicial vigilance in protecting freedom of the person. In this case, a Jehovah's Witness recovered damages against the local police for false arrest, false imprisonment and malicious prosecution. The appellant was charged with the distribution of a publication alleged at the time to be seditious libel. In the words of Rand J.:

The arrest and prosecution were quite without justification or excuse and the detention . . . carried out in a manner and in conditions little short of disgraceful. . ."

The shocking aspect of this case was the attempt by the police to force the appellant to sign a waiver of all claims for false arrest by threatening to charge her with promulgation of a seditious libel. The case exemplifies our dependence on the judiciary in protecting the security of persons especially against the abuse of authority by public officials.⁴⁹ Of special note was the court's obvious vigilance in delineating the bounds of a police officer's authority to lay a criminal information. The court was unable to agree that certain statutes relied on by Benoit, a special constable of the Quebec Provincial Police, could give umbrage where there is lack of "good faith" in prosecuting. In the words of Locke J.:

"The mere *bona fide* belief that he has power to do the act complained of is not enough; he must believe in facts which give him the power if they existed. . . . As to Benoit, without any lawful justification, he caused the arrest and imprisonment of the appellant and was responsible for the laying of the information and prosecution which followed. The appellant was subjected to the ignominy of arrest and prosecution for the offence of distributing a seditious libel, of which offence Benoit knew from the outset she was innocent. . ."

⁴⁵ *Leach v. Money* (1765), 19 St. Tr. 1002; *Wilkes v. Wood* (1763), 19 St. Tr. 1154.

⁴⁶ 1953-54, 2-3 Eliz. II, (Can.) ss. 429-445.

⁴⁷ *Habeas Corpus Acts*: 1640, 16 Can. 1 c. 10; R.S.O., 1950, c. 163; R.S.N.B., 1952, c. 101; R.S.N.S., 1954, c. 147; R.S.P.E.I., 1951, c. 70; and Can. Cr. Code, s. 680.

⁴⁸ [1959] S.C.R. (this case is unreported at the time of writing, but reasons for judgment were delivered in January 1959) and see also *Kennedy v. Tomlinson*, an appeal concerning malicious prosecution of an alleged vagrant, heard by the Ontario Court of Appeal on the 30th of March, 1959, and as yet unreported).

⁴⁹ See dicta of Boyd C. in *Tooth v. Frederick*, 14 P.R. 287.

Freedom of association is a public right within the competence of the federal parliament. By defining seditious conspiracies and unlawful assemblies, the Criminal Code permits all other kinds of associations which do not come within these restrictions.⁵⁰ Though the provinces may validly enact legislation to regulate the use of parks and public places under section 92(13) and (16) of the B.N.A. Act, the extent of this power seems limited by the Criminal Code. The power to declare an assembly unlawful could be abused but there appear to be no cases on the relevant section of the Code.⁵¹

Part II—The Proposed Bill of Rights

A. Federal Jurisdiction

The B.N.A. Acts do not contain a Bill of Rights as does the U.S. constitution. To a large extent, the civil liberties outlined in Part I above remain at the mercy of the appropriate legislature. Nevertheless some matters which have important implications for civil liberties are guaranteed in the B.N.A. Act and are put beyond the reach of either Dominion or provincial legislatures. The use of English and French languages is guaranteed by section 133; the right to separate schools by section 93; the right to a new parliament every five years by section 50; the right to an annual session of parliament by section 20; section 99 ensures security of tenure of office for the judges of the Superior Courts in the province and thus protects the right to an independent judiciary.

Since the proposed Bill of Rights was announced in September, 1958, many commentators have decried its utility as a mere statutory enactment and have called for its incorporation into the B.N.A. Act. Such an amendment would have the effect of making the prescribed rights more secure against legislative repeal. Civil liberties so entrenched would restrict the jurisdiction of legislatures and enable the Courts to set aside subsequent statutes impinging thereon. However, we are confronted with a Bill of Rights which is a federal statute setting out, like the English Bill of Rights of 1689, cardinal rights and liberties of Canadian citizens. Instead of extolling the value of a Bill of Rights as an amendment to the B.N.A. Act, it is suggested that it is more useful if we recognize the proposed federal enactment as a "fait accompli" and attempt to assess its constitutional basis and the legal implications of some of its terms. This approach, it is submitted, is more realistic in the light of the large majority supporting the government proposing the Bill.

A Bill of Rights such as that proposed will not bind future parliaments, although it will bind subsequent governments. It can be amended or abrogated by a mere majority vote. Whether future enactments could impliedly abridge or infringe any of the rights or freedoms recognized in Part I of the Bill is an open question. Section

⁵⁰ Ss. 60 and 64.

⁵¹ See Ryan, *More About a Bill of Rights* (1958), 1 Can. Bar J. 74; and *Chaput v. Romain*, [1955] S.C.R. 834.

3 of the Bill directs that all future acts and regulations shall not be so construed. In England, the power of a 'sovereign' legislature to repeal by implication any previously existing legislation has been strongly relied upon as establishing the proposition that the courts there could never inquire into the validity of an Act of Parliament since the power of Parliament to amend both the substance of the law and the manner of its working are uncircumscribed. The significance of the power of implicit repeal may be illustrated by two cases: *Vauxhall Estates v. Liverpool Corporation*⁵² and *Ellen Street Estates v. Minister of Health*.⁵³ In the latter, Maugham L.J. refers to the constitutional position that Parliament can alter an Act previously passed, and it can do so by repealing in express terms the previous Act, and it can do so in another way, "namely by enacting a provision which is clearly inconsistent with the previous Act." Maugham L.J. concluded:

"The legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject matter there can be no implied repeal. If in a subsequent Act, Parliament chooses to make plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislature."

The language of Maugham L.J. is emphatic but how far do these propositions extend? If the federal Bill of Rights is based on a valid constitutional basis, according to the propositions laid down by Maugham L.J., valid subsequent federal legislation could impliedly repeal the rights protected by the Bill of Rights.⁵⁴

The real strength of the Bill aside from a valid constitutional basis, resides in the solemnity of the occasion on which it is adopted and the symbolic nature of its provisions. This is the touchstone which will guide judicial interpretation and give effect to section 3. In the *Nova Scotia Delegation*⁵⁵ case, Rand J. observed that the delegation of power over federal subject matters to provincial legislators, though not an absolute transfer of power, might prove impossible to revoke if people get used to having it exercised by provincial legislators, as the power may vest in the form of a constitutional convention. This vesting argument of Mr. Justice Rand's might work in favour of the Bill of Rights, so that future Parliaments would hesitate to expressly repeal any of its provisions and the courts would be reluctant to construe subsequent legislation as impliedly repealing any of the terms of the Bill of Rights.

In Part I of this article an attempt was made to trace the protections afforded civil liberties and to locate their constitutional basis. By analysis of the cases on freedom of speech, press and religion, it was seen that the Courts tend to reject provincial infringements of

⁵² [1932] 1 K.B. 733.

⁵³ [1934] 1 K.B. 590.

⁵⁴ See Marshall, *Parliamentary Sovereignty And The Commonwealth* (1957), p. 35.

⁵⁵ *A.G. Nova Scotia v. A.G. of Canada*, [1950] 4 D.L.R. 369 at p. 387.

basic liberties but only impliedly place their constitutional basis in the Dominion. *Dicta* of the Supreme Court have been interpreted in some quarters as establishing that an implied bill of rights has been written into the B.N.A. Act in such a way as to be beyond the reach of both the Dominion and provinces.

What should concern us here is the area of federal jurisdiction over the proposed Bill. To put the question another way, are the liberties enumerated in Part I of the Bill within the exclusive domain of Parliament or of the provinces? The B.N.A. Act distributes legislative authority between the federal and provincial governments; it allocates all powers of government to one or other of the authorities. As Lord Loreburn has said:

"there can be no doubt that under this organic instrument the power distributed between the Dominion on the one hand, and the provinces on the other covers the whole area of self-government within . . . Canada. It should be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada."⁵⁶

Therefore, since there are no legislative powers denied to the Dominion and provincial governments, there can be no forbidden powers such as civil liberties and no implied bill of rights beyond the competence of both the Dominion and provinces.

The usual method of locating the constitutional basis of challenged legislation is to inquire whether it falls within any of the heads of section 92 of the B.N.A. Act. If it does not, it is exclusively federal under the general and residuary powers in section 91. If the impugned law also falls within section 92, we must apply certain canons of interpretation. We may be able to apply the rule of mutual modification;⁵⁷ or seek the leading feature of the challenged law.⁵⁸ If we cannot find a leading feature, and the Dominion and provinces legislate on the same matter under different aspects, there being an inconsistency, the Dominion's power prevails under the general power to make laws "for the peace, order and good government of Canada."⁵⁹ It should be noted that in this dual aspect situation the mere fact the Dominion does not legislate, the provincial legislation is not *ipso facto*, *intra vires* as it can be overridden by the Dominion.⁶⁰ With these rules of interpretation in mind, we can now consider whether the federal Parliament has jurisdiction to enact a statute dealing with fundamental freedoms and human rights under the peace order and good government clause of section 91 of the B.N.A. Act.

The civil liberties of Part I of the proposed bill are, it is submitted, the public rights of all Canadian citizens. They should not be characterized under the private law concepts of property and civil

⁵⁶ *A.G. Ont. v. A.G. Canada*, [1912] A.C. 571 (P.C.) at p. 581.

⁵⁷ *Citizen's Insurance v. Parsons* (1881), App. Cas. 96 (P.C.).

⁵⁸ *Union Colliery v. Bryden*, [1899] A.C. 580 (P.C.).

⁵⁹ *A. G. Ont. v. A.G. Can.*, [1894] A.C. 189.

⁶⁰ See especially, Kennedy, *The Interpretation of the British North America Act* (1943), 8 Camb. L.J. 146; MacDonald, *The Canadian Constitution Seventy Years After* (1937), 15 Can. Bar Rev. 401.

rights or as matters of merely local or private importance to the province. Taken in their broad sense, as public rights, they are not obviously related directly to any single specific head of section 91. They, therefore, belong to the Parliament of Canada, to which is assigned the general and residuary power to make laws for the peace, order and good government of Canada on all subjects not exclusively assigned to the provinces.⁶¹

Even if this submission were entirely acceptable, we would still be faced with the somewhat empty *facade* of the residuary power.⁶² Judicial interpretations from 1896 to 1946 have reduced the residuary clause significantly. From 1867 to 1896 the Privy Council construed parliament's powers broadly, giving full value to the general power.⁶³ From 1896 judicial interpretation worked a contraction of these powers in defence to the provincial powers in section 92.⁶⁴ Under the "emergency" doctrine propounded by Lord Chancellor Haldane, the Dominion's general power could be used only in periods of national emergency such as war.⁶⁵

Recent cases, however, indicate that the federal general power may be expanding. In *A.-G. Ont. v. Canada Temperance Federation*, Lord Simon found the test of the scope of the general power:

"to be in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole . . . then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures."⁶⁶

This, of course, is a return to the *Russell* test. It should be remembered, nevertheless, that Lord Simon's "inherent nature" test was partially curtailed by the *Margarine Case*.⁶⁷ In that case, Lord Morton held that Lord Simon's test must be considered in the light of Lord Atkin's observations in the *Labour Conventions* case, so that abnormal circumstances are required for the federal general power to justify overriding head 13 of section 92. Lord Morton's remarks

⁶¹ See Laskin, *Peace, Order and Good Government Re-examined* (1947), 25 Can. Bar Rev. 1054; Laskin (1957), 35 Can. Bar Rev. 101.

⁶² MacDonald, *The Privy Council and the Canadian Constitution* (1951), 29 Can. Bar Rev. 1021; Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians* (1951), 29 Can. Bar Rev. 1038.

⁶³ *Russell v. The Queen* (1882), 7 App. Cas. 829 at p. 839, per Sir Montague E. Smith: "Few, if any, laws could be made by parliament for the peace, order and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the parliament from the exercise of this general power whenever any such incidental interference would result from it.

⁶⁴ See *A.G. Ont. v. A.G. Can.*, [1896] A.C. 348, 359-61 (P.C.); *In Re Board of Commerce Act*, [1922] 1 A.C. 191 (P.C.); *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 (P.C.); *Co-operative Committee on Japanese Canadians v. Canada*, [1947] A.C. 87 (P.C.).

⁶⁵ *In Re Board of Commerce Act*, [1922] 1 A.C. 191 (P.C.); *Toronto Electric Commission v. Snider*, [1925] A.C. 396 (P.C.).

⁶⁶ [1946] A.C. 193 (P.C.).

⁶⁷ Reference re Validity of Section 5(a) of the Dairy Industry Act, [1951] A.C. 179.

may be taken, then, as a *caveat* against too liberal an approach to what is of national concern.

It is noteworthy that the Supreme Court of Canada, in the first major decision on this problem after the abolition of appeals to the Privy Council, followed Lord Simon's "inherent nature" test in the *Johannesson* case,⁶⁸ instead of the Watson-Haldane-Duff approach developed in the *Local Prohibition* case, the *Snider* case, the *Natural Products* case, and the *Margarine* case. And even more recently a judge of the Ontario High Court of Justice in *Pronto Uranium Mines v. O.L.R.B.*, explicitly chose to rely on the *Canada Temperance* test which might indicate that the "peace, order and good government" clause of section 91 is only a "sleeping giant." These recent cases provide ample justification for what easily could (and should) be an expansion of the federal power to include the proposed Bill of Rights. What could be, by its very nature, of greater concern to the Dominion as a whole than the protection of those liberties which are the primary condition of social life, thought and communication?

B. An Interpretation of Some of the Terms of the Bill of Rights

In Part I of this article, cases pertaining to freedom of speech, press, association, religion and person were analyzed to locate their constitutional basis. Despite varying opinions, one conclusion can reasonably be deduced: all leading dicta place jurisdiction over civil liberties beyond the competence of the provinces. These cases will be highly persuasive in future judicial interpretations of civil liberties as modified in section 2 of the Bill of Rights.

Future difficulties, however, will be met in the interpretation of other sections and terms of the Bill. This is especially true of section 2(a) and (b):

"2. It is hereby recognized and declared that in Canada there have always existed, and shall continue to exist, the following human rights and fundamental freedoms; namely,

- (a) The right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by *due process* of law.
- (b) The right of the individual to the protection of the law without discrimination by reason of race, national origin, colour, religion or sex;"

Fortunately, many of these terms are similar to those used in the U.S. Bill of Rights. Assistance, therefore, may be derived for future Canadian interpretation from the U.S. case law, especially with regard to the phrases "due process of law" and "protection of the law . . . without discrimination."

(1) *Due Process of Law*

(a) *Historical Origins.*

The phrase "due process of law" comes from an early Edward III statute, reading as follows:

⁶⁸ *Johannesson v. West St. Paul*, [1952] S.C.R. 292.

⁶⁹ [1956] 5 D.L.R. (2nd) 342.

"No man of what state or condition he be, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he brought to answer by due process of law."⁷⁰

This statute in turn relates back to the famous chapter 39 of the Magna Carta:

"No freedman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by lawful judgment of his peers or by the law of the land."⁷¹

The important phrase in chapter 39 is "by the law of the land", which is made by Coke synonymous with the latin phrase, "by due process of law"; and that in turn Coke equates to "due process of the Common law", that is, "the indictment or presentment of good and lawful men . . . or writ original of the common law." Historical evidence, however, shows that Coke did not regard "the law of the land", as he defined it, as beyond the power of parliamentary alteration.⁷² Nor did the early colonial constitutions after 1776, in which the phrase "law of the land" applies, import any limitation on legislative power.⁷³

"Law of the Land" and "Due Process of Law", however, derive their contemporary importance from their character as restrictions upon legislation in general. This function is significant in U.S. constitutional law because of the sweeping powers of judicial review exercised by the Supreme Court.

(b) *U.S. Judicial Interpretation.*

The phrase "due process of law" has had a chequered history in U.S. judicial interpretation. It appears in the federal Constitution in two separate amendments. The first ten amendments embodying the Bill of Rights were intended to curb all branches of the federal Government in the fields touched by the amendments—Legislative, Executive, and Judicial. The Fifth, Sixth, and Eighth Amendments were pointedly aimed at confining the exercise of power by courts and judges within precise boundaries, particularly in the procedure used for trial of criminal cases. The Fifth amendment required indictment by Grand Jury in many criminal trials, prohibits double jeopardy, self-incrimination, deprivation of life, liberty or property without due process of law or the taking of property for public use without just compensation. Fears of arbitrary court action sprang largely from the past use of courts in the imposition of criminal punishments to suppress speech, press, and religion. Hence the constitutional limitations of court powers were essential supplements to the First Amendment which was itself designed to ensure the widest

⁷⁰ 28 Edw. III, c. 3.

⁷¹ See McKechnie, *Magna Carta* (2nd rev. ed. 1914) at p. 28.

⁷² Inst. II, 50-1; and see generally Jenks, *The Myth of Magna Carta* (1904), *Indep. Rev.* 206; *Selected Essays on Constitutional Law* (1938), at p. 174.

⁷³ Thorpe, *American Charters*.

scope for all people to believe and to express the most divergent political, religious and other views.⁷⁴

But these limitations were not expressly imposed upon state court action. In 1833, *Barron v. Baltimore*,⁷⁵ held that the first eight amendments did not apply to the states. This was the controlling constitutional rule when the Fourteenth Amendment was proposed in 1866. The avowed purpose of that amendment was to make negroes citizens with full and equal rights as citizens despite the prior decision in *Scott v. Sandford*.⁷⁶ Some, however, feel that one of the chief objects of the provisions of the Amendment's first section, separately or as a whole, was to make the Bill of Rights applicable to the states.⁷⁷

On the whole, interpretations of the phrases "due process of Law" or "the law of the land" prior to 1870 placed few restrictions on the legislatures which were not merely procedural in character. The federal courts were seldom called on to protect either personal privileges or property rights under the Fifth Amendment. And when such an attempt was made it usually resulted in failure for the litigant.⁷⁸

When the Fourteenth Amendment was adopted in 1868, with the proviso that no one shall "deprive any persons of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws", a problem of constitutional interpretation arose. The states feared this amendment would subordinate them increasingly to federal authority. When the *Slaughter-House*⁷⁹ cases came before the Supreme Court, it being decided that the amendment was designed primarily to protect the negro, a strong dissent by Field J. avowed that the Amendment was to "protect the citizens of the United States against the deprivation of their common rights by state legislation." This dissent prompted counsel in later cases to urge that the new Amendments were intended to place the whole jurisprudence of the country under the protection of the Supreme Court.⁸⁰ Due process, applied in England as a guard against executive usurpation, became in the U.S., a defense against arbitrary legislation.⁸¹ Soon the prohibition against arbitrary acts as a part of Due Process, was applied to many types of state legislative and administrative acts.

⁷⁴ See generally Selected Essays on Constitutional Law (1938), vol. 1 at pp. 174-206.

⁷⁵ (1833), 7 Pet. 243.

⁷⁶ (1857), 19 How. 393.

⁷⁷ See Black J. (dissenting) in *Adamson v. California* (1947), 332 U.S. 46; . . . stating that the historical purpose of the Fourteenth Amendment never received full consideration and he proceeds to make applicable fully the Fifth Amendment and all the privileges of the Bill of Rights under the aegis of the due process of law clause of the Fourteenth Amendment.

⁷⁸ See *Murray's Lessee v. Hoboken Land & Improvement* (1855), 18 How. 272, but see also *Hurtado v. California* (1884), 110 U.S. 516.

⁷⁹ (1873), 16 Wall 36 at p. 39; and see also Corwin (1909), 7 Mich. L. Rev. 643.

⁸⁰ *Murdoch v. Memphis* (1899), 20 Wall 590.

⁸¹ *Hurtado v. California*, ante.

This marked a complete departure from the *Slaughter-House* philosophy of judicial tolerance of State regulation of business activity by the use of an expanded meaning of "due process" in the Fourteenth Amendment as a protection from state infringement of individual liberties of the Bill of Rights.⁸² The *Twining v. New Jersey*⁸³ decision, rejecting the compelled testimony clause of the Fifth Amendment, was the end result of this new interpretation. This case went so far as to declare that the "privileges or immunities" clause of the Fourteenth Amendment did not forbid the states to abridge the rights enumerated in the first Eight Amendments.⁸⁴

Later decisions have undermined this interpretation which broadly precluded reliance on the Bill of Rights to determine what is and what is not a "fundamental" right. For, despite *Hurtado* and *Twining*, the Supreme Court has held that the Fourteenth Amendment operates to protect from state invasion certain fundamental rights safeguarded by the Bill of Rights.

(c) *Recent Trends in the Interpretation of Due Process and Their Applicability to Canada.*

Turning now to the further developments under the Fourteenth Amendment, attention is drawn to the unsuccessful effort on the part of a minority of the Court in 1947 to reconsider the fundamental rights interpretation of the Due Process Clause and to equate the Fourteenth Amendment with the specific limitations of the Bill of Rights. In *Adamson v. California*,⁸⁵ the majority affirmed *Twining v. New Jersey*⁸⁶ to the extent that privilege against self-incrimination was not included among the basic freedoms protected by the due process clause. Mr. Justice Black (with whom Douglas J. concurred completely, and Murphy and Rutledge JJ. concurred partly), vehemently attacked the use of the natural law formula as the basis of Due Process of Law. He characterized the natural law approach as an "incongruous excrescence" upon the Constitution, and invoked historical sources to support his proposition that the original intention of the Fourteenth Amendment was to make the Bill of Rights applicable to the states. He objects to the fundamental rights approach on the basis that it emphasises "judicial subjectivity" in creating rights not explicit in the Constitution and often permits the disregard of limitations which should be emphasized.

Mr. Justice Frankfurter, of the majority, interprets the Due Process clause of the Fifth Amendment independently of the Fourteenth in relation to the federal government. By invoking the Fourteenth Amendment, the court must ascertain whether the proceedings offend those canons of decency and fairness which express

⁸² See Kauper, *Frontiers of Constitutional Liberty*, (University of Michigan Thomas Cooley Lectures 1956) at p. 171; and Mendolsohn (1955), 41 Va. L. Rev. 493.

⁸³ (1908), 211 U.S. 78.

⁸⁴ *Ibid.*, at p. 83.

⁸⁵ *Ante* footnote 77.

⁸⁶ *Ante* footnote 83.

the notions of justice of English speaking peoples. The importance of this case for our purposes is that it represents an attempt to escape from the static historical interpretation of Due Process in the interests of broadening the bounds of personal security at the expense of the state's power to define the procedure employed in its administration of criminal justice.⁸⁷

Looking at the cases and these didactic excerpts from the legal history of the term "due process of law", one might well ask just what the term does mean, and how far its American meaning may be applicable to the Canadian scene. Aside from the problem of whether Due Process of Law meant the same thing for state and federal actions, it is submitted that the term implies the individual's protection from the state's coercive power unless the latter is exercised in accordance with established usages and procedure. That process was due process which conformed to procedures established by law. Standing in the context of the limitations in the first ten Amendments, the Due Process clause of the Fifth Amendment might fairly be expressed as meaning that all proceedings which threaten vital interests, whether criminal or civil in character, shall conform to procedures established by law, whether by constitution, statute or decision, as distinguished from arbitrary assertions of power by governmental officials. The freezing of the due process concept of the Fourteenth Amendment has to some extent stultified its growth and oriented its meaning towards the broadly conceived "fair trial" standard. Due Process of Law requires a proceeding under authority of a general law, "a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."

From this brief summary, it should be clear that there are at least two dangers inherent in the due process concept. One is that Canadian courts should be careful not to equate political rights and interests of corporate enterprise in being free from government control of any kind, in the same way the U.S. Supreme Court did under the so-called "substantive due process." The second danger lies in the fundamental rights approach of Mr. Justice Frankfurter in the *Adamson* case with its emphasis on "due process" as a formula concept which is both nebulous and subjective and disregards the other important limitations explicitly set out in the proposed Bill of Rights and in the Criminal Code. Of paramount importance, of course, will be the use of this concept as a basis of review of decisions of administrative tribunals in conjunction with section 3(c)(d) and (e) calling for a fair hearing in accordance with the principles of fundamental justice.

(d) *Due Process of Law and Parliamentary Privilege.*

There have not been for many years problems concerning the exercise of parliamentary privileges in this country.⁸⁸ It may be

⁸⁷ See generally, *Kauper, ante footnote 82*.

⁸⁸ See Ward, Called to the Bar of the House of Commons (1957), 35 Can. Bar Rev. 529.

stated with substantial accuracy that, like the Imperial Parliament, each House of the Parliament of Canada can now define its own privileges, determine when they have been violated, and within certain limits, what punishments shall be inflicted. With the exercise of these powers the courts will not directly interfere. So, while the writ of habeas corpus is always available to a person imprisoned by either House, the courts uniformly remand the prisoner to custody if the return shows he is held on the order of the House. The ground of the committment will not be inquired into, and it was held that the return need not state in what the contempt of the House consisted.⁸⁹

Each House claims to be the sole judge of its own privileges and the courts recognize this as far as undoubted privileges are concerned.⁹⁰ But there has been controversy between the courts and parliament as to their respective functions in dealing with alleged privileges. The courts have taken the view that parliament can judge the breach, only if the privileges claimed have been found to exist by the courts. Parliament has taken the view that the only function of the courts is to help as occasion arises in carrying out the wishes of Parliament.

During the Pipeline Debate in the House of Commons in 1956, the Speaker entertained a motion that the writers of two letters to an Ottawa newspaper, Eugene Forsey and Marjorie LeLacheur, had made statements which were "derogatory of the dignity of parliament and deserve the censure of this House."⁹¹ Although the Speaker subsequently ruled that the statements were "fair and reasonable comment", a ruling today that the writers were in contempt of Parliament and the issue of a Speaker's warrant for their committal until they appeared before the Bar of the House of Commons would have raised a nice constitutional question. If the Speaker's warrant showed cause, the possibility of judicial review would exist. But if no cause were shown, on the basis of the present law it is doubtful whether the courts would be prepared to accept the warrant on an application for habeas corpus. The nice question arises in the light of the "due process" clause of section 2 of the new Bill of Rights: if it is held that this phrase means determination by "superior courts" whenever an individual is detained, the issue is settled. The writers would not have to appear before the Bar of the House of Commons until the courts had determined whether there had in fact been a breach of parliamentary privilege.

Of importance, however, is the U.S. experience in interpreting "due process of law." This experience may be highly persuasive for Canadian judicial interpretation. Therefore, U.S. decisions that "due process of law" does not necessarily mean, determination by a "superior" court may prompt reliance on the historical origins of the

⁸⁹ See (1925-26), 74 Penn. L. Rev. 691.

⁹⁰ *Stockdale v. Hansard* (1839), 9 A. & E. 1; *Sheriff of Middlesex's Case* (1840), 11 A. & E. 273.

⁹¹ Canada, House of Commons Debates, 1956, pp. 4528-90.

phrase. Thus, according to the modes of procedure current in England before the colonization of America, Parliament alone was judge and jury. It should be remembered that, although the question of parliamentary privilege has not arisen for several years, the frequent use of parliamentary investigating committees such as the Accounts Committee of 1958 will render the problem more important. Thus, if the engineers or the Queen's Printer, Edmond Cloutier had failed to appear when summoned before the Parliamentary Committee, or having appeared proved unco-operative in answering questions, could they be committed for contempt, without recourse to the courts first?

C. Section 2(b) "... protection of the law without discrimination. . ."

There is a striking similarity between section 2(b) of the Bill of Rights and the first section of the U.S. Fourteenth Amendment. The phrase "equal protection of the law", though not in the Fifth Amendment, had early been interpreted as a requirement for legislative and executive acts by certain state and federal courts prior to 1879.⁹² But it was used without any clear purpose in the Fourteenth Amendment so that there was little effort to apply its vague content to concrete cases.⁹³ Later, the equal protection clause was found to be a supplement to what would otherwise have been construed together to prevent all arbitrary legislative and administrative acts, and like certain other implied limits on legislatures, the equal protection principle was made an essential part of the concept of due process.⁹⁴

It is suggested, however, that the phrase "the right . . . to the protection of the law without discrimination . . ." will provide a separate head of legislative authority embodying the protection of the general rules governing Canadian citizens procedurally in court without discrimination. In addition, it may be the means of prohibiting discrimination on racial and religious grounds in employment practices, and in access to housing and places of public accommodation just as the Fourteenth Amendment was used by the U.S. Supreme Court to invalidate the segregation laws in the Southern states of the U.S., requiring separate accommodation for negroes and the like.⁹⁵ Although the federal Parliament has passed a Statute forbidding discrimination against any person on the grounds of race, creed, colour, nationality, ancestry, place of origin and sex, it is limited in its application to employees under its jurisdiction. Therefore the practical value of section 2(b) of the proposed Bill of Rights will depend on the constitutional basis of the statute in toto or in part.

In most fields, the subject of discrimination ostensibly comes within the power of the provinces. Some provinces have passed acts similar to the federal Fair Employment Practices Act.⁹⁶ The only

⁹² *Holden v. James*, 11 Mass. 396.

⁹³ *The Slaughter House Cases*, ante, at p. 89.

⁹⁴ *Connolly v. Union Sewer Pipe Co.* 184 U.S. 540; *Truax v. Corrigan*, 257 U.S. 312 at p. 322, per Taft C.J.

⁹⁵ See *Brown v. Board of Education* (1954), 347 U.S. 483; *Bolling v. Sharpe* (1954), 347 U.S. 447.

⁹⁶ (1952-53), 2-3 Eliz. II, (Can.) c. 19.

comprehensive statute is the Saskatchewan Bill of Rights Act⁹⁷ which prohibits discrimination "because of race, creed, religion, colour or ethnic or national origin" in six areas—employment, carrying on business, owning land, accommodations in public places, membership in professional and trade organizations, and education. The Ontario Fair Accommodations Practices Act forbids the denial "to any person of the accommodation services or facilities available in any place to which the public is customarily admitted."⁹⁸

Aside from the general consideration referred to earlier providing for the constitutional basis of the Bill of Rights under the residuary power of the federal parliament, section 2(b) may be specially protected by the heretofore undeveloped legislative head of "rights of citizenship." A separate status of citizenship was considered by Rand J. in *Winner v. S.M.T. (Eastern Ltd.)*, when he observed as obiter:

"The first and fundamental characteristic of the constitutional act was the creation of a single political organization of subjects of His Majesty within the geographical area of the Dominion, the basic postulate of which was the initiation of a Canadian citizenship. Citizenship is membership in a state; and in the citizens inhere those rights and duties, the correlatives of allegiance and protection, which are basic to that status.

The British North America Act makes no express allocation of citizenship as the subject-matter of legislation to either the Dominion or the provinces; but as it lies at the foundations of the political organization as its character is national, and by implication of head 25, section 91, "*Naturalization and Aliens*, it is to be found within the residual powers of the Dominion:" *Canada Temperance* case at p. 205. Whatever else might have been said prior to 1913, the Statute of Westminster, coupled with the declarations of constitutional relations of 1926, out of which it issued, creating in substance a sovereignty, concludes the question."⁹⁹

Then Rand J. expressed the opinion that "a province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason, as, for example, health."¹⁰⁰

In an excellent commentary¹⁰¹ on the substantive implications of Rand J.'s *Winner* opinion, it is suggested that the reason for creating a separate "citizenship status" was the desire to secure to civil liberties "an independent constitutional value"¹⁰² in order to give an "appropriate constitutional form to matters which because of their unique character have a unity of interest and significance, extending equally to all parts of the Dominion."¹⁰³ Surely the right of the individual to the protection of the law without discrimination "is a matter which from its inherent nature" is of concern to the Dominion as a whole? If this is so, it is submitted that section 2(b) of Bill of Rights will have an overriding effect on provincial enactments abridging or infringing it. This is true whether the section is characterized

⁹⁷ 1947, c. 35 (Sask.).

⁹⁸ 1954, c. 157 (Ont.); and see generally Bowker, *Protection of Basic Rights and Liberties* (1954-7), 2 U.B.C. Legal Notes, 281 at 302.

⁹⁹ [1951] S.C.R. 887 at pp. 918-9; and c.f. Reference re Alberta Statutes, [1938] S.C.R. 100 at p. 149 per Cannon J.

¹⁰⁰ *Ibid.*, at p. 920.

¹⁰¹ Price, Mr. Justice Rand and Canadian Citizenship (1958), 16 Fac. of L.R. 16; and see *Roncarelli v. Duplessis*, [1959] S.C.R. per Rand J. (unreported as yet).

¹⁰² *Ibid.*, at p. 20.

¹⁰³ *Ibid.*, at p. 24.

separately as an incident of citizenship or on a broader application under the residuary power of section 91 of the British North America Act.

Laws against discrimination by private persons obviously create extensive problems of enforcement. Even the most ardent advocates of explicit protection for civil liberties are opposed to such laws on the ground that prejudice and discrimination cannot be prevented by laws, as morality cannot be legislated. One important consideration should be pointed out. Civil liberties generally are negative in character, aimed at securing freedom from something. Therefore, positive legislation should first promote social justice by ensuring certain minima of well-being below which people should not be allowed to fall. In this way, racial and religious discrimination will be mitigated by protecting the individual from outside restraints and at the same time providing equality of opportunity.¹⁰⁴

(3) *Section 3 of the Bill of Rights*

This section for the most part spells out the legal protections that exist under the common law respecting arrest, trial and detention.¹⁰⁵ Much of this part of the Bill of Rights is codified by the Criminal Code. The salient features of the section are the provisions for the general right to counsel in section 3(b) (ii) and the right to counsel when appearing before an administrative tribunal in section 3(c). Although the Criminal Code and the various voluntary legal aid systems enable the indigent to be represented by counsel, this does not compel the court to provide counsel. The Sixth Amendment of the U.S. Bill of Rights enables the appointment of counsel for an accused in all federal cases, capital cases in state courts and lesser state crimes.¹⁰⁶ In fact, the right to aid of counsel in federal criminal proceedings under the Sixth Amendment extends to every phase of appeal, including the preliminary phase of obtaining permission to appeal. Perhaps section 3(b) (ii) will be interpreted so that our courts must provide counsel in all criminal matters?¹⁰⁷

D. The Value of a Statutory Enactment on Civil Liberties

Part II of the Bill of Rights deals with civil liberties in the event of "real or apprehended war, invasion or insurrection." As it stands now the War Measures¹⁰⁸ Act gives to the federal cabinet power to authorize whatever may be thought necessary in the interests of security. Among the powers specified are "censorship and control of publications and writing, communications" and "arrest, detention, exclusion and deportation." All of this would be done by orders-in-council with the force of law and if any of them were violated the Cabinet could without reference to any court, prescribe its own penalties up to five years or five thousand dollars, or both.

¹⁰⁴ For a survey of other discriminatory statutes, see Ryan, *More About a Bill of Rights* (1958), 1 Can. Bar J. 74 at p. 75.

¹⁰⁵ See generally, Bowker, *ante* at p. 313.

¹⁰⁶ *Anderson v. Heinze* (1958), 258 F. 2d. 479.

¹⁰⁷ For the protections under the Criminal Code, see Ryan, *ante* at p. 76.

¹⁰⁸ R.S.C. c. 288.

Section 6 of the War Measures Act is to be repealed so that the proclamation declaring a state of war can be debated and if both Houses of Parliament resolve that the Proclamation be revoked the Bill of Rights cannot be abrogated by the government. It seems to me that these provisions might be inherently dangerous to their influence on civil liberties in time of peace. Implicit in section 6 is the idea that the government can supervise the use of civil liberties. What then is to prevent a government in time of peace from making other insidious inroads on the use of civil liberties under the guise of protective legislation. The essence of civil liberties is that government agrees to keep its hands strictly off them—to preserve them rather than supervise their use. While they must be reserved to people, they cannot be left subject to the whims of majority opinion. Individual rights can best be protected against the vagaries of public opinion only through the courts. But in the light of the confused judicial interpretation of the constitutional basis of civil liberties, it is obvious that the courts themselves need guidance. The best form for this to take is as a Bill of Rights imbedded in the Constitution and thus made part of our national birth certificate.

Even if the Bill of Rights were specially buttressed as part of the British North America Act, there are still those who would oppose any codification of our fundamental freedoms.¹⁰⁹ It is better in Professor Clokie's opinion to view civil liberty "as flowing from numerous aspects of a well-balanced constitutional system of government." In his view "it is also better to have parliament draft appropriate laws now, even if misconceived and ill-judged, and establish the requisite procedural machinery, no matter how defective, than have these introduced, as they have been and will be in a haphazard, hasty and perhaps violent manner when necessity requires their speedy adoption. This is the way of constitutional wisdom and the guarantee of the continuance of our liberties."¹¹⁰

Implicit in these observations is the feeling that the only effective guarantee of freedom is a vigilant public opinion. For that reason, so the argument runs, civil liberties are better protected in Britain than in the United States. It should be remembered, however, that Canada and the United States lack the homogeneity and traditions of the British people. The existence of a federal system makes the situation more complex, especially in Canada where it is still uncertain what the distribution of legislative power is between the federal and provincial governments in respect to our basic freedoms. Although civil liberties have been traditionally better guarded in Britain, it is also true that civil liberties would have suffered severer abridgment in the United States,¹¹¹ without Bills of Rights in the federal and state constitutions.

¹⁰⁹ McD. Clokie, *The Preservation of Civil Liberties* (1947), 12 Can. J. Ec. Pol. Sci. at p. 394.

¹¹⁰ McD. Clokie, *Emergency Powers and Civil Liberties* (1947), 13 Can. J. Ec. Pol. Sci. 334 at p. 394.

¹¹¹ See generally, Corry *Democratic Government and Politics* (1952), and McCloskey, *Essays in Constitutional Law* (1957).

The prime advantage of a written Bill of Rights is its educational value. This is especially true in a young country like Canada to which are gravitating large numbers of persons of diverse origins and of little or no tradition of effective civil liberties. A Charter of basic liberties would be useful in teaching mutual respect and tolerance. In this regard, the proposed Bill of Rights is open to criticism. If a Charter of Liberties is to be of truly educational value, its language should be simple yet imaginative. It should contain salient phrases which are easily comprehended and catch the imagination of young and old alike. Unfortunately, the proposed Bill falls short of this ideal. It is set out like an elaborate blueprint, lacking even a decent preamble. This is one area where amendments might improve the language of the Bill and thus enhance its educational value. In addition, surely both the educational value and practical value of the proposed statute would have been greater if provision for some sort of sanctions had been made. Personal remedies in the form of injunctions and damages would certainly not be out of place. Finally, the content of the Bill might be criticized for its failure to take note of the change, in most Western countries, from *laissez-faire* to a more collectivist organization of society based on the principles of the Welfare State.¹¹² This omission is even more shameful when one remembers that Canada was a signatory to the United Nation's Declaration of Human Rights.

Actual protection of civil liberties in practice is essentially a judicial function. Too often basic values are lost sight of by the courts in their reliance on Austinian formalism and the canons of constitutional interpretation. Codification of fundamental freedoms would render the necessary recognition, provided it is in its proper constitutional form, of those "preferred freedoms" which are necessary for the working of the "body politic of the Dominion."¹¹³ Large policy considerations confront the Supreme Court, particularly in the discharge of its task to protect the fundamental rights of the individual. For this reason, the Supreme Court if it is to maintain its role in a democratic society, cannot divorce itself from the climate of thinking that determines the trends in Canadian political, social and economic life, although the Court itself is an important influence on these trends. The Supreme Court is now in a favourable position since the final abolition of the appeal from Canadian courts to the Privy Council to reappraise the hierarchy of constitutional values by departing from formalistic doctrinal concepts embodied in prior decisions especially in the field of public law.¹¹⁴ The court has open to it a variety of means to care for those interests which in its opinion demand special judicial protection. Surely those "preferred freedoms" enumerated in the proposed Bill are worthy of the vigilant protection of the Supreme Court, especially if they are violated by those provinces which have in the past done so much to undermine civil liberties. If the proposed Bill is questioned either in part or in toto would this

¹¹² See McWhinney, *A Bill of Rights* (1958), 5 McGill L.J. 36 at p. 46.

¹¹³ *Saumur v. The City of Quebec, ante*, at p. 386.

¹¹⁴ See generally McWhinney, *Judicial Review In the English Speaking World* (1956), chapter 1.

N.B. This article was completed before the March, 1959, issue of the *Can. Bar Rev.* was available.

not be a splendid opportunity for the Supreme Court of Canada to ensure a uniform standard of freedom to all by upholding the Bill of Rights as a valid federal enactment? It is in the area of Public law, then, that judicial determination of the interests to be served and the objectives to be attained can play its paramount role.

APPENDIX "A"

BILL C-60

An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.

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

PART I

BILL OF RIGHTS

1. This Part may be cited as the Canadian Bill of Rights.
2. It is hereby recognized and declared that in Canada there have always existed and shall continue to exist the following human rights and fundamental freedoms, namely,
 - (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
 - (b) the right of the individual to protection of the law without discrimination by reason of race, national origin, colour, religion or sex;
 - (c) freedom of religion;
 - (d) freedom of speech;
 - (f) freedom of assembly and association; and
 - (f) freedom of the press.
3. All the Acts of the Parliament of Canada enacted before or after the commencement of this Part, all orders, rules and regulations thereunder, and all laws in force in Canada or in any part of Canada at the commencement of this Part that are subject to be repealed, abolished or altered by the Parliament of Canada, shall 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 recognized by this Part, and, without limiting the generality of the foregoing, no such Act, order, rule, regulation or law shall be construed or applied so as to,
 - (a) impose or authorize the imposition of torture, or cruel, inhuman or degrading treatment or punishment;
 - (b) 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;
- (c) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel or other constitutional safeguards;
 - (d) 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; or
 - (e) deprive a person of the right to a fair and public hearing by an independent and impartial tribunal for the determination of any criminal charge against him.

4. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act and every Bill introduced in the House of Commons, to ensure that the purposes and provisions of this Part in relation thereto are fully carried out.

PART II

5. 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.

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

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

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

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

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

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

Section 6 of the War Measures Act now reads as follows:

"6. The provisions of the three sections last preceding shall only be in force during war, invasion, or insurrection, real or apprehended."