THE MEANING AND EFFECT OF THE CANADIAN BILL OF RIGHTS: A DRAFTSMAN'S VIEWPOINT

*Elmer A. Driedger**

I. INTRODUCTION

The Canadian Bill of Rights received a very poor reception from the legal profession. It has been said that it would have no impact on actual rights; that the judiciary have not given any effect to it; that it is but a pious, misleading direction; that it is not explicit enough in its direction that Parliament did intend its provisions to override inconsistent legislation; that it is not phrased as well as it might be; that it is incredibly badly drafted; that words should have been added to make explicit the intention of Parliament that courts were to declare inconsistent laws invalid or inoperative; that it does not apply to prior statutes; that in practice it has had limited application. [1]

The fundamental difference in theory between the Canadian Bill of Rights and a Bill of Rights that limits sovereign power, such as the one in the Constitution of the United States of America, does not appear to have been appreciated. There, if Congress enacts a statute inconsistent with the Bill of Rights, that legislation is declared by the courts to be ultra vires. In Canada, Parliament has full sovereign power and, within its area of jurisdiction, has the power to infringe fundamental rights and freedoms. The question of vires cannot therefore arise under the Canadian Bill of Rights, but it appears that the Bill has been looked upon, by analogy with the Bill of Rights of the United States, as directing the courts to declare a conflicting statute invalid, repealed or inoperative. In my view this is a misconception. Nowhere in the Bill of Rights is such an intention to be found; but because the Bill does not say what, according to this conception, it ought to say, it has been scorned as being incredibly badly drafted.

The Bill of Rights has also been regarded as a "clean up" statute. Statutes prior to 1960, it seems to have been thought, are teeming with provisions in violation of fundamental rights and freedoms, and the intention of the Bill of Rights was to expunge them from the statute book. But since the Bill makes no mention of repeal, its words are said to be imprecise and inadequate to carry out the intention of Parliament.

---

* Faculty of Law, University of Ottawa. Former Deputy Minister of Justice and Deputy Attorney General of Canada.

[1] For obvious reasons I do not wish to cite the sources of these criticisms. Anyone interested can find them in published materials on the Canadian Bill of Rights.

Before the Bill of Rights was introduced in Parliament, I read all the statutes in the Revised Statutes of Canada, 1952, and all subsequent statutes to 1960. While I was doubtful about two or three of these—no more—I found only one statute containing provisions that could be said to be clearly contrary to the Bill of Rights, namely, the seizure and forfeiture provisions in the Fisheries Act. These were changed by an amending act shortly after the Bill of Rights was enacted.[2] The onus provisions in the Opium and Narcotic Drug Act were also dubious, but they were changed in the new Narcotic Control Act.[3] Another reader might find one or two more such statutes, but there would be so few that a general repeal provision would have so little effect on prior legislation as to be useless. As for Regulations, these were examined by the departments and agencies administering them, and provisions found to be contrary to the proposed Bill of Rights were deleted or changed.

It has often been said that the Bill is ineffective because the courts have not struck down any legislation—or only very little. That is like saying the piracy and treason sections in the Criminal Code are useless because in modern times there have been no prosecutions under those sections. Effectiveness is not to be measured by legislation struck down, nor ineffectiveness by the rejection of specious arguments based on the Bill of Rights. The fact that the courts have found very few irreconcilable conflicts with the Bill of Rights in its seventeen years of operation signifies, if it signifies anything, that Parliament has in the past respected fundamental rights and freedoms.

II. The Structure of the Bill of Rights

What is the meaning and effect of the Bill of Rights? To answer that question we must look at the Bill of Rights and read its words in their grammatical and ordinary sense.

Section 1

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law:
>
> (b) the right of the individual to equality before the law and the protection of the law;
>
> (c) freedom of religion;
>
> (d) freedom of speech;
>
> (e) freedom of assembly and association; and
>
> (f) freedom of the press.

---

[2] S.C. 1960-61 c. 23, s. 10.

[3] S.C. 1960-61 c. 35.

Read by itself, this section is only a declaration without real legal effect. But it is an indication that Parliament recognizes and undertakes to respect fundamental rights and freedoms. It is in the nature of a modern Magna Carta.

Section 2

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

This section gives legal effect to the lettered paragraphs of section 1. Grammatically, all of these paragraphs are textually incorporated in section 2, because they are the rights and freedoms that are referred to in section 2. That section must therefore be read as follows: "Every law of Canada shall . . . be so construed as not to abrogate, abridge or infringe . . . the right of the individual to life, liberty, security of the person . . ." down to "freedom of the press".

It is to be noted that grammatically the words of section 1 preceding the lettered paragraphs are not incorporated in section 2; the declaration that the enumerated rights and freedoms have existed and shall continue to exist remains a declaration without legal effect. The words "without discrimination by reason of race, national origin, colour, religion or sex" were included in paragraph (b) in the original Bill as introduced in the House of Commons, but by an amendment they were moved to their present position. The grammatical effect of that amendment was that these words are not incorporated in section 2, and they cannot be read into the lettered paragraphs of section 1 because the phrase now modifies the preceding verb "exist".

However, the Supreme Court of Canada has at times evidently read these words as pervading the lettered paragraphs of section 1, and as being incorporated in section 2.[4] This is a clear departure from the strict grammatical sense, but the Court has not explained on what grounds it made this modification. Departure from strict grammatical sense is not permitted except to avoid some inconsistency, repugnance or incongruity, but none of these have been indicated. However, the matter is settled and, if the Court should expressly deal with the point, it would probably say (as Abbott J. indicated in *Attorney General of Canada v. Lavell*)[5] that these words

[4] *See* Ritchie J. in The Queen v. Drybones, [1970] S.C.R. 282, at 298, 9 D.L.R. (3d) 473, at 485 (1969); Laskin J. in Curr v. The Queen, [1972] S.C.R. 889, at 896, 26 D.L.R. (3d) 603, at 611; and the dissenting judgments of Laskin J. and Abbott J. in Attorney General of Canada v. Lavell, [1974] S.C.R. 1349, at 1374 and 1387, 23 C.R.N.S. 197, at 227 and 229 (1973). *But see* the judgment of Ritchie J. in *Lavell* at 1363, 23 C.R.N.S. at 209-10, which seems to support the idea that the "discrimination" phrase modifies the word "exist".

[5] *Supra* note 4, at 1374, 23 C.R.N.S. at 229.

serve no purpose in the opening paragraph—they can have no meaning unless they are read into the lettered paragraphs, and such must have been the intention of Parliament.

Section 3

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

This is an administrative "policing" provision. Draft regulations are examined in the Department of Justice, and any recognizable infringements of the Bill of Rights are there removed before the regulations become law. All government bills are drafted in the Department of Justice and the officials there will ensure that every bill is consistent with the Bill of Rights. The Minister of Justice does not certify that a regulation or bill is "clean", but if he finds one that is not, he must report to the House of Commons. A bill or regulation patently in violation of the Bill of Rights and lacking, in the case of a bill, the declaration contemplated by section 2, has almost no chance of becoming law. It is of course possible that after an innocent looking regulation or bill becomes law, the Supreme Court might find there is an infringement, in which case the Bill of Rights would operate.

The Minister of Justice has reported to the House of Commons under section 3 on one occasion.[6] In 1975 the Government introduced an amendment to the Feeds Act. It was amended in the Senate by a provision presuming guilt. When it returned to the Commons the Minister of Justice reported that the Senate amendment was an infringement of the Bill of Rights and it was deleted.

Section 4

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

This gives the title "Canadian Bill of Rights" to the first three sections, so that the technical provisions in section 5 and the amendment to the War Measures Act in section 6 need not be included for distribution in the instrument to be known by this title.

Section 5

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

---

[6] HOUSE OF COMMONS DEBATES, 1st Sess. 30th Parl., Vol. V 4543 (April 7, 1975).

> (2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.
>
> (3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

This section is not embraced in the title "Canadian Bill of Rights", but it has an important effect on the operation of the Bill of Rights. Subsection (1) is a savings provision, so that the Bill of Rights is not necessarily exhaustive. Subsection (2) defines "law of Canada" so as to include not only Acts of the Parliament of Canada, but any law within Parliament's jurisdiction. The expression "law of Canada" is used only in section 2, and the effect of section 5(2) is to confine the operation of section 2 to laws within Parliament's competence. It should be noted that "law of Canada" is expressly stated to include any Act of the Parliament of Canada enacted before or after the coming into force of the Bill of Rights. Subsection (3) is necessary to preclude the construction of section 1 as including matters within provincial jurisdiction.

III. The Application of the Bill of Rights

Prior Statutes

It was at first said, by judges [7] as well as by others, that the Bill of Rights has no application to prior statutes. I must say I find it difficult to understand how one could reach that conclusion. Section 2 says "every law of Canada", and that by itself would be sufficient to include prior statutes. A statute comes within the description no matter when it was enacted, and there is no more reason for confining that description to subsequent statutes than for saying that a statute that speaks of "persons" applies only to persons born after the statute was enacted. There is a presumption against the retrospective operation of statutes; but the prospective application of the Bill of Rights to a statute in existence when the Bill became law is not a retrospective operation. There is also a presumption against interference with vested rights; but the Bill of Rights gives rights, rather than interferes with them. In any case, subsection 5(2) expressly states that "law of Canada" includes prior statutes. How can anyone, in the face of that clear statement, say that it does not?

But there is more. A statute is subject to the Bill of Rights unless it contains the declaration described in section 2. Prior statutes do not have such a declaration; therefore they are subject to the Bill.

Finally, there is subsection 6(3) of the War Measures Act, as enacted by the statute that enacted the Bill of Rights. It says that any act or thing

[7] *E.g.*, in Robertson v. The Queen, [1963] S.C.R. 651, at 654, 41 D.L.R. (2d) 485, at 491 (Ritchie J.); The Queen v. Goldstein, 34 W.W.R. 236, at 238 (B.C. Mag. Ct.).

done or authorized or any order or regulation made under the authority of the War Measures Act shall be deemed not to be an abrogation, abridgment or infringement of any right or freedom recognized by the Canadian Bill of Rights. That provision has meaning only on the premise that the Bill of Rights applies to prior statutes.

The issue has now been settled by the Supreme Court. [8] The Bill of Rights means what it so clearly says and implies. But it is strange that the issue should ever have arisen.

"Construed and Applied"

The words "construed and applied" seem to have baffled lawyers. They ask: What do they mean? They mean what they have always meant. For centuries lawyers and judges have used those very words to describe what they do when reading statutes. They speak of construing a provision to mean this, or construing it to mean that; they speak of the construction of statutes, of strict construction, of liberal construction. And now they ask: What does "construing" mean?

The best short answer may be found in the words of Justice Brandeis, in *Dahnke-Walker Milling Co. v. Bondurant*: [9]

> [I]n every case involving a statute, the . . . court must perform . . . two functions essentially different. First the court must construe the statute; that is, determine its meaning and scope. Then it must apply the statute, as so construed, to the facts of the case.

To construe the words of a statute does not mean to find the dictionary meaning of the words out of context. That is only reading the words. To construe the words of a statute means to find the legal meaning or effect of the words in the context in which they are found and in the context of the law.

What do lawyers do when they find an apparent conflict between two statutes or two provisions within a statute? First, they try to reconcile them; that is to say, they try to construe them so that they can live together. Conflicting statutes or provisions are reconciled in different ways. Sometimes the grammatical structure is modified to a less exact or elegant structure, but one that the language used is reasonably capable of bearing. Sometimes a secondary or special meaning of a word is preferred to the primary or ordinary meaning. Sometimes the scope of a word is narrowed. Sometimes the one statute is read as an exception to or modification of the other. Sometimes the subject-matter of one statute (special) is subtracted from the subject-matter of the other (general). A court must reconcile conflicts within or between statutes, if it is able to do so within the ambit of the words actually used. [10]

---

[8] The Queen v. Drybones, *supra* note 4, at 295-96, 9 D.L.R. (3d) at 482-84 (Ritchie J.).

[9] 257 U.S. 282, at 924-95 (1921).

[10] For examples and authorities *see* E. DRIEDGER, THE CONSTRUCTION OF STATUTES at 44-52, 73, 79, 105, 106, 174-86 (1974).

But what if the conflict is irreconcilable? What do lawyers and judges do then? In some situations they say that the later statute overrides the earlier. They call this an "implied repeal", although it is questionable whether this expression is any more than a figure of speech. What they actually do is to apply the later statute to the facts before them, and ignore the earlier.

In some cases they say that a special statute overrides a general statute. If the special statute is also later, they say that the special has impliedly repealed the earlier in so far as they are inconsistent, or that the special amended the general by subtracting the subject-matter of the special from the subject-matter of the general. If the special statute is earlier, they cannot say it repealed the later, but they can say that the subject-matter of the general does not include the subject-matter of the special. Whatever they say, they are in fact simply ignoring the general statute and applying the special to the facts before them.

If the conflict is within one statute, the courts cannot say one provision repeals another. But in the case of overlapping provisions in a statute, they can say that a special provision reduces the ambit of an overlapping general provision. And there are times when, in order to resolve a conflict, the courts will ignore some words. Where the courts have ignored a statutory provision, they have "construed" the provision as meaning nothing in relation to the facts before them. [11]

Coming back to the Bill of Rights, in the event of an apparent conflict between the Bill and another statute, the courts must go through exactly the same process they have always gone through in dealing with a conflict between two statutes, but with the important difference that this time the Bill of Rights stands firm and it is the other statute that must give way.

The first step is to try to reconcile the conflict. This might be possible by modifying the grammatical or ordinary sense, or by reading the words of the Bill of Rights as an exception, qualification or addition. If the conflict is irreconcilable, then the courts should ignore the other statute or the relevant provision thereof. They "construe" the conflicting statute, in the face of the Bill of Rights, as having no meaning with respect to the facts before them. There is no need to say that the offending statute is inoperative or *pro tanto* repealed. But if, as in the *Drybones* [11a] case, the court says that a provision is inoperative, should it not say inoperative on the facts before it, and not inoperative generally or forever? There has been far too much stress on the offending statute and on finding words to describe what happens to it. The stress should be on the Bill of Rights; when it conflicts with another statute all that needs to be said is that the Bill of Rights prevails or is paramount. When, for example, a federal statute ousts a conflicting provincial statute, it is not said that the provincial law is "inoperative" or "repealed", but that the federal statute "prevails" or is

---

[11] *See* examples cited in E. DRIEDGER, THE CONSTRUCTION OF STATUTES, *id.*

[11a] *Supra* note 4.

"paramount". In tax convention acts, for example, there is always a provision to the effect that, in the event of any inconsistency between the convention and any other law (*e.g.*, the Income Tax Act), the provisions of the convention prevail to the extent of the inconsistency. In other words, the conflicting provisions of the Income Tax Act are ignored—not repealed, abrogated or made inoperative. Cartwright C.J. had the right idea in *Robertson v. The Queen,* [12] when he said that "where there is irreconcilable conflict between another Act of Parliament and the *Canadian Bill of Rights* the latter must prevail". Yet in *The Queen v. Drybones,* [13] when he adopted the words of Davey J.A. in *Regina v. Gonzales* [14] that "[i]f the prior legislation cannot be so construed and applied sensibly, then the effect of section 2 [of the Bill of Rights] is exhausted, and the prior legislation must prevail according to its plain meaning", he merely found the dictionary meaning of words in a statute, and did not *construe* them in the context of the Bill of Rights. He would do to the Bill of Rights precisely what he said he could not do to a conflicting statute, namely, disregard it.

It has been said that the Bill of Rights is "merely a canon or rule of interpretation". [15] What does that mean? It is indeed a rule of interpretation, or, as I prefer to put it, a rule of construction. But is it "merely" such a rule? The answer depends on what is meant by "merely". If that word means that fundamental rights and freedoms can be fully protected in a fully sovereign State by a rule of construction alone, then the answer is Yes. If it means that the courts can disregard the rule as they may disregard other so-called rules of interpretation or canons of construction, then the answer is No.

IV. The Effect of the Bill of Rights

On Draft Laws

It has been repeatedly said that the courts have given little or no effect to the Bill of Rights. But effect is given to the Bill of Rights outside the courts, because it exerts a powerful influence on drafts of laws before they became laws.

To understand how the Bill operates prenatally one must understand our institutions of government and our legislative process. Government bills are the only ones that have any real chance of becoming law. All government bills are drafted in the Department of Justice, but, before instructions can be given to the Department of Justice for the drafting of a bill, the sponsoring Minister must submit to the Cabinet a memorandum setting forth the nature of the proposed bill and its policy implications.

---

[12] *Supra* note 7, at 662, 41 D.L.R. (2d) at 489.

[13] *Supra* note 4, at 287, 9 D.L.R. (3d) at 476.

[14] 37 W.W.R. 257, at 260, 32 D.L.R. (2d) 290, at 292 (B.C.C.A. 1962).

[15] By Abbott J. in The Queen v. Drybones, *supra* note 4, at 299, 9 D.L.R. (3d) at 477.

Let us suppose that a memorandum is submitted proposing a measure that would be in violation of the Bill of Rights. The offending provision would be forthwith rejected, unless the government was prepared to submit such a bill to Parliament, in which case the declaration contemplated by section 2 of the Bill of Rights would be included. The issue would then be squarely before Parliament and, if the bill became law, would ultimately be adjudged by the electorate. No government would be so foolish or stupid as to submit to Parliament a bill obviously in conflict with the Bill of Rights without this declaration. If it did, the Opposition would move an amendment which, as a matter of simple politics, the government would have to accept.

Let us suppose, however, that no conflicting proposal is seen or recognized in a memorandum to Cabinet. In that case, after instructions for drafting the bill have been given, any proposed provision in conflict with the Bill of Rights would be caught by the drafting officers of the Department of Justice and would be taken out. If the instructing department insisted on it, a report would be made to the Minister of Justice, and in all likelihood he would speak to his colleague, who would agree to take the offending provision out. If not, the matter would go to Cabinet, and a choice would then have to be made between deleting the provision or including the declaration. The Government could not politically afford to put itself in a position in which the Minister of Justice would resign over the issue or make an adverse report against the Government in the House of Commons as required by section 3 of the Bill of Rights.

The chances that a statute patently in conflict with the Bill of Rights could be enacted are virtually non-existent, unless that were deliberate government policy, in which case the declaration would go in and the Government would have to face the music in the House of Commons.

It is of course possible that a bill considered innocent by everybody during its parliamentary stages would, after becoming law, be held by the Supreme Court to be in contravention of the Bill of Rights. In that event the court would deal with it in the normal way, namely, by removing the inconsistency in the manner I have indicated, or by ignoring the offending provision.

The Statutory Instruments Act [16] provides that all regulations must be submitted to the Clerk of the Privy Council in draft form, and he is required, in consultation with the Deputy Minister of Justice, to examine them as to policy, form, substance, validity and consistency with the Bill of Rights. If any provision inconsistent with the Bill of Rights is found, it would be taken out at the first official level. If the matter did go any higher in the public service - ministerial hierarchy, it would in the end be certain to disappear, because this time there can be no purifying declaration: [17] unless

---

[16] S.C. 1970-71-72 c. 38, s. 3.

[17] *I.e.*, because the regulation is not a "statute"; *see* the discussion in this regard in E. DRIEDGER, THE CONSTRUCTION OF STATUTES, *supra* note 10, at 276-79.

the declaration is in the authorizing statute, there is no power to make a regulation that offends the Bill of Rights.

Of course, officials of the Department of Justice could be wrong, and regulations they regard as pure might nevertheless be held by the Supreme Court of Canada to be in conflict with the Bill of Rights. In that event the regulation would be held ultra vires the statute under which it purports to be made.

All future laws are therefore purified before they become laws. At this stage, the courts are out of the picture, and judicial decisions do not and cannot disclose this purifying process. This process is possible only under a parliamentary system of government, where officials are responsible to Ministers, Ministers to the House of Commons, and the House of Commons to the electorate. The whole machinery of government—apart from the courts—is enlisted by the Bill of Rights to ensure that fundamental rights and freedoms are safeguarded. It cannot be disputed that at this stage the Bill of Rights is powerfully effective. This kind of control is not possible with a congressional system of government, where there is complete separation between the executive and the legislature and where the executive cannot control the content of bills submitted to the legislature.

On Statutory Powers

One of the major functions of the Bill of Rights is to circumscribe statutory powers, whether legislative, judicial, ministerial or administrative. This can be illustrated by a few simple examples.

Let us suppose that in the Explosives Act there is a provision authorizing the Governor in Council to make regulations respecting the holding of inquiries into accidents caused by explosions. Apart from the Bill of Rights, such a provision, in its context, might well be construed as giving the Governor in Council power to make regulations compelling a potential accused person to give evidence against himself. The Bill of Rights now takes that power away. All statutory legislative powers must now be construed as not authorizing anything contained in the lettered paragraphs of section 2.

This result could not be accomplished by a provision that a statute is repealed, abrogated or inoperative in so far as it is inconsistent with the Bill of Rights, because there is nothing in the foregoing example that could be said to be inconsistent with the Bill of Rights. The scope of the power has been reduced, but there are no words that could be said to be repealed, abrogated, invalidated or rendered inoperative.

True, the Bill of Rights itself precludes a regulation-making authority from making a regulation inconsistent with the Bill of Rights. But the situation is not that the regulation is *inoperative* on the ground that it offends the Bill of Rights; it is *ultra vires* the statute because there is now no power to make such a regulation. In the case of future statutes granting legislative

power, the Bill of Rights withholds power to make offending laws and the result is the same.

At the time the Bill of Rights came into effect there were many instances in the statutes of judicial power being given to individuals, boards, commissions and other agencies to determine rights. These provisions also are now restricted or modified by the enumerated paragraphs in section 2. Thus, a Minister might have had power to make a decision affecting rights or obligations without a hearing. The words "without a hearing" are not necessary to achieve this result, for they might be implicit in the language and intent of the statute. Here again there is nothing to be repealed or abrogated, but this power is now qualified by paragraph (e) of section 2. And what was done under the apparent authority, namely, the making of a decision, is not a "law" that could be repealed. [18]

Ministerial or administrative powers are in the same position. A statute might confer power on a Minister to seize and confiscate property. Apart from the Bill of Rights it could well be that the Minister had power to do so without compensation. Now that power must be qualified by paragraph (a) of section 1 (since it is incorporated in section 2) and it may well be that there would now be a right to compensation. Again, a trespass or other conduct under alleged statutory powers cannot be "repealed".

In these examples, the Bill of Rights operates by way of amendment or qualification rather than repeal. Statutes granting powers must now be so construed as not to authorize the abrogation, abridgment or infringement of the Bill of Rights, whether by subsidiary laws, by decisions determining rights or by any other action. This is accomplished by reading the provisions of the Bill of Rights into the statutes conferring powers; these provisions then operate to amend, qualify or restrict the power. [19]

Canon of Construction versus Entrenchment

In short, power to contravene the Bill of Rights is withdrawn from prior statutes and withheld from future statutes. Herein lies the difference in theory between our Bill of Rights and a Bill of Rights, such as the one in the Constitution of the United States of America, which limits sovereign power. The effect of the American Bill of Rights is to deny to Congress jurisdiction to grant power to anyone to do anything in contravention of the Bill of Rights. The courts will therefore construe any grant of power as not including power to commit any act in contravention of the Bill of Rights even though the words of the statute, when taken by themselves, could be said to include such a power. It follows automatically that any such act would be illegal.

---

[18] *See* discussion *id.*

[19] *See* the remarks of Laskin J. in Brownridge v. The Queen, [1972] S.C.R. 926, at 952 and 954; and see Pigeon J. in Attorney General of Canada v. Lavell, *supra* note 4, at 1390, 23 C.R.N.S. at 217; and Laskin C.J. in The Queen v. Burnshine, [1975] 1 S.C.R. 693, at 714, [1974] 4 W.W.R. 49, at 65.

In Canada, on the other hand, Parliament has jurisdiction to grant power to infringe fundamental rights and freedoms, and cannot deny such jurisdiction to itself. Hence, in order to make illegal anything done in the purported exercise of a power, that power must be taken away from past statutes and withheld from future statutes. That result can be achieved only by imposing a rule of construction.

It has been urged from time to time that the Bill of Rights should be constitutionally entrenched, meaning that it should be placed beyond the power of Parliament alone to amend. In other words, the sovereignty of Parliament ought to be limited. How this is to be accomplished has not been made clear. It might be thought that the addition of the Bill of Rights to the British North America Act by a further Act of the British Parliament would do it.

A Bill of Rights may operate to limit sovereignty in one of two ways. First, it might lay down a rule of law, as "no person shall be subject for the same offence to be twice put in jeopardy of life or limb". Secondly, it might directly limit or subtract from sovereign power, as "Congress shall make no law abridging freedom of speech". These provisions are contained in the Constitution of the United States of America, and are amendable only by a special procedure involving participation by Congress and the States. An overriding statute enacted by Congress would be ultra vires because Congress has no power to override.

Let us suppose that these provisions were put into the British North America Act in relation to Parliament by an Act of the British Parliament. What would be the result? Parliament could simply repeal or override, because under section 2 of the Statute of Westminster, 1931, Parliament may repeal or amend any Act of the British Parliament. Two limitations on this power are set out in section 7. Subsection (3) restricts the power to the enactment of laws in relation to matters within the competence of the Parliament of Canada. The first of the provisions cited above is criminal law; the second falls within communications under Parliament's jurisdiction, as, for example, radio. Subsection (3) of section 7 is therefore no bar. Subsection (1) of section 7 excludes the British North America Acts, 1867 to 1930; a new British North America Act, 1977, would not be included in the citation in subsection (1), so that is no bar. [20]

One might say "amend the Statute of Westminster, 1931" so as to make it inapplicable to a new British North America Act. The effect of that would be to transfer sovereignty back to the United Kingdom! Surely, no one in Canada would seriously suggest that. Moreover, there is doubt whether the British Parliament could do it. If, as is altogether probable,

---

[20] But *quaere* whether a declaration in such a B.N.A. Act 1977, to the same effect as, *e.g.*, the B.N.A. Act 1964, s. 2, including itself within the collective title "British North America Acts", would be sufficient to place it within the protection of s. 7(1) of the Statute of Westminster. For further discussion in this regard see Driedger, *Constitutional Amendment in Canada*, 5 CAN. B.J. 52, at 56 (1962).

the Statute of Westminster is an abdication of jurisdiction, then the British Parliament cannot take it back. [21]

But let us assume that in some way we get around the Statute of Westminster. Section 91 of the British North America Act confers legislative power on Parliament "notwithstanding anything in this Act". Consequently, under the authority of the British North America Act itself, Parliament could, within its sphere of jurisdiction under section 91, override any Bill of Rights added to it.

There is only one way in which we can get a constitutionally entrenched Bill of Rights, and that is to get an amending formula for our Constitution. Once that is done, a Bill of Rights could be added and it would be subject to the amending procedure in that formula. But, after over fifty years of trying, we still do not have an amending formula.

I do not think we need to worry about direct amendments to the Bill of Rights, or bills that are patently inconsistent with the Bill of Rights and do not contain the declaration. A direct amendment is easily recognizable as such, and to amend or not to amend would be directly at issue, in Parliament and before the public. A bill patently inconsistent with the Bill of Rights would never be introduced unless it contained the declaration, and again the Bill of Rights would be squarely in issue.

In my view the present Bill of Rights is adequately entrenched in Parliament, politics and public opinion. However, if it were desired to make it more difficult to override or amend the Bill of Rights, that could easily be done by a simple amendment to the Bill of Rights itself, to the effect that a *declaration* under section 2 is not effective if it is opposed by more than one-third of the members of the House of Commons. That would give further protection against the enactment of either amending or overriding statutes, and it would not impede the addition of further rights or freedoms, or the making of amendments not affecting rights or freedoms.

Declaration of Intent

The Bill of Rights is also a firm declaration of intent. An express provision repugnant to the Bill of Rights in a statute is easily recognized. The chances of one getting into a statute without an express overriding declaration are so remore that from a practical point of view this possibility need not be considered. But even in the absence of an express overriding provision, a court could find in one statute an implied intention to override another. Again, the Bill of Rights is a statute of the Parliament of Canada and Parliament has jurisdiction to override it. It could happen that a statute, when enacted, does not seem to be in conflict with the Bill of Rights, but subsequently and with reference to a particular set of facts turns out to be.

In the ordinary case of a possible conflict between two statutes, the

---

[21] For further discussion on this point see Driedger, *Statute of Westminster and Constitutional Amendments*, 11 CAN. B.J. 348, at 354 (1968).

question arises whether one statute overrides or is subject to the other, and the decision could go either way. That question cannot arise in the case of an apparent conflict between the Bill of Rights and another statute; it is settled by a firm rule, namely, that the Bill prevails.

An intention to override the Bill of Rights is not to be attributed to Parliament unless a specific form of words is used. A statute that does not include the declaration prescribed in section 2 cannot be construed as embodying an intention to override the Bill of Rights.

Summary of Effect

To sum up, the effect of the Canadian Bill of Rights is as follows:

1. It operates to remove from draft laws provisions inconsistent with the Bill of Rights, so that the ultimate law will be consistent. This process of purification is done by instruments of government other than the courts.

2. It operates to circumscribe statutory powers of every description in statutes enacted before or after the Bill of Rights. The fundamental purpose of a Bill of Rights is to protect the citizen against the power of the State. The Canadian Bill of Rights accomplishes this end by withdrawing or withholding power from those constituents of government that wield power.

3. It compels a modification of the language of statutes in order to remove conflict between them and the Bill of Rights, so far as that can reasonably be done within the framework of the language actually used.

4. In the event of irreconcilable conflict between the Bill of Rights and another statute, the Bill of Rights is paramount and the conflicting statute must therefore give way so far as is necessary to remove that conflict.

5. An intention to override the Bill of Rights by any subsequent statute is not to be imputed to Parliament in the absence of a declaration in that statute that it is to operate notwithstanding the Bill of Rights.

The Canadian Bill of Rights is built on a grand design. Section 1 is aimed at Parliament; section 2 is aimed at the courts; and section 3 is aimed at Ministers and the public service. Hence, all three branches of government in its broadest sense—legislative, judicial and executive—are charged with the duty and responsibility of respecting and protecting fundamental rights and freedoms. I doubt that there is a Bill of Rights anywhere in the world as comprehensive, powerful and effective as the Canadian Bill of Rights—except the Alberta Bill of Rights, [22] which is modelled on the Canadian. If I were asked to write a Canadian Bill of Rights within a framework of our present Constitution and system of government, and having regard to all that has been said and written about the one we have, I would write it exactly as it is now, without any change except to remove the anti-discrimination clause from its present position and put it back into paragraph (b) of section 1, where it was in the first place.

[22] S.A. 1972 c. 1.

Many of the criticisms that have been made of the Bill of Rights are rooted in the assumption that it embodies an intention to repeal or abrogate inconsistent laws. This is pure invention. There is not a shred of evidence of that intention to be found in the Bill of Rights. Why must it be thought that legislative draftsmen are so incompetent that they would not know how to provide for repeal or abrogation of inconsistent laws if that had been intended? Any draftsman would know how to do this, and it is nothing new. After new provinces joined Confederation, statutes were enacted bringing certain Acts of Parliament into force in those provinces, and they included a general repeal provision to the effect that inconsistent or repugnant laws were repealed. [23]

Why could not the simple, obvious and logical conclusion be drawn, namely, that if the Bill of Rights did not in general terms provide for a repeal of inconsistent laws, it did not intend to do so?

If, as has been urged, we had a Bill of Rights that would set forth fundamental rights and freedoms and would then go on to declare inconsistent laws to be repealed, invalid or inoperative, virtually nothing would be accomplished. Such a Bill of Rights would be sterile and useless. Fewer than a handful of statutes enacted before the Bill of Rights would be affected; for all practical purposes no future statutes that could be affected will be enacted; and such a Bill of Rights would have no effect on statutory powers. Moreover, these words are incapable of application to future statutes, since it would simply be absurd for Parliament to say today that what it says tomorrow is law is not law. A constitution can render future acts of a legislature void or inoperative, and an imperial legislature can say the same of colonial acts, but it makes no sense for a supreme legislature to say that its own statutes not yet enacted are repealed, void, invalid or inoperative. That is why our Bill of Rights must be founded on a rule of construction.

If, in a future statute, there is a provision that by its very terms is irreconcilably in conflict with the Bill of Rights, the courts would have to ignore it, just as they do in other cases of conflict between statutes. [24] But that situation is purely hypothetical, because in practice no such statute would ever be enacted without the saving declaration. No doubt provisions in past or future statutes will be found that on their face are not inconsistent with the Bill of Rights and do not contain any specific words that could be said to be repealed, invalid or inoperative, but are nevertheless capable of being construed and applied so as to infringe fundamental rights and freedoms. Provisions of this kind must now be given a modified, qualified or restricted construction so as to avoid a clash with the Bill of Rights; this process of construction does not repeal or invalidate anything. No doubt there will also be many decisions on statutes where the issue will be the

[23] As to British Columbia, *see* S.C. 1872 c. 37, s. 7; S.C. 1874 c. 42, s. 7. As to Prince Edward Island, *see* S.C. 1874 c. 27, s. 2; S.C. 1875 c. 14, s. 5; S.C. 1876 c. 25, s. 2; S.C. 1877 c. 4, s. 9. As to Newfoundland, *see* S.C. 1950 c. 12, s. 2.

[24] *See, e.g.,* Salmon v. Duncombe, 11 App. Cas. 627 (P.C. 1886).

scope or meaning of a specific right or freedom, but that has nothing to do with validity.

CODA: "DISCRIMINATION"

I had not intended in this paper to deal with the meaning or scope of the various specific rights and freedoms set forth in the Bill of Rights. However, I cannot resist the temptation to make a few comments, and raise a few questions concerning section 1(b) of the Bill, namely the right to "equality before the law".

It seems to me that too much attention has been focused on "discrimination". What is discrimination? It is really only a difference. Who is responsible for the difference? Does discrimination lie in the enactment of a law in the Indian Act, or in the failure to enact such a law in the Territorial Ordinances? In the *Drybones* case, [25] a provision of the Indian Act was held to be inoperative. Suppose that immediately after that decision, the Council of the Northwest Territories had amended its Liquor Ordinances to provide for exactly the same offence of intoxication with exactly the same penalty. Would the intoxication provision of the Indian Act then have become operative again? Suppose the Council of the Northwest Territories then later provided for a greater penalty in the Liquor Ordinance. Would there now be discrimination by the Council against non-Indians? And if this Territorial legislation were held to be inoperative, would the provision in the Indian Act become inoperative again? There could be quite a game of on-again, off-again Flanagan. Must all the Territorial laws in respect of non-Indians and the laws in respect of Indians always be the same? There are provisions in the Indian Act respecting distribution of property on intestacy, and there is a Territorial Intestate Succession Ordinance. They are different. Which is discriminatory, and in favour of or against whom? Who is doing the discriminating—Parliament or the Council?

The right protected by the Bill is "equality before the law". Apart from the meaning or effect of the whole phrase, the first and more fundamental question, I suggest, is: What is the meaning of the word *equality* as used in the Bill of Rights? Since the objective of the Bill is to produce equality, must we not say, first of all, that "equality" means such equality as *Parliament* can create, and that the lack of equality, or "inequality", aimed at by the Bill, is such inequality as *Parliament* can remove or empower the courts to remove. As legislative jurisdiction is divided between Parliament and the legislatures, and there never can be equality in the total body of the law, must we not say, secondly, that "equality" means equality in the law in relation to a subject-matter within Parliament's jurisdiction, because that is the only area where Parliament can create equality or remove inequality. Thirdly, "equality" must surely mean equality throughout the whole of Canada.

---

[25] *Supra* note 4.

Putting these thoughts together, we get this result: "equality" within the meaning of the Bill of Rights means equality within the areas of Parliament's legislative and geographical jurisdictions.

Most of the enumerated heads in section 91 are impersonal subject-matters, as, for example, navigation and shipping. In legislating under this head Parliament can create equality between all persons throughout the whole of Canada and can direct the removal of inequality in this area of law. Navigation and shipping laws, therefore, fall within the purview of "equality".

Section 91(24), however, unlike the other heads, confers jurisdiction by reference to persons. This gives Parliament jurisdiction to legislate with respect to section 92 subjects for these persons, but the legislatures have exclusive jurisdiction to make laws in relation to those subjects for all other persons. Parliament can therefore never create equality throughout Canada in the law with respect to section 92 subjects as between Indians and non-Indians. The Bill of Rights, therefore, does not demand it. Parliament can create equality in the law in the Territories on all subject matters, but surely the Bill of Rights demands equality throughout the whole of Canada and not just a part of it. But within the area of its jurisdiction, namely, Indians and Indian lands, Parliament can create equality throughout the whole of Canada.

Two conclusions flow from the preceding cogitations. The equality demanded by the Bill of Rights is not equality as between Indians and non-Indians. However, equality between Indians is required. To put these conclusions in another form, one might say that the Bill of Rights requires that in all legislation by Parliament there shall be equality throughout Canada as between all persons to whom Parliament can make the law apply. Thus, in a law in relation to navigation and shipping, a section 91 subject, there must be equality as between all persons. But, in a law in relation to Indians, the only equality demanded in section 92 subjects is equality as between Indians. The result is that legislation under section 91(24) cannot be said to be discriminatory by reason of race; but such legislation must not discriminate as between Indians.

On this line of reasoning, namely, that the equality demanded by the Bill of Rights means equality within the legislative and geographical areas of Parliament's jurisdiction, both the *Drybones* [26] case and the *Lavell* [27] case were wrongly decided. In the *Drybones* case, the inequality in the law was as between Indians and non-Indians in a matter governed by section 92, an inequality outside the scope of the Bill of Rights under the foregoing reasoning. Ironically, the *Drybones* decision itself created inequality in the law as between Indians in the Territories and Indians in the Provinces. The *Lavell* case was right in holding, in effect, that the Bill of Rights did not apply to the Indian Act (a decision seemingly contrary to the *Drybones* case), but

[26] *Id.*
[27] *Supra* note 4.

it could have been held that within the area of Parliament's legislative and geographical jurisdiction, there is discrimination as between Indians on the ground of sex.

There cannot be legislation under section 91(24) without creating a difference in the law as between Indians and non-Indians. If equality is given its broadest meaning, then Parliament has in effect undertaken not to enact any legislation at all under section 91(24) of the B.N.A. Act, unless the declaration required by section 2 of the Bill of Rights is included in every bill—something that hardly seems sensible.

Are there not two possible reasonable constructions of the word "equality"—a restricted or special one and an unrestricted one? It could be said that, since there is nothing in the Bill of Rights to indicate a choice, the second construction is unreasonable as compared to the first and, on normal principles of statutory construction, may therefore be rejected. Or, it could be said that a virtual renunciation of jurisdiction (or an undertaking not to exercise it) is such an enormous change in the law and in our legal and constitutional systems that an intention to make such a change is not to be imputed to Parliament in the absence of clear and express words to that effect. Finally, could it perhaps be said that discrimination between Indians and non-Indians lies in the British North America Act itself, and since that Act is not a law of Canada, discrimination authorized by that Act is outside the scope of the Canadian Bill of Rights.