"Parliamentary sovereignty rests with the courts:" The Constitutional Foundations of J. G. Diefenbaker's *Canadian Bill of Rights*

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Thesis submitted to the
Faculty of Graduate and Postdoctoral Studies
In partial fulfillment of the requirements
For the PhD degree in History

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Abstract

The 1980s witnessed a judicial "rights revolution" in Canada characterized by the Supreme Court of Canada striking down both federal and provincial legislation which violated the rights guaranteed by the 1982 *Charter of Rights*. The lack of a similar judicial "rights revolution" in the wake of the 1960 *Canadian Bill of Rights* has largely been attributed to the structural difference between the two instruments with the latter – as a "mere" statute of the federal parliament – providing little more than a canon of construction and (unlike the *Charter*) not empowering the courts to engage in judicial review of legislation.

Yet this view contrasts starkly with how the *Bill* was portrayed by the Diefenbaker government, which argued that it provided for judicial review and would "prevail" over other federal legislation. Many modern scholars have dismissed the idea that the *Bill* could prevail over other federal statutes as being incompatible with the doctrine of parliamentary sovereignty. That is, a bill of rights could only prevail over legislation if incorporated into the *British North America Act*. As such, they argue that the Diefenbaker government could not have intended the *Bill of Rights* to operate as anything more than a canon of construction.

However, such a view ignores the turbulence in constitutional thinking on parliamentary sovereignty in the 1930s through 1960s provoked by the *Statute of Westminster*. This era produced the doctrine of "self-embracing" sovereignty – in contrast to traditional "Dicey" sovereignty – where parliament could limit itself through "ordinary" legislation. The effective author of the *Canadian Bill of Rights*, Elmer Driedger, was an adherent of this doctrine as well as an advocate of a "purposive"

approach to statutory interpretation. Driedger, thus, drafted the *Bill* based upon the doctrine of self-embracing sovereignty and believed it would enjoy a "purposive" interpretation by the courts, with the *Bill* designed to be as effective at guaranteeing rights as the *Statute of Westminster* was at liberating Canada from Imperial legislation. ♦

Acknowledgements

Most critically, thanks must be extended to my supervisor, Professor Michael Behiels. This project only came into existence because of his advice and encouragement. It began as a summer research projected financed by Dr. Behiels as part of his research into the history of the *Charter* and unexpectedly blossomed into my doctoral dissertation.

As is clear in Chapter Two, a huge intellectual debt is owed to Professor Peter C. Oliver. Dr. Oliver was always extremely supportive of the project and provided advice at critical moments. Dr. Oliver provided crash courses covering unfamiliar legal concepts and conversations with Dr. Oliver broke a number of conceptual blockades that had stalled the project from time to time.

Professor Richard Connors played a similar role in the completion of this dissertation as he did for my previous dissertation. Dr. Connors would always – quickly – answer the often random questions relating to English legal history that I frequently posed to him, sparing me much time and effort.

I would also like to extend a special thanks to Professor Norman Hillmer whose revisions greatly increased the readability of the final version.

As with any project of this scope, the support and encouragement of my friends and family has been indispensable. My parents and brothers cheerfully absorbed my foul moods at the moments when the project stalled, providing an outlet from a wrath that may have otherwise spoiled relationships my friends, colleagues, and academic advisors.

While in Ottawa, I was blessed to have a large group of very supportive friends who provided appropriate distractions when I needed them and generally sought to boost my self-esteem in the more stressful moments. I would particularly like to thank Amy

Gill, Patrick Fournier, and Norah Holt. Amy, as a colleague, frequently acted as a sounding board against which I could develop ideas and, as a friend, ensured that I never became too isolated from the world around me. Patrick acted as the always reliable and diligent friend; mocking my research when appropriate, chauffeuring me around when deadlines had to be met or social events attended, and a reliable life of the party that ensured those social events were always entertaining. Norah must be commended for her curious tolerance of suffering through the most incoherent moments of the projects development. She patiently listened to my random and disjointed rants on various aspects of my research and put my moments of panic into appropriate perspective. She must also be commended for her diligence and patient in editing my introduction and conclusion to make it vastly more readable – despite my attempts to resist almost every word she cut.

Finally, I owe a huge debt of gratitude to the staff of the Library of the Supreme Court of Canada. Every day for a year they welcomed me to the library as I finished my research and wrote my first draft. They were always happy to answer my questions and provided me with essential research advice. Simply put, without the staff and resources of that library, I doubt whether this project could have been completed. ♦

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Introduction

Canada underwent a "rights revolution" in the 1970s and 1980s where "rights talk" became prominent in, and arguably central to, public political discourse. Further, Canada has developed one of the most robust rights regimes in the world – at least in terms of civil and political rights and non-discrimination – and Supreme Court of Canada rulings have become widely cited overseas.[1] This rights revolution and Canada's robust rights regime has been most inspired by and critically supported by the *Charter of Rights*[2] as well as a dynamic Supreme Court that emerged during the era in which the *Charter* was adopted and has been largely sustained since.[3] Although at the pinnacle of Canada's rights regime, the *Charter* is not the sole legal instrument of this regime. Instead, a panoply of instruments constitute Canada's rights regime, including both federal and provincial legislation such as human rights codes (and their attendant Commissions).[4]

One of the most anomalous instruments in Canada's rights regime is the *Canadian Bill of Rights*.[5] Enacted in 1960, it is often referred to as the precursor to the *Charter.*[6] While the enactment of Trudeau's[7] *Charter* as part of the *Constitution Act,*

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[1] T Groppi, "A User-Friendly Court: The Influence of the Supreme Court of Canada Decisions Since 1982 on Court Decision in Other Liberal Democracies," *The Supreme Court Law Review* 36 (2007): 337.
[2] *Canadian Charter of Rights and Freedoms*, 1982, c. 11, schedule B, Part I (UK)
[3] James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: UBC Press, 2005).
[4] E.g. *Canadian Human Rights Act,* SC 1976-77, c.33, s.1
[5] *Canadian Bill of Rights*, SC 1960, c. 44
[6] Thomas R. Berger, *One Man's Justice: a life in the law* (Vancouver: Douglas & McIntyre, 2002), p. 12; Thomas R. Berger, *Fragile freedoms: human rights and dissent in Canada* (Toronto: Irwin, 1982), p. 174; Alan Cairns & Cynthia Williams, *Constitutionalism, Citizenship, and Society in Canada* (Toronto: University of Toronto Press, 1985), p. 100; Joe Sornberger, *Dreams and Due Diligence: Till & McCulloch's Stem Cell Discovery and Legacy* (Toronto: University of Toronto Press, 2011), p. 12;

1982 superseded most of the rights recognized and declared under Diefenbaker's[8] *Bill*, the latter nevertheless remains in force. A national bill of rights was a personal project of Prime Minister J.G. Diefenbaker, who had agitated for a bill of rights of some sort as early as 1946, when he proposed an amendment to Canada's first *Citizenship Act*.[9] Though proclaimed by Diefenbaker at the time of its passage and proudly recounted in his memoirs as one of his most significant achievements,[10] the impact of the *Canadian Bill of Rights* has largely been viewed as disappointing and has only received sparse academic examination.

In contrast with the passage of the *Charter*, the enactment of the *Canadian Bill of Rights* generated only a very modest body of literature that was largely restricted to the pages of legal journals. While the field of legal history has grown considerably in the four decades since R.C.B. Risk lamented that "we know almost nothing about our legal past,"[11] large swathes still resemble a desert at the margins of both the legal and historical disciplines in Canada.

Some interest in the *Canadian Bill of Rights* has been sparked in the last decade with the emergence of a Canadian "human rights historiography" that has sought to chart the impact of social movements on the development of human rights in Canada prior to

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George Williams, *A Bill of Rights for Australia* (Sydney: UNSW Press, 1999), p. 45; John Winterdyk and Georgios Antonopoulos, *Racist victimization: international reflections and perspectives* (Aldershot, England: Ashgate Publishing, 2008), p. 44.

[7] Pierre Elliot Trudeau, Prime Minister of Canada from April 1968 to June 1979 and March 1980 to June 1984.

[8] John G. Diefenbaker, Prime Minister of Canada from June 1957 to April 1963.

[9] *Canadian Citizenship Act*, SC 1946, c.15 (CA).

[10] John G. Diefenbaker, *One Canada: memoirs of the Right Honourable John G. Diefenbaker* vol. 2 *The Years of Achievement, 1957-1962* (Toronto: Macmillan, 1977), pp. 264-265.

[11] R.C.B. Risk, "A Prospectus for Canadian Legal History" (1973) *Dalhousie Law Journal*, vol 1, p. 227.

the *Charter*.[12] However, the focus of these works have not been "upon the particular statute that grew to be the Canadian Bill of Rights; [but instead] upon the course of the bill of rights idea itself,"[13] with little inquiry into the *Bill* as a legal *instrument*. Instead, the *Bill* serves as little more than a punctuation point in the analysis of the broader Canadian human rights movement.

The typical interpretation of the *Canadian Bill of Rights*, reinforced in the recent human rights historiography, dismissed it as *structurally* flawed for never being "constitutionally entrenched" (i.e. never incorporated into the *British North America Act*). Primarily, its *form* as "an ordinary statute of the federal parliament"[14] that could be "repealed at any time," is interpreted to mean that it was destined to "never be effective at all."[15] As a "mere statute"[16] it has been (1) derided as failing to give adequate power to the judiciary to act as a robust guardian of civil liberties and (2) – with its applicability

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[12] Ross Lambertson, *Repression and Resistance: Canadian Human Rights Activists, 1930-1960* (Toronto: University of Toronto Press, 2005) at 3. See also *Carmela Patrias & Ruth A. Frager*, "'This is Our Country, These Are Our Rights': Minorities and the Origins of Ontario's Human Rights Campaigns" (2001) *Canadian Historical Review*, vol 82; George Egerton, "Entering the Age of Human Rights: Religion, Politics, and Canadian Liberalism 1945-1950" (2004) *Canadian Historical Review*, vol 85; Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (Montreal: McGill-Queen's University Press, 2003); Matt James, *Misrecognized Materialists: Social Movements in Canadian Constitutional Politics* (Vancouver: UBC Press, 2006); Carmela Patrias, "Socialists, Jews, and the 1947 Saskatchewan Bill of Rights" (June 2006), *Canadian Historical Review* 87(2):265-292. Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-82* (Vancouver: UBC Press, 2008); and Eric M Adams, *The Idea of Constitutional Rights and the Transformation of Canadian Constitutional Law, 1930-1960*, DJS thesis, Faculty of Law (Toronto: University of Toronto Press, 2009).

[13] Christopher MacLellan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights* (Montreal: McGill-Queen's Press, 2003), p. 5.

[14] Peter Hogg, *Constitutional Law of Canada*, 5th Edition (Toronto: Thompson, 2007), c.35.1, vol II, pp. 35.1.

[15] Hogg (2007), c.35.1, II: 35-1.

[16] E. D. Fulton (Minister of Justice) in *House of Commons Debates*, 24th Parl, 3rd Sess (1960), vol 6, p. 5885 (7 July 1960). [*Debates* 24-3, VI:5885]

exclusively to federal statutes – mocked as wonderful protection for human rights in Canada, "so long as you don't live in one of the provinces."[17]

The most commonly cited reasons, both contemporaneously[18] and subsequently,[19] as to why the Diefenbaker government avoided the route of an amendment to the *British North America Act* was that it believed that "the provinces would not agree to the adoption of a bill of rights which was applicable to them" and that "the government was reluctant to resort to the anachronistic procedure" of requesting the UK Parliament to amend the *British North America Act*[20] Yet, there has been no empirical account of the Diefenbaker government's *constitutional* justification for rejecting an amendment to the *British North America Act* to include a bill of rights. The inadequacy of the most commonly put forward arguments – of the need for provincial consent and the displeasure at using the "anachronism" of the UK Parliament for amendments to the *British North America Act* – are untenable from an examination of the context in which the *Canadian Bill of Rights* was passed and the early scholarship on the subject. In the scholarship and jurisprudence that does exist on the subject, little effort has been undertaken to determine how the *Canadian Bill of Rights* was understood by those ultimately responsible for its drafting – the senior members of the Department of Justice – and hence the meaning of the terms used therein and the Bill's internal logic as designed by its ultimate framers.

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[17] Michael Bliss, *Right Honourable Men: The Descent of Canadian Politics from Macdonald to Chrétien* (Toronto: HarperCollins Publishers, 1994).
[18] Walter Surma Tarnopolsky, "The Canadian Bill of Rights," unpublished LLM thesis (London, ON: University of Western Ontario, 1962).
[19] Walter Surma Tarnopolsky, *The Canadian Bill of Rights*, 2nd rev. ed. (Toronto: McClelland and Stewart, 1975), pp. 88-92; Hogg (2007), c.35.1, II:35-1.
[20] Hogg (2007), c.35.1, II:35-1.

THE CONSTITUTIONAL FOUNDATIONS OF CANADA'S *BILL OF RIGHTS*

The recent literature on the *Canadian Bill of Rights* attributes the emergence, form, structure, and language of the *Bill* to a sorry compromise between human rights activists agitating for a constitutionally-entrenched bill of rights and political and bureaucratic elites who rejected any limits on parliamentary sovereignty and thus judicial review based on a bill of rights. This contention fails to account for the explicit claims by the Diefenbaker government that the *Canadian Bill of Rights* would provide for judicial review and robust guarantees for civil liberties. In contrast, this dissertation challenges the prevailing view through a vigorous examination of the manner in which the Diefenbaker government *constitutionally justified* how a purely statutory bill of rights confined to federal jurisdiction would provide for judicial review and robust guarantees for civil liberties.

As such, this dissertation focuses on the gestation of the *Canadian Bill of Rights* in the Department of Justice from 1957 to 1960, and contends that the justification for the form, structure, and language of the *Canadian Bill of Rights* emerged primarily from the head of the Department of Justice's legislative section, Assistant Deputy Minister Elmer A. Driedger. Driedger's constitutional premises for a bill of rights rejected those of the grassroots activists for a bill of rights. Driedger's views were not merely accepted by the Deputy Minister of Justice and Cabinet, but were championed by the Minister of Justice. Thus the drafting of the *Canadian Bill of Rights* was almost exclusively an elite process which came to reject outside criticism of its proposed form and structure as "frivolous."

The Diefenbaker government resisted calls for the *Canadian Bill of Rights* to be promulgated as an amendment to the *British North America Act.* Instead, it chose to

employ a purely federal statutory instrument for a bill of rights while contending that it nevertheless provided for judicial review and robust guarantees for civil liberties. The Diefenbaker government did so because of how the Department of Justice (chiefly Elmer A. Driedger) conceptualized the constitution of Canada and, particularly, the sovereignty of Parliament. The basis for this was the belief (1) that civil liberties fell largely or exclusively within federal jurisdiction and (2) that it was *impossible* to further entrench anything that affected the sovereignty of parliament without first creating a wholly domestic amending mechanism for restricting or modifying the powers of parliament and the legislatures. Thus, for Elmer Driedger – and, in turn, the Diefenbaker government – a bill of rights promulgated as a standalone Act of the Parliament of Canada was understood as equally "constitutional" as an amendment to the *British North America Act*, yet in a more appropriate and *effective* form.

HISTORIOGRAPHY: MISCONCEIVED, MISINTERPRETED, MYSTIFIED

The literature related to the *Canadian Bill of Rights* is most notable for its paucity. Despite being viewed by Diefenbaker as one of the greatest accomplishments of his Premiership, [21] the *Canadian Bill of Rights* has only received sparse academic examination. In stark contrast to the *Canadian Charter of Rights and Freedoms*, there has been no published substantive effort to examine the origins and intent of the *Canadian Bill of Rights*,[22] there is only a single book-length monograph dedicated to the

[21] John G. Diefenbaker, *One Canada: memoirs of the Right Honourable John G. Diefenbaker – Vol 3: The Tumultuous Years, 1962-1967* (Toronto: Macmillan, 1977), pp. 264-265.

[22] The notable exception to this is an MA thesis, Robert M. Belliveau, *Mr. Diefenbaker, Parliamentary Democracy, and the Canadian Bill of Rights*, MA thesis, Department of Political Studies (Saskatoon: University of Saskatchewan, 1992).

Canadian Bill of Rights,[23] and there are only a handful of other sources that directly deal with it.

This is most remarkable in the biographical literature on Diefenbaker and the political histories of the Diefenbaker government. Despite arguing that "Diefenbaker viewed the Canadian Bill of Rights as his government's *most important piece of legislation,"*[24] Robert Plamondon devotes only a single short paragraph to that piece of legislation. While the authoritative biography by Denis Smith[25] is better,[26] he, too, makes no effort to probe Diefenbaker's understanding of the effect of the instrument, concluding that it was no more than "declaratory" like the "Universal Declaration of Human Rights."[27] Political histories examining the Diefenbaker era (already a relatively neglected period in Canadian history),[28] too, take a similar approach and eschew any examination of how Diefenbaker and his government understood the *Bill's* intended effect or constitutional functioning.[29]

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[23] Walter Surma Tarnopolsky, *The Canadian Bill of Rights* (Toronto: Carswell, 1966); republished in 1978 (Toronto: McClelland and Stewart); originally compiled as an LLM thesis in 1962 at the University of Western Ontario.

[24] Robert E. Plamondon, *Blue Thunder* (Toronto: Key Porter, 2009), p. 238. Emphasis mine.

[25] Denis Smith, *Rogue Tory: The Life and Legend of John G. Diefenbaker* (Toronto: Macfarlane Walter & Ross, 1995).

[26] Smith (1995), pp. 341-347.

[27] Smith (1995), p. 344.

[28] Patricia McMahon, *Essence of Indecision: Diefenbaker's nuclear policy, 1957-1963* (Montreal: McGill-Queen's University Press, 2009), pp. xii-xiii.

[29] Robert Bothwell, *Canada since 1945: power, politics, and provincialism* (Toronto: University of Toronto Press, 1981), pp 202-203; John English, *Years of growth, 1948-1967* (Toronto: Grolier, 1986), pp. 68-69; *J. L. Granatstein, Canada 1957-1967: the years of uncertainty and innovation* (Toronto: McClelland and Stewart, 1986), pp 40-41. Instructively, Bothwell's book, published prior to the *Charter*, notes that the "the bill was so drafted as to give it a certain primacy over other laws;" while Granatstein's book, published after the first leading *Charter* cases, describes the *Bill* as no more than a "declaration of principles."

This leaves little scholarship in which to root an analysis of the *Canadian Bill of Rights* as an instrument. What does exist is to be found in the legal literature on rights instruments and social history literature on human rights movements and activists. In the case of the legal literature, consideration of the *Canadian Bill of Rights* largely ceased in the 1980s after the advent of the *Charter* without ever having the benefit of being able to examine the Department of Justice files on the matter. The social history literature, in contrast, is a post-*Charter* development, that has only recently begun to blossom.

PRE-HISTORIOGRAPHY: THE 1959 CANADIAN BAR REVIEW

The *Canadian Bill of Rights* is unusual in that the literature examining it arguably began nearly two years prior to its enactment. A draft version of the *Canadian Bill of Rights*, Bill C-60, was tabled in Parliament nearly two years before it was finally enacted[30] provoking a special edition of the *Canadian Bar Review* dedicated exclusively to the proposed bill.[31] All but one of the contributors at that time were Canadian law professors and most were either mid-career (typically in their forties) or else younger with already prodigious careers. Thus, they were already respected legal scholars of similar authority, but whose more notable contributions were in the future.[32] While the

[30] In September 1958, the Diefenbaker government introduced Bill C-60, the *Canadian Bill of Rights*, late in the session for the express purpose of allowing the proposed legislation to die on the order paper therefore allowing for consideration by the public and allow for representations. This was typical for major and groundbreaking pieces of legislation including the *Income Tax Act*, the *Criminal Code*, the *Indian Act*, and *Food and Drugs Act*. (E.A. Driedger, "The Preparation of Legislation," *Canadian Bar Review* 31, no 1 (1953): 33-49.

[31] *Canadian Bar Review* 37, no 1 (March 1959).

[32] A. G. Donaldson a Parliamentary Draftsman to the Government of Northern Ireland. O. E. Lang (b. 1932) was a Rhodes Scholar at 21 and was appointed professor before he was 25, he would go on to become Dean of the Saskatchewan Faculty of Law prior to his 30th birthday. Edward McWhinney (b. 1924), had already published a monograph

general consensus of these scholars at the time held that a statutory bill of rights would enable judicial review, recent scholarship has tended to rely on the dissenting views of those who rejected the possibility of judicial review[33] (despite the fact that all of those dissenters later changed their minds).

MISCONCEIVED: THE 1960S

The only published monograph dedicated to examining the *Canadian Bill of Rights* appeared very shortly after the *Bill's* enactment, Walter Tarnopolsky's *The Canadian Bill of Rights*.[34] Its attempt to explain "why the government decided to enact what has been called 'a simple statute' rather than to seek amendment to the BNA Act"[35] is relatively brief.[36] Tarnopolsky reckons that "Mr. Fulton's arguments that the Bill of Rights is a constitutional statute even though not a part of the BNA Act *seem so obviously correct that there is no purpose in belabouring the issue*."[37] Although this

(*Judicial Review*, 1956) in addition to literally dozens of articles or book chapters by March of 1958 while being a visiting scholar in countries as diverse as India and Germany. Given his stature in the field, F.R. Scott's analysis of the issue would have been viewed as being of particularly authoritative to the typical audience of the *Canadian Bar Review*.

[33] Current scholarship tends to invoke this edition of the *Canadian Bar Review* to illustrate that at the time of the *Canadian Bill of Rights*'s passage it was generally condemned as being a mere canon of interpretation and could not be used as a tool for judicial review of federal legislation, typically drawing particular attention to Laskin's stark and colourful condemnation of the *Canadian Bill of Rights*. For example, Belliveau (1992), p. 63; MacLennan (1998), p. 118; MacLennan (2003), pp. 130, 158; Lambertson (2005), p. 370; Adams (2009), p. 252.

[34] Tarnopolsky (1966).The book was based upon Tarnopolsky's 1962 LLM thesis, and went through two published editions, the first in 1966 and the second in 1975.

[35] Tarnopolsky (1966), p. 62.

[36] Tarnopolsky (1966), pp. 63-64.

[37] Tarnopolsky (1966), p. 65. Emphasis mine.

work remains the main commentary on the terms of the *Canadian Bill of Rights*,[38] its exploration of the drafting background to the *Bill* and the meaning the terms held to its principal formal authors[39] has been rarely cited in recent years with modern scholars neither accepting nor refuting Tarnopolsky's analysis.

Generally, the academic literature from the 1960s similarly assumes that the *Canadian Bill of Rights* was intended to enable judicial review, but the courts had avoided applying it. While this provoked some to advocate for constitutional entrenchment as the solution,[40] such a response was not yet overwhelming. Instead, many – including advocates of entrenchment[41] – argued that the problem was judicial and

[38] For example, in Hogg (2007), it is the only academic commentary repeatedly cited in the chapter, "Canadian Bill of Rights" (chapter 35), at footnotes 2, 4, 39, 47. Only two other authors are cited separately: at footnote 63, Peter Russell "A Democratic Approach to Civil Liberties" (1969) *University of Toronto Law Journal* 19:109, 125-126; and D. M. Gordon "The Canadian Bill of Rights" (1961) *Canadian Bar Journal* 4:431-441, 457. The central importance of Tarnopolsky's work is reinforced by the almost laughable article by Gordon which notes – in all seriousness – that "there seems to be little doubt that the primary cause of the Bill was the possibility of a communist (or even a socialist) government's coming into power, and of its hastily passing drastic legislation that could do irreparable damage."

[39] Tarnopolsky (1966) pp. 60-66; Tarnopolsky (1975) pp. 87-92

[40] Most notably Pierre Trudeau's 1965 essay "Quebec and the Constitutional Problem" available in *Against the Current* (McClelland and Stewart Toronto 1996), pp. 219-28.

[41] See Bora Laskin, "Case Comment: Robertson and Rosetanni v. The Queen," *Canadian Bar Review* 42, no 1 (1964), pp. 147-156. Laskin argues that despite the Supreme Court's nominal embracing judicial review, the Supreme Court was set to adopt extremely feeble definitions of rights, "the majority at once accepts the application of the Bill of Rights in general and rejects it in the particular" (p. 148). Laskin notes that in *Robertson* the Majority had effectively distinguished between "establishment of religion" and "abridgement of the free exercise of religion" and only found the latter to be a violation of freedom of religion, ignoring, to his great consternation, the "pre-Confederation Act of 1852 declaring that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference [...] is [...] allowed to all Her Majesty's subjects [...]".) [*Rectories Act*, 1851, c. 175; available in RSC 1859, c. 74] (p. 149).

not legislative or constitutional:[42]

> *Yet, politically the Canadian Bill of Rights is not the sort of statute that any parliamentary body could easily change or repeal, though it takes the form of an ordinary statute. So long as it is in the statute book, it confers on Canadian judges important opportunities to strike down Canadian laws inconsistent with the liberties of the subject thus statutorily declared – opportunities that are very much like those possessed by America judges. Hence Canadian judges, if they chose to be bold about it, may now assert a good deal more influence and power in the field of civil liberties than English judges do.*[43]

MISINTERPRETED: THE 1970S

Drybones[44] seemed to portend at the time a radical change to Canada's academic and legal landscape with the Supreme Court of Canada's explicit affirmation of judicial review based on the *Canadian Bill of Rights*. The initial response to *Drybones* was cautious optimism with a massive upswing of *Canadian Bill of Rights* litigation.[45] For example, Tarnopolsky optimistically mused[46] that *Drybones* could also mark a reversal of

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[42] Such advocates included W. S. Tarnopolsky, Ivan Rand (1961), Kennenth Lysyk (165 and 1968), and (the now converted) W. R. Lederman (1966). This scholarship was also aided by scholars in the United Kingdom who equally wished for judicial review of legislation on the basis of human rights and made similar arguments to Canadian scholars, with constitutional scholar J.D.B. Mitchell (1963) being the most oft-cited.

[43] W.R. Lederman, "The Process of Constitutional Amendment for Canada," (1966) *McGill Law Journal* 12:371.

[44] *R v Drybones*, [1970] SCR 282 (SCC)

[45] Whereas cases citing the *Canadian Bill of Rights* began with a high of twenty references in 1961, slowly decreasing to an average of eight per year for the period from 1966 to 1969, there was an immediate five-fold increase in references to the *Canadian Bill of Rights Act* by Canadian courts in the year following *Drybones* and references averaged sixty-four cases per year for the decade from 1972 to 1981. Although the peak in references to the *Canadian Bill of Rights* would only come with the passage of the *Charter*, averaging over one-hundred-forty cases per year for the half-decade from 1982 to 1986. This probably had much to do with a massive increase in *Charter* litigation and courts evaluating the *Canadian Bill of Rights* jurisprudence. After the peak in the mid-1980s, references to the *Canadian Bill of Rights Act* has declined to an average of approximately forty per year for the period since 1994.

[46] Walter Surma Tarnopolsky, "The Canadian Bill of Rights From Diefenbaker to Drybones," *McGill Law Journal* 17, no 3 (1971), pp. 437-475.

the narrow meanings ascribed to the *Bill's* rights guarantees by the Supreme Court in the 1960s and mark a general shift of the Supreme Court to becoming a robust defender of civil liberties.[47]

This optimism was quickly deflated by the Supreme Court's 1973 ruling in *Lavell*.[48] While reaffirming the principle of judicial review based on the *Canadian Bill of Rights,* the Supreme Court of Canada, facing issues similar to *Drybones*,[49] deviated so sharply from *Drybones* as to effectively repudiate it. In the late 1970s, a majority of the Supreme Court applied narrow interpretations to the rights guaranteed by the *Canadian Bill of Rights* ensuring that the power of judicial review was rendered functionally moot, if not ever formally repudiated.[50]

As a consequence, the academic tenor towards the *Canadian Bill of Rights* in the 1970s was marked by a general acceptance that the instrument had been intended to enable judicial review, but the courts had failed to embrace that role.[51] As such, a number of scholars of that era[52] (and even Diefenbaker)[53] raised the alarm that extension

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[47] Tarnopolsky noted that along with the Supreme Court's ruling in *Drybones*, Parliament had seemingly affirmed the pre-eminence of the *Canadian Bill of Rights* with its invocation of that Act's *non obstante* clause in the *Public Order (Temporary Measures) Act, 1970, c. 2, s. 12*, and the broad interpretation ascribed to the term "detain" in the *Canadian Bill of Rights* in *R v Viens*, (1970), 10 CRNS 363 (ON PC).

[48] *Lavell v Canada (Attorney General)*, [1974] SCR 1349.

[49] At issue in *Drybones* was the inequality in sanctions for public intoxication against an Indian and a non-Indian. At issue in *Lavell* was the inequality in rights according to male and female Indians.

[50] Further, the Supreme Court of Canada reversed the logic of Justice Ivan Rand, where the *exclusive* criminal law nature of civil liberties was emphasized, in favour of recognizing a concurrent property and civil rights aspect to civil liberties in *Attorney-General for Canada and Dupond v Montreal*, [1978] 2 SCR 770.

[51] See, for example, Hovius (1982), p. 45; LaSelva (1983), pp. 392-393; McConnell (1977), p. 430; Strayer (1983), p. 34; Tarnopolsky (1976); p. 58.

[52] Walter Surma Tarnopolsky, "A New Bill of Rights in the Light of the Interpretation of the Present One by the Supreme Court of Canada," in *Special Lectures of the Law Society*

to provincial jurisdiction and entrenchment by themselves may not be enough. For them, the problem rested with a conservative judiciary supported by "a swing back to a more cautious, right-wing viewpoint on the part of Canadian society."[54] This development prompted some civil libertarians to argue that judicial review was seemingly weakening rights guarantees and, therefore, entrenchment should be avoided so as not to impose contemporaneous rights conservatism on future generations:

> *It has been the history of entrenched bills of rights that the courts have distorted the language of such a bill to give it entirely different meanings. [...] Those who favour entrenchment seem to have an idea that they would get better decisions from the courts if rights were entrenched. Time and again it has been said that the way the Supreme Court of Canada has dealt with cases arising under the Bill of Rights has been unsatisfactory. It would be that much worse if they were entrenched, because if the Bill of Rights is not entrenched and not satisfactory, amend it and get it right. But you then have the guidance of what the court has held it does not apply to. If it is in the public interest to correct the court's decision, that can be done by Parliament or the legislature.*[55]

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of Upper Canada 1978: The Constitution and the Future of Canada (Toronto: The Law Society of Upper Canada, 1978); Thomas R Berger, "The Supreme Court and Fundamental Freedoms: The Renunciation of the Legacy of Mr. Justice Rand," *Supreme Court Law Review* 1 (1980): 460-467; W R Lederman, "Mr Justice Rand and Canada's Federal Constitution"," University of Western Ontario Law Review 18 (1980): 31; Doris Anderson, "The Supreme Court and Women's Rights," Supreme Court Law Review 1 (1980): 459; Berend Hovius and Robert Martin, "The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada," *Canadian Bar Review* 61, no 1 (1983): 354-376; Samel V LaSelva, "'Only in Canada': Reflections on the Charter's Notwithstanding Clause," *Dalhousie Review* 63, no 3 (1983): 383-398.

[53] Diefenbaker (1976), p. 219.

[54] Doris Anderson, "The Supreme Court and Women's Rights," *Supreme Court Law Review* 1 (1980), p. 459.

[55] James McRuer in Canada, Parliament, Senate, Special Committee on the Constitution, *Proceedings of the Special Senate Committee on the Constitution* (Ottawa: Queen's Printer, 1978), no 6, pp 28-30. James "Jim" McRuer, Prominent civil liberties advocate and law reformer. He was appointed as Chief Justice of the High Court of Ontario (the second ranking Judge in Ontario) in December 1945. Upon retirement from the bench in 1964, he served as Chairman of the Ontario Law Reform Commission until 1966 and Vice-Chairman until 1977. He also headed Ontario's lengthy (1964-1971) Royal Commission Inquiry into Civil Rights.

THE 'OFFICIAL' HISTORY: THE 1980S TO THE PRESENT

With the enactment of the *Charter* in 1982, scholarship on the *Canadian Bill of Rights* began to disappear. What little scholarship that did appear (such as that of Berend Hovius and Robert Martin's general analysis of *Canadian Bill of Rights* jurisprudence) cautioned that "there is nothing in the language or structure of the Charter which will require the Supreme Court of Canada to renounce the restraint which characterised its approach to the Canadian Bill of Rights,"[56] citing a 1976 Privy Council decision on an entrenched bill of rights, *Antigua Times*,[57] that held

> *the proper approach to the question is to presume, until the contrary appears or is shown, that all acts passed by the Parliament of Antigua were reasonably required.*[58]

This was a minority view, with most legal scholars choosing to analyze the *Charter* without reference to the *Canadian Bill of Rights*. Instead, the "scholarly" analysis of the *Bill* only persisted in its treatment by the Supreme Court of Canada.

The Supreme Court of Canada's 1980s Rights Revolution

For most of the twentieth century, Canadian courts were highly reticent in accepting extrinsic evidence in interpreting statutes, particularly in the case of parliamentary debates. However, such references became ubiquitous and regularized in

[56] Berend Hovius and Robert Martin, "The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada," *Canadian Bar Review* 61, no 1 (1983), p. 364.
[57] *Attorney General v Antigua Times Ltd*, [1976] AC 16 (PC)
[58] *Antigua Times* per Lord Fraser of Tullybelton at 32

the 1980s[59] and thus court rulings often provide a sort of 'official history,' endowing certain historical interpretations and narratives with the authority of the court.

Beginning with *Skapinker*[60] in 1984, the Supreme Court of Canada progressively exposited an 'official history' of the *Canadian Bill of Rights* that portrayed it as a "mere" statute unable to empower the courts to engage in judicial review. This view was given its most powerful exposition by Justice Le Dain in *Therens:*

> *In considering the relationship of a decision under the Canadian Bill of Rights to an issue arising under the Charter, a court cannot, in my respectful opinion, avoid bearing in mind an evident fact of Canadian judicial history, which must be squarely and frankly faced: that on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of* ***the Canadian Bill of Rights*** *because it* ***did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament****.*[61]

This view was not immediately embraced by the entirety of the Supreme Court, with Justice Beetz continuing to assert the *Bill's* "constitutional mandate" to prevail over other legislation (and impliedly asserting the applicability of the 1970s rights jurisprudence to the *Charter*). However, by *Cornell*[62] in 1988, Beetz deferred to the wisdom of his colleagues and embraced the reasoning of Le Dain in *Therens*. While no historian would accept such an interpretation as definitive, in relation to legal history it has been strongly pervasive and has come to permeate legal and academic opinion on the *Canadian Bill of Rights* ever since.

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[59] The acceptance of an extremely wide variety of extrinsic evidence in interpreting statutes and other instruments began, in earnest, with the *Inflation Reference* and then, audaciously, in the *Patriation Reference*.
[60] *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357
[61] *R v Therens*, [1985] 1 SCR 613 per Le Dain at 638(¶44). [Emphasis mine.]
[62] *R v Cornell*, [1988] 1 SCR 461.

The New Orthodoxy

The impact of the Supreme Court of Canada's rights revolution of the 1980s was immense and radically reshaped popular and academic opinion on the effectiveness of constitutional entrenchment of a bill of rights. Whereas there had been a considerable body of scholarship since the advent of the *Bill* that disclaimed the need or positive effect of entrenchment, such views had disappeared by the end of the 1980s. Instead, post-*Charter* conventional wisdom holds that not only was the *Bill's* lack of entrenchment the cause of its relative weakness, but "indeed, there was little dispute from the time Diefenbaker first introduced his bill that it was symbolic but not much else."[63]

This view has persisted uninterrupted to this day. In the literature of the past two decades – popular, historical and social scientific, and legal – which comments on the *Canadian Bill of Rights*, its intended nature is a settled fact. For example, in Plamondon's mass market history, he concludes his brief treatment of Diefenbaker's Bill of Rights with "Diefenbaker saw the bill as an expression of Canadian values, rather than a raw legal instrument."[64] Matt James, a sociologist, succinctly concludes:

> *Animated by a [bill of rights] vision that was primarily symbolic rather than legal, Diefenbaker's Progressive Conservatives found it unnecessary to explore the possibility of constitutionally entrenching the 1960 Canadian Bill of Rights. They were certainly not interested in helping would-be citizen litigants attack the short comings of a hortatory statement that would have only the force of an ordinary statute.*[65]

Even Peter Hogg, probably the foremost legal scholar on the constitution of Canada, has expressed a similar view:

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[63] William Kaplan, *State and Salavation: The Jehovah's Witnesses and Their Fight for Civil Rights* (Toronto: University of Toronto Press, 1989), p. 267.
[64] Plamondon (2009), p. 238.
[65] Matt James, *Misrecognized Materialists: Social Movements in Canadian Constitutional Politics* (Vancouver: UBC Press, 2006), p. 53

> [*The Canadian Bill of Rights*] *was enacted as an ordinary statute of the federal Parliament, and it was made applicable only to federal laws. Apparently the government was reluctant to resort to the anachronistic procedure for amending the Constitution, and was convinced that the provinces would not agree to the adoption of a bill of rights which was applicable to them. However, the failure to entrench the Bill of Rights by constitutional amendment meant that it could be amended or repealed at any time by the federal Parliament, and raised the question whether it could be effective at all.*[66]

Dissent from this view is now almost non-existent.

PARLIAMENTARY SOVEREIGNTY REVISITED: THE 1990S

While more recent scholarship focuses upon Diefenbaker's references to the *Bill's* symbolic value and overlooks his (and his Justice Minister's) claims that the *Canadian Bill of Rights* was designed to have prevailing force against other legislation, this contradiction was not always overlooked at the beginning of the 1990s. Instead, some have attempted to reconcile it by arguing that the claims of "constitutionality" were dishonest. William Kaplan was particularly harsh on Diefenbaker, arguing that Diefenbaker "had an immense capacity for self-deception combined with an attraction for the bandwagon" and concluding that "there was little to his professed civil-liberties beliefs" such that "Diefenbaker's bill of rights must be judged a fraud." [67]

Robert Belliveau similarly addressed this seeming contradiction and similarly concluded that Diefenbaker's claim of the prevailing force of his bill of rights was dishonest. However, Belliveau did not embrace the idea that Diefenbaker's long advocacy for civil liberties was fraudulent and instead sought to reconcile Diefenbaker's advocacy for civil liberties with his enactment of a merely "declaratory" statute.

[66] Hogg (2007), c.35.1, II:35-1 - 35-2.
[67] Kaplan (1989), p. 268.

Belliveau finds his answer "by examining the convictions and characteristics of Diefenbaker's political thought" [68] and concludes that the *Bill*'s form can be understood as a reflection of Diefenbaker's views on parliamentary sovereignty. In brief, Belliveau argued that Diefenbaker, notwithstanding his sincere advocacy for civil liberties guarantees, pursued a purely "declaratory" bill of rights because of an unwavering commitment to "parliamentary sovereignty" and sought to strengthen parliament at the expense of both the executive and the judiciary:

> *Diefenbaker never had any intention of legally binding Parliament, but rather sought to ensure that future parliaments would be politically, and perhaps morally, bound by civil liberties legislation.*[69]

Belliveau's scholarship can be seen as part of a transnational body of literature in the 1990s examining the competing supremacy of parliaments and courts,[70] provoked by the ideological competition between the relative value of majoritarian and minority rights. In Canada, it was stimulated by the "Charter Revolution" of the 1980s,[71] but it also had parallels in the reactions to the 1990 European Court of Justice's assertion of supremacy over the British Parliament in *Factortame*[72] and the emergence of an "implied

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[68] Robert M Belliveau, "Diefenbaker, Parliamentary Democracy, and the Canadian Bill of Rights," in *Diefenbaker legacy: Canadian politics, law, and society since 1957, ed. Donald C Story and R Bruce* Shepard (Regina: Canadian Plains Research Center, 1998), p 100.

[69] Belliveau (1998), p. 101.

[70] The best example of this, as an apology for Parliamentary Sovereignty, is Jeff Goldsworthy, *The Sovereignty of Parliament* (Oxford: Oxford University Press, 1999).

[71] F L Morton, "The Charter Revolution and the Court Party," in *Impact of the Charter on the Public Policy Process*, ed. Patrick Monahan and Marie Finkelstein (Toronto: York University Centre for Public Law and Public Policy, 1993); F L Morton and Rainer Knopff, *The Charter Revolution & The Court Party* (Peterborough ON: Broadview Press, 2000).

[72] R v *Secretary of State for Transport, ex parte Factorame Ltd*, [1990] EUECJ-213/89 (E.C.J.), [1990] UKHL 7 (U.K.H.L.)

bill of rights" in the early 1990s in Australia.[73] In essence, Belliveau portrayed the 1950s debate over the *Canadian Bill of Rights* in terms of the 1990s debates over majoritarian and minority rights.[74]

A CANADIAN HUMAN RIGHTS HISTORIOGRAPHY: THE 2000S

The last decade appears to have resulted in a renewed interest in the *Canadian Bill of Rights* with the recent publication of Christopher MacLennan's *Toward the Charter*[75] and Ross Lambertson's *Repression and Resistance,*[76] as well as Eric Adams's *The Idea of Constitutional Rights*.[77] Despite their subtitles, these works treat the *Canadian Bill of Rights* more as a convenient milestone and less as an object of analysis. Instead, they represent the blossoming of the field of the history of social movement organisations in Canada including Matt James's *Misrecognized Materialists*[78] and Dominique Clement's *Canada's Rights Revolution*[79] (though neither of these latter works contains any significant treatment of the *Canadian Bill of Rights*).[80]

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[73] Jason L. Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Durham, NC: Carolina Academic Press, 2006), pp. 157-161.
[74] See *F.L. Morton and Rainer Knopff, The Charter Revolution & The Court Party* (Peterborough ON: Broadview Press, 2000).
[75] Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights* (Montréal: McGill-Queen's University Press, 2003).
[76] Ross Lambertson, *Repression and Resistance: Canadian human rights activists,1930-1960* (Toronto: University of Toronto Press, 2005),
[77] Eric M Adams, "The Idea of Constitutional Rights and the Transformation of Canadian Constitutional Law, 1930-1960," DJS thesis, Faculty of Law (Toronto: University of Toronto Press, 2009).
[78] James (2006)
[79] Dominique Clément, *Canada's Rights Revolution: social movements and social change, 1937-82* (Vancouver: UBC Press, 2008).
[80] James's work seeks to provide an overarching analysis from the Depression until the Charlottetown Accord (1992) but only devotes less than a page to Diefenbaker's Bill of Rights. Despite its grand title, Clement's work is largely a series of case studies of particular human rights organisations in the 1960s and 1970s rooted in an overarching

The recent expansion[81] of this new "human rights historiography" – including MacLennan, Lambertson, James, and Clement – is an outgrowth of the 1990s political science scholarship on majoritarian and minority rights that seeks out the historical antecedents (and sometimes purported analogs) of those debates. The scholarship of McLennan, Lambertson, and Adams is excellent at examining the history and thinking of human rights activists in the 1930s, 1940s, and 1950s, and provides much of the context upon which this dissertation relies. However, these works dedicate much less analysis of the Diefenbaker bill of rights than one would expect given that they portray the *Bill* as the fruit of the human rights movement they analyze. Instead, the focus of these works has not been "upon the particular statute that grew to be the Canadian Bill of Rights; [but instead] upon the course of the bill of rights *idea* itself."[82] The authors focus on the grassroots human rights activist of the 1930s and 1940s with the Diefenbaker bill of rights employed as a tidy book-end. As part of their analysis, these authors embrace the pervasive assumption that the Diefenbaker bill of rights was never intended to provide for

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theoretical framework rather than a comprehensive analysis of the human rights movement in that period and it dispenses with the *Canadian Bill of Rights* in less than two pages with the explanation that opposition to the *Bill* was "rooted in a reverence for Parliamentary Supremacy" and only cites A.V. Dicey as an authority for such a claim, without citing any contemporaneous and subsequent authority for such a claim (pp. 19-20).

[81] This is not wholly new ground. Historical analysis of the labour movement of this era had developed in the 1970s, particularly in the scholarship of Irving Abella (1973, 1974, 1975) The 1970s also saw the publication of Ken Adachi's (1976) history of the persecution of Japanese Canadians during and after the Second World War. Yet, this analysis, along with William Kaplan's (1989) history of the persecution of Jehovah's Witnesses existed as rather lonely tomes on minority persecution of that era, and it has only been in the last decade that comprehensive analysis of the human rights activist movement has appeared.

[82] MacLennan (2003), p. 5.

judicial review with no effort made to understand the 'elite' drafted *Canadian Bill of Rights* on the terms understood by those elites.

CONCLUSION

When the *Canadian Bill of Rights* was first mooted in the late 1950s its progenitors and advocates stated that it would provide for judicial review of other federal legislation and that it would broadly protect civil liberties as then-recent Supreme Court jurisprudence had indicated exclusive federal jurisdiction over civil liberties. While at the time two scholars fiercely dissented from this view, most accepted the former assertion while cautioning that the latter assertion had only begun to be litigated.

For most of the 1960s and 1970s, scholarship on the *Canadian Bill of Rights* generally argued that the Diefenbaker government's original assertions had proved correct, but that most of the value of the *Canadian Bill of Rights* had been gutted by extremely narrow definitions given to its guarantees by the courts. For some, this illustrated the inutility of any bill of rights and even augured against entrenchment. However, for a growing number it emphasized the importance of entrenching a bill of rights into the constitution applicable to both orders of government, particularly in light of *Dupond*.[83]

This latter view held that entrenchment now offered the only route to secure robust judicial review in Canada. Entrenchment would not only eliminate the potential of explicit parliamentary derogation from (or repeal of) a bill of rights and extend guarantees to provincial jurisdiction, but it would also provide the opportunity to redraft some of the language in the bill of rights. Entrenchment and new language, it was

[83] *Canada (Attorney-General) and Dupond v Montreal*, [1978] 2 SCR 770.

argued, would reverse the courts' narrow interpretation of rights guarantees by tightening the language to reduce the courts' ability to ignore a bill of rights and by powerfully signaling that they were to no longer so readily defer to legislatures.

When a constitutionally-entrenched bill of rights finally arrived in 1982 in the form of the *Charter*, some scholars cautioned that it could prove little more effective than the *Canadian Bill of Rights*, but most focused their efforts on ensuring that it became effective. The Supreme Court of Canada obliged and made robust use of the *Charter* to make the judiciary a central focus of rights-seekers.[84] As a result *Canadian Bill of Rights* scholarship largely ceased for most of the 1980s and it came to appear, helped by Supreme Court of Canada reasonings, that it was the lack of *entrenchment* that had made the *Bill* ineffective. Although this contradicted the scholarship of the 1960s and 1970s, this view became pervasive and most scholarship has come to assume that the defect with that instrument was its failure to be incorporated in the *British North America Act* and not broader issues such as the composition of the judiciary and curial access by individual rights seekers.

For more than two decades the *Canadian Bill of Rights* has been portrayed as intending to provide no more than a pious statement of rights in what was a sorry compromise between grassroots activist demands for a constitutionally-entrenched bill of rights and elite opposition to any change to the constitutional status quo. The assumption well serves the narratives and methodology of the recent literature examining the human rights activists of the 1930s, 1940s, 1950s fighting against civil liberties abuses and

[84] Michael D. Behiels, *Canada's Francophone Minority Communities: constitutional renewal and the wining of school governance* (Montreal: McGill-Queen's University Press, 2004).

minority persecution. Assuming that the *Canadian Bill of Rights* was never intended to have constitutional effect justifies a methodological approach that allows one to limit their inquiry to a more cohesive group of human rights activists: those who advocated for the incorporation of a bill of rights into *British North America Act* by the Westminster Parliament. By assuming that the *Canadian Bill of Rights* was only a pious declaration, all opposition to incorporation of a bill of rights into the *British North America Act* can be homogenized as support for the constitutional status quo. These methodological approaches allow the authors to provide greater cohesion to their immense subject by excluding any examination of the constitutional quandaries provoked by the *Statute of Westminster* or by human rights activists primarily concerned with a conservative judiciary and legal community.

THEORY AND METHODOLOGY

This dissertation builds on the recent "human rights historiography," but its concern is distinct and much more narrowly focused. While this new "human rights historiography" provides the story of constitutional rights from the perspective of grassroots activists, it takes little account of the constitutional thought that underpinned the legal regime in which these activists toiled. As Eric Adams quipped, "law and its practitioners have mysteriously fallen out of our modern constitutional history."[85] Adams's scholarship complements the research of MacLennan and Lambertson by exploring the "constitutional thought, culture, and practice" of those intellectuals and legal practitioners that supported the activists analyzed by MacLennan and Lambertson. However, such an exploration could only account for the constitutional thinking which

[85] Adams (2009), p. 5.

justified the *Canadian Bill of Rights* if the drafters of that instrument shared the same constitutional perspective of the human rights activists, intellectuals, and legal practitioners analyzed by MacLennan, Lambertson, and Adams. The existence of such a shared perspective is simply assumed by scholars of this new "human rights historiography" with little empirical evidence to support it.

The assumption of such a shared constitutional perspective is not unreasonable. Unlike most other countries, Canada has never had a revolutionary moment and its legal regime was built upon a centuries-old English constitutional order. Thus, barring some obvious conflict over a constitutional *grundnorm*, no one should be faulted for assuming consistency in constitutional thought. Yet, the potential for such a conflict is clearly illustrated by the claims of the Diefenbaker government that the *Canadian Bill of Rights* would provide for judicial review and robust guarantees for civil liberties and the claims of critics, both present-day and contemporaneous to the *Bill*'s passage, that, as a statute, it could not possibly do so.

Despite this evidence of a potential cleavage in constitutional thinking, none of the post-*Charter* literature on the *Canadian Bill of Rights* has attempted to explore this possibility. Instead, the authors assume that the drafters of the *Canadian Bill of Rights* share their constitutional perspective and therefore generally ignore or discount evidence to the contrary. Even Robert Belliveau, who directly confronts this contradiction, makes the same assumption and portrays contrary evidence as dishonest claims by their expositors.

This dissertation is therefore distinct from the current literature in that it rejects the assertion that the apparent contradiction between the Diefenbaker government's

claims of the intended constitutional strength of the *Canadian Bill of Rights* and its historic weakness can only be reconciled by assuming the *Bill* was only ever intended to act as a canon of construction. Whereas Adams examined the evolution of the constitutional thinking of the main human rights activists outside of the government in the decades leading up to the enactment of the *Canadian Bill of Rights,* this dissertation examines the constitutional thinking of those bureaucratic and political elites who actually drafted the *Canadian Bill of Rights*.

THEORY

There are three theoretical models that are critical to the development of this dissertation. The first is social scientific and is necessary to account for the constitutional perspective that underpins the assumptions made in the post-*Charter* literature. The second is analytic and is necessary to provide a framework to understand the competing constitutional perspectives analyzed in this dissertation. The third is constitutional and is necessary to explain the constitutional perspective embraced by the drafters of the *Canadian Bill of Rights.*

Rights Revolutions

Writing in 1998, Charles Epp observed that

> *A comparison of the negligible changes in attention to rights after passage of the statutory Bill of Rights in 1960 and the substantial judicial attention and approval to rights after passage of the Charter in 1982 commonly leads scholars to conclude that the new rights revolution resulted from constitutional engineering.*[86]

[86] Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and the Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998), p. 156

Following from such a conclusion, post-*Charter* scholars who consider the *Canadian Bill of Rights* are typically confronted with the question 'what accounts for the contradiction between the Diefenbaker's expressed support for a bill of rights and expressed desire to provide for robust protections of civil liberties with his government's failure to adopted an instrument that could provide for such robust protections?' Or, put another way, 'why did Diefenbaker profess a desire to trigger a rights revolution, yet fail to pursue the instrument necessary to provide for one?' While this was this same question that initiated this dissertation, an analysis of the literature reveals that the question itself is flawed as it is based upon unsubstantiated assumptions about the nature of rights revolutions, particularly in regards to the effects of grassroots 'bottom-up' agitation and elite 'top-down' agitation.

Since the 1990s, scholars examining the *Canadian Bill of Rights* have typically concluded that it was treated by the courts as a canon of construction and, more importantly, that it was intended by its progenitors to act in such a manner. Belliveau[87] is starkest on this interpretation with MacLennan[88] and Lambertson[89] being more equivocal. However, these authors proceed from the assumption that the rights revolution failed to begin prior to the 1980s solely or primarily because of the lack of a "constitutionally entrenched" (i.e. incorporated into the *British North America Act*) bill of rights (e.g. the *Charter*). Consequently, these authors proceed through a series of progressive assumptions. First, they assume that it is self-evident that only a constitutionally-entrenched bill of rights can provoke a judicially-sustained rights revolution. Second,

[87] Belliveau (1992), p. 116 and Belliveau (1998), p. 101.
[88] MacLennan (2003), p. 123.
[89] Lambertson (2005), pp. 367-368

they assume that the failure to seriously pursue a "constitutionally-entrenched" bill of rights by the progenitors of the *Canadian Bill of Rights* indicates that they did not wish to empower the judiciary to robustly protect civil liberties from legislative encroachment.[90] Third, they assume that the contradictory expressions and explanations made by the progenitors of the *Canadian Bill of Rights* must, therefore, be no more than distracting excuses to avoid enhancing legal protections for civil liberties.[91] Fourth, they then assume that the *Canadian Bill of Rights* was a mere statement of the principles packaged in a manner to satiate the most urgent appeals by human rights activists, though providing no real remedies for civil liberties violations. These assumptions have led to a distorted interpretation of many of the same materials that are examined in this dissertation and of the intentions of the progenitors of the *Canadian the Bill of Rights*.

The assumption that only a "constitutionally-entrenched" bill of rights can provide for effective protection civil liberties is the most pervasive and distorting of these. One of the best examples of this sort of distorted analysis is the following comment by MacLennan criticizing the potential effectiveness of the *Canadian Bill of Rights* in protecting those whose civil liberties were violated:

> *If, however, the unlucky person found a provincial culprit behind the infringement, which according to human rights advocates was often the case, Bill C-60*[92] *offered no protection. The Diefenbaker Bill of Rights*

[90] Belliveau (1992), p. 116; Belliveau (1998), p. 99; Lambertson (2005), p. 380; MacLennan (1998), p. 112; MacLennan (2003), p. 158.
[91] Belliveau (1992), p. 20; Belliveau (1998), p. 107; Lambertson (2005), p. 368; MacLennan (2003), p. 142.
[92] *Canadian Bill of Rights Act*, House of Commons of Canada, 1958, 1st Session, 24th Parliament, Bill C-60.

> *would be inoperable against either another Padlock Law*[93] *or another Alberta Press Act*[94].[95]

True enough; and Bill C-60 would have also been inoperable against provincial legislation on the Postal Service, Marine Hospitals, and Copyrights. While MacLennan's statement is true in the technical sense, it is a distracting argument as both the *Padlock Law* and the *Alberta Press Act* were deemed *ultra vires* provincial jurisdiction by the Supreme Court of Canada. It was the lack of litigation, not the lack of a bill of rights, that sustained the *Padlock Law* for two decades.

Parliamentary Supremacy

For Belliveau, the purpose of the *Canadian Bill of Rights* was to enhance parliamentary supremacy at the expense of not only the executive, but the judiciary as well. While Belliveau's arguments regarding Diefenbaker's political ideology and his commitment to Parliamentary supremacy are compelling, he creates a false dichotomy between Diefenbaker's claims that the *Canadian Bill of Rights* would be judicially enforceable[96]and Belliveau's own argument that "Diefenbaker was unwilling to transfer jurisdiction over civil liberties from Parliament to the courts."[97] Enhanced legislative oversight over the executive does not inherently limit the judiciary's oversight over the legislature. Instead, a supervisory role over parliament was envisioned by Diefenbaker and the Department of Justice as the only way to prevent the "unintentional or

[93] *Act Respecting Communistic Propaganda*, SQ 1937, c.11 (QC)
[94] *Accurate News and Information Act*, Alberta Legislative Assembly, 8th Legislature, 3rd Session (1937), Bill 9.
[95] MacLennan (2003), 129
[96] Belliveau (1992), p. 3.
[97] Belliveau (1992), p. 3.

unconscious encroachments or restrictions on human rights and fundamental freedoms,"[98] and that role was clearly with the judiciary.[99]

The theoretical framework implicitly adopted by Belliveau – shaped by the 1980s debate over rights protections – holds that rights guarantees by courts and legislatures are competitive and exclusive. This theoretical framework excluded the possibility of concurrent oversight of civil liberties by the judiciary and legislature, preventing the recognition of historic concurrent claims.

The New Human Rights Historiography

This same theoretical framework has been adopted by the scholars of the new human rights historiography. Despite their historical focus, they embrace a methodological approach that limits their analysis to the confines of the post-*Charter* conceptions of constitutionalism and rights guarantees. The *Canadian Bill of Rights* is not evaluated from its own historical context, but from a contemporary one. This has occurred because the *Canadian Bill of Rights* has yet to be analyzed from a historic perspective as a legal instrument and only as a foil to the demands of the grassroots

[98] "Memorandum Re: Bill of Rights", 19 March 1958 (DOJ/180667). Quoted in Belliveau (1992), p. 81.

[99] Despite the assumptions of many scholars even if the *Canadian Bill of Rights* had been entrenched in the *British North America Act* and made equally applicable to the provinces, there is no axiomatic tension between such entrenchment and parliamentary supremacy. One could have a bill of rights entrenched in the constitution, protected from direct amendment or even derogation by legislatures yet containing a blanket *non obstante* clause securing parliamentary supremacy, such that most legislation is subject to judicial review while preserving the right of parliament to expressly immunize some legislation from such review: judicial review is commonplace with a bill of rights beyond casual modification, but parliamentary sovereignty is equally secured. Notably, a restrictive form of this exists in today's *Charter*, with the "notwithstanding clause" (s. 33) which allows legislatures to override a limited number of Charter provisions for a fixed (albeit renewable) period, despite the presence of a robust derogation clause.

human rights activists that have been the focus of the existing literature. Unable to conceive of an alternate vision of judicial rights guarantees, they can only interpret the *Canadian Bill of Rights* as a rejection of judicial protection for civil liberties and not simply a rejection of the model advocated by the subjects of their analysis.[100]

Much of the argumentation is premised on the assumption that "constitutionally-entrenched" bills of rights automatically provide for robust judicial review of legislation and a failure to "constitutionally-entrench" a bill of rights can only be explained by an intention that such a bill can only act as a statement of principles and a canon of construction. However, the connection is not inherent. Based on this assumption contemporary scholars tend to posit that a bill of rights "as a formal addition to the BNA Act, [...] might have been regarded by the judiciary with more respect than a simple statute."[101] However, there is no empirical evidence to this effect presented by scholars who propose such a theory. Instead, as the comparative and empirical research of Epp illustrates, there is more reason to believe the opposite would have been the case.

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[100] Although these scholars attempt to portray the *Canadian Bill of Rights* as being the result of "fifteen years of direct lobbying" (MacLennan (1998), p. 117) that was the pinnacle of "the long postwar campaign for a national bill of rights" (MacLennan (1998), p. 118) which marked "the end of the first stage of Canadian human rights history" (Lambertson (2005), p. 371), they are actually unable to draw a solid a connection between the human rights movement they analyze and the *Canadian Bill of Rights*. This is revealed in their examination (or more precisely, lack thereof) of human rights activists in the 1950s. As MacLennan notes, the human rights movement considerably expanded in the 1950s, but none of the authors dedicate much of their analysis to this period. The reason is simple and the authors are quite aware of this: "by the beginning of the 1950s, while the movement itself expanded, the issues which gave rise to the calls for a national bill of rights slowly faded from public memory and appeared to vindicate the Liberal position that broad support simply did not exist" (1998, p. 117). The analyses by MacLennan, Lambertson, and Adams would have more cogently ended in the early 1950s with the failure of these activists to have achieved their goal of a constitutionally entrenched bill of rights.

[101] Lambertson (2005), p. 328.

Charles Epp's Rights Revolutions

In exploring these failures of the existing literature, Epp develops "a 'support-structure-centered' explanation which holds that the source of the rights revolution was pressure consist[ing] of deliberate, strategic organizing by rights advocates [...] and financing."[102] While, "according to most observers" Canada's rights revolution "resulted directly from the adoption in 1982 of Canada's new constitutional bill of rights, the *Charter of Rights and Freedoms*,"[103] Epp demonstrates that "sustained judicial attention to civil liberties began to develop significantly before 1982 in the context of growing support structures for legal mobilization"[104] and that a formal instrument enabling judicial review of legislation is neither automatically causal of a rights revolution, nor necessary to effect "judicial attention to rights and judicial policy making on rights."[105]

Whiles Epp's study of Canada's rights revolution remains undeveloped and cannot directly account for the failure of the *Canadian Bill of Rights*, it does put the lie to the assertion of most observers that Canada's rights revolution "resulted directly from the adoption of the *Charter*" and, its corollary, that the *Canadian Bill of Rights* could not have *intended* to provide for judicial review. This insight is critical to understanding the development of human rights in Canada as it can serve to break the teleological fixation upon instruments that pervades the current literature. Although convenient milestones, human rights instruments mark neither the foundation nor termination of rights regimes, but are products of trends both internal and external to such regimes.

[102] Epp (1998), pp. 2-3.
[103] Epp (1998), p. 156.
[104] Epp (1998), p. 157.
[105] Epp (1998), p. 12.

Conclusion

Curiously, Epp's cogent analysis of Canada's rights revolution has received little notice in Canada.[106] Academic interest in examining and explaining Canada's rights revolution is strong in Canada and Epp's analysis was produced at the zenith of that debate, yet it has been unduly overlooked in Canadian analysis of Canada's rights revolution. This is equally true of the new "human rights historiography" in the last decade with MacLennan,[107] Lambertson,[108] James,[109] and Clement[110] all citing Morton,[111] but making no reference to Epp. This is troubling because it not only represents parochialism in Canada's approach to its human rights regime, but, even more importantly, it reflects the failure of the Canadian human rights literature to critically evaluate conventional understandings of Canada's rights regime.

The current "human rights historiography" is also curious in that, despite its focus on the social context in which grassroots human rights activists operated, it implicitly posits a theoretical model where the agency of grassroots actors is wholly dependent upon the agency of elites, but there are no reciprocal limitations on the agency of elites. That is, the current literature holds that, while the agitation of grassroots human rights activists eventually resulted in overwhelming political pressure upon elites to enact a

[106] Out of a total of fifty-seven citations to Epp's *The Rights Revolution*, only six of those articles or monographs that cite Epp relate to Canada (ISI Web of Knowledge, 22 December 2010). By contrast Morton and Knoff's 2000 *The Court Party*, which was published at a similar time and covers similar material, has been cited over fifty times of which no less than thirty-four deal specifically with Canada (not including the earlier article on the same subject (Morton (1993); notably, Morton and Knopff cite Epp at pp. 25 and 59).
[107] MacLennan (2003), p. 8,
[108] Lambertson (2005), p. 325.
[109] James (2006), pp. 7, 11, 87, 88.
[110] Clement (2008), pp. 10, 11, 162.
[111] See footnote 106, above.

formal instrument enabling judicial review of legislation and thus provoking a rights revolution, political elites, in contrast, could have provoked a rights revolution at any time by simply enacting a proper instrument (although it would require federal and provincial elites to come to an agreement). My approach, instead, focuses on political and bureaucratic elites, illustrating the reciprocal nature of elite and grassroots agency. Despite their intention, sustained judicial attention and approval for individual rights could not be provoked by political and bureaucratic elites without greater grassroots support.

The post-*Charter* debate on rights is largely characterized by an adversarial paradigm between executive-dominated legislatures and courts. Whatever validity it may or may not have for current rights debates, the projection of this paradigm to the era of the *Canadian Bill of Rights* is unwarranted and has artificially limited how human rights have developed historically in Canada. This dissertation aims to break those shackles.

Constitutionalism

Functional Constitutionalism[112]

This dissertation employs a functional definition of the term "constitutional," that can be employed more neutrally and consistently and aids in clarifying some of the technical problems faced by the drafters of the *Canadian Bill of Rights*.

In functional terms, constitutional interpretation differs from statutory construction by the absence (or modification) of two important rules of statutory construction from constitutional interpretation: implied repeal ("*Leges posteriores priores*

[112] The term "functional definition" is more deeply exposited in the eponymous section of Appendix E, "*In perpetuum rei testimonium*."

contrarias abrogant") and implied exception ("g*eneralia specialibus non derogant*"). Under the principle of "implied repeal," when two enactments conflict, it is the enactment that was subsequently enacted that is deemed to impliedly repeal the earlier enactment. In contrast, a constitutional instrument is effectively deemed to always be the most recent enactment when in conflict with a statutory enactment.[113] Under the principle of "implied exception," if an enactment of a 'general' character conflicts with an enactment of a 'particular' character, the 'particular' will prevail over the 'general' (regardless of the above principle of "implied repeal.") In contrast, a constitutional instrument is effectively deemed to always be of a 'particular' character when in conflict with a statutory enactment, and prevails despite the typically general language of constitutional instruments.

Other than these two rules, the rules of constitutional interpretation tend not to significantly deviate from the rules of statutory construction.[114] While entrenchment and a particular central document may have symbolic importance and affect the procedure of modification, in functional terms it is only the differing rules of interpretation towards implied repeal and implied exception that significantly mark the difference in the application of 'constitutional' and 'ordinary' legal instruments.

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[113] This is even true in the case of conflicting constitutional provisions, see *Reference Re Bill 30, an Act to amend the Education Act (Ontario)*, [1987] 1 SCR 1148 at 1197 and *New Brunswick Broadcasting Co. v Nova Scotia*, [1993] 1 SCR 319 at 373. As well, subsequent constitutional instruments are not deemed to impliedly repeal (although they often explicitly repeal) earlier constitutional instruments. Thus, for example, the equality rights guarantees of the *Charter*, enacted in 1982, have not been found as impliedly repealing the provisions and guarantees of the *Constitution Act* (e.g. in relation to denominational schools and the retirement of judges), enacted in 1867 (Hogg (2007), c.55.14, II:655-660), or even the *Act of Settlement* (*O'Donohue v Canada*, 137 A.C.W.S. (3d) 1131, 2005 CanLII 6369 (ON CA) The reasoning of the court is given in *O'Donohue v Canada*, 124 A.C.W.S. (3d) 63, 2003 CanLII 41404 (ON SC)

[114] See discussion in the "Functional Constitutionalism" section of Appendix E.

Entrenchment[115]

One of the most common and most trenchant criticisms of the *Canadian Bill of Rights*, contemporaneous to its enactment and consistently since, was the failure to "entrench" it in the *British North America Act* and its blanket *non obstante* (or parliamentary derogation) provision. Many critics have gone so far as to attribute the *Canadian Bill of Rights'* failure to have resulted in powerful judicial review as stemming fundamentally from this lack of entrenchment.

However, such criticisms are rooted in a failure to reflect carefully on what "entrenchment" precisely means and how it is, or could be, accomplished. The justification for demands for entrenchment of a bill of rights are typically (1) to protect its provisions from capricious amendment by raising the threshold for amendment above that of ordinary legislation and (2) to enable judicial review of ordinary legislation against a bill of rights. However, incorporation into the *Constitution Acts* does not result in "entrenchment" in the sense of requiring "more than usually stringent conditions" nor does it necessarily provide for the ability of courts to nullify contrary 'ordinary' legislation (i.e. provide for "judicial review").

Instead, in functional terms, a bill of rights can potentially be entrenched by incorporation into a written 'Constitution,' through the 'ordinary' legislative procedure, or even by the judiciary. Similarly, in functional terms, entrenched rights can be derogated from ("un-entrenched") by formal "Constitutional" amendment, 'ordinary' legislative procedure, or even by the judiciary. The contours of the various manners of entrenchment and derogation are discussed in the "Entrenchment" section of appendix E,

[115] The concept of entrenchment is more deeply exposited in the eponymous section of Appendix E, "*In perpetuum rei testimonium*."

but the point most important to emphasize is that the drafters of the *Canadian Bill of Rights*, unlike many present-day scholars, carefully considered these issues.

Originalism[116]

When approaching a constitutional instrument such as the *Constitution of the United States* or the *Constitution Act, 1982*, judges often choose between two broad interpretive approaches: "originalism" [117] and "purposivism." [118] In discussing the interpretation of the *Constitution Act,* 1867, Peter Hogg argues that "originalism has never enjoyed significant support in Canada, either in the courts or the academy."[119] However, this contention is suspect and his evidence is quite weak. The attribution by scholars and the Supreme Court of Canada since the mid-1980s that the "frozen concepts" interpretive approach adopted by the Supreme Court of Canada in the 1960s and 1970s towards the *Canadian Bill of Rights* could be partially explained by its statutory, as opposed to "constitutional," status appears unjustifiable. Instead, the Supreme Court of Canada had generally embraced an 'Originalist' approach to constitutional interpretation during that era, and even had the *Canadian Bill of Rights* taken a different form, there is no evidence that the Supreme Court of Canada would not

[116] The theory of "originalism" as employed in Canada is more deeply exposited in the eponymous section of Appendix E, "*In perpetuum rei testimonium*."
[117] Briefly, originalism holds that constitutional instruments should be interpreted to reflect the meaning of the instrument as understood at the time of enactment. The basis of such an interpretative principle being that the constitutional instrument embodies a certain bargain that should be superior to ordinary law and that bargain should only be altered through the recognized process of constitutional change and not by the judiciary.
[118] A purposive approach, in contrast to originalism, holds that constitutional instruments should be interpreted to reflect the meaning of its provision as contemporarily understood. The basis of such an interpretative principle being that constitutional instruments embody certain superior purposes and those purposes need to be constantly re-adapted to new contexts.
[119] Hogg (2007), c.15.9(f), I: 475.

have equally embraced a "frozen concepts" approach to any constitutional entrenched bill of rights. A more detailed exploration of this issue can be found in the "Originalism" section of appendix E.

Declaratory Acts[120]

In order to draw a distinction between the interpretation of terms common to the *Canadian Bill of Rights* and the *Charter*, the courts in *Big M Drug Mart*[121] (and many other cases in the 1980s) emphasized that the *Canadian Bill of Rights* was "declaratory" whereas "the language of the Charter is imperative."[122] That difference defined as the *Charter*, unlike the *Canadian Bill of Rights*, being "not merely a declaration of existing law or a tool for use in statutory construction [but], by s. 24, the judiciary is charged with the task of devising appropriate remedies for infringement."[123] Thus, the term "declaratory" was being employed as if its use provided only for a canon of construction.

There has been a tendency to interpret the term "declare" and its cognates in both the statute itself as well as the internal discussions in the Department of Justice as indicative of an intent to produce an instrument that only indicates what the law should be and did not provide for its enforcement. However, this is simply to assume that terms typical to the then-nascent field of international human rights had come to replace the long-standing meaning that such terms had in domestic Canadian law and that understandings of constitutional law contemporaneous to the enactment of the *Canadian*

[120] The more detailed explanation of "declaratory" acts and their use in Canada is available in the eponymous section of Appendix E, "*In perpetuum rei testimonium*."
[121] [1984] 1 WWR 625 (AB CA); [1985] 1 SCR 295.
[122] *Big M Drug Mart* [1985] 1 SCR 295 per Dickson J at 343.
[123] *Big M Drug Mart* [1984] 1 WWR 625 *per* Laycraft JA at 646-647; cited approvingly in [1985] 1 SCR 295 per Dickson J at 308

Bill of Rights were static and binary between Diceyan absolutism and the "newer constitutional law." Instead, the meaning associated with "declaratory," as the legislature acting in its judicial capacity, was well understood in the era amongst legislative draughtsmen and its uses by them should not be proleptically interpreted.

The general lack of familiarity with the concept of declaratory statutes is surprising given their prominence in Canadian constitutional history. These include the *Colonial Laws Validity Act*, most of the amendments to the British North America Act in the nineteenth century, and the *Statute of Westminster*. A more detailed exploration of this issue can be found in the "Declaratory Acts" section of appendix E, but what is important to emphasize at this point was the *Statute of Westminster* was drafted, and widely interpreted, as a declaratory Act. Further, the *Statute of Westminster* was viewed as a serious attempt by Parliament to bind itself, at a minimum imposing on the courts strict rules of statutory construction preventing implied repeal or implied repugnancy and requiring a new procedure for enacting certain legislation (although whether such an attempt would actually bind a future parliament was disputed). The effect of the *Statute of Westminster* would come under significant consideration during the drafting of the *Canadian Bill of Rights* and its language would be used as a model in that statute.

Self-Embracing Parliamentary Sovereignty[124]

Eric Adams characterizes the liberal constitutionalism that emerged in the 1930s as the constitutional analog of the "nationalism [that] simultaneously occurred in the arts as Canadian painters and poets explicitly challenged the British traditions that had largely

[124] The more detailed exposition of "self-embracing" parliamentary sovereignty is available in the eponymous section of Appendix E, "*In perpetuum rei testimonium*."

dominated the Canadian cultural imagination"[125]). Adams's work is a more careful exposition of the portrayal pervasive in the existing scholarship that the ideological conflict of the 1930s to the 1960s as one between Diceyan absolutism of parliamentary supremacy[126] and the "Newer Constitutional Law" of constitutional supremacy (that is, parliamentary subservience to a single codified and entrenched supreme law "Constitution").[127] In this account, polities in the Westminster tradition are presented with a choice between (1) Diceyan parliamentary supremacy and (2) the "newer constitutional law" based upon a written Constitution that is supreme over all other legislation. The former is portrayed as being incapable of providing for entrenchment and robust judicial review of certain fundamental laws such as guarantees for civil liberties, while the latter is portrayed as allowing for "entrenchment" and robust judicial review of civil liberties guarantees.

Yet this purported dichotomy fails to account for the conflict amongst those who embraced parliamentary sovereignty, but contested Diceyan absolutism. This conflict was spurred by the *Statute of Westminster* and the question of the nature of Westminster's continuing sovereignty over the purportedly independent Dominions. While the crisis, in theory provoked by the *Statute of Westminster,* influenced most legal thinkers to defend

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[125] Adams (2009), p. 37. A development that Jose Igartua has recently termed "The Other Quiet Revolution" in *The Other Quiet Revolution: National Identity in English Canada* (2006).

[126] "The principle, therefore, of parliamentary sovereignty means neither more nor less than this, namely that 'Parliament' has 'right right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.'" See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1915), pp. xviii- xix. N.B. the first edition published in 1885 with the eighth (1915) edition being the last edited by Dicey.

[127] Adams (2009).

the contemporaneous orthodoxy by championing certain Diceyan rigidities (termed "continuing parliamentary sovereignty"), it influenced others to outright reject those same Diceyan rigidities (termed "self-embracing parliamentary sovereignty"). Peter Oliver has succinctly summarized the cleavage as one being that:

> *Whereas Dicey saw the Westminster Parliament as supreme or absolute, and therefore unique, fundamental and unchangeable, Jennings saw it as a legislature much like other legislatures, i.e. deriving its powers from the law and capable of limitation, including self-limitation.*[128]

Advocates of "self-embracing sovereignty" argued that a truly sovereign parliament included the power of self-limitation. For such advocates, it was not Parliament that was supreme, but the law (i.e. the common law): "the 'legal sovereign' may impose legal limitations upon itself because its power to change the law includes the power to change the law affecting itself."'[129] Advocates of "self-embracing sovereignty" favoured "manner and form" procedures of legislating for not only subordinate legislatures, but for wholly sovereign legislatures as well. Thus, the requirement for legislation to pass through majority assent of three readings in both Houses of Parliament and Royal assent was not some "ultimate legal principle," but simply the traditional "manner and form" of legislating, which could be both generally amended or particularly amended in certain circumstances.

Under this view, the declaration in section 4 of the *Statute of Westminster* for Dominion request and consent was not merely an interpretative provision that could be overcome by a sufficiently explicit Westminster utilizing the traditional manner and form

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[128] Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Toronto: Oxford University Press, 2005), p. 82.

[129] Ivor Jennings, *The Law and Constitution*, 5th edition (London: University of London Press, 1959), p. 252; cited by Oliver (2005), p. 84.

of legislating, but a legally enforceable procedure that would render any legislation that failed to meet such requirements *ultra vires* – even of a fully sovereign parliament. This not only accounted for the complete independence of a former dependency without disrupting legal continuity, but provided an avenue for the entrenchment of other legislation without abandoning "parliamentary sovereignty" for the "newer constitutional law."

In Britain, Diceyan parliamentary sovereignty precluded entrenchment and judicial review of rights guarantees and thus self-embracing parliamentary sovereignty was the only option for advocates of such constitutional innovations, short of an explicit constitutional revolution. In contrast, advocates of entrenchment and judicial review of rights guarantees in Canada could instead turn to the robustly developed mechanisms of entrenchment and judicial review for federalism and seek to apply that same functional constitutional supremacy to civil liberties. The orthodox theory of parliamentary sovereignty had always provided a justification for entrenchment and judicial review in Canada. It also, conveniently, provided for the entrenchment and judicial review of civil liberties without the need of first addressing the thorny question of an amending formula for the *British North America Act*.

There was either no incentive for advocates of constitutional supremacy to question orthodox parliamentary supremacy. The theoretical question of the "ghostly legal presence [of Westminster], legally able to interfere in the affairs of" Canada, unless its "courts and other law-enforcing and -administering institutions rejected such interference in an apparently extra-legal or revolutionary fashion"[130] paled to the practical

[130] Oliver (2005), p.3.

advantages provided by orthodox parliamentary supremacy in providing for effective constitutional supremacy in Canada. Further, orthodox parliamentary supremacy proffered a much simpler distinction between constitutional instruments and non-constitutional statutes in Canada: anything enacted as part of the *British North America Act* was "constitutional" and anything enacted outside of it, was not.

METHODOLOGY

This dissertation focuses on (1) trends in constitutional thinking leading up to the enactment of the *Canadian Bill of Rights*, (2) the drafting of the *Bill* by bureaucratic elites in the Department of Justice and its justification by political elites before parliament, and (3) the constitutional thinking of the *Bill's* prime draftsman. Only summary treatment is given to the broader context of the grassroots movement that agitated for a bill of rights enabling judicial review and to the political forces that propelled its enactment.

This approach is adopted, first, because of the nature of the constitutional thinking that underpinned the drafting of the *Canadian Bill of Rights.* It is both highly intricate and largely alien to most contemporary constitutional thought, thus requiring extensive analysis and explanation. Second, it is warranted by the sources that persuasively indicate the constitutional (as opposed to the political) justification for the form and structure of the instrument was effectively reliant upon a single individual.[131]

[131] That is to say, primary examination of the broader context is eschewed not only because it is already capably covered by the existing literature, but that to do so would distract from the controversy examined in this dissertation. This is illustrated by the existing literature that either ignores, downplays, or assumes deception in the claims of the Department of Justice and the government. They adopt such approaches because of their failure to grasp the – what are now very alien – legal and constitutional arguments proffered by the government and the Department of Justice.

Instead, like Adams's dissertation, "the chapters that follow are not, then, political history, although many politicians appear in its pages. Neither are they social history, although the rights-demands of social movements are frequently invoked. Rather, this dissertation aims to provide a *constitutional history*."[132] To wit, this dissertation is an intellectual history of law that charts the emergence of, and explains the constitutional justifications for, the form and structure of the *Canadian Bill of Rights*. Whereas Adams charted the emergence of an extant, and now prominent, idea of constitutional rights, this dissertation examines what is now a more unorthodox stream of constitutional thinking.

While a social history context can explain the agitation for legal remedies to rights grievances and a political history context can explain how associated instruments become enacted, these narratives do not account for how such instruments were *thinkable*, and therefore, politically possible. Such an ideational approach is critical to the emergent human rights historiography. In this literature, the *Canadian Bill of Rights* is used as an anchor point; either as the culmination of one era or the starting point for another. Thus, the methodology, selection of sources, and structure of analysis by other scholars have been shaped by their presumptions about constitutionalism and the intended effect of the *Canadian Bill of Rights*. Reshaping those presumptions will reshape how scholars analyze the development of human rights in Canada.

SOURCES

The sources for this dissertation are (1) the parliamentary materials, (2) confidential and internal government documents (particularly Department of Justice files as well as Cabinet minutes and assorted material from the Diefenbaker papers), (3) the

[132] Adams (2009), p. 5.

scholarly writings of Elmer A. Driedger, and (4) contemporaneous legal sources and scholarship.

The parliamentary materials (largely debates and committee evidence) contain the government's public legal justifications and explanations for the *Canadian Bill of Rights* and provide evidence of how such views were received by parliamentarians as well as leading legal scholars and human rights activists. Notably, these materials clearly highlight the contradiction between the government's contemporaneous claim of "constitutionality" and the contemporary literature's downplaying and rejection of such claims.

The internal government documents contain the government's private legal justifications and explanations. These materials revealed three surprising phenomenon that shaped the methodology and sources of this dissertation. First, that there was a consistency between the government's public arguments and private justifications that sharply contrasts with the presumptions of the existing literature. Second, the drafting process was generally closed to outside influences where outside critiques, when rarely considered, were typically rejected or refuted. Third, the that there was an ideational domination of the process by Elmer Driedger.

The unorthodox and innovative nature of the constitutional arguments combined with a closed drafting process almost exclusively ideational dependence upon Driedger dictated a reliance upon the writings of Driedger (as a source of his constitutional thinking) and contemporaneous legal sources (as a source of his constitutional influences).

The existing literature's focus on social and political influences to the exclusion of ideational influences in the development of the *Canadian Bill of Rights* has resulted in the presumption that the legal arguments proffered by the Diefenbaker government were no more than political arguments clothed in legal language. This has restricted and distorted how we have viewed the development of the human rights movement in Canada. This dissertation seeks to overcome that deficiency. Only once the ideational aspects of constitutional law related to the *Canadian Bill of Rights* are understood can the social, political, and economic forces that propelled those ideas and the *Bill* itself can be properly understood.

TERMS AND DEFINITIONS

This dissertation is less concerned with the scope and nature of the rights discussed and guaranteed, than it is with how those rights were sought to be protected within the constitutional order. However, some clarification of the terms that are used in this dissertation is warranted.

"Civil Libertarians" and "Egalitarians"

In this dissertation the term "civil liberties" is employed to refer to those who advocated for fundamental freedoms, legal rights, democratic rights, and "public" egalitarian rights (and, often private property rights), whereas I employ the term "human rights" to refer to those who advocated for "civil libertarian rights" (perhaps, less private property rights) as well as "private" egalitarian rights and/or economic rights.[133] In many

[133] Building upon the work for recent historians of pre-*Charter* human rights movements in Canada, advocates for human rights, particularly those advocating for judicially enforceable human rights instruments, can be divided into two broad groups: "civil

cases, the term "human rights" is employed when the rights being immediately discussed do not properly fit into the category of "civil liberties" alone so a broader term is employed. However, as the focus of this dissertation is upon bills of rights that only seek to protect civil liberties, the distinctions amongst those who advocated for human rights beyond civil liberties is not germane and, thus, they can be grouped together.

"Rights Regime"

This dissertation frequently employs the term "rights regime." The term is employed to refer broadly to how rights are conceptualized, expressed, and enforced in a jurisdiction. For example, the international human rights regime consist of codified "declarations" (most notably the *Universal Declaration of Human Rights*) which tend to express general views on rights, human rights treaties and other instruments (most notably the *International Covenant on Civil and Political Rights*[134]), and enforcement machinery (most notably the Human Rights Committee[135]). In Canada's case, my usage

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libertarians" and "egalitarians" (See Clement (2008), p. 8). The first group (who tended to emphasize a "civil liberties" self-appellation), typically advocated for fundamental freedoms, legal rights, democratic rights, and "public" egalitarian rights, while eschewing judicial protections for other sorts of human rights. The second group (who tended to emphasize a "human rights" self-appellation) , in contrast, typically advocated for the same rights as the "civil libertarians," but more strongly emphasized egalitarian rights – both "public" and "private." Notably, the bulk of the "egalitarian" human rights activists whilst also advocating for redistributive economic policies ("economic rights") under the rubric of human rights, eschewed judicial enforcement of those redistributive policies. Thus, although there was considerable debate as to the merits of enhancing judicial supervision at the expense of legislative supervision of civil liberties and egalitarian rights in Canada, there was very little advocacy for enhancing judicial supervision of economic redistribution.

[134] *International Covenant on Civil and Political Rights*, GA res 2200 A, 21 UN GAOR, Supp No 16, UN Doc A-6316 (1966) (UN).

[135] *Optional Protocol to the International Covenant on Civil and Political Rights*, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 59, U.N. Doc. A/6316 (1966), 999 UNTS 302.

of the terms "rights regime" principally refers to human rights instruments (e.g. the *Charter* and the *Human Rights Act*[136]) and its enforcement machinery (e.g. human rights commissions and the courts), but can also include popular and scholarly discussions and works on rights which shape the rights consciousness. Thus a reference to Canada's rights regime of the 1950s is starkly different to that of Canada's rights regime of the 1990s, which consists of radically different ideas about what rights are worthy of protection, as well as the instruments and machinery available in which to defend those rights.

"Rights Revolutions"

Canadian scholars tend to employ the term "rights revolution" to refer to the rise in popular rights consciousness and the emergence of numerous rights advocacy organisations in the 1960s and 1970s.[137] However, my employment of the term is more consistent with the usage of the term by Charles Epp,[138] which indentifies a rights revolution by the transformation in judicial protection of rights. Thus when I employ the term "rights revolution," I typically do so as an expression of a period when the courts (particularly the court of final appeal) began deciding and supporting individual (as opposed to business) rights claims in a sustained manner so as to become an effective guardian of individual rights, most notably freedom of expression, due process, and non-discrimination. In Canada this occurred most starkly in the mid- to late-1980s, but as Charles Epp illustrates, it began in the mid- to late-1970s. As such, I often qualify my use of the term "rights revolution" with the adjective "1980s" to distinguish from the

[136] *Canadian Human Rights Act*, SC 1976-77, c.33 (CA).
[137] For example, Clement (2008); Ignatieff (2000).
[138] Epp,(1998).

more societal and popular rights revolution of the 1960s and 1970s as well as the more subtle changes in legal culture of the 1970s and early 1980s.

"Bills of Rights" and "Human Rights Codes"

The split between "civil libertarians" and "egalitarians" is reflected in the type of instruments that exist as part of Canada's rights regime as there are generally two pre-eminent instruments in most Canadian jurisdictions. First, there are what I term "bills of rights" whose primary aim is to guarantee civil liberties (including "public" egalitarian rights) – although the current pre-eminent bill of rights in Canada, the *Charter*, also includes some social rights[139] such as language rights and aboriginal rights, building upon the pre-*Charter* constitutional groups right. Second, there are what I term "human rights codes;" the most notable of these being the *Human Rights Acts*, as well as analogous legislation in most provinces (or their 1950s antecedent "fair practices" Acts). Third, there is what I term "comprehensive bills of rights" that are simply a combination of a "bill of rights" and a "human rights code," the best example of this being the *Quebec Charter*.[140]

DISSERTATION OUTLINE

The rise of Canada's human rights movements was solidly rooted in the Canada's labour movement. Chapter one, relying on the pioneering scholarship of the "new human rights historiography," provides an overview of the early demands for a national bill of rights in Canada and the curious quieting of those demands in the years immediately

[139] More typically termed "minority" or "collective" rights in Canada.
[140] *Charte des droits et libertés de la personne, 1976*, RSQ c C-12.

preceding the drafting of the *Canadian Bill of Rights*. This chapter provides the political and social context that provoked the Diefenbaker government to pursue such an instrument and is germane to understanding how the existing literature came to perceive the *Canadian Bill of Rights*.

It is often assumed that the only effective way to provide for judicial review is through constitutional supremacy and that a bill of rights applicable to both levels of government is necessary to guarantee civil liberties. In fact, as chapter two – "The Other 'Newer Constitutional Law'" – demonstrates, in the era leading up to the enactment of the *Canadian Bill of Rights*, ideas of constitutionalism regarding the protection of civil liberties was more diverse than portrayed in the current scholarship. The development of the theory of "self-embracing sovereignty" posited mechanisms other than constitutional supremacy to provide for judicial review and had potentially strong jurisprudential foundations. Further, the nature of civil liberties was intensely controversial in the decades leading up to the *Canadian Bill of Rights*. One school of thought, seemingly ascendant in the 1950s, held that civil liberties were "public law" wholly within federal jurisdiction, thus mitigating any need for a bill of rights applicable to provincial legislatures.

Chapter three, "The 'Fathers' of the Canadian Bill of Rights," presents biographical sketches of those individuals most responsible for initiating and developing the *Canadian Bill of Rights*. Further consideration is given to the constitutional thinking of Elmer Driedger, who proves to be not only the bill's main draftsman, but its main constitutional apologist. It is clear that Driedger's constitutional thinking emerged from the sometimes unorthodox constitutionalism discussed in chapter three.

Chapters four, five, and six, chronicle the development of the *Canadian Bill of Rights* in the Department of Justice. Chapter four, "Bill C-60," includes an examination of the Department's approach prior to the Diefenbaker government under the long-serving Deputy Minister of Justice F. P. Varoce. However, the chapter concentrates on the evolution of the bill of rights concept under the new Deputy Minister, W.R. Jackett and the emergence of Elmer Driedger as the chief draftsman. The chapter concludes with the discussion of the effectively draft version of the *Bill*, bill C-60, in parliament in 1958. Chapter five, "The Entrenchment Crisis," examines the Department's reactions to the criticism of the *Bill* and the growth of vocal demands for "constitutional entrenchment" of the *Bill*. Chapter six, "Drafting Bill C-79," explores the constitutional innovations developed by Elmer Driedger to counter the demands for constitutional entrenchment and his emergence as the chief constitutional apologist for the *Bill*.

Chapter seven, "Parliamentary Consideration of Bill C-79," illustrates that the Diefenbaker government generally, and Justice Minister Fulton particularly, adopted Driedger's constitutional apologia for the *Canadian Bill of Rights* and championed that view in Parliament and Committee. The chapter charts the positions taken by witnesses before the Committee and by the various parties and factions in parliament in relation to both the content of the bill as well as their understanding of the nature of Canada's constitution. This chapter demonstrates that Driedger's constitutional apologia actually enjoyed wide acceptance when the *Canadian Bill of Rights* was enacted.

Finally, chapter eight, "Driedger's Reflections," analyzes Driedger's constitutional thinking related to the *Canadian Bill of Rights* in the decades following its enactment. Driedger continued to defend his vision of the constitution and the *Canadian*

Bill of Rights and became highly critical of the Supreme Court jurisprudence on the *Bill.* While popular and legal opinion increasingly favoured a vision of a constitutionally entrenched bill of rights enacted by a "Diceyan" Westminster parliament, achieving 'patriation' of the *British North America Acts* and a "constitutionally-entrenched" bill of rights in a single coup, Driedger argues that such an action would be unconstitutional and a extra-statutory bill of rights can only be enacted subsequent to the adoption of a domestic amending formula. A brief examination of the development of the *Canadian Bill of Rights* jurisprudence in light of Driedger's constitutional apologia is also included in the concluding chapter. ♦

Chapter One – Canada and a Bill of Rights, 1919-1957

GENESIS OF THE HUMAN RIGHTS MOVEMENT IN CANADA, 1919-1946[1]

Labour Agitation

The Canadian human rights movement and the calls for a Canadian bill of rights began, indirectly, with the Winnipeg General Strike of 1919. In response to the strike and the rise of communist agitation in the wake of the Russian Revolution, a nervous federal government added section 98 to the Criminal Code of Canada.[2] This enactment (1) outlawed any organization or publication that professed violence to bring about governmental or economic change in Canada and provided for up to twenty years imprisonment for any association with such organization or publications and (2) empowered the police to seize *without* a warrant any property of any such organization or of anyone *suspected* of being associated with such an organization. In practice, the enactment was often broadly applied to any labour agitation. Such persecution resulted in what was probably the first civil liberties organization in Canada, the Canadian Labour Defence League (CLDL), a communist front organization founded in 1925.[3] The CLDL was founded by a former Methodist reverend, A.E. Smith, with the purpose of raising funds for those arrested for striking and labour agitation.[4] However, as a communist

[1] This analysis is largely drawn upon material from Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (Montreal: McGill-Queen's University Press, 2003), pp. 12-32; Ross Lambertson, *Repression and Resistance: Canadian Human Right Activists, 1930-1960* (Toronto: University of Toronto Press, 2005), pp. 16-67; and Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-1982* (Vancouver: UBC Press, 2008), pp. 37-41.
[2] *An Act to amend the Criminal Code, 1919,* c. 46, s. 1.
[3] MacLennan (2003), p. 15.
[4] MacLennan (2003), pp. 14-15.

front organization, it expended little energy seeking potential general remedies to civil liberties violations in a capitalist and democratic system and instead its defence of civil liberties tended to focus on specific arrests and the specific enabling enactments (e.g. section 98).

Whereas the fiercest persecutions of the 1920s mostly targeted communists, the massive economic dislocation brought about by the Great Depression provoked the government of R.B. Bennett (1930-1935) to visit similar harassment on all forms of labour agitation. In reaction to this repression, the 1933 Co-operative Commonwealth Federation Programme (the *Regina Manifesto*) called for not only the repeal of section 98 of the Criminal Code, but also elements of a bill of rights nested within a national labour code, which would protect the right to work and freedom of assembly.[5] With the civil liberties violations continuing unabated, F.R. Scott[6] would (as one of the authors of the League for Social Reconstruction's 1935 *Social Planning for Canada*) go on to make an explicit call for an "entrenched Bill of Rights clause in the BNA Act [that] would do much to check the present drive against civil liberties."[7]

In 1927, in the wake of the 1926 Imperial Conference and the discussions on constitutional autonomy, J.S. Woodsworth[8] made the first call in Parliament for an entrenched bill of rights: "in any modification of the *British North America Act* I think

[5] MacLennan (2003), p. 17.
[6] Frank Scott was an influential legal scholar, Canadian poet, and constitutionalist as well as a leading light of the Co-operative Commonwealth Federation. During the Depression he founded the CCF's 'brain trust,' the League for Social Reconstruction, to advocate for socialist solutions to the economic crisis in the Canadian context.
[7] MacLennan (2003), p. 18.
[8] Research Committee of the League for Social Reconstruction, *Social Planning for Canada*, revised edition (Toronto: University of Toronto Press, 1975). [Cited as *Social Planning* (1935)].

there would need to be incorporated a series of clauses equivalent to a sort of bill of rights safeguarding the rights of minorities, whether of language, religion, or civil status."[9] Although strongly disturbed by the civil liberties violations engendered by section 98, Woodworth's early call for an entrenched bill of rights in Canada did not emerge from a concern over civil liberties violations *per se*, but from a desire to enhance the federal government's ability to exert control over the Canadian economy.[10] In order to bring about democratic socialism, Woodsworth (and most of those on the socialist left) believed that Canadian federalism had to be massively reformed to enhance the economic powers of the federal government. Yet Woodsworth recognized that the long-standing fear of French-Canadians of being swamped and their rights violated by English-speaking Canadians was both real and legitimate. As such, Woodsworth sought to deeply entrench French-Canadian minority rights in a patriated Canadian constitution, while relaxing the rigidity of Canadian federalism on economic matters.[11]

Thus, the early foundations of the bill of rights movement in Canada emerged from the socialist left and were prompted by two related, but distinct impulses. Although genuinely concerned with unjust persecution generally (e.g. of communists), the first impulse emerged from the persecution of labour activists and the belief that – in order to successfully organise and advocate for democratic socialism – civil liberties must be protected from violations by a capitalist state. The second impulse emerged from the desire to build a democratic socialist state whilst safeguarding national unity in Canada, as the socialist advocates of the 1920s and 1930s believed that French Canadians could

[9] *House of Commons Debates*, 16th Parl, 1st Sess (1926-1927), vol 1, p. 1042 (9 March 1927). [*Debates* 16-1, I:1042].
[10] Lambertson (2005), p. 26.
[11] MacLennan (2003), pp. 18, 31, 180.

only be reconciled to a more centralized state if their minority rights were rigidly safeguarded in the constitution.

The Padlock Law

In 1936, shortly after being re-elected Prime Minister, W.L. Mackenzie King repealed section 98 of the Criminal Code, honouring a promise he made during a parliamentary debate in 1932. In response to the disappearance of this powerful legislative tool to suppress "communists," the Duplessis government of Quebec enacted its own equivalent to section 98, the infamous *Padlock Law*,[12] named for its provision permitting the Attorney General of Quebec to "order the closing of [a] house"[13] (typically by padlocking it) if it was being used "to propagate communism or bolshevism."[14] The law was designed to give the Attorney General (always Duplessis when he was Premier) complete discretion in ordering such closures. However, the Mackenzie King government refused to be drawn into a politically explosive conflict with Duplessis and rejected not only disallowing the law, but even referring it to the Supreme Court of Canada to test its constitutionality (unlike the *Alberta Statute Reference*, which was struck down on reference in early 1938, a few months before the Mackenzie King government definitively refused to refer the Padlock Law).

Duplessis use of this law and the federal government's refusal to confront Duplessis resulted in the emergence of a large number of local civil liberty advocacy associations, notably the Montreal Canadian Civil Liberties Union (CLU), which began to form a loose network of civil liberties activists distinct from labour activism. Unlike

[12] *Loi concernant la propagande communiste*, SQ 1937, c 11. [*Padlock Law*]
[13] *Padlock Law*, s 4.
[14] *Padlock Law*, s 3.

early civil liberties associations that had emerged early in the 1930s,[15] many of those that formed in response to the Padlock Law would be sustained throughout the 1940s to join the campaign for a national bill of rights for Canada from 1946 to 1951. From 1937 to 1940, CLU leaders unsuccessfully challenged the Padlock Law (and suffered from its application in that pursuit),[16] but abandoned appeals beyond the Quebec courts after the outbreak of the Second World War and, instead, turned their attention to wartime violations of civil liberties, particularly under the *Defence of Canada Regulations*.[17] Although these organisations were predominately subscribed to by those on the socialist left, they were ideologically founded upon an independent defence of civil liberties and not as an adjunct to building democratic socialism.

Nationalist Civil Libertarians

Although civil liberty violations more readily agitated labour activists in the 1930s, more rightist elements in Canadian society were also unsettled by the recent violations of civil liberties and the weakness of the federal government in being able to address the economic calamities facing Canada. Expression of this non-labour disquiet appeared in a brief before the Rowell-Sirois Commission. Under the name of the "Native Sons of Canada," Winnipeg-based history professor A.R.M. Lower[18] argued that "the

[15] There were a large number of different civil liberties organisations founded between the CLDL and the CCLU. However, none of them had any significant impact or subscription and many of them were either communist front organisations or else 'united front' organisations with heavy communist membership. See Lambertson (2005), pp. 31-41.
[16] Lambertson (2005), p. 63
[17] Lambertson (2005), p. 67
[18] Arthur Reginald Marsden Lower (1889-1988) was an economic historian (focusing on the staples trade) who both studied and taught in the United States and Canada. His seminal work, *Colony to Nation*, first published in 1946, effectively captured the

citizen of Canada, or 'Canadian national,' has rights and duties by reason of the fact that he is a citizen, rights that cannot possibly be stopped or curtailed by provincial boundaries, but which must extend uniformly throughout the country."[19] Notably, this language would be echoed less than three months later by Justice Cannon in *re Alberta Statutes.*[20]

Lower was more flexible in his approach to the protection of civil liberties than were the labour activists. Whereas the labour activists overwhelmingly favoured entrenchment in the *British North America Act*, Lower proffered a wider array of potential options. In addition to the entrenchment of a bill of rights, he proposed constitutional revision to "vest in the Parliament of Canada an express power to define and protect these rights," thus protecting them from provincial (but not Dominion) violations. Alternatively, if *British North America Act* revision was not feasible, then the Dominion government should "define authoritatively the circumstances under which the power of disallowance should be exercised by the Government of Canada, including under these circumstances the invasion of the rights and liberties of the citizens of Canada."[21] Absent from these proposals were any protection for French-Canadian minority rights or specific protections for labour. Whereas the labour activists were fundamentally inspired by a desire to build a democratic socialist state, Lower's proposals were rooted in his powerful (English) Canadian nationalism concerned with enhancing

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emerging sense of Canadian identity. He was a "liberal nationalist," championing a distinct and independent Canadian state, but rejecting the economic radicalism of those in the CCF. See MacLennan (2003), p. 26.

[19] Co-authored with J.B. Coyne and R.O. MacFarlane *Rowell-Sirois Report*, Exhibit 33. Also quoted by MacLennan (2003), pp. 26-27.

[20] *Reference re: Alberta Statutes - The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] SCR 100.

[21] *Rowell-Sirois Report*, Book II, pp. 224-225

the power and prestige of the federal government. Thus Lower's proposals were aimed at reducing civil liberties violations by provincial governments and he did not harbour the same fears about an overly powerful majority in Ottawa that concerned labour activists.[22]

Defence of Canada Regulations

The occasional demands for a national bill of rights of the mid-1930s fell silent during the early years of the war, although civil liberties violations proceeded apace under the *Defence of Canada Regulations*. During the early years of the war, labour activists wholly concentrated their agitation against the most egregious rules under the *Defence of Canada Regulations* and most Canadians, notably those non-labour activists who had shown concern for civil liberties violations in the 1930s, broadly accepted the argument of the Mackenzie King government that limitations on civil liberties during wartime were necessary for efficient prosecution of the War. Thus, when the government bowed to popular pressure from British Columbia to intern the entirety of the ethnic Japanese population on the west coast,[23] almost no voices were raised in protest as labour activists (where they did not approve of it) were focused wholly on labour issues and more rightist civil libertarians (where they did not approve of it) accepted internment of ethnic Japanese and enemy aliens as a necessary suspension of liberties for the prosecution of the War.

As the Second World War drew to a close, the nascent civil liberties movement, which embraced those from a variety of political persuasions that had emerged in the late 1930s, began to re-coalesce. A series of developments and events would produce a

[22] MacLennan (2003), p. 27.
[23] Ann Gomer Sunahara, *The Politics of Racism: the uprooting of Japanese Canadians during the Second World War* (Toronto: Lorimer, 1981), p. 36.

diverse array of advocates for a national bill of rights that enjoyed genuinely popular support. However, this diversity and its popular support were sustained by a lack of clarity. This lack of clarity allowed divergent groups to support the same general goal and retain popular support by emphasizing a general ideal rather than its concrete implementation.

Throughout the 1940s, labour activists remained the backbone of the human rights movement and the advocates for a national bill of rights. The first group to join with activists in the defence of civil liberties were those whose plans for the post-war economy were diametrically opposed. Labour activists initially championed civil liberties as a way to protect themselves from harassment by the State. However, by 1943, with the end of the war in sight for the first time, business groups and traditional elites became concerned that traditional economic liberties that had been suspended for the prosecution of the war might be extended indefinitely in the post-war economic order. Notably, one of the first tasks of the newly created Civil Liberties Committee of the Canadian Bar Association was to investigate the government's intrusion into business; it sought an immediate termination of the *War Measures Act* at the end of the war.[24] Formerly the purview of nationalists and labour activists, civil liberties suddenly became a pressing issue for the business community and liberal professionals.

Japanese Expulsions

Early advocacy for civil liberties had championed economic rights and basic civil liberties, but in the closing years of the Second World War, demands for egalitarian rights would emerge (and arguably come to dominate rights discussions in the second half of

[24] MacLennan (2003), p. 36.

the twentieth century). The rise of egalitarian rights activists received its largest domestic boost from the government's decision to disperse, denaturalize, and expel Japanese Canadians. This decision, although justified on security grounds, had significantly been undertaken to appease anti-Japanese sentiment on the west coast and was championed by the powerful cabinet minister Ian Mackenzie. Removal of the Japanese from the west coast was extremely popular amongst British Columbians and what had, ostensibly, been a temporary policy became political difficult to reverse. Ian Mackenzie stymied any attempt by the federal Cabinet to allow the Japanese to return to their homes and resistance by provincial Premiers made it politically difficult to forcibly resettle them east of the Rocky Mountains. The government settled on what appeared to be the most politically expedient solution: expulsion from Canada, where no voter could complain about having Japanese settled in their midst. This rather grotesque solution to a political quandary provoked the emergence of a powerful new constituency of human rights activism and inspired previously unengaged groups.[25]

While many of the labour activists of the 1920s, 1930s, and 1940s had found their inspiration in the social gospel movement and labour churches, mainstream church groups had not previously been prominent in civil liberties advocacy. The Japanese expulsions changed that, with church groups and associations taking up a prominent position as defenders of the Japanese along with CCFers and other labour activists. Although opposition to the Japanese expulsions can hardly be characterized as a mass movement, it was definitively more diverse than the pre-War civil liberties movement, gaining the support of intellectuals from across the political spectrum and eliciting vocal

[25] Lambertson (2005), pp. 106-142.

criticism of the policy by newspapers of all political creeds, including Liberal newspapers. For the first time, what had commenced as a politically popular violation of human rights faced criticism from a politically diverse spectrum of intellectuals and activists, substantially shifting both popular opinion and moderating government policy. In sum, the effect of the Japanese expulsion controversy was to make the issue of civil liberties violations a general concern instead of a more specifically labour-left concern.

The Gouzenko Affair

Although the incarceration and prospective expulsion of ethnic Japanese inspired a diversity of groups to express concern for civil liberties, it could hardly be characterized as an issue of popular agitation or even concern. Instead, the Gouzenko Affair was the domestic issue that most contributed to making civil liberties (and a national bill of rights) a popular concern. The Gouzenko Affair began in September 1945 when a Soviet cipher clerk in Ottawa attempted to defect, bringing with him revelations of considerable Soviet espionage and penetration in Canada. The government's response was somewhat panicked and it used its continuing powers under the *War Measures Act* to suspend a wide variety of the civil liberties of suspects and witnesses during its espionage investigation, including habeas corpus, access to legal counsel, and safeguards against self-incrimination.

No subsequent contrition was shown by government officials for their actions during the Gouzenko Affair (although some internal disquiet was expressed) and the government received strong support from anti-Communist advocates, yet it was the Gouzenko Affair that did the most to undermine the trust extended to the executive to exercise prudently the extraordinary powers over civil liberties accorded to it. While

previous violations of civil liberties could be popularly excused and supported due to the exigencies of war or overlooked because such violations targeted unpopular minorities, the Gouzenko Affair provoked sharp and unyielding criticism from not only the CCF, but also from the Conservatives and even Liberal backbenchers. Suddenly the question of controlling the ability of the federal government to limit civil liberties moved from the periphery to the centre of the political debate.

Transitional Powers

Demands for a national bill of rights immediately resurfaced at the end of the war from the CCF, particularly through the advocacy of its leader M.J. Coldwell. However, it was the embrace of the issue by John G. Diefenbaker that changed the political dynamic in the advocacy of a national bill of rights. Diefenbaker had expressed concern over executive violations of civil liberties after his first election to Parliament in 1940, denouncing the *Defence of Canada Regulations* as "Star Chamber legislation"[26] and persisting in his criticism of the government's violations of civil liberties without an airing in parliament. However, it was the continuation of wartime limitations of civil liberties after the war under the *Emergency Powers Act, 1945*[27] epitomized by the Gouzenko Affair, which inspired in Diefenbaker a consistent advocacy for a national bill of rights until the passage of his own *Canadian Bill of Rights* in 1960.

In response to the revelations of the Gouzenko Affair in March of 1946, Diefenbaker definitively committed to advocacy for a national bill of rights. In doing so, Diefenbaker broke from the approach of his party. In general, condemnations by

[26] Diefenbaker, *Debates* 20-1 (1945, 2nd sess), II:2454-2457 (23 November 1945); Debates 20-1 (1945, 2nd sess), III:3099 (7 December 1945).
[27] *National Emergency and Transitional Powers Act*, SC 1945, c.25.

Conservative MPs remained somewhat guarded, with Leader of the Opposition John Bracken persisting in the language of condemning "Star Chamber methods."[28] Diefenbaker's approach tapped into the arguments of the broader international movement for a bill of rights and adopted the same programme as Coldwell in demanding the drafting of a national bill of rights. Throughout 1946, he exploited controversy over the Gouzenko Affair and the government's project to create a distinct Canadian citizenship to provide a platform for demanding a national bill of rights. Even with the controversy over the Gouzenko Affair, proposing a bill of rights as a private members bill would not likely have garnered much attention in 1946 and would have had no chance of success. However, by moving the bill of rights as an amendment to the *Citizenship Act*,[29] he was not only able to build on the attention given to that emotive issue, but doing so also provided a mechanism that would move the question of a national bill of rights to the top of the legislative agenda.

The visible continuations of civil liberties violations at the close of and following the war re-invigorated a plethora of civil liberties organisations in Canada. Whereas the focus of earlier years had tended to be repeal of a particular enactment – e.g. section 98, the Padlock Law, provisions of the *Defence of Canada Regulations*, and the Japanese expulsion orders (PC 7355, 7356, 7357) – the new movements were less concerned with the repeal of a particular enactment, such as the *Emergency Powers Act*, but instead began to focus primarily on securing "a Bill of Rights, as part of the written Canadian law."[30] This was an attempt at a more comprehensive response to civil liberties

[28] MacLennan (2003), p. 42.
[29] *Canadian Citizenship Act*, SC 1946, c.15
[30] OCLA, quoted by MacLennan (2003), p. 48.

violations instead of the largely ad hoc approach that had characterized earlier struggles. Further, whereas early demands for a national bill of rights had emerged primarily from left-labour activists and only received some support from a few nationalist intellectuals, the demands for a national bill of rights from 1946 embraced political support from the CCF, the Conservatives, and the Liberals. Admittedly, the Liberal and Conservative advocates for a national bill of rights tended to come from the periphery of their party, but the inspiration was no longer simply labour activism or enhancement of federal legislative power, but the nascent human rights movement.

A NATIONAL BILL OF RIGHTS FOR CANADA, 1946-1951

CANADA AND THE INTERNATIONAL BILL OF RIGHTS[31]

[31] The development of the ideology of human rights during the Second World War receives a magisterial account in A.W. Brian Simpson's *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2004). Ostensibly, the work is an analysis of Britain and the genesis of the *European Convention on Human Rights*, but the work contains a rare and highly effective analysis of the development of the concept of human rights from the late nineteenth century through the Second World War. Most analyses of the origins of the ideology of human rights focus on a collection of historical treatises with little historical analysis. My summation draws heavily upon the work of Brian Simpson. Analysis of the position and role of the Department of External Affairs in the negotiation of the international bill of rights is drawn from the research notes of Michael Behiels and an examination of the 5475-W-40 series of Department of External Affairs files at Library and Archives Canada. To the best of my knowledge, there is no comprehensive examination of Canada's role in the negotiation of the international bill of rights, nor is there any effective examination of the negotiations from an international perspective. Annemarie Devereux's examination in *Australia and the birth of the International Bill of Human Rights, 1946-1966* (Annandale NSW: Federation Press, 2005) of Australia's involvement gives hope that analysis of this important, but largely unexamined, topic will shortly receive more effective examination. For Canada's role, the best available analysis of Canada's negotiation and implementation of international human rights instruments is Michael Behiels's "Canada and the Implementation of International Instruments of Human Rights: A Federalist Conundrum, 1919-1982" (in *Framing Canadian Federalism: Historical Essays in Honour of John T Saywell*, eds Dimitry Anastakis and P E Bryden

Although there were many domestic events which provoked considerable concern about civil liberties violations in Canada leading to the popular multi-partisan demands for a national bill of rights in 1946, the switch from a largely *ad hoc* approach to dealing with such violations to that of a demand for a national bill of rights can be traced to the international discussion of human rights and the proposals for an "international bill of rights." As the Second World War progressed, the Western allies embraced the language of "human rights" and this language was incorporated into the Charter of the United Nations[32] and matched with a promise for an "International Bill of Rights" that would set global standards for government conduct. The international project had considerable success in its early years, culminating in a statement of international human rights by the United Nations General Assembly in December 1948, the *Universal Declaration of Human Rights*. However, work on this project would quickly bog down largely over ideological divisions over the nature and scope of rights, and legally-binding international human rights instruments would only come into existence in 1966 in the context of Cold War politicking for the support of newly independent African and Asian states.

Having its foundations in the British War Aims Committee (established August 1940),[33] President Roosevelt's inaugural enunciation of the "Four Freedoms" (January

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(Toronto: University of Toronto Press, 2009), pp. 151-184). William Schabas's "Canada and the Adoption of the Universal Declaration of Human Rights," *McGill Law Journal* 43 (1998):403 provides an analysis that focuses specifically on the "International Bill of Rights."

[32] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: http://www.unhcr.org/refworld/docid/3ae6b3930.html

[33] PRO CAB21/1581, see Christopher Hill, *Cabinet Decisions on Foreign Policy: The British Experience, October 1938-June 1941* (Cambridge: Cambridge University Press 1991), pp. 188-233.

1941),[34] and the joint Anglo-American *Atlantic Charter* (August 1941),[35] the justification of the war and the construction of the post-War order increasingly embraced the language of human rights (which was first popularized in Roosevelt's "Four Freedoms" speech). Concurrently, there was private advocacy for the incorporation of individual rights into the law of nations, such as Hersch Lauterpacht's *An International Bill of the Rights of Man,* published in 1945.[36] The wartime collaboration between the previously hostile Western democracies and the Soviet Union as well as the revelations of Axis atrocities generated support for the idea that international protections for individual rights was both feasible and necessary.

The Canadian government strongly supported the enactment of an international bill of rights, but demanded that any such instrument take due regard of Canadian federalism so as to exempt Canada from being required to implement that instrument within provincial jurisdiction.[37] Although this was a sincere concern, opposition to the international bill of rights ran considerably deeper within the Canadian government.[38] Both the Department of Justice and the Department of External Affairs strongly opposed any clearly elaborated international declaration and even more strongly opposed any

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[34] Franklin Roosevelt, "State of the Union Address 1941" in John T. Woolley and Gerhard Peters, *The American Presidency Project* (Santa Barbara, CA) [http://www.presidency.ucsb.edu/ws/?pid=16092].

[35] United States, Office of War Information, Division of Public Inquiries, *The Atlantic Charter* (Washington, DC: UNT Digital Library) [http://digital.library.unt.edu/ark:/67531/metadc581/].

[36] Hersch Lauterpacht, *An International Bill of the Rights of Man* (New York: Columbia University Press, 1945). An initial draft was prepared as early as 1943, see Simpson (2001), p. 11.

[37] For this section generally, see Department of External Affairs file 5475-W-40 and related files (5475-W-15-40 and 45-13-2-3), available from Library and Archives Canada.

[38] "Observations of Mr. Garson," 27 June 1960 (DEA/5475-W-40).

legally-enforceable instrument.[39] Canada had a similar view to that of the government of the United Kingdom on the domestic protection of civil liberties. However, the Canadian government parted ways in its belief of the utility of such an instrument. The Canadian government believed that such a bill was unnecessary in any country that would faithfully implement it and would remain unimplemented in any countries that did not already respect civil liberties, as the principle of state sovereignty would prevent any significant interference by international institutions.[40] Thus, the Department of External Affairs contended, its use would be purely one of propaganda value to highlight the discrepancy between the instrument's purported rights guarantees and actual practice.[41] However, the Department of External Affairs believed that highlighting such discrepancies would only be possible in countries with a free press and other basic civil liberties and thus the propaganda value perceived by the British Foreign Office would not actually be effective against Soviet bloc countries.

The influence of the Department of External Affairs on the Department of Justice and the debate over a domestic bill of rights is striking. It is notable that the first serious consideration of a national bill of rights by the government came not from the Department of Justice, but the Department of External Affairs, where Loring Christie first explored the issue.[42] Much of the Department of External Affairs's analysis of the international bill of rights was replicated for the government's opposition to a national bill of rights. Both departments in the 1940s were confident that Canada had a highly robust system of rights protection and that a national bill of rights would do little to

[39] Memorandum for Deputy Minister," 2 February 1950 (DEA/5475-W-40).
[40] "Memorandum for Deputy Minister," 20 January 1950 (DEA/5475-W-40).
[41] "Observations of Mr. Garson," 27 June 1960 (DEA/5475-W-40).
[42] MacLennan (2003), p. 32.

enhance civil liberties. Instead, it would only be useful as a tool for opponents of the government who would use litigation for its propaganda value, but would have little or no substantive affect on the enhancement of civil liberties in Canada. In sum, opposition to a domestic bill of rights by the Department of Justice in the late 1940s represented the same concerns as the Department of External Affairs in relation to an international bill of rights.

The Department of Justice did not believe that there were any significant violations of civil liberties by the Canadian government and those that did exist – such as those authorized under the *War Measures, Emergency Powers,* and *Transitional Powers* Acts – were necessary exceptions. Thus, a domestic bill of rights would not have any legitimate effect on enhancing civil liberties protections, but would simply be exploited for its propaganda effect to embarrass the government.[43]

This thinking is clearly reflected in the bill of rights drafted by the Department of Justice during the early debates in 1947 (and revised for the 1950 debates). This bill of rights imposed no restrictions on federal legislation or executive action, even in the most nominal sense.[44] The draft bill only provided criminal sanctions against individuals who violated the fundamental freedoms of others and immunized executive action as it exempted any such violation by those who did so in "the performance of a duty pursuant to a valid law." Further, the bill provided that anyone attempting to invoke its provisions would have to first gain the consent in writing of an Attorney General, such that any "frivolous" litigation could not be undertaken.

[43] "Observations of Mr. Garson," 27 June 1960 (DEA/5475-W-40).
[44] "Memorandum for the Deputy Minister," 16 February 1948 (DOJ/151813).

THE GOVERNMENT OF CANADA AND A NATIONAL BILL OF RIGHTS

The years from 1946 to 1951 witnessed the emergence of a highly diverse and popular movement for a national bill of rights in Canada to a degree that would not be seen again until the immediate lead up to the *Charter* from 1978 to 1982. The issue received considerable treatment in the press and a considerable airing in Parliament, with special committees formed to examine the issue, in 1947, 1948, 1949 (Senate), and 1951 (there would be no such committee again until the highly abbreviated committee of July 1960). Advocacy for a national bill of rights was initially propelled to the political centre and forefront by non-labour civil libertarians such J.G. Diefenbaker and Liberal Senator Roebuck. It gained further support from ethnic and women's advocacy groups in the wake of the *Universal Declaration of Human Rights*.[45] Yet, the movement continued to be led by labour activists,[46] both in terms of the most active advocates and in terms of the constitutional approach to a national bill of rights. However, it was the expansion of the bill of rights movement to include women and ethnic advocacy organisations and the changing priorities of labour activists that would undermine the focus of the human rights movement on a bill of rights protecting civil liberties and instead shift the focus towards issues of discrimination and different means of combating it.[47]

The demands of the non-labour civil libertarians who pushed the question of a national bill of rights to political prominence in 1946 to 1947 were less clear. As we

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[45] Arnold Bruner, "The Genesis of Ontario's Human Rights Legislation: A Study in Law Reform," *University of Toronto Faculty of Law Review*, vol. 37 (1979), p. 245.
[46] Bruner (1979), pp. 236-253.
[47] George Egerton, "Entering the Age of Human Rights: Religion, Politics, and Canadian Liberalism, 1945-50," *Canadian Historical Review*, vol 85, no, 1 (2005), pp. 451-479; Carmela Patrias and Ruth A. Frager, "'This Is Our Country, These Are Our Rights': Minorities and the Origins of Ontario's Human Rights Campaigns," *Canadian Historical Review*, vol 82 (2001), pp. 1-19.

have noticed, whereas labour activists advocating for a national bill of rights had embraced the "newer constitutional law" and had always sought out a bill of rights entrenched into the *British North America Act*, civil libertarians and British-Canadian nationalists such as Arthur Lower (and now joined by John Diefenbaker) were less clear in their demands. Although they had accepted the possibility of a *British North America Act* entrenched bill of rights, they equally accepted that the federal government could also act to clearly assert its exclusive authority over civil liberties and guarantee civil liberties through a statute (or even disallowance).

Yet, the debate over a national bill of rights over the next five years never squarely addressed the question of the effects of a purely statutory bill of rights as Diefenbaker proposed. Secretary of State Paul Martin's reply to Diefenbaker's proposal to annex a brief bill of rights to the Citizenship Act focused on the alienness and lack of necessity of such an "organic law,"[48] and only in passing noted that the proposed rights were divided between provincial and federal jurisdiction.[49] Diefenbaker would particularly dwell on the question of jurisdiction and would initially proclaim that the protection of human rights was exclusively within federal jurisdiction.[50] He consistently demanded that the government refer the issue to the Supreme Court of Canada for clarification.

Diefenbaker's more opaque approach to the form of a national bill of rights would be rapidly sidelined in the growing debate over a national bill of rights between advocates of *British North America Act* entrenchment (predominately championed by labour

[48] Paul Martin in *Debates* 20-2 (1946) II:1310-1311 (7 May 1946).
[49] Paul Martin in *Debates* 20-2 (1946) II:1312 (7 May 1946).
[50] J.G. Diefenbaker in *Debates* 20-3 (1947), II:1118-1119 (7 March 1947).

activists) and the Diceyan parliamentary supremacy espoused by the Justice Minister Garson and Deputy Minister Varcoe. Whereas Diefenbaker's proposal for a bill of rights always employed the opaque demand for "introducing a bill or declaration of rights,"[51] the demands for a bill proposed by the CCF or Senator Roebuck always took the form of the addition of a "section 148" to the *British North America Act*. Perhaps unsurprisingly, Garson and Varcoe focused their responses on the proposals for a bill of rights incorporated into the *British North America Act*.

As part of its research – and prompted by Diefenbaker – the 1947 Parliamentary Committee on Human Rights solicited the opinions of provincial Attorneys General and the deans of Canadian law schools. The response of the few provinces that replied[52] was that civil liberties were of divided jurisdiction between the federal and provincial governments and, as such, any federal attempt to enact a bill of rights would be unconstitutional. Only the Saskatchewan Attorney General indicated support for a federal attempt to enact a national bill of rights, but failed to comment on the constitutional query. The few law school deans that did reply – W.P.M. Kennedy, Louis-Philippe Pigeon, and Vincent MacDonald – echoed the contentions of the provincial Attorneys General that such rights did not come under a specific federal or provincial head of legislative jurisdiction, but were divided amongst various heads of federal and provincial powers. Further, they emphasized that any sort of bill of rights would be

[51] J.G. Diefenbaker in *Debates*, 21-2 (1949, 2nd sess), II:1173-1174 (26 October 1949); 21-6 (1952), I:714 (24 March 1952); 21-6 (1952), I:719 (24 March 1952); 21-7 (1952-53), II:1191-1192 (21 January 1953) [introduced by Fulton for Diefenbaker]; 22-2 (1955) I: 895 (7 February 1955).
[52] British Columbia, Nova Scotia, and Prince Edward Island.

unconstitutional in the sense that it would offend the doctrine of parliamentary supremacy.

Such views were already held by the Minister and Deputy Minister of Justice, who firmly developed and reiterated these views throughout the 1946 to 1951 period. At base, the most fundamental riposte was that civil liberties were already well protected in Canada and, as such, no significant change to the manner of protecting rights was needed or desirable. Further, the Minister and Deputy Minister argued that any guarantee of freedom "against infringement by any legislature,"[53] if feasible, would undermine the much more valuable constitutional principle of parliamentary sovereignty and "would be [a] retrograde step in that we would be returning to Westminster a power now enjoyed here."[54] Instead, Varcoe emphasized that, given what he viewed as the already robust protections of civil liberties in Canada, the more pressing constitutional need was a "means to amend the constitution" and that all other constitutional questions should be delayed until that issue was resolved.[55]

In sum, the government took the position from 1946 to 1951 that there was no pressing need in Canada for additional protections for civil liberties and given the constitutional controversies and problems involved in implementing any national bill of rights, the issue should be delayed until after a comprehensive domestic amending formula for the *British North America Act* had been agreed to and adopted. The government focused its arguments opposing a national bill of rights against the advocates of the "newer constitutional law," which was both easier because of the radical departure

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[53] Varcoe quoted in "The Joint Committee on Human Rights and Fundamental Freedoms." (1948) *Canadian Bar Review* 26(4):706-714. [1948 Joint Committee]
[54] 1948 Joint Committee.
[55] See Behiels (2008).

proposed by such advocates, and the fact that such voices predominated in clarity, numbers, and academic support.[56] Similarly, bill of rights advocates who adhered to the "newer constitutional law" were strongly motivated by a fear of legislative majorities and thus they rejected anything less than entrenchment into the *British North America Act*. The resulting compromise position adopted by the 1949 Special Committee on Human Rights advocating for a "declaration of human rights to be strictly limited to its own legislative jurisdiction"[57] was satisfactory to neither the largest contingent of bill of rights advocates nor to the St-Laurent government.

With increasing agitation for a bill of rights provoked by the more welcoming 1949 Special Committee, the St-Laurent government engaged in a two-prong plan to assuage the demands for a bill of rights. First, it used the 1950 Dominion-Provincial Conference to make a decisive declaration that it would take no action on a bill of rights so as not to retard the discussions of a domestic amendment procedure for the *British North America Act*. However, the government also developed a contingency plan if the decisive attempt to postpone a bill of rights debate failed to sufficiently quiet opponents of the government's policy. In this, they noticed the increase in egalitarian and anti-discrimination advocacy groups (i.e. ethnic and women's advocacy groups) that had presented before the 1949 Special Committee and whose leaders had corresponded with the government. The government secretly revised the 1948 draft 'bill of rights' that would protect against private discrimination (effectively, a human rights code). It was hoped that such an instrument would sufficiently satisfy the demands of the 1949 Special Committee for an "interim measure" as well as of the ethnic and women's advocacy

[56] See "A Scholarship of Rights" in Adam (2009), pp. 175-191.
[57] Quoted by Adams (2009), p. 194.

groups, so as to relieve pressure on the government for an instrument that would bind parliament's ability to legislate on civil liberties. In the end, the first procedure was sufficient and no recourse to the contingency plan proved necessary.

By 1952 demands for a national bill of rights had simply melted away, the St-Laurent government's stubborn refusal had succeeded in deterring human rights activists from pursuing the issue and the popular groundswell for a national bill of rights that had emerged in the 1940s died away, not to be reinvigorated with the same passion until the late 1970s with the discussions that resulted in the 1982 *Charter of Rights*.

FAIR PRACTICES LEGISLATION

Demands for a national bill of rights in 1946 and 1947 were initiated and sustained by civil libertarians and labour activists committed to the entrenching civil liberties and not social and economic rights. Many of these activists, such as Frank Scott, did not believe that social and economic rights were justiciable.[58] However, the attention given to the *Universal Declaration of Human Rights* in 1948 radically changed the composition of the human rights movement that had been re-invigorated in 1946 and 1947, with the *Declaration* inspiring ethnic and women's advocacy groups to become committed to the enactment of a national bill of rights. Although the UDHR contains guarantees for civil liberties, it equally embraces anti-discrimination and social and economic rights. Thus, the idea that a national bill of rights could protect against social and economic discrimination gained much more substantive currency and brought ethnic and women's advocacy groups to the forefront of the bill of rights advocacy movement. As such, the demand for a bill of rights which was much more focused on traditional

[58] Scott (1949), p. 497.

liberties in the 1946-1947 period gave equal prominence to the inclusion of anti-discrimination provisions in the demands for a bill of rights.[59]

Although initially providing greater weight to the bill of rights movement, these anti-discrimination provisions served ultimately to weaken the momentum for a national bill of rights. As we have noticed, by 1950 the federal government had observed the increased prominence of ethnic and women's advocacy groups amongst those demanding a national bill of rights and sought to spilt them from the civil libertarians by way of a bill of rights which would protect against private discrimination, but would not in any way impinge on the liberties of the federal parliament and government. However, the actions of the Ontario government largely obviated the need for the federal government to pursue this contingency plan.[60]

In 1951, the Ontario legislature enacted two landmark pieces of "fair practices" legislation, the *Female Employees Fair Remuneration Act*[61] and the *Fair Employment Practices Act*[62] (a *Fair Accommodations Practices Act*[63] was to follow in 1954). The effect of this legislation was to illustrate that issues of discrimination in the private sector seemed to fall more clearly within provincial jurisdiction and that at least some provincial governments were more amenable to broad rights-protection legislation. By 1960, six other provinces had enacted at least one of the trinity of fair pay, fair employment, or fair accommodations practices Acts. This success was largely the result of pressure from many of the advocacy groups that had invigorated the demands for a national bill of

[59] MacLennan (2003), pp. 91-99.
[60] Patrias and Frager (2001), pp. 1-19.
[61] SO 1951, c 26.
[62] SO 1951, c 24.
[63] SO 1954, c 28.

rights from 1948 to 1951, but now redirected their energies towards making demands for fair practices legislation. This included much of the labour movement, which began directing its energies towards anti-discrimination advocacy based on the belief that race-hatred was being used as an instrument to weaken or smash union solidarity.

THE DECLINE OF POPULAR SUPPORT FOR A NATIONAL BILL OF RIGHTS

The rapid melting away of the support for a national bill of rights in the early 1950s is surprising as the government developed no new arguments other than those used in 1947 and provided no program, legislative or otherwise, to assuage the demands for a bill of rights. Instead, it successfully presented a front of stony resistance that eventually succeeded. This fading away for support for a national bill of rights occurred for two main reasons: first, the popular support for a bill of rights was highly amorphous and lacked a coherent goal, and second, the massive widening of the human rights movement provoked by the demands for a national bill of rights expanded the goals of the movement from traditional civil libertarian goals to emergent egalitarians goals.

Two Gallup polls, one from 1947 and one from 1957, show a marked decline in concern over whether rights were threatened in Canada. Both surveys polled "a cross-section of the voting public" whether they thought "personal rights are being fully protected in Canada, or do you think that they are in danger?" In 1957, 63% responded that their rights "fully protected" and only 19% responding that their rights were in danger. In contrast, in the 1947 poll, only 35% responded that their rights were "fully protected" with 43% responding that their rights were in danger. Gallup attributed this drop from 43% to 19% mainly to"the lessening fear of communism, socialism, and left-wing political movements in Canada," noting that 10% fewer Canadians (two-fifths of

the decrease) cited the "threat of communism or socialism" as the primary threat to their personal liberty.[64] Many of those who cited international communism as the threat to their rights were probably less concerned with the rights abuses of the sort meted out during the Gouzenko Affair or under the Padlock law, but instead believed that a bill of rights would protect the citizen against abuses by a communist infiltrated government

Further, the issues that gave popular inspiration for a national bill of rights in the immediate aftermath of the war had largely disappeared by 1950. As embarrassing as the Gouzenko Affair had been to the government, such evident abuses had ceased by 1950. The administrative framework that had enabled the abuses of the Gouzenko Affair and the other prominent civil liberties abuses of the 1940s – the *War Measures Act*, the *Emergency Powers Act*, and the *Transitional Powers Acts* – were not only dismantled by 1950, but had been relatively benign in their use over the final two years. Government arguments that rights were well protected in Canada may have been seen as credulous in 1947, sparking popular support for a national bill of rights. Yet, St-Laurent's argument that the question of a national bill of rights should be wholly subordinated to the question of a domestic amending formula would probably have seemed eminently reasonable to most Canadians in 1950.

The significant popular support for a national bill of rights in the late 1940s that was probably unmatched until the mid-1970s emerged as a result of the evident abuses of civil liberties during the Depression, the War, and the beginnings of the Cold War, as well as the focussed commitment of labour activists to civil liberties. Remarkably, the

[64] Canadian Institute of Public Opinion, "Voter Concern for Personal Liberties Declines in Decade," 2 February 1957. An advanced version was sent to John G Diefenbaker by Bryne Hope Sanders on 29 January 1957 (Diefenbaker Papers, pp. 15379-15381). See also MacLennan (2003), p. 110.

labour movement in Canada never significantly advocated for the constitutional entrenchment of social and economic rights, allowing them to both build alliances with civil liberties advocates in the political centre and right as well as securing their leadership of the advocacy for civil liberties.

A similar dynamic occurred when labour activists embraced anti-discrimination as the focus of their human rights advocacy, building alliances with ethnic and women's advocacy groups whose politics were not necessarily supportive of labour. The emergence of provincially-focused anti-discrimination advocacy groups as major elements in the human rights movement and their conversation of the labour activists to making the championing of anti-discrimination their primary human rights goal shifted the focus of human rights advocates away from traditional civil liberties (and thus a national bill of rights) and towards anti-discrimination (and thus provincial fair practices legislation).

The effect of this was that the bill of rights project pursued by the Conservative Diefenbaker government of the late 1950s did not share the same foundations, either political or ideologically, as the demands (in the aggregate) for a national bill of rights in the mid and late 1940s. Diefenbaker's prominence in the human rights movement in the 1940s waned as quickly as it waxed. Although Diefenbaker was prominent in bringing the question of a national bill of rights to the forefront of the political discussion, his role as a leader in the movement had largely passed by 1948 to the labour activists and the plethora of human rights organisations that typically did not share the same political constituency as Diefenbaker.

THE "DECADE OF HUMAN RIGHTS:" THE 1950S

Despite the emergence of the new Canadian human rights historiography, examination of the period that F.R. Scott described as the "decade of human rights[65] (i.e. the 1950s) remains curiously undeveloped. Clement's analysis only begins in earnest in the 1960s;[66] MacLennan's analysis is rather brief;[67] and Lambertson only has two case studies from the early years of that decade.[68]

Excepting the emergence of the *Canadian Bill of Rights*, the 1950s were most notable in the development of human rights for two trends: first, the emergence of "fair practices" legislation;[69] and, second, the development of an 'implied' bill of rights by the Supreme Court of Canada. Neither of these stories has yet been given much scholarly treatment. While the 'implied' bill of rights is routinely mentioned in legal textbooks, careful examination of the jurisprudence is limited and careful examination of the full historical context of the cases is virtually non-existent.[70] Similarly, while there is some

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[65] F.R. Scott, "Expanding Concepts of Human Rights," *Canadian Bar Journal*, vol. 3(1960), p. 200. Originally delivered as an address to the Ontario Branch of the Canadian-Bar Association in February 1960.

[66] Clement (2008).

[67] MacLennan (2003), pp. 109-115.

[68] Lambertson (2005).

[69] Beginning with Leslie Frost's Progressive Conservative government of Ontario in 1951, provincial governments began to enact laws which banned and provided penalties for racial, ethnic, and gender discrimination on private property. Typically these took the form of a triptych of "Equal Pay," "Fair Employment Practices," and "Fair Accommodations Practices" acts. Between 1951 and 1961, five provinces – Ontario, Saskatchewan, Manitoba, Nova Scotia, and British Columbia – had enacted the full triptych of legislation, with Prince Edward Island and New Brunswick having enacted one of two elements, respectively, of the triptych.

[70] The best treatment is probably that of Ian Bushnell, *The Captive Court*: *a study of the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 1992), pp. 322-328. One of the most referenced sources is Dale Gibson "One Step Backwards: The Supreme Court and Constitutional Law in the Sixties" *Canadian Bar Review* vol 53 (1975), pp. 621-648. Shockingly, no mention of it is made in John Saywell, *The*

examination of the emergence of fair practices legislation in Ontario,[71] its spread to other provinces and its transformation into human rights codes[72] in the 1960s remains largely unexplored.

Notably, anti-discrimination legislation was not initially enacted under the rubric of 'human rights,' but instead under the rubric of 'fair practices.' While 'fair practices' legislation embraced the substance of the emerging human rights paradigm, it clothed itself in the language of traditional British rights, evoking the idea of British 'fair play.' It was only under the Robarts government of Ontario in 1962 that provinces began to consolidate their various 'Fair Practices' legislation into 'Human Rights Codes' with the added innovation of Human Rights Commissions – designed to make redress more readily accessible than simply the court system – as the enforcement mechanism. This not only made the protections more robust, but finally dispensed with the old 'British' diction in favour of modern 'universalist' diction.

Unfortunately, the full context of these developments in human rights cannot be explored in this dissertation. However, what is most germane is the impression that those two trends would have left on legal scholars and practitioners when the *Canadian Bill of Rights* was being drafted in the Department of Justice in the late 1950s.

As Frank Scott reflected before the Canadian Bar Association in February 1960,[73] "constitutionally speaking, the 1950s was predominantly the decade of human rights:"[74]

Lawmakers: Judicial Power and the Shaping of Canadian Federalism (Toronto: Osgoode Society, 2002). Equally surprising, William Kaplan's *State and Salvation: The Jehovah's Witnesses and Their Fight for Civil Rights* (Toronto: University of Toronto Press, 1989) does not cover the 1950s, despite the fact that many of leading "implied bill of rights" cases involved the Jehovah's Witnesses fight for civil liberties.

[71] e.g. Bruner (1979); Patrias and Ruth (2001)

[72] E.g. the *Ontario Human Rights Code* S.O. 1961-62, c.93. Enacted 30 March 1962.

> *If we take a short look backward over the past dozen years, and survey leading decisions of the Supreme Court of Canada as well as the substance of much federal and provincial legislation, we cannot but be struck by the emergence in our law of a remarkable combination of cases and legislative purposes which we can properly classify under the heading of human rights.*[75]

That is to say, from the vantage point of 1960, the 1950s jurisprudence had apparently established the division of powers between the federal and provincial governments over 'human rights.' The division of powers identified by Scott was one where discrimination was a private law (property and civil rights) matter that fell largely within provincial jurisdiction,[76] while 'civil liberties' were a public law (criminal law) matter that fell within federal jurisdiction.[77]

While the scope of a "bill of rights" during the debates in the 1940s was vague, "the decade of human rights" had seemingly clarified the issue. For a draftsman tasked with drafting a bill of rights within federal legislative, a neat division had seemingly emerged in the law that gave Parliament unfettered jurisdiction over civil liberties while excluding it from regulating matters of discrimination in the provinces. Though the development of fair practices legislation that had been the focus of human rights activists in the 1950s would have been notable, the primary concern to federal legislative draftsmen would have been the development in the civil liberties jurisprudence. This development is more carefully detailed in Chapter five.

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[73] Published as F. R. Scott, "Expanding Concepts of Human Rights," *Canadian Bar Journal* , vol. 3 (1960), pp. 199-208.
[74] Scott (1960), p. 200.
[75] Scott (1960), p. 199.
[76] Scott (1960), p. 201.
[77] Scott (1960), p. 200. Notably, Bora Laskin expressed a similar view in Bora Laskin, "An Inquiry into the Diefenbaker Bill of Rights," *Canadian Bar Review* 37, no 1 (March 1959), pp. 77-134.

CONCLUSION

The period from 1945 to 1960 marked a sea change in the discourse of rights in Canada. The phrase "human rights" had little currency prior to the Second World War and, instead, Canadians tended to speak of "British liberties" and "British fair play" to describe their heritage of individual rights and liberties. However, these individual rights and liberties were often reserved for those in the broad mainstream of society (British-Canadians and French-Canadians in Quebec) and effectively denied to 'alien' communities (e.g. Jehovah's Witnesses, Asians, Jews, Aboriginals, Eastern Europeans) and those who challenged the existing economic and patriarchal order (communists, radical trades unionists, feminists).[78] By the 1960s, the term "human rights" became broadly favoured and rights activism had spread to previously disenfranchised groups demanding rights on the basis of "universalism."[79]

In the intervening period, these two rights discourses not only existed in parallel but also intermingled. The *Canadian Bill of Rights* was a hybrid of traditional and modern approaches to rights. In its long title – *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms* – and justification on the basis of Canada's "international human rights obligations," the Act reflected an embrace of the modern approach. But its short title and operative language largely evoked Canada's British legal heritage.

However, this intermingling has largely been overlooked in the existing literature. To be sure, during this period many – particularly political, legal, and bureaucratic elites – rejected the innovation of "human rights" and much of its associated legal, political,

[78] Lambertson (1998), pp. 1-2.
[79] James (2006), pp. 41-66.

and social demands. Such detractors argued that Canadians had long had a robust tradition of British liberties and, thus, 'human rights' were but a cover for something nefarious. As Justice Minister Stuart Garson responded in 1955 (in between condemnations of American McCarthyism) to one of Diefenbaker's perennial demands for a bill of rights:

> *With the exception of the communists, who are very prominent supporters of a bill of rights in Canada, all these men and women are estimable citizens. [...] the only party that I know of in Canada which denies human rights to the individual is the communist party. Yet there is no political party or organization in Canada today which is more active than the communist part in its support of a bill of rights. Why? Because I suggest that a Canadian bill of rights would suit the interests and plan of that party.*[80]

However, as with fair practice legislation, embrace of the discourse of traditional British liberties did not axiomatically reflect a rejection of the modern precepts of human rights. As we have noticed, the existing literature has largely portrayed the contest between traditional 'British liberties' and modern 'human rights' in binary terms of rights conservatives ranged against rights progressives. In this account, those relying on the traditional discourse are simply trying to stymie the reforms of those who had embraced the modern discourse. This approach has tended to overlook the intermingling of these two traditions and thus largely ignored the development of fair practices legislation, the implied bill of rights and, the *Canadian Bill of Rights*. This dissertation begins to fill one element in this considerable void. ♦

[80] Stuart Garson (Minister of Justice), Debates 22-2 (1955), I:906 (7 February 1955).

Chapter Two – The Other "Newer Constitutional Law"

Canada's legacy as a British colony endowed it with legislatures with "authority as plenary and as ample [...] as the Imperial Parliament,"[1] but also with a "controlled" constitution that could not be amended by ordinary domestic legislative means but only through appeal to the Parliament of the United Kingdom. This contrast evoked a question as to the effect of this colonial legacy with the passage of the *Statute of Westminster*: did Canada emerge with a constitution akin to that of the United Kingdom where all statutes are, formally, of equivalent form (i.e. parliamentary supremacy) with the anomalous addition of entrenched federalism, or did it serve to render the *British North America Act* particularly as Canada's, albeit minimalist, supreme law (i.e. constitutional supremacy)? This technical aspect of the nature of Canada's constitution has received surprisingly little scholarly attention, notably amongst analyzes of the demands for a "constitutional" bill of rights in the first decades after the enactment of the *Statute of Westminster*. This chapter examines some of the contours of constitutional thinking leading up to the enactment of *Canadian Bill of Rights*.

"CONSTITUTIONAL" IN CURRENT SCHOLARSHIP

Although the typical characterization of Canada's constitution as being a mix of "written" and "unwritten" elements does continue to give some flexibility to the terms "constitutional" and "unconstitutional," these terms are largely understood and employed today to mean a violation of the section 52 defined Constitution. That is to say, "unconstitutional" now largely means a particularly egregious species of "illegal." As in

[1] *Hodge v The Queen, (1883)*, 9 App Cas 117 (PC) at 132

the United States, that which is "unconstitutional" are those laws, actions, and so forth, that the courts can modify or nullify on the basis of the supreme law of the Constitution.

This contrasts with the situation in the United Kingdom, where the term "unconstitutional" tends to convey the meaning of conduct contrary to the "undoubted principles of the unwritten but universally accepted constitution."[2] Obviously, there are and have always been situations in the United Kingdom where conduct contrary to "universally accepted principles" is not simply unwritten, but also contrary to law and even situations where judicial sanction can be given to violations of unwritten principles as in the law of torts when public officials commit wrongful acts that are "oppressive, arbitrary, or unconstitutional."[3] That is to say, "unconstitutional" embraces both rules that are both "illegal" and "wrong."

Today in Canada, "*ultra vires*" is more often taken to be synonymous with "unconstitutional," but at the beginning of Canada's federal union, it was the latter (British) definition of "unconstitutional" which prevailed. John A. Macdonald understood the term "unconstitutional" to be distinct from "exceed[ing] the jurisdiction conferred on local legislatures,"[4] distinguishing them as different grounds upon which he

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[2] Edward A Freeman, *The Growth of the English Constitution from earliest times*, 3rd edition (London: Macmillan, 1909), p. 117. Notably, Freeman argues that the term unconstitutional was synonymous with illegal prior to the seventeenth century, before men had "reached the more subtle doctrine that there may be offences against the Constitution which are no offences against the Law." (p. 113)

[3] *Rookes v Barnards* [1964] AC 1129; *Kuddus v Chief Constable of Leicestershire*, [2001] 3 All E.R. 193; cited in A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law*, 13th ed (Harlow, England: Pearson Education, 2003), p. 25.

[4] John A. Macdonald "*Re: Reports of the Minister of Justice and Order-in-Council with respect to the disallowance of Acts of the Provincial Legislatures"* (8 June 1868), reprinted in W.E. Hodgins (ed), *Correspondences, Reports of the Ministers of Justice and Orders in Council upon the subject of Dominion and Provincial Legislation 1867-1895* (Ottawa: Government Printing Bureau, 1896), pp. 61-62.

would veto provincial legislation.[5] At various times "unconstitutional" has meant conduct contrary to the "supreme law," such as the *British North America Acts* or *Constitution Acts*, conduct contrary to "unwritten" principles, and also conduct contrary to "ordinary" statutes. Invocation of the term "unconstitutional" has been employed to mean these different things (with varying degrees of exclusivity to the other meanings) not only by the same person at different times, but by the same person and the same time.

MORAL AND TECHNICAL APPROACHES TO THE CONSTITUTION

Since 1982 the Constitution of Canada has been formally and explicitly defined in section 52 of the *Constitution Act, 1982.* Yet, even this formal and explicit definition has proven to be incomplete and contested with the Supreme Court of Canada having found both that the list of instruments in the *Constitution Act, 1982* is non-exhaustive[6] and that certain principles are entrenched (despite a complete lack of any enactment which expresses that principle).[7] As a result, the precise limits of the "supreme law" of Canada remain uncertain and contested.

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[5] Vipond ("Alternative Pasts," 1990) and La Forest (*Disallowance*, 1955) have argued that both the terms "unconstitutional" and "illegal" meant "*ultra vires*" to Macdonald because they appear together ("illegal or unconstitutional") in the enumerated reasons for why "Macdonald indicated that the federal government would consider it appropriate to exercise the veto" (Vipond (1990), p. 129). However, this is an imprecise reading of the report. What Vipond indentifies as the reason for vetoing provincial legislation is, in actuality, terms upon which the Minister of Justice must write reports. Earlier in the document he clearly distinguishes "exceed[ing] the jurisdiction conferred on local legislatures" from "unconstitutional" with the latter term remaining undefined. The identification of "unconstitutional" and "illegal" as synonymous by Vipond and La Forest is illustrative of the power of contemporary understandings to cloud historic meanings.

[6] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly),* [1993] 1 SCR 319.

[7] This was most explicitly discussed in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly),* [1993] 1 SCR 319*;* however, it appears frequently in Supreme Court reasoning. For example, "judicial independence" in *Beauregard v*

For example, in *Beauregard*, the Supreme Court of Canada asserted judicial independence on the basis of an inference on the meaning of a preamble:

> *The preamble to the Constitution Act, 1867 states that Canada is to have a Constitution "similar in Principle to that of the United Kingdom" Since judicial independence has been for centuries an important principle of the Constitution of the United Kingdom,* ***it is fair to infer*** *that it was transferred to Canada by the constitutional language of the preamble.*[8]

Such a contention broke with the Court's own reasoning just before the passage of the 1982 Constitution, when it reasoned in the *Patriation Reference* that:

> *A preamble, needless to say, has no enacting force, but, certainly, it can be called in aid to illuminate provisions of the statute in which it appears.*[9]

Prior to *Beauregard*, courts in Canada, the United Kingdom, and in many other Commonwealth jurisdictions never had trouble construing legislation so as to safeguard the principle of judicial independence and understood it as such a fundamental *grundnorm* that they almost invariably construed any statute seeming to undermine that principle as "not possibly the intent" of the legislature.[10]

Canada, [1986] 2 SCR 56 at 73; the "rule of law" in *Reference re: Manitoba Language Rights*, [1985] 1 SCR 721 at 750; and "federalism" in the *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753.

[8] *Beauregard v Canada*, [1986] 2 SCR 56 at 73. Emphasis mine.

[9] *Reference re: Resolution to Amend the Constitution*, [1981] 1 SCR 755 at 805.

[10] For example, the Privy Council in *Toronto Corporation v York Corporation*, [1938] AC 415 per Lord Atkin at 426:

> *While legislative power in relation to the constitution, maintenance and organization of Provincial Courts of Civil Jurisdiction, including procedure in civil matters, is confided to the Province, the independence of the judges is protected by provisions that the judges of the Superior, District, and County Courts shall be appointed by the Governor-General (s. 96 of the British North America Act, 1867), that the judges of the Superior Courts shall hold office during good behaviour (s. 99), and that the salaries of the judges of the Superior, District, and County Courts shall be fixed and provided by the Parliament of Canada (s. 100). These are three principal pillars in the temple of justice, and they are not to be undermined.*

Prior to 1982, there was no equivalent to section 52 of the 1982 *Constitution Act* and thus the limits of the constitution of Canada were that much more uncertain and contested. These contested understandings of the constitution of Canada were both moral and technical. At a 1927 Dominion-Provincial conference no precise amending formula for the *British North America Act* could be agreed upon as it was believed that wide discussion of the issue "would stir up local party strife and arouse sentiment and feeling"[11] and, as such, Canada opted for continued constitutional dependence in 1931 with the *Statute of Westminster*.[12] Canadians had radically different visions of the moral basis of their union that scuttled every bid for complete constitutional independence for over fifty years.[13] Constitutional independence eventually succeeded, not by bridging those different visions, but by accepting that the consent of the Quebec government was unnecessary.

Yet, these controversies over the moral constitutional understandings have obscured a second level of debate that existed in relation to technical understandings of the constitution. The transition from formal constitutional subordination to formal constitutional independence required Canadians to re-confront the never reconciled controversies of the 1860s.[14] Yet it also required reconciling technical questions as to how a polity passes from formal constitutional subordination to formal constitutional independence. Both the moral and technical questions were addressed by the Supreme

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[11] Canada, Department of Labour, *The Labour Gazette*, vol. 27 (1927), p. 1169.
[12] *Statute of Westminster, 1931*, 22 George V, c.4 (UK)
[13] Peter H. Russell, *Constitutional odyssey: can Canadians become a sovereign people?* Third Edition (Toronto: University of Toronto Press, 2004).
[14] Jordan Birenbaum, "Nebulous Milestones: Canada's Independence Process," in *Historia Comparada de Las Américas: sus procesos independentistas*, ed. Patricia Galeana (Mexico: Siglo XXI editores, 2010), pp. 705-744 at 724-726.

Court of Canada in the *Patriation Reference,*[15] but the moral questions have so dominated the constitutional discussions since the 1960s that the technical questions were effectively relegated to irrelevance and received almost no academic treatment until Peter C. Oliver's 2005 *Constitution of Independence.*[16]

Instead, echoing the *Patriation Reference*, most scholars have assumed that a formal system of Diceyan parliamentary supremacy (of Westminster) was replaced by a formal system of constitutional supremacy (by section 52 of the *Constitution Act, 1982*). Further, the emergence of a theory of constitutional supremacy has, too, only recently been subject to careful examination, notably with Eric M Adams's discussion of "Canada's 'Newer Constitutional Law'"[17]

THE "NEWER CONSTITUTIONAL LAW"

For most modern scholars and many of the advocates of a bill of rights since 1930s, Canada's constitution was defined by a "Newer Constitutional Law" [18] of

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[15] *Reference re: Resolution to Amend the Constitution*, [1981] 1 SCR 755.

[16] Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Toronto: Oxford University Press, 2005).

[17] Eric M Adams, "Canada's 'Newer Constitutional Law' and the Idea of Constitutional Rights," *McGill Law Journal*, vol. 51 (2006), pp. 435-474; and Eric M Adams, "The Idea of Constitutional Rights and the Transformation of Canadian Constitutional Law, 1930-1960," DJS thesis, Faculty of Law (Toronto: University of Toronto Press, 2009), p. 28.

[18] The term "newer constitutional law" was employed by W.P.M. Kennedy in a book review in the *Canadian Bar Review* in 1931 (Kennedy (1931) at pp. 553-554). In his doctoral thesis, Eric Adams (Adams (2009)) employs the term (at p. 20) to characterize the constitutional thinking developing amongst mostly left-wing scholars and human rights activists beginning in the 1930s. Adam characterizes this thinking as nationalist and as being parallel to the nationalism which "simultaneously occurred in the arts as Canadian painters and poets explicitly challenged the British traditions that had largely dominated the Canadian cultural imagination" (p. 37). This line of constitution thought strongly emphasizes popular sovereignty and written, entrenched constitutions – particularly an entrenched bill of rights. I argue – and Adams, along with MacLennan

constitutional supremacy which rejected British parliamentary sovereignty and embraced American principles of constitutionalism as an expression of "Canada's constitutional maturity and independence."[19] For the adherents to the "Newer Constitutional Law," the *Statute of Westminster* did not replicate the British constitutional order adapted to Canada, but instead created a new constitutional order on the (American) model of constitutional supremacy, with the *British North America Act* Canada's Constitution *in toto*, although in need of considerable augmentation. While this "Newer Constitutional Law" dominates modern constitutional thinking and dominated the thinking of most of the advocates of a bill of rights since the 1930s, the existing scholarship largely fails to recognize that, particularly from the 1930s through the 1950s, thinking as to the technical foundations of the constitution was not dichotomous but pluralist.

PARLIAMENTARY SOVEREIGNTY PRIOR TO 1960

In the years leading up to the passage of the *Canadian Bill of Rights*, there were many competing visions of the constitution of Canada. Although I have spoken of different schools such as the "newer constitutional law," "Diceyan parliamentary sovereignty," and "self-embracing parliament sovereignty," such labels are often imprecise as leading constitutional thinkers combined elements of these different ways. For example, at times, I counterpoise Louis-Philippe Pigeon as an adherent of Diceyan ("continuing") parliamentary sovereignty and Driedger as an adherent of the "new view" of self-embracing parliamentary sovereignty. However, a careful analysis of each of their

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and Lambertson, would probably agree – that Trudeau – and thus, in turn, the *Canadian Charter of Rights and Freedoms* – was a direct heir of this approach to constitutionalism. As such, it is the sort of constitutional thinking that has dominated Canadian constitutional thought for at least the past three decades.

[19] Adams (2009).

writings reveals that they combined and adapted various elements of the theories proffered by leading British constitutional scholars of the era, to accommodate the peculiarities of the Canadian context.

Constitutional systems can be broadly divided between polities with parliamentary supremacy and polities with constitutional supremacy. Today, the former is rare and the latter is generally seen as essential to modern constitutionalism.[20] Typically, the United Kingdom is presented as the archetype of parliamentary supremacy and the United States as the archetype of constitutional supremacy. Parliament is supreme in the United Kingdom as the constitution is "unwritten" and (formally) as flexible as ordinary legislation. The Constitution is supreme in the United States as the constitution is exhaustively written in a single consolidated instrument and is less flexible to amend than ordinary legislation. As a British colonial polity, Canada formally existed in a constitutional order characterized by the parliamentary supremacy of the Westminster parliament (albeit with no more than, in the words of Edmund Burke, "virtual representation" in parliament), but in practical terms, by a constitutional order characterized by the constitutional supremacy of the *British North America Act* (and its predecessors as well as certain other British statutes) over local legislation. Therefore, Canadian constitutional thinkers were steeped in the logic of both types of constitutional orders.

The passage of the *Statute of Westminster* granting Canada legal independence (mostly), the logic of federalism, and the example of the United States provoked many to posit that the *Statute of Westminster* had bequeathed to Canada a constitutional order

[20] For example, Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction*. 5th edition. (Oxford: Oxford University Press, 2009).

based upon constitutional supremacy. However, this interpretation was neither exclusive nor automatic. Australia prior to the *Statute of Westminster* developed a jurisprudence of constitutional supremacy (which was, admittedly, somewhat repudiated by the Privy Council in *MacCawley*). [21] In contrast, South Africa enthusiastically embraced parliamentary supremacy following the passage of the *Statute of Westminster* with the passage of the *Status of the Union Act, 1934*[22] – explicitly declaring "the Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained" – and its highest domestic court endorsed this view in 1937 in *Ndlwana.*[23] For South Africa of that era, the provisions of the *South Africa Act, 1909*[24] were generally viewed as no more than directory and could be altered by explicit or even implicit amendment by its parliament.[25]

Neither parliamentary nor constitutional supremacy, were the automatic results of the *Statute of Westminster*. The logic of federalism – with the need for adjudication between competing legislative authorities – tended to emphasize the importance of constitutional supremacy, while the logic of nationalism – with the impulse to break from pre-existing limitations – tended to emphasize the importance of parliamentary supremacy. In the Canadian context, this resulted in leading constitutional experts simultaneously being defenders of parliamentary supremacy and constitutional supremacy, but in extremely diverse ways.

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[21] *McCawley v The King*, [1920] AC 691 (PC).
[22] Act no. 69 of 1934.
[23] *Ndlwana v Hofmeyr*, [1937] AD 229.
[24] 9 Edward VII, c 9.
[25] N.B. Even before the *Statute of Westminster*, the *South Africa Act* did contain an amending clause, s. 152, which provided that "Parliament may by law repeal or alter any of the provisions of this Act" except in a few specific areas which demanded an absolute two-thirds majority of parliament.

CONSTITUTIONAL SUPREMACY: THE "NEWER CONSTITUTIONAL LAW"

The human rights movement which emerged in the 1930s tended to embrace the "Newer Constitutional Law" of constitutional supremacy while opponents of judicial review of legislation on the basis of human rights guarantees tended to embrace Diceyan or "continuing" parliamentary sovereignty. However, these divisions were never perfectly correlative and the embrace of each of these constitutional philosophies was rarely tidy.

For socialist advocates of judicially-enforced rights guarantees, the tension between these poles could be particularly difficult as their nationalism and economic radicalism pushed them to break decisively from existing structures. Thus they "exalted in the democratic possibilities of parliamentary supremacy," yet they sought to "simultaneously undermin[e] the normative authority of legislatures to govern unconstrained by the strictures of written rights."[26] As such, while generally advocating in favour of constitutional supremacy some nevertheless continued to adhere to certain principles of parliamentary supremacy. Thus, a vocal and adamant defender of "Newer Constitutional Law" (i.e. constitutional supremacy) such as Bora Laskin nonetheless embraced the view that Parliament could exercise the judicial power of defining the terms of the *British North America Act*, a view more often reserved to advocates of parliamentary sovereignty. In his 1959 critique of the *Canadian Bill of Rights*, Laskin argued vigorously for constitutional supremacy and the primacy of the courts in

[26] Adams (2009), p. 67.

guaranteeing fundamental freedoms entrenched in that supreme constitution, yet he argued that parliament had the power to define the terms of that supreme constitution.

"CONTINUING" SOVEREIGNTY: DICEY'S ACOLYTES

However, more germane to discerning Driegder's constitutional thought is in understanding the perspective and contradictions in other leading adherents of parliamentary sovereignty. Driedger decisively rejected constitutional supremacy and embraced parliamentary sovereignty, but of a variety particularly at odds with other leading advocates of parliamentary sovereignty.

Louis-Philippe Pigeon

Louis-Philippe Pigeon's constitutional thinking represented the stream of thinking which emphasized Diceyan "continuing" parliamentary sovereignty. This probably emerged partially from his French-Canadian nationalist inclinations, which influenced him to embrace a constitutional approach that would help maximize the sovereignty of the Quebec legislature. Yet, the corollary of his approach also resulted in the maximization of the sovereignty of the Canadian Parliament. Although he was a staunch defender of federal rigidity and, therefore, the constitutional supremacy of section 92 of the *British North America Act, 1867,* Pigeon generally argued in favour of the maximization of continuing parliamentary sovereignty. In his criticism of Bill C-60 in 1959, Pigeon argued that, despite Canada's federal constitution, Parliament could exercise judicial powers and define the content of the division of powers which "would

amount to a constitutional restriction of their [provincial] legislative and executive powers."[27]

Further, Pigeon seemed to view many of the provisions of the British North America Act that most other scholars viewed as entrenched, as simply being directory and, therefore, not binding on Parliament. Pigeon posited that "it would not even be necessary to go through the motion of first passing an Act amending the Bill of Rights and then passing the Act derogating therefrom, because the proposed Bill does not purport to be an amendment of the constitution."[28] One could infer from such an argument that he believed that had the *Canadian Bill of Rights* been incorporated into the British North America Act, it would have been binding on Parliament and the provincial legislatures. Yet, he never makes such a contention clear and is keen to avoid doing so, noting that "whether or not section [2] would, as proposed, amount to an enactment of fundamental principles rather than a statement of principles of construction need not for the moment be pondered."[29] In fact, Pigeon seemingly argued that any limitation on parliamentary supremacy other than division of powers between legislatures was impossible and that even a Westminster-enacted bill of rights would not be entrenched (in accordance with Driedger's analysis on this issue). Pigeon would later repeat this argument as a Supreme Court Justice:

> *ss. 53 and 54 are not entrenched provisions of the constitution, they are clearly within those parts which the Parliament of Canada is empowered to amend by s. 91(1). Absent a special requirement such as in s. 2 of the Canadian Bill of Rights,[30] nothing prevents Parliament from indirectly*

[27] Pigeon (1959), p. 69.
[28] Pigeon (1959), p. 70.
[29] Pigeon (1959), p. 70.
[30] N.B. by this point, Pigeon has accepted the reasoning of the majority and ceased in his dissent (first expressed in his 1959 article and first reasoned in the Supreme Court in

> *amending ss. 53 and 54 by providing for the levy and appropriation of taxes in such manner as it sees fit, be delegation or otherwise.*[31]

The language guaranteeing democratic rights in, for example, the proposed 1971 *Victoria Charter*[32] differed little from ss. 53 and 54 of the *British North America Act*. For Pigeon in the *Egg Reference*, inclusion in the *British North America Act* did not in and of itself represent entrenchment, but instead whatever was not entrenched by s. 91(1) – and ss. 91 to 95 generally – was open to amendment by the respective legislatures. Thus if the language of ss. 53 and 54, which read,

> *53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.*
>
> *54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill* [...]

is not sufficient to protect those sections from either explicit or even implicit amendment by the Parliament, why would the similar language of the *Victoria Charter*, which reads

> *No citizen shall, by reason of race, ethnic or national origin, colour, religion or sex, be denied the right to vote* [...][33]

Drybones) that the *Canadian Bill of Rights* only provides for a canon of construction. When this change in opinion occurred is unclear because there was no other case which turned specifically on the question of an enactment being in direct conflict with the *Canadian Bill of Rights*. From his reasoning in *Hogan* ([1975] 2 SCR 574), it appears he still held to his dissent in that 1975 case, as he comments, at 585, "*even if* the Canadian Bill of Rights is given the same effect as a constitutional instrument" (emphasis mine). After *Hogan*, Pigeon ceases to make any explicit or implicit claims as to the inability of the *Canadian Bill of Rights* to render other enactments inoperative and instead concurs without separate comment to majority rulings on the *Canadian Bill of Rights*, indicating that he had adopted the majority's reasoning.

[31] *Reference re: Agricultural Products Marketing Act, 1970*, [1978] 2 SCR 1198 per Pigeon J at 1291.

[32] See Anne Bayefysky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, 2 vols (Toronto: McGraw-Hill Ryerson, 1989).

[33] Bayefysky (1989).

be sufficient to protect that section from either explicit or even implicit amendment by the Parliament? For Pigeon, "continuing" parliamentary sovereignty was as fundamental to the Canadian constitutional order as was federalism.

F.P. Varcoe

F.P. Varcoe (like Pigeon) was typically a vocal and adamant defender of Diceyan parliamentary supremacy, while at the same time advocating for the constitutional supremacy of the *British North America Acts*. Thus, Varcoe argued that any amendments to the *British North America Act, 1867* by Westminster would be legally effective at binding the Parliament of Canada, but he nonetheless opposed any such further limitations as an abdication of Canadian sovereignty and as illegitimately undermining the constitutional principle of parliamentary supremacy. For Varcoe, inclusion in the *British North America Act* was sufficient to entrench provisions either (1) from repeal (implicit and explicit) by the Westminster Parliament or (2) from implicit repeal by the Canadian Parliament under s. 91(1). This view was in stark contrast to the reasoning of Driedger, a later Deputy Minister.

"SELF-EMBRACING" SOVEREIGNTY: SOVEREIGNTY FOR THE AGE OF RIGHTS

Varcoe's thinking on the constitution represented the mainstream of Canadian constitutional thought of the era. That is to say, while the fundamental zeitgeist of the constitutional order was that of parliamentary sovereignty, it was actually rooted in the constitutional supremacy of the (parsimonious) *British North America Acts*. Thus, rights conservatives and rights advocates tended to agree on the fundamental nature of the Canadian constitutional order. They disagreed over whether the terms of the *British*

North America Act should remain limited – so as to preserve practical parliamentary supremacy and parliament as the forum for rights debates – or whether further rights guarantees should be added to the *British North America Act* – so as to reduce practical parliamentary sovereignty over human rights and enhance the courts as a forum for rights debates. This view has continued to predominate in subsequent years; for example, Justices Martland[34] and Ritchie[35] carved out a record of deference to parliament on rights issues during their years on the Supreme Court, but nonetheless unhesitantly stated that "the Canadian *C*onstitution was created by the *B.N.A. Act*"[36] and that "this Act became the *C*onstitution of Canada"[37] (with a capital 'C' in "Constitution").[38] The adoption of the *Constitution Act, 1982* and the seemingly consequential shift from a Supreme Court deferential on rights in the 1970s to the judicial rights revolution of the 1980s reinforced this earlier interpretation.

Driedger, however, embraced the unorthodox constitutional vision of self-embracing parliamentary sovereignty and it was upon that foundation that the *Canadian*

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[34] Roland Martland, served as a puisne Justice of the Supreme Court of Canada from 1958 to 1982. He was raised in Edmonton and was the recipient of a Rhodes Scholarship. He practiced in private law for over twenty-five years before being appointed by Diefenbaker to the Bench to replace Henry Grattan Nolan who had suddenly died after only one year on the bench. Diefenbaker felt politically constrained in replacing Nolan and was under considerable pressure from Alberta's Social Credit government to appoint Martland.

[35] Roland Ritchie, served as a puisne Justice of the Supreme Court of Canada from 1959 to 1984. He was born and raised in Halifax and studied in both Nova Scotia and at Oxford. Although largely engaged in private practice, he did serve as a Judge Advocate during the War, taught insurance law, and was appointed to the Royal Commission studying terms of Union with Newfoundland. He was appointed by Diefenbaker, whose choice in the selection was considerably constrained by political considerations.

[36] *Re: Resolution to Amend the Constitution* [1981] 1 SCR 753 at 825. [*re Patriation*]

[37] *re Patriation* at 817.

[38] Majuscule in original, emphasis mine.

Bill of Rights was drafted. From its first elaboration by Ivor Jennings in the early 1930s[39] until the present day, self-embracing parliamentary sovereignty has always remained a (typically quite small) minority view amongst British legal theorists, even with the advent of the *European Communities Act* and decisions such as *Factortame* and *Thorburn*, which are portrayed as exceptional in a constitutional order still solidly defined by continuing parliamentary sovereignty.[40] However, in the 1950s and early 1960s, when Driedger's constitutional views were consolidated and the *Canadian Bill of Rights* was drafted and enacted, self-embracing parliamentary sovereignty appeared to be an ascendant constitutional doctrine (although from a very low base), with particular applicability in the Dominions.

Even before the writings of Ivor Jennings and Richard Lantham in the 1930s, Berridale Keith argued that British constitutional law recognized that the limitations later associated with self-embracing parliamentary sovereignty were applicable to subordinate legislatures with otherwise "plenary" powers; a view given greater authority in *Trethowan*.[41] However, it was *Dönges*[42] that gave legal authority to the theoretical musings of Jennings and Lantham, with the sort of limitations on not fully sovereign legislatures as accepted in *Trethowan* equally applicable to fully sovereign parliaments.

The relevance of *Dönges* to Canada was explored by Hamish Grey in a 1953 article in the *University of Toronto Law Journal*, "The Sovereignty of Parliament

[39] Ivor Jennings, *The Law and Constitution*, [1st edition] (London: University of London Press, 1933).
[40] *Halsbury's,* 5th edition.
[41] *Attorney-General for New South Wales v Trethowan*, [1932] AC 526 (PC)
[42] *Harris v Dönges*, [1952] 2 AD 428

Today."[43] Gray's analysis of authorities then existing led him to argue that parliamentary sovereignty

> *depends on judicial determination in exactly the same way as any other question of law; and that Parliament is capable of binding its successors by [...] legislation affecting the existence, constitution, or composition of Parliament itself and legislation dealing with the procedure of law-making.*[44]

This conclusion provoked a number of outcomes that would be of particular interest to Driedger. First, it provided clear justification for the language of the *Canadian Bill of Rights* and Driedger's proffered construction, with Gray commenting that:

> *When Parliament is legislating and the Act which it passes is inconsistent with an earlier Act the later Act must prevail; but when Parliament has stipulated that certain Acts must be passed by a particular procedure, a subsequent Act does not supersede the rule merely by disregarding the procedural provisions.*[45]

Second, it confirmed Driedger's own interpretation of the constitutional effect of the *Statute of Westminster* and contributed to his argument that a bill of rights incorporated into the *British North America Act* would not be entrenched in its own right:

> *it may not be open to the Parliament of the United Kingdom to repeal section 4 of the Statute of Westminster, 1931, unilaterally. [...] The fact that section 4 relates to legislation by the Parliament of the United Kingdom for Dominions means that the repeal of the section must ipso facto extend to the Dominions. Accordingly, by section 4, if the Dominion Parliaments' request and consent is not recited in the Act repealing the section, the courts (if faced with the question) would be put on inquiry in the same way that a court in the United Kingdom would be put on inquiry if faced with the Parliament Act enacting words in an Act to extend the life of Parliament.*[46]

Presciently, Gray noted that

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[43] Hamish R. Gray, "The Sovereignty of Parliament Today," (1953) *University of Toronto Law Journal* 10(1):54-72.
[44] Gray (1953), p. 54.
[45] Gray (1953), p. 67.
[46] Gray (1953), pp. 69-70.

> *The effectiveness of Parliament's enactments will depend wholly on the application and enforcement of those enactments by judges who are at present, at all events, free from parliamentary interference in the manner in which they discharge their judicial duties. As long as it is for the courts to ascertain and apply the law, so long will parliamentary sovereignty rest with the courts.*[47]

Although the arguments of Gray and other advocates of self-embracing sovereignty failed to have a powerful impact upon Canadian judicial thinking, epitomized by the Supreme Court of Canada's 1981 explicit rejection of self-embracing sovereignty in the *Patriation Reference*,[48] the influence of self-embracing sovereignty advocates in the 1950s should not be discounted. Most contributors to the March 1959 edition of the *Canadian Bar Review* embraced the logic of self-embracing sovereignty – in regards to the ability of parliament to limit implied repeal and provide for judicial review – with its salience in Canadian legal thought of the 1950s being overlooked. While influence of the doctrine of self-embracing parliamentary sovereignty in Canada is difficult to gauge, it is clear it was heartily embraced by E.A. Driedger, the draftsman of the *Canadian Bill of Rights*.

PARLIAMENTARY SOVEREIGNTY JURISPRUDENCE

A.V. Dicey's most influential work, *The Law of the Constitution* was first published in 1885[49] and Dicey produced seven further editions in his lifetime,[50] with posthumous editions published by his acolyte.[51] His opus immediately founded, in the

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[47] Gray (1953), p. 61.
[48] See Oliver (2005), pp. 160-184
[49] Albert Venn Dicey, *Lectures introductory to the study of the law of the constitution*, [1st edition] (London: Macmillan, 1885).
[50] These editions were first published in 1886 (2nd), 1889 (3rd), 1893 (4th), 1897 (5th), 1902 (6th), 1907 (7th), and 1915 (8th).
[51] E C S Wade who edited the 9th (1939) and 10th (1959) editions.

words of Peter C. Oliver, an "intellectual empire"[52] which persists to this day as the orthodox theory of British constitutional law[53] (and not simply in British courts, but in Canadian courts examining aspects of British constitutional law).[54] Further, challenges to Dicey's intellectual empire over the twentieth century have produced robust apologists, such as Goldworthy's 1999 *The Sovereignty of Parliament*,[55] in response to challenges to Diceyan orthodoxy such as the Australian implied bill of rights and the House of Lords' and European Court of Justice's rulings in *Factortame*[56] or H.W.R. Wade's "The Basis of Legal Sovereignty"[57] in response to the reasoning expressed in *Dönges (1952)*[58] and *MacCormick (1953)*[59] and academic assaults of the 1950s by the likes of Ivor Jennings.[60]

Acceptance of Dicey's thesis was immediate and pervasive. Prime Minister W. E. Gladstone carefully studied Dicey's newly published work and in introducing the first Irish Home Rule Bill in 1886, Gladstone cited Dicey's *Law of the Constitution* as an authority for the constitutional validity of that bill against claims that it violated the 1800 *Act of Union*[61] (much to the chagrin of Dicey who vehemently opposed Irish home

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[52] Oliver (2005), p. 56.
[53] *Halsbury's* (1996), "Constitutional Law," ¶234
[54] See Peter Oliver's commentary on the *Patriation Reference,* [1981] 1 SCR 753 in Oliver (2005), pp. 160-184.
[55] Jeff Goldsworthy, *The Sovereignty of Parliament* (Oxford: Oxford University Press, 1999).
[56] R v *Secretary of State for Transport, ex parte Factorame Ltd*, [1990] EUECJ-213/89 (E.C.J.), [1990] UKHL 7 (U.K.H.L.)
[57] H W R Wade, "The Basis of Legal Sovereignty," *Cambridge Law Journal* 13, no 2 (1955), pp. 172-197.
[58] Harris v Dönges, [1952] 2 AD 428 (SA AD).
[59] *MacCormick v Lord Advocate*, [1953] SC 396 [No. 47]
[60] Ivor Jennings, *The Law and Constitution*, 4th edition (London: University of London Press, 1952).
[61] *Union with Ireland Act 1800*

rule).[62] The immediate and powerful influence of Dicey's work occurred because it clearly explained and justified not some innovation in British constitutional thought, but it expressed the fundamental principle of the English and British constitution that been broadly understood and accepted for two hundred years, expressed in moments of stress by Parliament in the *Declaratory Act 1766*[63] and the *Colonial Laws Validity Act 1865*.[64]

Dicey's purported orthodoxy of absolute Parliamentary sovereignty actually suffered a sustained attack in the era between the *Statute of Westminster* in 1931 and the 1960s – when the future cohesion of the British Commonwealth remained highly uncertain – by authors such as Ivor Jennings. Further, in the years prior to the *Statute of Westminster*, when Dicey's thinking was most influential, adherence to the Diceyan principle was not as fast as Dicey and his acolytes would claim (including by Dicey himself!)[65] and leading scholarly authority and jurisprudence even held the Diceyan principle of an unbounded parliament inoperative in the colonial context absent questions of conflict with imperial legislation.

Nairn

Despite the widespread acceptance of Diceyan constitutional theory, the highest court in Britain at times rejected the Diceyan principle that all statutes, from something as foundational as the *Act of Union*[66] to something as prosaic as the *Dentists Act*,[67] were equal in stature and that prosaic Acts necessarily impliedly repealed or amended pre-

[62] Iain McLean, *What's Wrong with the British Constitution?* (Oxford: Oxford University Press, 2010), pp. 129-130
[63] *American Colonies Act 1766*, 6 George III, c.53
[64] *Colonial Laws Validity Act 1865*
[65] Dicey (1915), "Introduction."
[66] *Union with Scotland Act 1706*, 6 Anne, c.11 (EN).
[67] *Dentists Act 1878*, 41 & 42 Victoria, c.33 (UK). See Dicey (1889), p. 136.

existing foundational Acts. That is to say, the House of Lords did at times find that certain statutes were, in my terminology, functionally "constitutional" and thus exempt from the typical rules of statutory construction, when in conflict with more prosaic enactments. This principle was expressed in the 1909 case *Nairn*.[68]

In 1867, the *Second Reform Act*[69] (and its Scottish analog)[70] deviated from the language used in the *Great Reform Act*[71] as well as significantly expanding the franchise. Resultantly, litigation shortly arose over whether women who met the criteria should be considered electors, decided in the 1868 case, *Chorlton v Lings*.[72] At issue was the application of *Lord Brougham's Act*[73] to the *Second Reform Act*, specifically section 4, which enacted that "in all Acts words importing the masculine gender shall be deemed and taken to include females [...] unless the contrary as to gender is expressly provided." The *Great Reform Act* had employed the phrase "every male person" (which under the terms of *Lord Brougham's Act* excluded women); however, the *Second Reform Act* instead employed the phrase "every man" when defining the criteria for the franchise. During debate on the Bill, John Stuart Mill (a supporter of female suffrage) had proposed an amendment that would instead change the phrase to "every person" in the belief that the phrase would more explicitly include women, with that motion being defeated.

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[68] *Nairn v University of St-Andrews*, [1909] AC 147 (HL).
[69] *Representation of the People Act 1867* (30 & 31 Victoria, c. 102).
[70] *Representation of the People (Scotland) Act 1868* (31 & 32 Victoria, c. 48).
[71] *Representation of the People Act 1832*, 2 & 3 William IV, c.45 (UK).
[72] (1868), 4 CP 374 (EWCP).
[73] *An Act for shortening the Language used in Acts of Parliament*, 13 & 14 Victoria, c.21. N.B. It is sometimes referred to as the *Interpretation Act 1850* and occasionally as *Lord Romilly's Act*; however *Lord Brougham's Act* is most common in the literature and the statute has no formal short title as it was superseded by the *Interpretation Act 1889* and thus was not scheduled in either the *Short Titles Act 1892* (55 & 56 Victoria), c.10, or the *Short Titles Act 1896* (59 & 60 Victoria), c.14.

However, so too was a motion that sought to revert to the language of the *Great Reform Act*, "every male person," which explicitly excluded women. Thus, there was a recognized ambiguity in the bill, which "Disraeli [the Prime Minister] ruled that it was a matter for the courts to decide."[74]

The matter was first litigated in Scots Law in *Brown v Ingram, (1868),*[75] where the House of Lords rejected female franchise providing only summary reasoning that "their Lordships rested their decision upon the fact that there was a long and uninterrupted custom in Scotland limiting the franchise to males."[76] The matter was more exhaustively examined in English law less than three weeks later in *Chorlton v Lings,*[77] but with the Law Lords reaching the same conclusion:

> *Now by the Reform Act of 1832, the occupation franchise in boroughs is expressly given to male persons who shall be qualified as therein mentioned. [...] It is perfectly clear, therefore, that women would not be entitled to the franchise under that Act; and as the two Acts are to be construed as one, we should endeavour as far as possible to put such a construction upon the later Act as will make it consistent with the provisions of the former statute.*
>
> *There is no doubt that, in many statutes, "men" may be properly held to include women, whilst in others it would be ridiculous to suppose that the word was used in any other sense than as designating the male sex: and we must look at the subject-matter as well as to the general scope and language of the provisions of the later Act in order to ascertain the meaning of the legislature. I do not collect, from the language of this Act, that there was any intention to alter the description of the persons who were to vote, but rather conclude that the object was, to deal with their qualification; and, if so important an alteration of the personal qualification was intended to be made as to extend the franchise to women, who did not then enjoy it, and were in fact excluded from it by the*

[74] Susan Kent, *Sex and Suffrage in Britain, 1860-1914* (Princeton NJ: Princeton University Press, 1987), pp. 194-195.
[75] (1868), 7 Crt Sess (3rd) 281 [No. 66]
[76] (1868), 7 Crt Sess (3rd) 281 at 281
[77] (1868), 4 CP 374

> *terms of the former Act, I can hardly suppose that the legislature would have made it by using the term "man."*[78]

The Scottish analog to the *Second Reform Act* added two Scottish university constituencies and extended the franchise to all graduates of those universities (from which women were barred from matriculating). In 1889, the *Universities (Scotland) Act 1889*[79] ended the absolute disability of women matriculating and graduating from the Scottish universities, arguably amending the definition of "every man" to include women graduates of Scottish universities. The matter was only litigated in 1909 in *Nairn*[80] with House of Lords ruling that the 1868 definition of "every man" should stand as the 1889 Act did not impliedly amend the 1868 Act.

The court emphasized that "whichever view be taken of the merits of the question whether women should vote for members of Parliament, it is at least a grave and important question for Parliament to decide"[81] and "if this legal disability is to be removed, it must be done by Act of Parliament."[82] This concluding emphasis of the judges on the need for parliament to decide on the issue was a curious contrast to how they characterized the issue. The judges were clear that they found no ambiguity or absurdity in the enactment and that

> *the Representation of the People (Scotland) Act, 1868, taken with the Universities (Scotland) Act, 1889, and the Ordinances made under the last-mentioned Act, do upon their literal construction confer upon women, if they comply with the requirements, a right to vote for university members.*

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[78] *Charlton v Lings* per Bovill CJ at 386.
[79] 52 & 53 Victoria, c 55.
[80] *Nairn v University of St-Andrews*, [1909] AC 147 (HL).
[81] *Nairn* per Lord Robertson at 165.
[82] *Nairn* per Lord Loreburn at 160.

Yet, despite the unambiguous literal construction that produced no absurdities, the Law Lords refused to accept that Parliament had spoken on the matter, finding that the later statute did not impliedly amend the earlier statute. What is notable is the reasoning used by the Law Lords to come to this conclusion. They argued that the later statute did not impliedly repeal the earlier statute not because the outcome of extending the franchise to women would be "absurd" (a conclusion that would have hardly been remarkable in the era), but because "subject-matter and fundamental constitutional law as guides of construction [are] never to be neglected."[83] That is to say, the Law Lords found that in British law, contrary to Dicey's supposedly lapidarian axioms, not all statutes were created equal and that some statutes had greater, "constitutional," force than others. This is an astounding conclusion given the supposedly pervasive influence of Dicey's theory of Parliamentary sovereignty at the time. One would have expected the court to have found the idea of extending the franchise to woman "absurd" rather than finding certain statutes of greater status than others. Such reasoning presaged Lord Sankey's reasoning in *Edwards* two decades later (but with an opposite outcome).

Burah

In tandem with Dicey's elaboration of absolute Parliamentary Sovereignty,[84] the Privy Council was building up a body of precedents which proclaimed that colonial legislatures were "of the same nature" as Westminster:

> *Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those*

[83] *Nairn* per Lord Robertson at 166.
[84] Dicey's *Law of the Constitution* was first published in 1885 and went through seven further editions in his lifetime, with Dicey passing in 1922.

> *limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.*[85]

This principle was first elaborated by the Privy Council in 1878 in *Burah*[86] and repeatedly confirmed during the late 19th century, notably for Canada in *Hodge*[87] in 1883 and *Maritime Bank*[88] in 1892.[89]

Thus, at the outset of the twentieth century two principles had seemingly emerged and gained general assent. The first being Dicey's account of the principle of parliamentary sovereignty. The second being that colonial legislatures, within their prescribe limits, have "plenary powers of legislation, as large, and of the same nature, as those of [the UK] Parliament itself."[90] One would assume that the corollary of these two principles together would have been the principle raised by modern and contemporaneous critics of the *Canadian Bill of Rights*: that the principle of Parliamentary supremacy would foreclose the possibility of judicial review of legislation based upon a formally coordinate statute, as is the case posited by Dicey with imperial legislation.

However, despite the confirmation of uncontrolled constitutions by *Burah* and its successors for local legislatures, in the first decades of the twentieth century there was persuasive judicial and scholarly authority for the principle of judicial review of colonial statutes based upon formally coordinate statutes. This jurisprudence and scholarly

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[85] *R v Burah*, (1878), 3 App Cas 889 at 904 (PC).
[86] *Burah*
[87] *Hodge v The Queen*, (1883), 9 App Cas 117 at 132 (PC).
[88] *Maritime Bank of Canada (Liquidators of) v New Brunswick (Receiver-General)*, [1892] AC 437 (PC).
[89] It is also notable that Sir Robert Collier, the author of the *Colonial Laws Validity Act*, was present for every one of these cases. Unfortunately, during this era the JCPC only rendered a single opinion on a case and thus we have no way of knowing the provenance of the constitutional theory first expressed in *Burah*.
[90] *Burah* per Lord Selborne at 904.

authority extended the judicial review for colonial statutes based upon Imperial statutes to formally coordinate statutes as well. Stemming from a series of controversies in Queensland related to the *Constitution Act, 1867*,[91] a jurisprudence developed that held that for constitutional statutes passed by local legislatures "an implied repeal was not within the power to alter or repeal, and was not valid, because it was not an exercise of legislative power."[92]

Cooper and McCawley

The landmark case in this jurisprudence was *Cooper*.[93] In that case, counsel for the Queensland government argued that its legislature was given "express power to alter the Constitution in the ordinary course of legislation, by merely passing Acts inconsistent with the Constitution" and that "no legislature can bind itself or limit the powers of its successors by means of a self-imposed fundamental law."[94] While Counsel for the appellant argued that

> *the Constitution cannot be repealed or altered by implication from the inconsistency of an ordinary Act with its provisions; it must be altered directly co nomine; the Parliament must use its legislative authority under the Constitution to enlarge the boundaries of its ordinary powers of legislature before it can step over the existing boundaries.* [95]

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[91] Queensland, 31 Victoria, No 38. Queensland and its fundamental constitution were created by an Imperial Order-in-Council in 1859. In 1867, the Queensland legislature would consolidated the terms of the 1859 Order-in-Council along with other revisions in the *Constitution Act, 1867*.

[92] Arthur Berriedale Keith, *Responsible Government in the Dominions*., [1st edition], vol I (Oxford: Clarendon Press, 1912), p. 428; quoting (without citation) *Cooper* per Barton J at 1317.

[93] *Cooper v Commissioner of Income Tax for the State of Queensland* (1907), 4 CLR 1304 (HCA).

[94] *Cooper* at 1308.

[95] *Cooper* at 1307.

Notably, counsel for the appellant even cited *Burah* at the same page where it discusses local legislatures having "plenary powers of legislation, as large, and of the same nature, as those of Parliament itself" as authority for its position that the Queensland legislature could not implicitly or by implied repeal overcome the provisions of the *Constitution Act 1867*. The High Court of Australia unanimously agreed with the appellant:

> *The whole controversy really turns on the question whether the Constitution Act 1867 does stand in the same position as any other Act of the Queensland legislature, or whether it is in reality a fundamental law which, although capable of being amended by that legislature, binds it until amended, just as a Constitution embodied in an Imperial Act would bind it.*[96]
>
> *I am of opinion that the Constitution of Queensland for the time being has the force of an Act of the Imperial Parliament extending to the Colony, and that it is the duty of the Court to inquire whether any Act passed by the State legislature is repugnant to its provisions.*[97]
>
> *An implied repeal is not within the power to alter or repeal, and is not valid because it is not an exercise of legislative power."*[98]
>
> *The distinction between an authority to alter or extend the limits of their powers, and an authority to disregard the existing limits is clear. I am, therefore, of opinion that the Income Tax Acts 1902-4, if and so far as they were inconsistent with the then existing Constitution, were wholly inoperative.*[99]

However, the court did not need to even come to a decision on this matter, as despite the lengthy discussion of whether the *Constitution Act 1867* could be amended by implied repeal, it was determined that the precise enactment in question did not actually conflict with the *Constitution Act 1867* and thus there was no need to declare inoperative the specific enactment. Yet the High Court was keen to warn the legislature that it could

[96] *Cooper* per O'Connor J at 1327.
[97] *Cooper* per Griffith CJ at 1315.
[98] *Cooper* per Barton J at 1317.
[99] *Cooper* per Griffith CJ at 1315.

not simply pass legislation inconsistent with the *Constitution Act 1867* and rely on implied repeal, but would have to clearly signal its intention, otherwise conflicting statutes would be declared inoperative.

When composing his encyclopaedic 1912 *Responsible Government in the Dominions* A. Berriedale Keith took notice of *Cooper* and repeated Justice Barton's reasoning that "an implied repeal was not within the power to alter or repeal, and was not valid, because it was not an exercise of legislative power."[100] However, Keith did not characterize *Cooper* as an anomalous ruling, something highly controversial, or even a radical shift in constitutionalism, but merely a confirmation of a long standing principle:

> *though in some cases no form was necessary to be observed in altering the constitution, it was always necessary that a Colonial constitution should be altered expressly : it would never have been possible to alter such a constitution merely by an ordinary Act which incidentally enacted provisions which were in conflict with the constitution.*[101]

Keith was no dissenting radical on the question of parliamentary supremacy; he rigorously defended the Sovereignty of Parliament ("Parliament has no superior, and it cannot bind itself"),[102] even in the wake of the *Statute of Westminster*, holding that the Imperial Parliament nevertheless retained its plenary legislative power over the Dominions.[103] In his 1928 edition of *Responsible Government in the Dominions,* Keith noted the difference between the United Kingdom's uncontrolled constitution and the uncontrolled aspects of Dominion constitutions:

> *The fundamental difference between an Imperial Act altering the Imperial constitution and a Dominion Act is shown in the proviso; an Imperial Act*

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[100] Keith (1912), p. 428.
[101] Keith (1912), pp. 425-426.
[102] Arthur Berriedale Keith, *Responsible Government in the Dominions*, 2nd edition, vol I (Oxford: Clarendon Press, 1927), p. 197.
[103] For a discussion of Arthur Berriedale Keith's approach to Parliamentary Sovereignty, see Oliver (2005), pp. 65-70.

> *cannot bind any succeeding Parliament; an enactment that a two-thirds majority would be necessary for the repeal of, say, a housing Act would be valueless; any subsequent Act passed with without a majority of the kind would bind the Courts, and the earlier Act would be extinguished by reason of its divergence from the later and more authentic Act. It is not so with the Dominions; any rule laid down by any of the means specified is binding, and any Act passed without due regard to the conditions specific is ultra vires.*[104]

A decade after *Cooper,* the issue of amendment of the *Constitution Act, 1867* was litigated again. In *Taylor*,[105] the High Court of Australia upheld its reasoning in *Cooper,* although there was no direct controversy over the question of implied repeal as at issue was a direct amendment to the *Constitution Act, 1867*.[106] Despite the High Court's confirmation of *Cooper* in 1917, a similar issue was immediately litigated in a case that would work its way through the High Court to the Privy Council: *McCawley*.[107]

At issue in *McCawley* was the tenure of judges of the Supreme Court of Queensland. The *Constitution Act, 1867* provided for lifetime tenure for Supreme Court judges. During the war, Queensland created a Court of Industrial Arbitration[108] and, in order to give greater authority to the Court, the Act held the President of the Court of Industrial Arbitration could be appointed a Judge of the Supreme Court with all the same rights. However, the Act also held that the tenure for the President of the Court of Industrial Arbitration as both President and Judge of the Supreme Court would only be

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[104] Keith (1927),I:350-351.
[105] *Taylor v Attorney-General of Queensland*, (1917), 23 CLR 457 (HCA)
[106] At issue in *Taylor* was the *Constitution Act Amendment Act 1908,* 8 Edward VII, no 2 (QL); while consistent with the *Constitution Act, 1867*, it violated the terms of Queensland's original constituent instrument, the 1859 Order-in-Council. The High Court determined that section 5 of the Colonial Laws Validity Act allowed the colony to violate the original Order-in-Council, so long as such amendments were consistent with whatever constitutional provisions have been legislated in the interim.
[107] *In re McCawley* [1918] St. R. Qd. 62 (Qd SC); *McCawley v The King*, (1918), 26 CLR 9 (HCA); *McCawley v The King*, [1920] AC 691 (PC).
[108] *Industrial Arbitration Act 1916* (Qld) 7 Geo V, no 5, s 6.

seven years. However, no explicit repeal or amendment of the relevant portions of the *Constitution Act* were enacted in the *Industrial Arbitration Act*.

When the case reached the High Court of Australia,[109] the High Court split with a four to three decision upholding *Cooper*. The majority reiterated the reasoning in Cooper and invoked a recent Privy Council case as further authority:

> *I take it to be indisputable that a power must exist before it is exercised, and that it cannot be created by a mere attempt to do something inconsistent with it. The reasoning of the Judicial Committee of the Privy Council in Attorney-General for the Commonwealth v. Colonial Sugar Refining Co, [1914] A.C. 237.*[110]

The minority, however, did not reject *Cooper* in whole and, importantly, never rejected the principle that a statute could be used as the basis for judicial review of other coordinate statutes. Instead, the minority disagreed with the majority on the issue of the *implied* primacy of the *Constitution Act*. Nowhere in the *Constitution Act, 1867* did it explicitly proclaim itself to prevail over other statutes of the Legislature of Queensland (unlike the *Canadian Bill of Rights*), instead in *Cooper* and the majority in *McCawley* held that it did so implicitly. The minority retorted that "there is nothing sacrosanct or magical in the word 'Constitution,'"[111] and that "'Full power ' in sec. 5 [of the *Colonial laws Validity Act*] means what it says"[112] and does not allow for any implied primacy simply because a statute contains the word "Constitution." However, the minority was keen to emphasize that it did not disagree that a legislature could enable judicial review of statutes based upon a coordinate statute if it made itself sufficiently clear:

> *Only two conditions are necessary. They are: (1) the law must, as to subject matter, answer the description, and (2) it must have been passed in*

[109] *McCawley* per Griffith CJ at 24.
[110] *McCawley* per Griffith CJ at 24.
[111] *McCawley* per Isaacs and Rich JJ at 52.
[112] *McCawley* per Isaacs and Rich JJ at 64.

> *"manner and form" as required by the law of the colony relating to the passing of laws. If no special provision as to the manner and form of passing a particular class of law exists, then the ordinary method may be followed ; but if as to any given class of law a specific method is prescribed, it must be followed. For instance, if a certain majority is required, or if reservation for the King's assent is prescribed, such a condition is essential to a valid exercise of the power.*[113]

The minority continued:

> *The question here is one of "power" to do the thing at all, and not as to the "manner or form" of doing it. And the argument to support the suggestion that prior repeal is necessary rests, as we have said, on a doctrine of implied prohibition arising, from the use of the word "Constitution." The suggestion in effect amounts to saying that a colonial legislature, by merely using the word " Constitution " in the title of an Act, may deprive itself of power to enact a different rule of conduct, while the Act so labelled stands. No such condition is found in sec. 5 of the Act of 1865, and no Court has any authority to insert it. We think that no legislature can, by merely using such a word, abdicate the power created for the benefit of the community by the Act of 1865.*[114]

With the minority concluding that "if Parliament, in passing the Constitution Act, had desired to except sec. 15 from the general power to make laws contained in sec. 2, it could easily have said so."[115]

Further, the High Court harshly rebuked counsel for its arguments that the High Court's reasoning in *Cooper* was simply *obiter* that could be ignored.

> *It is true that so far as the judgments dealt with this part of the appeal in Cooper's Case they were technically obiter dicta, but they were not obiter dicta in the sense of expressions beyond the matters argued, for the Court heard full argument on the point, and decided the matter with as much care and elaboration as if the point had been vital. In consenting to deal with the case, the Court, in my view, sought to lay down a reasoned opinion for future guidance.*[116]

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[113] *McCawley* per Isaacs and Rich JJ at 54.
[114] *McCawley* per Isaacs and Rich JJ at 57.
[115] *McCawley* per Higgins J at 74.
[116] *McCawley* per Barton J at 35

Thus, although the High Court of Australia was split (and thus encouraged a further appeal), the Court was unanimous that the Diceyan principle that a legislature could in no way bind itself was incorrect.

The case was duly appealed to the Privy Council, which overturned the decision of the High Court of Australia.[117] A superficial interpretation of such a decision would seem to indicate that the Privy Council was striking a blow for Diceyan absolutism, but an examination of the Privy Council's reasoning illustrates otherwise. The Privy Council did not simply reject the reasoning of the majority of the High Court of Australia *in toto*, but instead embraced the reasoning of the minority of the High Court. The Privy Council did not reject the principle that an enactment could immunize itself from implied repeal, but that the enactment had to be clear that it was doing so and could not simply be implied.

Instead of simply dismissing the principle that a colonial legislature (within its imperial limitations) can be bound, based upon the "full power" granted by s. 5 of *the Colonial Laws Validity Act*, the Privy Council examines *Constitution Act 1867* for any sign of an intention to bind its successors. It finds none and mocks those who claim one exists:

> *It may be premised that if a change so remarkable were contemplated one would naturally have expected that the Legislature would have given some indication, in the very lengthy preamble of the Act, of this intention. It has been seen that it is impossible to point to any document or instrument giving to, or imposing upon, the constitution of Queensland this quality before the year 1867. Yet their Lordships discern nowhere in the preamble the least indication that it is intended for the first time to make provisions which are sacrosanct, or which at least can only be modified by methods never previously required. The preamble does, indeed, deal with somewhat cognate matters. [...] The preamble, therefore, gives no*

[117] *McCawley v The King*, [1920] AC 691.

> *indication of intention such as might have been looked for if the effect of the Act were such as the respondents maintain.*[118]

The Privy Council continues on in such an examination of the *Constitution Act 1867*, and notes that while the Statute does not generally purport to bind future statutes, it does have a particular enactment that does so – section 9. This section:

> *required a two-thirds majority of the Legislative Council, and of the Legislative Assembly, as a condition precedent of the validity of legislation altering the constitution of the Legislative Council. We observe, therefore, the Legislature in this isolated section carefully selecting one special and individual case in which limitations are imposed upon the power of the Parliament of Queensland to express and carry out its purpose in the ordinary way, by a bare majority.*

The Privy Council was harsh on the High Court of Australia for reading in an implied primacy clause on the basis of the statute's title, but the Privy Council, nevertheless, denied Diceyan absolutism, so long as any such 'manner and form' restriction was clearly and expressly stated. Berriedale Keith summarized the effect of this decision in his second edition of *Responsible Government in the Dominions*:

> *The result, therefore, is simply that, as laid down in the first edition of this work, a constitutional change must be expressed, it cannot rest on mere inference ; if there is nothing which clearly alters the constitution, the later Act will be read subject to it ; if it clearly – in words or necessary intendment – alters the constitution, then the alteration is valid, subject of course to the special disabilities on alteration which now may be enumerated. The error of the High Court was in exaggerating the formality of change needed.*[119]

With the passage of the *Statute of Westminster* the question that was to emerge was: were the former colonies now to be governed by the rule governing the United Kingdom that an "Act cannot bind any succeeding Parliament" or would the old colonial rule that "any rule laid down by any of the means specified is binding, and any Act

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[118] *McCawley (1920)* per Lord Birkenhead at p. 711-712.
[119] Keith (1927), pp. 351-352.

passed without due regard to the conditions specific is *ultra vires*" persist for the now emancipated Dominions?

Notably, Berriedale Keith who made the above distinction in the years between the *Balfour Declaration* and the *Statute of Westminster* would argue shortly after the passage of the *Statute of Westminster* that the rule that once applied to uncontrolled colonial constitutions, but which did not apply to the United Kingdom's uncontrolled constitution, now equally applied to the United Kingdom:

> *The Statute of Westminster, 1931 deals with the chief legal restrictions on Dominion sovereignty. While it could not and does not attempt to deny the plenary power of the British Parliament, it [s.4] lays down a constitutional principle that no Act of Parliament passed after December 11, 1931, shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it expressly declared in the Act that the Dominion has requested, and consented to, the enactment thereof.* ***Nothing but an express repeal*** **pro tanto** ***of this provision would enable any Court to disregard the rule***.[120]

Trethowan

However, more relevant than Berriedale Keith's commentary is the treatment of this question by the Courts. In later decades, *Trethowan*[121] has been the most frequently cited case in scholarly commentary[122] as an example of "manner and form" constraints on legislatures, even being cited in recent years by the Supreme Court of Canada.[123]

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[120] Arthur Berriedale Keith, "Dominions, Colonies, Possessions, Protectorates, and Mandated Territories," in *Halsbury's Laws of England*, 2nd edition, vol 11, ed. Viscount Hailsham (London: Butterworths, 1933), p. 24(¶38). [Emphasis mine]

[121] *Attorney-General for New South Wales v Trethowan*, (1931), 4 CLR 394 (HCA); affirmed [1932] AC 526 (PC).

[122] For example, Friedman (1950), pp. 103-108; Gray (1953), p. 64; *Halsbury's* (1974), ¶811, fn. 6; Hogg (2010), c.12.3(b), p. 12-15, fn. 57; Laskin (1959), p. 130, fn. 204; Lysyk (1965), pp. 155-157; McWhinney (1958), p. 36; Oliver (2005), pp, 72-75, 81, fn. 31; Tarnopolsky (1966), p. 74.

[123] *R v Mercure*, [1988] 1 SCR 234 per La Forest at 279; *Reference re: Canada Assistance Plan (British Columbia*), [1991] 2 SCR 525 per Sopinka at 561.

Although, as we have noticed, the Privy Council accepted the effectiveness 'manner and form' restrictions in *McCawley,* that reasoning was buried within a decision that harshly rejected an implied 'manner and form' restriction. *Trethowan,* in contrast, is widely cited because it represents the first clear enunciation by the Privy Council of the principle that a legislature can bind itself with "manner and form" procedures and remained the only such clear pronouncement until *Ranasinghe*[124] in 1965.[125]

Trethowan examined the validity of the *Constitution (Legislative Council) Amendment Act, 1929*[126] to provide that "no Bill to abolish the Legislative Council should be presented to the Governor for His Majesty's assent until it had been approved by a majority of the electors voting upon a submission to them in accordance with the section [and] that the same provision was to apply to any Bill for the repeal or amendment of the section."[127] After the passage of that bill in law, a newly elected government sought to abolish the Legislative Council, yet cognizant that the precedents of *Cooper* and *McCawley* likely foreclosed the possibility of implied repeal, it also sought to have the legislature clearly express its intent to abolish the Legislative Council. Accordingly, it engaged in a two-step process, first passing a bill purporting to remove the new provision of the *Constitution Act* which required recourse to a referendum and then passed a second

[124] *Bribery Commissioner v Ranasinghe*, [1965] AC 172 (PC).
[125] Peter Hogg draws a distinction between *Trethowan* and *Ranasinghe* as "*Ranasinghe* involved restrictions in the Constitution itself, although the Constitution was freely amendable as an ordinary statute." (Hogg (2010), c.12.3(b), p. 12-15, fn 57) This distinction is erroneous, as *Trethowan* identically involved a provincial constitution (*Constitution Act, 1902,* No 32 of 1902 (NSW)) that was "freely amendable as an ordinary statute" until the 1929 amendments.
[126] No 28 of 1929 (NSW).
[127] *Trethowan (1932)* at 527.

bill abolishing the Legislative Council.[128] While the provision requiring a referendum to amend the relevant portion of the *Constitution Act* was not observed, there was no doubt that the New South Wales legislature made its intent explicit.

The case is notable because the statute in question did not simply add a manner and form restriction to amend a different particular statute, but, unusually for such cases, it also immunized itself from simple amendment or repeal by applying the same manner and form restrictions to modification of the manner and form restriction. Arguably, a compromise between "continuing sovereignty" and "self-embracing sovereignty" could embrace an acceptance of "manner and form" restrictions on certain types of legislation so long as legislations prescribing those restrictions remain unrestricted. For example, there could be a provision requiring a two-thirds majority for the amendment of a bill of rights, while the legislation entrenching the bill of rights could be freely amended or repealed through the ordinary process of a simple majority. As a result, the "manner and form" restrictions advocated by adherents to "self-embracing sovereignty" could be generally effective, while retaining the principle of fundamental "continuing sovereignty" in that only the 'ordinary' legislative procedure was fundamentally necessary, it just may have to be completed more than once in order for the legislature to clearly express its intent. Such an interpretation could be used to justify *Cooper* and *McCawley* whilst still fundamentally accepting continuing sovereignty. Hence, the *Constitution (Legislative Council) Amendment Act, 1929* diverged sharply from the issue at controversy in *Cooper*

[128] This is the process that the High Court of Australia outlined in *Cooper* and *McCawley* as necessary in the circumstances which provoked those cases. It is also the process recently followed by the Ontario government in 2003 in order to circumvent the *Taxpayer Protection Act, 1999*, S.O. 1999, c. 7 and litigated in *Canadian Taxpayers Federation v Ontario (Minister of Finance)*, (2004), 73 OR (3d) 621 (ON SC).

and *McCawley*, as not only was the possibility of implied repeal excluded, but so too was possibility of repeal or amendment by a simple parliamentary majority clearly and explicitly expressing its will. Yet, the Privy Council nonetheless endorsed the validity of both prescribed restrictions.[129]

Dönges

As noted, *Trethowan* has remained one of the most influential decisions examining "manner and form" restrictions on legislatures, but the Privy Council's decision rested upon New South Wales continuing subjection to the *Colonial Laws*

[129] The fact that *Trethowan* involved subordinate legislatures has been invoked by defenders of Diceyan continuing sovereignty. Ironically, however, Dicey himself approved of supported the type of reasoning used in *Trethowan* in the introduction to the eighth edition (1915) of his *Law of the Constitution*, even for a fully sovereign legislature such as Westminster. In response to the 1912 Irish Home Rule Bill (passed , but never implemented due to the First World War, the Easter Rising, and the eventual War of Independence), Dicey became an advocate of the referendum as a check on Parliament enacting major legislation major he believed violated the national will (xci-xcix):

> *The referendum is used by me as meaning the principle that Bills, even when passed both by the House of Commons and by the House of Lords, should not become Acts of Parliament until they have been submitted to the vote of the electors and have received the sanction or approval of the majority of the electors voting on the matter. [...]*
>
> *The electors, who are now admittedly the political sovereign of England, should be allowed to play the part in legislation [...] by, e.g., Queen Elizabeth at a time when the King or Queen of England was not indeed the absolute sovereign of the country, but was certainly the most important part of the sovereign power, namely Parliament. In this introduction the referendum, or the people's veto, is considered simply with reference to Bills passed by the Houses of Parliament but which have not received the royal assent. [...]*
>
> *The obvious corrective [to the decline in "trust in legislative bodies"] is to confer upon the people a veto which may restrict the unbounded power of a parliamentary majority.*

Validity Act[130] and the possibility of a different decision in the same circumstances excepting the context of a legislature emancipated from the *Colonial Laws Validity Act*. Instead, it was a series of controversies in South Africa related to voting rights for 'Coloureds and 'Natives' and certain 'entrenched' provisions in the *South Africa Act, 1909* that resulted in this question being litigated and being considered by South Africa's highest court.[131]

The pre-*Statute of Westminster* jurisprudence in South Africa had been broadly in line with the *Cooper* and *McCawley* jurisprudence, with the Supreme Court of South Africa deciding in *Ndobe*[132] that "the Court has power to enquire into the question as to whether an Act has been validly passed by Parliament:"[133]

> *To assume that it was passed by the two Houses of Parliament sitting together as prescribed in sec. 35 would be to assume that the Act was not validly passed. If the Act therefore contained a clause offending against sec. 35 the Court would have to assume that the clause was ultra vires, in the absence of some indication in the Act or proof aliunde that such clause was passed as contemplated in the section.*[134]

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[130] In the immediate aftermath of the *Statute of Westminster*, there was limited scope for the question of whether emancipated legislatures could impose 'manner and form' constraints upon themselves. Section 9 of the *Statute of Westminster* preserved the *status quo ante* in the Australian states where the jurisprudence emerged from. Section 10 of the Statute of Westminster reserved the applicability of the *Statute of Westminster* to Australia, New Zealand, and Newfoundland until they adopted it through an Act of their own Parliaments, with Newfoundland reverting to colonial status before it could ever adopt the Statute, and Australia and New Zealand only adopting the statute in 1942 and 1947 respectively (Oliver (2005), p. 45.). Section 7 preserved the *status quo ante* in regards to *British North America Act* amendments and provincial governments in Canada never embraced the sort of constitutional consolidations embraced by some Australian states.

[131] The Supreme Court (Appellate Division); N.B. South Africa abolished appeals to the Privy Council in 1950.

[132] *R v Ndobe*, [1930] AD 484.

[133] *Ndobe*, per headnotes at 484.

[134] *Ndobe*, per De Villiers CJ at 497.

Notably, however, the South African Supreme Court came to its decision in *Ndobe* without any reference to the *Colonial Laws Validity Act*, seemingly indicating that the same reasoning could be applied to legislatures that would shortly be emancipated from the *Colonial Laws Validity Act*.

However, in 1937 in *Ndlwana*,[135] the Supreme Court overturned a decision by the Cape Provincial Division which had confirmed *Ndobe*, deciding that "since the passing of the Statute of Westminster [...] the Court had no power to enquire into the question as to whether or not Parliament in passing the Act had adopted the procedure laid down in the South Africa Act and that the validity of the Act could not be questioned in a Court of Law:"[136] With Justice Stratford (for the court) rhetorically querying and answering:

> *the question then is whether a Court of Law can declare that a Sovereign Parliament cannot validly pronounce its will unless it adopts a certain procedure – in this case a procedure impliedly indicated as usual in the South Africa Act? The answer is that Parliament, composed of its three constituent elements, can adopt any procedure it thinks fit.*[137]

In coming to its conclusion, the Court relied on Dicey's writings in regards to sovereign parliaments and examined the *Statute of Westminster*. First, it dismissed the relevancy of *Ndobe "*since that case was decided before the Statute of Westminster."[138] Second, it noted that the *Statute of Westminster* had made the Parliament of South Africa "the supreme and sovereign law making body in the Union"[139] and that "Parliament's will, therefore, as expressed in an Act of Parliament cannot now in this country, as it cannot in England, be questioned by a Court of Law whose function it is to enforce that

[135] *Ndlwana v Hofmeyr*, [1937] AD 229.
[136] *Ndlwana*, per headnotes at 229.
[137] *Ndlwana* at 238.
[138] *Ndlwana* at 238.
[139] *Ndlwana* at 236.

will, not to question it." [140] Third, it noted that had limitations on the South African parliament being made into a "supreme and sovereign law making body" –been intended for the South African parliament, they, too, would have been included in the *Statute of Westminster* as had been done so for other Dominions.[141] Finally, it noted that the South African Parliament had, nevertheless, passed the *Status Act of 1934* where Parliament "defined its own powers and declared them to be 'sovereign'"[142] and therefore had any restrictions remained with South Africa Act, the *Status Act* removed them. As such, Justice Stratford pithily concluded: "Freedom once conferred cannot be revoked."[143]

Ndlwana combined with *Vauxhall* and *Ellen Street* (discussed below) had seemingly undercut the applicability of *Cooper* and *McCawley* to legislatures emancipated from the *Colonial Laws Validity Act* in the 1930s. However, the South African Supreme Court would revisit the issues raised in *Ndobe* and *Ndlwana* in 1952 and not simply sharply distinguish from *Ndlwana*, but explicitly overturned it in *Dönges*.[144] Even excluding the question of 'manner and form' restrictions, *Dönges* is a noteworthy case for its discussion of departure from *stare decisis* with Chief Justice Centlivres boldly stating that the Court had the right to depart from *stare decisis* "when it is clear that the decision is wrong"[145] (particularly given that the Court's decision in *Ndlwana* had been *per curiam*), as well as its extensive use of extrinsic evidence to determine the meaning of *the Statute of Westminster*.

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[140] *Ndlwana* at 237.
[141] *Ndlwana* at 237.
[142] *Ndlwana* at 236.
[143] *Ndlwana* at 237.
[144] *Harris v Dönges*, [1952] 2 AD 428 (SAAD).
[145] *Dönges* at 452G.

Chief Justice Centlivres disagreed with his predecessors that the *Statute of Westminster*, by necessary implication of making the Union Parliament a "supreme and sovereign law making body," had repealed the 'entrenched' sections of the *South Africa Act*. His analysis of the *Statute of Westminster* found no intention to amend any portions of the *South Africa Act* as it was already understood at the passage of the *Statute of Westminster* that the *South Africa Act* could be amended in its entirely within South Africa, so long as the proper procedures were followed. Thus, there was nothing in regards to the *South Africa Act* that required emancipation with the *Statute of Westminster*. Centlivre further criticised his predecessors in noting that "to say that the Union is not a sovereign state, simply because its Parliament functioning bicamerally has not the power to amend certain sections of the South Africa Act, is to state a manifest absurdity."[146] Notably, the Court relied on *Trethowan* as authority for "the power given to the Union Parliament to bind a subsequent Union Parliament to follow a prescribed procedure in amending specific provisions of the Union Constitution,"[147] erasing the distinction between emancipated and subordinated legislatures.

Although *Dönges* made an initial splash, its influence became increasingly devalued, being rarely mentioned after the 1960s. In general, one assumes that the taint of increasingly strident *apartheid* policies dissuaded many from even considering South Africa authorities, despite the fact that the Supreme Court was impeding the implementation of *apartheid* policies in its ruling (and for more cognizant observers, perhaps, because of that, as the judges opposition to *apartheid* policies could be portrayed as a decision rooted in its opposition to these policies as opposed to consistent

[146] *Dönges* at 468A.
[147] *Dönges* at 416G.

judicial reasoning).[148] However, it is important to emphasize that, although it has failed to gain the same currency as *Trethowan* in succeeding decades, it was clearly influential in Canada in the 1950s.[149]

Vauxhall and Ellen Street

Typically, the judicial authority for Diceyan absolutism does not come from Dicey's era or before, but instead come from a decade or later after Dicey's passing. As noted, there were a flurry of judicial authorities for Diceyan absolutism in the late 1960s and early 1970s (*R v Jordan*, *Cheney v Conn*, and *Blackburn v AG*), but much of the justification – and more germane to the discussion of the *Canadian Bill of Rights* in the

[148] N.B. Later in 1952, the Supreme Court, in *Minister of the Interior v Harris*, [1952] 4 AD 769, would strike down the government's attempt to circumvent the ruling by introducing the *High Court of Parliament Act* (no. 35 of 1952) which purported to constitute the Union Parliament as the final court of appeal. The Supreme Court determined that not only did that Act failed to meet the appropriate "manner and form" procedures for its passing, but that the "High Court of Parliament" did not constitute a true court, implying that even if Parliament had followed the prescribed manner and form procedures, the Supreme Court may even reject certain parliamentary legislation on as yet unarticulated fundamental principles. However, the Court's battle with Parliament effectively ended in 1957 in *Collins v Minister of the Interior*, [1957] 1 AD 552, where the Court determined that a bill reconstituting the Senate had followed the rules of the *South Africa Act*, thus it is the Senate for the purposes of the South Africa Act. The new Senate provided the government with the necessary majorities to circumvent the entrenched provisions of the *South Africa Act*.

[149] For example, it was prominently discussed in a *University of Toronto Law Journal* article by Hamish R. Gray, "The Sovereignty of Parliament Today," (1953) *University of Toronto Law Journal* 10(1):54-72.

1950s – were three cases decided in the 1930s:[150] *Vauxhall*,[151] *Ellen Street*,[152] and *British Coal*.[153]

The first two cases, *Vauxhall* and *Ellen Street*, concerned the same provision of the *Acquisition of Land (Assessment of Compensation) Act 1919*[154] and were both litigated for the claimants by the same counsel, Mr. M.A. Hill. In both cases, counsel made the bold argument that the compensation scheme provided for in the 1919 legislation was an attempt to bind Parliament and thus should prevail over the conflicting provisions of the *Housing Act 1925*[155] or any other future compensation scheme. Such an interpretation was dubious:[156]

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[150] The following analysis *of Vauxhall*, *Ellen Street*, and *British Coal* draws heavily upon the analysis of these cases in Oliver (2005), pp. 70-72, including abridged direct quotations without the use of quotation marks.

[151] *Vauxhall Estates Ltd v Liverpool Corpn*, [1932] 1 KB 433 (DC)

[152] *Ellen Street Estates Ltd v Minister of Health*, [1934] 1 KB 590 (CA).

[153] *British Coal Corpn v The King*, [1935] AC 500 (PC).

[154] 9 & 10 George V, c 57, s 7(1).

[155] 15 & 16 George V, c 14, s 46.

[156] The enactment in question (s. 71(1)) stated

> *The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect.*

In contrast to M.A. Hill's assertion, the enactment does not seek to make all Acts – past and future – subject to its provisions, but instead seeks to make clear that the provisions of the Act should *not* be interpreted not as complimentary to existing compulsory land acquisition enactments, but should instead be interpreted as prevailing over those enactments: "The provisions [...] shall [...] have effect subject to this Act and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect."

The only attempt of the statute to have a proactive effect on other statutes occurs in section 7(2) which directs that "the amount of rent or compensation payable" is not to be abrogated by potential amendments to the *Small Holdings and Allotments Act, 1908*. That is, the courts should not interpret potential future amendments to the Small Holdings Act as impliedly repealing the Acquisition of Land Act. This was in no way an attempt to bind future parliaments to the will of the current parliament, but clarification for the courts as the will of parliament in determining whether certain provisions were to

> *Instead the 1919 Act seemed to contemplate that authorisation for compulsory purchases could come, first, from pre-1919 legislation with provisions not yet in effect. According to this credible interpretation of Parliament's intention in enacting the 1919 Act, there was no attempt to bind a future Parliament. The marginal notes to section 7(1) confirmed as much.*[157]

Two of the six judges who heard the two cases took this view that there was no attempt by parliament in 1919 to have its compensation scheme preferred over a future compensation scheme. The remaining four judges left open whether the Act was future-directed and concluded that any such future-directed application was sufficiently contradicted by the later Act.[158] Thus, the more general comments about Parliament's ability to bind a future Parliament were therefore, for the former two judges, clear *obiter dicta* and, for the latter four judges, went beyond what the facts appeared to justify: "The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation."[159] The severe *obiter dicta* of a few of the Justices in regards to the sovereignty of Parliament should not be understood as a rebuke to a parliament attempting to explicitly – or even implicitly – bind its successors, but instead as a response and rebuke to the boldness of counsel in not simply attempting to invent a provision, but invent an unorthodox provision.

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prevail, and not be complimentary, over other Acts (s. 7(1)) and when other Acts should be understood as complimentary (s. 7(2)).

The argument by M. A. Hall in *Vauxhall* and *Ellen Street* was incredibly bold. There was no clear indication from the text of the statute that there was any intention by Parliament to bind its successors, the legislation simply sought to clarify for the courts the interaction of various statutes.

[157] Oliver (2005), p. 70.

[158] Oliver (2005), p. 71.

[159] *Ellen Street* per Maughan LJ at 597.

British Coal Corporation and *Moore*

The judgement in the third case, *British Coal*, also pronounced upon the ability of parliament to bind itself in *obiter dicta* that went well beyond what was required by the facts of the case. *British Coal* overturned the Privy Council's own decision in *Nadan*[160] which had struck down Canadian legislation preventing criminal appeals to the Privy Council. In *Nadan*, the Privy Council struck down the legislation solely on the grounds that (1) Canadian legislation had been "repugnant to [Imperial legislation] and was therefore void under the Colonial Laws Validity Act, 1865" and (2) the Canadian legislation "could only be effective if construed as having extraterritorial operation."[161] Both of these grounds were eliminated by the *Statute of Westminster* and thus general commentary on the ability of Parliament to bind itself was pure *obiter dicta.* Further, Lord Sankey's famous commentary in this case that

> *It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute. But that is theory and has no relation to realities.*[162]

was only invoked in a discussion of section 7 of the *Statute of Westminster* that immunized the *British North America Acts, 1867-1930* from "repeal, amendment, or alteration" by the "Dominion and Provincial Parliaments,"[163] noting that resort to Westminster was therefore still necessary despite the language of section 4. In contrast, no such bold comments about the continuing sovereignty of Westminster were made in

[160] *Nadan v The King* [1926] AC 482.
[161] *British Coal* at 516.
[162] *British Coal* at 520.
[163] *British Coal* at 520.

Moore v Irish Free State,[164] a parallel case decided by the exact same judges, on the exact same day, addressing the same issue of abolition of Privy Council appeals except in relation to the *Irish Free State*. In this context, the *obiter* comments in *British Coal* appear less to be an expression that Parliament is unable to bind itself, but instead that any attempt by Parliament to bind itself must be unequivocal and that the exceptions made in section 7 of the *Statute of Westminster*, allowed for exceptions in section 4 in relation to Canada.

Although the bold statements of *Ellen Street* and *British Coal* would have confirmed the authority of Diceyan absolutism to anyone biased towards those views, for those biased against Diceyan absolutism these leading judicial authorities in the years preceding the enactment of the *Canadian Bill of Rights* would have appeared highly questionable and non-authoritative. As we shall see, such pretentions were precisely contested by Elmer A. Driedger, when the *Canadian Bill of Rights* was drafted and enacted.

THE JUDICIAL REVIEW OF RIGHTS PRIOR TO 1960

RIGHTS PROTECTIONS IN THE UNITED STATES PRIOR TO THE 1950S

When demands for a constitutionally-entrenched bill of rights first emerged in the 1930s and 1940s, the only referenced model was the Bill of Rights in the Constitution of the United States. That it was labour activists that were most vocal in such demands is therefore quite remarkable. The United States only developed a Supreme Court that acted as a robust defender of civil liberties in the 1960s, with the first landmark human

[164] *Moore v Attorney-General (Irish Free State)*, [1935] AC 484 (PC).

rights case (excepting admittance of evidence) only occurring in the 1950s. From the perspective of 1935, when Frank Scott proposed constitutionally-entrenched guarantees for civil liberties in *Social Planning for Canada,* the constitutionally-entrenched guarantees for civil liberties in the United States Constitution had largely proved weak and even counter-productive to the goals of *Social Planning*: the Supreme Court of the United States had endorsed "Separate-but-Equal" in *Plessy v Ferguson,*[165] it had severely limited freedom of expression both during wartime[166] and peacetime,[167] and it had, since 1897,[168] consistently used the Fourteenth amendment to invalidate socially progressive legislation, quintessentially expressed in *Lochner v New York.*[169] A dozen years later, when the demands for a national bill of rights in Canada were at their peak from 1946 to 1951, little had changed. Although the United States Supreme Court had abandoned interfering in social legislation as it had done in the Lochner Era,[170] it had reinforced the limits on freedom of expression (again in both wartime[171] and peacetime[172]), as well as upholding the mass interning of Japanese-Americans under executive order.[173]

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[165] *Plessy v Ferguson,* (1896), 163 US 537.
[166] *Schenck v United States,* (1919), 249 US 47; *Abrams v United States,* (1919), 250 US .616.
[167] *Whitney v California,* (1927), 274 US 357.
[168] *Allgeyer v Louisiana,* (1897), 165 US 578.
[169] *Lochner v New York,* (1905), 198 US 45: the Supreme Court held that New York's regulation of the working hours of bakers was not a justifiable restriction of the right to contract freely under the Fourteenth Amendment's guarantee of liberty. Other leading cases include *Hammer v Dagenhar,* (1918), 247 US 251 where the court invalidated federal attempts to regulate labour conditions; *Bailey v Drexel Furniture Co,* (1922), 259 US 20, where the court invalidated a law against child labour; and *Adkins v Children's Hospital,* (1923), 261 US 525 where the court invalidated a minimum wage law for women.
[170] *West Coast Hotel Co v Parrish,* (1937), 300 US 379.
[171] *Chaplinsky v New Hampshire,* (1942), 315 US 568.
[172] *American Communications Association v Douds,* (1950), 339 US 382.
[173] *Korematsu v United States,* (1944), 323 US 214.

This apparent contradiction has largely remained unexplored,[174] but germane to this dissertation is that (with the exception of rules regarding the admittance of evidence) the Supreme Courts of Canada and the United States broadly paralleled each other in their respective approaches to civil liberties in the decades leading up to the enactment of the *Canadian Bill of Rights*. Both courts did show some pre-War creativity in interpreting the constitution to protect rights, such as the Supreme Court of Canada's ruling in the *Alberta Statutes Reference*, which found free speech protections in the space between legislative jurisdictions, and the United States Supreme Court's ruling in *Meyer v Nebraska,*[175] which used the due process provisions of the fourteenth amendment to invalidate a prohibition on teaching modern languages to grade school children. Equally, during the War, both courts accepted limits on free speech and the internment of ethnic Japanese. Finally, in the 1950s, both Courts began to take tentative steps towards becoming institutions that robustly defended civil liberties. It was only in the 1960s that the two courts began to take broadly different directions, with the United States Supreme Court consolidating its increased liberalism of the 1950s, but with the Supreme Court of Canada turning its back on the "implied bill of rights" it had developed in the 1950s, despite the step towards greater constitutional similarity between the two countries with the *Canadian Bill of Rights*.

[174] Eric Adams has briefly mused on the matter in "Canada's 'Newer Constitutional Law' and the Idea of Constitutional Rights" *McGill Law Journal*, vol. 51 (2006), pp. 435-474 at 469-472.
[175] *Meyer v Nebraska,* (1923), 262 US 390.

CANADA'S "IMPLIED BILL OF RIGHTS"

The years leading up to the enactment of the *Canadian Bill of Rights Act* were marked by the emergence of what has been commonly described as the "implied bill of rights"[176] in a number of leading Supreme Court of Canada rulings. Recognition of the "implied bill of rights" in Canada has a long and consistent, albeit limited history in Canada. Authors such as Bora Laskin discussed it in the late 1950s during the debates over the enactment of the *Canadian Bill of Rights*,[177] Dale Gibson and Tarnopolsky did so in the 1960s and 1970s in contrasting its jurisprudence with that under *Canadian Bill of Rights*,[178] and Justice LeBel of the Supreme Court of Canada has recently given it considerable and explicit attention in *Demers.*[179] The implied bill of rights is typically associated with a number of rulings with reasoning delivered by Justice Ivan Rand in the 1950s, although probably the most frequently cited example is the reasoning of Chief Justice Duff in the *Alberta Statutes Reference.* There were also a few other cases in the 1960s in which the reasoning behind that of the implied bill of rights was employed, but they have been essentially overlooked in the literature examining the implied bill of rights.[180]

The "implied bill of rights" never enjoyed consistent majority support and the reasoning was often supplemental to more narrow reasonings given by other judges that resulted in the same outcome, as there were only ever one or two judges on the Supreme

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[176] The provenance of this term is unclear, but it had common scholarly currency by 1966. See Dale Gibson, "Constitutional Amendment and the Implied Bill of Rights," *McGill Law Journal*, vol 12 (1966), pp. 497-501.
[177] Laskin (1959).
[178] Gibson (1966), p. 497; Tarnopolsky (1971), p. 438; Gibson (1975), p. 61; Tarnopolsky (1976), p. 60.
[179] *R v Demers*, 2004 SCC 46, [2004] 2 SCR 489.
[180] The best example of these would be *McKay et al. v R.*, [1965] SCR 798.

Court of Canada that consistently supported the reasoning underpinning the "implied bill of rights." As such, there were two, largely discrete, generations of the implied bill of rights: that of Duff and Davis in the late 1930s and that of Rand and Kellock in the 1950s. The "implied bill of rights" jurisprudence can also be divided into three different approaches to rights protection.[181]

Elements of the Implied Bill of Rights

Restrictive Interpretation

The first approach is what can be termed the "restrictive interpretation" approach. This approach is in no way peculiar to Canada nor even a relatively recent innovation, but instead represents what is arguably the quintessentially English approach to the rule of law. The "restrictive interpretation" is a presumption against the imposition of penal sanctions or the removal of common law rights (as well as taxation) unless a statute imposing such penalties or taking away such rights is explicit. This was one of Blackstone's ten "principal" rules of statutory construction described by Blackstone in his *Commentaries*[182] and its classic example during the latter half of the twentieth century was *Hallet & Carey*[183] (which, ironically, overturned a "restrictive interpretation" approach used by the Supreme Court of Canada in *Nolan*[184]). The most commonly cited

[181] Tarnopolsky's analysis of the 1970s and Mark Walters's 2008 analysis each divide the implied bill of rights into two different approaches to rights protection. My own analysis synthesizes and builds upon their work.
[182] William Blackstone, *Commentaries on the Laws of England: Book the First* (Oxford: Clarendon Press, 1765), p. 88.
[183] *Canada (Attorney General) v Hallet & Carey Ltd*, [1952] AC 427.
[184] *Canadian Wheat Board v Hallet and Carey Ltd.,* [1951] SCR 81. [*Nolan*]

"implied bill of rights" expression of this approach is *Boucher (1951),*[185] however that probably has as much to do with proximity as it does with stridency.

Power Allocation

The second approach can be termed the "power allocation" approach. This approach is the most classic of the "implied bill of rights" and the most common approach used in the most frequently cited examples of the "implied bill of rights." This approach is particular to federal constitutions and involves a sort of federalism shell game, where rights being violated by one level of government are declared to reside under the jurisdiction of the other government. A further variant is that certain rights are actually determined to be located in the space between legislative jurisdictions and thus immune from legislation at all. The former approach was that employed by Cannon in the *Alberta Statutes Reference* and generally by the Supreme Court of Canada in *Switzman*. The latter approach was embraced by Duff and Davis in the *Alberta Statutes Reference* and by the High Court of Australia in the early 1990s.

Substantive Due Process

The final, and arguably most creative, approach adopted by the Supreme Court of Canada can be termed the "*abus de droit*" or "substantive due process" approach. The most famous of the 1950s implied bill of rights cases, *Roncarelli,*[186] employed this method, although its first clear expression was in the little noted case, *Smith &*

[185] *R v Boucher*, [1951] SCR 265.
[186] *Roncarelli v Duplessis*, [1959] SCR 121.

Rhuland[187] and shades of this reasoning were expressed in Davis's dissent in *Christie v York.*[188] This approach is aimed at limiting the discretionary powers of public officials and is arguably an importation of the French legal principle of *abus de droit*, which subjects the exercise of the discretionary power of public officials to judicial review and allows the court to determine not simply whether the official acted within the scope of his powers but whether they were exercised in good faith. It can also be viewed as the adaption of the "substantive due process" approach being developed in the United States.

THE "IMPLIED BILL OF RIGHTS" JURISPRUDENCE

Origins

The Alberta Press Case

As noted, what is today the most widely cited "implied bill of rights" decision, the decision that most influenced the debates over a national bill of rights, and probably the most influential in the drafting of the *Canadian Bill of Rights*, was the reasoning of Duff (Davis concurring) and Cannon in the *re Alberta Statutes (1938).*[189] Briefly, *The Accurate News and Information Act* sought to subject the publication of any news and

[187] *Smith & Rhuland Ltd v Nova Scotia*, [1953] 2 SCR 95.
[188] *Christie v The York Corporation*, [1940] SCR 139.
[189] The case emerged out of a reference by the federal government of a series of Alberta statutes, most of which aimed to implement Social Credit theories. Three of these statutes – *The Alberta Social Credit Act*, *The Bank Taxation Act*, and *The Credit of Alberta Regulation Act* – directly related to banking and credit; however a third statute – *The Accurate News and Information Act* – aimed to regulate newspapers in the province. The banking and credit legislation were clearly *ultra vires* provincial legislative jurisdiction and the majority of the court (Crocket, Kerwin, and Hudson) simply invalidated the *Alberta Accurate News and Information Act* as forming "part of the general scheme of social credit legislation, the basis of which is The Alberta Social Credit Act; and since that Act is *ultra vires*, ancillary and dependent legislation must fall with it."

editorials to Alberta government approval. It was a frightening limitation on rights and clearly inspired Duff to finally implement on the bench what he had long preached off the bench, that "the law [w]as a living organism responsive to social change," but that had previously seen "little evidence of that sentiment in his judgments written over a period of nearly 40 years." [190] Duff, with Davis concurring, (albeit in *obiter*) located the power over freedom of expression in the "peace, order and good government" clause[191] as well as the "constitution similar in Principle" phrase in the preamble to the *British North America Act*. This second aspect left the question opaque as to whether Duff and Davis believed that the federal parliament could severely restrict freedom of expression as well, for although "the Parliament of Canada possesses authority to legislate for the protection of this right" and "any attempt to abrogate th[e] right of public debate [...] would, in our opinion, be incompetent to the legislatures of the provinces," no explicit statement is made as to an attempt "attempt to abrogate th[e] right of public debate" by the legislature of the Dominion. Only Cannon severed the *Accurate News and Information Act* from the other legislation and determined that it fell on the basis of the federal government's jurisdiction over criminal law and not as being ancillary to legislation that fell on the basis of the federal government's jurisdiction of banking and credit. As such the case provided a foundation for either (1) finding civil liberties as exclusively under the federal

[190] Kaplan (2009), p. 97., quoting D.R. Williams, "Legal Biography in Canada" in J.N. Fraser, ed., *Law Libraries in Canada: Essays to Honour Diana M. Priestly* (Toronto: Carswell, 1988), p. 128.

[191] *re Alberta Statutes* per Duff at 134: "the provisions of The *British North America Act*, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions."

criminal power, (2) under the 'residual' power, or (3) inviolate, protected by the preamble to the *British North America Act*.[192]

Fineberg v Taub[193]

At almost the same time that *The Accurate News and Information Act* was passed by the Alberta legislature, the Quebec legislature passed its own statute odious to civil liberties, the *Padlock Law*.[194] As we have noticed, the *Padlock Law* was passed in response to the repeal of section 98 of the Criminal Code and appeared to be a provincial invasion of the federal criminal law power. However, while the Liberal government in Ottawa was content to submit a statute from opposition dominated Alberta to the Supreme Court of Canada for review, it was unwilling to do the same for Liberal dominated Quebec out of fear of antagonizing the provincial Duplessis government,

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[192] The concept that "a constitutional similar in principle to the United Kingdom" referred to English statutes such as the *Magna Charta*, etc is largely a post-*Charter* invention. Prior to the *Charter* the phrase was rarely cited in Supreme Court of Canada rulings and when cited it was typically understood by the Supreme Court of Canada that the phrase simply referred to that fact that Canada was to have parliamentary government (see *Mercer* at 603). The meaning attached to the phrase was slightly expanded in the *re Alberta Statutes* (1938), *Saumur* (1953), and *Switzman* (1957); in 1938 Duff defined the phrase as referring to "a parliament working under the influence of public opinion and public discussion," and in 1957 Rand more vaguely defined it as referring to "parliamentary government, *with all its social implications*" [Emphasis mine]. Even in the bold *re Patration* (1981) the phrase was restricted to referring to "responsible government and some common law aspects of the United Kingdom's unitary constitutionalism, such as the rule of law and Crown prerogatives and immunities."

It was only post-Charter that the phrase began to take on a more expansive meaning. In *re Manitoba Language Rights* (1985), it began to encompass "the rule of law;" in *Beauregard* (1986), judicial independence; in *Proulx* (2001), the Royal prerogative; *OETCA* (2001), "no taxation without representation;" and – most bizarrely – in *Figueroa* (2003), majority governments. As frequently alluded to in this paper, there is significant scope to explore the emergence of a post-*Charter* "implied bill of rights" that parallels the implied bill of rights of the 1930s to 1950s.

[193] See Lambertson (2005), pp. 61-67 for a more detailed exposition.

[194] *Loi protégeant la province contre la propagande communiste*, S.Q. 1937, c. 11 [*Padlock Law*]

despite the numerous demands for it to do so. The Quebec government was keenly aware of the likely unconstitutionality of the *Padlock Law*, especially in light of the Supreme Court of Canada's ruling in the *Alberta Statutes Reference,* and avoided opportunities for the statute to be challenged in court. For example, a communist activist was padlocked from his home in July of 1938, he (along with two accomplices) openly – in front of the police – broke into his own home and was arrested under the Padlock Law as well as being charged with "conspiracy to obstruct a police officer."[195] However, all charges were dropped against one of his accomplices and the charges under the Padlock law were dropped altogether, eliminating the chance for the Padlock Law to be challenged.

In response, the Montreal Civil Liberties Union constructed a private law challenge to the Padlock Law preventing the Duplessis government from being able to withdraw the charges and prevent an outright challenge to the law.[196] In challenging the law, counsel for the defendant relied heavily on the language of Duff in the *Alberta Statutes Reference,* arguing that the Padlock law

> *constitutes a violation of the constitutional rights and liberties of the citizens of the Province of Quebec as British subjects;* [197] *[...]*
>
> *constitutes a violation of the constitutional rights of British subjects [...]to freedom of speech and the liberty of the press [...] and so sets up a standard of citizenship different from that obtaining in the rest of Canada;*[198] *[... and]*
>
> *prohibits free public discussion of affairs, and free examination and analysis of political views, and such curtailment interferes with the*

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[195] Lambertson (2005), pp. 61-62.
[196] *Fineberg v Taub* (1939), 77 CS 233 (QC SC). In brief, the Civil Liberties Union arranged for a landlord to sue his lessee, whose residence had been padlocked under the Padlock Law, for loss of rent income to the landlord; arguing that the lessee should be indemnified from damages because the damages were the result of an *ultra vires* law.
[197] *Fineberg* at 241.
[198] *Fineberg* at 242.

> *working of parliamentary institutions of Canada as contemplated by the provisions of the British North America Act.*[199]

Chief Justice Greenshields of the Cour Supérieure, however, rejected all of these arguments and relied on *Bedard v Dawson*,[200] which upheld a similar Quebec law that provided for the closing down of brothels ("disorderly houses") by the provincial government.[201] Given the potential for greater success before the Supreme Court given its recent ruling in *re Alberta Statutes*, the Montreal Civil Liberties Union readied for further appeals. However, the War was to shortly intervene and the alliance of interests supporting appeal melted away, with Communists supporting the Duplessis government for its "anti-imperialist" stance against the War, anti-Nazi supporters for the sake of national unity in the prosecution of the War, and the rest to focus on the more immediate issues of civil liberties violations under the *Defence of Canada Regulations.*

Christie v York

At the same time that Chief Justice Greenshields was rejecting the reasoning of the Montreal Civil Liberties Union in *Fineberg*, the Supreme Court of Canada was hearing a case involving a Montreal tavern's refusal to serve beer to a patron for being a "Negro."[202] This case is typically overlooked in discussions of the implied bill of rights

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[199] *Fineberg* at 242.
[200] *Bédard v Dawson*, [1923] SCR 681.
[201] Notably, Greeshields had been the provincial court judge who had originally upheld the brothels law and Justice Duff also upheld the held law when it reached the Supreme Court, commenting (at 684) that "the legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime."
[202] *Christie v The York* Corporation, [1940] SCR 139. In brief, the issue began when two "Negros" and a "Caucasian" walked into a Montreal tavern; these men then politely sat down at a table, ordered beer, and placed the money on the table for the beer. The waiter, discreetly, informed them that the bar does not serve Negros. After repeated pleas, one of the Negros (described by his counsel as "not extraordinarily black") telephoned the police

because the Supreme Court of Canada, including Chief Justice Duff, found that any merchant is free to deal with the public as he chooses, including discrimination based upon race. However Justice Davis strongly dissented in this decision arguing for an implied prohibition against discrimination (tactically making an analogy to religion). Whereas the court of first instance, which found in favour of the plaintiff, extended the meaning of "restaurant" and "traveller" to include any patron of a tavern, Davis's reasoning was more creative.

Davis did not rely on the *Quebec License Act*,[203] but instead upon the *Alcoholic Liquor Act*.[204] He notes that that Act provides a limited "privilege" to sell alcohol and "a holder of such a special privilege [...] from the government to sell beer in the glass to the public has not the right of an ordinary trader to pick and choose those to whom he will sell."[205] He went on to justify his reasoning that "in the changed and changing social and economic conditions, different principles must necessarily be applied to the new

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in order to compel the tavern to serve them. Upon arrival, the police refused to compel service. Resultantly, the aggrieved party commenced an action for damages in the Superior Court of Quebec. In that decision, the court found in favour of the plaintiff, ruling that the refusal to service the plaintiff was a violation of the *Quebec Licence Act*, RSQ 1925, c.25, obligating a "licensee for a restaurant [...] to give food to travellers" (s. 33) – a typical law designed to ensure that individuals can freely travel – extending the meaning of "restaurant" to include "tavern" and "travellers" to include "patrons." The case was appealed to the Court of King's Bench of Quebec (Appeal Side) (*York Corporation v Christie* (1938) 65 B.R. 104) which overturned the lower court's ruling, relying on *Halsbury's Laws of England* which clearly stated that the requirement of inns not to discriminate between lodgers did not extend to other forms of lodging such as "lodging-houses," "boarding-houses," or "ale-houses" as well as *R v Rymer*, (1877) 2 QBD 136 (QBD), which explicitly held that "a tavern is not within the definition" of "an inn" and resultantly "no one has a right to insist on being served any more than in any other shop." Special leave was given to appeal to the Supreme Court of Canada. In its 4-1 decision (Davis J *dissenting*), the Supreme Court upheld the reasoning of the appellate court.

[203] RSQ 1925, c 25.

[204] RSQ 1925, c 37.

[205] *Christie* per Davis J at 152

conditions;" [206] a ringing endorsement of what we would today describe as a purposive approach to statutory construction. Whereas Justice Philippe Demers of the Cour Supérieure simply extended a particular non-discrimination provision of a statute to a greater number of individuals, Justice Davis of the Supreme Court of Canada argued that the State has an inherent obligation to treat all subjects equally and therefore anyone acting under government license abandoned their private right to discriminate.

Alone, this was a radically more powerful argument than that of *Demers*, and even more so when combined with the general plea for creative approach in reasoning by courts. Yet, with *Christie*, the first generation of the "implied bill of rights" flickered and died. Both Duff and Davis would retire in 1944. However, shortly before and upon their retirement two new judges would be appointed to the Supreme Court of Canada, Ivan Rand in 1943 and Roy Kellock in 1944, that would constitute a second generation of implied bill of rights innovators in Canada.

Drummond Wren

As the investigations into the Gouzenko revelations were just beginning, Justice Mackay of the Ontario High Court of Justice delivered a judgment that embodied the emerging popular enthusiasm for human rights.[207] In brief, Drummond Wren sought to void a restrictive covenant on his property that it "not to be sold to Jews or persons of objectionable nationality" so that he could sell the land to a Jew, with J.R. Cartwright[208]

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[206] *Christie* per Davis J at 152
[207] *Re Drummond Wren* [1945] O.R. 778
[208] J.R. Cartwright would subsequently be appointed to the Supreme Court of Canada in 1949 and then as Chief Justice in 1967. While on the Supreme Court he would author the dissents to both *Robertson* and *Drybones*. Cartwright also acted as counsel for a similar case, *Re Noble and Wolf* [1948] O.R. 579 (ON SC) and [1949] O.R. 503 (ON CA). After

and Irving Himel[209] as counsel for Drummond Wren and the Canadian Jewish Congress as an intervenor. Justice Mackay of the Ontario High Court of Justice accepted their petition to void the restrictive covenant on the basis that it was "offensive to the public policy," finding evidence for this public policy in Canada's ratification of the United Nations Charter. Not only was this an unusual embrace of a court seeking to explore public policy ("in the changed and changing social and economic conditions, different principles must necessarily be applied to the new conditions," in the words of Justice Davis) but it relied not upon traditional conceptions of British liberties and instead sought to tap into the emerging human rights discourse. Although the case had little impact in Canada[210] (when the Supreme Court of Canada addressed a similar set of facts five years later, in *Noble and Wolf*,[211] it was much more conservative in its reasoning for voiding a

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he was appointed to the Supreme Court of Canada, the case was further appealed to the Supreme Court as *Noble and Wolf v Alley et al* [1951] SCR 64 and had to recuse himself from that case. Cartwright was also counsel for the Co-Operative Committee on Japanese Canadians which fought against the expulsion of Japanese Canadians, contesting the Orders in *Reference Re: Persons of Japanese Race* [1946] SCR 248 [*re Expulsion*].

[209] Irving Himmel was a Jewish civil liberties activist who headed and sustained the Toronto-based Association for Civil Liberties, a leading civil liberties association in Canada for the first two decades after the Second World War.

[210] The case indirectly led to the infamous proposed "Bricker Amendment" to the United States Constitution, as *Drummond Wren* and its reference to the UN Charter was cited as authority by a California court to invalidate and American law. Unlike in Canada and Britain where ratified treaties have no independent domestic effect and can only be implemented by separate domestic legislation (i.e. they are not "self-executing"), under the US constitution, treaties ratified by the Senate become part of the law of the United States. Thus reference to the UN Charter as an instrument to invalidate domestic American legislation frightened a number of US politicians who sought to amend the US constitution to remove the "self-executing" effect of ratified treaties. The Bricker amendment came only a few votes away from approval by the Senate and probably would have easily garnered sufficient ratification by the states to become law if it had made it out of the Senate. See also, *Sei Fujii v California,* (1950), 217 P.2d 481 (Superior Court of Los Angeles County), which cited *Drummond Wren* as authority.

[211] *Noble and Wolf v Alley et al*, [1951] SCR 64.

similar restrictive covenant), it did illustrate that some senior members of Canada's judiciary were caught up in the idea of a new role for human rights and of the courts in discovering and enforcing them.

Japanese Expulsion Reference

The celebrated implied bill of rights of the 1950s had its beginnings in the dissents of Justices Rand and Kellock in *re Expulsion*.[212] Although Rand and Kellock concurred with the other five presiding judges, upholding a series of Orders-in-Council passed under the *War Measures Act* that aimed at expelling ethnic Japanese from Canada (P.C. 7355, 7356, 7357), they dissented in part over the provisions of those orders that (1) revoked the citizenship of naturalized British subjects and (2) expelled natural born British subjects. Thus, they argued that ethnic Japanese Canadian nationals could not be expelled because the instruments purporting to expel them employed the term "deport" which, in their view, could only apply to aliens and not nationals. Instead if the government wished to remove ethnic Japanese British subjects, it would have to employ language along the lines of "exile" and not simply "deport." This was only a very cautious break in reasoning from their colleagues, but it did illustrate the beginnings of creative interpretation by these two judges so as to limit the impact of government violations of civil liberties.

[212] *Reference Re: Persons of Japanese Race*, [1946] SCR 248.

Ascendency

The implied bill of rights, proper, began with a series of three decisions of the Supreme Court of Canada delivered in November and December 1950 – *Noble*,[213] *Nolan*,[214] and *Boucher*[215] – where Justices Rand and Kellock were able to cobble together majorities in favour of much more restrictive interpretations than typically embraced by Canadian courts. This early phase of the implied bill of rights was highly fluid, only Rand and Kellock consistently voting with the majority, with each of the other judges variously present for the three cases once voted in the minority and at least once voted in the majority. However, it is notable that Rinfret, Tashereau, Cartwright, and Fauteux, agreed with Rand and Kellock in discovering an implied protection of property rights in *Noble* and *Nolan*, but otherwise found themselves in solid disagreement with Rand and Kellock for implied protections for freedom of expression,[216] freedom of association,[217] freedom of religion,[218] and due process.[219]

Noble

The questions of restrictive covenants, as in *Drummond Wren*, again came before the Ontario courts in *Noble*. However, the reasoning of Justice Mackay was not embraced by his colleagues, who explicitly rejected his reasoning in both the High Court of Justice[220] and the Court of Appeal,[221] finding racially restrictive covenants valid. The

[213] *Noble and Wolf v Alley et al*., [1951] SCR 64.
[214] *Canadian Wheat Board v Hallet and Carey Ltd.*, [1951] SCR 81.
[215] *R v Boucher*, [1951] SCR 265.
[216] *R v Boucher*, [1951] SCR 265.
[217] *Smith & Rhuland Ltd. v Nova Scotia*, [1953] 2 SCR 95.
[218] *Saumur*, [1953] 2 SCR 299.
[219] *Roncarelli*, [1959] SCR 121.
[220] *Re Noble and Wolf*, [1948] O.R. 579 per Schroeder J at 590.

Supreme Court of Canada overturned these decisions, yet did not embrace the bold reasoning of Justice Mackay in *Drummond Wren* (even Rand and Kellock), but instead voided the covenant at issue on the grounds of "uncertainty" given that it was not possible for a court to say with certainty whether a purchase is or is not within the ban on race.

Nolan

During the War, the broad language of the *War Measures Act* was upheld by the Supreme Court of Canada in the *Chemicals Reference.*[222] Following the cessation of hostilities, the Parliament enacted the *Emergency Powers Act, 1945*[223] to continue the government's wartime controls under the *War Measures Act* into peacetime. As such, a modified version of section 3[224] of the *War Measures Act* appeared as section 2[225] of the

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[221] *Re Noble and Wolf*, [1949] O.R. 503 per Henderson J.A. at 523 and Hogg J.A. at 532-533.

[222] *Reference Re: Regulations in Relation to Chemicals*, [1943] SCR 1 [*re Chemicals*]

[223] *National Emergency Transitional Powers Act*, SC 1945, c. 25

[224] "The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion, or insurrection deem necessary or advisable for the security, defence, peace, order, and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the said classes of subjects hereinafter enumerated, that is to say: –

a. censorship [...]
b. arrest [...]
c. control of the harbours [...]
d. transportation [...]
e. trading [...]
f. appropriation [...] of property"

[225] "The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan deem necessary or advisable for the purpose of

a. providing for and maintaining the armed forces [...]

Emergency Powers Act which provided for the general grant of legislative power to the Governor-in-Council. However, whereas the enumerated heads of the *War Measures Act* speak of control over "censorship," "arrest," "harbours," "transportation," "trading," and "appropriation [...] of property," the *Emergency Powers Act* enumerates powers over price and wage controls, "facilitating the readjustment of industry" and "continuing or discontinuing [...] measures adopted during and by reason of the war" and makes no explicit mention of "appropriation [...] of property." Further the *Emergency Powers Act* dropped the all-encompassing phrase "for greater certainty, but not so as to restrict the generality of the foregoing terms" used in the parallel section of the *War Measures Act*. Thus in *Nolan*,[226] which concerned the expropriation by the government of grain under measures adopted during and by reason of the war, the Supreme Court accepted the argument of the plaintiffs that there should be an implied protection for property rights and therefore the power of expropriation was excluded from the general grant of power in the *Emergency Powers Act*. [227]

Boucher

Most commentaries on the implied bill of rights either begin their analysis with the Court's decision in *Boucher* or skip straight to it after the *Alberta Statutes Reference*.

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b. facilitating the readjustment of industry [...]
c. [price and wage controls]
d. [distribution of relief supplies]
e. continuing or discontinuing [...] measures adopted during and by reason of the war."

[226] *Canadian Wheat Board v Hallet and Carey Ltd*., [1951] SCR 81

[227] The case was appealed to the Privy Council (*Hallet & Carey*, [1952] AC 427) that overturned the decision of the Supreme Court of Canada. Ironically, this decision is often cited as the basis that assuming protections for the individual is a rule of statutory construction: "there is a well-known general principle that statutes which encroach upon the rights of the subject... are subject to a 'strict' construction" (at 450).

Boucher involved a conviction for seditious libel in the Quebec courts of a Jehovah's Witness, Aimé Boucher, distributing a pamphlet entitled "La haine ardent du Québec pour Dieu, pour Christ, et pour la liberté est un sujet de honte pour tout le Canada."[228] Resultantly, he was charged, and convicted by a jury, under section 133 of the then Criminal Code for "producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects" without a good faith intention to ameliorate such ill-will and for attempting to vilify the administration of justice and bring it into disrepute (the pamphlet in question "insinuated that in Quebec the administration of justice was biased [and] that the clergy controlled the courts").[229]

At the Supreme Court of Canada, the minority agreed with the lower courts that attempting to vilify the administration of justice and bring it into disrepute sufficiently fell within the bounds of seditious libel that a jury could pronounce on the matter. The majority, however, argued that seditious libel must include an intention "to incite violence or public disorder or unlawful conduct against [...] the State,"[230] narrowing the meaning of seditious libel from the "plain meaning" it held according to the minority.[231] This case set the contours of the division in the Supreme Court of Canada over the implied bill of rights for the next decade, with Kerwin, Estey, and Locke siding with Rand and Kellock (although often for different reasons) with Rinfret, Tashereau, Cartwright, and Fauteux dissenting.

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[228] *Boucher* at 267.
[229] *Boucher* at 267.
[230] *Boucher* per Rand at 315.
[231] Notably, in the same year, the United States Supreme Court held in *Dennis v United States*, (1951), 341 US 494, that convictions for mere participation with the Communist Party were not a violation of the protections of free expression.

Smith & Rhuland

Of the typically cited classical implied bill of rights cases of the 1950s, all emerged from Quebec and most regarding controversies with Jehovah's Witnesses. Most scholars examining the implied bill of rights typically overlook a Nova Scotia case, *Smith & Rhuland v Nova Scotia*[232] that presaged reasoning used in the celebrated *Roncarelli.*[233] *Smith & Rhuland* involved the certification of a union by the Nova Scotia Labour Relations Board that amply met all of the conditions for certification. However, it was discovered by the Board that the organizer of the local and the secretary-treasurer was a communist and exercised a dominant influence in the local. Resultantly, the Board refused to certify the local. An appeal to the Supreme Court of Nova Scotia for a writ of *mandamus*[234] was successful and the issue was then further appealed by the employer to the Supreme Court of Canada. The three dissenting Supreme Court of Canada judges reasoned that the Board had been given wide discretion over the certification of unions and that it was not up to the courts to substitute their judgement for that of the Board. In contrast, the majority of four, while accepting that the Board did have discretion even when the union had met all of the certification requirements of the *Trade Union Act,*[235] that its discretion could not be exercised "upon the consideration of extraneous matters"[236] and that "to treat that personal subjective taint as a ground for refusing certification is to evince a want of faith in the intelligence and loyalty of the

[232] *Smith & Rhuland,* [1953] 2 SCR 95
[233] An exception is Thomas Berger, "The Supreme Court and Fundamental Freedoms: The Renunciation of the Legacy of Mr. Justice Rand," (1980) *Supreme Court Law Review* 1:460-467.
[234] A remedy to secure the performance of a public duty.
[235] SNS 1947, c. 3
[236] *Smith & Rhuland* per Kellock at 103

membership."[237] The decision effectively extended the principle of due process to a realm from which it had previously been excluded.

Power Allocation

The implied bill of rights is sometimes celebrated as much for its aggrandizing of federal jurisdiction as it was for its protection of civil liberties. Whereas in *Boucher* and *Smith & Rhuland* and the first "power allocation" case, *Saumur*, the Supreme Court was divided by a single vote, the subsequent two power allocation cases, *Henry Birks* and *Switzman* saw majorities of 9-0 and 8-1 respectively.

Saumur

Saumur, the first of these power allocation cases, however, was an extremely fragile victory for the implied bill of rights that could have easily proven to be a pyrrhic one. At issue in the case was a municipal by-law prohibiting the distribution of literature to the public with discretion given to the Chief of Police in deciding what was to be permitted. As in *Boucher*, the controversy involved the distribution of pamphlets by a Jehovah's Witness and the decision largely turned on whether the distribution of religious pamphlets was in federal or provincial legislative jurisdiction. Only four of the nine presiding justices – Rand, Kellock, Estey, and Locke – found that it was in federal jurisdiction, making the municipal bylaw *ultra vires*; for Rand, Kellock, and Estey, religious worship fell within the general (peace, order, and good government) legislative power of the federal government, while Locke located it under the criminal law power. In contrast, three of the justices – Kerwin, Rinfret, and Tashereau – found that freedom of

[237] *Smith & Rhuland* per Rand at 99.

worship is a civil right within the provinces. The remaining two – Cartwright and Fauteux – did not locate religious worship under a particular legislative heading and found the bylaw *intra vires*. In the end, the bylaw was invalidated because, although Justice Kerwin found it *intra vires* provincial legislation, he found it void for violation of a pre-Confederation *Rectories Act*[238] that guaranteed freedom of religion in the province. Although the Court split 5-4 in favour of invalidity the bylaw, the Court also split 5-4 in finding the bylaw *intra vires*. This marked an inauspicious start to the power allocation technique of creating an implied bill of rights and could have quite conceivably marked its end, given the limited support for locating religious worship in federal jurisdiction

Henry Birks

Henry Birks[239] provided the most solid support for the power allocation technique of finding an implied bill of rights, although it was based upon a classic and well respected Privy Council authority, *Hamilton Street Railway.*[240] At issue in the case was a provincial statute that authorized municipal councils to pass by-laws prohibiting stores from operating on specified Catholic Holy Days.[241] All nine judges of the Supreme Court agreed that because the by-law *prohibited* stores from opening on Catholic Holy Days that it was matter of criminal law, as religious disabilities had long been established to be elements of criminal law, and clearly expressed so for Canada by the Privy Council in *Hamilton Street Railway*. However, Rand, Kellock, and Locke extended the argument and emphasized that even if it was not a matter of criminal law legislation with respect to

[238] *Rectories Act*, SC 1851, c.175; available in RSC. 1859, c.74
[239] *Henry Birks & Sons (Montreal) Ltd v Montreal (City)*, [1955] SCR 799
[240] *Hamilton Street Railway*, [1903] AC 524.
[241] *Early Closing (Amendment) Act*, 1949, 13 Geo. VI, c. 61

freedom of worship was nevertheless *ultra vires* provincial jurisdiction. Although there was the clear authority of *Hamilton Street Railway,* both Kerwin and Tashereau had endorsed the view that issues of religious disabilities fell under federal jurisdiction in seeming contrast to their reasoning in *Saumur* (Rinfret had since retired, being replaced by Abbott). As well, Locke, who had only found religious worship to be a species of the criminal power in *Saumur*, now declared it to be a specific federal power (Estey, however, made the opposite journey, but he would shortly retire).

Switzman

It was in *Switzman*[242] that, after a seven year journey through the courts,[243] the notorious *Padlock Law* was finally invalidated with the Supreme Court of Canada explicitly overturning *Fineberg.*[244] As we have noticed, this ruling was in many ways unsurprising as the Duplessis government had sought to avoid its testing before the courts. The decision was very similar to that delivered in *Henry Birks*. Only Tashereau dissented, arguing, as did Greenshields in *Fineberg*, that the law dealt with property in the province and was only aimed at suppressing the conditions favouring crime and not trenching upon the criminal law power itself. The rest of the court overturned *Fineberg* finding that the law touched too heavily on the exclusive federal power over criminal law. Once again, Rand and Kellock (now joined by Abbott instead of Locke) extended the argument finding that the *Padlock Law* "constitutes an unjustifiable interference with

[242] *Switzman*, [1957] SCR 285
[243] The initial trial judgement was delivered in the Cour Supérieur of Montreal by Collins J on 26 June 1950.
[244] *Fineberg v Taub*, (1939), 77 CS 233 (QC SC).

freedom of speech and expression essential under the democratic form of government established in Canada," most evocatively echoing Chief Justice Duff in *Alberta Statutes.*

Roncarelli

The last[245] and one of the most remarkable implied bills of rights cases was *Roncarelli*,[246] as the authoritarian Premier of Quebec and father of the *Padlock Law*, Maurice Duplessis, was directly condemned by the court for the use of his executive powers. This ruling was marked, unsurprisingly, by a return to the dissents of Tashereau, Cartwright, and Fauteux, reprising their roles in *Smith & Rhuland* which touched upon a similar principle. In *Roncarelli*, Duplessis was successfully sued in the amount of $25,000 by a (Jehovah's Witness) tavern owner for ordering, in his capacity as Attorney-General, the Liquor Commission to cancel the liquor licence of the tavern owner. The minority on the Supreme Court of Canada found the cancellation of the liquor licence to be illegal, but immunized Duplessis from damages as a public official engaged "in the exercise of his functions" under the *Code of Civil Procedure*. The majority, in contrast argued that in directing the Liquor Commission to cancel the licence, the Attorney General had exceeded his authority and discretion and was therefore open to civil liability. The case strengthened the right to due process as it severely narrowed the discretionary powers of the Attorney General and demanded that public officials be

[245] Arguably, three cases from the 1960s could also be classified as "implied bill of rights" cases, but given their occurrence subsequent to the *Canadian Bill of* Rights and the retirement of both Rand and Kellock, they will be touched upon later in this dissertation. The three cases are: *Oil, Chemical, and Atomic Workers, International Union, Local 16-601 v Imperial Oil Ltd*,[1963] SCR 584; *McKay et al v R*, [1965] SCR 798; *Walter et al v Alberta (Attorney General) et al*, [1969] SCR 383

[246] *Roncarelli*, [1959] SCR 121

aware of the precise limits of their powers, for a claim to be acting in good faith was not adequate to immunize one from civil liability if one exceeded one's powers.

Decline

The principles which underpinned the "implied bill of rights" were largely repudiated by the Supreme Court in the 1960s following the departure of Rand and Kellock. In their absence, creative reasoning in favour of civil liberties largely disappeared from the Supreme Court. The vigour of the "implied bill of rights" was found in expansive definitions of political liberties (and locating them in federal jurisdiction). The Supreme Court of the 1960s elected to apply narrower definitions eliminating a main pillar of the implied bill of rights (and weakening the potential effect of any bill of rights, whether 'implied,' 'statutory,' or even 'constitutional').

While the Court had unanimously found that prohibiting stores from opening on Catholic holy days was a regulation of religion and not of stores in 1955 in *Birks*, the Court unanimously found that prohibiting Hutterite communal land holding was a regulation of land and not religion in 1969 in *Walter*.[247] This reversal of the implied bill of rights was rapid, with the Court (admittedly by a narrow majority) effectively reversing *Switzman* in 1963 in *OCAWIU*.[248] Curiously, the legacy of implied bill of rights was carried forward by Justice Cartwright who had been an opponent in of Rand and Kellock in the 1950s. Cartwright championed the *Switzman* precedent in his dissent to *OCAWIU* and had argued in favour of a more expansive definition of freedom of

[247] *Walter et al v Alberta (Attorney General) et al*, [1969] SCR 383.
[248] *Oil, Chemical, and Atomic Workers, International Union, Local 16-601 v Imperial Oil Ltd*, [1963] SCR 584.

religion established in *Birk* in his dissent to *Robertson*.[249] Cartwright also successfully championed the most traditional "restrictive interpretation" element of the implied bill of rights in a narrow majority in *McKay*.[250]

However, that traditional technique of protecting civil liberties was a two-edged sword for protecting civil liberties in the era of a statutory bill of rights. While useful for limiting civil liberties violations by provincial legislatures (as it did in *McKay*), it could be equally applied to weaken a bill of rights by extending a "restrictive interpretation" to such an instrument. Cartwright's reasoning in *Randolph*[251] that the "fair hearing" provisions in the *Canadian Bill of Rights* were already afforded by the maxim *audi alteram partem* was easily extended that those provisions provided no new remedies. That is to say, the only element of the implied bill of rights which persisted into the 1960s was that element which could be used to weaken an explicit bill of rights. In effect, the legacy of the implied bill of rights of the 1950s before a new generation of judges in the 1960s was not as a tool to protect civil liberties from violations by the legislature but as a tool to limit civil liberties granted by the legislature.

CONCLUSION

The existing scholarship considering the origins of the *Canadian Bill of Rights* has focused on the legal thinking of contemporaneous bill of rights advocates who share the present-day constitutional vision of those scholars. Little effort has been committed to examining the complexity of contemporaneous jurisprudence that forced the context in which the *Canadian Bill of Rights* as a legal instrument was drafted. The challenges to

[249] *Robertson and Rosetanni v the Queen*, [1963] SCR 651.
[250] *McKay et al v R*, [1965] SCR 798.
[251] *R v Randolph*, [1966] SCR 260.

the existing legal order epitomized by Roscoe Pound's "sociological jurisprudence" and the *Statute of Westminster* did not simply result in a uniform "newer constitutional law" challenging the existing "older constitutional law." Instead, the challenges to existing constitutional precepts opened them to a variety of interpretations, of which the apologia for the "older constitutional law" and advocacy of the "newer constitutional law" were but two iterations.

Advocates for a bill of rights sought such an instrument to provide for judicial review of legislation on the basis of fundamental rights and the entrenchment of those rights against legislative majorities. For the activists that have been the focus of the existing literature, a statute alone could not make such provisions. To adherents of the "newer constitutional law," a bill of rights as an 'ordinary' statute of parliament presented three weaknesses. First, civil liberties were divided between federal and provincial jurisdiction, so a statute could only ever be a partial protection. Second, a statute could be repealed by an ordinary legislative majority at any time whereas the *British North America* Act could not. Third, and in any case, only the *British North America Act* could provide for judicial review.

However, by the late 1950s, when the *Canadian Bill of Rights* was being drafted, Canadian jurisprudence had evolved in such a way that the enactment of a bill of rights in the form of a statute of the parliament of Canada could be seen as being as effective as a bill of rights incorporated into the *British North America Act*. First, the writings of Ivor Jennings, the precedents of *Trethowan* and *Donges*, and weaknesses in *British Coal* and *Ellen Street* all indicated that a parliament could provide for judicial review of its legislation by an 'ordinary' statute if was sufficiently explicit. Second, the "implied bill

of rights" jurisprudence indicated that the Supreme Court would find "fundamental rights"[252] exclusively in the jurisdiction of parliament, mitigating any need for a bill of rights to be applicable to the provinces so as to be comprehensively effective for protecting civil liberties. Third, Canadian (and American) jurisprudence indicated that courts would support national parliamentary majorities over constitutionally-entrenched limitations in exigent circumstances, rendering constitutional entrenchment meaningless.

While legal arguments are shaped by political considerations, political arguments are also shaped by legal perceptions. While the existing literature has explored some of the perceived political complexities surrounding the enactment of the *Canadian Bill of Rights*, it has only considered the legal arguments through its analysis of political considerations. This dissertation addresses the other side of this coin, examining the legal perceptions that sustained political arguments. As such, this chapter has explored the jurisprudential context in which the *Canadian Bill of Rights* was drafted, which has been largely overlooked by the existing literature. As we shall see, it was this jurisprudential context that supported the legal perceptions which shaped some of the political arguments around the enactment of a bill of rights by the Diefenbaker government. ♦

[252] *Saumur v Attorney General for Québec*, [1953] 2 SCR 299; *Oil, Chemical, and Atomic Workers, International Union, Local 16-601 v Imperial Oil Ltd,* [1963] SCR 584

Chapter Three – The "Fathers" of the *Canadian Bill of Rights*

One of the most remarkable aspects of the drafting of the *Canadian Bill of Rights* was how few hands it passed through and the limited number of changes it underwent from its original drafting through to its enactment. In brief, the *Canadian Bill of Rights* was largely autonomously drafted by the Assistant Deputy Minister of Justice, Elmer A. Driedger and received only relatively little input from his superiors, Deputy Minister W.R. Jackett, Minister of Justice E. Davies Fulton, and Prime Minister John G. Diefenbaker.

What is even more remarkable is how limited was the role of the elected progenitors of the *Canadian Bill of Rights*, including its initial instigator and champion Prime Minister Diefenbaker. Despite Diefenbaker's particular pride in the *Canadian Bill of Rights*, consistent demand for a national bill of rights in Parliament, and his famous distrust of the bureaucracy, he took a largely hands off approach to the drafting of the *Canadian Bill of Rights*. Instead, he accepted and championed, with only minimal critique, the bill prepared for him by the Department of Justice even before he had requested that one be drafted.

Arguably, one would have expected the opposite, that Diefenbaker would have had the instrument of his most cherished and quintessential policy drafted with his intimate involvement and outside of the potentially nefarious interference of the "local branch of the Liberal Party" (as Denis Smith describes Diefenbaker's view of the "senior civil service").[1] Although Diefenbaker's distrust was greatest for the "Pearsonalities" of

[1] Denis Smith, *Rogue Tory: The Life and Legend of John G Diefenbaker* (Toronto: MacFarlane Walter & Ross, 1995), p. 250.

the Department of External Affairs, one would have expected a similar degree of distrust for the Department of Justice, as it was during the debates over a national bill of rights during the 1946 to 1951 that some of the strongest opposition Diefenbaker faced in his advocacy was from then Deputy Minister of the Department of Justice, Frederick P. Varcoe. Yet this did not prove to be the case, and, instead – as explored in the following chapter – Diefenbaker accepted the advice of the Department of Justice with little question.

It is notable that although every analysis of Diefenbaker's premiership notes that the *Canadian Bill of Rights* marked one of Diefenbaker's crowning achievements, it plays such a minor role in analysis of his government and what little input in or concern his Cabinet had with the *Canadian Bill of Rights.*[2] This is best illustrated in Peter Stursberg's oral history of Diefenbaker's leadership of the Conservative Party whose material was largely collected in the early 1970s,[3] with *Drybones*[4] in recent memory and therefore one would have expected to contain considerable reflection on the *Canadian Bill of Rights*. Yet, in the section which examines recollections about rights and the

[2] Admittedly, these are few. The authoritative analysis remains Denis Smith 600-page biography *Rogue Tory: The Life and Legend of John G. Diefenbaker* (Toronto: MacFarlane Walter & Ross, 1995). Smith addresses the *Canadian Bill of Rights* in six pages (pp. 341-347) out of the two-hundred fifty pages examining the premiership. Smith dedicates an equal amount of space to Diefenbaker's advocacy for a bill of rights prior to coming into office (pp. 158-164). The next most weighty examination of the Diefenbaker premiership is that of journalist Peter Newman, whose *Renegade in Power: The Diefenbaker Years* (Toronto: McClelland and Stewart) was published months following the fall of the Diefenbaker government in 1963; he dedicates eight of its four-hundred pages to the *Canadian Bill of Right* (pp. 224-231).

[3] Peter Stursberg, *Diefenbaker: Leadership gained*, 1956-1962 (Toronto: University of Toronto Press, 1975), pp. xii-xiv.

[4] *R v Drybones*, [1970] SCR 282

accomplishments of the Diefenbaker government[5] most of the interviews proclaim only brief platitudes along the lines of "the Bill of Rights was an important accomplishment,"[6] but do not recount any substantive comment about controversy over its implementation, its terms, or its intended effect. This includes Quebec Ministers Jacque Flynn[7] and Paul Martineau [8] (who, notably, was Parliamentary Secretary to Diefenbaker during the passage of the *Canadian Bill of Rights*) and Diefenbaker loyalists Howard Green[9] and Gordon Churchill[10] (who, notably, was government house leader during the passage of the *Canadian Bill of Rights*). Donald Fleming, the powerful Minister of Finance, makes no mention of it whatsoever and the only interviewee who minimally recounts discussing the bill is *journalist* Grattan O'Leary, who notes that "I have talked to Supreme Court judges who downgraded the Bill of Rights. But apparently now it is taking a place in the country."[11]

The intent of, and the controversies over, the *Canadian Bill of Rights* feature so marginally in the recollections of Cabinet ministers despite its contemporaneous headlining because they were so little involved in its initiation and development. Instead, the *Canadian Bill of Rights* was pushed through Cabinet and parliament by the forceful efforts of the Prime Minister Diefenbaker and Justice Minister Fulton based upon the

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[5] Stursberg's editorial on the section is as follows: "One of Diefenbaker's achievements was the Bill of Rights, which became law 10 August 1960. He also removed questions on racial origins from the census. In the 1960 census, for the first time, people were able to register themselves as Canadian. The first half-decade of Diefenbaker government, in the view of the participants, was one of numerous accomplishments in the area of civil rights and in other areas as well"(Sturberg (1975), p. 217).
[6] Paul Martineau quoted by Stursberg (1975), p. 218.
[7] Stursberg (1975), p. 218.
[8] Stursberg (1975), p. 218.
[9] Stursberg (1975), p. 217.
[10] Stursberg (1975), p. 219.
[11] Stursberg (1975), p. 220.

largely uncritical acceptance of a draft and advice provided for them by a senior official of the Department of Justice. This is all grist for the mill that is the next chapter and, instead, this chapter provides a brief sketch of those individuals most centrally involved in the development and passage of the *Canadian Bill o f Rights*.

THE SUPERVISORS: BIOGRAPHICAL SKETCHES

THE INSPIRATION: JOHN G. DIEFENBAKER[12] (1895-1979)

Diefenbaker first achieved elected office as the Member of Parliament for Lake Centre Saskatchewan in disastrous Conservative wartime election campaign of 1940, narrowly defeating the Liberal incumbent. At the age of forty-four, Diefenbaker had been a perennial losing candidate for elected office for fifteen years, having twice lost a bid for a federal seat in 1925 and 1926 (the latter against a carpet-bagging Mackenzie King), twice for the provincial Conservatives in 1929 and 1938 (the latter as leader of the then largely moribund party), and once as Mayor of Prince Albert in 1933.

From the outset of his federal parliamentary career, civil liberties featured prominently, with Diefenbaker criticizing the King government for its "marked tendency towards dictatorship" during the election campaign (although, his pledge to seek a statutory floor price for wheat was probably of more decisive influence in his election).[13] Once in Parliament, he joined the Commons committee on the *Defence of Canada Regulations* and quickly made a name for himself in Parliament as a capable critic of the

[12] This is a purposely narrow biographical sketch for Diefenbaker, focusing exclusively on his involvement in demands for a bill of rights. For a comprehensive biography see Smith (1995), Smith (2000), and J.G. Diefenbaker (1975-1977).
[13] Denis Smith, "Diefenbaker, John George," *Dictionary of Canadian Biography Online*, vol 20 (University of Toronto/Université Laval, 2000).

government. He also quickly made a name for himself in the party by running for leadership of the Party in the 1942 convention and supporting the progressive and internationalist *Port Hope Resolutions*.[14]

By 1946 "Diefenbaker was unchallenged in caucus as the spokesman for progressive causes,"[15] and began to speak out loudly on rights issues. Although he had condemned the government's actions over the Japanese expulsion, he only became truly prominent and loudly vocal in the wake of the Gouzenko Affair. In 1946, he took up and gave prominence to a proposal made a few months earlier by CCF leader Major James Coldwell[16] to add a bill of rights to the proposed *Citizenship Act*.[17] Notably, his activism inspired neophyte Conservative MP Davie Fulton, who strongly supported and defended Diefenbaker's call for a bill of rights[18] and would go on to mimic Diefenbaker's criticisms of the continuation of the government's wartime controls.[19]

Diefenbaker's proposed bill of rights amendment[20] to the *Citizenship Act* was extremely limited – consisting of three brief clauses protecting (1) fundamental freedoms,[21] (2) habeas corpus,[22] and (3) a right to counsel when giving evidence[23] – and

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[14] Smith (2000).
[15] Smith (1995), p. 157.
[16] Major James Coldwell was the long-time leader for the CCF from 1942 to 1960 and a Saskatchewan MP. He was defeated as an MP during the 1958 Diefenbaker sweep and was pushed out as leader by a caucus revolt in 1960, shortly before the CCF morphed into the New Democratic Party. He remained a loyal member of the New Democratic Party despite solicitations to cross to the Liberals.
[17] Diefenbaker, *Debates* 20-2 (1946), II: 1300-1307 (7 May 1946).
[18] Fulton, *Debates* 20-2 (1946), II: 1308-1315 (7 May 1946).
[19] Fulton, *Debates* 20-3 (1947), III: 2345-2350 (23 April 1947).
[20] Amendment to Citizenship Act (Bill 7). *Debates* 20-2 (1946), II:1300 (7 May 1946)
[21] "Freedom of religion, freedom of speech, and the right to peaceable assembly are assured."
[22] "Habeas corpus shall not be suspended except by parliament."

despite his claims otherwise,[24] appears to be his first serious contemplation of a national bill of rights.

> *Such certificate of citizenship shall be deemed to include a Bill of Rights as follows:*
>
> *1. Freedom of religion, freedom of speech, and the right to peaceable assembly are assured.*
>
> *2. Habeas corpus shall not be suspended except by parliament.*
>
> *3. No one shall be required to give evidence before any tribunal or commission at any time if denied counsel or other constitutional safeguards.*

It was only subsequent to this motion that he seems to have collected material for drafting a bill of rights[25] and that his views about the constitutional nature of civil liberties in Canada came into any focus.

During debates in 1947, Diefenbaker clarified his views about rights under the *British North America Act* and, citing the reasoning of Cannon in the *Alberta Statutes Reference,* he argued that civil liberties fall exclusively within federal jurisdiction.[26] This view was reiterated shortly with the introduction of a motion calling for a national bill of rights.[27] His new bill was only a relatively minor expansion of his previous proposal as part of the *Citizenship Act*, adding a right to the security of person and privacy as well as a right to speedy trial.[28]

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[23] "No one shall be required to give evidence before any tribunal or commission at any time if denied counsel or other constitutional safeguards."
[24] John G Diefenbaker, *One Canada: memoirs of the Right Honourable John G. Diefenbaker – Vol 2: The Years of Achievement, 1957-1962* (Toronto: Macmillan, 1976), pp. 264-265.
[25] Ross Lambertson, *Repression and Resistance: Canadian Human Rights Activists, 1930-1960* (Toronto: University of Toronto Press, 2005), pp. 326-328.
[26] Diefenbaker, *Debates* 20-3 (1947), II:1118-1119 (7 March 1947)
[27] Diefenbaker, *Debates* 20-3 (1947), IV: 3149-3159 (16 May 1947).
[28] Diefenbaker, *Debates* 20-3 (1947), IV: 3152 (16 May 1947):

With the mooting of the draft *Universal Declaration of Human Rights* (UDHR) before parliament in April 1948, Diefenbaker demanded that the government refer to it to the Supreme Court of Canada for a determination as to the question of legislative jurisdiction.[29] It is unknown whether this request indicated (1) a wavering in the view that civil liberties were wholly under federal jurisdiction, (2) a recognition that the UDHR contained economic and social rights that were in provincial jurisdiction, or (3) an attempt to put to rest a common retort to demands for a national bill of rights. In companion to his demand that the UDHR be tested before the Supreme Court of Canada, he also demanded that the *Supreme Court Act*, which was about to be amended to remove Privy Council appeals,[30] also be amended to allow appeals to the Supreme Court of Canada for Rights violations (although he provided no specifics as to how precisely this would operate).[31]

Beginning in 1949, these previous two demands – for a bill of rights and for a Supreme Court reference – became an almost annual ritual for Diefenbaker with an

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1. Freedom of religion
2. Freedom of speech
3. Freedom of assembly
4. Freedom from wrongful interference by the state; and by that I mean freedom from unreasonable interference with person, home, reputation, activities and property of the individual
5. Freedom from arbitrary detention and in particular that habeas corpus shall not be suspended or abrogated except by parliament
6. The right of everyone to have his case determined without undue delay and assuring everyone required to give evidence before any tribunal or commission the preservation of all constitutional safeguards and, above all, the right of the individual to be represented by counsel.

[29] Diefenbaker, *Debates*, 20-4 (1948), III:2847 (9 April 1948)
[30] *Supreme Court Act, 1949,* 2nd sess, c. 37, s.3 (substituting s.54 of the *Supreme Court Act*).
[31] Diefenbaker, *Debates*, 20-4 (1948), III:2857 (12 April 1948)

almost identical motion being proposed each year.[32] Following the 1950 Senate Committee, Diefenbaker would often read into *Hansard* an abridged version Senator Roebuck's draft bill of rights as part of his speaking to his motion for a bill of rights.[33]

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[32] *Debates* 21-1 (1949, 2nd sess), II:1173-1174 (26 October 1949):

> *That in the opinion of this house immediate consideration should be given to the advisability of introducing a bill or declaration of rights to assure amongst other rights:*
>
> *1. Freedom of religion, freedom of speech, freedom of the press, and of parliament*
>
> *2. That habeas corpus shall not be abrogated or suspended except by parliament*
>
> *3. That no on shall be deprived of liberty or property without due process of law, and in no case by order in council*
>
> *4. That no tribunal or commission shall have the power to compel the giving of evidence by anyone who is denied counsel or other constitutional safeguards.*
>
> *And that as a preliminary step the Minister of Justice do submit for the opinion of the Supreme Court of Canada the question as to degree to which fundamental freedoms of religion, speech, and of the press and the preservation of the constitutional rights of the individual are matters of federal or provincial jurisdiction*

[33] *Debates* 21-6 (1952), I:719 (24 March 1952):

> *Article 1*
>
> *Everyone has the right to life, liberty, and the security of person*
>
> *Article 2*
>
> *No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.*
>
> *Article 3*
>
> *Everyone has the right to recognition throughout Canada as a person before the law.*
>
> *Article 4*
>
> *All are equal before the law and are entitled without any discrimination to equal protection of the law.*
>
> *Article 5*
>
> *Everyone has the right to an effect remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*
>
> *Article 6*
>
> *No person shall be subjected to arbitrary arrest, detention, or exile.*
>
> *Any person who is arrested or detained shall be promptly informed of the reasons for the arrest or detention and be entitled to a fair hearing within a reasonable time or to release.*

Thus, by the time that Diefenbaker formed a government in 1957, he had illustrated a stubborn commitment to a bill of rights, but had showed little creativity or refinement of his views on the matter. He showed a commitment only to a very narrow range of rights – fundamental freedoms, habeas corpus, and the right to counsel – and was content to uncritically rely on the views of others in developing an actual instrument. Notably, one of his key rights themes generally, equality and non-discrimination, expressed in his "One Canada" rhetoric and with a healthy legacy of parliamentary advocacy, such as his rather lone voice harshly criticizing the continued restrictions on

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No one shall be denied the right to reasonable bail without just cause.
No tribunal, royal commission, board, or state official shall have the right to compel anyone to give evidence who is denied counsel or other constitutional safeguards

Article 7

Every person who is deprived of his liberty by arrest or detention shall have an effective remedy in the nature of habeas corpus by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. Habeas corpus shall not be abridged, suspended or abrogate except by parliament.

Article 8

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 9

Every person is entitled to all the rights and freedoms herein set forth without distinction of any kind of such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

Article 10

Any person whose rights or freedoms as herein set forth have been violated may apply for relief on notice of motion to the supreme or superior court of the province in which the violation occurred.

Article 11

The above articles shall not be deemed to abridge or exclude any rights or freedoms to which any person is otherwise entitled.

Chinese immigration as early as 1947,[34] was never incorporated into his own demands for a bill of rights prior to forming a government.

Diefenbaker had made a second failed bid for leadership of the Conservative party in 1948, but succeeded in handily capturing the leadership in 1956 and leading the Conservatives to an upset victory against the Liberals and Louis St-Laurent and forming a minority government in 1957. The question of a bill of rights was largely absent from the 1957 campaign and the brief minority government from 1957 to 1958. However, with his landslide victory in 1958, the issue was prominently featured in his majority government's first speech from the throne.[35]

Diefenbaker's leadership style produced one of the most tumultuous Cabinets in modern Canadian history and conflicts over Canada's commitment to the United States to host nuclear weapons provoked a near Cabinet putsch against Diefenbaker. A few months prior to the fall of the minority Diefenbaker government in 1963, the Cabinet insurgents tasked George Hees and Davie Fulton to offer Diefenbaker the position of Chief Justice of the Supreme Court in order to ease him out of the Premiership. Diefenbaker took considerable offense at the offer, but gave no indication as to what was the cause of his consternation[36] (i.e. whether he was offended by the proposal to use the highest court for such crass politicking in addition to the attempt to ease him entirely out of politics). Despite his defeat in the election of 1963, Diefenbaker remained party leader until 1967, when he was ousted by a leadership review and a failed run for

[34] Diefenbaker, *Debates* 20-3 (1947), I:319-321 (11 February 1947)
[35] *Debates* 24-1 (1958), I:5-6 (12 May 1958)
[36] John G Diefenbaker, *One Canada: memoirs of the Right Honourable John G. Diefenbaker – Vol 3: The Tumultuous Years, 1962-1967* (Toronto: Macmillan, 1977), p. 163; Smith (1995).

continued leadership at the 1967 convention, losing to Robert Stanfield. He remained in Parliament until his death in 1979, leading an informal, though ever dwindling, insurgent group of MPs against the party leadership.

THE PARLIAMENTARY CHAMPION: E. DAVIE FULTON (1916-2000)

Davie Fulton was one of those individuals, like Paul Martin Sr., who was widely respected, remained highly active at the upper echelons of his party, and retained a burning ambition for leadership.[37] Upon his election as a Conservative Member of Parliament for Kamloops as one of the "khaki candidates" who just returned from fighting in Europe, he seemed destined if not for premiership, then at least for leadership of the Conservative Party. Fulton came from a prominent British Columbia family that had provided two Premiers of British Columbia on his mother's side[38] and whose father had served as an MP from 1917 to 1920 elected under Prime Minster Borden's Unionist banner. Fulton was a Rhodes Scholar who studied at Oxford from 1937 to 1939, only briefly returning to Canada before serving as a company Commander in the Canadian Army during the Second World War. He was nominated as the Conservative candidate for Kamloops for the 1945 federal general election while still fighting in Italy and returned home only weeks before the election to win a narrow upset victory against the long-serving Liberal incumbent. Fulton was atypical for a Western Tory, in that he spoke fluent French and provided an atypical maiden speech. For not only was he the first

[37] In 1963, Peter Newman described him as a politician who "manages, without giving up any of his partisan principles, to draw respect from every corner of the parliamentary chamber. To the country at large he becomes a symbol of what lawmakers should be and hardly ever are." Peter Newman, *Renegade in Power: The Diefenbaker Years* (Toronto: McClelland and Stewart, 1963), p. 103.

[38] Alexander Edmund Batson Davie (1887-1889) and Theodore Davie (1892-1895). Theodore Davie also served as Chief Justice of British Columbia

Anglophone Conservative MP to give a significant portion of his maiden speech in French, but he dispensed with the typical polite formalities of a maiden speech and engaged in a vigorous attack on the King government. Reportedly, "King was so impressed that he leaned over to his seat-mate Ian Mackenzie, then Minister of Veteran Affairs, and whispered: 'That young man will lead the Tories someday."[39]

Fulton was already an admirer of Diefenbaker when Fulton was first elected to Parliament and Diefenbaker reciprocated the respect with advice and guidance about the ways of the house.[40] Over the following decade, in Diefenbaker's view, Fulton would become his protégé[41] and the two would become friends. He supported Diefenbaker in his demands for a bill of rights annexed to the Citizenship Act[42] and followed Diefenbaker in his harsh criticism of the government for its continued wartime controls.[43] However, his commitment to civil liberties during this era was much less profound, both endorsing the Japanese expulsions[44] (admittedly, he did so with some circumspection and may have felt that no other choice was possible given popular opinion and his election victory by less than two hundred votes) and never staunchly advocating for a bill of rights while in opposition after 1947. (He did, however, introduce Diefenbaker's motion for a bill of rights in 1953 when Diefenbaker was unexpectedly absent;[45] whether this more reflected his own commitment to the project or simply his friendship with Diefenbaker is unknown.)

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[39] Newman (1963), p. 105.
[40] Smith (1995), p. 157.
[41] Newman (1963), p. 109
[42] *Debates* 20-2 (1946), II: 1308-1315 (7 May 1946).
[43] *Debates* 20-3 (1947), III: 2345-2350 (23 April 1947).
[44] *Debates* 20-2 (1946), I: 628-629 (5 April 1946).
[45] *Debates* 21-7 (1952-53), II:1191-1192 (21 January 1953)

Despite Diefenbaker's estrangement from the party leadership, Fulton expressed strong support for Diefenbaker, writing letters of support after Diefenbaker's failed 1948 bid for leadership and campaigning in French for Diefenbaker in his Prince Albert riding (being the only colleague to campaign on Diefenbaker's behalf in that election).[46] He was also sent to accompany Diefenbaker back to Ottawa after the death of his first wife in 1951 and two years later hosted a dinner party dinner party in honour of Diefenbaker's second marriage.[47]

During the 1956 Pipeline debate, Fulton became the Conservative caucus's point-man on the debate, responsible for coordinating the caucus's strategy with the CCF and making numerous blistering attacks on the government. His work brought him particular prominence in the party and, despite being an otherwise stalwart supporter of Diefenbaker, Fulton was persuaded to make a leadership bid in 1956. His run for the leadership was not so much aimed at challenging Diefenbaker, but he did so upon the urging of younger members of the party in order to "preserve their allegiance" to a party that was likely to have a relatively old leader[48] and further raise his profile in order "to stake out a claim for [a] future" bid for the leadership.[49] Despite "stirrings of national enthusiasm [as] had been unknown in the Conservative Party for twenty-five years" in favour of Diefenbaker's leadership, Diefenbaker took Fulton's bid against him as a personal slight and "never forgave Fulton for having run against him."[50] Fulton was initially unaware of the hurt he had caused Diefenbaker and the degree of Diefenbaker's

[46] Smith (1995), pp. 175-176.
[47] Newman (1963), p. 109.
[48] Stursberg (1975), p. 14.
[49] Smith (1995), p. 206.
[50] Newman (1963), p. 109

vindictiveness. Thus, when the Conservatives were elected to government in 1957, Fulton expected he would be immediately appointed a senior cabinet position given his past close relationship with Diefenbaker, his effectiveness in parliament, and his recent prominence. However, Diefenbaker attempted to squeeze Fulton out of Cabinet by asking him to become Speaker. Fulton refused and stated that it was the Justice portfolio that he aspired to. Fulton was forced to wait "five days before the Prime Minister telephoned him to confirm his appointment" as Minister of Justice.[51] Fulton particularly aspired to the Justice portfolio because, although it was treated as a second-tier portfolio at the time, he believed that he could reform the conventional operation of Cabinet so as to elevate it to a first-tier portfolio. He was seen as being an extremely effective minister, "handling the most diversified portfolio in the cabinet, [...] accomplish[ing] nearly everything that was demanded of him and more."[52]

Fulton became one of the lead insurgents against Diefenbaker's erratic leadership by 1962. As such, after the 1962 election he was demoted in Cabinet to the Public Works portfolio and, when Diefenbaker refused to resign in 1963, Fulton sought to return to British Columbia to revive the moribund provincial Conservative Party. His endeavour failed and he returned to federal politics in the 1965 election and made a second bid for leadership of the federal Conservative party in 1967, coming a somewhat distant third. He lost his seat in the 1968 election won by Trudeau and returned to private legal practice in British Columbia.

In 1973, he was appointed to the Supreme Court of British Columbia, serving on the bench until mandatory retirement in 1981. While on the Supreme Court, he delivered

[51] Newman (1963), p. 109.
[52] Newman (1963), p. 103.

over one-hundred fifty reported decisions, including one case, *Meier v United States*,[53] in which the *Canadian Bill of Rights* was at issue (this was not an atypical number of *Canadian Bill of Rights* cases, as during Fulton's tenure the Supreme Court of British Columbia heard over eight-thousand cases, but the *Canadian Bill of Rights* was at issue in less than fifty of them). In this decision, Fulton's view on the *Canadian Bill of Rights* was strident and clear. The *Canadian Bill of Rights* was to prevail over the *Extradition Act*,[54] overturning a lower court decision that the appellant's "detention is not arbitrary so as to make it subject to the application of the Bill of Rights"[55] and effectively nullifying section 18(1) of the *Extradition Act*. He went on to make clear that "nowhere is it declared that the *Extradition Act* shall operate notwithstanding the *Canadian Bill of Rights*, and to give it that effect would be contrary to the clear intent of Parliament appearing in the *Bill of Rights*"[56] and that "the *Canadian Bill of Rights* recognizes specifically the right to reasonable bail as a right normally prevailing in Canada."[57]

THE BUREAUCRATIC MANAGER: WILBUR ROY JACKETT[58] (1912-2005)

Of the four "Fathers" of the *Canadian Bill of Rights*, Wilbur Roy Jackett was probably the most conservative with reputation as a "black letter" lawyer. Jackett served as Deputy Minister of Justice from 1 May 1957 to 30 June 1960, appointed by Prime Minister Louis St-Laurent, but serving under Liberal Minister of Justice Stuart Garson for

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[53] *Meier v United States*, [1978] BCJ No 1165
[54] RSC 1970, c. E-21. Originally enacted as the *Extradition Act, 1877*, c.25.
[55] *Re Meier and United States of America (No. 1)*, (1978), 45 CCC (2d) 451 at 453, quoting Verchere J *Re Campbell* (1977), 1 WCB 495 at p. 5.
[56] *Re Meier and United States of America (No. 1)*, (1978), 45 CCC (2d) 451 at 454
[57] *Re Meier and United States of America (No. 2)*, (1978), 45 CCC (2d) 455 at 457
[58] This material is draw mostly from Richard W. Pound, *Chief Justice W.R. Jackett: By the Law of the Land* (Montreal: McGill-Queen's University Press, 1999).

less than two months before Davie Fulton was appointed Minister of Justice. Jackett resigned effective 30 June 1960, the day before the second reading of the bill which would become the *Canadian Bill of Rights* on 10 August 1960.

Like John G. Diefenbaker and Elmer A. Driedger, Jackett received his law degree from the University of Saskatchewan College of Law and, like Davie Fulton, was a Rhodes Scholar, returning from Oxford a few months before Fulton was to arrive in 1937. He articled in Depression-stricken Saskatchewan, but had to supplement his income working as an insurance adjustor.[59] In 1938, by contacting its deputy minister, Jackett was offered a lucrative position in the Department of National Revenue, but was turned down at the last minute due to political interference by the Minister, James Lorimer Ilsley (who would go on to lead the Department of Justice from 1946 to 1948), but did not want "to waste one of these appointments on a westerner."[60] Thwarted, he applied for a much less lucrative position in the Department of Justice. There was intense competition for the position with over a hundred candidates applying, and with Jackett beating out other candidates such as Elmer Driedger and Bora Laskin.[61]

Jackett rose quickly in the Department of Justice, becoming the de facto assistant to the Deputy Minister and helping to secure positions for fellow Saskatchewanians, such as Elmer Driedger and David Walter Mundell. The three of them would become known in the Department as the "Saskatchewan Triumvirate" for their considerable reputation and influence within the Department. During the 1940s, Mundell would develop a reputation as the department's best pleader, Driedger as its best legislative draftsman, and

[59] Pound (1999), p. 49.
[60] Pound (1999), p. 50.
[61] Pound (1999), p. 314.

Jackett as its best taxation specialist. Jackett also developed a particular interest in Crown liability, and was largely responsible for the drafting of the *Crown Liabilities Act.*[62] Upon Varcoe's retirement in 1957, Jackett, Mundell, Driedger, and Guy Favreau were all considered for the position.[63] However, Jackett was probably being groomed to succeed Frederick Varcoe as Deputy Minister for many years as he had been assigned most of Varcoe's administrative responsibilities in the early 1950s[64] (with Jackett using this position to continue to recruit talent from Saskatchewan).

Jackett's influence in the department in the 1950s and his appointment as Deputy Minister on the eve of the 1957 general election probably spared the Department of Justice significant turmoil and allowed it to draft the *Canadian Bill of Rights* with a minimal degree of political interference. As a St-Laurent era appointment, he had the confidence of the wider civil service, but was able to gain the trust of the incoming Diefenbaker Cabinet. Jackett was known to have come from a Conservative family and though he was never partisan, his political leanings were probably evident.[65] Further, the Department of Justice had the distinction of being one of the few departments with a portfolio that spread across the breadth of government, but it had not been one of the first-tier departments dominated by the "Pearsonalities" so detested by Diefenbaker.[66] Jackett continued this tradition and

> *did not try to become part of the ruling circle of bureaucrats. He did not consort with this group of mandarins on a social basis. He thought that the role of the deputy minister of Justice was such that he should remain*

[62] SC 1952-1953, c. 30.
[63] Pound (1999), p. 321.
[64] Pound (1999), pp. 76-77.
[65] Pound (1999), p. 92.
[66] Granatstein (1982).

> *somewhat apart in order to be able to provide advice that was unencumbered by social contact.*[67]

Added to that, the heavy representation by Saskatchewanians in the Department probably helped to exempt it from Diefenbaker's notorious suspicions of the civil service.[68]

In his biography of Jackett, Richard Pound argues that "the legal content of Diefenbaker's political success [with the *Canadian Bill of Rights*] was designed by Wilbur Jackett." However, this characterization is inaccurate and would be akin to claiming that the legal content of *Crown Liabilities Act* was designed by Frederick Varcoe because discussion of it passed under Varcoe's signature to the Minister and Cabinet. Instead, just as Jackett had been largely responsible for the drafting of the *Crown Liabilities Act*, though the process was supervised by Varcoe, similarly it was Driedger who was largely responsible for drafting of the *Canadian Bill of Rights*, though the process was supervised by Jackett. A story recounted in Pound's biography is illustrative of this

> *Fulton smiles, as he remembers an occasion in his office when he mentioned to Jackett that they should, perhaps, now be thinking of drafting the bill. Jackett replied, 'Minister, I was wondering when you might ask me that. As a matter of fact, Elmer [Driedger] has a copy of a draft Bill in his briefcase for your consideration.*[69]

As illustrated in the subsequent chapter, the claim that "the legal content" of the *Canadian Bill of Rights* "was designed by Wilbur Jacket" simply does not resonate with

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[67] Pound (1999), p. 92

[68] Pound (1999), p. 114. Diefenbaker would have been reminded of the Department's composition when Jackett and Diefenbaker were both granted honorary doctorates in law from the University of Saskatchewan at the same ceremony in 1958

[69] Quoted in Pound (1999), p. 121. This is slightly at variance from the Department's records. It appears the subject was first broached in December of 1957, and then during the election campaign Jackett, on his own initiative developed a preliminary draft of a Bill of Rights for Driedger to put into proper statutory form such that when Fulton raised the issue with Jackett again subsequent to the 1958 general election, a draft was already prepared.

the documentary evidence. Although Jackett initiated the drafting of a bill of rights, the task itself was entirely delegated to Driedger. Jackett reviewed, but largely passed on without any amendment, draft bills and memoranda produced by Driedger to the Minister and Cabinet.

Jackett rather abruptly resigned as Deputy Minister of Justice in 1960, shocking his Minister and his entire department. Sometime in March, April, or May of 1960 (likely May),[70] Jackett was approached by Ian Sinclair, Vice President and General Counsel of the CPR (later to become President, Chairman, and CEO), to take over as General Counsel of the CPR. Seeking an eventual appointment to the bench and realising that such an appointment was not likely from within government, Jackett jumped at the opportunity to dispense with administrative duties and engage in a purely legal, but very diverse, practice.

Jackett's tenure with the CPR was short and his desire to be appointed to the bench was quickly fulfilled. With the accession of Guy Favreau[71]as Minister of Justice, Jackett was offered the appointment as President of the Exchequer Court of Canada..Jackett enthusiastically took up this position on 28 April 1964. Jackett's career on the Exchequer Court would be particularly illustrious. Shortly after his arrival to the bench he initiated the first National Conference of Judges on Sentencing, a body that would evolve into the Canadian Judicial Council[72] in 1971.[73] Jackett also pushed for

[70] Pound (1999), pp. 126-128.
[71] Favreau had been Jackett's former subordinate in the Department of Justice. Favreau departed the department at approximately the same time as Jackett departed.
[72] "The Canadian Judicial Council was established to help promote efficiency, uniformity, and accountability, and to improve the quality of judicial service in the superior courts of Canada. It has authority over all federally appointed judges in Canada,

significant reforms to the Exchequer Court and literally drafted the legislation for the Court's successor, the Federal Court of Canada.[74] He would then go on to lead it as Chief Justice for its first eight years. He would spend the final quarter century of his life thereafter maintaining a limited private practice.

Jackett was rather conservative in his approach to civil liberties and was never particularly fond of the *Canadian Bill of Rights*. Jackett maintained a close relationship with the RCMP during his time at the Department of Justice and embraced the approach of the police unions during the controversies over police brutality during the rights revolution of the 1960s. Illustrative of this was a speech he gave – a rare event for Jackett who took the view that bureaucracy and judiciary should be "silent services"[75] – for an RCMP banquet in the presence of Minister of Justice Favreau:

> *When the Constitution of the United States was being created, the apprehension was that Congress or a State Legislature might enact laws that would unduly restrict human rights or fundamental freedoms. The solution adopted by the United States was to incorporate in their Constitution a Bill of Rights by which Congress and the State Legislatures are deprived of capacity to make laws that encroach on human rights or fundamental freedoms. A similar apprehension gave rise to the Canadian Bill of Rights* [...]
>
> *The real threat to the security of the person and the property of the individual today is not governmental tyrants or bad laws. It is the law breaker. So long as men, to say nothing of women and children, cannot walk with safety in our city streets, so long as hoodlums break into the residences of peaceful citizens and rape and rob, so long as gangsters prey on honest businessmen, so long as unprincipled outlaws lead our young people into the use of narcotic drugs and into prostitution, our so-called human rights and fundamental freedoms will lack something in reality.*

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including the power to investigate complaints about judges' conduct." (http://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_main_en.asp)

[73] Pound (2003), p. 197.

[74] Pound (2003), p. 213.

[75] R. Roy McMurty and Peter N. Oliver in Pound (1999), p. viii.

> *My suggestion, with great respect, to my academic friends who are so concerned about the protection of the status of the individual in our democratic society is that we do not provide the individual with more effective protection by enacting more laws, more effective Bills of Rights, or more constitutional limitations on our legislative authorities. What is required in order to protect the rights and freedoms of the individual is much greater respect for, and observance of, the laws that we have, for, with some minor exceptions, the laws that we have are well designed to protect human rights and fundamental freedoms.* [...]
>
> *The most typical example of course is the cry of police brutality that goes up if a necessary degree of force is used to protect the public from mass action taken by some irresponsible group to manifest defiance of laws enacted by our democratic institutions.*[76]

Jackett's time on the bench also illustrated a rather conservative approach to civil liberties, avoiding an invocation of the *Canadian Bill of Rights* whenever possible and closely following the Supreme Court of Canada's narrow reading it of terms. While on the Exchequer and Federal Courts, Jackett ruled on eighteen reported cases in which the *Canadian Bill of Rights* was potentially at issue.[77] However, on only one case -- *Lavell*[78] – did he invalidate an enactment on the basis of a conflict with the *Canadian Bill of Rights*, ([79]). When possible, Jackett attempted to avoid discussion of the *Canadian Bill of Rights* altogether, with three cases being dismissed on the basis of a lack of jurisdiction

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[76] Pound (2003), pp. 100-101.

[77] *Germain v Malouin*, [1979] 2 FC 784; *Stewart v Public Service Staff Relations Board*, [1978] 1 FC 133; *Lugano v Canada (Minister of Manpower and Immigration)*, [1977] 2 FC 605; *Johnston v Canada (Attorney General)*, [1977] 2 FC 301; *Lambert v Canada*, [1977] 1 FC 199; *Canada v Douglas*, [1976] 2 FC 673; *Martineau v Matsqui Institution*, [1976] 2 FC 198; *Bell Canada v Communications Workers of Canada*, [1976] 1 FC 459; *Fardella v Canada (Treasury Board)*, [1974] 2 FC 465; *Cotroni v Canada (Attorney General)*, [1974] 1 FC 36; *Cotroni v United States of America*, [1973] FC 1095; *Howarth v Canada (National Parole Board)*, [1973] FC 1018; *Canada (Minister of National Revenue) v Creative Shoes Lt*d, [1972] FC 1425; *Prata v Canada (Minister of Manpower and Immigration)*, [1972] FC 1405; *Douglas v Canada (Minister of Manpower and Immigration)*, [1972] FC 1050; *Lavell v Canada (Attorney General)*, [1971] FC 347; *Randolph v Canada*, [1966] Ex.C.R. 157; *Gunn v Canada*, [1966] Ex.C.R. 118

[78] *Lavell*, [1971] FC 347.

[79] N.B. Jackett's decision would be overturned by the Supreme Court of Canada in *Lavell*, [1974] SCR 1349.

for the Federal Court[80] and another two with the question of conflict being mooted by finding in favour of the applicant on the basis of a different enactment:[81] "In view of the conclusion that I have reached with regard to the first ground of attack on the orders in question, I am relieved of the necessity of considering the several very difficult questions that arise in dealing with the other grounds of attack."[82] In general, he followed the Supreme Court of Canada in giving very narrow meanings to the terms used in the *Canadian Bill of Rights* such that he could rule that there was no conflict between the *Canadian Bill of Rights* and the other enactment(s) in controversy. A good example of the narrowness applied to the terms in the *Canadian Bill of Rights* was Jackett's final bill of rights case, *Germain v Malouin,*[83] where he reasoned that "we are not satisfied that the difference between the relationship of a mother to an illegitimate child and the relationship of an illegitimate child to its natural father was not a proper basis for the making of such a legislation distinction." This closely mirrored the reasoning in the infamous *Bliss*[84] case, whose Federal Court antecedent was delivered less than three weeks earlier[85] by Pratte J,[86] who concurred with Jackett in *Germain*.

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[80] *Cotroni* v *United States of America,* [1973] FC 1095; *Martineau v Matsqui Institution,* [1976] 2 FC 198; *Johnston v Canada (Attorney General),* [1977] 2 FC 301
[81] *Randolph,* [1966] Ex CR 157; *Douglas,* [1972] FC 1050
[82] *Randolph* at 171
[83] *Germain v Malouin,* [1979] 2 FC 784. In *Germain v Malouin* the court ruled that different regulations covering rights extended to mothers of illegitimate children, but not to fathers of illegitimate children were not a form of discrimination upon the basis of sex.
[84] *Bliss v Canada (Attorney General),* [1979] 1 SCR 183. In *Bliss* the court ruled that different regulations covering unemployment insurance for pregnant women was not a form of discrimination upon the basis of sex.
[85] *Canada (Attorney General) v Bliss,* [1978] 1 FC 208
[86] N.B. this is not the same judge as Yves Pratte who served on the Supreme Court of Canada and concurred in *Bliss*.

However, despite Jackett's avoidance of the *Canadian Bill of Rights* and the narrowness of the construction he adopted for its terms, he was unwavering in his belief that in the case of a direct conflict, the *Canadian Bill of Rights* would prevail and render inoperative any conflicting enactment. Most evidently this was done in *Lavell,*[87] but it was also clear in his first *Canadian Bill of Rights* decision, delivered in October 1965, *Gunn v Canada*.[88] Although *Gunn* was typical in that Jackett found no conflict between the *Canadian Bill of Rights* and, in this case, his own cherished *Crown Liability Act*,[89] he was to comment that the *Canadian Bill of Rights*

> *in the absence of an appropriate declaration, no law of Canada shall be "construed" or "applied" so as to "deprive a person of a fair hearing ..." for the determination of his rights. Section 2(e) is a prohibition against giving a statute the effect of depriving a person of a fair hearing for the "determination" of his rights unless it is expressly declared by the statute that it shall so operate "notwithstanding the Canadian Bill of Rights"*.[90]

However, he then goes on to state that the matter is not relevant as "the statutory provisions in question here do not relate to the procedure for the "determination" of the suppliant's rights." [91] Jackett's rulings show a clear deference to Parliament on questions of civil liberties, but he always held that, in the face of an outright conflict, the *Canadian Bill of Rights* would have to prevail over any other enactment, even before the Supreme Court of Canada made that reasoning clear in *Drybones*.

[87] *Lavell*, [1971] FC 347
[88] *Gunn*, [1966] Ex CR 118
[89] SC 1952-1953, c.30 (CA)
[90] *Gunn* at 124
[91] *Gunn*

THE INTELLECTUAL FONT: ELMER A. DRIEDGER[92]

BIOGRAPHICAL SKETCH (1913-1985)

The individual most responsible for the language and structure of the *Canadian Bill of Rights* was Elmer A. Driedger. He was the individual charged with its original drafting and revisions and developed the constitutional justifications for its form in face of criticism of its lack of entrenchment and other purported defects. Driedger was quickly recognized as the leading statutory draftsman in the Department of Justice and went on to found Canada's first training program for legislative drafting and to compose Canada's first indigenously produced textbook on statutory interpretation, with his principle of statutory interpretation (the "Modern Principle") being explicitly adopted by the Supreme Court of Canada as its preferred interpretative approach.[93] More than anyone else in mid-twentieth century Canada, Driedger understood how statutes were to be drafted.

Until becoming Deputy Minister, Driedger's background and career path shared many similarities with that of his immediate predecessor, Wilbur Roy Jackett. Driedger's family was of Old Colony Mennonite stock from what is now east-central Ukraine arriving in Manitoba in 1875.[94] His family then moved to Osler on the edge of the "Hague-Osler Block" reserved for Mennonite settlers north of Saskatoon, where the family became estranged from the Mennonite community. Elmer Driedger's grandfather,

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[92] Material for this section is largely drawn from Harold J Dick, *Lawyers of Mennonite Background in Western Canada Before the Second World War* (Winnipeg: Legal Research Institute of the University of Manitoba, 1993) as well as various material collected from the Driedger Fonds at Library and Archives Canada.

[93] *Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 SCR 27

[94] Leo Dreidger, *Mennonite Identity in Conflict* (Lewiston, NY: Edwin Mellen Press, 1988), pp. 61-76.

Johann, had engaged in unorthodox professions for a Mennonite including running stores and serving as postmaster. After an insurance dispute with the Old Colony Church over the destruction of Johann's store by what was suspected as a Mennonite arsonist, Johann was expelled from the church in 1908. Johann, however, never joined another church but continued to correspond with the Old Colony Church leadership where he "used his orthodox, if modern, interpretation of the Scriptures to try to convince the elders logically that a more progressive perspective was possible."[95]

Elmer Abram Driedger was born 13 January 1913[96]to Abram Driedger, a son of Johann, who had married an ethnic Mennonite of the Swedenborgian faith[97] and joined a more progressive Mennonite church, the General Conference church (as there was no Swedenborgian Church available to attend). Despite Abram being a regular churchgoer, he "was probably agnostic" and sent his son Elmer to the public high school in Rosthern [98] despite the presence of a Mennonite school in the same town. [99] Consequently, Elmer Driedger grew up speaking English as well as Mennonite

[95] Dick (1993), p. 151

[96] Harold Dick gives his birth year as 1914 based upon the records of the Law Society of Saskatchewan. However, this is probably an error and 1913 is more plausible birth year. 1913 is the date is listed on Driedger's CV in the Driedger Fonds at Library and Archives Canada and it is the year given by his wife, Elsie, in an interview with Harold Dick in 1991. Also. the fact that no source remarks on his age when enrolling at the University of Saskatchewan in 1929. If he had enrolled at the atypical age of 15, that would probably have been commented upon.

[97] Swedenborgianism was a small New Church movement (having never numbered more than ten thousand adherents in North America) founded on 7 May 1787 upon the basis of the writings of Emanuel Swedenborg. The Church had a reputation as a particularly liberal church.

[98] Dick (1993), p. 152.

[99] George Epp (ed), *Roots and Wings: 100 Years of Rosthern Junior College*. Rosthern: Rosthern Junior College, 2005.

plattdeutsch ("low German") and his parents further secured for him private lessons in more standard and literary *hochsprache*.[100]

Like Jackett, Driedger proceeded to the University of Saskatchewan, enrolling in an academic program that combined a general Arts degree with a Law degree that cut a year off of the academic studies and graduating in 1934 (one year after Jackett). Driedger showed an early interest in constitutional law, joining the newly founded "Haldane Club" which discussed constitutional and quasi-legal problems,[101] and was one of only four students (Jackett was another) to lead discussions in the 1932-33 academic year.[102] After graduating from the College of Law, Driedger won a scholarship to study in Germany "offered on somewhat the same criteria as the Rhodes scholarships"[103] and spent a year studying at the Universities of Marburg (1934-1935) and Kiel (1935) in Germany likely studying international law,[104] with "political developments in Germany forc[ing] his return to Canada."[105]

Driedger then returned to Saskatchewan and articled with Ferguson, MacDermid & MacDermid in Saskatoon. Formally, he articled with F.F. MacDermid, but Driedger's

[100] Dick (1993), p. 153
[101] Pound (1999), p. 22.
[102] Pound (1999), p. 23
[103] Pound (1999), p. 56.
[104] Dick (1993), p. 154.
[105] Pound (1999), pp. 56-57. I am dubious of Pound's claim here and suspect that the scholarship was only for a single year. Pound claims that Driedger only returned "a year or so before the war." This contradicts the records of the Law Society of Saskatchewan that have him articling in Saskatchewan from 1935 to 1937. On the other hand, as Driedger did not appear to have been awarded a degree while in Germany, he may have left early due to political controversies (particularly given his Mennonite background) and it is Pound's comment about him returning in the 1937 to 1938 period that is inaccurate.

brother recalls that he actually worked under Peter Makaroff, a Doukhobor lawyer.[106] He was called to the bar in 1937 and continued to work for his articling firm until 1939. At that point he lectured in Company Law at the University of Saskatchewan and then became a partner in a Yorkton, Saskatchewan practice, "eking out a living"[107] at less than $400 a year.[108]

In 1940 he successfully applied for a position as a librarian at the Supreme Court of Canada, the notice of which was sent to him by Wilbur Jackett.[109] However, before being confirmed for this post, questions were raised about Driedger's German background and his time in Germany. Fortunately for Driedger, his family was not only very liberal, but it was also very Liberal and Driedger's father "used contacts within the Liberal Party to ensure Driedger's appointment."[110] After less than a year in Ottawa Jackett convinced the then newly appointed Deputy Minister of Justice, Frederick Varcoe, to meet with Driedger, who then proceeded to promptly poach him for Justice from the Supreme Court library.[111]

Driedger quickly became the Department's foremost draftsman and "after his arrival at the department, was gradually assigned most of the responsibility for the drafting of statutes." [112] When the Department of Justice created a Legislative Section in 1944, Driedger was made its head with the title of "Parliamentary Counsel."[113] As soon

[106] Dick (1993), p. 155.
[107] Pound (1999), p. 57.
[108] Dick (1993), p. 155.
[109] Pound (1999), p. 57.
[110] Dick (1993), p. 155.
[111] Pound (1999), p. 57.
[112] Pound (1999), p. 57.
[113] D.S. Thorson, "Forward" in E A Driedger, *The composition of legislation; Legislative forms and precedents* (Ottawa: Department of Justice, 1976).

as the war ended, Driedger was sent for further legislative drafting training in the United Kingdom and shortly began developing the first indigenously Canadian literature on statutory drafting and construction. Driedger's approach to legislative drafting was characterized by what would today be referred as a "purposive approach"[114] and later termed by him as "the modern principle" in his 1974 textbook on statutory interpretation.[115] He was particularly noted for a style of legislative drafting that emphasized concision and was recognized as being exceptionally "skilled at expressing it [legislative enactments] precisely and concisely."[116]

After the appointment of Jackett as Deputy Minister, Jackett consistently brought Driedger to his meetings with the Minister, seemingly grooming him for the position of Deputy Minister.[117] Driedger would be appointed Deputy Minister of Justice on 1 July 1960 (the day that the *Canadian Bill of Rights* received second reading in the Commons) and would then go on to serve as Deputy Minister for nearly seven years, retiring five weeks prior to Pierre Trudeau's appointment as Minister of Justice.

After retiring from the Department of Justice, he briefly served as Consul General for Canada in Hamburg, but returned to teach at Queen's University in Kingston for one year and then for a decade at the University of Ottawa. During this time until almost the end of his life in 1985, Driedger maintained links with the Department of Justice. At the University of Ottawa he founded a legislative drafting program funded by the Department of Justice and championed by Justice Minister John Turner.

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[114] Driedger's approach to statutory interpretation has been explicitly adopted by the Supreme Court of Canada since 1997 in *Rizzo & Rizzo Shoes Ltd*. (Re), [1998] 1 SCR 27.
[115] Driedger (1974).
[116] Pound (1999), p. 314
[117] Pound (1999), pp. 93-94

Driedger was particularly upset with the treatment of the *Canadian Bill of Rights* by the Supreme Court of Canada. While Deputy Minister, he penned a scathing critique of the Supreme Court of Canada's first major treatment of the *Canadian Bill of Rights* in *Robertson and Rosetanni*,[118] endorsing the minority opinion of Justice Cartwright. However, as he was Deputy Minister at the time, the article remained unpublished until after his retirement from the Department of Justice and then was only being published in a relatively obscure *festschrift* by the University of Saskatchewan in 1968.[119] The result of this delay and relatively obscure publishing format reduced the impact of the critique (although it seemingly convinced Lederman, who makes note of it as changing his views on the *Canadian Bill of Rights* in the *McRuer Report*[120]).

DRIEGDER'S CONSTITUTIONAL THINKING PRIOR TO 1958

Situating Elmer A. Driedger

Analysis of Elmer A. Driedger's influence upon the modern Canadian legal system been has minimal given his immense contributions. The foundations of modern Canadian legislative drafting rest significantly upon Driedger's shoulder by the sheer fact that he was responsible for drafting much of the immediate post-war federal legislation that massively altered the Canadian legal, political, and social landscape and thus set the templates for future legislation. From this practical experience, Driedger would quickly

[118] *Robertson and Rosetanni v The Queen*, [1963] SCR 651
[119] E.A. Driedger, "The Canadian Bill of Rights" in O.E. Lang (ed) *Contemporary Problems of Public Law in Canada: Essays in Honour of Dean F. C. Cronkite* (Toronto: University of Toronto Press, 1968), pp. 31-48. [Driedger (1964)]
[120] W.R. Lederman, "A Comment on the Canadian Bill of Rights and Judgement of the Supreme Court of Canada in the case of: The Queen v Joseph Drybones," *Background Papers and Reports*, vol. 2 (Toronto: Ontario Advisory Committee on Confederation, 1970).

become the leading authority on statutory interpretation and, notwithstanding the passage of over twenty-five years, his opus, *Construction of Statutes*, remains highly influential. Despite Driedger's considerable contributions, the sources of his thinking have largely gone unexamined.

Driedger and Authority

A major difficulty faced in any analysis of Driedger's thinking as expressed in his writings is his failure to cite authorities that explicitly reveal the influences upon his thinking. Driedger makes almost no citations to authorities other than cases and instruments after 1953. The exceptions to this are citations to his own publications and the very occasional citation of a reference work such as *Halsbury's Laws of England* (in this case, only in a memo on divorce, from the late 1960s)[121] and George Coode's *Legislative Expression*[122] (in a 1950 essay "The Retrospective Operation of Statutes"[123]). One rare example of a citation beyond these sorts is a general one at the beginning of a 1949 article, "Legislative Drafting" in which he directs "readers interested in this subject might refer further to" and goes on to list a dozen works on legislative drafting and clear language.[124] Most of these dozen works, too, could be described as "reference" works,

[121] Driedger Fonds, LAC MG31 E39 v.17.01
[122] George Coode, Legislative Expression, or *The Language of the Written Law* (London: W Benning, 1845).
[123] It was later published in the *Festschrift*, J.A. Corry (ed) *Legal essays in honour of Arthur Maxon* (Toronto: University of Toronto Press, 1953).
[124] Jeremy Bentham, *Nomography*, vol. III in the *The Works of Jeremy Bentham* (Edinburgh: W Taite, 1843); George Coode, *On Legislative Expression; or the Language of the Written Law* (Extract from Appendix to Report of the Poor Law Commissioners on Local Taxation, House of Commons Papers 1843, vol. Xx. London, 1845; Reprinted London, 1852; Reprinted Halifax, 1946); Lord Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* (London, 1877; Reprinted Toronto & Boston, 1902); Sir Courtenay Ilbert, *Legislative Methods and*

such as *Plain Words: A Guide to the Use of English* and "Punctuation in the Law" and thus give little insight into the basis of his "novel" views on the constitution and statutory interpretation.

Nor is this approach to writing typical in his field or even amongst his colleagues or mentors. One extremely influential source for Driedger's thinking on constitutionalism and statutory construction was J.A. Corry,[125] one of Driedger's law school professors. Driedger's magnum opus on statutory interpretation, *Construction of Statutes*,[126] was built upon Corry's lectures (Driedger even includes Corry's essay summarizing the lectures given on the subject while Driedger was a student at the University of Saskatchewan in an appendix to his own tome). In those lectures, Corry liberally cites traditional sources such as Dicey, Locke, and Aristotle as well as contemporary commentators such as those by American authors M. R. Cohen,[127] J.C. Gray,[128] and Roscoe Pound;[129] along with contemporary reference sources such as

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Forms (Oxford, 1901); Sir Alison Russell, *Legislative Drafting and Forms* (4th ed., London 1938); E.L. Piesse, *Elements of Drafting* (Sydney, 1946); Sir Ernest Gowers, *Plain Words: A Guide to the Use of English* (London, H.M. Stat. Off. 1948); "Rules of Drafting adopted by the Conference of Commissioners on Uniformity of Legislation in Canada"(1948), 26 Can. Bar Rev. 1231; F.A. Mann, "The Interpretation of Uniform Statutes," 62 *L.Q.R.* 278; Ernst Freund, T"he Use of Indefinite Terms in Statutes," 30 *Yale Law Journal* 437;U.A. Lavery, "Punctuation in the Law," 9 *American Bar Association Journal* 225; Granville Manson, "The Drafting of Federal Statute Law," 43 *American Bar Association Journal* 121; H.E. Read and J.W. MacDonald, *Cases and Other Materials on Legislation* (Brooklyn, 1948).

[125] Corry had followed a similar early path as Driedger and Jackett, obtaining a law degree from the University of Saskatchewan and then winning a Rhodes scholarship. He returned to teach law at the University of Saskatchewan from 1927 to 1936. In 1939 he would author "Difficulties of divided jurisdiction" for the Rowell-Sirois Commission.

[126] Driedger (1974).

[127] M.R. Cohen, *Law and Social Order* (New York, 1933)

[128] J.C. Gray, *The Nature and Sources of the Law*, 2nd ed. (New York, 1927).

[129] R. Pound, *Law and Morals* (Oxford, 1924);

Llewelyn Davies,[130] F.J. De Sloovere,[131] F.W.L. Dwarris,[132] H. Lauterpacht,[133] and M. Radin.[134] Although avoidance of authorities such as these was typical in appeal court judgements in Canada until tentative steps in the 1970s, this was not the case for scholarly writings. As a result, my analysis of Driedger's constitutional theory is the outcome of a close reading of his scholarly works and his reasoning expressed in those works and in his memoranda produced while at the Department of Justice.[135]

The Ecumenical Legal Theorist

While in earlier editions of her text,[136] Ruth Sullivan emphasizes the continuity between her analysis of constitutional construction and that of Elmer Driedger, in her most recent (2008) edition of *Construction of Statutes*[137] she has been harshly critical of

[130] Llewelyn Davies, "The Interpretation of Statutes in the Light of their Policy by the English Courts," (1935) 35 *Columbia Law Review* 519.
[131] F.J. De Sloovere, "Steps in the Process of Interpreting Statutes" in 10 *NYU LR* 538 (1934).
[132] F.W.L. Dwarris, *Statute Law* (London, 1831).
[133] H. Lauterpacht, "Some Observations on Preparatory Work in Interpretation of Treaties," 48 *Harvard LR* 574 (1935).
[134] M. Radin, "Statutory Interpretation" in 43 *Harvard LR* 881 (1931).
[135] In Driedger's early publications (before 1955) which largely dealt with legislative drafting, reference to authorities was more common. From this limited source it appears that on matters of statutory drafting and construction, Driedger depended exclusively on British texts on statutory construction, despite his affinity for American jurisprudence. However, as discussed below, reliance on British texts (e.g. *Craies's* and *Maxwell's*) over American texts (e.g. *Beal's*, *Black's*, and *Sutherland's*) may have been the result of attempting to situate his novel approach within a conservative framework. Thus he referenced the leading texts on statutory construction preferred by the conservative legal community of that era.
[136] Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd edition (Toronto: Butterworths, 1994); Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th edition (Toronto: Butterworths, 2002);
[137] Ruth Sullivan, *Sullivan on the Construction of Statues*, 5th edition (Markham, ON: LexisNexis, 2008).

Driedger's "modern principle" of statutory construction and the Supreme Court of Canada's embrace of that interpretative principle:

> *The Supreme Court of Canada did not accept my reformulation of Driedger's modern principle. In* Re Rizzo & Rizzo Shoes Ltd,[138] *decided in 1998, the Court preferred Driedger's modern principle as formulated in the first and second* [*Driedger's*] *editions of the Construction of Statutes, over the modern rule set out in the third edition* [*Sullivan's first edition*]. [...] *However, at least some of the time the attraction to Driedger's formulation appears to be its lack of clarity. Because it is unclear, it is able to serve as all things to all people and allows courts to take pretty much any approach they like, from the plain meaning rule to equitable construction, without having to acknowledge and justify what they are doing.*[139]

Sullivan characterizes her own reformulation of Driedger's "modern principle" as rooted in a sharp philosophical divergence between the two authors:

> *Driedger was a positivist and insisted on the primacy of legislative intent. I* [*Sullivan*] *am a pragmatist; I like to expose and justify rather than paper over the pragmatic approach that courts have taken to statutory interpretation since the mid-nineteenth century.*[140]

Expressed alternately, Sullivan does not feel compelled to force a harmonization – in her words, "paper over" – of the often inconsistent and contradictory interpretive methods taken by senior appellate courts, but instead seeks to expose the immediate pragmatic considerations courts made to justify one interpretive approach over another. Further, Sullivan has gone out of her way to distinguish between her summation of the "the rules, presumptions, and conventions" relied upon by Canadian courts and her own preferred approach to statutory interpretation.

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[138] [1998] 1 SCR 27.
[139] Sullivan (2008), pp. vii-viii.
[140] Sullivan (2008), p. vii.

The Construction of Statutes

Driedger, in contrast, felt compelled to harmonize the various approaches to statutory interpretation taken by the courts and synthesize them into a single, cohesive "modern principle" that would simultaneously be both a guide to future statutory interpretation as well as an explanation of past statutory interpretations. That is to say, Driedger took an ecumenical approach to statutory construction, portraying the various approaches as expressions of a consistent and cohesive – though evolutionary – approach to statutory interpretation. Or, as Driedger put it, each of the "different rules or approaches" typically adopted by judges are no more than

> *different aspect[s] of the same process. The[se] approaches [...] have been fused into one, but in the process of their fusion their original meanings have undergone a metamorphosis. [...] The result then is that, whatever judicial attitudes may have appeared in the past, today there is only one method of construction and that is the literal one, but literal in total context.*[141]

Driedger's belief that he was, somewhat uniquely, presenting a comprehensive approach to statutory interpretation explains his adoption for his opus of the title *Construction of Statues* instead of the more typical *Interpretation of Statutes* used by leading statutory interpretation texts such as *Beal, Black, Maxwell, Sutherland* and even his own previously typical usage of the term. For Driedger, "all statutes must be 'construed,' and only where there is some ambiguity, obscurity, or inconsistency in a statute is the term 'interpret' fitting."[142] Other texts, to Driedger, presented what were effectively partial rules for the interpretation of statutes as they tended to provide only an "index" of

[141] Driedger (1974), pp. 1-2.
[142] Driedger (1974), p. ix.

previous decisions. Driedger saw his text as comprehensive as it relied upon an analysis of "how the courts go about solving" the "problems that arise with statutes."[143]

That said, one would be naïve to believe that Driedger sought to do no more than, as Dicey dubiously stated of his own work, "state what are the [approaches], to arrange them in their order, to explain their meaning, and to exhibit where possible their logical connection."[144] Driedger challenged the wisdom of certain techniques (i.e. maxims or presumptions) of statutory interpretation employed by the courts and sought to develop what would today be described as a "purposive" or "intentionalist" approach to statutory interpretation inspired by the same sources that influenced the adherents of the "Newer Constitutional Law" to embrace constitutional supremacy.

The "Modern Principle"

> Driedger summarized his "modern principle" of statutory interpretation as
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> *the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*[145]

He described this "method of construction" as "the literal one, but literal in total context."[146] This description of his method of interpretation as "the literal one" – while probably intended as 'ecumenical' in the sense that he was attempting to portray his approach as a consistent evolution of existing approaches to statutory interpretation – was ironic, if not subversive, as he appropriated the language of the interpretive technique he most directly challenged to describe his own approach.

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[143] Driedger (1974), p. vii.
[144] Dicey (1885), p. 31.
[145] *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at ¶21 per Iacobucci J, quoting Driedger (1983) at p 87.
[146] Driedger (1983), p. 2.

Towards a New Approach

The "Literal" Rule

In the nineteenth century and for much of the twentieth century, the ascendant approach in the United Kingdom and Canada (as well as the United States) to determining the intent of parliament in statutory interpretation was the "literal" or "plain meaning" method.[147] This approach emphasized "the words themselves [of a statute] alone do, in such case, best declare the intention of the lawgiver"[148] and eschewed reference to extrinsic evidence. This approach resulted in cases where the court accepted "literal" readings that removed long standing rights (the classic example being *Alina*).[149] In response to such "absurdities," this approach was typically tempered by the "golden rule," which allowed judges to depart from the "literal" meaning if it would otherwise "lead to some absurdity or some repugnance[150] or inconsistency[151] *with the rest of the*

[147] The appellation "textualism" is typically employed to express the analogous concept in modern American jurisprudence, with Supreme Court Justice Antonio Scalia identified as its leading proponent. See Frank B. Cross, *The Theory and Practice of Statutory Interpretation* (Stanford, CA: Stanford Law Books, 2009) or Lawrence Solan, *The Language of Statutes: laws and their interpretation* (Chicago: University of Chicago Press, 2010).

[148] *Sussex Peerage Case* (1844), 11 Cl & Fin 85, 8 ER 1034.

[149] *Brown & Sons v The Russian Ship Alina*, (1880), 5 Ex. D. 227. In *Alina*, the Court of Appeal accepted the literal terms of a statute that removed jurisdiction for damage claims from one court and transferred it to a different court, but limited damage claims to those less than £300, resulting in an effective privative (or liability limitation) clause for damage claims in excess of £300.

[150] The classic example cited by Driedger being *R v The Judge of the City of London Court* ([1892] 1 Q.B. 273) where the *County Courts Admiralty Jurisdiction Act* 1868 (31 & 32 Victoria, c. 71 and 32 & 33 Victoria, c. 51) removed jurisdiction over certain actions from the Admiralty Court and transferred them to the County Court, but the statute then provided for the transferring any action commenced in a County Court to the Admiralty Court. On a literal reading, there was a repugnancy in that the statute explicitly provided that cases could be transferred to a court that was explicitly denied jurisdiction. Thus, the High Court of Justice had to deviate from the literal language

instrument, in which case the grammatical and ordinary sense of the words might be modified so as to avoid that absurdity and inconsistency, *but no further*."[152] Resultantly, the "literal" approach to statutory construction, even tempered by the "golden rule," rested upon the assumption that the only legitimate evidence of legislative intent is the text itself.

This "literal" approach to statutory construction began to be challenged particularly in the United States during the interwar years inspired by thinkers such as Roscoe Pound with his "sociological jurisprudence" and expressed by American judges such as Oliver Wendall Holmes, Louis D. Brandeis, and Learned Hand.[153] Either through the influence from the United States or drawing upon similar inspiration, such thinking spread beyond America with Lord Sankey's reasoning in *Edwards* being an expression of a similarly developing approach in the United Kingdom. However, Lord Sankey's approach had little influence upon the Canadian judiciary.

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denying the Admiralty Court jurisdiction, to that of the court being solely a court of appeal and not a court of first instance for certain matters.

[151] The classic example cited by Driedger being *Miller v Salomons* (1852) (7 Ex. 475, 155 E.R. 1036) where *The Treason Act 1766* (6 George III, c. 53) had prescribed the "Oath of Abjuration" as to King George III but with no mention of his successors. A further section of the statute perpetually removed certain indictments for Treason for those having taken the "Oath of Abjuration." Resultantly, there was an inconsistency in a literal reading, as the Oath according to one section was only applicable in the lifetime of George III, whereas in another section purported to make indefinite changes to the law of Treason so long as one swore fidelity to a dead monarch. As such, the language of the statute had to be altered by the court to either add "and his successors" to the Oath of Abjuration, or else add "during the reign of George III" to the section of indictments for Treason if the Act was not to be internally inconsistent. Thus, the Exchequer Court chose to read "George III" as "Victoria" in the Oath of Abjuration, as had anyways been the practice.

[152] *Grey v Pearson* (1857), 6 HL Cas 61 at 106, 10 ER 1216 at 1234. [Emphasis mine.]

[153] Adams (2009), pp. 41-46.

J.A. Corry's "The Interpretation of Statutes"

While having little immediate impact on the Canadian judiciary, Roscoe Pound's sociological jurisprudence did have significant influence on certain elements of the broader legal community in Canada. As capably analyzed by Eric Adams, Roscoe Pound's "view of law as a 'jurisprudence of ends' emphasizing the law's ability to achieve or retard progressive social change"[154] was transmitted to a generation of Canadian lawyers through the likes of Frank Scott and W.P.M. Kennedy. This development produced a commitment to the "Newer Constitutional Law" and constitutional supremacy that characterized the majority of activist lawyers within the human rights movement from the 1930s through to the 1950s.

Driedger, too, was introduced to (and embraced) Roscoe Pound's "sociological jurisprudence" and similar approaches through his law school professor, J.A. Corry. Drawing upon Pound's analysis, Corry argued that the "cannon of literal interpretation [...] needs to be supplemented [...] by judicial reference to the broad object and social purpose of the statute as a guide to the intention of the legislature."[155] Corry taught Driedger that "the intention of the legislature" derived solely from the text of a statute alone "is a myth."[156] Instead, "though the intention of the legislature is a fiction, the purpose or object of the legislation is very real. No enactment is ever passed for the sake of its details; it is passed in an attempt to realize a social purpose"[157] and "the first duty

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[154] Adams (2009), p. 42.
[155] J.A. Corry "The Interpretation of Statutes" (1935) in E.A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), pp. 203-234 at p. 204. NB "The Interpretation of Statutes" is an abridged version of J.A. Corry, "Administration of Law and Interpretation of Statutes," *University of Toronto Law Journal,* (1935-36) 1:286-312.
[156] Corry (1935), p. 205.
[157] Corry (1935), p. 208.

of judges was to make the statute realize its purpose."[158] Corry attempted to legitimize what was then a radical approach by an appeal to classic case law, notably *Heydon's case*[159] which he characterized has having "resounding language [that] celebrates the unity of purpose which, in theory at any rate, animated the legislature and the judges under the leadership of the Crown." [160] However, whereas Scott and Kennedy's reading of Pound pushed them towards rejection of parliamentary supremacy in favour of constitutional supremacy, these were not the conclusions drawn by Corry and taught to Driedger. Instead, Corry argued that

> *The supremacy of Parliament would not be shaken in any way if the courts should throw off the spell of the literalness and then, by virtue of a legislative fiat or judicial indulgence, proceed, where necessary, to examine the object data which will reveal the aim and object of the legislation.*[161]

Corry highlighted an inconsistency he found of the "literalists" in embracing the "golden rule," which allowed departure from literalism where "the imminence of an absurdity has power to limit words but not to extend them." For Corry, it was inconsistent that the literal rule could be departed from only *to limit* the effect of a statute and not *to extend* its effect. Instead Corry argued that judges should "look at the policy or purpose of the legislation for confirmation of possible implications of the language used."[162]

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[158] Corry (1935), p. 211.
[159] (1584), 3 Co. Rep. 7a, 76 E.R. 637.
[160] Corry (1935), p. 211.
[161] Corry (1935), pp. 233-234.
[162] Corry (1935), p. 231.

The 1951 "New Approach"

Although perhaps not initially as bold as Corry, Driedger built his own approach to statutory interpretation based upon Corry's thinking and came to shortly express his own strong disapproval of "literalism" in statutory construction.[163] Driedger's opposition was rooted in his belief that the "intention of parliament" can rarely be derived intrinsically from any provision of a statute and any claims to finding the "intention of parliament" in a "literal reading" is, instead, based upon "invent[ing]" some "obvious" "intention of parliament:" "Once the intention of Parliament has been invented, it is easy enough to support the desired construction." [164]

Driedger's "New Approach to Statutory Interpretation" in 1951 stressed his "rule of inferred intent" which "assume[d] that every statute contains a logical and complete legislative scheme" [165] and emphasized the legacy of the "mischief" rule from *Heydon's Case*. [166] This emphasis on the "inferred intent" and the strong endorsement of *Heydon's Case* was a sharp divergence from the contemporaneous approach to statutory interpretation. *Heydon's Case* epitomized the "equitable construction" approach to statutory interpretation in which "legislation is construed so as to promote legislative purpose, cure any over- or under-inclusions in the implementing provisions and suppress attempts by citizens to avoid the intended impact of legislation."[167]

The "equitable construction" approach predominated in the seventeenth century under the Stuart kings and "was appropriate in an era when judges were active

[163] E.A. Driedger, "A New Approach to Statutory Interpretation," (1951) *Canadian Bar Review* 29(8):838-845.
[164] Driedger (1951), p. 845.
[165] Driedger (1951), p. 841.
[166] Driedger (1951), p. 843.
[167] Sullivan (2008), p. 4.

participants in law-making and texts were difficult to access and apt to be unreliable." [168] However, changing conditions in the eighteenth century made possible the rise of the "doctrine of strict construction" [169] in the nineteenth century. Most broadly, "literal" construction became plausible due to the rise of parliament as the sole legitimate source of legislation in the wake of the Glorious Revolution and the publication of standardized compilations of statues (notably an early abridgement in 1720 by Edward Sayer[170] and vastly more comprehensive editions by Owen Ruffhead [171] in 1783 and Charles Runnington[172] in 1786). To these eighteenth century foundations, the ascendency of the doctrines of parliamentary sovereignty and the rule of law inspired an abandonment of "equitable construction" epitomized in *Heydon's case* in favour of "literal construction," as epitomized in the *Sussex Peerage Case*.[173] This approach become favoured as it was argued that it offered the best evidence of parliament's intent (parliamentary sovereignty) and that it provided for certainty and predictability for citizens as they could rely on the apparent meaning of the legislation that governs them (rule of law).[174]

Thus, Driedger's emphasis on "inferred intent" and his valuing of *Heydon's case* sharply diverged from the contemporaneous leading texts on statutory interpretation that

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[168] Sullivan (2008), p. 4.
[169] Sullivan (2008), p. 5.
[170] Edward Sayer (ed), *An Exact Abridgement Of all the Statutes in Force and Use, from* Magna Charta, 9 H. 3. *To the Beginning of the Reign of King George*, 4 vols. (London: His Majesty's Printers, 1720).
[171] Owen Ruffhead (ed), *The Statutes at Large from Magna Charta, To the End of the Last Parliament, 1761*, 8 vols. (London: King's Printer, 1763).
[172] Charles Runnington (ed), *The Statutes at Large from Magna Charta, To the Twenty-Fifth Year of the Reign of King George the Third, inclusive With a Copious Index and an Appendix consisting of Obsolete and Curious Acts, some of which were never before printed,* 10 vols. (London: King's Printer, 1786).
[173] (1844), 11 Cl. & Fin. 85, 8 E.R. 1034.
[174] Sullivan (2008), p. 5.

depreciated the precedent of *Heydon's case*.[175] The then most recent edition of *Craies*[176] noted in relation to *Heydon's case*,that "although it is allowable" to examine "the circumstances under which it [a statute] was passed [...] it was not to be favoured"[177] and that "it is altogether a mistake to apply the resolutions in *Heydon's case* to a criminal statute which creates a new offence."[178] Instead, *Heydon's case* was only to be invoked for "obscure enactments"[179] and "obscurely penned statutes." [180] While not as harsh as *Craies*, the then most recent edition of *Maxwell*[181] was also strongly depreciative of *Heydon's case*. Although fond of the paraphrase from *Heydon's case* that legislation aims to "suppress the mischief and advance the remedy," *Maxwell* cautioned, in relation to *Heydon's case,* against "invoking consideration of the supposed intention of the legislature." [182] Instead, *Maxwell* only relied on *Heydon's case* for a very narrow application of its principles such as in support of a "beneficial construction" of a term (although never one which sought to extend "the natural meaning of the word")[183] or as a

[175] Here, I cite *Craies* and *Maxwell* because they were generally recognized as leading authorities, and because they appear in one of Driedger's rare footnotes so I can confirm that Driedger was familiar with the specific volumes I cite. The citations appear in E.A. Driedger, "The Retrospective Operation of Statutes," in J.A. Corry, *et al* (ed), *Legal Essays in Honour of Arthur Moxon*, (Toronto: University of Toronto Press, 1953), pp. 3-22. The essay was prepared in 1950.
[176] Walter S. Scott, *A Treatise on Statute Law by the Late William Feilden Craies, MA, founded on Hardcastle on Statutory Law*. Fourth edition. (London: Sweet & Maxwell, 1936).
[177] *Craies* (1936), p. 69.
[178] *Craies* (1936), p. 454.
[179] *Craies* (1936), p. 93.
[180] *Craies* (1936), p. 453.
[181] Gibert H. B. Jackson, *The Interpretation of Statutes by the Late Sir Peter Benson Maxwell*, Ninth Edition (London: Sweet & Maxwell, 1946).
[182] *Maxwell* (1946), p. 22.
[183] *Maxwell* (1946), p. 71.

qualification of the maxim of strict construction of penal statutes such as "sent" including "affixing on someone's door" in a statute penalising "sending a threatening letter."[184]

Driedger was also critical of the heavy reliance of many judges on what he called "the Rule of Presumed Intent;" i.e. the classic "maxims" of statutory interpretation "established by the courts" that declare "certain presumptions about the intent of Parliament" such as "retrospective operation" and "substantial alteration of the law." [185] Although Driedger believed such maxims to be essential in statutory construction, he cautioned against any pre-eminence being given to them and that "these presumptions are always rebuttable: they must give way to an indication of contrary intent." [186] Driedger was particularly critical of how other authorities defined the presumption against retrospective operation of statutes (*nova constitution futuris formam imponere debet, non praeteritis*)[187] and explicitly declared that the definitions of retrospective statutes adopted in *Craies* and *Maxwell* were "wrong"[188] with those definitions creating a sort of *leges mori serviunt*;[189] Driedger also sought to illustrate that these definitions had never been endorsed by the courts.[190] Driedger cautioned against the tendency of some lawyers to use such maxims to "find some ambiguity, inconsistency, or other defect that does not in fact exist" and portraying "such a flaw [as] key to the application of the present rules of

[184] *Maxwell* (1946), pp. 281-282.
[185] Driedger (1951), p. 844.
[186] Driedger (1951), p. 844.
[187] "New statutes ought to prescribe future, not past, acts" [my translation]. Coke, 12 Inst 292.
[188] Driedger (1950), p. 5.
[189] "laws are subservient to custom"
[190] Driedger (1950), p. 4.

interpretation [with] every effort [being] made to find one in the statute" thus "build[ing] a castle in the air."[191]

For Driedger in 1951, the appropriate method of statutory interpretation was to "reconstruct, from the words of the Act, the draftsman's final legislative scheme. In other words, he must reverse the drafting process."[192] This was a direct challenge to the literalist school which held, in the classic words of Lord Halsbury,[193] that

> *in construing a statute [...] the worst person to construe it is the person who is responsible for its drafting [as] he is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, though, perhaps, it was not done.*[194]

For Driedger, although the text of the statute itself was central, a "literalist" approach was too narrow precisely because of the criticisms raised by Lord Halsbury. In attempting to construe a statute, it was incumbent upon the lawyer or judge to reconstruct what the draftsman intended to effect, and not simply "the language which in fact has been employed," through an examination of "the broad object and social purpose of the statute." Driedger's embrace of this approach would become more strident through his

[191] Driedger (1951), pp. 844-845
[192] Driedger (1951), p. 843
[193] This passage was paraphrased in Corry (1935), p.218.
[194] *Hilder v Dexter* [1902] AC 474 at 477 (H.L.). N.B. Lord Halsbury abstained from formally giving any judgement in the case as he "was largely responsible for the language in which the enactment is conveyed" (477-478); that enactment being the *Companies Act, 1900*, 63 & 64 Victoria, c.48, s.8, sub-s.2. Despite formally abstaining, he was keen to state that "I entirely concur with every word of them [the judgements of his colleagues]. I believe that the construction at which they have arrived was the intention of the statute. I do not say my intention, but the intention of the legislature" (477).

career, particularly after 1957 when the House of Lords embraced this view (and referenced Coke's words in *Heydon's case*) in *Prince Augustus:*[195]

> *In order to discover the intention of Parliament it is proper that the court should read the whole Act, inform itself of the legal context of the Act, including Acts so related to it that they may throw light upon its meaning and of the factual context, such as the mischief to be remedied, and those circumstances Parliament had in view. [...] It is the merest commonplace to say that words abstracted from context may be meaningless or misleading.*

In his 1974 opus on statutory interpretation, Driedger would succinctly describe this as "words must be construed in the light of the facts known to Parliament when the Act was passed."[196]

Although Driedger's approach to statutory interpretation in the early 1950s clearly diverged from the leading authorities of that era, his "ecumenical" approach to legal theory was already manifest. The more radical influences of Corry are clearly evident in his writings, yet the tone of his writing style is one which attempts to situate his approach as not a radical break from existing approaches, but "a new approach to statutory interpretation" that was evolutionary from existing approaches. Driedger was careful to only cite conservative authorities[197] and portrayed his more radical divergences not as blunt challenges to the existing approach (as did many of the adherents of the "newer constitutional law") but instead as a reinvigoration of classic reasoning. In sum, while

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[195] *Attorney General v Prince Ernest August of Hanover*, [1957] AC 436, per Lord Normand at 465.

[196] Driedger (1974), p. 123. N.B. In the second edition (1983), Driedger notes in a footnote (p. 149, fn. 1) that while the approach had been accepted by some lower courts in Canada, it had not been accepted by the Supreme Court of Canada (though, nor had it be explicitly rejected).

[197] N.B. While footnoting was exceptional amongst the lifetime compilation of Driedger's works, that "A New Approach to Statutory Construction" lack of footnotes was somewhat exceptional in his early (pre-1955) writings with "Legislative Drafting" (1949), "Retrospective Operation" (1950), and "The Preparation of Legislation" (1953) all containing the occasional citation to non-statute, non-case authorities.

intellectually radical, Driedger was temperamentally conservative; a combination which produced an analytical approach that sought out novel solutions to legal problems, but solutions that took pains not to formally break from the existing approaches. This purposive "New Approach" to statutory interpretation expressed by Driedger in 1951 would strengthen throughout his career and would be more boldly and elaborately expressed in his opus *Construction of Statutes*, where he would advocate approaches to statutory interpretation rejected by Canadian courts at the time of publication, but later enthusiastically embraced by the Supreme Court (and hence their eventual fondness for Driedger's *Construction of Statutes*).

THE REVISED STATUTES AND THE *BRITISH NORTH AMERICA ACTS*

In the 1950s, Driedger was probably the individual with the most encyclopaedic knowledge of Canadian statutes. He was one of the few members of the Statutory Review Commission[198] which produced the *1952 Revised Statutes of Canada* and, as its most junior member, he was likely the commissioner most familiar with the revised statutes (Driedger later claimed to have carefully read the entirety of the 1952 *Revised Statutes*).[199] Driedger was also the individual of his era most intimately familiar with the

[198] The other appointed members of the Commission were the Chief Justice (T. Rinfret), the Deputy Minister (F.P. Varcoe) and Assistant Deputy Minister (W.R. Jackett) of Justice as well as the civil service head of the Department of State (Undersecretary C. Stein). N.B. The Secretary of State was a cabinet portfolio that, after 1927, was used to coordinate various administrative tasks and was assigned various files and responsibilities that did not fall well into existing portfolios (prior to the appointment of the British High Commissioner to Canada in 1927 the Secretary of State was responsible for coordinating communications between London and Ottawa; the position was abolished in 1993).
[199] Driedger (1977), p. 304.

text of the British North America Acts, producing the first consolidation in 1956.[200] Updated versions of Driedger's work have been published with each new amendment to the British North America and Constitution Acts, and its most recent publication is a slim bilingual green tome[201] that rests on the bookshelf of most scholars of the constitution of Canada. Prior to that publication, legal practitioners and scholars had typically relied upon compilations of the various British North America Acts passed by Westminster, but which made no effort to consolidate the various alterations by Westminster, the Parliament of Canada, and the provincial legislatures[202] (often, such compilations also included a wide array of other constitutional instruments such as pre-confederation instruments, letters patent, orders-in-council, and selected statutes of the Parliament of Canada).[203] Driedger's effort in consolidating the British North America Acts (i.e. incorporating amendments, substitutions, and additions as well as identifying spent provisions) endowed him with a unique and comprehensive understanding of the language of the British North America Act.

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[200] E. A. Driedger (ed), *A Consolidation of the British North America Acts, 1867 to 1952* (Ottawa, Queen's Printer, 1956).

[201] Canada, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Department of Justice Canada, 2001).

[202] For example, Edmond Cloutier (ed), *British North America Acts, 1867 to 1951: preceded by a short introduction on Parliamentary Government and Constitution, and followed by the Statute of Westminster*. (Ottawa: Edmond Cloutier, 1952).

[203] For example, Edmond Cloutier (ed), *British North America Act and amendments, 1867-1948*. (Ottawa: Edmond Cloutier, 1948); or Maurice Ollivier (ed), *British North America acts and selected statutes: (together with pre-Confederation statutes and documents, a short historical review, a chapter on responsible government and a chapter on the years preceding Confederation; together also with many acts and orders in council relating to Canada and its Provinces; to which has been added the letters patent constituting the office of Governor General of Canada together with the commission and instructions, also the form of commission of an instructions to the Lieutenant-Governors. Abundant notes accompany all these statutes and documents), 1867-1962*. (Ottawa: R. Duhamel, Queen's printer, 1962).

CONCLUSION: THE POST-COLONIAL CRISIS

The *Statute of Westminster* provoked challenges to the foundations of the contemporaneous constitutional order. Its major effect in this regards at the imperial centre was to engender a re-examination of the nature of parliamentary sovereignty (both challenges to, and more strident apologies for, the orthodox view), while its major effect in Canada was to foster a school of constitutional thought that rejected parliamentary sovereignty in favour of constitutional supremacy. For Driedger, as an 'ecumenical' legal theorist in that milieu, self-embracing parliamentary sovereignty was the most congenial of these constitutional theories, as only it could account for Canada's recent constitutional evolution and provide for the desired constitutional innovations such as judicial review for rights guarantees while still remaining consistent with the pre-*Statute of Westminster* constitutional order.

In a British and Imperial context, continuing parliamentary sovereignty failed to not only provide for constitutional innovations seen by many as necessary to a modern state, but failed to convincingly account for developments in the law such as *Trethowan, Donges,* and the *Parliament Acts.* In the Canadian context, the constitutional supremacy of the *British North America Act* within the framework of Westminster's continuing parliamentary sovereignty proffered by the adherents to the "newer constitutional law" could not be logically sustained. Further, if consistently applied, the most rigid accounts of continuing parliamentary sovereignty – such as that at times proffered by Louis-Philippe Pigeon – would have even precluded Canada's autonomy under the *Colonial Laws Validity Act* and the *Statute of Westminster*.

Driedger would have found Hamish Gray's exposition on self-embracing parliamentary sovereignty in 1953[204] particularly convivial, as Gray portrayed self-embracing sovereignty as an evolution of – and not a challenge to – Dicey's doctrine of parliamentary sovereignty. In his analysis, Gray accepts Dicey's description of parliamentary sovereignty[205] as authoritative, but reformulates it in order to highlight qualifications unsatisfactorily explored in Dicey's *Law of the Constitution*:

> *Whatever Parliament (as from time to time constituted by law) enacts, in the manner and form prescribed by law, shall be the law where it is supposed to apply, and shall be applied and enforced by the courts of law in the United Kingdom; and whatever law Parliament may repeal in the appropriate manner and form will cease to be so applied and enforced.*[206]

Gray argues that Dicey's doctrine begs the questions "What is Parliament?" and "What is an Act of Parliament?" without satisfactorily answering them – or at least justifying his answer. Gray argues that answers to these questions cannot be found in the common law alone and instead that, in response to the first question, "Parliament is what it has declared itself to be by Act of Parliament," and, to the second question, "an Act of Parliament is a law enacted by Parliament in a particular form which may be prescribed by common law or by earlier Act of Parliament." As a result, "parliamentary sovereignty

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[204] Hamish R. Gray, "The Sovereignty of Parliament Today," (1953) *University of Toronto Law Journal* 10(1):54-72.

[205] "The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined, as under the English constitution, the right to make or unmake any law whatever that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament. A law may, for our present purpose, be defined as "any rule which will be enforced by the courts." [...] Some apparent exceptions to this rule no doubt suggest themselves. But these apparent exceptions, as where, for example, the Judges of the High Court of Justice make rules of court repealing Parliamentary enactments, are resolvable into cases in which Parliament either directly or indirectly sanctions subordinate legislation." Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 9th edition, ed. E C S Wade (London: Macmillan, 1952), pp. 39-40.

[206] Gray (1953), p. 57

is to be found in the fact that the courts recognize its existence as a legal doctrine."[207] For Gray, it was not that Dicey's determination of what was parliament and what was a statute that was incorrect, but that the then available authorities only provided contemporaneous descriptions of parliament and statutes. That is to say, for Gray, while authorities available to Dicey did not explore the fundamental principles defining parliament or a statute, more recent authorities did. Like Driedger's "modern principle," self-embracing parliamentary sovereignty provided the possibility of consistency with existing authorities while allowing for more effective adaptation to contemporary constitutional exigencies. ♦

[207] Gray (1953), pp. 57-58

Chapter Four – Drafting Bill C-60[1]

The election of the Diefenbaker government in 1957 coincided with the end of a long era of stability in the Department of Justice. Fulton's predecessor, Stuart Garson, had the longest continuous tenure – at eight years and seven months – as Minister of Justice in Canadian history[2] and Deputy Minister Frederick Varcoe marked the last of the

[1] Material for this and the following two chapters is drawn primarily from (1) Canadian Department of Justice legislation files, (2) cabinet minutes, (3) Diefenbaker Papers, and (4) Parliamentary debates. Most of this material has been deposited with Library and Archives Canada (LAC). However some material – either because it has not been deposited with LAC or because my request of access was denied – has been accessed indirectly through copies of material generously provided by Robert Belliveau. Strangely some Department of Justice material (including that deposited with LAC) was deemed suitable for public access in 1991, but was no longer deemed so in 2009.

- The relevant Department of Justice files include:
  - file 151913 which contains bill of rights study materials from the period from 1946 to 1953. [DOJ/151913]
  - file 157988 which contains materials related to the 1951 Senate Committee on Human Rights and Fundamental Freedoms. [DOJ/157988]
  - file 171644, which contains material for the use by the Minister in debates durin ghte years prior to the Diefenbaker government, mostly for countering demands by Diefenbaker and Coldwell for a Bill of Rights. [DOJ/171644]
  - file 180667 (including its supplement 180667-1 containing correspondences with the public), which is the most substantive file and was the Department of Justice's general file on the Canadian Bill of Rights. [DOJ/180667; DOJ/180667-1]
  - file 182000-29, which was the specific legislative file for the Canadian Bill of Rights for the 1958 session (i.e. Bill C-60) [DOJ/182000-29]
  - file 184000-27, which was the specific legislative file for the Canadian Bill of Rights for the 1959 session; [DOJ/184000-27]
  - file 186000-8, which was the specific legislative file for the Canadian Bill of Rights for the 1960 session (i.e. Bill C-79) [DOJ/186000-8]
- The Cabinet minutes are deposited with Library and Archives Canada as part of the Privy Council Office fonds, RG2, Privy Council Office, Series A-5-a, [Cabinet Minutes]

[2] Ernest Lapointe had a significantly longer tenure at eleven years and four months, but his tenure was divided into three distinct mandates.

decennial Deputy Ministers[3] with no successor serving longer than eight years. The period from the first Parliamentary debate on human rights and a bill of rights in May 1946 until Varcoe's retirement in 1957, the Department had only a single Deputy Minister and three Ministers (James Ilsley,[4] Louis St-Laurent[5], and Stuart Garson[6]). During this period, both the Mackenzie King and St-Laurent governments remained – along with their senior subalterns in the Department of Justice – implacably opposed to a bill of rights.

THE OLD POLICY

One of the main forces behind this resistance was the highly effective Deputy Minister Frederick Varcoe, who gave no concessions to the demands for a bill of rights. Shortly after the first parliamentary debate on human rights began in May 1947, he produced a memo outlining a series of – sometimes contradictory – arguments against a bill of rights.[7] He inveighed against any such bill as a "transfer of the problem of freedom from Parliament to the courts," yet equally argued that "so far as binding Parliament is concerned, this cannot be done." He argued that a "bill of rights," which only took "the form of a Declaration by Parliament that certain rights would not be interfered with, but there being no sanction or remedies," would have no effect except

[3] Frederick Varcoe retired on 30 April 1957 after nearly sixteen years as deputy minister.
[4] Rt. Hon. James Lorimer Ilsley served as Minister of Justice from 10 December 1946 to 30 June 1948.
[5] Rt. Hon. Louis Stephen St-Laurent served as Minister of Justice from 10 December 1941 to 10 December 1946 and again from 1 July 1948 to 15 November 1948, at which point he became Prime Minister.
[6] Hon. Stuart Sinclair Garson served as Minister of Justice from 15 November 1948 to 21 June 1957.
[7] W. R. Jackett, "Memorandum re: Considerations to be taken into account in determining whether Parliament should enact a statute to protect civil rights of Canadians," 15 June 1946 (DOJ/151913).

perhaps to give moral suasion to disallowing provincial statutes. Yet in the next paragraph he cautioned that

> *Such a Bill in declaratory form might be taken to be an interpretation of the constitution, a function which I clearly think does not belong to Parliament, or at any rate has not been exercised by Parliament, the courts being looked to exclusively in this connection.*

In general, however, he saw that there was no conceivable need for a bill of rights in federal legislative jurisdiction and, although, one might be desirable in provincial jurisdiction, it would trample on provincial rights. He concluded that the only sort of 'bill of rights' that could be envisioned was not one of limiting the legislature through judicial review, but an instrument more akin to a human rights code that would provide for "penalties for breach[ing] the statute [and] would be justifiable, if at all, as criminal law."

Initially, Varcoe followed this critique by directing one of his subordinates to compile materials denying the wisdom and efficacy of bill of rights.[8] The result was a memorandum that concluded that in normal periods "English courts make good any defect in formal enunciation of constitutional principles by their jealous readiness to safeguard the rights of individuals" and that during times of emergency bills of rights are less effective and do not protect minorities.[9] Varcoe added to these criticisms of the wisdom and efficacy of a bill of rights by arguing that it would (citing Thomas Jefferson)

[8] F.P. Varcoe, "Memorandum for Mr. MacLeod, Re: Proposed Bill of Rights," 21 December 1946 (DOJ/151913).

[9] A.J. Macleod, "Memorandum for the Deputy Minister," 13 January 1947 (DOJ/151913).

be undemocratic to impose restrictions on later generations and that courts were not the "proper arena" for "the battles for political freedom."[10]

Yet, with agitation for a bill of rights mounting, Varcoe began to focus on legal barriers to a bill of rights instead of arguing against its wisdom and efficacy which was having little resonance. Varcoe would go on to author memoranda that focussed on the issue of the "Supremacy of Parliament" and arguing that the *British North America Act* "cover[s] the whole area of self-government within the whole area of Canada" and that there can be no limitations on legislation in Canada which a bill of rights would entail.[11] He further added that "Disallowance was the constitutional means contemplated in 1867 whereby abuses by the provincial legislatures were intended to be checked."[12]

In an article published in the *Canadian Bar Review* in 1949,[13] Frank Scott attacked the argument that the supremacy of Parliament was foundational to Canada's constitution and noted a number of restrictions on the supremacy of Parliament that "make the beginnings of a Bill of Rights," including the guarantees of annual sessions of Parliament and the use of both English and French in Parliament. Scott argued that "every one of these rules protects a fundamental freedom, and every one is a limitation on the sovereignty of either the Dominion Parliament or the provincial legislatures, or both." These sentiments were echoed by other public intellectuals such as A.R.M. Lower.[14] In

[10] F.P. Varcoe, "Memorandum, Re: Canadian Bill of Rights," 12 June 1947 (DOJ/151913).
[11] F.P. Varcoe, "Memorandum, Re: Bill of Rights," 2 June 1947; F.P. Varcoe, DOJ 151913 "Memorandum, Re: Bill of Rights," 2 July 1947 (DOJ/151913).
[12] F.P. Varcoe, "Memorandum, Re: Bill of Rights," 2 July 1947 (DOJ/151913).
[13] Frank Scott, "Dominion Jurisdiction over Human Rights and Fundamental Freedoms," (1949) *Canadian Bar Review*, 27:497-536.
[14] F. P. Varcoe, "Memorandum for the Minister of Justice," 18 February 1950 (DOJ/157988).

response to these claims, Varcoe would pen a series of memoranda countering Scott's arguments. Varcoe retorted that although restrictions on Parliamentary Sovereignty do exist in the *British North America Act*, "none of the existing restrictions are in the nature of a 'Bill of Rights,' and the argument, it appears to me, is irrelevant."[15] When pressed to elaborate, Varcoe explained that the "the only restrictions in the B.N.A. Act [...] rise from the fact that our system is federal [or ...] are there to maintain the sovereignty of Parliament rather than the reverse. Typical of these are sections 53 and 54 - which give the House of Commons control of expenditure and taxation."[16]

In face of the retorts that if a bill of rights as an amendment to the *British North America Act* was not feasible, either due to provincial resistance or even supposed constitutional impossibility or inappropriateness, then a statutory bill of rights should be adopted. This was equally rejected by the Department of Justice of this era. A statutory bill of rights was that which was proposed by Diefenbaker as well as the favoured option of the 1950 Senate Committee on Human Rights and Fundamental Freedoms. However, an analysis by Department of Justice officer D.H.W. Henry expanded on Varcoe's early comment that a federal statute would act as an interpretation of the division of powers and argued that such a statute would be an assumption by Parliament of the power to interpret the constitution. Such a statute would bind the provincial legislatures by declaring what was understood by the Department of Justice of the era as an area of divided jurisdiction as subsequently being solely within federal jurisdiction, thus "binding the provincial legislatures." Yet because of Henry and Varcoe's approach to

[15] F. P. Varcoe, "Memorandum for the Minister of Justice," 18 February 1950 (DOJ/157988).
[16] F. P. Varcoe, "Memorandum for the Minister of Justice," 22 February 1950 (DOJ/157988).

implied repeal and the supremacy of Parliament, they argued that such a statute could not in any way provide for judicial review of federal statutes[17] (note the similarities to the arguments made by Bora Laskin and Louis-Philippe Pigeon in 1959 discussed below).

The most consistent attitude of Varcoe during this era was one of incredulity at the idea that a bill of rights was in any was conceivably needed to protect against rights violations by the federal Parliament. With Varcoe once dismissively stating at the end of the major demands for a bill of rights that "with all the ballyhoo about a Bill of Rights, not a single example of encroachment or failure to provide remedies – at any rate in the federal field – is ever put forward."[18] Although readily admitting that violations do occur within provincial legislative jurisdictions, Varcoe rejected the accusations of any civil rights violations, excepting those that were required for the proper conduct of the War. Instead, Varcoe was of the opinion that if there ever was a federal statute that violated rights, the appropriate solution was not the creation of a bill of rights in order to provide for judicial review of such legislation, but that "there is, of course, no need to pass the Bill of Rights. All one has to do is repeal any existing statute that offends and refrain from enacting anything in the future."[19]

Throughout Varcoe's long tenure as Deputy Minister of Justice, he remained implacably opposed to a bill of rights and maintained three principal arguments opposing any bill of rights. First, Varcoe argued that there should be no restriction on the legislative powers as that would be contrary to the inviolable principle of the supremacy

[17] D.H.W. Henry, "Memorandum for the Minister of Justice, Re: Human Rights and Fundamental Freedoms," 15 January 1949 (DOJ/157988).
[18] F.P. Varcoe, "Memorandum to the Minister," 10 March 1952 (DOJ/157988).
[19] W. R. Jackett, "Memorandum re: Considerations to be taken into account in determining whether Parliament should enact a statute to protect civil rights of Canadians, 15 June 1946 (DOJ/151913).

of parliament. Second, Varcoe argued that a bill of rights in statutory form would only place restrictions on provincial legislatures and would not protect against implied repeal by the federal parliament. Third, Varcoe argued that the federal parliament did not represent any threat to human rights.

During Varcoe's tenure, the only sort of "bill of rights" considered by the Department of Justice was one that would in no way restrict legislative action of any federal, provincial or municipal government. Instead, consideration was only given to a "bill of rights" that would restrict the activities of individuals under the criminal law power, but put no limitations on the sort of legislation that could be passed by legislatures. Varcoe directed E.A. Driedger to produce such a draft in 1948.[20] This first "bill of rights" drafted in the Department of Justice criminalized any person who "obstruct[ed] or prevent[ed]" fundamental freedoms ("free exercise of religious worship," "peaceable assembly," freedom of the press, and freedom of speech) under the summary conviction section of the criminal code or by indictment, but only "at the election of the Attorney General of Canada." This draft produced by Driedger was exceedingly rough and it does not appear to have been significantly discussed in the department at the time.

However, the draft was revived and significantly edited in 1952 in the belief that some sort of "bill of rights" would be necessary to appease the growing human rights movement of the early 1950s. This draft[21] was augmented with an extensive preamble written by D.W. Mundell[22] but was substantially weakened by the addition of two further clauses. The first was a blanket immunization to government officials against

[20] E.A. Driedger, "Memorandum for the Deputy Minister," 16 February 1948 (DOJ/151913).
[21] Rt Hon Louis St-Laurent Papers MG 26 L, vol. 86, file C-19-1-A.
[22] D.W. Mundell, "Preamble," 19 September 1952 (DOJ/157988).

prosecution under the Act where it is established that "the act complained of was lawfully done in the exercise of a right or the performance of a duty pursuant to a valid law" and a second clause that forbid any litigation under the Act "without the consent in writing of the Attorney General of Canada or of the Attorney General of the Province within which the offence is alleged to have been committed." Such an Act, although proposed to be titled *The Canadian Bill of Rights*, would provide almost no rights protection.

The last discussion of any significance in Parliament of a bill of rights prior to the election of the Diefenbaker government in 1957, was the debate in February 1955.[23] In what had become an almost annual ritual, Diefenbaker once again moved that the House of Commons consider a declaration to ensure fundamental freedoms. As per usual, Diefenbaker read into *Hansard* an abridged version of Senator Roebuck's proposed bill of rights and provided a long list of human rights violations by the recent Liberal governments. Notably, Diefenbaker made reference to recent Supreme Court rulings and argued that the government's avoidance of the issue due to jurisdictional concerns was simply a bad excuse as "civil liberties were outside provincial competence." [24] Justice Minister Stuart Garson largely avoided addressing the criticisms and attempted to deflect the criticism through a McCarthyesque *ad hominem* attack:

> *With the exception of the communists, who are very prominent supporters of a bill of rights in Canada, all these men and women are estimable citizens . [...] the only party that I know of in Canada which denies human rights to the individual is the communist party. Yet there is no political party or organization in Canada today which is more active than the communist part in its support of a bill of rights. Why? Because I suggest that a Canadian bill of rights would suit the interests and plan of that party.* [25]

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[23] *Debates* 22-2 (1955), I:895 (7 February 1955)
[24] *Debates* 22-2 (1955), I:902 (7 February 1955)
[25] *Debates* 22-2 (1955), I:906 (7 February 1955)

JACKETT PREPARES FOR A NEW POLICY

With the election of the Diefenbaker Conservatives in 1957, the newly appointed Deputy Minister Wilbur R. Jackett immediately began to prepare the government's inevitable demands for a bill of rights. (Diefenbaker had immediately demanded that the Department of External Affairs examine the "ratification" of the Universal Declaration of Human Rights by other countries. They reported that although some countries had subsequently incorporated articles from the UDHR into their constitution or other domestic human rights instruments, no country had "ratified" the UDHR.)[26] Jackett immediately directed D.H.W. Henry – who had hitherto been one of the department's officers most involved in the question of a bill of rights – to compile an outline of a history of the consideration of a Bill of Rights; this compilation was submitted to the deputy minister on 27 June 1957,[27] six days after the appointment of Fulton as Minister of Justice. This material would be revised in October in response to extra-parliamentary demands for a bill of rights by CCF leader James Coldwell[28] (his Parliamentary demand for a bill of rights would only come in January 1958[29]) and again in December as background material for the Minister. It was only in this last revision that a departmental memorandum first included significantly positive reasoning for the promulgation of a bill of rights.[30]

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[26] G.B. Summers, "Memorandum for the Prime Minister, Re: Human Rights," 3 October 1957 (DEA/5475-W-15-40).
[27] D.H.W. Henry, "Memorandum for the Deputy Minister, Re: Bill of Rights," 27 June 1957 (DOJ/171664).
[28] D.H.W. Henry, "Memorandum, Re: Bill of Rights," 30 October 1957 (DOJ/180667).
[29] M. J. Coldwell (Rosetown-Biggar), *Debates* 23 (1957-58) III: 2877 (6 January 1958).
[30] D.H.W. Henry, "Memorandum, Re: Bill of Rights," 16 December 1957 (DOJ/180667).

FULTON SETS A NEW COURSE

On December 16th 1957, the Minister of Justice sat down for the first time with his deputy minister (as well as D.H.W. Henry) to discuss the bill of rights.[31] Three alternatives for a bill of rights were presented to the Minister at this meeting, (1) "a constitutional amendment such as that proposed by Mr. Coldwell," (2) "a statute or declaration enacted by Parliament such as that proposed by Mr. Diefenbaker," or (3) a "statute enacted by Parliament having the effect of an interpretation act which would enact the principle that dominion statutes are to be interpreted as not intending to abridge fundamental rights and freedoms unless expressed to be enacted notwithstanding the Bill of Rights." Whether Jackett at this stage believed that such "an interpretation act" would provide for judicial review is unclear. Fulton's response at this meeting and a memo from the following April[32] seems to indicate that Jackett's suggestion was more along the lines of a canon of construction as opposed to an instrument providing for judicial review. In December, Fulton responded that he would "favour a Dominion statute [...] enacting substantive law" and not necessarily "being in the nature of an interpretation act such as Mr. Jackett suggested," with the memo from the following April noting that "it was tentatively suggested that the Bill might take the form of an interpretation act and you [Fulton] asked us to draft such an act as well as a Bill in the form of an ordinary statute." [33] At this time, Fulton also maintained that any such drafts should be prepared so that they would be "suitable to be submitted to the Supreme Court." However, Fulton

[31] D.H.W. Henry, "Memorandum for File, Re: Bill of Rights," 17 December 1957 (DOJ/180667).
[32] W.R. Jackett, "Memorandum for Deputy Minister: 180667," 21 April 1958 (DOJ/180667).
[33] W.R. Jackett, "Memorandum for Deputy Minister: 180667," 21 April 1958 (DOJ/180667).

noted at this time that any draft would be "submitted to a parliamentary committee in order to have the benefit of the members views."[34]

BRINGING IN THE STATUTORY DRAUGHTSMAN

In March 1958, during the election campaign for the twenty-fourth Parliament, Jackett circulated a very rough draft of a bill of rights along with an explanatory memorandum to D.H.W. Henry and Driedger for comment.[35] In a broad sense, this draft bill's structure was very similar to what would eventually become the *Canadian Bill of Rights*. Jackett's explanatory memo indicates that he was proposing an instrument that would provide for judicial review:

> *It must be borne in mind that the effect of enactment by Parliament of a measure such as that contemplated by the attached draft would have the effect of transferring to the courts, and presumably particularly to the Supreme Court of Canada, the determination of the precise effect of general words used to describe our human rights and fundamental freedoms. While Parliament is, in one sense of the word, transferring what might be regarded as a legislative authority to the courts, I suggest that it is preferable to a constitutional amendment which would not only transfer the authority to the courts, but would transfer to the Imperial Parliament the power to change any decision of the courts.*

That the draft bill was intended to provide for judicial review was clearly understood by Driedger, as illustrated by his analysis of Jackett's draft bill:[36]

> *The suggested draft incorporates phrases and expressions that are used in the United States Constitution. The result, I feel certain, would be that the courts would examine and probably apply jurisprudence of the United States. I think it is necessary to examine the provisions of the United States Constitution, particularly the "due process clause" to see what principles are applied in testing the validity of legislation in the United States. The*

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[34] D.H.W. Henry, "Memorandum for File, Re: Bill of Rights," 17 December 1957 (DOJ/180667).
[35] W.R. Jackett, "Memorandum for Messrs. Driedger, Henry, and Miss Ritchie, Re: Bill of Rights," 27 March 1958 (DOJ/180667).
[36] E.A. Driedger, "Memorandum – Re: Bill of Rights," 28 March 1958 (DOJ/180667).

> *effect of section 3 of the Bill may well be to amend existing law, but we would not know the extent of the amendment until the Supreme Court had given a decision.*

Concerned that Jackett might not be seeking a bill providing for judicial review, Driedger proposed two other options for making legislation conform to a human rights instrument without it coming before the courts. First, placing such responsibility in the hands of the Department of Justice and forbidding the department from producing any draft legislation that did not conform to a human rights instrument. Second, making the Speaker responsible for ensuring that legislation conforms to a human rights instrument (either by an amendment to the Standing Orders or else by enacting a statute on the lines of section 54 of the *British North America Act*[37]). From this point onwards, all drafts of the *Canadian Bill of Rights* came under the hand of Driedger and D.H.W. Henry ceased to be consulted on issues related to the *Canadian Bill of Rights* (despite Henry remaining in the department until September 1960).

The overwhelming victory of the Diefenbaker Conservatives a few days later in the general election on 31 March 1958 ensured that the question of a bill of rights would be addressed. However, it appears that the issue initially remained a "parochial" concern of Diefenbaker and Fulton as no mention of the bill of rights appears in the initial Cabinet discussions for the upcoming throne speech,[38] with the issue only being first broached in Cabinet a few weeks later when the legislative program for the upcoming session was discussed on 21 April 1958.

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[37] Section 54 of the *British North America Act* demands executive consent for the introduction of money bills. The near identity between these two options is illustrated by the fact that the inclusion of section 54 in the British North America Act is actually rather anomalous, as that requirement is provided for in the Standing Orders of the Westminster Parliament and the provincial legislatures.

[38] Cabinet Minutes, 3 April 1958.

During April, the foundations of what would become the *Canadian Bill of Rights* came solidly together. Driedger had completed his first draft by April 8th and supplemented it with an explanatory memorandum to the Deputy Minister on April 16th.[39] The language Driedger used was clear and explicit. His draft bill was intended to function like a constitutional instrument that could be used to invoke the judicial review of other statutes:

> *Under the "due process" clause property cannot be confiscated without legal investigation and adjudication, and accordingly statutes giving liens in priority to pre-existing claims may be held to be* ultra vires.

He cautioned that due to the draft bill's functionally constitutional impact that it may be wise to redraft it so as to immunize extant statutes and have it only apply to future statutes:

> *The impact of a bill of rights on existing law could produce many changes in the law, changes that would not be known until the courts had decided what they were. It might be desirable to apply a bill of rights to future laws only, and to change existing law only in the normal way, i.e. by specified Parliamentary amendments.*

A week later Driedger's analysis would be incorporated into a memorandum by Jackett for the Minister.[40] Jackett recounted what appears to have been a disagreement between himself and the Minister in December when he proposed something more akin to a statute providing for a canon of construction, whereas Fulton had demanded a statute that would provide for judicial review:

> *We have developed a Bill which is something more than an interpretation act and which is the most effective form of Bill of Rights that we have been able to conceive.*

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[39] E.A. Driedger, "Memorandum for Deputy Minister: 180667," 16 April 1958 (DOJ/180667).

[40] W.R. Jackett, "Memorandum for Deputy Minister: 180667," 21 April 1958 (DOJ/180667).

Jackett made it very clear that the draft bill was not on the model developed under the St-Laurent government that would have operative effects upon individuals. Instead, the draft presented to the Minister was intended to control federal legislation:

> *it can, for the future, amend all laws heretofore enacted by requiring that they be construed as not encroaching on the "rights" and "freedoms", and it can require that all laws hereafter enacted be similarly construed.*

Jackett added that, since the purpose of the law was only to affect other federal legislation and not to act directly upon individuals, there was no need for a reference to the Supreme Court since there would then be no question over the division of powers: the bill was making no claim to clarify or expand the current legislative jurisdiction of the federal parliament, only control federal legislation.

Yet, expressing his own reticence with something more powerful than a canon of construction, Jackett cautioned that "you may consider that it [the draft bill] cuts too "blindly" into our present laws." Jackett would then go on to repeat the Department of Justice's historic concerns over a bill of rights that would provide for judicial review of legislation:

> *This can be regarded as a transfer by Parliament to the Courts of the task of determining the precise ambit of the "rights" and "freedoms."*
>
> *The creation of these overriding rules applicable to presently existing laws will create uncertainty as to the state of the law where certainty now exists with resulting possibilities of expensive litigation [...]*
>
> *The amendment of the existing law by general words may create unforeseen results which are undesirable. (e.g. it might abolish hearings in camera by military courts martial or in cases of juvenile delinquency and it might substantially change our law about contempt of court).*

Jackett also noted that the addition of the general derogation clause for any legislation "that makes provision for the security, defence, peace, order, and welfare of Canada in the event of real or apprehended war, invasion, or insurrection" was added against

Fulton's instructions that there should not "be any exception contemplated in this Bill but [that] there might be an emergency powers bill as a comparison [*sic*] bill." (In response to Fulton's concerns over the blanket derogation clause for security legislation, over the next few weeks Driedger redrafted the bill to removing the offending clause[41] and added in new clauses[42] that specifically exempted the *War Measures Act* and the *Defence Production Act* from the draft *Canadian Bill of Rights*.)

Jackett's memo quoted Driedger's almost in full, while adding his own commentary. This represented the beginning of an accelerating pattern, where the substantive analysis would be drafted by Driedger in a memorandum to the Deputy Minister. Jackett would then abridge Driedger's arguments for presentation to the Minister. Finally, Fulton would present those views to Cabinet or to the Prime Minister. The constitutional thinking that underpinned the *Canadian Bill of Rights* as it was drafted was consistently – and increasingly exclusively – founded upon Driedger's comprehension of statutory construction and constitutional interpretation.

On May 10th, Fulton presented the draft bill of rights written by Driedger at the beginning of April (i.e. including the general derogatory clause for security legislation) to Cabinet.[43] Fulton was clear that he was presenting an instrument that would amend extant legislation and curtail future legislation (i.e. provide for judicial review) and not simply provide for a more human-rights-favourable canon of construction. Fulton described section 3 (equivalent to section 2 in the eventual *Canadian Bill of Rights*) as giving the "detailed rules developed from the primary 'rights' and 'freedoms' [...]

[41] Draft Bill of Rights, 29 April 1958 (DOJ/182000-29)
[42] Draft Bill of Rights, 7 May 1958 (DOJ/182000-29)
[43] Cabinet Minutes, 10 May 1958.

overriding effect" that would "for the future amend all laws heretofore enacted" and "require that all laws hereafter enacted be similarly construed, unless of course they specifically provided to the contrary." Fulton went on to explain to Cabinet that "it was likely that Canada had statutes or statutory provisions that would not in all respects meet the tests of proper legislation" and "a Bill of Rights imposed on existing law would no doubt make some changes in the law" and that "*if some statutory provisions or regulations were casualties, it would probably be all to the good*."[44] He, however, cautioned that exceptions for security legislation were necessary and "there were, however, two important exceptions," to his belief that there should be some "casualties" amongst extant legislation "namely, the *War Measures Act* and the *Defence Production Act*, both of which authorized orders that could be said to infringe the Bill of Rights." Fulton also repeated his deputy's advice that "there would seem to be no reason for a reference to the Supreme Court of Canada."

During the following discussions in Cabinet, concern was raised over the use of the language that the enumerated rights "have always prevailed" in Canada, because it was viewed as inaccurate and might be taken as an admission by the current government that the actions taken by the previous government did not infringe the rights enumerated in the draft bill. As such, Cabinet demanded that new language be drafted to replace that term. Secondly, Cabinet expressed its dismay over the term "enacted before or after the commencement of this Act" used in the draft bill which seemingly purported to "bind a future Parliament." Although it was explained that the language was employed so as to affect future legislation and was not intended to bind legislation that expressly sought to

[44] Emphasis mine.

override the proposed bill of rights, there was no equivalent to the "notwithstanding" clause. Cabinet did approve the general structure and purpose of the draft bill of rights, though it sought new language for the specifically critiqued sections. With this tentative approval, the decision to proceed with the bill of rights was announced in the Throne Speech two days later on May 12th.

Whereas there had been no mention of a bill of rights in the Diefenbaker's first Throne Speech in October 1957, it featured in the May 1958 Throne Speech with the succinct note that, "My government will propose to you the enactment of a bill of rights to safeguard the rights of all persons in Canada in respect of all subjects within the jurisdiction of Parliament."[45] At this juncture, Diefenbaker briefly justified the proposed bill of rights as being part of a general programme of parliamentary reform and to uphold Canada's international commitment to Human Rights. Notably, the Leader of the Opposition, Lester Pearson, made no comment on the proposed bill of rights and only one Liberal MP, H.J. Robichaud (Gloucester), spoke to the issue in the reply to the Speech from the Throne:. Robichaud considered the proposal for a bill of rights to be a waste of Parliament's time as "Canadians have enjoyed since the early days of our constitution a maintenance and preservation of freedom probably unequalled in any other free country of the world" and that the government should instead concentrate on more urgent matters dealing with the welfare and general economy of the Canadian people. He concluded with the statement that "the British North America Act safeguards the rights of all Canadian citizens irrespective of racial origin; and all Canadians are proud of this act

[45] *Debates* 24-1 (1958), I:5 (12 May 1958).

which has given us, as I have just said, a freedom probably unequalled in any other free country."[46]

On the day of the Throne Speech, Driedger produced a memo for Fulton addressing the concerns raised in Cabinet two days earlier[47] (N.B. the analysis in regards to the draft bill came to the Minister directly from Driedger and was not filtered through the Deputy Minister). On the issue of the use of the phrase "have always prevailed," Driedger responded that

> *We had used the word "prevail" in the sense of being prevalent or current; but the word "prevail" also means to have ascendancy, and used in this sense I can well see the force of the criticism* [*that it "might be construed as an admission by the present government that actions taken by a previous government did not infringe the fundamental rights and freedoms met forth in this Act"*].[48]

He then proposed "that we simply substitute the word 'exist,'" but at this time he only gave the written explanation that "to say that they [rights] have existed does not imply that they have always been respected." Driedger, however, had already developed a strong reputation as the leading statutory draftsman who was "skilled at expressing [legislative enactments] precisely and concisely"[49] and it is unlikely that he was unaware of the legal meaning associated with the word "existing" as defined in standard legal dictionaries of the time. Both *Black's*[50] and *Bouvier's*[51] of the era giving the same definition:

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[46] *Debates* 24-1 (1958), I200-201 (19 May 1958)
[47] E.A. Driedger, "Memorandum for Minister of Justice, Re: Bill of Rights," 12 May 1958 (DOJ/180667).
[48] E.A. Driedger, "Memorandum for Minister of Justice, Re: Bill of Rights," 12 May 1958 (DOJ/180667).
[49] Pound (1999), p. 314
[50] Henry Campbell Black, *Black's Law Dictionary*, 3rd edition (St. Paul, MN: West Publishing, 1933), p. 722.

> *The force of this word is not necessarily confined to the present. Thus a law for regulating "all existing railroad corporations" extends to such as are incorporated after as well as before its passage,*

Or as Driedger would later describe:

> *since the law is always speaking, "existing" in a statute means existing when the statute is read. A new right, arising, say, five years hence, would at that time be an existing right within the meaning of the provision.*[52]

Further, it is clear from Driedger's commentary that when he changed the term from "prevail" to "exist" he was not conceding a change in his original intended meaning of "prevalent or current;" that is to say there was no indication that the word "exist" was in any way intended to limit the meaning of the enumerated rights to their contemporaneous definition. The word "exist" has a particular legal meaning and there is no indication that Driedger would have been so sloppy as to employ it contrary to its standard definition.[53]

On the issue of whether his draft bill attempted to "bind parliament," Driedger makes clear the applicability of the *Canadian Bill of Rights* to future legislation as

> *Clause 3 deals not only with future Acts of Parliament and regulations, but also to existing Acts of Parliament and all laws within the jurisdiction of Parliament; this would include pre-Confederation laws and also the common law.*

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[51] Francis Rawle, *Bouvier's Law Dictionary and Concise Encyclopedia*, Third Revision (Kansas: Vernon Law Book Company, 1914), vol. 1, p. 1155.

[52] Driedger, Elmer A. "The Canadian Charter of Rights and Freedoms." (1982) *Ottawa Law Review* 14:336-378, p. 370.

[53] It is notable that the phrase "prevailing" was absent from most of the leading legal dictionaries of the era such as, *Black's* (1933), *Bouvier's* (1914), *Stroud's* (1952), Jowitt's *Dictionary of English Law* (1959), and Sanagan and Drynan's *The Encyclopedia of Words and Phrase, Legal Maxims* (1940) and only appeared in *Judicial and Statutory Definitions of Words and Phrase* (1914) which defined "the word 'prevailing' having no technical meaning and as used signifying that which is common, in operation, or prevalent."

He, however, retorts that despite the draft bill's practical limiting effects, it "is, *in the last analysis*, directed to the judiciary rather than to the legislature."[54] Thus, the clause is intended to prevent implied repeal; that is, although the legislature could expressly alter the proposed Act, the judiciary was never to impute that intent except if it was explicitly declared.

RECONCILING RIGHTS AND SECURITY

The final issue that Driedger addressed in his memo of 12 May was the issue that would largely retard progress on the bill of rights during the 1958 session: the question of reconciling security legislation with the proposed bill of rights. Whereas the April draft of the bill had contained a general derogation clause for security legislation, Driedger noted that he was working on specific amendments to, and exemption from, the *War Measures Act* and the *Defence Production Act* that were more in line with Fulton's and Cabinet's concerns over all-powerful security legislation. In advance of the May 27th Cabinet meeting, Driedger prepared a formal draft *Canadian Bill of Rights* acceptable for introduction into Parliament, complete with not only the amendment clauses for the *War Measures Act* the *Defence Production Act* but including details such as marginal notes.

Thus, the *War Measures Act* was the main issue in controversy during the discussion of the bill of rights at the May 27th Cabinet meeting.[55] The question was made narrower for Cabinet as the Public Works Minister announced that the offensive sections in the Defence Production Act were to be repealed. However, on the question of the *War Measures Act*, it was agreed that there must be some sort of "saving clause in respect of

[54] Emphasis mine.
[55] Cabinet Minutes, 27 May 1958.

the War Measures Act" as it "was clearly required in times of emergency." Cabinet discussed four general options.

The first option was a general derogation clause ("omnibus exception" clause as termed in the minutes) that had appeared in the April draft bill. However, this option was rejected as "to provide an exception for the War Measures Act in the Bill of Rights would be starting immediately to make exceptions to a fundamental bill and it appeared to be an "omnibus" exception of the type to which the Conservative Party had objected in opposition."

The second option was to strike out the phrase "before the commencement of this Act" so as to immunize all pre-existing legislation from the effects of the *Canadian Bill of Rights*. This option, too, was rejected as it "would greatly weaken the Bill of Rights because it would then only apply in future to the amendments passed each year."

The third option mooted was to amend the *War Measures Act* after the *Canadian Bill of Rights* had been enacted that would explicitly exempt itself from the *Canadian Bill of Rights*. This third option was rejected because it "would lead to a serious debate on that act, and the charge that laws were being passed immediately after the Bill of Rights which over-rode it."

Thus, it was the fourth option which Cabinet adopted. This option entailed temporary exceptions for "orders and regulations made under the War Measures Act" that would "permit them to be reviewed by Parliament" through a section of the *Canadian Bill of Rights*.

The second issue addressed during discussion of the bill of rights at the May 27th Cabinet meeting was a proposal by Prime Minister Diefenbaker to include a "freedom to

work" listed along with freedom of speech, etc. in the bill. Diefenbaker sought the inclusion of such a freedom as a step that "might be taken toward ultimate restriction upon the wide powers of labour unions." Diefenbaker, however, expressed reticence about his proposal given the potential reaction "in labour circles" to such a freedom. Cabinet decided that such a freedom should not be included in the bill of rights at this time, but, alas, the minutes do not record the reasoning (if any) other than the fact that it "would require study by various groups and would present many problems."

The May 27th Cabinet meeting illustrated two important developments. First, the debate clearly illustrated that Cabinet understood that the proposed bill of rights was not to simply be a canon of construction, but that laws – both pre-existing and future – were to be limited by the *Canadian Bill of Rights* unless they expressly held otherwise. Second, there was relatively limited involvement or influence of Diefenbaker on the development of the project which he was championing. Examination of including the "freedom to work" never appears in the Department of Justice files on the *Canadian Bill of Rights*, either before or subsequent to this Cabinet meeting, indicating that Diefenbaker never directly requested the Department to consider the issue, nor did Fulton feel any obligation to pass on to his Department the Prime Minister's concern over this issue, with the question being entirely disposed of in Cabinet.

Despite the lapsing of any problems with the *Defence Production Act*, potential issues with a number of other instruments other than the *War Measures Act* were raised by the departments of National Defence, Revenue, and External Affairs such as the military code of discipline. As a result, for the June 6th Cabinet meeting, Fulton asked that Cabinet chose between two drafts, "Draft B" containing the general derogation

clause from the April draft bill or "Draft A" restricted to specific amendments to the War Measures Act alone. Fulton argued that Cabinet should opt for "Draft A" and amend other legislation to bring it in line with the *Canadian Bill of Rights*. However, cabinet demurred due to concerns raised by the Ministers of National Defence and National Revenue and the Secretary of State for External Affairs and opted to defer from taking any decision until the concerned departments could produce a report on the matter. The result was Cabinet only (again) opted against a general derogation clause for security legislation at the end of July.[56]

Throughout August, it remained the government's hope to both introduce and pass the *Canadian Bill of Rights* during the 1958 session. As late as August 22nd, Diefenbaker insisted in the House of Commons that the Bill of Rights would be introduced "this session, and my hope is that the legislation will receive the support of the house and of the other place [the Senate]."[57] However, obtaining that increasingly remote goal was effectively killed in Cabinet on August 26th when Diefenbaker raised two concerns with the draft bill.

First, he was concerned with the phrase "shall take such steps as appear to him [the Minster of Justice] to be necessary" in clause 4, as it "would imply a derogation of the rights of Parliament."[58] In Diefenbaker's view, this provision "seemed to substitute the Minister of Justice and his department for Parliament and the judiciary as the protectors of human rights and fundamental freedoms." Diefenbaker's main priority in advocating for a bill of rights had always been to restrict the power of the executive and

[56] Cabinet Minutes, 24 July 1958.
[57] *Debates* 24-1 (1958), IV:3930 (22 August 1958)
[58] Cabinet Minutes, 26 August 1958.

to give greater power to the executive at the expense of parliament, even under the pretence of protecting human rights, was anathema to him. Notably, however, was his equal concern with the potential restrictions on the power of the judiciary in regards to the matter, putting the lie to the claim that Diefenbaker's goal was to strengthen Parliament at both the expense of the executive *and* the judiciary. Second, Diefenbaker noted the lack of a non-derogation clause for rights not enumerated in the draft bill; that "there was no reference to the fact that such enumeration was not to be construed to deny or disparage other rights and freedoms retained by the people. Cabinet agreed with Diefenbaker on both concerns and demanded that the bill be redrafted in accordance with the two concerns raised by Diefenbaker.

The Department of Justice worked quickly and material was prepared for a Cabinet meeting the following day. Diefenbaker, too, brought his own proposed amendments to the draft bill to satisfy his concerns. Cabinet, however, opted for the revisions developed by the Department of Justice and presented by Fulton. Yet given the late date and doubts due to the late re-drafting, Cabinet abandoned making any attempt to enact the legislation during the 1958 session and instead opted to have it introduced only for public comment and to bring the matter forward in the next session.[59] This decision was shortly announced by Diefenbaker in the House of Commons,[60] and Bill C-60 was duly given first reading on September 5th,[61] the second last day of the 1958 session.

[59] Cabinet minutes, 27 August 1958.
[60] *Debates* 24-1 (1958), IV:4358 (30 August 1958).
[61] *Debates* 24-1 (1958), IV:4638 (5 September 1958).

THE BILL C-60 PARLIAMENTARY DEBATE

From the government benches, only Diefenbaker spoke to Bill C-60.[62] His speech on Bill C-60 was largely in regards to the general need for a bill of rights. As well as noting his own long advocacy for a bill of rights since 1942, much of Diefenbaker's speech focused on bashing the rights violations by previous Liberal governments, although purportedly "not for the purpose of bringing up the past but simply to provide enlightenment for the future." In his brief summary of the Bill, Diefenbaker noted that the Bill sought to (1) enumerate the rights of Canadians and (2) "to carry out one of the major principles of the charter of the United Nations [...] of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." He also noted that in the pursuit of these goals the bill (3) employed "simple language," (4) ensured any derogations would only be undertaken by parliament and not the executive, and (5) kept the bill "strictly within the constitutional powers of the federal parliament."

On the question of where civil liberties fell in the division of powers and why the Bill did not seek application to provincial legislative jurisdiction, Diefenbaker made an oblique answer that sought to indicate that it protected civil liberties regardless of jurisdiction while repeatedly making express declarations that the bill respected provincial legislative authority. Essentially he indicated his belief that civil liberties fell exclusively or largely in federal authority, while not explicitly saying as much so as to avoid alienating those for whom provincial rights were a priority. Diefenbaker used the rhetorical flourish of the phrase "I am not going to refer in particular to authorities on the

[62] *Debates* 24-1 (1958), IV:4638-4644 (5 September 1958).

division of power as between the federal government and the legislatures in respect of this subject." Yet he then went on to say that

> *It is interesting, Mr. Speaker, to note that there was never a case in the privy council at the time when it was our supreme law body wherein an interpretation as given of the constitutional division with respect to civil rights. Some recent cases are the Saumur case [...];*[63] *the Winner case [...]*[64] *which deals with interprovincial jurisdiction; the Birks case [...];*[65] *and the Switzman case [...].*[66] *However in reading these authorities one feels that the question as to the division of the constitutional power over fundamental freedoms has as yet been far from interpretation and delineation.*

Thus, in one sense, Diefenbaker states explicitly that he is making no exclusive claim upon federal jurisdiction over civil liberties and that instead that the delineation between federal and provincial jurisdictions over civil liberties is still an open question for the Supreme Court. However, Diefenbaker also attempted to send the implicit message that his bill of rights would broadly protect civil liberties as the Supreme Court would find civil liberties in federal jurisdiction when the issue would be litigated. This is illustrated in Diefenbaker's reference to not only the "implied bill of rights cases," but also to the otherwise curious inclusion of *Winner* in his list of cases on the interpretation "of the constitutional division with respect to civil rights." *Winner* was in no way a civil rights case, but instead dealt with the supremacy of federal legislation in regards to *intra*provincial aspects of an interprovincial enterprise. Diefenbaker's implicit message in grouping this case with the leading "implied bill of rights" cases was to illustrate that there was no controlling Privy Council precedents and that since its emancipation from the Privy Council, the Supreme Court of Canada had taken an expansive view of federal

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[63] *Saumur*, [1953] 2 SCR 299.
[64] *Winner*, [1951] SCR 887.
[65] *Henry Birks*, [1955] SCR 799.
[66] *Switzman*, [1957] SCR 285.

legislation that would result in *Canadian Bill of Rights* protecting civil liberties generally without having to explicitly restrict provincial jurisdiction.

On the question of why the government was pursuing a statute over an amendment to the *British North America Act*, Diefenbaker again emphasized his respect for provincial jurisdiction and pre-emptively explained that "a constitutional amendment which was passed by parliament in so far as those rights are concerned and which would permit of such a declaration being made by the federal parliament would be subject to repeal as is a statute." At this point, Diefenbaker continued that he was not opposed to an amendment to the *British North America Act* that would equally bind the provinces, but counselled that "this bill will not do everything, but I do think fair minded Canadians will agree that it is a major step forward."

On the question of whether the Bill C-60 was designed to allow for judicial review, Diefenbaker did not directly address the issue in his own speech, only noting that the bill of rights "would establish the right of the individual to go into the courts of this country, thereby assuring the preservation of his freedom." However in response to a statement by Pearson that "No bill of rights in our neighbouring country [the United States] was able to save some of these men. But an aroused public could and did correct many of these excesses and abuses," Diefenbaker queried "Did not the Supreme Court of the United States make some decisions?"[67] indicating that he envisioned the *Canadian Bill of Rights* playing a role similar to that of the American Bill of Rights.

[67] *Debates* 24-1 (1958) IV: 4650 (5 September 1956).

The reply by Lester Pearson,[68] the leader of the opposition, was outright schizophrenic. In general, Pearson, at this time, opposed the bill of rights and championed the status quo. Pearson repeatedly emphasized that Canada had the greatest respect for human rights of any country on earth and argued that the foundation of this exemplary rights regime was based upon British principles of parliamentary sovereignty. Pearson reflected on his time as a diplomat and foreign minister to note that

> *I have heard at the United Nations, advocating human rights and fundamental freedoms with eloquence and vehemence, men who were representing states whose people were ground down by dictators or in one or two cases states which actually recognize slavery in their constitutions.*

Instead, Pearson argued that

> *rights and freedoms are not established or protected merely or primarily or often at all by proclamations of beliefs or written constitutions, but by the slow, sure building of a sound and progressive social, political and economic structure of law, justice and understanding. That has been the British way and it has worked there; and on the whole it has worked with us too.*
>
> *Not only do constitutional acts or bills of rights even in free democracies not always ensure the individual of the rights and freedoms which we consider to be fundamental; arbitrary and just administration can defeat even beneficent laws and weaken the protection they are supposed to give. Further-more, legislatures themselves and their members, even under the law, can prejudice and even destroy an individual's rights, debase his dignity and weaken his security by arbitrary investigatory processes ostensibly for the purpose of securing facts and opinions on which to base good legislation*

However, although Pearson did concentrate this reply on championing the status quo, he – reflecting the changing mood in his own party – gave hedging support for a constitutionally-entrenched bill of rights, stating that he opposed Diefenbaker's bill of rights because "we have to be very sure before we make a change that it is going to be an effective change, and a change in the right direction." He cautioned that a bill of rights

[68] *Debates* 24-1 (1958) IV: 4644-4653 (5 September 1958).

"enshrined in a federal statute, [may] make progress perhaps more difficult" towards a bill of rights constitutionally entrenched into the *British North America Act.* Yet Pearson sought to accommodate the contradictory impulse that "the ideal we must seek to realize while preserving the constitutional rights of every province; while preserving also the necessity, which is a primary one but which can be abused, of ensuring the security of the state."

Pearson, thus, embraced the reasoning of the critics of the bill of rights from both extremes: those who opposed a bill of rights on the grounds of opposition to any sort of bill of rights as well as those who wanted a bill of rights that was both entrenched and applicable to provincial legislative jurisdiction. Further, Pearson was keen to emphasize that his "ideal" rights regime accommodated the same concerns that the Diefenbaker bill of rights sought to accommodate: provincial legislative liberty and derogations in times of emergency. Such a schizophrenic opposition gave comfort to Diefenbaker, who could portray Liberal opposition as simply contrarian and opportunist and not principled.[69]

CONCLUSION

At the close of the 1958 Parliamentary session, the Diefenbaker government was confident that it would be able to quickly enact a bill of rights at the beginning of the 1959 session. It believed that its enactment would serve as a powerful political coup that would lubricate the rest of the government's legislative agenda for the session. From the

[69] The reply of the CCF, as delivered by Hazen Argue, struck a consistent tone that a statutory bill – and one restricted to civil liberties – was not sufficiently secure or comprehensive. Diefenbaker, accurately, defined the position of the parties at this time as the CCF being in favour of a bill of rights as a *British North America Act* amendment, the Conservatives in favour of a statutory bill of rights, and the Liberals in favour of the status quo. See *Debates* 24-1 (1958) IV:4653-4657 (5 September 1958).

Liberal response in Parliament to Bill C-60, it appeared that the debate would largely be between a reactionary Liberal party championing the status quo and a progressive Conservative party championing human rights. Pearson might have won his Nobel Peace Prize, but Diefenbaker alone would be able to claim credit for fulfilling Canada's international human rights obligations and building on the attention around the tenth anniversary of the *Universal Declaration of Human Rights*. Diefenbaker, however, misread the public mood and failed to anticipate the nature of the resistance to his proposed bill of rights. Instead of being the envisioned fillip to the government's 1959 legislative agenda, it instead became a drag upon it. ♦

Chapter Five – The Entrenchment Crisis[1]

Bill C-60 did not receive a widely enthusiastic welcome, and was immediately criticized in the press. The Department of Justice took note of these criticisms, including an editorial by human rights lawyer Morris Shumiatcher less than a week after the bill's introduction that it was mere "window dressing" that was too timid and could be wiped out by another parliament.[2] Those most concerned with human rights not only prioritized anti-discrimination provisions (which features little in a bill of rights), but tended to be adamant that civil liberties be protected from any possible future legislative override and sought the bill's incorporation in the *British North America Act.*

Much of the criticism focused on the failure of the bill to apply to the provinces and the need for constitutional entrenchment. As a result, the debate would eventual shift from a contest between a reactionary status quo and a progressive statutory bill of rights, to one that focused on the question of "entrenchment" – incorporation into the *British North America Act* – that would entail negotiations with and the consent of the provinces. The comfortable paradigm Diefenbaker believed would characterize the bill's debate disappeared and was replaced by one much less politically congenial to the Diefenbaker government.

"FRIVOLOUS" CRITICISMS

In December 1958, in the shadow of the tenth anniversary of the *Universal Declaration of Human Rights*, Driedger produced a memorandum for the deputy minister compiling the complaints received by the department. Along with the most common

[1] See footnote 1 to previous chapter.
[2] *Globe & Mail*, 11 September 1958. Also DOJ/182000-29.

critiques of its lack of applicability to the provinces and its lack of entrenchment in the *British North America Act*, the memo included thirty other proposed amendments to the bill of rights.[3] Whether this memo was an honest reflection of the criticisms received by the department or constructed to produce a designed impression, the impression it did convey was that most of the criticisms received were frivolous.

There were some respectable critiques such as calls for the inclusion of protections for pre-existing rights such as the secret ballot, jury trials, and rights to appeal. There was also one very creative call for what was essentially an expansion of the innovation developed by the Department in relation to the *War Measures Act*; that is, requiring the ratification of *all* orders in council by parliament within one year. As well, there were also demands for more traditional, but controversial, rights, such as the "right to work" and the right to bear arms.

However, most of the criticisms were not demands for rights, but specific policy complaints. In this vein there were demands to abolish the wheat board, withdraw Canada from the Commonwealth, for a "right to a republican form of government," and the banning of the fluoridation of water. This was the message transmitted to Cabinet, where Fulton informed them that "none of the communications received by his office concerning the draft Bill of Rights, which had been introduced at the last session could form the basis of serious amendments to the bill."[4]

Upon reflection, Fulton continued to reject the "representations and suggestions with regard to the content of the Bill of Rights." In a letter to the Prime Minister, he

[3] E.A. Driedger, "Memorandum for the Deputy Minister: 180667-1," 19 December 1958 (DOJ/180667-1).
[4] Cabinet Minutes, 15 December 1958.

explained that "After considering these representations and conferring with officials of my Department, I have come to the conclusion that, except in one respect, no changes in the Bill need to be made."[5] The only revision Fulton accepted was based upon criticism originally raised in Cabinet during the summer of 1958 about the "binding" of Parliament, or, rather, the inability to do so:

> *The one criticism that I do feel calls for some amendment is to the effect that notwithstanding the declaration in clause 3 of the Bill, any subsequent Parliament is free to abrogate or override the Bill of Rights or any provision thereof, either deliberately, or perhaps even unwittingly, by enacting some law that would be inconsistent with or repugnant to the Bill of Rights.*
>
> *In order to meet this criticism I would suggest that clause 3 be amended by inserting after the word "shall" in the third line on page 2 the words "unless it is otherwise expressly stated in any Act of the Parliament of Canada hereafter enacted,". An amendment in these terms would, I think, strengthen the Bill to the point where an express reference to the Bill of Rights would virtually be necessary in order to overcome or in any way vary the rule of interpretation laid down by that provision.*

Fulton had embraced the version of the bill of rights developed with his Department and resisted the entreaties for an amendment to the *British North America Act*, and insisted on revisions of the draft bill within the confines of its original form.

THE SHUMIATCHER REPORT

The Department did receive one set of criticisms to which it paid particular attention, that of a report by the Saskatchewan Civil Liberties Sub-section of the Canadian Bar Association authored by Morris Shumiatcher.[6] Yet the Department's

[5] E.D. Fulton, Correspondence with J. G. Diefenbaker, 27 January 1959 (DOJ/184000-27).

[6] Morris Shumiatcher, *Report of the Saskatchewan Sub-Section of the Civil Liberties Section of the Canadian Bar Association, Concerning Bill C-60 being "The Canadian Bill of Rights,"* 2 March 1959. Morris Shumiatcher (1917-2004), born in Calgary

treatment of these criticisms revealed their confidence in their own draft. The report contained nine principal recommended revisions to Bill C-60; the addressing of these criticisms was assigned to Driedger. Driedger's responses were transmitted to the Minister of Justice verbatim by the Deputy Minister.[7] In general, Driedger's response was largely dismissive. Of the nine recommended revisions, Driedger's most positive response was "I would have no real objection to making this change," in regards to the proposal that a section 4(2) be added which would read:

> *4(2) The Minister of Justice shall bring to the attention of the House of Commons any inconsistency appearing to exist between any bill introduced in the House of Commons and the principles contained in Part I of this Act.*

In response to the proposal of the addition to section 3 of the sub-clause "(a) authorize or effect the arbitrary arrest, detention, imprisonment or exile of any person," Driedger again commented that he would have "no objection to this proposal," but nevertheless retorted that the proposed clause was already covered by section 2(a) protecting life, liberty, and the security of the person.

For four of the recommended revisions, Driedger dismissed them without any significant explanation. For example, in response to Shumiatcher's criticism that the phrase "have always existed and will continue to exist" was "not strictly accurate," Driedger retorted with the terse response that "we considered this point and I do not think we should change the opening words or section 2." Driedger was similarly terse in his

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Alberta, became a leading Saskatchewan lawyer. In the late 1940s, he served as a Law Officer to the Attorney General of Saskatchewan and from there became the personal assistant to CCF Premier Tommy Douglas. In that capacity, he was responsible for drafting the *Saskatchewan Bill of Rights*. Resultantly, he was one of the few individuals in Canada that could claim expertise in the area of drafting a bill of rights.

[7] W.R.Jackett, "Memorandum for the Minister of Justice: 180667-1, Re: Bill of Rights," 23 March 1959 (DOJ/184000-27).

treatment of Shumiatcher's proposals for the additions aimed at clarifying the clauses guaranteeing reasonable bail as well as the protection against self-incrimination as well as the proposed striking-out of the Department of Justice review of bills introduced into the House of Commons.

Only on the recommendations for the addition of the words "the benefits and" immediately before the phrase "the protection of the law without discrimination" and the addition of a clause for the non-derogation of other rights did Driedger provide a significant response. In the case of the former proposed revision, Driedger believed that it would extend the draft bill into the realm of "the social welfare aspect of the modern concept of Bill of Rights," – giving the example that the provision of Family Allowances discriminates against non-citizens – and expressed his belief that such a revision "would point inevitably to an entirely different type of Bill of Rights to that which the present one purports to be" and that there "was no intention" to include social welfare rights.

In the latter case, Shumiatcher proposed the addition of the following clause to the end of section 2:

> *and without restricting the foregoing, no act, order, rule, regulation, or law in Canada shall be construed or applied to restrict or abridge any such right.*

Shumiatcher explained the benefit of such a clause as a confirmation of the principle of the implied bill of rights that civil liberties fell exclusively within federal jurisdiction and that

> *the proposed words at the end of Section 2 of the Bill might have the effect of abrogating any provincial statute, regulation, or order which is repugnant to the terms of Section 2 of Bill C-60.*

To this, Driedger responded that the intent was only to make the law applicable to federal statutes and that nevertheless "*it is clearly beyond the powers of Parliament to set up an*

interpretation provision for provincial statutes or regulations."[8] He further counselled, in regards to the political dangers of such a revision, that "those who believe that the provinces were intended to have sovereign rights in their own fields, would regard this as a blatant manoeuvre by Parliament to cut down the stature of the provincial legislatures."

Particularly notable as well was Driegder's response to Shumiatcher's criticism of the use of the phrase "due process of law." Shumiatcher argued that the phrase "due process of law"

> *may have two meanings, first it may mean merely 'according to law' and secondly, it may mean 'according to certain basic standards of justice'. Since in [the] Bill of Rights the second view has customarily been adopted, it is suggested that this be spelled out in paragraph (a).*

As such, Shumiatcher counselled that "due process of law" should be augmented with the phrase "according to the principles of fundamental justice." This was one of the few criticisms that Driedger welcomed, commenting that "the point here is well taken." Despite this, Driedger opposed any such change. He argued that as "these additional words do not appear in the United States Constitution, I would be inclined to stay with the expression we have." This was a pregnant justification that alluded to Driedger's commentary a year earlier that the effect – and, now, purpose – of the draft bill was to have Canadian courts "examine and probably apply jurisprudence of the United States;" [9] a justification that Driedger would shortly elaborate upon in greater detail. At this time, Driedger conceded that Shumiatcher's preferred addition of the phrase "according to the principles of fundamental justice" "could perhaps be made without changing the sense of the bill" as there was no difference between the contemporary use of the phrase "due process" alone or with the added clause. For Driedger, the addition of this clause could

[8] Emphasis mine.
[9] E.A. Driedger, "Memorandum – Re: Bill of Rights," 28 March 1958 (DOJ/180667).

therefore be used "if it is desired to make some amendment" without changing the structure and meaning of the draft bill.

Driedger shortly expanded upon this point, explaining in greater detail his understanding of the phrase "due process." [10] He noted that

> *The authorities indicate that the due process clause in the United States Constitution is intended to perpetuate old and well-established principles of rights and justice, and judicial interpretation of the expression has gone far beyond the literal meaning of due procedure; "due process" is not limited to settled usage of the past, but may include new methods of procedure.*
>
> *In applying the due process clause to substantive rights, the courts in the United States have interpreted the provision to mean that the government is without right to deprive a person of life, liberty, or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power. The due process clause is intended to protect against arbitrariness.*

Driedger went on to observe that "this phrase has received considerable judicial attention in the United States," but that "there are apparently no Canadian or English cases interpreting the expression." Thus, Driedger favoured the use of the phrase "due process" so that American authorities on the issue could be used by Canadian courts instead of employing a different phrase of which the treatment by the courts could not be predicted. As he had stated in his first memorandum on the subject over a year earlier, he was designing the *Canadian Bill of Rights* to enable the same sort of judicial review practiced in the United States based upon its constitutionally-entrenched bill of rights.

[10] E.A. Driedger, "Memorandum," 8 April 1959 (DOJ/182000-29).

THE BRITISH NORTH AMERICA ACT, 1959

At the end of February, Fulton would make the case for proceeding with Bill C-60 to his Cabinet colleagues (with only the one significant refinement of the notwithstanding clause earlier explained to Diefenbaker). [11] Diefenbaker, however, did not present a common front with Fulton and instead suggested that consideration should be given to the criticism by the Canadian Bar Association that the language of the draft bill was "too pedestrian" and of the demands that the bill be made as an amendment to the *British North America Act*. Cabinet rejected "revising the language of the bill to make it more attractive but less precise" and instead only endorsed the Fulton revisions. On the question of a *British North America Act* amendment, Cabinet was reticent, noting that "it would be necessary to consider the methods by which the B.N.A. Act could be amended," but did not close the door on such a pursuit.

In response, Fulton immediately consulted his deputy minister as to how a *British North America Act* amendment could be accomplished. Jackett discussed the issue with Driedger and prepared a memorandum on the matter for Fulton. [12] In this memo, Jackett suggested that resort could be made to "an amendment of the constitution under the *British North America Act, 1949*"[13] by adding "a concluding Clause providing that 'this

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[11] Cabinet Minutes, 26 February 1959.

[12] W.R. Jackett, "Memorandum for Minister of Justice, Re: Bill of Rights – Constitutional Amendment," 26 February 1959 (DOJ/186000-8).

[13] This Act added the provision which allowed the federal government to amend the "Constitution of Canada" in areas of exclusively federal concern. Its modern analog is s.44 of the *Constitution Act*, 1982. From 1949 to 1982, Section 91(1) of the British North America Act read:

> *The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or*

Act may he cited as the *British North America Act, 1959*, and shall be included among the Acts which may be cited as the *British North America Acts, 1867 to1959*.'" However, Jackett emphasized to Fulton that such a provision would have absolutely no practical effect and that "we can see no reason why, if the Bill of Rights were so enacted, the scope of the present Bill would have to be limited in any way." Jackett then went on to caution against such procedure for enacting the bill of rights as

> *It accomplishes neither more or less than the present Bill, but is not as simple as the present Bill. If this sort of constitutional amendment is put forward, it is inevitable that a large number of people will think that it has effect to limit the powers of Parliament or the Legislatures or both and there is bound to be a reaction when it becomes known that it does not accomplish either purpose. It will invite the criticism that the whole thing is really a sham and will obscure the very important accomplishment of the Bill in the present form which, in effect, if not in law, will operate to curb both Parliament and the Executive when otherwise tempted to encroach on human rights and fundamental freedoms.*

THE MARCH 1959 CANADIAN BAR REVIEW

Despite the discussions of a possible *British North America Act* amendment at the beginning of March, the Department of Justice – with the support of Cabinet – seemed poised to proceed with the bill of rights project in the current (1959) session with only minimal revisions to Bill C-60. The then-received criticisms were portrayed as frivolous or minimal and the Department of Justice was prepared to robustly rebuff the calls for a *British North America Act* amendment. However, March would prove devastating to the

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> *the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that the House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuance is not opposed by the votes of more than one-third of the members of such House.*

government's confidence in its project as it marked the publication of a special edition of the *Canadian Bar Review* dedicated to consideration of Bill C-60. [14]

CONTRIBUTORS

This edition of the *Canadian Bar Review* contained eight main articles on the *Canadian Bill of Rights* and a further three "Case and Comment" articles. The contributions included many of the leading constitutional and legal scholars of the era, including future Supreme Court Justices Louis-Philippe Pigeon and Bora Laskin as well as the grand champion of a constitutionally entrenched bill of rights, Frank R. Scott. Modern scholars often cite this edition of the *Canadian Bar Review* to illustrate that at the time of the *Canadian Bill of Rights*'s passage it was generally condemned as being a mere canon of interpretation and could not be used as a tool for judicial review of federal legislation, typically drawing particular attention to Laskin's stark and colourful condemnation of the *Canadian Bill of Rights*.[15]

However, such an interpretation of contemporaneous scholarly opinion of the *Canadian Bill of Rights* as expressed in that edition of the *Canadian Bar Review* is highly inaccurate. Of the eleven authors, three (Bora Laskin,[16] W.R. Lederman,[17] and Louis-

[14] *Canadian Bar Review* 37, no 1 (March 1959).
[15] For example, Belliveau (1992), p. 63; MacLennan (1998), p. 118; MacLennan (2003), pp. 130, 158; Lambertson (2005), p. 370; Adams (2009), p. 252.
[16] Bora Laskin (b. 1912), Q.C., Faculty of Law, University of Toronto. Bora Laskin, "An Inquiry into the Diefenbaker Bill of Rights," *Canadian Bar Review* 37, no 1 (March 1959): 77-134.
[17] W. R. Lederman (b. 1916), Dean, Faculty of Law, Queen's University. W.R. Lederman, "The Nature and Problems of a Bill of Rights," *Canadian Bar Review* 37, no 1 (March 1959): 3-15.

Philippe Pigeon[18]) argued that the *Canadian Bill of Rights* would *not* empower the courts to engage in judicial review of federal legislation, four (Albert S. Abel,[19] C.B. Bourne,[20] W.F. Bowker,[21] and Edward McWhinney[22]) argued that it *would* empower the courts to engage in judicial review of federal legislation, and the remaining four (Maxwell Cohen,[23] A.G. Donaldson,[24] O.E. Lang,[25] and Frank R. Scott[26]) did not explicitly stake a position as they examined human rights in other jurisdictions.

[18]Louis-Philippe Pigeon (b. 1905), Q.C., Lecturer, Université Laval. Louis-Philippe Pigeon, "The Bill of Rights and the British North America Act," *Canadian Bar Review* 37, no 1 (March 1959):66-76.

[19] Albert S. Abel (b. 1906), Faculty of Law, University of Toronto. Albert S. Abel, "The Bill of Rights in the United States: What has it accomplished?" *Canadian Bar Review* 37, no 1 (March 1959): 147-188.

[20] C. B. Bourne (b. 1921), Faculty of Law, University of British Columbia. C.B. Bourne, "The Canadian Bill of Rights and Administrative Tribunals: An Analysis of the Problems Raised by Sections 2(a) and 3(c), (d), and (e)," *Canadian Bar Review* 37, no 1 (March 1959): 218-227.

[21] W. F. Bowker (b. 1910), Q.C., Dean, Faculty of Law, University of Alberta. W.F. Bowker, "Basic Rights and Freedoms: What are they?" *Canadian Bar Review* 37, no 1 (March 1959): 43-65.

[22] Edward McWhinney (b. 1924), Faculty of Law, University of Toronto. Edward McWhinney, "The Supreme Court and the Bill of Rights – The Lessons of Comparative Jurisprudence," *Canadian Bar Review* 37, no 1 (March 1959): 16-42.

[23] Maxwell Cohen (b. 1910), Faculty of Law, McGill University. Maxwell Cohen, "Bill C-60 and International Law: The United Nations Charter; Declaration of Human Rights," *Canadian Bar Review* 37, no 1 (March 1959): 228-233. Maxwell Cohen simply notes the controversy on judicial review and explicitly expressed no opinion, instead examining Canada's obligations under international law its influence on the *Canadian Bill of Rights*.

[24] A. G. Donaldson (b. 1927), LL.B., Ph.D. (Belfast), Parliamentary Draftsman to the Government of Northern Ireland. A.G. Donaldson, "Fundamental Rights in the Constitution of Northern Ireland," *Canadian Bar Review* 37, no 1 (March 1959): 189-216.

[25] O.E. Lang, "Human Rights – Provincial Legislation: The Saskatchewan Bill of Rights," *Canadian Bar Review* 37, no 1 (March 1959): 233-236.

[26] F. R. Scott (1899), Faculty of Law, McGill University. F.R. Scott, "The Bill of Rights and Quebec Law," *Canadian Bar Review* 37, no 1 (March 1959): 135-146.

Those contending that the bill provided for judicial review

Yet even the implication of most of those who did not state an explicit opinion on the effect of the *Canadian Bill of Rights* was that a statutory bill of rights would nevertheless enable judicial review. O.E. Lang's examination of the Saskatchewan Bill of Rights notes that in the one significant case then to date, *Naish,*[27] "the magistrate considered constitutional and statutory guarantees to be in the same position" and as such "the Bill of Rights Act is read as overriding other law."[28] F.R. Scott does not examine the effect of the *Canadian Bill of Rights* on federal legislation, but instead focuses on civil liberties in Quebec's jurisdiction and is largely concerned over the fact that the *Canadian Bill of Rights* does not extend to provincial jurisdiction. Although there is considerable ambivalence in his other writings (and he clearly favours constitutional entrenchment), the implication in this article is that a statute can permit judicial review. Donaldson examines the rights protections in the *Government of Ireland Act 1920,*[29] clearly arguing that a statute can empower judicial review and has the ability to render other enactments inoperative, although in the very different context of devolution. (Notably, when Ivan Rand, the champion of civil liberties on the Supreme Court of Canada in the 1950s, first writes about the *Canadian Bill of Rights* shortly after its passage, he unambiguously argues that "if the language cannot fair be so construed [to comply with the *Canadian Bill of Rights*], it must, in effect, be treated as meaningless and as if struck out of the law.")[30]

[27] *R v Naish*, [1950] 1 WWR 987 (SK PC)
[28] Lang (1959), p. 236.
[29] *Government of Ireland Act 1920*, 10 & 11 George V, c.67 (UK)
[30] Ivan Rand, "Except by Due Process of Law" *Osgoode Hall Law Journal* 2 (1961): 171.

Edward McWhinney

Edward McWhinney, the most strident defender of the eleven of the *Canadian Bill of Rights* termed it "a constitutional Bill of Rights" and condemned those "critics of the current draft of the *Canadian Bill of Rights*" for their emphasis on the "fact that it is a simple declaratory Act, and not a formal amendment to the British North America Act:"

> *To strain at this particular issue and to assert, that, unless the Bill be made part of the British North America Act, there can be no Canadian civil liberties jurisprudence built around it, is both to ignore the marked achievements of the Canadian Supreme Court in the political and civil rights area in recent years in the absence of any express bill of rights, and also to give a nineteenth century quality of absolutism to Dicey's lapidarian generalities.*[31]

In response to the criticisms that the *Canadian Bill of Rights* could be amended or repealed as an ordinary statute, he retorted:

> *If the new Canadian Bill of Rights happens to correspond to deeply-felt popular sentiments, no legislative majorities in the future are likely to interfere with it: if it does not so correspond, then no amount of "entrenchment" or any other type of constitutional concretisation can save it and put teeth into its paper guarantees.*

Instead, he presciently argued that it was "the Supreme Court of Canada, [that] will play a decisive role in the implementation and elaboration of any legislatively-established Bill of Rights," [32] concluding that the retirement of Justice Ivan Rand was of greater importance to judicial review and protection of civil liberties than any bill of rights.

Others

It is likely that modern scholars have conflated a generally negative contemporaneous opinion towards the *Canadian Bill of Rights* as a confirmation of their assumption that the *Canadian Bill of Rights* was viewed as failing to provide for judicial

[31] McWhinney (1959), p. 17.
[32] McWhinney (1959), pp. 21-22.

review. Some, such as Scott, disliked the *Canadian Bill of Rights* because it only applied to federal jurisdiction and could be amended or repealed as easily as a statute. Others – such as Abel, Bowker, and even McWhinney – opposed, or were unsure about, the *Canadian Bill of Rights* because they thought that, although it would empower judicial review of legislation, they did not believe that the courts would robustly protect civil liberties if given the power to do so and by keeping the power exclusively with Parliament, popular pressure would force it to be vigilant in protecting civil liberties, whereas the courts would be immune from that pressure. Bowker gives the example of section 98 of the Criminal Code[33] which outlawed (on pain of imprisonment of up to twenty years) "any association [...] one of whose purposes is to bring about any governmental, industrial, or economic change within Canada by use of force [...] or by threats [...] or shall so teach, advocate, advise, or defend." The provision had been used to considerable effect by the Bennett government,[34] and Mackenzie King promised to abolish it during the 1935 election campaign and it was duly repealed shortly after his election.[35] In contrast, the United States Congress passed a statute of the same effect as section 98[36] that was not only contemporaneously still in force, but had been upheld by the U.S. Supreme Court in 1950.[37] The implication of Bowker's analysis was that, had there been a bill of rights in the 1930s, the judiciary may have given legitimacy to section 98 and there would have been less (or at least delayed) parliamentary pressure to repeal the provision.

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[33] *Criminal Code*, R.S.C., 1927, c. 36, s. 98
[34] As the research of MacLennan and Lambertson illustrate, the response to the use of this provision launched the human rights movement in Canada.
[35] *Criminal Code Amendment Act,* SC 1936, c.29, s.1.
[36] RS §102, 2 USC §192
[37] *Dennis v United States,* (1951), 339 U.S. 162.

Thus, by simple numbers, the majority opinion is clearly for the interpretation of the *Canadian Bill of Rights* empowering judicial review, although there was more authoritative heft in the voices that denied that *Canadian Bill of Rights* would prevail over other federal legislation – Laskin, Lederman, and Pigeon (notably, however, both Laskin[38] and Lederman[39] would change their minds in the 1970s). Yet a careful examination of Laskin's and Pigeon's arguments in these articles gives the impression that scholars citing their opinions have relied much more on their reputation for the authority of their condemnation of the *Canadian Bill of Rights,* rather than on an examination of the reasonableness of the arguments in those articles.

Those contending that the bill did not provide for judicial review

The arguments made by Laskin and Pigeon in 1959 are mirror images of each other and equally strange in contemporary terms. Both Laskin and Pigeon argue that although the *Canadian Bill of Rights* is not constitutional in the sense that it will empower the courts to engage in judicial review of other federal legislation, yet the *Canadian Bill of Rights is* constitutional in the sense that it will alter the division of powers. For Pigeon, it provided for the transferring control of civil liberties from the provincial to the federal government and for Laskin it provided for the reverse. Thus, for both Laskin and Pigeon the *Canadian Bill of Rights*, a statute of the federal parliament alone can do something as powerful as alter the division of powers – something that hitherto had required action by the United Kingdom Parliament after the request of the

[38] *R v Hogan,* [1975] 2 SCR 574 at 597

[39] W R Lederman, "A Comment on the Canadian Bill of Rights and Judgement of the Supreme Court of Canada in the case of: *The Queen v Joseph Drybones*," in *Background Papers and Reports*, vol 2 (Toronto: Ontario Advisory Committee on Confederation, 1970).

federal parliament and unanimous consent of the provincial legislatures – but cannot do the considerably more mundane task of enabling judicial review within federal jurisdiction alone.

Louis-Philippe Pigeon

Pigeon is clear that the *Canadian Bill of Rights* "certainly involves no curtailment of future [federal] legislative power" and "would not bring about any constitutional restriction of legislative power in Canada."[40] He argues that

> *It would not even be necessary to go through the motion of first passing an Act amending the Bill of Rights and then passing the Act derogating therefrom, because the proposed Bill does not purport to be an amendment of the constitution.* [41]

He gives the example that "it does not seem that" the *Canadian Bill of Rights*

> *would have the effect of suppressing the penalty of whipping as being "cruel punishment". It would no doubt be argued that if Parliament had so intended it would have amended the Criminal Code.* [42]

However, although the article commences with this line of criticism, Pigeon is not primarily focused on this aspect stating that whether the *Canadian Bill of Rights* "would, as proposed, amount to an enactment of fundamental principles rather than a statement of principles of construction need not for the moment be pondered*."* Instead he argues that the *Canadian Bill of Rights*, if found valid, would

> *dominate and override all provincial legislation and executive action in the same way as the well-known amendments appended to the United States constitution dominate and override all state legislation.* [43]

[40] Pigeon (1959), p. 70.
[41] Pigeon (1959), p. 70.
[42] Pigeon (1959), p. 72.
[43] Pigeon (1959), p. 72.

For Pigeon, civil liberties fall largely within provincial jurisdiction and he understands the *Canadian Bill of Rights* as a "an assertion of supreme judicial authority" by the federal parliament in determining the division of powers, moving those powers into federal jurisdiction whilst not providing for judicial review of federal legislation on those powers. Thus for Pigeon, in sum, the *Canadian Bill of Rights*

> *would not bring about any constitutional restriction of legislative power in Canada, it would merely involve an assumption by the federal Parliament of the power of defining the fundamental principles which all legislation, federal or provincial, would have to obey.* [44]

It is an audacious and strange argument: that although as an ordinary statute of the Parliament of Canada the *Canadian Bill of Rights* can have no more effect than as a canon of construction on federal legislation, it "would amount to a constitutional restriction of their [provincial] legislative and executive powers."[45]

Bora Laskin

Laskin makes a parallel argument. He notes that it has been widely and consistently claimed by the government that the proposed bill of rights would prevent the abridgement of the declared human rights and fundamental freedoms. Yet he dismisses its legal effect:

> *While the Prime Minister in debate referred to his Bill as if it would preserve and maintain rights against invasion by Parliament and as if it would be binding on Parliament, this could not have been meant to be an argument of law.* [46]

He instead argues that "legislative supremacy as an implicit legal principle is too deeply embedded in constitutional practice to admit of limitation through a simple

[44] Pigeon (1959), p. 70.
[45] Pigeon (1959), p. 69.
[46] Laskin (1959), p. 130.

statute" and, as such, "*it simply cannot be that an unentrenched non-constitutional enactment will be given force to limit future parliamentary action*," [47] and thus (although somewhat contradictorily) that "to give the present Bill this force would involve an inroad on the legal supremacy of Parliament." [48] He is slightly more circumspect than Pigeon, admitting that there are leading authorities who question such an interpretation, such as Ivor Jennings. [49] Laskin further argues that the claim that the *Canadian Bill of Rights* is intended to provide for judicial review is disingenuous because the Diefenbaker governments refuses

> *to entertain the idea of a constitutional amendment because (to use his [Diefenbaker 's] words): "a constitutional amendment which was passed by Parliament in so far as those rights are concerned and which would permit of such a declaration being made by the federal Parliament would be subject to repeal as a statute." [50]*

However, the bulk of the article is dedicated to analyzing the recent implied bill of rights jurisprudence ("recent judicial concern with political liberties" [51]) and the distribution of civil liberties. He argues that the Supreme Court of Canada had been particularly effective in defending civil liberties, that most of the attacks on civil liberties had come from the provinces, and that the Supreme Court has held that civil liberties fall within federal jurisdiction. As such, he reasons (again, somewhat contradictorily) that there is little urgency in promulgating a bill of rights to protect against federal violations, but there is greater urgency in doing so against provincial violations (never explaining how if civil liberties fall exclusively within federal jurisdiction there is any need for an

[47] Laskin (1959), p. 132. [Emphasis mine.]
[48] Laskin (1959), p. 132.
[49] Laskin (1959), p. 132.
[50] Laskin (1959), p. 132.
[51] Laskin (1959), p. 84.

instrument to protect them from provincial violations). Instead of the proposed *Canadian Bill of Rights*, Laskin argues

> *It would be better that no Bill be proposed so that the common-law tradition be maintained through the unifying force and position of the Supreme Court of Canada . And better too, in such case, to allow that court to continue unaided in developing constitutional doctrine which has already pointed to legal limitations on legislative encroachments on civil liberties.* [52]

Laskin, however, seems to overlook (as McWhinney critiques) that nearly all of the rulings by the Supreme Court robustly protecting civil liberties he cited were authored by Justice Ivan Rand. Yet no comment is made as to what possible effect his retirement will have on the continued development of the "recent judicial concern with political liberties."

While arguing that the *Canadian Bill of Rights* failed to provide for judicial review, it will nonetheless effectively alter the division of powers. For Laskin, the Supreme Court of Canada had built up over the previous decade a body of jurisprudence that brought civil liberties under the exclusive jurisdiction of the federal government and, Laskin argues, under Canadian federalism "there is no such thing (apart from sections 94A and 95) as overlapping *powers."* [53] As such, for Laskin, excepting a *British North America Act* amendment applicable to both the federal and (particularly) provincial governments, there should be no attempt to alter the constitutional status quo on civil liberties. Since Laskin argues that it is impossible for a statutory federal bill of rights to enable judicial review of legislative, then "what other meaning can be given to [Diefenbaker's] rejection of a constitutional amendment which would bind provinces and

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[52] Laskin (1959), p. 78.
[53] Laskin (1959), p. 119.

Dominion*"* [54] other than a sort of "assertion of supreme judicial authority" dictating to the Supreme Court of Canada that its recent jurisprudence on finding civil liberties exclusively within federal jurisdiction was incorrect and that some are to be found in provincial jurisdiction. Thus, Laskin argues that it is impossible through a federal statute alone to declare that federal statutes are to be judicially reviewed on the basis of civil liberties, but it is possible – through a federal statute alone – to declare that the Supreme Court's interpretation of the division of powers is incorrect.

CONCLUSION

Many modern scholars have pointed to Laskin's and Pigeon's contemporaneous criticism of the *Canadian Bill of Rights* as authority for its inability to trigger judicial review of federal statutes, but have ignored the fundamental inconsistency and even audacity of their arguments: that a federal statute alone can alter the division of powers but it cannot enable judicial review. An examination of these arguments in context reveals that they are much less legal analyses of the *Canadian Bill of Rights* than they are scholarly-clothed political manifestos. Both scholars, instead, were primarily concerned with the division of powers; for Pigeon it was the maintenance of provincial autonomy and for Laskin, concerned with provincial violations of civil liberties, it was the consolidation of civil liberties into exclusive federal jurisdiction. Both Pigeon and Laskin were perturbed by the *Canadian Bill of Rights*, not because it could not be effective in its stated goal – enabling judicial review of federal statutes – but because the effect of enabling judicial review based on a federal statute could impinge on the courts' interpretation of the division of powers. Pigeon saw the *Canadian Bill of Rights* as a

[54] Laskin (1959), p. 119.

consolidation of the implied bill of rights of the 1950s which had limited Quebec's autonomy by withdrawing provincial violations of civil liberties into federal jurisdiction. In contrast, Laskin viewed the *Canadian Bill of Rights* as an attempt to limit and even diminish that same process.

Pigeon and Laskin[55] contended that the *Canadian Bill of Rights* involved "the passing of a declaratory Act,[56] viewed constitutionally, is an assertion of supreme judicial authority, such as was often exercised in earlier Parliaments, and not of legislative authority."[57] Driedger, in many ways, fundamentally agreed with this. However, while Laskin and Pigeon felt that such a federal declaratory Act could affect entrenched provisions of the British North America Act, but could not affect any unentrenched provisions, Driedger took the view that while entrenched provisions of the constitution were protected from alteration by the federal parliament alone, the federal parliament could, through a declaratory Act, affect provisions of the constitution exclusively in its jurisdiction.

It is notable that, of the authors in the March 1959 *Canadian Bar Review* who argued that the *Canadian Bill of Rights* could not enable judicial review, all but one of them changed their position. Lederman changed his view[58] on the basis of Driedger's explanation of the *Canadian Bill of Rights* published in 1968.[59] Laskin, who strongly

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[55] See post Appendix F, "*Robertson.*"
[56]See post Appendix E, "Declaratory Acts"and "Appendix F, "*Robertson.*"
[57] Henry Hardcastle, *A Treatise on the Construction of Statute Law*, 3rd edition, ed. William Feilden Craies (London: Stevens and Haynes, 1901), p. 69; quoted by Pigeon (1959) at p. 68.
[58] Lederman (1970).
[59] Elmer A. Driedger, "The Canadian Bill of Rights" in O.E. Lang (ed) *Contemporary Problems of Public Law in Canada: Essays in Honour of Dean F. C. Cronkite* (Toronto: University of Toronto Press, 1968), pp. 31-48. [Driedger (1964)] This essay was

favoured judicial review of legislation on the basis of civil liberties, changed his mind about the ability of the *Canadian Bill of Rights* to enable judicial review after the failure of the Victoria Charter in 1972 when no constitutional entrenched instrument seemed likely in the foreseeable future to replace it. It was only Justice Pigeon who maintained his position and he became a rather lone voice on the Supreme Court in arguing that the *Canadian Bill of Rights* did not enable judicial review, refusing (unlike Justice Abbott), to concede to the consistent interpretation of his peers.

In sum, the general scholarly opinion at the time of the passage of the *Canadian Bill of Rights* was that it would enable judicial review of federal statutes. Most of the leading scholars who opposed this view, whether sincerely or not, largely opposed the *Canadian Bill of Rights* for reasons unrelated to whether it did or did not enable judicial review. In the end it was scholars like McWhinney and Bowker who were most cognizant and even prescient. They understood that the *Canadian Bill of Rights* both intended and would enable judicial review, but expressed doubt as to whether the courts would robustly embrace the power granted to them. For example, McWhinney noted that judicial interpretation of the Fourteenth Amendment to the United States Constitution had mirrored Congressional support: immediately after the Civil War, when Radical Republicanism was dominant, the United States Supreme Court deferred and gave a broad interpretation in *Railroad Company v Brown*,[60] but when segregationist support was ascendant in Congress, the Supreme Court again deferred and legitimized "separate

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originally written as early as 1964 (MG31 E39 v.09.02), but was only published subsequent to his retirement as Deputy Minister. All quotations are taken from the 1964 draft, but for ease of reference citations are made to their equivalent in the 1968 published version; resultantly, there may be discrepancies between quotations and how they appear in the cited version. See Appendix F, "*Robertson*"

[60] *Railroad Company v Brown*, (1873), 17 Wall. 445

but equal" in *Plessy v Ferguson*,[61] and had only recently reversed itself in *Brown v Board of Education*[62] in face of the waning of, and rising discomfort with, that principle.[63]

CONCLUSION

Although the criticisms of Bill C-60 were contradictory, they represented a panning of the proposed bill of rights by many of Canada's leading constitutional scholars. Whatever the merits of the criticism and whatever counter-arguments the Department of Justice could proffer, the criticism had to be addressed and in April, Cabinet agreed that the proposed bill of rights should not be included in the 1959 sessional programme.[64] Although the issue of proceeding with the *Canadian Bill of Rights* was consistently raised[65] with a glimmer of hope that the matter could be addressed during the current session, in June it was resolved that although the issue could not be addressed in 1959, it would top the agenda for the 1960 legislative session.[66]

By May 1959, consideration of the *Canadian Bill of Rights* ceased in the Department of Justice as its focus was directed towards other items on the legislative agenda and, most notably, towards the revived discussions of domesticating the amending formula for the *British North America Act*.[67] Although the government had originally hoped to proceed on the bill of rights without addressing the issue of patriation, the existing correspondence with the provinces on the matter, combined with the

[61] *Plessy v Ferguson,* (1896), 163 U.S. 537
[62] *Brown v Board of Education,* (1954), 347 U.S. 483
[63] McWhinney (1959), p. 27.
[64] Cabinet Minutes, April 1959
[65] Cabinet Minutes, 26 May 1959, 21 June 1959, 13 July 1959.
[66] Cabinet Minutes, 21 June 1959
[67] See DOJ/184000-27.

academic, popular, and Parliamentary[68] demands for a bill of rights as a *British North America Act* amendment, forced the deferring of the statutory bill of rights until the question of patriation could be addressed. ♦

[68] *Debates* 24-2 (1959), I:805, 811, 856 (9, 10 February 1959)

Chapter Six – Drafting Bill C-79[1]

The 1959 parliamentary session ended on 18 July 1959 and Cabinet met in October 1959 to discuss the upcoming 1960 legislative session.[2] Diefenbaker emphasized the importance of giving priority to the bill of rights in the 1960 session. However, Diefenbaker was still drawn to the calls for *British North America Act* amendment to entrench the bill of rights. Diefenbaker noted to Cabinet that whereas the Liberals had previously opposed a bill of rights generally, since arriving in opposition they had begun to increasingly embrace such an instrument, but had largely staked out the position that, if there were to be a bill of rights "it should be in the form of an amendment to the B.N.A. Act." Diefenbaker proposed embracing the criticism the government had faced over the last year and suggested that letters should "be sent to the provincial governments asking their views on this proposal."

Diefenbaker was not committed to this idea and Cabinet was particularly opposed. It was noted that attempting to achieve agreement from the provinces would delay passage of the bill of rights by at least another parliamentary session and that "it was considered absolutely essentially to pass [it] at the next session." As well, not only was delay a concern, but it was feared that "a negative reply from Quebec or one of the Conservative provinces would give the opposition a club to beat the government's political allies." Finally, a number of Cabinet ministers argued that the recent Supreme Court of Canada jurisprudence had indicated that civil liberties were entirely within the jurisdiction of the federal parliament and as such requesting the consent of the provinces

[1] See footnote 1 to previous chapter.
[2] Cabinet Minutes, 8 October 1959.

"might be creating a precedent, therefore, to ask the consent of the provinces for an amendment to the Constitution on a subject matter which was of exclusive federal jurisdiction." Consequently, although with evident trepidation, Cabinet resolved "on the introduction at the next session of the Bill of Rights and agreed that it be introduced in substantially its present form."

By October the government had resolved to press ahead with a statutory bill of rights. Yet it did so with the nagging sense that while only a *British North America Act* amendment would gain popular legitimacy, pursuing such an option would be politically poisonous. The government's sense of disquiet in regards to constitutional legitimacy was to be shortly to be calmed by Driedger with his "novel propositions" that gave constitutional legitimacy to the government's politically motivated rejection of a *British North America Act* amendment.

DRIEDGER'S "NOVEL PROPOSITIONS"

On 29 October 1959, Driedger sent a memorandum to Jackett addressing the question of constitutional amendment. In the memo[3] and his attached reasoning,[4] Driedger concludes that "there is no way in which we can have an entrenched provision unless we cut ourselves adrift from the United Kingdom Parliament." Driedger's reasoning is clear and deserves some quotation at length:

> *The more I think about it, the more I am convinced that there is serious doubt whether the United Kingdom Parliament could now put a Bill of Rights into the British North America Act that would be beyond the reach of either Parliament or the legislatures.*

[3] E.A. Driedger, "Memorandum for the Deputy Minister, Re: Bill of Rights by Constitutional Amendment," 29 October 1959 (DOJ/186000-8).
[4] E.A. Driedger, "Memorandum, Re: Bill of Rights by Constitutional Amendment," 28 October 1959, (DOJ/186000-8).

> *Sections 2(2) and 7(2) of the Statute of Westminster, taken by themselves, give to Parliament and the legislatures complete jurisdiction to amend or repeal any United Kingdom law whenever passed insofar as it is the law of Canada or the province. These provisions, it seems to me, are more than mere grants of jurisdiction; indeed, I should think that they constitute an abdication of jurisdiction and I hardly think it is possible to go back on these provisions.*
>
> *The only thing that precludes these sections from extending to the British North America Act is sub-section (1) of section 7. That subsection, however, applies only to the British North America Acts 1867 to 1930.*[5]

The attached memo containing his reasoning at greater length was a *tour de force* designed to address the main criticisms of the draft *Canadian Bill of Rights*.

First, Driedger made clear that the draft statutory bill of rights was designed to permit the "courts [to] declare [...] legislation ***ultra vires***." He contrasted the draft statutory *Canadian Bill of Rights* with the Bill of Rights in the Constitution of the United States. Whereas the American Bill of Rights tended to be "directed against a named legislative authority" with its typical phrasing of "Congress shall make no law...," the draft statutory *Canadian Bill of Rights* typically sought to be "universal" in its rights protections. Driedger gave the example of the key provision in the draft bill that "Every person has the right not to be deprived of life, liberty or property, without due process of law" and argued that "a universal prohibition would apply to all legislative authorities and also to individuals as, for example, government officials." Thus, Driedger first made it clear that the draft bill was not only designed to be able to be used to strike down contrary legislation in the style of the American Bill of Rights, but was to go further in controlling the acts of government officials.

[5] Emphasis in original.

Driedger then went on to attack the manner in which the term "constitutional" was being employed in criticisms of Bill C-60; in particular, the term was being used synonymously with the term "entrenched." Driedger argued that

> *If a declaration of rights is a "constitutional" provision, then, insofar as it is part of the "Constitution of Canada" it could be repealed under 91(1), and insofar as it is part of the "Constitution" of the province, it could be repealed by the legislature of the province.*
>
> *The result seems to be that an amendment in the form of a declaration of right could be changed by Parliament or the legislatures under sections 91 and 92.*

For Driedger, what many were describing as "constitutional" was exactly contrary to their intended meaning of "entrenched" since with "constitutional" provisions being inherently non-entrenchable as they can be amended through the ordinary legislative process under ss. 91 and 92.

In consequence, Driedger argued that in order for a bill of rights to be functionally entrenched into the *British North America Act* "it would be necessary to add a prohibition to the effect that no legislature in Canada shall enact a law in derogation of such a right." Yet, a bill of rights in such a form "would not be complete because it would not prevent officials (as distinguished from legislatures) from depriving people of property without due process, etc." Thus, a statutory bill of rights would be functionally more robust at protecting civil liberties than the "constitutional" bill of rights often called for. For Driedger, if a "constitutional bill of rights" was to be as functionally effective as his statutory bill of rights, it would "have to take the form of a universal prohibition, or would have to be in the form of a declaration of right plus a corresponding prohibition." However, an amendment to the *British North America Act* in such a form would

> *not be sufficient because the prohibition could conceivably be removed by appropriate legislative action under 91 or 92. Section 91 overrides all*

> *other provisions of the Act. There would have to be an express provision that the Bill of Rights clauses do not come within 91(1) or 92(1). Even this might not be effective.*
>
> *Apart from the Statute of Westminster, a law enacted by the United Kingdom has no special sanctity merely because it is contained within the covers of the British North America Act. Parliament or the legislatures can now change any law of the United Kingdom. If, for example, we asked the Parliament of the United Kingdom to make a new rule as to negotiable instruments, and the Parliament of the United Kingdom did this by putting it into the B.N.A. Act, there would be no reason why Parliament could not change that rule under the authority of 91(18).*
>
> *Under section 129 of the B.N.A. Act, Parliament and the legislatures are prohibited from amending United Kingdom statutes that apply* ex proprio vigore. *This limitation was removed by section 2 of the Statute of Westminster, 1931, but section 7 of that statute says that nothing in that Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts 1867 to 1930.*
>
> *It may be that section 7 of the Statute of Westminster gives a sanctity to the B.N.A. Act. However, it applies only to the B.N.A. Acts 1867 to 1930, and the question arises whether the exception in section 7 of the Statute of Westminster applies to any subsequent B.N.A. Act. I do not find in the common law or statutes of the United Kingdom any provision that a citation of an Act includes all its amendments. It is customary to insert in an Act a provision that references to an Act shall be construed as a reference to the Act as amended. There is no such provision in the Statute of Westminster, but there is in many other statutes of the same session. Even if there were such a provision in the United Kingdom Interpretation Act, or any such a law, that provision or law would not be part of the B.N.A. Act and could, therefore, be changed in Canada.*

Driedger also addressed the common criticism of Bill C-60 that it did not make provision for penalties and retorted that:

> *There need be no penalties against a legislative body because the courts would declare the legislation ultra vires. It would seem that there need also be no penalty as against officials or other persons, because if the act is contrary to the declared rights or prohibition, the actions would be illegal and there would be a remedy in trespass, assault, false imprisonment, etc.*

Driedger then emphasized the lack of functional protection that *British North America Act* amendments had against future amendments:

> *The United Kingdom Parliament now acts at the request of the Government of Canada. It is customary to have a Resolution of the Senate and House of Commons of Canada; it is not customary to have any expression of views from the governments or legislatures of the provinces.*
>
> *There is no constitutional requirement that there be even an Address of the Senate and House of Commons. If the Government of Canada requested the Government of the United Kingdom to make a change, it is difficult to see how the United Kingdom Government could refuse.*
>
> *In any case, even the strongest constitutional provision could be changed at the request of the Government or the Parliament of Canada. It therefore seems to be impossible to have an absolutely entrenched provision - that is to say, a provision beyond the reach of the Parliament of Canada.*
>
> *A provision could become truly entrenched only if we had an amending procedure in the B.N.A. Act itself, as they have in the Constitutions of the United States, Australia, etc. The Constitutional Conferences of 1950 failed to find an acceptable amending procedure.*

From Driedger's perspective, to argue that a *British North America Act* amendment was more secure from repeal than a federal statute would require one to believe that there would be a government willing to pay the political price of repealing the *Canadian Bill of Rights,* yet unwilling to make a request to the United Kingdom government for a *British North America Act* amendment without the consent of the provinces. To put it another way, what sort of political resistance would federal government face from an action to grant a provincial legislature greater powers without its consent than it would from repealing the *Canadian Bill of Rights* alone?

In the end, Driedger conceded only one concern with a statutory bill of rights in contrast with a *British North America Act* amendment in the contemporaneous constitutional context, that "a provision confined to one jurisdiction leaves the undesirable implication that other jurisdictions are free to enact legislation contrary to the Bill of Rights*."*

HOPE FOR THE NEW YEAR

Jackett immediately embraced Driedger's reasoning and communicated these "novel propositions" to Fulton:[6]

> *I draw your attention to the, to me, quite novel proposition put forward by Mr. Driedger that, since the Statute of Westminster, any Imperial statute affecting Canada, including any amendment to the B.N.A. Act since that time, can be amended by Parliament or the legislature in its own field. The more I think of it, the more I come to the conclusion that any proposal for putting the Bill of Rights in the Constitution is, to the extent that it claims some greater protection for the individual, of no real value.*

Prior to this point Jackett – like Varcoe before him – always characterized a "constitutional" bill of rights as one that would be an embarrassing and inappropriate abdication of sovereignty to Westminster before patriation, but there had never been a question to whether it was possible. Driedger's "novel propositions" gave a solid constitutional foundation to Jackett's distaste for a constitutional bill of rights.

In his summation to the Minister,[7] Jackett noted that the calls for constitutional entrenchment had suggested two different possibilities:

> *(a) an amendment to the British North America Act by the Imperial Parliament requested by the Government of Canada after a resolution has been passed by the two Houses of the Canadian Parliament; and (b) an amendment to the "Constitution of Canada" by the Parliament of Canada under s. 91(1) of the British North America Acts, 1867 to 1949.*

Armed with Driedger's "novel propositions," Jackett argued that

> *upon analysis, it would not appear that neither of such methods would result in entrenchment. As far as a s. 91(1) amendment is concerned, any subsequent amendment would be made in exactly the same way as an amendment to the present Bill of Rights, if it is proceeded with. As far as an Imperial amendment is concerned, just as the original amendment can be obtained with less fuss and debate in the Canadian Parliament, so, as a*

[6] W.R. Jackett, "Note to the Minister of Justice, Re: Bill of Rights," 3 November, 1959 (186000-8).
[7] W.R. Jackett, "Re: Bill of Rights – Amendment to the Constitution," 2 November, 1959 (186000-8).

> *practical matter, any subsequent change could be obtained with less trouble than would be involved in amending the proposed Bill of Rights. Because an Address to [the] UK Parl[iament] involves only a "one-stage" debate, whereas an amending Bill would take 3 readings, etc."*

Repeating Driedger's arguments, Jackett also noted that "I think there is good ground for saying that, under the Statute of Westminster, Parliament and each of the legislatures could repeal such a law so far as its own legislative authority is concerned." Further, whatever Jackett's reticence towards the bill rights both before and subsequent to his time as Deputy Minister, in embracing Driegder's arguments to counter the demands for a *British North America Act* amendment he portrayed a solely statutory bill of rights in grandiose terms, claiming that

> *The present Bill of Rights is designed to reshape all substantive law in the Dominion field so as to eliminate any aspect of any such law that would authorize encroachment on human rights and fundamental freedoms*[8]

Fulton, in turn, embraced Driedger's "novel propositions" and after a few weeks presented them to the Prime Minister:[9]

> *You will remember that in our discussion of the Bill of Rights last week, I told you that I had considered carefully with the officers of my Department the question of enacting the Bill of Rights by way of an amendment to the B.N.A. Act "entrenching" it in the Constitution, as opposed to embodying it in an ordinary statute of the Canadian Parliament. The suggestion for entrenchment has come from many quarters. I also told you that it was our considered opinion, as a result of this consideration, that it is preferable to do it by way of a statute of the Canadian Parliament rather than by way of a Constitutional amendment.*
>
> *I now enclose for your information and consideration, a copy of the memorandum prepared by my Deputy Minister on this subject, which contains some very interesting reflections on this problem, and on which a conclusion as to the better course to be followed, is based. I believe you will find Mr. Jackett's memorandum both sound and interesting.*

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[8] W.R. Jackett, "Memorandum for the Minister of Justice, Re: Bill of Rights – Constitutional Amendment," 23 November 1959 (186000-8).
[9] E.D. Fulton, Letter to the Prime Minister, 24 November 1959, Diefenbaker Papers.

"AUTHORITY TO MAKE CONSTITUTIONAL LAWS"

When addressing the question of constitutional amendment in Canada, Driedger often observed that

> *The 'Constitution of Canada' is popularly thought to be the British North America Act of 1867 and its amendments, and a reference to constitutional amendment is usually intended to mean the amendment of the British North America Acts.* [10]

Driedger contented that such a view was incorrect and "in Canada we have no document that purports to set out the complete laws of our government."[11] The Constitution of the United States, for example, emerged from a revolutionary break and thus its foundation was *sui generis*. For Driedger however, Canada had no such revolutionary break and thus the *British North America Act* as the foundational constitutional instrument (akin to the US constitution) could not be justified as *sui generis*. Instead it, and Canada's constitution, could only be justified by the constitutional order in which it emerged: the sovereignty of the Westminster parliament. Thus, central to Driedger's analysis of Canada's contemporaneous constitution was the instrument that defined the relationship between Westminster and Canada's legislatures and that, above all other instruments, defined Canada's constitution: the *Statute of Westminster*.

STRUCTURE AND COMPONENTS OF CANADA'S CONSTITUTION

In response to the constitutional debates provoked by the *Canadian Bill of Rights* and, particularly, the first attempt at patriation of the *British North America Acts* since

[10] Elmer A. Driedger, "Constitutional Amendment in Canada," *Canadian Bar Journal* vol. 5 (1962), p. 53.
[11] Driedger (1962), p. 53.

1950,[12] Driedger published an article in the *Canadian Bar Journal*[13] which explained the nature of the constitution of Canada, its structure and components, and "from a legal point of view, what is meant by the 'amendment of the Constitution in Canada.'"[14]

Despite being published in mid-1962, it appears that the article was drafted in late 1960, a few months after the enactment of the *Canadian Bill of Rights*,[15] and seemingly draws entirely from material prepared in the Department of Justice between October 1959 and February 1960.[16] Further, it appears that it was only as part of his work on the *Canadian Bill of Rights* that Driedger first engaged in a careful analysis of the *Statute of*

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[12] Following the adoption of the *Canadian Bill of Rights* in August 1960, the Diefenbaker government directed its constitutional efforts towards the patriation ("domestication" in the terminology of the era) of the British North America Acts. Between October 1960 and November 1961, there were four conferences of Attorneys General and one conference of Deputy Attorneys General on constitutional amendment which produced a draft patriation statute that would provide for domestic amendment and end amendment by Westminster along the lines of what is now referred to as the "Favreau-Fulton Formula." While implementation foundered on neo-nationalist demands for greater powers for the Quebec legislature and further pursuit of the matter fell victim to increasing divisions in the Diefenbaker cabinet, the conferences produced significant discussion about the nature of Canada's constitution and constitutional amendment in Canada. See Anne F. Bayefsky (ed), *Canada's Constitution Act 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson Limited, 1989).

[13] E.A. Driedger, "Constitutional Amendment in Canada" (1962) *Canadian Bar Journal* 5:52-59. Later republished by the Department of External Affairs as "Reference Paper 113" (1965).

[14] Driedger (1962), p. 53.

[15] Driedger Fonds, LAC, MG31, E39, vol. 17, file 10. Cf, Elmer Driedger "Address to the Institute of Public Administration of Canada" 15 February 1961, LAC, MG31, E39, vol. 17,file 9. Cf. Canada, Information Section, Department of External Affairs, "Constitutional Amendment in Canada," Reference Paper 113 (1965).

[16] See "Bill of Rights by Constitutional Amendment," 28 October 1959, (DOJ/180667); "Memorandum, Re: Bill of Rights by Constitutional Amendment," 28 October 1959, (DOJ/186000-8); "Memorandum for the Deputy Minister, Re: Bill of Rights by Constitutional Amendment," 29 October 1959 (DOJ/186000-8); "Memorandum for Mr. Jackett, Re: Bill of Rights," 3 November 1959 (DOJ/186000-8); "Memorandum for the Deputy Minister," 7 January 1960 (DOJ/186000-8); "Re Joint Committee on Human Rights and Fundamental Freedoms," n.d. (DOJ/186000-8); "Memorandum for the Deputy Minister, Re: Constitutional Amending Procedure," 4 February 1960 (DOJ/187574); "Memorandum, Re: Constitutional Amendment," 5 February 1960 (DOJ/180667).

Westminster.[17] While written after the enactment of the *Canadian Bill of Rights*, it was drafted based on his material from the October 1959 to February 1960 period. It was only the discussions of patriating the *British North America Act* beginning in October of 1960 that seemingly prompted Driedger to consolidate these earlier memos into a rarefied document for wider consumption. It is analyzed here in favour of the department of justice memos because his structuring and language is clearer and more accessible.

In this 1962 article, Driedger argued that while "the system of laws and conventions by which a state is governed [...] may be formally expressed, as in the case of the United States Constitution,"[18] the parallel popular attribution of the "Constitution of Canada" as being *British North Act 1867* was incorrect. Unlike many contemporary

[17] In Driedger's 1958 *Consolidation of the British North America Acts, 1867 to 1952* (Ottawa : Edmond Cloutier, 1958), he mistakenly attributes the repeal of s. 118 of the *British North America Act, 1867* to the UK's *Statute Law Revision Act, 1950* (14 George VI, c. 6). This error persists, as Section 118 of the Constitution Act, 1867 is recorded as being "Repealed" in *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Dept of Justice Canada, 2001). This is incorrect, and should be recorded as "Spent." The footnote to s. 118 notes that that section was repealed by the *Statute Law Revision Act, 1950* (UK). However, as the *Statute Law Revision Act, 1950* makes no express declaration that it was enacted with the request and consent of Canada, it – in light of the *Statute of Westminster, 1931*, s. 4 – is not to be construed as applying to Canada. Instead s.118, as originally enacted in the BNA Act 1867, was made inoperative by s. 1(5) of the *British North America Act, 1907*. To wit, the BNA Act 1907 did not expressly repeal or amend s. 118 of the BNA Ac 1867, but instead "substituted" the grants provided for by s. 118 for a new schedule of grants and thus the relationship between the two enactments is one of paramountcy, not amendment or repeal. Further, as the *British North America Act, 1907* was not included in the *British North America Act, 1867 to 1930*, it therefore fell under s. 2(2) – and not s. 7(1) – of the *Statute of Westminster* and thus alterable by Parliament through the ordinary legislative process. (As the *BNA Act 1907* was subject to amendment through the ordinary legislative process by the federal parliament under the *Statute of Westminster* and that they as do not obviously fall under ss. 41, 42, 43, and 45 *Constitution Act 1982*, the *Constitution Act, 1907* therefore – in my view – now falls under s. 44 of the *Constitution Act, 1982*.) The result being that s. 118 should be listed unamended in the *Constitution Act 1867*, but note that it is spent and now covered by other legislation, similar to how s. 40 of the *Constitution Act 1867* is treated.

[18] Driedger (1962), p. 53.

and future commentators on the Constitution, Driedger does not portray Canada's constitution as a mix of a British "unwritten" constitution and an American "written" constitution. Instead he unequivocally states that "in Canada we have no document that purports to set out the complete laws of our government [...] as in the case of the United Kingdom." [19] For Driedger, the principle of constitutional supremacy was (contemporaneously) absent from Canada with parliamentary sovereignty wholly pervading the Canadian constitutional order; in this vein, he noted that the "authority to make constitutional amendment is therefore simply authority to make constitutional laws."[20]

From this basis, Driedger described the composition of Canada's constitution as including a mix of (1) "Statutes of the United Kingdom" (such as the "British North America Acts, [the] Statute of Westminster, 1931, [and the] Parliament of Canada Act, 1875"), (2) "Statutes of Canada" (such as the Senate and House of Commons Act, [the] Canada Elections Act, [... and the] Saskatchewan Act"), (3) "Statutes of the Provinces" (such as "Act relating to [the] Executive Council, [the] Legislature, [... and] Election"), (4) "other documents" including "Instructions to Governors" and "Letters Patents," and (5) "conventions." For Driedger, the *British North America Acts, 1867 to 1930,* were simply another set of statutes like the *Senate and House of Commons Act*. Just as the fact that *Senate and House of Commons Act* could not be amended by the provincial legislatures did not in any way diminish the principle of parliamentary sovereignty, the fact that certain provisions of the *British North America Acts, 1867 to 1930* could only be amended by Westminster did not in any way substitute constitutional supremacy for

[19] Driedger (1962), p. 53.
[20] Driedger (1962), p. 54.

parliamentary sovereignty. As Driedger noted "constitutional laws for Canada may be made by the Parliament of Canada, by the provinces, or by the Parliament of the United Kingdom." [21] It was not that the *British North America Acts* held any intrinsic constitutional supremacy, but that parliamentary sovereignty was exercised by various legislatures that exercised a mix of exclusive and concurrent legislative powers, including the "authority to make constitutional laws." [22]

THE "ABDICATION OF IMPERIAL POWER"

The *Statute of Westminster* was Canada's most important constitutional instrument as it defined the "authority to make constitutional law." While the importance of the *British North America Act* was evident in its defining much of the machinery and organisation of the Canadian polity, its existence, and – ultimately – all other constitutional statutes, were governed according to the rules defined in the *Statute of Westminster*.

In its general approach, the *Statute of Westminster* emphasizes the parliamentary sovereignty of Dominion parliaments as the governing principle of Dominion polities. Its provisions are premised upon "plenary powers of legislation, as large, and of the same nature, as those of [Westminster]" [23] inherent upon the creation of any representative legislature, to enact laws for the "peace, welfare, and good government" and to "make laws respecting the constitution." [24] With restrictions on that plenary power enacted in instruments expressed as limited exceptions (such as the *British North America Acts*).

[21] Driedger (1962), p. 57.
[22] Driedger (1962), p. 54.
[23] *R v Burah*, (1878), 3 App Cas 889.
[24] *Colonial Laws Validity Act 1865.*

The first five sections following the definition section of the *Statute of Westminster* (i.e. ss. 2-6) seek to terminate Westminster's unencumbered sovereignty over Dominion parliaments and the transfer of those powers to the Dominion parliaments, particularly subsection 2(2). Read alone, this subsection, in rather unequivocal language, terminates the paramountcy of Westminster legislation over the Dominions and transfers that paramountcy to Acts of Dominion parliaments:[25]

> *No law [...] shall be void or inoperative on the ground that it is repugnant to [...] any existing or future Act of Parliament of the United Kingdom [...] and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act [...] in so far as the same is part of the law of the Dominions.*

Limitations on this plenary power contained in other constitutional statutes are only subsequently delineated as express exceptions from this general principle. In Canada's case, these express limitations are provided in section 7 which limits this plenary legislative power to the existing "matters within [their] competence" (in s. 7(3)) and that

> *Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder [in s. 7(1)]*.

Driedger wavered in his analysis of the *Statute of Westminster* – whether it provided for the retention at Westminster of an unlimited legislative jurisdiction over Canada or whether Westminster's jurisdiction was limited only to its exclusive legislative power of "the repeal, amendment or alteration of the *British North America Acts, 1867 to 1930*, or any order, rule, or regulation made thereunder" (although, in either case, always subject to the "request and consent" of Canada). When the issue of Westminster legislating for Canada was more abstract, such as when drafting his 1962 article, Driedger accepted the construction that Westminster's legislative jurisdiction remained

[25] N.B. Equally extended to provincial legislatures by subsection 7(2).

unlimited in theory and retreated from the most "novel" of his constitutional postulates that the *Statute of Westminster* terminated Westminster's power to legislate on Canadian matters other than the division of powers and a domestic amending formula. As such, in 1962 Driedger argued that while

> *the Parliament of the United Kingdom['s] power to make constitutional laws for Canada […] is, theoretically at least, still without limit; [...] in practice, however, this power is not exercised except with regard to those constitutional amendments that cannot now be made by any legislative authority in Canada.* [26]

In this tempered analysis, Driedger still emphasized that, while the power to make "laws of any character having application in Canada" was still "theoretically" unlimited, this power was subject to a manner and form restriction, that it must comply "with the formalities prescribed in the Statute of Westminster, namely, request and consent by Canada."[27]

However, when the discussion of Westminster legislating for Canada was more concrete (e.g. during the drafting of the *Canadian Bill of Rights* or the adoption of the *Charter*), Driedger argued for the construction that terminated Westminster's concurrent powers and only retained its exclusive powers over the amending process and the division of powers. Yet, even when he accepted the construction that section 4 of the *Statute of Westminster* provided for Westminster's unlimited legislative jurisdiction, Driedger consistently argued that any enactment outside of Westminster's exclusive legislative jurisdiction in subsection 7(1) was subject to the continuing concurrent jurisdiction of the relevant Canadian legislatures.

[26] Driedger (1962), p. 57.
[27] Driedger (1962), p. 57.

For Driedger, the contention that Westminster continued to exercise an unlimited and paramount legislative jurisdiction over Canada was one of those "castles in the sky" built up by examining a single provision of the *Statute of Westminster* while failing to examine "the words of an Act [...] read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[28] To properly understand section 4, Driedger argued, one had to read it in light of the whole statute, particularly sections 2 and 7. For Driedger, "the scheme of the Act, the object of the Act, and the intention of Parliament" was to "ratify, confirm, and establish"[29] the principle that "Great Britain and the Dominions [...] are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs."[30] As such,

> *Section 4 cannot be construed as reserving full imperial power, for that would destroy section 2 [as] it would not make sense to say that subsection 2(2) grants power to amend any British statute and then to say that power is taken away by section 4 if the statute is requested and consented to by Canada [...] Subsection 2(2) of the Westminster Act is an abdication of imperial power, and the British Parliament cannot now take it back and impose restrictions or conditions on the exercise of the jurisdiction it relinquished in 1931.*[31]

Driedger argued that section 4 should not be construed as concurrent to subsection 2(2), but as a qualification. Driedger locates these qualifications in sections 4 and 7. Section 4 "speaks of the extension to a Dominion of an Act of the British Parliament, which rather implies that there must be an independent law for the United Kingdom

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[28] Driedger (1974), p. 67.
[29] *Statute of Westminster, 1931* (22 & 23 George V, c. 4), preamble
[30] "Balfour Declaration 1926," *Report of the Inter-Imperial Relations Committee of the Imperial Conference 1926*, p. 2. Available from the National Archives of Australia:A4640/32.
[31] E.A. Dreidger, "The Canadian Charter of Rights and Freedoms," (1982) *Ottawa Law Review* 14:336-378 at 369 and 373.

before it can be extended."[32] Construction of this section is to be aided by the preamble that proclaims that "any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom." As for section 7, Driedger argues that it was intended to further limit section 4 to only those powers reserved to Westminster by subsection 7(1):

> *The position of Canada is clear. If an Act of the British Parliament is a repeal, amendment or alteration of the British North America Acts, 1867 to 1930, it is a valid imperial law and, without more, untouchable by any legislative authority in Canada; if the Act does not fall within subsection 7(1), and purports to be a law for Canada alone, then, at worst it is not law in Canada, and, at best, it is subject to repeal, amendment or alteration by Parliament or the legislature of a province according as it is in relation to a matter within the competence of the Parliament of Canada or the legislatures of the provinces under the present distribution of powers.*[33]

Thus, for Driedger, any attempt to entrench the a bill of rights and extend its application to the provinces simply by having Westminster incorporate it into the *British North America Act* would be futile , as such an effort would be "founded on a fallacy and a misconception. The fallacy is the assumption that the British Parliament still had jurisdiction to enact as a constitutional law for Canada any law on any subject."[34] For even if such an enactment was valid law for Canada and the provinces, it would be subject to future amendment by either Parliament or the legislatures of the provinces "in relation to matters with the competence of the Parliament of Canada or any of the legislatures of the Provinces."

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[32] Driedger (1982), p. 369.
[33] Driedger (1982), p. 369.
[34] Driedger (1982), p. 377.

THE "EFFECT OF REVISION OR CONSOLIDATION"

As the purpose of *Statute of Westminster* was "an abdication of imperial power" that precluded Westminster taking back "the jurisdiction it relinquished in 1931," it was necessary to apply a strict construction to the statute's technical terms. Most pertinent in this regard was the reference to the "*British North America Acts, 1867 to 1930*" in subsection 7(1), which Driedger argued could not be construed to include subsequent amendments to the British North America Act.[35] As a result, the only amendments to the *British North America Acts* that could be inherently entrenched were amendments that fell within the construction of subsection 7(3), that is, to amendments which altered the "matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively." Any other amendments to the British North America Act made by Westminster (or Parliament under the *British North America Act (No. 2), 1949*) could be amended by ordinary legislation by whatever legislature had power over the relevant subject-matter.

Canada's *Interpretation Act* has long included a provision defining one of the "effects of revision or consolidation" being that a reference to a repealed or amended enactment is to be construed as a reference to the substituted enactment (relating to the same subject-matter).[36] Thus, references to a principal Act, unless the contrary intention

[35] This argument first appears in E.A. Driedger, "Memorandum, Re: Bill of Rights by Constitutional Amendment," 28 October 1959, (DOJ/186000-8). It subsequently appears Driedger (1962), p. 56; Driedger (1964), p. 27-28; Driedger (1968), p. 350; Driedger (1977), p. 314; and (1982a), p. 369.

[36] The provision can be found in s. 44(h) of the current *Interpretation Act* (1985 RSC, c. I-21):

> *any reference in an unrepealed enactment to the former enactment shall, with respect to a subsequent transaction, matter or thing, be read and*

appears, are to be construed as a reference to the principal Act as amended. Arguably, therefore, subsequent amendments to the *British North America Acts, 1867 to 1930* should be deemed to include in the *Statute of Westminster*'s reference to "*British North America Acts, 1867 to 1930*" in s. 7(1).

Driedger rejected such a construction of the *Statute of Westminster*, arguing that such provisions need to be interpreted in the context in which they were enacted, that is, as a statute of the British Parliament. Driedger noted that this principle was absent from both "the common law [and] statutes of the United Kingdom."[37] British *Interpretation Acts* [38] have never contained an analog provision to the Canadian provision on consolidation. While the principle was not alien in the United Kingdom, it had to be explicitly expressed in a particular statute. Compare, for example, two statutes enacted in the era of the *Statute of Westminster*.[39] First, the *British North America Act, 1930,*[40] which reads

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> *construed as a reference to the provisions of the new enactment relating to the same subject-matter as the former enactment*

At the time of the enactment of the *Statute of Westminster* and the *Canadian Bill of Rights* (save for an errant comma that was removed in 1935) the provision was found in s. 20(b) of the *Interpretation Act* (1927 RSC, c. 1; 1952 RSC, c. 158) and read:

> *20. Whenever any Act or enactment is repealed, and other provisions are substituted by way of amendment, revision or consolidation [...]*
> *(b) any reference in any unrepealed Act or in any rule, order or regulation made thereunder to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject-matter as such repealed Act or enactment.*

[37] E.A. Driedger, "Memorandum, Re: Bill of Rights by Constitutional Amendment," 28 October 1959, DOJ file 186000-8.

[38] For example, the *Interpretation Act 1889*, 52 & 53 Victoria, c.63 (UK) or the *Interpretation Act 1978*, c. 30 (UK).

[39] Enacted 10 December 1931

[40] 20 & 21 George V, c 26, s 3. Enacted 10 July 1930.

> *This Act may be cited as the British North America Act, 1930 and the British North America Acts, 1867 to 1916, and this Act may be cited together as the British North America Acts, 1867 to 1930.*

Second, the *Housing Act, 1930*,[41] which reads

> *(1) This Act may be cited as the Housing Act, 1930, and shall be construed as one with the principal Act [the Housing Act, 1925], and that Act and this Act may be cited together as the Housing Acts, 1925 and 1930.*
>
> *(2) [...] Any reference [...] to the principal Act shall be construed as a reference to the principal Act as amended.[...]*

Had subsection 7(1) of the *Statute of Westminster* intended to include subsequent amendments to the *British North America Acts, 1867 to 1930*, it would have included the sort of language that appeared in the *Housing Act 1930*, calling for subsequent amendments to be "construed as one" with the *British North America Acts, 1867 to 1930*. Further, subsequent amendments to the *British North America Act* replicated the language of the *British North America Act 1930* and, similar to the Statute of Westminster, did not add language along the lines of "any reference to the principal Act shall be construed as a reference to the principal Act as amended." In Driedger's words, Section 7(1)

> *contains a vital phrase, namely, 'the British North America Acts, 1867 to 1930' [...] This citation does not include later British North America Acts. There is no provision in British Statutes corresponding to the one in our Interpretation Act that a reference to an Act is to be deemed a reference to the Act as amended. In any case each British North America Act includes at the end a citation clause giving a new embracing title to the series of Acts which the addition is being made, from which it is clear that the old citation does not include the new Act. [...] The result therefore is that 1867 to 1930 in the Westminster Act means exactly what it says.*[42]

A PARALLEL INSTRUMENT: THE *CANADIAN BILL OF RIGHTS*

The limitations that the imperial parliament imposed upon itself in the *Statute of Westminster* reflected how Driedger viewed Parliament could limit itself and provide for

[41] 20 & 21 George V, c 39, s 65. Enacted 1 August 1930.
[42] Driedger (1968), p. 350.

judicial review with the *Canadian Bill of Rights.* Parliament's sovereignty was not so mean as to render such declarations ephemeral. Just as Westminster could limit its purported continuing sovereignty over the Dominions through a 'mere' statute, so too could Canada's parliament limit its purported continuing sovereignty over "human rights and fundamental freedoms" through a 'mere' statute.

Driedger modelled section 2 of the *Canadian Bill of Rights* on the *Statute of Westminster*. Initially, the language of s. 2[43] in Bill C-60 (which now persists as subsection 5(2)) reflected the language of subsections 2(2) and 7(1) of the *Statute of Westminster* with the phrase "All the Acts of the Parliament of Canada enacted before or after the commencement of this Act all orders, rules and regulations thereunder" being modelled on the phrase "any existing or future Act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act;" and "that is subject to be repealed, abolished, or altered" being modelled on the phrase "deemed to apply to the repeal, amendment or alteration."

Cabinet had been uncomfortable with that section, believing it would either irrevocably limit parliament or would only be treated by the courts as a directory canon of construction. In order to remove this doubt Fulton directed Driedger to devise language which would "strengthen the Bill to the point where an express reference to the Bill of Rights would virtually be necessary to overcome or in any way vary the rule of interpretation laid down by that provision."[44] Driedger found such language in that most powerful constitutional instrument which had sought to fundamentally reshape the role of a legislature: the *Statute of Westminster*. Thus, the wording of s. 2 of the *Canadian Bill*

[43] then s. 3
[44] EA Driedger, Letter to Prime Minster (p2), 27 January 1959 (DOJ/184000-27).

of Rights came to closely parallel the language of section 4 of the *Statute of Westminster* (as illustrated in Table). For Driedger, so far as Canada was granted independence with the *Statute of Westminster*, human rights and fundamental freedoms were guaranteed by the *Canadian Bill of Rights*.

Table 1: *Statute of Westminster,* s 4 and the *Canadian Bill of Rights,* s 2 compared.

Statute of Westminster, Section 4	*Canadian Bill of Rights*, Section 2
No Act of Parliament of the United Kingdom passed after the commencement of this Act	Every law of Canada
shall extend to a Dominion as part of the law of that Dominion,	shall [*be so construed and applied*],
unless it is expressly declared	**unless it is expressly declared**
in that Act	by an Act of the Parliament of Canada
that that Dominion has requested, and consented to, the enactment.	that it shall operate notwithstanding The Canadian Bill of Rights,
[*extend to a Dominion as part of the law of that Dominion*]	be so construed and applied […]

CONCLUSION: PRELUDE TO THE QUIET REVOLUTION

Yet, despite Driegder's "novel propositions," Diefenbaker continued to favour exploring the possibility of constitutional entrenchment to meet the clamour for a *British North America Act* amendment. Two options were proffered. One, Driedger expanded upon his "novel propositions" to note "that in order to place the Bill of Rights, even if it is an amendment to the British North America Act, out of the reach of the Parliament of

Canada it would be necessary also to amend the Statute of Westminster, 1931."[45] This option was so politically remote that it was dismissed as quickly as it was proposed. The second option proposed a partial patriation of the *British North America Act* by creating a domestic amending procedure that required unanimous consent while having Westminster retain a concurrent amending power. This option was explored[46] to solve a myriad of constitutional issues facing the Diefenbaker government including the question of the bill of rights, a desire to alter the tenure of federal court judges, and a general desire to get political credit for a degree of patriation of the constitution. Driedger developed a number of alternatives along this line by the beginning of February 1960, three weeks after the start of the 1960 legislative session.[47]

However, so far as this option was conceivably applicable to the *Canadian Bill of Rights*, it was shortly mooted as an option by the pronouncements of the Quebec government under the leadership of the recently elevated Antonio Barrette.[48] Following comments by the Attorney General of Quebec, Antoine Rivard,[49] that the proposed statutory bill of rights would invade the rights of Quebec, the Quebec legislature unanimously passed a resolution to the same effect, with the resolution proclaiming that the bill of rights:

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[45] E.A. Driedger, "Memorandum for the Deputy Minister," 7 January 1960 (DOJ/186000-8).
[46] See Department of Justice file 187574 "Re: Constitutional Amendment" 18 January to 23 August 1960.
[47] E.A. Driedger, "Memorandum for the Deputy Minster, Re: Constitutional Amending Procedure," 4 February 1960 (DOJ/187574).
[48] Antonio Barrette became Premier of Quebec on 8 January 1960, following the deaths of Maurice Duplessis on 7 September 1959, and then Paul Sauvé on 2 January 1960.
[49] Maurice Duplessis had concurrently served as Attorney General of Quebec as well as Premier; Antoine Rivard was appointed as Attorney General upon the passing of Duplessis.

> *must not in any way, neither directly nor indirectly, encroach upon the exclusive jurisdiction vested in the province under the sections 92, 93 and others of the British North American Act, 1867 and more especially as regards the right of liberty, property and civil rights, liberty of religion, liberty of speech, of assembly and association, liberty of the press, administration of justice in the province, the civil and criminal procedure as laid down by the Legislature in the exercise of its rights, and generally all matters of a purely local or private nature in the province.*
>
> *The Legislative Assembly of the Province of Quebec reasserts that the rights of the province must not be restricted, diminished, amended or altered by an Act of the Parliament of Canada and without the consent of the provincial legislatures.*

If the Quebec government was opposed to a bill of rights as a federal statute, then there was no chance that it would support an amendment to the *British North America Act* that would limit its legislative liberty. Diefenbaker was livid at the pronouncement by the Quebec government and legislature and noted that both "Duplessis and Sauvé had had no objections to the bill in its present form."[50] Consequently, the Diefenbaker government opted to delay introduction of the *Canadian Bill of Rights* until later in the session, after the upcoming Quebec provincial election[51] which occurred on June 22nd. The defeat of their erstwhile *Union Nationale* allies in Quebec removed what had been the latest perceived impediment to proceeding with the *Canadian Bill of Rights*. On the day following the provincial election in Quebec, the Diefenbaker Cabinet approved the introduction of the *Canadian Bill of Rights*,[52] which was rapidly given first reading as Bill C-79 on 27 June 1960.[53]

In the intervening months between the resolution of the Quebec legislature and the introduction of Bill C-79, very little attention was given to the draft bill of rights by

[50] Cabinet minutes, 9 February 1960.
[51] Cabinet minutes, 5 May 1960.
[52] Cabinet minutes, 23 June 1960.
[53] *Debates* 24-3 (1960), V:5415 (27 June 1960).

the Department of Justice, which had settled on its favoured option and was simply waiting for the government to choose the most politically opportune moment to introduce the bill. However, Diefenbaker continued to be perturbed by the various criticisms of the draft bill, not simply its failure to be constitutionally entrenched, but its purported lack of penalties, enforcement machinery, and ability to sterilize conflicting legislation. During this period of delay, Fulton sought to shield the draft bill of rights from further revisions. Working from material largely crafted by Driedger, Fulton counselled Diefenbaker that none of the criticisms proffered were valid. Fulton assured Diefenbaker that "the scheme does operate by cutting down the operative effect of otherwise oppressive legislation" and that "the proposed Bill of Rights operates by making sure that no Dominion statute – past or future – can be regarded as authorizing encroachment unless Parliament has expressly authorized an encroachment 'notwithstanding the Bill of Rights.'" On the question of penalties and enforcement machinery, he digested Driedger's arguments about the efficacy of the current court system in enforcing the bill of rights and cautioned against any parliamentary or extra-parliamentary human rights scrutiny committee as being a tool of the government's opponents but providing little actual protection for human rights.[54] ♦

[54] E.D. Fulton, Letter to the Prime Minister, "Re: Memorandum of February 29th," 7 March 1960. Diefenbaker Papers.

Chapter Seven – Parliamentary Consideration of Bill C-79

On the same day that the Bill C-79, which was to become the *Canadian Bill of Rights*, was first to be defended before Parliament, Driedger was elevated to the position of Deputy Minister of Justice. As such, the view generally taken by the Deputy Minister towards the *Canadian Bill of Rights* during its formative drafting period definitively became the authoritative view within the Department of Justice. At this point, Driedger maintained the following views on the nature of the proposed *Canadian Bill of Rights* and related constitutional issues.

First, the proposed *Canadian Bill of Rights* as a statute of the federal parliament was a functionally 'constitutional' instrument in the sense that it would provide for the courts to modify or even strike down both pre-existing and future legislation if such legislation conflicted with the *Canadian Bill of Rights*. Driedger used a variety of terms to describe such potential action by the courts, including "prevailing" over, rendering "inoperative," and even ruling such legislation "*ultra vires*" the *Canadian Bill of Rights*. He was also content to use the term "constitutional," but emphasized that the British North America Acts consisted of only some of the many written instruments of the constitution of Canada. For Driedger, enacting a bill of rights through an amendment to the *British North America Act* would give it "no special sanctity" in the eyes of the courts.

Second, enacting a bill of rights through an amendment to the *British North America Act* would not result in any greater entrenchment than an "ordinary" statute. If passed under the provisions of section 91(1), which followed the ordinary legislative process, it could just as easily be repealed or amended through that same ordinary

process. Yet, if passed by the Westminster Parliament, it would only entail the process (in Canada) of passing a single-stage resolution in the Canadian Parliament, a process less burdensome than the passage of ordinary legislation.

Third, the incorporation of the *Canadian Bill of Rights* into the *British North America Act* by the Parliament of Canada via s. 91(1) would restrict its applicability to future statutes and would not amend or restrict pre-existing statutes. Whereas a bill of rights enacted as a statute can amend or impliedly repeal pre-existing enactments and its express language can limit future implied repeal, an amendment to the *British North America Act* would not have the same effect. An amendment affecting s. 91 would only act as a limit on prospective legislation and a separate statute would still be necessary to amend pre-existing legislation ("all Laws in force") which limited rights guaranteed by the bill.

Fourth, the incorporation of the *Canadian Bill of Rights* into the *British North America Act* by the Westminster Parliament (and applicable to the provinces as well) would not result in entrenchment as any such enactment would be subject to express or implied amendment by the ordinary legislative process under the division of powers. Any entrenchment via *British North America Act* amendment would further require amendment to the *Statute of Westminster* by the Westminster Parliament to include the *Canadian Bill of Rights* along with the *British North America Acts 1867 to 1930* as instruments excluded from the liberating effects of s. 2(2) of the *Statute of Westminster*.

Fifth, Driedger expressed doubt that incorporation of the *Canadian Bill of Rights* into the *British North America Act* by the Westminster Parliament was possible subsequent to the passage of the *Statute of Westminster*. Driedger briefly expressed the

view that, in enacting the *Statute of Westminster*, the Westminster Parliament had terminated its concurrent legislative powers over Canada and transferred them wholly to Canadian legislatures, saving only the specifically reserved powers over amendment of the pre-existing *British North America Acts*.

It was within this perceived constitutional framework that Driedger "had formulated most of the terms of the bill."[1] The logic and consistency of the language used in the *Canadian Bill of Rights* was predicated upon Driedger's conception of the constitution of Canada and the intent behind that language and those terms. In the aggregate, Parliament appears to have largely adopted the constitutional and bill of rights vision embraced by Driedger, as expressed by Parliamentarians during the legislative process from 27 June to 10 August 1960.

SECOND READING OF BILL C-79

THE CONSERVATIVE CAUCUS

Thirty-six different Conservative Members of Parliament spoke to the second reading of Bill C-79. Most of these interventions were dominated by two themes. First, many of the columns of *Hansard* filled by Conservative parliamentarians are replete with general discussion about the importance of rights, with a particular emphasis on recounting the historical development of rights. There are grand histories of the development of rights since the Norman Conquest, more focused narratives on the development of human rights in the twentieth century, and even descriptions of the contours of Canadian history generally. That is to say, much of the advocacy for Bill C-

[1] Paul Martin (Essex East) in *House of Commons Debates*, 24th Parl, 3rd Sess (1960), vol 7, p. 7410 (2 August 1960). [*Debates* 24-3, VII:7410].

79 focuses on the importance of civil liberties and human rights generally, without discussing the specific, practical, contributions that would be made by the *Canadian Bill of Rights*.

The second dominant theme was that of provincial rights. Nearly every Conservative member who spoke to Bill C-79 highlighted that the bill respected provincial rights and was restricted to "the jurisdiction of the federal parliament." Some members, following Fulton's lead, emphasized that the intention was to indefinitely maintain a strict division of powers in regards to civil liberties, avoiding, as one Saskatchewan MP described it "forc[ing] our conclusions, much less our methods, upon other freely elected governments."[2] Others, following Diefenbaker's lead, emphasized that a bill of rights restricted to federal jurisdiction was simply a first step that could be entrenched into the constitution and made applicable to the provinces at a future date: "This bill is a major step forward, and eventually perhaps it may be written into our constitution."[3] Although, one notable exception to this was Grant Campbell, the MP for Stormont,[4] who tentatively challenged his caucus's defence of provincial rights:

> *I am not too sure—and I throw this out because I certainly make no pretensions to being a constitutional lawyer—that this bill of rights as it stands would not apply directly to the provinces. The property and civil rights reserved under section 92 of the British North America Act to the provinces refer to quite a different thing.* [...] *It had nothing whatever to do with civil liberties, which is a different matter and which could more correctly be called public laws.*[5]

On the matter of the practical implications of the *Canadian Bill of Rights*, explanations of the meaning of the language used in that bill and its specific intended

[2] Mr. H. F. Jones (Saskatoon) in *Debates* 24-3 (1960), V:5705 (4 July 1960).
[3] Mr. E. J. Broome (Vancouver South) in *Debates* 24-3 (1960), V:5708 (4 July 1960).
[4] Stormont is a now historic county in Eastern Ontario, which then included the city of Cornwall.
[5] *Debates* 24-3 (1960), V:5787 (7 July 1960).

function, and the role of the courts in relation to the bill, pronouncements by Conservative MPs were much rarer and more circumspect. Less than a dozen Conservative Parliamentarians spoke directly to the question of the role of the courts. However, never was it expressed by a Conservative MP that the purpose of the bill was purely "declaratory" (i.e. directory) or educative. When the effects of the interaction of the *Canadian Bill of Rights* with other federal statutes was discussed, it was consistently remarked that the bill would provide a "defence before the courts"[6] or that it would "superimpose upon every act and every regulation of the parliament of Canada."[7]

J.G. Diefenbaker

Diefenbaker scheduled the debate on Bill C-79, the *Canadian Bill of Rights,* to commence on the symbolically important July 1st, 1960. Diefenbaker's introduction of Bill C-79[8] focuses mostly on grand themes of rights protections discussing the origins of Canada, the *Universal Declaration of Human Rights*, and examples of rights violations by previous governments. Diefenbaker outlined the rights that the *Canadian Bill of Rights* would guarantee. He also keenly repeated that these rights fell within federal jurisdiction (even making a curious distinction between federal jurisdiction over "enjoyment" of property and provincial jurisdiction over "ownership" of property).

Notable amongst these generalities, though without explaining its constitutional justification, Diefenbaker repeatedly noted that the *Canadian Bill of Rights* would override other federal legislation, both pre-existing and forthcoming:

[6] Noel Dorion (Bellechase) in *Debates* 24-3 (1960), V:5777 (5 July 1960).
[7] D.J. Walker (Minister of Public Works) in *Debates* 24-3 (1960), V:5735 (5 July 1960).
[8] *Debates* 24-3 (1960), V:5642-5650 (1 July 1960).

> *There will be some statutes in existence which* ***will have to be changed*** *and which will be interpreted accordingly.*[9] *[...]*
>
> *what it [the Canadian Bill of Rights] says in effect is that any legislation that is passed which derogates from the constitutional freedoms that are mentioned* ***shall be ineffectual.***[10] *[...]*
>
> *In effect what you do is this: You declare in a united parliament that every statute which has ever been passed by parliament, or that will hereafter be passed* ***shall not contravene*** *or diminish these freedoms.*[11]

He also noted that this intention behind the *Canadian Bill of Rights* had been understood by outside observers, providing the example of an editorial from the Manchester *Guardian*:

> *Many who, like Mr. Diefenbaker, are devoted to the parliamentary system of government, have felt keenly the need for a bill of rights which would allow the courts to review arbitrary legislation and action.*[12]

On matters related to entrenchment and *British North America Act* amendment Diefenbaker repeated Driedger's argument that there was no difference between a statute and a *British North America Act* amendment restricted to federal jurisdiction. He otherwise spent his discussion focussed on the impossibility of gaining provincial consent to any sort of entrenchment or *British North America Act* amendment.

Diefenbaker's questions to the opposition were, perhaps, most revealing of his views. When Pearson criticized the bill for failing to protect "individual rights and freedoms" within provincial jurisdiction, Diefenbaker retorted "would the honourable gentleman tell me what particular constitutional freedoms come under provincial jurisdiction?"[13] Later, when Pearson argued that the bill "merely declares; it does not

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[9] *Debates* 24-3 (1960), V: 5646 (1 July 1960). [*Emphasis mine.*]
[10] *Debates* 24-3 (1960), V: 5649 (1 July 1960). [*Emphasis mine.*]
[11] *Debates* 24-3 (1960), V: 5649 (1 July 1960). [*Emphasis mine.*]
[12] *Debates* 24-3 (1960), VI: 5949 (7 July 1960).
[13] *Debates* 24-3 (1960), V: 5660 (4 July 1960).

guarantee. […] Any individual who claims his freedoms or rights have been interfered with by anyone else will be in the same position as if this bill never became law," Diefenbaker heckled "That is not a fact!"[14]

Diefenbaker's subsequent interventions[15] did not particularly expand upon these points, nor did he address Driedger's other constitutional postulates. Instead, he focused on countering criticisms related to the question of constitutional entrenchment and a preamble for the Bill of Rights. Diefenbaker gave the impression through his parliamentary interventions that he clearly believed that the *Canadian Bill of Rights* would have the effect of allowing the courts to review other federal legislation and render it inoperative when it came in explicit conflict with the *Canadian Bill of Rights*. However, his guarded language on the matter indicates that he did not believe such direct conflicts would be frequent, a point most clearly illustrated by his rejection of the idea that there would be a conflict between the *Canadian Bill of Rights* and the *Lord's Day Act*.[16]

E.D. Fulton

Fulton was more focused and more explicit than Diefenbaker in regards to the intended judicial effect of the *Canadian Bill of Rights* on other statues. He argued that the *Canadian Bill of Rights* is

> *a statute which will clearly authorize and assist the courts to interpret and protect those rights and which will, in addition, set a* ***limit*** *to executive*

[14] *Debates* 24-3 (1960), V:5664 (4 July 1960).
[15] *Debates* 24-3 (1960), VI: 5938-5951 (7 July 1960) and *Debates* 24-3 (1960), VII: 7414-7418 (2 August 1960).
[16] *Debates* 24-3 (1960), V:5731 (5 July 1960).

> *and, in so far as it is possible or desirable, parliamentary authority to interfere with or abridge those rights.*[17]

In reply to the claims that it would not have such an effect Fulton retorted:

> *When one analyses particularly the provisions of clause 3 it becomes apparent that* ***the bill will have effect with respect to all past federal statutes*** *and all regulations made under those statutes which are within the competence of the federal parliament. If hon. members will examine the clause they will find* ***that parliament is being asked to say that the bill has effect with respect also to the application and interpretation of all future statutes of this parliament,*** *and that if parliament desires to exempt any of its future statutes from the operation of the bill it can only do so by an express provision contained in the subsequent statute.*[18]

Diefenbaker's interventions in regards to entrenchment and *British North America Act* amendment emphasized the inability of gaining provincial consent. The implicit corollary of this was that Diefenbaker did not embrace Driedger's view of constitutionalism and therefore held that *British North America Act* entrenchment by the Westminster parliament would be both possible and effective. In contrast, Fulton's interventions in regards to entrenchment and *British North America Act* amendment illustrated that his views were closer to those of Driedger.

Instead of focusing on problems with gaining provincial consent, Fulton made an argument for the superiority of a "mere statute" over that of intervention by the Westminster Parliament. He rejected the argument that "our proposal is weak and feeble because it is a mere statute of the parliament of Canada and not imbedded in the constitution."[19] Instead, Fulton retorted that such a view "is based on an entirely false assumption as to the binding and solemn effects of a statute standing on its own as

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[17] *Debates* 24-3 (1960), V:5789 (5 July 1960). [*Emphasis mine.*]
[18] *Debates* 24-3 (1960), VI:5885 (7 July 1960). [*Emphasis mine.*]
[19] *Debates* 24-3 (1960), VI:5886 (7 July 1960).

compared with a statute having the force of a constitutional amendment."[20] Instead, he proclaimed that "our courts recognize that a statute of parliament represents the highest and most completely binding expression of the authority of the people."[21] Fulton argued that the *Canadian Bill of Rights* would be "part of our constitution and recognized as such. This bill of rights, although a statute of the parliament of Canada and not an amendment to the *British North America Act,* will be of equal force and effect as part of the constitution of Canada."[22]

Fulton reacted angrily to opposition claims that the bill was mere hortatory and would have no legal effect. He was particularly mocking of the claims on one hand that the bill would be without legal effect while at the same time demands that the language used in the bill ought to become more "sonorous," commenting, "what extraordinary criticism; that a bill that does nothing should nevertheless be required to do it in a graceful, poetic manner."[23] Fulton argued the virtues of the bill's plain language and refuted the claims that the bill would have no legal effect in claiming that "What we are trying to do is to enact a statute having legal effect, so we called in legal draftsmen."[24] For Fulton, the language of the bill was precise and purposeful for achieving a specific legal end as developed for him by Driedger.

Unlike Diefenbaker, who in his interventions in Parliament implicitly accepted the ideal of a bill of rights equally applicable to the provincial legislatures but accepted one restricted to federal authority as an appropriate first step, Fulton, once again, made a

[20] *Debates* 24-3 (1960), VI:5886 (7 July 1960).
[21] *Debates* 24-3 (1960), VI:5886 (7 July 1960).
[22] *Debates* 24-3 (1960), VI:5886 (7 July 1960).
[23] *Debates* 24-3 (1960), VI:5889 (7 July 1960).
[24] *Debates* 24-3 (1960), VI:5889 (7 July 1960).

virtue of this deficiency. Fulton argued that "we believe that the question of constitutional amendment should be approached on the basis of respect for that constitution itself"[25] and rejected seeking a *British North America Act* amendment applicable to the provinces as being rooted in the opposition's "centralizing tendencies."[26] Instead, Fulton posited that "there are cases where an objective can be met by uniform and complementary legislation of each authority in its own field" and therefore that with "one province having already enacted a bill of rights and the federal government having enacted a bill of rights in its field, other provinces should follow suit."[27]

Other Conservative Interventions

For those few Conservative MPs who did speak with any particular clarity or at any particular length to the interaction of the *Canadian Bill of Rights* with other federal statutes, there was never any doubt expressed that the bill would not amend and constrain other enactments. This approach was made clear by contrasting the approach to a bill of rights put forward by their Conservative government to that of the previous Liberal government. Grant Campbell set the contrasting context by quoting former Minister of Justice Stuart Garson

> *The introduction of this deceptively simple but rather emotional issue into such a complex field creates a problem which is an extremely difficult one.* ***It is the problem of superimposing a bill of rights, after the United States fashion****, upon the federal constitution of Canada, whose main feature, inherited from the constitution of Great Britain, is the sovereignty of its legislative bodies. [...] It is this British principle which the hon. member for Prince Albert [Diefenbaker] proposes to abridge* ***by attaching***

[25] *Debates* 24-3 (1960), VI:5888 (7 July 1960).
[26] *Debates* 24-3 (1960), VI:5888 (7 July 1960).
[27] *Debates* 24-3 (1960), VI:5888 (7 July 1960).

> ***constitutional limitations to it in the manner of the bill of rights in the United States constitution***.[28]

Campbell did not attempt to deny that the proposed *Canadian Bill of Rights* sought to import the sort of rights regime practiced in the United States, granting the power of the judiciary to strike down conflicting legislation. He emphasized that the "sovereignty of legislative bodies" was not essential to the Canadian system, but that instead

> *It should be remembered, of course, that this absolute and unfettered power possessed by the British parliament is not due to any deliberate planning but is due to the fact that parliament has gradually acquired the power originally possessed by despotic kings who knew no bounds to their power save the limits placed on tyranny by the threat of rebellion. This accident of history has left the British parliament with a constitution resting on usage which knows no restraint on its legislative power*.[29]

Other Conservative Parliamentarians mimicked this language, referring to the *Canadian Bill of Rights* as being "superimposed"[30] on other legislation, as being an "overriding statute,"[31] and as "revising"[32] other legislation.

One of the parliamentarians most critical of the *Canadian Bill of Rights* was Liberal MP Paul Martin (Sr.) who rejected the idea that the statute could have any effect on other legislation such as implied repeal. An exchange between him and Conservative MP Laurier Regnier (St. Boniface) was indicative of the contrasting viewpoints:

> *Mr. REGNIER: I suspect, that the hon. member for Essex East has not read section 3 of the said bill* [...]
>
> *Mr. MARTIN (Essex East): Does my hon. friend deny my statement when I said that this bill does not in any way alter the fundamental law of this country which now protects every right which is sought to be protected in this bill?*

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[28] *Debates* 24-3 (1960), V:5787 (5 July 1960).
[29] *Debates* 24-3 (1960), V:5787 (5 July 1960).
[30] D.J. Walker (Minister of Public Works) in *Debates* 24-3 (1960), V:5735 (5 July 1960).
[31] R.S. MacLellan (Inverness-Richmond) in *Debates* 24-3 (1960), V:5732 (5 July 1960).
[32] Mr. Laurier Regnier (St. Boniface)

> *Mr. REGNIER: I will deny the statement just made by the hon. member because the bill makes all laws that have been passed hitherto subject to the principles of this bill and also all future laws that will be passed subject to the principles of this bill.*
>
> *Mr. MARTIN (Essex East): It does not alter the law at all.*
>
> *Mr. REGNIER: This is more than a declaration of the convictions of this parliament with regard to human rights and fundamental freedoms. This bill, with few exceptions, expunges from all acts of the parliament of Canada and all laws in force in any part of Canada anything that abrogates, abridges or infringes any of the rights or freedoms recognized in the bill.*

Mr. Regnier continued that "Bill C-79 is not only a declaration of human rights, it also provides for the revision of present and future laws which may come in conflict with its provisions" and "let us not forget that this new act will have precedence over past and future legislation, as indicated in section 3."[33]

The defence of the Bill C-79 that most closely resembled the views of Driedger were presented by Robert MacLellan, a backbench Tory MP from Nova Scotia and a lawyer in his extra-parliamentary life. MacLellan was clear that he understood the *Canadian Bill of Rights* to be "an overriding statute" that "from the point of view of practical operation the work this bill will do is chiefly as a watchdog over parliament"[34] with "the judiciary to guarantee that these freedoms are not overrun by statutes of this parliament." [35] Beyond the issue of judicial review, MacLellan's views on the constitution generally closely resembled those of Driedger, with MacLellan remarking that

> *The British North America Act does not constitute the constitution of Canada; it is only that part of the constitution which delineates the*

[33] *Debates* 24-3 (1960), VI:5924 (7 July 1960).
[34] *Debates* 24-3 (1960), V:5719 (4 July 1960).
[35] *Debates* 24-3 (1960), V:5726 (5 July 1960).

> *authority of the provinces vis-à-vis the federal authority, limiting the authority of each.*
>
> *The British North America Act does not contain the whole constitution of Canada. Most of the important parts of our constitution are not written at all; they come to us from the customs and traditions of many years. Much of the most important part of our Canadian constitution is to be found in a hundred statutes spread through the statute books and in many decisions of the courts which define the rights of citizens and of legislative bodies both federal and provincial.*
>
> *Mr. Speaker, by proposing that we pass Bill No. C-79 we do amend the constitution of Canada. We set forth in writing rights which heretofore did not exist in the same form in any statute. We establish a special statute of interpretation and make it part of our constitution, so that from now on all federal statutes are tested in accordance with this one. […] to amend the British North America Act would give this bill no sacrosanct quality which it would not have after passage in this house.*

THE COOPERATIVE COMMONWEALTH FEDERATION CAUCUS

The most focused and consistent opposition to Bill C-79 came from the Cooperative Commonwealth Federation (CCF) caucus. Their main message was simple and clear in condemning the form that the proposed instrument took: the *Canadian Bill of Rights* was insufficient because (1) it did not apply to the provinces and (2) it was not entrenched against repeal by a simple majority of Parliament. Although taking a much lower priority in their criticisms, the CCF also took issue with the content of the *Canadian Bill of Rights*, noting (1) that the "bill fails to enumerate in any way basic economic rights that thinkers are now saying should be included in any modern bill of rights"[36] and (2) that the bill lacked any specific penalties upon individuals who violated the *Canadian Bill of Rights* (i.e. they sought an instrument inclusive of "fair practices" or "human rights code" provisions). However, despite their strident advocacy for a bill of rights as an amendment to the *British North America Act*, the CCF accepted the view that

[36] Argue in *Debates* 24-3 (1960), V:5672 (4 July 1960).

a purely statutory bill of rights could, nevertheless, provide for judicial review and supremacy over conflicting statutes.[37] Indeed, CCF leader Hazen Argue noted that

> *I think the Prime Minister is of the opinion that this law will be passed at this session of parliament, and that it will supersede laws passed heretofore which at present interfere with human rights and fundamental freedoms. I trust that is the correct interpretation of this bill and that it is the interpretation which will be placed on this measure by the courts.*[38]

The CCF's main concern was that despite providing for judicial review and the ability to strike down contrary legislation, the *Canadian Bill of Rights* would in practice have very little effect. Like their Liberal and Conservative peers, the CCF believed that the federal government's contemporaneous human rights protection was generally very good and as such there was very little in the way of extant legislation that violated the bill of rights and could be struck down by the courts. Instead, the CCF believed that the most typical source of human rights violations was provincial legislatures. Further, they did not believe Conservative claims that future governments would be reticent to override or even outright repeal the *Canadian Bill of Rights* if it was ever found inconvenient. For the CCF, the problem with the *Canadian Bill of Rights* was not that it lacked legal effect or was merely "declaratory," but that the status quo method of rights protection was generally effective in the federal domain and that in times of stress a government would feel no compunction in repealing or suspending the *Canadian Bill of Rights.*

THE LIBERAL CAUCUS

The Liberal opposition to Bill C-79 in the House of Commons lacked cohesiveness. Opposition critiques spanned the spectrum from opposition to any sort of

[37] Mr. Erhart Regier (Burnaby-Coquitlam) being the exception.
[38] *Debates* 24-3 (1960), V:5688 (4 July 1960).

bill of rights to demands – like the CCF – for a constitutionally-entrenched bill of rights including economic rights and "fair practices" (or human rights code) penalties for individuals. Further, this lack of cohesiveness extended to individual speeches with certain parliamentarians speaking of the failure to respect provincial rights while criticising the bill for failing to extend to provincial legislative jurisdiction. While the Conservatives were consistent in their protestations for safeguarding "provincial rights" and the CCF were consistent in their demands for a bill of rights extending to provincial jurisdiction, the Liberals expressed both views, sometimes in the same speech.

For the Liberals, the assault on the Bill C-79 was led by Paul Martin, with Pearson, as Leader of the Opposition, making the longest intervention against the bill. During the later Committee of the Whole in August, Paul Martin would champion amendments to the bill with Deschatelet, Badanai, Batten, Chevrier, and Crestohl also particularly active in opposition to the bill.

Pearson

Pearson's "schizophrenic" opposition to Bill C-60 repeated itself in his opposition to Bill C-79, but the emphasis reversed from two years earlier. That is to say, Pearson championed both the status quo as well as a constitutionally-entrenched bill of rights, but this time round he emphasized the need for a constitutionally-entrenched bill of rights. Pearson began by speaking eloquently in favour of the status quo:

> *Incorruptible and respected courts enforcing laws made by free men in parliament assembled and dealing with specific matters, with specific sanctions to enforce their observance; these are the best guarantee of our rights and liberties. This is the tried and tested British way, and this is a better course to follow than the mere pious affirmation of general principles, to which some political societies are addicted.*

However, unlike his approach in 1958, Pearson's defence of both alternatives was not inconsistent in 1960. Although he spoke eloquently about the past efficacy of the "British tradition" of protected civil liberties "grounded in the sovereignty of a free and democratic parliament,"[39] he noted that "conditions change and circumstances alter"[40] and, as such, a new approach was justified. For Pearson, the problem with Bill C-79 was that it was nothing more than a "pious affirmation of general principles" and would have no legal effect:

> *What we have is a normal piece of legislation to be passed in the ordinary way with ordinary effect and which, of course, could be abrogated or changed by any future parliament in the ordinary way. Without recourse to any of the procedures that were promised some time ago, this limited and purely declaratory bill was introduced.*[41]

Pearson embraced the constitutional thinking of Bora Laskin in arguing that no statute could limit the principle of implied repeal, quoting Laskin that "the injunction to the courts to construe an enactment in conformity with the bill would not enable the courts to ignore terms that ran counter to the bill."[42] As such an instrument protecting human rights either had to be a statute with specific penalties punishing individuals for violations or an amendment to the *British North America Act*. The constitutional thinking that underpinned the drafting of the *Canadian Bill of Rights* in the Department of Justice was simply incomprehensibly alien to Pearson. However, as is often the hazard of opposition, Pearson further condemned the bill of rights by relying on authorities that challenged the constitutional view upon which Pearson rooted his opposition to the

[39] *Debates* 24-3 (1960), V:5672 (4 July 1960).
[40] *Debates* 24-3 (1960), V:5661 (4 July 1960).
[41] *Debates* 24-3 (1960), V:5658 (4 July 1960).
[42] *Debates* 24-3 (1960), V:5665 (4 July 1960).

Canadian Bill of Rights. Pearson quoted the condemnations by A.N. Carter,[43] "a distinguished lawyer in this country," of the *Canadian Bill of Rights* that "if Parliament in the future should decide that the law should be changed, it would simply preface its enactment by the formula 'notwithstanding' […]." Yet Carter opposed the bill of rights precisely because of its constitutional impact of enabling judicial review and the striking down of conflicting statutes and quoted text that was reflective of his view that Parliament could limit implied review:

> *It will be a sorry day for Canada when Parliament is so distrustful of itself and its successors that it surrenders its power to change the law. [...] It would substitute either unqualified rights for the delicately modulated rights fashioned by the courts and legislatures after centuries of experience, or rights with implied qualifications fixed in the model of today and incapable of adaptation to meet changing circumstances and public opinion.*

Carter concludes the article that Pearson quotes with the commentary that "the suggestion that the Bill of rights should be enacted by the Parliament of Great Britain as part of the BNA Act is even more objectionable than having it enacted in its present form by the Parliament of Canada."[44]

Pearson was also careful to balance his demands for a bill of rights applicable to provincial authorities while constantly emphasizing his absolute respect for provincial rights. As such, he advocated for a bill of rights that guaranteed that rights "cannot be diminished let alone destroyed by any legislative process from any Canadian source" while at the same time "preserving the constitutional rights of every province." His caucus had generally come down on the side of demanding a bill of rights applicable to

[43] A.N. Carter, QC was a lawyer from St-John N.B. who was then a Member of the Special Advisory Committee to the Civil Liberties Section of the Canadian Bar Association.

[44] *Special Committee* 24-3 (1960) 3:238-240 (19 July 1960), quoting A.N. Carter, "Letter to the Editor," (March 1959) *Canadian Bar Review* 37(1):259-262.

the provinces, but was incredibly sensitive to accusations that they had any intention to violate provincial rights. This unease with the question of provincial autonomy is best illustrated by his exchange with one Conservative Minister:[45]

> *Mr. WALKER: The Leader of the Opposition would have a bill of rights affecting not only the dominion parliament but all the provincial legislatures.*
>
> *Mr. PEARSON: Mr. Speaker, I rise on a point of order.*
>
> *Mr. WALKER: There is no point of order; I am interpreting what you said.*
>
> *Mr. PEARSON: You are not.*
>
> *Mr. Speaker: Is the Leader of the Opposition rising on a point of order?*
>
> *Mr. PEARSON: Yes, Mr. Speaker, in spite of the minister's assertion that there is no point of order, he having not heard it. My point of order is that I made no such statement in my speech, that this particular bill should be applicable to the provinces, and the minister of course knows it.*
>
> *Mr. WALKER: The Leader of the Opposition suggested that any bill of rights passed by this parliament should be made applicable to all ten provinces.*
>
> *Mr. PEARSON: On a point of order, I made no such suggestion and the minister knows it. I did suggest that we should get in touch with the provinces to see if they would agree to the extension of these principles to cover both the provinces and the federal government, which is a very different thing.*

Pearson embraced the constitutional thinking of the "newer constitutional law" and rooted his opposition to the *Canadian Bill of Rights* in an approach very similar to that of Bora Laskin. However, this approach was somewhat confounded by an attachment to his, and his party's, traditional opposition to a bill of rights generally and their particular concern with provoking the wrath of Quebec's provincial autonomists.

[45] *Debates* 24-3 (1960), V:5736 (5 July 1960).

Paul Martin (Essex East)

Paul Martin (Sr.) led his caucus's assault on Bill C-79 and, in general, situated this opposition to the left of his party, demanding a constitutionally-entrenched bill of rights and demanding the inclusion of economic and social rights (such as medical care and pensions)[46] with greater stridency than most CCF parliamentarians. However, facing the same constraints as Pearson, Martin's opposition was even more contradictory at times. Like Pearson, he generally embraced that same blending of Diceyan Parliamentary Supremacy and the "newer constitutional law" in denying that a "mere statute" could provide for judicial review of other statutes, and whose opposition seemed to be modelled considerably on the views presented by Professor Louis-Philippe Pigeon.

Martin, like Pigeon, argued that Bill C-79 not only failed to limit implied repeal of the *Canadian Bill of Rights* by future statutes, but it also "does not [even] modify all pre-existing legislation."[47] Yet, when criticizing the bill's prosaic language, he notes that the clause which purports to limit implied repeal "is familiar to the hon. Gentleman, to other lawyers in this house and to all legislators. However it certainly will not make its appeal to those who are uninitiated in the jargon and the forms of parliament."[48] Martin, thus, contended that "lawyers" and "legislators" understood that the language used in the bill was intended to limit parliament when condemning its prosaic language despite having previously claimed that it did not have that effect. Further, mirroring Professor Pigeon's arguments, Martin argued that despite the fact that the bill would not affect federal legislation, it would be "a violation of section 92 of the British North America

[46] *Debates* 24-3 (1960), V:5730 (5 July 1960).
[47] *Debates* 24-3 (1960), V:5731 (5 July 1960).
[48] *Debates* 24-3 (1960), V:5734 (5 July 1960).

Act, and particularly of the property and civil rights clause" such that *Canadian Bill of Rights* would "interfere with the constitutional powers of the provinces."[49]

Martin goes on to argue that even though Bill C-79 was drafted with the intent to be restricted to federal jurisdiction (as "that is what the Prime Ministers says and that is the view of all of us in this house"), that "will not necessarily be the view of the Supreme Court of Canada or of any other judicial body called upon to interpret this measure."[50] Thus, like Professor Pigeon argued a year earlier, Paul Martin argued that the Supreme Court of Canada would on one hand refuse to implement the language that "is familiar to […] lawyers and […] legislators" to limit implied repeal over federal legislation, but on the other hand would use the bill to override the division of powers in the *British North America Act*.

CONCLUSION

In the aggregate, the issue most dwelt upon by Parliamentarians during consideration of the second reading of Bill C-79 was that of provincial autonomy. All caucuses were clear that a bill of rights applicable to the provinces would first require the consent of those provinces, but the parties differed in tone as to how this could be achieved. The CCF was most clear and consistent on the matter, as it pilloried the *Canadian Bill of Rights* for its lack of application to the provinces. It argued that provincial consent for a bill of rights equally applicable to them should be aggressively sought and that any instrument short of that would simply delay the passage of a bill of rights applicable to the provinces. Although less clear and consistent, the Liberal caucus

[49] *Debates* 24-3 (1960), V:5731 (5 July 1960).
[50] *Debates* 24-3 (1960), V:5731 (5 July 1960).

took a similar approach, although more motivated by the assertion that a statutory bill of rights would have no legal effect.

The Conservatives largely took the opposite view, repeatedly and consistently proclaiming their respect for provincial rights. However, the Conservatives did split on the absolute nature of those rights. Though some members (such as Fulton) argued that provincial rights were so sacrosanct that no bill of rights that limited the legislative authority of the provinces should ever be included in the *British North America Act*, most others (such as Diefenbaker) simply proclaimed that, though such an instrument was desirable, the provinces should not be pressed towards it, but seek to voluntarily embrace it. Thus, the Conservative view was that the *Canadian Bill of Rights* would act to raise rights awareness and encourage provincial electorates to demand similar rights protections from their governments. In the case of the former group, this would result in the enactment of parallel provincial bills of rights; in the case of the latter group, this would result in eventual active provincial support for an amendment to the *British North America Act* providing for a constitutionally-entrenched bill of rights.

On the question of whether the *Canadian Bill of Rights* would provide for judicial review and the ability to strike down conflicting statutes by limiting implied repeal, Parliamentarians, in the aggregate, embraced the view that the bill would have that desired effect. The Liberals seemingly dissented from this view, but at times their arguments against the bill were rooted upon the opposite view. This conflict in Parliament reflected the contemporaneous debate in the legal community between those who advocated for Diceyan Parliamentary Supremacy and those who advocated for the self-embracing sovereignty of parliament that could not limit its successors' liberty

except by express declaration. At this time, Parliament largely decided against the advocates of Diceyan Parliamentary supremacy.

On the question of Driedger's most novel propositions regarding the inefficacy (or even ability) of an amendment by Westminster to the *British North America Act* for entrenching a bill of rights, these were never argued during second reading of Bill C-79 and were implicitly rejected. No question was ever raised about the efficacy of a bill of rights enacted as an amendment by Westminster to the *British North America Act* – only its propriety and the ability to get provincial consent – with the obvious implication that its efficacy was not doubted.

THE SPECIAL COMMITTEE

The hastily assembled Special Committee on Human Rights and Fundamental Freedoms sat for fourteen days between Tuesday 12 July and Friday 29 July 1960. The short notice and brief mandate of the committee was a source of perennial complaint by both witnesses and opposition committee members. Half of its proceedings (eight days) were committed to entertaining submissions and testimony and interviewing witnesses from academia, the Canadian Labour Congress, human rights groups (including ethnic and religious organisations), business groups (e.g. chambers of commerce), and private individuals. The remaining six days were dedicated to entertaining testimony from and questioning the Minister of Justice, E.D. Fulton (with Driedger in attendance as counsel to his minister). The committee was composed of fifteen members: ten Conservative members (including the Chair and Vice-Chair), four Liberals, and one New Democrat (reflecting the overall composition of parliament). However, the proceedings were dominated by interventions from Liberal MP, Paul Martin.

WITNESS TESTIMONY BEFORE THE SPECIAL COMMITTEE

In the aggregate, the witnesses to the Committee advocated for a bill of rights that would extend equally to the provinces and that would be entrenched. The questions posed by the committee members focused on two other issues: first, the effect of Bill C-79 on provincial rights; and second, (repeatedly and almost exclusively by Paul Martin) the effect of Bill C-79 on other federal statutes. As a result, the government committee members largely ignored the pleas for provincial consultation and constitutional entrenchment, while pressing the witnesses to declare that Bill C-79 would have no effect on provincial rights. In contrast – while often criticising the government for failing to consult the provinces – the opposition members pressed the witnesses to declare that Bill C-79 would impinge on provincial statutes and – particularly in the case of Paul Martin – pressed the witnesses to declare that Bill C-79 would have no effect on other federal legislation.

Overwhelmingly, the witnesses declared that the bill had no applicability within provincial jurisdiction, even over issues such as "property" (this lack of provincial applicability was often their complaint) and that the bill did, indeed, amend pre-existing legislation and would similarly restrict future legislation. As such, many witnesses – principally legal academics – opposed Bill C-79 precisely because of its impact on other statutes and argued that it should be redrafted as a canon of construction. Most of the other witnesses – principally those from labour and human rights organizations – readily argued, or admitted under questioning, that Bill C-79 would empower the courts to strike down federal legislation, but opposed the bill because it only did so within federal jurisdiction and that such restrictions were not entrenched.

Varcoe

Even Fredrick Varcoe – a grand champion of opposition to a bill of rights and advocate of parliamentary supremacy – was convinced that Bill C-79 was no mere canon of construction, but actually placed limits on parliament:

> *Now, I thought when I first read this bill that it was merely a sort of an interpretation act. In fact, the marginal note clause says "construction of law", but it does not say that in the event of doubt the act shall be construed or applied so as to do this.* ***It categorically says that no matter what is in that act, no matter how clear it is that parliament intended to authorize or effect the arbitrary detention, imprisonment or exile of any person—that this rule is to apply. It is not, strictly speaking, an interpretation act at all.***

Varcoe, however, was careful to avoid any commentary on the wisdom of a bill of rights, simply offering his constitutional views on the matter.

Advocates for a Canon of Construction

Three witnesses came out particularly against the bill precisely because of the potential for "power over policy [being] transferred to the courts"[51] and thus the "great latitude for judicial law-making:"[52] Professor W.F. Bowker, Dean of the University of Alberta Faculty of Law, Professor O.E. Lang, of the University of Saskatchewan College of Law, and Professor C.R. Dehler, a Theology and Philosophy Professor at the University of Ottawa.

The two law professors did express some doubts as to whether the courts would actually take up the power granted to them noting that "I find it impossible to predict

[51] O. E. Lang in *Special Committee* 24-3 (1960), 5:346 (21 July 1960).
[52] Donald McInnes, Dominion Vice-President, Canadian Bar Association in *Special Committee* 24-3 (1960), 1:111 (12-15 July 1960).

what the courts will do with a bill like this,"[53] and "at the moment there is great uncertainty as to how this bill will be interpreted and as to how it will affect other legislation passed previously by parliament, and legislation which is yet to come."[54] Yet they generally feared that it would be (too) effective. Professor Bowker rejected any sort of bill of rights, arguing "there was no question [one should] do it [protect civil liberties] by way of amending a particular statute;" [55] Professor Dehler argued it should be transformed into a "manifesto;"[56] and Professor Lang that "it should be made, if it is to be passed at all – this is in other words, my last hope, my last recommendation – clearly a simple statute of construction."[57] For these witnesses, Parliament should remain the focus of rights advocacy, and that "the bill effects the transfer of power, and this transfer would weaken the spirit of liberty, which [...] in the end, will perish."[58]

Frank Scott

Of all the witness, it was Frank Scott who expressed the greatest doubt in regards to the effect of the *Canadian Bill of Rights* on other federal legislation, although he had no doubts that the government intended the bill to override other federal legislation:

> *under section 3 there is an instruction to the judges in Canadian courts in the future when interpreting any federal statute or regulation under a statute to interpret it in such a manner as not to infringe the rights or freedoms that are there set out and, indeed, it attempts to prevent what might be called an inadvertent invasion of those freedoms by a future act of parliament by saying that such future act must be taken as not having*

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[53] W. F. Bowker in *Special Committee* 24-3 (1960), 2:149 (18 July 1960)
[54] Lang in *Special Committee* 24-3 (1960), 2:149 (18 July 1960)
p. 345
[55] W. F. Bowker in *Special Committee* 24-3 (1960), 2:149 (18 July 1960)
[56] Dehler in *Special Committee* 24-3 (1960), 1:64 (12-15 July 1960)
[57] O. E. Lang in *Special Committee* 24-3 (1960), 5:351 (21 July 1960).
[58] O. E. Lang in *Special Committee* 24-3 (1960), 5:345 (21 July 1960), paraphrasing Judge Learned Hand.

> *intended any invasion of these freedoms, unless the act itself expressly states that it is the intention of parliament so to do*[59]

However, he cautioned that the failure of the bill to be incorporated into the *British North America Act* would result in judges not feeling bound to follow its injunctions:

> *There could be argument as to whether the judges will feel bound by this rule or interpretation, if in fact they are confronted with a future federal statute which, while not saying in express terms that it intends to amend the bill of rights, nevertheless does so by its necessary meaning. But I do not know; there is never any use in attempting to predict what the judges will do. This is a statement in the bill that they are supposed to act in a certain way and we may hope that perhaps they will do so.*[60]

Advocates for more precise language

Although Scott's fear that the bill would not be effective because of its failure to be entrenched in the *British North America Act* was unique amongst the witnesses, caution that the bill would not have the effect its progenitors hoped for was more common. Unlike Scott, these witnesses did not point to the lack of the bill's inclusion amongst the *British North America Acts*, but instead criticised how rights were defined in the bill. Perhaps the most biting, but neutral, criticism came from David Mundell. Mundell was then a Professor of constitutional law at Osgoode Hall and had been chairman of the civil liberties section of the Canadian Bar Association during the consideration of Bill C-60. However, he had also been a former senior counsel in the Department of Justice from 1939 to 1953, being a close colleague of both Driedger and Jackett, who together were referred to as the "Saskatchewan Triumvirate" for their considerable collaboration and influence in the Department of Justice under Varcoe. Mundell was clear that "as far as federal statutes are concerned, clause 3 certainly has the

[59] F. R. Scott in *Special Committee* 24-3 (1960), 1:29 (12-15 July 1960).
[60] F. R. Scott in *Special Committee* 24-3 (1960), 1:29 (12-15 July 1960).

effect which the chairman says it has; it gives legal operation to clause 2"[61] and was clear to maintain this view in the face of a barrage of questions from Paul Martin:

> *Mr. MARTIN (Essex East): Will clause 3 have the effect of overriding existing inconsistent legislation?*
>
> *Mr. MUNDELL: That would be my interpretation of this provision.*
>
> *Mr. MARTIN (Essex East): It will have that effect?*
>
> *Mr. MUNDELL: Yes.*
>
> *Mr. MARTIN (Essex East): You said that you did not think it would override the Expropriation Act?*
>
> *Mr. MUNDELL: Depending on the interpretation given to "due process of law".*
>
> *Mr. MARTIN (Essex East): Would it override the various sections of the Immigration Act?*
>
> *Mr. MUNDELL: It might well. It might affect the National Defence Act too.*[62]

Further, Mundell did not hesitate in expressing its application to future statutes:

> *The CHAIRMAN: May I direct your attention to the fact that the statute applies also to future statutes. Is it not a restraint upon parliament in the future designating a punishment or treatment that is cruel?*
>
> *Mr. MUNDELL: To the extent that the statute did not expressly over-ride this section, it would be a restraint.*[63]

However, despite being clear that it could be used to strike down other federal legislation, Mundell, throughout his testimony, emphasized that the legislation would result in great uncertainties as to when the courts would strike down other legislation, humorously noting that, "I must say that one prominent practitioner in Toronto informed me that he

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[61] Mundell in *Special Committee* 24-3 (1960), 7:478 (23 July 1960)
[62] *Special Committee* 24-3 (1960), 7:478 (23 July 1960)
[63] *Special Committee* 24-3 (1960), 7:493 (23 July 1960)

expected to retire on the litigation created by this bill."[64] To illustrate his point, he reflected on the uncertain meaning in the words "cruel, inhuman, or degrading" and commented that "we will not know whether or not it abolishes capital punishment until the Supreme Court of Canada resolves the uncertainty: but it could be so interpreted."[65] Mundell did not think that such an outcome was likely and was sanguine about the effects of the bill, neither arguing that it should be strengthened or weakened, merely clarified.

Notably, despite Paul Martin's repeated demands for judicial review, constitutional entrenchment, and an expansion of the protected rights to include economic rights, his view of the appropriate balance between courts and parliament in rights protection was largely congruent with those of the Canadian Bar Association. Martin rhetorically demanded a more expansive and powerful bill of rights, but when pressed on the practical functioning of such an instrument, he had a much more meagre vision of that instrument, as illustrated by an exchange between Fulton and Martin during the committee proceedings:

> *Mr. MARTIN (Essex East): I know, ultimately, if the situation arises, you say parliament can correct these things. In the meantime the Criminal Code is in difficulty. There are certain punishments for certain kinds of crime, in which the courts are given the responsibility, or the duty, as you say, of imposing punishment pursuant to their findings in relation to the facts that are presented. But the statute under which they operate the Criminal Code is definitely precise.* ***We are creating a whole series of adjectives here that give them a discretion which I think belongs primarily to the legislature****. We ought to frame this paragraph in such a way as to* ***restrict their opportunity of judicial law-making****. It seems to me that is one of the functions of the legislature.*
>
> *Mr. FULTON: Unless you take away from the courts the right and obligation to interpret statutes, you must repose in the courts the function you are describing. The only way you can prevent them from doing it is to*

[64] Mundell in *Special Committee* 24-3 (1960), 7:481 (23 July 1960)
[65] Mundell in *Special Committee* 24-3 (1960), 7:486 (23 July 1960)

change our whole constitutional set-up under which, at the present time, the courts have to interpret statutes.

Mr. MARTIN (Essex East): If a man commits murder in this country, under the law the judge must impose capital punishment. By this paragraph we are giving the judge the opportunity of denying the expressed will, as of this moment, of the legislature, which is that this must be the form of punishment. That judge may say, "In the light of this section I consider capital punishment is cruel, inhuman and degrading. True, the Criminal Code says that, but I so find, in my conscience, and I will not impose that kind of punishment because the bill of rights says I shall not."

Mr. FULTON: If parliament intends, as I think parliament does, to prevent the imposition of cruel, inhuman or degrading punishment, then that is the will of parliament, is it not?

Mr. MARTIN (Essex East): That is right.

Mr. FULTON: Then, if the courts hold that capital punishment is cruel, inhuman or degrading—if the courts hold that—are not the courts exercising their proper function of interpreting the will of parliament; and if that is held by the courts, does it not then follow that Parliament should take a look at the question of hanging and deal with that point when it arises?

Advocates for more precise language: Limiting the bill's scope

Donald McInnes, Vice President of the Canadian Bar Association, presented a memorandum on Bill C-79 that had been endorsed by a resolution of the Canadian Bar Association and made further testimony and answered questions in regards to the Canadian Bar Association's views on the bill. Although the Canadian Bar Association did not outright oppose a bill of rights, it expressed views much more akin those of Lang and Bowker than to those of the human rights and labour organisations and emphasized the importance of maintaining rights advocacy in parliament and limiting the "discretionary power in the hands of judges" over civil liberties:[66]

[66] McInnes in *Special Committee* 24-3 (1960), 1:113 (12-15 July 1960)

> *We are all agreed, however, that one of the principal agencies for ensuring the interests of the individual is parliament and that its democratic character, and that of our other legislative bodies, must be preserved. [...] The bill of rights now proposed may strengthen the hand of the judiciary in preventing unwarranted encroachments upon our rights and liberties. Indeed, the bill leaves very wide discretionary power in the hands of the judges.*

Further, like Mundell, McInnes was at pains to emphasize that "I think I can foresee—and, again, I am speaking personally—that there will be a great deal of litigation arising out of this bill," and thus emphasized the need to tighten the language used in the bill so as to limit the "discretionary power" of judges over civil liberties.

Advocates for more precise language: Expanding the bill's scope

Those representing religious organisations (such as Darren Michael of the Seventh Day Adventists and L.A. Tufts of the Christian Scientists) as well as human rights activists (such as Irving Himel of the Association for Civil Liberties and Professor Maxwell Cohen, Acting Dean of the Faculty of Law at McGill University) agreed with Mundell and the Canadian Bar Association that although the bill would allow for judicial review and the striking down of contrary legislation, there was great uncertainty as to the scope of the rights guaranteed by the bill. However, their concern was opposite to that of the Canadian Bar Association, viewing the general language of the *Canadian Bill of Rights* not as a licence for judges to usurp the legislative powers of parliament, but to provide an excuse for judges not to robustly protect civil liberties and defer to any rights derogations by parliament.

These organizations tended to advocate for the embrace of the language of the *Universal Declaration of Human Rights*, the *European Convention*, and the United Nations' draft covenants on human rights. Even restricted to civil liberties, the language

used in these instruments was much more specific – and in the eyes of Justice Minister Fulton, repetitive and alien to the Canadian legal tradition – than that used in Bill C-79. These organisations believed that such repetition and specificity in language was necessary to ensure that judges consistently defended civil liberties, even if some of the phrases used in the international instruments were without distinction and thus repetitive. For example, in his criticisms of the clause 2(b) of Bill C-79 that stated "the right of the individual to protection of the law without discrimination," Irving Himel noted that

> *the clause that is used in the declaration of human rights and the draft covenant, and which is to be found in the convention on human rights of the council of Europe, includes both "equality before the law" and "the right of the individual to protection of the law without discrimination".*
>
> *I do think—at the moment **I have not been able to find the distinction with any great clarity**—there is an important difference between "the right to equality before the law" and "the right of the individual to protection of the law without discrimination". [...] Since most of the recognized documents that deal with bills of rights in modern times, incorporate both, we feel that both should be incorporated in this Bill*[67]

(Notably, Fulton was not impressed with such arguments and retorted that "one of our attempts was brevity, without fundamental error or omission.") These demands revealed the sharp divergence between the architects of the *Canadian Bill of Rights* and the leaders of the contemporaneous human rights movements, with the former drawing from Canada's own British legal traditions and the human rights movement inspired by the international human rights movement that emerged at the end of the Second World War.

Advocates for Extension and Entrenchment

The main criticism of Bill C-79 by witnesses during the Special Committee was the same as that in regards to Bill C-60 for the previous two years – its lack of

[67] Himel in *Special Committee* 24-3 (1960), 3:187 (19 July 1960)

applicability to the provinces and its failure to be entrenched. On the matter of applicability to the provinces, two issues were raised. First, a number of organisations emphasized that rights violations much more frequently emerged from provincial authorities and thus the focus needed to be on debarring provincial authorities from committing such violations. Further, a federal-only bill of rights would give a false sense of rights protection that would mute concerns by Canadians in regards to rights violations in other provinces. Second, there was the concern that failure to extend the bill of rights to the provinces would result in the emergence of a patchwork of rights regimes in Canada and thus a patchwork of "citizenships." The passage of the *Canadian Bill of Rights* would result in some, but not necessarily all, provinces developing bills of rights and that the terms of these would not be uniform. Although the main concern of the witnesses was the violation of rights by provincial authorities, the Committee members turned such discussions into exhortations to the witnesses to support their views on Bill C-79's effect on provincial 'rights.' Thus, the Conservative members repeatedly pressed the witnesses to explicitly state that there was no trenching upon provincial legislative authority, such as in the following exchange between Conservative Committee member Stewart and Canadian Labour Congress Representatives Dr. Eugene Forsey and Claude Jodoin:[68]

> *Mr. STEWART: Getting back to the federal level; you agree that there should be one bill of rights?*
>
> *Dr. FORSEY: We have said so, most emphatically.*
>
> *Mr. STEWART: And you will agree that bill C-79 does not attempt to encroach upon the provinces, as it is set up now?*
>
> *Dr. FORSEY: Quite.*

[68] *Special Committee* 24-3 (1960), :204 (July 1960)

Mr. DESCHATELETS [Liberal]: What is the answer?

Dr. FORSEY: I agree that it does not invade provincial jurisdiction at all.

Mr. STEWART: It does not touch provincial matters at all?

Mr. JODOIN: That is what we are complaining about.

Mr. STEWART: That is just what I am getting at.

Mr. JODOIN: We suggest this procedure, until we succeed in agreeing on a method of amending our whole constitution within Canada, which we hope will soon be done.

Mr. STEWART: I quite agree; but I am trying to get across the first bridge, and I would suggest that bill C-79, with a few amendments, if necessary, be now passed; and that retains in Canada the right to amend, develop it, as the case may be.

In response to such interventions by Conservative Committee members, Liberal Committee members pushed the witnesses to repudiate or qualify such statements that endorsed the government's view that there was no trenching upon provincial rights:[69]

Mr. MARTIN (Essex East): May I ask you if you have given any consideration as to whether or not there is at least doubt as to whether or not in section 2 of the word "Canada" and the word "property" do raise grave doubt as to the constitutional competence of parliament.

Dr. FORSEY: Well, if you want my lay opinion, with great deference to all the learned counsel who are here, I would say the words "in Canada" here have the sense of "in Canada" insofar as it is within the jurisdiction of the parliament of Canada.

Mr. MARTIN (Essex East): Can you point to anything in clause 2 which says that is the case.

Dr. FORSEY: No: but it seems to me to be the only meaning. You cannot pass an act of parliament which applies validly to something outside the jurisdiction of parliament.

Mr. MARTIN (Essex East): Of course not, validly. There is no question about the intent. The intent is it shall not apply to anything outside the federal jurisdiction insofar as one can ascertain by government policy

[69] *Special Committee* 24-3 (1960), 3:207 (19 July 1960)

> *stated by the Prime Minister and the Minister of Justice particularly; but I am suggesting to you that the language of that section—*
>
> *Mr. MANDZIUK [Conservative]: Mr. Chairman, I object. I suggest that Dr. Forsey has answered the question honestly and sincerely as he saw it. I do not think any suggestions or words should be thrown into his mouth. I do not think it is proper. You are not cross-examining Dr. Forsey.*

On the question of entrenchment, despite its harsh criticism of the bill, the Canadian Labour Congress took almost no issue with the constitutional postulates put forward by Justice Minister Fulton. The Canadian Labour Congress readily agreed with the government's contention that an amendment via s. 91(1) would have no greater entrenchment than an 'ordinary' statute and that the passage of a bill of rights through *British North America Act* amendment by Westminster without the support of the provinces would actually be easier to repeal than an 'ordinary' statute. Instead, the debate between Fulton and Forsey was one of predicting future political exigencies and liabilities. For Fulton, future governments and parliaments would tread lightly around the *Canadian Bill of Rights* and be reticent to invoke its *non obstante* clause and the rare resort to the *non obstante* clause would only be done for highly justifiable and legitimate rights derogations where the courts clearly overstepped the power of parliament. In contrast, Forsey feared a sort of death by a thousand cuts for the *Canadian Bill of Rights* through frequent and casual resort to its *non obstante* clause. He had little faith that future governments and parliaments would be troubled or face any significant political price for invoking the *non obstante* clause of the *Canadian Bill of Rights*. Although Forsey readily admitted that repeal of a bill of rights incorporated into the *British North America Act* would be easier than repeal of a statutory bill of rights and he endorsed the argument that, once such an instrument was in force, any future government would find it politically difficult, if not impossible, to repeal it. As such, for Forsey the advantage of a

bill of rights through *British North America Act* amendment by Westminster was his belief that such an instrument would lack a *non obstante* clause and would force a future government and parliament to make the political costly choice of an outright bill of rights repeal if it wished to derogate from the bill of rights.

Fair Practices

Another issue raised by a number of the witnesses, but particularly highlighted by Irving Himel of the Association for Civil Liberties, was the failure of Bill C-79 to contain sanctions that applied to individuals, particularly in regards to preventing discrimination.[70] The significant concern with this issue illustrated the shift in the priorities of the human rights activist community from the 1940s to the 1950s. As discussed elsewhere in this dissertation, the focus of the human rights movement in the 1940s was to prevent the abuses of civil liberties by governments of the sort that occurred during the Depression as well as the Second World War and its immediate aftermath. However, with the end of the most visible and egregious of those abuses and the expansion of the human rights movement, the focus shifted to that of using government to prevent private discrimination. As such, for many human rights advocates appearing before the Special Committee, a general human rights instrument that did not include effective anti-discrimination clauses that prevented private discrimination was considerably inadequate. It is a noteworthy reflection of the nature of human rights thinking in the era that even labour activists prioritized anti-discrimination provisions over those of economic rights in any general human rights instrument.

[70] *Special Committee* 24-3 (1960), 3:180 (19 July 1960)

FULTON BEFORE THE SPECIAL COMMITTEE

The lengthiest, clearest, most explicit, and most persuasive public defence of the *Canadian Bill of Rights* was that given by Justice Minister Fulton before the Special Committee. As noted, six of the fourteen days of proceedings were dedicated to either testimony by, or questioning of, Fulton and during the testimony by other witnesses, Justice Minister Fulton was given license to question and debate with them. Fulton's defence of Bill C-79 was tenacious and he only seldom made minor concessions to his critics (for example, he agreed to drop the word "always" in the phrase "there have always existed and shall continue to exist"[71]). Thus, although the Committee itself tended to be dominated by Paul Martin, the proceedings in general were dominated by E.D. Fulton. Notably, E. A. Driedger attended all of the sessions at which Fulton gave testimony and although he never directly testified himself, the proceedings indicate that Fulton, at least occasionally, consulted Driedger before giving a response.

Although one could challenge the constitutional vision presented by Fulton and doubt the potential efficacy of the language used in the bill, it is impossible to otherwise conclude that Justice Minister Fulton intended anything less than a bill of rights which would robustly empower the judiciary to strike down legislation that violated civil liberties on the basis of the *Canadian Bill of Rights.* His defence of the bill as a robust constitutional instrument empowering the courts to monitor and control federal legislation was explicit and emphatic.

[71] Fulton in *Special Committee* 24-3 (1960), 6:412 (22 July 1960).

Effectiveness

Fulton's robust defence of Bill C-79 was not limited to his own testimony and clashes with committee members. He forcefully challenged the criticism of bill C-79 by other witnesses. Fulton debated with Irving Himel[72] of the Association for Civil Liberties; Eugene Forsey[73] of the Canadian Labour Congress; Frederick Varcoe,[74] the former Deputy Minister of Justice; Professor A.R.M. Lower,[75] a history professor at Queen's University; and Maxwell Cohen,[76] Acting Dean of the Faculty of Law at McGill University. In these clashes the greatest concession that these learned witnesses could pry out of Fulton was an agreement to disagree. Fulton, however, was much more often able to convince critics of the wisdom of his approach. As noted above, not only did the staunch parliamentary supremacist Varcoe concede that the *Canadian Bill of Rights* would be able to strike down other legislation, but Fulton successfully turned Varcoe on other constitutional issues. For example, Varcoe expressed his surprise that the government failed to proceed with an amendment to the *British North America Act* under the provisions of section 91(1), with an amendment to the *British North America Act* phrased along the lines of "notwithstanding anything contained in section 91 [...] the parliament of Canada shall no longer have power to [...] authorize or effect [...]."[77] However, upon questioning by Fulton as to the potential practical difficulties with such an approach Varcoe seemingly changed his opinion on the matter: [78]

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[72] See *Special Committee* 24-3 (1960), 3:182-190 (19 July 1960).
[73] See *Special Committee* 24-3 (1960), 3:216-226 (19 July 1960).
[74] See *Special Committee* 24-3 (1960), 3:227-230 (19 July 1960).
[75] See *Special Committee* 24-3 (1960), 4:330-337 (20 July 1960).
[76] See *Special Committee* 24-3 (1960), 5:373-394 (21 July 1960).
[77] Varcoe in *Special Committee* 24-3 (1960), 3:227 (19 July 1960).
[78] Varcoe in *Special Committee* 24-3 (1960), 3:230 (19 July 1960).

> *Mr. FULTON: However under 91(1) I suppose you would simply have a constitutional amendment saying that the parliament of Canada shall not legislate so as to deprive anybody, etc.*
>
> *Mr. VARCOE: Yes.*
>
> *Mr. FULTON: It seems to me it would apply only to statutes in the future.*
>
> *Mr. VARCOE: I am bound to say that I have not thought of that.*
>
> *Mr. FULTON: So that if the intention is to get the existing statutes in, in so far as you can do it and instruct the courts to interpret it with application to statutes previously enacted, does that not make it more difficult to do by a constitutional amendment?*
>
> *Mr. VARCOE: I agree. There is a consideration there to be taken into account.*

More radically, Fulton was able to temper some of A.R.M. Lower's harshest criticism. For example, during his general testimony Lower had criticised the inclusion of amendments to the *War Measures Act* in the *Canadian Bill of Rights,* and was particularly upset that it failed to give any significant judicial or parliamentary oversight to the invocation of a real or apprehended state of war by the government. He observed that:

> *This clause [section 6], it seems to me, giving parliament the power to resolve that the declaration be revoked, does not mean a thing. It just does not mean a thing because, of course, the government of the day, under that clause, will do as it likes and parliament will obediently follow it, especially in a time of hysteria such as wartime.*[79]

However, following Lower's presentation, Fulton was given the opportunity to question Lower, through a series of what were essentially rhetorical questions (nearly every one of Lower's answers was simply "yes") which eventually convinced Lower to revise his harsh view of the clause in question:[80]

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[79] Lower in *Special Committee* 24-3 (1960), 5:381 (21 July 1960).
[80] *Special Committee* 24-3 (1960), 4:331-332 (20 July 1960).

> *Mr. FULTON: Would you then agree with me that it is a sensible provision at the moment to put this safeguard in against abuses of the powers of invoking the War Measures Act, which will thus give you some protection against the abuse of the powers conferred by the act; and then say we will look next at the act to see whether improvements should be made in the statute itself.*
>
> *Mr. LOWER: Yes. I was under the impression, when I read this, that this is an attempt to make criticism of the War Measures Act [impossible]. From what you say about it I can see you have something additional in mind. I would be very happy not only to have this retained but also to have the revision of the War Measures Act made subsequently.*

Constitutional Issues

Driedger's Constitutional Views

The vision of the constitution and the role of the *Canadian Bill of Rights* within that framework presented by Justice Minister Fulton was a repetition of Driedger's constitutional analysis, often repeated before the committee verbatim. Fulton began by repeating the basic structure of the bill developed by Driedger, outlining that

> *Clause 2 affects the legislature, and it is a declaration by the legislature of the rights and freedoms that exist in Canada. Clause 3 is an enactment by the legislature by way of a direction to the judiciary as to how the judiciary will interpret all statutes of the legislature heretofore or hereinafter to be enacted, as well as the orders and regulations made under those statutes. Clause 4 affects the executive. [...] The scheme is as comprehensive as we can make it, not only with respect to the field or rights, but with respect to all branches and parts of the government within the federal field of jurisdiction.*[81]

Fulton did note the political difficulties of gaining provincial consent as a straightforward justification for proceeding with the bill of rights as a statute of the federal parliament, commenting that "I agree with those who have also said that however desirable it might be, it does not seem to be possible at the present time; so, let us get on

[81] *Special Committee* 24-3 (1960), 6:406 (22 July 1960).

with the bill of rights we can have."[82] However, Fulton nonetheless held fast to the constitutional analysis proffered by Driedger that *British North America Act* amendment would not only do no more than a federal statute, but would actually do less. On the question of "constitutional amendment," Fulton was emphatic in differentiating between the *British North America Acts* and the "constitution" and in noting that inclusion of a bill of rights in *the British North America Act* was not a guarantee of entrenchment:

> *Those who put forward the view that it should be by way of a British North America Act amendment do so under the impression that the bill of rights would become entrenched and beyond the reach of any legislative authority in parliament. May I comment first on that, by saying the law is not entrenched, because it happens to be contained within the British North America Act. There are a number of laws have been passed by provincial legislatures and by the parliament of Canada which, although perhaps not always expressed as amendments to the British North America Act, have nevertheless changed the law as contained in the British North America Act. So that it is on that basis, first, that I say that merely putting something in the British North America Act does not mean that it is entrenched, in the sense that it is beyond the reach of parliament.*[83]

Here Fulton embraced the more novel aspects of Driedger's propositions and noted that this did not simply apply to an amendment via section 91(1), but equally to one consented to by the provinces and enacted by Westminster:

> *Even though it were argued that we should accept that course and cut out the words where they now appear in section 91., "notwithstanding anything in this act," in order to entrench the bill of rights, I suggest that even this would not place the bill of rights beyond the reach of the parliament of Canada, because of the existence and effect of the Statute of Westminster. Subsection' (2) of section 2 of the Statute of Westminster, 1931, provides as follows:*
>
> > *(2) No law and no provision of any law made after the commencement of this act by the parliament of a dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future act of*

[82] *Special Committee* 24-3 (1960), 6:406 (22 July 1960).
[83] *Special Committee* 24-3 (1960), 6:406 (22 July 1960).

> *parliament of the United Kingdom, or to any order, rule or regulation made under any such act, and the powers of the parliament of a dominion shall include the power to repeal or amend any such act, order, rule or regulation in so far as the same is part of the law of the dominion.*
>
> *The foregoing provision has been extended to the provincial legislatures by subsection (2) of section 7 of the Statute of Westminster, 1931, which reads as follows:*
>
> > *(2) The provisions of section two of this act shall extend to laws made by any of the provinces of Canada and to the powers of the legislatures of such provinces.*
>
> *So that a statute of the United Kingdom adding a new section to the British North America Act would be subject to repeal or amendment by parliament; and if the bill of rights in the British North America Act covered the provincial field, it would also be subject to repeal by the provincial legislatures.*
>
> *Subsection (1) of section 7 of the Statute of Westminster excepts from the operation of the foregoing provisions "the British North America acts, 1867 to 1930." Any subsequent amendment to the British North America Act is not included in the collection of acts known as the British North America Acts, 1967 to 1930. So that to entrench the bill of rights it would be necessary to amend also the Statute of Westminster.*[84]

For Fulton, entrenchment was not possible through an amendment to the *British North America Act* and a purely statutory bill of rights was therefore, in practice, more entrenched.

Fulton considered a statutory bill of rights more robust than a "constitutional" bill of rights in another matter. As noted above, during his questioning of Varcoe, Fulton noted that a *British North America Act* amendment would not be "retroactive;" that is to say that it would not apply to pre-existing statutes, only future statutes. In his own testimony, Fulton expanded upon this, arguing that "it is neither appropriate nor is it

[84] *Special Committee* 24-3 (1960), 6:407 (22 July 1960).

really feasible from a drafting point of view" of effecting "a measuring having retroactive effect being inserted in the British North America Act itself:"[85]

> *the question has been raised as to the effect of the bill of rights on statutes already enacted. May I say, in passing, that one of the reasons why we determined against an amendment to the BNA Act is that we did desire, and I believe we have succeeded, to give this bill of rights an effect with respect to statutes previously enacted. This is one case where the government is prepared, and indeed advocates, the enactment of a statute having a retroactive effect.* [86]

Thus, Fulton adopted and clearly explained before the Committee all of Driedger's "novel propositions" except – perhaps – his musings as to the irreversibility of the *Statute of Westminster* and thus the end of concurrent legislative jurisdiction between Westminster and Canadian legislatures in 1931. Instead of definitively taking a position on this issue, Fulton focused on the nationalist element and pilloried the idea that Westminster should be able to amend statutes having effect in Canada, but Canada could not:

> *I am quite certain that even those who vehemently advocate the course of constitutional amendment would not on reflection wish to take their argument so far as to suggest that we amend the statute of Westminster to deprive ourselves of the power of amending statutes of the United Kingdom parliament having application in Canada.* [87]

Constitutional Statute

Fulton took great pains to emphasize that the Canadian Bill of Rights was to be a "constitutional statute," and that "it seems to me that it is an absurdity, in the light of that, for anyone to say that the constitution of Canada is contained only in the British North America Act and its amendment."[88] In describing the *Canadian Bill of Rights*, Fulton

[85] *Special Committee* 24-3 (1960), 6:413 (22 July 1960).
[86] *Special Committee* 24-3 (1960), 6:413 (22 July 1960).
[87] *Special Committee* 24-3 (1960), 6:408 (22 July 1960).
[88] *Special Committee* 24-3 (1960), 6:409 (22 July 1960).

repeatedly emphasized its similarity and parallelism with *the British North America Act*, particularly section 91:

> *I would like, Mr. Chairman, to turn to the question of whether anything hinges on the fact that clause 2 is in the form of a declaration. It has been suggested that as clause 2 is only a declaration it does not operate as law. May I direct your attention, and that of those persons who make this criticism, to section 91 of the British North America Act, which is only a declaration.*[89]

Just as the declaration in section 91 "has the force of law in the B.N.A. Act" when it "defines those things which fall exclusively within federal jurisdiction by way of a declaration," "**the declaration in the bill of rights would have equally the force of law**."[90]

Fulton repeatedly built on his paralleling of the *British North America Act* and the *Canadian Bill of Rights* to emphasize its supremacy over other statutes and its greater dynamism than other statutes, with even the *Interpretation Act* being "subject to the bill of rights."[91] For example, Fulton argues that the phrase "it is hereby recognized and declared that in Canada there have always existed and shall continue to exist" in the *Canadian Bill of Rights* should be taken as akin to the phrase in section three of the *British North America Act* that reads "the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be one dominion under the name of Canada." The term "Canada" was not frozen in the *British North America Act* to mean what it meant on 29 March 1867 (i.e. Ontario and Quebec), but that the Act redefined the term "Canada" and was understood that it should be interpreted flexibly to include expansions of "Canada." Similarly, therefore, the recognition by the *Canadian Bill of Rights* that certain rights

[89] *Special Committee* 24-3 (1960), 6:411 (22 July 1960).
[90] *Special Committee* 24-3 (1960), 6:411 (22 July 1960). [Emphasis mine.]
[91] *Special Committee* 24-3 (1960), 3:186 (19 July 1960).

"existed and shall continue to exist" did not mean that the bill was freezing in time certain rights as they had been previously defined by parliament and recognized by the courts, but that the bill re-defined those rights and expected that in "continuing to exist" they would continue to develop.[92]

Judicial Review

Fulton's comparison of the *Canadian Bill of Rights* with the *British North America Act* was in no way the employment of grandiose language designed to obscure a miserly functioning of the bill of rights in practice. When discussing the practical effects of the *Canadian Bill of Rights*, Fulton left no doubt that he intended the courts to robustly use the *Canadian Bill of Rights* to protect civil liberties and strike down contrary legislation, as

> *a court really would not find much difficulty in holding* ***the bill of rights has explicitly repealed the contradictory provisions****, because it says:*
>
> > *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, unless it is otherwise expressly stated in any act of the parliament of Canada hereafter enacted, be so construed and applied as not to abrogate, abridge or infringe—*
>
> *and so on.*
>
> *I do not know how you could have words more specifically applying the bill of rights to the previous statutes.*[93]

To such grand statements, he also added specific examples of legislation being rendered without effect by the *Canadian Bill of Rights*:

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[92] *Special Committee* 24-3 (1960), 6:436 (22 July 1960).
[93] *Special Committee* 24-3 (1960), 6:448-449 (22 July 1960).

> *Supposing, under the existing Immigration Act, for instance, or the Customs and Excise Act, we put in a provision – I am not sure whether or not it is there now – that "a person who is arrested or detained under the provisions of this act shall not have the right to apply for a writ of habeas corpus. Supposing parliament passed that statute, or supposing the minister elected, under the Excise Act, to pass a regulation having that effect – then our view was that* ***the bill of rights would overcome that provision, and with respect to future statutes, unless they said "notwithstanding the bill of rights", such a provision would be of no effect.*** *With regard to a regulation made under a statute, it would have no effect in any event, because the bill of rights says that no act, order, rule, regulation or law shall be construed so as to deprive a person of his right to habeas corpus.*[94]

Fulton noted the critique that "the great charters of the past" already purported to protect most of the rights guaranteed in the *Canadian Bill of Rights*, but drew a stark contrast between his bill and those earlier charters

> *I think there is a difference between the effect of this bill of rights in its application to statutes past or future and the application of the great charters of the past to which you have referred. I think that difference arises in this way; the charters are all ancient constitutional documents. It is a principle of legislation and of the supremacy of parliament—it is also a principle of interpretation—that in looking at a statute the courts will look at the last enactment of parliament, and if there are inconsistencies between statutes the general principle is that it is the last enactment that speaks, because parliament does have the right to alter its previous enactments. Therefore, parliament is presumed, where there are inconsistencies, to have intended to alter the older statute. Therefore, supposing there was a statute in force which gives to an administrator operating under it—an officer acting under the authority of the statute—some arbitrary power which appears to be inconsistent with one of the old historic documents. Of course, quite properly so, it must have been the intention of parliament to set aside the protection of the old historic document because here is an express statute, or a statute expressly authorizing the kind of action which has taken place.*
>
> *Our bill of rights says explicitly that all previous statutes of the parliament of Canada, and all regulations and orders made thereunder, shall be interpreted in accordance with the bill of rights. Therefore, our bill of rights is expressly made applicable to those statutes.* [95]

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[94] *Special Committee* 24-3 (1960), 5:390 (21 July 1960).
[95] *Special Committee* 24-3 (1960), 6:444-445 (22 July 1960).

Fulton, too, shared the concerns of some witnesses that -- despite what he viewed as the clear intent of the bill -- the courts might fail to give "wide application" to the *Canadian Bill of Rights.* However, it was his belief that the *Canadian Bill of Rights* would inspire parliament to be more "freedom-conscious" and, therefore, would more readily remedy such injustices:

> *Some judges may tend not to give the bill of rights the wide application which it might otherwise have. If we find that to be the case, and on examination, feel that this is a case where the bill of rights should apply, then it will be for parliament to decide whether or not to amend the statute under which the action complained of has been taken, and has been upheld by the courts.* ***Generally speaking we think the bill of rights will prevail****. Where cases of doubt, or uncertainty arise on the part of the courts in applying the statute and in applying the bill of rights, or where indeed the courts take a contrary view to that which I have expressed, then we may have to deal, by legislation, with the particular case and particular statute in question.* [96]

In this vein, Fulton was dismissive of the common complaint by witnesses before the committee that the language used in Bill C-79 provided for too great uncertainty as to rights guarantees. For Fulton, the general language used in the bill was purposely designed to fulfill two goals for the *Canadian Bill of Rights*. First, as this was a constitutional instrument, the language employed had to be able to stand the test of time and adapt to future exigencies and developments:

> *We are legislating, as I see it, not for this generation only. It is true we are admitting that what we have here is our inheritance of ancient and traditional liberties and we are, if you like, codifying and declaring that with legal effect, but we are also declaring that it exists for the future.*[97]

Second, the language was designed to give the *Canadian Bill of Rights* a broad and liberal application and Fulton again invoked a comparison between it and the *British North America Act*:

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[96] *Special Committee* 24-3 (1960), 6:445 (22 July 1960).
[97] *Special Committee* 24-3 (1960), 6:458 (22 July 1960).

> *Every law has uncertainties. If statutes could be written without uncertainties we would no longer need the courts. Take the main statute which forms the basis of our constitution itself, the British North America Act. This act has been full of uncertainties. Is it any the less valuable as a constitutional document? I submit it is not, although it probably has been the subject of more major litigation than any other statute in Canada.*

Robust Courts

It appears that Fulton had greater faith in, and greater expectations for, the role of the courts in defending civil liberties than many of the human rights advocates. Fulton can be faulted for assuming that the Supreme Court's robust defending of civil liberties through its then recent development of an "implied bill of rights" marked the beginning of a court committed to greater judicial review that could be consolidated by Parliament in enacting the *Canadian Bill of Rights*. Fulton interpreted the "series of cases in the Supreme Court [where the judges] have felt impelled to rest their reasoning and their conclusions in part on the preamble of the British North America Act,"[98] as a sign that the Court was keen to defend civil liberties and expand the scope of judicial review. For Fulton, the Supreme Court had recently developed greater judicial review and protection of civil liberties as a sort of *a priori* reasoning, but that "our judges would reach out for something, and they are happier when they can find some written statement of law on which to rest their conclusions rather than having to reach them from *a priori* reasoning."[99] For example, the *Canadian Bill of Rights* only strengthens Parliament's oversight of the executive under the *War Measures Act* and provides no direction to the courts to review the invocation of a state of war or insurrection. However, when pressed on what protections there existed against a government which "continued such a

[98] *Special Committee* 24-3 (1960), 6:439 (22 July 1960).
[99] *Special Committee* 24-3 (1960), 6:439 (22 July 1960).

proclamation in effect for some time after the emergency might be considered to have passed," Fulton argued that "In this respect I am advised that it would be open to the courts to entertain an argument that at that point the exercise of the emergency powers was not warranted on the grounds that the emergency no longer existed."[100] This was not simply a view that the courts failed to embrace over the subsequent two decades, but was exceedingly optimistic given the courts' reasoning in the *Chemicals Reference*,[101] the *Japanese Expulsion Reference*,[102] and *Hallet & Carrey*[103] which had generally granted the executive unlimited discretion, immune from judicial review, under the *War Measures Act*.

Sanctions

This generous view of the role of the courts is also what helped to underpin Fulton's rejection of the inclusion of any specific sanctions in Bill C-79:

> *I think the suggestion that the bill of rights should contain sanctions is a misconception of the purpose and functions of a bill of rights. A bill of rights constitutes the framework within which the legislature, the judiciary and executive must operate. If there is a violation by a legislative body the courts will not enforce or give effect to that violation. If there is a violation by a state official or an individual against another individual, the remedy lies in the field of substantive law. And we are creating, or are declaring substantive law.*[104]

For Fulton, the inclusion of a section equivalent to section 24(1) of the *Charter*[105] would have been redundant, for it was the inherent purpose of courts to provide remedies for

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[100] *Special Committee* 24-3 (1960), 9:583 (26 July 1960).
[101] *Reference Re: Regulations in Relation to Chemicals*, [1943] SCR 1
[102] *Reference Re: Persons of Japanese Race*, [1946] SCR 248
[103] *Canada (Attorney General) v Hallet & Carey Ltd*, [1952] AC 427
[104] *Special Committee* 24-3 (1960), 6:412 (22 July 1960).
[105] Section 24(1) reads: "Anyone whose rights or freedoms, as guaranteed by this Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

violations of substantive law and explicit sanctions would not provide the necessary flexibility for courts to justly remedy specific rights violations (this is part of the reason why the *Charter* lacks specific sanctions). Instead, Fulton made it very clear that the purpose of the *Canadian Bill of Rights* was to strike down any enactment that violated the rights guaranteed by the bill and that any attempt to enforce such inoperative legislation would be contrary to the law and thus individuals were to seek remedies for any other action by the executive that was contrary to the law.

Provincial Jurisdiction

Just as the main concern for committee members in their questioning of witnesses was the question of the bill of rights upon provincial rights, a similar treatment was accorded to Fulton during his many days of testimony. For two full days the opposition committee members questioned Fulton as to why he had not made a greater effort to consult the provinces and achieve a bill of rights agreed to by all the provinces as well. Fulton provided no new arguments in this regard, maintaining the argument that the provinces were "jealous" of their rights and success of such an agreement would be impossible in the immediate and medium term future.

In this vein, he was particularly aggravated by Paul Martin's constant interventions that repeated the arguments of Bora Laskin and, particularly, Louis-Philippe Pigeon that Bill C-79 would trench upon provincial legislative jurisdiction. Fulton was dismissive of the argument and eventually showed irritation at Martin's repeated claims in this regard:[106]

[106] *Special Committee* 24-3 (1960), 6:429-437 (22 July 1960).

> *As I understand it, Parliament cannot simply by declaring something to be within federal jurisdiction, give itself the right to legislate. [...]*
>
> *The bill of rights, especially in its present form, cannot affect the fundamental division of authority between the parliament of Canada and the legislatures of the provinces. [...]*
>
> *I think everyone will understand the parliament of Canada not being able, by its own unilateral action, to alter the division of constitutional authority. This statute cannot enlarge the field of our jurisdiction. [...]*
>
> *Mr. Martin, I think that you are probably pressing a point to an illogical conclusion.*

Language

On the matter of the language employed to protect specific rights, Fulton clashed with both the witnesses and the opposition committee members over two broad and interrelated issues. First, Fulton favoured brevity and generality in the language used in the bill of rights whereas many of the witnesses and some of the committee members pressed for more specificity and thus greater length and often repetition. Second, Fulton typically favoured language in the English and American traditions, whereas many of the witnesses and some of the committee members pressed for the adoption of the language in the tradition of the emergent international human rights movement.

Brevity vs Specificity

Fulton defended the purposely vague language upon the belief that it would allow for rights not expressly incorporated into the bill of rights to be accorded the same Rights protections that he believed would be accorded by the bill of rights. For example, the use of the entirely undefined phrase "other constitutional safeguards" could be viewed as simply a nullity – because it does not explicitly protect any right – or it could be extremely pregnant – allowing for judicial review for an extreme broad and adaptive

definition of rights. Fulton's intended meaning was partially a repetition of the phrase "due process" as it "means our constitutional and judicial rights with regard to legal process and the rights and protection of a witness who is before the court,"[107] but it also was to allow the court to incorporate into the *Canadian Bill of Rights* rights variously protected in other federal statutes. Thus, when Paul Martin expressly asked what was meant by "constitutional safeguards," Fulton replied

> *A witness sometimes takes counsel's advice as to whether he should answer or not; and counsel advises him to ask for the protection afforded under the Canada Evidence Act. I agree with Mr. Dorion it just is not explicit or implicit in the law now, but this guarantees it for the future. [...] I think it [the right not to give evidence against yourself] is included in the generic description, just as are other specific statutes, apart from the B.N.A. Act, in our constitution.*[108]

Anglo-American vs International traditions

Although Fulton prized the bill's symbolism, he always remained cognizant that the bill was at base a practical legal instrument. In this regard he favoured the use of language in the English and – particularly – American traditions in contrast to the international language generally favoured by human rights activists of the era. For Fulton, not only was the international language alien (and more verbose), but it lacked any jurisprudential foundations and as a result there were few or no precedents litigants could cite to convince judges to give a broad or effective meaning to the hoary language of international instruments. In contrast, the use of, particularly, American language would provide a rich source of precedents which litigants could invoke in order to justify effective use of the bill of rights.[109]

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[107] *Special Committee* 24-3 (1960), 6:460 (22 July 1960).
[108] *Special Committee* 24-3 (1960), 6:460-461 (22 July 1960).
[109] *Special Committee* 24-3 (1960), 6:441 (22 July 1960).

"by due process of law" vs "in accordance with law"

One highly controversial issue was the bill's employment of the phrase "by due process of law." It was noted by a number of witnesses, that, although this phrase did have an ancient history in the English tradition, it was also rather anaemic in that tradition, meaning little more than something authorized by the law (as opposed to capriciously outside of the law) with no controlling force over how any such law was implemented.[110] As such, a number of the witnesses suggested that "by due process of law" be revised to "in accordance with law" (a suggestion duly taken up by Paul Martin[111]).

Critics of the phrase "due process" pointed to its anaemic use in the English tradition and wanted a change in language so that judges would not rely on those anaemic English precedents. Thus, as Maxwell Cohen explained, "due process" only meant authorized by law and did not include "process" or "substance" in the English tradition that Canadian judges typically followed. In contrast, Cohen argued that Canadian courts "during the last forty years" had interpreted "the words 'by law' as meaning 'reasonably;'" in employing the phrase "by law" would give the clause greater strength, as "law means process; law means substance."[112]

Fulton was not swayed by this argument and believed that replacing the phrase "due process" with a phrase such as "by law" or "in accordance with the law" would

[110] *Special Committee* 24-3 (1960), 6:441 (22 July 1960).
[111] *Special Committee* 24-3 (1960), 10:606 (27 July 1960).
[112] Maxwell Cohen in *Special Committee* 24-3 (1960), 5:378 (21 July 1960)

result in those latter phrases being read literally by the courts, which would inestimably weaken the *Canadian Bill of Rights*,[113] He gave the example that

> *Some people think that the Expropriation Act's excessive in the powers it carries, but suppose you had the phrase "except by law", would it not be open to argue that so long as you have a law, even an excessive law or a harsh Expropriation Act, the courts could not look at it and say it is inconsistent with the bill of rights. The bill of rights would say "except by law". You are invoking a law.*[114]

Instead, Fulton favoured the phrase "due process" for the reasons presented to him by Driedger. It would act to import the meaning attached to that phrase in the American tradition:

> *It was our view that in trying to interpret this phrase our courts would refer to the American jurisprudence which has been built up around that phrase. [...] I have a note here on the basis of the study we made of the phrase when we decided to incorporate it to the effect that:*
>
> > *In applying the due process clause to substantive rights, the courts in the United States have interpreted the provision to mean that the government is without the right to deprive a person of life, liberty, or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power. The due process clause is intended to protect against arbitrariness.*

When the opposition members of the committee later pressed hard to revise the phrase, Fulton pushed back equally hard, arguing that due process "embraces procedure as well as substance—procedural law as well as substantive law"[115] and emphasized that the American interpretation of that phrase would come to prevail in Canada:

> *But the words "due process" have, we think, inescapably a different connotation. It is true that we cannot say that our courts would follow all*

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[113] In the end, Fulton's arguments swayed Maxwell Cohen, who conceded that the phrase 'by law' "would require further imagination to read into it what I want to read into it" and "that the Supreme Court [of Canada] would not be adverse to looking at American experience in this field. They are doing it now in the anti-trust cases, for example."
[114] Fulton in *Special Committee* 24-3 (1960), 5:378 (21 July 1960)
[115] *Special Committee* 24-3 (1960), 10:600 (27 July 1960).

> *the American jurisprudence; but our courts could not fail to take account of the fact that these words are in the American constitution, that they have been given judicial interpretation; and* ***I state as a reasonable certainty that our courts, in considering how they should interpret the words "due process of law" would look to see how the Americans had interpreted them, and by what process of reasoning and judicial deduction they had come to give them their present application****. [...] In applying the "due process" clause to substantive rights, the courts in the United States have interpreted the provision to mean that the government is without right to deprive a person of life, liberty or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power. The "due process" clause is intended to protect against arbitrariness." I cannot think of a better expression to import into our bill of rights, having in mind that one of its fundamental purposes is to protect the citizen against arbitrary exercise or interpretation of powers by administrative officers or members of the government themselves, and it was for that specific reason we came to the conclusion it is better to say "by due process of law" here than any of the other phrases that have been suggested.* [116]

"cruel and unusual" vs "torture or cruel, inhuman, or degrading"

One of the most controversial aspects of the bill of rights was its inclusion of a prohibition on "cruel, inhuman, or degrading punishment" that many claimed could include a prohibition on capital punishment. Fulton readily admitted that this was a possibility, although he emphasized that he did not believe it to be a likely interpretation by the courts. The inclusion of the phrase "torture or cruel, inhuman, or degrading punishment" was atypical in the bill of rights as it was one of the few occasions in which Driedger had opted for a phrase adapted from an international instrument[117] as opposed to a readily available analog in the Anglo-American tradition, that is, "cruel and unusual punishment."[118] Fulton tended to refuse the entreaties to incorporate language from the

[116] *Special Committee* 24-3 (1960), 10:599 (27 July 1960).
[117] *Universal Declaration of Human Rights*, GA res 217A (III) (UN Doc A/810 at 71) (1948), Article 5
[118] The phrase appears in both the English and American bills of rights.

international tradition and, in this case, he suggested revisions to his own bill that would substitute the international phrase for the more traditionally Anglo-American one. Although this substitution was consistent with Fulton's general approach to the bill of rights, it is clear that Fulton's motives in this matter were more the result of a conservative approach to capital punishment. It is likely that the repeatedly raised prospect in the committee that the *Canadian Bill of Rights* could result in the courts abolishing the death penalty convinced Fulton to opt for the Anglo-American phrase. Whereas the American phrasing had long been held to be consistent with capital punishment, it was likely feared that the phrase used in the Universal Declaration could eventually come to be seen as prohibiting capital punishment.

Changes adopted by the Committee

After nearly three weeks of testimony, discussion, and debate, only five changes to the language used in the bill were adopted, plus the adoption of a preamble. Although Fulton fiercely rejected most criticisms of the bill, he was not wholly immovable and did respond to some of the criticisms. However, he remained tightly in control of any changes, as all of these changes were proposed by him (although, obviously, formally moved by various Committee members). Most of the changes involved tidying up the language of the bill with no deviations from the vision developed by Driedger and defended by Fulton.

The first change involved moving the long introductory portion of section 3 defining what instruments the *Canadian Bill of Rights* applied to,[119] to a definition

[119] "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

section later in the bill (section 5(2)) and replacing it with the more succinct phrase "law of Canada." This, along with moving the short title from the beginning (section 1) to the end (section 4) of Part I of the *Canadian Bill of Rights*, was aimed at making the bill more accessible to a popular audience while maintaining its specific legal definitions.

The second change proposed by Fulton sought to clarify that the responsibility given to the Minister of Justice to review legislation was purely directory and not coercive in relation to Parliament. As such, the phrase that the Minister of Justice "shall report any such inconsistency to the House of Commons" was added to section 4 to make clear that the bill's requirement for the Justice Minister to ensure conformity of legislation with the bill of rights was subservient to Parliament and did not grant the Minister of Justice any powers to compel Parliament. A main aim of the bill was to weaken the relative power of the executive in relation to Parliament and it was feared that the originally drafted clause could unintentionallyimpute the contrary.

The third revision was the replacement of the phrase "torture or cruel, inhuman, or degrading" with "cruel and unusual," as discussed above.

The fourth revision involved the addition of explicit guarantees for the presumption of innocence and the right to bail. During the committee proceedings, Fulton had fiercely defended leaving such specific enumerations out in the name of brevity, arguing that they were already guaranteed under the rubric of "due process" and protections against arbitrary detention. Unfortunately, there is no significant explanation in the Committee proceedings, nor is any explanation available in private records that explains Fulton's reasoning for accepting such changes. This change is noteworthy,

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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 [...]"

because it moves in the opposite direction from the "cruel and unusual" amendment, in that the language employed seems to have been drawn from the international tradition. The language is generic enough, however, so that the similarities may not be significant.

The final change to the operative clauses involved the replacing of the non-discrimination sub-clause with a sub-clause guaranteeing "equality before the law" and moving the non-discrimination phrase to be included into the main clause recognizing and declaring rights. It appears that this revision was prompted by demands from Conservative members of the special committee, who had favoured a similarly-themed amendment proposed by the opposition members of the special committee, but out of party solidarity, rejected it. They subsequently pressured Fulton to develop a revision that would similarly emphasize the non-discrimination aspect of the *Canadian Bill of Rights*. This was one revision that Driedger opposed as it impinged on the structure of the bill as he envisioned it. [120]

The final change adopted by the committee was the incorporation of a preamble for the bill. Originally, the Department of Justice had avoided including a preamble as, from a legislative drafting perspective, that practice had largely been discontinued. Discussions of a preamble took up considerable space in the proceedings of the special committee and many of the drafts submitted by committee members were grandiloquent and quite long. In the end, Fulton had drafted a relatively succinct preamble that addressed concerns that could not effectively be addressed in the bill's operative clauses but held powerful symbolic value, particularly for the conservative French-Canadian

[120] Elmer A. Driedger, "The Canadian Bill of Rights" in *Contemporary Problems of Public Law in Canada: Essays in Honour of Dean F. C. Cronkite*, ed. O.E. Lang (Toronto: University of Toronto Press, 1968), p. 36.

committee members and members of parliament; that is, the reference to the supremacy of God as well as to the family, along with a repetition of the bill's respect for provincial jurisdiction.

THE COMMITTEE OF THE WHOLE AND THIRD READING

The return of the bill to the House in a Committee of the Whole repeated the earlier debates of the special committee, but addressed them more superficially. Lester Pearson and Paul Martin repeated their arguments that the bill was purely "declaratory"[121] (i.e. directory); CCF leader Argue hammered on the lost opportunities to consult the provinces;[122] and Conservative MPs, such as Macdonnell and Dorion, discussed the importance of the bill in the fight against "dialectic materialism"[123] [i.e. communism]. Rhetoric against the bill reached a fevered pitched at times resulting in some curious exaggerations, such as that by Argue that "I venture to say about half of the words in the new bill were not in the first bill that came before this house"[124] or by Paul Martin that "the evidence before the committee establishes without any shadow of doubt that this bill declaratory in form does not alter the fundamental law of this land."[125]

Beyond the general rhetoric, a dozen further amendments were proposed for the bill, the overwhelming majority being those that had been defeated in the special committee. They were once again defeated in the committee of the whole, such as proposals for including rights to privacy,[126] movement,[127] nationality,[128] family,[129] social

[121] *Debates* 24-3 (1960), VII:7375 (1 August 1960)
[122] *Debates* 24-3 (1960), VII:7379 (1 August 1960)
[123] *Debates* 24-3 (1960), VII:7391 (2 August 1960)
[124] *Debates* 24-3 (1960), VII:7378 (1 August 1960)
[125] *Debates* 24-3 (1960), VII:7434 (2 August 1960)
[126] *Debates* 24-3 (1960), VII:7432 (2 August 1960)

security,[130] and just remuneration.[131] With the exception of the latter two, Fulton opposed the amendments on the ground that the essence of those rights were already protected in the current bill or could not be protected by the bill (e.g. Fulton argued that the family was not a "juridical" unit that could be accorded rights and instead that families were guaranteed the aggregate rights of their individual members[132]). Only two amendments were adopted in the Committee of the Whole. The first was a right to an interpreter during a trial moved by Liberal MP Deschatelets,[133] and the second was a repetition that there was no intention to invade provincial rights moved by Conservative MP Brooks.[134]

CONCLUSION

Thus, when the bill was finally passed by the Commons (and the Senate) on August 4th, it had changed little in substance from the original bill drafted by Driedger. Only the right to an interpreter had been added and only the rights to reasonable bail and the presumption of innocence clarified. Otherwise, the changes were largely cosmetic. Assuming his explanations before Parliament, and especially the Special Committee, were honest, Fulton clearly championed a bill of rights that was intended to be empowering for the courts. The embrace of broad language and the adoption of specifically American terms provided, in Fulton's view, the foundation for an extremely

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[127] *Debates* 24-3 (1960), VII:7436, 7440 (2 August 1960).
[128] *Debates* 24-3 (1960), VII:7441 (2 August 1960).
[129] *Debates* 24-3 (1960), VII:7444 (2 August 1960).
[130] *Debates* 24-3 (1960), VII:7446 (2 August 1960).
[131] *Debates* 24-3 (1960), VII:7470 (3 August 1960).
[132] *Debates* 24-3 (1960), VII:7435 (2 August 1960).
[133] *Debates* 24-3 (1960), VII:7484 (3 August 1960).
[134] *Debates* 24-3 (1960), VII:7502 (3 August 1960).

robust rights regime in Canada (at least at the federal level). The broad and general terms that would give the courts considerable scope to apply the bill of rights as well as considerable flexibility defining rights guarantees. Further, by endorsing the importation of a rich and generally rights-favourable jurisprudence, Fulton believed the *Bill* was giving litigants readily-available and persuasive precedents upon which to successfully pursue their rights in court. In sum, for Fulton, the analog for the *Canadian Bill of Rights* was not the *Universal Declaration of Human Rights* or even the English *Bill of Rights*, but instead the American Bill of Rights, with a similar constitutional impact and embracing similar conceptions of rights. ♦

Chapter Eight – Driedger's Reflections

Elmer A. Driedger would oversee the Department of Justice as Deputy Minister during the first seven years of the *Canadian Bill of Rights*, retiring a few months before Pierre Trudeau arrived as Minister of Justice, championing a bill of rights incorporated into the *British North America Act*. Following a brief stint as a diplomat, Driedger would pass his remaining years in academia. His main focus in these latter years was expositing his views on legislative drafting and statutory interpretation, but he did make a number of academic interventions as to the interpretation of the *Canadian Bill of Rights*. This chapter explores Driedger's response to the operation of the *Canadian Bill of Rights* and his views on statutory interpretation related to that instrument.

The chapter begins with an analysis of Driedger's view on statutory interpretation generally (as expressed in his 1974 opus, *The Construction of Statutes*[1]). While scholarly and judicial analysis of constitutional interpretation has evolved in recent years in Canada as a discipline within the law sharply distinct from statutory construction, this distinction between the two disciplines results in some curious inconsistencies and is, in functional terms, often superficial. In contrast, for a proponent of parliamentary sovereignty (albeit, the unorthodox "self-embracing" version) such as Driedger, constitutional interpretation in Canada was no more than a species of statutory interpretation. That is to say, Driedger's analysis of and exposition on statutory interpretation is equally his analysis of and exposition on constitutional interpretation. As such, examining Driedger's writings on statutory interpretation give keen insight to his views on the constitution, the

[1] E.A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974),

Canadian Bill of Rights, and civil liberties generally. The rest of the chapter explores Driedger's writings specifically on the *Canadian Bill of Rights* after its enactment.

THE "NEW APPROACH" ELABORATED

In addition to Driedger's reticence to cite scholarly authorities, another methodological difficulty in gauging the evolution of Driedger's thinking is the considerable delay between his writing of an essay and its eventual publication. It would be tempting to read his 1953 essay on the retrospectivity of statutes[2] in light of the 1952 *Crown Liability Act,*[3] his mid-1962 constitutional amendment essay[4] in light of the December 1961 draft ("Fulton") amending formula, or his 1968 *Robertson* article[5] in light of his having years of considered reflection on the case. Yet, for each of these essays, it is demonstrably clear that they were written much earlier and published with almost no revision. It appears that Driedger was content to have his writings published years after drafting them without revising them in light of intervening events. As such, it is well-nigh impossible to evaluate with certainty the precise chronological evolution of Driedger's thinking.

As we noticed, Driedger had embraced progressive innovations in the law developed in the interwar period with his "New Approach" to statutory interpretation rejecting the literalist school and adopting an approach that, in contemporary terms,

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[2] Elmer Driedger, "The Retrospective Operation of Statutes," *Legal Essays in Honour of Arthur Moxon*, eds., J.A. Corry, F.C. Cronkite, and E. F. Whitmore (Toronto: University of Toronto Press, 1953).
[3] SC 1952-53, c. 30
[4] Elmer Driedger, "Constitutional Amendment in Canada," *Canadian Bar Journal* vol 5 (1962), pp. 52-59.
[5] Elmer Driedger, "The Statute of Westminster and Constitutional Amendments," Canadian Bar Journal vol 11 (1968), pp. 348-356.

would be termed "purposive." While this more purposive approach was first outlined in the decade before he drafted the *Canadian Bill of Rights*, it only received comprehensive expression in 1974 with his *Construction of Statutes*. Yet, given the consistency between his "New Approach" in 1951 and his "Modern Principle" in 1974, the views he espoused in 1974 can also be taken as a qualified proxy for his views on the matter when drafting the *Canadian Bill of Rights*.

AUTHORITIES FOR THE "MODERN PRINCIPLE"

If one assumes that frequent citation reflects particular interest in the value of a case (either fondness for or rejection of its authority), then there are nine cases[6] which Driedger disproportionately cites in his two editions of *Constitution of Statutes*. Driedger's use of these authorities reflects the advocacy of his "entire context" approach and a readiness to render enactments inoperative in order to uphold the "intention of the legislature."

Adamson and The Mostyn

Much of Driedger's "New Approach" and "Modern Principle" is founded upon the teachings of J.A. Corry. Driedger devotes considerable space, particularly in his first chapter, to examining the reasoning in two very similar cases illustrating divergent approaches to statutory interpretation that had been analyzed by J.A. Corry in his lectures

[6] Excluding the three foundational cases for building his "modern principle" of *Heydon's Case*, (1584) 76 ER 637; the *Sussex Peerage Case*, (1844), 1 Cl&Fin 85); and *Grey v Pearson*, (1857), 6 HL Cas 61.

in the 1930s: *Adamson*[7] and *The Mostyn*,[8] two cases five decades apart which examined liability under the 1847 *Harbours Act*.[9]

Driedger savaged the reasoning used in *Adamson*.[10] He characterized the method of interpretation adopted by the majority of the judges as involving "a pure subjective test" in which the judges "obviously considered a law of which [they] did not approve to be a mistake."[11] As a result, the judges found the

> *intention of Parliament in [their] own mind rather than in the words of the statute, and then rationalized by sheer speculation that the clause was a clause of procedure only, dealing with the mode in which a right already existing should be asserted, and not creating a right.*[12]

Driedger favourably contrasted the reasoning in *The Mostyn*[13] with that in *Adamson* He characterized the reasoning in *The Mostyn* as less subjective and absent an attempt "to circumvent the plain meaning of the statute by distorting its language merely because they do not like the result of its application to the facts before them."[14] For Driedger, *The Mostyn* represented an important step on the path towards "the Modern principle" as it marked a shift by courts away from traditional modes of interpretation

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[7] *River Wear Commissioners v Adamson*, (1877), 2 App Cas 743.
[8] *Great Western Railway Co v The Mostyn (Owners)*, [1928] AC 57.
[9] *Harbours, Docks, and Piers Clauses Act, 1847*, 10 & 11 Victoria, c.27, s. 74.
[10] At issue in *Adamson* were damages caused to a pier by a ship that had been abandoned in a storm and then later caused damage to the harbour when a rising tide subsequently caused the ship to collide with the pier. The House of Lords reasoned that despite the unambiguous wording which extended liability of ships owners for damages caused by their ship to harbours, it should not apply to situations where there was no *wilful* negligence.
[11] Driedger (1974), p. 22.
[12] Driedger (1974), p. 22.
[13] At issue in *The Mostyn* were damages caused to a ship's anchor to electric cables which lit the harbour at the bottom of a communications passage. The House of Lords reasoned that despite the precedent in *Adamson* which limited liability for damages under the *Harbours Act* to *wilful* negligence, that *Adamson* only applied to derelict ships and not to unintentional negligence by a human crew.
[14] Driedger (1974), p. 26.

that had favoured the presumptions of judges for one that emphasized "the intention of Parliament must be gathered from the words it has used to express that intention."[15]

Prince Augustus

Prince Augustus,[16] a 1957 House of Lords ruling, is clearly Driedger's most favoured authority in *Construction of Statutes*; it is this case that Driedger speaks most approvingly of and quotes at greatest length. For Driedger, it is the case that most epitomizes his "Modern Principle" as it largely adopted the sort of principles that characterized the approach to statutory interpretation advocated by Driedger in his 1951 "New Approach." The reasoning in the case, as analyzed by Driedger, proffered a rejection of 'literalism' and repeatedly emphasized the importance of "context," particularly "external context" referenced in a statute.

The case addressed three elements at the core of Driedger's modern principle. First, that in order to give proper meaning to individual enactments, a statute needs to be read in its entirety to understand its overall purpose[17] and in the context of not only "statutes *in pari materia,"* but statutes in the "same broad category [...] though not *in pari materia."* [18] Second, that statutes should be given a purposive construction as "Parliament may well intend the remedy to extend beyond the immediate mischief"[19]

[15] Driedger (1974), p. 26.
[16] *Prince Augustus*, [1957] AC 436 (HL).
[17] Driedger (1974), pp. 64, 69, 151.
[18] Driedger (1974), p. 131.
[19] Driedger (1974), p. 121 quoting Viscount Simonds at 462-464

(and, as such, reference should be made to "legislative history").[20] Third, Driedger used the decision to illustrate that[21]

> *Context includes more than the words of the Act. Words must be construed in the light of the facts known to Parliament when the Act was passed. Lord Normand in the* Prince Augustus *case said [at 465] that*
>
> > In order to discover the intention of Parliament it is proper that the court should read the whole Act, inform itself of the legal context of the Act, including Acts so related to it that they may throw light upon its meaning, and of the factual context, such as the mischief to be remedied, and those circumstances which Parliament had in view.[22]

Hallet & Carey

The case most frequently cited in the 1974 edition of *Construction of Statutes* is *Hallet & Carey*[23] and while always approvingly spoken of, it is never as quoted at length as *Prince Augustus* and it is not invoked to defend core principles in the manner of *Prince Augustus*. The case is particularly useful in illustrating the consistency in Driedger's views from the late 1950s with those expressed in 1974 as the case featured prominently in a lecture he gave on 26 October 1959 (subsequently published in the *Canadian Bar Review*).[24]

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[20] Driedger (1974), p. 131.
[21] Driedger (1974), p. 123.
[22] *Prince Augustus*, [1957] AC 436 at 465 (HL).
[23] *Hallet & Carey*, [1952] AC 427 (PC).
[24] Elmer A. Driedger, "Subordinate Legislation" (1960 March) *Canadian Bar Review*, 38(1):1. Notably, however, a comparison of Driedger's approach in 1959 and 1974 seems to illustrate a disdain for the *Chemical Reference* ([1943] SCR 1) which *Hallet & Carey* affirmed. In 1959, Driedger constituently cites the two cases in tandem, yet in 1974 such tandem citations cease. This is atypical for Driedger's *Construction of Statutes* as he is wont to provide multiple authorities; for example, nearly every citation to *re Alberta Statutes* is paired with a citation of *Salmon v Duncombe* when they are used to illustrate a similar principle. This disdain for the *Chemicals Reference* may reflect a growth in Driedger's emphasis on civil liberties by 1974 as the *Chemicals Reference* generally employs the same reasoning and decision as *Hallet & Carey*, but without the rhetorical emphasis on private rights.

The case[25] is notable because it is an authority for two principles that are often at odds. The decision is often cited for its clear expression that a court of law may intervene if "powers entrusted for one purpose are deliberately used with the design of achieving another, itself unauthorized or actually forbidden" [26] and that in such interventions the court should favour "the rights of the subject:"

> *There is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a "strict" construction. Most statutes can be shown to achieve such an encroachment in some form or another, and the general principle means no more than that, where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed.*[27]

However, the central thrust of the overall reasoning is a repudiation of conservative courts frustrating purposely bold acts by legislatures and, as such, "there is no rule of construction that general words are incapable of interfering with private rights."[28]

Driedger invokes *Hallet & Carey* as authority for both these principles, however – much like Lord Radcliffe in *Hallet & Carey* – Driedger's main use of the decision is as authority for weakening the oft-proclaimed presumption against alterations in the law. While general words in any particular enactment may be given a narrow construction in order to limit its effect on private rights, the same principle should not be applied "where the language is clear" to general words aimed at expressing the purpose of a Statute,[29] particularly those in the preamble or introductory operative clause(s).[30]

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[25] At issue in *Hallet & Carey* was the power of the government to expropriate property under the *National Emergency Transitional Powers Act* (in contrast to the powers of expropriation it had under the *War Measures Act*).
[26] *Hallet & Carey* at ¶12.
[27] *Hallet & Carey* at ¶18.
[28] *Hallet & Carey* at ¶18.
[29] Driedger (1974), pp. 139, 308.
[30] Driedger (1974), p. 290.

Salmon v Duncombe, Ottawa v Hunter, and Alberta Statutes

Next to *Prince Augustus*, Driedger's most favoured authority is *Salmon v Duncombe,*[31] a Privy Council decision from 1886.[32] *Salmon v Duncombe* is employed by Driedger as authority for judges to outright "ignore words" in order "to achieve harmony with the declared objects of the statute" when "a literal reading of the section would reduce to a nullity the main object of the statute as stated in the preamble and the title."[33]

Driedger also extended the principle that, if the main approach of statutory construction should be to give force to "the main object of [a] statute" and thus it is acceptable to "ignore words" in order to achieve those declared objects, then it was equally acceptable to add words in order to achieve an appropriate construction. Driedger had little direct authority for this extended principle and noted that there was considerable authority against this principle.[34] However, he argued that such contrary authorities were not consistent as

> *do not the courts add or delete words or fill in gaps when they reduce the scope or ambit of words ("import" in* Canada Sugar Refining v the Queen[35]*) or enlarge them ("obligation" in* In re City of Calgary Charter[36]*) or ignore them (*Salmon v Duncombe[37]*) or take the subject -matter of one section out of another (*Re Assessment Equalization Act[38]*)? The answer*

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[31] (1886), 11 App Cas 627 (HL).
[32] Notably, references to the decision are usually cited in tandem with the Supreme Court of Canada's decision in *re Alberta Statutes*, [1938] SCR 100; as it typically expressed the same principle; as well being frequently shortly precede or follow by references to *Ottawa v Hunter,*(1900), 31 SCR 7, which expressed a corollary of the main principle in *Salmon v Duncombe*. This liaison accounts for most the frequent references to *re Alberta Statutes* and *Ottawa v Hunter* in *Construction of Statutes*.
[33] Driedger (1974), p. 51.
[34] Driedger (1974), pp. 76-77.
[35] *Canada Sugar*, [1898] AC 735 (PC).
[36] [1933] 3 WWR 385 (ABCA).
[37] (1886), 11 App Cas 627; *re Alberta Statutes* [1938] SCR 100, at p. 126. *In re Sally Tavens, Ex parte Moriss Tavens* (1942), 24 CBR 44 (ONSC).
[38] (1963), 44 WWR 604 (BCSC).

> *must be that they do, but in so doing they are construing the statute, not amending it.*[39]

Driedger presented the case as a prime example of the sort of construction that was necessary to avoid an "objective absurdity"[40] – in brief, a "disharmony" or "inconsistency" within a statute or with statutes *in pari materia* – that could only be resolved by altering the language of an enactment. For Driedger, authority for such alterations was widely accepted and that the appropriate construction was one that was consistent with the "the main object of [a] statute" rather than the "literal" reading of a particular enactment.

Salmon v Duncombe is particularly notable because it figures as a prominent authority in Driedger's analysis of the *Canadian Bill of Rights* in *Construction of Statutes*.[41] Here, he notes that in rendering an enactment inoperative due to a conflict with the *Canadian Bill of Rights*,

> *The result is not a breach of the injunction to 'construe,' for they have then construed the offending enactment as meaning nothing in relation to the facts before them, just as they have 'construed' a statute that has 'yielded' to another, or have construed superfluous words or words that must be deleted to make sense of an enactment as in Salmon v Duncombe. To 'construe' the words of a statute means not merely to find their grammatical meaning, but to ascertain their legal effect.*[42]

Nokes

Whereas most of Driedger's frequently cited authorities are done so with approval, Driedger often cites *Nokes*[43] with disapproval. On the surface, the method of statutory interpretation in *Nokes* is similar to that employed in *Salmon v Duncombe*, with

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[39] Driedger (1974), p. 79.
[40] Driedger (1974), p. 51.
[41] Driedger (1974), pp. 194-197.
[42] Driedger (1974), p. 196.
[43] *Nokes v Doncaster Amalgamated Collieries Ltd*, [1940] AC 1014 (HL).

the court refusing to give full effect to an enactment because the court deemed that "there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles."[44] However, in this case, the reason the court chose not to give full (or 'literal') effect to words in an enactment was not derived from an intention of parliament declared in the general language of the statute, but a general "presumption of legislative intent" imputed to all statutes regardless of their language.

In this case, the presumption was "that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares" when faced with a "departure from observing the ordinary rights of property.[45] Driedger argued that such a "test was clearly subjective; of the two possible constructions, [the majority] chose the one that was to [them] the most reasonable." Thus Driedger criticised the majority for employing "a legal maxim to impute an intention to the legislature that was in accord with [their] values" converting the "initial subjective test to [a seemingly] objective one."[46]

Despite his criticisms of the reasoning in *Nokes*, Driedger recognized the considerable difficulty the judges faced in the case and noted that the case "illustrates what may well be the most common problem in the construction of statutes, namely, determining the scope or ambit of words and phrases." He noted that, although there were dissenting judges in the case who instead approached the 'absurdity' "in relation to

[44] Driedger (1974), p. 18, quoting *Nokes* per Viscount Simon at p. 1022.
[45] Driedger (1974), p. 18.
[46] Driedger (1974), p. 19.

the object of the Act and thus the apparent ambiguity disappeared,"[47] a subjective test of reasonableness (what Driedger terms a "subjective absurdity") might on occasions be necessary and legitimate:

> *A solution had to be found in a subjective test of reasonableness, on the theory that Parliament's concept of reasonableness coincides with that of the judges, and an intention to be reasonable is then imputed to Parliament. This subjective solution must be only a last resort; it is legitimate only if the scope of the language of the statute is not delineated by the context."*[48]

CHALLENGING PRESUMPTIONS

Driedger argued that the traditional approach to statutory interpretation relied heavily on "the application of precedents" as well as the application of "legal maxims" or "canons of interpretation."[49] For Driedger, this approach had the effect of emphasizing a conservative contemporaneous exposition in judges application of precedents and permitting judges to frequently impute "an intention to the legislature that was in accord with [their] values" in their application of legal maxims.[50] In contrast, Driedger's *Construction of Statutes*, like his "New Approach to Statutory Interpretation," presents a model of statutory interpretation that emphasized "logical argument,"[51] which encouraged both a bias in favour of civil liberties as well as bias towards expansive (and purposive) constructions of parliamentary statutes. Driedger challenges a number of the traditional presumptions of statutory interpretations; though, consistent with his "ecumenical" approach, he avoids outright rejection of those traditional presumptions. Instead, he often seeks to limit the applicability of such traditional presumptions.

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[47] Driedger (1974), p. 19.
[48] Driedger (1974), p. 20.
[49] Driedger (1974), p. viii.
[50] Driedger (1974), p. 19.
[51] Driedger (1974), p. 67.

Substantial Alteration of the Law

The presumption that Driedger was most critical of, and partially explains why *Nokes* is so frequently cited, was "that the Legislature does not intend to make any substantial alteration of the law." [52] In *Nokes*, not only did the majority invoke a "legal maxim" to make a "subjective" test appear "objective," but they invoked one that could persistently serve to circumscribe parliamentary sovereignty. That is, the ability of parliament to make radical general change to the law without being frustrated by conservative judges. Driedger described this legal maxim as "perhaps the least satisfactory of the presumptions."[53] For him, even in the most ideal situation – where judges limited invocation of the presumption to situations "where two reasonable constructions are open and one of these would result in a fundamental change in the law"[54] – what is considered a greater "magnitude" of change would always be "a matter of personal judgement,"[55] not open to any sort of objective analysis and thus other methods of deciding between "two reason constructions" would always be preferable.

Parliamentary Material

On the issue of parliamentary materials, Driedger repeats the rule that "debates or materials before Parliament are not admissible to show Parliamentary intent," [56] but spends the section contesting, not justifying or substantiating, that view. Driedger argues

[52] Driedger (1974), p.158.
[53] Driedger (1974), p.159.
[54] Driedger (1974), p.159.
[55] Driedger (1974), p.160.
[56] Driedger (1983), p. 156.

that, at a minimum, there is authority to support those parliamentary materials may be used "to show 'mischief.'" Continuing,[57] he writes:

> *If a Royal Commission Report is, in the language of Lord Wright in the Assam case*[58] *"even more removed from value as evidence of intention" than is the "language of a Minister of the Crown in proposing" legislation, but is nevertheless admissible to show "the evil or defect," then, logically, a Minister's speech should "even more" be admissible to show "the evil or mischief."*

The section is significantly expanded in his second edition, as the Supreme Court of Canada began to dispense with that longstanding rule in the intervening years; tentatively in the 1976 *Anti-Inflation Reference*[59] and then in a torrent in 1981 in cases such as *R v Vasil*,[60] *Canada v Kelso*,[61] *Alberta v Putnam*,[62] and *R v Paul*.[63] Today, resort to such materials is routine and in certain types of cases, *de rigueur*.

Language Context

Driedger recognized[64] the authority of the classic precedent, *Sharpe v Wakefield*, requiring that "words must be given the meaning they had at the time of enactment,"[65] but gave the principle little emphasis. In his *Construction of Statutes*, the principle is introduced as part of the argument that "a statute must be considered in the light of all circumstances existing at the time of its enactment."[66] It being only expressed in a short paragraph buried in a section on "The Language Context" which discussed in which

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[57] Driedger (1974), p. 130.
[58] *Assam Ry & Trading Co Ltd v IRC* [1935] AC 445 (HL).
[59] *re Inflation*, [1976] 2 SCR 373.
[60] [1981] 1 SCR 469.
[61] [1981] 1 SCR 199.
[62] *Attorney General of Alberta v Putnam*, [1981] 2 SCR 267.
[63] [1982] 1 SCR 621.
[64] Driedger (1974), p. 135.
[65] (1889), 22 QBD 239 at p. 242 (CA).
[66] Driedger (1974), pp. 134-135

situations a technical or particular (secondary) meaning can be preferred to the meaning of a general application. That is to say, while recognizing the authority that underpinned the original meaning rule and the doctrine of contemporaneous exposition, Driedger did not favour attempting to precisely define and fix a meaning at the time of enactment as it typically resulted in a narrow definition. Such narrow meanings only being appropriate when a technical meaning to the word is clearly intended by the scope of the statute.

IMPLIED REPEAL: "THIS IS A CASE OF PARAMOUNTCY"

The central issue of controversy in regards to the *Canadian Bill of Rights* between an adherent of self-embracing sovereignty, such as Driedger, and continuing sovereignty, such as Pigeon, is the question of implied repeal. Pigeon argued in 1959, and largely maintained the view, that the *Canadian Bill of Rights* could not be effective because no parliament could limit itself or its successors and thus "it would not even be necessary to go through the motion of first passing an Act amending the Bill of Rights and then passing the Act derogating therefrom." Pigeon and other advocates of continuing parliamentary sovereignty cite Dicey for scholarly authority and theoretical justification and cite *Vauxhall*[67] and *Ellen Street*[68] for precedent in support of their view.

Driedger, however, sharply disagreed. Following the reasoning of scholars like Ivor Jennings and R.T.E. Lantham, Driedger believed that the rules governing statutory interpretation were neither unchanging nor immutable from alteration by parliament. Instead parliament, and the rules governing how its intentions were to be interpreted, were subject to the law; a law alterable by parliament itself. Driedger's views on the

[67] *Vauxhall Estates, Ltd. v Liverpool Corporation* [1932] 1 KB 733.
[68] *Ellen Street Estates v Minister of Health* [1934] 1 KB 590.

matter were most exhaustively elaborated in his chapters on "The Operation of Statutes" and "Declarations of Intent" in his texts *Construction of Statutes*,

Driedger's analysis of implied repeal in *Construction of Statutes* begins by noting examples of rules governing how parliament's intentions were to be interpreted are routinely altered by parliament in the *Interpretation Act*, giving the examples of the day when a statute comes into force and the effect of a repealing statute on other statutes and the common law. For such alterations, Driedger notes that there are a plethora of precedents upholding those rules (his favourite being *Ottawa v Hunter*[69]) and none contesting them.

Driedger then moves on to directly address the precedent of *Ellen Street*, quoting its claim against implied repeal:

> *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.* [70]

However, Driedger argues for the limited scope of this precedent, noting Canadian precedents where the court explicitly prevented implied repeal[71] and that "an intention not to repeal by implication may also be implied."[72] Thus, Driedger notes that, whatever uncertainties *may* exist in England on the matter of implied repeal, Canadian courts have upheld limitations on implied repeal.

From this, Driedger questions "whether what is called a 'repeal' by implication has the same effect as an express repeal by the legislature" and concludes

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[69] *Ottawa (City) v Hunter*, (1900), 31 SCR 7.
[70] *Ellen Street Estates Ltd v Minister of Health* [1932] 1 KB 590 per Maugham LJ at 597.
[71] *R v Stanely*, [1925] 1 WWR 33.
[72] Driedger (1974), p. 179; citing *Old Kildonan Municipality v City of Winnipeg* [1943] 2 WWR 268 (MNSC).

> *Having regard to the state of the authorities, it is submitted that the more reasonable or logical position to that is that what is called an implied repeal is not the same thing as an express repeal by Parliament. It may be, as Hannen J. says,*[73] *merely a figure of speech. The purpose of implied repeal is to resolve a conflict between two statutes. There are different kinds of conflicts between two statutes. There are different kinds of conflicts between enactments, so of which cannot be resolved by saying there has been an implied repeal either in whole or in part; and if it cannot be said in one kind of conflict, why need it be said in another kind? [...] Thus, if two enactments are reconciled by reading one as a qualification of the other, the latter has merely been compressed like a balloon, and when the obstruction is removed, it springs back to its original shape. [...] The situation is similar under the Canadian Bill of Rights where conflicting laws are regarded as inoperative rather than repealed.*[74]

For Driedger, the precedent of *Ellen Street Estates* does not apply to conflicts between the *Canadian Bill of Rights* and other federal statutes, as the issue is never one of the *Canadian Bill of Rights* preventing the implied repeal of a "subsequent statute dealing with the same subject-matter," but instead preventing "implied repeal" by statutes dealing with different subject matter. He addressed this issue again in his section on the *Canadian Bill of Rights* noting that

> *Although the Bill of Rights has been regarded as a "repealing" statute, it is submitted that the effect of the Bill of Rights on statutes is not in the nature of a repeal. The word "repeal" is not appropriate to describe a situation where one statute overrides another; this is a case of paramountcy.*[75]

As such, for Driedger, the relationship between the *Canadian Bill of Rights* and other federal statutes is the same as when "a federal enactment render[s] an existing valid provincial enactment totally inoperative; that is an application of the doctrine of

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[73] *Mirfin v Attwood* (1869), 4 QB 333 at 340.
[74] Driedger (1974), pp.182-183.
[75] Driedger (1974), p.195.

paramountcy."[76] Notably, in the 1983 revision of *Construction of Statutes*[77] Driedger approvingly cites *Heerspink* in support of his analysis of "implied repeal."

SULLIVAN ON DRIEDGER

Ruth Sullivan contrasts her editions of *Construction of Statutes* with those of Driedger. She argues that her editions are targeted towards "the practising bar" and, as such, they offer "a more or less complete summary of the rules, presumptions, and conventions relied on by courts in resolving issues of statutory interpretation" based upon "a systematic survey of relevant Canadian case law at the appellate level"[78] and rely "almost exclusively on the case law of the Supreme Court of Canada and its evolving conventions of analysis."[79] She contrasts this with Driedger's editions which were targeted "primarily at students" and sought "to explain and justify his thesis about the right way to read a statute"[80] through a historical analysis that "looked to the case law of the Court of Appeal of the United Kingdom and the House of Lords as authority."[81] Sullivan characterized this analysis as one which explored "the historical evolution of the ordinary meaning rule, the rule in *Heydon's Case*, and the golden rule" in order to support the thesis "that in modern practice these three historical approaches were integrated into a single modern principle, which amounts to a words-in-total-context approach."[82]

Sullivan's approach in her editions of *Construction of Statutes* has been one of providing a comprehensive summary and analysis of Canadian statutory construction

[76] Driedger (1974), p.185.
[77] Driedger (1983), p. 226.
[78] Sullivan (2008), p. xii.
[79] Sullivan (2008), p. vii.
[80] Sullivan (2008), p. xii.
[81] Sullivan (2008), p. vii.
[82] Sullivan (2008), p. ix.

while presenting her preferred approach to statutory construction not as the evident evolution of statutory construction, but as a more reasonable approach. Driedger, in contrast, portrays his approach as one that explores the evolution of "the processes by which the judges arrived at their conclusions" in order to illustrate "how [modern] courts go about solving" problems.[83]

Thus, while Sullivan's anger at the Supreme Court of Canada's rejection of her approach to statutory interpretation is transparently displayed, it is largely confined to her express discussion of the matter in the Forward and introductory chapter and leaves the remaining analysis and description largely objective. In contrast, while Driedger's *Construction of Statutes* is pedagogical, it is hardly a 'textbook.' Although Driedger portrays it as a comprehensive analysis of how statutory interpretation operates, it is in effect an extended essay challenging traditional approaches and advocating for his own "words-in-total-context approach."

Driedger's reliance on "the Court of Appeal of the United Kingdom and the House of Lord as authority" is not (or, at least, not simply) a reflection of anglophillic preference for British case law, but is the result of the general absence of Canadian precedents supporting his thesis. For example, Driedger argues that "there is now less propensity on the part of judges" to engage in the reasoning in *Adamson* where "readers of statutes begin with a subjective judgement" and then "will either invent a meaning [...] or will invent an intention of Parliament."[84] Instead, arguing that this reasoning has been repudiated by "*The Mostyn* [which] makes it clear that an objective scrutiny of the words

[83] Driedger (1974), pp. vii-viii.
[84] Driedger (1974), p. 26.

of a statute in their context must be made before a particular construction is adopted." [85] However, in the period between the Second World War and the publication of Driedger's *Construction of Statutes*, the *Canadian Case Citations*[86] notes three cases[87] that followed *Adamson* and the reasoning of Lord Blackburn in *Adamson* is cited by the Supreme Court of Canada in a further three cases,[88] and, at least a handful of other lower court rulings are recorded in *Quicklaw*. In contrast in the same period, similar citations to *The Mostyn* are absent from *Canadian Case Citations*, and I could only find one lower court reference to it in *Quicklaw* – which does not even cite the reasoning Driedger uses to support his thesis (instead it cites the case as authority on the question of the binding effect of House of Lord's judgements). [89] Similarly, while *Prince Augustus* is recorded in *Canadian Case Citations* as being followed eight times since 1981, it was never followed in Canada prior to 1981. *Salmon v Duncombe* is slightly better, being following once in that era.[90] A further example is in his challenging of the authorities on the exclusion of parliamentary material for which he has no authorities in the 1974 edition, [91] but provides three *Canadian* authorities in the 1983 edition[92] as they had all appeared in the intervening years. When Canadian authorities exist, he cites them (e.g. *Ottawa v Hunter* and *re*

[85] Driedger (1974), p. 26.
[86] As of June 2010.
[87] *Prince Edward Island (A-G) v Harper* (1946), 90 CCC 114 (PEI SC); *Hooker v Gumpruch* (1954), 111 CCC 217 (ON Mag Ct); *Manor & Co v "Sir John Crosbie"* (The), [1967] 1 Ex CR 94;
[88] *Canada (Wheat Board) v Hallett and Carey Ltd*, [1951] SCR 81; *Canadian Pacific Railway Co v Winnipeg (City)*, [1952] 1 SCR 424; *Premium Iron Ore Ltd v Canada (MNR)*, [1966] SCR 685.
[89] *re International Petroleum Co Ltd*, [1962] OR 705 (ON CA).
[90] *Smith v MacDonald* [1951] OR 167 (ON CA)
[91] Driedger (1974), pp. 130-131.
[92] Driedger (1983), pp.156-158.

Alberta Statutes), but generally they do not and Driedger is often forced to cherry pick authorities to support his thesis.

DRIEDGER'S LEGACY

Despite the availability of competing and contemporary Canadian works on statutory interpretation in the form of Sullivan's *Construction of Statutes*[93] (1994, 2003, 2008) and Côtés's *Interpretation des lois*[94] (1982, 1990, 1999, 2009) – which are favoured by law schools – the Supreme Court of Canada, consistently since the late 1990s, has enthusiastically embraced Driedger's "Modern Principle" of statutory interpretation[95] from his *Construction of Statutes*[96] (1974, 1983).[97] Although explicit reference by the Supreme Court of Canada to Driedger's writings on statutory

[93] Ruth Sullivan, *Sullivan on the Construction of Statutes*, Fifth Edition (Toronto: LexisNexis Canada, 2008).

[94] Pierre-André Côté, *Interprétation des lois* (Montréal: Éditions Thémis, 2009)

[95] See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at p. 41; *R v Gladue*, [1999] 1 SCR 688, at ¶25; *R v Araujo*, [2000] 2 SCR 992, 2000 SCC 65, at ¶26; *R v Sharpe*, [2001] 1 SCR 45, 2001 SCC 2, at ¶33, per McLachlin C.J.; *Chieu v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 84, 2002 SCC 3, at ¶27; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 at ¶26; *Epiciers Unis Metro-Richelieu Inc, division "Econogros" v Collin*, [2004] 3 SCR 257 at ¶ 20. With some irony given his treatment of the *Canadian Bill of Rights*, Driedger's Modern Principle was first adopted by Brian Dickson in *Houde v Quebec Catholic School Commission*, [1978] 1 SCR 937. However prior to *Rizzo*, Driedger's modern principle was most typical embraced by Estey J, e.g. *Stubart Investments Ltd. v The Queen*, [1984] 1 SCR 536, at p. 578; *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114; *Québec (Communauté urbaine) v Corp. Notre-Dame de Bon-Secours*, [1994] 3 SCR 3 at p. 17.

[96] E. A. Driedger, *Construction of Statutes* 2nd edition (Toronto: Butterworths, 1983).

[97] As of April 2011, since the publication of Sullivan's second edition in 2003, there have been 50 references to Driedger, 41 references to Sullivan, and 9 references to Côté by the Supreme Court of Canada.

construction only began in 1977,[98] Driedger was long recognized by the Supreme Court and the larger legal community as the pre-eminent Canadian authority on statutory interpretation. Prior to tentative steps in the 1970s, the Supreme Court rarely cited authorities other than precedents and some very established legal reference sources such as legal dictionaries, so the absence of citations to Driedger is unsurprising. By 1954, Driedger's authority on legislative drafting and statutory interpretation was signalled by the Supreme Court Library's decision to collect Driedger's existing principle essays and bound them together in a single volume entitled *Legislative Drafting and Interpretation*[99] for easy reference by the Supreme Court Justices. Thus, there is particularly irony in the Supreme Court of Canada's general refusal to embrace Driedger's interpretation of the *Canadian Bill of Rights* both prior to the *Charter* and more recently in *Authorson.*[100]

DRIEDGER ON THE *CANADIAN BILL OF RIGHTS* CASE LAW

Despite Driedger's immense stature and influence in the field of statutory interpretation generally, his writings on the *Canadian Bill of Rights*[101] seemingly had

[98] *Houde*, [1978] 1 SCR 937. In this case, reference to Driedger was not in regards to his "modern principle," but instead as an authority on the effect of a schedule or appendix to a statute.
[99] Supreme Court of Canada Library control number 0000011911
[100] *Authorson v Canada (Attorney General)*, SCC 39, [2003] 2 SCR 40.
[101] Driedger published three essays exclusively discussing the *Canadian Bill of Rights*; in 1968, 1974, and 1977. See Elmer A. Driedger, "The Canadian Bill of Rights" in O.E. Lang (ed) *Contemporary Problems of Public Law in Canada: Essays in Honour of Dean F. C. Cronkite* (Toronto: University of Toronto Press, 1968), pp. 31-48 [Driedger (1964)] (This essay was originally written as early as 1964 (MG31 E39 v.09.02), but was only published subsequent to his retirement as Deputy Minister. All quotations are taken from the 1964 draft, but for ease of reference citations are made to their equivalent in the 1968 published version; resultantly, there may be discrepancies between quotations and how they appear in the cited version). Elmer A. Driedger, "The Canadian Bill of Rights and the *Lavell Case*: A Possible Solution." (1973-1974) *Ottawa Law Review* 6:620-621. Elmer A. Driedger, "The Meaning and Effect of the Canadian Bill of Rights: A

much less scholarly impact.[102] While Deputy Minister as well as in academia, Driedger held fast to the constitutional vision that had come into focus while drafting the *Canadian Bill of Rights* and became more confident in those views despite the frequent challenges to them.

THE DEPUTY MINISTER AND THE *CANADIAN BILL OF RIGHTS*

In the 1960s very little litigation based upon the *Canadian Bill of Rights* was initiated and even fewer cases made their way to the Supreme Court of Canada. While in 1961 there were twenty reported cases in Canada that invoked the *Canadian Bill of Rights*, this modest number had declined to an average of nine cases per year for the period from 1965 to 1969. This contrasts with the average of sixty cases per year for the – post-*Drybones* – period from 1970 to 1981; over one hundred twenty cases for the period from 1982 to 1990 when the *Charter* provisions were evaluated against the *Canadian Bill of Rights* precedents; and under forty two per year since.[103]

Excluding *Robertson* and *Drybones*, which are discussed separately below, the few cases that made their way to the Supreme Court of Canada in the 1960s concerning

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Draftsman's Viewpoint." (1977) *Ottawa Law Review* 9:303-320. N.B. Driedger also dedicates a section of his *The Construction of Statutes* (1974, 1983) to the *Canadian Bill of Rights*.

[102] A search through ISI's *Web of Knowledge* (on 4 October 2010). produces only a dozen citations for Driedger, excluding citations to *Composition of Legislation* and the two editions of *Construction of Statutes* (however such searchs are not necessarily exhaustive, particularly for the pre-1980s era). These citations are from Samuel LaSelva, "Only in Canada," (1983) *Dalhousie Review* 63(3): 383-398; J.L. Hiebert, "New Constitutional Ideas," (2004) *Texas Law Review* 82(7):1963; G.V. Laforest, "The Canadian Charter of Rights and freedoms: An Overview" (1983) *The Canadian Bar Review* 61(1):19; A. Jodouin, "The Canadian Charter of Rights and Freedoms and the Moral Element of Interpretation," (1983) *The Canadian Bar Review* 61(1): 211. Further these citations largely focused on Driedger's comments on retrospectivity rather than the application of the *Canadian Bill of Rights* generally.

[103] *QuickLaw*; 2010-11-29.

the *Canadian Bill of Rights* consisted of three sorts of challenges. First, there were cases that challenged deportations on the basis of the right to liberty in section 1. Second, there were cases that challenged discretionary power on the basis of the right to a fair hearing in section 2(e). Third, there were challenges to administrative investigations on the basis of section 2(e). These cases are notable because they occurred while E.A. Driedger served as Deputy Minister of Justice. However, excepting the administrative investigation cases, the Department of Justice files and the judgements indicate that the Deputy Minister had no direct involvement in the appeals (often not even the Department of Justice itself).

Sun *and* Rebrin

The earliest invocations of the *Canadian Bill of Rights* were attempts to challenge deportation orders of immigrants who were deemed by a "Special Inquiry Officer" to have violated their "six-month non-immigrant visa" in *Sun*[104] and *Rebrin*.[105] In both cases, the Supreme Court of Canada – on full panels of all nine Justices – unanimously rejected the appeals that the deportations were in violation of the appellant's right to liberty because the deportations occurred according to law, which included investigations by the Special Inquiry Officer, and thus "there was no infringement as the appellant has not been deprived of her liberty except by due process of law."[106] Thus, so long as there was a consistent process that provided some degree of impartial review of deportation orders, the Court was content to accept that as proper "due process." It appears that this reasoning pervaded the legal system through the 1960s and 1970s. The Court's reasoning

[104] *Sun v Canada (Attorney-General),* [1961] SCR 70.
[105] *Rebrin v Bird*, [1961] SCR 376.
[106] *Rebrin*, per Kerwin CJ at 381.

in both cases was extremely brief and there was only one occasion[107] in which either case is noted[108] as being followed or even considered prior to *Singh*[109] in 1984. This indicates that there was little inclination to challenge such minimal review processes under the rubric of the right to due process or even a fair hearing (in contrast with rulings in the 1980s and Fulton's assertions to the contrary[110]).

McCaud

One of the more important *Canadian Bill of Rights* cases in the 1960s that limited the scope of the fair hearing provision in the *Canadian Bill of Rights* was *McCaud*,[111] which challenged the discretionary ability of a Parole Board to revoke parole without allowing for the appearance of the parolee as well as the private clause in the *Parole Act* which prevented appeal of such revocations. The case did not involve the federal Department of Justice. The matter was handled by a very junior Crown Prosecutor in the Office of the Attorney General of Ontario and is notable in that the Supreme Court of Canada served as the court of first instance because of an alleged conflict of interest on the part of the Chief Justice of Ontario (which was dismissed by the Supreme Court as "quite fallacious"). In the case, the Court ruled that, as the sentence of a convict continues in force while on parole, "the question of whether that sentence must be served in a penal institution or may be served while released from the institution and subject to the conditions of parole is altogether a decision within the discretion of the Parole Board

[107] *Turpin v Canada (Minister of Manpower & Immigration*) (1968), 3 CRNS 330 (Ex Crt).
[108] *Canadian Case Citations.*
[109] *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177.
[110] *Special Committee* 24-3 (1960), 3:187 (19 July 1960).
[111] *In re McCaud*, [1965] 1 CCC 168 (SCC).

as an administrative matter and is not in any way a judicial determination"[112] and that the private clause cannot be challenged. In effect, the court distinguished between "rights" and "privileges" and found and determined that "privileges," not being "rights," were not subject to the "fair hearing" provisions of the *Canadian Bill of Rights*. The case was influential and was followed eleven times over the following decade until it was reaffirmed by the Supreme Court in *Howarth,*[113] which was then followed twenty-eight times in the subsequent decade.[114]

Guay v Lafleur

Guay v Lafleur[115] was a case in which Driedger took special interest, appearing before the Supreme Court of Canada as supervising counsel ("*avoué*") on the case. The matter in controversy was whether an investigation initiated by the Minister of National Revenue under the *Inquiries Act*[116] violated the right to a fair hearing of individuals under investigation if they were not formally informed of the inquiry and not granted the right to be present and to be represented by counsel during the examination of all persons summoned by the investigator. The court determined the investigation was "a purely administrative matter which can neither decide nor adjudicate upon anything, that it is not a judicial or quasi-judicial enquiry but a private investigation"[117] and therefore there were no rights guaranteed by the *Canadian Bill of Rights* as the relevant provision only guaranteed the right to a fair hearing in a matter which involved "the determination of his

[112] *McCaud* per Spence J at 169.
[113] *Howarth v Canada (National Parole Board)*, [1976] 1 SCR 453.
[114] *Canadian Case Citations.*
[115] *Guay v Lafleur*, [1965] SCR 12.
[116] RSC 1952, c 154.
[117] *Guay v Lafleur*, per Abbott J at 16

rights and obligations."[118] Here, the Department of Justice intervened in order to safeguard the freedom of action of the bureaucracy (the investigation was ordered by the Deputy Minister of National Revenue, not by the Minister).

Violi

In *Violi*,[119] in contrast to *McCaud*, the Supreme Court allowed an appeal from the discretionary powers of a minister. In this case, the Minister of Citizenship and Immigration exercised his discretionary powers under the *Immigration Act* to defer by one year the deportation order for a convicted criminal pending a review of his deportation. Three years later, the individual was arrested for deportation and then notified that the case had been reviewed and determined that he was to be deported. While the dissenting justices ruled that the decision to defer deportation was wholly discretionary and could be revoked at any time, the majority ruled that, with the passage of the original period of deferment without any review of order, the Minister's discretionary power to revoke the deferment had lapsed:

> *Having exercised his power of review, under s. 31(4), his decision is, by the terms of that subsection, final. [...] The Minister did not, thereafter, have power to make a further review and to decide to extend the probationary period for an additional time.*[120]

The subsequent deportation was a violation of the *Immigration Act* and, resultantly, no reference being made to the *Canadian Bill of Rights*. For the majority, the Minister's discretion was limited by the *Immigration Act*, regardless of the enactment of

[118] *Guay v Lafleur*, per Cartwright J at 19.
[119] *Violi v Canada (Minister of Citizenship and Immigration)*, [1965] SCR 232.
[120] *Violi*, per Martland J at 242.

the *Canadian Bill of Rights*, although reliance on it was invoked in lower court proceedings.

Randolph

R v Randolph[121] illustrates the courts reticent to even consider the effects of the *Canadian Bill of Rights.* At issue in the case was the validity of interim orders by the Postmaster General to suspend postal delivery during the course of an investigation under the *Post Office Act* and it immunization of the Crown from liabilities for such orders. Like the investigation in *Guay v Lafleur,* these orders were made without the respondents having been previously heard and without having had any opportunity to object or present a defence.

At the Exchequer Court, counsel for the suppliants invokes two attacks on the orders. First, they invoked the interpretive principle of *audi alteram partem* ("an opportunity to be heard") arguing the

> *the Post Office Act must be so read as to make it a condition precedent to the validity of an interim prohibitory order thereunder against any person that such person has first been given an opportunity to be heard and to correct or contradict any relevant statement prejudicial to him.*[122]

Failing the applicability of that maxim, counsel further argued that the *Canadian Bill of Rights* affects the *Post Office Act* such that it does "not authorize the orders in the manner in which they were made and they are therefore nullities."[123] The case was presided over by Justice J.R. Jackett (the former Deputy Minister of Justice), who recognized that, unlike in *Guay v Lafleur,* the investigation was of a judicial nature and thus the defence

[121] [1966] Ex.C.R. 157 (Ex Crt); affirmed [1966] SCR 260.
[122] *Randolph,* at ¶12.
[123] *Randolph,* at ¶12.

that it was merely administrative was not applicable and nullified the interim orders and allowed the suppliants to apply for damages. However, Jackett limited his analysis only "to the first ground of attack" and ignored the second as he was "relieved of the necessity of considering the several very difficult questions that arise in dealing with the other grounds of attack."[124]

As a result, when the issue was appealed to the Supreme Court, neither the appellant nor the respondant addressed the effect of the *Canadian Bill of Rights* in their factums [125] and the effect of the *Canadian Bill of Rights* did not feature in the ruling of the Supreme Court. The Supreme Court reversed the decision of the Exchequer Court, emphasizing the brief *interim* nature of the orders (in this instance, six days) followed by "an expeditious hearing" which relieved them of examining "the exact nature of the authority which the Postmaster General was exercising."[126] As a result the court was also relieved of examining the effects of the *Canadian Bill of Rights* on an investigation by the Post Office, as the investigation into the final order by the Postmaster was not controverted.

Conclusion

The Supreme Court of Canada's discomfort with the role enjoined to it by the *Canadian Bill of Rights* in the 1960s is illustrated by the judges' considerable attempts to avoid examination of its rights guarantees and to avoid any significant discussion of those rights when obligated to address them. While the "implied bill of rights" withered and

[124] *Randolph* at ¶33.
[125] SCC Registrar case file [Docket #] 10360
[126] *Randolph*, per Cartwright J at 265.

died at the Supreme Court of Canada in the 1960s,[127] the courts atypically favoured rights-friendly common law presumptions in order to avoid applying the *Canadian Bill of Rights*. In *Randolph* at the Exchequer court, one of the 'fathers' of *the Canadian Bill of Rights* invoked a common law interpretative maxim to avoid analyzing similar provisions in the *Canadian Bill of Rights*, equally relieving the Supreme Court from having to address that issue as well.

Similar rights-friendly common law presumptions were applied to the construction of the *Immigration Act* in *Violi,* which provided more robust protections than offered by the Court under the *Canadian Bill of Rights* only seven months earlier (with four of the six judges in *McCaud* taking a contrary view in *Violi*). In general, it appears that during Driedger's tenure as Deputy Minister, the Department of Justice – under both Conservative and Liberal Ministers – rarely took any interest in intervening to push the courts towards robust definitions of the rights guaranteed under the *Canadian Bill of Rights* and was content with the overall general approach by the Courts to the

[127] There were three notable "implied bill of rights" cases in the 1960s in which provincial rights violations were challenged on the basis of the division of powers: *Oil, Chemical and Atomic Workers, International Union, Local 16-601 v Imperial Oil Limited*, [1963] SCR 584; *McKay et al. v R.*, [1965] SCR 798; and *Walter et al. v Attorney General of Alberta et al.*, [1969] SCR 383.. Only in *McKay* (with a 5-4 split) did the court limit a provincial statute, with the provincial legislation being upheld in the other two cases. The decision in *OCAWIU* was a closely split decision (4-3) delivered in the period between the retirement of Kerwin and Locke (both who had consistently supported the implied bill of rights since *Boucher*) and the appointment of rights-friendly Hall and Abbott. In *OCAWIU,* the court effectively repudiated *Switzman* with the minority following it and the majority distinguishing from it in allowing provincial labour relations to limit the freedom of expression of unions; the majority view carried despite Cartwright's rediscovery of his civil liberties inclinations from the 1940s which persisted until his last year on the bench in 1969. In *McKay,* Cartwright briefly swung the court back towards the logic of *Switzman* and *re Alberta Statutes* (although, strangely, without Hall) in limiting the applicability of a municipal bylaw to federal campaigning. However, the implied bill of rights wholly died in *Walter*, where the court unanimously upheld a provincial statute which violated freedom of religion.

interpretation of the *Canadian Bill of Rights*. Application of the *Canadian Bill of Rights* was limited by applying 'black-letter' meanings to the provisions and by not invoking the *Canadian Bill of Rights* even when the Supreme Court of Canada sought to uphold civil liberties.

DRIEDGER'S DEFENCE OF A CONSTITUTION

While the Department of Justice largely adopted a hands-off approach to the *Canadian Bill of Rights* during the period when Driedger was Deputy Minister, there was one notable exception: *Robertson*,[128] a challenge to the *Lord's Day Act*[129] based on the *Canadian Bill of Rights*. The arrival of *Robertson* before the Supreme Court of Canada occurred in tumultuous times for both the Diefenbaker government and the Supreme Court and has the appearance of involving a certain degree of intrigue. Formally, the Department intervened to defend the *Lord's Day Act,* but it proffered only a very weak defence, one that refused to comprise the constitutional integrity of the *Canadian Bill of Rights*, despite entreaties to do so.[130]

Robertson (1964)

In the end, the majority opinion of the court in *Robertson* opted for a narrow definition of the guarantee of "freedom of religion" in the *Canadian Bill of Rights* to avoid finding any conflict with that instrument and, resultantly, avoided addressing its constitutional functioning. The practical result was that on the question of a conflict between the *Canadian Bill of Rights* and another federal enactment, the Supreme Court of

[128] *Robertson and Rosetanni v The Queen*, [1963] SCR 651.
[129] RSC 1952, c. 171; Originally enacted SC 1906, c 27.
[130] See Appendix F, "*Robertson*" for a more expansive analysis of the context and decision of this case.

Canada – at best – failed to give any direction to lower courts and – at worst – implied that no prevailing effect should be given to the *Canadian Bill of Rights*.

Though the outcome ostensibly accorded with that sought by the Department of Justice, Driedger was livid about the majority's reasoning in their decision. While Driedger did relatively little to champion his vision of the *Canadian Bill of Rights* during his tenure as Deputy Minister, upon his exit he made his vision known and seemingly contributed to the Supreme Court's landmark decision in *Drybones*.

Driedger Responds

Consequently, Driedger drafted a blistering critique[131] of the majority decision and argued that Cartwright's dissent[132] accorded with the proper construction of the *Canadian Bill of Rights*. However, Driedger refrained from immediately publishing his essay because of the considerable impropriety of the Deputy Attorney General of Canada openly and harshly critiquing the reasoning of Supreme Court Justices. Publication of the essay[133] had to wait until his retirement from the Department of Justice in 1967, which blunted the influence of his critique. The essay provides a solid exploration of how Driedger viewed the constitutional status and the *proper operation* of the *Canadian Bill of Rights*, but one which only clarified and systematized the views previously expressed

[131] Driedger, E. A. "The Canadian Bill of Rights," MG31 E39 v.09.02. 1964.
[132] *Robertson* at 658.
[133] Elmer A. Driedger, "The Canadian Bill of Rights" in O.E. Lang (ed) *Contemporary Problems of Public Law in Canada: Essays in Honour of Dean F. C. Cronkite* (Toronto: University of Toronto Press, 1968), pp. 31-48. [Driedger (1964)] This essay was originally written as early as 1964 (MG31 E39 v.09.02), but was only published subsequent to his retirement as Deputy Minister. All quotations are taken from the 1964 draft, but for ease of reference citations are made to their equivalent in the 1968 published version; resultantly, there may be discrepancies between quotations and how they appear in the cited version.

while drafting the *Canadian Bill of Rights* and thus is highly reflective of his views at its original enactment.

Introduction

As with so much of Driedger's writings, the essay gives little hint as to much of the source of its insight. Not only does the essay include no footnotes,[134] but at no time does Driedger mention any involvement in drafting the instrument. Instead Driedger writes the essay from the perspective of a third-party observer and speaks of what "parliament intended." The moment he most implies his involvement is his criticism that the non-discrimination clause was "moved upstairs" from section 1(b) in the "original bill" to the head of section 1 "by an amendment in the House;" as "grammatically, the original version was better"[135] (a point that is not mentioned by other commentators on the *Canadian Bill of Rights*). The essay attempts to explain the Act in a matter that directly addresses the main criticisms of the bill and thus contains an exploration of bills of rights generally, Canada's constitutional order, and a section-by-section analysis of the *Canadian Bill of Rights*. Notably, Driedger chooses to employ the same language used by critics of the *Bill* who portray it as no more than a canon of construction, but Driedger associates radically different meanings to those same terms (e.g. "declaratory" and "interpretation").

[134] N.B. The published version does contain footnotes, but limited only to legislation and cases: the *Canadian Bill of Rights* (Bill C-79, 3rd sess., 24 parl. 27 June 1960; S.C. 1960, c. 44), the *War Measures Act* (RSC 1952, c. 288), the *Statute of Westminster* (1931, c.4 (UK)), *R v Robertson* ((1964) 41 DLR (2d) 485), and *R v Gonzales* ((1962) 32 DLR (2d) 290).
[135] Driedger (1964), p. 36.

Bills of Rights

Driedger's analysis commences with a general discussion of bills of rights. He is keen to emphasize that the *Canadian Bill of Rights* –like the English and American bills of rights – does not extend (and should not) to being an "economic charter" that "will provide jobs, wealth, and [social] security for everybody" nor is it "an instrument designed to protect individuals from each other" (i.e. a human rights code). Instead, "the fundamental purpose of a Bill of Rights, as [Alexander] Hamilton correctly stated it, is to protect the individual against the power of the state." [136]

Driedger also distinguishes the English, American, and Canadian bills for rights. English bills of rights such as the *magna charta* and the 1688 *Bill of Rights* were "stipulations between kings and their subjects, abridgements of prerogative in favour of privilege, reservations of rights not surrendered to the prince."[137] That is, protection of the individual against the executive, but which "offer[s] no protection of the individual against the legislative power of the state."[138] The American bill of rights, in contrast, "does not fit Hamilton's definition" and instead "curbs legislative power."[139] The Canadian bill of rights, however, seeks to limit both executive and legislative power.

"Although differing in theory and somewhat in substance, these two [English and American] Bills of Rights are essentially of the same character, they are both limitations on the sovereign power."[140] Yet, Driedger argues, a Canadian bill of rights that seeks to limit both executive and legislative power cannot resort to similar limitations on

[136] Driedger (1964), p. 32.
[137] Driedger (1964), p. 31, quoting Alexander Hamilton in *Federalist no. 84* (although with no citation).
[138] Driedger (1964), p. 31.
[139] Driedger (1964), p. 31-32.
[140] Driedger (1964), p. 31.

sovereign power as "there are no overriding limitations on Parliament's powers" in Canada and "one parliament cannot bind future parliaments."[141] Such limitations are simply not possible in Canada's contemporaneous constitutional order and such a solution would require "a completely new constitution for Canada and the provinces containing the desired limitations on the powers of Parliament and the provincial legislatures, but the writing of a new constitution is not something that can be done overnight."[142]

"Binding"

Thus, absent a wholly new constitutional order, Driedger explained how a bill of rights must be drafted to provide judicial rights guarantees against executive and legislative encroachment. He invokes the language of those who criticize the bill of rights as no more than a canon on construction, plainly stating that it is "well established that Parliament cannot limit itself, and that one Parliament cannot bind future Parliaments" and that the *Canadian Bill of Rights* is no more than "in part a declaration and in part a rule of interpretation."[143] Yet, for Driedger, "declarations" and "rules of interpretation" can have much more effective and transformative effects than is assumed by others.

"declaring"

Although "the statute, in effect, declares that these [guaranteed rights] are not new rights or freedoms, [...] a statement that rights and freedoms have existed and do exist

[141] Driedger (1964), p. 33.
[142] Driedger (1964), pp. 33-34.
[143] Driedger (1964), pp. 33-34.

does not deny that infringements or violations have take place or do exist."[144] Thus, just as the *Colonial Laws Validity Act* "declared" – despite previous judicial findings to the contrary – that (1) colonial legislatures always had the power to modified the law of England, that (2) changes to the law in England did automatically apply to the colonies, and that (3) courts were to enforce such laws; the *Canadian Bill of Rights* declared – despite previous infringements upheld by the courts – certain rights were to be guaranteed by the courts against "abrogation, abridgment or infringement" of any "law of Canada."

"rule of interpretation"

While "Parliament cannot limit itself," it can provide by a – 'mere' – "rule of interpretation" the same effect. The "rule of construction" that "an Act of Parliament of Canada shall be construed and applied so as not to abrogate, abridge, or infringe the fundamental rights and freedoms" can "be overcome only by an express declaration that a statute is to operate notwithstanding the Canadian Bill of Rights."[145] That is, "it must be remembered that section 2 applies [...] to rules of the common law" and also that "the effect of this provision, therefore, would appear to be to abrogate the two rules of inconsistency, namely, that a particular statute overrides a general statute and that a later statute overrides an earlier one."[146]

Thus, Driedger agrees with the critics of the *Canadian Bill of Rights* that a "mere" statute cannot "bind" parliament. He is actually more adamant on this point than many of the critics of the *Canadian Bill of Rights* in that he even rejects the ability of Westminster

[144] Driedger (1964), pp. 34 and 36.
[145] Driedger (1964), p. 34.
[146] Driedger (1964), pp. 37-38.

to "bind" parliament by enacting a mere amendment to the *British North America Act*. Absent an entire reshaping of the Canadian constitutional order, parliament cannot be bound. Yet it can "abrogate" the rules of construction in a way that has a similar practical effect. While Westminster could not formally bind itself in the *Statute of Westminster*, it could practically limit itself through an abrogation of the existing rules of construction. In parallel, the Canadian parliament could practically limit itself through an abrogation of the existing rules of construction in the *Canadian Bill of Rights*.

Section 1

In the section-by-section analysis, Driedger challenges the specific legal contentions that have weakened the effect of the *Canadian Bill of Rights*. First, he challenges the claim that section 1 "put the stamp of approval of all existing laws and must therefore be taken to have recognized and declared that no law in force at the time the Bill of rights became law is in conflict with the Bill of Rights" as expressed in *Gonzales*.[147] While he notes that if section 1 was drafted partially to have a non-operative effect that "explained to the world at large that these were not new" rights and therefore – if viewed in isolation – serves as no more than a canon of construction. However Driedger notes that the declared rights in section 1 are incorporated by direct reference ("the rights or freedoms herein recognized and declared") into the operative section two and that this was done to reduce "the complexity of Section 2."[148] A similar procedure was adopted in regards to subsection 5(2), which during the drafting process appeared in section 2, but its six lines were replaced with the three words "law of

[147] Driedger (1964), p. 36.
[148] Driedger (1964), p. 36.

Canada." As we have noted, Driedger would condemn those who construe enactments without regards to the rest of the statute they form part of in his *Construction of Statutes*. While statutes had been divided into sections since 1850 to make it easier for the courts to understand the intention of parliament clearer, such division of the *Canadian Bill of Rights* into sections was seemingly making the intention of parliament less clear to the courts.

Driedger stressed that the limited construction of section 1 expressed in *Gonzales*[149] was "unsound" and that "the point has not yet been settled by the Supreme Court of Canada." Quite the opposite, Driedger emphasized that in the only Supreme Court opinion that "held that there was a conflict" between the *Canadian Bill of Rights* and another enactment – Cartwright's dissent in *Robertson* – "that the courts were obliged to refuse to apply the *Lord's Day Act*" and "that Mr. Justice Cartwright's view is the correct one."[150]

Section 2

In his analysis of section 2, Driedger's main point was to address the claim that the bill was ineffective because parliament cannot bind itself and the contention, such as presented by the Lord's Day Alliance, that "the word 'applied' does not extend the scope of the section beyond the word 'construed,' but refers to the application of the law as it should be constructed"[151] and that the Bill did not affect pre-existing statutes.

First, he plainly repeated that "granted that Parliament cannot bind itself and cannot bind future Parliaments," yet, he continued, "it may nevertheless lay down the

[149] *R v Gonzales*, (1962), 32 DLR (2d) 290 (BC CA).
[150] Driedger (1964), p. 36.
[151] SCC/09741, Factum of the Lord's Day Alliance, p.5.

rules that are to govern the interpretation and application of its own statutes."[152] In this case: "parliament has not said that its own powers are any the less, nor that a future Parliament must not enact a conflicting law. Parliament has said only that certain intentions shall not be imputed to it unless a special form of words is used."[153]

Second, Driedger challenged the contention that "apply" should not be read disjunctively or that it requires the application of an enactment that infringes on rights guaranteed by the *Canadian Bill of Rights*. Thus, while courts endeavour to construe enactments so that they remain effective while conforming to the rights guaranteed in the *Bill*, if they conclude that a "statute is so plain they have no choice but to construe it for what it says." As a result "in the face of the Bill of Rights, the courts may refuse to construe the statute" and therefore "although the statute cannot be construed in any other way, they might not 'apply' it to the particular case."[154]

Third, Driedger mocks the argument that "s. 1 of the Bill of Rights has confirmed" that pre-existing statutes that violated the rights guaranteed in Bill of Rights "is regarded by Parliament as being contrary to the Bill of Rights." Driedger states that such an interpretation "is contrary to the express terms of the Bill of Rights. Section 5 makes it quite clear that the Bill of Rights is to apply to laws then in force, and there is nothing in it to suggest that it should not have full effect according to its terms." Instead:

> *Parliament has expressly said that all laws in force at the time the Bill of Rights was enacted shall be construed and applied so as not to abrogate, abridge, or infringe any of the rights or freedoms therein recognized and declared. If this cannot be done, except by cutting down, even to the zero point, the ordinary meaning of a provision, then, it is submitted, the courts must so cut the meaning down. It can hardly be supposed that Parliament*

[152] Driedger (1964), p. 36.
[153] Driedger (1964), p. 37.
[154] Driedger (1964), p. 38.

> *intended merely that where there is a choice the one more favourable to the subject shall be chosen, because the courts could and probably would do that anyway apart from the Bill of Rights, and there would then be little if any purpose in expressly making it apply to existing laws.*[155]

Driedger builds from this to clearly outline that the Bill of Rights, in the face of contrary statutes enacted both before and subsequently, is to have an effect equivalent to paramountcy:

> *Assuming that the courts have found that certain provisions of pre-existing laws are inconsistent with the Bill of Rights, have they been repealed, or what is the position? Clearly they would henceforth be inoperative, at least with respect to the particular facts before the court, but it is submitted that they could not be regarded as repealed in the same sense as if Parliament had repealed them. [...] The situation appears to be similar to a case where valid provincial legislation ceases to be operative by reason of subsequent conflicting federal legislation. [...] A statute enacted after the Bill of Rights must have an express overriding declaration in it; a statute enacted before the Bill of Rights could not have included such a declaration. Is this not an indication that the Bill of Rights was intended to override previously existing legislation according to its terms?*[156]

Criticisms

Driedger also confronted the two criticisms that were often invoked to portray the *Canadian Bill of Rights* in general terms as no more than a canon of construction: its failure to be enacted as part of the British North America Act and its lack of specific penalties for violations. On the first issue, Driedger briefly repeated his arguments that are well examined elsewhere in this dissertation that barring "a new constitution for Canada,"

> *any subsequent enactment by the British Parliament, even if it extends to Canada, falls into section 2(2) of the Statute of Westminster, 1931. The result is that, even if such an amendment to the B.N.A. Act were made, Parliament could repeal it and could enact statutes inconsistent with it.*[157]

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[155] Driedger (1964), pp. 40-41.
[156] Driedger (1964), p. 41.
[157] Driedger (1964), p. 46.

On the matter of penalties for violations of the Bill of Rights, Driedger notes that such penalties would only be appropriate for fair practice legislation (i.e. human rights codes) as "a Bill of Rights is aimed against the power of the state, and can be violated only by the state or a state agency." As such, the same remedies available in other such violations by the State or a State agency are available under the Bill of Rights: "if it is done by the legislative power of the state" then "regulations could be declared *ultra vires*," and "legislation may be inoperative;" if it by the executive then "the Crown is also liable for the torts of its servants or agents."[158]

Driedger concludes with the clear statement that contrary to the claims that it is only a canon of construction, "the fundamental purpose of [the *Canadian*] *Bill of Rights* is to *prevent* undesirable legislation" and "short of a constitutional enactment of the American variety, it would seem that Parliament has done all it can to give fundamental rights and freedoms formal legal expression and to protect and safeguard them."[159]

The contrasting interpretations of the *Canadian Bill of Rights* as only a canon of construction by its critics and Driedger's robust defence of it as an instrument that can "*prevent* undesirable legislation" can be largely attributed to their respective approaches to parliamentary sovereignty. For an adherent of continuing (Diceyan) parliamentary sovereignty holding that parliament cannot "bind" itself, section 2 can provide no more than "rule of interpretation," and that – signaled by its failure to be included as an amendment to the *British North America Act* and its lack of penalties – section one was only a non-operative "declaration" of rights which could only be used to apply a loose cannon of construction. However, for an adherent of self-embracing sovereignty, despite

[158] Driedger (1964), p. 47.
[159] Driedger (1964), p. 48.

parliament being unable to "bind" itself, a "declaratory" statute which provided for "rules of interpretation" could have the practical effect of limiting itself because such "rules of interpretation" can radically alter how statutes are interpreted.

Adherents of continuing sovereignty view "implied repealed" as a type of repeal and therefore a form of enactment (albeit a negative one) and as parliament is supreme and cannot derogate from ("bind") the powers of a subsequent Parliament, an enactment cannot be precluded from repeal or even dictate its form. However, for Driedger, "implied repeal" was frequently not a form of repeal, but simply a "figure of speech" for briefly describing the effect of the construction of conflicting enactments. That is, it was not that one enactment repealed the other, but that for a given set of facts one enactment may displace another enactment having the same appearance as (implied) repeal, but without necessarily displacing it for a different set of facts. To wit, Parliament can declare what are the rules of constructing conflicting statutes. For Driedger, the proposition that "sovereign" parliament could not expressly declare the rules of constructing conflicting enactments, yet it could implicitly limit itself by entitling an Act "British North America" was maddening.

***Drybones* (1969)**

Six years after *Robertson* and a year after the publication of his essay on the *Canadian Bill of Rights*, Driedger received a degree of vindication with the Supreme Court of Canada's decision in *Drybones*[160] where the Court rendered a section of the *Indian Act* inoperative, overruling the British Columbia Court of Appeal's decision in *Gonzales* and repudiating Davey J's contention that that *Canadian Bill of Rights* was no

[160] *R v Drybones*, [1970] SCR 282.

more than a canon on construction. Davey's reasoning in *Gonzales* had more of the effect of dissuading *Canadian Bill of Rights* litigation, rather than having the persuasive effect of its reasoning on other courts. While courts bound by the decisions of the British Columbia Court of Appeal did apply *Gonzales*, it was never once followed outside of British Columbia and the Yukon and was even rejected within six months by a Saskatchewan judge.[161]

In *Drybones* – a case which emerged from the Northwest Territories – the Supreme Court of Canada was confronted with the same issue that confronted the British Columbia Court of Appeal in *Gonzales* – that is, an alleged conflict between section 94(*b*) of the *Indian Act* and the *Canadian Bill of Rights* – but came to the contrary conclusion to that of the British Columbia Court of Appeal. The Supreme Court of Canada's decision emerges as somewhat of a mirror image to *Robertson*, with Ritchie again authoring the majority opinion – but this time in favour of finding a conflict – and Cartwright again authoring a dissenting opinion – but this time repudiating his reasoning in *Robertson* (Fauteaux again concurred with Ritchie while Abbott concurred in the dissent).

Evidently, the majority opinion was written with Driedger's critique of *Robertson* in mind, as Justice Ritchie appears to lift an unattributed passage, almost verbatim, from Driedger's article:

> *The situation appears to be similar to a case where valid provincial legislation ceases to be operative by reason of subsequent conflicting federal legislation.*[162]

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[161] *Richards v Cote*, (1962), 39 C.R. 204 per McFadden D.C.J. The Supreme Court of Canada Library received its copy *Criminal Reports* vol. 39, in which *Richards v Cote* is reported, on 8 July 1963, long after the hearing in *Robertson*.
[162] Driedger (1964), p. 41.

Ritchie simply replaces Driedger's employment of the word "similar" with the phrase "somewhat analogous," adding the (superfluous) phrase "in an otherwise unoccupied field," and drops the word "subsequent" before the word "conflicting"[163] (see Table 2: Ritchie in *Drybones* and Driedger in "Canadian Bill of Rights;" compared). While Driedger's *Canadian Bill of Rights* writings have largely been ignored by academics, his first intervention likely contributed to the brief fillip enjoyed by the *Canadian Bill of Rights* in *Drybones*.

Table 2: Ritchie in *Drybones* and Driedger in "Canadian Bill of Rights;" compared

***R v. Drybones,* [1970] SCR 282 per Ritchie CJ at pp. 294-295**	**Driedger in "The Canadian Bill of Rights" (1964, published 1968)**
The situation appears ***to me***	*The situation appears*
to be ***somewhat analogous***	*to be* ~~*similar*~~
to a case where valid provincial legislation	*to a case where valid provincial legislation*
in an otherwise unoccupied field	
ceases to be operative by reason of	*ceases to be operative by reason of* ~~*subsequent*~~
conflicting federal legislation.	*conflicting federal legislation.*

DRIEDGER'S LAMENT FOR A CONSTITUTION

The Supreme Court's decision in *Drybones* proved to be a pyrrhic victory for the human rights activist community and the continued vitality of the *Canadian Bill of Rights*. While the Court's endorsement of the prevailing power of the *Canadian Bill of*

[163] Driedger's employment of the word "subsequent" in this context does not indicate that at this time he viewed the *Canadian Bill of Rights* as only applicable to statutes enacted following the *Canadian Bill of Rights*, but simply that he had previously dealt in the article with the issue of the effect of the *Canadian Bill of Rights* on "pre-existing law." Thus the deletion of the word "subsequent" was faithful to the meaning of Driedger's the original text in which the inclusion of the word "subsequent" would have been out of context for the quote if it were to stand alone.

Rights provoked a considerable torrent of *Canadian Bill of Rights* litigation, the Court would go on to give extremely narrow definitions to the guaranteed rights and invent an incredibly expansive derogation doctrine of a "valid federal objective."[164] Thus, while Driedger's constitutional vision, as it applied to the *Canadian Bill of Rights*, persisted in the Supreme Court through the 1970s, the *Canadian Bill of Rights* was nevertheless effectively stripped of its prevailing effect over statues through narrow definitions and new doctrines.

As a result, the *Canadian Bill of Rights* was once again oft-portrayed as no more than a 'declaratory' instrument of no effective value. Driedger, who became increasing frustrated with such criticisms of the purported weakness of the *Bill*, retorted

> *All Acts must now be construed consistently with the Bill of Rights unless there is an express declaration to the contrary. Parliament has, in effect, said to the Courts "If you find anything in any statute that could be construed as contrary to the Bill of Rights, that was not our intention, so don't construe it that way; and if* [...] *there is a provision patently and directly in conflict with the Bill of Rights, we goofed, we made a mistake, but you have the power to correct our error; just ignore our lapse.*[165]

In frustration with the narrowing jurisprudence and the characterization of the *Bill* as merely a statement of rights, Driedger would revisit his analysis of the *Canadian Bill of Rights* a decade later in a 1977 article in the *Ottawa Law Review*, "The Meaning and Effect of the Canadian Bill of Rights: A Draftsman's Viewpoint."[166]

The article contained nothing fundamentally new, but its emphasis changed and it included analysis of some recent case law. Notably, Driedger's exposition and declaration of the intended effects of the *Canadian Bill of Rights* had become much

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[164] *R v Burnshine*, [1975] 1 SCR 693 per Martland J at 707.
[165] Driedger Fonds, LAC MG31 E39, vol 17, file 19.
[166] E.A. Driedger, "The Meaning and Effect of the Canadian Bill of Rights: A Draftsman's Viewpoint," *Ottawa Law Review*, vol. 9 (1977), pp. 303-320.

clearer and less forgiving of alternate interpretations. This more strident approach emerges from the greater authority he clothes himself in this later article as, unlike the 1964 essay, Driedger made it clear in the 1977 article – even baldly in its title – that he was draftsman of the *Canadian Bill of Rights*.

Whereas the 1964 essay focused mainly on the language of the *Canadian Bill of Rights,* the 1977 article focused much more heavily on the issue of constitutional entrenchment and the *Statute of Westminster*. When the 1964 essay was drafted, while demands for constitutional entrenchment were present, it was not the main focus of criticism of the *Bill*'s weakness and Driedger had covered the issue in a 1962 article.[167] That changed with Pierre Trudeau's renewed call for an entrenched bill of rights in 1965 (adopted as official government policy, by Trudeau as Minister of Justice, in the January 1968 paper proposing a *Charter* entrenched into the *British North America Act*).[168] In response, [169] Driedger drafted an essay reiterating his views on constitutional entrenchment.*[170]* Much of this material was incorporated into the 1977 article.

> Driedger summarized "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*

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[167] E. A. Driedger, "Constitutional Amendment in Canada," (1962) *Canadian Bar Journal* 5:52-59.

[168] See Anne F. Bayefsky (ed), *Canada's Constitution Act 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989), vol. 1, pp. 51-61.

[169] See MG31 E39 vol.17.01. The draft of that article appears to have been completed in February 1968, indicating that it was written in response to Trudeau's January1968 paper

[170] Driedger, Elmer A. "The Statute of Westminster and Constitutional Amendments," (1968) *Canadian Bar Journal*, 11:348-356.

> *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."*

In his analysis, Driedger was unapologetic of his drafting of the *Canadian Bill of Rights* and after explaining and defending its terms and constitutional underpinnings, concluded

> *The Canadian Bill of Rights is built on a grand design [and..] 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.*[171]

Paramountcy

Driedger's analysis of the language of the *Canadian Bill of Rights* was no more comprehensive than that which appears in his 1964 essay, but he rejected the cautious terms previously employed. While content with the term "inoperative" being used to described the effect of the *Canadian Bill of Rights* on other enactments in 1964, he advocated for more powerful language in 1977. Driedger disliked that the Courts were failing to give particular weight to the *Canadian Bill of Rights* over other enactments epitomized by their use of the term "inoperative" and instead argued that

> *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*

[171] Driedger (1977), p. 316.

> *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 "paramount".*[172]

He was particular critical of how the doctrine of "implied repeal" had developed, particularly, in its application to the *Canadian Bill of Rights*:

> *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. [...] they are in fact* ***simply ignoring the general statute*** *and applying the special to the facts before them.*[173]

That is to say, while judges claim that a later or particular statute "repeals," since there is not actual explicit repeal or repeal by necessary intendment, judges are simply giving preference to one enactment over another. The tendency of the Supreme Court of Canada in the 1970s had been to accord such preference to statutes that conflicted with the *Canadian Bill of Rights*. In Driedger's view, that preference should have been given to the *Bill* and not to conflicting enactments.

While the contention that the *Canadian Bill of Rights* was only a canon of construction had been rejected by the Supreme Court of Canada in *Drybones* in 1969, such claims continued to abound in the 1970s including from Supreme Court Justice Louis-Philippe Pigeon. As such, Driedger also sought to directly refute that claim:

> *It has been said that the Bill of Rights is "merely a canon or rule of interpretation."*[174] *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*

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[172] Driedger (1977), pp. 309-310.
[173] Driedger (1977), p. 309.
[174] *R v Drybones*, [1970] SCR 282 per Abbot J at 299.

> *they may disregard other so-called rules of interpretation or canons of construction, then the answer is No.*

Self-Embracing Sovereignty

For Driedger, as examined in his *Construction of Statutes*, there are various rules of interpretation that courts may apply or refrain from applying in order to give the proper construction to a statute. Such rules emerged from the common law and their appropriate application is determined by judges according to the common law, but rules of interpretation declared by statute cannot be ignored or substituted for common law rules of interpretation. For example, the *Interpretation Act* directs that Acts are to come into force on the date of Royal Assent unless the Act, by express declaration, provides otherwise.[175] If a judge believes that two conflicting enactments can be better construed by having one come into force earlier than its date of royal assent, he cannot apply the common law rule that statutes come into force on the first day of the session in which it was enacted[176] and ignore the *Interpretation Act*, even if it were to produce a construction more congruent with the intent of Parliament. Similarly, the *Canadian Bill of Rights* proclaims that it is to prevail over all other laws, unless the law, by express declaration provides otherwise. Judges who chose to apply other rules of interpretation over the one enacted in the *Canadian Bill of Rights* are not upholding parliamentary sovereignty, but defying it. Whereas critics of the Bill of Rights continued to condemn is "declaratory" nature, Driedger saw its "declaratory" form as what should provide its strength:

> *The Bill of Rights is also a firm declaration of intent. [...] In the ordinary case of a possible conflict between two statutes, the question arises whether one statute overrides or is subject to the other, and the decision*

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[175] *Interpretation Act*, RSC 1985, c I-21, s 5(3).
[176] *Panter v Attorney General* (1772), 6 Bro Parl Cas 486 at 490, 2 ER 1217 at 1219-1220.

> *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.*

Driedger's commentary on the *Canadian Bill of Rights* as a "rule of interpretation" reflected part of his general espousing of the principles of self-embracing sovereignty in his characterization of the Canadian constitution and defence of the *Canadian Bill of Rights*. To those who sought entrenchment of a bill of rights in the *British North America Act*, Driedger replied that, given the precepts of self-embracing sovereignty which underpinned the *Canadian Bill of Rights*, entrenchment could be accomplished by parliament alone:

> *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.*[177]

He again presented the argument that even entrenchment in the *British North America Act* may, after the *Statute of Westminster*, no longer be possible; noting

> *there is doubt whether the British Parliament could do it [amend the British North America Act]. If, as is altogether probable, the Statute of Westminster is an abdication of jurisdiction, then the British Parliament cannot take it back.*[178]

British North America Act Amendment

For Driedger Canada's constitutional order was fundamentally premised on the principle of parliamentary sovereignty. Thus, while a parliament could alter the rules defining which statutes prevailed over other statutes and alter the enactment procedure to

[177] Driedger (1977), p. 315.
[178] Driedger (1977), pp. 314-315.

make amending certain statutes more difficult (i.e. manner and form restriction), the contention that a sovereign parliament could declare that statutes of a *future* parliament would be void (i.e. including a bill of rights in the *British North America Act*) was constitutional infeasible: "it makes no sense for a supreme legislature to say that its own statutes not yet enacted are repealed, void, invalid or inoperative." [179] Instead, "that is why our Bill of Rights must be founded on a rule of construction" [180] as

> *Power to contravene the Bill of Rights is withdrawn from prior statutes and withheld from future statutes. [...] 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.*[181]

For Driedger, such denial of sovereignty to parliament could not come about by a Westminster amendment to the *British North America Act* – as Westminster had already given up that power – but could only come through a new constitution based on a domestic amending formula:

> *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.*[182]

Driedger would repeat this point when the *Charter* was adopted and argue that "the *Canada Act, 1982* is founded on a fallacy and a misconception. The fallacy is the assumption that the British Parliament still had jurisdiction to enact as a constitutional law for Canada any law on any subject." As such, since the *Charter* was enacted by

[179] Driedger (1977), p. 317.
[180] Driedger (1977), p. 317.
[181] Driedger (1977), pp. 313-314.
[182] Driedger (1977), p. 315.

Westminster it would not be entrenched until enacted according to the rules of the newly adopted amending formula.[183]

"Statutes are always speaking"

One of the interpretations of the *Canadian Bill of Rights* that was most frustrating for Driedger was the manner in which the phrase "existed and shall continue to exist" was treated. The head of section 1 of the *Canadian Bill of Rights* reads:

> *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,*

This section has been sometimes interpreted by Canadian courts – and resultantly criticized in the literature on the *Canadian Bill of Rights* as defectively drafted – as (1) providing no more than a non-operative "declaration" (i.e. directory statement) of rights and (2) the *Canadian Bill of Rights* "protects only rights that existed in 1960, prior to passage of the *Bill of Rights*"[184] and "that the meaning to be given to the language employed in the Bills of Rights is the meaning which it bore in Canada at the time when the Bill was enacted"[185] (that is, fixing the meaning of the guaranteed rights as what they were understood in at the moment of enactment, i.e. 10 August 1960, and not how those rights are understood when the statute is read , i.e. at the moment of the litigated action). Such interpretations were maddening to Driedger as a subversion of the clear words of the statute.

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[183] Elmer A. Driedger, "The Canadian Charter of Rights and Freedoms," (1982) *Ottawa Law Review* 14:336-378 at 369 and 378.
[184] *Authorson* at ¶33.
[185] *Curr*, per Ritchie at 916.

In order to understand this, it is necessary to return to the drafting history of this section. Driedger's original preferred formulation for the head of section 1 would have been the following:

> *It is hereby recognized and declared that in Canada the following human rights and fundamental freedoms hereinafter in this section set forth shall prevail, that is to say,*

However, for Diefenbaker, the *Canadian Bill of Rights* was also aimed at fulfilling Canada's obligations under the United Nations Charter (extending to the *Universal Declaration of Human Rights*) and as part of the international contest with Soviet Communism. Diefenbaker insisted that the *Canadian Bill of Rights* express that its rights guarantees were not *new* in Canada, but had always existed – if not always faithfully observed in full:

> *it was not desirable to make it appear to the general public and to other countries (especially the new independent countries) that the rights and freedoms set out in the Bill of Rights never existed before and were now being established in Canada for the first time.*[186]

As such, the section was drafted by Driedger as follows:

> *It is hereby recognized and declared that the human rights and fundamental freedoms hereinafter in this section set forth have always prevailed and shall continue to prevail in Canada, that is to say,*[187]

In Driedger's scholarly writings, "prevail" was his preferred term to describe the enactment that is applied over another enactment rendered a nullity when two enactments conflict. Driedger cited its use, in *Stanely*,[188] to describe the relationship between two enactments in a case regarding implied repeal (reflecting his intended function of the

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[186] Driedger (1964), pp. 8-9 (35).
[187] Draft Bill of Rights 8 April 1958 (DOJ/182000-29).
[188] *R v Stanely* [1925] 1 WWR 33.

Canadian Bill of Rights). For Driedger the word meant "overcome"[189] and was equivalent to "paramount"[190] and was the term that should have been used by the Supreme Court of Canada to describe the operation of the *Canadian Bill of Rights* instead of using the term "inoperative" to describe a conflicting statute,[191] as it did in *Drybones*.

As we have noticed, the Cabinet was not fond of the word "prevail" because it felt that the verb was too definitive and as such it was dishonest and might be taken as an admission by the current government that the actions taken by the previous government did not infringe the rights enumerated in the draft bill.[192] Further, while Driedger was fond of the word, it lacked much authoritative specific legal meaning. The word "prevail" and its cognates was absent from legal dictionaries of the era such as *Black's* (1933), *Bouvier's* (1914), *Stroud's* (1952), Jowitt's *Dictionary of English Law* (1959), and Sanagan and Drynan's *The Encyclopaedia of Words and Phrase, Legal Maxims* (1940). Only in *Judicial and Statutory Definitions of Words and Phrases*[193] did the word "prevailing" appear,[194] describing "the word 'prevailing' [as] having no technical meaning and as used signifying that which is common, in operation, or prevalent." While the word had a clear meaning to Driedger, he could not justify its use by an appeal to contemporary leading authorities.

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[189] Driedger (1976), p. 138.
[190] Driedger (1977), p. 309.
[191] Driedger (1977), p. 309.
[192] Cabinet Minutes, 10 May 1958
[193] National Reporter System, *Judicial and Statutory Definitions of Words and Phrases*, Second Series (St. Paul: West, 1914).
[194] *Judicial Definitions*, III:1170.

Thus, Driedger sought to address Cabinet's concerns while having the enactment continue to express his original meaning. As such, he replaced "prevailing" with "existing" and proposed redrafting the head of the section as follows:

> *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*

In contrast to "prevailing," the word "existing" had a specific legal meaning that was defined identically in both *Bouvier's*[195] and *Black's*[196] as well as appearing in Driedger's own 1957 *The Composition of Legislation*. While not as powerful in its popular understanding as "prevail," Driedger was clearly cognizant of the specific legal meaning of "existing" and believed it would have at least the same effect as "prevailing."

Finally, section 1 was amended in committee such that the anti-discrimination language of one of the lettered paragraphs rights was moved to the head of the section, on the belief that it would emphasize the anti-discrimination effects of the bill. Notably, Driedger condemned this amendment as having "the grammatical effect[...] that these words [...] cannot be read into the lettered paragraphs of section 1 because the phrase now modifies the preceding verb 'exists.'"[197] However, in his 1977 commentary Driedger notes that despite this grammatical problem, the deficiency has been overcome by "the Supreme Court of Canada [...] at times evidently read[ing] these words as pervading the lettered paragraphs of section 1," with the court seemingly accepting "that these words serve no purpose in the opening paragraph – they can have no meaning unless they are

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[195] Francis Rawle, *Bouvier's Law Dictionary and Concise Encyclopedia*, Third Revision (Kansas: Vernon Law Book Company, 1914), vol. 1, p. 1155,

[196] Henry Campbell Black, *Black's Law Dictionary*, 3rd edition (St-Paul, MN: West, 1933), p. 722.

[197] Driedger (1977), p. 305.

read into the lettered paragraphs, and such must have been the intention of Parliament."[198]

The fact that section 1 was expressed as a declaration and separated from the operative section 2 led some to argue that section 1 was, in effect, an extension of the preamble simply expressing a sentiment and not actually guaranteeing any rights. While Driedger unabashedly admitted that section 1 "is only a declaration" – characterizing it as being "in the nature of a modern Magna Carta"[199] – the argument that it resultantly had no operative, i.e. limiting, effect on other statutes was one of those arguments which Driedger would describe as "a castle in the sky." Such an argument was the sort that he pilloried in his 1951 essay and as one of those that purposely sought to find ambiguity by reading an enactment without regards for the statute as a whole in which it appears. While section 1 was by itself "only a declaration," its operative effect was clear by reading the following section (whose operative effect was never doubted) that expressly incorporated section 1 with the phrase "any of the rights or freedoms *herein recognized and declared."*

While this first erroneous (in the eyes of Driedger) interpretation of section 1 found only limited support and was consistently rejected by a majority of the Supreme Court of Canada, the second – that the *Canadian Bill of Rights* only "protects rights that existed when the *Bill of Rights* was enacted, in 1960"[200] – has been much more prevalent. This interpretation, termed as the "Frozen Concepts" interpretation by Walter

[198] Driedger (1977), p. 305.
[199] Driedger (1977), p. 305.
[200] *Authorson*, ¶33.

Tarnopolsky,[201] was consistently adopted by the Supreme Court of Canada in the 1970s (for example, in *Curr (1972),*[202] *Burnshine (1975),*[203] and *Miller (1977)*[204] and was reaffirmed by the Supreme Court of Canada *in Authorson (2003),* [205] its latest *Canadian Bill of Rights* case.

Such an interpretation was first endorsed by the Supreme Court of Canada in *Curr* with Ritchie J (Fauteux C.J. and Judson J concurring), at 916, that

> *the meaning to be given to the language employed in the Bills of Rights is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that, in my opinion, the phrase "due process of law" as used in s. 1(a) is to be construed as meaning "according to the legal processes recognized by Parliament and the Courts in Canada".*

This interpretation was particularly galling to Driedger, given – as we have noticed – that he had opted for the phrase "due process of law" and defending it against criticism precisely because he believed that it would import the evolving meaning associated with the phrase from the United States.

Despite the clarity of Ritchie's statement, he did not provide any reasoning to justify this interpretation. This justification would later be supplied by Martland[206] in *Burnshine*[207] who reasoned that

> *Section 1 of the Bill declared that six defined human rights and freedoms "have existed" and that they should "continue to exist". All of them had*

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[201] W.S. Tarnopolsky, "The Canadian Bill of Rights and the Supreme Court of Decisions in Lavell and Burnshine: A Retreat from Drybones to Dicey?" (1975) *Ottawa Law Review* 7(1):1-33 at 12. See also W.S. Tarnopolsky, "The Canadian Bill of Rights From Diefenbaker to Drybones," (1971) *McGill Law Journal* 17(3):437-475 at 450.
[202] *Curr*, [1972] SCR 889.
[203] *Burnshine*, [1975] 1 SCR 693, at p. 705.
[204] *Miller*, [1977] 2 SCR 680, at pp. 703-4.
[205] *Authorson v Canada (Attorney General),* SCC 39, [2003] 2 SCR 40 at ¶10, ¶33, and ¶52.
[206] NB Martland had specifically refused to endorse or contest Ritchie's interpretation in *Curr* at 914.
[207] *Burnshine*, [1975] 1 SCR 693.

> *existed and were protected under the common law. The Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute, and, further, by s. 2, to protect them from infringement by any federal statute.*

That is to say, the contemporaneous exposition or "frozen concepts" interpretation of the *Canadian Bill of Rights* was justified by interpreting "have existed" as declaring the current scope of the guaranteed rights and interpreting "shall continue to exist" as permanently entrenching those rights to that scope.

While this interpretation has been repeatedly endorsed by the Supreme Court of Canada, it was originally grossly unorthodox and its continued endorsement by the Supreme Court of Canada is flatly contradictory with other precedents such as *Sparrow*.[208] Driedger was perturbed by such a development and seemingly could not conceive in 1960 that such an interpretation of that phrase was even possible as it baldly contradicted not only Driedger's unambiguous definition of "existing" but also the understood legal meaning of the word in statutes as well as the *Interpretation Act*.

The specific legal meaning of "existing" was well and consistently understood such that it was even defined identically in both *Bouvier's* [209] and *Black's*[210] as

> *The force of this word is not necessarily confined to the present. Thus a law for regulating "all existing railroad corporations" extends to such as are incorporated after as well as before its passage, unless exception is provided in their charters.*

Driedger's own 1957 *The Composition of Legislation* reflected the orthodox definition of this phrase, where he comments on "existing," that it

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[208] *R v Sparrow*, [1990] 1 SCR 1075.
[209] Francis Rawle, *Bouvier's Law Dictionary and Concise Encyclopedia*, Third Revision (Kansas: Vernon Law Book Company, 1914), vol. 1, p. 1155
[210] Henry Campbell Black, *Black's Law Dictionary*, 3rd edition (St. Paul, MN: West Publishing, 1933), p.722.

> *Should not be used as a reference to the time of the passing of the Act. Statutes are always speaking, and existing therefore means the time the statute is being read. It is senseless to apply an enactment to an existing company – it couldn't apply if the company did not exist.*[211]

The phrase also evoked section 10 of the *Interpretation Act*[212] (confirming a common law principle) that the law is "always speaking:"

> *The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof, according to its spirit, true intent, and meaning.*

This is also reflected in the language used in subsection 5(2) of the *Canadian Bill of Rights* which drew much of its language from subsection 2(2) of the *Statute of Westminster*, but replaces "existing or future Act" in the *Statute of Westminster* with "enacted before or after" in the *Canadian Bill of Rights*. Driedger, it appears, was not content with the inexact use of "existing" in the *Statute of Westminster* and substituted the more precise (or, at least in the context, less ambiguous) word "before."

The Supreme Court of Canada's determination that "have existed and shall continue to exist" directed a contemporaneous exposition interpretation of rights not only overturned the generally understood meaning of "existing," but expressly contradicted the *Interpretation Act* which required that for such an interpretation the adjective "now" would have to have been included before the word "existed" as it held that :

> *"now" or "next" shall be construed as having reference to the time when the Act was presented for Royal Assent.*

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[211] Driedger (1957), p. 83.

[212] RSC 1952, c. 158, s.10 [at the time of the enactment of the *Canadian Bill of Rights*]; RSC 1970, c. I-23, s. 10 [during the period of the leading *Canadian Bill of Rights* cases]; RSC 1985, c. I-21, s. 10 [during most of the *Charter* period].

Driedger made sure to note this in the 1976 revision of his 1957 *Composition of Legislation* and was never resolved to the Supreme Court of Canada's interpretation of that phrase in the bill of rights.

The Supreme Court of Canada's repeated and consistent interpretation in the 1970s of "have existed and shall continue to exist" as limiting rights to their contemporaneous exposition had convinced many that the Supreme Court of Canada would continue to consistently apply a contemporaneous exposition to the word "existing" when defining rights and influenced the drafting of the *Constitution Act, 1982*. During the negotiations which resulted in the *Charter* and the *Constitution Act, 1982* Saskatchewan strongly insisted on the inclusion of guarantees for aboriginal rights while British Columbia and Alberta strongly resisted such guarantees. A compromise was eventually brokered when Alberta Premier Peter Lougheed stated that he would only acquiesce to the proposed constitutional provision (now s. 36(1)) that aboriginal and treaty rights "are hereby recognized and affirmed" if the word "existing" was inserted before "rights" (i.e. "existing aboriginal and treaty rights"). Lougheed demanded this amendment as he believed that the court would apply its consistent interpretation of "existing" in the *Canadian Bill of Rights* to the *Constitution Act, 1982* and thus limiting aboriginal and treaty rights to their exposition at the time of the enactment of the *Constitution Act, 1982*.[213]

Never having reconciled to the Supreme Court of Canada's interpretation of "existing" in the *Canadian Bill of Rights*, Driedger warned that despite the intent to limit Aboriginal and treaty rights to a contemporaneous exposition in the *Constitution Act,*

[213] Romanow (2007), p. 214.

1982, "since the law is always speaking, 'existing' in a statute means existing when the statute is read. A new right, arising, say, five years hence, would at that time be an existing right within the meaning of the provision."[214] On this critique, Driedger would be vindicated by the Supreme Court in 1990, when, in *Sparrow*, the Supreme Court of Canada rejected the sort of reasoning it had used in *Burnshine*, and ruled that "existing" once again had its previous meaning, with Dickson CJ and LaForest writing that while "a number of courts have taken the position that "existing"' means being in actuality in 1982"[215] the phrase 'existing' "must be interpreted flexibly so as to permit their evolution over time" and "clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate 'frozen rights' must be rejected."[216] Curiously, a decade later in *Authorson,* while the Ontario courts adopted such reasoning, the Supreme Court elected not to, applying an interpretation to the *Canadian Bill of Rights* alone that it had rejected for all other rights instruments. Driedger would indeed be confused.

CONCLUSION

The *Canadian Bill of Rights* has been often portrayed as no more than a statement of principles deceptively proclaimed as an effective instrument. Yet, the *Canadian Bill of Rights* was drafted by the government's foremost expert on legislative drafting, whose reputation in that discipline has only increased since the enactment of the *Bill*. That draftsman, Elmer Driedger, never gave any hint – at the time of drafting or subsequently, either publicly or privately – that he viewed the *Canadian Bill of Rights* as anything less

[214] Driedger (1982), p. 370.
[215] *R v Burnshine*, [1975] 1 SCR 693 at ¶21
[216] *Burnshine*, ¶27

than a 'constitutional' instrument that would provide for judicial review of legislation on the basis of the *Bill's* rights guarantees.

Further, Driedger's drafting of the *Bill* forced him to carefully consider the nature of the constitution of Canada, where he solidly embraced the theory of self-embracing sovereignty. Thus, Driedger rejected the constitutional effectiveness of the most commonly proffered alternative to his statutory bill of rights – a bill of rights incorporated into the *British North America Act* by the Westminster parliament. Driedger became increasingly committed to this view in the years subsequent to the enactment of the *Canadian Bill of Rights*. Driedger not only rejected the purported greater effectiveness of a bill of rights incorporated into the *British North America Act* by Westminster), but also rejected the continuing power of Westminster to enact such an instrument.

It is clear from Driedger's legal advice in the Department of Justice and his later academic writings, that not only did he draft the *Canadian Bill of Rights* with the clearly expressed (to his political masters) intention for it to be a legally effective human rights instrument, but that he viewed the most effective type of instrument available (prior to the adoption of a domestic amending formula for the *British North America Act*). Whatever the political considerations were in adopting the *Canadian Bill of Rights* as a statute of the Canadian parliament, there is no indication the leading legal advice from the Department of Justice that a statutory bill of rights was the most effective instrument available for guaranteeing civil liberties was anything but sincere. ♦

Conclusion

> *It seems hardly possible that those who make this attack [that the Bill of Rights should be included in the BNA Act] could be so ignorant as to suppose that the Canadian constitution is found only in the British North America Act. ...* ***This bill of rights****, although a statute of the parliament of Canada and not an amendment to the British North America Act,* ***will be of equal force and effect as part of the constitution of Canada.***[1]
>
> - Edmund Davie Fulton, Minister of Justice, 22 July 1960

> *A court cannot, in my respectful opinion, avoid bearing in mind an evident fact of Canadian judicial history, which must be squarely and frankly faced: that on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of* ***The Canadian Bill of Rights*** *because* ***it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament****.*[2]
>
> - Puisne Justice Gerald Le Dain, in *R. v. Therens* (1985)

The current literature related to the *Canadian Bill of Rights* has failed to consider the full context in which the *Bill* emerged. This dissertation has had a strong emphasis on contemporaneous jurisprudence and legal theory, at times only briefly addressing the broader social and political context in which the *Canadian Bill of Rights* emerged. This approach is tailored to address a key piece of context that is essential to make sense of the development of human rights in Canada in the immediate post-War era.

The existing literature has largely embraced a proleptic approach to constitutionalism, effectively presuming that conceptions of constitutionalism are both static and non-pluralist. The existing literature concludes that the Diefenbaker government could only be dishonest in its claims that the *Canadian Bill of Rights* would

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[1] E. D. Fulton (Minister of Justice), 7 July 1960. Canada, *House of Commons Debates*, 24th Parliament, 3rd session (1960), vol. VI, p. 5886. [Emphasis mine.]
[2] *R v Therens*, [1985] 1 SCR 613, per Le Dain J at ¶48. [Emphasis mine.]

provide for judicial review and limits on implied repeal. The result of such presumptions has been a narrowing of the scope of inquiry and a distortion of the development of the early human rights movement in Canada. We can only begin to fully understand the development of human rights in Canada if we are open to understanding alternative conceptualizations, particularly in relation to rights and constitutionalism.[3]

DRIEDGER'S CONSTITUTION

This dissertation challenges a typical presumption of the current scholarly view and its principal corollary. That is, the existing literature holds that the *Canadian Bill of Rights* was not effective because it was merely an 'ordinary' statute and as such would not prevail over conflicting legislation. The corollary of this presumption is that the *Bill* was mostly pedagogical and never intended to limit the powers of parliament or even grant power to the courts to strike down contravening legislation.

In contrast, this dissertation argues that while Diefenbaker was committed to the *principle* of a bill of rights, he proved not to be particularly concerned with its form or specific content. Diefenbaker had a Weberian approach to the Department of Justice and accepted the advice it provided so long as the central political proposal was implemented. Thus, the principal author of the *Canadian Bill of Rights* was not Diefenbaker but the Assistant Deputy Minister of Justice, Elmer Driedger. Driedger's superiors (Jackett,

[3] The existing literature, including this dissertation, still leaves essential questions about the development of the early human rights movement unanswered. Notably, the spread of anti-discriminatory "fair practices" legislation in the 1950s and their transformation into human rights codes with the attendant enhanced enforcement machinery (e.g. human rights commission) in the 1960s; as well as the full historical (as oppose to simply jurisprudential) foundations of the "implied bill of rights." It is hoped that the revelations of this dissertation will help provoke future scholarship in this area to be more cognizant of the pluralist, as opposed to binary, nature of the intellectual contest over rights and their enforcement instruments and machinery.

Fulton, and Diefenbaker) accepted his drafting of the *Canadian Bill of Rights* with little alteration and accepted his constitutional justifications for its form and likely effect.

In understanding the origins of Driedger's constitutional thinking (and thus the *Canadian Bill of Rights*), it is important to recognize that the *Canadian Bill of Rights* was formulated in the twilight of a particular era of constitutional innovation. The legal independence of the Dominions, as expressed in the *Statute of Westminster*, had undermined the orthodox 'Diceyan' understanding of constitutionalism in Canada.[4] In the wake of these challenges, a plurality of alternative conceptions of constitutionalism emerged.

The events and intellectual innovations that provoked the challenge to traditional constitutionalism – represented by constitutional supremacy – also provoked other sorts of challenges to traditional constitutionalism. The sharp focus on jurisprudence and the constitutional thought of Driedger in this dissertation is designed to break from the prevailing presumptions about the nature of constitutionalism. According to the existing literature, the constitutional thinking of the era is a largely settled fact that requires no exploration or even an admission that the matter may be more contested than currently understood. This is unjustifiable in a field only recently furrowed.

[4] As well as in other Commonwealth polities. In this context, Ireland and South Africa would decide upon 'revolutionary' breaks with the established constitutional order; whereas, Canada, Australia, and New Zealand, would struggle with the idea from the 1930s through the 1950s, and then largely abandon the controversy (by accepting imprecision) only to return to the matter in the 1980s. The 1930s through the 1950s marked a period in which the future of "Dominion Status" and the Commonwealth was unknown. In the end, it proved to simply be a cover or half-way house towards independence. However, during those years there were many who believed that the Commonwealth could develop into some sort of cohesive international entity and that the increasing autonomy of the former colonies could have been reversible once the taint of colonial subordination had be cleaned away. See Oliver (2005).

In drafting the *Canadian Bill of Rights*, Driedger had a peculiar view of the constitution of Canada, one that precluded an entrenched bill of rights in the *British North America Act* prior to patriation of an amending formula. This approach to the constitution emerged strongly out of Driedger's 'ecumenical' approach to legal theory. This ecumenical approach equally applied to his view of the constitution and, thus, while he embraced the orthodoxy of parliamentary sovereignty (in contrast to constitutional supremacy), he also adopted the heterodoxy of "self-embracing" parliamentary sovereignty. That is, Driedger's view of the constitution was one that precluded an entrenched bill of rights prior to patriation, but held that a statutory bill of rights (if properly drafted) could have the same effect before the courts as an entrenched bill of rights.

DECLINE, GASP, AND FALL: *BILL OF RIGHTS* JURISPRUDENCE

The enactment of the *Canadian Bill of Rights* in 1960 provided a foundation for a potential judicial rights revolution in Canada. Freed from the Privy Council's oversight in 1949, the Supreme Court of Canada, initially, (1) modestly expanded federal jurisdiction in cases such as *Winner*,[5] (2) generally recognized civil liberties as being a matter of public law under federal jurisdiction in cases such as in *Saumur*[6] and (3) acted to narrow restrictions on civil liberties in federal jurisdiction generally in cases such as in *Boucher*.[7] These trends, coupled with the passage of a statutory bill of rights designed by to provide for judicial review of federal statutes and executive actions, provided two pillars of a constitutional regime for a potential judicial rights revolution. First, the

[5] *Winner v SMT (Eastern) Ltd*, [1951] SCR 887.
[6] *Saumur v Attorney General for Québec*, [1953] 2 SCR 299.
[7] *R v Boucher*, [1951] SCR 265.

Supreme Court of Canada could have – as it did in the 1950s – continued to take an expansive view of federal powers over civil liberties, restricting and striking down as *ultra vires* provincial legislation and executive acts impinging on civil liberties. Second, the Supreme Court could have used the *Canadian Bill of Rights* to restrict or strike down federal legislation and executive acts impinging on civil liberties. Yet this potential judicial rights revolution based on the *Canadian Bill of Rights* never emerged.

Formally, the Supreme Court of Canada consistently held that the *Canadian Bill of Rights* was no "mere statute," with it providing for judicial review of legislation and that conflicting enactments – both pre-existing and subsequently enacted – would be rendered "inoperative." In practice, the Court would go on to (1) provide miserly scope to the *Bill*'s guaranteed rights, (2) develop an expansive doctrine of implicit parliamentary derogations, and (3) push civil liberties into provincial jurisdiction. In the face of greater popular demand for rights protections by the courts (particularly in the 1970s), a highly conservative Supreme Court of Canada resisted such demands by narrowing the applicability of the *Canadian Bill of Rights*, even in the face of rights insurgents on the Court such as Bora Laskin.

After the enactment of the *Canadian Bill of Rights*, the Supreme Court quickly reversed the logic of the "implied bill of rights" jurisprudence. Instead of effectively treating civil liberties as a distinct federal head of power, they found civil liberties subsumed under other heads of powers, both federal and provincial. The first two key cases in this regard came down in October 1963, just before the Supreme Court's ruling in *Robertson.*[8] In *OCAWIU,*[9] the Supreme Court found that provincial legislation

[8] *Robertson and Rosetanni v the Queen*, [1963] SCR 651.

regulating the political expression of unions was *intra vires* provincial power over labour regulation and not subject to exclusive federal jurisdiction, effectively overturning *Smith & Rhuland.*[10] In *Lieberman,*[11] the Supreme Court found that a municipal bylaw regulating the operation of bowling alleys on a Sunday was *intra vires* provincial jurisdiction, so long as it was expressed in wholly secular terms, effectively overturning *Birk*[12] (although in accord with contemporaneous US jurisprudence on the matter).[13] Similar rulings continued throughout the 1960s and 1970s, such as in *Walter*[14] and *McNeil*;[15] reaching a zenith in *Dupond* (where Laskin, dissenting, described the controverted provincial legislation as a "mini-criminal code").[16] This weakened one of the two pillars that could have upheld a rights regime built around the *Canadian Bill of Rights.*

Yet, the critiques of Laskin and Pigeon in 1959[17] – that a statutory bill of rights could not provide for judicial review of other statutes – never proved to be true. Instead, that second pillar of a rights regime built around the *Canadian Bill of Rights* remained

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[9] *Oil, Chemical, and Atomic Workers, International Union v Imperial Oil Ltd,* [1963] SCR 584.
[10] *Smith & Rhuland Ltd v Nova Scotia,* [1953] 2 SCR 95.
[11] *R v Lieberman,* [1963] SCR 643.
[12] *Henry Birks & Sons (Montréal) Ltd v Montréal (City),* [1955] SCR 799.
[13] See *McGowan et al v Maryland,* 366 US 420 (1961); *Two Guys v McGinley,* 366 US 582 (1961); *Braunfeld v Brown,* 366 US 599 (1961); and *Gallagher v Crown Kosher Market,* 366 US 617 (1961).
[14] *Walter et al v Alberta (Attorney General) et al,* [1969] SCR 383.
[15] *Reference re: Nova Scotia Board of Censors v McNeil,* [1978] 2 SCR 662.
[16] *Attorney General for Canada and Dupond v Montréal,* [1978] 2 SCR 770 at 773 per Laskin CJ.
[17] Bora Laskin, "An Inquiry into the Diefenbaker Bill of Rights" (1959) 37 Can Bar Rev 77; Louis-Philippe Pigeon, "The Bill of Rights and the British North America Act" (1959) 37 Can Bar Rev 66.

formally intact. That is, the principle embodied in *Drybones*[18] – that the *Canadian Bill of Rights* would prevail over other conflicting federal legislation – was consistently accepted by the Supreme Court during the entire era prior to the enactment of the *Charter*.

Nevertheless, the *Canadian Bill of Rights* proved to be a weak instrument even in areas the Supreme Court found to be within federal jurisdiction. This did not occur because of the statutory form of the *Canadian Bill of Rights*, but due to judicial interpretation that could have equally applied to a "constitutionally entrenched" instrument. During the two decades following the enactment of the *Canadian Bill of Rights*, the Supreme Court adopted four techniques (other than finding civil liberties subject to provincial jurisdiction) that weakened the *Bill.* First, the Supreme Court adopted an approach that limited the scope of justiciability over executive actions[19] (departing from the logic of *Smith & Rhuland* and *Roncarelli*[20]). Second, the Supreme Court chose to avoid animating the *Canadian Bill of Rights* by finding its provisions already expressed by other instruments[21] or maxims,[22] limiting interest of litigators to invoke the *Canadian Bill of Rights.* Third, and most routinely, the Supreme Court simply adopted extremely narrow definitions of the rights guaranteed by the *Canadian Bill of*

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[18] *R v Drybones*, [1970] SCR 282.
[19] In *In re McCaud,* [1965] 1 CCC 168, 43 CR 256 (SCC); *Reference re: Criminal Law Amendment Act, 1968-69 (Canada),* [1970] SCR 777; *R v Smythe*, [1971] SCR 680; and *R v Mitchell*, [1976] 2 SCR 570, the Supreme Court of Canada rejected examining the discretionary power of executive agents such as parole boards and the Attorney General.
[20] *Roncarelli v Duplessis*, [1959] SCR 121.
[21] E.g. in *Batary v Saskatchewan (Attorney General),* [1965] SCR 465, the Supreme Court found that the protections against self-incrimination were already protected by *Canada Evidence Act*, RSC 1952, c 307.
[22] Notably, in *R v Randolph*, [1966] SCR 260, *R v Lowry,* [1974] SCR 195, and *Doré v Canada (Attorney General)*, [1975] 1 SCR 756, the Supreme Court held that the common law maxim of "*audi alteram partem*" already provided for provision of a fair hearing.

Rights that allowed conflicting legislation to stand.[23] Finally, the Supreme Court accepted broad and explicit derogations to the *Canadian Bill of Rights*, without any invocations of the formal derogation clause,[24] typically under the rubric of such derogations being an – ill-defined – "valid federal objective."[25]

The interpretative techniques applied to the statutory *Canadian Bill of Rights* that weakened its effectiveness could have been equally applied to a "constitutionally-entrenched" bill of rights. For example, contemporaneously the Privy Council adopted similar techniques in regards to "constitutionally entrenched" bills of rights in other Commonwealth countries. In *Antigua Times*,[26] for example, the Privy Council expanded the permitted "reasonably justifiable" derogations of the constitutionally entrenched bill of rights in the Antiguan Constitution[27] to include almost any derogation under the principle that "the proper approach to the question is to presume, until the contrary appears or is shown, that all acts passed by the Parliament of Antigua were reasonably required."[28]

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[23] The first and most notable example of this was in *Robertson*, where the Supreme Court held that while the *Lord's Day Act*, RSC 1952, c 171, fell under federal jurisdiction because it involved regulation of religious practice, yet its effects were deemed sufficiently secular so as not to violate freedom of religion. Other notable instances include *R v O'Connor*, [1966] SCR 619; *R v Curr*, [1972] SCR 889; *R v Duke*, [1972] SCR 917; *Lavell v Canada*, [1974] SCR 1349; *R v Hogan*, [1975] 2 SCR 574; *R v Jumaga*, [1977] 1 SCR 486; *R v Miller*, [1977] 2 SCR 680; and *R v Chromiak*, [1980] 1 SCR 471.

[24] An early instance can be found in *R v Appleby*, [1972] SCR 303.

[25] E.g. *R v Burnshine*, [1975] 1 SCR 693, *Prata v Canada (Minister of Manpower and Immigration)*, [1976] 1 SCR 376, *Bliss v Canada (Attorney General)*, [1979] 1 SCR 183, *Canada v Solosky*, [1980] 1 SCR 821, and *R v MacKay*, [1980] 2 SCR 370.

[26] *Attorney-General v Antigua Times*, [1976] AC 16 (PC) [*Antigua Times*].

[27] *Antigua Constitution Order 1967*, SI 1967/225, sch 2, ss 1-16.

[28] *Antigua Times*, *supra* note 27 at 32 per Lord Fraser of Tullybelton.

Just prior to the adoption of the *Charter*, it appears that the Supreme Court had begun to swing in favour of more robust usage of the *Canadian Bill of Rights*. This was due, in part, to the changing composition of the Court, notably the replacement of Justice Pigeon by Justice Lamer in March of 1980. *Shelly*[29] – where the majority read down the applicability of a reverse onus provision on the basis of section 2(f) – was the first instance where either Justices Martland or Ritchie dissented in a *Canadian Bill of Rights* case.[30] *Shelly*, thus, marked what could have been an incipient rights revolution based around the *Canadian Bill of Rights*. However, *Shelly* also marked the last *Canadian Bill of Rights* case to reach the Supreme Court prior to the "Kitchen Accord"[31] that heralded the adoption of a new bill of rights directly incorporated into the *British North America Acts* (renamed the *Constitution Acts*) and applicable to all governments in Canada.[32]

While there is no way to know with certainty, it appears that absent the *Charter*, *Shelly* would not have been an exceptional decision by the Supreme Court. In *Singh*[33] – the next case addressing the meaning of a term in the *Canadian Bill of Right*[34] – the Supreme Court struck down a section of the *Immigration Act*. The case was heard by a panel of six judges that split equally as to the basis of striking down that section, with half relying on the fair hearing provisions of the *Canadian Bill of Rights* and half relying

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[29] *R v Shelley*, [1981] 2 SCR 196.
[30] Excepting *Canada (Minister of Justice) v Borowski*, [1981] 2 SCR 575 (which did not turn on meaning and scope of rights, but instead on the question of standing), it was also the last *Canadian Bill of Rights* case heard by both Martland and Ritichie.
[31] Roy Romanow, John Whyte, and Howard Leeson, *Canada... Notwithstanding: The Making of the Constitution, 1976-1982.*, 25th anniversary edition (Toronto: Thompson-Carswell, 2007).
[32] Again, excepting *Borowski*.
[33] *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177.
[34] Thus, excepting *Canada (Commission des droits de la personne) v Canada (Attorney General)*, [1982] 1 SCR 21, which turned primarily on the definition of a "Court."

on the "security of the person" provision in the *Charter*.[35] That is to say, the Court had unanimously decided that it was appropriate for it to interfere with the substantive content of legislation on the basis of a human rights instrument, whether 'statutory' or 'entrenched.' As the matter at issue in the case was the adjudication of refugee status claims, it would have fit much better under the rubric of a right to a "fair hearing." However, Justice Wilson reasoned that, while "there can be no doubt that this statute [the *Canadian Bill of Rights*] continues in full force and effect and that the rights conferred in it are expressly preserved [...], the present situation falls within the constitutional protection afforded by the [*Charter*]" and, as such, she "prefer[red] to base [her] decision upon the *Charter*."[36]

Singh was exemplary of the coming direction of the Court in regards to civil liberties. The Court had abandoned its previously conservative approach to the substantive content of legislation on the basis of human rights guarantees when called upon to do so by a "fundamental law," both 'entrenched' and 'statutory.' Yet, it was to prefer the *Charter* as a distinctly new instrument, not restricted in its interpretation by the reasoning associated with the "quasi-constitutional"[37] *Canadian Bill of Rights*.

Thus – six months after *Singh* – in *Craton,*[38] the Supreme Court would unanimously affirm the minority reasoning of Justice Lamer in *Heerspink.*[39] That is, that

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[35] N.B. there is no equivalent to the fair hearing provision in the *Charter*.
[36] *Singh* at ¶4 ; Dickson CJ and Lamer J concurring.
[37] The term "quasi-constitutional" was first applied to the *Canadian Bill of Rights* by Laskin in 1975 in *Hogan,* [1975] 2 SCR 574. This descriptor was most enthusiastically embraced by Beetz, who first used in 1976 in *Canard,* [1976] 1 SCR 170, and continued to use it a decade later, most notable in 1985 in *Singh,* [1985] 1 SCR 177. This descriptor of the *Canadian Bill of Rights* was, however, also adopted by Dickson in his dissent in 1979 in *Gay Alliance,* [1979] 2 SCR 435, in reference to the *Canadian Bill of Rights*.
[38] *Winnipeg School Division No 1 v Craton,* [1985] 2 SCR 150.

(1) non-entrenched, (2) primacy-clause absent, and (3) statutory human rights codes were "fundamental law." Although not enjoying the same protection against alterations, as "fundamental law," they would attract the same principles of interpretation as a "constitutionally-entrenched" instrument:

> *It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement*[40]

Within three months of *Singh* – in *Big M Drug Mart*[41] and *Therens,*[42] the Supreme Court would revisit issues previously litigated under the *Canadian Bill of Rights* (in *Robertson*[43] and *Chromiak,*[44] respectively), and deliver radically different interpretations of Charter provisions that were almost identically worded in the *Bill*. Thus, with the advent of the *Charter,* despite its very similar language to the *Bill, the* Supreme Court essentially overturned a number of decisions from the *Bill of Rights* period (in areas such as freedom of religion[45] the right to counsel,[46] and the presumption of innocence[47]).[48] The Supreme Court did not reason in those cases, as Lord Sankey in *Edwards*[49] or as Justice Riley in *Boardwalk,*[50] that the law "is a living, changing, and breathing thing"[51]

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[39] *Insurance Corporation of British Columbia v Heerspink et al*, [1982] 2 SCR 145.
[40] *Craton* per McIntyre at ¶8.
[41] *R v Big M Drug Mart Ltd*, [1985] SCR 295.
[42] *R v Therens,* [1985] 1 SCR 613.
[43] *Robertson and Rosetanni v the Queen*, [1963] SCR 651.
[44] *R v Chromiak*, [1980] 1 SCR 471.
[45] *Robertson and Rosetanni v the Queen*, [1963] SCR 651.
[46] *R v Chromiak,* [1980] 1 SCR 471
[47] *R v Appleby*, [1972] SCR 303
[48] An example of this is presented in Table . The table compares the Supreme Court of Canada's treatment of the right "to retain and instruct counsel without delay" in *Chromiak (1980)* and *Therens (1985)*.
[49] *Henrietta Muir Edwards v Canada (Attorney General),* [1930] AC 124 (PC).
[50] *Boardwalk Merchandise Mart Ltd et al v R*, [1972] A.J. No. 64 (AB SC)
[51] *Boardwalk* per Riley J at ¶101

that must be subject to reinterpretation for a new generation. Instead, the Supreme Court of Canada held that the *Charter* demanded an entirely new interpretation of the terms it contained as a new instrument.

Table 3: *Chromiak* and *Therens*; compared

<table>
<tr><th>Case</th><td>R v Chromiak, [1980] 1 SCR 471</td><td colspan="2">R v Therens, [1985] 1 SCR 613</td></tr>
<tr><th>Relevant Enactment</th><td><u>Canadian Bill of Rights</u>:
2. […] no law of Canada shall be construed or applied so as to [...] (c) deprive a person who has been arrested or detained [...] (ii) of the right to retain and instruct counsel without delay</td><td colspan="2"><u>Canadian Charter of Rights and Freedoms</u>:
10. Everyone has the right on arrest or detention [...] (b) to retain and instruct counsel without delay and to be informed of that right</td></tr>
<tr><th rowspan="3">Justices</th><td rowspan="3">• RITCHIE (478)
○ Martland
○ Pigeon
○ Beetz
○ Estey
○ McIntyre
○ Chouinard</td><td colspan="2">Detention and violation of respondent’s right to counsel</td></tr>
<tr><td>Wide (new) meaning to the word “detained"</td><td>Narrow (old) meaning to the word “detained"</td></tr>
<tr><td>• Le DAIN (¶48)
○ Dickson (¶1)
○ McIntyre (¶14)
○ Lamer (¶17)</td><td>• ESTEY (¶6)
○ Beetz
○ Chouinard
○ Wilson</td></tr>
<tr><th>Judgment</th><td>The words “detain” and “detention” as they are used in s. 2(c) of the Bill of Rights connote some form of compulsory restraint. […] In the present case, the appellant, after he had co-operated in furnishing the preliminary sobriety tests, was allowed to go away and he was at no time detained.</td><td colspan="2">A person who complied with a demand, pursuant to s. 235(1) of the Criminal Code, to accompany a police officer to a police station and to submit to a breathalyzer test is “detained” within the meaning of s. 10 of the Charter and that person is therefore entitled to be informed of his right to retain and instruct counsel without delay.</td></tr>
</table>

These two trends could be in conflict. On one hand, the Supreme Court was clear to express that so long as an instrument dealt with matters of fundamental rights, the

Court was empowered to use that instrument – whether statutory or entrenched – to evaluate the substantive content of legislation and strike it down if need be. Yet, on the other hand, the Court was reluctant to be bound by its previous evaluation of the substantive content of legislation based on the *Canadian Bill of Rights*. One possible resolution of such a conflict would be a break in the principle of *stare decisis*, with the Court proclaiming that it was not necessarily bound by its own precedent in matters of human rights. In context, this would not necessarily have been incongruous, as contemporaneously – in England's own milder "rights revolution"[52] – the Court of Appeal had done as much, reasoning in *Spencer* that when "dealing with the liberty of the subject [...] departure from authority [may be] necessary in the interests of justice to an appellant, then this court should not shrink from so acting."[53]

However, the Supreme Court of Canada was reticent to break with *stare decisis* and found a solution by portraying the *Canadian Bill of Rights* – unlike other statutory human rights instruments – as more akin to a mere canon of construction. This provided a simplistic explanation as to why established definitions of terms used when the *Charter* was drafted were not applicable to the *Charter*. *Stare decisis* was formally upheld, but the precedent of *Drybones* was effectively repudiated and the treatment of the *Canadian Bill of Rights* was sharply distinguished from other statutory human rights instruments (despite its atypical inclusion of an explicit paramountcy clause). While the Court was not initially unanimous in this approach (with Beetz J maintaining a consistent dissent until 1988), by the close of the 1980s it had developed into the basis of the Court's

[52] See Charles R Epp, *The Rights Revolution: Lawyers, Activists, and the Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998), pp. 132-155.
[53] *R v Spencer,* [1985] 2 WLR 197 at 203 (CA)

reasoning on the *Canadian Bill of Rights*, effectively eliminating most *Bill of Rights* litigation. As a result, by the beginning of the 1990s, the *Canadian Bill of Rights* largely gained the status of historical relic for litigation purposes and became viewed in the human rights historiography as never being, nor intended to be, any more than a canon of construction.

In the end, however, this transformation of the perception of the *Canadian Bill of Rights* in the eyes of many observers came not at the hands of an opponent of robust judicial protection of human rights, but from one of its foremost champions.[54] In the mid- to late-1980s, Chief Justice Brian Dickson would effectively sacrifice the *Canadian Bill of Rights* upon the alter of human rights in order to grant greater legitimacy to the Supreme Court's robust use of the *Charter*. By portraying the *Canadian Bill of Rights* as

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[54] Beginning in 1976 with *Mitchell*, [1976] 2 SCR 570, Dickson became a faithful ally of Laskin in supporting the use of the *Canadian Bill of Rights* to strike down enactments that violated the Canadian Bill of Rights. Of the 9 *Canadian Bill of Rights* cases that both Laskin and Dickson were present for

- in five cases(*Mitchell*, *Jumaga*, *Miller*, *Dupond*, and *Shelley*), Dickson concurred with Laskin's opinions In one case (*Solosky*), Laskin concurred of Dickson's opinion
- In one case (*CDP c. Canada*), they both concurred in the judgement of another judge (Chouinard)
- In one case (*Mackay*), they concurred that a specific enactment would be inoperative the *Canadian Bill of Rights*, but disagreed whether the specific issue at hand was covered by the enactment in controversy (In *Mackay*, although he disagreed with Laskin that the specific crime being examined was sufficient connected with the Appellant's military service, he did agreed with Laskin that the enactment of the *National Defence Act* which purports to try military personal for civilian crimes not connected with their military service in military courts is inoperative the CBRA; he disagreed with Laskin whether the specific crime being examined was sufficient connected with the Appellant's military service.
- In one case (*Borowski*), they disagreed (however, they did not disagree over the role of the *Canadian Bill of Rights*, but over jurisdictional issues.)
- They also concurred on all five Human Rights Code cases that came before the SCC in that era.

His demeaning language for the *Canadian Bill of Rights* in *Big M Drug Mart*, thus, is in stark contrast to his treatment of the *Canadian Bill of Rights* in the years prior to the *Charter*.

no more than a canon of construction, Dickson was able to overturn the narrow Supreme Court of Canada civil liberties jurisprudence of the 1960s and 1970s without violating the principle of *stare decisis*.[55] Although Dickson came to be a highly progressive – even radical – champion of human rights, he remained a judicial conservative, particularly unwilling to depart from that traditional principle of English jurisprudence – *stare decisis.*

MISCONCEIVING "ENTRENCHMENT"

Most of the scholars who have analyzed the development of the human rights movement in Canada from the 1930s through the 1950s presume that if Canada had an entrenched bill of rights of the kind advocated for by the subjects of their analysis, Canadians would have enjoyed greater protections against civil liberties violations. However, there is ***no*** comparative empirical or even elaborated theoretical evidence that an entrenched bill of rights would have had any substantive effect in mitigating human rights abuses during the Second World War or its immediate aftermath of the early Cold War. For example, the United States Supreme Court legitimized Japanese deportations, wartime restrictions on civil liberties, and anti-Communist McCarthyism. Further, the

[55] Dickson was not comfortable in abandoning the principle of *stare decisis* in interpreting the *Charter*, but nor was he comfortable with the narrow jurisprudential legacy that the *Canadian Bill of Rights* would have imparted upon the *Charter*. Although the *Charter* gave clear power to invalidate legislation, it could not easily be justified to redefine well-established meanings associated with words common to the Bill of Rights and the *Charter*. Characterizing the CBRA as an instrument more akin to a canon of construction rather than a constitutional instrument provided an easily justifiable reasoning to break with the Bill's jurisprudence without having to break with the principle of stare decisis. For a discussion of Dickson's approach to *stare decisis*, see Robert J Sharpe "The Doctrine of *Stare Decisis*" in *Brian Dickson at the Supreme Court of Canada, 1973-1990*, ed. De Llyod J. Guth (Winnipeg: Canadian Legal History Project, 1998), pp. 193-204.

great peacetime violations of civil liberties – Duplessis's *Padlock Law* and Alberta's *Press Bill* – were both struck down by the Supreme Court of Canada without the aid of any entrenched – or even written – bill of rights. The *Padlock Law* persistent for twenty years because of the obstacles to litigation, obstacles that would not have been overcome by the existence of a constitutionally entrenched bill of rights.

Even the *Canadian Bill of Rights's* failure to apply to the provinces is an overstated defect in the context of when it was drafted. The Supreme Court of Canada's solution to civil liberties abuses in the 1950s (as well as in 1938) was to find matters related to civil liberties to fall under federal jurisdiction, striking down provincial abuses. Had there been a Supreme Court of Canada committed to civil liberties in the 1960s and 1970s, there probably would have been a continuation of that trend such that any abuse of civil liberties could be found to be either *ultra vires* the provincial legislatures or to be invalid as violation of the *Canadian Bill of Rights*.

In the lead up to the 1982 *Charter*, provincial governments resisted a constitutional-entrenched bill of rights applicable to their legislatures as they believed that a constitutionally-entrenched bill of rights would limit their sovereignty and would act as a centralizing instrument. While this may have been sound reasoning given the experience of the 1960s and 1970s, such reasoning may not apply in the context of a judiciary, a populace, and litigating rights-advocacy organisations all committed to the elaboration of judicially enforced human rights, such as the 1980s. During the 1950s, when no human rights instrument was available, civil libertarian Supreme Court justices manoeuvred to limit the most grievous rights violations by using the division of powers and, consequently, limiting provincial sovereignty. Had there been not *Charter* in the

1980s, a newly civil libertarian Supreme Court of Canada – pushed by well resourced litigating rights advocacy organisations – very likely could have repeated the civil liberties jurisprudence of the 1950s as well as employing the *Canadian Bill of Rights* to limit federal rights violations. The result could have been a much greater limitation on provincial sovereignty than the limits imposed by the *Charter*, had the only manner in which civil liberties could be judicially safeguarded had been to locate them in another legislative jurisdiction.

In the 1950s, championed by Justice Rand, the Supreme Court of Canada defended civil liberties in the absence of a specific instrument calling upon it to do so. In contrast to the 1960s and 1970s, the Court, championed by Justices Martland and Ritchie, did not want to the task of defining and defending civil liberties and avoided doing so, despite the presence of the *Canadian Bill of Rights*. Yet, this was not simply the result of a lack of concern for civil liberties and a generalized deference to parliament.

In the 1960s and 1970s in matters not related to the *Canadian Bill of Rights*, the Supreme Court of Canada did occasionally challenge parliament in the defence of traditional civil liberties. The Supreme Court not only rejected the attempt by Parliament to have it protect civil liberties against legislative encroachments with the *Canadian Bill of Rights*, it also rejected attempts by Parliament to limit its review over administrative tribunals. After the Second World War, Parliament began establishing administrative tribunals to adjudicate disputes that emerged from the administration of the increasing number of programs established by federal and provincial governments as part of the emerging *Etat providence*. In order to streamline their operation and in recognition of their particular expertise (particular in relation to the regular courts) Parliament and

legislatures increasingly included privative clauses which explicitly exempted review of tribunal decisions by the regular courts. The Supreme Court rejected this limitation on its traditional role despite clear legislative intent.

Any claim by the Supreme Court of Canada in the 1960s and 1970s that it was attempting to defer to the will of Parliament by granting narrow interpretations to the *Canadian Bill of Rights* would have been disingenuous. Having courts reviewing federal legislation to robustly defend civil liberties was parliament's explicit direction in the *Canadian Bill of Rights*, one that the Supreme Court of Canada ignored. Instead, the Supreme Court was resolutely conservative and consistently rejected attempts by Parliament to alter its role, preferring to maintain its traditional role in relation to both oversight of administrative tribunals as well of civil liberties.

NO 'SILVER BULLET'

The power of a human rights instrument comes not from their form nor even from their specific wording, but simply from the manner in which it is treated by the courts. It should always be remembered, for example, that the principle of "separate-but-equal" was both legitimized[56] and struck down[57] by the same court operating in – formally – the same constitutional order, employing the same instrument. A "constitutionally-entrenched" bill of rights with exhaustively and precisely elaborated language operating with no explicit derogation provisions can nonetheless be narrowed, avoided, and even explicitly violated by a creative court determined to do so. Similarly, even absent any such instrument, a creative court can invent interpretative techniques to

[56] *Plessy v Ferguson*, (1896), 163 US 537 (USSC).
[57] *Brown v Board of Education*, (1954), 347 US 483 (USSC).

provide an effect similar to an "entrenched bill of rights." Canada and Australia both saw the invention of 'implied' bills of rights at very different times in very different contexts. In New Zealand, that country's highest domestic court has been tiptoeing towards transforming the expressly directory *New Zealand Bill of Rights*[58] into a more robust instrument that can be employed to functionally strike down inconsistent legislation.[59]

That is to say, it is not human rights instruments that are the true foundation of rights revolutions, but a robust civil society human rights movement. As Charles Epp has clearly demonstrated, it is motivated, focused, and sufficiently financed human rights

[58] *New Zealand Bill of Rights Act 1990*, SNZ 1990, No 109 (NZ).

[59] The *New Zealand Bill of Rights* was enacted in 1990 after a declaratory bill that would have provided for judicial review and the striking down of inconsistent legislation was abandoned in the face over overwhelming opposition. Even with the watering-down of the bill to only a canon of construction, it was only narrowly passed by New Zealand's single chamber parliament. Yet, the robustness of the *New Zealand Bill of Rights* quickly grew. In *Ministry of Transport v Noort*, [1992] 3 NZLR 260 (NZCA), the New Zealand Court of Appeal adopted a purposive interpretation for the *Bill*. In *Simpson v Attorney-General*, [1994] 3 NZLR 667 (NZCA), the Court declared that it would attach enhanced remedies for violations enactments that also violated the *Bill of Right*. In *Quilter v Attorney-General*, [1998] 1 NZLR 523 (NZCA), the Court adopted a procedure akin to a "declaration of incompatibility" in the then newly enacted British *Human Rights Act 1998*, c.42 (UK), as part of its reasoning. In *Moonen v Literature Board of Review*, [2000] 2 NZLR 9 (NZCA), the Court enhanced the *de facto* "declaration of incompatibility" by developing a test of reasonableness (akin to the *Oakes* test) that would be applied to its future analysis of legislation against the *Bill of Rights*. Finally, in *Hopkinson v Police*, [2004] 3 NZLR 704 (NZCA), the Court effectively declared an enactment inoperative on the basis of the *Bill of Rights* (although it carefully avoided such explicit wording). In *Hopkinson*, the Court found a provision in the *Flags, Emblems, and Names Protection Act* (1981, No. 47, s. 11(1)(b)) prohibiting "dishonouring" of the national flag not including any "non-violent forms of communication that attempt to convey an idea or meaning" including "non-verbal conduct and 'symbolic speech'" under the *Bill of Rights* protections of free expression. One would be hard pressed to invent a situation where the flag could be "dishonoured." N.B. New Zealand's highest domestic court until 2004 when appeals to the Privy Council were abolished in favour of a new Supreme Court.

organisations that are the essential 'yeast' to provoke the rights of a rights revolution.[60] The size and shape of that revolution may be significantly influenced by the available human rights instruments, legal institutions, and leading judicial actors, but it is the underlying movement that is fundamental. The human rights movement in Canada remained weak and immature in the 1960s and early 1970s. A conservative Supreme Court of Canada and limited human rights instruments may have contributed to the "one step backwards"[61] in civil liberties in the 1960s and early 1970s. Yet, it was the fundamental weakness and immaturity of the human rights movement in Canada of that era that resulted in the failure to capitalize on the 1950s civil liberties jurisprudence and the potential of the *Canadian Bill of Rights* to provoke a rights revolution.

A constitutionally entrenched bill of rights is often hoped to be a 'silver bullet' that will provoke a rights revolution. However, as the experiences of India and even the United States in the wake of the Fourteenth Amendment illustrate, a "rights revolution" cannot be provoked by a constitutionally entrenched bill of rights alone and can even occur in the absence of one.[62] Instead, a constellation of other changes is required to underpin such a revolution, including a change in popular perceptions towards human rights, a change in the judicial culture, and the emergence of well-resourced human rights litigation organisations. Essentially, Diefenbaker's *Canadian Bill of Rights* was weak not primarily because of the failure to constitutionally entrench it, but Diefenbaker's failure to appoint Justices to the Supreme Court committed to judicially enhanced civil liberties and

[60] Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and the Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).
[61] Dale Gibson, "And One Step Backwards: The Supreme Court and Constitutional Law in the Sixties" *Canadian Bar Review* 53 (1975), pp. 621-648.
[62] See Epp (1998).

to extend resources to aid bill of rights litigation, as Trudeau did prior to enacting the *Charter*. ♣

Appendix A – *Canadian Bill of Rights*, SC 1960, c.44

Canadian Bill of Rights

1960, c. 44

[*Assented to August 10th, 1960*]

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

Preamble

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

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

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

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

PART I

BILL OF RIGHTS

Recognition and declaration of rights and freedoms

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.

Construction of law

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

(*a*) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(*b*) impose or authorize the imposition of cruel and unusual treatment or punishment;

(*c*) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(*d*) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

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

(*g*) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

Duties of Minister of Justice

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.

Short title

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

PART II

Savings

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.

"Law of Canada" defined

(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.

Jurisdiction of Parliament

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

War Measures Act, RS, c. 288.

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

Coming into force by proclamation.

"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.

Proclamation to be submitted to Parliament.

(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.

Opportunity for debate.

(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.

Revocation of Proclamation by resolution.

(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.

Canadian Bill of Right.

(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."

♦

Appendix B – *Statute of Westminster,* 22 George V, c. 4 (UK)

ARRANGEMENT OF SECTIONS.

Section.

1. Meaning of "Dominion" in this Act.
2. Validity of laws made by Parliament of a Dominion.
3. Power of Parliament of Dominion to legislate extra-territorially.
4. Parliament of United Kingdom not to legislate for Dominion except by consent.
5. Powers of Dominion Parliaments in relation to merchant shipping.
6. Powers of Dominion Parliaments in relation to Courts of Admiralty.
7. Saving for British North America Acts and application of the Act to Canada.
8. Saving for Constitution Acts of Australia and New Zealand.
9. Saving with respect to States of Australia.
10. Certain sections of Act not to apply to Australia, New Zealand or Newfoundland unless adopted.
11. Meaning of "Colony" in future Acts.
12. Short title.

An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930

[11th December 1931.]

Preamble

WHEREAS the delegates to His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences:

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom:

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained:

Now, therefore, be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Meaning of "Dominion" in this Act

1. In this Act the expression "Dominion" means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

Validity of laws made by Parliament of a Dominion. 28 & 29 Vict. c. 63.

2.(1) The *Colonial Laws Validity Act, 1865*, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

Power of Parliament of Dominion to legislate extra-territorially

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

Parliament of United Kingdom not to legislate

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a

for Dominion except by consent

Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

Powers of Dominion Parliaments in relation to merchant shipping. 57 & 58 Vict. c. 60.

5. Without prejudice to the generality of the foregoing provisions of this Act, section seven hundred and thirty-five and seven hundred and thirty-six of the *Merchant Shipping Act, 1894*, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

Powers of Dominion Parliaments in relation to Courts of Admiralty. 53 & 54 Vict. c. 27.

6. Without prejudice to the generality of the foregoing provisions of this Act, section four of the *Colonial Courts of Admiralty Act, 1890* (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

Saving for British North America Acts and applications of the Act to Canada

7.(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts, 1867 to 1930*, or any order, rule or regulation made thereunder.

(2) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

(3) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

Saving for Constitution Acts of Australia and New Zealand

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

Saving with respect to States of Australia

9.(1) Nothing in this Act shall be deemed to authorize the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia, in

any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and government of the Commonwealth.

Certain sections of Act not to apply to Australia, New Zealand or Newfoundland unless adopted

10.(1) None of the following sections of this Act, that is to say, sections two, three, four, five, and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in sub-section *(1)* of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand, and Newfoundland.

Meaning of "Colony" in future Acts

11. Notwithstanding anything in the *Interpretation Act, 1889*, the expression "Colony" shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

Short title

12. This Act may be cited as the *Statute of Westminster, 1931*.

♦

Appendix C – *Canadian Bill of Rights* Drafts

Table 4: List of Drafts of the *Canadian Bill of Rights*

Draft[1]	Date	Source	LAC[2] Reference	Page
I	16 February 1948	DOJ[3] 151913	RG13 v.2643	436
II	9 September 1952	Louis St-Laurent Papers	MG26L v.86 file C-19-1-A	437
III	27 March 1958	DOJ 180667	A91-00038	439
IV	8 April 1958	DOJ 182000-29	RG13 v.2795	442
V	26 May 1958	DOJ 182000-29	RG13 v.2795	444
VI	5 September 1958	DOJ 182000-29	RG13 v.2795	447
VII	8 April 1959	DOJ 184000-27	RG13 v.2804	450
VIII	27 June 1960	DOJ 186000-08	RG13 v.2804	453
IX	4 August 1960	DOJ 186000-08	RG13 v.2804	456

[1] This list is not exhaustive of draft bills of rights in the Department of Justice files
[2] Library and Archives Canada
[3] Department of Justice File Number

DRAFT I – 16 FEBRUARY 1948

Memorandum for the Deputy Minister
February 16, 1948
E. A. Driedger

1. No person shall do any act that is, or is likely, or intended, to have the effect of obstructing or preventing any of the following activities:
   (a) the free exercise of religious worship by any person;
   (b) the peaceable assembly of any persons;
   (c) the printing or distribution by any person of a newspaper, magazine, or other similar publication;
   (d) The communication by one person with another either orally or in writing

2. In any prosecution under this section it is an defence to prove
   (a) that the activity in respect of which the prosecution was instituted, constituted, or if undertaken, would have constituted a breach of any law or an infringement of the rights of the accused; or
   (b) that the act complained of was lawfully done pursuant to valid law.

3. Nothing in this section shall be construed as limiting or affecting the legislative jurisdiction of any authority.

4. Every person who violates this section is guilty of an offence and
   (a) may be prosecuted under Part XV [Summary Convictions] of the Criminal Code and if convicted is liable .....
   (b) may at the election of the Attorney General of Canada be prosecuted upon indictment and if convicted is liable .....

♦

DRAFT II – 9 SEPTEMBER 1952

An Act for the Protection of Civil Rights

WHEREAS recognition and protection of civil rights and liberties of persons are inherent in and fundamental to the political and legal institutions of Canada

AND WHEREAS the Charter of the United Nations of which Canada is a Member, reaffirms faith in fundamental human rights and in the dignity and worth of the human person

AND WHEREAS the Universal Declaration of Human Rights approved by the General Assembly of the United Nations on the tenth day of December, nineteen hundred and forty-eight, at Paris recognizes that equal and inalienable rights of all members of the human society are the foundation of freedom, justice, and peace i the world and that such rights should be secured and protected by law;

AND WHEREAS the protection of human rights and liberties in Canada by law is best afforded by defining legal rights enforceable by process of law in the courts, and by creating criminal offences punishable by process of law in the courts for violations thereof;

AND WHEREAS under our federal constitution, as defined by the British North America Act, legislative jurisdiction is divided between Parliament and the Legislative Assemblies of the provinces and the subject matter of criminal law is within the exclusive legislative authority of Parliament;

AND WHEREAS it is desirable that the Parliament of Canada reaffirm, clarify, and extend the protection afforded by the criminal law of Canada to certain fundamental rights and liberties of person:

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

1. This Act may be cited as *The Canadian Bill of Rights Act*.

2. Every one commits an offence who wilfully does an act that obstructs, prevents, or restricts

(a) the free exercise of religious worship (religion) by any person,

(b) the lawful assembly of persons

(c) the law association of persons

(d) the lawful communication in speech or writing between persons,

(e) the lawful printing or lawful distribution by a person or any writing, or

(f) the lawful exercise or lawful enjoyment by any person, by reason of the race, creed, religion, or colour of that person, of any right or privilege exercised or enjoyed by persons generally.

3. Everyone who commits an offence under this Act is guilty of

(a) an indictable offence and is liable to imprisonment for one year, or

(b) an offence punishable on summary conviction and is liable to imprisonment for six months or to a fine of five hundred dollars, or both,

4. No accused person shall be convicted of an offence under this Act where he establishes that the act complained of was lawfully done in the exercise of a right or the performance of a duty pursuant to a valid law in that behalf.

5. No proceedings hall be instituted under this Act without the consent in writing of the Attorney General of Canada or of the Attorney General of the Province within which the offence is alleged to have been committed

♦

DRAFT III – 27 MARCH 1958

March 27, 1958.

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

1. This Act may be cited an the *Canadian Bill of Rights*.

2. The following human rights and fundamental freedoms:

   (1) the right of the individual, to life, liberty and security of the person and to enjoyment of property

   (2) the right of the individual

      (a) to recognition as a person before the law,

      (b) not to be deprived of life, liberty, security of the person or property except by due process of law, and

      (c) to equal protection of the law without discrimination by reason of race, colour, sex, religion or national origin;

   (3) freedom of religion;

   (4) freedom of speech;

   (5) freedom of assembly and association; and

   (6) freedom of the press and radio;

are hereby recognized as having always prevailed and continuing to prevail in Canada.

2. (1) It is hereby declared that no prerogative or other right of Her Majesty, authorizes Her Majesty or any officer, servant or agent of Her Majesty to infringe or abridge any right or freedom recognized by this Act.

   (2) It is hereby declared that no law in force in Canada that is subject to being altered by the Parliament of

Canada authorizes any person to infringe or abridge any right or freedom recognized by this Act.

3. (1) Every enactment of the Parliament of Canada, heretofore or hereinafter enacted, shall be construed as though everything done or authorized thereby were expressed to be done or authorised except insofar as it would infringe or abridge any right or freedom recognized by this Act.

(2) Without limiting the generality of subsection one, no enactment of the Parliament of Canada, heretofore or hereinafter enacted, shall be construed, regardless of how it is expressed:

(a) as imposing, or authorizing the imposition of torture or cruel, inhuman or degrading treatment or punishment;

(b) as depriving a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for arrest or detention;

(ii) of the right to a judicial hearing within a reasonable time or to release, 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) as depriving a person who has, been arrested or detained of the right to be released on reasonable bail unless there be just cause for refusal of bail; .

(d) as authorizing a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel or other constitutional safeguards;

(e) as depriving a person of the right to a fair hearing in accordance with the principles of fundamental justice for determination of his rights and obligations; or

(f) as depriving 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 Exchequer Court of Canada has concurrent original jurisdiction to hear and determine

(a) proceedings by way of Crown Write or otherwise to determine any question as to whether any person, board or commission on whom any power has been conferred or duty imposed by the Parliament of Canada has exceeded the power or failed to discharge the duty, and

(b) proceedings by way of action against the Attorney General of Canada for a declaration as to whether any right or freedom recognized by this Act has been infringed by any person acting on behalf of Her Majesty in right of Canada or would, if it were not for this Act, be abridged by any Act of the Parliament of Canada or any law subject to alteration by the Parliament of Canada.

5. The Minister of Justice has such power and duties in relation to the maintaining and safeguarding of human rights and fundamental freedoms as may be prescribed by regulation of the Governor in Council.

♦

DRAFT IV – 8 APRIL 1958

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 the House of Commons of Canada, enacts as follows:

1. This Act may be cited as the *Canadian Bill of Rights Act*.

2. It is hereby recognized and declared that the human rights and fundamental freedoms hereinafter in this section set forth have always prevailed and shall continue to prevail in Canada, that is to say,

(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;

(e) 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 Act all orders, rules and regulations thereunder, and all laws in force in Canada or in any part of Canada at the commencement of this Act that are subject to be repealed, abolished or altered by the Parliament of Canada, shall be so construed and applied as not to abrogate, abridgement or infringement of any of the rights or freedoms recognized by this Act 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 arrest or detention

(ii) of the right to a judicial hearing within a reasonable time or to release,

(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

(iv) of the right to be released on reasonable bail unless there be just cause for refusal of bail,

(c) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if his 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. This Act does not apply to the extent that a contrary intention appears in any law that makes provision for the security, defence, peace, order and welfare of Canada in the event of real or apprehended war, invasion or insurrection.

5. The Minister of Justice shall, in accordance with such regulations as may be prescribed by regulation examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the regulations under the *Regulation Act*, and every Bill introduced in the House of Common and shall take such steps as appear to him to be necessary to insure that the purposes and provisions of this Act in relation thereto are fully carried out.

♦

DRAFT V – 26 MAY 1958

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 the House of Commons of Canada, enacts as follows:

Part I
Bill of Rights

Short Title

1. This Act may be cited as the *Canadian Bill of Rights Act*.

Recognition and declaration of rights and freedoms

2. It is hereby recognized and declared that the human rights and fundamental freedoms hereinafter in this section set forth have always prevailed and shall continue to prevail in Canada, that is to say,

(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;

(e) freedom of assembly and association; and

(f) freedom of the press

Construction of law

3. All the Acts of the Parliament of Canada enacted before or after the commencement of this Act all orders, rules and regulations thereunder, and all laws in force in Canada or in any part of Canada at the commencement of this Act that are subject to be repealed, abolished or altered by the Parliament of Canada, shall be so construed and applied as not to abrogate, abridgement or infringement of any of the rights or freedoms recognized by this Act 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 arrest or detention

(ii) of the right to retain and instruct council 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 his 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.

Duties of Minister of Justice

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 *Regulation Act*, and every Bill introduced in the House of Common and shall take such steps as appear to him to be necessary to insure that the purposes and provisions of this Act in relation thereto are fully carried out.

Repeal Section 6 of the War Measures Act and substitute the following

"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 two 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 four days of the day the proclamation was laid before Parliament, praying that the proclamation he 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 proclamations 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 abrogation, abridgement or infringement of any right or freedom recognized by the

Canadian Bill of Rights."

Add the following to the Defence Production Act

43. 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 of infringement of any right or freedom recognized by the *Canadian Bill of Rights Act*.

♦

DRAFT VI – 5 SEPTEMBER 1958

1st Session, 24th Parliament, 7 Elizabeth II, 1958

Bill C-60

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

First Reading, September 5, 1958

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

Part I
Bill of Rights

Short Title

1. This Part may be cited as the *Canadian Bill of Rights*

Recognition and declaration of rights and freedoms

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;

(e) freedom of assembly and association; and

(f) freedom of the press

Construction of law

3. x, and all laws in force in Canada or in any part of Canada at the commencement of this Act that are subject to be repealed, abolished or altered by the Parliament of Canada, shall be so construed and applied as not to abrogate, abridgement or infringement of any of the rights or freedoms recognized by this Act 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 arrest or detention

(ii) of the right to retain and instruct council 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.

Duties of Minister of Justice

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 Common to ensure that the purposes and provisions of this Part in relation thereto are fully carried out.

PART II

Savings

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.

War Measures Act, R.S. c. 288

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

Coming into force by proclamation

"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.

Proclamation to be submitted to Parliament

(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 two days next thereafter that Parliament is sitting.

Opportunity for debate.

(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 he 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.

Revocation of proclamation by resolution

(4) If both Houses of Parliament resolve that the proclamations 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.

Canadian Bill of Rights

(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 abrogation, abridgement or infringement of any right or freedom recognized by the *Canadian Bill of Rights*."

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DRAFT VII – 8 APRIL 1959

2st Session, 24th Parliament, 7-8 Elizabeth II, 1959

Bill C-

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 the House of Commons of Canada, enacts as follows:

Part I
Bill of Rights

Short Title

1. This Part may be cited as the *Canadian Bill of Rights*

Recognition and declaration of rights and freedoms

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;

(e) freedom of assembly and association; and

(f) freedom of the press

Construction of law

3. All the Acts of the Parliament of Canada enacted before or after the commencement of this Act all orders, rules and regulations thereunder, and all laws in force in Canada or in any part of Canada at the commencement of this Act that are subject to be repealed, abolished or altered by the Parliament of Canada, shall, unless it is otherwise expressly stated in any Act of the Parliament of Canada hereafter enacted, be so construed and applied as not to abrogate, abridgement or infringement of any of the rights or freedoms recognized by this Act 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) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of torture, or cruel, inhuman or degrading treatment or punishment;

(c) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for arrest or detention

(ii) of the right to retain and instruct council without delay, or

(iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self-crimination, or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations; or

(f) 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.

Duties of Minister of Justice

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 Common, in order to ascertain whether any of the provisions are inconsistent with the purposes and provisions of this Part.

PART II

Savings

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.

War Measures Act, R.S. c. 288

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

Coming into force by proclamation

"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.

Proclamation to be submitted to Parliament

(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 two days next thereafter that Parliament is sitting.

Opportunity for debate.

(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 he 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.

Revocation of proclamation by resolution

(4) If both Houses of Parliament resolve that the proclamations 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.

Canadian Bill of Rights

(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 abrogation, abridgement or infringement of any right or freedom recognized by the *Canadian Bill of Rights*."

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DRAFT VIII – 27 JUNE 1960

First Reading June 27, 1960

3rd Session, 24th Parliament, 8-9 Elizabeth II, 1960

Bill C-79

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 the House of Commons of Canada, enacts as follows:

Part I
Bill of Rights

Short Title

1. This Part may be cited as the *Canadian Bill of Rights*

Recognition and declaration of rights and freedoms

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;

(e) freedom of assembly and association; and

(f) freedom of the press

Construction of law

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, unless it is otherwise expressly stated in any Act of the Parliament of Canada hereafter enacted, 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) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of torture, or cruel, inhuman or degrading treatment or punishment;

(c) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for arrest or detention

(ii) of the right to retain and instruct council without delay, or

(iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination, or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations; or

(f) 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.

Duties of Minister of Justice

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 Common, in order to ascertain whether any of the provisions are inconsistent with the purposes and provisions of this Part.

PART II

Savings

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.

War Measures Act, R.S. c. 288

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

Coming into force by proclamation

"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.

Proclamation to be submitted to Parliament

(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.

Opportunity for debate.

(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 he 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.

Revocation of proclamation by resolution

(4) If both Houses of Parliament resolve that the proclamations 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.

Canadian Bill of Rights

(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 abrogation, abridgement or infringement of any right or freedom recognized by the *Canadian Bill of Rights*."

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DRAFT IX – 4 AUGUST 1960

As Passed by the House of Commons, 4th August, 1960.

3rd Session, 24th Parliament, 8-9 Elizabeth II, 1960

Bill C-79

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

Preamble

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

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

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

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

Part I

Bill of Rights

Recognition and declaration of rights and freedoms

1. It is hereby recognized and declared that in Canada there have always 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

Construction

2. Every law of Canada shall, unless it is expressly declared by an Act of

of law

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

(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

(c) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for arrest or detention

(ii) of the right to retain and instruct council without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination, or other constitutional safeguards;

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

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

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

Duties of Minister of Justice

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.

Short Title

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

PART II

Savings

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.

"Law of

(2) The expression "law of Canada" in Part I means an Act of the

Canada" defined

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.

Jurisdiction of Parliament.

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

War Measures Act, R.S. c. 288

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

Coming into force by proclamation

"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.

Proclamation to be submitted to Parliament

(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.

Opportunity for debate.

(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 he 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.

Revocation of proclamation by resolution

(4) If both Houses of Parliament resolve that the proclamations 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.

Canadian Bill of Rights

(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 abrogation, abridgement or infringement of any right or freedom recognized by the *Canadian Bill of Rights*."

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Appendix D – Timeline

Table 5: *Canadian Bill of Rights* Drafting Timeline	
Date	**Notes**
1957-04-12	*22nd Parliament prorogued and dissolved*
1957-05-01	*W.R. Jackett becomes Deputy Minister of Justice*
1957-06-12	*23rd general election*
1957-06-21	*E.D. Fulton appointed Minister of Justice*
1957-06-27	• DHW Henry composes a history of the bill of rights thinking in the Department, as directed by Jackett in prep for dealing with the Diefenbaker govt
1957-10-14	*Start of 23(1) Session*
1957-10-14	• Speech from the Throne

1957-12-17	• Jackett's First meeting with Fulton on the Canadian Bill of Rights
	  • Discusses options of (1) constitutional amendment, (2) overriding statue using criminal law, (3) federal statute with a notwithstanding clause
	  • Fulton opted for the third option
	  • Fulton still wants SCC reference and parliamentary committee

1958-01-06	• Coldwell motion for a BNA Act bill of right (Debate on human rights)
1958-02-01	*23rd Parliament prorogued and dissolved*
1958-03-27	• Jackett's Draft
1958-03-28	• Driedger describes the Draft Bill as creating judicial review
1958-03-31	*24th general election*
1958-04-08	• Driedger's DRAFT Bill of Rights (182000-29); Driedger's First Draft
1958-04-29	• Driedger's DRAFT Bill of Rights (182000-29)
1958-04-29	• Fulton explains to PM that the draft bill is :"Something more than an Interpretation Act" • Notes that there is no need for a SCC reference because there are no criminal sanctions, so no issue of invading provincial jurisdiction

	• Notes judicial review
1958-05-08	• Driedger’s memo on the WMA, suggests exempting them from the CBRA
1958-05-10	• Fulton's Presentation to Cabinet on the Canadian Bill of Rights • Cabinet raised concerns about the meaning of the words "have always prevailed" and the meaning of the words "enacted before or after the commencement of this Act" • Cabinet approves the proposals, but with revisions
1958-05-10	• Driedger argues that "Clause 3 is directed to the judiciary" and is *not* "merely a rule of interpretation"
1958-05-12	• Driedger suggests changing "prevail" to "exist"
1958-05-12	*Start of 24(1) Session*
1958-05-26	• Driedger’s draft Bill of Rights (182000-29) with WMA and DPA amendments
1958-05-27	• Fulton raises the issue of the WMA • Diefenbaker raises the issue of the "right to work" • Cabinet decides against "right to work" • Cabinet requests draft sections providing for exceptions for the WMA
1958-06-06	• Draft 'A': Amendments to the WMA • Draft 'B': Generalized clause for security and defence laws • Fulton prefers Draft A • Cabinet defers a decision until the report of the Departments of Defence, etc.
1958-07-24	• Cabinet approves the option of Draft 'A'
1958-08-22	• Pearson inquires about the CBRA

1958-08-26	• Diefenbaker
	  • dislikes the wording on the section give responsibilities to the Department of Justice, as it could detract from the powers of parliament and the courts
	  ○ [[Diefenbaker clearly envisions a robust role for the judiciary]]
	  • raises concerns over the lack of a clause not derogating from existing rights.
	• Cabinet agrees with Diefenbaker's concerns and sends the bill for revision

1958-08-27	• Diefenbaker and Fulton (severally) submit language for a non-derogation clause • Cabinet approves Fulton's revisions • Cabinet approves only proceeding with first reading in the current session.
1958-08-30	• Diefenbaker announces that the CBRA will be proposed and then tabled to the subsequent session
1958-09-05	• Bill C-60, 1st reading
1958-09-06	*End of 24(1) Session*
1958-12-15	• Fulton dismisses the correspondences criticizing the Canadian Bill of Rights
1959-01-15	*Start of 24(2) Session*
1959-01-15	• Speech from the Throne (no mention of the CBRA)
1959-01-27	• Fulton suggests adding a notwithstanding clause to Diefenbaker
1959-02-09	• Motion for correspondences with provinces, re: CBRA
1959-02-09	• Motion for Dom-Prov Conference
1959-02-10	• Demand for a Committee to examine the CBRA
1959-02-26	• Jackett suggests passing the CBRA as a 91(1) amendment and calling it the BNA Act, 1959. • "will operate to curb both Parliament and the Executive"
1959-02-26	• Fulton proposes a notwithstanding clause • Diefenbaker raises the issue of the Bill's "pedestrian" language and the question of BNA Act amendment • Cabinet rejects Diefenbaker's suggestions, but accepts Fulton's of a notwithstanding clause
1959-03-03	• Goodman correspondence, re: draft enforcement mechanism
1959-03-09	• Goodman correspondence, re: s.107 of the criminal code
1959-03-23	• Driedger rejects changing "due process of law" as "benefit" means the same thing, but said it could be used as a sop for demands or revisions • Jackett rejects "benefit" as imputing social welfare
1959-03-23	• Jackett suggests referring the NFLD labour law to the Supreme Court

1959-04	• Cabinet decides against passing the Canadian Bill of Rights in 1959.
1959-04-08	• Draft Bill
1959-05-11	• Jackett suggests addition of "arbitrary detention" and "self-crimination"
1959-05-11	• Fulton discusses an amendment to the CBRA to include an "arbitrary detention" clause. • Amendment was taken from a suggestion by Schumiatcher
1959-05-26	• Diefenbaker notes the need for a Parliamentary Committee, but does not believe it should occur in 1959
1959-06-21	• Cabinet decides that the Canadian Bill of Rights will probably not be able to be brought forth in the 1959 session, but that it will be the first bill of the 1960 session.
1959-07-13	• Diefenbaker stated that he would introduce the Canadian Bill of Rights if the session extended beyond July 18th [[It did not]]
1959-07-18	• Diefenbaker proposes a joint committee for the subsequent session
1959-07-18	*End of 24(2) Session*

1959-10-08	• Diefenbaker floats the idea of BNA Act amendment
	• Cabinet noted that
	  • the Canadian Bill of Rights (and Civil Liberties generally) are within exclusive federal jurisdiction and it would be an unfortunate precedent to seek provincial consent for a constitutional amendment solely in federal jurisdiction
	  • a constitutional amendment in federal jurisdiction is subject to repeal as a statute
	  • correspondences with the provinces would cause delay
	  • a negative reply from Quebec or a conservative province would be political damaging
	  • Constitution can be amended later
	• Cabinet decides to introduce the CBRA in its current form

1959-10-28	• Driedger argues that BNA Act amendment would not entrench the Bill of Rights
1959-10-29	• Driedger discusses the "abdication of jurisdiction" by the UK parliament in the S. of W.
1959-11-03	• Driedger argues that the government cannot entrench prior to getting an amending formula
1959-11-17	• Question of BNA Amendment remains

1959-11-24	• Fulton argues that we should not entrench, memo Justice explaining
1960-01-14	*Start of 24(3) Session*
1960-02-04	• First question in the Commons, re: Quebec's reticence
1960-02-04	• Driedger proposes a partially domesticated amending formula so as to be able to adopt a bill of rights
1960-02-05	• Driedger gives broad definition of the constitution

1960-02-09	• Diefenbaker notes
	  • his surprise at the comments from Quebec in regards to provincial jurisdiction.
	  • "The members from Quebec would be expected to know what would be expected of them when the time came to vote on the Bill of Rights."
	• Cabinet notes that the finance Minister would discuss the Bill with the Premier of Quebec.

1960-02-17	*Quebec Legislature Resolution, re: CBRA and provincial powers*
1960-02-19	• Driedger argues that unanimity is needed for BNA amendment
1960-03-07	• Fulton argues against a human rights committee
1960-03-07	• Fulton address why there are no penalties in the bill • CBRA is designed to strike down other legislation
1960-03-11	• Question about delay of the CBRA
1960-05-05	• Cabinet committed to introducing the CBRA in the current session
1960-06-08	• Question about delay of the CBRA
1960-06-23	• Cabinet approves Bill C-79
1960-06-27	• Bill C-79, 1st reading (Commons)
1960-07-01	• Bill C-79, 2nd reading (Commons)
1960-07-01	• Bill C-79, Debate (July 1, 4, 5, 7)
1960-07	• Cabinet noted the PM's report on the Bill of Rights
1960-07-07	• Motion to send C-79 to a Special Committee
1960-07-12	• House of Commons Special Committee (July 12 to 29)
1960-07-20	• Driedger's Memo defending the CBRA (prep for Fulton's appearance before the Special Committee on July 22)

1960-07-25	• Fulton argues Notwithstanding clause is need to override future legislation • Fulton argues Courts are "to disregard any provision [...] which limits one of the rights affirmed by the bill"
1960-08-01	• Commons goes into committee for C-79 (August 1, 2, 3)
1960-08-04	• Bill C-79, 3rd reading (Commons)
1960-08-04	• Bill C-79, 1st reading (Senate)
1960-08-04	• Bill C-79, 2nd reading (Senate)
1960-08-05	• Bill C-79, 3rd reading (Senate)
1960-08-10	• Bill C-79, Royal Assent
1965-07-26	• Driedger explains that the CBRA is a limitation on Parliament's powers
1967-11-04	• H. McIntosh Repeats Driedger's arguments for Trudeau that a Bill of Rights cannot be adopted prior to patriation of the constitution

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Appendix E – *In perpetuum rei testimonium*

FUNCTIONAL CONSTITUTIONALISM

This dissertation employs a functional definition of the term "constitutional," that can be employed more neutrally and consistently throughout this dissertation. A functional definition of "constitutionality" will also aid in clarifying some of the technical problems faced by the drafters of the *Canadian Bill of Rights*. Such a definition first requires a comparison of constitutional and statutory interpretation.

As illustrated by *Heersprink*,[1] there is a sort of Chinese wall between writings on constitutional interpretation and statutory interpretation despite the common origins and highly coincident rules. This is particularly surprising given Canada's English legal heritage, where no formal distinction is made between constitutional statutes and other statutes, and both sorts of statutes must be approached with "the same methods of construction and exposition which they apply to other statutes."[2] This is not to say that the English tradition of statutory construction at any time held that the same rules of interpretation are applied uniformly to all types of statutes. For example, Blackstone is keen to distinguish penal statutes from other statutes to emphasize that "penal statutes must be construed strictly" whereas other statutes "are to be liberally and beneficially expounded."[3]

For centuries, British courts have divided statutes into different species and applied different rules of statutory construction. The rules of statutory construction have

[1] *Insurance Corporation of British Columbia v Heerspink et al*, [1982] 2 SCR 145.
[2] *Bank of Toronto v Lambe,* (1887), 12 App Cas 575 at ¶1 (PC).
[3] William Blackstone, *Commentaries on the Laws of England: Book the First* (Oxford: Clarendon Press, 1765), p. 88.

evolved over time and have always been many, elastic, and contested. This gives broad scope to judges as to which rules they choose to emphasize or even entirely ignore. Constitutional interpretation is simply a derivative of statutory construction, which largely applies the same rules of interpretation. Strangely, this is not explicitly exposited by leading contemporary Canadian constitutional texts, although it is somewhat implicitly expressed. Hogg's introduction to his chapter on "Paramountcy" is highly illustrative:

> *Every legal system has to have a rule to reconcile conflicts between inconsistent laws. The solution of the common law, which is applicable in unitary states such as the United Kingdom or New Zealand, is the doctrine of implied repeal [...]. The doctrine of implied repeal applies in Canada to resolve conflicts between laws enacted by the same legislative body, for example, conflicts between two statutes of the federal parliament or two statutes of the Ontario Legislature.*[4]

In fact, the common law provides a wide array of rules to reconcile conflicts between inconsistent statutes beyond implied repeal including reading down, reading in, and implied exclusion. In practice, constitutional interpretation employs most of the same rules as statutory construction, although often under different names. Thus, the "paramountcy" and nullification in constitutional interpretation[5] are simply particular forms of implied repeal ("*leges posteriores priores contrarias abrogant*") used in statutory construction, with the only difference being that a provision inoperative due to paramountcy "resumes its full operation upon repeal of the paramount law"[6] (and even this difference is overstated, as although express repeal of a repealing statute no longer[7]

[4] Hogg (2007), c.16.1, I:483-484.
[5] See, for example, Hogg (2007), c.16.6, I:501-502.
[6] Sullivan (2008), pp. 649-650.
[7] See Blackstone, *Commentaries*, Introduction, §3, p. 90.

revives the former law,[8] the same would not necessarily apply in the case of an implied repeal). "Reading down" a statute to conform with a constitutional provision[9] bears a striking resemblance to the implied exclusion ("*expression unius est exclusio alterius*") one statute can undergo in the face of another.[10] Analysis of the constitutional principle of "originalism"[11] mirrors the analysis of the statutory construction rule of "original meaning" ("*contemporanea expositio*").[12]

Therefore the question becomes how are the rules of statutory construction applied differently for reconciling a conflict between a constitutional provision and a statutory enactment in contrast with reconciling a conflict between two statutory enactments.[13] In functional terms, when two enactments or provisions are wholly inconsistent and one is declared either unconstitutional (a nullity), paramount, inoperative, impliedly repealed, or impliedly excepted, the outcome is the same: one enactment is recognized as effective and the other enactment is recognized as ineffective or circumscribed. The same enactment could be reduced to no effect by it being declared

[8] *Interpretation Act*, RSC 1985, c.I-21, s. 43(a).
[9] See, for example, Hogg (2007), c.15.7, I:452-453.
[10] See, for example, Sullivan (2008), pp. 243-252.
[11] See, for example, Hogg (2007), c.15.9(f), I:473-477; c.60.1(e), II:803-805.
[12] See, for example, Sullivan (2008), pp. 143-162.
[13] Many would argue that the main hallmark of a constitutional instrument or provision is its "entrenchment (that is a more arduous procedure for amendment or enactment), however, from a functional perspective, this is an entirely extraneous. First, the contention that entrenchment is a hallmark for a constitutional provision is false, as, for example, ss. 44 and 45 of the *Constitution Act, 1982* provide for amendment to the "supreme law of Canada" through the same process as the enactment of ordinary statutes (thus, for example, how despite the very specific provisions in the *Constitution Act, 1867* for a legislative council for Quebec, none exists today). Second, even if the contention were true and the rules for such amendments were made more arduous (e.g. a two-thirds vote in the lower house on third reading), in functional terms, for conflicts between statutes and constitutional provisions, such procedures have no bearing on how the courts reconcile two valid enactments – one constitutional and one statutory.

"of no force or effect" on the basis of the *Constitution Acts*, "inoperative" on the basis of the *Canadian Bill of Rights*, or ignored ("impliedly excluded") in favour of a more "specific" enactment.[14]

A clearer illustration would be to consider the interaction between three hypothetical statutes. First, consider a hypothetical *Broadcasting Act* that regulates television programming. In it, the Act lists types of programs that can be broadcast, including political analysis and editorials; however, the Act also includes a section that forbids the broadcasting of political advertisements. Second, a hypothetical *Campaigning Act* that regulates when and where political advertisements are allowed and contains an enactment that states that political advertisements are allowed in any media including newspapers, television, radio, posters, etc. Third, a hypothetical *Free Press Act* which declares that government agencies will not abridge the right of political criticism, requiring government agencies to justifiably demonstrate that any limit on press expression is only done so for reasons of public safety or national security.

Ignoring the effect of a Constitutionally-entrenched protection of free expression and examining the situation purely as one of statutory construction, the first two hypothetical Acts are in direct conflict and cannot stand together as one cannot be specifically allowed to advertise on television and specifically forbidden to do so. As such if the *Broadcasting Act* was passed subsequently to the *Campaigning Act*, a court

[14] For example, the provisions of the criminal code restriction abortion have been held by the Supreme Court of Canada to be of no force or effect because they violate the *Charter* (*Morgentaler* [1988] 1 SCR 30) yet they remain on the statute books (*Criminal Code*, R.S.C. 1985, c. C-46, s. 287) because although they are of no force or effect, they were nonetheless validly enacted (i.e. parliament followed the legal procedure of enactment). In contrast, if a court had determined that the enactments had failed to be properly enacted by parliament (i.e. parliament failed to follow the legal procedure of enactment, e.g. failing to get royal assent), then it would be expunged from the statute books.

could invoke the principle of implied repeal ("*Leges posteriores priores contrarias abrogant*") in order to uphold the conflicting provision of the *Broadcasting Act*. The *Broadcasting Act* also conflicts with the third Act. Though, if the *Free Press Act* was passed subsequently to the *Broadcasting Act*, a court would not have to invoke the principle of implied repeal and could instead easily invoke the principle of implied exception ("g*eneralia specialibus non derogant* ") in order to allow the *Broadcasting Act* to stand unaffected. Thus, despite two direct enactments conflicting with the *Broadcasting Act*, it could nonetheless stand.

At the same time, the conflicting provision of the *Broadcasting Act* forbidding political advertisements could be severed from the Act and nullified on the basis of a Constitutionally-entrenched protection (e.g. the *Charter*) for free expression. It could also be rendered inoperative by the *Free Press Act*, with a court refusing to find the provisions of the *Broadcasting Act* demonstrably justified. The *Broadcasting Act* could also be given no effect in the face of the subsequently passed *Campaigning Act*. In each case, the practical effect is the same, the prohibition on broadcasting political advertisements, despite remaining on the statute books, has no force of law.

In theory, a law that is declared to be unconstitutional is quite different than any other form of nullification because it is "invalid from the moment it is enacted:"[15]

> *An unconstitutional act is not a law; it confers no rights; it imposes no duties, it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.*[16]

[15] *Nova Scotia v Martin* [2003] 2 SCR 504 per Gonthier J (for the court) at ¶28; quoted in Hogg (2007), c.58.1, II:746.
[16] *Norton v Shelby County* (1886) 118 U.S. 425 per Field J at 442, quoted in Hogg (2007), c.58.1, II:745.

As such, whereas a law that is nullified in the face of a conflicting statute only has prospective effective, "a judicial decision that a law is unconstitutional is retroactive."[17] Although this theoretical distinction is emphasized by the Supreme Court of Canada,[18] in practice the difference is marginal. In Canada, stays of proceedings,[19] notice requirements in litigation,[20] tortious indemnity or "good-faith" defence for public officials,[21] *res judicata*,[22] the *de facto* officer doctrine,[23] and the (extremely vague) "rule of necessity"[24] are all applied or invoked by the courts to obviate the theoretically retroactive effects of declaration of unconstitutionality. Notably, in the United States, such devices to obviate retroactive effects are sometimes not even required as the United States Supreme Court does not feel bound by this distinction in theory either, and has been content to engage in explicitly "prospective overrulings."[25] Thus, the main functional effect which

[17] Hogg (2007), c.58.1, II:746.
[18] Hogg (2007), c.58.1, II:746-747.
[19] Where the Court gives force to an unconstitutional enactment, etc for a discrete period of time. Typically, this is done to allow the legislature to enact a statute, typically retroactively to the passage of the original unconstitutional statute, that provides for the same or similar provisions, but on a solidly constitutional basis.
[20] Curially respected laws which "preclude a court from considering the constitutional validity of a statute unless prior notice has been given to the Attorney General." (Hogg (2007), c.58.2, II:751.)
[21] Further, there is no reported Canadian case in which an official was held personally liable for acting under an unconstitutional statute. (Hogg (2007), c.58.3, II:752.)
[22] "A judicial decision is binding on the parties to the litigation, so that the same issue may not be re-litigated by the losing party." (Hogg (2007), c.58.5, II:755.)
[23] A doctrine which protects "the act of an officer who has apparent (de facto) authority to act, but lacks the legal (de jure) authority." (Hogg (2007), c.58.6, II:756.)
[24] A principle which justifies unconstitutional actions on the basis of preventing a sort of legal vacuum, typically justified on the basis of the need for the continuing "rule of law." The rule is extremely vague and I am unable to provide a concise definition. Please see *re Manitoba Language Rights* ([1985] 1 SCR 721) and *re Provincial Court Judges* [1997] 3 SCR 3.
[25] Hogg (2007), c.58.1, II:746.

differentiates "unconstitutionality" from "illegality" is, in practice, marginal or non-existent.

In functional terms, therefore, constitutional interpretation differs from statutory construction by the absence (or modification) of two important rules of statutory construction from constitutional interpretation: implied repeal ("*Leges posteriores priores contrarias abrogant*") and implied exception ("g*eneralia specialibus non derogant*").

With two conflicting statutory enactments, whatever enactment is subsequently enacted is deemed to impliedly repeal the earlier enactment. Whereas, with a conflict between a statutory enactment and a constitutional provision, the constitutional instrument is deemed to have been the most recent enactment. This is even true in the case of conflicting constitutional provisions, with subsequent constitutional instruments not being deemed to impliedly repeal (although they often explicitly repeal) earlier constitutional instruments.[26] Thus, for example, the equality rights guarantees of the *Charter*, enacted in 1982, have not been found as impliedly repealing the provisions and guarantees of the *Constitution Act* (e.g. in relation to denominational schools and the retirement of judges), enacted in 1867,[27] or even the *Act of Settlement*.[28]

With two conflicting statutory enactments, whenever one enactment is expressed generally and the other is expressed particularly the particular enactment will prevail over the general enactment (regardless of whichever was enacted first). Whereas with a conflict between a statutory enactment and a constitutional provision, the constitutional

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[26] *Reference Re Bill 30, an Act to amend the Education Act (Ontario)*, [1987] 1 SCR 1148 at 1197 and *New Brunswick Broadcasting Co. v Nova Scotia*, [1993] 1 SCR 319 at 373.
[27] Hogg (2007), c.55.14, II:655-660
[28] *O'Donohue v Canada*, 137 A.C.W.S. (3d) 1131, 2005 CanLII 6369 (ON CA) The reasoning of the court is given in *O'Donohue v Canada*, 124 A.C.W.S. (3d) 63, 2003 CanLII 41404 (ON SC)

provision prevails despite its typically general language. Examples of this are replete, but Sullivan gives the example of *Lalonde v Sun Life Compagnie d'assurance vie*[29] for conflicting statutes and Hogg's first post-Charter cited example is *Hunter v Southam*.[30]

Other than these two rules, the rules of constitutional interpretation tend not to significantly deviate from the rules of statutory construction. While entrenchment and a particular central document may have symbolic importance and affect the procedure of modification, in functional terms it is only the differing rules of interpretation towards implied repeal and implied exception that significantly mark the difference in the application of 'constitutional' and 'ordinary' legal instruments.

ENTRENCHMENT

One of the most common and most trenchant criticisms of the *Canadian Bill of Rights,* contemporaneous to its enactment and consistently since, was the failure to "entrench" it in the *British North America Act* and its blanket *non obstante* (or parliamentary derogation) provision. Many critics have gone so far as to attribute the *Canadian Bill's of Rights* failure to have resulted in powerful judicial review as stemming fundamentally from this lack of entrenchment. "Entrenchment," however, is not as straight forward a concept as other scholars examining bills of rights often assume. The

[29] [1992] 3 SCR 261, at 272-279. Sullivan (2008), p. 344. I would not have used this as my primary post-Charter Supreme Court of Canada precedent as at issue in this case is a conflict between a particular provisions (arts. 1169, 1171) of *Civil Code of Lower Canada* and the general provisions (ss. 1-4, 12) of the *Husbands and Parents Life Insurance Act,* RSQ 1964, c. 296. Arguably, different rules of statutory interpretation should be, and are, applied to the *Civil Code* which would encourage a interpretative approach similar to a constitutional instrument despite the typically very particular language of the code.

[30] Hogg (2007), 36.8(b), II:54, fn.125; citing *Hunter v Southam* at 156.

word largely has no specific legal meaning and is absent from most legal dictionaries.[31] The adjective "entrenched," in the Canadian constitutional context, is typically employed to refer to an enactment that is "capable of being altered solely through a constitutional amendment,"[32] or, more specifically, incorporated in the *Constitution* or *British North America Acts* with the further implication that such enactments provide for judicial review of ordinary legislation. However, the definition provided for by the *Oxford English Dictionary* is more expansive, with "entrenched" defined as "constitutional legislation that may not be repealed except under *more than usually stringent condition*."[33] This difference between the parochial Canadian definition and the broader *OED* definition is not inconsequential. The justification for demands for entrenchment of a bill of rights are typically (1) to protect its provisions from capricious amendment by raising the threshold for amendment above that of ordinary legislation and (2) to enable judicial review of ordinary legislation against a bill of rights. However, incorporation into the *Constitution Acts* does not result in "entrenchment" in the sense of requiring "more than usually stringent conditions" nor does it necessarily provide for the ability of courts to nullify contrary 'ordinary' legislation.

Although amendment to much of the *Constitution Acts* requires procedures more stringent than that of ordinary legislation (or that amendment of the *British North America Acts* required extra-Canadian legislation before 1982), not the entirety of the *Constitution Acts* require more stringent procedures for amendment than that of ordinary

[31] See, for example, *Ballentine's* (1969); *Black's* (2009); *Bouvier's* (1914); Hay (2007); *Words & Phrases* (1993).
[32] Daphne A. Dukelow, *The Dictionary of Canadian Law*, 3rd ed (Toronto: Thompson Carswell, 2004), p. 414.
[33] Emphasis mine. *OED* (1989) [2nd ed], 5:306.

legislation.[34] The drafters of the *Canadian Bill of Rights* believed that including it in the *British North America Act* would not provide for "more than usually stringent conditions" for amendment, but subject it to the ordinary legislative process of both the federal and provincial governments. Further, entrenchment in the constitution is no guarantee of judicial review.[35] Thus, when many Canadian constitutional scholars speak of "entrenchment" they are attempting to convey a meaning that will have the same substantive effects ("more than usually stringent conditions")as the general meaning of the term (and more, i.e. judicial review), but only provide for something much less (incorporation into the *British North America Act*).

As such, this section discusses the various ways in which a bill of rights can be "entrenched" (per the *OED* definition, not the "Canadian" definition) and how bills of rights can be "un-entrenched" or derogated from.

Processes of Entrenchment

There are three different processes that can occur in order to entrench a bill of rights, which I term "contractual," "manner and form," and "judicial invention."

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[34] Sections 44 and 45 of the *Constitution Act, 1982* (largely equivalent to ss. 91(1) and 91(2) of the *British North America Act* from 1949 to 1982) provide for some amendments through the ordinary legislative process of the federal and provincial legislatures (respectively). One of the most obvious examples of this is the existence of rather precisely enacted provisions for the Legislative Council of Quebec (*Constitution Act, 1867* (CA), ss. 72-79), but the lack of a Legislative Council of Quebec. No special procedure was undertaken to abolish the legislative council, simply the ordinary legislative process of the Quebec legislature (*Legislative Council Act*, SQ 1968, c.9).

[35] There are significant examples of constitutional bills of rights (most notably the French Third Republic) that were "entrenched," in the sense of being subject to different procedures for amendment, but for which no judicial review was provided for. As noted below, there is no explicit guarantee for judicial review in the Constitution of the United States. As well, it has been argued that certain provisions of the *Constitution Act*s are merely directory and thus are not even enforceable by the courts (See Hogg (2007), c.14.2(a), I:400.).

"contractual"

The first of these different processes is the most popularly well known and understood – the "contractual" procedure – which involves including a bill of rights in a supreme law that is immunized from the ordinary legislative procedure (typically in a single, supreme, codified instrument) and a constitutional provision for judicial review of ordinary legislation on the basis of the supreme law. I apply the term "contractual" as such forms of entrenchment typically exist in a system of a theoretical "social contract" between popular sovereignty and a "contracted" constitutional order. That is – in theoretical terms – the people as a whole have agreed to be governed by a particular constitutional order and that the terms of that "social contract" include an agreement that certain rights are protected from abridgement by the constituted government. Thus, changes to the contract cannot be undertaken by the ordinary legislative process, but require consent from the originating source of sovereignty. The quintessential example of a "contractually" entrenched bill of rights is the Constitution of the United States in which every provision of the Constitution is immune from alteration by the ordinary legislative process and instead requires supermajorities (two-thirds) of both houses of Congress and further ratification by three-quarters of US state legislatures. In the context of the United States "entrenchment" and "constitutional amendment" are synonymous terms, as the only procedure for entrenchment is inclusion in the Constitution and every provision of the constitution is entrenched.

"manner and form"

The second process is that which characterized the *Canadian Bill of Rights* – the "manner and form" procedure – which involves the provision of judicial review of

ordinary legislation on the basis of a statute that was itself enacted through the ordinary legislative process. The "manner and form" procedure of entrenchment can take on either a strong, medium, or weak version. In the weak version (which has recently been termed by Stephan Gardbaum as "new Commonwealth model of constitutionalism")[36] judicial review is provided for, but the instrument is only immunized from *implied* repeal or amendment, but can still be expressly repealed or amended by the ordinary legislative process.[37] The *Canadian Bill of Rights* employed this weak version (although stronger versions were proposed by E.A. Driedger).

In the medium version of "manner and form" entrenchment, the entrenched instrument is subject to a more stringent procedure for amendment, although the statute providing for that entrenchment is only subject to the ordinary legislative process. Thus, no new legislative procedure is necessarily required to amend or repeal the entrenched instrument (although a different procedure typically remains available as an alternate procedure), but the ordinary legislative procedure must be undertaken at least twice. The *Ontario Taxpayers Protection Act*[38] provides an example of this, where the Act prohibited any new tax without popular approval in a referendum, but the entrenching statute itself is still open to ordinary amendment – as was illustrated in 2004.[39] As such, the imposition of a new tax in Ontario in 2004 required two sequential bills, where only one would previously have been required.

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[36] Stephan Gardbaum, "Reassessing the new Commonwealth model of constitutionalism," *International Journal of Constitutional Law* vol 8, no. 2 (2010 April), pp. 167-206.
[37] Arguably, this "weak form" declaratory entrenchment is not entrenchment at all, but simply a distinct procedure for enabling judicial review.
[38] SO 1999, c 7.
[39] Hogg (2010), 12.3(b), p. 12-13.

In the strong version of "manner and form" entrenchment, the more stringent procedure is not only applied to the entrenched statute, but the entrenching statute applies the same (or some other more stringent procedure) to itself, making it self-entrenching. The *Constitution (Legislative Council) Amendment Act, 1929* as discussed above in the analysis of *Trethowan*, is an example of this self-entrenchment.

"judicial invention"

The third process, which I term "judicial invention," involves the judiciary engaging in judicial review of legislation without explicit mandate for such action. The most famous, and theoretically most justifiable, judicial invention of this sort of entrenchment is the United States Constitution and the Supreme Court's decision in *Marbury v Madison,*[40] where the US Supreme Court nullified a federal statute on the basis of its inconsistency with the U.S. constitution. It is often overlooked today that this was, contemporaneously, a somewhat radical decision, as it not only asserts the supremacy of the constitution, but, particularly, the Supreme Court's version of the constitution. A routine proposition today, but with little precedent in 1803, a point that Chief Justice Marshall made in his ruling: "The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States."[41] The radicalism of this proposition is illustrated by the fact that such judicial review only become routine in the United States *post-bellum*[42] (which raises the

[40] *Marbury v Madison*, (1803), 5 US 137 (USSC)
[41] *Marbury v Madison* at 175.
[42] The United States Supreme Court would only again reassert its power to strike down an Act of Congress in 1857 – ironically in a discussion of civil liberties – in *Dred Scott v Sandford*, 60 U.S. 393. However, it is equally important to note that the power of judicial review over state law, including over state courts of final appeal rulings, was relatively

little explored question of how prevalent the idea of judicial review of a federal constitution was in British North America at the time of Confederation).

The "judicial invention" process has also manifested itself for the entrenchment of civil liberties through the discovery of rights in the space between legislative jurisdictions in federal constitutions. Here, courts entrench certain rights in the constitution by finding them "implied" from provisions with no explicit connection to the right judicially entrenched. A more novel variation of this has recently been applied by the Supreme Court of Canada as discussed above in the analysis of *Beauregard*,[43] where certain provisions are found entrenched in previously non-operative preambulatory clauses.

Finally, one of the most recently discovered forms of judicial entrenchment is that expressed in *Heerspink*[44], where the Court simply declares a law to be "fundamental" and therefore immune from implied repeal and treated as functionally constitutional. However, this recent invention has arguably a much older lineage in the concept of "natural law," where, as discussed by Sir Edward Coke in *Dr. Bonham's Case (1610)* "that 'it appears in our books' that the common law would control, and adjudge void, an Act of Parliament contrary to common right and reason."[45] Obviously striking down a statute on the simple basis of its violation of "common right and reason" is a much bolder act than using an ordinary statute to control other legislation, but both conclusions were based on an appeal to non-positive law.

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quickly embraced by the United States Supreme Court in 1810 (*Fletcher v Peck*, (1810), 10 US 87) and 1816 (*Martin v Hunter's Lessee*, (1816), 14 US 304) respectively. See Gary L. Rose, *Shaping a Nation: Twenty-Five Supreme Court Cases That Changed the United States* (Palo Alto: Academica Press, 2010), p. 4.

[43] *Beauregard.*

[44] *Heerspink.*

[45] *Dr. Bonham's Case* at 118a.

In sum, the above analysis illustrates that functional entrenchment can take many forms and that formal inclusion in a formal codified supreme law provides no inherent guarantee of functional entrenchment.

"Un-entrenchment" and Derogation

As we just noted, rights can be entrenched in the Constitution, by legislatures, and by the courts. Equally, they can be similarly "un-entrenched," or derogated from, by those same vectors. One of the starkest examples of "un-entrenchment" was the eighteenth amendment to the Constitution of the United States, wholly outlawing the manufacture, sale and importation of intoxicating liquors for beverage purposes (i.e. "prohibition"). However, examples, of such outright limitations on rights by constitutional amendment are rare, which inspires the demands to entrench rights into a constitution so as to secure them from violation by the executive and legislature. However, derogation of rights, even those supposedly entrenched into a written supreme Constitution, can be wholly derogated from through various procedures by both legislatures and the judiciary.

Legislative derogation: non obstante clauses

Legislatures can "un-entrench" entrenched rights through *non obstante* clauses (commonly referred to in Canada as "notwithstanding" clauses) which allow for derogation from entrenched rights without formally repealing or amending the instrument which guarantees those rights. As noted, the *Canadian Bill of Rights* contains a blanket derogation or *non obstante* clause, which provides for legislative derogation from the *Canadian Bill of Rights* without formally amending or repealing it. The procedure for

doing so is no different than the passage of ordinary legislation, but it requires Parliament to "expressly declare" that it is doing so. Similarly, the *Charter* contains a *non obstante* clause which allows legislatures, through the ordinary legislative process, to derogate from its rights guarantees. However, this *non obstante* clause is severely more restrictive, applying to only certain rights guarantees in the *Charter* and requiring that any such derogation be re-enacted at least every five years (meaning that at least one general election must occur for such a rights derogation to be perpetuated). This sort of legislative derogation from entrenched rights is unusually among modern human rights instruments and it, arguably emerges out of the tradition of parliamentary sovereignty which made the drafters of that entrenched human rights instruments reticent to remove wholly limit parliamentary sovereignty over rights.[46]

Instead, many modern human rights instruments explicitly provide for derogations directly accompanying the guaranteed right. This is best exemplified by the *European Convention*[47] where most of the rights guaranteed by that instrument include a clause allowing (and often specifically enumerating) acceptable derogations as well as including a general derogation clause in times of emergency (only four of thirteen rights guarantees lack derogations clauses and only two of those, the prohibitions on torture and punishment without law, are exempted from the general derogation clause). Even though both the *Charter* and the *Canadian Bill of Rights* contain general legislative derogation clauses, those also contain some particular derogation clauses.

Judicial derogation: "reasonably justifiable"

[46] See Gardbaum (2010).
[47] *European Convention on Human Rights and Fundamental Freedoms.*

In practice, in a rights regime of entrenched rights, most rights derogation do not come from explicit constitutional or legislative derogations, but from the judiciary making space for derogations by ordinary legislation (or executive acts). In some cases, such as under section 1 of the *Charter*, judicial derogation is explicitly provided for by the entrenched instrument. In such circumstances, the courts may create a set of criteria which determines the boundaries of acceptable derogations (the *Oakes* test[48] in the case of the Supreme Court of Canada and the *Charter*). However, some instruments, such as the *Canadian Bill of Rights* or the United States' *Bill of Rights* contain no such formal provisions for derogations, and instead derogations are invented by the courts. Under the United States *Bill of Rights*, this has been sometimes been termed "the Constitution is not a suicide pact,"[49] allowing for derogations from the rather absolutist rights guarantees under the Constitution. In some cases, these derogations can be quite severe and persistent, not limited to periods of national emergency.

Currently, the United States is often noted as having one of the most robust regimes for the protection for free expression in the world. However, this robust regime only dates to the late 1960s and early 1970s, when the United States Supreme Court reversed its earlier limitations on free expression in a series of cases in rapid succession: *Tinker v School District*,[50] *Brandenburg v Ohio*,[51] *Cohen v California*,[52] and *New York*

[48] *R v Oakes*, [1986] 1 SCR103.
[49] *Kennedy v Mendoza-Martinez*, (1963), 372 US 144 per Goldberg J at 160: "while the Constitution protects against invasions of individual rights, it is not a suicide pact."
[50] *Tinker v Des Moines Independent Community School District*, (1969), 393 US 503. The Court held that the First Amendment, as applied through the Fourteenth, did not permit a public school to punish a student for wearing a black armband as an anti-war protest, absent any evidence that the rule was necessary to avoid substantial interference with school discipline or the rights of others.

Times v United States.[53] However, the last four decades contrast starkly with the era from the First World War until the McCarthyism of the early 1950s, where the United States Supreme Court severely limited the rights to free expression, even in the relatively calm 1920s, in *Schenck v United States*,[54] *Abrams v United States*,[55] *Whitney v California*,[56] *Chaplinsky v New Hampshire*,[57] *ACA v Douds*,[58] and *Dennis v United*

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[51] *Brandenburg v Ohio*, 395 U.S. 444 (1969). The Court held that Ohio's criminal syndicalism statute violated the First Amendment, as applied to the state through the Fourteenth, because it broadly prohibited the mere advocacy of violence rather than the constitutionally unprotected incitement to imminent lawless action.

[52] *Cohen v California*, 403 U.S. 15 (1971). The Court held that the First Amendment, as applied through the Fourteenth, prohibits states from making the public display of a single four-letter expletive a criminal offense, without a more specific and compelling reason than a general tendency to disturb the peace.

[53] *New York Times v United States*, 403 U.S. 713 (1971). The Court held that in order to exercise prior restraint, the Government must show sufficient evidence that the publication would cause a "grave and irreparable" danger.

[54] *Schenck v United States*, 249 U.S. 47 (1919). The Court held that a defendant's criticism of the draft was not protected by the First Amendment, because it created a clear and present danger to the enlistment and recruiting practices of the U.S. armed forces during a state of war.

[55] *Abrams v United States*, 250 U.S. 616 (1919). The Court held that a d efendants' criticism of U.S. involvement in First World War was not protected by the First Amendment, because they advocated a strike in munitions production and the violent overthrow of the government.

[56] *Whitney v California*, 274 U.S. 357 (1927). The Court held that a defendant's conviction under California's criminal syndicalism statute for membership in the Communist Labor Party did not violate her free speech rights as protected under the Fourteenth Amendment, because states may constitutionally prohibit speech tending to incite to crime, disturb the public peace, or threaten the overthrow of government by unlawful means.

[57] *Chaplinsky v New Hampshire*, 315 U.S. 568 (1942). The Court held that a criminal conviction for causing a breach of the peace through the use of "fighting words" does not violate the free speech guarantee of the First Amendment.

[58] *American Communications Association v Douds*, 339 U.S. 382 (1950). The Court held that the *Taft–Hartley Act*'s anti-communist oath does not violate the First Amendment.

States.[59] With the Supreme Court only tempering its restrictions in the late 1950s with *Yates v United States*[60] and *Roth v United States*.[61]

The Supreme Court of Canada, too, would invent a similar principle to justify derogations from the *Canadian Bill of Rights* which would eventually be termed "a valid federal objective." The Supreme Court of Canada of the 1970s would frequently employ this phrase so as to narrow the rights guaranteed under the *Canadian Bill of Rights*.[62] Section 1 of the *Charter* was, in many ways, included so as to limit judicial derogations from *Charter* rights as without any specific judicial derogation clause providing instructions, the Supreme Court of Canada had invented an extremely broad one.

Historical scholarship addressing human rights in Canada has often failed to carefully reflect on the meaning of the term "entrenchment" and how, in functional terms, rights have become "entrenched" in Canada's rights regime. Often simplistic understandings of how rights are functionally protected have led scholars to fail to understand the complexities which troubled attempts to guarantee rights.

ORIGINALISM

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[59] *Dennis v United States*, 341 U.S. 494 (1951). The Court held that a defendants' convictions for conspiring to overthrow the U.S. government by force through their participation in the Communist Party were not in violation of the First Amendment

[60] *Yates v United States*, 354 U.S. 298 (1957). The Court held that the First Amendment protected radical and reactionary speech, unless it posed a "clear and present danger.

[61] *Roth v United States*, 354 U.S. 476 (1957). Although the Court held that obscenity is not protected by the First Amendment, it more strictly defines what is considered "obscene."

[62] The phrase "valid federal objective" was first employed in *R v Burnshine*, [1975] 1 SCR 693 per Martland J at 707 and 708. It was later invoked in *Canard v Canada (Attorney General*), [1976] 1 SCR 170; *Prata v Canada (Minister of Manpower and Immigration),* [1976] 1 SCR 376*; Bliss v Canada (Attorney General),* [1979] 1 SCR 183; *Canada v Solosky,* [1980] 1 SCR 821; *R v MacKay,* [1980] 2 SCR 370; *Canada (Commission des droits de la personne) v Canada (Attorney General),* [1982] 1 SCR 215.

When approaching a constitutional instrument such as the *Constitution of the United States* or the *Constitution Act, 1982* judges often choose between two broad interpretive approaches: "originalism" and "purposivism" (but which have been expressed by a wide variety of terms).[63] The contrast between these interpretative approaches is considerably more pronounced in the United States and typically these two approaches are termed "strict constructionism" and "liberal constructionism." Whereas, in the United States this contest is perennial, in Canada divisions over such interpretative principles have been more punctuated, with a relatively rapid shift by the whole of the Supreme Court of Canada away from one interpretative principle to the other.

Briefly, originalism holds that constitutional instruments should be interpreted to reflect the meaning of the instrument as understood at the time of enactment. The basis of such an interpretative principle being that the constitutional instrument embodies a certain bargain that should be superior to ordinary law and that bargain should only be altered through the recognized process of constitutional change and not by the judiciary. In contrast, a purposive approach holds that constitutional instruments should be interpreted to reflect the meaning of its provision as contemporarily understood. The basis of such an interpretative principle being that constitutional instruments embody certain superior purposes and those purposes need to be constantly re-adapted to new contexts.

[63] Brumbaugh (1917), p. 129 employs the terms "strict constructionism" and "liberal constructionism" in the American context. When the "culture wars" in the United States became more became more politicised and acrimonious in the United States, Ely (1980), p. 1, adopted the terms "noninterpretivism" and "interpretivism." Hogg (2007), c.60.1(e), II:803-805, uses the terms "originalism" and "progressive interpretation."

The contrast between an "originalist" and a "purposive" approach in Canadian history is clear in the different rulings by the Supreme Court of Canada and the Privy Council in *Edwards*.[64] In that case, the Supreme Court of Canada ruled that it was clear that the term "qualified persons" excluded women in 1867:

> *Passed in the year 1867, the various provisions of the B.N.A. Act* [...] *bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were first enacted. If the phrase "qualified persons" in s. 24 includes women to-day, it has so included them since 1867.*[65]

As such, the Supreme Court of Canada surveyed the status of the law in 1867 and concluded that according to the common law of England and the laws of the federating colonies, women were not considered qualified persons for public office and therefore "qualified persons" could not include women.[66]

In contrast, the Privy Council took what we would today term a "purposive approach." It noted that "the exclusion of women from all public offices is a relic of days more barbarous than ours"[67] and that

> *their Lordships do not think it right to apply rigidly to Canada of today the decisions and the reasons therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development.*[68]

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[64] *Edwards*
[65] *re "Persons"* per Anglin J at 282
[66] Notably, Duff J, the father of the "implied bill of rights," although coming to the same outcome as the majority of the Supreme Court of Canada, did so for different reasons. His reasoning was largely adopted by the Privy Council (at ¶¶17, 40, 63, 72) as part of their decision. Duff differed from the Privy Council in that as a legislative body, the Senate had particular control over its own membership and that any such changes should be determined by them.
[67] *Edwards* at 128(¶9).
[68] *Edwards* at 134-135(¶39)

Thus, on the exact same issue, two different senior appellate courts came to opposite conclusions because of different principles of constitutional interpretation. As noted, *Edwards*, went almost fifty years with almost no notice by the Supreme Court of Canada (and Canadian courts, generally) only to come to a frequently cited authority beginning in 1979.[69]

In discussing the interpretation of the *Constitution Act,* 1867, Peter Hogg argues that "originalism has never enjoyed significant support in Canada, either in the courts or the academy."[70] However, this contention is credulous and his evidence is quite weak. Although purposive approach has always been applied the *Charter*, Hogg presents no authority for a rejection of originalism by the Supreme Court of Canada between 1929 (which itself is dubious) and the late 1970s with *Zelensky*[71] and *Blaikie;*[72] one would think that had "originalism has never enjoyed significant support" in Canada from the 1930s through the 1970s, there would some authority for that.[73]

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[69] *Blaikie*, [1979] 2 SCR 1016
[70] Hogg (2007), c.15.9(f), I:475.
[71] *R v Zelensky* [1978] 2 SCR 940 at 951
[72] *Blaikie v Quebec (Attorney General)*, [1979] 2 SCR 1016
[73] It is only in the fifth (2007) edition of his opus that Hogg has any solid judicial authorities for "progressive interpretation" of non-charter constitutional provisions since the adoption of the *Charter* with *Tesling*, [2004] 3 SCR 432, the *Same Sex Marriage Reference*, [2004] 3 SCR 698 and *Employment Insurance Reference*, [2005] 2 SCR 669, indicating that even with the embrace of a clearly purposive approach to *Charter* interpretation, that the Court may have been reticent in applying that interpretative principle to non-human rights issues. Hogg cites four cases in support of the contention that "originalism has never enjoyed significant support in Canada:" *Toronto v Bell Telephone Co*, [1905] AC 52, *PATA v Canada*, [1931] AC 310, *Alberta v Canada*, [1947] AC 503, and *Edwards*, [1930] AC 124. It is clear that the Privy Council had rejected originalism for the *British North America Act* in the 1930s and 1940s, but there is little evidence that the Supreme Court of Canada ever seriously rejected this interpretative principle before the late 1970s. In *Toronto v Bell Telephone,* which decided that "telephone" came under the rubric of "telegraph," is in accord with even the most conservative interpretations of *contemporanea expositio*; in *Edwards*, the Privy Council

Explicit discussions by the Supreme Court of Canada of originalism in relation to the *British North America Act* were seemingly absent in the years between the enactment of the *Canadian Bill of Rights* and the late 1970s and thus it is hard to illustrate what sort of interpretative approach the Supreme Court embraced during that period. However, a proxy for it can be found in the Court's approach to legislative history.[74] In the 1930s the Privy Council, coincident with its purposive approach to the *British North America Act*, embraced the use of legislative history.[75] As well, beginning with the *Inflation Reference*

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overruled the Supreme Court of Canada; and *Alberta v Canada* skipped the Supreme Court of Canada entirely. Thus, none of these cases provide any support for a rejection of originalism by the Supreme Court of Canada. Thus, it is only in *Reference re: Combines Investigation Act (Canada),* [1929] SCR 409 (which was appealed to the Privy Council as *PATA*) amongst Hogg's cited authorities that a rejection of originalism by the Supreme Court of Canada has some merit. However, at issue in the reference was whether the scope of "the Criminal Law" should be confined to what was criminal in 1867 and the court's reasoning was not so much a rejection of originalism as it was an interpretation that the original meaning of "the Criminal Law" was the power to criminalize Acts and not what was specifically criminalized in 1867. This is hardly a rejection of originalism and is consistent with the definition of the Law of England at the time of Confederation. Further the Supreme Court of Canada's decision was handed down between its ruling in the *Persons Case*, but before the successful appeal of that case to the Privy Council. Therefore, it seems unlikely that the Court had a *sui generis* radical shift in its commitment to originalism expressed in the *Person's Case* and it cannot be portrayed as following the Privy Council's reasoning in *Edwards*.

[74] Perhaps counter-intuitively, it is originalists who tend to reject recourse to legislative history and purposivist who embrace it. Originalists seek to apply the language of the instrument as it was understood at the time of passing, whereas purposivists more typically seeks to apply the general principle enunciated in the instrument adapted to contemporary circumstances. Thus, originalists tend to seek for the meaning of contemporary terms by examining contemporaneous case law and other contemporaneous statutes; while legislative history is rejected as an authoritative source as the meanings of any particular Member of Parliament or (worse) extra-parliamentary reports are not deemed to be effective insight into the collective meaning associated with the enactment. In contrast legislative history is accepted by purposivists in order to determine the general intent of parliament during the era so that terms contained within the bill can be translated into contemporary terms even though such liaisons may not be evident from the text alone or contemporaneous case law.

[75] *re Combines Investigation Act* at 317; *re Criminal Code* at 376; *Ladore v Bennett* at 488. See Hogg (2007), c.60.1(b), II:799.

(1975)[76] the Supreme Court of Canada began to embrace legislative history and has consistently maintained that approach.[77] However, in the years between the end of Privy Council appeals and the *Inflation Reference*, Canadian scholarly opinion[78] and the Supreme Court of Canada[79] rejected the trend by the Privy Council of the 1930s to use legislative history as part of judicial analysis. Although such a proxy is not definitive it does give a clear indication in the absence of other evidence that the Supreme Court of Canada retained a strongly originalist approach to both statutory and constitutional interpretation.

Therefore, the attribution by scholars and the Supreme Court of Canada since the mid-1980s that the "frozen concepts" interpretive approach adopted by the Supreme Court of Canada in the 1960s and 1970s towards the *Canadian Bill of Rights* could be partially explained by its statutory, as opposed to "constitutional," status appears unjustifiable. Instead, the Supreme Court of Canada had generally embraced an originalist approach to constitutional interpretation during that era and even had the *Canadian Bill of Rights* taken a different form there is no evidence that the Supreme Court of Canada would not have equally embraced a "frozen concepts" approach to any constitutional entrenched bill of rights.[80]

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[76] *re Inflation* at 438-439, 471-472.
[77] *Re Residential Tenancies Act* at 721-723; *re Export Tax* at 1048; *Schneider* at 131; *re Upper Churchill* at 315-319; *GM v City National* at 679-681, 686-688; *Morgentaler (1993)* at 485; *RJR-MacDonald* at ¶¶30, 35-37; *re Firearms Act* [2000] 1 SCR 783 at ¶20; *Siemens v Manitoba* at ¶20. See Hogg (2007), c.60.1(b), II:799.
[78] D.G. Kilgour (1952), "The Rule against the Use of Legislative History," *Canadian Bar Review* 30:769; J.A. Corry (1954), "The Use of Legislative History in the Interpretation of Statutes," *Canadian Bar Review* 32:624. See Hogg (2007), c.60.1(b), II:799.
[79] *Texada Mines* at 720; *Reader's Digest* at 782, 791. See Hogg (2007), c.60.1(b), II:799.
[80] While not touching on the issue of originalism, after the failure of the Victoria Charter, Laskin was explicit that he would have made the same rulings whether the bill of rights

DECLARATORY ACTS

In order to draw a distinction between the interpretation of terms common to the *Canadian Bill of Rights* and the *Charter*, the courts in *Big M Drug Mart*[81] (and many other cases in the 1980s) emphasized that the *Canadian Bill of Rights* was "declaratory" whereas "the language of the Charter is imperative."[82] That difference defined as the *Charter*, unlike the *Canadian Bill of Rights*, being "not merely a declaration of existing law or a tool for use in statutory construction [but], by s. 24, the judiciary is charged with the task of devising appropriate remedies for infringement." [83] Thus, the term "declaratory" was being employed as if its use provided only for a canon of

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was a statute or constitutionally-entrenched. This was first expressed in *R v Hogan*, [1975] 2 SCR 574 at 597-598:

> *The Canadian Bill of Rights is a half-way house between a purely common law regime and a constitutional one; it may aptly be described as a quasi-constitutional instrument. It does not embody any sanctions for the enforcement of its terms, but it must be the function of the Courts to provide them in the light of the judicial view of the impact of that enactment. The Drybones case has established what the impact is, and I have no reason to depart from the position there taken. In the light of that position, it is to me entirely consistent, and appropriate, that the prosecution in the present case should not be permitted to invoke the special evidentiary provisions of s. 237 of the Criminal Code when they have been resorted to after denial of access to counsel in violation of s. 2(c)(ii) of the Canadian Bill of Rights. There being no doubt as to such denial and violation, the Courts must apply a sanction.*

Laskin was then even more clear in *R v Morgentaler*, [1976] 1 SCR 616 at 632:

> *There is as much a temptation here [in using the Canadian Bill of Rights] as there is on the question of ultra vires to consider the wisdom of the legislation, and I think it is our duty to resist it in the former connection as in the latter.*

[81] [1984] 1 WWR 625 (AB CA); [1985] 1 SCR 295.
[82] *Big M Drug Mart* [1985] 1 SCR 295 per Dickson J at 343.
[83] *Big M Drug Mart* [1984] 1 WWR 625 *per* Laycraft JA at 646-647; cited approvingly in [1985] 1 SCR 295 per Dickson J at 308

construction.[84] This interpretation of the term is consistent with the language used by international human rights instruments referred to in the judgment[85] such as the *Universal* ***Declaration*** *of Human Rights*[86] which was simply a statement of principles in contrast to the legally binding *International* ***Covenant*** *on Civil and Political Rights*.[87] Recent scholars of the *Canadian Bill of Rights* such as Robert Belliveau,[88] Christopher MacLennan,[89] and Ross Lambertson,[90] also employ the term "declaratory" to mean an instrument that would serve either as a statement of principles or no more than a canon of construction. Belliveau makes particular use of this, emphasizing that use of the term "declaratory" by the Department of Justice referred to an instrument "declaring broad principles" and not "enacting substantive law"[91] as part of his conclusion that the *Canadian Bill of Rights* was only intended to be a canon of construction because its progenitors believed that "it was not the judiciary's role to interfere with the law making authority of Parliament."[92] However, this is a proleptic interpretation of the term "declaratory" assuming that its meaning when used in the term of human rights

[84] N.B. In *Big M Drug Mart*, the Alberta Court of Appeal explicitly took the position that the term "declaratory" meant that the *Canadian Bill of Rights* should be interpreted as only having the status as a canon of construction and that the definition of those rights should be interpreted as what they were when the statute was enacted. The Supreme Court of Canada, however, was more opaque; it emphasized that the "declaratory" nature of the *Canadian Bill of Rights* meant that it guaranteed the meaning of its protected rights as understood at the time of enactment, but it never explicitly accepted or rejected the Alberta Court of Appeal's reasoning that the *Canadian Bill of Rights* should only be interpreted as a canon of construction.
[85] *Big M Drug Mart* at 309
[86] GA res 217A (III), UN Doc A/810 at 71 (1948)
[87] GA res 2200 A, 21 UN GAOR, Supp No 16, UN Doc A-6316 (1966)
[88] Belliveau (1992), p. 99.
[89] MacLennan (2003), p. 32.
[90] Lambertson (2005), p. 327.
[91] DOJ 180667, "Memorandum for the File," 17 December 1957; document cited by Belliveau (1998), p. 105.
[92] Belliveau (1992), p. 116

instruments in the contemporary era was the same when employed by the drafters of the *Canadian Bill of Rights*.

Declaratory Statute

The interpretation of "declaratory statute" as providing for nothing more than a canon of construction could be viewed as consistent with current legal definitions. For example, the Yogis's 2009 *Canadian Law Dictionary* includes a definition for "declaratory statute" as

> *One that merely declares the existing law without proposing any additions or changes, for the purpose of resolving conflicts or doubts concerning a particular point of the common law or a meaning of a statute.*[93]

This definition can be used as justification to construe a "declaratory statute" as being "merely" a canon of construction if one emphasizes the "without proposing any additions or changes" and the "resolving conflicts or doubts concerning [...] a meaning of a statute" aspects of this definition. However, the existence of a genus of "declaratory statutes" where a legislature "declares the existing law without proposing any additions or changes" should sound incongruent to current legal scholars and practitioners accustomed to the principle that legislatures only use statutes to make "additions or changes" to the law and it is the judiciary's prerogative to "resolv[e] conflicts or doubts concerning a particular point of the common law or a meaning of a statute."

Instead, the manner in which "declaratory" was used in *Big M* and understood by other recent scholars of the *Canadian Bill of Rights* describes what is more typically

[93] John Yogis, *Canadian Law Dictionary*, 6th ed. (Hauppauge, NY: Barron's Educational Series, 2009), p. 75.

referred to as a "directory" or "interpreting" statute. Note the contrasting definitions from *Black's Law Dictionary:*[94]

> ***directory statute:*** *A law that indicates only what should be done, with no provision for enforcement.*
>
> ***declaratory statute****: A law enacted to clarify prior law by reconciling conflicting judicial decisions or by explaining the meaning of a prior statute.*

Although the Supreme Court of Canada muddles this distinction in *Big M* and other cases where the precedential value of the *Canadian Bill of Rights* in relation to the *Charter* is being questioned, it does not always do so. For example, in the contemporaneous case *Quebec v Healey*,[95] the court made a clear distinction between an "interpreting" statute and a "declaratory" statute, with the former only providing an interpretive guide to the courts while the latter sets aside a rule of interpretation and imposes a new interpretation.

This interpretation of the term "declaratory" ultimately derives from Blackstone's *Commentaries.*[96] Blackstone posits that there are four types of enactments possible in statutes:

> *one, declaratory ; whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down: another, directory ; whereby the subject is instructed and enjoined to observe those rights and to abstain from the commission of those wrongs: a third, remedial ; whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added a fourth, usually termed the sanction, or vindicatory branch of the law ; whereby it is signified what*

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[94] Bryan A Garner (ed), "Statute," *Black's Law Dictionary* (St-Paul MN: West, 2009), pp. 1542-1544.
[95] *Quebec (Attorney General) v Healey*, [1987] 1 SCR 158
[96] William Blackstone, *Commentaries on the Laws of England: Book the First* (Oxford: Clarendon Press, 1765).

> *evil or penalty shall be incurred by such as commit any public wrongs, and transgress of neglect their duty.*[97]

However, when it comes to the "principal" rules of statutory construction, Blackstone identifies only two different types of statutes, "declaratory" and "remedial."[98] He then outlines ten principal rules of statutory construction,[99] but which are only applicable to remedial statutes.[100] As such, declaratory statutes are not necessarily subject to the same rules of construction as remedial statues such as "strict construction"[101] and "*leges posteriores priores contrarias abrogant*."[102]

This understanding of the term "declaratory" was much more prevalent during the era in which the *Canadian Bill of Rights* was originally formulated and enacted. Witness Louis-Philippe Pigeon's description in 1965. At that time, Pigeon was a Laval Law Professor and advisor to the Lesage government and gave a series of lectures to lawyers working for the government of Quebec on drafting and interpretation legislation.[103] Pigeon briefly discusses the difference between "declaratory" and "interpretative" statutes,[104] noting:[105]

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[97] Blackstone, I:53-54.
[98] Blackstone, I:86
[99] Blackstone, I:87-91
[100] Blackstone, I:86-87
[101] Blackstone, I:88
[102] Blackstone, I:89
[103] Pigeon (1965). The lectures were a response to the lack of legislative drafting education in Canada and the lack of any Canadian history of literature on legislative drafting (with the first Canadian work of any substance, Dreidger's *The Composition of Legislation*, only having been published in 1957). Pigeon's lectures were recorded and edited by the Quebec *Bibliothèque de la Législature*, with their publication marking the first French-Canadian work of any substance on legislative drafting and interpretation.
[104] Pigeon (1965), pp. 49-51.
[105] He also goes on to note that the "*exception à l'efficacité de la législation déclaratoire*" is that it must apply within the jurisdiction of the legislature and cannot declare the law of the federal parliament or vice versa. Pigeon (1965), p. 50.

> *By reason of the absolute authority of legislation, the courts must comply with every declaration of the Legislature, once it is sufficiently explicit. [...] if he [the legislator] expresses his wishes sufficiently clearly, the courts have no choice but to comply: R. Ex rel. Tolfree v Clark, [1943] 3 D.L.R. 684.*[106]

He contrasts this with "interpretive" enactments

> *An interpretative provision is not a true interpretation because, according to the principle of separation of powers, the courts interpret the laws and the Legislature makes them. So when the Legislature interprets a statute that it has itself promulgated, it is not really interpreting, but legislating. [...] A rule of interpretation does not receive absolute effect; it is valid as long as it is consistent with the text. [...] A rule of interpretation cannot set aside a formal text.*[107]

Pigeon then singles out the *Canadian Bill of Rights,* claiming it was not a declaratory statute, but instead "is strictly interpretative."[108] This varied from his argument in 1959 where he held that the *Canadian Bill of Right*'s inability to enable judicial review was the result of its form as a simple statute of Parliament, but, as we have noticed, his main concern in that article was not the question of the effectiveness of the *Canadian Bill of Rights* in guaranteeing civil liberties, but his concern over the distribution of powers. His peculiar discussion of the *Canadian Bill of Rights* in *Rédaction et interprétation des lois* (being the only statute he feels necessary to clarify that it is *not* declaratory and providing no examples of other statutes that are either declaratory or interpretative) seemingly emerges at this point because the obvious interpretation of his definition of declaratory and interpretative statutes would be to conclude that the *Canadian Bill of Rights* was the latter. Thus Pigeon is keen to

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[106] Pigeon (1965), pp. 49-50 : « *Le caractère absolue de l'autorité législative fait que les tribunaux sont tenus de se conformer à la déclaration de la Législature dès qu'elle est suffisamment explicite. [...] s'il [le législateur] exprime sa volonté de façon suffisamment claire les tribunaux doivent s'incliner, Tolfree c. Clark,(1943, 3 D.L.R., 684).* »
[107] Pigeon (1965), pp. 50-51.
[108] Pigeon (1965), p. 51: « *n'est qu'interprétatif*. »

emphasize that the *Canadian Bill of Rights* is "strictly interpretative," although he does so without ever quoting any text from the *Canadian Bill of Rights* indicating that it is "strictly interpretative" and not declaratory, despite giving examples of language used in other statutes (although without naming them) which provide for only an interpretive statute (and that same language is absent from the *Canadian Bill of Rights*). Pigeon concludes by invoking *Robertson*[109] as authority for construction of the *Canadian Bill of Rights* as a "strictly interpretative" instrument, but, as we noticed above in Bora Laskin's analysis of the *Robertson*, this is a misportrayal of the Court's reasoning in *Robertson*. For Pigeon, had the *Canadian Bill of Rights* been a "declaratory" statute, it would have had the effect of enabling judicial review, as "the courts must comply with every declaration of the Legislature."[110] However, he seemingly feared the role that such a statute would impose upon the courts and thus sought to portray it as purely interpretive despite the fact that his own analysis of statutory drafting would indicate that it was "declaratory" and therefore enabling judicial review.

As examined in greater detail later in this dissertation, the *Canadian Bill of Rights*, was a peculiar type of declaratory statute as it did not simple "recognize[111] and declare"[112] the rights so as to impose a canon of construction on "every law of Canada" both subsequently and retrospectively, but it was also declared that no "law of Canada" could be "applied" to operate in violation of the *Canadian Bill of Rights* unless it too declared that it would do so. Although a rarity, the *Canadian Bill of Rights* was not

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[109] *Robertson*
[110] Pigeon (1965), p. 49: « *les tribunaux sont tenus de se conformer à la déclaration de la Législature dès qu'elle est suffisamment explicite.* »
[111] see *British Pacific Trust Co v Ballie* (1914), 7 WWR 17 per Macdonald J at 21: "The word 'recognize' in the statute is imperative and is equivalent to 'give effect to.'"
[112] *Canadian Bill of Rights*, s.2.

wholly innovative in this approach, but represents a particular species of declaratory statutes.

In sum, there has been a tendency to interpret the term "declare" and its cognates in both the statute itself as well as the internal discussions in the Department of Justice as indicative of an intent to produce an instrument that only indicates what the law should be and did not provide for its enforcement. However, this is simply to assume that terms typical to the then-nascent field of international human rights had come to replace the long-standing meaning that such terms had in domestic Canadian law and that understandings of constitutional law contemporaneous to the enactment of the *Canadian Bill of Rights* were static and binary between Diceyan absolutism and the "newer constitutional law." Instead, the meaning associated with "declaratory," as the legislature acting in its judicial capacity, was well understood in the era amongst legislative draughtsmen and its uses by them should not be proleptically interpreted.

The British North America Acts

The general lack of familiarity with the concept of declaratory statutes is surprising given that most of the early statutes enacted by the United Kingdom Parliament that are listed in the schedule to the *Constitution Act, 1982* are purely declaratory and made no alteration to the text of the *British North America Act, 1867*, but simply clarified its terms. That is to say, instead of pursuing certain constitutional controversies through the courts, the Dominion government sought to have Imperial Parliament exercise its judicial functions avoiding the period of uncertainty during the litigation process (and, of course, any unfavourable rulings).

These declaratory statutes include the *British North America Act, 1871*[113] and the *British North America Act, 1886*[114] which clarified the Dominion parliament's vague powers under s. 146 of the *British North America Act, 1867*; the *Parliament of Canada Act, 1875*[115] clarified the Dominion parliament's powers under section 18; the *Canadian Speaker (Appointment of Deputy) Act, 1895*[116] clarified the Dominion parliament's powers under section 91; and the *Canada (Ontario Boundary) Act, 1889*[117] definitively clarified Ontario's boundaries. Excepting the *Parliament of Canada Act, 1875*, none of these statutes altered the text of the *British North America Act, 1867* and even *Parliament of Canada Act, 1875* confirmed the validity of Dominion legislation under the original wording of s. 18, while changing the text of so to remove any potential future ambiguity.

That the Dominion government sought to make use of the judicial functions of the Imperial Parliament in the early years after Confederation should hardly be surprising. Prior to the *Supreme Court Act, 1875*[118] there was no general appeal court in Canada and prior to the *Appellate Jurisdiction Act 1876*[119] the Judicial Committee of the Privy Council was lacking in resources and professionalization (e.g. those without legal training sat as judges) and, resultantly, litigation on such matter could have easily stalled in provincial courts. The practice of requesting declaratory statutes ceased in the twentieth century as the issue dealt with in these early declaratory statutes are of the sort that have largely been dealt with by the courts in the twentieth century.

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[113] 34 & 35 Victoria, c.28 (UK)
[114] 49 & 50 Victoria, c. 35 (UK)
[115] 38 & 39 Victoria, c. 38 (UK)
[116] 59 Victoria, session 2, c. 3 (UK)
[117] 52 & 53 Victoria, c. 28 (UK)
[118] *Supreme and Exchequer Court Act*, SC 1875, c.11
[119] 39 & 40 Vic., c. 59 (UK)

The clearest example that there was a shift in preference for seeking judicial determination from the courts instead of by declaratory statutes of the Imperial Parliament is with the *Canada (Ontario Boundary) Act, 1889.* That statute simply confirmed a ruling of the Judicial Committee of the Privy Council in the *Ontario Boundary Case*[120] as the Privy Council recommended that a declaratory statute be enacted. The Privy Council made such a recommendation because it purposely left an ambiguity in its decision. Its decision had determined the boundaries of Ontario according to pre-Confederation instruments. While that determination conflicted with the boundaries of Manitoba defined by an Act of the Dominion Parliament,[121] the Privy Council specifically declined to determine whether Canadian statutes (both federal and provincial) had subsequently altered the boundaries of Ontario or were invalid. It is probable that the Privy Council declined to rule on this so as to avoid a precedent that could affect the powers of the Dominion government under ss. 2-4 of the *British North America Act, 1871* (which in turn, as noted, was a clarification of its powers under ss. 91 and 146 of the *British North America Act, 1867*).

The Colonial Laws Validity Act

Probably the most notable declaratory Act in Canadian history is the *Colonial Laws Validity Act.*[122] This 1865 Act of the Imperial Parliament did not seek to alter the

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[120] Unreported decision of 22 July 1884; an Imperial Order-in-Council embodying the decision was promulgated on 11 August 1884 and is available as Appendix C to *The Proceedings before the Judicial Committee of Her Majesty's Imperial Privy Council on the special case respecting the westerly boundary of Ontario* (Toronto: Warwick & Sons, 1889), pp. 416-418.

[121] *An Act to provide for the extension of the boundaries of the Province of Manitoba* (1881) 44 Victoria, c. 14 (Can.)

[122] *Colonial Laws Validity Act 1865*, 28 & 29 Victoria, c. 63.

established constitutional order, but instead confirmed the ultimate sovereignty of the Imperial Parliament over all of the Queen's dominions (a principle never seriously questioned since the American Revolution) and confirmed a principle of statutory interpretation that had been consistently observed since the beginning of England's colonial empire: that colonies with representative legislatures had full power to enact legislation that would provide for the law of the colony that would prevail over any repugnancies to the "Law of England" (including the "full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature"),[123] except so far as laws of the Imperial Parliament by "express Words or necessary Intendment"[124] applied to them. Although this statute was to become frequently cited to both sustain and strike down colonial legislation, it expressed nothing more than what had long been conventional practice.

Despite the central role of this instrument in British colonial history, the story of its origins remains largely obscure, but can be summarized as the result of one particular judge in South Australia – Justice Boothby[125] – who, contrary to advice from the Law Officers of the Crown,[126] continued to strike down local South Australian legislation as repugnant to the law of England, despite the fact that these English laws made no pretention to extend to South Australia. It was only in response to this one court's actions that it was felt that there was a need for Parliament to act in a judicial capacity and to

[123] *Colonial Laws Validity Act,* s. 5.
[124] *Colonial Laws Validity Act,* s. 1.
[125] Benjamin Boothby. Born 5 February 1803 at Doncaster, Yorkshire. Appointed to the Supreme Court of South Australia in 1853.
[126] Ralph M. Hague, *Hague's History of the Law in South Australia, 1837-1867* (Adelaide: University of Adelaide Barr Smith Press, 2005), pp. 269, 304, 344-352.

declare what the law "shall [be], and be deemed at all Times to have [been]."[127] Judges throughout the Empire would go on to heavily rely on the *Colonial Laws Validity Act*, but, as was largely the case before 1865, would have made the same rulings based upon a doctrine of construction as opposed to specific imperial statute.

The *Colonial Laws Validity Act* was not only a stark example of a declaratory statute, with a legislature imposing a rule of interpretation over dissenting judicial interpretations, but it provided a framework for how the judiciary should approach the creation of "Laws respecting the Constitution" and how they are to interact with other statutes; that is, it created explicit grounds for the judicial review of colonial legislation. Notably, it created a clear framework in which a plenary, albeit subservient, legislature could create an entrenched constitution. During the "intellectual empire"[128] of Diceyan absolutism, it was widely posited that a plenary legislature could not bind itself in either the subject or even form of future legislations. However, colonial constitutions, although judicially described as "plenary,"[129] could be bound. Obviously their constitutions were controlled[130] by virtue of imperial instruments (e.g. Acts of Parliament, Letters Patent, Orders-in-Council), typically their constituent[131] instrument. Yet, they could be further controlled by "colonial laws" which specified a certain "manner and form" procedure for amending or repealing such laws by statutes that are incorporated by reference into

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[127] *Colonial Laws Validity Act,* s. 4.
[128] Oliver (2005), p. 56
[129] *R v Burah* (1878), 3 App Cas 889 per Lord Selborne at 904: "when acting within those limits [prescribed by an Imperial Act], [a colonial legislature] is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself."
[130] Here, I use "controlled" in the sense of an organic instrument which cannot be amended by the normal legislative process.
[131] Here, I use "constituent" in the sense of a founding instrument and not of organic instruments generally.

imperial law, as the Act made manner and form procedures of any "Colonial Law" equivalent to manner and form procedures of an "Act of Parliament."[132] Thus, although colonial laws could be validly enacted, if they violated the provisions of a Imperial law or a colonial law incorporated by reference into the *Colonial Law Validity Act* by section 5, could be judicially declared to be, "to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative."[133] Although this is not identical to judicial review for a plenary, but non-subservient, legislature, the *Colonial Laws Validity Act* did provide a model for judicial review and the language to be use to both enable such judicial review and for the effect of such judicial review.

The Statute of Westminster

The *Statute of Westminster* was a declaratory Act and, like the *Colonial Laws Validity Act*, it purportedly sought not to alter the conventional constitutional order, but to codify ("ratify, confirm, and establish") that convention (although such convention was so recent and so sharply divergent from past practice that it was in more practical terms an alteration of the existing constitutional order). Given the contributions of both blood and treasure of many of the self-governing dominions to the war effort during the First World War, a number of the Dominions pushed for recognition as a full and equal member of the community of nations. At the end of the War, the Dominions were granted a hybrid status as they put their own signatures to the Treaty of Versailles and received equal seats at the League of Nations, yet in both cases they remained part of the "British Empire." The contradictions of this hybrid status came to a head by 1926, with a

[132] *Colonial Laws Validity Act,* s. 5.
[133] *Colonial Laws Validity Act,* s. 2.

push amongst some Dominions (notably Canada, South Africa, and Ireland) for a clarification of their status. This resulted in the 1926 Imperial Conference and its *Balfour Declaration* which stated that the United Kingdom and the Dominions

> *are autonomous communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, although united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.*[134]

However, as the Privy Council's judgment in *Nadan*[135] (eight months prior to the 1926 Imperial Conference) painfully portended, established practice and the pronouncements of Imperial Conferences may not be uniformly accepted by the courts. As such, the subsequent Imperial Conference in 1930 resolved that the pronouncements of the *Balfour Declaration* should be converted into an Imperial statute to remove any "doubts [...] respecting the Validity of divers Laws enacted"[136] by Dominion legislatures as had been the case which had provoked the passage of the *Colonial Laws Validity Act.*[137] Thus, although the *Statute of Westminster* recited in its preamble that it was "the *established* constitutional position that no law [...] of the United Kingdom shall extend to any of the [...] Dominions [... other] than at the request and with the consent of that

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[134] Founding Docs
[135] *Nadan v The King* [1926] AC 482.
[136] *Colonial Laws Validity Act,* preamble
[137] During the years between the two Imperial Conferences there was considerable debate as to whether such a Statute was necessary or appropriate and that the convention established in 1926 would suffice. For example, a Privy Council revisiting *Nadan* in light of the *Balfour Declaration* could have interpreted the phrase "Plantations, Colonies and other Dominions of His Majesty abroad" in the *Judicial Committee Act* as not including the self-governing Dominions and that therefore there was no longer any conflict between the *Colonial Laws Validity Act* and the *Judicial Committee Act*.

Dominion," [138] the Statute sought to give unequivocal force to that "established constitutional position" through an Act of the Imperial Parliament.

The *Statute of Westminster* was greeted by many legal scholars as the first serious attempt by Parliament to bind itself. Although restrictions on both the procedure and even content of legislation do exist in the statute books prior to the *Statute of Westminster*, the *Statute of Westminster* was viewed as much more substantive in scope. For advocates of self-embracing sovereignty, the prior abrogation of purported restrictions on the content of legislation expressed in the Acts of Union with Scotland[139] and Ireland[140] could be dismissed on the grounds that in those two Acts Parliament did not bind itself, but instead dissolved itself and created new – unbound – Parliaments, as those abrogations of the terms of the Acts of Union were not violations any self-imposed restriction, but merely terms directed by its predecessor. For advocates of continuing sovereignty, the precedential value of the changes in the procedure of legislation in the *Parliament Act, 1911*[141] could be dismissed as that change in procedure was less, not more, onerous that the normal procedure.[142]

The *Statute of Westminster* was more akin to the *Parliament Act* than to the Union Acts as it did not formally restrict the content of future legislature, only the manner in which such legislation could be enacted. Further, it could even be portrayed as the most limited kind of manner and form restriction as it did not prescribe a particular procedure

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[138] Emphasis mine
[139] *Union with Scotland Act 1706* (6 Anne), c. 11 (Eng).
[140] *Union with Ireland Act 1800* (39 & 40 George III), c. 67 (GB).
[141] *Parliament Act 1911* (1 & 2 George V), c. 13 (UK).
[142] Although from a Diceyan paradigm it is hard to theoretically distinguish why imposing a less restrictive procedure should be any less problematic than imposing a more restrictive procedure, particularly in light of the of the abolition of colonial upper houses by colonial legislation.

of enactment, as did the *Parliament Act*,[143] but simply stated that any such enactment must be "expressly declared." Even its most limited interpretation, the Statute dispensed with the phrase "express Words or by necessary intendment" so often used in the statute books (including the *Colonial Laws Validity Act*), which gave courts discretion to extend Acts to dependencies that were not specifically enumerated in an Imperial Act. Instead, the *Statute of Westminster* embraced the phrase "expressly declared" for the possible extension of an Imperial Law to a Dominion, thus purporting to preclude any sort of implied repeal or implied repugnancy being construed by the courts. Therefore, at a minimum, for any Act of Parliament to apply to a Dominion, it must clearly express that it applies to that specific Dominion.

In a more expansive interpretation, it would be argued that an Imperial Statute could not simply recite that request and consent had been given for the Act, but that – if challenged in court – proof must be given of such request and consent equivalent to the requirement of a certificate of the Speaker in the *Parliament Act.*[144] That is to say, the Statute did not simply require Westminster to expressly declare that it was legislating for a Dominion (i.e. have the appropriate "form"), but that obtaining request and consent

[143] *Parliament Act 1911*. Although, arguably the formally required procedures were fewer than what is enacted in the *Parliament Act, 1911* as the requirement for a certificate of the Speaker on a Money bill could be interpreted as merely directory and not declaratory (i.e. not part of the necessary procedure, or "manner and form," for the passage of a money bill). That is to say, only ss. 1(1) (requiring that the Bill be a money bill) and 4(1) (requiring that the Bill recite particular words of enactment) need to be followed for a bill to become law under this different procedure . The purpose of the certificate of the speaker enacted in s. 1(3) (requiring for certification by the Speaker that the Bill is a money bill), along with s. 3, seems to be part of a privative clause. Thus if a money bill lacks the certificate, although it could be "questioned in [a] court of law," it would not be deemed invalid if it could be proved to the court that the Statute in question had been a money bill.

[144] *Parliament Act 1911*, s. 1(3)

was now part of the obligatory procedure (e.g. having three readings of a bill) in passing such legislation (i.e. the appropriate "manner").

The influence of the *Statute of Westminster* will be further discussed variously in this dissertation, however what is important to emphasize at this point was the *Statute of Westminster* was universally understood as a declaratory Act and a serious attempt by Parliament to bind itself, at a minimum imposing on the courts strict rules of statutory construction preventing implied repeal or implied repugnancy and requiring a new procedure for enacting certain legislation (although whether such an attempt would actually bind a future parliament was disputed). The effect of the *Statute of Westminster* would come under significant consideration during the drafting of the *Canadian Bill of Rights* and its language would be used as a model in that statute.

"SELF-EMBRACING" PARLIAMENTARY SOVEREIGNTY

The theory of self embracing parliamentary sovereignty was first powerfully exposited in the 1930s, in response (principally) to the *Statute of Westminster*. It was an outgrowth of a generalised malaise with the existing constitutional order, epitomized by the *Parliament Act 1911*[145] that formally repudiated the Glorious Revolution balance between the Crown, Lords, and Commons in legislation. This new approach drew upon protean ideas of human rights, favouring natural law over positivism. As such, it could invoke ancient authorities that had relied on the similar principles of divine law[146] to

[145] *Parliament Act 1911*, 1 & 2 George V, c.13 (UK). The advocates of self-embracing sovereignty got a supplemental boost with the *Parliament Act 1949*, 12-13 & 14 George VI, c.103 (UK).

[146] Classic examples include

Dr Bonham's Case (1610) 8 Co Rep114a per Coke CJ at 118a:

enhance its legitimacy. It also was able to find support in recent colonial jurisprudence that challenged Diceyan absolutism.

From the end of the American Revolution until the *Statute of Westminster*, the absolute sovereignty of the Parliament at Westminster over all of Britain's dependencies (as expressed in the *Declaratory Act*[147]) passed without serious challenge, with even the mid-nineteenth century agitation for "responsible government" and the policy of extending complete internal self-government to settler colonies (a constitutional order epitomized by the *Colonial Laws Validity Act*) not evidently disturbing this doctrine.[148]

> *And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometime adjudge them to be utterly void: when an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void*

Day v Savage (1614) 80 ER 235 per Hobart CJ at 237:

> *Even an Act of Parliament, made against natural equity, as to make a man judge his own case, is void in itself, for* jura naturae sunt immutabilia [*natural law is immutable*], *and they are* leges legume [*the highest law*].

R v Love (1651) 5 State Tr 43 Keble J at 172:

> *Whatsoever is not consonant to Scripture in the law of England, is not the law of England, the very books and learning of the law: Whatsoever is not consonant to the law of God, or to right reason which is maintained by scripture; whatsoever is in England be it Acts of Parliament, customs, or any judicial acts of the court, it is not the law of England, but error of the party, which did pronounce it; and you or any man else at bar may so plead it.*

[147] *American Colonies Act 1766*, 6 George III, c.53 (UK). The Act is typically referred to as the *Declaratory Act*, but it was given the short title *The American Colonies Act*, by the *Short Titles Act 1896*, 59 & 60 Victoria, c.14 (UK).

[148] See Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Toronto: Oxford University Press, 2005), pp. 118-121, 138-140. Notably however, D.A. O'Sullivan – author of the first detailed legal analysis of the Canadian Constitution, *A Manual of Government in Canada* (1879) – argued that the use of "exclusive" in the BNA Act meant that the Imperial Parliament had abandoned sovereignty over those (non-Imperial) areas. Although O'Sullivan persisted in his views, they never gain a significant following. Yet it should be noted that after the granting of responsible government,

However while, at the outbreak of the First World War, Canadians had been enjoying internal self-government for over seventy years and did not seek any break with Westminster's formally unfettered sovereignty, certain commentators, such as A.V. Dicey, took note of a subtle shift in British colonial policy that presaged the tumult capped by the *Statute of Westminster*.

According to Dicey,[149] the original policy of colonial self-government had been one in which the settler colonies were to be accorded "as much of independence as was necessary to give to such colonies the real management in their internal or local affairs" with such internal self-government restricted within the wide bounds of "English interests" and "English ideals of political prudence." However, sometime before the outbreak of the First World War, this policy had undergone a subtle, though qualitative, shift in which the settler colonies were to be accorded "absolute, unfettered, complete [internal] autonomy, without consulting English ideas of expediency or even of moral duty." Such a subtle, but qualitative, shift helps explain why, at the closing of the First World War, the self-governing Dominions suddenly demanded, and were accorded, international recognition as equal members of the international community of nations including their own signatures on the Treaty of Versailles and independent and equal representation at the League of Nations. This constitutional innovation led, to varying

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although Britain would tempt, cajole, and manipulate colonies to agree to constitutional change, Britain would not engage in compulsory interference without the request and consent of the colony. Sometimes such request and consent was only tenuously present, as with Nova Scotia and Confederation, but never again would Britain impose a constitutional order on a colony without its formal consent. This fact raises unexplored questions about the nature of conventional British sovereignty over its colonies with responsible government in the nineteenth century that have yet to receive any effective exploration.

[149] Dicey (1915), pp. xxxi-xxxii.

degrees, a push by some Dominions in the 1920s for complete formal legal independence to match their newly acquired international and *de facto* status. The result of this agitation was the *Statute of Westminster*.

Yet the *Statute of Westminster* was not a treaty between the former imperial power and post-colonial revolutionary regimes (*à la* the 1783 *Treaty of Paris*[150]) marked by constitutional discontinuity. Instead, it was an instrument wholly within the existing constitutional framework of the (formal) unfettered sovereignty of the Westminster Parliament over all of the Crown's dependencies. Its scope and effect was made more opaque by the numerous particular exceptions to Dominion independence written into the *Statute of Westminster* (such as Canada's reliance on Westminster for amendment of the *British North America Act, 1867-1930*) as well as the generalized provision from section 4 that provided for continued legislative powers by Westminster over the Dominions in any Imperial Act which "expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof." Consequently, the *Statute of Westminster's* simultaneous declaration of Dominion independence matched with its declared possibility of continued Dominion dependence provoked a crisis in British constitutional thinking as it starkly challenged the contemporaneous orthodoxy of parliamentary sovereignty.

While the crisis influenced most legal thinkers to defend the contemporaneous orthodoxy by championing certain Diceyan rigidities (termed "continuing parliamentary sovereignty") that were never as faithfully followed prior to this crisis (as discussed below), it influenced others to outright reject those same Diceyan rigidities (termed "self-

[150] *Treaty of Paris* (3 September 1783), National Archives [United States of America], Record Group 11, ARC Identifier 299805. (Available from www.archives.gov).

embracing parliamentary sovereignty"). Peter Oliver has succinctly summarized the cleavage that:

> *Whereas Dicey saw the Westminster Parliament as supreme or absolute, and therefore unique, fundamental and unchangeable, Jennings saw it as a legislature much like other legislatures, i.e. deriving its powers from the law and capable of limitation, including self-limitation.*[151]

Advocates of "continuing sovereignty" argued that despite the legal and *de facto* independence of former dependencies, Diceyan absolute parliamentary sovereignty continued to prevail and Westminster could theoretically continue to legislate for former dependencies, even without their request and consent, if Westminster was explicitly clear about its intention do to so. For such advocates, Parliamentary (Westminster) supremacy was the "ultimate legal principle" which was "unique in being unchangeable by Parliament."[152] Thus, the ghost of continuing imperial sovereignty over the purportedly independent former dependencies remained and in the – almost inconceivable, but theoretically possible – scenario of Westminster attempting to legislate without the consent of a former dependency, courts in the former dependency would either have to take notice of such legislation or, if they choose to ignore such legislation, accept a "disguised revolution" of a constitution discontinuity with the courts throwing off the rule of law of the old legal order for a new legal order.

In contrast, advocates of "self-embracing sovereignty" argued that a truly sovereign parliament included the power of self-limitation. For such advocates, it was not Parliament that was supreme, but the law (i.e. the common law): "the 'legal sovereign' may impose legal limitations upon itself because its power to change the law includes the

[151] Oliver (2005), p. 82.
[152] H W R Wade, "The Basis of Legal Sovereignty," *Cambridge Law Journal* 13, no 2 (1955), p. 189; cited by Oliver (2005), p. 93.

power to change the law affecting itself.'"[153] Advocates of "self-embracing sovereignty" favoured "manner and form" procedures of legislating for not only subordinate legislatures, but for wholly sovereign legislatures as well. Thus, the requirement for legislation to pass through majority assent of three readings in both Houses of Parliament and Royal assent was not some "ultimate legal principle," but simply the traditional "manner and form" of legislating which could be both generally amended or particularly amended in certain circumstances.

Under this view, the declaration in section 4 of the *Statute of Westminster* for Dominion request and consent was not merely an interpretative provision that could be overcome by a sufficiently explicit Westminster utilizing the traditional manner and form of legislating, but a legally enforceable procedure that would render any legislation that failed to meet such requirements *ultra vires* – even of a fully sovereign parliament. This not only accounted for the complete independence of former dependency without disrupting legal continuity, but provided an avenue for the entrenchment of other legislation without abandoning "parliamentary sovereignty" for the "newer constitutional law."

In Britain Diceyan parliamentary sovereignty precluded entrenchment and judicial review of rights guarantees and thus self-embracing parliament sovereignty was the only option for advocates of such constitutional innovations, short of an explicit constitutional revolution. In contrast, advocates of entrenchment and judicial review of rights guarantees in Canada could instead turn to the robustly developed mechanisms of entrenchment and judicial review for federalism and seek to apply that same functional

[153] Jennings (1959), p. 252; cited by Oliver (2005), p. 84.

constitutional supremacy to civil liberties. The orthodox theory of parliamentary sovereignty had always justified entrenchment and judicial review in Canada and it, conveniently, provided for the entrenchment and judicial review of civil liberties without the need of addressing the thorny question of an amending formula for the *British North America Act*.

Resultantly, there was either no incentive or even a disincentive for advocates of constitutional supremacy to question orthodox parliamentary supremacy, as the theoretical question of the "ghostly legal presence [of Westminster], legally able to interfere in the affairs of" Canada, unless its "courts and other law-enforcing and -administering institutions rejected such interference in an apparently extra-legal or revolutionary fashion" [154] paled to the practical advantages provided by orthodox parliamentary supremacy in providing for effective constitutional supremacy in Canada. Further, orthodox parliamentary supremacy proffered a much simpler distinction between constitutional instruments and non-constitutional statutes in Canada: anything enacted as part of the *British North America Act* was "constitutional" and anything enacted outside of it, was not. ♦

[154] Oliver (2005), p.3.

Appendix F – *Robertson:* Background and Decision

This appendix explores the background to, and the decision in, the leading Supreme Court of Canada case, *Robertson and Rosetanni v The Queen (1963),*[1] which addressed the guarantee of "freedom of religion" in the *Canadian Bill of Rights*.[2] The arrival of *Robertson* before the Supreme Court of Canada occurred in tumultuous times and has the appearance of involving a certain degree of intrigue. As a result, the development of this case deserves some background as well

THE LAW

OPERATIVE EFFECT OF THE *CANADIAN BILL OF RIGHTS*

The two Supreme Court cases previous to *Robertson* which figured the *Canadian Bill of Rights* had found no conflict between that statute and the controverted enactment (in those cases, the *Immigration Act*) and lower courts had generally opted to rule in a similar fashion. However, there was one exception to this that would provoke considerable interest for the eventual litigants in *Robertson*. In *Gonzales*,[3] a three judge panel of the British Columbia Court of Appeal, on 9 January 1962, upheld a conviction (from 24 April 1961) on the basis of s. 94(a) of the *Indian Act* that made it an offence for Indian to possess liquor. As was typical for *Canadian Bill of Rights* cases, two of the three judges found no conflict between the enactments[4] citing American authorities that

[1] *Robertson and Rosetanni v The Queen*, [1963] SCR 651
[2] *Canadian Bill of Rights*, SC 1960, c. 44.
[3] *R v Gonzales*, (1962), 32 DLR (2d) 290.
[4] *Gonzales* per Tyson at 296: "It is sufficient to say that in my opinion in its context s. 1(*b*) means in a general sense that there has existed and there shall continue to exist in

similarly reconciled the US Bill of Rights with parallel US legislation.[5] However, Justice Davey reasoned differently than the other two judges, reasoning that the *Canadian Bill of Rights* is no more than a canon of construction and comparison the to the US Bill of Rights is unwarranted.[6] Since the majority of the court found no conflict between the two enactments, Justice Davey's comments were *obiter*, but nonetheless marked a potentially fatal wound to the *Canadian Bill of Rights* if ever adopted by other courts. (Notably, the first judicial consideration of Davey's reasoning came in an appeal decision on 20 June 1962 by a Saskatchewan District Court judge who repudiated Davey's reasoning.[7]

Canada a right in every person *to whom a particular law relates or extends*, no matter what may be a person's race, national origin, colour, religion or sex, to stand on an equal footing with every other person to whom that particular law relates or extends, and a right to the protection of the law."

[5] *Gonzales* per Tyson at 295 citing 42 *Corpus Juris Secundum*, s. 76, p. 791; and *United States v Nice* (1916), 241 U.S. 591 per Van Devanter at 597: "The power of Congress to regulate or prohibit traffic in intoxicating liquor with tribal Indians within a state, whether upon or off an Indian reservation, is well settled. It has long been exercised, and has repeatedly been sustained by this court. Its source is twofold; first, the clause in the Constitution expressly investing Congress with authority 'to regulate commerce [...] with the Indian tribes', and, second, the dependent relation of such tribes to the United States."

[6] *Gonzales* per Davey at 292 "The difficulty with s. 94 (*a*) of the Indian Act is that it admits of no construction or application that would avoid conflict with s. 1(*b*) of the Canadian Bill of Rights as appellant's counsel interprets it. Since the effect of the Canadian Bill of Rights is not to repeal such legislation, it is the duty of the courts to apply s. 94(*a*) in the only way its plain language permits, and that the learned magistrate did when he convicted."

[7] *Richards v Cote*, (1962), 39 C.R. 204. McFadden D.C.J. upheld an acquittal (from 9 January 1961) on the basis that s. 94(b) of the *Indian Act,* which made it an offence for Indian to be intoxicated off a reserve, was rendered inoperative by the *Canadian Bill of Rights*. (N.B. this was the same decision and reasoning as in *Drybones* seven years later.) McFadden examined *Gonzales* and repudiated the reasoning of Davey, finding, at ¶11, that s. 94(*b*) of the Indian Act "is, and has been, contrary to the provisions of the Canadian Bill of Rights and is inoperative in so far as the charge herein is concerned." Explaining at p. 214, that s. 94(*b*) of the Indian Act "contrary to the *Canadian Bill of Rights* for the following reasons, namely: (a) it discriminate against the accused, an Indian, by reason of his race, of his right as an individual to liberty, security of his person and enjoyment of his property and in the consequences of such enjoyment: (b) it discriminates against the accused, an Indian, by reason of his race, of his right as an

However, it appears that case had no influence on *Robertson*, as it was not reported until after the hearing in *Robertson*[8] nor is it listed as an authority in any of the Factums of the litigants; unlike *Gonzales*, which appears not only in the Factums, but also in the Memoranda of Argument for the leave to appeal of both the appellant and the respondent in *Robertson*.) As such, this reason had to be addressed by litigants of a *Canadian Bill of Rights* case before the Supreme Court of Canada and it piqued the interest of the Department of Justice under Driedger to intervene in the case.[9]

THE *LORD'S DAY ACT*

Legislation criminalizing violations of the Sabbath had a long history in English law going back to even before the Norman Conquest and was imported into Canada with the wholesale adoption of English Criminal Law. The English Sunday observance laws were modified by the pre-confederation legislation which continued in force after

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individual to equality before the law and protection of the law by making him subject to punishment to which non-Indians are not subject." McFadden, at pp. 209-210, chose to distinguish from, rather than not follow, *Gonzales* as it dealt with s. 94(a) which operated differently in Saskatchewan, permitting the sale of alcohol to Indians. Thus because the Indian Act permitted in Saskatchewan the sale of alcohol on equal terms to Indians and non-Indians , then the particular prohibition on public intoxication for Indians was discriminatory. The Saskatchewan decision was crafted to subtly not conflict with the ruling of the British Columbia Court of Appeal, while generally repudiated the reasoning of the British Columbia decision.

[8] The Supreme Court of Canada Library received its copy *Criminal Reports* vol. 39, in which *Richards v Cote* is reported, on 8 July 1963 – more than three months before the Court's decision in *Robertson*. However, the volume was only first signed out on 14 January 1964 (three months subsequent to the decision in *Robertson*) and Supreme Court judges did not have clerks at that time so it is exceedingly unlikely the judges were familiar with the case.

[9] Unfortunately, this cannot yet be absolutely confirmed by contemporaneous documents as the relevant file (likely D H Christie, "Memorandum to D.S. Maxwell, re: Lieberman v The Queen; Robertson and Rosetani v The Queen," 14 December 1962 (DOJ/198064, p. 155-161)) has been redacted by the Department of Justice. Instead, it is interpreted from Driedger's comments on *Gonzales* and *Robertson* in the 1964 draft of his first essay on the *Canadian Bill of Rights* (LAC MG31 E39 v.09.02. 1964.)

Confederation and it was later contested as to whether such legislation was criminal law under federal jurisdiction or a local matter under provincial jurisdiction. In 1903 the Privy Council determined[10] that such laws were criminal law and thus wholly in the domain of the federal Parliament. Resultantly, in 1906, the federal Parliament enacted the *Lord's Day Act*[11] which criminalized most commercial activity on Sundays, but allowed for exceptions provided by provincial law. The *Lord's Day Act* continued in force[12] at the time of the enactment of the *Canadian Bill of Rights*.

Despite the long pedigree of similar Sunday Observance state legislation in the United States, such "blue laws" began to be more vigorously challenged on the basis of the First (non-establishment of religion) and Fourteenth (equal protection) Amendments to the United States Constitution. Initially, such challenges had little effect, with, for example, New York's Sunday observance legislation being upheld by that state's supreme court[13] and with the United States Supreme Court declining to grant leave to appeal.[14] However, in 1960, the United States Supreme Court granted leave to appeal to four different challenges to Sunday Observance laws from three different states, hearing the appeals together on the same day and delivering their decisions together on the same day (29 May 1961).[15] In its decisions, the United States Supreme Court determined that a statute whose primary aim was to enforce a religious dogma would be "one respecting an

[10] *Ontario (Attorney General) v Hamilton Street Railway*, [1903] AC 524.
[11] SC 1906, c. 27.
[12] RSC 1952, c.171
[13] *New York v Freedman*, (1950) 302 NY 75
[14] 341 US 907
[15] *McGowan et al v Maryland*, (1961) 366 US 420; *Two Guys v McGinley*, (1961) 366 US 582; *Braunfeld v Brown*, (1961) 366 US 599; *Gallagher v Crown Kosher Market*, (1961) 366 US 617

establishment of religion" and therefore unconstitutional[16] (such as the original Maryland statute).[17] However, the Court determined that over time the Sunday observance laws had ceased being laws regulating religious conduct and had evolved into ones secular laws regulating working-hours and providing for a common day of rest with the fact that a statute "agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation."[18]

While opposition to Sunday closing legislation abounded in Canada at the time of the enactment of the *Canadian Bill of Rights*[19] providing ample sources for challenges to the *Lord's Day Act* on the basis *Canadian Bill of Rights*, that such a challenge was the first major treatment of the *Canadian Bill of Rights* by the Supreme Court of Canada is surprising. That *Robertson* could pass through three Ontario courts without formal reasons ever being given is a testament to the prevailing view that Sunday Observance legislation, while enforcing a religious tenet, was not an abridgement of the free exercise of religion and thus not affected by the *Canadian Bill of Rights*.

THE CRIME: BOWLING ON SUNDAY

[16] *McGowan* at 431
[17] *McGowan* at 448
[18] *McGowan* at 442
[19] In Canada, the *Lord's Day Act* even spawned a consequential lobby group committed to upholding the statute, the Lord's Day Alliance of Canada (LDAC). As there was no prevailing human rights instrument upon which to challenge the federal statute (prior to the *Canadian Bill of Rights*), litigation focused on provincial and municipal Sunday closing legislation. For example, in 1958 the LDAC's intervened to (unsuccessfully) challenge to a British Columbia bill that aimed to weaken limit the scope of the *Lord's Day Act* in Vancouver (*Lord's Day Alliance of Canada v Attorney General of British Columbia*, [1959] SCR 497) and in 1960 a bowling alley operator challenged a St-John NB municipal bylaw that mandated the closing of bowling alleys on Sundays (while provincial legislation permitted it under the *Lord's Day Act*) arguing that that the bylaw infringed on federal criminal law (*R v Lieberman*, (1960) unreported (NB Co Crt); (1961) 36 DLR (2d) 266 (NB CA); [1963] SCR 643.

On Sunday 14 January 1962, Fred Rosetanni and Walter Robertson "carr[ied] on the business of their ordinary calling, to wit: the operation of a bowling alley"[20] in Hamilton Ontario. Resultantly, they were summarily convicted in a county court and fined $31 each, repeatedly appealing the conviction without reasons ever being given for the dismissal of their appeals and eventually securing a hearing for leave to appeal to the Supreme Court on 19 November 1962 on the grounds "that in proper construction and application of the Lord's Day Act is in conflict with the Canadian Bill of Rights ." It was only in preparation of this motion that formal reasons were proffered (by the Attorney General of Ontario) for a construction of the *Lord's Day Act* unhindered by the *Canadian Bill of Rights*. In that memorandum, John Freeman argued that the *Lord's Day Act* did not fall afoul of the *Canadian Bill of Rights* because the (1) Lord's Day Act does not compel anyone to perform a religious practice and therefore not a violation of freedom of religion, (2) that as "a general later law does not abrogate an earlier special one by mere implication," and as such "earlier legislation dealing with a special subject is not to be considered repealed, altered or derogated from without any indication of a particular intent to do so" (i.e. the *Canadian Bill of Rights* is only a canon of construction).

THE TIMES

The short period of little over three months (which included Christmas) between the grant of leave to appeal and the hearing of the appeal on 27 February 1963 was a particularly tumultuous time for the Department of Justice and the Supreme Court of Canada.

[20] Supreme Court of Canada, "Information," *Case on Appeal*, p. 1, (SCC/09741)

GOVERNMENT DISTRACTION

Following the 1962 general election, Donald Flemming replaced Davie Fulton as Minister of Justice who had held the portfolio for over five years and had championed the Bill of Rights. The 1962 general election also saw Toronto lawyer F. Andrew Brewin capture a seat for the NDP after unsuccessfully running (for the CCF) in every general election since 1945. By December1962 the Diefenbaker government was in chaos with Ministers openly revolting against his leadership (including both Fulton and Flemming). When the conflict in cabinet had reached its nadir at the beginning of February with Defence Minister Harkness threatening to loudly resign over a nuclear weapons controversy , the Supreme Court of Canada was also thrown into some tumult with the unexpected death of Chief Justice Kerwin. This unfortunate event provoked George Hees and Davie Fulton to offer Diefenbaker the post of Chief Justice if he resigned as Prime Minster in favour of Hees in order to salvage the Conservative government.[21] Diefenbaker rejected the offer and Defence Minister Harkness resigned the following day, provoking a confidence vote the subsequent day which toppled the government and brought about the second general election in less than a year.

The Department of Justice file concerning the Attorney General's intervention in *Robertson* is atypical in comparison to other Department files from that era given the incredibly sparse record of interactions with Cabinet. In the whole file, there is only a single correspondence to the Minster of no more than 50 words (the section is redacted) and no other communications either with the Minister, the Prime Minister, or Cabinet. Whatever interest the Minister or Cabinet had in the case was communicated orally and

[21] Marcel Gringras, *Diefenbaker et le Canada français* (Vanier, ON: Interligne, 1997), p. 92.

was not deemed important enough to the Department to record. Even correspondences with the Deputy Minister are scant.[22] This reflects how distracted the government was when the challenge to the *Canadian Bill of Rights* and the *Lord's Day Act* in *Robertson* was being addressed by the Department of Justice. Thus, the *Canadian Bill of Rights*'s main champion, Davie Fulton, had only been ousted from the supervising portfolio a few months earlier, but his was caught up in the middle of the conflict over Diefenbaker's leadership, and was further distracted by his plans to leave federal politics in order to revive the moribund British Columbia provincial Progressive Conservative party. Further, the limited correspondences from Driedger indicate that the tumult in Cabinet had largely distracted him from the file, forcing him to almost wholly rely on his subalterns.

COURT INTRIGUE

The developments in the Supreme Court before the hearing are also intriguing. The panel which granted leave to appeal – Chief Justice Kerwin and Justices Cartwright and Abbott – disproportionately consisted of the more rights-friendly Supreme Court Justices of the era. From November through January, motions relating to the case were all handled by the Chief Justice and by mid-December the window to motion for leave to intervene has closed with only the Attorney General of Canada intervening. Chief Justice Kerwin set 16 January 1963 as the deadline to file Factums and on 7 January 1963 the court announced that the case would be heard during the Winter Session of the Court.

[22] The file was primarily handled by the Director of the Criminal Law Section, D.H. Christie and overseen by overseen by Assistant Deputy Minister T.D. MacDonald. There were also significant contributions by D.F. Walker, a lawyer who worked from the Department from January 1961 to September 1963.

As the Department of Justice wished to defend both the *Canadian Bill of Rights* and the *Lord's Day Act*, its line of argument was very restricted and brief. Its case was simply that the right to legislate for Sunday closing laws was well established as being under the criminal power and that there was no conflict between the two statutes because "freedom of religion" was not infringed by the prohibition of an "activity which a religion practiced in Canada does not require to be performed by its adherents on that day."[23] The argument presented in the factum was extremely briefly, consisting of less than ten lines. The list of authorities in the Department's Factum reflect a heavy reliance on US precedents that found state Sunday closing laws congruent with freedom of religion (particularly the suite of cases from 1961)[24] and a few British authorities that emphasized that "Christianity is recognised by the law as the basis to a great extent of our *civil* polity."[25]

On 10 January, the recently elected NDP MP (and lawyer) F. Andrew Brewin secured a meeting with T.D. MacDonald, the Assistant Deputy Minister supervising the case, to discuss the Department's approach to *Robertson* and how it planned to defend the *Lord's Day Act*. Brewin was disappointed with the limited defence the Department was willing to accord to the *Lord's Day Act* and requested that the Department seek to have him declared *amicus curiae*, so that he could offer a more robust defence of the *Lord's Day Act*. Brewin suggested that he would defend the *Lord's Day Act* on the basis that the *Canadian Bill of Rights* was no more than a canon of construction and that even

[23] "Factum of the Attorney General of Canada," p. 4, (SCC/09471)
[24] *McGowan et al v Maryland*, (1961) 366 US 420; *Two Guys v McGinley*, (1961) 366 US 582; *Braunfeld v Brown*, (1961) 366 US 599; *Gallagher v Crown Kosher Market*, (1961) 366 US 617
[25] *Bowman v Secular Society* [1917] AC 406 per Lord Finlay LC at 428. Emphasis mine.

if the Court were to find a conflict with the *Canadian Bill of Rights*, it would therefore be obliged to uphold the *Lord's Day Act*. MacDonald rejected pursuing this line of argumentation and Brewin left discontented. MacDonald warned the director of the Criminal Law section, D.H. Christie, he was not sure "what steps [Brewin] now proposes to take," but that he would likely approach "who[ever] is to argue the case for the Respondent" such that they provide a more robust defence of the *Lord's Day Act*.[26]

While both the Appellants and the Department of Justice had completed and filed their Factums in time for the 16 January deadline, the day following Mr. Brewin's meeting with ADM T.D. MacDonald, the Attorney General for Ontario motioned for an extension to file it Factum to 4 February, which was granted by Chief Justice Kerwin. On 2 February, Chief Justice Kerwin unexpectedly dies and leadership of the Court passes to the senior puisne judge, Tashereau (who had the strongest record of opposition to the Rand-Kellock implied bill of rights). Two days later , the Attorney General of Ontario motions for leave to intervene on behalf of the Lord's Day Alliance and further extend its deadline to submit a factum. This motion is successfully granted by Tashereau on 12 February and the Lord's Day Alliance submits its factum with the benefit of having read the Factums of the other parties. Notably, the respondant (the Attorney General of Ontario) files no factum and instead relies on that of the Lord's Day Alliance of Canada.

Curiously, while a panel of seven justices (the maximum given the death of Kerwin) were empanelled to hear *Lieberman*[27] – another case dealing with Sunday bowling (but instead challenging a municipal bylaw for trenching on the federal criminal

[26] T D MacDonald, "Memorandum for D. H. Christie, re: Lieberman," 10 January 1963 (DOJ/198064, p. 130)
[27] *R v Lieberman*, [1963] SCR 643.

law power) – only five justices were empanelled to hear *Robertson* the following day (with Taschereau, Cartwright, Fauteux, Abbott and Ritchie JJ hearing both cases and Martland and Judson JJ hearing *Lieberman* as well). This was a curious decision, as the two cases both dealt not only with the scope of the *Lord's Day Act* butt also specifically with the operation of bowling alleys on Sunday and were directed by the court has being twined with the grant of leave for appeal for *Robertson* directed notice be given to the parties to *Lieberman*. Typically, only five judges are empanelled when issues at question are less controversial and this indicates that acting Chief Justice Tashereau felt that the question of the division of powers in regards to religion in *Lieberman* was more difficult than the question of the interaction of the *Canadian Bill of Rights* with the *Lord's Day Act* in *Robertson* (notably, Tashereau was the most resolute opponent of the Rand-Kellock implied bill of rights and, particularly, the power allocation technique of excluding matters from provincial legislatures).

THE HEARING

In the three facta presented to the court by the parties, there were two main issues addressed; first, the question of the paramountcy of the *Canadian Bill of Rights* and, second, the scope of freedom of religion. On the question of paramountcy, the appellants argued in favour of the *Canadian Bill of Rights* prevailing power, the Department of Justice avoided the issue (although implied its paramountcy in its silence on the matter), and the Lord's Day Alliance argued that the Canadian Bill of Rights was no more than a canon of construction that did not even implied amend pre-existing statues. On the scope of freedom of religion, the appellants argued that laws regulating Sunday closing hours were inherently religious and thus fell afoul of the *Canadian Bill of Rights*, the

Department of Justice emphasized the dual religious and civil nature of Sunday closing hours, and the Lord's Day Alliance emphasized a narrow definition of freedom of religion.

THE DEPARTMENT OF JUSTICE

As noted, the Department of Justice's factum was extremely meagre confining its argument to that there is no conflict between the two statutes. It contained no supplement arguments to address a finding that the two statues were in conflict. There is no attempt to address the question of the *vires* of the *Lord's Day Act*, simply resting upon the authority of *Hamilton Street Railway*[28] without any further argumentation. There is no examination of the paramountcy of *the Canadian Bill of Rights* and no effort is made to address the question of reasoning expressed *in Gonzales* (nor is it listed in its list of authorities). Instead, it heavily relies on American authorities which uphold Sunday closing laws for their secular effects (but which never address the division of powers issues) and Canadian cases which uphold that Sunday closing laws come under federal jurisdiction (though do not address the issue of a bill of rights).

Thus, the Department of Justice presented a curiously weak Factum. Not only did it provide little elaboration of its reasoning as to how the legislation was not a violation of freedom of religion, but it remained silent on a seemingly evident contradiction. The factum sought to reconcile the *Lord's Day Act* with the guarantee of freedom of religion in the *Canadian Bill of Rights* by portraying the *Lord's Day Act* as a secular regulation of working hours, but it relied for its ability to enact what was otherwise in exclusive provincial jurisdiction upon authorities which upheld the legislation on the basis of its

[28] *Hamilton Street Railway*, [1903] AC 524.

religious subject matter. This evident weakness in their intervention begs the question as to how committed they were to their argument. The Department seemingly sought to defend the *Lord's Day Act* against the *Canadian Bill of Rights*, but not at the cost of portraying the latter as only a canon of construction or even arguing for a narrow definition of the rights guarantees in the latter.

THE APPELLANTS

Counsel for the Appellants prepared a Factum that emphasized that the courts had found the exclusive power of the federal legislature over prohibitions of religious matters and the severe limitations upon provincial legislatures to prohibit religious activity under the guise of licensing regimes or labour regulation. They also emphasized that, similarly, the federal government could not legislate for labour regulations under the guise of a different power. Thus, any provincial legislation affecting Sunday observance and any federal legislation regulating working times must be declared *ultra vires*. The appellant factum then sought to specifically repudiate the reasoning of Davey JA in *Gonzales* and instead invoked American authorities on the US Bill of Rights to craft an appropriate construction of the *Canadian Bill of Rights* which sterilized conflicting federal statutes. Thus, the appellant factum concluded that *Canadian Bill of Rights* "prohibit[s] the Parliament of Canada, a secular legislature, from prescribing religious obligations" and that "it is now established constitutional law that legislative jurisdiction over hours of labour is primarily vested in the Provinces." Resultantly, the *Lord's Day Act* had to be sterilized because either it fell afoul of the *Canadian Bill of Rights* if construed as regulating religion under the criminal power or it was *ultra vires* if construed as regulating labour and therefore a provincial power.

THE LORD'S DAY ALLIANCE

The factum of the Lord's Day Alliance presented two distinct arguments in support of the *Lord's Day Act*. The first of these was a more robust version of the argument proffered by the Department of Justice, that there was no conflict between the *Lord's Day Act* and freedom of religion. While the authorities relied upon by the Department of Justice's emphasized the American cases which emphasized the secular character of Sunday closing laws, the Lord's Day Alliance emphasized authorities which while nonetheless recognizing the religious character of Sunday closing laws, did not find them an abridgement of freedom of religion. In that vein, they cited a 1950 New York Court of Appeals case, whose leave to appeal was dismissed by the Supreme Court, upheld the state's Sunday Observance law since it "does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, [...] provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion."[29] However, it more strongly focused on this history of Sunday Observance laws in Canada and argued that they had long been judicially recognized as consistent with freedom of religion as such freedoms must be "subject to law."

The second line of argument raised by the Lord's Day Alliance was that the *Canadian Bill of Rights* only provided for a canon of construction and further argued that because the *Canadian Bill of Rights* was a statute of a general nature, it could not operate to effect a pre-existing specific statute "by mere implication." The Factum considerable quoted Davey JA from *Gonzales* in support of this latter contention.

[29] *New York v Freedman*, (1950) 302 NY 75 per curiam at 79.

THE DECISION

The decision in *Robertson* was paired to the decision in *Lieberman,* with both being delivered on the same day with *Robertson* following *Lieberman*. Both the Court's decision in *Lieberman* and the majority's decision in *Robertson* were delivered by Justice Ritchie J (with only Cartwright J dissenting in *Robertson*).

RITCHIE'S OPINION IN *LIEBERMAN*

In *Lieberman,*[30] Ritchie J found a municipal bylaw which provided for early closing hours for bowling alleys on Sunday to be "primarily concerned as it undoubtedly is with secular matters, has for its true object, purpose, nature or character, the regulation of the hours"[31] and therefore did not trench on the federal criminal power over Sunday observance legislation. Ritchie was forced to address an extensive jurisprudence presented by appellant counsel that had found the particular regulation of Sunday closing hours to be in exclusive federal legislative jurisdiction and thus *ultra vires* provinces and municipalities, such as *Attorney General of Ontario v Hamilton Street Railway,*[32] *Re Sunday Observance,*[33] *Ouimet v Bazin,*[34] *In St-Prosper v Rodrique,*[35] and *Henry Birks & Sons (Montreal) Ltd. v Montreal.*[36] Ritchie distinguished between *Lieberman* and those cases by noting that while the purpose of the municipal bylaw in *Lieberman* was "primarily concerned [...] with secular matters," "the very language" of the controverted legislation in the other cases "invites the conclusion that they were intended for the

[30] *Lieberman,* [1963] SCR 643
[31] *Lieberman* at 649
[32] [1903] AC 524
[33] (1905), 35 SCR 581
[34] (1911), 46 SCR 502
[35] (1917), 56 SCR 157
[36] [1955] SCR 799.

purpose of enforcing the of he religious significance attaching to the Sabbath and to other religious feasts."[37] Such a distinction is easier to accept in most of the cases were the controverted legislation spoke of "Profanation of the Lord's Day" (*Hamilton)* "observance of Sunday" (*Ouimet*) and "*des bonnes moeurs*" (*St-Prosper*), or even in *Re Sunday Observance* where the Ontario legislature attempted to resurrect a statute declared *ultra vires* by removing all religious language but maintaining the same Sunday regulations. However, distinguishing *Lieberman* from *Henry Birk* required a particular intellectual contortion. In *Henry Birks*, the law in question – Quebec's *Early Closing Act* – made no mention of "profanation," observance" or "public morals," but simply sought to provide for municipalities to regulate when stores were open – just like the controverted law in *Lieberman*. The *Early Closing Act* fell afoul only so far as it provided for early closing on "on New Year's day, on the festival of the Epiphany, All Saints day, Conception day, and on Christmas day."

Thus in *Lieberman*, Ritchie J reasoned that an enactment providing for particularly early closings on "Christmas day" in a statute that made no explicit mention of religion was of a matter of freedom of religion, yet an enactment providing for particularly early closings on "Sundays" was not a matter of freedom of religion. While Ritchie formally distinguished from *Henry Birk* in *Lieberman*, in practice *Lieberman* marked the beginning of the reversal of the 1950s jurisprudence that had found civil liberties – no matter their titular description in provincial legislation – as being exclusively in federal legislative jurisdiction, to the trend of the 1960s and 1970s that

[37] *Henry Birks* at 649

permitted concurrent jurisdiction over civil liberties so long as the provincial legislation made a titular claim to being in provincial jurisdiction (finding its zenith in *Dupond*).[38]

RITCHIE'S OPINION IN *ROBERTSON*

The majority opinion by Ritchie J in *Robertson* largely adopted the reasoning in the first line of argument proffered by the Lord's Day Alliance in finding no conflict between freedom of religion in the *Canadian Bill of Rights* and the provisions of the *Lord's Day Act*. Ritchie, for the majority, avoided addressing the second line of argument that the *Canadian Bill of Rights* was no more than a canon of construction.

Ritchie J begins his analysis with an examination of "the concept of religious freedom which was recognized in this country before the enactment of the Canadian Bill of Rights"[39] in order to determine the scope of "freedom of religion." Ritchie relies on judicial authorities for this definition and draws on a selection of three implied bill of rights cases and one American authority on freedom of religion, *re Alberta Statutes*,[40] *Saumur*,[41] *Chaput*,[42] and *Board of Education v Barnette.*[43] It is a curious selection of cases as it includes one case that did not address freedom of religion (*re Alberta Statutes*), yet it excludes other leading freedom of religion cases that Ritchie considered in *Lieberman* (e.g. *Henry Birks*).

Drawing from this curious selection of cases, Ritchie J concludes that the courts had long expressed that freedom of religion has prevailed in Canada concurrent with the

[38] *Attorney-General for Canada and Dupond v Montreal*, [1978] 2 SCR 770,
[39] *Lieberman* at 654
[40] *re Alberta Statutes*, [1938] SCR 100
[41] *Saumur v A-G Quebec*, [1953] 2 SCR 299
[42] *Chaput v Roman*, [1955] SCR 834
[43] (1943) 319 US 624.

existence of the *Lord's Day Act* and therefore the *Lord's Day Act* "has never been [judicially] considered as an interference with the kind of 'freedom of religion' guaranteed by the *Canadian Bill of Rights*."[44] Essentially, Ritchie argued that if there are high judicial authorities which express that a certain right or freedom prevailed at the time of that decision, any then-existing legislation is considered by the court not to be an interference in that right unless it is expressly declared to be such a violation in that decision.[45] This was a reflection of the arguments advanced by the Lord's Day Alliance that "freedom of religion" is synonymous with no more than "untrammelled affirmation of religious belief and its propagation, personal or institutional" and does not extend to a restriction on the legislature enacting laws that affirm and propagate religious belief so long as they do not compel worship or restrict propagation by citizens. Put perhaps another way, it is a more 'robust' guarantee of "freedom of religion" as not only are *individuals* guaranteed the right to untrammelled affirmation of religious belief and its propagation," but the *legislature* is guaranteed those same rights.

Ritchie J then briefly revisits the question of *vires*, noting that while for "purely secular purposes of regulating hours of labour [...] is primarily vested in the provincial legislatures,"[46] legislation for the "express purpose of safeguarding the sanctity of the Sabbath [...] constitutes a part of the criminal law in its widest sense and is thus reserved

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[44] *Robertson* at 658

[45] While Ritchie never expressly states this, the logic employed inexorably leads to the conclusion that the *Canadian Bill of Rights* declared that all then-existing legislation was immune from a challenge based on the *Canadian Bill of Rights*. This argument was also the seed of what became known as the "frozen concepts" doctrine – i.e. a doctrine of strict contemporaneous construction – in the interpretation of the *Canadian Bill of Rights* that served to narrow restricted the scope of rights guarantees.

[46] *Robertson* at 657

to the Parliament of Canada by s. 91(27) of the British North America Act."[47] Ritchie cites *Hamilton Street Railways* as authority for this determination to dispense with any division of powers attack on the *Lord's Day Act*.

Arguably, Ritchie J could have ended his reasoning there that (1) it has been judicial determined that the *Lord's Day Act* does not constitute a violation of freedom of religion and (2) the *Lord's Day Act* is *intra vires* the federal parliament because it safeguard's "the sanctity of the Sabbath." Yet, these two statements appear evidently contradictory and Ritchie feels compelled address the contradiction, producing a rather curious line of argument.

Establishing that the *Lord's Day Act* was *vires* the federal parliament because its "express purpose of safeguarding the sanctity of the Sabbath," Ritchie reasons that "the *effect* of the Lord's Day Act rather than its purpose must be looked to in order to determine whether its application involves the abrogation, abridgment or infringement of religious freedom."[48] From his analysis of the *effect* of the *Lord's Day Act*, Ritchie finds that "the practical result of this law on those whose religion requires them to observe a day of rest other than Sunday, is a purely secular and financial one" touching on matters of working hours and therefore does not infringe upon freedom of religion in the *Canadian Bill of Rights*. That is, in enacting the *Lord's Day Act* Parliament's purpose was purely one of "sanctity," but its effect was "purely secular:"

> *the fact that it has been brought about by reason of the existence of a statute enacted for the purpose of preserving the sanctity of Sunday, cannot, in my view, be construed as attaching some religious significance to an effect which is purely secular in so far as non-Christians are concerned.*

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[47] *Robertson* at 656
[48] *Robertson* at 656. Emphasis mine.

This was a significant variation from the previously standard approach to constitutional interpretation and Ritchie provided no authorities to justify this approach. Typically, courts would first test *vires* against the express purpose of a Statute. Thus, the Privy Council in *Hamilton* (as with the Supreme Court in *Ouimet* and *St-Prosper*) sterilized a statute because its express purpose was *ultra vires* and gave relatively little consideration to its effects since that second step was unnecessary. In *Henry Birks* and *Re Sunday Observance,* the Supreme Court observed that legislation that in its "express purpose" was *intra vires* and then proceeded to a second step of examining its practical effects and determined that whatever the *vires* of "express purpose" its practical effects were *ultra vires*. Yet in *Robertson,* Ritchie restricted his examination on the basis of the *British North America Act* to the statute's purpose and restricted his examination of on the basis of the *Canadian Bill of Rights* to the statute's practical effect. Thus, had the examination of both purpose and effect been applied to both analyzes or even if the examination of purpose and effect had been switched for the analysis, then Ritchie's reasoning could not have been sustained.

RITCHIE'S CONTRASTING REASONING

Despite the incredible parallels of the case – (1) dealing with the same instrument, (2) hearing the cases one immediately after the other, (3) having the opinion written by the same judge and (4) having the reasons delivered the same day – Ritchie's reasoning in *Lieberman* and *Robertson* were curiously contrary. In *Lieberman,* Ritchie J upheld a municipal bylaw that was argued conflicted with the *Lord's Day Act* by testing the bylaw's validity only against its *purpose* and by disregarding its *effect*. Yet in *Robertson,* Ritchie upheld the *Lord's Day Act* that was argued conflicted with the *Canadian Bill of*

Rights by testing the *Lord's Day Act*'s validity only against its *effect* and by disregarding its *purpose*.

Further, whereas Ritchie J dismissed the appeal in *Lieberman* without according costs to the appellant in *Robertson*, he dismissed with costs to the appellant. The failed appellant in *Lieberman* whose claim sought to strengthen the *Lord's Day Act* was spared from paying costs, while the failed appellants in *Robertson* whose claim sought to challenge the *Lord's Day Act* were ordered to pay costs. As a result, the appeal against $62 in fines by Robertson and Rosetanni resulted in not only their own legal fees in pursuing a case to the Supreme Court, but a further $1341.50 of their opponents' costs. Thus in two very similar cases, but in one case where the opponents were challenging a federal statute and in the other they were defending the federal statute, those who challenged a federal statute were punished with costs. This different approach in according costs in two very similar cases heard and delivered at the same time by most of the same judges likely indicates that the majority felt a challenge based on a division of powers had merit and it was not unreasonable for the government to pay its own legal fees to defend such a potentially dubious statute, challenges based upon the *Canadian Bill of Rights*.

CARTWRIGHT'S LONE DISSENT IN ROBERTSON

While concurring with Ritchie's reasoning in *Lieberman*, Cartwright (as noted, the only judge who heard both the leave for appeal and the appeal itself) dissented from Ritchie's reasoning in *Robertson*. In Cartwright's opinion he determined (1) that "the *Lord's Day Act* is clear and unambiguous and does infringe the freedom of religion

contemplated by the *Canadian Bill of Rights*"[49] and (2) that "where there is irreconcilable conflict between another Act of Parliament and the Canadian Bill of Rights the latter must prevail."[50] Resultantly, he concluded " that s. 4 of the *Lord's Day Act* does infringe the freedom of religion declared and preserved in the *Canadian Bill of Rights* and must therefore be treated as inoperative." Ritchie's majority opinion, in contrast, only addressed the first issue and therefore was not obligated to address the second.

In terms of authorities, Cartwright differed from Ritchie J in his treatment of the implied bill of rights cases. While Ritchie ignored *Henry Birks* in his analysis of freedom of religion in *Robertson*, Cartwright invoked the reasoning of Rand, Kellock, and Locke in *Henry Birks* that the enactment in question was a violation of freedom of religion (the other six justices – which included Cartwright himself and the three judges who concurred with Ritchie in *Robertson* – never addressed the freedom of religion question, confining their decision on the matter of the criminal power). This was a pointed critique of Ritchie's main reasoning that regulating closing hours over the issue of "sanctity" was not judicial determined to be an infringement of freedom of religion in that three Supreme Court justices finding that particular regulation of closing hours on a holy day was (and the other six not contesting that conclusion) more recently than any of Ritchie's authorities. Cartwright also directly rejects Ritchie's interpretation of the American authority, *Board of Education v Barnette*, arguing that such authority was only valid for "a law which has a constitutionally valid purpose and effect" and "a law which compels a

[49] *Robertson* at 661
[50] *Robertson* at 662

course of conduct, whether positive or negative, for a purely religious purpose infringes the freedom of religion."[51]

Cartwright, thus, rejects the fundamental basis of Ritchie's argument

> *that because the Lord's Day Act had been in force for more than half a century when the Canadian Bill of Rights was enacted, Parliament must be taken to have been of the view that the provisions of the Lord's Day Act do not infringe freedom of religion. To so hold would be to disregard the plain words of [the Canadian Bill of Rights].*[52]

Instead, Cartwright determines the meaning of "freedom of religion" without reference to judicial authorities and concludes that:

> *A law which, on solely religious grounds, forbids the pursuit on Sunday of an otherwise lawful activity differs in degree, perhaps, but not in kind from a law which commands a purely religious course of conduct on that day, such as for example, the attendance at least once at divine service in a specified church.*[53]

As a result, Cartwright is obligated to examine a question Ritchie was able to avoid: what happens when an enactment is construed as being in "clear and unambiguous" conflict with the *Canadian Bill of Rights*? For this question, Davey's opinion in *Gonzales* was the only authority made known to the court that directly addressed the issue. Cartwright unequivocally rejected the reasoning of Davey JA that the *Canadian Bill of Rights* "seems merely to provide a cannon or rule of interpretation for such legislation."[54] Instead Cartwright reasoned that " where there is irreconcilable conflict between another Act of Parliament and the Canadian Bill of Rights the latter must prevail:"

> *The imperative words of s. 2 of the Canadian Bill of Rights, quoted above, appear to me to require the courts to refuse to apply any law, coming*

[51] *Robertson* at 680
[52] *Robertson* at 661
[53] *Robertson* at 661
[54] *R v Gonzales*, (1962), 32 DLR (2d) 290 at 292

within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the Canadian Bill of Rights. As already pointed out s. 5(2), quoted above, makes it plain that the Canadian Bill of Rights is to apply to all laws of Canada already in existence at the time it came into force as well as to those thereafter enacted. ♦

Table 6: *Robertson* Timeline

1962-01-14 (Sunday)	Walter Robertson and Fred Rosetanni **operated their Hamilton bowling alley beginning in the morning hours in violation**[55] **of the federal *Lord's Day Act.***[56]
1962-01-25	Robertson and Rosetanni's violation of the *Lord's Day Act* was formally **reported** to Hamilton Police by Charles Boecker.
1962-02-14	The **trial** of Robertson and Rosetanni was presided over by Magistrate W.R. Morrison.
1962-02-21	Robertson and Rosetanni were **convicted** of violating the *Lord's Day Act* and each sentenced to a **$31 fine** (inclusive of costs) or five days detention by Magistrate W.R. Morrison who gave no reasons for his decision.
1962-03-19	**Leave to appeal** was granted to the Ontario **superior court** on the basis that the *Lord's Day Act* conflicted with the *Canadian Bill of Rights*.
1062-04-10	Justice Schatz **dismissed the appeal** finding no conflict between the *Lord's Day Act* and the *Canadian Bill of Rights*, but he gave no reasons for his decision.
1962-04-18	**Leave to appeal** was granted to the **Court of Appeal** of Ontario on the basis of the original appeal.
1962-08-09	Diefenbaker replaces Fulton as Minister of Justice with Flemming (following the 25th general election of 18 June 1962).
1962-09-18	Justices Aylesworth, Gibson, and Schroeder of the Court of Appeal **dismisses the appeal**, but gives no reasons for their decision.

[55] N.B. Hamilton By-Law 9252 permitted the operation of a bowling alley on Sundays, but only between the hours of 1:30 pm and 6:00 pm. The Hamilton bylaw was authorized by section 1 of the Ontario *Lord's Day Act*, which, in turn, was authorized by section 4 of the federal *Lord's Day Act*.
[56] RSC 1952, c. 171, s. 4.

1962-10-30	Notice of a **motion** for **leave to appeal to the Supreme Court of Canada** was filed.
1962-11-19 10h30-10h33	The motion for **leave to appeal** was heard by a panel consisting of Chief Justice Kerwin and Justices Cartwright and Judson, with leave being **granted**. The Order granting leave to appeal directed that Notice be served upon the Attorney General of Canada as well as the parties to the case *Lieberman v The Queen*.[57]
1962-12-14	Director of the Criminal Law Section, D.H. Christie, prepares for the Assistant Deputy Minister T.D. MacDonald[58] a draft memo for the Deputy Minister concerning *Lieberman v The Queen* and *Robertson and Rosetanni v The Queen* (unfortunately the entirety of this six-page memo has been redacted).[59]
1962-12-17	T.D. MacDonald, passes along D.H. Christie's memo to the Deputy Minister of Justice adding a two page cover letter (unfortunately the entirety of this cover letter along with the six-page memo have been redacted).[60]
1962-12-18	D.S. Maxwell informs E.A. Driedger that a hearing for leave to appeal will be entertained by Chief Justice Kerwin.[61]
1962-12-19	D.H. Christie successfully motions to have the deadline to seek leave to intervene extended to 19 December and gains **leave to intervene for the Attorney General of Canada** (i.e. the Department of Justice) with a deadline of 16 January 1963 to file Factums.[62] E.A. Driedger informs the

[57] *R v Lieberman*, [1963] SCR 643.

[58] NB at this time the Department had two Associate Deputy Ministers and Three Assistant Deputy Ministers who directly reported to the Deputy Minister (LAC MG31E39v.21,f.4) Between November 1962 and April 1963 the Legal Branch of the Department had a staff of 47 including the Deputy Minister (DOJ A91-00038)

[59] D H Christie, "Memorandum to D.S. Maxwell, re: Lieberman v The Queen; Robertson and Rosetani v The Queen," 14 December 1962 (DOJ/198064, pp. 155-161)

[60] D S Maxwell, "Memorandum to the Deputy Minister, re: Lieberman v The Queen; Robertson and Rosetani v The Queen," 17 December 1962 (DOJ/198064, pp. 150-151).

[61] DS Maxwell, "Memorandum to the Deputy Minister, re: Lieberman v The Queen; Robertson and Rosetani v The Queen," 18 December 1962 (DOJ/198064, p. 142). This inferred as the document is largely redacted.

[62] D H Christie, "Memorandum for file 198064" 19 December 1962 (DOJ/198064, p. 143).

	Minister of Justice that the Department will be intervening in the case and explains why.[63]
1963-01-07	The case was confirmed that it would be heard in the winter session of the Court.
1963-01-10	NDP MP (and lawyer) F. Andrew Brewin meets with T.D. MacDonald to discuss the Department's approach to *Robertson* and argues that the *Lord's Day Act* should be defended on the grounds that the *Canadian Bill of Rights* is "only a statute of interpretation, notwithstanding the presence of the word 'applied' in section 2." The Department rejected this defence.[64] Brewin had his law firm approach the Lord's Day Alliance of Canada (LDAC) to intervene to provide a more aggressive defence of the *Lord's Day Act*. When the Attorney General of Canada refused to seek leave to intervene on behalf of the LDAC, Brewin's firm successfully approach the Attorney General of Ontario to seek such leave to intervene.
1963-01-11	Counsel for the **Appellants** informs the other parties that their **Factum is completed**. The Attorney General of Ontario motions to extend the original deadline for the Filing of Factums of 16 January 1963 to 4 February 1963.
1963-01-16	The **Attorney General of Canada files its Factum** with the Registrar of the Supreme Court. Chief Justice Kerwin extends the deadline for the filing of Factums to 4 February 1963. This deadline was further extend to at least 12 February 1963 (material delineating the exact date of the extension and explaining this extension are missing from the case file).
1962-02-02	Chief Justice Kerwin dies.
1963-02-04	The Attorney General of Ontario applies for leave to intervene on behalf of the Lord's Day Alliance of Canada.
1963-02-06	The Diefenbaker government loses a confidence motion and parliament is dissolved.
1963-02-08	The Attorney General of Ontario transmits the **factum** of the **Lord's Day Alliance** of Canada to the Department of Justice.[65]

[63]E A Driedger, "Memorandum for Minister, re: Lieberman v The Queen; Robertson and Rosetani v The Queen," 19 December 1962 (DOJ/198064, pp. 138-141). This inferred as the document is largely redacted.
[64] T D MacDonald, "Memorandum for D. H. Christie, re: Lieberman," 10 January 1963 (DOJ/198064, p. 130).
[65] J W Austin, "Letter to T D MacDonald, Re: Regina vs. Walter Robertson and Fred Rosetanni" 8 February 1963 (DOJ/198064, p. 109)

1963-02-12	On 12 February 1963, the **Lord's Day Alliance** of Canada is **granted leave to intervene**.
1963-02-24	T.D. MacDonald, Solicitor for the Attorney General of Canada, drafted a memo to Deputy Minister (likely) explaining their approach to the case (unfortunately the entirety of this two page memo and the contents of its cover letter have been redacted).[66]
1963-02-26	The cause of ***Lieberman*** *v The Queen* is **heard before a panel of seven Justices** (Taschereau, Cartwright, Fauteux, Abbott, Martland, Judson, and Ritchie). o Counsel for the Attorney General of Ontario, W.C. Bowman and F.W. Callaghan, were present but did not speak (both were present for *Robertson* with Bowman speaking for eight minutes).
1963-02-27 *1963-02-28*	The cause *of* ***Robertson*** *and Rosetanni v The Queen* is **heard before a panel of five Justices** (Taschereau, Cartwright, Fauteux, Abbott and Ritchie) o At the hearing counsel for the appellant speaks for two hours of opening argument and thirty minutes of closing argument; counsel for the Attorney General of Ontario speaks for eighty minutes; counsel for the Attorney General of Canada speaks for two hours; and counsel for the Lord's Day Alliance speaks for thirty minutes.
1963-10-18	The **decisions of the Court** in both ***Lieberman*** as well as ***Robertson*** are handed down.
1964-03-06	**Robertson and Rosetanni** were served with **costs of $1341.50** in excess of their own legal fees.

[66] T D MacDonald, "Memorandum for Deputy Minister, re: Lieberman v. The Queen; Robertson and Rosetani v. The Queen," 24 February 1962 (DOJ/198064, pp. 94-96). This is inferred, as the document is largely redacted.

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List of Court Abbreviations

Abbrev.	Court
__ CA	[court of appeal of a province]
__ SC	[superior courts of a province, including district and county courts]
__ PC	[provincial court]
CA	Court of Appeal [England]
CAC	Court of Appeal, Civil Division [England]
Cha	High Court of Justice, Chancery Division [England]
CP	Court of Common Pleas [England]
CS	Court of Session [i.e. civil] [Scotland]
DC	Divisional Court [i.e. administrative court] [England]
ECHR	European Court of Human Rights
ECJ	European Court of Justice
Exq	Court of Exchequer [England]
FCA	Federal Court of Appeal
FCC	Federal Court [Trial]
HCA	High Court of Australia
HCJ	High Court of Justice [England]
HL	House of Lords
NYSC	New York Supreme Court
NZCA	New Zealand Court of Appeal [i.e. highest domestic court of appeal]
PC	Judicial Committee of the Privy Council
QB	Court of Queen's Bench [England]
QBD	Queen's (King's) Bench Division of the High Court of Justice [England]
Qld SC	Queensland Supreme Court
SAAD	South Africa Supreme Court (Appeal Division)
SCC	Supreme Court of Canada
USSC	United States Supreme Court

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