

2004

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Citation Information

Sossin, Lorne. "The Quasi-Revival of the Canadian Bill of Rights and Its Implications for Administrative Law." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 25. (2004).
DOI: <https://doi.org/10.60082/2563-8505.1063>
<https://digitalcommons.osgoode.yorku.ca/sclr/vol25/iss1/6>

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The Quasi-Revival of the *Canadian Bill of Rights* and Its Implications for Administrative Law

Lorne Sossin *

Curiously, one of the most significant features of the administrative law cases decided by the Supreme Court this past term was the prominence of the *Canadian Bill of Rights*.¹ *Authorson (Litigation Guardian of) v. Canada (Attorney General)*² raised the scope of procedural protection in sections 1(a) and 2(b) of the *Bill of Rights*, while *Bell Canada v. C.T.E.A.*³ the content of section 2(b). The Court has also granted leave in a third *Bill of Rights* case, *Air Canada v. Canada (Attorney General)*.⁴ In this brief review, I offer an account of what appears to be something of a *Bill of Rights* revival in the federal administrative law sphere, and the implications of the *Bill of Rights* for the development of Canadian administrative law more generally. Notwithstanding the enduringly conservative approach of the Supreme Court to developing its *Bill of Rights* jurisprudence, I suggest the role of the *Bill of Rights* (and other quasi-constitutional instruments) may grow in light of other developments in Canadian administrative law.

The *Bill of Rights* often has been described as “a half-way house between a purely common law regime and a constitutional one” or simply,

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¹ S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III. For additional commentary on the significant administrative decisions during this term, see L. Sossin, “Developments in Administrative Law: The 2002-2003 Term” (2003) 22 Sup. Ct. L. Rev. (2d) 21-82.

² [2003] 2 S.C.R. 40, [2003] S.C.J. No. 40.

³ [2003] 1 S.C.R. 884, [2003] S.C.J. No. 36.

⁴ (2003), 23 C.P.R. (4th) 129, [2003] J.Q. no. 21 (C.A.), leave to appeal to S.C.C. granted (2003), 26 C.P.R. (4th) vi (S.C.C.).

for short, a “quasi-constitutional” instrument.⁵ The significance of this characterization for administrative law was highlighted in the Supreme Court’s decision in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*,⁶ in which the Court observed that the common law rules of procedural fairness could be displaced by an expressly worded statute, except in jurisdictions where quasi-constitutional guarantees of procedural fairness had been enacted. The significance of *Ocean Port* for the *Bill of Rights* is addressed further below.

Where statutory provisions appear to displace common law procedural guarantees, the *Bill of Rights* may well be the only recourse affected parties have to challenge federal government action.⁷ Even where other protections are available (for example, the Charter), the *Bill of Rights* may nonetheless provide a preferable route to a remedy in light of the distinctive features of the due process and fair hearing provisions (for example, the due process protection over the enjoyment of property)⁸ and the absence of a limiting clause such as section 1 of the Charter. For all of these reasons, the *Bill of Rights* merits renewed attention from constitutional and administrative law observers alike.

This paper is divided into three sections. In the first section, I trace the background of the *Bill of Rights* and its impact on federal administrative law. In the second section, I examine *Authorson* and *Bell Canada*,

⁵ See, for example, *R. v. Hogan*, [1975] 2 S.C.R. 574, at 597.

⁶ [2001] 2 S.C.R. 781, [2001] S.C.J. No. 17. In that case, the quasi-constitutional guarantee referred to was s. 23 of the Quebec *Charter of human rights and freedoms*, R.S.Q. c. C-12. In *Air Canada*, as discussed below, the Quebec Court of Appeal observed that other quasi-constitutional instruments such as the *Bill of Rights* would be treated similarly. (See *supra*, note 4, at para. 56).

⁷ While the *Canadian Charter of Rights and Freedoms* [Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11], also provides procedural guarantees under s. 7, the threshold of having to demonstrate that a right to life, liberty or the security of the person has been deprived, limits its application in administrative law settings. For discussion of the Charter’s application to administrative settings, see *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, [2000] S.C.J. No. 43. See also *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177, [1985] S.C.J. No. 11, discussed below.

⁸ See *R. v. Bryan* (1999), 170 D.L.R. (4th) 487, at 497-98, [1999] M.J. No. 49 (C.A.). See generally P. Hogg, “A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights” in Beaudoin & Ratushny (eds.), *The Canadian Charter of Rights and Freedoms* (2d ed. 1989), at 7.

and the questions resolved and raised by the Supreme Court's recent treatment of the *Bill of Rights* in this context. In the third and final section, I consider the future of the *Bill of Rights* for administrative law and the issues to be raised in the forthcoming *Air Canada* appeal.

I. A SHORT, AMBIVALENT HISTORY OF THE *CANADIAN BILL OF RIGHTS* AND ADMINISTRATIVE LAW

Those who welcomed the *Bill of Rights* in the pre-Charter era rarely did so on the basis of its promise of procedural protections. David Mullan recently observed bluntly that, "[t]he *Canadian Bill of Rights* has never figured prominently in federal Administrative Law."⁹ Mullan accounts for this by recourse to a variety of factors, including the "parsimonious" judicial interpretation of the *Bill of Rights* in the period from its enactment to the entrenchment of the *Charter of Rights and Freedoms* and the preference for the Charter after that period. As I elaborate below, the other factor which may account for the *Bill of Rights*' checkered past is the lack of clarity regarding the where and how the procedural protections contained in the *Bill of Rights* differed from those contained in the common law duty of fairness and those protected by the Charter, respectively.

The relevant parts of the Canadian *Bill of Rights* provide:

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...
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

⁹ D. Mullan, "Constitutional Guarantees, Quasi-Constitutional Guarantees and Administrative Tribunals: A Thaw in the Ice?" (Paper prepared for The Constitution in Your Administrative Law Practice, OBA Conference, Tuesday, March 2, 2004), at 3 [unpublished].

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

...

- (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...

Prior to the enactment of the Charter, the *Bill of Rights* had little impact on administrative law in Canada, notwithstanding the guarantee of “due process” in section 1(a) and a “fair hearing” in section 2(e) of the *Bill of Rights*.

The “due process” protection in section 1(a) of the *Bill of Rights* is often associated with the American constitutional tradition, where it has predominated the debate on procedural fairness. The term, of course, has a much richer and deeper tradition, appearing shortly after the *Magna Carta* and typically associated with checks on executive power — for example, the statute abolishing the Star Chamber in 1640 cited the fact that its actions had not been in accordance with “due process of law.”¹⁰ However, for Canadian jurists, it is the long and controversial history of “due process” in American constitutional law that has proven the most vexing.¹¹ Wary of being seen as second guessing the wisdom of legislation without any constitutional mandate to do so, the “due process” protection under section 1(a) of the *Bill of Rights* was held not to be infringed where government acted in accordance with statutory guidelines, even if those guidelines themselves failed to provide even minimal procedural protections.¹²

¹⁰ *Act of Parliament, 1640* (U.K.), 16 Chas. I, c. 10. For a discussion of “due process,” see W. Tarnopolsky, *The Canadian Bill of Rights*, 2d ed. (Toronto: Methuen, 1976), at 221-35.

¹¹ In what is often referred to as the *Lochner* era (named after *Lochner v. New York*, 198 U.S. 45 (1905)), the “due process” clause of the Fourth and Fifteenth Amendments to the U.S. Constitution was invoked to invalidate early welfare state legislation on the rationale of protecting “economic rights.” The notion of substantive due process has often served as a touchstone for judicial intervention in public policy ever since. For its influence on Canadian thinking in the early *Bill of Rights* era, see I.C. Rand, “Except by Due Process of Law” (1961) 1 Osgoode Hall L.J. 171.

¹² For a survey of this early Bill of Rights case law, see Tarnopolsky, *supra*, note 10, at 234. In *P.S.A.C. v. Canada (Treasury Board)*, [1984] 2 F.C. 562 (T.D.), *aff’d* [1984] 2 F.C. 889 (C.A.), Reed J. stated (at 603 [T.D.]), “‘without due process of law’ in the Canadian Bill

The best known statement on substantive due process under section 1(a) of the *Bill of Rights* appears in *R. v. Curr*,¹³ which involved a challenge to a provision of the *Criminal Code*¹⁴ making it an offence not to provide a breath sample without reasonable excuse. In his analysis of this provision, Laskin C.J., speaking on behalf of himself, Abbott, Martland, Judson, Hall, Spence, and Pigeon JJ., left the door only slightly ajar for review of legislation for substantive due process:

... I am like wise of the opinion that s. 1(a) of the *Canadian Bill of Rights* does not make it inoperative. Assuming that “except by due process of law” provides a means of controlling substantive federal legislation — a point that did not directly arise in *Regina. v. Drybones* — compelling reasons ought to be advanced to justify the court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the *British North America Act*. Those reasons must relate to objective and manageable standards by which a Court should be guided if scope is to be found in s. 1(a) due process to silence otherwise competent federal legislation. Neither reasons nor underlying standards were offered here. For myself, I am not prepared in this case to surmise what they might be.¹⁵

Procedural due process is also clearly contemplated by section 1(a), but as Laskin J. observed in *Curr*, it is difficult to see what procedural content may be read into section 1(a) beyond what is already contemplated under section 2(e).¹⁶ The “fair hearing” guarantee under section

of Rights has not been interpreted as including substantive due process. Even if the Supreme Court left the door open a crack, towards this expanded interpretation in *R. v. Curr*, [1972] S.C.R. 889, at pages 899-900, as plaintiff argues, jurisprudence since that time has not opened that door. Indeed, Laskin C.J. in giving the majority decision of the Court in the *Curr* case at page 902, warned against entering the “‘bog [of] legislative policy making’ which is involved in considerations of economic due process.”

¹³ [1972] S.C.R. 889.

¹⁴ S.C. 1953-54, c. 51 [now R.S.C. 1985, c. C-46].

¹⁵ *Curr*, *supra*, note 13, at 899-900.

¹⁶ *Id.*, at 898. Nonetheless, s. 1(a) has been viewed as primarily a procedural protection in its more recent interpretations: see *Smith, Kline & French Laboratories Ltd. v. Canada (Attorney General)*, [1986] 1 F.C. 274, at 302-304, *aff’d* [1987] 2 F.C. 359, [1986] F.C.J. No.

2(e) of the *Bill of Rights* is limited to settings where a person's "rights or obligations" may be adversely affected. Mullan earlier described this protection as "generally unfertile ground" for procedural claims in the period of *Bill of Rights* jurisprudence prior to the enactment of the Charter.¹⁷

After the enactment of the Charter, the *Bill of Rights* seemed to be granted a new lease on life by the Supreme Court in *Singh v. Canada*.¹⁸ In that decision, three justices of a six-justice majority relied on section 2(e) of the *Bill of Rights* in ruling inoperative a statutory scheme which failed to provide refugee claimants with an oral hearing (the other three justices in the majority relied on section 7 of the Charter). Among other findings, Beetz J., writing for the three justices who applied the *Bill of Rights*, concluded that the procedural protections contained in section 2(e) of the *Bill of Rights* are not ancillary to the "due process" contained in section 1 — in other words, it is not necessary to demonstrate the violation of a "fundamental right" in order to invoke the right to a fair hearing; rather, the infringement of any right or obligation is sufficient to trigger the free-standing procedural protections of section 2(e). While *Singh* may have resolved the question of a link between these two procedural protections, that decision only accentuated the question as to the different scope and content each of these procedural guarantees might contain.

Subsequently, in *MacBain v. Canada (Human Rights Commission)*,¹⁹ the Federal Court of Appeal explored the reach of section 2(e) in more depth, and used the "fair hearing" protection to rule inoperative provisions of the *Canadian Human Rights Act*²⁰ which permitted the Chair of the Canadian Human Rights Commission to select Tribunal members to hear a complaint which the Commission was also charged with investigating and prosecuting. While the Supreme Court has not

787 (C.A.), leave to appeal to S.C.C. refused (1987), 27 C.R.R. 286n (S.C.C.). See also *Energy Probe v. Canada (Attorney General)* (1994), 17 O.R. (3d) 717, at 759, [1994] O.J. No. 553 (Gen. Div.).

¹⁷ D. Mullan, *Administrative Law* (Toronto: Carswell, 1996) at §88, citing *Prata v. Canada (Minister of Manpower & Immigration)*, [1976] 1 S.C.R. 376; *Howarth v. Canada (National Parole Board)*, [1976] 1 S.C.R. 453; and *R. v. Mitchell (sub nom. Mitchell v. R.)*, [1976] 2 S.C.R. 570.

¹⁸ *Supra*, note 7.

¹⁹ [1985] 1 F.C. 856, [1985] F.C.J. No. 907 (C.A.).

²⁰ S.C. 1976-77, c. 33 [now R.S.C. 1985, c. H-6].

expressly endorsed *MacBain*, it has been relied upon in other cases in the context of institutional independence and impartiality.²¹

After *MacBain*, this judicial revival of the procedural protection contained in section 2(e) of the *Bill of Rights* appeared to stall. Where both the *Bill of Rights* and the Charter applied, litigants and courts appeared to prefer the Charter route, or simply to proceed under the common law procedural guarantees where applicable.²² It remained an open question how the Court would apply protections contained in the *Bill of Rights*, such as the “due process” guarantee, that were not duplicated in the Charter.

One of the sparks that ignited renewed interest in the *Bill of Rights* among administrative law observers was the Supreme Court’s reference to quasi-constitutional instruments in *Ocean Port*. In *Ocean Port*, the Supreme Court distinguished between common law independence protections, which could be displaced by an expressly worded statute on the one hand, and Charter and quasi-constitutional independence protections on the other hand, which could not.²³ Specifically, McLachlin C.J., writing for the Court, pointed out that the Court’s willingness to subject a statutory scheme of liquor regulation to scrutiny on independence grounds in 2747-3174 *Québec Inc. v. Québec (Régie des permis d’alcool)*,²⁴ was based on the fact the challenge in that case was brought pursuant to section 23 of the Quebec *Charter of human rights and freedoms*, which guaranteed the right to “a full and equal, public and fair hearing by an independent and impartial tribunal.” The Court in *Ocean Port* characterized the Quebec *Charter* as a “quasi-constitutional” statute.²⁵

While the *Bill of Rights* is not mentioned in *Ocean Port*, the reaffirmation that courts will only entertain challenges to statutes that deprive

²¹ *Syndicat des employés de production du Québec & de l’Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879, at paras. 52, 67, 70-71, [1989] S.C.J. No. 103.

²² *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39. The Charter aspects of this challenge to a denial of a statutory exemption under the *Immigration Act* [R.S.C. 1985, c. I-2; now *Immigration and Refugee Protection Act*, S.C. 2001, c. 27] on humanitarian and compassionate grounds were argued extensively but not referred to by the Supreme Court, which found in favour of the applicant on administrative law grounds.

²³ *Supra*, note 6, at para. 24.

²⁴ [1996] 3 S.C.R. 919, [1996] S.C.J. No. 112.

²⁵ *Supra*, note 6, at para. 28.

parties of procedural rights where the Charter or a quasi-constitutional statute applies may breathe new life into *Bill of Rights* litigation. The *Bill of Rights* threshold of “rights and obligations” for invoking the “fair hearing” protection under section 2(e) is far broader than the Charter threshold of deprivations of life, liberty, and security of the person — thus, there will be many cases where a litigant’s only recourse to challenge a statutory scheme is the *Bill of Rights*. Below, I consider two examples from this past year in which litigants raised *Bill of Rights* challenges in precisely these circumstances. That neither litigant was successful in the Supreme Court under the *Bill of Rights* serves as a cautionary tale about the continuing reticence of the Supreme Court in the face of the *Bill of Rights*. However, that both litigants were successful in the lower courts on this issue suggests some judicial willingness to approach the *Bill of Rights* in a novel and expansive fashion. Judicial ambivalence toward the *Bill of Rights* continues to provide hope to many and certainly to few.

II. FAIRNESS UNDER THE BILL OF RIGHTS: *AUTHORSON V. CANADA* AND *BELL CANADA V. C.T.E.A.*

As indicated above, the unresolved questions swirling around the *Bill of Rights* surfaced in two cases before the Supreme Court in 2003. While neither of the litigants seeking to raise the *Bill of Rights* to challenge federal laws discussed below was successful, there is, I would suggest, nonetheless a basis to believe that a *Bill of Rights* revival may yet be around the corner.

1. *Authorson v. Canada*

Authorson v. Canada involves a sprawling class action against the federal Crown for failing to pay interest on pension funds for disabled veterans being administered by the federal government. By the time the case reached the Supreme Court, however, the only disputed issue before the Court was the scope and application of the *Bill of Rights*. *Authorson* presented the Court with a stark case of an admitted injustice involving the breach of a fiduciary obligation to a vulnerable group. Faced with explicit legislation barring any claims against the Crown in relation to that injustice, however, the Court concluded that it had no choice but to defer to the supremacy of Parliament. *Authorson* also

raised the issue of whether “due process” under section 1(a) of the *Bill of Rights* contains a substantive dimension, akin to substantive fundamental justice under section 7 of the Charter. In other words, are some types of statutory provisions inconsistent with section 1(a) *per se*, irrespective of what procedural guarantees are offered to an affected party? This is a question which the Supreme Court had avoided in earlier *Bill of Rights* jurisprudence.²⁶ In order to understand the Court’s approach to the *Bill of Rights* in *Authorson*, it is important to understand something of the legally complex and politically sensitive nature of the litigation.

Until January 1, 1990, the administered accounts of disabled veterans were not held in interest-bearing accounts. From January 1, 1990 onwards, the Minister of Finance directed that interest was to be paid on these accounts. In 1990, the *Department of Veterans Affairs Act* was amended to include an express bar to civil claims for unpaid interest on administered veterans’ accounts.²⁷

Joseph Authorson, the representative plaintiff for the class, suffered from a mental disability exacerbated during his service in the Canadian army during the Second World War. In 1950, he was awarded a full pension, which was ordered to be administered by the Crown. He spent the next forty years in a veterans’ hospital until 1991 when he was declared competent to manage his own financial affairs. During the four decades his pension was administered by the Crown, no interest was paid or permitted to accrue on his account. This class action was brought by Authorson on behalf of all the disabled veterans whose accounts were administered by the Department of Veterans Affairs. The class was certified on October 26, 1999. While the total amount of exposure of the Crown remained a point of some contention, it was estimated to be in excess of \$1 billion.

On October 11, 2000, Brockenshire J. of the Superior Court of Ontario granted a motion for summary judgment brought by Mr. Authorson, and dismissed the summary judgment motion brought by the Attorney

²⁶ See, for example, *R. v. Morgentaler* (No. 5), [1976] 1 S.C.R. 616, at 633, *per* Laskin J.

²⁷ This provision became s. 5.1(4) of the *Department of Veterans Affairs Act*, R.S.C. 1985, c. V-1 [added 1990, c. 42, s. 2]. It read: “No claim shall be made after this subsection comes into force for or on account of interest on moneys held or administered by the Minister during any period prior to January 1, 1990 pursuant to subsection 41(1) of the *Pension Act*, subsection 15(2) of the *War Veterans Allowance Act* or any regulations made under section 5 of this Act.”

General for Canada.²⁸ Justice Brockenshire found that the Crown owed a fiduciary duty to the disabled veterans, and that the Crown had breached this duty by its failure to pay interest on administered accounts. Justice Brockenshire further found that the statutory bar to civil recovery enacted in 1990 was inoperative due to the combined effect of sections 1(a) and 2(e) of the *Canadian Bill of Rights*.

The Ontario Court of Appeal unanimously upheld the main aspects of the trial decision.²⁹ The Court of Appeal's ruling in *Authorson* confirmed the existence of a fiduciary obligation owed to the disabled veterans whose pension accounts were being administered by the Crown. The Court of Appeal echoed the trial judge's conclusion that "due process" cannot mean "no process."³⁰ The Court of Appeal emphasized that the affected veterans were not notified that their property rights were going to be foreclosed by this statutory amendment or given any opportunity to contest that foreclosure. The Court of Appeal relied on *MacBain* and *Singh* for its interpretation of procedural protections afforded under the *Bill of Rights*.³¹ Not only did the Court of Appeal's interpretation of the *Bill of Rights* appear to contradict Supreme Court decisions under the Charter that confirmed that the legislative process was not subject to procedural rights,³² but earlier jurisprudence under section 2(e) of the *Bill of Rights* and under section 7 of the Charter, has also consistently held that neither of these guarantees contains a right to an action before a civil court to recover damages, which is what the plaintiffs in *Authorson* sought.³³

While the litigation before the Ontario Superior Court and Ontario Court of Appeal had focused on whether the Crown owed a fiduciary obligation to the veterans, analogous to the obligation recognized in

²⁸ (2001), 53 O.R. (3d) 221, [2000] O.J. No. 3768 (S.C.J.).

²⁹ (2002), 58 O.R. (3d) 417, [2002] O.J. No. 962 (C.A.).

³⁰ *Id.*, at 451.

³¹ *Id.*, at 452.

³² *Native Women's Assn. of Canada v. R. (sub nom. Native Women's Assn. of Canada v. Canada)*, [1994] 3 S.C.R. 627, [1994] S.C.J. No. 93.

³³ See *Energy Probe v. Canada (Attorney General)*, *supra*, note 16, at 731-60; *Filip v. Waterloo (City)* (1992), 98 D.L.R. (4th) 534, [1992] O.J. No. 2470 (C.A.); *Hernandez v. Palmer* (1992), 46 M.V.R. (2d) 26, [1992] O.J. No. 2648 (Gen. Div.).

*Guerin v. Canada*³⁴ (with both the Superior Court and Court of Appeal finding that such a fiduciary relationship existed between the Crown and the disabled veterans), the Crown took the position in its appeal to the Supreme Court that it would concede the existence of a fiduciary obligation. The Crown contended that no recovery for breach of that obligation was available, however, because of the express statutory bar. The only issue in the appeal, therefore, was whether the *Bill of Rights*, because it contains a protection for the “enjoyment of property” and the right to a “fair hearing,” rendered the statutory bar inoperative.

The Supreme Court allowed the Crown’s appeal and denied a basis of recovery to the veterans. While clearly sympathetic to the veterans, the Court rejected the Ontario Court of Appeal’s approach to the *Bill of Rights* and its finding that the “due process” protection imposed procedural obligations on Parliament. Justice Major, writing for the Court, explained, “[d]ue process does not require that the veterans receive notice and a hearing before Parliament prior to the passage of expropriative legislation. As unfortunate as it is for the respondent, long-standing parliamentary tradition has never required that procedure,”³⁵ and later added, “[l]ong-standing parliamentary tradition makes it clear that the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent. Once that process is completed, legislation within Parliament’s competence is unassailable.”³⁶

Justice Major also discussed the scope of the property protection under section 1(a) of the *Bill of Rights* which, while not affecting the legislative process, would entitle affected persons to “notice and some opportunity to contest” a governmental expropriation of property rights through “adjudication of that person’s rights and obligations before a court or tribunal.”³⁷ How this “due process” right differs in the view of

³⁴ [1984] 2 S.C.R. 335. For additional discussion of the fiduciary aspect of *Authorson*, see L. Sossin, “Public Fiduciary Obligations, Political Trusts and the Evolving Duty of Reasonableness in Administrative Law” (2003) 66 Sask. L. Rev. 129-82.

³⁵ *Authorson*, *supra*, note 2, at para. 12.

³⁶ *Id.*, at para. 37.

³⁷ *Id.*, at para. 42. Justice Major is warier of extending “substantive due process” protections through the *Bill of Rights* in light of the American experience with property rights of a substantive nature in *Lochner*, discussed above, in note 11. While not foreclosing the development of substantive property rights under the *Bill of Rights*, just as Laskin C.J. had

Major J. from the protection under section 2(e) of the *Bill of Rights* guaranteeing “fundamental justice” before a tribunal determining an affected party’s rights and obligations is unclear. What is clear to him is that neither of these provisions impedes Parliament’s right to enact legislation expropriating or otherwise affecting property.

The most puzzling aspect of Major J.’s approach to the *Bill of Rights* is his assertion that it “protects only rights that existed in 1960, prior to passage of the *Bill of Rights*.”³⁸ He concludes that, since a right against state expropriation did not exist prior to 1960, the *Bill of Rights* could not be interpreted to protect such a right. As Mullan observes,

[n]ot only does this hearken back to the jurisprudence which saw section 1 of the *Bill of Rights* as merely declaratory of existing rights but it also reflects a position that would make any advocate of original intention theory of constitutional interpretation proud.³⁹

Mullan goes on to observe that even if this narrow approach to the substantive protections of the *Bill of Rights* is appropriate (and he speculates that this assertion is motivated by the Court’s desire to limit the reach of the *Bill of Rights* in substantive rights), it would be an odd and ultimately untenable basis by which to understand the procedural guarantees contained in the *Bill of Rights*. The duty of procedural fairness was embryonic in the period prior to 1960. To suggest that the interpretation of “fair hearing” or “due process” should be frozen in time at that moment, and therefore that the common law protections afforded affected parties far outstrip the protections available under the *Bill of Rights*, seems to me to be both wrong in principle and an implausible interpretation of a quasi-constitutional instrument. It is also fundamentally at odds with the Court’s approach to the procedural protections afforded by the *Bill of Rights* in *Singh* in which refugee claimants, who

not foreclosed their development in *Curr*, *supra*, note 13, Major J. concluded that it was unnecessary to explore their scope in this case.

³⁸ *Authorson*, *id.* at para. 33. Justice Major elaborates, “The Bill of Rights protects only rights that existed in 1960, prior to passage of the *Bill of Rights*. See, *e.g.*, *Miller v. The Queen*, [1977] 2 S.C.R. 680, at pp. 703-4 (no absolute right to life existed prior to the *Bill of Rights*, so a death penalty statute was not inoperative); *R. v. Burnshine*, [1975] 1 S.C.R. 693, at p. 705 (a right to uniform sentencing across different regions of Canada did not exist prior to 1960, and was therefore not protected by the *Bill of Rights*).” (At para. 33.)

³⁹ Mullan, *supra*, note 9, at 15.

would have been entitled to no procedural guarantees prior to 1960, were found to be entitled to an oral hearing in 1985.

The Court appeared to have a promising case to clarify the procedural dimensions of the *Bill of Rights*, and in particular the section 2(e) fair hearing protection, in the *Bell Canada* case. As discussed below, however, the Court chose to avoid the key question whether the content of “fair hearing” and the common law duty of procedural fairness are coterminous or distinct.

2. *Bell Canada v. C.T.E.A.*

Bell Canada involved complex pay equity litigation which has dragged on for years, often ending up in Federal Court based on challenges to the impartiality and independence of the Canadian Human Rights Tribunal which is conducting the hearing.⁴⁰ This appeal raised two such concerns: first, that the Tribunal lacked independence because the Canadian Human Rights Commission, a party of interest in the proceedings, has the power to issue binding guidelines interpreting the *Canadian Human Rights Act*⁴¹ in “classes of cases”; and second, that the Tribunal lacks independence because the Chair of the Tribunal has discretion over whether sitting members can continue to hear cases which will run on past the expiry of their terms. While the *Act* clearly authorized both powers, Bell argued that because the Tribunal is purely adjudicative — more a “human rights court” than an administrative tribunal — it should enjoy the constitutional protections of “adjudicative independence,” and alternatively, that section 2(e) of the *Canadian Bill of Rights*, which guarantees a “fair hearing,” is a quasi-constitutional protection which renders inoperative statutory provisions inconsistent with the standards of independence and impartiality.

The Tribunal rejected Bell’s position and directed that the hearings should proceed. The Federal Court, Trial Division, allowed Bell’s application for judicial review, holding that even the narrowed guideline power of the Commission unduly fettered the Tribunal, and that the Chairperson’s discretionary power to extend appointments did not leave

⁴⁰ See, for example, *Bell Canada v. C.T.E.A. (sub nom Bell Canada v. Canadian Telephone Employees Assn.)*, [1998] 3 F.C. 244, [1998] F.C.J. No. 313.

⁴¹ R.S.C. 1985, c. H-6 [am. 1998, c. 9].

Tribunal members with a sufficient guarantee of tenure.⁴² The trial judge based her remedy, which was to quash the proceedings, on the fact that the institutional structure of the Tribunal was inconsistent with the protection afforded under section 2(e) of the *Bill of Rights*.⁴³ The Federal Court of Appeal reversed that judgment (although, because it had reversed on the issue of whether the common law standard of independence was breached, the Court indicated that the scope of the procedural reach of section 2(e) of the *Bill of Rights per se* did not need to be addressed — the implication of this position is that section 2(e) of the *Bill of Rights* could be triggered only where a Court found the common law standards of procedural fairness were inconsistent with a statutory provision).⁴⁴

The Supreme Court unanimously upheld the judgment of the Court of Appeal. The Court reiterated in *Bell Canada* two principles of administrative independence. First, the Court unambiguously affirmed its position in *Ocean Port* that adjudicative tribunals do not enjoy any constitutionally rooted protection of judicial independence or impartiality. Writing jointly for the Court, McLachlin C.J. and Bastarache J. also rejected the attempt by *Bell Canada* to delineate a category of tribunals, known as “quasi-judicial” or “purely adjudicative,” which would be subject to higher requirements of independence and impartiality.

In light of their analysis of the Human Rights Tribunal, McLachlin C.J. and Bastarache J. concluded that a high degree of independence applied to the Tribunal, and that neither of the powers challenged infringed that standard. In particular, they characterized the guideline making power as akin to the power of Cabinet or a Ministry to make Regulations. An administrative tribunal’s impartiality cannot be said to be compromised because it is bound to apply the “law” relevant to a particular setting. They concluded, “[t]he Act therefore evinces a legislative intent, not simply to establish a Tribunal that functions by means of a quasi-judicial process, but also to limit the interpretive powers of the Tribunal in order to ensure that the legislation is interpreted in a non-discriminatory way.”⁴⁵ The fact that the Commission’s guidelines

⁴² [2001] 2 F.C. 392, [2000] F.C.J. No. 1747 (T.D.).

⁴³ *Id.*, at paras. 129-30.

⁴⁴ [2001] 3 F.C. 481, [2001] F.C.J. No. 776 (C.A.).

⁴⁵ *Supra*, note 3, at para. 26.

were subject to the *Statutory Instruments Act*⁴⁶ and that the process for developing guidelines involved consultations analogous to the legislative process further distinguished them from mere administrative guidelines in the Court's eyes.⁴⁷ The Court also was not persuaded that the Chair's power to extend the term of members past the expiry of their term adversely affected the independence or impartiality of the Tribunal, especially since a similar power in relation to provincial court judges was upheld as not inconsistent with judicial independence in *R. v. Valente*.⁴⁸

Because the common law standard of independence and impartiality was held not to be infringed, the Court saw no reason to embark on a discussion of section 2(e) of the *Bill of Rights*. This implies that the standards of independence and impartiality contained in section 2(e)'s "fair hearing" right are identical to the common law standards for impartiality and independence, or put differently, confirms that the *Bill of Rights* serves merely to "entrench" already existing common law rights rather than create new ones.⁴⁹ Chief Justice McLachlin and Bastarache J. stopped short of explicitly endorsing this view, finding instead that since none of the parties suggested the standards differed, the issue did not arise. As indicated above, this approach left in doubt the distinctiveness, if any, of the procedural guarantees contained in the *Bill of Rights*.

To take but one example, the *Bill of Rights* separately guarantees a "fair hearing" under section 2(e) and a "fair and public hearing by an independent and impartial tribunal" under 2(f), which is limited in scope to criminal adjudication. Generally, the Supreme Court has yet to rule on the precise scope of the independence and impartiality requirements contained in the *Bill of Rights*.⁵⁰

⁴⁶ R.S.C. 1985, c. S-22.

⁴⁷ *Bell Canada*, *supra*, note 3, at para. 37.

⁴⁸ [1985] 2 S.C.R. 673, [1985] S.C.J. No. 77.

⁴⁹ This is a point also underscored by Major J. in *Authorson*, *supra*, note 2, at para. 33, discussed above.

⁵⁰ In *MacBain*, the Federal Court of Appeal held inoperative a provision of the *Human Rights Act* which permitted the Commission to appoint specific members of the Tribunal's hearing panel. While it predated the development of the doctrine of administrative independence and institutional bias, *MacBain* has been cited numerous times since although never expressly adopted by the Supreme Court. In *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at 941-42, [1990] S.C.J. No. 129, which considered, *inter alia*, whether the Canadian Human Rights Commission was biased because of its multiple functions in the

Neither *Authorson* nor *Bell Canada* provided the necessary factual and legal matrix to examine the relationship between the procedural protections of the *Bill of Rights* and other procedural protections contained at common law or under the Charter.

In *Baker v. Canada (Minister of Citizenship & Immigration)*,⁵¹ the Supreme Court synthesized its approach to the duty of fairness at common law, setting out five factors to be used in determining the appropriate degree of fairness owed in specific contexts. In *Suresh v. Canada (Minister of Citizenship & Immigration)*,⁵² the Supreme Court confirmed that the same methodology would be applied in determining the minimum procedural rights guaranteed under section 7 of the Charter.⁵³ Given that section 2(e) of the *Bill of Rights* blends common law and constitutional norms (“fair hearing” with “principles of fundamental justice”), one would expect a similar methodology to be employed in determining the scope of the procedural protections under the *Bill of Rights*. This issue did not squarely arise in either *Authorson* or *Bell Canada*, as neither case presented the Court with a scenario that met the threshold for the application of the procedural aspects of the *Bill of Rights* (in *Authorson*, this was because the legislative process was deemed not to be a “hearing,” while in *Bell Canada*, this was because the fact a tribunal was bound by “law” was deemed not to raise questions of fairness such as impartiality). Thus, key questions about the interpretation and application of the *Bill of Rights* remain largely unresolved. The Court will have an opportunity shortly to once again revisit the *Bill of Rights*. As discussed below, the time may well be ripe for the Court to clarify the intersection of the *Bill of Rights* and Canadian administrative law.

human rights administrative process, the Court was asked to apply *MacBain*. They declined to do so since the circumstances of *Taylor* were distinguishable as the allegation of bias was only raised several years after the initial hearing.

⁵¹ *Supra*, note 22.

⁵² [2002] 1 S.C.R. 3, [2002] S.C.J. No. 3.

⁵³ While adopting the common law framework, the Court took pains to emphasize that a distinction remained between the common law and constitutional analysis of procedural fairness, stating, “The principles of fundamental justice of which s. 7 speaks, though not identical to the duty of fairness elucidated in *Baker*, are the same principles underlying that duty... At the end of the day, the common law is not constitutionalized; it is used to inform the constitutional principles that apply to this case.” *Id.*, at paras. 113-14.

III. THE *BILL OF RIGHT*'S FUTURE: *AIR CANADA*, DUE PROCESS, AND BALANCING RIGHTS

The elusive case capable of putting the nature and scope of procedural protections under the *Bill of Rights* squarely before the Court may well be *Air Canada v. Canada*. The issue in the appeal is a provision of the *Competition Act* which empowers the Commissioner of Competition to issue temporary orders without notice or hearing⁵⁴ — in this case, an order against Air Canada in the context of an inquiry into alleged abuses — which remained in force for a period of 20 days and could be renewed for two further 30-day periods. When issuing these orders, which could have substantial economic impacts on affected parties, the Commissioner acted, in effect, as investigator, prosecutor, and judge. Like *Authorson* and *Bell Canada*, this case raised procedural concerns which flowed directly from a legislative scheme. Unlike those cases, however, the allegations of procedural unfairness do not relate to the legislative process. Like *Ocean Port*, this case involves a practice which, if it were not expressly authorized by statute, would appear at first glance to be contrary to the common law requirements of institutional impartiality and independence.

The Quebec Court of Appeal declared the impugned provision of the *Competition Act* to be inoperative because it was inconsistent with the protection contained in section 2(e) of the *Bill of Rights*. The Quebec Court of Appeal's decision in *Air Canada* was issued in January of 2003, after the Ontario Court of Appeal's decision in *Authorson* and the Federal Court of Appeal's decision in *Bell Canada* (and its then-companion decision of *Northwest Territories v. P.S.A.C.*).⁵⁵ Citing those appellate decisions, along with the earlier *Singh* and *MacBain* cases, the Quebec Court of Appeal rejected the submission that section 2(e) of the *Bill of Rights* was "outdated" and asserted,

[s]ince *Drybones*, and even more so since the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, the courts have not hesitated to invoke the *Canadian Bill of Rights* to declare

⁵⁴ *Competition Act*, R.S.C. 1985, c. C-34, s. 104.1.

⁵⁵ [2001] 3 F.C. 566, [2001] F.C.J. No. 791, 201 D.L.R. (4th) 128 (C.A.), leave to appeal to S.C.C. granted by the Supreme Court of Canada, however discontinuance on August 15, 2002, Court File No. 28737.

inoperative any contrary legislative provisions enacted by the Canadian Parliament.⁵⁶

Turning to the interpretation of the *Bill of Rights*, the Quebec Court of Appeal linked the quasi-constitutional nature of the *Bill of Rights* with the Supreme Court's approach to Parliamentary supremacy in *Ocean Port*. Justice of Appeal Rochon stated:

It is true that Parliament may expressly amend the principles of procedural fairness. But, any such amendments must comply with the Constitution and quasi-constitutional instruments. Thus, to the extent that Parliament amends these principles and that the Act is not attacked constitutionally, Parliament remains sovereign within its field. [footnote 21]

[footnote 21] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, [2001] S.C.J. No. 17, 2001 SCC 52, 204 D.L.R. (4th) 33, paras. 20-22, discussing the principle of natural justice, independence and fairness of administrative decision-makers.⁵⁷

Therefore, where section 2(e) applies, it would appear, at a minimum, to constitutionally entrench the protections afforded by the common law duty of fairness. As in the case of the Supreme Court's approach to the methodology of section 7 of the Charter, the Quebec Court of Appeal turns to the common law framework for ascertaining the appropriate degree of fairness owed in a particular context (as last articulated by the Supreme Court in *Baker*) as a means of determining the appropriate degree of fairness owed under section 2(e) of the *Bill of Rights*. The Quebec Court of Appeal's approach, along with the Supreme Court's approach in *Suresh*, reflects what broadly may be construed as a trend toward the "unity of public law," under which Charter, international, quasi-constitutional, and administrative duties are viewed as aligned and interrelated.⁵⁸

Drawing on constitutional, quasi-constitutional, and common law case law, the Quebec Court of Appeal concluded that the impugned

⁵⁶ *Air Canada*, *supra*, note 4, at para. 43.

⁵⁷ *Id.*, at para. 56.

⁵⁸ See D. Dyzenhaus (ed.), *The Unity of Public Law* (London: Hart, 2004).

provision of the *Competition Act* violated the rules of natural justice which guarantee institutional impartiality (as entrenched under section 2(e) of the *Bill of Rights*). Further, drawing on sources from the protection of aboriginal rights to the Charter, the Court also accepted that the rights protected in the *Bill of Rights*, including section 2(e), should be subject to some limiting mechanism by which the government can establish legitimate infringements. The circumstances of *Air Canada*, however, failed to meet the modified *Oakes* test which the Quebec Court of Appeal proposed and applied. The Court bluntly held that “[T]hese violations of rights guaranteed by section 2(e) of the *Canadian Bill of Rights* are neither reasonable nor justified.”⁵⁹ Thus, unlike *Authorson* and *Bell Canada*, *Air Canada* will place the nature and scope of the procedural protections under section 2(e) of the *Bill of Rights* to legislation curtailing procedural fairness (and the link between this quasi-constitutional protection and the scheme of Parliamentary supremacy affirmed in *Ocean Port*) squarely before the Supreme Court when the appeal in that case is decided this coming term. If the Quebec Court of Appeal’s approach to section 2(e) is validated, the quasi-revival of the *Bill of Rights*, which the decisions in *Authorson* and *Bell Canada* have to some extent deflated, will no doubt gain new momentum.

IV. CONCLUSION

One of the enduring issues in the *Bill of Rights* jurisprudence is how the protections it contains were intended to evolve and how they were intended to be limited. While a quasi-constitutional instrument may not be a living tree, neither should it be permitted to ossify into a petrified forest. In *Canada (Attorney General) v. Central Cartage Co.*,⁶⁰ the Federal Court of Appeal considered a challenge to a provision of the *Canada Evidence Act*⁶¹ providing for certain Crown privileges. Justice of Appeal Iacobucci (as he then was) stated:

⁵⁹ *Supra*, note 4, at para. 107.

⁶⁰ (1990), 71 D.L.R. (4th) 253, [1990] F.C.J. No. 407 (C.A.).

⁶¹ R.S.C. 1970, c. E-10 [now R.S.C. 1985, c. C-5].

The fair hearing guaranteed in s. 2(e) of the Bill of Rights is not a frozen concept that remains static. A court in interpreting the concept, should be mindful of its origin and evolution and of the specific context in which it is being raised. In other words, the guarantee of a fair hearing in s. 2(e) should be given a meaning that recognizes not only the interpretation and evolution of the term over time but also the particular circumstances involved. [footnote 9]

[footnote 9] In this respect, I agree with the analysis of Professor Peter Hogg when he concludes that, although the *Canadian Bill of Rights* does not contain a limitation clause comparable to section one of the Charter, courts have not interpreted the guarantees of the Bill of Rights as absolute. See Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights", in Beaudoin and Ratushny, *Canadian Charter of Rights and Freedoms*, 2nd ed. (1989), p. 7.⁶²

In this sense, I view what I would characterize the "quasi-revival" of the *Bill of Rights* to be a positive development. I wish to conclude, however, with several caveats to that assessment.

First, because at least some of the *Bill of Rights* protections extend to property rights, there is a concern that the *Bill of Rights* will be used by corporate interests to resist efforts at legitimate regulation by the state. Here, the three cases discussed in this analysis present something of an irony. The only case among these invoking the property rights "due process" protection, *Authorson*, involved a group of disabled veterans fending off an expropriation by the state. This kind of normative claim regarding the redress of unjust state action against vulnerable parties suggests fears regarding corporate interests brandishing the *Bill of Rights* against progressive state intervention may be overstated. However, *Bell Canada* and *Air Canada*, which raised only the "fair hearing" protections under section 2(e), arose out of claims by large corporations seeking to roll back state intervention aimed at countering human rights violations and competition abuses, respectively. As with the *Charter of Rights and Freedoms*, perhaps it is not surprising that both vulnerable groups and powerful interests benefit when legal instruments offering procedural guarantees are entrenched.

⁶² *Canada (Attorney General) v. Central Cartage Co.*, *supra*, note 60, at 270.

Second, there are several questions that arise from the Quebec Court of Appeal's use of the *Baker* common law framework to assess the degree of fairness owed under section 2(e) of the *Bill of Rights* in the *Air Canada* case.⁶³ The point of that framework in *Baker*, and other common law cases, is said to be the search for the degree of fairness intended by the legislature in the statute empowering the decision-making. In other words, the Court purports in the common law cases to be filling in the blanks left by vague or ambiguous statutory provisions which call for a "hearing" or for a matter "to be determined." This strikes me as a strange foundation on which to build protections intended to curtail the ability of statutes themselves to impose procedures that are contrary to the "principles of fundamental justice" or "due process." While a contextual analysis is no doubt appropriate, and while a variable spectrum of fairness obligations will invariably result from this analysis, some discussion of the different aims and origins of the constitutional and quasi-constitutional standards of fairness from those at common law would seem necessary.⁶⁴

Third and finally, the *Bill of Rights* uniquely (and one must presume, intentionally) uses two different formulations to connote procedural guarantees — one is the reference to "due process" under section 1(a) and the other is the reference to "fair hearing in accordance with the principles of fundamental justice" under section 2(e). When one considers the various appellate decisions in *Authorson* and *Bell Canada*, it would appear that section 2(e) does little more than entrench the existing common law jurisprudence on procedural fairness (and may not even do this if Major J.'s assertion that the *Bill of Rights* extends only to rights which existed in 1960). As for "due process," beyond some general assertions regarding the procedural obligation of "notice and some opportunity to contest a governmental deprivation,"⁶⁵ we are left with

⁶³ *Supra*, note 4, at para. 82. A similar approach was taken to the scope of disclosure obligations pursuant to section 2(e) of the *Bill of Rights* by the Competition Tribunal in *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2003), 28 C.P.R. (4th) 335 (Competition Tribunal).

⁶⁴ The same concern, it should be added, arises in the case of the adoption of the *Baker* framework under the s. 7 procedural rights analysis in *Suresh*, *supra*, note 52, notwithstanding the Court's assertion, emphasized above, that by adopting the common law framework, it is not merely "constitutionalizing" the common law procedural guarantee.

⁶⁵ *Authorson*, *supra*, note 2, at para. 42.

little clarity on its nature and scope, and a series of questions. Given that “due process” and “fairness” are now used interchangeably in administrative law circles (just like the “duty of fairness” and the “rules of natural justice”), does it make sense to impose some artificially derived distinctness on their definition under the *Bill of Rights* simply because they may have been understood differently in 1960?⁶⁶ On the other hand, can courts interpreting a statute, even a quasi-constitutional one, ignore the plain meaning of the legislative intent to use different terminology in these two distinct settings? Finally, how should courts interpreting the *Bill of Rights* use the Charter in its analysis, which conflates some of the language from section 1 of the *Bill of Rights* (life, liberty, and security of the person) with language from section 2(e) (principles of fundamental justice) in order to establish the procedural protections under section 7 of the Charter?

These caveats are intended not to sound a note of caution regarding the renewed interest in the *Bill of Rights*, but rather to anticipate the more rigorous examinations which will accompany *Bill of Rights*’ jurisprudence if this revival continues. It would be a strange and perhaps happy irony if the orphan of Canada’s constitutional order were to become a principal vehicle to elaborate and explore the most intriguing quandaries of administrative law. This proves the adage that if you leave something in the back of the closet long enough, it is bound to come back in fashion eventually.

⁶⁶ There has been at least some indication that Courts might approach “due process” as a broader procedural guarantee, encompassing “a total process” including a reasonableness requirement. See *Smith, Kline & French Laboratories Ltd. v. Canada (Attorney General)*, *supra*, note 16.