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JUDICIAL REVIEW
AND THE BILL OF RIGHTS:
DRYBONES AND ITS AFTERMATH

PAUL CAVALLUZZO*

INTRODUCTION

"The court of last resort should not get mixed up in the legislative process."1

This statement was made by A. S. Pattillo, a past president of the Canadian Bar Association, after the Regina v. Drybones2 decision was handed down by the Supreme Court of Canada. It was quite representative of the conservative elements in the Bar who feared that this landmark decision signified that the Canadian court was about to follow in the footsteps of the United States Supreme Court and "make law rather than interpret it."

Meanwhile the liberal elements of the profession and the media hailed this decision as a turning-point in Canadian legal history. They looked upon the Drybones decision as a combination of the Marbury3 and Brown4 decisions in the United States. The courts would now oversee the actions of Parliament even when it was acting within the jurisdiction assigned to it by the constitution. As well the public could now meaningfully resort to the judicial process for the protection of its civil liberties.

This paper will attempt to show that the Drybones decision is neither an agent of apocalypse nor a vehicle to utopia. It is important in that it appears to have given new life to the Bill of Rights which until this time had remained dormant at the behest of our judiciary. Moreover it signifies that our courts will play a greater role in our political system. Curiously, the decision arose in the "thick" of the debate of whether Canada needs a more comprehensive, entrenched bill of rights which would be part of our constitution and apply to provincial laws as well. Needless to say, the Drybones decision will have a significant effect on this debate.

The ultimate purpose of this paper is to assess the consequences which Drybones will have in the Canadian legal system. It is broken down into five separate sections. The first presents a historical analysis of the rival concepts of parliamentary sovereignty and judicial review. As well, we shall look at

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*This article was written pursuant to the thesis requirement of the Masters of Law Program at Harvard Law School, 1971.
3 Marbury v. Madison, (1803) 1 Cranch 137, 2 L. Ed. 60.
the effects of a bill of rights on these two concepts in Canada. The second section evaluates the impact of a bill of rights in a liberal democratic society. In this part we shall question whether Canada needs a written bill of rights in order to adequately protect our liberties. Moreover we shall discuss the societal allocation of power which results from the implementation of a bill of rights. Finally, a comparative analysis of American and Canadian civil liberties cases will be presented.

The third section is a discussion of legal philosophy in Canada. It describes the prevailing philosophy in Canada today as well as the jurisprudential change which, in my opinion, is taking place within our legal system. This section also discusses the contemporary debate in the United States about the legitimate role of the judiciary. Finally, some suggestions are made as to the legal philosophy which our bench and bar should adopt in order to provide Canadians with an adequate administration of the present Bill of Rights. In so doing we shall answer whether Canada can afford a more comprehensive, entrenched bill of rights at this time.

The fourth section consists of a detailed case analysis of the Drybones decision. We shall also canvass the effects that the decision is likely to have in our legal system. In this section an attempt is made to predict the probable actions of the Supreme Court after Drybones. The concluding part of this paper presents a theoretical model of judicial decision making for cases arising under the Bill of Rights. Finally, this model is applied to the particular facts of the Drybones case itself.

I

THE PARADOX OF CANADA'S CONSTITUTION

Since Confederation Canadian have suffered from an incurable identity crisis. This state of mind was inevitable because of geo-political reasons. Our nation is a “vertical mosaic” of Britons, Frenchmen and “others”. These others are becoming an increasingly significant third force which will necessarily aggravate this problem of identity. Moreover Canada was placed next to the strongest and richest nation in the world. This, as well, has made the search for Canadianism all the more difficult. Before we could decide who we were, we were inundated with the values and lifestyle of our great neighbour to the south. These were transmitted via the vast network of American mass media to the majority of Canadians living parasitically on the border. It is little wonder that it was a Canadian, Marshall McLuhan, who first realized the powerful impact of the media.

Historically Canada has been a “buffer state” in the North Atlantic triangle between Britain and the United States. Inevitably these two nations have had a great influence on the make-up of Canada. This is clearly manifest in our constitution. Our parliamentary form of government is British. Our federal political system is American. No doubt these two contributions are compatible. However there are inherent institutional characteristics of each which do conflict. Our concern in this part of the paper are the conflicting principles of parliamentary sovereignty and judicial review.
It is unnecessary to emphasize the profound effect that Dicey has had on our legal system. Most Canadian judges and lawyers have felt his influence in their training as well as in their practice of law. His concepts of parliamentary sovereignty and the rule of law are deeply ingrained in our legal order. They have directed the role our courts are to play in our political system. They have directed the development of our legal system. However in assessing the future impact of this legal theory, I would submit that Dicey's concept of parliamentary sovereignty will become less important in Canada while the rule of law will continue to be an integral part of our legal system. The reasons for this will be canvassed below but there is one point which should be noted now. I suggest that the Canadian Bill of Rights is the sword by which parliamentary sovereignty will fall.

The present threat to this concept is no reason to dismiss it summarily. As I said before Canadian judges and lawyers are steeped in its tradition. Therefore one must understand its implications before he can fully appreciate the present mechanics of our legal system. However because of the scope of this paper it will only be discussed briefly. Besides it is a concept which has been thoroughly dealt with elsewhere. The most concise statement of its content can be found in Dicey:

The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the laws of England as having a right to override or set aside the legislation of Parliament.

Hence Parliament cannot by law bind its successors and no body, including a court of law, has a right to overrule legislation of Parliament. However Dicey does concede some limits to parliamentary sovereignty. The most important is that Parliament, despite its supremacy, is not likely to do an act which is politically indefensible. In effect there is indirect popular control of Parliament. Also conventions develop in the British legal system which further dictate the actions of Parliament. For instance, it is customary for a parliamentary government to resign if it is defeated on a no confidence motion. Some further limits have been suggested by the critics of Dicey. Professor Gray argues that notwithstanding the doctrine of the sovereignty of Parliament, Parliament can, besides abolishing itself, limit its sovereignty and therefore bind its successors in two ways, namely by prescribing the process of legislation.

These are the limits on parliamentary sovereignty as it applies in Britain today. When applied to a federal state like Canada or Australia, the limits of
this concept are even more acute. Because of its division of legislative powers, Dicey has even admitted that a federalism is necessarily based on the supremacy of the law, not of Parliament.\(^6\)

Sir Owen Dixon, one of the greatest Australian judges, has argued that "the rival conception of the supremacy of the law over the Legislature is the foundation of federalism."\(^10\) An increasing awareness of the limitations of parliamentary sovereignty as applied to Canada will no doubt dilute its effect on our legal system.

At the outset it was asserted that our constitution bears two conflicting principles. The conflict lies in Dicey's second principle which states that no body could set aside parliamentary legislation. Of course this conflicts with the principle of judicial review. Two questions arise from this conflict. First, we must see how these two principles are reconcilable in our legal system. Secondly, we must ask whether the decreasing importance of parliamentary sovereignty will increase the effect of judicial review in Canada. To answer these questions we must give a brief account of the history of judicial review.

By the time of the enactment of the British North America Act in 1867, the concept of judicial review was firmly established in the United States. Article III of the American constitution provides for a federal judiciary with an indefinite jurisdiction:

1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish ...

2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution ...

The jurisdiction is indefinite in that there is no explicit grant of power to set aside Congressional legislation which may conflict with the Constitution. Moreover historians are not in agreement as to the intentions of the framers of the Constitution on this particular issue.\(^11\) Whatever those intentions may have been, Marshall in *Marbury v. Madison*\(^12\) settled the question when he said:

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that a court must decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules govern the case. This is of the very essence of judicial duty."

In effect in cases of conflict an American court is appealing to the natural law since the United States constitution is steeped in the tradition of that legal philosophy.

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\(^6\) Dicey, *supra* note 6 at 138-80.


\(^12\) (1803) 1 Cranch 137, 2 L.Ed. 60, 177-8.
The principle of judicial review is also provided for in theories of legal positivism. Kelsen has justified judicial review in the following words:

If the legal order does not contain any explicit rule to the contrary, there is a presumption that every law-applying organ has this power of refusing to apply unconstitutional laws. Since the organs are entrusted with the task of applying “laws”, they naturally have to investigate whether a rule proposed for application really has the nature of a law. Only a restriction of this power is in need of explicit provision.

It is a truism that the scope of judicial review in a British parliamentary system is less than its counterpart in the United States. However it should be noted that from time to time English courts have asserted a power to pass judgment on the validity of legislation. The most powerful assertion was made by Lord Coke in *Dr. Bonham’s case* where he stated:

And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void...

Inevitably Coke’s theory of natural law was struck down by the prevailing legal positivism in England. Both Bentham and Austin asserted that in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law. By the middle of the nineteenth century Coke’s dictum had fallen into oblivion. At the end of the last century Maitland disposed of it in the following words:

Just now and then in the last of the middle ages and thence onwards into the eighteenth century, we hear the judges claiming some vague right of disregarding statutes which are directly at variance with the common law, or the law of God, or the royal prerogative. Had such come of this claim, our constitution must have taken a very different shape from that which we see at the present day. Little came of it... The theory is but a speculative dogma...

It must be admitted that this position has prevailed in Canada. This is exemplified in the following statement of Lord Hershell in the *Fisheries case*:

The Supreme Legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected.

However it must not be assumed that any form of judicial review is precluded in Canada. We must appreciate that there are two possible levels of review in a federal state. One is the review of legislation when there is no division of powers question. For instance an American federal court can strike down federal legislation concerning a federal subject matter if it conflicts with one of the Amendments. Of course the same is true of state legislation. It is submitted that this type of review is not accepted in most federal par-

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18 2 Maitland, Collected Papers, (1911) 481.
liammentary systems. The other level of review is the review of legislation when there is a division of powers question. For instance the judicial overriding of provincial legislation which is unconstitutional because it relates to a federal subject matter. It must be admitted that this level of review has been traditionally accepted in Canada from colonial times.

Under our written constitution, the B.N.A. Act, the Supreme Court is nowhere given a defined jurisdiction even to the extent that is provided for under Article III of the American constitution. Section 101 of the B.N.A. Act does state that the federal Parliament may “provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.” In no place in the Act is the court given the power of judicial review at even the second level which we discussed. However by convention our courts do exercise such power. This has been established by the judicial review of colonial legislation to determine whether it conflicted with the legislation of the Imperial Parliament. This judicial power was described by one learned writer in the late nineteenth century:

It is the primary condition of all legislation by subordinate and provincial assemblies, throughout the British Empire, that the same shall not be repugnant to the law of England. This condition is enforced by the local judiciary of the colony, in the first instance, and ultimately of Her Majesty’s Imperial privy council, upon an action or suit at law, duly brought before such a tribunal, to declare and adjudge a colonial, dominion or provincial statute, either in whole or in part, to be ultra vires and void, as being in excess of the jurisdiction conferred on the legislature by which the same was enacted...

The basis for judicial review in Canada is not purely historical. There is a practical reason why our courts must be the final authority as to the extent of legislative power. This is because a federal state needs an impartial arbiter to decide questions of legislative jurisdiction in order to maintain peaceful relations between the local and central governments. Hence from 1867 until the Statute of Westminster, 1931, when Canadian law no longer had to conform to Imperial legislation, our courts had the power of judicial review at both levels. That is to say they could review the laws of any Canadian legislature, which was legislating upon a subject matter assigned to it by the constitution, to determine whether it conflicted with English laws. As well the courts could review the laws of a legislature which was legislating upon a subject matter that was not assigned to it by the constitution. Needless to say this anomolous situation did not give rise to judicial supremacy as the British Parliament remained theoretically sovereign. Of course with the enactment of the Statute of Westminster Canadian courts lost the power of judicial review at the first level. Then their sole power was confined to the second level, i.e. division of powers questions. If the court decided that the subject matter of the legislation in question was within the jurisdiction of the enacting legislature, then its job was finished. Parliamentary sovereignty prevailed and no body could set aside such legislation. They refused to check

20 Its jurisdiction is defined in the Supreme Court Act, 1952 R.S.C., c. 259.
22 22 Geo. 5, c. 4.
the wisdom or fairness of legislation. Nor did they feel the obligation to check the possibility of abuse of legislative power. The following words of Chief Justice Taylor of Manitoba made in the 1890's, pretty well summed up the position of Canadian judges:

I am not here to dispense justice. I am here to dispose of this case according to law. Whether this is or is not justice is a question for the legislature to determine.

It now becomes necessary to relate the foregoing discussion to the Canadian Bill of Rights. On first glance it appears that the Bill flies right in the face of Dicey's parliamentary sovereignty in two ways. First, it seems that by the enactment of the Bill, Parliament has bound its successors to pass laws which do not abridge the freedoms declared therein. It is submitted that there are two reasons why the Bill is not contrary to this aspect of Dicey's theory. Because of the non obstante clause of section 2, successor Parliaments are not in fact tied down by the Bill since they can pass laws which abridge its declared freedoms as long as it is expressly provided that the laws are to operate notwithstanding the Bill. Furthermore there are precedents for this kind of legislation. For example section 4 of the Statute of Westminster provides:

No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that Dominion has requested and consented to that the enactment thereof.

As Professor Wheare points out:

... this provision does not deny future parliaments the power to legislate for the Dominions, but it does lay down a rule to determine when the power may be deemed to have been exercised.

In effect Parliament has just dictated the "manner and form" of its legislative process. This is a limit on parliamentary sovereignty which had been accepted before the enactment of the Bill. Moreover nothing in the Bill prevents a future Parliament from amending or even repealing it by an ordinary Act of Parliament. Hence it must be concluded that the Bill does not conflict with the first aspect of parliamentary sovereignty.

The second aspect of Dicey's concept you may recall, was that no person or body could overrule the legislation of Parliament. As you will see in a later section, the effect of section 2 of the Bill is that it gives the court the power to render inoperative any law of Canada which runs counter to the Bill of Rights. This is judicial review at the first level since the court can now strike down federal legislation relating to a subject matter assigned to the federal parliament by the constitution if conflict is found. Unlike the period from 1867 to 1931 it appears that the Bill of Rights has given rise to quasi-judicial supre-

27 Tarnopolsky, supra note 5 at 66-89.
However Dicey has not been completely rejected for theoretically Parliament maintains sovereignty for the following reasons. Parliament can circumvent the Bill of Rights by implementing the non obstante clause. Moreover it can amend or repeal the Bill at any time by simple Act of Parliament. Furthermore because the courts are creatures of Parliament, it has the power to re-define their jurisdiction. But I would suggest that in practice parliamentary sovereignty is no longer a viable concept in the federal sphere for it is politically infeasible for Parliament to assert its theoretical sovereignty. As long as our courts meet the challenge of this newly acquired power there seems to be no reason why Parliament’s theoretical sovereignty will not be removed from our constitution by convention. As well the paradox of our constitution will also disappear. But this does not mean that we should completely transplant the American judicial approach in Canada. This country requires a unique approach to legal problems because of the uniqueness of our society. Below I shall attempt to develop an approach which in my opinion is most compatible with the court’s increased powers. Before that, it is necessary to turn to a discussion of the impact of a bill of rights in a liberal democratic society.

II

CANADA AND A BILL OF RIGHTS

In recent years the protection of civil liberties has been a very topical subject in Canada. International concern of human rights has increased since the Second World War. A recurring news feature in our papers has been investigations of human rights in totalitarian regimes such as Greece and the Union of South Africa. As well we have seen concern over the plight of prisoners of war in Vietnam or of “peace” in Spain and Russia. Canada has also been inundated with reports of the recent application of the Bill of Rights by the United States Supreme Court and its effect on the American political system. Of course the reasons contributing to this increased Canadian interest are not all external. Two very recent events in Canada will surely accelerate the debate about a bill of rights. These are the Drybones decision, with which this paper is concerned, and the implementation of the War Measures Act, which suspended civil liberties in Canada in the autumn of 1970. However these are only contemporary aspects of the debate which has continued since the beginning of the last decade when our present Bill of Rights was enacted. During the 1960’s many federal-provincial conferences were concerned with Mr. Trudeau’s proposed charter of human rights which has far greater scope than the present Bill. Our Prime Minister, as well as many other Canadians believe that we need an entrenched bill of rights in our constitution that would apply to provincial laws as well as federal. At a recent conference in the week

28 It must be remembered that quasi-judicial supremacy only prevails in the federal sphere as the Bill of Rights does not apply to provincial laws.

29 Professor McWhinney has suggested special “American” factors in the political success of the United States Supreme Court which explain why the American approach cannot simply be transposed to Canada. See Federal Supreme Courts And Constitutional Review, (1967), 45 Can. Bar Rev. 578, 591-93.
of February 8, 1971, it appeared that there was consensus about the entrenchment of certain rights. This is the position in which we find ourselves today.

It is no doubt that the debate has progressed to high intellectual levels. However, in my opinion, two very fundamental issues have been glossed over because they have been assumed to be "givens". It is suggested that these issues must be resolved intelligently since their resolution must be the basis of any approach which is proposed. These issues are inter-related. For the purposes of intellectual clarity they are discussed separately in the context of each other.

The first issue which should concern us is whether Canada needs a written bill of rights. Of course we already have one in the federal sphere but this is not reason enough to assume one is necessary. Moreover this question must be answered before we invoke an entrenched bill of rights which would also extend into the provincial sphere. The arguments for and against a written bill of rights have been adequately dealt with elsewhere. In this section we shall discuss only those which I believe to be fundamental.

The pre-amble to our written constitution provides that Canada shall have "a Constitution similar in Principle to that of the United Kingdom..." This did not tell us very much because Britain does not have a written constitution. Its constitution has been most clearly defined by A. F. Pollard in the following words:

The British constitution is a miscellaneous, uncollected, undigested mass of statutes, legal decisions, and vague understandings or misunderstandings some of which have never been put down in writing.

Apart from the meagre provisions for civil liberties in the B.N.A. Act and other Canadian statutes, a Canadian's freedom in 1867 depended on antiquated British statutory and decisional law. Even though this law was not purely constitutional in nature, it was the basis of a legal system which revered civil liberties. Indeed some assert that this "miscellaneous, uncollected, undigested mass" has more adequately protected civil liberties than has any other society.

Many Canadian constitutional experts have used Britain as a model in rejecting the necessity of a written bill of rights. In the 1947 parliamentary debates, the Right Honourable Ian Mackenzie, then Minister of Veteran Affairs stated:

Let us never forget that we already possess in this country the rights affirmed in Magna Charta on nineteenth day of June, 1215, the declaration of rights in 1628, the Habeas Corpus Act of 1679, and the great body, with its sweep and scope, of common law.

Former Dean W. P. M. Kennedy of the University of Toronto Law School in a letter to the Joint Committee of the Senate and the House of Commons on Human Rights and Fundamental Freedoms held a similar view:

Although it is not therefore the question submitted to me, I do not believe that a bill of rights is really necessary; I think that our "freedoms" are well enough

30 Tarnopolsky, supra note 5, at 12 - 13.
31 Pollard, Factors in Modern History, (1932) 176.
protected in the ordinary law and, if this is not so, it ought to be possible to change the law in the various jurisdictions to suit occasions.\(^{3}\)

Other experts have gone further and suggested that a bill of rights is but a sham. Professor Dicey somewhat arrogantly described such documents as "mere paper affirmations".\(^{34}\) Professor Dorsen points out that "The German Weimar Republic had a written constitution and bill of rights, and this not only was the vehicle for the rise of Naziism, but was used after 1932 to provide an air of macable legality to the venal government."\(^{35}\) Today such totalitarian regimes as Rumania and Spain boast of written documents guaranteeing the human rights of their peoples.

Does the fact that Britons are adequately protected without a constitutional bill of rights resolve the problem? Professor Frank Scott thinks not. In his usual concise way he demonstrates why the British approach in the Canadian context has limits. He suggests that Britain's lack of a constitutional bill of rights depends on three factors: parliamentary restraint in legislation, bureaucratic restraint in administration and a strong and live tradition of personal freedom among the citizens generally.\(^{36}\) He points out that Canada has not one but eleven legislatures to supervise. Needless to say this introduces the problem of which government has jurisdiction over civil liberties. Moreover because of recent immigration Canada has many ethnic peoples without this tradition of civil liberties. Finally Canada is a bilingual and bicultural country which necessitates a uniquely Canadian approach to this problem.

One Canadian lawyer has gone so far as to suggest that the British approach should be completely rejected. W. Glen How, counsel for the Jehovah's Witnesses in the civil liberties cases of the 1950's writes that "the unwritten British constitution means nothing more nor less than unlimited legislative power."\(^{37}\) In his very interesting article Mr. How attempts to demonstrate how ineffective it has been in protecting freedoms. He then proceeds to make a somewhat sacriligeous statement for a Canadian lawyer:

> Nothing in the Magna Charta prohibited the grisly practise of burning to death those who disagreed with the majorities on theological questions. It did not prevent the abuse of the Court of Star Chamber; the despotism of the Stuarts; the oppressive political prosecutions of the 18th and early 19th centuries; imprisonment without trial; trials by ordeal; executions in England, even of young children for minor criminal offenses — these and a host of other outrages on humanity occurred centuries after Magna Charta. So far as it is concerned they could all happen today.\(^{38}\)

Unfortunately Mr. How's training as a lawyer seems to have prevented him from giving intellectually satisfying arguments. Perhaps because he is such a fine advocate he is troubled in presenting the other side fairly. The examples which he has put forward are taken out of their context and put in a twentieth century setting. He does not provide us with a comparative analysis. Would

\(^{33}\)\(1948),\ 26\ Can.\ Bar\ Rev.\ 711.\)
\(^{34}\)\(Dicey, supra\ note 6, 341 passim.\)
\(^{35}\)\(N.\ Dorsen, Frontiers of Civil Liberties,\ (New\ York: Pantheon\ Books, 1968), 16.\)
\(^{36}\)\(F.\ Scott, Frontiers of Civil Liberties,\ (U. of T. Press, 1957), 13.\)
\(^{37}\)\(W.\ G.\ How, The Case for a Canadian Bill of Rights,\ (1948), 26\ Can.\ Bar\ Rev.\ 759, 763.\)
\(^{38}\)\(Id.\ at 765.\)
those rights have been more protected if Britain had what Mr. How proposes? What was the comparative situation in the United States after 1789? Surely he does not expect that his last statement is to be taken seriously. Ironically, in his conclusion Mr. How does relent, however unintentional it may be, when he states:

Magna Charta has been a talisman of freedom ever since 1215. By the 17th century the general practise and customs of society had given the people additional liberties probably undreamed of by the framers of Magna Charta.

I would finally like to present an argument that will logically lead us into the next fundamental issue which we shall discuss. This is the hypothesis of Professor Cah that no matter how courageous the man, "without an authoritative text the modern democratic judge... will certainly decline to overrule or annul a legislative decision". On the other hand Professor Cahn believes that a judge with a written document "feels equipped with legitimate standards of decision and ready to perform his function independently and manfully." We shall test this hypothesis in the final part of this section. Before we do that and before we make any conclusions we must discuss the next issue in the context of our previous discussion.

In answering whether Canada needs a constitutionally entrenched bill of rights, we must advert to a societal allocation of power. In other words which institution in our society shall bear the major responsibility in protecting our civil liberties. Is it to be the legislature or the courts?

Before we can answer this question we must discern the purpose of a bill of rights. In a leading American case Justice Jackson elaborated his conception of its purpose:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish the legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedoms of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

39 "I am a fairly consistent reader of British newspapers. I have been repeatedly impressed with the speed and certainty with which the slightest invasion of British individual freedom or minority rights by officials of the government is picked up in Parliament, not merely by the opposition but by the party in power, and made the subject of persistent questioning, criticism, and sometimes rebuke. There is no waiting on the theory that the judges will take care of it. In this country, on the contrary, we rarely have a political issue made of any kind of invasion of civil liberty... The attitude seems to be, leave it to the judges. Years after the event takes place, the judges make their pronouncement, often in the form of letting some admittedly guilty person go, and that ends the matter. In Great Britain, to observe civil liberties is good politics and to transgress the rights of the individual or the minority is bad politics. In the United States, I cannot say that this is so." Jackson, The Supreme Court in the American System of Government 81-82 (1955).

40 How, supra note 32, at 774.


42 Id. at 35.

43 See Dorsen, supra note 35, at 4.
In a somewhat less eloquent manner, Mr. Diefenbaker, the father of Canada's Bill of Rights, described its purpose in the following words:

What would a bill of rights do? It would establish the right of the individual to go into the courts of the country, thereby assuring the preservation of his freedom. These great traditional rights are merely pious ejaculations unless the individual has the right to assert them in the courts of law.\(^\text{44}\)

Notice that Justice Jackson and especially Mr. Diefenbaker appear to unequivocally place the main responsibility of protecting our liberties on the courts. Before accepting these assertions we must be assured that the institutional characteristics of our court system is better suited to effect the purposes of a bill of rights than are those of the legislature.

There are many technical factors which suggest that our courts are better suited. Because of its inherent nature a bill of rights is expressed in very general terms. Of course it is the function of the legislature to declare these rights. However it is suggested for a number of reasons that a court is better suited to periodically define the scope of these rights. Civil liberties are dynamic concepts which fluctuate from year to year. The legislature does not have the political resources to amend a bill of rights annually. Nor is the inherent nature of a bill of rights susceptible to such piecemeal amendment, especially if it is to be part of our constitution. Moreover the prestige which our courts possess in Canada enhance the effectiveness of a bill of rights because its expositions of rights are more likely to be accepted. Canadians believe that our courts are composed of independent and impartial judges who are not as susceptible to political pressures as legislators. Judicial application of a bill of rights would in turn enhance the role of our judiciary, especially the Supreme Court, as an educational body. On face it appears that this reasoning is circular. What appears to be the conclusion is that the Bill of Rights would be more effective if the courts were given the major responsibility in administering it. Conversely, it is argued that the courts would become more effective if it had this responsibility. I submit that these two propositions are true if our judiciary has the ability to meet the challenge. This topic will be our concern in a later section.

It has been argued that it is contrary to basic democratic principles to allocate such power to an appointed, unresponsive body. However I suggest that this argument holds little weight today. The proliferation of appointed, administrative boards demonstrates that all democratic societies have accepted such allocations of power. Professor Shapiro writes that the court is in fact accountable and responsible to the public because of its duty to square its decisions with reason and authority:

The necessity of justifying every decision publicly is a restraint placed on few other government officials.\(^\text{45}\)

Moreover for the most part, courts have in the past upheld our democratic tradition by protecting the rights of minorities and by making the other arms of government more democratic, especially the executive arm through the use

\(^{44}\) H. C. Debates (1947) Vol. 86, 3197.

of judicial review of administrative action. As Madison said when he argued for the amending of the American constitution by adding to it a bill of rights:

Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the Declaration of Rights.\(^4\)

Furthermore the powers that a court would wield with this responsibility is often over-estimated. For a court could only assert this power when a dispute arose or an advisory opinion was asked of it. The opportunity for a court to assert its policy making powers would only arise sporadically. This certainly limits any judicial usurpation.

Nevertheless the judicial power may be abused. This is the concern of many great American constitutional jurists.\(^4\) In cases of constitutional law, which of course envelop the application of a bill of rights, Thayer argued that a court could only set aside legislation when those "who have the right to make laws have not merely made a mistake, but have made a very clear one — so clear that it is not open to rational question."\(^{48}\)

"Judge Learned Hand ... by grudgingly recognizing a right of judicial review, implicitly cautioned judges to exercise the power with extreme reluctance if at all"\(^{49}\) Justice Jackson seemed to agree with this approach when he deprecated the role of the courts in the following words:

... I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions ... I doubt that any court, whatever its powers, could have saved Louis XVI or Marie Antoinette. None could have avoided the French Revolution, none could have stopped its excesses, and none could have prevented its culmination in the dictatorship of Napoleon.\(^{50}\)

Judge Hand went even further in the following statement in which he demeans the effect of a bill of rights as well as the role of the courts:

Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.\(^{51}\)

However Professor Henry M. Hart points out the logical fallacy of Hand's somewhat apocalyptic statement which:

assumes that there are two kinds of societies—one kind, over here, in which the spirit of moderation flourishes, and another kind, over here, which is ridden by

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\(^{48}\) Dorsen, supra note 35 at xiv.

\(^{47}\) See J. B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, (1893), Harv. L. Rev. 129; H. S. Commager, Judicial Review and Democracy, The Virginia Quarterly XIX (Summer 1943), 417.


\(^{49}\) Dorsen, supra note 35 at 12. It is submitted that there is a presumption of constitutionality in Canada. See B. Laskin, Canadian Constitutional Law, (Carswell Co., 3rd ed. 1966) 145-46. However it is doubtful that it extends to the limits suggested by Thayer and Hand.

\(^{50}\) Jackson, The Supreme Court in the American System of Government, (1955), 80. Also see Jackson, supra note 39.

\(^{51}\) Hand, The Spirit of Liberty, (Dillard ed. 1953), 190.
dissension. Neither kind, Judge Hand says, can be helped very much by the courts. But, of course, that isn't what societies are like. In particular, it isn't what American society is like. A society is a something in process — in process of becoming. It has always within it, as ours does, seeds of dissension. And it has also within it forces making for moderation and mutual accommodation. The question — the relevant question — is whether the courts have a significant contribution to make in pushing American society in the direction of moderation — not only by themselves; of course they can't save us by themselves; but in combination with other institutions. Once the question is put that way, the answer, it seems to me, has to be yes.  

As Professor Hart suggests, this allocation of power debate could be resolved by rephrasing the question presented at the outset of this section. Neither institution is to bear the major responsibility in protecting our liberties. However both have significant roles to play. Justice Holmes has said "that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." The legislature declares the rights enumerated in a bill of rights. More importantly, it should attempt not to abridge these rights in the legislative process. The courts define the scope of these rights and hence develop the law which protects our liberties. To suggest that one has a more important role to play than the other obfuscates the fact that both have complimentary roles to play in the protection of our liberties. Cries of "judicial legislation" or "judicial usurpation" disregard this fact and may inhibit the court from exercising its legitimate powers.

However we should not completely disregard the point made by Judge Hand because of its extremist nature. His statement is valid to the extent that the legislature and judiciary will be ineffective protectors of civil liberties if their patron, the public, does not value their protection. Ultimately it is the people who set the framework within which these two institutions work. As Professor McWhinney said:

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 consecration can save it and put teeth into the paper guarantees.

One of the most recent Canadian articles in this area will surely contribute to the quality of the debate in Canada. It was written by a political scientist who has become a leading expert on the Supreme Court of Canada. It is a realistic approach to the protection of civil liberties in a liberal democratic society. In Canada, as in the United States, it seems that the realist tradition is being carried forward by the political scientists.

Professor Russell's thesis is that a constitutionally entrenched bill of rights would be of minimal value in the protection of our liberties. A more useful effort for civil libertarians would be to divert their efforts to increasing

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52 See the remarks of Professor Hart in Government under Law 140-41 (Sutherland ed. 1956).
53 Dorsen, supra note 35 at XIV.
democratization in Canada. Two factors are involved in this process. One is the scale of government. Here he is concerned with the decentralization of authoritative decision making. Of course, this proposal is not new. It has recurred over the last three millennia in such philosophies as that of Aristotle, grass root democrats or the New Left. How viable this approach is in a mass technological society is for social scientists to show. So far they have had difficulty in demonstrating that its benefits would outweigh the resulting costs.

The other factor which Russell discusses is the scope of government. Here he is concerned with the range of social activities subjected to government control and regulation. In other words whether more or less government is required to enhance liberty. He seems to be concerned about unnecessary government regulation which inhibits the maximization of the individual's capacity for self-development. Moreover he is concerned with government by minority interest. He suggests that we can alleviate the unequal distribution of power in our society by teaching our citizens the political skills of organization so that they can increase their capacity for citizenship.

He then proceeds to deprecate the effectiveness of a bill of rights for the following reasons that I will briefly outline. Professor Russell's prime concern here is the shifting of responsibility from the legislature to the courts. The policy decisions required in a civil liberties case should be made by a legislature which is more democratic and hence more sensitive to public opinion. Besides these decisions should not be left to our courts because of the type of man appointed to the bench and our traditional style of jurisprudence. Furthermore an effective bill of rights might “enable the interests dominant in national decision making to impose, through the judicial branch of government, their particular conception of civil liberties on deviant local legislatures”, at a time like today when provincial politics is as democratic as national politics. He then suggests that a more effective means of protection of our liberties would be an ombudsman-like institution or an agency such as the Ontario Human Rights Commission.

Most of these arguments have been dealt with elsewhere in this paper. However there are a few issues which are peculiarly Canadian in substance that I would like to focus upon at this time. His argument about the imposition of national values on local areas must be rejected. He does not seem to appreciate that this process is not dependent on the existence of a bill of rights. Admittedly this process occurred in the United States in the De-Segregation Cases. However it also happened in Canada in the Quebec civil liberties cases of the 1950's without a bill of rights. Moreover in emphasizing the value of decentralizing these decisions to the local areas, his argument seems to lack critical morality. Surely Professor Russell does not see greater value in decentralization than he does in the protection of minority rights in the South or in Quebec. When he argues that provincial politics is as democratic as national politics he shows an incredible naivete of Canadian politics. Historically, it has been the provincial legislatures which have created the greatest dangers to our liberties. Contrary to what Professor Russell suggests, this statement is just as valid today as is evident in Alberta and British Columbia policy relating to Hutterites and Doukhobors.

56 Id. at 126.
His thesis must be rejected on two other counts. First it is unfair for him to imply that lawyers are not concerned with increased democratization in our society. He has not appreciated the implications of the writings of many Canadian jurists nor does he seem to realize what is happening in Canadian law schools today. Moreover his analysis does not seem to appreciate the democratic effect of a bill of rights which we have already discussed. There is no reason why a bill of rights cannot be part of his programme of increased democratization. Indeed Prime Minister Trudeau who is the leading exponent of an entrenched bill of rights has seriously attempted to increase the participation of citizens in the decision making process. The increase of decentralization, government restraint and public education does not preclude a role for a bill of rights in a more democratic society. Secondly, in his analysis, Professor Russell has fallen into the habitual trap to which most writers on this subject are prone. He concentrates on the institutional problem of whether it should be the legislature or the courts which should bear the responsibility in protecting our liberties. Hopefully by now the reader appreciates the inefficacy of this approach. In the next section we shall turn to Professor Russell’s concern of the competence of our judiciary and the quality of our jurisprudence.

At this time I would like to apply Professor Cahn’s hypothesis that a written bill of rights in some way gives a judge courage to more “independently and manfully” protect our liberties. Of course this could be the topic of discussion for a whole thesis itself. Because of the limits of this paper I have chosen to apply it to only a few cases, perhaps at the expense of oversimplifying the problem. However I believe that these cases shed some light on the validity of Cahn’s point.

The first set of cases that I have chosen go to refute his argument. The two cases deal with legislation which in effect outlawed the advocacy of communism in the United States and Quebec. In the first case the court had a bill of rights in hand. In the second it did not.

In *Dennis v. U.S.*\(^{57}\) the defendants were convicted under the Smith Act\(^{58}\) of “teaching and advocating” the doctrine of overthrowing the state by force and of conspiracy to teach and advocate such doctrines. In the Court of Appeals it was found that the defendants had effective control of the Communist Party which had as its general goal the successful overthrow of the existing order by force and violence. The main issue in the Supreme Court was whether the convictions violated the First Amendment. Over the rigorous dissent of Douglas the Supreme Court upheld the convictions and hence the constitutional validity of the Smith Act.

The Canadian case with which I would like to compare this is *Switzman v. Elbling* (*The Padlock Act Case.*)\(^{59}\) The Padlock Act purported to make illegal the preaching of communism in houses in Quebec, and the printing and distribution of literature propagating or tending to propagate these ideologies anywhere in the province. Before reaching the Supreme Court, the Quebec courts had upheld the constitutionality of this legislation. The Supreme Court found the Padlock Act ultra vires the province because the subject

\(^{57}\) (1951) 341 U.S. 494.


matter of the Act fell under the federal criminal law power. Although the case was decided on a division of powers point, the Court did allude to the grave implications of such legislation. During the course of his opinion Rand said:

Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Canada, as a subject matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion.  

In effect it appears that the Canadian Supreme Court, without the benefit of a bill of rights, has more effectively protected freedom of expression than its American counterpart. However before we reject Cahn's hypothesis there are some possible limitations which should be mentioned which weaken the validity of our comparison. The two cases were decided six years apart. Dennis arose in the height of McCarthyism whereas the Canadian case was decided in a more temperate era. Although Switzman was decided in the Dulles era of brinksmanship it must be conceded that the fear of communism at this time was not as irrational as in the McCarthy era. As we know the late 1940's and early 1950's revealed some serious communist conspiracies in both Canada and the United States. Further it must be admitted that the role the United States plays in international politics calls for a somewhat stronger stand against communism than is required by a middle power like Canada. Finally we must remember that the Canadian court was dealing with provincial legislation and the American court with federal legislation. Generally the courts in both countries are less likely to strike down the legislation of the central government. Moreover the provincial legislation struck down by the Canadian court was part of the repressive policies implemented in the Duplessis era which the court had consistently overruled.

The next set of cases once again goes to disprove Cahn's hypothesis. Similarly one case is Canadian and the other American. In the early 1950's a Jehovah's Witness in Quebec City defiantly breached a municipal by-law which forbade the distribution in the streets of the city of any book, pamphlet, circular etc. without prior permission of the Chief of Police. When this case came before the Supreme Court the defendant argued that the by-law was unconstitutional as it infringed upon his rights to freely express his opinions and it interfered with his freedom of religion. The conviction was set aside for a myriad of reasons some of which related to the civil liberties issues. The Court upheld the constitutional validity of the by-law but it found that the regulation did not prohibit the Witnesses from distributing such literature in the streets. In effect, Mr. Saumur's freedoms of expression and conscience were protected by a Court that did not have a bill of rights as a standard.

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60 Id. at 306.

61 It should be noted that in Yates v. U.S. 354 U.S. 298, also decided in 1957, the United States Supreme Court liberalized its position somewhat by distinguishing between advocacy of merely abstract doctrine and advocacy which is planned to instigate unlawful action.


In comparison similar by-laws have been declared unconstitutional by the United States Supreme Court. What can be inferred from these cases? Similar facts induced similar results using different legal tools. No doubt many more cases can be found in which both courts similarly accepted or rejected defenses based on civil liberties. Once again it appears that the presence of a bill of rights does not effect more protection by the court. However it should be noted that the American court did declare the by-law unconstitutional. This seems to be a stronger position than the stand taken by the majority of the Canadian court.

The final set of cases that will be discussed are the most useful empirically. They were both decided by the same court one year apart. Canada uniquely provides ideal scientific conditions for the application of Cahn's hypothesis. For the Supreme Court of Canada has the advantage of a bill of rights in cases of federal jurisdiction. Such is not the case in disputes arising under provincial jurisdiction. A comparison of the Court's actions in both fields should verify or disprove the hypothesis.

In a recent case Walters v. A. G. Alberta the Supreme Court had a civil liberties issue before it without the benefit of a bill of rights for a standard. The Alberta legislature had passed legislation which restricted the right of Hutterites to purchase more land within the province. Even though there appeared to be a denial of equality before the law as well as an infringement on freedom of religion, the Court upheld this discriminatory legislation. The Court did not question the justness of the law because it found it related to land law which is under provincial jurisdiction.

The other case arose under federal jurisdiction which meant that the Bill of Rights applied. This is the Drybones decision which is the topic of discussion of this paper. As we will see the same court struck down federal legislation which denied the defendant equality before the law. It seems safe to infer that the Supreme Court in these cases proved Cahn's hypothesis.

Although I admit the validity of Cahn's point I would suggest that there is another variable which is more controlling than the presence of a bill of rights. It is a major premise of this paper that the make-up of a court is the most important factor in the protection of civil liberties by a court. No doubt the presence of a bill of rights gives a court more courage in protecting liberties. However it is suggested that if a civil libertarian philosophy prevails in a court then a bill of rights is not needed for the adequate protection of our liberties. In my opinion the 'implicit bill of rights' developed by the Canadian Supreme Court in the 1950's is evidence of this. I would further suggest that the Walters case would have been decided differently if it had arisen in the 1950's. Although a bill of rights may give courage to a court, it is its application rather than its existence which determines how our liberties will be protected. Below an attempt is made to show that a Bill of rights can have a deleterious effect in our legal system if it is applied by a court which does not possess the necessary, accompanying philosophy. It is now appropriate to turn to a discussion of this judicial philosophy.

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64 See Cantwell v. Connecticut (1940), 310 U.S. 296.
III

LEGAL PHILOSOPHY AND THE CANADIAN JUDICIARY

In this section our concern will generally be legal philosophy and more particularly the philosophy of judging. This latter aspect has become an increasing concern of Canadian jurists and its interest will no doubt be increased by the *Drybones* decision. The role of the judiciary in a democratic society is by no means certain. Indeed it is uncertain because that role is a dynamic one which evolves with changing political and social conditions. However one thing is certain and that is that the judiciary has an important role to play in the development of our legal order. The scope of that role in the protection of our liberties is our concern at this point.

In the eighteenth century Bishop Hoadley in a sermon before George I said:

Nay whoever hath an absolute authority to interpret any written or spoken laws it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spoke them.

With this power did our judiciary adequately develop Canadian constitutional law? Unfortunately the answer to this must be in the negative. Our judges are steeped in the positivistic tradition. As it operates in Canada, this philosophy produces a mechanical application of the written law without regard to social and political facts. This judicial approach is inadequate in the private sphere but is even more inappropriate in the public sphere. Mechanistic positivism has no role to play in constitutional law. As Professor Friedmann has said:

A predominately political document must be interpreted flexibly and general terms in it must be understood in the light of changing social and political developments.

Our judiciary, but more in particular the Privy Council, failed in its role as the interpreter of our constitution. The philosophical attitudes of the judges effectively thwarted the development of the Canadian legal system. This was dramatically displayed in the judicial review of Prime Minister Bennett's "New Deal" legislation. In my opinion, by its interpretation of the B.N.A. Act as an ordinary statute the Privy Council had defeated the intentions of the fathers of Confederation. In short the Privy Council has given credence to Bishop Hoadley's words.

Canada has a great deal to learn from the on-going debate in the United States about the role of the judiciary. The opposing philosophies may be described, perhaps somewhat oversimplistically, as judicial activism and judi-
This is not the place to comprehensively discuss the merits of each philosophy. However a striking feature of the debate should be pointed out. It is that both philosophies appreciate that a court at sometime will be validly involved in "judicial legislation." The difference lies in the extent of this activity. Most adherents of judicial restraint agree that the court should play a major role in developing our legal system. They accept that the court is a great educational institution. Because of its prestige, its decisions are respected. In fulfilling its role the court necessarily creates law. However the court should be restrained in creating law because everytime it does so it endangers its prestige. The public looks upon the role of the court as one of interpretation rather than legislating. The more it participates in the latter function the more political it appears to the public which cherishes the independence of the judiciary.73 If its decisions are without legitimacy then they are rendered ineffective. As well, because of the limits of adjudication, the court must be restrained in its law-making.

It can be seen that the difference is one of degree rather than substance. Does this fact mean that such phrases are not useful in Canada? Professor Robert Girard has argued that such labels signify nothing more than their author either agrees or does not agree with a particular decision or group of decisions by the Court. If he thinks the Court should not have interfered as it did, then you have 'judicial legislation', or even worse 'judicial usurpation' depending on the intensity of the author's conviction. If the Court should have stepped in when it did not the result is 'judicial abnegation'. On the other hand if the Court's response meets his fancy then you are blessed with 'judicial restraint' or 'judicial statesmanship'.74

In a very witty way he has shown the dangers of such labels. However Professor Girard has missed the subtle advantages of such classification. Professor McWhinney has described these in the following way:

Whatever the usefulness, therefore, of this form of classification for Canada and the other Commonwealth countries in which the institution of judicial review also exists (and I believe that this particular classification, inflexible and over-

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72 For a defense of judicial restraint see the articles by Thayer and Commanger in Levy or the books by Professor A. Bickel. For a defense of judicial activism see the article by Rostow in Levy or Professor Black's "The People and the Court" supra note 48.

73 This position is exemplified in the vigorous dissenting opinion of Justice Frankfurter in Baker v. Carr 394 U.S. 186 reproduced in Freund et al. supra note 11 at 1180, 1191.

"The Court's authority-possessed of neither the purse nor the sword-ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."

The opposing view was stated By Justice Clark in a concurring opinion in the same case, at p. 1191:

"It is well for the Court to practise self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time. National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court . . ."

simplified as it may be, has still some usefulness for the Commonwealth countries in clarifying thinking about judicial thought-ways), it is clearly only the beginning of wisdom in the analysis of Supreme Court jurisprudence in the United States. The wise constitutional judge needs to be familiar with and able to apply the advantages of both restraint and activism; he needs to know when to favor one approach and when the other; he needs, in fact, to make an ally of time—to know when to decide and when not to decide, and when to enunciate a broad principle and when to decide a particular problem—situation narrowly on the facts.76

Hence this classification emphasizes the dynamic nature of the role of a court. There is a time for judicial activism as there is for restraint. Despite its mechanical interpretation of our constitution, the Privy Council in some cases did recognize that its role was dynamic. For instance when it implied the power in the federal government to adequately deal with the emergency conditions created by the two wars it exercised ‘judicial restraint’ as it deferred to the legislative judgement as to the existence of an emergency.76 Or, when it struck down much of Bennett’s New Deal legislation it exercised ‘judicial activism’ because it was concerned with the effect that this comprehensive legislative programme would have on the federal nature of Canada.77 However many Canadian commentators would question the Privy Council’s timing in both periods. In my opinion the Supreme Court of Canada more ably appreciated the times necessary for judicial activism. This is especially true in the civil liberties cases of the 1950’s some of which were discussed above.

It must be agreed that there are institutional limitations of a court which require it to be restrained at most times. For example because of its method of data gathering it is less equipped than is a legislature to make policy decisions. It does not have access to all the relevant evidence because of its evidentiary rules and because it only receives evidence from two interested parties. Even if it did have the required evidence before it, judges do not necessarily have the expertise to evaluate it. Moreover because it is a non-elective body “judges simply are not as capable of registering and reflecting the sentiments of a majority of citizens which, it is believed, should be the prime determinant of the social policies embodied in our laws”.78 However this is not to say that judicial restraint is equivalent to mechanistic positivism. Judicial restraint requires creativity in that a court must make its decision in light of social and political realities. It also requires the intelligence and courage to recognize situations when the court must take an active role in developing our law. This is especially true in the application of a bill of rights which requires that a court rigorously protect our liberties.

This “creative judicial restraint” suggests that our court must change its approach in its interpretation of political documents like the Bill. The most important change should be in its means of interpretation. Because of the

inherent nature of a bill of rights, the court must be more flexible in its statutory interpretation. In order to adequately appreciate the social interests involved in a civil liberties issue, the court must resort to external aids. This was not done in Drybones and the result was an inadequate decision for reasons which will be elaborated below. However the court should be limited by traditional constitutional principles. For instance there should be a presumption of constitutionality, i.e. a presumption that the legislation in question is not in conflict with the Bill. This should be especially true of a case arising under the Canadian Bill since section 3 explicitly requires the Minister of Justice to examine every piece of federal legislation before it is enacted to ascertain whether it abridges any declared rights. The courts should decide cases narrowly under the Bill as the majority attempted to do in Drybones but failed. Finally the court should not decide the case on a Bill of Rights issue, if another ground can be rationally relied upon. But when such is not the case the Court must apply the Bill rigorously so that our liberties are protected. As Justice Rand said:

The rule of the judiciary in preserving freedoms is not sufficiently ascertained by a mere statement of jurisdiction, we must examine that rule in action. They can be preserved only through a judicial administration which, by intelligence, courage and unremitting vigilance maintains their standards inviolate. But as the first condition of such functioning the judicial mind must itself be free.3

No doubt it is not only the judges that will have to improve their performance in constitutional adjudication. As Bentham said: "The law is not made by judge alone, but by judge and company." The Canadian Bar must present the kind of arguments that are ammenable to the type of decision that this paper calls for. Until now Canadian lawyers were not prepared to present such arguments because of their training and because the courts were likely to reject such submissions. However it is suggested that future lawyers in Canada will be capable of presenting such arguments because of the improving quality of legal education. Today most professors in Canadian law schools have pursued their graduate studies in the United States unlike in the past when Britain was the Mecca for legal scholars. Their tradition is becoming more noticeably American as are their teaching methods and materials. The realist and sociological schools of jurisprudence have won, or at least are winning the battle of jurisprudence in the leading Canadian law schools over mechanistic positivism. Austinean theory is studied but only as a vehicle for comparison. The positivist theories which maintain any credence in our law schools are those of legal philosophers such as H.L.A. Hart and Hans Kelsen which are far more sophisticated than the positivism which prevails in Canada today. It seems likely that our future lawyers, judges and legislators, and hence our legal system will reflect this jurisprudential metamorphosis.

It is fortuitous that the Drybones case was decided while Canadian legal philosophy is in the process of change. This is fortunate for the reasons discussed above. However this process is not complete. It is suggested that the men on the bench today are not totally competent to assert the new power which has been given to them nor are most lawyers capable of aiding

the court in exercising this power. The Drybones case is evidence of this. I would recommend that Canada not constitutionally entrench a bill of rights in the near future. We must see how our present bench and bar deal with the existing Bill. Perhaps they will meet the challenge of this new power. But this is not reason enough to proceed and enact a more comprehensive bill. As we have seen a bill of rights has educational value. If the public witnesses an inadequate application of this new bill then its value is lost. For reasons already outlined the judicial power under the present bill is limited as is its impact on the public. Before we expand this power we should await and observe the performance of the court under its present power. It is to be hoped that experience will increase its competence to operate in its new jurisdiction. Moreover, the next generation of lawyers will surely enhance the court's competence to assert its new power. At this time, and only at this time, will Canada be ready for a constitutionally entrenched bill of rights. It has been emphasized throughout this paper that a bill of rights is a weak weapon against abuses of civil liberty unless in its application the court has all the necessary skills. As it stands today the marksmanship of the court is not up to the sophistication of the weapon.

IV

CASE ANALYSIS

On April 8th, 1967, Joseph Drybones, a Dogrib Indian, was found intoxicated in the lobby of Yellowstone's Old Stope Hotel. He was charged and convicted under section 94(b) of the Indian Act which provides:

"s. 94. An Indian who
(a) has intoxicants in his possession,
(b) is intoxicated, or
(c) makes or manufactures intoxicants off a reserve, is guilty of an offense and is liable on summary conviction to a fine of not less than ten dollars and not more than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment."

In the Northwest Territories a non-Indian is liable to criminal punishment for being intoxicated in a public place. However his punishment is less in that there is no maximum fine provided, and the maximum term of imprisonment is thirty days. Moreover there are no Indian reserves in the Northwest Territories so that an Indian could be convicted if he was found intoxicated in his own home. Such conduct by a non-Indian is not punishable.

Drybones successfully appealed his conviction before Judge Morrow of the Northwest Territories Territorial Court. The basis of his decision was that section 94(b) was inoperative since it conflicted with section 1(b) of the Bill of Rights in that it deprived Drybones of equality before the law.

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80 Justice of the Peace John Andrew Thompson, April 10, 1967.
81 R.S.C. 1952, ch. 149.
82 Liquor Ordinance, R.O.N.W.T. 1956, c. 60, s. 19 (1).
83 June 5, 1967.
because it provided for harsher penalties in the Northwest Territories for liquor offenses for Indians than apply to anyone else. Section 1(b) of the Bill of Rights provides:

"s.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:

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

The Crown appealed this decision to the Court of Appeal of the Northwest Territories which upheld Judge Morrow’s decision. It further appealed to the Supreme Court of Canada which upheld the lower courts’ decisions by a majority vote of six to three.

Justice Ritchie wrote the majority opinion of the Court. He accepted the lower courts’ findings that the defendant was deprived of his right to equality before the law. He then proceeded to deal with the first submission of the appellant. It was contended that the decision of the court below made the question of whether s.94(b) has been rendered inoperative by the Bill dependent upon whether or not the law of any province or territory makes it an offense to be intoxicated otherwise than in a public place. Hence its operation could therefore not only vary from place to place in Canada, but also from time to time depending upon amendments which might be made to the provincial or territorial legislation. Ritchie rather inadequately and summarily dismisses this argument by stating that “the ordinance in question is a law of Canada within the meaning of s.5(2) of the Bill of Rights, and it is a law of general application in the Territories, whereas the Indian Act, is, of course, also a law of Canada although it has special application to Indians alone.”

Here Ritchie is clearly evading a key issue. What if Drybones was convicted in a province so that the Indian Act would be compared to provincial legislation rather than federal territorial legislation? In other words does “equality before the law” require that an Indian be treated equally under the Indian Act as a non-Indian is treated under provincial legislation? As the Bill does not apply to provincial legislation, the answer to this seems unclear. However the concept of “equal protection of the law” has developed in the United States so that it only applies to equal protection before the laws of the same sovereign body. This would seem to dispose of the issue. Ritchie should have more adequately dealt with this problem. Parliament has declared the right. It is up to the Court to give meaning to the Bill by defining the scope of these rights.

Next Ritchie addresses himself to the argument that section 2 of the Bill is only a rule of construction which does not have the effect of repealing inconsistent legislation. Ritchie lays down two reasons for rejecting this approach. First he accepts the reasoning of Cartwright in the Robertson case

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86 Id., Fauteux, Martland, Judson, Hall, Spence, J.J. concurring.
87 Id. at 291.
which rejected this approach.²⁸ Ironically in the case under discussion, Cartwright has refuted this position. Secondly, Ritchie feels that the non obstante clause of section 2 would become superfluous if this approach were accepted because an inconsistent Act would operate notwithstanding the Bill of Rights anyway. It is submitted that Ritchie has approached this problem in a common sense way. The Bill, in other words, makes no sense if the alternative interpretation is accepted. However a philosophical statement of the principles and purposes of the Bill of Rights is lacking. Such a statement would justify the interpretation accepted by Ritchie as well as lay down some guidance for the future application of the Bill. Finally, as you will see, if the parliamentary debates were referred to, Ritchie could have disposed of this issue summarily.

Ritchie then proceeded to deal with the argument that the Bill of Rights must have reference to and be circumscribed by the laws of Canada as they existed on the date of its enactment. In other words section 1(b) of the Bill is to be treated as being limited or affected by section 94(b) of the Indian Act. Ironically this argument is based upon a statement by Ritchie in the Robertson case (supra):

“It is to be noted at the outset that the Canadian Bill of Rights is not concerned with 'human rights and fundamental freedoms' in any abstract sense but rather with such rights and freedoms as existed in Canada immediately before the statute was enacted (see also s. 5(1)). It is therefore the 'religious freedom' then existing in this country that is safeguarded by the provisions of s.2...”

Needless to say this statement could not be accepted as a guide in interpreting a bill of rights declaring rights and freedoms which expand or contract as changing social conditions require. Of course this reasoning only applies if these rights are not absolute, which is certainly the case in Canada.

Ritchie rejects this reasoning for two reasons. First, in the Robertson case, the majority did not find conflict with the Bill of Rights. Therefore it cannot be used as authority in the present case which involves conflicting legislation. Secondly, this argument is contrary to section 5(2) of the Bill which makes it applicable to every “Act of the Parliament of Canada enacted before or after the coming into face of this Act.” If rights are to be circumscribed by previous legislation then this provision becomes meaningless. Once again Ritchie applies a good common sense approach. But once more he fails to provide future courts with a philosophical basis for the application of the Bill. However it is interesting to see that Ritchie has gone one step further than Cartwright in his interpretation. In the construction of the provision in question Ritchie is referring to other provisions in the Bill. In other words he is interpreting a provision in the context of the whole Bill rather than just construing each provision literally. But it is suggested that this is not enough. Statutory construction of a bill of rights must involve an analysis of philosophical, political, social and economic factors as well as legal.

The final argument with which Ritchie deals has to do with the scope of the right in question. In R. v. Gonzales³⁹ Tysoe J.A. defined the right of equality before the law in the following words:

“A right of 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

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an equal footing with every other person to whom a particular law relates or extends and a right to the protection of the law." (The italics are Mr. Justice Tysoe's)

Ritchie rejects this definition because of the implications of such holding:

I cannot agree with this interpretation pursuant to which it seems to me that the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members "to equality before the law", so long as all the other members are being discriminated against in the same way. 90

In his argument Ritchie does give a very general definition of the right in issue:

... I think that s.1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offense or having been made subject to any penalty.

Finally after having read the two dissenting opinions Ritchie cautiously lays down a qualification to his judgment:

It appears to me to be desirable to make it plain that these reasons for judgment are limited to a situation in which, under the laws of Canada, it is made an offence punishable at law on account of race, for a person to do something which all Canadians who are not members of that race may do with impunity; in my opinion the same considerations do not by any means apply to all the provisions of the Indian Act. 92 (Italics mine)

In so doing he has indirectly answered the question that was posed earlier. That is, that the right of equality before the law does not require that an Indian be treated equally under the Indian Act as a non-Indian under provincial law. The unfortunate impact of this holding is that section 94(b) is probably still operative in the provinces. But it seems clear that the importance of the majority decision is not its effect on the constitutional position of the Indian but its effect on the concept of judicial review in Canada.

In Chief Justice Cartwright's dissenting opinion he assumes that section 94(b) infringes the right of the defendant to equality before the law. He seems satisfied to proceed on this assumption without questioning the implications of such holding. The Chief Justice then goes on to face the main issue of the case as he sees it:

In these circumstances the choice open to us is to give effect to the section according to its plain meaning or to declare it inoperative, that is to say, to declare that the Indian Act is pro tanto repealed by the Bill. 93

In my opinion Cartwright has mis-stated the issue in a manner that is unfavourable to the defendant. He states that if the latter approach is accepted then the Indian Act is pro tanto repealed. If such was the case then a court would be chary of using this approach because of its grave implications. But such a holding would be contrary to established rules of interpretation deve-

90 Drybones, at 297.
91 Id. at 297.
92 Id. at 298.
93 Id. at 286.
oped in Canadian constitutional law. A court should not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Hence only section 94(b) of the Indian Act would be rendered inoperative by an application of the Bill of Rights.

Cartwright suggests three reasons to show that the Bill does not have the effect of repealing an inconsistent statute. First, he accepts the reasoning of Davey, J.A. in *Regina v. Gonzales*:

In so far as existing legislation does not offend against any of the matters specifically mentioned in clauses (a) to (g) of s.2, but is said to otherwise infringe upon some of the human rights and fundamental freedoms declared in s.1, in my opinion the section does not repeal such legislation either expressly or by implication. On the contrary, it expressly recognizes the continued existence of such legislation, but provides that it shall be construed and applied so as not to derogate from those rights and freedoms. By that it seems merely to provide a canon or rule of interpretation for such legislation. The very language of s.2, “be so construed and applied as not to abrogate” assumes that the prior Act may be sensibly construed and applied in a way that will avoid derogating from the rights and freedoms declared in s.1. If the prior legislation cannot be so construed and applied sensibly, then the effect of s.2 is exhausted, and the prior legislation must prevail according to its plain meaning.

Curiously this was the reasoning which Cartwright had rejected seven years earlier in the *Robertson* case (supra). His change of mind is due to the realization that “the Bill directs the courts to apply such a law not to refuse to apply it.” This is inferred from the opening words of section 2 that “Every law of Canada shall... be so construed and applied as not to abrogate...”

I would suggest that this is the type of literal interpretation and mechanical application of law that our legal system should not tolerate especially when a court is administering a bill of rights. It is the philosophical principles that the Bill declares with which a court should be concerned, rather than the words. Perhaps the positivist strain is too entrenched in the Canadian judiciary to enable it to apply a normative document like a bill of rights. However it is submitted that even a mechanical application of the Bill requires that a court declare inconsistent legislation inoperative. Cartwright does not give enough weight to the closing words of section 2, i.e. “... no law of Canada shall be construed or applied so as to...” This clause in particular refers to specific, enumerated breaches of natural justice but it would be unreasonable to suggest that it did not also apply to the declared rights enumerated in section 1. Hence the Court has been directed by Parliament not to apply an inconsistent piece of legislation. Moreover, there is a traditional canon of construction that a statute should be construed so as not to interfere with the rights of individuals. It is not reasonable to suggest that Parliament only intended section 2 to be a canon of construction when such a canon already existed.

Even though we can achieve a desirable result using the latter approach, I maintain that it is inadequate in interpreting a political document like a bill

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94 Laskin, *supra* note 49, at 145. Notice that this is also the American approach; see *Steamship Co. v. Emigration Commissioners*, 113 U.S. 33.

95 *Supra* note 89, at 239.

of rights. It has been suggested in this paper that ordinary rules of statutory construction should not apply in constitutional cases.97 The reasoning of this suggestion has been concisely given in the following words:

... statutes are by no means all of one kind and that both judicial practise and principle indicate important differences between the rules of interpretation appropriate to different types of statutes. An eminently political and general document, such as a constitution, is not and cannot be treated in the same way as a statute concerned with the registration of land or with criminal procedure.98

One improvement that I would recommend is that the Court should refer to more external aids in interpreting political documents. The value of extrinsic aids has been recognized by the Supreme Court of Canada:

In certain cases, in order to avoid confusion extraneous evidence is required to facilitate the analysis of legislative enactments, and thus disclose their aims which otherwise would remain obscure or completely concealed. The true purposes and effect of legislation, when revealed to the courts, are indeed very precious elements which must be considered in order to discover its real substance.99

Although the Court was referring to evidence as to the effect of the impugned legislation, I believe that this reasoning should be extended to the legislative history of statutes as a means of discerning the purpose of the legislation in question. More particularly I am concerned with the admissibility of the evidence of parliamentary debates or legislative committee hearings. Presently such evidence is inadmissible in Canadian courts.100 They have followed the British rule of total exclusion of evidence of legislative history.101 This tradition is exemplified in the following obiter dicta of Lord Wright:

It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible.102

It is conceded that there are limitations in the use of these external aids. For instance Justice Frankfurter warned that “Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when the legislative history is doubtful do you go to the statute.”103 However the possibility of abuse should not preclude its admission in evidence when there is some ambiguity in the words of the statute as to its purpose as there is in the case at hand. This is not to say that the legislative history is

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97 Some jurists would suggest that cases arising under the Bill of Rights are not “constitutional” because that document is only an ordinary statute. However it is suggested that the Bill is an integral part of our constitutional system as is other statutory or common law which is also outside the B.N.A. Act.


103 Frankfurter, Some Reflection on the Reading of Statutes, (1947), 47 Col. L. Rev. 527, 543.
conclusive evidence of parliamentary intention. The Court would have the discretion to give this evidence the weight which it deems appropriate.\textsuperscript{104}

If the parliamentary debates were referred to in this case the Court would have discovered that Parliament had already addressed itself to this issue. Mr. Martin (L, Essex East) of the Opposition proposed an amendment to the Bill of Rights which would have decided this issue:

We want a bill of rights that will see to it that any inconsistent legislation, which violates any of the provisions of the bill, will be inoperative.\textsuperscript{105}

He introduced into the record the views of Mr. Donald McInnes, the then vice-president of the Canadian Bar Association, who postulated that the words of section 2 could be interpreted in either of two ways. First, it could be interpreted as a simple rule of construction which would not have the effect of revoking inconsistent legislation. Needless to say this is the approach adopted by Cartwright. Or, it could have the effect of repealing legislation as far as it is contradictory to the Bill.

Mr. Fulton, the then Minister of Justice, rejected Mr. Martin's proposed amendment because he thought the words of section 2 were satisfactory to require a court to adopt the latter approach. In so doing the Minister laid down the approach that a court should implement in applying the Bill:

They will then have a look at the section or provision in question and say first, does this statute have within it an express declaration that it operates notwithstanding the bill of rights? If the answer to that question be no, it does not contain such an express provision, they would then look at the question of whether or not the provision of the statute which is before them does contravene the bill of rights. If the answer to that question be yes, then they would say, by virtue of the bill of rights we are directed not to give that statute or provision that construction, interpretation or application; in fact, we are directed \textit{not to apply} it in a manner which will contravene the bill of rights.\textsuperscript{106}

In a recent article E. A. Driedger, the Chief Parliamentary Draftsman at the time of the enactment of the Bill, and who drew its actual provisions, said:

The effect of this provision (i.e. section 2) therefore would appear 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.\textsuperscript{107}

Hence the priority rules for the particular over the general, or the later over the earlier, do not apply in cases involving the Bill of Rights which has an overriding effect.

It is unfortunate that the Court should waste its resources on an issue already decided by Parliament. Of course the Court is not alone to blame. It is submitted that the Bill of Rights is a poorly drafted piece of legislation. As is so often the case, the legislation before the Court does not clearly declare legislative intent. This gives credence to the argument that these external

\textsuperscript{104} For an excellent discussion of the issues here in concern see Hart and Sacks, \textit{The Legal Process} (tenth ed. 1958) pp. 1243-1286.


\textsuperscript{106} \textit{Id.} at 7476.

aids should be available to courts in the construction of all statutes, or at least in the construction of political documents which are necessarily expressed in general terms.

Canadian courts have placed themselves in a mechanistic trap. They have confined themselves by a short-sighted philosophy of judicial restraint. They extract the worst of that philosophy while disregarding its merits. The Court is very chary of policy making. It feels that as soon as it opens itself to such external aids, it adopts the characteristics of a policy maker. It is concerned with legislative words and not legislative policy. However in its lack of insight, the Court has not realized that these external aids are useful in discerning legislative intention. More importantly it has not realized that a philosophy of judicial restraint does not preclude the use of judicial creativity. Judges should be restrained by the limits of the power granted to them and by the limits of the adjudicative process, not by an antiquated legal philosophy which has remained static in a dynamic society.

Cartwright's next reason for his interpretation is that "it must not be forgotten that the responsibility (i.e. of declaring inconsistent legislation inoperative) ... if imposed at all, is imposed upon every justice of the peace, magistrate and judge of any court in the country who is called upon to apply a Statute of Canada, or any order, rule or regulation made thereunder." 108 Presumably such lower court judges should not have such responsibility. But is not this the responsibility that any such judge has in any ordinary constitutional case? A magistrate in traffic court may declare a federal regulation ultra vires if he finds it to be "in relation to" a provincial subject matter. Why is he less competent to declare federal legislation inoperative which he finds to be inconsistent with the Bill of Rights? In any case there is always a court of appeal to oversee the administration of the Bill.

Finally Cartwright feels that if Parliament had intended to give the Court such power, it would have done so in explicit language. The arguments in favour of external aids apply to this reason also. Moreover the Court has the power to declare inoperative a piece of legislation if the enacting legislature does not have the requisite constitutional powers. In no legislation is the Court explicitly given this power. It has developed by convention in our constitutional system. Although the Court is a creature of Parliament, it must not feel compelled to only act on the explicit direction of its creator. It has an area of discretion in which to work. It has the major responsibility of directing its own development. It has the obligation of providing our legal system with an appropriate "dispute-settling mechanism" capable of keeping our constitutional system answerable to the needs of a changing society. Parliamentary sovereignty does not mean that Parliament is alone responsible for the development of our legal system.

Mr. Justice Pigeon in his dissenting opinion gives four reasons to show that Parliament has not given the Court such powers. His primary reason is that the opening words of section 1 make it clear that the declared freedoms in the Bill are to be circumscribed by the existing legislation at the date of the enactment of the Bill. The key words are that the enumerated rights and

108 Drybones, 287-88.
freedoms “have existed and shall continue to exist...” He feels that these rights and freedoms are not legal concepts of precise and invariable content. By these words Parliament has supplied a large measure of precisions. Hence the implication of his decision is that the Bill does not affect previous conflicting legislation because the scope of freedom provided for in this legislation defines the scope of the freedom provided for in the Bill of Rights.

This argument must be rejected for reasons already discussed. Rights and freedoms in a liberal democratic society are flexible concepts. By confining them to the scope which they possessed on a specific date is arbitrarily unreasonable. Moreover with Pigeon’s interpretation, section 5(2) of the Bill which defines a law of Canada as any Act “enacted before or after the coming into force of this Act...” becomes meaningless. Professor Tarnopolsky points out that this position is untenable because any subsequent expansion by Parliament of these rights and freedoms as they existed in 1960 could later be abrogated despite the existence of our Bill of Rights. Finally, if Pigeon had referred to the Debates he would have seen that his position was wrong. The then Prime Minister, Mr. Diefenbaker, made the following statement which described the effect of section 2. He also demonstrated that the Bill of Rights is not to be circumscribed by the laws of Canada as they existed on the date of the Bill’s enactment:

Furthermore, if any of these several rights should be violated under legislation now existing, the courts in interpreting the particular laws or statutes which have been passed will hereafter, if this bill is passed, be required to interpret those statutes of today in the light of the fact that whenever there is a violation of any of these declarations or freedoms, the statute in question is to that extent non-operative and was never intended to be so operative.

(italics mine)

Secondly Pigeon agrees with Cartwright that section 2 only lays down a rule of construction which does not have the effect of revoking conflicting legislation. However he does concede that the non obstante clause of section 2 is a strong argument against his interpretation. But then he reverts back to his first argument and states that there can never be any necessity for declaring existing legislation inoperative as coming in conflict with the rights and freedoms defined in the Bill seeing that these are declared as existing in them. He concludes that this is more compelling than the effect of the non obstante clause.

Pigeon’s reasoning leaves one big gap. What if the legislation in question has been enacted after the enactment of the Bill so that the rights declared in it could not possibly be so circumscribed? Does the Court then have the power to overrule this subsequent legislation if it conflicts with the Bill? In other words does the effect of section 2 depend on whether the legislation was

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100 Tarnopolsky, supra note 5, at 113.
111 Curiously this is the position taken by Pigeon before his appointment to the Court. See The Bill of Rights and the B.N.A. Act, (1959), 37 Can. Bar Rev. 66, 72. It was also the position of Laskin before his appointment to the Court which was after the Drybones decision. See An Inquiry into the Diefenbaker Bill of Rights (1959), 37 Can. Bar Rev. 77, 130-32.
passed before or after 1960? Had Pigeon referred to the Debates, he would not have been forced to take such an unreasonable position on this decided issue.

Thirdly Pigeon looks at the impact of the majority decision. Indians are now to be subject in every province to the same rules of law as all others in every particular not merely on the question of drunkeness. "Outside the territories, provincial jurisdiction over education and health facilities would make it very difficult for federal authorities to provide such facilities to Indians without "discrimination" as understood in the court below." Several comments can be made on this argument. Is this the kind of matter that we want judges to look at? Are they competent to decide whether Parliament can provide such facilities for Indians? This dangerously sounds like policy making. It is interesting to see that the judges who are most frightened of policy making in reality are the ones who concern themselves with policy questions. Also, as we have seen, a close analysis of the majority position would not yield the effects which Pigeon foresees. Ritchie clearly confined his decision to the case where two pieces of federal legislation conflicted. Pigeon foresees effects resulting from a conflict of provincial and federal legislation. As was stated above, equality before the law means equality under the laws of the same sovereign body.

Finally Pigeon argues that if Parliament had intended to give the courts such new powers then it would have done so in clear language. For this position Pigeon relies on an old common law maxim. This is the presumption against implicit alteration of the law; Parliament must not be presumed to depart from the existing law any further than expressly state. This maxim has value when there is ambiguity in the statutory language. However its value diminishes in the context of the case at hand because the introduction of a bill of rights in a parliamentary system is a major alteration in the law. An interpretation of the Bill must be made in this context. Old maxims are not adequate justification for such interpretations. It is to the purposes, principles and policies of a bill of rights that a judge's mind should be directed in its interpretation.

Curiously the judges who are only willing to discern legislative intent from the clear words of the statute are the judges who have mis-interpreted the intention of Parliament in this case, as the Debates show. Moreover it is these same judges who are most frightened of judicial law making. As we see, if accepted their approach would have made law contrary to the wishes of Parliament. It is extremely ironic that the dissenting judges in this case are the judicial activists on our Court. Hence we can see that a mechanical application of law is no guarantee that judges will be be restrained by the limits of the legal powers which were granted to them. This unrestrained judicial action is unintentional but it will continue as long as Canadian jurisprudence does not place a premium on judicial creativity. Mechanistic positivism is inadequate not only because it fails in keeping the law in tune with prevailing social conditions but also because it may inhibit our judiciary from carrying

112 Drybones, 303.
out the intentions of Parliament. This is the supreme paradox which most Canadian judges, jurists and lawyers have failed to grasp and why in turn they have provided our technological society with an antiquated jurisprudence.

At this time we should look back and make some general comments from our analysis. In my opinion it must be conceded that the approach of the Court, including the majority, is inadequate. The decision provided no guidelines for the application of the Bill of Rights in lower courts. It completely lacked a balancing of interests which is called for in every civil liberties question since these rights are not absolute. The cost of infringing an individual's rights must be weighed against the benefit to be derived from the state policy or actions which cause the infringement. The Court should have questioned whether there were justifiable policy reasons for treating Indians differently than other Canadians. I am not inferring that this was not a complex question to resolve. I am suggesting that this was the appropriate question to ask in order to settle the dispute before the Court. Instead of applying its resources to this basic question the Court has dwelled on an issue which had already been decided by the legislature. As long as the Court is not prepared to implement this type of analysis, then I suggest it is incompetent to apply the present Bill of Rights, let alone the more comprehensive bill which the Prime Minister and his followers recommend.

It should also be mentioned that this decision may have grave consequences on the legislative process. The majority's definition of "equality before the law" would seem to preclude Parliament from enacting preferential legislation for any group classified on race, national origin, colour, religion or sex. This may have significant effects on future parliamentary activity, especially in the area of the regulation of the economy. For instance, Drybones would appear to prohibit the treating of foreign-owned corporations operating in Canada differently from corporations owned and controlled by Canadians. Moreover this decision seems to have grave implications on existing legislation. It may invalidate much of our Indian legislation as well as legislative provisions in our electoral laws, our immigration laws and our criminal law. As well Drybones will likely have a deleterious impact on the judicial process. Since it was reported our lower courts have been inundated with cases involving the Bill of Rights. Unfortunately they have no guidelines to refer in its administration.

In its decision, the Court did not recognize that in certain cases legislative classification is justifiable even if it is based on one of the above mentioned categories. In the United States the fourteenth Amendment has not precluded such classification:

It is clear that the demand for equal protection cannot be a demand that laws apply universally to all persons. The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals.

115 See Immigration Act, R.S.C. 1952 c. 325.
Here the Supreme Court of Canada failed to decide whether there was “reasonable classification”. In not doing so, it has created uncertainty in our law.

As to the near future I would suggest that the Court will be very conservative in the assertion of its new power. It will be very chary of striking down federal legislation unless the conflict of legislation is as blatant as it thought it was in the case under discussion. Perhaps this is fortunate since it appears that the Court presently lacks the requisite philosophical approach to apply a bill of rights. It is to this approach that we shall now turn in the conclusion of this paper.

V

CONCLUSION — A SUGGESTED APPROACH

It would be remiss of me if I did not attempt to suggest an approach that the Court could take in interpreting the Bill of Rights. In doing this I would like to briefly elaborate upon my conception of the role of the Court which is probably evident to the reader by now.

In a liberal democratic society the role of a court as a policy maker must be limited. This is because of the aforementioned institutional limitations of adjudication as well as the legal values that are gained when a court adheres to a policy of stare decisis. However a court must be creative within the confines of the restraints set down by our legal system. The tools with which a court deals (legal rules, principles and policies) are purposive instruments which must be applied creatively to particular fact situations. In interpreting a legal rule a court must impute the social purpose which this rule expresses. In no other way can the law remain answerable to the needs of people in a society of rapid social change.

I suggest that the institutional role of a judge is as dynamic as the law that he applies. In my opinion there are a number of factors which dictate the degree of creativity that is open to a judge in his decision making. The most important of these is the body of law that the court is applying. It seems reasonable that a court should be more creative in developing the decisional law than the statutory law. Our legal system has delegated this responsibility to the courts because they have the resources that are required in the development of the common law. In other words the courts are better suited than the legislature for this role.

However this does not preclude creativity in the judicial task of statutory interpretation. In this area, as well, the degree of creativity required of a court is dependent upon the statute that is being interpreted. When a statute relates to an area of the law that the court has traditionally developed, then it must be more creative in its interpretation. For instance, in the interpretation of The Negligence Act and The Broadcasting Act, the court must be more prepared to defer to the legislature in the latter case. The court has historically developed the law of torts while communications policy must be

118 For excellent discussions of these legal values see Hart and Sacks, supra note 104, at 587-88 and P.C. Weiler, supra note 78, at 9-29.
admitted to be primarily within the domain of the legislature. Moreover a
court should be more creative when dealing with legislation expressed in
general terms rather than specific. Needless to say, in the former case the
legislature has allocated more discretionary power to the court than in the
latter.

Now we must relate this discussion to the role of the court in the inter-
pretation of a bill of rights. As we have seen a bill of rights has a major
effect on the institutional allocation of power in our political system. It must
be admitted that a bill increases the power of a court in a parliamentary
system. In other words, Parliament in its wisdom has made the policy decision
to give the court a greater role to play in the political system. In accepting
this new responsibility the court must be prepared to be creative in its appli-
cation of the bill. Moreover since the bill is expressed in such general terms
the degree of creativity open to a court is great.

The question now is whether our court is ready to accept this new
responsibility. From the discussion in other parts of this paper it is apparent
that I have concluded that it is not so prepared. Therefore we must provide
an approach which is commensurate with the court's present competence and
which is flexible enough to be the basis of the approach that is required in the
application of a bill of rights. Of course the requisite approach is an idyllic
notion which can never be reached but only be striven toward.

The rights declared in the Bill of Rights have been classified as follows:110
political liberties — freedoms of religion, speech, assembly and press (section
1(c) — (f) ); economic liberties — the right to own property, the right not
to be deprived thereof without due process, freedom of contract etc. (section
1(a) ); legal liberties — freedom from arbitrary arrest, right to fair hearing,
access to counsel etc. (sections 1(a), 2(a) — (g) ); egalitarian liberties —
equality before the law (section 1(b) ). Because of the inherent nature of
these rights and because of the competence of the court I would suggest that
the degree of creativity open to a court is dependent upon the right which it
is expounding. At this time the court should be most active when it is defining
legal liberties. Many of the rights declared in sections 1(a) and 2(a) — (g)
have been created and expanded by the courts and hence are more susceptible
to development by the judiciary.120 Furthermore, it is likely that these rights
involve the kinds of issues with which the electorate feels the court should
deal. Hence the problem of legitimizing the court's decision will be less even

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110 See Laskin, supra note 111.

120 Even Professor Bickel, a stalwart of judicial restraint, would allow the Court
freedom in reforming the criminal process. See A. Bickel, The Supreme Court and The
Idea of Progress, (1970) p. 32. This paper does not suggest that the issues arising in a
"legal liberties" case are simple policy questions which a court can easily resolve. Such
notions have been disproven in Goldberg and Dershowitz Declaring the Death Penalty
Unconstitutional, 83 Harv. L. Rev. 1773, 1798-1802 (1970). However, it is submitted
that a court is more competent to deal with these issues than those arising in other
civil liberties cases and is more competent than the legislature to piecemeally develop
this procedural area.
though the court may in fact be "legislating".\footnote{This submission might be seriously questioned because of the American experience. It must be conceded that the American Court's actions in the area of criminal procedure caused a great deal of adverse public reaction. However we must not infer too much from this phenomenon. The Supreme Court was most active at a time when the crime rate was high. The Court was a very convenient scapegoat for this crisis in "law and order". The public was persuaded that the Court caused, or at least enhanced this increased criminal activity, although this relationship was never empirically proved. Such conditions do not exist in Canada and hence the American experience is of minimal value to us. Moreover the rights enumerated in section 2 of the Canadian Bill are much more specific than the due process clause of the American Bill. The substantive and procedural goals are more clearly delineated. In other words, the Canadian Court has clearer standards and hence its decisions will be more easily legitimated.} The exposition of the other three classes of liberty involve broad policy questions with which the court is not necessarily competent to deal, at least presently. This is not to say that the court should not define and expand this class of liberty. It is only to suggest that in dealing with these liberties, the court should be more ready to defer to the legislature. That is to say that it should be less likely to find conflict with the Bill of Rights. But it must be emphasized that this does not preclude a more active role in these areas for the court in the future. As has been stated above, the court's competence to deal with these issues may increase with experience. Moreover in one of these areas — that of political liberties — it has a firm base from which to work, i.e. the "implicit bill of rights" developed by the Supreme Court in the 1950's.

The model that we are about to discuss attempts to create an atmosphere or mood in which three judicial attributes are enhanced. First, it emphasizes the collaborative role that the court is to play with the legislature. Secondly, it outlines a process of decision making in which a court must be creative. Finally, the model sets forth a framework in which the judicial decision is made in light of the institutional limits of adjudication that we discussed above. Therefore the role of the court must be limited by these factors.

In deciding whether the legislation in question is in conflict with the Bill of Rights, the first step is the inference of statutory purpose. I would suggest that the court implement the approach developed by Hart and Sacks.\footnote{In past constitutional cases, Canadian courts have exercised such powers — see \textit{Fort Frances Pulp and Paper Co. Ltd. v. Manitoba Free Press Co.} [1923] A.C. 695; \textit{Co-operative Committee on Japanese Canadians v. A. G. Canada} [1947] A. C. 87.} As was stated above, this would require the court to liberalize its present rules of evidence. Since this model envisages a court balancing different interests and values it is imperative that it discern the "true" purpose of the legislation because that purpose is an expression of the interests that the legislature is attempting to accommodate and hence an expression of the value which the legislature is trying to achieve.

In the second stage the court would evaluate the legitimacy of the statutory purpose. In other words the court would ask whether this is a reasonable goal for the legislature to achieve. To answer this the court would have to question whether there is in reality an evil or problem with which the state should be concerned. Hence the court would have to look at the legislative facts upon which which the statutory purpose is based.\footnote{Hart and Sacks, supra note 104, Ch. VII.}
the legitimacy of the statutory purpose the court must be aware of its own limits as a policy maker. But it must be creative in assessing its own competence to question the legitimacy of the statutory purpose. As was said before the court's competence to act is dependent upon the problem with which it deals. For instance, I would suggest that a court is more competent to question whether a privilege as to self-incrimination impedes the administration of justice than whether preferential economic policies are necessary for the health of the economy. The court must be more ready to defer to the legislature in the latter case. If it does not and the court rejects the legitimacy of the statutory purpose then the matter is ended and the court must declare the legislation inoperative. If the court accepts its legitimacy then it must proceed to the final stage of the process.

The third step involves an evaluation of the means of effecting the legitimate statutory purpose. In effect a benefit-cost analysis of the legislation is called of the court at this time. The court must decide whether the social value gained by the implementation of this legislation is greater than the social value lost through its infringement on civil liberty. In answering this I suggest that the court look at the following considerations which are by no means exclusive. What is the probability that this legislation will in fact eradicate the evil or danger in question? What is the degree of infringement on the liberty in question? Are there alternative and reasonable means to effect the same purpose in a less onerous way? Once again the court must make this evaluation in light of its institutional limitations. If it accepts the legitimacy of the legislative means then it has found no conflict with the Bill of Rights and the legislation is upheld. Otherwise there is conflict and the legislation must be declared inoperative.

At this point it might be helpful to apply the proposed model to the case under discussion. As we saw in the case analysis, section 94(b) of the Indian Act appeared to treat Indians unequally in the Northwest Territories because it provided for harsher penalties for liquor offenses than apply to non-Indians. As well the Indian was penalized for conduct which would not make a non-Indian liable to punishment.

In order to decide whether this deprived Drybones of equality before the law, the court should have first inferred the purpose of section 94(b). Unfortunately counsel in this case did not give evidence of the statutory purpose nor did the Supreme Court even allude to it. The policy reasons why our society has so restricted the use of liquor by Indians has been described by Justice Douglas in the following words:

> Experience shows that liquor has a devastating effect on the North American Indian and Eskimo. It is, therefore, commonly provided in the United States and Canada that no liquor should be sold to those races. Other regulations based on race may likewise be justified by reason of the special traits of those races, such, for example, as their susceptibility to particular diseases. What at first blush may seem to be an invidious discrimination may on analysis be found to have plausible grounds justifying it.124

Now that the court has inferred the statutory purpose it must then evaluate its legitimacy. It should question the legislative facts upon which this

purpose is based. On Douglas' justification section 94(b) would seem to pass the American test of "reasonable classification" in that the legislative classification (i.e. Indians) is reasonably related to the purpose for which it was enacted (i.e. to protect Indians from the harmful effects of liquor).\footnote{125} Similar liquor legislation with respect to Indians has been upheld in the United States.\footnote{126}

In our case the court could defer to the legislative judgment at this point and agree that this is a reasonable goal for Parliament to achieve. Or it could ask for biological and cultural evidence to demonstrate that liquor does in fact cause peculiar individual or social harm to the Indian. I would suggest that the court should adopt the latter approach in order to discover whether there is reasonable justification for the legislative purpose. However once such evidence is produced it should defer to the legislature because it is less competent to assess such evidence. Of course if the evidence clearly displays the fallacy of such legislative assumptions, then the court should reject the legitimacy of the statutory purpose. But if such is not the case then the court should accept the legitimacy of the purpose of section 94(b).

The court should now proceed to evaluate the means by which Parliament has chosen to effect this purpose. At this stage it would make some of the following considerations. It must assess the probability that the Indian will be protected by treating him harsher than the non-Indian. It must question whether the difference in penalty is called for by the seriousness of the problem. Then the court must consider the costs derived in treating the Indian differently. It must assess whether this different treatment causes disrespect for the law since the Indian may deem it to be unreasonable and unjust. The court could also consider whether all Indians should be treated harsher because liquor has harmful effects on some Indians. Finally it could canvass some alternative methods, such as education, which would effect the same purpose but would not treat the Indian differently before the law.

After weighing all these factors I would suggest that the court would reject the legislative means chosen to effect the legitimate purpose of Parliament. In effect I believe that the benefits gained by the application of section 94(b) are less than the costs derived in treating the Indian differently. The efficacy of the model may be questioned in that it reached the same conclusion as the Supreme Court did in fact. But I would suggest that this result was largely fortuitous. In this paper we are more concerned with the process of decision making rather than the result of the decision itself. The benefits in using the analysis called for in this paper should be apparent. It has laid a practicable framework for lower courts to apply the Bill of Rights. It does not have the deleterious effects on the legislative process that we discussed above. It has not created uncertainty but has clarified the law by defining the scope of "equality before the law". Finally the model has restrained the court to reasoned decisions. As it stands today, \textit{Drybones} has placed no restraints on the court in the application of the Bill of Rights because of the arbitrariness of its decision.

\footnote{125}{See \textit{Railway Express Agency v. New York} (1949), 336 U.S. 106 for an expression of this test.}
It is not suggested that judicial decisions based on reason and principle can ever achieve the "neutrality" that Professor Wechsler calls for. Judicial decision making is a human activity; a fortiori it involves a value judgment. Principles necessarily refer to societal value choices. As well, in choosing what principle to apply in a case, the judge is making a value preference since there are many principles which he can apply. Indeed in some cases there may even be conflicting relevant principles from which the judge can choose. This realistic view of the judicial role has been described by Professor McDougal in the following way:

The essence of a reasoned decision by the authority of the secular values of a public order of human dignity is a disciplined appraisal of alternative choices of immediate consequences in terms of preferred long-term effects, and not in either the timid foreswearing of concern for immediate consequences or in the quixotic search for criteria of decision that transcend the world of men and values in metaphysical fantasy. The reference of legal principles must be either to their internal-logical arrangement or to the external consequences of their application. It remains mysterious what criteria for decisions a neutral system could offer.

Although this statement abounds in realism, it somehow overstates its case. It is agreed that pure objectivity is an ideal which can never be achieved. But this is not reason enough to preclude an attempt to devise an approach which would encourage and enhance human objectivity. In some ways Professor Wechsler's approach does that. By forcing the judge to use standards already established in the legal system as the authoritative source of his decisions, his value preferences, although not eliminated, are greatly subdued.

By now it must be apparent that there are legal values to be gained with such restraints placed on the judiciary. However a problem does arise when there are no clear standards by which a judge can refer in his decision. I suggest that this will often be the case in disputes arising under the Bill of Rights. At this time it is up to the judge to decide whether the benefits to be gained in creating new social policy are greater than the losses that will incur by acting in this manner. Hopefully the model suggested in this paper will in some way make that decision less difficult.

On first glance the model which has been proposed appears to be a radical departure from present judicial review in Canada. But it must be remembered that in the enactment of the Bill of Rights, Parliament has intended to increase the powers of the court in the protection of civil liberties. Moreover I would suggest that the model in many ways is consistent with traditional constitutional rules of interpretation.

Historically, our courts have asserted that they are not concerned with the policy embodied in legislation but only with its constitutional validity.

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130 See P. C. Weiler, supra note 78 for an article which in my opinion bridges the gap between these two philosophies.
131 See Laskin, supra note 49 at 189.
But this proposition is easier to state than apply. It would seem that before an adjudicator could decide whether a legislature has exceeded its jurisdiction, it must look at the purpose and policy of the legislation. The court must decide the "what, why and how" of the legislation in order to conclude whether the constitution has given this legislature such power to so act. Otherwise the decision of the court would be arbitrary rather than rational. If the court could not evaluate the purposes and policies of legislation, it would have no real standard by which to decide constitutional cases. In effect, the evaluation of legislative policy restrains the court to make a principled and reasoned decision.

A few examples from our constitutional jurisprudence will perhaps clarify this argument. In Lower Mainland Dairy Products Board et al. v. Turner's Dairy Ltd. et al. the administrative board in question had made orders pursuant to the scheme set up by the National Products Marketing (B.C.) Act. The court had to decide the constitutionality of certain equalization levies designed to effectuate a provincial scheme of price fixing as an aid in orderly marketing within the province. In order to decide this question the court had to look at the legislative policy although it did not admit to this. It decided that, in real purpose and effect, these orders were a colourable device to equalize the returns to milk producers by taking a portion of their returns from some and contributing it to others, thereby imposing an indirect tax, which was forbidden by the constitution.

The court similarly acted in A. G. Alberta v. A. G. Canada et al. The Act in question imposed an annual tax on every corporation, other than the Bank of Canada, incorporated for purposes of doing banking or savings bank business within the province. Once again the court struck down this provincial legislation after evaluating its policy. It decided that the purpose and effect of the Act was not in any real sense true taxation in that it raised revenue for provincial purposes. The legislation was ultra vires because it was part of a legislative scheme to rid the province of its federally incorporated institutions.

These cases demonstrate that our courts in fact evaluate legislative policy to determine whether a legislature has exceeded its powers. They are legitimately concerned with the "what, why and how" of the legislation. This is what a court would be doing under our model. Only now a court would question whether Parliament had exceeded its jurisdiction by legislating "in abrogation of" a declared right rather than by legislating "in relation to" a subject matter assigned to the provinces. In both instances the court must evaluate legislative policy in order to determine whether Parliament was legitimately acting within its powers in that its actions merely "affected" a declared right or a provincial subject matter.

It is not suggested here that judicial review under the Bill is identical to traditional constitutional judicial review. Above we saw that Parliament intentionally increased the powers of the court in enacting the Bill. But in my

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132 See Turner's Dairy infra note 133.
133 [1941], 4 D.L.R. 209.
134 R.S.B.C. 1936, c. 165.
opinion the difference in approach is one of degree rather than substance. Historically our judiciary has decided what level of government is best suited to deal with a social problem. It must be admitted that this is in fact what the court has done for the division of powers set out in the British North American Act, 1867, in such general terms. This is what the court had done in the two cases that we just discussed. This is what it has done in the civil liberties cases that it has decided. We can see this in the following statement of Cannon, J. in the Alberta Press Bill case:

The federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion.  

As well this was demonstrated in the Padlock case by Rand:

Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government the freedom of discussion in Canada, as a subject matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is ipso facto excluded from head 16 as a local matter.

Under the Bill of Rights the court would not be deciding which government is best suited to deal with a social problem. It will be deciding whether government should deal with a particular social problem and if it should then whether it has dealt with it in a legitimate way. It is suggested that our courts have traditionally not decided such issues, especially the former, but in fact some Canadian judges have ventured into this realm of decision-making. In defining the scope of freedom of expression in the Padlock case, Abbott, J. made the following comments:

This right cannot be abrogated by a provincial Legislature, and the power of such Legislature to limit it, is restricted to what may be necessary to protect purely private rights, such as for example provincial laws of defamation ... Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian Constitution being declared to be similar in principle to that of the United Kingdom, I am also of the opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation.

In effect Abbott has stated that Parliament can only limit freedom of expression in dealing with certain social activities which relate to some subject matters over which it has exclusive jurisdiction. Otherwise, not even Parliament can abrogate freedom of expression. In other words, Abbott is postulating that certain social activities are beyond the legislative competence of Parliament to regulate. The court must decide when this competence is spent. I think the reader will agree that in essence this is the decision that this paper calls for under the Bill of Rights.

188 Id. at 328.