Some Aspects of the Canadian Bill of Rights: An American View

Roger A. Pauley

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/ohlj

Citation Information
http://digitalcommons.osgoode.yorku.ca/ohlj/vol4/iss1/2

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.
SOME ASPECTS OF THE CANADIAN BILL OF RIGHTS: AN AMERICAN VIEW

ROGER A. PAULEY

Introduction

The Canadian Bill of Rights, unlike its American counterpart, is a statute, enacted by the Parliament of Canada on August 10, 1960. As such it does not bind the Dominion government as the United States Bill of Rights binds Congress and is subject to repeal, explicit or implied, by a subsequent legislative Act.

After a brief preamble, “affirming”, among other things, the “dignity and worth of the human person” and proclaiming that the “Canadian Nation is founded upon principles that acknowledge the supremacy of God”, the Bill continues:

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

---

1 8 and 9 Eliz. II, c. 44.
2 I should make clear at the outset that I do not propose to discuss, apart from this note, whether the Bill is constitutional. Much of it, including most of Section 2, (see appendix for text of Bill) seems to me undeniably within the powers of the Dominion Parliament under Section 91(27) (criminal law and procedure) of the British North America Act. As for the rest, since the Bill purports to extend only to Dominion legislation, (see infra, pp. 3-5), it too is probably constitutional. But caution: should the Bill become a vehicle for changing the character of the legislation to which it applies to legislation essentially concerning individual liberties against the government, it might well be void as encroaching upon the exclusive capacity of the provinces to legislate upon the subjects of “Property and Civil Rights”. B.N.A. Act, s. 92(13).
Some Aspects of the Canadian Bill of Rights

(e) freedom of assembly and association; and
(f) freedom of the press.³

There then follows the vital Section 2 of the Act with its peculiar and ambiguous phraseology:

2. Every law of Canada shall... be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, [i.e. those in Section 1] and in particular, no law of Canada shall be construed or applied so as to...

and there ensues a list of rights, which I shall not here enumerate,⁴ mainly to do with the basic guarantees connected with arrest, detention and procedures at a criminal trial, but also providing for a “fair hearing” for the determination of a person’s rights and obligations.

Two problems immediately arise with regard to the interpretation of this Section. The first and most important concerns the strange juxtaposition, in two places in the text, of the terms “construed” and “applied” which appear, upon reflection, to contradict each other. To illustrate, if emphasis is put upon the word “applied”, it seems evidence that the Section was intended to repeal all portions of existing statutes found to be inconsistent with its terms; while on the other hand if stress is placed upon the word “construed”, the conclusion seems equally inescapable that the Section was designed only to provide a rule of construction in the event ambiguity is discovered in the language of another enactment which bears upon the rights embraced.⁵ Faced with this initial and crucial interpretative dilemma, the Canadian courts have thus far failed to make a definite choice, though indications are that the Section will be held not to have a repealing effect.⁶

³ Because of the repeated use of the terms “human” and “individual” in Section 1, the Bill has been held inapplicable to a trade union, Oil, Chemical & Atomic Workers Union v. Imperial Oil Ltd. (1961), 30 D.L.R. (2d) 657 (B.C.S.C.), aff’d without discussion of point in (1962), 38 W.W.R. 533 (B.C.C.A.) and in (1963) S.C.R. 584, and apparently does not extend to corporations either. This is an important limitation, especially on the rights not to be deprived of property without due process of law or be denied the equal protection of the law. In the United States corporations are “persons” under the Fourteenth Amendment for the purposes of both the corresponding constitutional provisions: Santa Clara County v. Southern Pacific R.R. Co. (1886), 118 U.S. 394 (equal protection); Minneapolis & St. Louis R.R. Co. v. Beckwith (1889), 129 U.S. 36 (due process); and note cases and discussion in Wheeling Steel Corp. v. Glander (1949), 337 U.S. 562, at pp. 574 et seq.

⁴ See appendix for complete text of Section.

⁵ See D. A. Schmeiser, Civil Liberties in Canada (1964), pp. 38, 39.

⁶ E.g. R. v. Goldstein (1961), 34 W.W.R. 236 (B.C. Mag. Ct.); R. v. Gonzales (1962), 32 D.L.R. (2d) 290, at p. 292 (B.C.C.A.) (dictum) (Davey J.A. concurring); contra Cartwright J., dissenting, in Robertson & Rosettanii v. The Queen (1963), 41 D.L.R. (2d) 485, at p. 489 (S.C.C.). Such a holding would have the approval of Laskin, who argues in his article, Canada’s Bill of Rights (1961), 11 Intl & Comp. L. Q. 519, that since the Bill purports (by Section 5(2)) to apply ‘identically’ to future as well as existing legislation, it cannot have been intended to have a repealing effect because its enactors must have realized their inherent inability to bind a successor Parliament. This is certainly a valid point, but not all the inferences that can be drawn from the Bill support this position. For example, it is plain that the word “applied” was not inserted

[footnote continued on next page.]
Quite apart from this issue, moreover, there remains the question of the meaning of the phrase "law of Canada" in Section 2 which marks the scope of the Bill's application.\(^7\) Part II, Section 5(2) of the Bill of Rights endeavors to define this term. It says:

The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

Thus far the Section seems to say simply that the words "law of Canada" mean any federal statute (or rule, order or regulation thereunder) now in existence or which comes into being in the future. But the Section continues, in a separate subheading:

The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.\(^8\)

Does the italicized phrase mean that the Act extends to matters on which the Parliament of Canada could legislate but has not done so? A dictum in Re Williams & Williams,\(^9\) indicates that provincial statutes existing in a field in which Parliament also has the power to act (in that case securities regulation) are not covered. But, as Mr. Schmeiser is at pains to point out, the Court was there unaware of the problem posed by the language of Sections 5(2) and 5(3) and so cannot be taken to have decided the issue. It is suggested, however, despite Mr. Schmeiser's doubts, that the Bill is restricted to Dominion statutory provisions. There is no necessity to perceive the two Sections as being "patently in conflict" as Mr. Schmeiser postulates.\(^10\) Indeed the fact that a separate paragraph is set aside to define the term "law of Canada" would indicate fairly conclusively that that definition was meant to be controlling and the following subsection would seem more plausibly explained as representing the draftsman's overcautious attempt to insure that the Bill not be construed to apply to subjects of exclusive provincial competence. If this view be correct, then it has at least one additional important consequence—namely that the Bill does not extend to judicially created rules of law, whether of merely carelessly in Section 2 from the fact that its Section 2 partner "construed" appears alone in Sections 5(1) and 5(3). This to me is at least some indication that of the pair the term "applied" was meant to carry the decisive content and that the Section was indeed, therefore, designed to have a repealing effect on prior inconsistent legislation.

It is even more likely on the cases that Section 1 of the Bill will be held not to possess repealing ability: Robertson & Rosetanni v. The Queen, \(\text{supra} (\text{dictum})\); \(\text{R. v. Leach, ex parte Bergsmna (1965), 50 D.L.R. (2d) 114 (Ont. H.C.), reversed on other grounds, [1966] 1 O.R. 106 (Ont. C.A.)}\). This would seem to foreclose the question as to Section 2 as well, although one judge has suggested that there may be a difference in intended repealing capacity between the two Sections. See Davey J.A. in \(\text{R. v. Gonzales, supra.}\) Why any difference should exist, however, is puzzling in view of the application by explicit reference in Section 2 to the Section 1 "rights or freedoms". See \(\text{supra}\), p. 37, or appendix.

\(^7\) See p. 2, or appendix for the phrase in context.
\(^8\) Italics mine.
\(^9\) (1961), 29 D.L.R. (2d) 107, at p. 110 (Ont. C.A.), noted by Schmeiser, \(\text{op. cit.}\), p. 40.
\(^10\) Schmeiser, \(\text{op. cit.}\), p. 40.
Some Aspects of the Canadian Bill of Rights

a sort which Parliament could validly supersede or not. Nonetheless, as we shall later observe, the Canadian courts in at least two instances have treated the Bill as applicable to judicial doctrines without so much as pausing to justify their action.\textsuperscript{11}

\textit{A Brief Digression}

Having then completed this introduction, it is time now to launch into a discussion of some of the cases which have arisen under the Bill. Obviously it will not be possible to refer to, much less to relate, all the decisions involving the Bill which have been handed down to date. Therefore I have chosen to confine myself principally to two areas, selected I confess for no better reason than their interest to me in light of the comparisons they present to American case law. The first such area is the admissibility of evidence and the validity of convictions obtained through methods violating the Bill's purported guarantee of the right of an accused or detained person to counsel. The second is the issue of the nature and scope of religious freedom secured by the Act.

I said "confine myself principally" to these two areas, however, because first I should like to devote a little space to the study of two other major decisions involving the Bill of Rights, \textit{Guay v. Lafleur},\textsuperscript{12} and \textit{R. v. Gonzales}.'\textsuperscript{13}

The first of these concerns Section 2(e), which provides:

\begin{quote}
No law of Canada shall be so construed or applied so as to . . . (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.
\end{quote}

The facts were that pursuant to the Income Tax statute the defendant Guay, an officer of the Department of National Revenue, was authorized by the Deputy Minister to investigate the affairs of the plaintiff Lafleur and thirteen other persons, corporations and associations with respect to possible violations in the payment of their income tax. The result of the investigation was to be the filing of a report to the Minister presumably recommending a course of action in each instance but not constituting a legally binding order regarding any of the investigated persons' or entities' possible liabilities under the Income Tax Act. The inquiry began by the defendant summoning a number of people, Lafleur not among them, to testify before him under oath on matters concerning those under scrutiny. The plaintiff then brought an action seeking an injunction against

\textsuperscript{11} The two cases adverted to are \textit{R. v. Steeves} (1963), 42 D.L.R. (2d) 335 (N.S.S.C.) and \textit{R. v. O'Connor} (1964), 48 D.L.R. (2d) 110 (Ont. H.C.), reversed (1965), 52 D.L.R. (2d) 106 (Ont. C.A.), discussed \textit{infra}, pp. 41-45. As both the decisions give restrictive interpretations of the Bill of Rights, it is probable that the judges concerned applied the Bill through pure oversight. However, it will be interesting to see whether subsequent courts will seize the opportunity thus afforded them by the two "precedents" above to enlarge the Bill's effective scope.


\textsuperscript{13} (1962), 32 D.L.R. (2d) 290 (B.C.C.A.).
the continuance of the proceedings until he was accorded an opportunity of being present in person and with counsel at the hearings. The two lower courts granted this relief on the theory that the hearing was quasi-judicial in character and that while Lafleur's rights might not be conclusively decided by the inquiry, they would certainly be affected in a practical sense by its outcome. The Supreme Court of Canada, however, reversed the decision, holding that since no legally binding order respecting the respondent's rights or obligations could result from the hearing, Section 2(e) of the Bill of Rights was inapplicable.

To my mind it is impossible to quarrel with the Lafleur decision in view of the stringent word "determination" employed by the statute itself. Nonetheless I do feel it to be desirable that in solemn investigations such as the one in the Lafleur case, which can lead at a later stage to the institution of legal proceedings against a party, a person whose rights may be affected should have the right to appear in person throughout the portions of the inquiry relevant to him. However, owing to the Lafleur holding, it would seem that a statutory amendment will be needed to achieve this result.

Of equal if not greater importance in the history of judicial interpretation of the Bill of Rights is the case of R. v. Gonzales. Here an Indian was convicted of the offense of possessing liquor off his reservation in violation of a Dominion statute. He appealed on the ground that the Act was repugnant to Section 1(b) of the Bill of Rights and was therefore of no effect. It will be recalled that Section 1(b) provides:

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 three judges who heard the case in the British Columbia Court of Appeal were all agreed that the conviction must stand. Two members of the Court, through an opinion by Tysoe J.A., held that the phrase "equality before the law" did not deprive Parliament of the power to pass laws which distinguished on a reasonable basis between differing groups of persons, but only gave to an individual the right to remain on the same legal footing as the other members

---

14 Guay v. Lafleur, supra, footnote 12; see also Fauteux J., dissenting, in Batary v. Attorney-General for Saskatchewan, [1965] S.C.R. 465, at p. 468, where His lordship referred in his opinion to Wolfe v. Robinson (1962), 31 D.L.R. (2d) 233 (Ont. C.A.), in which it had been similarly held that counsel for an interested party at a coroner's inquest was not entitled to participate in the proceedings or to cross-examine witnesses, since a coroner's inquest was not a hearing for the determination of a person's rights or obligations under Section 2(e) of the Bill of Rights.
15 See Hall J., dissenting, in Guay v. Lafleur, supra, footnote 12. Nonetheless not even the American Administrative Procedure Act, 5 U.S.C. §§ 1001 et seq. (1958), goes this far. Cf. Sections 4 and 5(b) which, however, do not deal with the type of hearing involved in the Lafleur case.
16 Supra, footnote 13.
of his class for the purposes of a given statute. Since Indians were a well recognized and distinct category of persons in Canada and since the Act was designed for their protection as wards of the Canadian government, there was no denial of “equality before the law and the protection of the law” within the meaning of the Bill of Rights.17

Davey J.A., concurring, took a different tack. He held that whatever the term “equality before the law” might mean and whatever might be the effect of the rights enumerated and guaranteed in Section 2 of the Bill of Rights, the freedoms merely “recognized and declared” in Section 1 were declaratory only and were not intended to repeal existing inconsistent legislation. Hence the defendant’s appeal must be refused. It should be noted that the case of Richards v. Cote18 is directly contrary to the judgment of Davey J.A. with regard to the ability of Section 1(b) of the Bill of Rights to nullify inconsistent portions of previously enacted legislation, but the Cote decision is itself against the weight of authority on this point and is not entitled to much attention.19

I should say that I think both the opinions of the Court in the Gonzales case express correct interpretations of the Bill of Rights but I find the judicial method of the majority slightly preferable in choosing to construe the words of the Act to reach their result rather than decide the broader question of the effect of Section 1 of the statute on existing Dominion legislation.

Right to Counsel

I turn now to a discussion of the cases involving the admissibility of evidence and the validity of convictions obtained through denials of the right to counsel guaranteed under Section 2(c) (ii) of the Bill of Rights. The Section gives “a person who has been arrested or detained . . . the right to retain and instruct counsel without delay”.

One of two key decisions thus far in this field is R. v. Steeves.20 Steeves was taken to a police station on a charge of leaving the scene of an automobile accident, his counsel being present with him at the station. He was then escorted into a separate room for interrogation. His counsel sought to accompany him but was denied permission to do so by the police. An interrogation then ensued in which Steeves voluntarily disclosed the name of a witness to the accident later used against him at his trial. The magistrate, after hearing all the evidence, dismissed the charge against Steeves on

---

17 Similar legislation has been upheld in the United States. See United States v. Nice (1916), 241 U.S. 591, where a federal statute making it a crime to sell liquor to an Indian either on or off his reservation was sustained against constitutional challenge. The majority opinion in the Gonzales case cites this decision and, I think, borrows much of its reasoning.


19 Schmelser, op. cit., p. 44.

20 Supra, footnote 11.
the ground that the securing of the name of an adverse witness through procedures violating Section 2(c)(ii) of the Bill of Rights vitiated the conviction. The Crown appealed to the Supreme Court of Nova Scotia, which held unanimously that the decision below should be reversed.

Two judges held that Section 2(c)(ii) of the Bill of Rights, even assuming it was violated, did not prevent the defendant from being convicted, since there was and is, they declared, no bar in Canada to the admission in a criminal trial of evidence given voluntarily by an accused, although under circumstances impairing his right to consult counsel or to have counsel present during an interrogation.

The third member of the Court, Coffin J., concurred in the result but on wholly different grounds. He asserted that Section 2(c)(ii) of the Bill of Rights was not infringed at all since, the defendant, not being a compellable witness, could lawfully have refused to make any statement, and thus the need—and the right—to have counsel present disappeared. With all respect I find this argument difficult to accept, for it is precisely to apprise the accused, inter alia, of his privilege of remaining silent that the right to counsel at a pre-trial stage of a criminal proceeding is deemed so vital.

Coffin J. went on, however, to indicate his approval of the majority's view that Section 2(c)(ii) of the Bill of Rights was not intended to nullify convictions based on evidence obtained in contravention of its terms. But he further commented, in an interesting dictum, that the remedy which the Bill did contemplate was a civil action and that Steeves had a right to have evidence taken at his trial on the issue whether or not a Section 2(c)(ii) violation had occurred.

So much, then, for the Steeves decision. It is fascinating to observe that the Court treated the Bill of Rights as applicable, although, so far as I can see, no "law of Canada" in the sense intended by the Bill was involved and certainly none was discussed. It is plain, however, despite the Court's probably unwarranted application of the Bill, that the ironical effect of the Steeves holding is to utterly emasculate the very Section applied. For even if Coffin J.'s view prevails and a civil action is permitted, this is hardly comforting to the man already serving his sentence; nor, if experience in the United States is any guide, is it likely to deter those responsible for law enforcement from pursuing illegal methods. For this reason I find the result of the Steeves decision, and the entire state of the law on this matter, extremely disquieting.

21 See supra, pp. 4, 5. It is judicial doctrine, and not a statute, which governs the question in Canada whether illegally obtained evidence is admissible at a criminal trial. E.g., Attorney-General for Quebec v. Bédin, [1955] 5 D.L.R. 394 (S.C.C.), mentioned infra, p. 45.

22 See infra, p. 45.
Before considering briefly the position in the United States on this question, however, it is interesting to examine the attempt, albeit an abortive one, made by the Ontario High Court to retreat from the Steeves doctrine. In *R. v. O'Connor*, the defendant was stopped by a policeman while driving and escorted to a police station. As the Court elected to treat the facts, he was at that time under arrest, although he had not yet been informed by the police of this circumstance. Still believing himself to be unarrested, the defendant willingly submitted to two breathalyzer tests which disclosed the presence of .2% alcohol in his bloodstream. At this point the defendant was told he was under arrest. He immediately asked to be allowed to make a telephone call to his solicitor and, receiving the assent of the police, did so. The solicitor was away, however, and the defendant requested permission to make another call in an effort to obtain counsel. This time the police refused. At the trial, evidence of the results of the two breathalyzer tests was admitted and the defendant convicted. The case then came by way of appeal as a stated case to the Ontario High Court.

That Court unanimously held that the conviction should be set aside. The fact that the denial of counsel occurred after the breathalyzer tests were administered was irrelevant, said the Court, owing to the failure of the police to inform the defendant that he was under arrest. Had he been so informed, the Court did not doubt that he would have requested counsel prior to submitting to the breathalyzer tests.

The chief problem still confronting the Court was the Steeves decision and this the Court proceeded to distinguish away. In *Steeves*, the Court pointed out, the evidence obtained (i.e. the name of an adverse witness) was "objective"; its truth and reality were independent of any violation of the rights of the accused. Here, on the other hand, the weight to be given to the breathalyzer readings depended to a large degree upon possibly fallible apparatus and personal observation. The Court concluded, therefore, that owing to the denial of counsel "at a crucial stage" the defendant was prevented from having a skilled legal advisor present who might have found some flaw in the breathalyzer equipment or who might have advocated the taking of a blood test which would have proved the lack of alcohol in the defendant's system. The Court hence remanded the case for retrial absent the breathalyzer data.

---

23 *Supra*, footnote 11.
24 It is rather odd, to my mind, that this view should have been taken. I had always considered it to be universal common law doctrine (although I could find no Canadian authority on the point) that for a criminal arrest to be valid, the intent to arrest must be communicated to the arrestee. See "Arrest", Corpus Juris Secundum, Sec. 1(b), pp. 571-73; cf. *Christie v. Leachinsky*, [1947] A.C. 573 (grounds of arrest made without a warrant must be communicated). However, the matter is academic, as nothing hinges on whether the initial "arrest" was in fact proper; any defect was cured as soon as the police informed the defendant that he was under arrest. See *Christie v. Leachinsky*, *supra*.
25 For a similar holding, see *R. v. Gray* (1962), 132 C.C.C. 337.
As an alternative holding, moreover, the Court indicated that the Bill of Rights must have been intended to render inadmissible any evidence obtained in violation of its Section 2 provisions. It was inconceivable, urged the Court, that no remedy was intended to be available, yet no tort could be impliedly created to give redress for a breach of the Bill’s provisions, as was suggested by Coffin J. in the Steeves decision, since this would be to invade the exclusive competence of the provinces to legislate on the subject of “Property and Civil Rights”. Thus to declare inadmissible evidence acquired in violation of Section 2 of the Bill was the only way to give effect to the rights there laid down.

It is hard not to sympathize with the overall result the High Court was seeking to achieve in the O’Connor case, but at the same time it must be conceded that the distinction employed by the Court to circumvent the Steeves decision is not a worthwhile one. The difference between objective and non-objective sorts of evidence is not at all easy to perceive (indeed on the facts in the O’Connor case I would have thought that breathalyzer data fell within the former category); nor, more significantly, is it useful in determining whether to admit the evidence obtained. The High Court’s theory seems to have been that counsel may have been of real assistance to a defendant only where the evidence elicited from him was of the non-objective variety. This completely disregards the possibility that had counsel been present, he might have advised his client to decline to answer any police questions or submit to any proposed tests, in which event the police would get no evidence whatever from their prisoner.

In light of its rather weak analysis, therefore, it is perhaps not too much to be regretted that the holding of the High Court in the O’Connor decision was itself overturned, and the conviction reinstated, by the Ontario Court of Appeal. That Court rejected outright the distinction of the Steeves case below and further held that the question whether evidence obtained in violation of Section

---

26 B.N.A. Act, s. 92(13). Whether Dominion legislation under the criminal law power may constitutionally be held to give rise to a civil action for injuries resulting from unlawful conduct thereunder has never been determined by a Canadian Court. There are only scattered dicta, for and against this proposition, such as those found in the Steeves and O’Connor decisions. See, e.g., Floyd v. Edmonton City Dairy Ltd., [1935] 1 D.L.R. 754 (Alta S.C.) (for) and Gordon v. Imperial Tobacco Sales, [1939] 2 D.L.R. 27 (Ont. H.C.) (against). Personally I see no reason why, under normal pith and substance principles, civil actions ought not to be allowed to be created by the Dominion even if done expressly. The test could be, of course, whether such actions were incidental and necessary to the dominant criminal law aspects of the legislation. Cf. R. v. Chief (1964), 42 D.L.R. (2d) 712 (Man. Q.B.) (Manitoba Child Welfare Act section making it an offense punishable by up to five years’ imprisonment to neglect a child upheld under B.N.A. Act, s. 92(15), since the main object of the legislation as a whole was to secure proper treatment for children.) If the provinces can, in the course of valid civil rights enactments expressly create a crime as an incidental aid to the scheme of enforcement, then why may not the Dominion do likewise, vis-à-vis a civil proceeding, in the context of a criminal statute?

27 If, that is, one accepts that the Bill should have been applied at all. See discussion supra, pp. 38, 42, 43.

28 (1965), 52 D.L.R. (2d) 106.
2(c) (ii) of the Bill of Rights was admissible in a criminal proceeding had been settled in principle some years ago by the Supreme Court decision of Attorney-General for Quebec v. Béggin. There it had been stated, in a strong dictum that evidence obtained illegally but voluntarily was not thereby rendered inadmissible in a criminal trial, as there was no reason to doubt its veracity. Nothing in the Bill of Rights itself, the Court of Appeal noted, made this general pronouncement of the Supreme Court inapplicable. However, the Ontario Court did leave open the possibility that in circumstances disclosing an "abuse of [the] system of criminal justice" (not defined except to say that malice was an essential element thereof), evidence unlawfully acquired might be deemed incompetent.

Thus the upshot of the Steeves and O'Connor decisions, as stated before, is that the Bill of Rights has been almost totally emasculated as to the Section 2(c) (ii) guarantees. I consider these holdings and the dictum of the Supreme Court in the Béggin case to be extremely unfortunate and the result of the Canadian courts paying too much attention to the fact whether the illegally obtained evidence sought to be admitted is reliable and not enough to other policy factors such as the deterring of unlawful police practices.

The situation in the United States, by way of contrast, is one of complete opposition to the Canadian cases. In a long line of decisions culminating only recently in Escobedo v. Illinois, the Supreme Court has held that the Sixth Amendment, which guarantees to an "accused" the right "to have the Assistance of Counsel for his defence" also carries with it the right to have any conviction quashed which is based upon evidence obtained in circumstances constituting a violation of the Amendment. Thus it can be seen from this case—and others—that the Supreme Court of the United States has come round to the view that in criminal proceedings it is less important that the accused occasionally receives the benefit of an unmerited acquittal than that state and federal law enforcement officers be encouraged to accord to prisoners their constitutional

29 Supra, footnote 21.
30 Ibid., at pp. 396, 397.
31 Furthermore there appears to be no barrier to the extension of the rationale of these cases to instances involving evidence secured through infringement of other Section 2 rights as well. See, e.g., Sections 2(a) (arbitrary detention, imprisonment or exile), 2(b) (imposition of cruel or unusual punishment), and 2(c) (i) (right to be informed promptly of reason for arrest or detention).
32 For a similar criticism, see the brief article by A. M. Harradence, Truth or Consequences (1962), 2 Alta L. Rev. 5.
34 Interestingly enough, the facts in Escobedo were nearly identical to those in Steeves, (save that the charge in Escobedo was murder), the defendant's lawyer being with Escobedo at the police station and the police refusing to let him be consulted until after they had interrogated the defendant and elicited damning admissions of his involvement in the crime.
rights. The Escobedo case, moreover, may not be the end of constitutional interpretation of the Sixth Amendment in favor of defendants. Owing to some broad language in the Court's opinion, other federal and state tribunals are currently engaged in determining whether the full import of the Escobedo holding may be to place an affirmative obligation upon the police to inform an arrested or detained person of his right to counsel and to remain silent before undertaking any interrogation. And one court of appeal, as well as one highly respected state court, have already so held.\textsuperscript{36} I believe these decisions to be desirable, particularly in the context of American police practice, and would urge that it is time for the Canadian courts, if not to emulate the American rule, at least to carefully re-examine their position.

\textit{Freedom of Religion}

The final part of this paper concerns freedom of religion as protected by Section 1(c) of the Bill of Rights. Here we encounter what seems to be the first case decided under the Bill of Rights by the Supreme Court of Canada, \textit{Robertson \& Rosetanni v. The Queen.}\textsuperscript{37} The facts were simple. The defendants were convicted in the courts below of operating a bowling alley on a Sunday in contravention of the Dominion Lord's Day Act.\textsuperscript{38} They contended on appeal that Section 1(c) of the Bill of Rights had repealed or rendered ineffective that statute.

The majority, however, consisting of all but one of the Supreme Court, sustained the conviction. They concluded that the Bill of Rights was not infringed, as there was no conflict between the "freedom of religion" therein declared and the effect\textsuperscript{39} or operation of the Lord's Day Act. The Court reasoned that the intent of the Bill of Rights had not been to alter any formerly existing statutory provisions but only to preserve the rights and freedoms laid down in the Bill as they existed at the date of its enactment. Moreover on that date, said the Court, freedom of religion in Canada encompassed generally the right to believe and to practice one's belief. The Lord's Day Act did not encroach upon this freedom; it merely established a duty not to do business on Sundays, a duty which the majority conceived of as financial in character, not as a restriction upon the ability to exercise freely one's religion.

Alone of the Court, Cartwright J., dissenting, saw the Act as compelling the observance of a religious day not shared by those of all faiths.

\textsuperscript{37} \textit{Supra}, footnote 6.
\textsuperscript{38} R.S.C. 1952, c. 171.
\textsuperscript{39} That the Court looked to the effect of the Lord's Day Act rather than, as is customary, to its purpose is the basis for one of the many criticisms of the \textit{Rosetanni} judgment in \textit{Godfrey, Freedom of Religion and the Canadian Bill of Rights} (1964), 22 U of T Fac. L. Rev. 60.
Though the *Rosetanni* case throws a large and seemingly quiescent body of Canadian law into a turmoil,\(^{40}\) I find it hard to differ with the result it reached. For undoubtedly much benefit to society springs from having a common day of rest from commercial activities. And while it is true that the Lord's Day Act imposes a heavy burden on such people as Orthodox Jews, who are forbidden under the tenets of their religion from working on Saturdays and who are thus forced by the Act to a choice between their pocketbooks and their beliefs, it is a persuasive testimonial to the correctness of the policy determination implicit in the Court's decision that the United States Supreme Court, using a balancing-of-interests approach, has likewise only recently upheld legislation of the Lord's Day type against First Amendment challenge.\(^{41}\) I cannot but concur, therefore, with the holding that the Lord's Day Act is not in conflict with "freedom of religion", however much confusion in other areas of Canadian law is caused by this pronouncement.

Finally we come to the case of *R. v. Leach ex parte Bergsma*,\(^{42}\) a product of the Ontario High Court. Although this case has been reversed,\(^{43}\) it is useful to consider it in light of the Court's discussion of the meaning of religious freedom assured to all persons under the Bill of Rights.

The facts were that an atheist seeking naturalization was denied Canadian citizenship by an examining magistrate solely for refusing to speak the words "So help me God" incorporated in the oath of allegiance required to be uttered by the Canadian Citizenship Act.\(^{44}\) The applicant appealed, alleging that the refusal to grant him citizenship on this basis violated both the Canada Evidence Act,\(^{45}\) which permits a "solemn affirmation" in lieu of an oath where a person declines to be sworn on grounds of "conscientious scruples", and the "freedom of religion" guaranteed by Section 1 (c) of the Bill of Rights. After dismissing the applicant's arguments relating to the Canada Evidence Act,\(^{46}\) the High Court (Schatz J.) dealt with the remaining contention under the Bill of Rights. The Court held, following the *dictum* in the *Rosetanni* case,\(^{46}\) that the Bill of Rights was not intended to alter existing statutory rights but only to preserve them

\(^{40}\) The judgment, sustaining the Lord's Day Act while deciding that it is chiefly commercial in its operation, contradicts the rationales of several previous Supreme Court and Privy Council cases, e.g., *A.-G. for Ontario v. Hamilton Street Railway*, [1903] A.C. 524; *Lord's Day Alliance of Canada v. A.-G. for Manitoba*, [1925] A.C. 384; and *Lord's Day Alliance of Canada v. A.-G. for British Columbia*, [1959] S.C.R. 497, which had seemed to establish that Dominion Lord's Day legislation was valid, as being under the criminal law power, only assuming it was enacted primarily from a religious rather than a commercial aspect. See also *In re Legislation Respecting Abstention from Labour on Sunday* (1905), 35 S.C.R. 581, at p. 592.


\(^{42}\) *Supra*, footnote 6.

\(^{43}\) Ibid.

\(^{44}\) R.S.C. 1952, c. 33.

\(^{45}\) R.S.C. 1952, c. 307, s. 15(1).

\(^{46}\) *Supra*, p. 46.
and that under the Canadian Citizenship Act it was a permissible exercise of discretion to refuse to grant an applicant naturalization who declined to comply with one of the Act's stated requirements, i.e., the taking of the oath there set forth. This, be it noticed, was sufficient to dispose of the matter before the Court. However, the Court chose not to stop there and went on to say that in addition to the Bill of Rights not being capable of superseding the clear provisions of the Canadian Citizenship Act, it was in any event not applicable to the appellant's claim, since the term "freedom of religion" in Section 1(c) had no application to one who rejects the existence of a "divine ruling power".47

To me this is an outrageous pronouncement and the fact that the preamble to the Bill of Rights, as the Court noted, recites that the "Canadian Nation is founded upon principles that acknowledge the supremacy of God" by no means establishes the Court's interpretation as the correct one. The state may praise, even advocate, religious observance; but that does not imply that its law guaranteeing "freedom of religion" should be taken as excluding those whose choice respecting religion is no religion at all. Indeed to begin with it is a quite telling comparison against the High Court's view that the very similar language of the First Amendment to the United States Constitution—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"48—has long been held to afford protection to atheists and agnostics.49 Furthermore the Bill of Rights as enacted extends the guarantee of "freedom of religion" in what is undoubtedly a Christian society50 to Buddhists, Taoists and Zoroastrian believers alike, though presumably it is not the policy of Canada to foster the spread of non-Christian religions within her borders. The question which must be asked, therefore, is: could Parliament, given this fact, have intended to deny a similar protection to atheists and agnostics? I submit not and I find it incredible that the High Court was prepared, in the

47 Supra, footnote 6, at p. 127.
48 Italics mine.
49 E.g. McCollum v. Bd. of Education (1948), 333 U.S. 203 (Illinois law providing for the dissemination of religious doctrines on public school premises held unconstitutional on the challenge of the atheistic parents of a child then in the Illinois public school system); Torcaso v. Watkins (1961), 367 U.S. 488 (state law requiring a declaration of belief in the existence of God as a prerequisite to holding public office held unconstitutional on the suit of an agnostic seeking to occupy the office of notary public.

The First Amendment has been held applicable to the states as being incorporated into the "due process" clause of the Fourteenth Amendment. Cantwell v. Connecticut (1940), 310 U.S. 296. In addition, for a case very close on its facts to E. v. Leach, see Girouard v. United States (1946), 323 U.S. 61, where the Court decided that the Immigration and Nationality Act's requirement that an applicant for citizenship declare himself ready to "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, . . ." does not require a willingness to take up arms. The plaintiff was a Seventh Day Adventist opposed on religious grounds to combatant duty.

50 As the examining magistrate in the Leach case observed. See his interchange of views with the appellant, reported in E. v. Leach, ex parte Bergsma (1965), 50 D.L.R. (2d) 114, at p. 116 (Ont. H.C.).
event that the Bill of Rights had been deemed capable of overruling existing statutory provisions inconsistent with its terms, to hold that so precious a thing as citizenship should be withheld on account of a non-belief in God from a man who admittedly met all the other requisites for naturalization. The word "religion" of course is susceptible of bearing the narrower meaning attributed to it by the Court, as well as the broader one which I am advocating. But in deciding which meaning to adopt the Court might well have remembered that it was not a dictionary which it was expounding (the Court actually placed great reliance on the dictionary definition of "religion") but a Bill of Rights in which the evident aim of the legislature to safeguard certain freedoms is paramount.

Thus it is not to be lamented that, as I stated earlier, the Leach decision has been reversed by the Ontario Court of Appeal. However, in reversing the High Court the Court of Appeal left untouched the unfortunate dictum of Schatz J. regarding the inapplicability of Section 1(c) of the Bill of Rights to one who has no belief in the existence of a "divine ruling power". This resulted from the fact that the Court of Appeal based its reversal on the grounds that the Canada Evidence Act and the nearly identical language of the Ontario Evidence Act gave the appellant a right to substitute a "solemn affirmation" in lieu of the oath seemingly required by the Canadian Citizenship Act. The Court held that the term "conscientious scruples" should be broadly interpreted to include the case of an atheist as well as one whose refusal to swear was founded upon a religious conviction against uttering the name of the Deity. The Court did mention the Bill of Rights but only to say that it was inapplicable in view of its prior holding and Section 5(1) of the Bill, which preserves "any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act". The right to affirm instead of taking the oath existed, the Court said, at the commencement of the Bill.

The upshot of the Court of Appeal's decision is to leave neither strengthened nor diminished the dictum of Schatz J. to the effect that the Bill of Rights' guarantee of "freedom of religion" does not extend to atheists. What damage this dictum may cause from its current position in limbo remains to be seen. In view of the error of law, on a serious matter of statutory construction, which to my mind the dictum embodies, I feel the Court of Appeal was wrong in failing expressly to disavow it.

51 R.S.O. 1960, c. 125, ss. 18(1) and (2), made applicable, the Court indicated, by operation of the Dominion Oaths of Allegiance Act, R.S.C. 1952, c. 197, s. 5.

52 On the other hand I do not wish to be understood as implying that the Court should have predicated its reversal of the decision below on the Bill of Rights. To do this, the Court would have had to hold that the Bill of Rights was capable of superseding the provisions of prior legislation. And such a holding of course would have been contrary to the great majority of Canadian cases. See supra, footnote 6.
Here I end this discussion, except for some concluding comments regarding the efficacy in general of the Canadian Bill of Rights and the need for further development in Canada in this area.

Conclusion

As we have seen, the Canadian Bill of Rights has most often been construed as a measure designed simply to aid in the interpretative process whenever ambiguity with respect to the rights it lays down appears on the face of another enactment. Apart, therefore, from the marginal circumstances in which it can be invoked, the Bill in reality confers no rights at all and contains few if any safeguards against governmental abridgment of personal liberties. To be sure, the Bill has accomplished some good, both through its initial endeavor to enumerate and define which rights and freedoms deserve to be protected against legislative or executive invasion and through the healthful litigious controversy regarding certain facets of those rights which it has engendered. But it remains in my view to go much further.

It may be, of course, that the Dominion Parliament has already gone as far as it constitutionally can in passing the Bill of Rights in its present form, in light of the exclusive reservation to the provinces in Section 92(13) of the B.N.A. Act of the power to pass laws on the subjects of “Property and Civil Rights”. But even supposing that the Dominion’s limit in this field has been reached, the possibility remains of the Canadian people incorporating into their Constitution a Bill of Rights along the lines of the American and I would urge that this be done.

It is a fallacy, assuming a reasonable amendment procedure, to believe that a constitutional Bill of Rights must function as a strait-jacket impeding the development of human rights; indeed the experience in the United States demonstrates the large potentialities for growth inherent in such a document. Moreover, I submit, only by having one can Canadians rest assured that their civil liberties will not at some future date be impaired by provincial or Dominion legislation.

For it is well to remember—lest it be thought that Canadians stand in no need of such protection from their legislators—that in Canada, as in other democratic countries, law makers are subservient to popular opinion and may in times of social stress and passion allow themselves to ride roughshod over the interests and freedoms of a few in their desire to please, or appease, the many. One example taken from history is the not so long ago repealed British Columbia statute upheld in Cunningham v. Tomey Homma, prohibiting any

53 Though as stated before, the effect of the Bill—and especially of Section 2—has still to be definitively established. See supra, p. 37 and footnote 6.
54 See Rinfret C.J.C., Kerwin and Taschereau JJ. in Sauvur v. City of Quebec, [1953] 2 S.C.R. 299, 4 D.L.R. 641; and see supra, footnote 2.
Chinaman, Japanese or Indian, whether naturalized or not, from voting in a provincial election.\textsuperscript{56} One would like to think that today such a law not only would but \textit{could} not be validly enacted. But prejudices remain, the future is uncertain, and without a constitutional Bill of Rights to provide a higher law to bind the governments of the provinces and the Dominion the courts would be helpless to prevent such a statute from being applied. It is for this reason, I hold, that Canada needs a constitutional Bill of Rights, and needs one badly.\textsuperscript{57}

Appendix

The Canadian Bill of Rights

8-9 Elizabeth II

Chapter 44


The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

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

PART I

BILL OF RIGHTS

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

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

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press.


\textsuperscript{57} My judgment is not altered by the fact that in the area of freedom of speech and discussion the courts may be themselves developing a doctrine—based upon the declaration in the B.N.A. Act that the Canadian Constitution is “similar in principle” to that of the United Kingdom—whereby to invalidate both provincial and Dominion legislation purporting to restrict unduly its exercise. See the \textit{dictum} of Abbott J. in Switzman v. Elbling and Attorney-General of Quebec, [1957] S.C.R. 285, 7 D.L.R. (2d) 337, at p. 371. This is a development (should it ever become law) of limited scope, in no way detracting from the general need in Canada for an entrenched Bill of Rights.
Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
(b) impose or authorize the imposition of cruel and unusual treatment or punishment;
(c) deprive a person who has been arrested or detained
(i) of his right to be informed promptly of the reason for his arrest or detention,
(ii) of the right to retain and instruct counsel without delay, or
(iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;
(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;
(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

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

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

PART II

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

The expression 'law of Canada' in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

Section 6 of the War Measures Act is repealed and the following substituted therefor:
"6. (1) Sections 3, 4, and 5 shall come into force only upon the issue of a proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended, exists.
(2) A proclamation declaring that war, invasion or insurrection, real or apprehended, exists shall be laid before Parliament forthwith after its issue, or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting.
(3) Where a proclamation has been laid before Parliament pursuant to subsection (2), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within ten days of the day the proclamation was laid before Parliament, praying
that the proclamation be revoked, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made.

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

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