

A BILL OF RIGHTS AND FUTURE CONSTITUTIONAL CHANGE

W. S. TARNOPOLSKY*

Ottawa

Probably the surest predictions that can be made concerning future constitutional developments in Canada are that: 1) the Canadian Bill of Rights¹, even though not entrenched, will never be amended except with the intention of improving it; and 2) if the British North America Act² is ever patriated, or replaced by some new basic constitutional document, then the present or a strengthened Bill of Rights will be entrenched in that basic constitutional document.

These predictions are based upon the history of constitutional proposals since the constitutional debates which began in February, 1968, and culminated with the Victoria Charter in June, 1971. For the very first session the Federal Government proposed, as one of the four items on the agenda, the issue of fundamental rights. At that first session the Government submitted a policy paper entitled *A Canadian Charter of Human Rights*, which set out recommendations for an expanded Bill of Rights to be entrenched in the constitution and made equally applicable to both orders of government. A year later, the Federal Government submitted another policy paper, entitled *The Constitution and the People of Canada*, which reiterated the proposal for a new Charter of Human Rights and went on to outline in some detail suggestions for adding provisions to the existing Bill of Rights and for increasing its effectiveness.

When, a decade later, the Trudeau government submitted Bill C-60—The Constitutional Amendment Bill—Division III of Part I³ made provision for a Canadian Charter of Rights and Freedoms. The importance which the government attached to such an entrenched guarantee of rights and freedoms was underlined in its policy paper *A Time for Action*, which was published to introduce Bill C-60:

The Government sets only two conditions for the renewal of the constitution.

The first is that Canada continue to be a genuine Federation . . .

The second is that a Charter of basic rights and freedoms be included in the new Constitution and that it apply equally to both orders of government.

With this kind of commitment, it would be difficult to see the federal Liberal Party now opting for no Bill of Rights in any future constitution. At the same time, one cannot foresee the present Conservative government or, for that matter, the New Democratic

* W.S. Tarnopolsky, Visiting Professor, Faculty of Law (Common Law Section), University of Ottawa.

¹ R.S.C., 1970, Appendix III.

² 1867, 30 & 31 Vict., c. 3, as am. (U.K.), hereinafter cited as B.N.A. Act.

³ (1978)

Party, taking any different position. For one thing, both parties favoured adoption of a written Bill of Rights even earlier than did the Liberals. For another, the father of the present Canadian Bill of Rights was John Diefenbaker. For a third, both in 1972 and 1978, joint House-Senate Parliamentary Committees unanimously supported the Federal Government proposals of 1968 and 1978 concerning adoption of a Human Rights Charter. Thus, in 1972, the Special Joint Committee of the Senate and House of Commons on the Constitution recommended that a comprehensive Bill of Rights be entrenched in the constitution. When, in 1978, the Joint Committee of Parliament reviewed the Constitutional Amendment Bill (Bill C-60), about the only part of that proposal that they could agree upon endorsing was Part III—The Canadian Charter of Rights and Freedoms. In addition, the 1978 Special Senate Committee on the Constitution also endorsed the proposal for such a Charter. Furthermore, both the Canadian Bar Association Committee on the Constitution, in its published proposals *Towards a New Canada*⁴, and the Task Force on Canadian Unity, in its observations and recommendations published under the title *A Future Together*⁵, recommended that any new constitutional changes include a comprehensive and entrenched Bill of Rights.

Thus, the question concerning the status of a Bill of Rights in future constitutional arrangements is not: a Bill of Rights—yes or no? but rather: a Bill of Rights—what kind? The object of this article is to try to respond to that latter question by using the Bill C-60 proposal for a Canadian Charter of Rights and Freedoms (the most recent concrete proposal at the federal level), as the bench mark and to organize that response by focussing on three main issues: 1) the issue of overriding effect; 2) definition and scope; 3) enforcement and remedies.

I. *The Issue of Overriding Effect.*

Unless a Bill of Rights is a sham, or is merely intended as a statement of guiding principles, hopefully followed, the only real test of its effectiveness is whether the judiciary can apply it so as to override legislative or administrative action found to be inconsistent. Apart from the necessity of having a majority of judges on the Supreme Court with courage enough to take up the challenge, the two most important factors to determine whether a Bill of Rights will have such overriding effect are: 1) its constitutional status; and 2) the intent expressed as to its application.

⁴ (1978)

⁵ (1979)

1) *Constitutional Status.*

During the past two decades much has been written about the desirability of entrenching a Bill of Rights and even whether it is at all possible in the face of a constitutional principle such as that of "parliamentary supremacy". It would be otiose to repeat the various arguments because it now seems well enough accepted, particularly since the decision of the Judicial Committee of the Privy Council in the *Ranasinghe* case,⁶ that a constitution can provide for entrenchment of all or part of its provisions. It seems strange that Canadian lawyers took so long to accept that fact because there was never a time when all parts of our constitution could be amended by a simple legislative process of either legislative order and no one can seriously argue that that would ever be the case, even with patriation.

Nevertheless, it is not so much whether a bill of rights can be amended or repealed that is important: it is rather whether the courts will give it overriding effect. Except in a revolutionary situation or a state of war, when the whole constitution, including a Bill of Rights, may be suspended, no country which has adopted a written Bill of Rights has, in time of peace when the constitution as a whole is respected and applied, done away with a Bill of Rights. In our own case, as mentioned earlier, there has never been any proposal by any political party at the federal level to do away with the present Bill of Rights or to amend it, except in an attempt to improve it. Nevertheless, including a Bill of Rights in the basic constitutional document and providing for its entrenchment therein could be and probably is, important for another reason, and that is that this may be the quickest means to convince a reluctant judiciary that the legislators were serious when they attempted to adopt a Bill of Rights which would have overriding effect.

This should be all the more convincing when one considers the status given to the Canadian Bill of Rights. Despite the fact that it was never made a part of the B.N.A. Act, and has instead been described as a "statutory" enactment, a majority of the Supreme Court of Canada in the *Drybones* case,⁷ has held that, in the absence of the "*non obstante*" clause referred to in Section 2, a law of Canada which cannot be "sensibly construed and applied" so that it does not abrogate, abridge or infringe one of the rights or freedoms recognized and declared by the Bill, is inoperative to the extent of such abrogation, abridgement or infringement. That principle has never been dissented from and, in fact, in at least two leading decisions, both majorities and minorities on the Supreme Court have

⁶ *Bribery Commissioner v. Ranasinghe*, [1965] A.C. 172.

⁷ *Regina v. Drybones*, [1970] S.C.R. 282.

referred to its "paramountcy" or its "primacy by way of a positive or suppressive effect on the operation and application of federal legislation".⁸ Therefore, if the present Bill of Rights could achieve such "paramountcy" or "primacy" without being part of the B.N.A. Act or entrenched, inclusion of a Bill of Rights in a new basic constitutional document should give it even more primacy.

2) *Intent.*

Nevertheless, as mentioned earlier, the intent expressed in the application section is the other important factor in determining whether a Bill of Rights will be effective in overriding inconsistent legislative or administrative action. The Canadian Bill of Rights has been criticized on the basis that its operative provision, section 2, merely proclaims that in the absence of the "*non obstante*" clause set out therein, "every law of Canada shall . . . be so construed and applied as not to abrogate, abridge or infringe . . . etc. . . . any of the rights or freedoms herein recognized and declared". Prior to 1970, many critics questioned whether this indicated any suppressive intent. However, despite this ambiguity, the majority of the Supreme Court in the *Drybones* case did hold that section 2 could be given no sensible interpretation other than that a suppressive effect over inconsistent legislation was intended. The three dissenting judges all indicated that they might have agreed with the majority if the legislative intent had been more clearly expressed.

It would appear, therefore, that the operative provision of the proposed Canadian Charter of Rights and Freedoms, section 23, was drafted so as to remove doubt that the Charter was intended to have overriding effect:

To the end that full effect may be given to the individual rights and freedoms declared by this Charter, it is hereby further proclaimed that, in Canada, no law shall apply or have effect so as to abrogate, abridge or derogate from any such right or freedom.

However, even this provision is not as clear and explicit as it could have been, not just because there is still some ambiguity as to what is meant by the words "no law shall apply or have effect", but also because it is not absolutely clear that the suppressive effect is intended to apply to laws enacted after, as well as those before, and also because, as will be discussed subsequently herein, it is not absolutely clear that administrative action which contravenes the Bill of Rights is intended to be invalidated. Therefore, it is suggested that obfuscation be avoided and what is intended be expressed in terms such as:

⁸ *Curr v. The Queen*, [1972] S.C.R. 889; *Hogan v. The Queen*, [1975] 2 S.C.R. 574.

To the end that the paramountcy of this Bill be recognized and that full effect be given to the rights and freedoms herein proclaimed, any law, whether enacted before or after the coming into effect of this Bill, and any administrative act in enforcement thereof, which is inconsistent with any provision of this Bill, except as specifically provided for, shall be inoperative and of no effect to the extent of the inconsistency.

To summarize, the entrenchment of a Bill of Rights, in the sense that amendment of it is more difficult or complicated than the usual legislative process, is not as important as whether the Bill is clearly designated and accepted as being part of the constitution and whether its operative provision expresses clearly enough the intent that the Bill is to have overriding effect. However, as the cases following *Drybones* have indicated, there are two other important issues which can drastically affect the efficacy of a Bill of Rights, even if the judiciary is prepared to accept its "primacy", and that is: 1) the way in which the courts define the scope of the rights and freedoms proclaimed; and 2) whether remedies are available and applied.

II. *Definition and Scope.*

The scope of a Bill of Rights is determined by the definitions given by the courts to the rights and freedoms declared. This in turn is largely determined by three factors: 1) the time frame; 2) the rights and freedoms included; 3) the accepted limitations.

1) *The Time Frame.*

Probably no other factor has contributed as much to the lack of application of the present Canadian Bill of Rights as the determination by majorities on the Supreme Court that the Bill did not create any new rights or freedoms, but was only intended to protect those in existence at the time it was enacted. I have called this the "frozen concepts" principle of interpretation.⁹

This interpretation started from the *Robertson and Rosetanni* case,¹⁰ where Mr. Justice Ritchie declared that:¹¹

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 they existed in Canada immediately before the statute was enacted.

This approach was carried forward by Mr. Justice Martland in *Regina v. Burnshine*¹² where he, like Ritchie J. in the *Robertson and*

⁹ See A New Bill of Rights in the Light of the Interpretation of the Present One by the Supreme Court of Canada, in Special Lectures of the Law Society of Upper Canada on the Constitution (1978), pp. 161, 181-191.

¹⁰ [1963] S.C.R. 651.

¹¹ *Ibid.*, at p. 662.

¹² [1975] 1 S.C.R. 693.

Rosetanni case, made reference to the words "have existed and shall continue to exist" in section 1 of the Bill of Rights to conclude that.¹³

The Bill did not purport to define any new rights and freedoms. What it did was to declare their existence in a statute, and, further, by s.2, to protect them from infringement by any federal statute.

This in turn, led Mr. Justice Ritchie, in the *Miller and Cockriell* case,¹⁴ in considering whether the death penalty provisions in the Criminal Code contravened the Bill of Rights, to conclude that since, shortly after the enactment of the Canadian Bill of Rights, the Parliament of Canada amended the Criminal Code several times with respect to the death penalty and did not include the "*non obstante*" clause of section 2 of the Bill of Rights, therefore Parliament did not assume that the death penalty provisions were contrary to the "cruel and unusual" clause of the Bill of Rights. The result of this decision is that if Parliament did include the "*non obstante*" clause, the Bill of Rights would *not* apply, but that also when it *does not* include the clause, the Bill of Rights would *not* apply. The result of this "frozen concepts" interpretation is that the Bill of Rights could *never* have effect. This has been one of the most important impediments to the effectiveness of the Canadian Bill of Rights.

It would appear that the same fate would await the proposed Charter of Human Rights and Freedoms (if it were ever enacted as proposed), because the opening paragraphs of section 6 (the "fundamental rights and freedoms") and section 7 (the "individual legal rights") declare that "every individual shall enjoy *and continue to enjoy*" these rights and freedoms. How can a person "enjoy" these rights and freedoms in the future without being in a position to "continue to enjoy" them? The possible danger herein described becomes more obvious when one considers that other sections in the proposed Charter use the present tense only. Thus, section 9 declares that the rights and freedoms "shall be enjoyed" without discrimination, and does not proclaim that they "shall be enjoyed and continue being enjoyed". These other sections use the present tense, obviously because the present tense in statutes reads into the future and does not have to be emphasized as "continuing".

Either the words "and continue to enjoy" are totally superfluous and should be deleted for reasons of style, or else they should be deleted because courts will presume that they must have been intended to have a meaning other than the present tense "to enjoy" and so might be tempted to escape having to evaluate rights and freedoms as of the date when the issue arises before them by once

¹³ *Ibid.*, at p. 702.

¹⁴ *Regina v. Miller and Cockriell* (1976), 70 D.L.R. (3d) 324.

again adopting an interpretation "freezing" the concepts of the enacting date—(1984?). Would we then have a confusion between the concepts of 1960 and those of some later date? Clearly, in order to avoid confusion and in order to prevent another development of the "frozen concepts" principle of interpretation, the words "and continue to enjoy" must be deleted. In fact, does it matter whether these rights are "enjoyed"? A more direct and efficacious phrasing would be: "Everyone in Canada has the right to the following fundamental freedoms: . . .".

2) *The Rights and Freedoms Included.*

Space does not permit discussion of more than the main changes and additions to the existing Bill of Rights that have been suggested since 1968. The ones dealt with here are: changes to the "due process" and the "equality" clauses and the additions of prohibitions against unreasonable searches and seizures and retroactive punishment.

One of the changes included in all the recommendations since 1968¹⁵ is the separation of the "due process of law" clause, with respect to liberty and security of the person, from the right to the use and enjoyment of property. Such separation might not prevent a future development in Canada of the "substantive due process" interpretation that was applied in the United States in the period from the ninth decade of the nineteenth century to the third decade of the twentieth. However, in addition to the expectation that, since our Supreme Court has been most reluctant to apply *any* American jurisprudence concerning the Bill of Rights, it might not adopt the most criticized part of it, a separation of the protection of property from the "due process" clause might provide further assurance against such a development.

With the adoption of such an amendment, however, the question that arises is whether to include any clause for the protection of property rights and if so, whether a phrase such as "except in accordance with law", which is the one most frequently recommended, would be sufficient protection to ensure "just" treatment and "just" compensation for the taking of property. For this purpose one could add to that clause the requirement that expropriation shall only be "in the public interest" and for

¹⁵ This was first proposed in the 1969 federal policy paper entitled *The Constitution and the People of Canada*; it was supported in 1972 by the Special Joint Committee of the Senate and House of Commons on the Constitution; it was proposed by the Manitoba Law Reform Commission in its Study Paper entitled *The Case for a Provincial Bill of Rights*; it was submitted again in 1978 in the Charter proposed in Bill C-60; and supported by the Canadian Bar Association recommendations.

"compensation". The problem with such formulation, however, is that unless a further provision is made to exempt taxation or forfeiture by way of penalties from the protection for "just compensation", then some court could extend the coverage of the property protection clause to provide an argument against the paying of taxes or the levying of forfeitures of property. Besides, there could be extensive litigation over the "justice" of "just" compensation. Therefore it is probably preferable to provide merely that there shall be no deprivation of property "except in accordance with law", and rely, thereby, on the representation of propertied interests in our legislatures to prevent the enactment of laws providing for expropriation without "just" compensation and confiscation without justification.

With respect to subsection 1(b) of the present Bill of Rights, all of the proposals since 1968 have suggested adding the word "equal" to the "protection of the law" clause, or even leaving out the "equality before the law" clause which comes before. The really important question is whether this is sufficient to reverse the position of Mr. Justice Ritchie, in the *Lavell* case,¹⁶ wherein he specifically rejected arguments that subsection 1(b) incorporated the "egalitarian" concepts of the United States Bill of Rights. Instead, probably partly because of his "frozen concepts" interpretation, he referred to English constitutional authority as a basis for deciding that the "equality before the law" clause had the same meaning that was given to it by Dicey in 1885 as part of the "rule of law" principle: implying merely that all individuals, whether private citizens or government officials, were equal before the law and the courts of the land. Perhaps one need not worry overly about this Ritchie limitation in the *Lavell* case, because on this point it was not a majority decision. Moreover, in two subsequent decisions, the *Burnshine*¹⁷ and *Prata*¹⁸ cases, Mr. Justice Martland did not refer to this Ritchie definition but instead seemed to accept that the "equality before the law" clause had certain egalitarian implications, subject only to the reasonable limitation of "a valid federal objective". Nevertheless, to ensure that no future court adopt the Ritchie interpretation of the "equality" provision, reference should be made to "equal protection of the laws".

Two additions to the list of prohibitions in section 2 of the Canadian Bill of Rights, which have been included in all of the recommendations since 1968, are those concerning injunctions against "unreasonable searches and seizures" and the right not to be subjected to retroactive penal laws or punishments. In the United

¹⁶ *Attorney General for Canada v. Lavell*, [1974] S.C.R. 1349.

¹⁷ *Supra*, footnote 12.

¹⁸ *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376.

States the "unreasonable searches and seizures" clause has probably had a greater role in the development of the interpretation of the Bill of Rights than any other. Most cases involving or leading to arrest also involve searches or seizures or both. Clearly they are a vital element in the administration of justice. Just as clearly courts should have the duty of assessing their "reasonableness" on a case-by-case basis rather than either, on the one hand, abdicating any supervisory role at all by admitting evidence obtained as a result of a search or seizure, regardless how brutally or inhumanly such action was conducted or, on the other hand, invalidating otherwise "reasonable" searches or seizures on mere technicalities. As far as retroactive penal legislation is concerned, not only has every proposal since 1968 recommended its inclusion, but also, since in 1976 Canada ratified the International Covenant on Civil and Political Rights,¹⁹ it is now an international obligation, pursuant to article 15 thereof, to provide that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall such a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

3) *Limitations.*

The Victoria Charter, upon the insistence of the provinces, included a limitations clause applying to the political civil liberties agreed upon for inclusion. Similarly section 25 of the 1978 proposed Charter of Rights and Freedoms contained the following limitations clause applicable not just to the political civil liberties (or fundamental freedoms), but to all the rights and freedoms proclaimed:

Nothing in this Charter shall be held to prevent such limitations on the exercise or enjoyment of any of the individual rights and freedoms declared by this Charter as are justifiable in a free and democratic society in the interests of public safety or health, the interests of the peace and security of the public, or the interests of the rights and freedoms of others, whether such limitations are imposed by law or by virtue of the construction or application of any law.

The first point that must be noted is that whether such a clause is included in a Bill of Rights or not, the courts will give a "reasonable limitation" interpretation to what might otherwise seem to be unlimited rights or freedoms. Thus, although the First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press", the United States Supreme Court has repeatedly and consistently recognized that there are limitations which are reasonably justifi-

¹⁹ U.N.G.A., Resol. 2200 (XXI), Dec. 16th, 1966.

able. It is for this reason that the Canadian Bar Association recommended that a limitations clause is not necessary and in part detracts from the educational value of a Bill of Rights.

The only real question, therefore, is whether spelling out the limitations gives the legislatures wider or narrower scope than might be applied by the courts in the absence of such specification. Arguments against such a limitations clause, in addition to those raised by the Canadian Bar Association, include the following: 1) it seems to contemplate almost any limitation that a legislature may wish to place on any particular right or freedom; and 2) it could encourage the judiciary to abdicate their responsibility in judicial review, by applying the opinion of Parliament in lieu of an attempt at an objective assessment. On the other hand, in favour of a limitations clause could be the fact that it is recognized in the European Convention on Human Rights, in most of the Bills of Rights provided by the United Kingdom for the newly independent members of the Commonwealth, and in the International Covenant on Civil and Political Rights. Therefore, although such a limitations clause will probably be subjected to criticism by public interest groups and by the media, it would not be out of line with various national and international Bills of Rights drawn up since World War II. What is even more important, however, is that a limitations clause, properly restricted, and which places the onus on the government to justify the limitations, encourages the courts to exercise review. These are the matters that must be amplified.

With respect to the list of limitations, the first question that could arise is whether a limitation "in the interests of" is not too broad, especially when equally applied to all rights and freedoms. The national and international Bills of Rights mentioned above, which have limitations clauses, do not apply them equally to all provisions. For example, with respect to freedom of expression, the limitation is restricted to what is thought to be "for the protection of" and is not just "in the interests of" certain specified purposes. The latter form could be seen as too broad a limitation if used with reference to freedom of religion and of expression, but not if applied with reference to freedom of assembly and of association. The second issue concerns the need both for the terms "public safety" and "peace and security of the public". Is there a difference between the two?

In the end, however, these questions are not as important as is that of the onus of proof. Is the onus on the government to prove that the limitations are necessary for the purposes specified, or does the citizen who claims that his or her right or freedom is being limited have to prove that they are not? Based upon past traditions of our courts, one would have to assert that unless the onus of proving the

“justifiability” of limitations is upon whoever imposes them, our judiciary would probably defer to legislative opinion without much impartial evaluation.

What is probably more serious, however, is that for the laudable purpose of substituting such a limitations clause for section 6 of the War Measures Act,²⁰ the government proposed a limitations clause which was applicable to *all* rights and freedoms. Moreover, section 6 of the War Measures Act only comes into operation rarely and with the specific invocation of that Act, while under the proposed section 25, limitations could be deemed to apply at any time.

The various national and international Bills of Rights referred to earlier do contain limitations clauses, but they are applied only to the provisions dealing with fundamental freedoms and privacy, as well as some specific limitations on such rights as those to a public trial. Section 25 would obviously be much wider. It would raise the possibility, for example, of a limitation on “the right of the individual to life” or “the right not to be subjected to any cruel and unusual punishment”. Should such rights be subject to the limitations listed in section 25? It is pertinent to note on this point that article 4 of the International Covenant on Civil and Political Rights specifically recognizes that during times of emergency, “officially proclaimed”, States Parties “may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”. Furthermore, paragraph 2 of article 4 says that “no derogation” may be made from those provisions dealing with, *inter alia*, “the right to life”, and the “cruel treatment or punishment” clause, as well as the prohibition against retroactive criminal legislation.

To summarize, it is proposed that there be two, not one, limitations clauses. The one applicable to the fundamental freedoms might read:

- (1) The manifestation or exercise of these freedoms, since it carries with it duties and responsibilities, may be subject only to such limitations as are prescribed by law and proved to be justifiable in a free, democratic and pluralistic society in the interests of national security, public safety, order, health or morals, or the fundamental rights and freedoms of others.
- (2) The burden of proving that a limitation referred to in subsection (1) is reasonably justifiable lies upon the person asserting that such limitation was necessary.

The limitations clause proposed for the individual legal rights would read:

²⁰ R.S.C., 1970, c. W-2.

In time of public emergency, which threatens the life of the nation, and the existence of which is officially proclaimed through the invocation of the War Measures Act or specific reference to this provision, the rights mentioned in this section may be derogated from to the extent strictly required by the exigencies of the emergency, except that such measures cannot be inconsistent with [the "equality" clause] and no derogation can be made from [the rights: to an interpreter; not to be subjected to retroactive penalties or punishments; not to be subjected to cruel and unusual treatment or punishment].

III. *The Question of Effect or Remedy.*

Ordinarily it would not appear that specific provision has to be made for a remedy for the enforcement of a Bill of Rights which purports to be and is held by the courts to be "paramount" with respect to inconsistent legislative or administrative acts. Clearly, even by the application of the *Drybones* decision, a person's right or freedom cannot be abrogated, abridged or infringed by a legislative act and therefore such act must be held inoperative. However, is this necessarily true with respect to an administrative act? One would have thought so until one considers the *Hogan* case.²¹ In this case, although both the majority and minority decisions unquestionably held that the "right to counsel" in paragraph 2(c)(ii) of the Canadian Bill of Rights was infringed, the majority decision went on to hold that no remedy could be granted. Mr. Justice Ritchie, who again gave judgment on behalf of the majority, held that the evidence, even though illegally obtained, was "clearly admissible at common law". Therefore, even though he referred to the *Drybones* case²² as authority for the proposition that "any law of Canada which abrogates, abridges or infringes any of the rights guaranteed by the Canadian Bill of Rights should be declared inoperative and to this extent it accorded a degree of paramountcy to the provisions of that statute", nevertheless, he asserted, "whatever view may be taken of the constitutional impact of the Bill of Rights", did not necessarily mean that where there is a breach of one of the provisions of that Bill "it justifies the adoption of the rule of 'absolute exclusion' on the American model which is in derogation of the common law rule long accepted in this country". He therefore ruled that the law courts "were correct in accepting [the evidence obtained while right to counsel was denied] in accordance with the rules of evidence governing the trial of criminal cases as they presently exist in this country". Thus, although he declared that a right existed, he felt he could not provide a remedy.

The *Hogan* case brings us to the following anomalous result: if one follows the *Drybones* case, then an enactment in the Criminal Code, which would provide that a request to retain and instruct

²¹ *Supra*, footnote 8.

²² *Supra*, footnote 7.

counsel could be denied in compelling an accused to take a breathalizer test, would be declared inoperative, because it was inconsistent with the Canadian Bill of Rights, but when the transgression does not have legislative sanction, in that it merely takes place because of police initiative, then the Canadian Bill of Rights is to be ignored.

In light of the above, it is clear that a remedies provision such as that set out in section 24 of the 1978 proposed Charter is necessary:

Where no other remedy is available or provided for by law, any individual may, in accordance with the applicable procedure of any court in Canada of competent jurisdiction, request the court to define or enforce any of the individual rights and freedoms declared by this Charter, as they extend or apply to him or her, by means of a declaration of the court or by means of an injunction or similar relief, accordingly as the circumstances require.

The only question is whether section 24 is not too narrowly framed. Although it provides for a request to a court "to define or enforce any of the individual rights or freedoms declared by this Charter", the means specified are those of a declaration or an injunction "or similar relief". Would this proposed section 24 overcome the impotence exhibited by the Supreme Court majority in the *Hogan* case? I am not at all sure that it would. A "declaration" would have given *Hogan* nothing. What would have been the efficacy of "an injunction or similar relief"? Would a court grant an injunction against the admission of evidence?

This ambiguity raises the question which was hinted at earlier with respect to the words in section 23 of the Charter that "no law shall apply or have effect so as to abrogate, abridge or derogate from any such right or freedom". Would this provision in section 23 have helped *Hogan*? I am not at all sure that it would have.

There is no avoiding the fact that in the absence of a rule declaring evidence obtained in contravention of the Bill of Rights to be inadmissible, or in the absence of some alternative remedy, the Bill of Rights can be infringed with impunity. Has there ever been a case, in similar circumstances, where enforcement through a civil remedy such as that of damages for tort was worth the cost of bringing such action? Not really since the Jehovah's Witnesses cases. But these resulted from the broader application of the Quebec civil law of delict. There must be some considerable doubt as to whether the Quebec cases would apply equally in the common law provinces.

Accordingly, it would appear that to the words in section 23—"no law shall apply or have effect"—should be added the words "nor shall any action pursuant to such law be valid". In addition, the last part of section 24 should be changed to read something such as "by means of a declaration, an injunction, or any

other effective remedy, accordingly as the circumstances require''. Thus, the alternatives proposed to section 23 and section 24 would read:

To the end that the paramountcy of this Charter be recognized and that full effect be given to the rights and freedoms herein proclaimed, any law, whether enacted before or after the coming into effect of this Charter, and any administrative act in enforcement thereof, which is inconsistent with any provision of this Charter, except as specifically provided for, shall be inoperative and of no effect to the extent of the inconsistency.

Every court shall have the power, to the extent of its jurisdiction, to issue such remedies, prerogative writs, directions and orders, including, where deemed by the court to be just in the circumstances, exclusion of evidence obtained in contravention of the rights and freedoms assured by this Charter or, where deemed necessary, orders for the payment of compensation by way of special, general or punitive damages, that may be appropriate for the enforcement of any of the rights or freedoms conferred by this Charter, and for the proper compensation of anyone injured by contravention or infringement of such rights and freedoms.
